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S O U T H A U S T R A L I A

Report

of the

Auditor-General

Supplementary Report

for the

year ended 30 June 2006

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Matters Arising from the Further Audit Examination of the Administration of the *Criminal Law (Forensic Procedures) Act 1998* and Other Matters

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Gentlemen

REPORT OF THE AUDITOR-GENERAL: SUPPLEMENTARY REPORT: MATTERS ARISING FROM THE FURTHER AUDIT EXAMINATION OF THE ADMINISTRATION OF THE *CRIMINAL LAW (FORENSIC PROCEDURES) ACT 1998* AND OTHER MATTERS

Pursuant to section 36(3) of the *Public Finance and Audit Act 1987*, I herewith provide to each of you a copy of my Supplementary Report 'Matters Arising from the Further Audit Examination of the Administration of the *Criminal Law (Forensic Procedures) Act 1998* and Other Matters.

This Report presents separate commentaries with respect to four matters that, in my opinion, are important to bring to the attention of the Government and the Parliament.

The first commentary discusses issues arising from the further examination of certain matters associated with the administration of the *Criminal Law (Forensic Procedures) Act 1998*. The matter of compliance with the requirements of this Act regarding the use of DNA in the administration of the criminal justice system, and other related matters, was the subject of comment in my November 2005 Supplementary Report to Parliament titled *Government Management and the Security Associated with Personal and Sensitive Information*. In further examining this area of government administration, issues concerning Audit authority to review and Audit access to information and documentation were matters to be dealt with and clarified.

The other commentaries in this Report discuss matters of principle and consequence that have arisen out of the performance of certain statutory audit responsibilities undertaken in relation to the Director of Public Prosecutions and his Office. The matters of Audit authority and access are again relevant issues in this context.

Yours sincerely,

K I MacPherson
AUDITOR-GENERAL

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AUDIT COMMENTS ON FURTHER AUDIT EXAMINATION OF THE ADMINISTRATION OF THE *CRIMINAL LAW (FORENSIC PROCEDURES) ACT 1998*

INTRODUCTION

In November 2005, I presented to Parliament a Supplementary Report for the year ended 30 June 2005 titled *Government Management and the Security Associated with Personal and Sensitive Information* (2005 Supplementary Report).

A significant audit finding in that Report was that there had not been strict compliance in the destruction and removal of DNA information from the SACREDD system of Government. The SACREDD system is used primarily for the searching and matching of nominated DNA profiles as determined by the *Criminal Law (Forensic Procedures) Act 1998*.

The DNA information contained on the SACREDD system is used for the investigation of criminal offences and, therefore, is important in the administration of the criminal justice system in South Australia. Non-compliance with the legislative requirements of the *Criminal Law (Forensic Procedures) Act 1998*, for the collection, recording, matching, and destruction of DNA information, has the potential consequence that DNA evidence may not be admissible for the effective prosecution of criminal offences.

Since the tabling in the Parliament of the 2005 Supplementary Report, I have further examined some matters regarding the management of DNA by the South Australia Police (SAPOL) and the Director of Public Prosecutions (DPP) in the investigation and conduct of certain criminal prosecutions.

During that further examination, issues were raised regarding Audit authority to enquire into these matters and the Audit authority to access information and documentation that would allow Audit to form an opinion regarding government agency compliance with the requirements of the *Criminal Law (Forensic Procedures) Act 1998*, ie, the lawfulness of the conduct of government processes.[1]

Government Announcement of Proposed Amendments

Whilst the Government has announced that there will be amendments made to address the particular issues that arose in the matter of *R v Dean,*[2] the underlying principle of compliance by all Executive Government agencies with express statutory requirements is the matter of importance that arises in this context. This is particularly significant when the agencies involved are the very ones responsible for law enforcement.

The Audit Mandate

The audit mandate states that the Auditor-General provide an opinion regarding the adequacy of the controls and the propriety and lawfulness of public authority financial transactions. Further, the Auditor-General is required to bring to the attention of the Government and the Parliament matters that in his opinion, are important. The comment herein relates to both control inadequacies and matters that, in my opinion, are important to bring to the attention of the Government and the Parliament.[3]

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1 See section 36(1)(a)(iii); *Public Finance and Audit Act 1987*.

2 (2006) SADC 54 (Judge Shaw; 25 May 2006).

3 See section 36 (1)(a)(iii) and 36 (1)(b); *Public Finance and Audit Act 1987.*

The DPP and the Commissioner of Police have raised queries concerning the right of audit access to certain information requested under the *Public Finance and Audit Act 1987*. The Office of the Director of Public Prosecutions (ODPP)[4] and SAPOL are public authorities and are, by law, subject to audit by the Auditor-General. It is entirely proper for the Commissioner and the DPP to seek clarification of the audit mandate under the *Public Finance and Audit Act 1987*.

The Audit authority to request access to the relevant information in the matters referred to hereunder has been confirmed by the advice of the Solicitor-General in relation to the DPP and the Crown Solicitor's Office in relation to the Commissioner of Police.

This matter does, however, raise wider issues of importance for the Parliament regarding the discharge of its constitutional responsibilities. To provide a context, and to assist the Parliament in examining this matter, in my opinion, it is also necessary that there be a re-statement of the underlying principles associated with the discharge by the Auditor-General of the audit mandate under the *Public Finance and Audit Act 1987*. The discussion of these principles is to be found under the topic heading 'Consequences of a Limitation on Audit Scope' hereunder in this Report.

The following sets out some relevant considerations and certain particulars regarding the further examination of this matter.

SOME RELEVANT CONSIDERATIONS

The law and order policies of government, in my opinion, give rise to a number of matters that raise issues of public interest importance. Both international and domestic developments have necessitated policy responses by government at all levels resulting in substantial changes in the criminal law and other legislation with, in some cases, serious penal consequences for those members of the community whose conduct is contrary to law.

These changed arrangements in the law provide for wide powers to be vested in government officials. In my opinion, for the reasons discussed in this section of this Report, the controls and other checks and balances that exist under current administrative arrangements may not be adequate to provide reasonable assurance that in some important matters associated with law and order, that the exercise of governmental powers at all relevant times comply with the high standards that must inform official conduct and actions.

A Principle of Fundamental Importance

It is important in matters of this type to be reminded of the comments by Mr Justice Brandeis in *Olmstead v United States* (1928) 277 US 438.

> *Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teachers the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to*

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[4] The ODPP is, for administrative purposes, designated as a 'business unit' within the Attorney-General's Department.

> *become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.*

The Statement of Legislative Intent

In the matter that is the subject of this audit examination, it is of particular significance to note the legislative intention as stated in the Second Reading Speech of the responsible Minister at the time of the introduction of the *Criminal Law (Forensic Procedures) Act 1998* (House of Assembly Hansard 26 February 1998 at page 574).

> *Law enforcement authorities were critical of the strict rule of inadmissibility that is contained in the Model Provisions. The approach taken there and in the Bill is, however, consistent with current law. It requires the prosecution to satisfy the court that, despite the fact that the standards set down by Parliament have been broken, the evidence should still be admitted. It is also provided that the probative value of the evidence is not by itself sufficient to warrant admission. The reason for this is that the Bill deals with real evidence and the temptation to break the rules in order to get the vital piece of hard evidence must be high. In reality, it is no defence to breaking the law to say that the evidence actually obtained proves guilt – the end does not justify the means.*[5]

It is to be noted that the failure to comply with the provisions of the *Criminal Law (Forensic Procedures) Act 1998* regarding the matter of the removal of a DNA profile from the DNA database may constitute a criminal offence with a maximum penalty of $10 000 or imprisonment for two years.[6] In enacting these provisions the legislature clearly intended compliance by all persons including those persons involved with law enforcement responsibilities.

The integrity of the administration of the criminal justice system is of fundamental importance. This is an Executive Government responsibility. As such, all aspects of the processes involved must be capable of effective review and audit. Further, there must also be, in my opinion, appropriate mechanisms to ensure the accountability of those persons who are responsible for the relevant administrative arrangements.

THE AUDIT OBJECTIVE CONCERNING THE ADEQUACY OF CONTROLS RE DNA MANAGEMENT, PROCESSES, ETC

Audit Request to the Commissioner of Police

The audit objective associated with the request to the Commissioner of Police was to obtain audit assurance that no person had been convicted (and possibly imprisoned) on the basis of DNA evidence that should have been destroyed under the *Criminal Law (Forensic Procedures) Act 1998* without that matter having been drawn to notice, and having been the subject of judicial determination as to its admissibility.[7]

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5 See also *Bunning v Cross* (1978) 141 CLR 54; and *R v Ireland* (1970) 126 CLR 321.

6 Section 46C(3); *Criminal Law (Forensic Procedures) Act 1998*.

7 This matter is the subject of a more extensive commentary under the topic heading 'Further Audit Analysis of Issues Involved' hereunder in this Report.

It was important to understand whether DNA evidence had been presented at a trial where an accused person had pleaded 'not guilty'. If this was the case, there is the possibility of adverse financial and other consequences for government. As I am now informed the person concerned pleaded 'guilty'.[8] This does not, however, affect the basis for the commentary in this Report which has as its focus the need for compliance with mandated legal requirements by public authorities.

This was a matter of particular importance having regard to the judgment of Her Honour Judge Shaw in the matter of *R v Dean* (2006) SACD 54.[9] Judge Shaw made a number of observations that indicated that there is a need for SAPOL to take remedial action to ensure proper compliance with the *Criminal Law (Forensic Procedures) Act 1998*. The comments that were made by Judge Shaw were made several months after the tabling of the 2005 Supplementary Report in which these matters were initially raised as being of concern.

It was following Judge Shaw's judgment in this case that the Commissioner indicated at the time when questions were raised as to whether there were any other cases similar to that of Dean that 'one possible case has turned up'.[10]

In a letter to the Auditor-General dated 29 August 2006, the Commissioner of Police advised as follows:

> *As you are aware, there are complicated legal requirements associated with the DNA legislation and I will need to obtain advice from the Crown Solicitor's Office on whether your request is within your legislative charter and whether I can release the information you seek under the forensic procedures legislation. I appreciate that you refer to advice you have received from the CSO, but this is somewhat inconsistent with advice we have previously received from the CSO. In addition, I will need to consult with the DPP.*

The Commissioner was concerned about the strict confidentiality obligations in section 47 of the *Criminal Law (Forensic Procedures) Act 1998,* given that there are criminal sanctions for the unauthorised release of DNA related information that relates to the identity of a person.[11] Subsequent to obtaining advice from the Crown Solicitor, the Commissioner in a letter to the Auditor-General dated 25 September 2006 released the non-identifying information sought by this Department which was within SAPOL's knowledge and control.

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8 The underlying issue of whether the plea of guilty in this matter can be said to be a 'tainted plea' is not for me to resolve as part of this audit examination. I simply do not have any evidence to suggest what the position is in this regard. This is a matter for the Commissioner of Police and the DPP to resolve as to whether there is any issue of substance in this context.

9 (2006) SADC 54.

10 *The Advertiser* newspaper; May 30, 2006, page 19.

11 The Commissioner stated that he had received advice from the Crown Solicitor's Office that is inconsistent with the advice on this matter upon which I am relying. I respect the Commissioner's caution having regard to the secrecy provisions of the *Criminal Law (Forensic Procedures) Act 1998* and the criminal sanctions that are attendant with a breach of that Act. Whilst having regard to the Commissioner's concerns, the Crown Solicitor is of the view that, notwithstanding the need for caution by the Commissioner, relevant information to provide audit assurance can be provided without the Commissioner being at risk of contravening the *Criminal Law (Forensic Procedures) Act 1998.* This may mean that it is arguable that the 'name' of the person who is the 'one possible case [that] has turned up' can be de-identified and that all other information requested by Audit can lawfully be provided. The Commissioner has now provided the relevant information.

Further, on 5 October 2006 the Commissioner advised that the DPP indicated on 26 September 2006 he had made an assessment of the circumstances in the relevant case. As a result, SAPOL has destroyed the forensic material in question and removed the relevant profiles from the DNA database. However, the correspondence received from the DPP does not enable SAPOL to specifically answer the Auditor-General's outstanding questions.

Audit Request to the Director of Public Prosecutions

The DPP has provided certain information to an audit request regarding the 'control processes' that are adopted within his Office concerning the assessment of the admissibility of DNA evidence obtained from the Police. The Solicitor-General has confirmed the Audit authority to request information from the DPP with respect to this matter. Following the receipt of the Solicitor-General's advice, in a letter dated 18 August 2006, the DPP responded to the audit request and provided certain information.

Having regard to that information and further information provided to-date by the DPP, including his letters of 6 October 2006 and 7 November 2006, further Audit clarification may be necessary.

The Present Position in Summary

The present position can be summarised in the following terms.

The 'one possible case that turned up' referred to above, concerned offences committed at four separate premises.[12] In 2005, DNA material found at the premises was compared to profiles contained in the SACREDD system. A match was indicated with a profile in the system that had been obtained in 2003. That 2003 profile had been obtained as part of the investigation of offences for which charges did not proceed.[13] Under section 44C(1)(b)(ii)(B) of the *Criminal Law (Forensic Procedures) Act 1998*, that material should have been destroyed as soon as practicable after the proceedings were discontinued, which in this case was 18 December 2003.

After the comparison of DNA found at the premises where the offences were committed was compared and matched to a profile on the SACREDD system, the person identified by the profile was arrested. The Senior Prosecutor for this matter stated that:[14]

> *The only evidence which could demonstrate a link between* [the offender] *and the premises where the offences were said to have taken place was evidence of matching DNA profiles.*

The arrest occurred in March 2005. DNA was then taken from the suspect under the authority of section 15(1)(c) of the *Criminal Law (Forensic Procedures) Act 1998*. In the material provided to me by the DPP and SAPOL, no other reason for arresting the suspect has been advanced other than the DNA match. I therefore conclude that, had the DNA profile been destroyed in 2003 as required, there would be no basis on which to arrest the suspect.

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12 Letter from a Senior Prosecutor in the ODPP to the suspect's solicitor dated 28 September 2006.

13 Letter from the DPP to the Auditor-General dated 7 November 2006.

14 Letter from a Senior Prosecutor in the ODPP to the suspect's solicitor dated 28 September 2006.

That being the case, it is arguable that SAPOL were not authorised under section 15(1)(c) of the *Criminal Law (Forensic Procedures) Act 1998* to take the further DNA sample. Notwithstanding these facts, the DPP has argued that the arrest and the subsequent taking of a DNA sample were prima facie lawful as the arresting officer had reasonable cause to suspect that the person concerned had committed a number of offences.[15] This argument is at odds with the statement made by the Senior Prosecutor in his letter to the suspect's solicitor.[16]

Where a DNA sample has been taken without proper authority that evidence is not admissible against the person providing the sample unless the person does not object to its admission or the court is satisfied that the evidence should be admitted in the interests of the proper administration of justice despite the contravention.[17] In the case of forensic material that should have been destroyed, evidence obtained from that forensic material is inadmissible without qualification.[18] As the 2003 material should have been destroyed that evidence would not be admissible under the *Criminal Law (Forensic Procedures) Act 1998*. However, it would be a matter for the court to decide, in accordance with the matters listed in section 45(2) of the *Criminal Law (Forensic Procedures) Act 1998*, whether the 2005 forensic material could be admitted into evidence.

In the case in question, the suspect pleaded guilty to the offences and so no evidence was tendered. The effect of a guilty plea is an admission to all elements of the offence.[19] The circumstances in which a guilty plea could be set aside have been summarised in this paragraph from *Meissner v The Queen*.[20]

> *It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud.* (footnotes omitted)

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15 Letters from the DPP to the Auditor-General dated 6 October 2006 and 7 November 2006.

16 See footnote 12 above.

17 See section 45(1) of the *Criminal Law (Forensic Procedures) Act 1998*.

18 See section 45(3) of the *Criminal Law (Forensic Procedures) Act 1998*.

19 See *R v Pugh* (2005) SASC 427 Supreme Court of South Australia – Court of Criminal Appeal.

20 *Meissner v The Queen* (1995) 184 CLR 132 at 157 per Dawson J.

The Need for Caution in Use of DNA Evidence

Whilst, understandably there can be no sympathy for a person who is guilty, the need for caution in the use of DNA evidence without confirmation that all relevant safeguards with respect to the use of such evidence have been met is obvious. This matter is of importance simply to emphasise the necessity for adherence to mandated legal requirements and the assurance that adequate procedural controls have been satisfied.[21]

The DPP, on 28 September 2006, informed the solicitor who represented the suspect in relation to his guilty plea of the fact that the DNA evidence should have been destroyed prior to the suspect's arrest.

FURTHER AUDIT ANALYSIS OF ISSUES INVOLVED

Introduction

As noted above, one of the key Audit findings contained in the 2005 Supplementary Report was that there was not strict compliance in the destruction and removal of DNA information from the SACREDD system.[22] I concluded that:

> *The significance of the DNA database requires that the computer and related record keeping processes are undertaken in a manner that guarantees the integrity of DNA profile information, its recording, its confidentiality, and timely removal where required by legislation.*

Removal of Information from the SACREDD System

Section 46C(1) of the *Criminal Law (Forensic Procedures) Act 1998* requires the Commissioner of Police to ensure that a DNA profile derived from forensic material obtained under the Act is not retained on the SACREDD system beyond the time the destruction of the material is required under the Act.

A person who intentionally or recklessly causes information to be retained on the database system in contravention of section 46C is guilty of an offence with a maximum penalty of $10 000 or imprisonment for two years.[23]

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[21] That DNA evidence is open to be contested is demonstrated by cases such as *Macartney v The Queen* (2006) 31 WAR 416.

[22] See 2005 Supplementary Report, pages 12 and 13.

Among other things, this Report discussed certain issues that were identified in respect of the audit of the management and control of the South Australian Criminal Reference and Evidence DNA Database (SACREDD) system. The system is established and operated under the *Criminal Law (Forensic Procedures) Act 1998*.

The SACREDD system is used primarily for the searching and matching of nominated DNA profiles as determined by the *Criminal Law (Forensic Procedures) Act 1998* and their automated reporting to the DNA Management Section of SAPOL. The DNA information contained on the SACREDD system is used for the investigation of criminal offences and, therefore, is of critical importance in the administration of justice in South Australia.

[23] *Criminal Law (Forensic Procedures) Act 1998*, section 46C(3).

The Requirement to Dispose of Forensic Material

Division 4 of Part 4A of the *Criminal Law (Forensic Procedures) Act 1998* deals with the destruction of forensic material.[24] A distinction is made between:

- forensic material obtained from a person voluntarily (referred to as a category 2 (volunteers) procedure);[25]
- forensic material obtained from a person who is suspected of committing a crime (referred to as a category 3 (suspects) procedure);[26]
- forensic material obtained from an offender (referred to as a category 4 (offenders) procedure).[27]

Section 44B deals with the destruction of forensic material obtained by carrying out a category 2 (volunteers) procedure. Section 44C deals with the destruction of forensic material obtained by carrying out a category 3 (suspects) procedure. Section 44D deals with the destruction of forensic material obtained by carrying out a category 4 (offenders) procedure.

Section 44C requires destruction of forensic material if a matter is discontinued, unless there are other proceedings pending.

Section 45 states that non-compliance with the *Criminal Law (Forensic Procedures) Act 1998* in relation to forensic material or a DNA profile derived from forensic material has the effect that the evidence obtained from the forensic material is not admissible in evidence[28] against the person on whom the procedure was carried out unless:

> *(d) the person does not object to the admission of the evidence; or*
>
> *(e) the court is satisfied that the evidence should be admitted in the interests of the proper administration of justice despite the contravention.*

The District Court's Decision in *R v Dean*

In *R v Dean*,[29] the accused was arrested on 26 July 2004 and was charged with the offence of aggravated robbery allegedly committed at a supermarket in March 2004. The arrest came about as a result of a match between the accused's DNA profile on the

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24 The term 'forensic material' is defined in section 3(1) to mean 'material obtained by carrying out a forensic procedure and includes the results of analysis of any such material'. Section 3(1) also defines a 'forensic procedure' to mean a procedure carried out by or on behalf of SAPOL or a law enforcement authority and consisting of the taking of prints of the hands, fingers, feet or toes, an examination of a part of a person's body (but not an examination that can be conducted without disturbing the person's clothing and without physical contact with the person), the taking of a sample of biological or other material from a person's body (but not the taking of a detached hair from the person's clothing), or the taking of an impression or cast of a part of a person's body.

25 *Criminal Law (Forensic Procedures) Act 1998*, section 13E.

26 *Criminal Law (Forensic Procedures) Act 1998*, section 14.

27 *Criminal Law (Forensic Procedures) Act 1998*, section 30.

28 *Criminal Law (Forensic Procedures) Act 1998*, section 45.

29 (2006) SADC 54 (Judge Shaw, 25 May 2006).

SACREDD system and the DNA profile obtained from material allegedly located at the crime scene. The accused's DNA profile was placed on the SACREDD system as a result of his arrest in December 2003 for charges of assaulting a family member, which were discontinued in April 2004. Despite those proceedings being discontinued, the accused's forensic material was not destroyed. There were other proceedings of a summary nature pending against the defendant at the time that charges of assaulting a family member were discontinued. However, his DNA profile was not removed from the SACREDD system until December 2005.

Judge Shaw of the District Court ruled that the accused's arrest was unlawful because police had contravened sections 44C and 46C of the *Criminal Law (Forensic Procedures) Act 1998*. Her Honour found that upon the finalisation of the charges of assaulting a family member, the forensic material obtained upon the accused's arrest for those offences, ought to have been destroyed.

Her Honour also described what she saw as systemic failures on the part of SAPOL to comply with the requirements of the *Criminal Law (Forensic Procedures) Act 1998*.

The decision in *R v Dean* attracted significant media comment.[30] In an article appearing in *The Advertiser* on 29 May 2006, Police Commissioner Hyde is reported to have strongly rejected Judge Shaw's findings, saying that SAPOL had always done their utmost to comply with the DNA legislation.[31]

Correspondence with the Commissioner of Police

On 1 June 2006, I wrote to the Commissioner of Police regarding the follow up audit of the matters previously reported in the 2005 Supplementary Report. I asked the Commissioner to supply me with copies of the legal advice to which the Police Commissioner referred when commenting on the Dean decision in the media.

The Police Commissioner replied to my letter on 28 June 2006. He stated that there was no specific advice provided on the handling of the DNA disputed in the case of *R v Dean*. Rather, the advice relied upon was derived from an opinion from the Crown Solicitor's Office dated 22 October 2003.

SAPOL have advised me that the Crown Solicitor's Office opinion of 22 October 2003 was the basis upon which a process was established within the DNA Management Section. Reliance was placed by the SAPOL on the definitions provided on the basis that statutory terms within the same provisions are presumed to be interpreted consistently.

In the advice to me dated 16 August 2006 the Commissioner of Police stated:

> *SAPOL's practices were, at that time, based upon the definition of "proceedings" provided in the Crown Solicitor's opinion.*

Judge Shaw held that 'proceedings' in section 44C referred only to proceedings for offences of a nature that would have permitted the conduct of a forensic procedure under the *Criminal Law (Forensic Procedures) Act 1998.*

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30 See eg, *The Advertiser*, Monday 29 May 2006, Metropolitan Edition, page 1; *The Advertiser*, Tuesday 30 May 2006, Metropolitan Edition, page 2; and *The Advertiser*, Tuesday 30 May 2006, Metropolitan Edition, page 19.

31 *The Advertiser*, Monday 29 May 2006, Metropolitan Edition, page 1.

Correspondence with the Director of Public Prosecutions

On 9 August 2006, I wrote to the DPP seeking information on the procedural control tasks that are implemented within his Office in order to ensure that DNA evidence presented in court proceedings meets the statutory requirements of the *Criminal Law (Forensic Procedures) Act 1998*.

The DPP replied by letter dated 18 August 2006, in which he noted:

> *The responsibility for the DNA database sits with the Commissioner of Police. I do not see it as my role to oversee the exercise of the Commissioner's powers. Indeed, it is highly desirable that the investigation process and the prosecution process remain separate. This represents a proper check and balance in the criminal justice system. There will be times, of course, when I will have input in the investigation process of individual matters. There will also be times in relation to more general matters when I will use my powers under section 11(1) of the* Director of Public Prosecutions Act, 1991*. In the main, however, I operate on the basis that the investigation of any particular crime is a matter for the police and I start with the presumption that the evidence has been obtained lawfully.*

It is acknowledged that, as a general rule, in the absence of an express legislative prohibition, the presumption that evidence has been lawfully obtained is a reasonable approach. In my opinion, the ODPP should rigorously scrutinise the admissibility of evidence of this type presented to it by SAPOL, before deciding whether or not to prosecute the accused. It is my understanding that, in the *Dean* case, the DPP was aware of the circumstances and considered that this was a matter for legal argument and determination by the Court in exercising its discretionary powers in such matters.

CONSEQUENCES OF A LIMITATION ON AUDIT SCOPE

Where there is a limitation on the audit scope, there is, in my opinion, in the absence of any other compensating arrangements to inform the Parliament, a consequential limitation imposed on the Parliament in discharging its constitutional responsibilities.[32]

In *Horne v Barber* (1920) 27 CLR 494, Isaacs J, at page 500 stated as follows:

> *One of the duties* [of a member of Parliament] *is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament. … That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.*

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[32] In South Australia there is no separate authority within the constitutional framework that is the equivalent of, for example, The Independent Commission Against Corruption (New South Wales), and the Criminal Justice Commission (Queensland). Similar bodies and/or organisations exist in some other jurisdictions. The Anti-Corruption Branch of the Police Force is a branch within the Police Force subject to the control and direction of the Commissioner of Police. Whilst the Anti-Corruption Branch of SAPOL is subject to external independent audit, that audit does not provide a report to the Parliament but reports to the Minister responsible for SAPOL. In these circumstances there is no independent audit assurance being provided to the Parliament regarding the propriety and the lawfulness of the general administrative processes of SAPOL other than that of the Auditor-General. In my opinion, the jurisdiction of the Police Complaints Authority and the Office of the Ombudsman do not address the audit related issues that are being raised.

In the absence of an express statutory provision that exempts a public authority from the audit provisions of the *Public Finance and Audit Act 1987,* that agency is, by law, subject to audit by the Auditor-General. It is important to note the following proposition that has long been recognised:

> *Without audit, no accountability; without accountability no control; and if there is no control where is the seat of power?*[33]

The answer to that rhetorical question is that no Executive Agency is the ultimate power unto itself.[34]

In the matter of the exercise of governmental prerogative and statutory authority, accountability must ultimately be to the Parliament.

Former Solicitor-General's Comment on Role of Auditor-General

The former Solicitor-General, Mr Bradley Selway QC, in his book 'The Constitution of South Australia' included the following specific comment on the role of the Auditor-General.[35]

> *The Auditor-General holds a statutory public office under the Crown. The Auditor-General is independent of both the executive and the parliament. It may be doubted whether the Auditor-General is an employee of the executive. The Auditor-General has security of tenure and can be removed from office only on the address of both Houses of Parliament.*
>
> *The Auditor-General exercises a number of functions given by statute.*
>
> *The basic function of the Auditor-General is to audit the public accounts with a view to making reports to the executive and to the parliament on the result of such audits. The Auditor-General protects the executive from inappropriate or fraudulent behaviour in respect of the public accounts. The Auditor-General reports to parliament on whether the executive is properly acting within the law respecting public finances and informs the parliament of any inappropriate or fraudulent behaviour he or she has identified.*
>
> *The role of the Auditor-General in the proper functioning of the executive is often not fully appreciated. As part of the independent audit role, it is the function of the Auditor-General to identify ultra vires acts and*

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33 E L Normanton; 'The Audit and Accountability of Government' (1966); Manchester University Press; Foreword by W J M McKenzie.

34 The audit mandate under the *Public Finance and Audit Act 1987* expressly includes the requirement that the Auditor-General provide an opinion regarding the adequacy of the controls associated with the financial transactions of government including matters of propriety and compliance with the law associated with those financial transactions. Financial transactions do not take place in an administrative vacuum. This necessarily involves the Auditor-General gaining an understanding of the conduct associated with those financial transactions. As noted elsewhere in this Report (ie, see reference to WA Inc Royal Commission Report, eg, paragraph 3.10.6) there is no activity of government that fails to involve some use or commitment of public resources. It is also to be noted in this context the statement in A J V Durell 'The Principles & Practice of the System of Control Over Parliamentary Grants' (1917), page 1:

> *All State action costs money, directly or indirectly, … 'Expense governs everything'. Finance may therefore be said with truth to be the foundation of government, in the sense that ways and means must be found for everything which a government desires to do.*

35 Paragraph 9.10 at page 137.

inappropriate practices and to bring these to the attention of relevant authorities including, where the Auditor-General thinks it appropriate, the parliament.

In order to perform these functions the Auditor-General has extensive powers to interview persons and to call for records. (footnotes omitted)

Royal Commission Comment on Role of Auditor-General

The 'Western Australian Report of the Royal Commission into Commercial Activities of Government and Other Matters' (WA Inc Royal Commission Report) stated as follows:[36]

3.10.1 The office of the Auditor-General provides a critical link in the accountability chain between the public sector, the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigation and review. This function must be fully guaranteed and its discharge facilitated. The Auditor-General is the Parliament's principal informant on the performance of the administrative system.

3.10.5 … Although in the end only a reporting agency to Parliament, it [the Auditor-General's function] *can properly be described as the public's first check and best window on the conduct of government.*

3.10.6 No activity of government fails to involve some use or commitment of public resources. No activity of government, can in consequence, be allowed to be removed from the Auditor-General's scrutiny. … What we wish to emphasise is that for so long as an agency owns, or uses, or risks, public property in its operations, there can be no acceptable reason for its not being subject to the full scrutiny of the Auditor-General.[37]

The Conduct of an Audit

No Auditor-General on becoming seized of a matter of audit consequence, can, in my opinion, consistent with his/her obligations to the Parliament, fail to take all necessary steps to obtain a level of audit assurance that is appropriate in the particular circumstances.

In an earlier report[38] I advised the Parliament as follows:

It is not open to an Auditor-General to accept with uncritical passivity the assertions of government agencies regarding financial and/or other representations on matters that are within the audit mandate. It is also to

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36 Royal Commission Report 1992. The three Royal Commissioners appointed to conduct this Royal Commission were a former Justice of the High Court of Australia (the Hon Sir Ronald D Wilson QC), a Justice of the Supreme Court of Western Australia (the Hon G A Kennedy) and a former Justice of the Supreme Court of Western Australia (the Hon P F Brinsden).

37 In my opinion, 'scrutiny' is not incompatible with the requirement for 'accountability' and does not interfere with the exercise of independent statutory powers in circumstances where that scrutiny occurs *ex post facto* the conduct and/or events that are the subject of review. Inherent in a claim by a public officer exercising public powers and using public resources that that public officer is not open to scrutiny is a claim that that public officer is unaccountable. In my opinion, any such claim is untenable under the Westminster system of Parliamentary Government where that officer is exercising powers derived under statutory authority conferred by the Parliament and is paid from the public purse.

38 *Report of the Auditor-General for the year ended 30 June 1995,* page 2.

be emphasised that audit will not allow inadequate explanations to deflect it from gaining a thorough and detailed understanding of issues that may be the subject of audit inquiry. To do so would be to not only fail to meet established professional standards, but also the expectations of Parliament and the community regarding the role of the Auditor-General.

Where an Auditor-General is not provided with unrestricted access to all information that is relevant to the performance of the audit responsibilities, the Parliament can have no independent assurance regarding the conduct of the Executive Government.[39] Under normal arrangements there is a co-operative approach adopted by both auditor and auditee. This is consistent with the fact that the Auditor-General and the auditee are both acting in the public interest.

Recommendation on the Matter of Authorised Person under Section 47 of the *Criminal Law (Forensic Procedures) Act 1998*

In my opinion, any potential for a limit on audit investigations should, for the reasons discussed herein, be drawn to the attention of the Government and the Parliament.[40]

To address the circumstances that have arisen in this matter, it may be appropriate to expressly include the Auditor-General as a person, who, together with the Ombudsman and the Police Complaints Authority, is authorised pursuant to sections 46D and 47 of the *Criminal Law (Forensic Procedures) Act 1998*.

CONCLUDING COMMENTS

I noted in the 2005 Supplementary Report, that within Government there are certain agencies whose operations are required to comply with specific statutory arrangements, and that it is important that these agencies comply with those arrangements.[41]

SAPOL, for example, is required to comply with the requirements of the *Criminal Law (Forensic Procedures) Act 1998* in relation to the disposal of forensic material and the removal of DNA information from the SACREDD system. The decision in *R v Dean* highlighted that at that time there was a systemic failure on the part of the Police to comply with these legislative requirements 'based upon the interpretation of "proceedings" in section 44C of the *Criminal Law (Forensic Procedures) Act 1998* which had been adopted at the relevant time'. I had previously identified such non-compliance in the 2005 Supplementary Report and observed that remedial action was being taken.

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39 This of course is in the absence of other comprehensive compensating arrangements for informing the Parliament. As stated by the Western Australian Royal Commission referred to elsewhere in this Report:

> *The Auditor-General is the Parliament's principal informant on the performance of the administrative system.* (Refer to paragraph 3.10.1 referred to above in the text of this Report)

40 Where an agency does not provide relevant information, subject to any express statutory authority authorising the right to withhold such information from the Auditor-General, the Parliament has provided the Auditor-General with the necessary formal powers in order to enable him/her to obtain that information in order that the necessary level of audit assurance can be obtained (section 34; *Public Finance and Audit Act 1987*). Without such assurance, there is the potential for the Parliamentary processes to be frustrated and undermined.

As I have previously advised the Parliament, those formal processes have been and will be exercised when considered necessary to ensure that it, ie, the Parliament, is accurately informed in a timely manner of matters that, in my opinion, are of importance to it and the Government.

41 See 2005 Supplementary Report, page 10.

In my opinion, this matter highlights the importance of the audit process in ensuring transparency and accountability in public administration in South Australia, particularly as this State has no body or organisation equivalent to New South Wales' Independent Commission Against Corruption (ICAC)[42] or Queensland's Crime and Misconduct Commission (CMC).[43] One of the primary purposes of these bodies is 'to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector'.[44]

In the absence of a body or organisation such as ICAC in this State, Audit, as illustrated by this issue of non-compliance with the statutory requirements of the *Criminal Law (Forensic Procedures) Act 1998*, can continue to usefully fulfil the important role of identifying systemic issues within this State's public sector. The identification and resolution of systemic issues within the public sector leads inevitably to an improvement in the accountability, transparency and integrity of the public sector. This, in turn, will ultimately increase confidence in public administration.

In this regard, I note that the Report of the WA Inc Royal Commission expressed its opinion regarding the role of the Auditor-General as follows:

> *The Auditor General is no mere scrutineer of the financial affairs of the departments and agencies of government, notwithstanding the importance of this responsibility. The Auditor General's role must now be accepted as multi-purposed. … In auditing the accounts of an agency, the Auditor General is expected to address not merely the financial integrity of the agency's activities but also such matters as the agency's compliance with the law and the legislation and directions under which it acts and the controls it has to secure that compliance; the probity of official conduct in its financial affairs; the appropriateness of performance indicators; and, of no little importance, given our inquiries, the adequacy of the records on which its management is based and carried into effect. As well, the Auditor General has an expanding and more far reaching responsibility, one which relates directly to protecting the public purse.*[45]

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42 *Independent Commission Against Corruption Act 1998* (NSW).

43 *Crime and Misconduct Act 2001* (Qld).

44 *Crime and Misconduct Act 2001* (Qld), section 4(1)(b). See also the *Independent Commission Against Corruption Act 1998* (NSW), section 2A(a).

45 The Royal Commissioners were Justice Geoffrey Kennedy (a Justice of the High Court of Western Australia), Sir Ronald Wilson (a former Justice of the High Court of Australia) and the Hon Peter Brinsden (a former Justice of the Supreme Court of Western Australia).

RESOLUTION OF DISPUTES BETWEEN CROWN AGENCIES

This commentary with respect to disputes between Crown agencies has been included in this Report having regard to issues that have arisen concerning the audit mandate in relation to matters associated with SAPOL and the ODPP.

In a letter to the Auditor-General, dated 25 August 2006, the DPP stated as follows:

> *While you continue to hold the view that you may intrude into areas that are properly, in my view, matters for me and in the absence of any agreement between us, it seems inevitable that a resort to the courts will be necessary. It is essential that the limits of our respective statutory powers be properly and clearly defined.*[46]

In matters giving rise to a dispute between statutory officers within the Executive Government it is important to note that there is a Cabinet Directive regarding the resolution of such matters.[47] It is also to be noted that the Treasurer's Instructions under the *Public Finance and Audit Act 1987* would require the involvement of the Crown Solicitor in decisions involving legal proceedings.[48]

In summary terms, the Cabinet Directive of 20 August 1990 provides that where agencies that are subject to Ministerial direction are in disagreement regarding a matter of legal authority, the matter is to be referred by the responsible Ministers to the Attorney-General. It would be anticipated that the Attorney-General would arrange for an opinion to be prepared that would be regarded as conclusive as between the agencies concerned.[49]

It is to be noted that whilst the Office of Auditor-General is not subject to Ministerial direction, it would only be in highly unusual circumstances that a different approach would be adopted by the Auditor-General.[50] In essence, as Auditor-General, I would regard the opinion of the Law Officers of the Crown (ie, the Attorney-General and Solicitor-General), where the underlying facts are not in contention, as authoritative of my legal powers and functions under the *Public Finance and Audit Act 1987*.

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46 The Commissioner of Police also sought advice from the Crown Solicitor on the matter of the audit mandate which was confirmed.

47 This Directive was approved by Cabinet on 20 August 1990 and continues to be the operative policy in these matters.

48 See Treasurer's Instruction No. 10.

49 Under the *Director of Public Prosecutions Act 1991* the Director is subject to Ministerial direction (see section 9(2)). The Commissioner of Police is subject to governmental direction by the Minister in accordance with the provisions of the *Police Act 1998*. It is further to be noted that in the case of both the DPP and the Commissioner of Police that any direction must be published in the Government Gazette and also tabled in the Parliament in accordance with the relevant legislative requirements.

50 As an Auditor-General's responsibilities are to report to the Parliament this possibility should not be entirely ruled out. However, any situation where this did occur would require that the matter be brought to the attention of Parliament by the Auditor-General at the earliest possible opportunity.

MATTERS RAISED IN 2004-05 ANNUAL REPORT TO PARLIAMENT OF THE DIRECTOR OF PUBLIC PROSECUTIONS: COMPLIANCE WITH THE LAW BY A PUBLIC AUTHORITY EXERCISING STATUTORY POWERS: THE POWERS OF THE AUDITOR-GENERAL UNDER THE *PUBLIC FINANCE AND AUDIT ACT 1987*: OTHER MATTERS: AUDIT COMMENT

BACKGROUND

The matters stated hereunder are made in response to comments made in the 2004-05 Annual Report of the DPP tabled in Parliament on Wednesday, 19 October 2005. The particular comments appear in the section of the DPP Annual Report titled 'Director's Overview'. The comments by the DPP (Mr Pallaras QC) have been the subject of media and Parliamentary comment.

In my opinion, the several matters the subject of comment herein raise issues of importance that should be brought to the attention of the Government and the Parliament.[51]

It was my intention in the latter part of 2005 to report to the Parliament on this matter. After providing Mr Pallaras the opportunity to comment on the draft that was prepared at that time I determined not to proceed. With the benefit of hindsight, I have reconsidered the position. I am now of the view, having regard to subsequent developments, that it is necessary to explain the basis for the adoption by Audit of formal procedures in certain circumstances. It is also, in my opinion, important that the Parliamentary record be corrected.

DPP CRITICISM OF USE OF AUDIT SUMMONS FOR DOCUMENTS

In his report, Mr Pallaras stated as follows:[52]

> - *As a further example of the manner in which another government office has dealt with the ODPP, I report that on 12 July 2005 the Auditor-General's office served the ODPP with a subpoena to produce all records of any dealings had with a public relations firm, a request that involved an enormous amount of work for several ODPP staff. In the light of the concession by the Auditor-General's office that the ODPP had fully co-operated with the initial request to supply information to the Auditor-General, the issuing of the subpoena was unnecessary and provocative.*

It is a fact that a summons was issued under the *Public Finance and Audit Act 1987* requiring production of documents relevant to a matter associated with the expenditure of public monies in accordance with a contractual relationship for the provision of public relations services.[53]

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51 Section 36 (1) (b); *Public Finance and Audit Act 1987*.

52 DPP Annual Report 2004-05 at pages 2 and 3.

53 It must be emphasised that nothing in this Report is a reflection on the integrity and professionalism of the public relations firm involved.

The comments by Mr Pallaras were in a context of what he perceived as the interaction of the Office of the Auditor-General and the Government.[54] Of particular concern is that Mr Pallaras also made reference to 'This impression of deliberate antagonism and provocation',[55] presumably involving myself as Auditor-General and/or a member of the staff of this Department.

For the reasons discussed herein, the audit processes that have been adopted in this matter in relation to the ODPP were, in my opinion, neither 'unnecessary' nor 'provocative' and further, there was no 'deliberate antagonism' by Audit in relating to the DPP and/or the ODPP.

THE EXERCISE OF STATUTORY REPORTING POWERS AND COMMON LAW RIGHTS

It is important that in the exercise of statutory powers that a public officer at all times act lawfully. Regrettably, in the publication of his Annual Report referred to above, the DPP made several comments that are clearly adversely reflective of the conduct, etc of several public officers including the Auditor-General.

In *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11, the High Court stated as follows:

> *It has long been accepted that reputation is an interest attracting the protection of the rules of natural justice.*

As a public officer and as a person who was the subject of adverse comment in his Annual Report, I was not accorded procedural fairness (natural justice) in accordance with my common law rights. In publishing his report in these circumstances the DPP, in my opinion, acted unlawfully.

THE RESPONSE OF THE DPP WITH RESPECT TO THIS MATTER

I have set out hereunder relevant extracts from the correspondence that has taken place between my Office and the DPP. In my opinion, this correspondence is instructive, and is quoted in this Report in order that there can be no misunderstanding regarding the basis for the Audit comment and opinion that has been expressed herein.

On 22 September 2006, a letter was forwarded to Mr Pallaras advising him of the matters that were proposed to be included in the Auditor-General's Annual Report to Parliament for 2005-06. In that letter it was stated as follows:

> *It would be appreciated it you would advise me whether there is any comment that you wish to make regarding the accuracy of any factual comment that is included in this draft and/or any other views that you may wish to place before me.*

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54 See the references to 'government' in the third paragraph of page 3; the fourth dot point on page 3; and the first full sentence on page 4 of the DPP Annual Report.

55 DPP Annual Report 2004-05 at page 3.

On 25 September 2006, Mr Pallaras responded as follows:

> *As you are aware, my position as a statutory officer requires me to report to Parliament on any matters I judge as impacting upon the proper functioning of my office.*
>
> *I am most concerned at your attempt to interfere with my reporting relationship with Parliament and, in my view, seeking to visit me with consequences as a result of me fulfilling my statutory obligations is arguably a contempt of Parliament.*
>
> *I would strongly urge you to take advice before tabling your report.*

The reference by Mr Pallaras to the matter of 'contempt of Parliament' has been further considered by me. I have sought advice in relation to this matter. Any suggestion of contempt of Parliament in bringing to the notice of the Parliament matters that fall within my statutory responsibilities, having fulfilled my obligation to accord procedural fairness where that is necessary, are such as to not constitute a contempt.

The powers of reporting to the Parliament provided under section 12 of the *Director of Public Prosecutions Act 1991* are not a license to comment without providing to those, the subject of those comments, procedural fairness according to law where that is required by the circumstances.[56] It is in this context that, in my opinion, Mr Pallaras has failed to understand his responsibilities as a statutory officer. There is no suggestion of interference with his reporting relationship with Parliament. It is, however, important that he act consistently with his lawful obligations in doing so.

In Mr Pallaras' response of 25 September 2006, he did not provide any factual information to support his contention regarding the matters that were raised in the draft Audit Report. On 28 September 2006, in a separate letter to Mr Pallaras it was specifically requested as follows:

> *In one of your letters of 25 September 2006 you have expressly stated that you provided me as Auditor-General with procedural fairness prior to the publication of your 2004-05 Annual Report. I expressly request that you advise me of the facts that support this assertion on your part.*

On 3 October 2006, Mr Pallaras responded with a further letter in which he stated as follows:

> *You will recall that in my Annual Report 2004-05, I made comments on two matters that concerned you and your office.*
>
> *The first comment related to my complaint that you found it necessary to issue me with a subpoena when your own office through Mr Marsh conceded that we had been cooperative and had not refused any request for information. You were on notice through that conversation with Mr Marsh at approximately 1619 hours on 12 July 2005 that I objected to the process you were adopting, a process that I regarded as unnecessary and provocative. For you to suggest that you had no notice of our position, subsequently outlined in my Annual Report is factually wrong.*[57]

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[56] Section 12 of the *Director of Public Prosecutions Act 1991* deals with Annual Reports and reporting to Parliament on matters affecting the proper carrying out of the functions of the ODPP.

[57] The second matter referred to by Mr Pallaras in his letter concerned the charging of Randall Ashbourne. It is not relevant to comment on the substance of that matter further in this context.

It is, in my opinion, disingenuous for Mr Pallaras to now claim that a comment that was made by him to Mr Marsh (the Director of Audits) on 12 July 2005 is a proper and lawful discharge by him of his separate responsibility to accord procedural fairness regarding a subsequent (and at that time unwritten) publication to the Parliament of a criticism associated with a particular audit process.

The situation that has arisen is both regrettable and a matter of concern. It is of concern that a public officer associated with important matters concerning law enforcement would fail to appreciate his responsibilities to comply with fundamental common law requirements associated with his own administrative processes.

For Mr Pallaras to seek to blend the comments made on 12 July 2005 with the separate publication of his Annual Report several months later is, in my opinion, inappropriate. At no time following his oral statements to Mr Marsh on 12 July 2005 did Mr Pallaras provide any opportunity and/or notice to this Office as to what he was, at a future time, minded to publish in his Annual Report.

THE AUDITOR-GENERAL, THE GOVERNMENT AND THE PARLIAMENT

Mr Pallaras' comments raise a number of important issues. The most significant, from my point of view, is that, with respect, in my opinion, they betray a misconception of the role of the Auditor-General and the Parliamentary system of government.

The Auditor-General does not perform services for 'government' or report to 'government'. The Auditor-General discharges a statutory role, and exercises statutory powers, for the purpose of enabling supervision ***by the Parliament*** of expenditure of public monies and the conduct of government.[58]

The Parliament is entitled to have confidence that the Auditor-General will, at all times, conduct his/her procedures according to law and will report to the Parliament in such terms as he/she deems necessary in given circumstances. Further, the Parliament is reliant upon the Auditor-General to report matters that are, in his opinion, important to draw to the attention of the Parliament concerning the operations of public authorities.[59] The DPP is a public authority under the *Public Finance and Audit Act 1987.*

To assist the Parliament in the discharge of its own constitutional responsibilities, my Office has been given a very high measure of independence from 'government'; compare, for instance subsection 9(2) of the *Director of Public Prosecutions Act 1991* (which authorises the Attorney-General to give directions and furnish guidelines to the

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Mr Pallaras on several occasions has made comment to the effect that the Auditor-General 'has no role or expertise in determining whether a matter should be prosecuted in the courts'. Other than in answer to questions being raised by members of a Committee of the Parliament, at no time have I, as Auditor-General, nor has any member of this Department, made a comment regarding the decision to prosecute matters in the courts. It is unrealistic to suggest that an Auditor-General should remain mute when a Parliamentary Committee, specifically established to review a prosecutorial matter, asks his opinion on a matter that has been the subject of a decision to prosecute by the DPP, and when the Auditor-General has been involved in the antecedents associated with that particular matter.

58 See B Selway QC; 'The Constitution of South Australia' (1997) Federation Press; at page 137. See also WA Inc Royal Commission Report (1992); Part II; paragraph 3.10.5.

59 As stated by the Western Australian Royal Commission referred to elsewhere in this Report:

> *The Auditor-General is the Parliament's principal informant on the performance of the administrative system.* (Refer to paragraph 3.10.1 referred to above in the text of this Report)

DPP in relation to his functions)[60] with subsection 24(6) of the *Public Finance and Audit Act 1987*, which provides:

> *The Auditor-General is not subject to the direction of any person as to -*
> *(a) the manner in which functions are carried out or powers are exercised by the Auditor-General under this Act;*
> *(b) the priority which he or she gives to a particular matter in carrying out functions under the Act.*

Mr Pallaras in his comments aligns my Office with 'government' in terms which suggest that he considers the discharge of my statutory role involves some sort of improper encroachment by 'government' upon the independence of his Office. In so doing, Mr Pallaras, in my opinion, misconceives the accountability of his Office under the *Public Finance and Audit Act 1987*. It is also relevant to note that the DPP is not a Chief Executive Officer and is a statutory officer within the Attorney-General's Department (albeit with stated powers and functions associated with the initiation, etc of criminal matters in the courts).

THE REASON FOR THE USE OF FORMAL PROCESS

Mr Pallaras' criticism is, however, primarily directed to the issue of the summons itself. That criticism fails to appreciate the basis upon which audit procedures are undertaken. The purpose of issuing a summons under the *Public Finance and Audit Act 1987* is to ensure the integrity of the evidentiary basis upon which an audit opinion may be based.

Where an auditor is reliant upon another party to positively confirm that all relevant documentation has been provided, it may well be considered appropriate, as in this case, to apply formal audit procedures. Where public interest considerations are involved, the failure to use formal powers provided by the Parliament could, depending upon the circumstances, constitute negligence on the part of the auditor,[61] and undermine the integrity of the audit.

The ODPP was not subjected to any special procedure in the issuing of the summons. Summonses have been issued on many other occasions.

No discourtesy is involved in the exercise of the Auditor-General's statutory power to compel the supply of information by summons. No discourtesy was intended nor shown to Mr Pallaras by the issue of the summons in question. The responsible Director of Audits in my Office first contacted Mr Pallaras by telephone to inform him that a summons had been prepared requesting the documentation held by his Office regarding the use of public relations services.

CONCLUDING COMMENT

With respect, this criticism by the DPP is, in my opinion, unfounded, and, for the reasons discussed above he acted unlawfully in not providing procedural fairness according to law in publishing the matters referred to herein in his report to Parliament.

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60 See *Nemer v Hollaway and Others* (2003) 87 SASR 147.

61 For the information of the Parliament, one of the parties (not the DPP) did not initially present all relevant documentation in response to the summons that was issued in this matter. It was following the intervention of the Crown Solicitor, acting on behalf of the Auditor-General, that the outstanding documents were received.

AUDIT PROCEDURES: PUBLIC OFFICERS: THE MATTER OF STATUTORY INDEPENDENCE AND ACCOUNTABILITY (INCLUDING POLITICAL INDEPENDENCE AND ACCOUNTABILITY): THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS: AUDIT COMMENT

INTRODUCTION

There are certain statutory officers in the Executive structure of Government who, under their enabling legislation, have authority to make decisions and to act without the need for confirmation, approval, etc, or indeed, any direction, control or influence by any other person at the time of exercising statutory authority.[62] This authority is, as a matter of law, not one of unlimited independence. 'Independence' under statutory arrangements is never absolute. It is always important to clarify the particular relationships and functions to which the statutory independence granted by the Parliament is intended to apply.

This matter is included in this Report as a result of several representations that have been made to me in recent times by the DPP concerning the authority of the Auditor-General under the *Public Finance and Audit Act 1987*. Under the heading 'The Audit Mandate' I have set out certain matters upon which the audit jurisdiction is founded with respect to the ODPP. Having regard to the importance of this matter, I have stated in some detail other considerations that are relevant with respect to the audit relationship with the ODPP.

The DPP carries out his administrative responsibilities within a statutory framework, ie, the *Director of Public Prosecutions Act 1991*. Legal principle, authority, and longstanding precedent clearly establish that an authority granted pursuant to a statutory instrument is not without its limitations. Further, under the *Director of Public Prosecutions Act 1991* the Attorney-General may give a direction to the DPP and the DPP must comply with that direction.

THE DPP IS A PUBLIC OFFICER

The DPP is a public officer who has the administration and control of the ODPP. He spends public monies, and in his operations, he uses public property. His Office is staffed by public servants engaged under the *Public Sector Management Act 1995*.[63] As a public officer the DPP is accountable through the Attorney-General to Parliament for his actions in administering and controlling the operations of the ODPP. An important part of that accountability is ensured through the audit by the Auditor-General of the Attorney-General's Department of which the ODPP is a 'business unit'.

In the exercise of a prosecutorial discretion it is plain that the DPP should act properly, and lawfully, and that he should have regard to matters of efficiency and economy. Apart from the review of the operation of the ODPP by the Auditor-General by way of a statutory audit, there is no other systematic mechanism by which the Parliament can have independent assurance that the expenditure of public monies associated with the exercise of prosecutorial discretions and administrative arrangements within the ODPP is proper and lawful, and are carried out with regard to the requirements for economy and efficiency.

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62 In this Report the focus is with respect to statutory officers, eg Auditor-General, Ombudsman, DPP, Electoral Commissioner, etc.

63 These public servants are also subject to the authority of the Chief Executive of the Attorney-General's Department in matters arising under the *Public Sector Management Act 1995*. Such authority would necessarily be exercised by the Chief Executive so as not to be inconsistent with the prosecutorial powers and functions of the DPP under the *Director of Prosecutions Act 1991*.

THE AUDIT MANDATE

It must be emphasised that, except as may be provided in the *Director of Public Prosecutions Act 1991,* that no person within the Executive Government, subject to the right of direction of the Attorney-General as explained by the Supreme Court in *Nemer v Holloway*[64] has authority to influence the making, or disturb, or confirm the decision of the DPP in the matter of the exercise of his prosecutorial discretions.[65]

Nonetheless, the ex post facto opinion expressed by a statutory officer concerning a prosecutorial and/or administrative decision by the DPP in the exercise by that statutory officer of a separate statutory power to do so, is, in my opinion, not to interfere with the independent exercise by the DPP of his statutory powers, particularly where all judicial processes are finalised and the DPP is in substantive terms 'functus officio'.

If, for example, the conduct of the DPP in making a decision was not honest or impartial, involved a misuse of information acquired by him in connection with the performance of his Office, or involved the DPP in a conflict of interest that required notification under section 4(6) of the *Director of Public Prosecutions Act 1991* and no notification was given, such conduct would be improper and/or unlawful, and, as such, a matter falling within the audit mandate.[66] In certain circumstances, non-compliance with the matter of conflicts of interest may constitute grounds for the termination of the appointment of the DPP under section 4(8) of the *Director of Public Prosecutions Act 1991*.

In the absence of any other facility to review these matters the role of the Auditor-General in bringing to notice improper and/or unlawful matters assumes a particular importance. This is especially the case where the agency concerned is exempt from Freedom of Information requirements.[67]

In this context, resort by the DPP to the concept of 'independence' as a protection against aspects of audit accountability and as a reason to criticise audit procedures should, in my opinion, be carefully scrutinised.

DPP IS NOT SUBJECT TO FREEDOM OF INFORMATION REQUESTS

Where an agency is exempt from Freedom of Information requirements, apart from the mandated legislative audit processes within government undertaken by the Auditor-General, there are very limited mechanisms available for the Government and the Parliament to have independent assurance that that agency is operating with propriety and lawfully.

In the absence of independent audit assurance regarding the adequacy of controls, the potential for systemic failure, including at worst corruption, may go unchecked. For the Parliament to be precluded from the right of the Auditor-General to advise it on these matters is, in my opinion, untenable.

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64 (2003) 87 SASR 147.

65 It is important to note the authority of the Attorney-General to give a direction to the DPP. See *Nemer v Hollaway and Others* (2003) 87 SASR 147.

66 Section 36; *Public Finance and Audit Act 1987*.

67 See B Selway QC; 'The Constitution of South Australia'; (1997); Federation Press; paragraph 9.10 at page 137. It is relevant to note Selway's reference to the role of the Auditor-General being to identify 'inappropriate practices etc' and that where the Auditor-General considers it appropriate to do so that such matters are to be brought to the attention of the Parliament.

RESPONSIBILITIES OF PUBLIC OFFICERS

Where a public authority has statutory independence in a particular relationship and with respect to particular matters, this does not, in my opinion, translate into a right to deny the application of the legislative authority vested in another statutory officer, where, on a proper construction of the two legislative instruments, this is shown to be the intention of the Parliament.

As a matter of statutory construction, in my opinion, there is nothing in the *Director of Public Prosecutions Act 1991* to exclude the application of the *Public Finance and Audit Act 1987* with respect to those matters where the application of the latter legislation is not incompatible with that of the former.[68]

Neither the exercise of a prosecutorial discretion by the DPP, ie, a discretion to prosecute or not to prosecute, nor a decision by the DPP taken in the context of the administrative management of his Office, are made in a factual and/or administrative vacuum. The DPP's decisions are 'administrative' with respect to both prosecutorial and administrative matters. As with all administrative decisions, subject to any express statutory provisions to the contrary, there is, in my opinion, in principle, no basis to a claim that such decisions are not, in appropriate cases, subject to both judicial review and audit pursuant to the *Public Finance and Audit Act 1987*.[69]

SOME ISSUES ASSOCIATED WITH AUDIT

Some well settled points associated with the discharge of audit responsibilities are: ***firstly***, the primary condition for an audit is that there is a relationship of accountability or a situation of public accountability; ***secondly***, that accountability extends to the regularity, efficiency and economy with which publicly funded services are provided; ***thirdly***, for there to be proper and effective audit the subject matter should be susceptible to verification by evidence; ***fourthly***, proper and effective audit produces economic and social benefits; ***fifthly***, proper and effective audit is a legal obligation on the part of those accountable; ***sixthly***, under the regime established by the *Public Finance and Audit Act 1987* for this State, that obligation is owed to the Parliament; and ***seventhly***, the audit process is itself subject to Parliamentary scrutiny.

These points, in the context of the administrative arrangements in this State, in my opinion, leave little occasion to argue that the audit process is an unwarranted intrusion upon the independence of the DPP.

Furthermore, the DPP Annual Report deals with a range of matters that fall for consideration in the conduct of any government audit: successes, goals, values, strategic focus, organisational structure, management structure, corporate governance, levels of funding and budgets, performance indicators, business operations, outcomes, case management systems, staffing levels, training and professional development, etc. All of those factors may influence the regularity, efficiency and economy of prosecutorial decision-making and the administration of the ODPP.

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68 This has been confirmed by both the Solicitor-General and the Crown Solicitor with respect to the statutory relationship of the DPP vis-à-vis the Auditor-General.

69 See *R v DPP* ex parte C (1995) 1 Cr App Rep 136.

Audit assessments of such factors, and the resultant quality of decision-making within administrative units of the South Australian public service, are, in my opinion, the legitimate concern of the Auditor-General in the ex post facto examination of such matters.

AUDIT PROCEDURES WOULD NOT INTERFERE WITH THE EXERCISE OF PROSECUTORIAL DISCRETIONS

An audit procedure necessarily takes place after the exercise of a particular prosecutorial discretion is complete and all judicial processes have been finalised. Thus, there can be no basis to claim that audit based accountability of the DPP interferes with the exercise of his discretion as to whether or not to institute and the manner of the conduct of a particular prosecution. Audit does not exercise executive authority and cannot, as a matter of law, disturb or confirm a decision that has been made by the DPP. However, *ex post facto* audit review of a particular prosecutorial decision may shed light on the regularity, efficiency and economy with which public sector resources are being utilised.[70]

There are many examples of the review of the affairs and operations of the DPP in other States and countries; and without compromising prosecutorial independence, other States and countries have enacted regimes which permit greater scrutiny of such matters than that which currently prevails in South Australia.

THE DECISION NOT TO PROSECUTE

There is persuasive authority that in certain situations the decision not to prosecute can be judicially reviewed (see *R v DPP* ex parte C (1995) 1 Cr App Rep 136). Although the power of review is available, the Court in the matter of the 'DPP ex parte C' noted that it was a power that was to be used sparingly.[71] It has long been settled law that there is a discretion in the prosecutorial authorities not to prosecute.

In a statement to the House of Commons Sir Hartley Shawcross QC, the then Attorney-General of the United Kingdom stated as follows:

> *It has never been the rule in this country and I hope it never will be that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first regulations under which the Director of Public Prosecutions worked provided that he should … prosecute 'whenever it appears that the offence or circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.*[72]

It has been noted that it is no longer appropriate to adopt as authority for the conduct of prosecutions in Australia a statement by an Attorney-General of the United Kingdom to the British House of Commons. Nonetheless, the principle espoused by Sir Hartley Shawcross QC, is to my understanding, still appropriate in terms of the underlying

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70 See ICAC Reports (NSW) and Queensland Crime and Misconduct Commission Reports involving the DPP in those States.

71 The type of order that can be made, and was in fact made in the case of the DPP ex parte C referred to in the text, is that the matter be remitted to the prosecution authorities in order that they may reconsider the decision not to prosecute.

72 H C Debates, Volume 483, column 681, 29 January 1951.

requirements for the public interest to be a significant consideration in prosecutorial decision-making in Australia, including South Australia. That this is the case, is confirmed by a review of the guidelines that have been published by the DPP in South Australia pursuant to the authority to do so under the Director of *Public Prosecutions Act 1991*.

In my opinion, there is nothing in the *Director of Public Prosecutions Act 1991* that displaces the right of review of the lawfulness of the exercise of statutory powers of the DPP in this State not to prosecute.[73]

As has been pointed out by the Solicitor-General in his Report to the Attorney-General with respect to the prosecution in the Nemer matter (Kourakis QC Report) a concomitant element of independence is that of accountability. The concepts of accountability and independence are not inherently incompatible.

All public officials are accountable. In the case of the DPP, the persons to whom accountability is owed include the Attorney-General and the Chief Executive of the Attorney-General's Department. The DPP also has an accountability requirement to the Courts and relevant professional bodies.[74] As a statutory officer the DPP is, of course, accountable to the Parliament through its Committees.

POLITICAL INDEPENDENCE AND ACCOUNTABILITY

The DPP is a public officer within the Executive structure of Government, ie, the Attorney-General's Department, and as such, under the relevant administrative arrangements the Attorney-General continues to be responsible to the Parliament for all matters associated with the exercise of the powers and functions of the DPP under the *Director of Public Prosecutions Act 1991*.

For this reason it is important that the Attorney-General be fully informed of matters of public interest importance associated with the ODPP, in order that he may discharge his responsibilities to the Parliament and his separate constitutional responsibilities as Attorney-General within the Government. The Chief Executive is, in my opinion, entitled to be informed of matters involving his administrative responsibilities under the *Public Sector Management Act 1995.*

In my opinion, the DPP has a responsibility to provide information to the Attorney-General on any matter within his statutory responsibilities. This includes, in my opinion, both administrative matters and matters associated with the exercise of his prosecutorial discretions. Lest it be misunderstood, subject to the right of direction by the Attorney-General as stated by the Full Court of the Supreme Court in *Nemer v Holloway* (2003) 87 SASR 147, this is not to suggest that the DPP is subject to any influence whatsoever regarding the exercise by him of his prosecutorial discretionary powers and the exercise of his independent legal judgment as to the exercise of those powers in a particular matter. In essence, in my opinion, the Attorney-General must be provided with whatever information he/she requests from the DPP. This is no more than the operation of the necessary controls and the checks and balances that must be in place within government and which are fundamental in order that the Attorney-General may properly discharge his responsibilities.

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73 Issues of locus standi would need to be satisfactorily resolved in this situation.

74 Accountability by other independent office holders, eg, Auditor-General, Ombudsman, Police Commissioner, Electoral Commissioner, etc is to be determined having regard to the relevant legislative arrangements.

In *Nemer v Holloway* (2003) 87 SASR 147 at page 155, Doyle CJ stated as follows:

> *… I consider that the Attorney-General can give a direction that refers to and is limited to a particular case, can give a direction expressed in general terms that leaves the Director with no discretion to exercise in relation to the exercise of a statutory power or the carrying out of a statutory function, and can give a direction that might cause the Director to reconsider or to reverse a decision already made. Indeed, an appropriate general direction that was expressed to apply to cases already considered by the Director might, in effect, require the Director to reverse or to revoke a decision already made.*

(See also Prior J at page 159 and Vanstone J at page 166).

It is always open for the DPP in the context of his/her relationship with the Attorney-General to suggest in response to a particular request from the Attorney-General that certain information is extremely sensitive, etc. It is, in my opinion, then a matter entirely for the Attorney-General in his/her judgment, and not the DPP, to decide how to proceed. Any lesser arrangement, in my opinion, undermines the Attorney-General's Ministerial capacity to properly discharge his constitutional responsibilities and whether or not he should exercise his powers of direction under the *Director of Public Prosecutions Act 1991*.

In recent times the Government has taken a number of measures to establish a basis for effective communication with the DPP to assist him in the discharge of his responsibilities. This has included, inter alia, increasing his resources.

Submission by DPP

The DPP has stated to me in a letter dated 7 November 2006 that he does not agree with the comments on this topic of 'Political Independence and Accountability' and that they should not be included in this Report. In my opinion, this submission by the DPP cannot be accepted having regard to all of the relevant facts, legal principle, and legal authority.

Whilst the DPP is an independent statutory officer whose statutory functions are concerned, almost exclusively, with matters associated with criminal prosecutions and related matters, he is, nonetheless, an officer within the Executive Branch of the Government of South Australia. In my opinion, the observations of Justice Roma Mitchell (as she then was) as Royal Commissioner in the '1978 Royal Commission Report on the Dismissal of Harold Hubert Salisbury' are directly relevant to the present situation of the DPP vis-à-vis the Government.[75]

It is instructive in this context to note the following two paragraphs from the Salisbury Royal Commission Report. The Royal Commissioner stated as follows:

> ***(a) Mr Salisbury's view as to responsibility***
> ***52.*** *In his interview with the Premier on the 13th January 1978 Mr Salisbury said that special branches of Police Forces had duties he considered to be to the Crown, to the law and not to any political party or elected government. In giving evidence he again affirmed that that was*

[75] A reference to 'the Government' does not include 'public servants'. See 'Royal Commission Report on the Dismissal of Harold Hubert Salisbury' (1978) paragraph F90, page 27.

his belief and he said "As I see it the duty of the police is solely to the law. It is to the Crown and not to any politically elected government or to any politician or to anyone else for that matter". That statement, insofar as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system of South Australia or, for that matter, of the United Kingdom. As I understand his evidence he believed that he had no general duty to give to the Government information which it asked but he regarded it as politic to give such information as, in his view, was appropriate to be general knowledge.

…

60. *In my view Mr Salisbury was obliged to give to the South Australian Government truthful information in reply to the questions which it asked, which questions were upon matters as to which the Government was entitled to have information.*

In my opinion, the position held by the DPP under the *Director of Public Prosecutions Act 1991* does not carry with it any greater right to withhold information from the responsible Minister of the Crown than did Mr Salisbury.

Having regard to the judgment of the South Australian Supreme Court in the Nemer[76] matter, any suggestion that the Attorney-General should not be fully and accurately informed of all matters in which he indicates an interest/requirement on being informed, is, in my opinion, untenable as a matter of law.

CONCLUSION AND RECOMMENDATIONS

As Auditor-General, the Parliament needs to have assurance that I will not be deterred from the proper discharge of my responsibilities under the *Public Finance and Audit Act 1987* by claims to a special prerogative of independence by the DPP concerning particular matters for which there is, in my opinion, no lawful basis.

The powers exercised by the DPP vis-à-vis the members of the community are arguably the most important undertaken by an Executive Government. In my opinion, in these circumstances, it is important that the Government and the Parliament have independent assurance as to the propriety and lawfulness of the exercise of these powers.

It is recommended that:

1. As an alternative to audit by the Auditor-General, consideration could be given to the appointment of an appropriate qualified independent person who could be appointed to review/audit 'prosecutorial decisions'. This could be on a similar basis to that of the independent audit of the Anti-Corruption Branch of SAPOL. It is my view that the independent reviewer in this situation, unlike that of the Anti-Corruption Branch, would provide independent assurance to the Government and the Parliament regarding the propriety and lawfulness of prosecutorial decision making by the DPP in this State.

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[76] *Nemer v Holloway* (2003) 87 SASR 147.

2. Where a decision is made by the DPP not to prosecute offences (both indictable and summary) that are the subject of a recommendation to prosecute from the Commissioner of Police, and/or have been the subject of committal by a magistrate, if requested to do so, the DPP provide written reasons for that decision to the Commissioner. The Attorney-General can, and, in my opinion, must be advised on any such matters if he so requests. Those reasons, should, in my opinion, detail the basis for the decision so as to enable proper audit analysis by an independent reviewer.

Where a public officer does not provide reasons for an administrative decision there is no proper accountability in that situation.