"GOVERNANCE OF THE POLICE: INDEPENDENCE, ACCOUNTABILITY AND INTERFERENCE"[1]

PHILIP C. STENNING[†]

I am most flattered and honoured to have been invited to deliver this lecture, so before I begin the lecture I would like especially to thank the Law School at Flinders University for inviting me and bringing me to Adelaide (one of my favourite Australian cities), and TAFE South Australia for co-sponsoring the lecture and providing this venue for it. All very much appreciated. I am also very pleased that Ray Whitrod's son Ian has been able to attend.

I INTRODUCTION

This audience hardly needs to be reminded as to what a significant topic police governance and accountability was for Ray Whitrod. He not only experienced it first-hand as the Commissioner of no fewer than three police services during his long and distinguished police career, but he chose it as the topic for his John Barry Memorial Lecture in 1975 (subsequently published in the *Australian and New Zealand Journal of Criminology*). For me therefore, who was just cutting his milk teeth as a policing scholar at that time, it seemed the obvious topic to choose when I received the very flattering invitation to deliver this lecture in his honour today.

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[1] This is a revised version of the Ray Whitrod Memorial Lecture delivered in Adelaide on 6 October 2011 by Professor Stenning at the TAFE SA Adelaide campus, sponsored by Flinders University and TAFE SA.

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> "The Government's view seems to be that the police are just another Public Service Department, accountable to the Premier and Cabinet through the Police Minister, and therefore rightly subject to directions, not only on matters of general policy, but also in specific cases. I believe as a Police Commissioner I am answerable not to a person, not to the Executive Council, but to the law".[2]

Mr. Whitrod was reported as having made this statement at a press conference on the day that he resigned as Queensland's Commissioner of Police in 1976. It provides a perfect starting point for my lecture, not only because of its author, but also because it nicely captures the nub of the controversy which police governance and accountability has engendered almost since the modern 'new police' was first established in the United Kingdom in the early 19th Century, and which has raged unabated ever since to the present day in virtually every common law jurisdiction that has inherited some version of that institution. Indeed Prime Minister Gillard made reference to this thorny issue just recently:

> "Our system of democracy, our system of government, relies on the fact that office bearers like police commissioners, independently of political processes, exercise their best judgment".[3]

The Prime Minister was criticising a Liberal senator for having telephoned New South Wales' Liberal Police Minister before sending information to the State's Police Commissioner concerning allegations that a Labour MP had corruptly used a union credit card to pay for personal services. The suggestion here was that this was an attempt to bring partisan political influence to bear on a police investigation.

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2 Ray Whitrod, quoted in Russell Hogg and Bruce Hawker, "The Politics of Police Independence" (1983) 8 (4) *Legal Services Bulletin* 160-165, 164.

3 Prime Minister Julia Gillard, as reported in Paul Osborne, 'Gillard warns about Thomson interference', *Sydney Morning Herald* (online), 25 August 2011 <http://news.smh.com.au/breaking-news-national/gillard-warns-about-thomson-interference-20110825-1jaru.html>.

But to return to Whitrod's comments, are the police appropriately regarded as "just another Public Service Department"? And if not, why are they not, and what are the implications of this for their effective governance and accountability? Those who have addressed these questions over the years are legion, and have included judges, politicians, public servants, chairs of commissions of inquiry, academics (including myself on several occasions) and police officers themselves in countries across the world. Indeed, the published literature on these issues is dauntingly voluminous, such that the challenge of adding anything new to it is equally daunting. Nevertheless, I am going to give it a go this evening, and I am sure that were Ray Whitrod here with us today he would enjoy the spectacle of my struggle to do so in his honour.

II WHITROD'S QUEENSLAND PURGATORY

I am sure that most, if not all, of you are well aware of the trials and tribulations that Ray Whitrod experienced during his seven years as Queensland's Commissioner of Police, and which eventually led him to resign in protest. They are well documented in the Fitzgerald Report,[4] as well as in several other sources. So I do not need to rehearse them in any great detail now. Suffice it to say that campaigns against him by several of his senior officers (some of whom were later convicted of corruption), and the then Premier of Queensland's proclivity for countermanding his orders with respect to criminal investigations, in public, played a significant role. The 'final straw', however, was the Premier's decision to appoint an Assistant Commissioner against Whitrod's advice - an Assistant Commissioner, what is more, who was appointed to succeed him as Commissioner when he resigned, and who was subsequently also convicted and served seven years in prison for corruption.

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4 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry) (1989) *Report* (Brisbane: Government Printer).

Whitrod argued that the Premier's interventions to thwart criminal investigations and to appoint an Assistant Commissioner whose appointment he, as Commissioner, did not support, constituted a violation of what he referred to as the constitutional doctrine of the 'separation of powers' which, in his view, guaranteed the Commissioner's political independence with respect to such decisions. I will return to this idea that the idea of 'police independence' is derived from the constitutional doctrine of the 'separation of powers' shortly. But the focus of my talk this evening will be on the concept of the political independence of the police, and the implications of several recent developments in a number of common law jurisdictions for the likely future of this concept.

III RECENT POLICE COMMISSIONER/GOVERNMENT CONFLICTS IN AUSTRALIA, CANADA & ENGLAND

That this concept remains central to an understanding of the constitutional role of the police in Australia and other common law jurisdictions is perhaps no more apparent than from the fact that within the last ten years commissioners of police have found themselves in usually terminal conflicts about their political 'independence' and accountability with governments under which they have served in Australia, Canada and the UK: Commissioners McKinna and Salisbury, in 1970 and 1978 respectively, under the Dunstan Government in this State; Commissioner Ryan under the Carr Government in New South Wales in 2002, under circumstances eerily reminiscent of those under which Whitrod had resigned a quarter of a century earlier. And, as we all know, the latest such casualty has been Chief Commissioner Overland of the Victoria Police under the Baillieu government earlier this year.

Two Commissioners of the Royal Canadian Mounted Police have resigned as a result of such conflicts during the last fifty years, and most recently two Commissioners of the Metropolitan Police in London have been prematurely forced from office.

It is worth noting briefly the circumstances of these various conflicts:

> McKinna (South Australia, 1971): Conflict between the Commissioner and the Government over the policing of a public demonstration. Commissioner retired shortly after a Royal Commission reported on the conflict.
>
> Whitrod (Queensland, 1976): Commissioner resigned, alleging improper government interference with police investigations and appointment of an Assistant Commissioner not supported by, and without consulting, the Commissioner. [Right wing government]
>
> Salisbury (South Australia, 1978): Commissioner misled the Chief Secretary in his written response to the Chief Secretary's request for information about the activities of South Australian Police's Special Branch. When the Commissioner refused a request to resign, he was dismissed.
>
> Ryan (NSW, 2002): Commissioner resigned, alleging multiple interferences by the Minister of Police in operational police decision-making.
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> Overland (Victoria, 2011): Commissioner resigned after having been found by the Ombudsman to have released misleading crime statistics which were favourable to the government immediately before an election.
>
> Nicholson (RCMP, Canada, 1959): Commissioner resigned alleging improper government interference in operational police decisions in the policing of a labour dispute.
>
> Zaccardelli (RCMP, Canada, 2006): Commissioner resigned after admitting to having given misleading and contradictory information to a parliamentary committee.
>
> Blair (London Met., 2008): Pressured into resigning by the newly-elected Mayor of London on the ground that the Mayor did not have confidence in his leadership of the MPS.
>
> Stephenson (London Met., 2011): Resigned after criticism from the Home Secretary for having failed to inform her that the MPS had hired a former News International staff member as a media adviser at a time when the Service was investigating News International re illegal phone hacking.

IV COMMISSIONER-GOVERNMENT CONFLICTS, AUSTRALIA, CANADA & ENGLAND

	Political leanings of the government	Control or Accountability issues
Australia		
McKinna (1971)	Labour (SA)	Control
Whitrod (1976)	CP/National (Qld)	Control
Salisbury (1978)	Labour (SA)	Accountability
Ryan (2002)	Labour (NSW)	Control
Overland (2011)	Liberal (Vic)	Accountability
Canada		
Nicholson (1959)	Conservative	Control
Zaccardelli (2008)	Conservative	Accountability
London Met.		
Blain (2008)	Labour government/ Conservative mayor	'Loss of confidence'
Stephenson (2011)	Coalition (Conservative/ Lib. Dem)	Accountability

As this chart shows, these disputes have not been party-specific in Australia, although three out of the four in Canada and UK occurred during Conservative or Conservative-dominated administrations, while Ian Blair fell victim to a power struggle between a Labour government and a Conservative Mayor. And as you can see, these conflicts were pretty much evenly divided between conflicts about government control over police and conflicts about police accountability, with Ian Blair the exception, having stated that he felt that he had no real option but to resign when the new (elected) Mayor of London (who was also Chair of the Metropolitan Police Authority) called him in to tell him that he (the Mayor) did not have confidence in Blair's leadership of the Metropolitan Police. And it is worth noting that the Commissioner of the Met is appointed by the British Government (technically by the Crown), not by the Mayor of London, so the Mayor would not have had any authority to dismiss the Commissioner.

The demise of commissioners of police in such numbers and in such rapid succession in recent years, however, is unprecedented in the history of policing in common law jurisdictions; Ian Blair was the first Metropolitan Police Commissioner to resign in over a hundred years; Leonard Nicholson, who resigned as RCMP Commissioner in 1959 was, as far as I have been able to discover, the first Commissioner of that Force to resign since its establishment 1873 (as the NorthWest Mounted Police). This recent spate of resignations and dismissals reflects, I shall argue, some seismic shifts in attitudes towards the governance and accountability of police in these countries.

V THE SEPARATION OF POWERS DOCTRINE - ITS IMPLICATIONS FOR 'POLICE INDEPENDENCE'

Before getting directly to the concept of the political independence of the police, I want to make a small digression to consider some foundational constitutional principles that are accepted in most liberal democratic parliamentary systems such as we have in this and other common law jurisdictions, and which provide a necessary context for considering the concept of 'police independence'.

Ever since Montesquieu's famous treatise on the American constitution,[5] the doctrine of the 'separation of powers'[6] to which Whitrod alluded, has been an accepted constitutional principle, if not always reflected in practice. This doctrine can be graphically illustrated thus:

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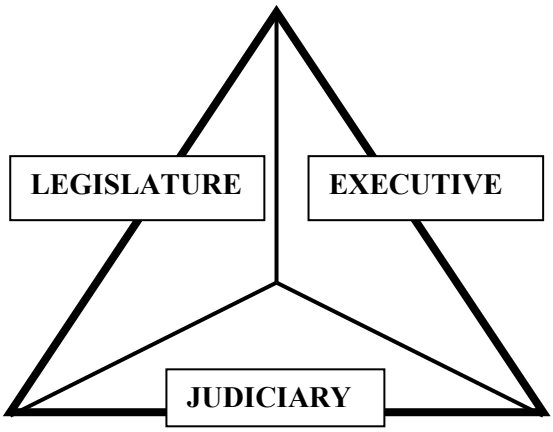
5 Baron Charles de Montesquieu (1748). *The Spirit of Laws (De l'esprit des lois)*, accessible at <http://www.constitution.org/cm/sol-02.htm>.

6 Some have argued that 'division of powers' would be a more accurate translation from the French.



The doctrine posits that the liberty of the citizen depends on the three 'branches' of government - the executive, the legislature and the judiciary - being kept 'separate', each acting 'independently' of the other two. The fact that the principle has not been scrupulously observed in practice in many liberal democratic constitutional systems - the former role of the Lord Chancellor of England as a Cabinet Minister, Speaker of the House of Lords, and Head of the Judiciary, providing the most oft-cited example - has not diminished the potency of the principle as a constitutional aspiration. The point about it that I want to emphasise this evening, however, is the fact that the Executive, in this conception, includes both the elected government of the day *and* the public service that supports it - these are not considered 'separate' powers and, in the normal executive arrangements, the public service is subordinate to the direction and control of, as well as accountable to, government ministers. I take it that this is what Whitrod had in mind in asserting that the police should not be regarded as "just another Public Service Department". As my colleague at Griffith University, Professor Mark Finnane, has rightly pointed out in his 1994 book, *Police and Government: Histories of Policing in Australia*, however, "if the police belong anywhere in this triumvirate, they belong to the executive" (p. 33). What this indicates is that whatever may be its provenance, the principle of 'police independence' does *not* find its roots in the *conventional* doctrine of the separation of powers. So what is its pedigree?

VI ORIGINS OF THE CONCEPT OF 'POLICE INDEPENDENCE'

I do not have time this evening to review the chequered and rather dubious history of this concept - others, notably Geoffrey Marshall in his 1965 book, *Police and Government* - have already done a better job than I can in explaining and critiquing it. But it seems to me that the simplest, and perhaps best, explanation lies in the transition of the police, in the 19th Century, from **judicial** to **political** governance and accountability - that is from governance by justices of the peace to governance by political police authorities and government ministers. It was in that Century that, with radical reforms to Parliament and an emerging recognition of the idea of judicial independence that the doctrine of the separation of powers came into its own. The fact that the 'new police' were no longer governed by the judiciary, and could not therefore benefit from the newly emerging concept of judicial 'independence', and that they were increasingly subject to political governance and accountability, posed a challenge to which the gradual emergence of a doctrine of 'police independence' was the response. This challenge has been nicely summarised in a recent article by the Irish scholars, Dermott Walsh and Vicky Conway, as follows:

> "Given the sensitive nature of aspects of the police function, it is easy to appreciate why there should be a concern to protect the police against the full rigours of democratic governance and accountability as applied to the executive generally. The failure to do so would run the risk of politicising safety, security and justice. The prospect of the police being required, whether directly or indirectly, to apply vindictive or preferential law enforcement treatment to distinct groups or individuals for politically partisan ends, is clearly intolerable in any liberal democracy based on respect for human rights. On the other hand, to insulate the police too heavily against democratic direction and accountability will only lay the foundations for the worst excesses of a police state. The open-ended challenge, therefore, is to devise methods which strike a reasonable accommodation between these conflicting tensions."[7]

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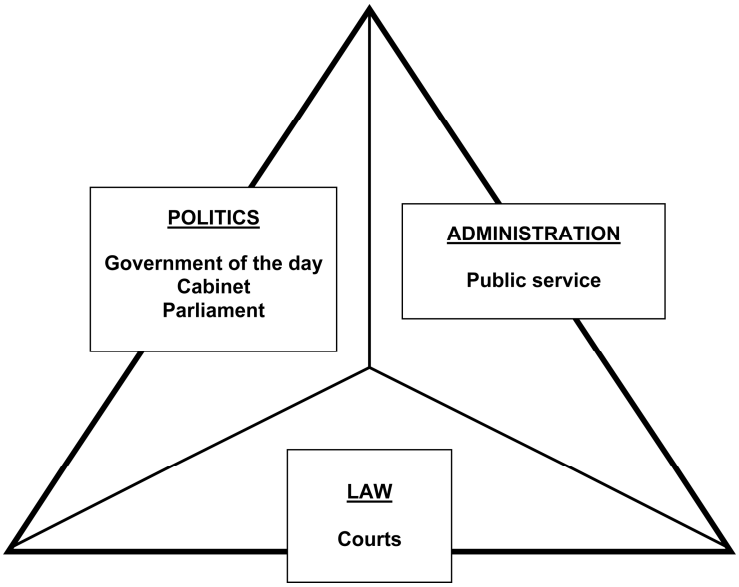
[7] Dermot Walsh, and Vicky Conway, "Police governance and accountability: overview of current issues" (2011), 55(2-3) *Crime, Law and Social Change* 61, 71.

This has led to a different conception of 'separation of powers' which has been applied to those public servants (not just police, but also prosecutors and administrative bodies such as parole boards) who are responsible for the enforcement of the law and the administration of criminal justice, and which can be illustrated thus:



Just as the conventional doctrine of the separation of powers accords to the judiciary an extensive independence from political direction and accountability, this modified version of the doctrine is designed to accord to certain public servants a similar, although less extensive (for reasons Walsh and Conway allude to) political independence with respect to their law enforcement and criminal justice administration responsibilities.

VII THE CONCEPT OF THE POLITICAL INDEPENDENCE OF THE POLICE

As Walsh and Conway make clear, it is relatively easy to state what the ostensible objective of the concept of 'police independence' is: it is to ensure that the police are deployed and act only in the broad 'public interest' rather than in partisan political, corporate or personal interests; that they are not subject to undue partisan political influence, from whatever source, in doing their work; that they are not deployed to suppress or harass political opponents or dissidents; and that in doing their work they uphold the civil and human rights (such as rights of free association and expression) of those they police.

It is much harder, however, to find agreement about the precise scope and implications of this concept. Indeed, in the thirty-five years or so during which I have been undertaking research on the concept, I have come across at least five importantly different formulations of it, ranging the limited formulation of it in the 1962 report of the English Royal Commission on the Police at one extreme to Lord Denning's much more expansive formulation of it in his opinion in the 1968 English case of *R. v. Metropolitan Commissioner of Police, ex parte Blackburn* at the other. Here is the Royal Commission's formulation:

> "The duties which it was generally agreed in the evidence should be performed by chief constables unhampered by any kind of external control are not capable of precise definition, but they cover broadly what we referred to earlier as "quasi-judicial" matters, that is, *the enforcement of the law in particular cases involving, for example, the pursuit of enquiries and decisions to arrest and to prosecute*…. We entirely accept that it is the public interest that a chief constable, in dealing with these quasi-judicial matters, should be free from the conventional processes of democratic control and influence" (emphasis added).[8]

[8] United Kingdom, Royal Commission on the Police (1962) *Final Report* Cmnd. 1728 (London: H.M.S.O.).

And here is Lord Denning's:

> "I have no hesitation….in holding that, like every constable in the land, the Commissioner should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone".[9]

The two key issues which differentiate these various formulations of the concept are: (1) to what activities/decisions of the police the concept applies; and (2) whether the concept gives the police immunity from political control or influence *and* from political accountability, or only from political control or influence but not from political accountability with respect to these activities/decisions.

With respect to the first of these, the activities/decisions referred to in the various formulations of the concept include: 'law enforcement' decisions generally (Denning's formulation); 'operational' (as opposed to 'policy') decisions generally; 'quasi-judicial' decisions (such as decisions to arrest, charge and prosecute suspects) in 'individual cases' (the Royal Commission's formulation); and specific personnel decisions (appointment, deployment, transfer or promotion, and so on) with respect to individual officers other than those of the very highest ranks (e.g. Assistant Commissioner, Deputy Commissioner and Commissioner[10]).

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9 Lord Denning, in *R v. Metropolitan Police Commissioner, ex parte Blackburn* [1968] 1 All E.R. 763, 769.

10 See, eg, *Police Service Administration Act, 1990* (Qld) ss 4.6 and 4.8.

With respect to the second issue - whether 'police independence' entails immunity from political accountability as well as from political control - Lord Denning's formulation famously claimed that with respect to their 'law enforcement' functions, the police are immune from both political direction *and* from political accountability - as he put it, with respect to these activities and decisions they are "answerable to the law and to the law alone".[11] From Whitrod's quoted remark as he left office, which I alluded to at the beginning of this talk, it will be evident that this was his view of police independence; in fact, he cited Denning's *Blackburn* formulation immediately after the remarks that I have quoted. Indeed, despite having been strongly criticised by many academics (including myself) in their writings on this topic - one, Laurence Lustgarten, in his 1986 book *The Governance of Police*, commented that "seldom have so many errors of law and logic been compressed into one paragraph";[12] Denning's formulation of this concept in the *Blackburn* case is undeniably the most frequently cited, not only by police officers themselves, but also by politicians, judges, commissions of inquiry and many academics across the common law world, as the *true doctrine*. Indeed, one English Chief Constable, who had earlier been invited to conduct a review of the administration of the Victoria Police Force,[13] wrote in his memoirs that "in operational matters a Chief Constable is answerable to God, his Queen, his conscience, and to no one else".[14] In a review of the law and literature on the subject in 1997, however, the Melbourne-based Centre for Constitutional Studies described Denning's formulation as "an extreme view, not consistently accepted by the bench nor by subsequent judicial inquiries" in Australia.[15] It can be added that it is also not consistent with relevant provisions of police legislation in any Australasian state or territory.

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11 Lord Denning, above n 9, 769.

12 Laurence Lustgarten, *The Governance of Police* (Sweet & Maxwell, 1986).

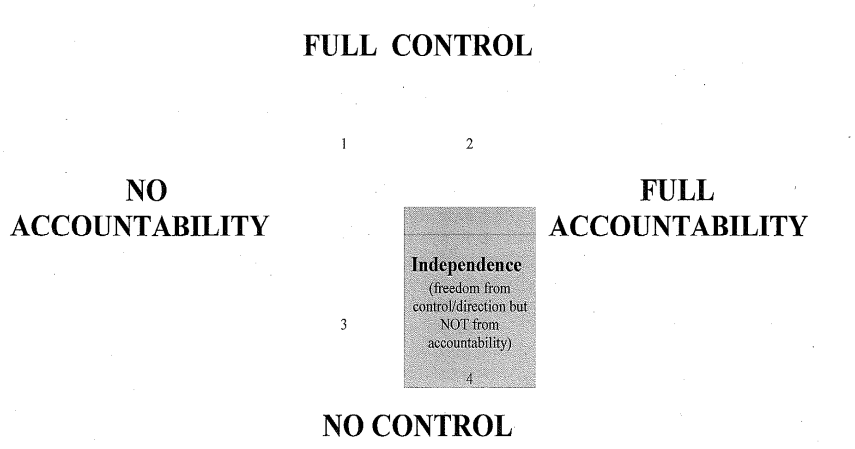
13 Eric St. Johnston, A Report on the Victoria Police Force following an inspection (Government Printer, 1971).

14 Eric St. Johnston, *One Policeman's Story* (Barry Rose, 1978) 153.

15 Centre for Comparative Constitutional Studies, University of Melbourne, 'Governance and Victoria Police: Discussion of Issues Concerning the Constitution of Victoria Police and its Relationship with the System of Government' (University of Melbourne, 1997) 5.

Despite the frequency with which Denning's expansive formulation of the concept is cited, therefore, I have not found any common law jurisdiction in which his assertion that the police are not politically accountable (at least after the fact) for their law enforcement activities and decisions is accepted in practice. The catalogue of recent police commissioners in Australia and elsewhere who have run afoul of their governments over these issues, to which I alluded earlier, amply illustrate this. So I think the most commonly desired situation in this matter in Australia - limited independence will full political/public accountability for certain police functions - can be graphically illustrated as being in quadrant 4 in the following matrix:

VIII POLITICAL INDEPENDENCE – LIMITED INTERPRETATION



The Denning formulation of police independence would place the police in quadrant 3 rather than quadrant 4, at least as far as 'law enforcement' decisions are concerned. The extreme bottom left-hand corner of quadrant 3 of this matrix represents a situation in which the police are not subject to any control or accountability, whereas the

extreme top right-hand corner of quadrant 2 represents a situation in which the police are completely controlled by, and accountable to, the government.[16] Interestingly, both of these situations are referred to as a 'police state'. The classic example of the former is the situation of J. Edgar Hoover when he was Director of the FBI, who abused his independence to intimidate and blackmail politicians and opponents. And the classic example of the latter situation is the South African Police under the apartheid regime who, under the direction of the government, abused their power to enforce the subjugation and oppression of the black majority. Quadrant 4 represents the situation in which the police are accorded independence from political control with respect to some of their functions, but nevertheless remain fully accountable (usually after the fact) for the performance of those functions.

Having said this, there has by no means been agreement here as to which are matters appropriate for ministerial directions to the police (political control), and which are not (political independence). Consider, for instance, the recommendations of the three most recent inquiries in Australia that have considered this matter:

The Fitzgerald Report (Queensland 1989) recommended that:

> "It is anticipated that the Commissioner remain answerable to a Minister of Police for the overall running of the Police Force, including its efficiency, effectiveness and economy…. The Minister can and should give directions to the Commissioner on any matter concerning the superintendence, management and administration of the Force.
>
> The Minister may even implement **policy directives** relating to resourcing of the Force and the **priorities** that should be given to various aspects of police work and will have responsibility for the development and determination of overall policy.

[16] The top left-hand corner of quadrant 1 represents the classic "dirty tricks" or "plausible deniability" situation, in which the government directs the police to "get the job done, but we don't want to know anything about how you do it" (control without accountability) - the Watergate break-in in the U.S. was apparently one of these situations.

> **Priorities determined would have to include the degree of attention which is to be given to policing various offences**….
>
> The Commissioner of Police should continue to have the independent discretion to act or refrain from acting against an offender. **The Minister should have no power to direct him to act, or not to act in any matter coming within his discretion under laws relating to police powers**". [17]

Its recommendations in this respect were implemented in subsequent police legislation in that state.

The Wood Royal Commission Report (NSW, 1997) recommended that:

> "In the course of round table discussions it was said that there is a recognised convention that the Minister is concerned with matters of 'policy' and not with 'operational' matters. If this is so, then it seems to the Commission that the statute should reflect that situation, defining what is policy and what is operational, and providing for resolution of any overlap. The problem can be illustrated by asking whether the following matters are operational or policy:
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> - the particular location of a number of police officers;
> - the opening or closing or relocation of a police station;
> - the creation of a Task Force;
> - the targeting of a particular category of conduct and the means by which it should be achieved.
>
> **In the view of the Commission it is difficult to see why any of these matters is other than an operational matter, in respect of which the Police Commissioner should retain independence**". [18]

These recommendations have not been implemented in New South Wales.

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[17] Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry) (1989) *Report* (Government Printer, 1989) 278-279 (emphasis added).

[18] New South Wales, Royal Commission into the NSW Police Service (Wood Inquiry), *Final Report* (1997), 244-245 (emphasis added).

The Ministerial Administrative Review Report (Victoria 2001) recommended that:

> "**Recommendation 7 - Ministerial Direction Power**
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> [a] **Ministerial Direction Power: In view of the governance principles, which emphasise transparency and accountability, police legislation include a Ministerial direction power with the following key features:**
> - a broad definition of the scope of matters on which the Minister may direct, e.g., along the lines of the general formula of **'general policy in relation to the performance of the functions of Victoria Police'** contained in s.13(2) of the *Australian Federal Police Act 1979 [Cwlth]*. As an alternative, a more prescriptive formula could be prepared, for example, based on that contained in the *Police Service Administration Act 1990* [Qld] but qualified to safeguard the operational independence and accountability of the Chief Commissioner; ....
>
> [b] **inclusion of Non-exhaustive List:** Consideration be given to also incorporating with the proposed Ministerial direction power a non-exhaustive list of **matters on which the Minister cannot direct the Chief Commissioner** including, for example, decisions to investigate, arrest or charge in a particular case; or to appoint, deploy, promote or transfer individual sworn staff members".[19]

These recommendations have not been implemented in Victoria.

Different views as to the appropriate scope of police independence from political direction can clearly be seen in these three sets of recommendations. The Fitzgerald Inquiry basically recommended the position recommended by the English Royal Commission on the Police almost thirty years before. The Wood Royal Commission, on the other hand, envisaged a larger scope for police independence, treating some matters that the Fitzgerald

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[19] Victoria, Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues (2001) (John C. Johnson, Chair) *Report* (Melbourne: Department of Justice) 56 (emphasis added).

Inquiry had identified as matters of policy as 'operational' matters with respect to which the police should enjoy independence (closer to the Denning formulation). The Ministerial Administrative Review in Victoria largely followed the Fitzgerald Inquiry's recommendations, but added some personnel decisions to the list of matters with respect to which the police should enjoy independence. So there has not been complete consensus on these matters in this country.

IX WHEN ARE POLICE 'TOO CLOSE' TO THEIR GOVERNMENTS?

Of course, disputes between police commissioners and their governments do not always involve resignations or dismissals of the police commissioners; in a few cases they have involved resignations of Police Ministers. Nor does controversy over the police-government relationship always arise as a result of disputes about improper government 'interference' or inadequate police accountability. As the recent controversy over Chief Commissioner Overland in Victoria illustrates, such controversies sometimes involve allegations that police commissioners are 'too close' to the governments under which they serve.[20] So I want to draw towards a conclusion on this topic by considering some recent discussions in the South African Constitutional Court about what should be considered 'too close' in this respect, and why.

Relations between police commissioners and governments in South Africa have been notoriously controversial for decades. Prior to 1994, the police were regarded by most reasonable observers as being essentially an instrument of the government in enforcing he oppression of the Black majority under the Apartheid regime; the

[20] The video of Premier Brumby affixing the new Commissioner's epaulettes on his uniform (cited as evidence that they were 'too close'), can be viewed at: <http://media.theage.com.au/?rid=46611&sy=age&source=theage.com.au%2Fnational%2Fsimon-overland-victorias-new-police-chief-20090302-8lxb.html>.

idea that the police could have enjoyed some political independence from the government was not a credible one, however much both parties claimed that it was the case.

With liberation, the new ANC government emphasised the need for a break with the past. The idea of police independence had its place in discussions around the new constitution and the new *South African Police Service Act 1995*. But the concept is not reflected in the provisions of the Constitution concerning the Police Service. In fact, although the Constitution enjoins members of all the security services not to "prejudice a political party interest that is legitimate" or "further, in a partisan manner, any interest of a political party", Article 206 provides that "a member of the Cabinet must be responsible for policing and must determine national policing policy" and Article 207 provides that

> "(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing".[21]

Nor is the idea of the political independence of the Police Service reflected anywhere in the *Police Service Act 1995*, the preamble to which states that the Police Service "shall function under the direction of the national government as well as the various provincial governments".[22]

The matter of the independence of the police came to judicial attention recently in a rather unexpected way, resulting in a judgment of the Constitutional Court which I suspect will in time come to be cited around the common law world.

The story is a long and rather intriguing one. But of course I must summarise it very briefly this evening. In 2001 a Directorate of

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21 *South African Police Service Act 1995.*
22 Ibid 1 (preamble).

Special Operations (which came to be known as the Scorpions) was created with a specific mandate to investigate organised crime and corruption. It was not established within the Police Service, however, but within the National Prosecution Authority, which had been recognised by the courts as enjoying political independence when investigating and prosecuting individual cases.

The Scorpions were quite successful in bringing prosecutions, and in 2009 they were in the midst of investigating allegations of corruption against both the Commissioner of Police (who was eventually convicted last year) and the Deputy President, Jacob Zuma. Weeks before the Presidential election in 2009, however, the case against Zuma was dropped under highly questionable circumstances. Zuma became President and one of his government's first acts, with the backing of his African National Congress Party, was to introduce legislation to abolish the Scorpions and replace them with a Directorate of Priority Crime Investigation (which came to be known as the Hawks), which was located within the South African Police Service.

Out of the blue, a prominent businessman, Hugh Glenister, challenged this legislation in the courts, arguing that it was unconstitutional because the Hawks, within the police service, would not enjoy sufficient political independence compared with the Scorpions whom they had replaced. Glenister lost in the lower courts but, to everyone's (including his) surprise, won his case on appeal in the Constitutional Court (South Africa's highest court), albeit by a very narrow 5-4 majority, in March of this year.[23]

Of course, I do not have time this evening to go into the fine details of this very important and fascinating judgment. But I want to highlight the aspects of it that I think should be carefully considered by police, governments, lawyers and judges in Australia.

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[23] *Glenister v. President of the Republic of South Africa and others* Case CCT 48/10 [2011] ZACC 6.

The majority judgment in the case held that South Africa had a duty under its constitution and in light of its international treaty obligations, like Australia, it is a signatory to both the UN and the OECD Anti-Corruption Conventions, to establish a politically independent anti-corruption entity. And the court held that the Hawks, as established by the legislation that created them, lack sufficient political independence to fulfil this constitutional requirement.

The majority listed the following 7 indicia of the Hawks' lack of sufficient political independence:

1. Its members have no security of tenure - they can be moved out of the unit at any time by the Police Commissioner who, as I indicated earlier, is not explicitly recognised as enjoying political independence either in the Constitution or in the *SAPS Act*

2. The Director of the Hawks may be appointed for short, renewable terms of office. The majority commented that renewable terms of office render office holders more susceptible to improper political influence

3. Members of the Hawks enjoy no statutorily secured remuneration levels

4. The power the statute grants to the Hawks to combat and investigate national priority offences is expressly subordinated to policy guidelines issued by a Ministerial Committee, as is the power of the National Commissioner [of SAPS] to refer offences or categories of offences to them - the majority held that this power of the Ministerial Committee is so "untrammelled" that it could be used to prevent the Hawks from investigating particular categories of offences (such as corruption) or particular categories of state officials

5. Parliament's powers of oversight are insufficient to allow it to rectify the independence deficit which flows from the untrammelled power of the Ministerial Committee

6. The power to involve independent prosecutors in investigations is at the discretion of the National

> Commissioner of SAPS, who himself does not enjoy adequate independence from political influence
>
> 7. The complaints mechanism established under the legislation operates only after the fact and does not constitute an effective hedge against improper political interference.

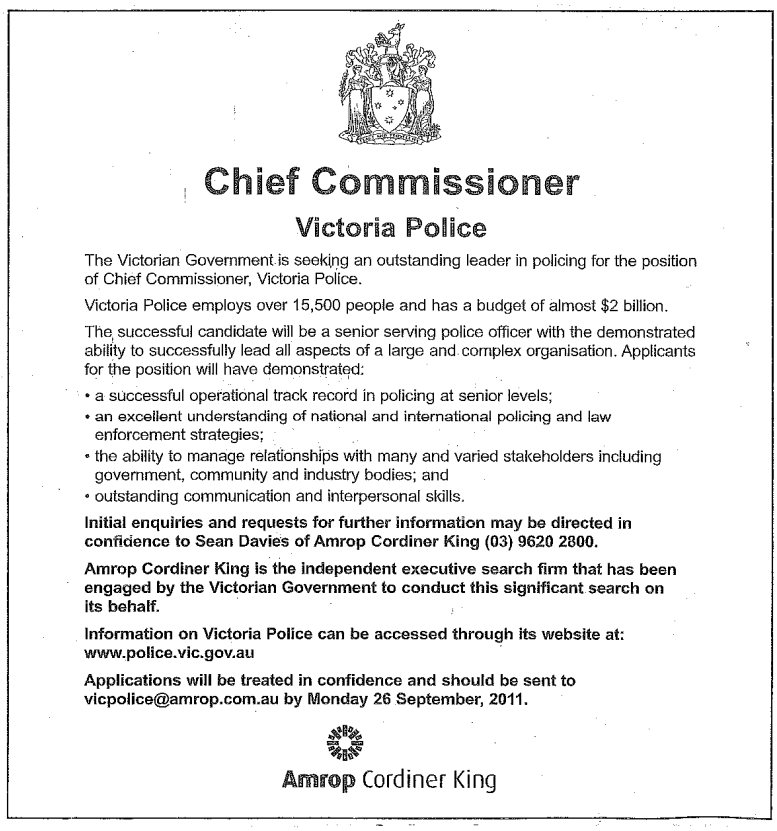
The Court has given the South African government 18 months in which to bring its legislation establishing an anti-corruption investigative agency in compliance with the Constitution and its international treaty obligations.

Now of course it may be argued that an anti-corruption investigative agency requires a greater degree of political independence than a regular police service; indeed, the fact that many Australian states (although not this one yet) have established such agencies separately from their police service may be construed as a recognition of this.

The *Glenister Case*, however, appears to have set a gold standard for the political independence required of any agency charged with combating, investigating and prosecuting corruption, and although I have not examined each piece of Australian legislation carefully enough yet, I think I am on pretty sure ground in asserting that none of the anti-corruption agencies so far established in Australia, and certainly none of Australia's police services, currently satisfies all seven of the indicia of independence that the South African Constitutional Court has specified, although some come closer than others.

So let me conclude this exploration of independence, accountability and 'interference' by asking you to consider the criteria which have recently been published for hiring a new Chief Commissioner of Police in Victoria (which also does not, yet, have a separate general anti-corruption agency).

Here is the advertisement[24] that appeared in the newspapers six weeks or so ago:



Chief Commissioner

Victoria Police

The Victorian Government is seeking an outstanding leader in policing for the position of Chief Commissioner, Victoria Police.

Victoria Police employs over 15,500 people and has a budget of almost $2 billion.

The successful candidate will be a senior serving police officer with the demonstrated ability to successfully lead all aspects of a large and complex organisation. Applicants for the position will have demonstrated:

- a successful operational track record in policing at senior levels;
- an excellent understanding of national and international policing and law enforcement strategies;
- the ability to manage relationships with many and varied stakeholders including government, community and industry bodies; and
- outstanding communication and interpersonal skills.

Initial enquiries and requests for further information may be directed in confidence to Sean Davies of Amrop Cordiner King (03) 9620 2800.

Amrop Cordiner King is the independent executive search firm that has been engaged by the Victorian Government to conduct this significant search on its behalf.

Information on Victoria Police can be accessed through its website at: www.police.vic.gov.au

Applications will be treated in confidence and should be sent to vicpolice@amrop.com.au by Monday 26 September, 2011.

Amrop Cordiner King

You will note that it says nothing about the relationship between the Chief Commissioner and the Victorian Government.

But here is the list of responsibilities of the Chief Commissioner that appears on the last page of a 4-page document entitled "Role Description for the Chief Commissioner of Police for Victoria, Australia" which has recently been published on the Internet:[25]

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24 Advertisement taken from the *Weekend Australian* 13-14 August 2011.

25 Role Description for the Chief Commissioner of Police for Victoria, Australia, Victoria Police, 4 (emphasis added):

"**Responsibilities of the Chief Commissioner of Police**

2.1 Exercise all the statutory powers and authorities of the Chief Commissioner, including power to delegate the authority of the Chief Commissioner.

2.2 **Provide** superior leadership to ensure a commitment to service excellence and **a corporate culture which supports** community and **government priorities**; develop corporate plans which accommodate Government requirements and provide effective reporting on performance to Government.

2.3 Maintain and enhance the ethics, integrity, accountability and public credibility of Victoria police.

2.4 Forecast and identify developments and trends in the policing environment locally, nationally and globally with potential impact on the activities of the Victoria Police in order to establish strategies and supporting plans which ensure that resource levels and operations meet the present and future needs of the community and Victoria Police.

2.5 **Develop and implement policing strategies which are in accord with Government priorities**, including the promotion of a strong commitment by Victoria Police to community safety, road safety and crime prevention programs.

2.6 Ensure that Victoria Police manages its resources within its overall budgetary allocation **in accordance with Government policies and priorities** and implement contemporary management and information technology systems, to improve efficiency and effectiveness, enhance productivity and overall policing outcomes for the community.

2.7 Contribute to the development of national policing strategies through liaison with other police services."

As you will see, it has a lot to say about the responsibility of the Chief Commissioner to comply with Victorian Government policies and priorities in leading the Victoria Police.

<http://resources.news.com.au/files/2011/06/17/1226077/263772-hs-news-file-chief-commissioner-job-description.pdf>.

There is no question that this role description does not meet the criteria for political independence specified in the *Glenister* case, particularly if the government's right to set "priorities" is thought to include a right to dictate "the targeting of a particular category of conduct and the means by which it should be achieved",[26] which the Wood Royal Commission insisted should be a matter of police independence. And perhaps, you may say, there is no reason why we should accept the *Glenister* criteria; that decision, after all, is a South African decision. But I think it is worth asking whether this role description meets our expectations of the independence and accountability of police here in Australia, especially in the absence of a separate independent anti-corruption agency.

As the ongoing sorry saga of the phone hacking scandal in the UK, and the resignation of the Metropolitan Police Commissioner which it brought about, has sadly demonstrated, this is, I think, about the capacity and willingness of the police to speak truth to power.

I wonder what Ray Whitrod would have thought about this?

Thank you for your attention.

[26] *Glenister v. President of the Republic of South Africa and others* Case CCT 48/10 [2011] ZACC 6.

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