Police and the Executive

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Abstract

This thesis examines the legal relationship between police and government in Australia to ascertain the extent to which the statutory forms and the understanding of those forms allow Australian police forces to be subject to direct or indirect government direction. The thesis also proposes areas of law reform to establish a constitutionally and legally coherent relationship.

The methodology for the thesis is doctrinal and documentary. It involves examination of the statutory, parliamentary, judicial and historical record in Australia and comparable jurisdictions (predominantly United Kingdom and Canada) to ascertain the elements of the different models, the reason for their enactment and how they have been applied and understood.

The thesis finds that there are three different statutory approaches used in Australia: the No, Broad and Limited Direction Models. However, the understanding of those models and the development of the Limited Direction Model, has been confused by a supposed doctrine of police independence developed during the 20th century based on flawed legal and historical considerations. Those flawed considerations include:

- Selective use of the historical record;
- Ignoring expressions of parliamentary intention when interpreting legislation;
- Misapplication of judicial authorities;
- Inflating the significance of the office of constable;
- Misunderstanding and misapplying the doctrine of separation of powers;
- Applying a flawed 'mythology' regarding Sir Robert Peel and his intentions; and
- Minimising the constitutional significance of the doctrine of ministerial responsibility.

This flawed view, combined with an erroneous understanding constitutional conventions, have led to a widely held but confused understanding of the police government relationship in Australia that police are, or should be independent of government in relation to 'operational' matters, but with no settled view as to the meaning of that term. This is further confused by another widely held view that policy decisions are the preserve of government, even though policy and operations are related and not contradictory concepts.

The thesis has also identified a further area of confusion in the relationship, being significant legislative reductions to the security of tenure of Police Commissioners. All State police Commissioners are now employed for 5 year terms and most have little or no protection from

arbitrary termination of appointment. This provide a means for indirect influence in a non transparent manner over Police Commissioners.

Given this confused relationship the thesis proposes elements as a basis for the development of a coherent constitutional relationship. Those elements are:

- Basing the relationship on the doctrine of ministerial responsibility with government empowered to direct police on all or the majority of policing matters. The only exclusions would be matters which can be demonstrated as inappropriate for government to direct. This element is consistent with government's responsibility for policing and recognises that the effectiveness of police, as with other statutory bodies, can require certain well defined areas of independence.
- Requiring the government direction power to be exercised transparently; which will ensure that governments are subject to scrutiny for exercises of that power.
- Increasing the security of tenure for Police Commissioners, so as to reduce indirect government influence over police.

Student Declaration

Doctor of Philosophy Declaration

I, Ian David Killey PSM declare that the PhD thesis entitled *Police and the Executive*, is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature

Date 13/12/17

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Acknowledgments

With great thanks to Professor Neil Andrews and Dr Matt Harvey, and for the innumerable discussions we have had and suggestions they made which have assisted me over the last three years. Of course, I have not adopted all of the ideas and concepts discussed, but each has made me think and, at least, to review and justify positions taken in this thesis.

And to the research assistance provided by the Victoria University Law Library, particularly the efforts of Bronwyn Betts for locating and obtaining the impossible.

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Chapter 1 – Introduction

1.1 - The Problem –

Australia's police exist for the public purposes of crime prevention and deterrence and to maintain public order. As the fulfillment of those purposes can be both difficult and dangerous, police forces have been established as statutory quasi-military bodies with significant powers including the use of firearms and the capacity to arrest, detain and prosecute. Those powers, while necessary for the public benefit, can also be a source of serious injury to individuals, the community and the state if misused or misdirected. As a result, clarity in the accountability, responsibility and control of those powers is a matter that is in the public interest.

With other forms of statutory bodies, questions regarding control of and accountability for their functions are generally resolved by the constitutional doctrine of ministerial responsibility.[1] The constitutional responsibility of a Minister to Parliament for the activities of bodies responsible to that Minister allows government (subject to any contrary legislative intention)[2] to have both responsibility for and control over, the powers and functions of those statutory bodies.

There is, however, considerable uncertainty over the extent to which that doctrine applies to Australian police forces and, therefore, the extent to which police is subject to ministerial direction and control, as there is a widely held view that police forces are, to some extent, independent of government direction and control. That independence is often referred to as 'operational independence'; yet there is uncertainty as to meaning of that phrase as well as its theoretical and constitutional basis. The desirability for police independence is also open to question. Although independence can be regarded as necessary to minimize the danger of the misuse of police powers for political purposes,[3] it can also mean reduced accountability, which Walsh and Conway considered 'will only lay the foundations for the worst excesses of a police state'.[4]

The purpose of this thesis is to examine the nature, source and extent of 'police independence' from government in Australia.

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[1] Which is discussed in Chapter 10 and in such works as Geoffrey Marshall, (ed), *Ministerial Responsibility (*Oxford, 1989); RAW Rhodes, John Wanna & Patrick Weller, *Comparing Westminster*, (Oxford, 2011); Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed) *Law and Government in Australia* (Federation, 2005) 82; Charles Lawson, 'The Legal Structure of Responsible Government and Ministerial Responsibility' (2011) 35 *Melbourne University Law Journal* 1005 and Diana Woodhouse, *Ministers and Parliament, Accountability in Theory and Practice* (Clarendon, 1994) 3-39.

[2] as is the case with such public bodies as the Victorian Ombudsman and Auditor-General – see *Constitution Act 1975* (Vic) ss 94B & 94E.

[3] see for example Robert Mark, *Policing a Perplexed Society* (Allen & Unwin, 1977) 24.

[4] Dermot P J Walsh & Vicky Conway, 'Police governance and accountability: overview of current issues' (2011) *Crime, Law and Social Change* 61. The concept or 'police state' is discussed below in Chapter 10.3.5.

Nature, in this context refers to whether police independence, if it exists, is based on law, constitutional convention[5] or mere practice. *Source*, refers, if independence is a legal restriction, to whether it is derived from the office of constable,[6] or from statutory design or interpretation or whether it arises from some constitutional doctrine, such as separation of powers[7] or the rule of law.[8] *Extent* refers to whether Police Commissioners are completely immune from ministerial direction and control, or whether their independence is more limited, such as to 'operational' matters, and if so, what 'operational' means.

1.2 - Thesis Questions

The **central objective** of this study is to ascertain a **legally and constitutionally coherent understanding** of the police and government relationship in the context of Australian jurisdictions. For that purpose, this study has also considered the rationale for the current understanding of the relationship including the identification of the strengths and weaknesses of justifications for that understanding.

The **secondary objective** of this thesis was, initially, to identify possible statutory models which allow for a clear constitutional relationship between police and government, catering for both the responsibilities of government and the functions of police. However, the extent of the material and the complexity of the issues related to the central objective has necessitated that the bulk of this thesis be devoted to that objective. As a result, the emphasis on the secondary objective has been reduced and consideration of that objective has concentrated on identifying issues for subsequent study.

The ***overall thesis questions*** for this thesis are:

> *To what extent:*
>
> *(i). are Australian Police Forces independent of government direction and control? and*

[5] A constitutional convention is a binding practice, rather than a law. See Geoffrey Marshall, *Constitutional Conventions; The Rules and Forms of Political Accountability* (Oxford, 1984); Ian Killey, *Constitutional Conventions in Australia* (Australian Scholarly Publishing, 2012) Ch 2. This issue is further discussed in Chapter 8.
[6] as seems to be the basis of the views of Lord Denning MR in *R v Metropolitan Police ex parte Blackburn* [1968] 2 QB 118, 136. This issue is discussed in Chapter 7.4.
[7] The argument concerns whether police form or are part of branch of government separate and distinct from the executive branch. This issue is discussed in Chapter 7.2.
[8] R W Whitrod, 'The Accountability of Police Forces – Who Polices the Police?' (1976) 9 *Australian and New Zealand Journal of Criminology* 7, 16. (That article is also in Kerry L Milte, *Police in Australia* (Butterworths 1977) 225, 235). Colleen Lewis, 'Depoliticising Policing: Reviewing and Registering Police Reforms' in Colleen Lewis, Janet Ransley and Ross Homel (eds) *The Fitzgerald Legacy* (Australian Academic Press, 2010) 95. Also Roach who considers that the Canadian Supreme Court's acceptance of the *Blackburn* principles in interpreting and limiting the scope of a Ministerial statutory power was based on the rule of law – Kent Roach, 'Police Independence and the Military Police' (2011) 49 *Osgoode Hall Law Journal* 117, 126. This issue is discussed in Chapter 7.3.

(ii). should such forces be independent of such direction and control?

The ***sub-questions*** are:

A. *To what extent does the law in each Australian jurisdiction allow the government to direct and control the activities of police forces?*
B. *To what extent does any constitutional convention in Australian jurisdictions either allow for, or limit, government power to direct and control police forces?*
C. *What legislative changes are necessary to add clarity and certainty to the constitutional relationship between police and government?*

Sub-questions A and B predominantly relate to overall question (i), while sub-question C predominantly relates to question (ii).

The research necessary to answer these questions and sub-questions also requires examination of a number of **discrete research issues.** Those discrete research issues are:

a) *The application of the doctrine of ministerial responsibility to statutory bodies generally and the police forces specifically.*
b) *Origins and sources of 'police independence'*[9] *and the related concept of 'operational independence'.*
c) *The elements and effect of different statutory models in Australia and other jurisdictions.*
d) *The practice of and understandings of the interrelationship between police and government in Australian jurisdictions.*
e) *Effectiveness of alternative forms of accountability for independent police forces.*
f) *The adequacy of conventions as the basis of police independence.*

These discrete research issues relate to the sub questions in the following way:

- Discrete Research Issues a), b) and d) predominantly relates to sub questions A and B.
- Discrete research issue c) relates to sub-questions A, B & C.
- Discrete research issue e) predominantly relates to sub-question C.
- Discrete research issue f) predominantly relates to sub-question B.

[9] Including consideration of judicial decisions on police independence. These decisions include *Fisher v Oldham Corporation* [1930] 2 KB 364; *Enever v The King* (1906) 3 CLR 969; *Attorney-General for NSW v Perpetual Trustee Company* [1955] AC 457; *R v Metropolitan Police, ex parte* Blackburn [1968] 2 QB 118; *R v Campbell & Shirose* [1999] 1 SCR 565.

Given the changed emphasis of the thesis, the treatment of overall question (ii), sub question C and discrete research issue e) are now confined to discussion as matters for further study and research.

Chapter 2 – Preliminary

2.1 – Methodology

The thesis questions are questions of law, legal policy and legal reform and the methodology selected to answer those questions is primarily a doctrinal examination using standard documentary legal analysis with historical, comparative and reform oriented methods.

Doctrinal methodology, in its pure form, is desk bound research, the data for which consists of existing publicly available material; and its role is to analyse and redefine legal relationships between elements referred to in that material. It is a 'search for legal coherence'[10] and its research questions relate to the central issue of, 'what is the law?'[11]

It is not the only the form of methodology applicable to legal studies but those other forms are not mutually exclusive[12] from doctrinal. That was made clear by the Council of Australian Law Deans (CALD) which considered doctrinal methodology as making 'legal research distinctive,'[1314] a distinctiveness that 'permeates every other aspect of legal research'.[15]

Doctrinal research was defined by the 1987 Pearce Committee Australian Law Schools report as 'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between … rules, explains areas of difficulty and, perhaps predicts future developments.'[16] CALD considered doctrinal methodology as involving 'at its best, … rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of

[10] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (ed) *Research Methods in Law* (Routledge, 2013) 7,10; and see Caroline Morris & Cian Murphy, *Getting a PhD in Law* (Hart Publishing, 2011) ch 3.
[11] Paul Chynoweth, 'Legal Research' in Andrew Knight & Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 28, 30. 'Law' is normally and usually confined to forms popularly recognised as 'law', such as 'common', 'statute' and 'international'. This thesis will take a broader view of the law for this purpose, given the prevalent uncertainty as to the source, nature and extent of police independence and, while recognising the enforceability distinctions between law, convention and practice, apply doctrinal methodology to those concepts. This is consistent with the views of Professor Hart as to the scope of the legal system: H L A Hart, *The Concept of Law* (Oxford, 2nd edition 1994) 44-8, 111.
[12] Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005), 1 ('CALD').
[13] ibid 3.
[14] There are, however difficulties in explaining its requirements in that lawyers' training does not involve, and the practice of the vast majority of legal scholars avoids, research methodology theorising. Moreover, for the few who have written on the subject, there seems uncertainty or confusion as to its fundamentals. For example, Chynoweth maintains that it involves deductive reasoning, while Dobinson and Johns have argued that 'what a doctrinal researcher does' is 'judicial inductive reasoning'. Fortunately, Hutchinson and Duncan consider that doctrinal research allows for both forms of reasoning, a position I take as being correct. An additional difficulty is that the language or terminology used to describe doctrinal research is not universal, as can be seen from the differences between the terminology used in the explanation of doctrinal research provided by the eminent continental European scholar, Martin Van Hoecke, in comparison with that used in the 2005 by CALD. For the current purposes I have adopted the terminology used by CALD. Chynoweth, above n 11, 32; Terry Hutchinson & Nigel Duncan 'Defining and Describing what we do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 98-101; Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press) 20, 21; Mark van Hoecke (ed), *Methodologies of Legal Research* (Hart 2011); CALD, above n 12.
[15] CALD above, n 12, 3.
[16] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Disciplinary Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing, 1987) as quoted in Hutchinson, above n 10, 10.

extracting general principles from the inchoate mass of primary materials.'[17] As this thesis is to examine and clarify the confused nature of the legal and constitutional relationships between police and government, doctrinal research is the most appropriate core methodology for that study.

The other forms of legal research used in this thesis in combination with doctrinal are reform-oriented,[18] theoretical[19] as well as historical and comparative techniques, as the overall research question relates to legal history, the relevance and application of legal and constitutional concepts and doctrines to certain circumstances, the presence of similar issues and concerns in comparable jurisdictions and means to overcome those concerns.

The comparable jurisdictions used are those which have sufficiently commonality with Australian jurisdictions in terms of the nature and origin of the police-government relationship to make reference relevant to resolving uncertainties in Australian jurisdictions. The first of those jurisdictions is England and Wales, as the policing model used in Australia is, as discussed in Chapter 3, considered to be derived or modelled on the 'New Police' model introduced in England and Wales beginning in London in 1829. The other comparable jurisdictions are those with policing models based on the 1829 model, such as Canada, its provinces and New Zealand, as well as Ireland and the United States as their legal systems have similarities with and origins in the Westminster system, and also because other research has made use of the United States as a point of comparison.[20]

The distinction between these non-doctrinal research approaches (ie reform-oriented, theoretical, historical and comparative) and doctrinal is in the immediate research objective as the research method remains largely desk bound analysis – examining written sources, whether cases, legislation, Hansard, parliamentary reports, inquiry reports, commentary, biographies, histories and similar documents, to examine what happened, why it happened or was believed to have happened and how that information relates to the current legal relationships in Australian jurisdictions.

Empirical Research – When confirmation was granted, it was intended that research would also include an empirical element involving interviews with Police Commissioners and Ministers. This was to be for the limited purpose of supplementing and adding further clarification to information gained from documentary sources. It was anticipated that failure of this empirical element was likely due to limited responses from subjects, but that such

[17] CALD above, n 12, 3.
[18] Which CALD defined as 'recommendations for change based on critical examination'. Ibid 1.
[19] 'the conceptual bases of legal rules and principles' - ibid.
[20] For example, David H Bayley and Philip C Stenning, *Governing the Police in Six Democracies* (Transaction, 2016) which compared the police-government relationship in Australia, Britain, Canada, New Zealand, United States and India.

failure would not be fatal to the study as sufficient documentary material is available to allow the constitutional relationship between police and government to be examined and analysed on a desk bound basis.

As the research undertaken has produced even more documentary material than was originally anticipated, and as the analysis and discussion of that material and its consequences required extensive documentation, it became apparent that the maximum word allowance for the thesis would be insufficient to allow inclusion of that element as well as a complete and proper analysis and documentation of empirical research (if that research could be successfully be undertaken). Accordingly, and as the empirical research was always intended to only supplement the documentary analysis, it was decided to not undertake that form of research.

The thesis was also originally intended to involve two elements, which can be summarised as:

- What is the law? and
- What should the law be?

However, as the discussion and analysis of the first element was extensive, requiring extensive documentation, the word limit for the thesis proved insufficient to allow the second element to be properly and fully explored.

As such, consideration of the second element is limited to chapter 12 and the discussion and analysis in that chapter is confined to identifying elements for an alternative police-government model for further development and assessment in subsequent studies.

2.2 – Literature Review

As the primary methodology for this thesis is doctrinal, to a large extent the thesis itself is a literature review. It is, however, considered desirable to identify, at this stage, the nature of the forms of literature that will be examined and apparent themes arising from that literature.

The relevant literature encompasses the following types of document:

Statutes – That is, the various policing acts of parliament which seek to define the police-government relationship.[21] The statutory history in Australia, including the effect of the

[21] The current Australian statutes that define the police – government relationship are:
- *Police Act 1990* (NSW);
- *Victoria Police Act 2013* (Vic);

different models is set out in chapters 3 to 9. The statutory history of policing also requires reference to the *Metropolitan Police Act 1829* (UK). That Act introduced what is regarded as the modern form of policing, known as the 'New Police', to London, in a model that formed the basis for the statutory model for two of the Australian colonies. It has also had an influence in the development of policing in other parts of the British Commonwealth and beyond.[22]

Legal Authorities. As will be apparent from the thesis, the primary decisions that have influenced the police – government relationship in Australia are:

- the *obiter dicta*[23] of Lord Denning MR and Salmon LJ in *R v Commissioner of Police, ex parte Blackburn (No 1);*[24]
- the High Court decision in *Enever v R;*[25]
- the High Court and Privy Council decisions in *Attorney-General (NSW) v Perpetual Trustee Co Ltd;*[26] and
- the decision of McCardie J in *Fisher v Oldham Corporation.*[27]

In addition, there have been a small number of Australian and Canadian[28] decisions which have considered the relationship, although it is notable that those decisions have been substantially ignored in academic literature and inquiry reports in Australia. They are the single judge decisions in *Griffiths v Haines*[29] and *Rutherford v Swanson*[30] and the decision of the Canadian Supreme Court in *R v Campbell & Shirose.*[31]

Most of those decisions support, or have been taken as supporting, a legal basis for the independence of the police from the executive. Whether they actually do support that conclusion is considered and discussed, particularly in chapters 5.1 and 6.3.

- *Police Service Administration Act 1990* (Qld);
- *Police Service Act 2003* (Tas);
- *Police Act 1998* (SA);
- *Police Act 1892* (WA);
- *Police Administration Act* (NT); and
- *Australian Federal Police Act 1979* (Cth).

[22] G M O'Brien, *The Australian Police Forces* (Oxford, 1960) 3; Wilbur R Miller, *Cops and Bobbies, Police Authority in New York and London, 1830-1870* (University of Chicago Press, 1977) 3.
[23] *Obiter dicta* is the part of judgment in a legal decision which was not necessary to make the finding of the decision, and so does not for part of compulsory precedential value of the decision. Roger Bird, *Osborn's Concise Law Dictionary,* (Street and Maxwell, 7th edition, 1983) 238.
[24] [1968] 2 QB 118.
[25] (1906) 3 CLR 969.
[26] (1952) 85 CLR 237 (HC) and (1955) 92 CLR 113.
[27] [1930] 2 KB 364.
[28] The significance of Canadian decisions is that they concerns the interpretation of a statutory form that has been used in five out of Australia's states and is currently used in three States and the Northern Territory, and one of the decisions is from that country's highest court of appeal.
[29] [1984] 3 NSWLR 653.
[30] [1993] 6 WWR 126.
[31] [1999] 1 SCR 565.

Inquiry Reports – There have been a number of inquiry reports which have discussed the police-government relationship, although that issue has generally been only one of the issues reported on. As a result, the conclusions that those reports have reached on this issue may not have been well founded and be problematic. The primary Australian reports that have considered the relationship and have led to legislation change are:

- the South Australian Bright Report in 1970,[32] the recommendations of which led to the introduction of a broad transparent government direction model in 1972.[33]
- the Mark Report in 1978,[34] the recommendations of which led to the current form of the Australian Federal Police and the first limited government direction model in Australia, in 1979.[35]
- the Queensland Fitzgerald Report in 1989,[36] the scope of which was broad, but with limited consideration of the police-government relationship and which led to new policing legislation in Queensland, the *Police Service Administration Act 1990* (Qld) which also included a limited government direction model.[37]
- the Victorian Rush Report[38] in 2011, which recommended new police legislation for that State including a limited government direction model enacted in 2013.[39]

These reports are discussed in more depth elsewhere in the thesis, particularly in chapters 3, 6.4 & 9.

There were also a number of other inquiry reports which have discussed the police-government relationship. Of the Australian reports, the most significant in considering this relationship are:

- the South Australian Mitchell Report in 1978;[40]
- the NSW Lusher Report in 1981;[41]
- the Victorian Johnson Report in 2001;[42]

[32] South Australia, Royal Commission 1970. *Report on the September Moratorium Demonstration* ('*The Bright Report*').
[33] *Police Regulation Act 1952* (SA) s 21(1) as amended by *Police Regulation Act Amendment Act* 1972 (SA).
[34] Sir Robert Mark, *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and other Related Matters* (Australian Government Publishing Services, 1978) ('*The Mark Report*').
[35] *Australian Federal Police Act 1979* (Cth) s 37.
[36] Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Order in Council,* (26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989) ('*The Fitzgerald Report*').
[37] *Police Service Administration Act 1990* (Qld) s 4.6(2).
[38] State Services Authority, *Inquiry into the command, management and functions of the senior structure of Victoria Police* (2011) ('*The Rush Report*').
[39] *Victoria Police Act 2013* (Vic) s 10. This became operational in 2014.
[40] South Australia, Royal Commission 1978, *Report on the Dismissal of Harold Hubert Salisbury* (1978) ('*The Mitchell Report*').
[41] NSW, *Report by Mr Justice Lusher of the Commission to Inquire into New South Wales Police Administration*, 29 April 1981. ('*The Lusher Report*').
[42] John C Johnson, *Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues* (2001) ('*The Johnson Report*').

and by Parliamentary Committees, the most significant of which occurred in Tasmania in 2009[43] and NSW in 1993.[44] In addition, the Centre for Comparative Constitutional Studies at the University of Melbourne, in its 1998 advice to the Police Board of Victoria, discussed the police-government relationship, but largely avoided reaching definitive conclusions as to the nature of or the desirable relationship between the police and the executive.[45]

The views expressed in these reports vary considerably and are further discussed in the thesis, particularly in chapters 6.4 and 9.

It is also notable that Australian Inquiry reports and academic discussions have largely omitted consideration of the police-government in inquiry reports from other countries, particularly a number of significant Canadian and English reports. Canadian reports are of particular significance to Australia in that the statutory form federally,[46] and in many of its provinces,[47] is similar to that used in many Australian jurisdictions. The most significant relevant Canadian and English reports that have commented on this issue are:

- the 1981 McDonald Report;[48]
- the 1989 Nova Scotia, Marshall Report;[49]
- the 2001 APEC Report;[50]
- the 2007 Ontario Ipperwash Report; and[51]
- the 1962 English Willink Report.[52]

Academic Commentary - There has also been research conducted by academics and commentators, predominantly in other countries on the question of police independence.

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[43] Parliament of Tasmania, Joint Select Committee on Ethical Conduct, Final Report, *Public Office is Public Trust*, (2009) ('*The Tasmanian Report*').
[44] Joint Select Committee upon Police Administration, Parliament of New South Wales, *Second Report, Police Service (Management) Amendment Bill, 1993*, 13 March 1993. ('*The JSCPA Report*')
[45] Centre for Comparative Constitutional Studies, The University of Melbourne, *Governance & Victoria Police, Discussion of issues concerning the constitution of Victoria Police and its relationships within the system of government*, Prepared for the Police Board of Victoria (1998) ('*CCCS Report*'). This report can be found in Police Board of Victoria*, Reference No 3, Review of the Police Regulation Act 1958, Principles for the Development of Modern Police Services in Victoria, Report to the Minister for Police and Emergency Services, Volume 3: Research Papers* – April 1998 (Part 2).
[46] *Royal Canadian Mounted Police Act* RSC 1985, c R-10, s 5(1) uses the form first introduced in NSW in 1862 and still used in NSW, Tasmania, South Australia and the Northern Territory. The origins of this form, referred to in this thesis as the Cowper formulation, are discussed in Chapter 5.2.
[47] Cowper provisions operate under the following Canadian provincial Acts: *Police Act* RSA 2000, c P-17, s 2; *Police Act* RSBC 1996, c 367, s 7; *Royal Newfoundland Constabulary Act* SNL 1992, c R-17, s 4(1); *Police Services Act* RSO 1990, c P 15, s 17(2); *Police Act* 2006 c.16 RSPEI 1988, P-11.1, s 6(2).
[48] Canada, Commission of Inquiry Concerning Certain Activities of the RCMP, Sec*ond Report, Freedom and Security under the Law* (1981) ('*The McDonald Report*').
[49] Nova Scotia, Royal Commission on Donald Marshall Jr Prosecution*, Digest of Findings and Recommendations* (1989) ('*The Marshall Report*').
[50] Commission for Public Complaints Against the RCMP, *Commission Interim Report Into the complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver BC in November 1997 at the UBC Campus and at the UBC and Richmond detachments of the RCMP* (31 July 2001) ('*The APEC Report*').
[51] Ontario, Ipperwash Inquiry, *Report of the Ipperwash Inquiry*, Vol 2, Policy Analysis (2007) ('*The Ipperwash Report')*.
[52] United Kingdom, Royal Commission on the Police 1962, *Final Report,* Cmnd 1728, May 1962 ('*The Willink Report*').

These commentators seem to fall within one of two loose schools of thought. The first queries the existence of the independence of police from the executive; some limiting their rejection to the concept as a legal doctrine, accepting that a practice or convention may have or should arise to support a degree of independence for police. What is common is their rejection of any historical, legal or constitutional basis for the independence of police from direction from the executive.

The notable commentators in this school are Marshall[53] and Lustgarten[54] from England; the Australian commentators Waller[55] and Plehwe;[56] Orr[57] and Cull[58] from New Zealand and the Canadians, Roach[59] and Stenning.[60] What is notable about these commentators is, first, their expertise, as many were leading constitutional scholars.[61] Second, their observations (other than those of the Canadians) are not recent, being produced between the 1960s and the 1980s. And third, that their views have been largely ignored or minimised by those in the

[53] Geoffrey Marshall, *Police and Government* (Methuen 1965); Geoffrey Marshall, 'Police Accountability Revisited' in David Butler and A H Halsey (eds), *Policy and Politics* (MacMillan 1978) 51; Marshall (1984), above n 5, ch8; Geoffrey Marshall & Barry Loveday, 'Police Independence and Accountability' in Jeffrey Jowell & Dawn Oliver (eds), *The Changing Constitution* (Clarendon, 1994) 295.
[54] Laurence Lustgarten, *The Governance of Police* (Street & Maxwell, 1986).
[55] Louis Waller, 'The Police, the Premier and Parliament: Government Control of the Police' (1980) 6 *Monash University Law Review* 250.
[56] R Plehwe, 'Some Aspects of the Constitutional Status of Australian Police Forces' (1973) 32 *Australian Journal of Public Administration* 268; R Plehwe, 'Police and Government: The Commissioner of Police for the Metropolis' [1974] *Public Law* 316; Rudolph Plehwe and Roger Wettenhall, 'Reflections on the Salisbury Affair: police-government relations in Australia' (March 1979) *The Australian Quarterly* 75.
[57] Gordon Orr, 'Police Accountability to the Executive and Parliament' in Neil Cameron and Warren Young (eds), *Policing at the Crossroads* (Allen & Unwin 1986) 46.
[58] Helen Ann Cull, 'The Enigma of a Police Constable's Status' (1975) 148 *Victoria University Wellington Law Review* 148.
[59] Kent Roach 'The Overview: Four Models of Police-Government Relations' in Margaret E Beare and Tonita Murray (eds), *Police & Government Relations: Who's Calling the Shots?* (University of Toronto Press 2007), 16.
[60] Phillip C Stenning, *Legal Status of the Police, A study Paper prepared for the Law Reform Commission of Canada by Philip C Stenning* (Law Reform Commission of Canada,1981); Philip C Stenning, 'Police and Politics: There and Back Again?' in R C MacLeod & David Schneiderman (eds), *Police Powers in Canada: The Evolution and Practice of Authority* (University of Toronto Press 1994) 209; Philip C Stenning, 'Someone to Watch over Me: Government Supervision of the RCMP' in W. Wesley Pue (ed), *Pepper in Our Eyes: The APEC Affair* (UBC Press 2000) 87; Philip Stenning, 'The Idea of the Political "Independence" of the Police: International Interpretations and Experiences' in Beare and Murray (eds), above n 59, 183 (Stenning (2007)); Philip Stenning, 'Ingredients for a good police/executive relationship' A paper presented to the Roundtable Workshop on Police Reform in South Asia: Sharing of Experiences, New Delhi 23-24 March 2007 (Stenning (2007B)); Philip C Stenning, 'Governance of the Police: Independence, Accountability and Interference' (2011) 13 *Flinders Law Journal* 241. I have listed Stenning as a Canadian as that county is his origin and much of his work in this particular field is in Canadian journals and books. However, when he made his contribution to the Ipperwash Report he was at Victoria University, Wellington in New Zealand. He then went to Keele University in the UK and now holds a professorship at Griffith University. It may be, from an examination of his most recent work conducted with David Bayley, that Stenning is best regarded as being more closely aligned with the second school of thought. Bayley & Stenning, above n 20, chapter 3 in particular.
[61] For example, Louis Waller held the Sir Leo Cussen Chair of Law at Monash University between 1964 and 2000 and was Dean of the Monash University Law School between 1968 and 1970. https://www.monash.edu/law/about-us/meet-our-people/academic/louis-waller.
Geoffrey Marshall was Provost of Queen's College, Oxford and author of leading books on constitutional conventions and practices in the United Kingdom. Laurence Lustgarten was Professor of Law at the University of Southampton, and a Commissioner of the Independent Police Complaints Commission. He is currently an Associate Fellow Centre for Socio-Legal Studies, University of Oxford. https://www.law.ox.ac.uk/people/laurence-lustgarten.
Hellen Ann Cull, who wrote her paper on police independence when she was an undergraduate at Victoria University Wellington, was subsequently made one of Her Majesty's Counsel in 1997 before being a Member of the New Zealand High Court in 2016. http://www.kiwisfirst.com/judge-file-index/high-court-justice-helen-cull/
Gordon Orr was Professor of Constitutional Law at Victoria University, Wellington.
Rudolf Plehwe was senior lecturer in Political Science at La Trobe University.

second school of thought, and totally ignored by the Australian inquiry reports that led to the introduction of limited government direction models.[62]

The second school consists of those who consider that police independence is a necessary concept, based on sound legal, constitutional and historic foundations and includes those who consider that the power of government over police is or should be constitutionally or legally limited. An identifying element of this school is the unchallenged acceptance of the *dicta* of Lord Denning in *Blackburn* as representing the correct understanding of the independence of the police, as well as reliance on the decisions in *Enever* and *Perpetual Trustees* as supporting that independence. Those who adopt this view tend to be mainly former members of police forces, or from the fields of police science, criminology or political science, with Pue[63] seeming as a notable exception. In this group are the former Commissioner of the London Metropolitan Police (the Met), whose recommendations established the current design of the Australian Federal Police, Sir Robert Mark,[64] and other retired Police Commissioners in Australia and the United Kingdom. That includes Sir Ian Blair (the Met),[65] Sir Paul Stephenson (the Met),[66] Christine Nixon (Victoria),[67] John Avery (NSW),[68] Ian Oliver (Scotland, Grampian Police)[69] and Ray Whitrod (Qld).[70]

This group also includes academics and other current and former police officials, including, from England, Jefferson and Grimshaw,[71] Gillance and Khan,[72] Hewitt,[73] Keith-Lucas,[74] and Lister[75] and, from Australia, Grant and Brian Pitman,[76] Colleen Lewis,[77] Manison,[78] Bersten,[79] Bolen,[80] Milte,[81] Duport[82] and Fleming.[83]

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[62] Limited direction models are those that provide government with a limited and highly constrained power of direction over police. The approach is discussed in Chapter 9.
[63] Nemetz Professor of Legal History at the Peter A. Allard School of Law at the University of British Columbia, Vancouver. W Wesley Pue, 'Policing and the Rule of Law, and Accountability in Canada: Lessons from the APEC Summit' in W. Wesley Pue (ed), *Pepper in Our Eyes: The APEC Affair* (UBC Press 2000) 3; W Wesley Pue, 'The Prime Minister's Police?: Commissioner Hughes' Report' (2001) 39 *Osgoode Hall Law Journal* 165.
[64] *Mark Report*, above n 34, 53.
[65] Ian Blair, *Policing Controversy* (Profile, 2009) Chapter 2.
[66] Sean O'Neil, 'Met chief Sir Paul Stephenson warns politicians to keep out of policing' *The Times*, 16 September 2009 who said that the principle of the operational independence of the police was 'set in stone' and 'must not be compromised'.
[67] Christine Nixon, *Fair Cop* (Victory, 2011) 245-246.
[68] John Avery, *Police- Force or Service* (Butterworths, 1981) Chapter 11.
[69] Ian Oliver, *Police, Government and Accountability* (MacMillan, 1997) 35, where he refers to the 'constitutional independence' of police.
[70] Whitrod (1976) above, n 8, 13.
[71] Tony Jefferson and Roger Grimshaw, *Controlling the Constable, Police Accountability in England and Wales* (Frederick Muller, 1984).
[72] K Gillance and A N Khan, 'The Constitutional Independence of a Police Constable in the Exercise of the Powers of His Office' (1975) 48 *Police Journal* 55. Gillance was a Chief Inspector in the Cleveland County Constabulary when this piece was written.
[73] Eric J Hewitt, 'Operational Independence – Myth or Reality?' (1991) *Police Journal* 321. Hewitt was a Superintendent in the Greater Manchester Police when this article was written.
[74] Bryan Keith-Lucas, 'The Independence of Chief Constables' (1960) 1 *Public Administration* 1.
[75] Stuart Lister, 'The New Politics of the Police: Police and Crime Commissioners and the 'Operational Independence' of the Police' (2013) 7 *Policing* 239.
[76] Grant Alan Pitman, *Police Minister and Commissioner Relationships*, (PhD Thesis, Griffith University, Commerce and Administration Faculty, 1998). Grant Pitman, 'An interdependency model for police executive relationships' (2004) 6 *International Journal of Police Science & Management* 115. Grant Pitman & Brian Pitman, 'Can our police commissioners cope?' (August 1997) 2-2 *Themis* 23. Both are former members of Queensland Police Service. Brian Pitman was a retired superintendent in 1997.When Grant Pitman's thesis and articles were written he was a serving member of the Queensland

A more nuanced view has been provided by Reiner[84] who provides observations on elements in the debate, rather than falling into either camp.

What is notable about these written discussions, as well as the various inquiry reports and legal authorities, whether in the first or second schools, is that the little attention given to the different statutory models and the legislative intent for their enactment. While some studies have, at most, compared the perceived effects of different statutory models,[85] there seems to be no examination or comparison of the models themselves to ascertain both how and why they lead to particular effects. Those factors are essential elements of the research for this thesis (discussed in chapters 4 to 9).

Few of the various studies and inquiry reports have given any attention to the effect that security of tenure or lack thereof of a Police Commissioner can have on independence. The issue was has recently been discussed by Bayley and Stenning[86] and by Dupont,[87] although no study has sought to assess the impact of limited tenure on police independence. This issue is discussed in chapter 11.

Despite these limitations, the studies from both camps are highly informative in assessing police independence. But they, like the inquiry reports, are limited in that none have attempted a comprehensive study including all of the discrete research issues listed in chapter 1. Marshall,[88] Lustgarten,[89] Jefferson and Grimshaw[90] and Bayley and Stenning[91] are possibly the only authors who seem to have undertaken broad studies of the issue but those studies did not relate to the specifics of the Australian experience.[92] Stenning's 2011 paper seems to be the only attempt of an Australian nationwide examination.[93]

However, there have been examinations and discussions of the discrete issues.

Police Service, being an inspector in 1997 and a superintendent in 2004. He retired as a Chief Superintendent. https://www.mormonwiki.com/Grant_Pitman.

[77] Colleen Lewis, above n 8, 97.

[78] Gary F Manison, 'Managing Australia's Police: The Challenge to identify who should be in charge – politicians or police?' (1995) 54 *Australian Journal of Public Administration* 494, 498. Manison was a Superintendent in the Northern Territory police when article written.

[79] Michael Bersten, 'Police and Politics in Australia, The Separation of Powers and the Case for Statutory Codification' (1990) 14 *Criminal Law Journal* 302, 311.

[80] Jill M Bolen, *Reform in Policing, Lessons from the Whitrod era* (Hawkins, 1997).

[81] Milte, above n 8.

[82] Benoit Dupont, 'The New Face of Police Governance in Australia' (2003) 78 *Journal of Australian Studies* 15.

[83] Jenny Fleming, '*Les liaisons dangereuses*: Relations between police commissioners and their political masters' (2004) 63 *Australian Journal of Public Administration* 60.

[84] Robert Reiner, *The Politics of the Police* (Oxford, Third edition, 2000); Robert Reiner, *Chief Constables* (Oxford, 1992).

[85] For example, Plehwe & Wettenhall (1979) above n 56, 77.

[86] Bayley & Stenning, above n 20, 89.

[87] Dupont, above n 82, 21.

[88] Marshall (1965), above n 53; Marshall (1984), above n 5, chapter 8.

[89] Lustgarten, above n 54.

[90] Jefferson and Grimshaw, above n 71.

[91] Bayley and Stenning, above n 20.

[92] In Bayley and Stenning, Australia was one of the six countries examined, but the authors did not seek to examine the differences between the differing State, federal and territory models.

[93] Stenning (2011), above n 60.

The application of the doctrine of ministerial responsibility. (Discrete research issue a) – A number of authors have done considerable work on that doctrine. Of note are Marshall,[94] Woodhouse[95] and Weller[96] whose works relates to the general obligations and ministerial relations with the public service, while others such as Finn and Lindell,[97] Goldring and Wettenhall,[98] David Lewis[99] and Mantziaris[100] have examined the doctrine in relation to its application to particular types of statutory bodies. Finn has provided a useful legal history on the growing use of statutory bodies and ministerial responsibility in colonial Australia.[101] But those works have not dealt with the specifics of the police and government relationship. This issue is discussed in chapters 10.3 and 12.

Development and sources of police independence (Discrete research issue b) – There has been extensive work on the history of the 'New Police' in England and Wales and the office of constable, most notably by Critchley,[102] Hart,[103] Reith,[104] Lee,[105] Maitland,[106] Ascoli[107] and most recently by Emsley who criticised the 'whiggish' nature of previous police histories.[108] Other works have examined particular aspects of police work, such as Porter's on the Special Branch[109] and Mather's on maintaining public order in Victorian England.[110] Each deals in varying ways with policing in England prior to and after 1829 and contain material relevant to historic attitudes to the police and government relationship and expectations of police independence when the 'New Police' were established. This material, together with contemporary parliamentary committee reports and examination of the Hansard record of the passage of the 1829 Act[111] assists in determining to what extent the New Police was

[94] Marshall (1989), above n 1.
[95] Woodhouse (1994), above n 1.
[96] Patrick Weller, *Cabinet Government in Australia, 1901-2006* (UNSW Press, 2007); Patrick Weller, *Don't Tell the Prime Minister* (Scribe, 2002); Patrick Weller & Dean Jaensch (eds), *Responsible Government in Australia* (Drummond, 1980).
[97] P D Finn & G J Lindell, 'The Accountability of Statutory Authorities' in Commonwealth Parliament Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth: Fifth Report* (1982) Appendix 4.
[98] John Goldring and Roger Wettenhall, 'Three Perspectives on the Responsibility of Statutory Authorities' in Weller & Jaench, above n 96, 136; John Goldring, 'Accountability of Commonwealth Statutory Authorities and "Responsible Government"' (1980) 11 *Federal Law Review* 353.
[99] David Lewis, 'Statutory Authorities and Constitutional Conventions – The Case of the Reserve Bank of Australia' (1987) 16 *Melbourne University Law Review* 348.
[100] Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26 *Federal Law Review* 309.
[101] Paul Finn, *Law and Government in Colonial Australia* (Oxford, 1987).
[102] T A Critchley, *A History of Police in England and Wales* (Constable, 1978).
[103] J M Hart, *The British Police* (Allen & Unwin, 1951).
[104] Charles Reith, *A New Study of Police History* (Oliver and Boyd, 1956).
[105] W L Melville Lee, *A History of Police in England* (Methuen, 1901).
[106] Frederick William Maitland, *Justice and Police* (MacMillan, 1885).
[107] David Ascoli, *The Queen's Peace* (Hamilton, 1979).
[108] Clive Emsley, *The English Police* (Longman, 2nd edition 1991) 4; and see Clive Emsley, *The Great British Bobby* (Quercus, 2009). Whig history is an approach which 'studies the past with reference to the present' and presents the past as an inevitable progression towards ever greater liberty and enlightenment, culminating in modern forms of liberal democracy. See Herbert Butterfield, *The Whig Interpretation of History* (Norton, 1965) & Ernst Mayr, 'When is Historiography Whiggish' (1990) 51 *Journal of the History of Ideas* 301.
[109] Bernard Porter, *The Origins of the Vigilant State* (Weidenfeld & Nicolson, 1987).
[110] F C Mather, *Public Order in the Age of the Chartists* (Kelley, 1967). Also see Richard Vogler, *Reading the Riot Act, The magistracy, the police and the army in civil disorder* (Open University Press, 1991) & J M Beattie*, The First Detectives, The Bow Street Runners and the Policing of London*, 1750-1840 (Oxford, 2012).
[111] *Metropolitan Police Act 1829* (UK).

intended to be granted any 'independence' from government control. Many also deal with the history of the constable which, together with much earlier writings of Bacon[112] and Lambarde[113] are used in assessing arguments that police independence is derived from that office.

The various authors have considered this material and this thesis reviews their considerations. However, previous studies have largely avoided consideration of parliamentary committees of the 1820s and 1830s, despite them providing valuable information on the legislative intention for the 'New Police'. This issue and that material are discussed, particularly in chapters 5.1 and 7.4.

Australian policing histories, such as O'Brien's 1960 study of Australian Police Forces,[114] Haldane's of the Victorian Police[115] and Johnston's of Queensland Police[116] do little to clarify the police-government relationship. The most thoughtful Australian policing studies by Finnane[117] do not progress the issue much further. This is because they either do not consider the issue, or assume that a level of independence exists, but do little to examine its scope, the basis of its existence or the relevance of different statutory models to police independence.[118] The same applies to biographies and autobiographies of Australian former Police Commissioners (such as those of Victoria's Kel Glare,[119] and Christine Nixon,[120] NSW's Peter Ryan[121] and Queensland's Ray Whitrod).[122]

Operational Independence (Discrete research issue b) – This concept is referred to in most academic writings[123] and in inquiry reports[124] on the police-government relationship but they provide little clarity on the origin and scope of that term. There has, however, been an acceptance that police operational independence does not extend to government's role in policy matters.[125] How, however, to distinguish between the two concepts is far from clear

[112] Francis Bacon, 'The Office of Constables, Original and Use of Courts Leet, Sheriff's Turn, etc with the Answers to the Questions Propounded by Sir Alexander Hay, Knight, touching the Office of Constables, AD 1608' in *The Works of Francis Bacon Lord Chancellor, Vol 3* (Cary and Hart, 1844) 315.
[113] William Lambarde, *The Duties of Constables* (EEBO Reprint of Wight and Norton,1599).
[114] G M O'Brien, above n 22.
[115] Robert Haldane, *The People's Force* (Melbourne University Press 2nd edition 1995).
[116] W Ross Johnston, *The Long Blue Line, A History of the Queensland Police* (Boolarong, 1992).
[117] Mark Finnane, *Police and Government, Histories of Policing in Australia* (Oxford, 1994); and see Mark Finnane (ed), *Policing in Australia Historical Perspectives* (UNSW Press 1987).
[118] Possibly the most interesting consideration of this element by an Australian author has been by Finnane in his concise discussion of six pages devoted to the issue in his 1994 study. Ibid 38-44.
[119] Kelvin Glare, *The Angry Ant* (Glare, 2015).
[120] Nixon, above n 67.
[121] Sue Williams, *Peter Ryan, The Inside Story* (Viking, 2002).
[122] Ray Whitrod, *Before I Sleep, Memoirs of a Modern Police Commissioner* (UQP 2001). Also see Whitrod (1976), above n 8.
[123] For examples see Pitman (1998), above n 76; Bayley and Stenning, above n 20, 57-59; Fleming, above n 83, 67; Lustgarten, above n 54, 20; Stuart Lister, above n 75; Jefferson & Grimshaw, above n 71, 61-83; Hewitt, above n 73; K Gillance and A N Khan, above n 72.
[124] For example *Johnson Report*, above n 42; *Rush Report,* above n 38, xi, xii, 40 and 47; *Fitzgerald Report,* above n 36, 384.
[125] Lorne Sossin, 'The Oversight of Executive-Police Relations in Canada: "The Constitution, the Courts, Administrative Processes, and Democratic Governance"' in Beare and Murray, above n 59, 96, 103. New South Wales, Royal Commission into the New South Wales Police Service, *Final Report, Vol II: Reform*, 237 ('*The Wood Report*'). *Johnson Report*, above n 42, 37. *Rush Report*, above n 38, 42.

and Lustgarten has considered that the concept arose from a 'false distinction' between policy and operational matters derived from the law of negligence which 'breaks down in relation to policing'.[126] The Patten Report into policing in Northern Ireland recognised difficulties with the concept of operational independence and recommended replacing the concept with 'operational responsibility'.[127] The origins of 'operational' and 'police independence' are discussed in chapters 8.4, and 10.2.

Studies of statutory models & police and government practices (Discrete research issues c and d) - No study has been located which contains any significant historical examination of the police - government statutory models and practices used in Australian jurisdictions. It seems limited to Plehwe and Wettenhall's 1979 discussion of the perceived effects of the different statutory models,[128] the informative study by Pitman on Queensland and NSW police,[129] and the more limited works of Stenning,[130] Fleming,[131] Manison[132] and Milte.[133] This thesis, particularly in chapters 4 to 9 compares the different statutory models in operation in Australia and their differing effects.

Effectiveness of alternative forms of accountability (Discrete research issue e) - Little examination has been given to the effect and adequacy of alternative forms of accountability (such as public scrutiny by enquiries, integrity bodies or the media). Aside from Lewis's studies of civilian oversight by external complaints bodies and the directions registration system in Queensland,[134] other works are largely limited to those favouring police independence which seek to demonstrate the effectiveness of various alternative forms of accountability. Relevant authors include Manison,[135] Jefferson and Grimshaw,[136] Lauer[137] and Sir Robert Mark.[138] This issue is examined in chapter 10.3 of this thesis.

Constitutional Conventions (discrete research issue f) - The various studies of police independence have also given little attention to the significance, nature and effect of constitutional convention, which is particularly odd as, if the legal basis for police independence is doubtful, its constitutional basis can only be conventional. Significant work

[126] Lustgarten, above n 54, 20-22.
[127] Northern Ireland, The Report of the Independent Commission on Policing for Northern Ireland, A New Beginning Policing in Northern Ireland (1999) ('*The Patten Report*'), 32.
[128] Plehwe and Wettenhall (1979), above n 56, 77.
[129] Pitman (1998), above n 76.
[130] Stenning (2011) above n 60.
[131] Fleming, above n 83.
[132] Manison, above n 78.
[133] Milte, above n 8, Ch 11.
[134] For example: C H Lewis, 'Police Civilians and democratic accountability' *Democratic Audit Discussion Paper* Series (ANU, August 2005) (C Lewis, (Audit)); Colleen Lewis (2010), above n 8.
[135] Manison, above n 78, 502.
[136] Jefferson & Grimshaw, above n 71.
[137] A R Lauer, 'Policing in the 1990s: Its Role and Accountability' in David Moore and Roger Wettenhall (eds), *Keeping the Peace: Police Accountability and Oversight* (University of Canberra and Royal Institute of Public Administration Australia, Canberra, 1994) 61.
[138] Mark (1977), above n 3, 11-12, 24-25.

in defining the concept and the operation of particular conventions has been done, predominately by Marshall[139] in England, Heard[140] in Canada and the current author in Australia.[141] However, only Marshall sought to examine conventions on police independence, and only in relation to England and Wales.[142] Regarding police independence conventions in Australia, the treatment of commentators seems limited to asserting[143] that there is some form of uniform convention in Westminster systems on police independence relating to operational matters with little clarity as to its scope. The Victorian Johnson report gave some attention to the issue, although it demonstrated little understanding of that subject, referring to conventions as 'rules of thumb'[144] a phrase subsequently adopted by Rush.[145] The thesis examines the possible presence and scope of a police independence convention in Australian jurisdictions in chapter 8.

This review of the literature indicates that there are significant gaps in the knowledge regarding the constitutional relationship between police and government in Australia, particularly the source, development and extent of any police independence, - gaps that this thesis seeks to fill.

2.3 – Statutory Interpretation

As this thesis relates to the meaning of various statutory models of the police-government relationship, it requires that statutes containing those models be interpreted. As there can be disagreements on the correct method or methods of statutory interpretation, this section outlines the method of statutory interpretation adopted in this study

The method adopted is intended to be the orthodox method applying the principles endorsed by the High and other senior Australian Courts.

Relying on the notable work undertaken by Pearce and Geddes,[146] there are two general approaches to the interpretation of statutes, the literal and purposive approaches.[147]

The first is the *literal approach* which was defined by Higgins J in the *Engineer's Case*[148] as follows:

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[139] Marshall (1984), above n 5.
[140] Andrew Heard, *Canadian Constitutional Conventions; The Marriage of Law and Politics* (Oxford, 2nd edition 2014).
[141] Killey, above n 5.
[142] Marshall (1965), above n 53; Marshall (1984), above n 5, Ch 8.
[143] For example, in Pitman (1998) above n 76, 44; the *Wood Report,* above n 136, 237; the *Johnson Report*, above n 42, 37.
[144] *Johnson Report*, above n 42, 34 & 37. .
[145] *Rush Report*, above n 38, 42.
[146] Dennis C Pearce & Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th edition, 2014).
[147] Ibid 35.
[148] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161.

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

The literal rule, however, has been tempered by what is known as the Golden Rule,[149] which was described by Lord Wensleydale in *Grey v Pearson*[150] as being:

> the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

This limiting effect has been accepted by the High Court.[151]

The other approach is the *purposive approach* – which allows a court to adopt an interpretation of the words consistent with the purpose of the provision or the 'mischief' with which it was intended to deal, rather than a literal approach. However, as Pearce and Geddes have observed, the purposive approach 'was generally accepted [as]… applied only when an attempt to apply the literal approach produced an ambiguity'. [152]

In 1998, in *Project Blue Sky Inc v Australian Broadcasting Authority*,[153] the High Court discussed statutory interpretation methodology applied by that Court. McHugh, Gummow, Kirby and Hayne JJ emphasised the primary, but not exclusive role of the literal approach when they said that:

> The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended to have.[154] Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of literal or grammatical construction, the purpose of the statute or the cannons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

Any uncertainty that this statement may lead to over when the literal approach would not apply seems minimised by subsequent views of the High Court where it has re-emphasised the primacy of the literal approach. The Court said, in 2012 and 2014:

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[149] Pearce and Geddes, above n 146, 36.
[150] (1857) 6 HLC 61, 106.
[151] See *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311, 341 and *Broken Hill South Ltd v Commissioner or Taxation* (NSW) (1937) 56 CLR 337, 371.
[152] Pearce and Geddes, above n 146, 38.
[153] (1998) 194 CLR 355.
[154] A related issue is the ascertainment of which Parliament's intention is relevant when a statutory form has been repeated by a number of parliaments and over many years. This issue is discussed in Chapter 7.4 in the context of the understanding of the meaning of the word 'constable' in policing legislation.

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'.[155] So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text.[156]

As this thesis also deals with the manner in which precedents from other jurisdictions are used, as well as precedents based on different statutory models, it is necessary to review the views of the High Court and other senior courts regarding the use of such precedents.

The first principle is that, as Pearce and Geddes have observed, 'If a court is seeking the meaning of a particular piece of legislation, it cannot be bound by the interpretation placed on like words in other legislation by another court'.[157]

In support of that proposition is the decision of the Privy Council *in Ogden Industries Pty Ltd v Lucas*[158] which concluded that (again emphasising the primacy of the literal approach):

> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction. And courts must beware of falling into error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.[159]

This authority has been accepted and applied by the High Court,[160] the Federal Court[161] and State Supreme Courts.[162]

A related position is that courts should not, in the words of McHugh J in *Marshall v Director-General, Department of Transport*[163], 'slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation'.[164] In his view, in words

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[155] This is an extract from the judgment in 2009 in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 of Hayne, Heydon, Crennan and Kiefel JJ who said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

[156] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 per French CJ, Hayne, Crennan, Bell & Gageler JJ which was endorsed in *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 per French CJ, Hayne, Kiefel, Gageler and Keane JJ. This approach was recently endorsed and applied by the Victorian Court of Appeal in *Attorney-General v Glass (in her capacity as Ombudsman)* [2016] VSCA 306, per Warren CJ, Beach and Ferguson JJA.
[157] Pearce and Geddes, above n 146, 9.
[158] [1970] AC 113.
[159] Ibid 127.
[160] *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, 661 (McHugh, Gummow, Heydon JJ) with whom Gleeson CJ and Hayne J agreed (at 650 & 668).
[161] *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51, 69 (Sackville J) 53 (Whitlam J) and 75 (Mansfield J).
[162] *R v Fowler* [2006] SASC 18 at [56]; *Corruption and Crime Commission v Stokes* [2013] WASC 282 at [62]-[63] and *Ibrahim v Pham* [2004] NSWSC 650 at [23].
[163] (2001) 205 CLR 603.
[164] Ibid 632.

subsequently endorsed by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority:*[165]

> The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.[166]

It has, however, been observed by the NSW Court of Appeal in *Gett v Tabet*[167] that:

> where two Australian legislatures, largely contemporaneously, adopt similar or identical language in pursuit of a common statutory purpose …. the coherent development of the law within Australia would not be promoted by the courts of one jurisdiction adopting a different construction to those of another. [168]

The final issue concerns the position to be taken where a court has previously interpreted a provision with which the current court disagrees, and the weight to be given to the failure of the relevant legislature to enact remedial legislation. In *Geelong Harbour Trust Commissioners v Gibbs Bright & Co*[169] Lord Diplock for the Privy Council said:

> If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. …. It may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary.[170]

Pearce and Geddes interpreted Lord Diplock as meaning that 'if a decision as to the meaning of an Act has stood for a long time and the legislature, being an active law-making body, has chosen not to alter that legislation, a court should be slow to take action that, in effect, amends that legislation'.[171]

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[165] (2008) 233 CLR 259.
[166] Ibid 270.
[167] [2009] NSWCA 76
[168] Ibid [289].
[169] (1974) 129 CLR 576.
[170] Ibid 585.
[171] Pearce and Geddes, above n 146, 15.

This proposition, however, seems not favoured by the High Court. In *Babaniaris v Lutony Fashions Pty Ltd*[172] Mason J made the following observation, (which was later endorsed by Mason C.J., Wilson, Dawson, Toohey and Gaudron JJ in *John v Federal Commissioner of Taxation*)[173] again emphasising the primacy of literalism:

> The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute. If an appellate court, particularly an ultimate appellate court, is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute …. It is no part of a court's function to perpetuate error and to insist on an interpretation which, it is convinced, does not give effect to the legislative intention.[174]

In that passage, Mason J went on the state that 'The fact that Parliament can, if it so chooses, displace an erroneous interpretation does not provide a justification for the court's refusal to give effect to the law as declared by Parliament'.[175]

Wilson and Dawson JJ expressed similar views:

> This Court is reluctant to depart from long-standing decisions of State courts upon the construction of State statutes if the meaning is doubtful, particularly where those decisions have been acted on in such a way as to affect rights and obligations …. It cannot, in any event, justify a departure from the plain meaning of the provisions in question.
>
> Other maxims - *stare decisis*[176] and *communis error facit jus*[177] - have been called in aid of this approach …. But one thing about it is clear. It has no application where the meaning of a statute is plain and free from ambiguity ….If it were otherwise, it would be an invitation to perpetuate an obvious misconstruction of a statute and to disregard the evident intention of the legislature. No line of authority, however longstanding, could justify such a course.[178]

It is apparent that the High Court has adopted a literalist approach to the interpretation of legislation, an approach expressed by the recently retired Chief Justice in the following expression:

> those who are required to apply or administer the law, those who are bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen.[179]

This approach is followed in this thesis when examining and interpreting the various statutory formulations of the police – government relationship and when considering the interpretations of courts and others of those provisions. It is a form of examination, as

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[172] (1987) 163 CLR 1.
[173] (1989) 166 CLR 417, 439-40.
[174] (1987) 163 CLR 1, 13
[175] Ibid 14.
[176] 'To stand by decided matters' – John Gray, *Lawyers Latin, A Vade-Mecum* (Robert Hale, 2002) 130.
[177] 'Common mistake sometimes makes law' – Bird, above n 23, 82.
[178] (1987) 163 CLR 1, 22-23.
[179] *International Finance Trust Co Limited v New South Wales Crime Commission* (2009) 240 CLR 319, 34 (French CJ).

recently expressed by the Victorian Court of Appeal, 'starting and ending with the statutory text when considered in light of its context and purpose'.[180]

[180] *Attorney-General v Glass (in her capacity as Ombudsman)* [2016] VSCA 306, [65] (Warren CJ, Beach and Ferguson JJA).

3 – Statutory Models

3.1 – Introduction

The primary issue to be considered in this thesis is who is in control in the police-government relationship in Australian jurisdictions?

This is does this by:

- examining and analysing the meaning and effect of the various statutory models that operate or have operated in each of the Australian jurisdictions; and by
- examining the presence of constitutional conventions in those jurisdictions.

This chapter examines statutory models to identify the legal relationship in each Australian jurisdiction between Police Commissioners and governments which define the extent to which a government can direct a police force.

Chapter 8 will later discuss, in the context of a statutory form imposing little or no legal constraints on a power to direct, any limitations imposed by 'convention' or binding practice.[181]

For the purpose of this thesis, the terms 'police' and 'police force' are understood in accordance with the definition in the *Oxford Dictionary of English*, 'the civil force of a state, responsible for the prevention and detection of crime and the maintenance of public order'.[182]

The police forces to be examined are the eight separate civil forces operating in Australia; one in each State and in the Northern Territory as well as the Australian Federal Police.[183]

There are also a number of specialist 'police like' bodies operating in Australia, such as the Australian Security Intelligence Organisation, the Australian Border Force, the military and the Military Police, each of which has, or can have, the power to arrest offenders, investigate criminal activities or maintain public order in particular circumstances. However, those police like bodies are not the subject of this study as the purpose of the thesis is to concentrate on the relationship between the executive government and general authority police forces.

To examine the actual and desirable relationships between Australian police forces and their respective executive governments, the starting point is to review the development of the

[181] See Killey, above n 5, chapter 2; Marshall, above n 5, chapter 1.
[182] *Oxford Dictionary of English* (OUP, 2nd ed, Revised 2010) Loc 545117 (Kindle edition).
[183] which operates nationally and provides policing services for the Australian Capital Territory as well as other Commonwealth external territories such as Christmas Island, Cocos (Keeling) Island, Norfolk Island and Jervis Bay Territory; see the AFP webpage https://www.afp.gov.au/what-we-do/our-work-overseas/international-deployment-group/external-territories.

statutory relationships in each Australian jurisdiction which has, or has had,[184] a separate police force.[185] There are nine of those jurisdictions: the Commonwealth, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory. The variations in the nature of the police-government relationship in each Australian jurisdiction is diagrammatically represented in **Table 3.2** below.

This chapter seeks to identify, from current and earlier policing legislation in Australian jurisdictions, provisions allowing *direct* government control of the activities of police forces and the nature of the provision. That is, provisions which expressly state that a Police Commissioner is subject to government direction or control whether by the responsible Minister or the Governor or some other official outside of the force.

There are also provisions that allow *indirect* control over the police.[186] These provisions are relevant to the police government relationship and are discussed later in Chapter 11.

3.2 – Statutory Models – Direct Control

An examination of the statutory history of the various Australian jurisdictions reveals that there are three types of statutory model used in Australia dealing with the power of government to directly control police forces.

The types are:

1. No Direction;
2. Broad Direction; and
3. Limited Direction.

What is examined here are not provisions which provide a direction power with general application to the population or to the public sector, such as auditing requirements,[187] but

[184] The ACT had a separate police force between 1927 and 1979. See *Police Ordinance 1927* (Cth) (See Commonwealth Gazette, 27 September 1927 (No 101). The Ordinance was amended in 1981 to make the Commissioner of the AFP the Commissioner of the ACT Police (see *Police (Amendment) Ordinance 1981* (Cth)). The 1927 Ordinance and subsequent amending ordinances, now referred to as Acts, were repealed by the *Crimes (Amendment) Act (No. 2) 1994* (ACT), s 10 & sch 2.

[185] This study seeks to examine sovereign governments and their relationship with police forces. A jurisdiction, for the purpose of this study, is a region at a national or state or colonial government level. Local or municipal government, being the product of state or colonial government legislation is not regarded as a jurisdiction for the purposes of this study.

[186] such as provisions which relate to the security of tenure of the police commissioner and the governments control over the recruitment to the police force.

[187] For example, in Victoria, Victoria Police is treated as a department for auditing purposes and the statutory obligations placed on the police are the same as those applicable to other statutory bodies. See *Financial Management Act 1994* (Vic) Part 7 and s 3 (definition of 'department) and *Public Administration Act 2004* (Vic) s 16(1)(c).

provisions which allow the government to direct the police in relation to the specific policing functions that policing legislation allows or requires the police to undertake.

3.2.1 – No Direction Type

The ***No Direction Type*** is present where there is no express statutory power to direct the police in relation to the policing functions. This type was used in most Australian jurisdictions, particularly before federation in 1901.[188] It is also the type that has operated in Western Australia since 1849.[189] The meaning and effect of the no direction arrangement is considered in Chapter 4.

3.2.2 – Broad Direction Type

The ***Broad Direction Type*** are express powers that allow, or appears to allow, the government to have broad powers of direction over police forces. Three versions of this type have been used in Australia. They are:

(i). the Peel Model;
(ii). the Cowper Model; and
(iii). the Broad Direction Model – Other.

The *Peel Model* is the type used in the *Metropolitan Police Act 1829* (UK). This Act is of particular relevance to this study as it established what is widely regarded as a new form of policing,[190] which Bayley and Stenning refer to as '"democratic policing"' or 'policing in the interests of the public at large rather than the exclusive interests of the government in

[188] **NSW** – *Colonial Police Act 1850* (NSW) & *Police Regulation Act 1852* (NSW) which operated from 1850 to 1862. **Victoria** – was part of New South Wales until the separation of the two colonies in 1851. Accordingly, the legislation which governed Victoria's policing on separation was the *Colonial Police Act 1850* (NSW). This Act was replaced in Victoria in 1853 by *An Act for the Regulation of the Police Force 1853* (Vic) and subsequently by the *Police Regulation Statute 1865* (Vic) which operated until 1873. **Queensland** – was also originally part of NSW and the NSW *Colonial Police Act 1850* (NSW) operated in that colony on separation in 1859 and operated until 1863 when Qld enacted the *Police Act 1863* (Qld) which contained a Cowper provision. **Tasmania** - *An Act for regulating the Police in the Townes and Ports of Hobart-town and Launceston and for removing and preventing nuisances and obstructions therein 1833* (Tas) and *An Act to regulate the Police in certain Towns and Ports within the Island of Van Diemen's Land and to make more effectual provision for the preservation of the peace and good order throughout the said Island and its Dependencies generally* (Tas) (1838) operated from 1833 to 1857. The *Municipal Police Act 1857* (Tas) which provided direct control over police to municipal government. **South Australia** – *Police Act 1863* (SA); *Police Act 1869* (SA); *Police Act 1916 (*SA); Police Act 1936 (SA); Police Regulation Act 1952 (SA). These Acts operated from 1863 with no government direction power until 1972 when the 1952 Act was amended by the *Police Regulation Act Amendment Act 1972* (SA).

[189] *An Ordinance for regulating the Police in Western Australia 1849* (WA); *An Ordinance for consolidating and amending the Laws relating to the Police in Western Australia, and for removing and preventing Nuisances and Obstructions 1861* (WA); and *Police Act 1892* (WA).

[190] W L Melville Lee, above n 105, chapter 12; Charles Reith, *British Police and the Democratic Ideal,* (Oxford, 1943) chs 7, 8, 9, 10 and 11; Ascoli, above n 107, ch 2.

power'.[191] This type is named after Sir Robert Peel, Home Secretary in 1829, [192] who was responsible for the development and introduction of this new form of policing. Peel is regarded, as former Chief Commissioner of Victoria Police, Christine Nixon, observed, as having 'founded the concept of modern police'.[193] And that concept was influential beyond England. As O'Brien observed (writing in 1960, but using language and concepts formed in an earlier generation), 'The example set by England in instituting an effective police force was followed by all the outlying components of the Empire, the character and methods of the original being closely copied'.[194]

The elements of the Peel model can be seen from the original wording of s 1 of the 1829 Act. That section allowed the King to:

> cause a new Police Office to be established in the City of Westminster, and … to appoint Two fit Persons as Justices of the Peace … to execute the Duties of a Justice of the Peace at the said Office … together with such other Duties as shall be hereinafter specified, or as shall be from Time to Time directed by One of His Majesty's Principal Secretaries of State,[195] for the more efficient Administration of the Police within the Limits hereinafter mentioned.

There is a certain ambiguity in the meaning of words used in the 1829 Act, as it is not entirely clear whether the power of direction is limited to what falls within the words 'other Duties', or covers all of the duties of the two Justices of the Peace. This issue is discussed in Chapter 5.1.

Both NSW[196] and South Australia[197] used Peel as their initial model, abandoning it in favour of a no direction approach in, respectively, 1850[198] and 1863.[199] NSW also followed the

[191] Bayley & Stenning, above n 20, 44.
[192] Peel went on to be United Kingdom Prime Minister between 1834 and 1835 and between 1841 and 1846. Douglas Hurd, *Robert Peel, A Biography* (Phoenix, 2008); Norman Gash, *Mr Secretary Peel, The Life of Sir Robert Peel to 1830* (Faber & Faber, 2011); Norman Gash, *Sir Robert Peel, The Life of Sir Robert Peel after 1830* (Faber & Faber, 2011).
[193] Nixon, above n 67, 68.
[194] O'Brien, above n 22, 3.
[195] A senior or Cabinet Minister – Bird, above n 23, 299.
[196] *Sydney Police Act 1833* (NSW) s 1; *Police Act 1838* (NSW) s 1; *Seaman and Water Police Act 1840* (NSW) s 1.
[197] *An Act for regulating the Police Force of the Province of South Australia* (SA) 1841, s 1. This Act differed from the NSW Act and from the 1829 UK Act in that the persons appointed were not to be Justices of the Peace, but were described as 'Commissioners of Police'. Despite this variation, the similarity of the wording, as well the views of Governor Gawler, indicates, as the Governor advised the Colonial Office, that the Act was 'founded principally on the English Metropolitan Police Bill.' Dispatch to Colonial Office, 20 March 1840, *Australian Joint Copying Project*. The Governor was writing in March 1840 regarding an earlier South Australian Act that had been disallowed in London for, it seems, financial reasons. (Colonial Office Response, 31 December 1840, *Australian Joint Copying Project*). However, the provision in the earlier Act regarding the relationship between police commissioners and the government is almost identical with the 1841 Act. *An Act for Raising and Organising a Police Force for the Province of South Australia 1839* (SA) (Disallowed) s 1. The Peel model was continued in *An Ordinance for Regulating the Police in South Australia 1844* (SA) s 2
[198] *Colonial Police Act 1850* (NSW).
[199] *Police Act 1863* (SA).

English practice of having its early city or function[200] based police subject to central government control.[201]

The *Cowper Model* is named after the first Minister to have introduced this new form of direction model, Sir Charles Cowper, NSW Colonial Secretary[202] in 1862. Section 3 of the *Police Regulation Act 1862* (NSW), empowered the Governor in Council to appoint the Inspector General who 'shall *under the direction of the Colonial Secretary* be charged with the superintendence of the Police Force of the Colony' [emphasis added].

The difference between the Cowper provision and its predecessor, the Peel model, is its clarity. The NSW provision, using what would later be referred to 'plain English', sets out the relationship between the executive government, whether at ministerial or gubernatorial level, and the official that heads the police force in straightforward terminology – 'under the direction of the' or similar wording (ie 'subject to the direction of').

Cowper's intention was to increase government control over police, which he made clear to the NSW Legislative Assembly:

> The great objection to the present police force was that materials were inefficient, and were not suitable for the object for which they were intended, *whilst the Government had no power of control over the force'*.[203]

He made reference to complaints made to him about police activities about which 'he could do nothing' other than make representations. 'Yet that was not the position that a Minister of the Crown ought to occupy'.[204] He considered that 'At present the Government of the country has no means of making the force efficient and this bill was intended to give them the means of so doing'.

He claimed that the system he proposed was based on those 'which had been introduced into Ireland, into Victoria, into South Australia; and its beneficial operation had been witnessed in all of these countries'.[205] Cowper, whose contemporary political enemies referred to him as 'Slippery Charlie'[206] may well have been adopting those 'slippery' skills in this assertion as his assessment of the state of the law in Victoria, South Australia and

[200] Ie, Water Police.
[201] This was made confirmed by the *Aid to Sydney Police and City Fund Act 1842* (NSW) s 3 and *Police Rate Sydney and Melbourne Act 1847* (NSW) Preamble, which both explicitly stated that 'it is expedient to retain in the hands of the Executive Government the management of the said Police Force'.
[202] A ministerial office in the 19th and 20th century in NSW usually held in the 19th century by the State Premier.
[203] *Sydney Morning Herald*, November 28 1861 page 3 (emphasis added).
[204] Ibid.
[205] Ibid.
[206] Stephen Dando-Collins, *Sir Henry Parkes, The Australian Colossus* (Knopf, 2013) ch 4, Loc 698 (Kindle Edition).

Ireland[207] was either unfounded or deceptive, as none then had a provision of the type he was introducing.

Despite this questionable foundation, this formulation became the dominant form for police-government relations throughout Australia being quickly adopted in Queensland[208] and Victoria;[209] and became the formulation for the initial version of the Commonwealth Police[210], the Commonwealth Peace Officers from 1934[211] and the ACT police.[212] It was also adopted and remains the formulation operating in New South Wales,[213] Tasmania,[214] South Australia[215] and the Northern Territory.[216] This formulation was also adopted in Canada and some of its provinces.[217]

Despite the use of the Cowper formulation in other jurisdictions, little can be located as to the reasoning why it was adopted.[218] The exception, however, is South Australia, the last of the Australian States to adopt a Cowper model in 1972.

Those changes occurred as a result of the one of difficulties that occurred in the relationship between government and Police Commissioners in that State in the 1970's. Those difficulties led to three inquiries,[219] the termination of services of a Police Commissioner[220] and the 1972 legislative changes.

The immediate difficulty was what Waller has described as the 'open disagreement' between the ALP government, led by Don Dunstan, and the then Police Commissioner, Brigadier McKenna, over police action in relation to a Vietnam Moratorium march in September

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[207] In Ireland, the *Constabulary (Ireland) Act 1836* (UK), which established the Royal Irish Constabulary (RIS), contained no provision equivalent to the provision that was included in the new New South Wales Act. It did contain extensive powers in the Lord Lieutenant of Ireland relating to all aspects of the hiring, dismissal and rulemaking regarding the RIC, and that force has been regarded as being subject to the direct control of the government. Vicky Conway, *Policing Twentieth Century Ireland, A History of an Garda Siochana,* (Routledge, 2014) 12-14; Seamus Breathnach, *The Irish Police* (Anvil, 1974) 36-39. Nonetheless, as that control was achieved without a direction provision of the type included in the 1865, Ireland cannot be regarded as being a precedent for the Cowper formulation.

[208] *Police Act 1863* (Qld) s 3; *Police Act 1937* (Qld) s 6(1).

[209] *Police Regulation Act 1873* (Vic) s 5; *Police Regulation Act 1890* (Vic) s 5; *Police Regulation Act 1915* (Vic) s 5; *Police Regulation Act 1928* (Vic) s 5; *Police Regulation Act 1958* (Vic) s 5.

[210] *Commonwealth Police Force Order 1917* cl 31 (see Commonwealth Gazette 12 December 1917 (No 215)).

[211] *Police Officers Regulations 1928* reg 3, added in 1934 by Stat Rule 53 of 1934 reg 2.

[212] *Police Ordinance 1927* (Cth) s 5(3).

[213] *Police Regulation Act 1899* (NSW) s 4(2) which operated until 1935. From that year until 1990, s 4(1) (*Police Regulation (Amendment) Act 1935* (NSW) s 2). From 1990 *Police Service Act 1990* (NSW) s 8(1).

[214] *Police Regulation Act 1898* (Tas) s 8; *Police Service Act 2003* (Tas) s 7(1).

[215] *Police Regulation Act* 1952 (SA) s 21(1) as amended by *Police Regulation Act Amendment Act 1972* (SA) s 3(a); *Police Act* 1998 (SA) s 6.

[216] *Police and Police Offences Ordinance 1923* (NT) s 8(2); *Police Administration Act 1979* (NT) s 14(2).

[217] *Royal Canadian Mounted Police Act* RSC 1985, c R-10, s 5(1); *Police Act* RSA 2000, c P-17, s 2; *Police Act* RSBC 1996, c 367, s 7; *Royal Newfoundland Constabulary Act* SNL 1992, c R-17, s 4(1); *Police Services Act* RSO 1990, c P 15, s 17(2); *Police Act* 2006 c.16, RSPEI 1988, P-11.1 s 6(2).

[218] And what indications there are can be misleading. For example, in Victoria in 1873 the Premier, James Francis advised the Parliament that the new Act, which introduced a Cowper provision into that colony for the first time, 'does not propose to make any material alteration in the general scope of the present law'. Victoria, *Parliamentary Debates,* Session 1873 Vol XVI 1134 (19 August 1873).

[219] The *Bright Report,* above n 32; South Australia, *Special Branch Security Records, Initial Report to the Honourable Donald Allan Dunstan QC LLB MP, Premier of the State of South Australia, by The Honourable Mr Acting Justice White (1977)* ('*The White Report*'); The *Mitchell Report,* above n 40.

[220] Commissioner Salisbury.

1970.[221] The *Police Regulation Act,* prior to the 1972 amendments, provided the government with no direction powers, the effect being, as Premier Dunstan told the Parliament on 17 September 1970 'The Government has no power to direct the Commissioner of Police in this matter … and over him we have no control'.[222]

The Premier had requested the Commissioner not to interfere with a protest march, which the Commissioner refused. In McKenna's view, to adopt the Premier's view would 'condone a flagrant breach of the law'.[223]

The effect of the amendments, in Waller's view, was to 'enact so recently and clearly legislation expressing the subordination of the police to the executive government'.[224] This was clearly the government's intent. The Attorney General (and later State Chief Justice) Len King opened his second reading speech with the unequivocal, 'The purpose of this Bill is to vest the ultimate responsibility for the control of the Police Force in Executive Government'.[225]

This Bill was based on the 1970 report from Justice Bright in both form and concept.[226] Bright, after examining the status of the law in South Australia considered that the police force then had 'some independence of operation' but recommended amendments so that the Commissioner 'should be ultimately responsible, like his colleagues in many parts of Australasia, to the executive government'.[227] Bright also states that 'the Commissioner of Police should retain the independence of action appropriate to his high office'.[228] However, it seems that this independence was to be based on convention, rather than law, given the amendment that Bright proposed and his other recommendation: 'A convention should be established … with regard to the limits within which any such written direction may be properly be given'.[229]

Table 3.1 lists the various Cowper that have operated in Australian jurisdictions. The most significant difference between the provisions concerns the holder of the power. In most instances, the relevant Minister holds the direction power. However, in Victoria that power, between 1873 and 2014, was held by the Governor in Council.[230] And in South Australia,

[221] Waller, above n 55, 254.
[222] South Australia, *Parliamentary Debates,* 17 September 1970, 1454.
[223] Waller, above n 55, 254.
[224] Ibid 255.
[225] South Australia, *Parliamentary Debates,* 14 September 1972, 3828.
[226] Ibid. *Bright Report,* above n 32, 82. Bright's recommendation was to adopt wording closer to that used in NSW, providing direction power to the Minister, but accepted that if a more formal process was considered desirable, 'a direction by the Governor in Executive Council may be adopted, as in Victoria'.
[227] *Bright Report,* above n 32, 82. The reference to 'colleagues' seems to be a reference to the direction powers then in some other states, such as New South Wales, Queensland and Victoria.
[228] Ibid.
[229] *Bright Report,* above n 32, 82.
[230] In Victoria, the 'Governor in Council' means 'the Governor with the advice of the Executive Council'. *Interpretation of Legislation Act 1984* (Vic) s 38.

between 1972 and 1998, the power was held by the Governor.[231] The location of the power in the Governor, whether advised by the Executive Council or not, necessitates a level of formality and transparency in the process followed; and the effect of transparency as a form of limitation on the exercise of the power preventing or limiting its misuse is discussed in Chapter 12.3.

Table 3.1 – Cowper Provisions in Australia

Jurisdiction	Years	Wording	Holder of Power		Statutory direction limitation	
			Mistr	Gov[232]	Form	Extent
NSW	1862-1899	**Inspector General** shall under the **direction** of the **Colonial Secretary** be charged with the superintendence of the Police Force of the Colony[233]			No	No
	1899-1935	**Inspector General** shall, under the **direction** of the **Colonial Secretary**, be charged with the superintendence of the police force of New South Wales[234]			No	No
	1935-1990	**Commissioner of Police** who shall under the **direction** of the **Minister** be charged with the superintendence of the police force of New South Wales[235]			No	No
	1990-date	**Commissioner** is, subject to the **direction** of the **Minister**, responsible for the management and control of the NSW Police Force[236]			No	No
Qld	1863-1937	**Commissioner of Police** shall under the **direction** of the **Colonial Secretary** be charged with the superintendence of the Police Force of the whole colony including the Native Police Force[237]			No	No

[231] *Police Regulation Act 1952* (SA) s 21(1) as amended by *Police Regulation Amendment Act 1972* (SA) s 3(a).
[232] Incudes Governor, Governor in Council or Administrator.
[233] *Police Regulation Act 1862* (NSW) s 3.
[234] *Police Regulation Act 1899* (NSW) s 4(2).
[235] Ibid s 4(1) as amended by *Police Regulation (Amendment) Act 1935* (NSW) s 2.
[236] *Police Service Act 1990* (NSW) s 8(1). Initially s 8 referred to the 'Police Service'.
[237] *Police Act 1863* (Qld) s 3.

	1937-1990	**Commissioner of Police** who shall, subject to the **direction** of the **Minister**, be charged with the superintendence of the Police Force of Queensland[238]			No	No
Victoria	1873-2014	**Chief Commissioner** shall have subject to the **directions** of the **Governor in Council**, the superintendence, and control of the force[239]			Yes – arising from the formal requirements for the Executive Council.[240]	No
Tasmania	1898-2003	**Commissioner of Police** who shall, under the **direction** of the **Minister**, and subject to the provisions of this Act, have the control and superintendence of the Police Force of Tasmania[241]			No	No
	2003-date	The **Commissioner**, under the **direction** of the **Minister**, is responsible for the efficient effective and economic management and superintendence of the Police Service[242]			No	No
SA	1972-1998	Subject to this Act and the **directions** of the **Governor**, the **Commissioner** shall have the control and management of the police force[243]			Yes - Tabled - Gazetted	No
	1998-date	Subject to this Act and any **written directions** of the **Minister**, the **Commissioner** is responsible for the control and management of the SA Police[244]			Yes - Tabled - Gazetted - In writing[245]	Yes Directions cannot relate to the appointment, transfer, remuneration or termination of a particular person.[246]

[238] *Police Act 1937* (Qld) s 6.
[239] *Police Regulation Act 1873* (Vic) s 5; *Police Regulation Act 1890* (Vic) s 5; *Police Regulation Act 1915* (Vic) s 5; *Police Regulation Act 1928* (Vic) s 5; *Police Regulation Act 1958* (Vic) s 5.
[240] Ibid. There is no current publically available Executive Council Handbook regarding the Victorian Executive Council. However, as is pointed out on the Governor of Victoria's website 'Action by the Governor in Council is initiated by written recommendation and supporting material from the Minister responsible for the legislation, recommending the proposed course of action'. https://www.governor.vic.gov.au/victorias-governor/government-in-australia. The processes for the Victorian Executive Council are similar to those of the Western Australian Executive Council as detailed in the Executive Council Guidelines located in the website of the Western Australia Department of Premier and Cabinet. https://www.dpc.wa.gov.au/RoleOfGovernment/Pages/ExecutiveCouncilGuidelinesHTMLversion.aspx. These processes reflect the long established practices of the Victorian Executive Council as determined by the author who was appointed as a Clerk of the Victorian Executive Council on 8 April 2003.
[241] *Police Regulation Act 1898* (Tas) s 8.
[242] *Police Service Act 2003* (Tas) s 7(1).
[243] *Police Regulation Act* 1952 (SA) s 21(1).
[244] *Police Act* 1998 (SA) s 6.
[245] Ibid ss 6 & 8.
[246] Ibid s 7.

N Territory	1963-1979	The **Commissioner** shall exercise and perform all powers and functions that belong to his office in accordance with such **instructions** as are given to him by the **Administrator.**[247]			No	No
	1979-date	The **Commissioner** shall exercise and perform all the powers and functions of his office in accordance with the **directions in writing**, if any, given by the **Minister**[248]			Yes - In writing.[249]	No
ACT	1927-1979	The Director of the Investigations Branch of the Commonwealth Attorney-General's Department shall be the **Chief Officer of Police** and be subject to the **direction** of the **Attorney-General**[250]			No	No
C'th						
C'th Police (version 1)	1917-1919	**Commissioner** of the Commonwealth Police Force … shall, under the **direction** of the **Attorney-General**, be charged with the superintendence and direction of the Police Force[251]			No	No
Peace Officers	1934-1960	The **Superintending Peace Officer** shall be subject to the **direction** of the **Attorney-General**[252]			No	No

Table 3.1 includes any form requirements associated with Cowper provisions. Initially, there were no formal limitations on directions to Police Commissioners. However, the requirement in some jurisdictions for the direction function to be gubernatorial rather than ministerial (the Governor - South Australia 1972-1998; the Governor in Council - Victoria 1873-2014; Administrator - Northern Territory 1963-1979) necessitated a more formal and documented process than an unrestricted direction power exercised by a Minister.

In jurisdictions with Cowper ministerial direction powers (NSW, Queensland until 1990, Tasmania, South Australia from 1998 and the Northern Territory from 1979) the form requirements have varied. In New South Wales, Queensland, Tasmania (under both of its variations of the Cowper model (1898 and 2003)), the ACT Force and the two federal

[247] *Police and Police Offences Ordinance* 1923 (NT) s 8(2) as added by *Police and Police Offices Ordinance 1963*, s 2.
[248] *Police Administration Act 1978* (NT) s 14(2). This Act commenced 1 August 1979. *Police Administration Act* (NT) Endnt 2.
[249] Ibid.
[250] *Police Ordinance 1927* (Cth) s 5(3).
[251] *Commonwealth Police Force Order 1917* cl 31 (see Commonwealth Gazette 12 December 1917 (No 215)).
[252] *Police Officers Regulations 1928* reg 3, added in 1934 by Stat Rule 53 of 1934 reg 2.

forces, there have been no form requirements. In those forces directions could be made orally (which can be a source of confusion when determining what directions have been given and whether they have been complied with) and there was no requirement that directions be publicised. The 1979 Northern Territory ministerial direction process, however, does, at least require directions to be written.

South Australia, however, under both its 1998 ministerial direction variation and its earlier 1972 Governor direction model recognised the need for transparency in the exercise of government directions. The 1972 model required that a copy of a direction be tabled in both Houses within six sitting days of the direction and be included in the South Australia Gazette within eight days. The 1998 model had both of those formal requirements as well as the requirement that the direction be in writing. Both of those obligations provide a level of transparency and certainty not present in the jurisdictions with no formal requirements. Moreover, the 1998 Act specifies a limited area that cannot be subject to direction 'in relation to the appointment, transfer, remuneration, discipline or termination of a particular person'. This indicates, adopting the maxim, *expressio unius est exclusio alterius*[253] that there are no other exclusions from the scope of directions.

Cowper provisions and the comparative meaning of 'Peel' and 'Cowper' provisions is discussed further in Chapter 5.

The third version is *Broad Direction – Other*. This covers statutory forms that allow broad direction over police forces, but do not have the essential requirements of either the Peel or Cowper models. This version has been used twice in have been used in Australia: the use of direct local government control in early Tasmania (between 1857 and 1898);[254] and the second type of Commonwealth Police between 1960 and 1979 which had the Commissioner 'responsible' to the Secretary of the Commonwealth Attorney-General's Department 'for the general administration and efficient operation of the Police Force.'[255]

[253] An express reference to one matter indicates that other matters are excluded. See the discussion of this principle in Pearce & Geddes, above n 146, 178-181.
[254] *Municipal Police Act 1857* (Tas) s 6; *Police Regulation Act 1865* (Tas) ss 2 & 22. The local government control over Tasmanian police was ended by the *Police Regulation Act 1898* (Tas), s 8.
[255] *Commonwealth Police Regulations 1960* (Cth) reg 6. These regulations were made pursuant to the *Commonwealth Police Act 1957* (Cth) which did not deal with the issue of the control of Commissioner of the force.

3.2.3 – Limited Direction Type

The third type is the ***Limited Direction Type.*** Three different versions of this type operate in Australia, each of which have the common elements of an express power of government direction subject to considerable limitations as to the extent of that direction power.[256]

There are also, in each version, form requirements. In each, the Minister must confer with the Police Commissioner prior to giving a direction;[257] directions must be in writing,[258] and be made public, although the nature of the publicity requirements differs.

The first of these limited direction types was adopted by the Commonwealth for the Australian Federal Police (AFP) in 1979. The AFP replaced the Commonwealth Police and took over ACT policing. The other two forms of limited direction types were those introduced for the Queensland Police in 1990 and the Victorian Police in 2014.

Each was adopted to fulfil the recommendations of an inquiry report. The AFP was based on recommendations of Sir Robert Mark,[259] the former London Metropolitan Police Commissioner. Mark had publicly expressed very strong views regarding both police independence[260] and his very short, 28 page report, completed in little over a month,[261] not surprisingly, recommended greater police independence, limiting the ability of government to direct and control police force to nonoperational issues.

His report was the basis for the *Australian Federal Police Act 1979* (Cth)[262] which repealed the *Commonwealth Police Act*.[263] The 1979 Act created a new force, the AFP, to replace both the Commonwealth Police and the Australian Capital Territory Police.[264]

In this model the AFP Commissioner has the 'general administration of, and control of the operations of' the AFP,[265] but is subject to the directions provided by the Minister. However, the Minister's power of direction does not cover the full scope of the Commissioner's functions as ministerial directions can only be 'with respect to the general policy to be

[256] For the purpose of this division, the limitation introduced in South Australia from 1998 which prevents ministerial directions regarding the 'appointment, transfer, remuneration or termination of a particular person' is not regarded as bringing that example into the 'Other' category in view of the relatively minor limitation that that restriction imposes. See *Police Act 1998* (SA) s 7.
[257] *Australian* Federal *Police Act 1979* (Cth) s 37(2); *Police Service Administration Act 1990* (Qld) s 4.6(2); *Victoria Police Act 2013* (Vic) s 10(1).
[258] Ibid.
[259] The *Mark Report*, above n 34.
[260] Sir Robert Mark, *In the Office of Constable* (Collins, 1978); Mark (1977) above n 3.
[261] The terms of reference were issued on 1 March 1978 and Sir Robert signed off on the report on 6 April 1978. *Mark Report,* above n 34*,* 1 and 30.
[262] Parliament of the Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 10 May 1979, The Hon John McLeay MP.
[263] *Australian Federal Police Act 1979* (Cth) s 3.
[264] Explanatory Memorandum and Notes on Clauses, Australian Federal Police Bill 1979 (Cth) 2.
[265] *Australian Federal Police Act 1979* (Cth) s 37(1). The direction provision was s 13 when the Act was originally passed. The current s37 is substantially the same as the original s 13.

pursued in relation to the performance of the functions' of the AFP.[266] Moreover, ministerial directions must be in writing[267] and cannot be given without the Minister first consulting with the Commissioner.[268] The Commissioner is compelled to comply with such directions. [269]

The second, Queensland model, enacted in the *Police Service Administration Act 1990* (Qld) was based on the recommendations of the Fitzgerald Royal Commission.[270][271] Fitzgerald made a number of recommendations regarding corruption in Queensland and the management and control of the Queensland Police in particular.

The most significant change to the police-governor relationship brought about by the 1990 Act is its alteration to the ministerial direction power. Section 4.6(2) allows the Minister, after receiving advice from the Police Commissioner, to give directions, but only in relation to a limited range of subjects: the overall administration of the Police Service, the policy and priorities to be followed and the number and deployment of police and the number and location of police stations. The Commissioner is required to comply with those directions.[272] The Commissioner is also required, by s 4.7, to keep a register of those directions and to annually provide a copy of that register to the Crime and Corruption Commission (CCC),[273] which then provides it to the chair of the Parliamentary Crime and Corruption Committee who is required to table those directions.

The other form requirement in Queensland is that any ministerial directions must be in writing.[274] Legal advice provided by Kerry Copley QC to the then Chair of the Criminal Justice Commission in 1992, Sir Max Bingham QC, on the provision's correct interpretation, was the Minister could also provide oral directions and that there was no obligation to include such oral directions in the register that the Police Commissioner is required to maintain by s 4.7. Copley wrote:

> If the Commissioner has given directions orally to[275] the Minister concerning the matters referred to in section 4.6(2), those oral directions or a written record note or memorandum of them are not required to be recorded in the register kept pursuant to section 4.7(1).[276]

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[266] Ibid s 37(2).
[267] Ibid.
[268] Ibid.
[269] Ibid s 37(4).
[270] *The Fitzgerald Report*, above n 36.
[271] Queensland, *Parliamentary Debates,* Legislative Assembly, 20 March 1990, 449 (The Hon T M Mackenroth MP).
[272] *Police Service Administration Act 1990* (Qld) s 4.6(2)
[273] When the *Police Service Administration Act 1990* (Qld) was enacted the obligation was to provide the certified copy of the register to the Criminal Justice Commission (CJC), but s 4.7 has been amended to replace the reference to the CJC with references to its successors, the Crime and Misconduct Commission and subsequently the Crime and Corruption Commission.
[274] *Police Service Administration Act 1990* (Qld) s 4.6(2).
[275] Although Copley used the word 'to', it seems that he intended to use the word 'by' as s 4.6(2) concerns directions made by the Police Minister to the Police Commissioner, and as there is no basis why, either pursuant to the statutory regime found in the *Police Service Administration Act 1990* (Qld) or otherwise, the Police Minister should be subject to directions from the Police Commissioner.

Although the then chair of the Criminal Justice Commission seems to have accepted that view[277] it is difficult to see how the Minister could have an oral right of direction that compelled the Commissioner to comply. Section 4.6(2) of the *Police Service Administration Act* empowers the Minister to provide the Commissioner with a written direction in relation to a relatively limited range of policy/non-operational matters and s 4.6(3) obliges the Commissioner to comply with such directions. There is no equivalent provision allowing oral directions or obliging the Commissioner to comply with such directions. Any implied ability to provide compelling oral directions (apparently on any subject) would seem to undermine and render pointless the statutory written direction power regarding a limited range of subjects as well as the transparency provision (s 4.7) that applies only to written directions. Again this seems another instance of the relevance and applicability of the maxim *expressio unius est exclusio alterius*[278] or the similar and related maxim *expressum facit cessare tacitum.*[279] The latter maxim was explained by Dixon J in *R v Wallis; Ex parte Employers Association of Wool Selling Brokers*[280] when he said:

> An enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely that the same matter is not to be done according to some other course.[281]

Dixon used the word 'usually' as the maxim does not apply where the legislative intention is apparent that the tacit or unspoken method is still to be available.[282]

However, given the lack of relevance that the express process will have if a tacit process is available, the maxim indicates that the presence of an express power of written direction regarding a limited range of subject matters demonstrates a legislative intention as to both the only means of direction and the extent to which a Police Commissioner can be made subject to direction.

The last and most significant of the limited direction models was included in the *Victoria Police Act 2013* (Vic) which commenced operation from 1 July 2014.[283] This Act followed the State Services Authority's inquiry into Victoria Police, conducted by Jack Rush QC that

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[276] Kerry Copley QC, *Opinion Re: Police Service Administration Act 1990, Sections 4.6 and 4.7 Ex parte Parliamentary Justice Committee*, 5 March 1992, 3 - which can be found in *Report of the Acting Commissioner of the Police Service being a certified copy of the register of all reports and recommendations made to the former Minister for Police, the Honourable T.M. Mackenroth, MLA and his successor the Honourable N.G. Warburton, MLA and all directions given in writing to the Commissioner along with the report of the Chairman of the Criminal Justice Commission* tabled in the Queensland Legislative Assembly, 19 March 1992 ('*The 1992 certified copy*'): http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/1992/4692T1514.pdf.
[277] Judging by Sir Max's letter to the Queensland Premier, Peter Beattie MLA 18 February 1992 which can also be found in the *1992 certified copy*, above n 276.
[278] 'An express reference to one matter indicates that other matters are excluded'. Pearce & Geddes, above n 146, 178 and Gray, above n 176, 55.
[279] 'What is expressly made (provided for) excludes what is tacit' - Gray, above n 176, 55. See also Pearce and Geddes, above n 146, 181-183 and Bird, above n 23, 142.
[280] (1949) 78 CLR 529.
[281] Ibid 550.
[282] As was found by Gibbs CJ in *State Bank of New South Wales v Commonwealth Savings* Bank (1984) 154 CLR 579.
[283] *Victoria Police Act 2013* (Vic) s 2 & Endnote 1. Victoria, *Government Gazette*, Special Gazette No. 200, 24 June 2014, 2.

reported in 2011.[284] This report (the Rush Report) was extensive in its coverage, if not its length (106 pages); it spent only a few pages examining the constitutional relationship between the police and government.[285] Nonetheless, Rush recommended that a new Act was required to 'articulate' the relationship between government and police providing 'a power for the Minister to direct regarding policy the Chief Commissioner on matters of policy, qualified so as to safeguard the independence of the Chief Commissioner in relation to operational matters'.[286]

The Government's response to the Rush Report was to accept the bulk of his recommendations, considering that the 'safeguarding of operational independence of the Victoria Police is a fundamental principle' without indicating the source of that principle or why it needed to be codified.[287]

The resulting legislation allows the responsible Minister to give the Chief Commissioner directions in writing, but only after consulting with the Chief Commissioner, and only in relation to policy and priorities to be followed.[288] Moreover, these directions cannot be given in relation to a number of named areas including:

- the preservation of peace and the protections of life and property in relation to any person or group of persons.
- the enforcement of the law in relation to any person or group of persons.
- the investigation or prosecution of offences in relation to any person or group of persons.[289]

It is uncertain whether the phrase 'group of persons' covers large groups such as all Victorians.[290]

The Act also provides that directions can be made in some areas, but subject to quite extensive form requirements. That is, first, in relation to a number of apparently banal areas such as:

- the organisational structure of Victoria Police;
- the allocation or deployment of police officers;
- training, education and professional development programs within Victoria Police; and

[284] *The Rush Report*.
[285] Ibid 41-44.
[286] Ibid 44, Recommendation 13.
[287] Victoria, *Government response to the Inquiry into the command, management and functions of the senior structure of Victoria Police*, March 2012.
[288] *Victoria Police Act 2013* (Vic) s 10(1).
[289] Ibid s 10(2).
[290] This issue is discussed in Chapter 9.

- the content of any internal grievance-resolution procedures[291] -

directions can be given, but only if a report has previously been made by one of limited group of integrity type types of bodies,[292] and the Minister considers the police have not adequately responded to that report.[293]

Second, directions must be in writing[294] and be publicised. That is, the Minister must cause a copy of a direction to be placed in the Government Gazette[295] and the Chief Commissioner must place a copy of any directions currently in force on the police's internet site.[296] The Act does not, however, include any time requirement for either of these publicity obligations, or specify the consequences of failure to comply with this obligation.

Whether the Chief Commissioner is obliged to comply with a ministerial direction that complies with the requirements of s10 also seems an open question. Unlike the other two forces subject to limited direction provisions, there is no statutory obligations to comply. [297] This is odd as s 11(1) allows the Minister to request material from the police force and s 11(2) is quite specific when its states that the Chief Commissioner 'must comply with a request under subsection (1).' It appears, at least, arguable that inclusion of the s11(2) obligation indicates that the parliamentary intention was that the Chief Commissioner's obligations to be only those specified in the Act, and the omission to include such an obligation in s 10 indicates that there is no requirement for the Chief Commissioner to comply with a ministerial direction.

The effect of the limited direction provisions is discussed in Chapter 9.

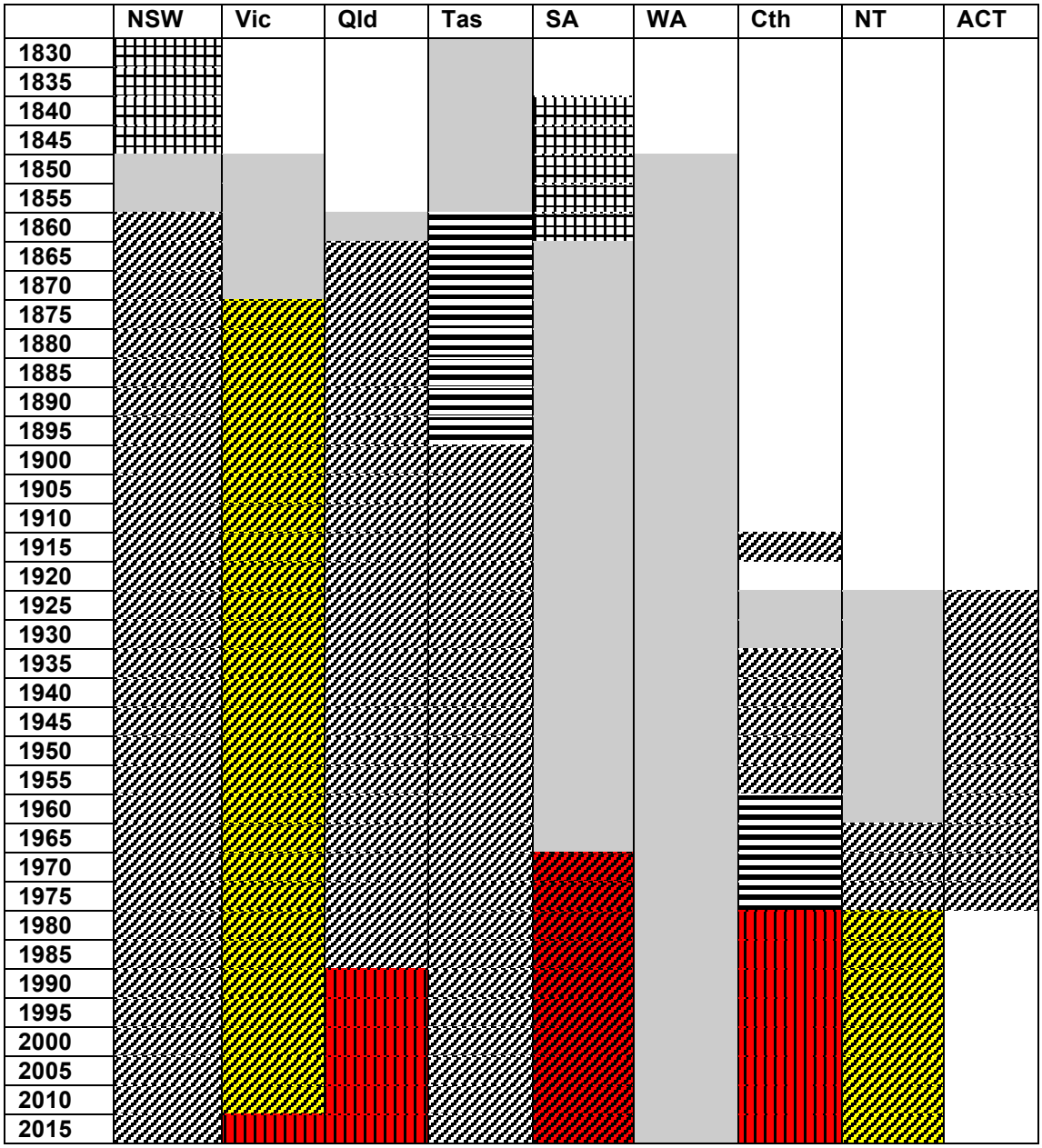
3.3 - Comparison

Table 3.2 is a diagrammatic representation of the statutory police-government relationships in Australia since 1830 broken down into half decades. It shows the five different types or sub-types of police–government relationship and the colour overlay of either red of yellow, demonstrates form requirements if present. It shows that the traditional legal relationship for the police government relationship in all jurisdictions other than Western Australia is government having the ability to directly control the police. It also demonstrates that form

[291] Ibid s 10(3).
[292] Including the Independent Broad-based Anti-corruption Commission (IBAC), the Auditor-General, the coroner, a parliamentary committee and a Royal Commissions
[293] *Victoria Police Act 2013* (Vic) ss10(3) & (4).
[294] Ibid s 10(1).
[295] Ibid s 10(6).
[296] Ibid s 10(7).
[297] *Australian Federal Police Act 1979* (Cth) s 37(4) and *Police Service Administration Act 1990* (Qld) s 4.6(3).

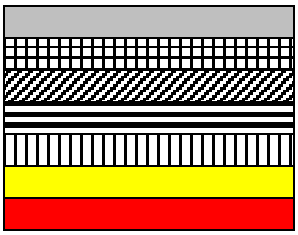
requirements (as demonstrated by colour overlay of either red or yellow) are largely, with the exception of Victoria, a late 20th century device and also one that still has not impacted on NSW or Tasmania.

Table 3.2 - Comparative Representation of the history of direct police-government models in Australia



Legend

No Direction Power
Broad Direction Power - Peel
Broad Direction Power - Cooper
Broad Direction Power - Other
Limited Direction Power
Form Requirement - Writing
Form Requirement – Writing and Publicity Requirements



4 – No Direction Power –

4.1 – Implied Direction Power

Where there is no express direction power the issue of concern is whether a direction power can be implied. This issue is relevant to Western Australia, the policing legislation of which has never contained an express direction power.[298] It is also relevant to the situation that formerly applied in:

- New South Wales between 1850 and 1862[299]
- Victoria between 1851 and 1873[300]
- Tasmania between 1833 and 1865[301]
- Northern Territory between 1923 and 1963[302] and
- South Australia between 1863 and 1972.[303]

Little can be located of any understandings in those jurisdictions regarding the effect of the lack of such a direction provision, other than the very pointed observations of New South Wales Premier Cowper in 1861 and of the South Australian Premier Dunstan in 1970. Both were of the view that in the absence of a provision which allowed the government to direct the Police Commissioner, in the words of Premier Dunstan: 'over him we have no control.'[304] However Plehwe, in his assessment of the constitutional status of Australian Police Forces, suggested that a Minister has, in addition to any statutory power to direct a police force, an additional '*general* authority'[305] to do so. Unfortunately Plehwe did not expand on or explain that observation.

It may well be that there was belief, regardless of the statutory arrangements in place, that Ministers held a *de facto*, if not *de jure*, ability to direct police in operational matters. Such a belief can be seen in the 19th century at least, in an article in the Melbourne *Argus* of 29 June 1880 entitled 'The Ministry and the Kellys'. The article details the arrangements between the Victorian Chief Secretary Robert Ramsay and the police force regarding the capture of the Kelly Gang. In Victoria, as noted earlier, a Cowper provision was in place, but

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[298] *Police Act 1892* (WA).
[299] The policing legislation of the NSW did not contain a government direction provision from the enactment of the *Colonial Police Act 1850* (NSW) until that Act was repealed and replaced by the *Police Regulation Act 1862* (NSW).
[300] In 1851 Victoria separated from NSW and the policing legislation operating until the enactment of the *Police Regulation Act 1873* (Vic) did not include a government direction provision.
[301] The policing legislation in Tasmania prior to the enactment of the *Police Regulation Act 1865* (Tas) did not include a government direction provision.
[302] The policing legislation of the Northern Territory did not contain a government direction provision between 1923 when the *Police and Police Ordinance 1923* (NT) was enacted until that ordinance was amended in 1963 by the *Police and Police Offences Ordinance 1963* (NT).
[303] The policing legislation in South Australia commencing with the enactment of the *Police Act 1863* (SA) until the enactment of the *Police Regulation Act Amendment Act 1972* (SA) did not include a government direction provision.
[304] Quoted in Waller, above n 55, 254.
[305] Plehwe (1973), above n 56, 274 (emphasis original).

the direction power was in the hands of the Governor in Council, rather than the Minister.[306] Nonetheless, according to the article, Minister Ramsay issued orders to operational police, bypassing the Chief Commissioner of Police, Captain Standish, to direct the operation. This included the order to Superintendent Hare that 'the departmental routine must be set aside altogether, and that he was at liberty to pick his men and make whatever arrangements he thought proper without interference from Melbourne, and that his expenses were not to be questioned by the department'. Minister Ramsay's operational involvement also included making suggestions for the use of cannon and electric light against the Kellys, ordering Standish to 'proceed by special train with medical assistance' to Glenrowan and sending Superintendent Chomley to Queensland to 'obtain black trackers'.[307]

Such a belief of inherent ministerial authority may also have been present in Western Australia (despite the lack of any direction provision) judging by an interrelationship between the Commonwealth and Western Australian governments in 1924. Prime Minister Bruce described an incident to the House of Representatives, as one of the incidents that prompted the creation of the Commonwealth Peace Officers:

> Towards the end of last year, when a very serious position had been brought about in many of the States by a shipping upheaval, Commonwealth officers in Western Australia were prevented from carrying out their function in that State. Certain Customs officers who wished to board a vessel on its arrival in Australia at Fremantle were impeded and obstructed in trying to reach the launch that was to take them to it. They then appealed to the local State police, who said that the matter must be referred to police head-quarters in Perth, and on the matter being so referred the reply came back that the police were not authorized to afford any protection to the federal officers.[308]

Bruce considered that this lack of assistance was as a result of a government decision imposed on police, rather than a police decision as he made clear when he dispatched a telegram to the WA Premier on 2 December 1924 seeking the Premier's 'immediate assurance that the necessary protection assistance will be afforded.'[309]

Whatever the position in 1925, it seems clear from Western Australian Hansard, that by 1988, that the ministerial and parliamentary view had become that there was no ability (or need) to direct the police. On 24 May 1988, the leader of the National Party moved a motion that included:

> That this House –

[306] *Police Regulation Act 1873* (Vic) s 5.
[307] 'The Ministry and the Kellys', *The Argus,* 29 June 1880, 7.
[308] Commonwealth, *Parliamentary Debates,* House of Representatives, 28 August 1925, 1875 (The Hon S M Bruce MP).
[309] Ibid 1876.

(4) instructs the Commissioner of Police that there shall be no attempt in the future by the police to intimidate the Press or inhibit its freedom.[310]

This element of the motion was rejected by both the government and the opposition[311] and prompted the response from the Minister for Police and Emergency Services: 'If we want to 'instruct' the Commissioner of Police, we will need to change the Police Act'.[312]

Nonetheless, the then Premier (Peter Dowding SC) may have taken a slightly, but significantly, different view when he said: 'The central issue is whether this country wants a Police Force which is at the beck and call of politicians or whether it wants a Police Force which has *operational independence'*.[313]

By limiting the independence of the Police Commissioner to 'operational' matters (a vague concept that will be discussed later)[314] the Premier implied or indicated that the Police Commissioner can be subject to ministerial directions in relations to non-operational matters.

This view seems to have been reinforced by a later WA Premier, Dr Gallop, in 2004 when he told the WA Legislative Assembly: 'The Police Service is in a different position from other mainstream pubic services in that it has such an important job to do in our society that we give it operational independence'.[315]

Leaving the questionable logic of this proposition to one side (ie, it is such an important job that government exercises no control over what they do), Dr Gallop's view indicates that *non-operational* matters seem to be subject to government direction.

These views also seem supported by the views of a recent WA Minister for Police, Liza Harvey. She told the WA Legislative Assembly on 24 November 2015 that 'it would be improper of me to direct the Commissioner as to where he should put any of his resources'.[316] That statement is open to the interpretation that:

- it would be proper for her to direct the Commissioner in relation to other matters; and
- the restriction on making of directions is not due to a lack of power to do so, but one of propriety, ethics or convention.

This view of government considering that it has the power to direct police is also supported by the observations of a former WA Police Commissioner who told ABC Stateline in 2004 of:

[310] Western Australia, *Parliamentary Debates,* Legislative Assembly, 24 May 1988 273 (H J Cowan MLA, Leader of the National Party).
[311] Ibid 277 (The Hon I F Taylor MLA, Minister for Police and Emergency Services) & 280 (B J MacKinnon MLA, Leader of the Opposition).
[312] Ibid 277.
[313] Ibid 287 (emphasis added).
[314] Chapter 8.4.
[315] Western Australia, *Parliamentary Debates,* Legislative Assembly, 26 October 2004, 7256.
[316] Western Australia, *Parliamentary Debates,* Legislative Assembly, 24 November 1988, 273.

‘”his sometimes stormy tenure” and his less than satisfactory relationship with his Police Minister “over where the boundaries are in terms of whose responsibility it is for what”’.[317]

A broader view of police independence, however has been indicated by the by the current WA Police Minister[318] who regards the Police Commissioner as ‘an independent statutory office’.[319]

Whatever the ministerial view has been as to the availability of a power to direct, it is still necessary to identify a legal basis for government to issue directions to a Police Commissioner where there is no express statutory power to direct.

While the courts have not addressed this issue in the Western Australian police force context, there is, at least, some basis to consider that that force is subject to ministerial direction. That conclusion can be derived from two sources, although neither can be considered as anywhere close to being conclusive.

The first is a series of High Court decisions and judicial observations regarding the obligations of statutory power holders to consider and/or be bound by ministerial policies and directives. These range from the view of Evatt J, in 1931 in *R v Mahoney*,[320] that a licencing officer was ‘not debarred from considering the existence of such a policy’ and ‘he might pay some regard to the preference scheme favoured by the Government’, to the much more robust views expressed by Windeyer J in 1965 in *R v Anderson; Ex parte Ipec-Air Pty Ltd,*[321] Barwick CJ and Murphy J in 1977 in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*[322] and Barwick CJ and Gibbs J[323]in *Salemi v Mackellar (No 2).*[324]

Windeyer J considered that decision makers not only could or even should consider government policies and directives, but that they were bound by them, so long as they were lawful. This can be seen from the following blunt observations from his judgment:

> I think that the only consideration by which the Director-General could properly have been guided was the policy of the Government.[325]

[317] Fleming, above n 83, 67. Fleming did not identify the police commissioner, but it appears to have been Barry Matthews, WA Commissioner between 21 June 1999 till 20 June 2004 who advised WA Stateline in April 2004 of the need to ‘uphold the separation of powers between the Government and the service under his command’. ABC News, *Police chief won’t apologise for differences with Govt,* 24 April 2004.
[318] M H Roberts MLA.
[319] Western Australia, *Parliamentary Debates,* Legislative Assembly, 27 June 2017, 1651. Similar views were also expressed by the current shadow WA Police Minister, Peter Katsambanis MLA who considers the police commissioner as being ‘absolutely independent and making decisions that are in the best interests of Western Australians, not in the best interests of the government of the day’. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 June 2017, 1666.
[320] (1931) 46 CLR 131.
[321] (1965) 113 CLR 177.
[322] (1977) 139 CLR 54.
[323] And possibly Aickin J who seems to have agreed with the reasoning of Gibbs J.
[324] (1977) 137 CLR 396.
[325] (1965) 113 CLR 177, 205.

> [T]he Director-General must have regard to the policy of the Government and must exercise his functions accordingly.[326]

> [M]y opinion … does not mean that he is to grant or refuse permission according to some view of his own, giving weight or no weight as he chooses to the policy of the Crown. On the contrary, I think his duty is to obey all lawful directions of the Minister under whom he serves the Crown. The Minister is answerable to Parliament.[327]

Murphy J and Barwick CJ, both former Commonwealth Attorneys-General, seem to have shared Windeyer's views in 1977. In *Ansett*, Murphy J considered that:

> Unless the language of legislation (including delegated legislation) is unambiguously to the contrary, it should be interpreted consistently with the concept of responsible government. It would be inconsistent with that concept for the secretary or any officer of a department to exercise such a power or discretion contrary to the Minister's directions or policy (provided of course these are lawful). … The duty of those in a department is to carry out the lawful directions and policy of their Minister.[328]

In that case, and in *Salemi* Barwick CJ[329] and Gibbs J[330] expressed similar views.

These judicial observations seem based, judging on the views of Windeyer and Murphy JJ, on the doctrine of responsible government, a doctrine which forms an underlying theme in both the Commonwealth and State Constitutions. As in all Australian constitutions, much of the substance of the constitution is unstated, relying on implication or convention for its presence and operation. There is, for example, nothing in the Commonwealth or State Constitutions on a Minister's responsibility to the Parliament or the lower house or that Ministers must have the confidence of the majority of the lower house; but there is no doubt that both requirements operate in all Australian Constitutions. There are, however, some primary or formative elements of responsible government in the Commonwealth *Constitution*, such as s 64 (which Murphy J specifically relied on) which requires that Ministers 'administer … departments of state' and must be members of one of the two Houses of Parliament. Although neither of those formative elements can be located in the WA Constitution documents, history and practice in that State renders it difficult to deny the acceptance and operation of responsible government in that State.[331] But if there was any

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[326] Ibid.
[327] Ibid.
[328] (1977) 139 CLR 54, 87.
[329] In *Ansett,* Barwick CJ said (ibid 62):

> The Comptroller-General of Customs …. would be bound, in my opinion, to carry out the communicated policy of government in deciding whether or not to grant his consent to importation. The vesting of a discretion in an official in an area such as control of entry into Australia of goods or persons does not, in my opinion, give him a power to ignore or to depart from government policy in the exercise of this discretion in relation to such entry.

His views in *Salemi* are expressed at (1977) 137 CLR 396, 403.
[330] 'It will have been observed that the Minister has no power himself to grant an entry permit; that power, as I have already pointed out, is confided to "an officer". No doubt the Minister has the power to control the officers of his department in the execution of their duties, and could direct any such officer to grant an entry permit'. - (1977) 137 CLR 396, 416.
[331] See for example the discussion of the constitutional development of WA which involved responsible government in R D Lumb, *The Constitutions of the Australian States* (UQP, 4th edition, 1980) 38 and (UQP, 5th edition, 1991) 36.

uncertainty, the acknowledgement and recognition by the High Court of responsible government's essential part in the WA constitution, particularly in *Western Australia v Wilsmore,*[332] removes that concern. Accordingly, the principles derived from the Commonwealth Constitution relating to a ministerial power of direction derived from responsible government, would seem equally applicable to state Ministers and their ability to direct state officials in the exercise of their statutory discretions.

One issue with the views of these judges concerns the legal nature of what they were saying. That is, were they identifying an implied constitutional principle, in a not too dissimilar manner from the way in which the High Court later implied freedom of political communication from the text and structure of the Commonwealth Constitution?[333] In this instance, and in its purest form, it would be a principle that both empowers Ministers without statutory authorisation (and possibly contrary to statutory language) to issue directives to statutory bodies and obliges those bodies to comply with those directives. The argument would be, as Lewis described it:[334]

> the integration of the concept of executive power can only take place under the general oversight of ministers who are responsible to Parliament. In short, all executive action must conform to the Westminster model of government.

Or were they discussing a rebuttable statutory interpretation presumption – that provisions empowering officials to exercise powers will be subject to ministerial direction unless that function is expressly excluded. Just as courts will presume that legislation will not operate retrospectively or extra territorially unless there is a clear statutory intent,[335] the importance of responsible government to Australian systems of government leads to the presumption that provisions providing officials with statutory decision making power are subject to ministerial direction unless excluded by express words. The latter view seems to be that of Murphy J when he talked of statutory language being 'interpreted consistently' with responsible government: 'Unless the language of legislation (including delegated legislation) is unambiguously to the contrary'.[336]

As to the others, their position or positions are unclear.

In the context of the *Police Act* (WA), both options are available as there is nothing in the WA policing legislation which excludes the operation of a ministerial power of direction. The Act is simply silent on the question of government direction and control, a silence which

[332] (1982) 149 CLR 79.
[333] See for example *Lange v Commonwealth* (1992) 174 CLR 302.
[334] David Lewis, above n 99, 369.
[335] See for example *Jumbunna Coal Min NL v Victorian Coal Miners' Association* (1908) 6 CLR 309,363 (O'Connor J) and *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).
[336] (1977) 139 CLR 54, 87.

leaves both the constitutional principle and statutory interpretation open as possible bases for application of the ministerial direction power in relation to the WA Police.

There are, however, other difficulties with this issue in its application to WA police. The first is that the decisions in which the principle was discussed related to persons holding specific offices within departments who were statutorily empowered, by virtue of holding those offices, to make specific decisions. It might be argued that any obligation flowing from responsible government would be significantly different if the person holding the decision making position is in a statutory body having separate existence or legal personality from central government and departments, as in, for example, the Reserve Bank or the Western Australian Police Force. This distinction is not merely a question of differences in statutory structure. As Lewis points out:

> To insist upon the application of ministerial responsibility to a statutory authority whose statute has removed it from the departmental norm is a *non sequitur*. To do so obviates the benefits which Parliament sought to gain from utilizing this form of administration.[337]

Whether the four judges intended the principle identified to extend to such separate bodies is not entirely apparent. Only Murphy seems to have addressed this issue and his language specifically related to departments.

The other difficulty, of course, is that the other judges who specifically considered this issue (in 1965 and 1977) took a less robust view, generally favouring an entitlement to consider and even place considerable weight on a ministerial policy, but not be bound.[338] But that is not sufficient for there to be a ministerial power of direction. And of the judges who took a less robust view, Mason J rejected the concept in its entirety.[339]

Since *Ansett*, the High Court has not reviewed the issue, although, O'Connor has observed that subsequent court decisions 'have shown little enthusiasm for the view that decision makers nominated by statute are subject to ministerial direction'.[340]

The most significant subsequent High Court consideration of the issue seems to have been the observations of Mason and Wilson JJ in *Bread Manufacturers of NSW v Evans*,[341] which French CJ and Kiefel J endorsed in *CPCF v Minister for Immigration and Border Protection*.[342] These comments do little to clarify the position as they emphasise that:

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[337] David Lewis, above n 99, 371.
[338] See for example the views of Taylor and Owen JJ in *Ipec* (1965) 113 CLR 177, 200 and Aicken J in *Ansett* (1977) 139 CLR 54, 115-116.
[339] (1977) 139 CLR 54, 82.
[340] Pamela O'Connor, 'Knowing When to Say "Yes Minister": Ministerial Control of Discretions Vested in Officials' (1998) 5 *Australian Journal of Administrative Law* 168, 179.
[341] (1981) 180 CLR 404.
[342] (2015) 255 CLR, 514, 537 & 603.

> the problem is not one which admits of an answer having universal application. So much depends on a variety of considerations…. One must take into account the particular statutory function, the nature of the question to be decided, the character of the tribunal and the general drift of the statutory provisions in so far as they bear on the relationship between the tribunal and the responsible Minister, as well as the nature of the views expressed on behalf of the Government.[343]

Despite these uncertainties, the views expressed by Windeyer J, Barwick CJ, Murphy and Gibbs JJ can be said to provide a legal basis, although hardly a conclusive one, for the existence of a government power of direction over the Western Australian Police Commissioner.

There is, in addition, a further basis for government direction, although one that seems even less robust. And that is a 'police prerogative'. This concept is discussed in the decision of the Court of Appeal of England and Wales in *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority*.[344] This matter concerned a Home Office Circular, which empowered the Home Office, on behalf of the Home Secretary to maintain a store of plastic baton rounds and CS gas which could be issued to police forces even if the local police authority objected. In England and Wales police forces are established on a local basis and local police authorities were the immediate source of policy direction of local forces. In this matter, the local police authority objected to the circular, but the Court of Appeal unanimously found in favour of the Home Secretary, due to both statutory interpretation and, so far as is relevant to this study, a prerogative to keep the peace.

A prerogative is, as Blackstone said, as quoted by Purchas LJ in *Northumbria:*

> that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. … And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others; and not to those which he enjoys in common with any of his subjects.[345]

A simpler definition comes from Dicey, who considered prerogatives as 'nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.[346]

Prerogatives came to Australia with British settlement in eastern Australia; although some, which are not suitable to Australian circumstances, according to Renfree, may not.[347]

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[343] (1981) 180 CLR, 404, 429.
[344] [1989] 1 QB 26.
[345] Ibid 54.
[346] A V Dicey, Introduction to the Study of the Law of the Constitution (Macmillan, 8th edition, 1927) 420.

Prerogatives can also, as has been observed in *Attorney-General v De Keysey's Royal Hotel Ltd*[348] be subject to abridgement or being placed in abeyance by legislation.

Those two difficulties are unlikely to impact on this prerogative. Its difficulty concerns its existence. That is, there is little historical basis for this particular prerogative. Ward queried the merit of the *Northumbria* decision observing that the Court of Appeal used 'disparate sources' to justify the existence of the prerogative 'a few obvious makeweights' being 'a passage from Blackstone …; a sentence from Hood Phillips; and two obscure nineteenth century dicta'. In Ward's view, 'the result looks distinctly like that constitutional solecism, the recognition of a new prerogative'.[349] Since *Northumbria* there seems no UK or Australian decisions that have adopted or applied that decision; and given the questionable basis of this prerogative, Australian Courts may well be less enthusiastic than the Court of Appeal and the Divisional Court in recognising its existence.

If it is accepted in Australia, its scope is unclear. The Lord Justices in *Northumbria* did not spend much time in defining that issue, although, according to Purchas LJ it is the power 'to do all that is reasonably necessary to keep the Queen's Peace. It involves the commissioning of Justices of the Peace, constables and the like'.[350]

And presumably it must also include the power to supply police forces, even contrary to the wishes of the desires of the local police authority, with equipment. The members of the Divisional Court (Watkins LJ and Mann J),[351] whose judgments were subject to appeal to, and were, in this context, approved in *Northumbria* were slightly more forthcoming as they considered that it covered the provision of equipment where this 'is necessary to meet either an actual or an apprehended threat to peace'.[352]

Otherwise, the judgments are not helpful on the breath of the principle. Ward, however, has expressed the view that 'the impact of the prerogative power to maintain the peace is potentially so far-reaching as to make the decision look rather like Pandora's box – from which a host of evils were loosed upon the world, and in which nothing remained but Hope'.[353] Ward's concern was that the prerogative may undermine certain civil liberties decisions, which he put in context by referring to the 1765 decision in *Entick v Carrington.*[354] In that case a warrant issued by a Secretary of State, which was used as the basis for the

[347] H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 591. His example, is the Royal prerogative over Royal Swans, which provided ownership of all wild white swans swimming in open and common rivers.
[348] [1920] AC 508. This decision has been accepted and applied in Australia – *Barton v R* (1974) 131 CLR 477 & *Brown v West* (1990) 169 CLR 195.
[349] Robert Ward, 'Baton Rounds and Circulars' [1988] *Cambridge Law Journal* 155, 156.
[350] [1989] 1 QB 26, 55.
[351] [1987] 2 WLR 998.
[352] Ibid 1004.
[353] Ward, above n 349, 157.
[354] (1795) 9 St Tr 1030.

search of the premises of a journalist and seizure of material from that property, was found to be invalid as there was no statutory or common law basis for its issue. Ward queried whether that decision 'might have been decided differently had the court been apprised of' the prerogative identified in *Northumbria*.[355]

In relation to Western Australia, much depends on whether the prerogative is accepted in Australia. If it is, and Ward's concerns as to its breadth are correct, it seems capable of empowering a Minister, in the absence of any statutory provision to the contrary, to direct the Police Commissioner where the Minister considers that this is 'necessary to meet either an actual or an apprehended threat to peace.' This would seem an effective manner of directing police where there is no statutory inhibition on such a prerogative based ministerial power of direction. One possible statutory limitation, the provision of the common law constable privileges (to be discussed later),[356] ceased to be relevant in WA in 2007 as result of legislative amendment.[357]

4.2 - Conclusion

The existence of these two possible bases of a power of ministerial direction, however, can only be regarded as being, at best, tentative. And that is because, in relation to the first, it may not apply to statutory bodies and it has never been supported by the majority of the High Court. The most that can be said for this approach is that the court has not rejected it, but neither has it endorsed or applied it. As to the second its uncertainty is because the prerogative recognised (or invented) in *Northumbria* has a doubtful basis, has never been accepted in Australia and seems not to have been used in England in any other subsequent matter.

As a result, the better view is that the No Direction Model does not include or imply any power of government to direct police.

[355] Ward, above n 349, 156.
[356] Chapter 7.4.
[357] *Police Act 1892* (WA) s 7(1) was amended by *Criminal Investigation (Consequential Provisions) Act 2006* (WA) s 62, which removed reference to powers and privileges of constables. This change operated from 1 July 2007.

5 – Broad Direction Powers (Peel & Cowper)

Australian policing legislation contains provisions which appear to provide the government with unlimited power to direct police. These provisions fall into two types with variations within each type. For the purposes of this study each type is identified by using the name of the Minister who first introduced that type of legislative provision.

The first, *the Peel model*, was used in colonial Australia in New South Wales between 1833 and 1850[358] and in South Australia between 1841 and 1863.[359] It was modelled on the English 1829 *Metropolitan Police Act*, an initiative of the Home Secretary, Sir Robert Peel.

The second type, *the Cowper model* was first introduced in New South Wales in 1862 by the then Premier and Colonial Secretary of New South Wales, Sir Charles Cowper. It was subsequently adopted and adapted in all Australian jurisdictions other than Western Australia, although it took until 1972 for South Australia to take this step. While some jurisdictions have abandoned this type, it was part of policing legislation in Queensland until 1990[360] and Victoria until 2014[361] - and it remains the model that is still used in four of the eight jurisdictions subject to this study - New South Wales, Tasmania, South Australia and Northern Territory.

5.1 – Meaning – Peel Model

Although the Peel model has not operated in any Australian jurisdiction for over 150 years, it is important to examine how it operated and was intended to operate. Peel is regarded as the 'father of modern policing'[362] and many consider that the 1829 model he initiated formed the basis for Australian policing.[363] Accordingly, if that model was intended to include police independence, that understanding has relevance for the police-government relationships in other jurisdictions which derive their policing culture from the Peel developments, even where different models have subsequently been used.

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[358] *Sydney Police Act 1833* (NSW) s 1; *Police Act 1838* (NSW) s 1. Repealed by *Colonial Police Act 1850* (NSW) s 30.

[359] *An Act for regulating the Police Force of the Province of South Australia (*1841) (SA) (5 Vic No 3) s 1; *An Ordinance for Regulating the Police in South Australia 1844* (SA) s 2; Repealed by *An Act to consolidate and amend the Laws relating to the Police of South Australia 1863* (SA) s 1.

[360] *Police Service Administration Act 1990* (Qld) s 11.4 which repealed the *Police Act 1937* (Qld). See Table 3.1 for the Cowper provisions that have operated in Queensland.

[361] *Victoria Police Act 2013* (Vic) which repealed the *Police Regulation Act 1958* (Vic) with effect from 1 July 2014. *Victoria Police Act 2013* (Vic) s 2 & Endnote 1. Victoria, *Government Gazette*, Special Gazette No. 200, 24 June 2014, 2. See Table 3.1 for the Cowper provisions that have operated in Victoria.

[362] C Lewis (Audit) above n 134, 1; Leonard A Steverson, *Policing in America: A Reference Handbook* (ABCClio, 2008) 137; David J Thomas, *Professionalism in Policing: An Introduction* (Delmar, 2011) 6; Christine Nixon, above n 67, 68.

[363] As an example, the Queensland Criminal Justice Commission considered that:

> Peel's Metropolitan Police set the example which provincial England, Australia and much of the common law world followed, while the rest of the world looked on in envy.

Criminal Justice Commission, *History of Policing and Powers, Report on A Review of Police Powers in Queensland, Volume 1, An Overview* (1993), Appendix 1, 111. Also see Haldane, above n 115, 254; G M O'Brien, above n 22, 21 and Victoria, *Report of the Committee of Inquiry – Victoria Police Force,* June 1985 ('*The Neesham Report*') Vol 1, 23.

Some have argued that Peel was the founder of police independence. As an example the law reformer, Baroness Chakrabarti, considered that 'Peel and early Commissioners deliberately insulated the service from direct central and local government control. They created a doctrine of constabulary independence'.[364]

Similarly, the former Commissioner of the MET, Sir Ian Blair, considered that 'operational independence is one of Peel's greatest legacies'[365] as did Sir Hugh Orde when President of the Association of Chief Police Officers in England, Wales and Northern Ireland. Sir Hugh expressed that view when he advised the readers of the *Times* in 2011 that 'One of the foundations of British policing is Robert Peel's doctrine of constabulary independence'.[366]

He also told a House of Commons committee, in the previous year, that 'I think that the principle goes back to Peel, which was very much around a police force answerable to the law and not to government'.[367]

To ascertain the intended meaning of the Peel model, however, it is necessary to look to the words used and the way that the courts have interpreted them. Unfortunately, there are few, if any, judicial decisions which have looked closely at the meaning of the Peel model. The notable exception, however, is the decision of the English Court of Appeal in 1968 in *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No 1)*.[368]

5.1.1 - *Blackburn*

This matter concerned an application for mandamus[369] from Mr Blackburn, a person described by Lustgarten as a 'moral entrepreneur and litigator extraordinary'.[370] Mr Blackburn sought the writ to compel the Police Commissioner to withdraw an instruction to the force which limited policing activities in gaming clubs without his authorisation. The case, therefore, had little to do with the relationship between the MET Commissioner and the government. Nonetheless, two members of the Court (Lord Denning MR and Salmon LJ), made observations which, although being *obiter dicta*,[371][372] have now gained the status of

[364] Shami Chakrabarti, 'A Thinning Blue Line? Police Independence and the Rule of Law' (2008) 2 *Policing* 367, 368.
[365] Ian Blair, above n 65, 47. And see his article Ian Blair, 'Police Independence is under threat' *New Statesman,* 6 June 2012.
[366] Sir Hugh Orde, 'Tension between politicians and police is healthy', *The Times*, 18 August 2011.
[367] United Kingdom, House of Commons Home Affairs Committee, *Policing: Police and Crime Commissioners, Second Report of Session 2001-11*, HC 51 (1 December 2010), ('*Home Affairs Report*') 17.
[368] [1968] 2 QB 118.
[369] A prerogative writ issued to some person or body 'to compel the performance of a public duty' – Bird, above n 23, 213.
[370] Lustgarten, above n 54, 63.
[371] 'An observation by a judge on a legal question suggested by the case before him [or her], but not arising in such a manner as to require decision' – Bird, above n 23, 238.
[372] Plehwe (1974) above n 56, 317; Milte, above n 8, 206.

virtual holy writ regarding police independence and are regularly and repeatedly cited and referred to (but rarely analysed) by those advocating that doctrine and its necessity.[373]

Lord Denning was the most extensive in his consideration and his observations require quotation in full due to their 'seminal'[374] effect on police independence.

> The office of Commissioner of Police within the Metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined force. The Commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their Report in 1962 (Cmnd. 1728). But I have no hesitation in holding that, like every constable in the land, he 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 upon 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 of the Metropolis, 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.[375]

Those observations indicate that Denning considered that the 1829 Act rendered the MET Commissioner as completely independent of ministerial control. Salmon LJ shared that view.[376] These views were not, however, free from critics, one of the earliest of whom was Quintin Hogg PC QC MP, who was later, as Lord Hailsham, Lord Chancellor in Margaret Thatcher's government. Writing in February 1968, Hogg was highly critical of the *Blackburn* decision and the judicial interpretation of policing legislation generally:

> The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges…..it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is an option.[377]

An equally robust but more extensive critique was provided by Lustgarten. With reference to Denning's views, Lustgarten considered, somewhat colourfully, that 'seldom have so many errors of law and logic been compressed into one paragraph'.[378] So far as is relevant to the issue that this chapter is discussing (the intended legislative meaning of the Peel model) two

[373] See for example the references to *Blackburn* in Blair (2009), above n 65, 46-7; Jefferson & Grimshaw, above n 71, 22 & 55; Pitman & Pitman (1997), above n 76, 24; Pitman (2004) above n 76, 115, 118 & 123; Avery, above n 68, 69; Oliver, above n 68, 20; Finnane (1994), above n 117, 42; Milte, above n 8, 206.
[374] *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747, [33] (Kenny J).
[375] [1968] 2 QB 118, 135.
[376] Ibid, 138.
[377] As quoted in *R v Metropolitan Police Commissioner, Ex parte Blackburn (No 2)* [1968] 2 All ER 319, 320 (Lord Denning MR). Hogg's article was in the satirical journal *Punch.*
[378] Lustgarten, above n 54, 64.

elements of Lord Denning's observations cause concern. The first is the expression, which seems to be the underlying basis of his views, that 'like every constable in the land, he should be, and is, independent of the executive'. This passage indicates that Lord Denning considered that the MET Commissioner was a constable or had the powers and privileges of constables. However, this element of Lord Denning's reasoning appears flawed as Sir Robert Mark, a former MET Commissioner (and a great supported and promoter of police independence) recognised, if not acknowledged:

> The Commissioner is appointed by the sovereign on the recommendation of the Home Secretary and on appointment ceases to be a policeman. He loses all his police powers and in my day was sworn in as an *ex officio* justice of the peace.[379]

The fact that in 1968 the MET Commissioner was not and had never been a constable is plain from a reading of the 1829 Act. Under s 1 the MET Commissioner was, in 1829, not appointed as constable but as a justice of the peace[380] and no changes had been made to that provision prior to 1968. The Commissioner was also was not sworn as a constable. The only persons sworn as constables and deemed to have the common law powers and privileges of constables were, in 1829, those appointed as constables, and by 1968 this had been expanded to every member of the force (but did not include the Commissioner).[381]

The second issue of concern is Denning's reference to the *Police Act 1964* (UK) and his belief that a provision in that Act (s30) allowed the Secretary of State to require the MET Commissioner to report and retire. The 1964 Act post-dated the 1829 Act and its later relationship to the 1829 Act tells us nothing about the intended meaning of the 1829 Act when it was enacted. The concern, however, with Lord Denning's reference to the 1964 Act, for the current purposes, concerns the Lord Denning's method of statutory interpretation in reaching his conclusions. The issue is that s 30, despite Lord Denning's apparent belief, clearly had no application to the Commissioner of the MET. It specifically applies, in subsections (1) and (2), to the chief constables (a term used in the 1964 Act to refer to county and borough forces in England and Wales)[382] and subsection (3) extends the operation of s 30, but only to cover the Commissioner of the London Police.[383] This is a straightforward error in a straightforward piece of statutory interpretation - made, as Plehwe respectfully observed,[384] *per incuriam.*[385] If want of care is so obviously evident in one aspect of Lord Denning's reasoning, one must also query the accuracy of other aspects of

[379] Mark (1978), above n 260, 144.
[380] *Metropolitan Police Act 1829* (UK) s 1.
[381] Ibid s 4 & *Police Act 1964* (UK) s 18.
[382] See *Police Act 1964* (UK) s 5.
[383] The City of London Police is a police force separate and distinct from the MET which polices the square mile of the City of London. Its empowering instrument is the *City of London Police Act 1839* (UK). City of London Police, *Police Governance*, https://www.cityoflondon.police.uk/about-us/Pages/Police-Authority.aspx.
[384] Plehwe (1974), above n 56, 319.
[385] 'through want of care' – Bird, above n 23, 249.

his reasoning, particularly when His Lordship was not able to identify any other statutory support for his conclusions.

Lord Denning did, however, rely on two authorities, being the Privy Council decision in *Attorney-General for New South Wales v Perpetual Trustees*[386] and an earlier single judge decision in *Fisher v Oldham Corporation*.[387] However, neither of those decisions relates to the independence of a Police Commissioner or concerned the independence of police from central government.

Although often relied on to justify police independence, *Perpetual Trustees* was not about that issue. It was about the employment status of police constables and whether a master and servant relationship existed. Moreover, in deciding that such a relationship did not exist, the Privy Council, as Marshall[388] pointed out 'did not dissent from the view expressed by the High Court of Australia that for the purposes of this particular action the service relationship of a constable was not in principle distinguishable from that of a soldier'.[389]

So either the Privy Council and the High Court were both of the view that constables *and* soldiers are not subject to direction from the executive, or their judgments were limited to the issue before them – whether a master and servant relationship existed, and had nothing to do with any broader constitutional position of police.[390]

The other decision relied on by Lord Denning, however, appears to provide a firmer basis for police independence from government direction. *Fisher v Oldham* concerned the liability of the borough of Oldham for the actions of the Oldham Police. McCardie J concluded that if local authorities were to be liable for police actions with respect to felons and misdemeanours:

> then it would be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, *involve a grave a most dangerous constitutional change*.[391]

That observation, while *obiter dicta*,[392] was reached following an examination of the history of the office of constable[393] and a survey of authorities relating to vicarious liability of

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[386] (1955) 92 CLR 113; [1955] AC 457 - which is discussed in more detail in Chapter 6.2.
[387] [1930] 2 KB 365.
[388] Marshall (1965), above n 53.
[389] Ibid 44. Viscount Simonds was explicit on this point:
> Their Lordships share the opinion entertained by all of the judges of the High Court that the case of the constable in not in principle distinguishable from that of a soldier. (1955) 92 CLR 113, 129

[390] Marshall also pointed out that civil servants had been found not to be 'servants' in the context of an action for loss of services and concluded that, unless civil servants and soldiers are constitutionally independent of the executive:
> the New South Wales case, though often quoted in works on police, is of no more relevance to them in the constitutional context than it is to the constitutional position of solders or civil servants.

Marshall (1965), above n 53, 45 relying on *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641.
[391] [1930] 2 KB 365, 377-378 (emphasis added).
[392] Stenning (1981), above n 60, 113.

corporations. He placed particular reliance on the 'weighty and most instructive' views of Griffith CJ in *Enever v R*[394] regarding the original powers of constables that 'cannot be exercised on the responsibility of any person but himself'.[395] But the foundation of McCardie J's conclusion that the Oldham borough was not liable for the actions of the Oldham police was not due to the absence of a master and servant relationship. While he considered that Oldham police constables were not the servants of the borough, he regarded each police constable as 'a servant of the State, a ministerial officer of the central power',[396] relying[397] on a 1621 decision of the Privy Council in *Coomber v Justice of Berks*.[398] What constitutional views he would have had regarding the central government having 'full measure of control over the arrest and prosecution of all offenders', McCardie J simply did not say, as this issue was not relevant to the dispute before him. But on the basis of McCardie's reasoning, it seems that he may have seen that relationship as not having the same degree of constitutional difficulty as he saw in the case of local authorities, accepting Lord Blackburn's view that 'the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of Government'.[399] As Lustgarten observed: 'if the constable is the servant of the central power, by parity of reasoning the Home Secretary could have argued to have precisely this power'.[400]

Although Marshall has queried the accuracy of McCardie's analysis,[401] it seems clear, that there is some significant inconsistency between McCardie J's reasoning and the *Perpetual Trustees* and *Enever* decisions. Both of those cases found, unlike McCardie J, that police were not in a master and servant relationship with the State, the finding that has been used as the basis for citing those decisions as a justification for police independence.

McCardie can also be accused of having ignored recent history in the relationship between borough forces and their watch committees. Section 7 of the *County and Borough Police Act 1856* (UK)[402] required police constables to obey the lawful commands of a watch committee and it was apparent that, during the 19th century at least, watch committees directed borough forces on operational matters. This can be seen from the decision in *Andrews v Nott-Bower*[403]which included Lord Esher's observation that a resolution by the watch committee directing the chief constable to compile a report of information gathered regarding the conduct of public houses was an order under s 7 with which the chief

[393] An issue discussed in Chapter 7.4.
[394] (1906) 3 CLR 969.
[395] Ibid 977.
[396] [1930] 2 KB 365, 371.
[397] Ibid 369-70.
[398] 9 App Cas 61.
[399] [1930] 2 KB 364, 369 quoting 9 App Cass 61, 67 (Lord Blackburn).
[400] Lustgarten, above n 54, 60.
[401] Marshall (1965), above n 53, 38. And see Ibid 57-61.
[402] 19 & 20 Vic c69.
[403] [1895] 1 QB 888.

constable was required to obey.[404] Similarly, in 1890, the Liverpool watch committee ordered the chief constable, Captain Nott-Bower, to bring prosecutions against all brothels, an order that the head constable objected to but complied with.[405] And in 1888, the Birmingham watch committee directed its head constable not to take proceedings 'likely to affect a number of ratepayers, or to provoke public comment' without first informing the watch committee. The chief constable, according to Reiner 'refused to comply unless instructed to by the Home Secretary and the justices'[406] (thereby indicating the chief constable's acceptance of his subordinate position, if not to the watch committee). He then gave way after the Home Secretary directed the chief constable regarding the legislative powers of the watch committee to dismiss the chief constable. This, according to Reiner, 'plain as pikestaff interpretation … demonstrates that watch committees were seen as empowered to give chief constables lawful orders about law enforcement priorities'.[407]

As a result, neither of the decisions Lord Denning cited,[408] on close examination justify his constitutional *dicta* that a constable and a Police Commissioner are 'answerable to the law and the law alone'.

Although Lord Denning's analysis of the legislation governing the relationship between the MET and the government was scant and erroneous, this is not to say that his conclusions are not applicable to other forces established on different statutory models. And neither does it mean that Denning's *obiter* has not been influential in later judicial and academic reasoning. But on the 19th century intended meaning for the Peel model, it is clear that Lord Denning's observations and reasoning provide nothing of assistance.

5.1.2 - Analysis of the 1829 Act

The weakness in Lord Denning's approach was his failure to undertake a close examination of the language used in the 1829 Act in formulating his views. The relevant wording in the 1829 Act is found in s of 1:

> to cause a new Police Office to be established in the City of Westminster, and … to appoint Two fit Persons as Justices of the Peace … to execute the Duties of a Justice of the Peace at the said Office …, together with such other Duties as shall be herein-after specified, or as shall be from Time to Time

[404] Ibid 894. See Lustgarten, above n 54, 38-9.
[405] Lustgarten, above n 54, 38.
[406] Reiner (1992), above n 84 ,12.
[407] Ibid 13. Also see Jefferson and Grimshaw, above n 71, 42 for a contrary view. Another 19th century example is, according to Wren, a Mayoral direction to the Chief Constable of the Oldham Police 'to take a posse of Policemen to the city boundary to prevent the Inspector of Constabulary from entering'. Pauline Wren, 'The Police Inspectorate' (1971) *Police Review* 619.
[408] [1968] 2 QB 118, 136.

> directed by One of His Majesty's Principal Secretaries of State,[409] for the more efficient Administration of the Police within the Limits herein-after mentioned.

One who did attempt a close examination of the wording of s 1 was Lusher in the course of his 1981 Report.[410] He considered that there 'is no ambiguity to be found in the enactment'[411] and that the 'capacity to direct is as to further or additional duties and is not a general power of direction as to performance'.[412] It is difficult to see why Lusher felt certain about this as the words seem open to a number of interpretations. Others have not been as sure as Lusher. Plehwe, also considered that the Minister's power of direction was not a general power of direction, but he accepted that 'there is room for doubt as to its meaning'.[413] Lustgarten, moreover, considered that 'it appears that some structure of overlapping responsibilities was envisaged, and that no one felt the need for a clear legal division of powers'.[414]

Each of those authors seems to have based their respective positions on interpreting the meaning to be given to the third element in s 1 – 'such other duties … as shall be from Time to Time directed by One of His Majesty's Principal Secretaries of State' – considering that element to be the only basis upon which a general ministerial power of direction could be supported. This may be because each of them has provided a 20th century gloss to the first element –'as Justices of the Peace … to execute the Duties of a Justice of the Peace at the said Office', assuming that the judicial independence essential to any person holding any judicial office today would be equally essential in 1829. However, this may have been an error when considering the way justices of peace operated before 1829.

Prior to the 1829 Act, the authority for policing in London was based on the *Middlesex Justices Act 1792* (UK) which established seven public offices across the London metropolis with each staffed by three stipendiary magistrates,[415] two clerks and, originally, up to six constables, which was later expanded to 12.[416] The magistrates controlled the constables and had a close connection with the Home Office. The Chief Magistrate of the Bow Street office, in particular, regularly conferred with the Secretary or Undersecretary (daily, according to Beattie)[417] and acted as 'the secretary of state's principal advisor on policing issues'.[418] This proximity, according to Critchley, led to the Chief Bow Street Magistrate to be 'ever ready to act on the Home Secretary's directions in appointing his constables as

[409] A term used in the United Kingdom to refer to a Cabinet Minister.
[410] *Lusher Report*, above n 41.
[411] Ibid 690.
[412] Ibid.
[413] Plehwe (1974), above n 56, 324.
[414] Lustgarten, above n 54, 34.
[415] Paid justices of the peace.
[416] Beattie, above n 110, 167; Critchley, above n 102, 37 & 43.
[417] Beattie, above n 110, 169.
[418] Ibid 169.

spies and informers'[419] and allowed, according to Beattie, 'the government to use the runners and the patrolmen as they thought necessary'.[420]

While there was a particular closeness between Bow Street and the Home office, the magistrates at the other offices were not immune from Home Office influence. According to Vogler, the quality of the individuals appointed as stipendiary magistrates was not high and that allowed the magistracy to become 'more and more an instrument of the Home Office and an object of its patronage.[421] He pointed out that magistrates, unlike the professional judiciary, were largely not trained in the Inns of Court and were unable to look to those Inns as 'their centre of authority'. Instead, 'The gravitational pull of the Home Office was for them irresistible, and advances in status or power had to be co-ordinated with the intentions of government'.[422]

When Peel became Home Secretary, in 1822, he used the Home Office's influence over the magistrates. According to Beattie, 'Peel made it clear from the beginning that he was going to manage metropolitan policing in a way never previously attempted' and this included 'dressing down' magistrates.[423]

With this perspective, it is not difficult to see how the relationship between the Home Secretary with the magistrates under the 1792 Act was one of superior and subordinate, with magistrates being, as Vogler puts it, 'state servants'.[424] On that basis, the reference in the 1829 Act to Justices of the Peace could well have been, and it is suggested was probably intended, to reflect the pre-1829 relationship between magistrates and the government; one of subordination to the Home Secretary, providing government control over the justices and their policing function. Accordingly, the power of direction in s1 regarding such 'other duties' to be provided to the Justices in charge of the MET seems not one limited in any way by any judicial independence of the Justices, as such a concept was substantially, if not entirely foreign to Justices of the Peace in 1829.

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[419] Critchley, above n 102, 43.
[420] Beattie, above n 110, 173.
[421] Vogler, above n 110, 21.
[422] Vogler, above n 110 23. However Payley, in her study on the Middlesex Justices Act, maintains that from 1801 most stipendiary magistrates were barristers, although 'many of the stipendiaries who described themselves as barristers had either never practised or had been unsuccessful whilst others were simply too old or infirm to continue working'. She also recognised the controlling role that government had over magistrates and police prior to the 1829 Act:

> With the guidance of the Senior Magistrate at Bow Street, the Home Secretary had, as a matter of necessity, frequently attempted to co-ordinate police activity in the past. Now that he had the services of reliable magistrates, it was only natural that he should make use of them.

Ruth Payley, *The Middlesex Justices Act of 1792. Its Origins and Effects*, Phd Thesis, University of Reading, 1983, 268-9 & 284.
[423] Beattie, above n 110, 236.
[424] Vogler, above n 110, ch 2.

5.1.3 - Effect of Extraneous material

In any case, had Lusher J considered that there was ambiguity in s 1 (as Plehwe did) he would have been required, as he acknowledged, to consider the impact of extraneous materials to assist in his interpretation.[425] Although the parliamentary debate regarding the 1829 Act contains nothing revealing,[426] there are two relevant extraneous items. The first is the report of the Parliamentary committee which recommended the passage of the 1829 Act.[427] That committee considered that:

> There should be constituted an Office of Police *acting under the immediate direction of the Secretary of State for the Home Department*, upon which should be devolved the general control over the whole of the Establishments of Police of every denomination, including the Nightly Watch.[428]

The second item is the preamble to the 1829 Act which included the following passage:

> to constitute an Office of Police, which, acting *under the immediate Authority of One of His Majesty's Principle Secretaries of State*, shall direct and control the whole of such new System of Police within those Limits…[emphasis added].

Both the report and the preamble indicate a clear legislative intention for the Minister to be able to 'direct and control the whole of such new System of Police', and not for the 1829 Act to be the birthplace of police independence.

Another extraneous source is found in parliamentary reports examining the practices adopted regarding the police and government relations in and after 1829. Such investigations would be quite foreign to 21st century Australian parliamentary committee practice. However, in the early 19th century at least, the Westminster Parliament used its committees to examine policing issues, including operational issues. And as 19th century Parliamentary committees reports also included transcripts of the evidence received, it is possible to identify the understandings of individual witnesses, including the Police Commissioners and the responsible Minister.

An early post 1829 committee investigation occurred in 1833 concerning the MET's actions to control the Cold Bath Fields riots.[429] The Committee heard evidence from the two Police

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[425] *Lusher Report*, above n 41, 690.
[426] United Kingdom, *Hansard's Parliamentary Debates,* New Series, Vol 21, House of Commons, 15 April 1829, 867-884.
[427] United Kingdom, *Report for the Select Committee on the Police of the Metropolis* (11 July 1828).
[428] Ibid 30 (emphasis added).
[429] United Kingdom, *Report from the Select on the Cold Bath Fields Meeting with the Minutes of Evidence* (23 August 1833) ('*The Cold Bath Fields Report*'). This relates to the earliest use of the Metropolitan Police for crowd control of a large meeting arranged by the National Union of the Working Classes which the Secretary of State had declared illegal. The police actions was successful as the crowd was dispersed and, unlike previous crowd control efforts conducted by the military, such as the Peterloo Massacre in 1819 (J White, *Waterloo to Peterloo,* (Mercury, 1963) chapter 15) and the Gordon Riots in 1780, (Christopher Hibbert, *King Mob* (Sutton, 2004) there was no loss of civilian life. However, one constable was killed (Constable Culley), a death that the Coroner's court jury found to be justifiable homicide. (Gavin Thurston, *The Clerkenwell Riot, The Killing of Constable Culley* (Allen and Unwin, 1967) 46, 128-135).

Commissioners.[430] Extracts from their evidence relating to their relationship with the then Home Secretary, Lord Melbourne, are as follows:

> 4. Did you receive any instructions for the regulation of your conduct as Commissioners on that day? – Yes, we did.
>
> 5. From whom did you receive those instructions? – From the Secretary of State for the Home Department.
>
> 6. Were those instructions verbal on in writing? – They were verbal.
>
> ….
>
> 9. What did you do in consequence of those instructions? – (Colonel Rowan) – We made our arrangements for having a sufficient force on the spot to carry them into execution.[431]
>
> ….
>
> 96…. We conceived, according to our instructions, and various expressions used by Lord Melbourne in discussing the matter, that the moment we could ascertain it to be the meeting announced on the placard, we were to interfere for the purposes stated, namely, apprehending the leaders and dispersing the meeting; the principal circumstance I recollect that Lord Melbourne pointed out, by which we should decide whether we were to interfere, was any person beginning to address the meeting and referring to the placard calling for a National Convention.[432]

The Committee also had a written report from the Commissioners to Lord Melbourne[433] which contained the following passages:

> On Saturday the Commissioners received *your Lordship's directions*, that the meeting being illegal, and a public notice to that effect given, was not to be allowed to take place; that the meeting, if attempted, was to be dispersed, and the leaders seized on the spot.
>
> ….
>
> The Commissioners, in making their arrangements for executing *your Lordship's orders*
>
> ….
>
> but it was deemed advisable for the police to act at once, in obedience to the instructions they had received for *executing your Lordship's orders*.[434]

Lord Melbourne also gave evidence to the Committee. His evidence included the following passages:

> 4766. …. I thought *the instructions* were not quite accurately stated in this Report, at the same time that they were correct in substance.[435]

[430] Lieutenant Colonel Rowan and Richard Mayne.
[431] *Cold Bath Fields Report*, above n 429, 5-6.
[432] Ibid 13.
[433] Dated 20 May 1833.
[434] *Cold Bath Fields Report*, above n 429, Ibid 8-9 (emphasis added).

….

4797. The police are *entirely under the control of the Home Department*, are they not? – *Yes*.[436]

These passages (and many others)[437] indicate quite clearly that both Commissioners and the Home Secretary considered that the Commissioners were 'entirely under control' of the Home Secretary. They were subject to his the direction in relation to all matters, including operational issues including the use of force and when to arrest.

In the Committee's report no question was raised challenging or criticising the Minister's power to issue directions to the police on operational issues, or the Commissioners' acceptance of those resolutions. The only reference to Lord Melbourne's directions in the committee's considerations was in Resolution 1:

> That no blame attaches to them in the arrangements which they made for *carrying into effect the instructions they received from the Secretary of State* on the occasion in question.[438]

What then is to be made of the interpretation and conclusions of the former Commissioner of the Metropolitan Police, Sir Ian Blair, of the Cold Bath Fields Report. In 2012 he wrote:

> In 1833, a proto-Chartist demonstration was called in Cold Bath Fields in Clerkenwell, London. Melbourne ordered the Commissioners to have it broken up. In the ensuing confrontation, a police officer was killed. The Commissioners told the subsequent parliamentary inquiry about the home secretary's orders and how they had objected to them. Melbourne denied this. The MPs believed the Commissioners and backed their authority. A new, independent entity had appeared in the state.[439]

It is apparent from reading the Cold Bath Fields Report that either Sir Ian had never read it, or his article, like Lord Denning's views in *Blackburn*, had been written *per incuriam.* There is simply nothing in the Report to support his view that the Commissioners objected to Lord Melbourne's directions or that the Committee supported those objections.

There is, however, another report in which Commissioners Rohan and Mayne did raise the issue of objecting to directions. This report concerned complaints about Sergeant Popay whose policing activities involved him operating as a 'spy' and agent provocateur in radical groups.[440]

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[435] Ibid 191.
[436] Ibid 192 (emphasis added).
[437] see Ibid ,11, 13 – 15, 190-192. One of the issues before the committee was whether the Commissioners correctly understood the instructions given by Lord Melbourne, but at no stage was there any indication from any of the witnesses or the committee that Lord Melbourne did not have the authority or should not have the authority to direct the police in operational matters.
[438] Ibid 3 (emphasis added).
[439] Blair (2012) above n 365.
[440] activities which the committee considered as being 'abhorrent to the feelings of the People, and most alien to the spirit of the Constitution'. United Kingdom, *Report from the Select Committee on the Petition of Frederick Young and Others (Police)* (6 August 1833) ('*The Popay Report*') 3.

It is apparent from this report that Lord Melbourne continued to be closely involved in and directing police operational activities including instructing Sergeant Popay. The Commissioners did not refuse any of his directions.

> 3913. … (Mr Mayne) - We have always acted under orders from the Home department in what we have done.
>
> …..
>
> 3947. Had you any particular instructions from the Home-office to attend to Political Union meetings? – We employed Popay by the express desire of the Secretary of State or the Under Secretary; they did not name Popay, but desired that a police constable should be so employed.
>
> ….
>
> 3951. Then it appears by Lord Melbourne's direction a gun was purchased in order to confirm that statement? – Yes.[441]

However, the Commissioners did express concern regarding one limited form of ministerial direction:

> 3917. Had you ever any object in view, to gain information for the Government, or to employ spies to pry into people's private actions? – (Colonel Rowan) – I will venture to say there are no two gentlemen in the town that would more abhor such an action than the two Commissioners of Police, and they would not obey any such instruction from the Government. – (Mr Mayne) – I must be allowed to say, that the imputation that we could have sanctioned or allowed any such practices has been painful to us in the highest degree.
>
> 3918. As gentlemen and men of honour, you would have felt it an insult to be required to conduct such a system? – (Mr Mayne) – Yes, and I would undoubtedly have quitted the office rather than comply with any such directions.[442]

What is apparent from those answers is that the area in which the Commissioners considered appropriate for objection and rejection was quite limited - instructions to use 'spies' to pry into the private actions of individuals. No concern was indicated over being instructed in relation to operational matters more generally. And the basis of their objection, at least in the case of Mayne (who was the legally trained Commissioner) was not the Minister's lack of power to make such a direction, but issues of principle. Mayne did not assert that the Minister did not have the power to direct him to undertake spying activity, but that he would resign 'rather than comply'.

Furthermore, in this report, as in the Cold Bath Fields Report, the committee expressed no concerns about the level and nature of ministerial involvement in police operations.

[441] Ibid, 171 & 173.
[442] Ibid 171-172.

The police-government issue was again subject to another parliamentary committee to consider in the 1834 report into the Police of the Metropolis.[443] That committee considered the Cold Bath Fields and Popay Reports and expressed its view that:

> They deem it their duty to express their entire concurrence in the opinion of the reports of the Committees alluded to; and also to add, that the Metropolitan Police Force, its management, and the principles upon which it is conducted, deserve the confidence and support of The House. That it is well calculated to check crime, and to maintain the peace and order of the Metropolis, both effectively *and constitutionally*.[444]

It is clear that these three committees held a uniform position regarding ministerial involvement in police operational matters and that position does not provide any support for the 1829 Act containing or creating any element of police independence.

As a matter of completeness, it might be argued that the views and conclusions of those committees might have diverged from those of Sir Robert Peel. However, such a concern seems entirely untenable as Sir Robert was a member of each of those three committees,[445] and there was no minority report nor any indication that Sir Robert did not stand by their conclusions.

5.1.4 - Post 1829 Activities

The active role of the minster in directing the MET continued throughout the 19th century and up until the end of the First World War, and possibly beyond. A number of instances of active ministerial activity in the operations and organisation of the MET are listed below to demonstrate:

- 1839 – Police Commissioners were permitted by the Home Office, ten years after the commencement of the MET, and following repeated requests, to wear uniforms.[446]
- 1842 – The Police Commissioners sought and received the authority of the Home Secretary[447] to establish a detective force.[448]
- 1845 – The Home Secretary[449] ordered that in future that 'Police Constables must on no account be allowed to use artifices of this description'. That is, to be disguised as cobblers.[450]

[443] United Kingdom, *Report from the Select Committee on the Police of the Metropolis; with the Minutes of Evidence, Appendix and Index* (13 August 1834) ('*The 1834 Report*').
[444] Ibid 21(emphasis added).
[445] *Cold Bath Fields Report,* above n 429, 2; *Popay Report*, above n 440, 2; *1834 Report*, above n 443, 2.
[446] Ascoli, above n 107, 90.
[447] Sir James Graham.
[448] Ascoli, above n 107, 119.
[449] Sir George Grey.

- 1855 – Commissioner Mayne advised the Royal Commission into the 1855 Hyde Park riots that:

> The Secretary of State hears what I have to say, and then he gives his opinion; I sometimes get my opinion qualified, or sometimes we differ, *and finally what the Secretary of State thinks fit is done.*[451]

- 1880-1 – Home Secretary, Sir William Harcourt made the following directions to the MET :
  - no action was be taken to supress Irish lottery advertisements.[452]
  - the Head of the Criminal Investigation Division (CID) of the MET was 'to devote himself exclusively for the next month to Irish and Anglo-Irish business'.[453]
  - *agents provocateurs* were not to be used without his authority.[454]
- 1887 – 'Section D' of the MET CID was made directly responsible to the Home Secretary, rather than the Metropolitan Police Commissioner.[455]
- 1888 – The then Commissioner of the MET, Sir Charles Warren published an article in *Murray's Magazine* critical of the police administration. This caused the Home Secretary[456] to call for and receive his resignation[457] as the publication of the article was in breach of a Home Office Circular of 1879 and because Sir Charles refused to accept the Minister's instructions to comply with the Circular.[458]

  Despite that difference, Warren's article confirmed the intended extent of ministerial authority under the 1829 Act:

> The Scotland Yard Office of Police was established by Sir Robert Peel in the year 1829, which, *acting under the immediate authority of the Secretary of State*, should direct and control the whole system of Metropolitan Police.[459]

- 1909 – The Home Secretary, Winston Churchill attended the site of a police operation concerning what we would now call terrorists - the Sidney Street siege.[460] There was parliamentary criticism of his attendance, which Churchill subsequently

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[450] Porter, above n 109, 5.
[451] United Kingdom, *Report of Her Majesty's Commissioners appointed to inquire into the Alleged Disturbance of the Public Peace in Hyde Park on Sunday, July 1st, 1855; and the Conduct of the Metropolitan Police in Connexion with the same*. Together with Minutes of Evidence, Appendix and Index (1856) 340 (emphasis added).
[452] Marshall (1984), above n 5, 136.
[453] Porter, above n 109, 41.
[454] Marshall (1984), above n 5, 136.
[455] Porter, above n109, 86.
[456] Henry Matthews.
[457] Ascoli, above n 107, 162.
[458] United Kingdom, *Parliamentary Debates,* House of Commons, 13 November 1888, vol 330 cc 1035-8.
[459] Charles Warren, 'The Police of the Metropolis', *Murray's Magazine*, November 1888. Transcribed in http://www.jtrforums.com/showthread.php?t=24179 (emphasis added).
[460] Donald Rumbelow, *The Houndsditch Murders and the Siege of Sidney Street* (W H Allen, 1988).

accepted. However, he continued to regard his authority over the police as unchanged:

> It was no part of my duty to take personal control or to give executive decisions. From my chair in the Home Office *I could have sent any order and it would have been immediately acted on,* but it was not for me to interfere with those who were in charge on the spot. Yet, on the other hand, my position of authority, far above them all, attracted inevitably to itself direct responsibility. I saw now that I should have done better to have remained quietly in my office.[461]

- 1913 – the Home Secretary instructed the Commissioner that proceedings were not to be instituted against 'whist drives' unless there was reason to believe that the drive is a 'cloak for gambling of a serious kind or for profit making out of gambling'. These instructions were repeated in 1921 and 1925.[462]
- 1928 – Sir Edward Troup, former (1908-1922) Permanent Under-secretary in the Home Office[463] wrote of two former Commissioners of the Metropolitan Police, both of whom had 'disregard[ed]… the statutory provisions which require him to take his instructions from the Home Secretary' (referring, it seems to s1 of the *Metropolitan Police Act 1829* (UK)) and 'which ended on each occasion in the Commissioner's resignation'.[464]

The late 19th century understanding of the police-government relationship as established by the 1829 Act can also be seen from addresses to the House of Commons by the Home Secretary, Henry Matthews, and his predecessor, Sir William Harcourt, in November 1888. Both had the same view of that relationship:

> Matthews - It would be intolerable that in such a town as London, or in any large town, the Commander of the Police Force, or of any other Force, should hold irresponsible authority, and be able to disregard the instructions of persons who had to answer in Parliament for the conduct of the men under their command.[465]

> Harcourt - For a Commissioner to declare a condition of independence of the Secretary of State is a thing I never could conceive possible. …. [It] would be a state of things that no Statesman of any Party has ever contemplated.[466]

Both, however, indicated that the Minister's power of direction was limited to matters of 'policy'. As Harcourt put it

[461] Winston S Churchill, *Thoughts and Adventures* (Mandarin, 1990) 45 (emphasis added).
[462] United Kingdom, *Parliamentary Debates,* House of Commons, *28 June 1928,* vol 218 5 s c 315 (Sir William Joynson-Hicks). And see R Plehwe (1974) above n 56, 329.
[463] or Department head.
[464] Sir Edward Troup, 'Police Administration, Local and National' (1928) 1 *Police Journal* 5, 14. The two Commissioners that Troup was referring to were Sir Charles Warren and his successor James Munro. Sir Edward Troup, *The Home Office* (Putnam, 1925) 105-106.
[465] United Kingdom, *Parliamentary Debates,* House of Commons*, 14 November 1888* vol 330 3rd series cc 1173-4.
[466] Ibid c 1161.

> It is a matter entirely at the discretion of the Secretary how far the principle of responsible government shall interfere with Executive action, and the less any interference happens the better. Of course, the Commissioner is the man who knows the Force under him, what is its work, and how it can be best accomplished; but for *the policy of the police*, so to speak, the Secretary of State must be, and is responsible.[467]

Precisely what Matthews and Harcourt meant by 'policy' was not made clear; however it seems that that word was not intended by those speakers to exclude operational issues.[468] That seems apparent from the practices adopted by Harcourt as Home Secretary,[469] and was the view expressed in 1928 by Troup, the former under-secretary of the Home Office. He considered that 'policy' as used by those the Ministers 'can only refer to the means and methods of carrying out these duties and to the preparations to be made for doing this effectively'.[470]

The official understanding of the police-government relationship in the early years of the 20th century is seen in Troup's 1925 blunt observations:

> The Metropolitan Police Force is under the direct control of the Home Secretary.[471]
>
> where difference of opinion exist … the final decision rests with the Home Secretary.[472]
>
> the Home Secretary cannot divest himself of his responsibility for the executive action of the Commissioner and of the force under his command.[473]

5.1.5 - Conclusion

The conclusion that can be drawn from this material and its analysis is that the 1829 Act was not intended to give rise to any degree of police independence and was not considered to have done so during the 19th century and the early part of the 20th century.

This is not a surprise, bearing in mind that there had been much opposition to the introduction of a uniformed force in England, as well as public mistrust of the force during its formative years.[474] This mistrust can be seen from the views of an 1822 Parliamentary committee, just seven years before the commencement of the MET:

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[467] Ibid cc 1162-3. See also c 1174 for Matthew's discussion of 'policy'.
[468] The issue of the distinction between 'policy' and 'operational matters' will be discussed in depth in Chapter 8.4.
[469] As listed above.
[470] Sir Edward Troup (1928), above n 464, 5.
[471] Troup (1925) above n 464, 97.
[472] Ibid 105.
[473] Ibid 104.
[474] See Critchley, above n 102, 54; Emsley (1991), *above n 108,* 32-40; Emsley(2009) above n 108, chapter 39; R D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481 regarding initial public reactions to the New Police in London and in elsewhere in England.

> It is difficult to reconcile an effective system of police, with that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society in this country; and Your Committee think that the forfeiture or curtailment of such advantages would be too great a sacrifice for improvements in police, or facilities in detection of crime, however desirable in themselves if abstractedly considered.[475]

With this degree of uncertainty and mistrust evident in both in Parliament and among the people of London as to the effect police would have on citizens and their rights, the likelihood that the Parliament intended the new, untried and untested police force to have any degree of independence from ministerial control seems minimal, at best.

The impact on Australia is that, to the extent that the Peel model has been accepted as the model upon which police-government relations were to be based, it provides no support for any expectation that Australian police forces would have any independence from government.

Different statutory models were also used in Australia, including the no direction approach that still operates in Western Australia and formerly operated for varying periods in a number of other jurisdictions. That model may indicate that a positive decision had been made to diverge from the Peel approach and establish police independence through omission.[476]

As to the two jurisdictions that adopted the Peel model (NSW[477] and South Australia)[478] the provisions in those colonies included some differences from the London model. Neither included the preamble statement equivalent to that in the 1829 Act, which clearly indicated the intention of the Westminster Parliament. And the South Australian Act also did not place its force under magistrates or justices of the peace, but Commissioners. Neither variation, however, seems to indicate a different underlying intention, and the second, by omitting any element of any judicial independence from the Commissioners, seems more indicative of closer government control rather than any independence of police.

5.2 – Meaning - Cowper Model

The other form of government direction power used in Australia is the Cowper model. This was first introduced in 1862 in New South Wales by the then Chief Secretary, Sir Charles Cowper, and was subsequently adopted and adapted in all Australian jurisdictions other than

[475] United Kingdom, *Report from the Select Committee on the Police of the Metropolis,* 17 June 1822, 11. Public mistrust can also be seen, in practical terms, in the jury verdict of justifiable homicide regarding the death of Constable Culley in 1833 during the Cole Bath Fields Riot, a verdict which seems unthinkable today in similar circumstances. Thurston, above, n 429, 128-135.
[476] The operation of those provisions is discussed in Chapter 4.
[477] *Sydney Police Act 1833* (NSW); *Police Act 1838* (NSW).
[478] *An Act for regulating the Police Force of the Province of South Australia (*1841) (SA).

Western Australia. Variations of that model continue to be to the operative formulation in New South Wales, Tasmania, South Australia and the Northern Territory. The various uses of Cowper provisions in Australia are detailed in Table 3.1.

5.2.1 – Cowper distinguishing elements

The term 'Cowper provision' is used in this thesis to describe provisions which have the essential elements that Cowper included in his original 1862 model. That is, a provision that empowers the executive government to direct Police Commissioners; where the extent of those direction powers equates with the Police Commissioner's powers to supervise and control a police force, covering all, or almost all,[479] of the functions provided to the Police Commissioner including law enforcement functions.

For the purpose of this thesis, the equivalence of Commissioner control power with government direction power is seen in two different types of provision.

- Provisions similar to the original Cowper formulation, which empower the relevant Police Commissioner to have the 'superintendence'[480] or to have the 'management and control'[481] of a police force, but make that function subject to the direction of government; and
- Provisions that require the Police Commissioner to exercise all of the Commissioner's powers and functions in accordance with government direction.[482]

The common element of both approaches is the apparent parallel between the superintendence powers of the Police Commissioner and those of the executive government.

Such provisions appear, on their face, to allow directions regarding all functions of a Police Commissioner including law enforcement functions.

It should, however be noted that Bayley and Stenning[483] have expressed doubts over the extent of the Canadian Cowper provision (s 5 *Royal Canadian Mounted Police Act* (Can)) as:

> There is no indication in the Act as to what 'the direction of the Minister' might legitimately encompass, or what is or is not included under the rubric 'the control and management of the Force'.[484]

[479] In the South Australian provision, there is a statutory prevention of any direction relating to the appointment, transfer, remuneration or termination of a particular person.
[480] NSW between 1862 & 1990; Qld between 1863 & 1990; Victoria 1873 & 2014; Tasmania from 1898; Commonwealth Police 1917 & 1919.
[481] South Australia from 1972; NSW from 1990.
[482] Northern Territory since 1963; ACT 1927-1979; Commonwealth Peace Officers 1934-1960.
[483] above n 20.

It is, however not clear why those authors were not prepared to give the statutory language in s 5 the natural meaning that those words would normally have and which Cowper clearly intended. The authors associated issue regarding 'control and management' is also puzzling as those words relate not only to the power of the Minister, but also the ability of the Police Commissioner to manage the force. As such, any limitation to the natural meaning of those words would hamper the control of the force by the Police Commissioner, an effect that cannot have been intended. Waller, in his assessment of the addition of a Cowper provision in South Australia in 1972 did not share the doubts of Bayley and Stenning when he stated: 'In no other Australian state had Parliament enacted so recently *and clearly* legislation expressing the *subordination of the police* to the executive government'.[485]

The only express limitation regarding the *extent* (as distinct from the form) of the direction power in any of the Cowper provisions listed in Table 3.1 is contained in the model currently operative in South Australia. That limitation is that the Minister cannot make a direction regarding 'the appointment, transfer, remuneration, discipline or termination of a particular person'.[486] There is no other express limitation on the extent of the Minister's power of direction and certainly there is no restriction otherwise limiting the Minister's power to direct concerning operational issues.

There are, however, some *formal* restrictions in some of the Australian Cowper provisions. In Victoria the direction power was, until 2014, with the Governor in Council;[487] that is, the Governor advised by the Executive Council.[488] This required a formal documentary process as well as scrutiny by the Victorian Governor before a direction was made.[489] Unlike some other Australian jurisdictions, including the Commonwealth,[490] the Victorian Governor[491] must preside at meetings of the Executive Council.[492] This presence of a vice regal representative can act as a limiting factor in the exercise of a governmental power. Although Governors are constitutionally bound, at least on the basis of convention, to act in accordance with ministerial advice, their presence at, and presiding over, Executive Council meetings enables a Governor who has concerns about a proposed order to exercise what Bagehot referred to as the 'right to warn'.[493] Such an exercise will not compel a Minister to withdraw a matter, but can lead to the Minister reviewing the issue before proceeding with it.

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[484] Ibid 79.
[485] Waller, above n 55, 255 (emphasis added).
[486] *Police Act 1998* (SA) s 7.
[487] *Police Regulation Act 1958* (Vic) s 5.
[488] *Interpretation of Legislation Act 1984* (Vic) s 38.
[489] See the discussion of Victorian Executive Council procedures and requirements, above n 240.
[490] Department of Prime Minister and Cabinet, *Federal Executive Council Handbook* (Commonwealth of Australia, 2017), Para 2.1.6. https://www.pmc.gov.au/resource-centre/government/federal-executive-council-handbook-2017.
[491] or the Lieutenant Governor or the Administrator - *Constitution Act 1975* (Vic) s 6A.
[492] Ibid s 87C.
[493] William Bagehot, *The English Constitution* (Milford, 1945) 67; Killey, above n 5, 205.

The formal restriction in the two other jurisdictions with Cowper provisions (South Australia and Northern Territory) is that directions must be in writing.[494] In addition, in South Australia, a direction must also be published in the Government Gazette and tabled in both houses of Parliament within a fixed amount of days of the making of the direction.[495] The effect of the direction, however, is not delayed until that gazettal and tabling and an interesting, but unclear question concerns the consequence of failure to comply with that legislative obligation.

Cowper direction powers are not unique to Australia and are also used in Canada[496] and some of its provinces.[497] The Canadian federal use of such a provision can be found in 1886 when s 4 of the *North West Mounted Police Act*[498] provided that the Commissioner of Police:

> shall perform such duties as shall be subject to the controls, orders and authority of such person or persons as are, from time to time, named by Governor in Council for that purpose.

While the language differs from that used in Australia, the essential element is present – the Police Commissioner was subject to the direction and control of government.

This formula was altered in the 1906, 1927 and 1952 statutory re-enactments to place the management and control of the police directly in the hands of a Minister.[499] The 1952 wording was:

> Such member of the Queen's Privy Council for Canada as the Governor in Council from time to time directs has the control and management of the Force and of all matters connected therewith.

In 1959, the then operative Act, the *Royal Canadian Mounted Police Act* 1952, was amended in relation to the organisation and administration of the force. One of those amendments was to alter the formulation regarding the police-government relationship to one similar to that used in Australian jurisdictions,[500] an approach which continues in the current Act. The current formula refers to the:

> Commissioner of the Royal Canadian Mounted Police … who, under the direction of the Minister, has the control and management of the Force and all matters connected with the Force.[501]

[494] *Police Administration Act 1979* (NT) s 14(2); *Police Act 1998* (SA) s 6.
[495] *Police Act 1998* (SA) s 8.
[496] *Royal Canadian Mounted Police Act* RSC 1985, c R-10, s 5(1).
[497] *Police Act* RSA 2000, c P-17, s2; *Police Act* RSBC 1996, c 367, s 7; *Royal Newfoundland Constabulary Act* SNL 1992, c R-17, s 4(1); *Police Services Act* RSO 1990, c P 15, s 17(2); *Police Act* 2006 c.16 R.S.P.E.I. 1988, P-11.1 s 6(2).
[498] 49 Vic, c 45.
[499] *Royal Northwest Mounted Police Act*, RS 1906, c 91, s 4; *Royal Canadian Mounted Police Act,* RS 1927, c 160, s4; *Royal Canadian Mounted Police Act*, RS 1952, c 241, s 4.
[500] *Royal Canadian Mounted Police Act*, 7-8 Eliz II, c 54, s 5.
[501] *Royal Canadian Mounted Police Act* RSC 1985, c R-10, s 5(1).

How the Canadians developed this formula (whether they adopted it from the established models, based on Australian models or elsewhere, or invented it themselves) is unknown. However, in his second reading speech for the 1959 Bill, Minister Fulton observed, when discussing the amending Bill as a whole, that 'the bulk of the recommendations for this improvement and modernization came from the police themselves'.[502]

Whatever the origins of the Canadian provisions are, the use of similar wording in both countries makes the understanding and experience in Canada regarding the intent and operation of the formulation as being highly relevant to the Australian understanding. Canadian interpretations are discussed in Chapter 6.

Cowper provisions can be distinguished from more limited direction powers used in some other counties, such as the Irish direction provision (s 25 *Garda Siochana Act 2005* (Republic of Ireland)). Section 25(1) allows the Minister to issue written directives to the Garda Commissioner regarding 'any matter relating to the Garda Siochana' (that is the police force). However, an operational limitation is provided by s 25(4) which provides that the Minister's power of direction:

> may not be exercised to limit the independence of a member of the Garda Siochana in performing functions relating to the investigation of a specific offence or the prosecution of an offence ….

An even more limited direction power is provided by New Zealand police legislation. Section 16 of the *Policing Act 2008* (NZ) provides that the New Zealand Police Commissioner is responsible to the Minister for 'giving effect to any lawful ministerial directions'. However, a lawful direction does not include directions concerning operational matters as is made clear by s 16(2). That section provides that the Police Commissioner 'is not responsible to, and must act independently of, any Minister of the Crown' regarding a number of matters including the enforcement of order and the enforcement of law in relation to any individual or group of individuals, and the investigation and prosecution of offences.

As can be seen from Table 3.1 each Cowper variation in Australian jurisdictions contains the distinguishing characteristic – the ability of government to direct the Police Commissioner in the conduct of his or her duties. The most significant differences concern the way in which the functions of the chief police official are described. This description varies between jurisdictions as well as over time. In the earliest examples, the function was described simply as 'superintendence'[503] or 'superintendence and control',[504] while in later versions it

[502] Canada, *Parliamentary Debates, House of Commons,* June 9 1959 4491 (Fulton).
[503] New South Wales & Queensland.
[504] Victoria, Tasmania (1898).

has been described as 'management and control',[505] and 'the efficient effective and economic management and superintendence'.[506] And two of the Commonwealth models do not refer to the functions at all,[507] while the NT examples refer to 'all' the powers and functions of the Commissioner.

Whether these differing formulations have any significance and effect is not, however, of relevance to this study which concerns the ability of the executive to direct the exercise of Police Commissioner functions, however they are described, not the extent of Police Commissioner functions.

5.2.2 - Intention underlying the Cowper Model

As discussed earlier[508] the Cowper model was first introduced in New South Wales with the express intent of giving government control over the police force. Sir Charles Cowper was concerned that he was unable, should he detect any defects in the force, to correct them. All he could do was to make representations and suggestions, as he had no means to control or direct the force. He acknowledged that any suggestions he made 'had always received consideration … yet that was not a position that a Minister of the Crown ought to occupy'.[509]

Most other Australian colonies adopted the Cowper model in the 19th century, but with little apparent consideration or Parliamentary discussion of its significance. However, when South Australia adopted the model in 1972 it was done with a clear specific objective: to make 'it clear that in the exercising that control and management the Commissioner is to be subject to any directions of the Governor'[510] to 'vest the ultimate responsibility for the control of the Police Force in Executive Government'.[511] In the second reading speech for the amending bill that would make these changes,[512] the Attorney-General, Len King, based the measure on the report of 1970 Royal Commission of Bright J, whose views he referred to, quoted at length and adopted. In the passages quoted by the Attorney-General, the Royal Commissioner recommended the course taken in the 1972 amendments,[513] and he did so predominantly on the basis of the standards and expectations of responsible government.

[505] NSW (1990), South Australia.
[506] Tasmania (2003).
[507] ACT & Peace Officers.
[508] Chapter 3.2.
[509] *Sydney Morning Herald*, November 28 1861, page 3.
[510] South Australia, *Parliamentary Debates,* House of Assembly, 14 March 1972, 3830, (The Hon Len King).
[511] Ibid. 3828.
[512] The Bill became the *Police Regulation Act Amendment 1972* (SA) which amended the *Police Regulation Act 1952* (SA).
[513] although he preferred that the direction power be vested in the Minister, not the Governor. See the *Bright Report,* above n 32, 82.

> I do not think that the Commissioner of Police and his force ought to be placed in a situation where they have to take sole responsibility for making what many reputable citizens regard as a political type decision. The Commissioner of Police ought to have the right, in such a case, of obtaining general advice from the Chief Secretary but the Commissioner of Police ought not to be bound to initiate such decisions. The Chief Secretary ought to be willing to advise and direct the Commissioner in any such case, to make public the fact that he has done so, and to take the burden of justifying the decision off the shoulders of the Commissioner of Police and on to his own shoulders in parliament.[514]

The Bill was opposed by the Opposition Liberal Party with the result that the second reading was passed by a mere four votes.[515] Nonetheless, the amending bill became law and no subsequent efforts have been made to repeal the government directions power when the Liberal Party came into power in South Australia, as it did in 1979[516] and later in 1996.[517]

South Australia's policing Act, the *Police Regulation Act 1952* (SA), was replaced in 1998 by the *Police Act 1998* (SA) during the term of the Olsen Liberal government. Rather than repealing or reversing the government directions power, the 1998 Act retains it, although it provides that power to the responsible Minister rather than the Governor. By doing so, it more closely follows the recommendations of Bright than its 1972 predecessor.[518] In the second reading speech, the main reference to the governmental direction power was made by Minister Evans and was limited to 'Clause 6 provides that the Commissioner is responsible for the control, and management of South Australian Police, subject to the directions of the Minister'.

In that speech he made no indication that the breadth of the directions power was to be in any way limited other than by express limitations. Moreover, if there was any doubt that the directions power extended to operational matters, this certainly seems put to rest by clause 8 as it was initially worded. Minister Evans, described it as requiring 'any directions the Minister gives to the Commissioner in relation to enforcement of a law or law enforcement methods, policies, priorities and resources must be published in the Gazette and laid before Parliament'.[519]

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[514] *Bright Report,* above n 32, 80; quoted in South Australia, *Parliamentary Debates,* House of Assembly, 14 September 1972, 3828-3829 (The Hon L J King).
[515] South Australia, *Parliamentary Debates,* House of Assembly, 22 March 1972, 4173.
[516] A Liberal Party government led by David Tonkin held office from 18 September 1979 until 10 November 1982. Parliament of South Australia, Premiers of South Australia, https://www.parliament.sa.gov.au/Members/Ministers/Pages/PremiersofSouthAustralia.aspx.
[517] Liberal Party governments led by Dean Brown, John Olsen and then Rob Kerrin held office between 14 December 1993 until 5 May 2002. Parliament of South Australia, Premiers of South Australia, https://www.parliament.sa.gov.au/Members/Ministers/Pages/PremiersofSouthAustralia.aspx.
[518] *Police Act 1998* (SA) s 6.
[519] South Australia, *Parliamentary Debates,* House of Assembly, 3 June 1998 (The Hon I F Evans) 1062. Clause 8 when originally introduced was limited to law enforcement directions, but was subsequently amended to cover all directions. This issue seems first raised by Mr Conlon on 8 July 1998 during the committee debate on of the Bill, South Australia, *Parliamentary Debates,* House of Assembly, 8 June 1998 (Mr Conlon) 1387.

The Attorney-General, Trevor Griffin, made it clear that clause 8, in its original form drew, a 'distinction between operational and non-operational matters,' and that the reason for that distinction was not to prevent government directing on operational matters: 'It is only in relation to operational matters that directions given by the Minister are required to be published'.[520]

As an indication of how far the Liberal attitude had moved from 1972, one Liberal Party member, Ivan Venning, observed:

> The Commissioner will be subject to ministerial direction and not, as is currently the case, the Governor. To me, that is common-sense, because it makes the *channel of command* more direct, and the Minister of the Government of the day—whether it be a Liberal or a Labor Government, or whatever—is able to give the Commissioner of the day some direction.[521]

The parliamentary intent for the 1998 provision, like its 1972 predecessor, seems therefore to be clear: that the parliament intended the Police Commissioner to be subject to the government direction in relation to all matters other than where there is an express legislative limitation.

Reference can also be made to the introduction of a Cowper provision into Tasmania in 1898[522] and to its re-enactment in 2003.[523] Both Acts contained Cowper provisions, although, as Table 3.1 shows, the form of the 2003 provision is slightly varied from that used in 1898. The 1898 Parliament did not discuss the intention underlying its use of a Cowper provision, although the approval expressed in that debate [524] of the 1891 views of the former Attorney-General,[525] Andrew Inglis Clark, indicates that those views were also those of, at least, the government. Clark, who was also one of Australia's leading constitutional founders, was of the view that the 'police was the arm of the executive' and that its duties 'should be carried out by servants *directly responsible to the executive*'.[526]

In 2003, the Tasmanian Parliament similarly did not consider or discuss the meaning and extent of the re-enacted government direction power. In fact the only notable observation regarding the provision was made by an opposition Liberal Party member in the Legislative

[520] South Australia, *Parliamentary Debates, (Legislative Council*), 4 August 1998,1154 (The Hon K T Griffin). The government was opposing amending clause 8 due to perceived practical difficulties if all directions were required to be publicised. However, this objection was withdrawn and the clause was amended to cover all directions. South Australia, *Parliamentary Debates, (Legislative Council*), 13 August 1998,1373 (J C Irwin).
[521] South Australia, *Parliamentary Debates, (House of Assembly*), 7 July 1998, 1343 (emphasis added).
[522] *Police Regulation Act 1898* (Tas).
[523] *Police Service Act 2003* (Tas).
[524] *The Mercury*, 16 June 1898, page 4.
[525] and constitutional founding father.
[526] Ibid, 24 September 1891, page 4 (emphasis added).

Assembly, Michael Hodgman QC, who referred to the provision containing the direction power as being 'excellent'.[527]

5.2.3 - Canadian Intention

The intention underlying the adoption of the Cowper model in Canada in 1959 is not clear. The government-police relationship provisions regarding the Royal Canadian Mounted Police, prior to 1959, clearly placed direct control in the hands of the government. Little was said in the parliamentary debate regarding the introduction of the Cowper provision in 1959 other that the observation of the Minister that the provisions in the amending Bill 'will retain and in some respects improve the system by which there is an over-all control of the force by the government and responsibility of the force to the government'.[528]

The Minister, however, did say, during the committee consideration of the relevant clause (cl 5) that there will be 'no change in effect under the new bill'.[529] He was, however, discussing the appointment process for the Police Commissioner, not the degree to which the government could control or direct the Commissioner. Nonetheless, given that the Minister was discussing the clause containing the direction power and was comparing the effect of that clause with the pre-existing statute, this exchange would have provided the Minister with the opportunity to draw to the Parliament's attention any alteration to the police-government relationship brought about by the clause. As he did not, it seems reasonable to conclude that the Minister considered that the clause would make 'no change in effect' to the police-government relationship.

5.2.4 - Conclusion – Cowper

From this examination of the various Cowper provisions and the expressions of parliamentary intention for their enactment, it appears that those provisions were intended to be read literally and consistently with the doctrine of responsible government. Although the parliamentary discussion regarding the intention for their enactment has not been extensive, from the instances when this issue was discussed, all indications are that the various parliaments intended Cowper direction provisions to have a broad application and to mean

[527] Tasmania, *Parliamentary Debates, Legislative Assembly,* 26 November 2003; Tasmania, *Parliamentary Debates, Legislative Council*, 27 November 2003.
[528] Parliamentary Debates, *Canadian Parliament, House of Commons,* June 9 1959 4481 (Fulton).
[529] Ibid 4495.

what they say. That is, to empower government to direct Police Commissioners regarding all functions unless expressly limited in the relevant legislation.

6 – Broad Direction Powers (Cowper) - Effect

The previous Chapter analysed the parliamentary intent for the introduction of the two government direction provisions used in Australian jurisdictions (Peel and Cowper provisions). It concluded that while the various Parliaments had not spent extensive time in considering their intent, parliamentary discussions demonstrated a consistent view that those provisions were introduced to allow the government to direct all functions of the police other than where expressly excluded, consistently with the doctrine of ministerial responsibility.

This Chapter examines how Cowper provision direction powers[530] have been interpreted. That is, have Cowper provisions been regarded as having broad scope, as the enacting parliaments seemed to have intended, or have those powers been qualified or limited and if so, to what extent and for what reason?

For this purpose this Chapter looks to formal expert sources of interpretation, the results of which affect the manner in which the powers are understood and applied. That is, judicial decisions (which, as will be seen, are few in number) and consideration by government and parliamentary inquiry reports.

It is also relevant to consider contemporary understanding of the police-government relationship following the enactment of Cowper provisions. While this thesis does not pretend to provide a comprehensive history of police-government relationships in the different Australian jurisdictions, particular instances are drawn on to illustrate understandings at different times and places. Concerning the understandings of the police-government relationship in the immediate aftermath of the passage of Cowper provisions, reference is made to the understanding of the individual who is regarded as Australia's primary constitutional founding father, Sir Henry Parkes.[531] Parkes was not only a long time politician in colonial Australia, but was also one of the few who documented his perspective of his role - which included being Colonial Secretary (with responsibility for police) between 1866 and 1868, and later five times Premier of NSW.[532] From his writings[533] it is clear that his understanding matched Cowper's intention. Parkes was an active police Minister, and unambiguously regarded the police force as 'under my ministerial control.'[534]

[530] See Table 3.1 for the Cowper provisions used in Australia.
[531] See for example http://www.australia.gov.au/about-australia/australian-story/federation which refers to Parkes as 'the "Father of Federation" for his role as a long-time agitator for the cause' of federation.
[532] Between 1872 & 1875; in 1877; between 1878 & 1883; between 1887 and 1889 and between 1889 and 1891.
[533] Henry Parkes, *Fifty Years in the Making of Australia's* History (Longman, 1892), which seem never to have been examined in previous academic discussions of the police—government relationship.
[534] Ibid, Vol 1 214.

> Repeatedly I have brought the arm of the Police to bear with proportioned force on disturbed conditions, where the peace of society appeared to be in danger.[535]

And his actions are consistent with that language as Parkes took direct operational command of the force in dealing with the two major policing issues facing NSW during his two years as Colonial Secretary; the bushranger Clarke brothers,[536] and the attempted assassination of Prince Alfred in 1868.[537] Making it clear how far he considered that his operational control of the police went, Parkes appointed the officer to take charge of the Clarke operation contrary to the wishes the Police Commissioner with the following blunt instruction: 'I represent the Government, you are an officer of the Government; Wright is to go on this service, and you must assist the Government by assisting him in the undertaking.'[538]

The effect of Peel provisions in Australia is not examined as this issue is of marginal relevance to the primary objectives of this study as the last occasion in which a Peel provision was operational in Australia was in 1863.[539]

6.1 - Cowper Provisions - Functions

As discussed in Chapter 5.2, the expression 'Cowper provision' refers to a provision which empowers an executive government to direct a Police Commissioner where that power of direction is expressed to cover at least the substance of the Commissioner's powers to control a police force including law enforcement powers.

The common element with Cowper provisions is the apparent parallel between the superintendence powers of the Police Commissioner and the direction powers of the executive government.

Given this apparent legislative parallel, it would seem that if is to be argued that there is some limitation to a government's direction power, for example, that it does not apply to law enforcement decisions, this could only occur if either the Police Commissioner powers do not cover law enforcement decisions, or there is some limitation on the government's power of direction that is not apparent from the language of the Cowper provision. The first option

[535] Ibid Vol 2 390.
[536] Ibid Vol 1 220-221.
[537] Dando-Collins, above n 206, ch 16 (loc 3172, kindle edition). Parkes also initiated and directed policing operations outside of the NSW police force when he established an unsuccessful force of special constables independent of NSW police to catch the Clarke brothers and 'employed a secret agent to carry out investigations in Melbourne' regarding Fenian gangs responsible for the attach on Prince Albert. Parkes, above n 533, Vol1 215-219 & Dando-Collins, ch 16 (loc 3252, kindle edition).
[538] Parkes, above n 533, Vol 1 220-221.
[539] Repealed in South Australia by the *Police Act 1863* (SA).

seems a most unlikely conclusion as it would seem to result in a quasi-military force not subject to either external or internal control.

Unfortunately, despite this textual difficulty, academic work, judicial authorities and the inquiry reports discussed below have not analysed or closely considered the language of Cowper provisions in assessing the breadth of the government's direction power. Those that have considered that the government's direction power does not relate to operational matters, seem to have reached that conclusion based on the second method. However, as discussed below, there is little clarity in those discussions on the source of that not apparent limitation on a government's powers of direction.

6.2 - Judicial decisions

Despite Cowper provisions being in existence since 1862[540] there are only three judicial decisions in which the scope of those provisions has been examined – to express a considered view whether the broad government direction power apparently provided by the provision is any way confined or restricted. One is a single judge discussion from New South Wales in 1982 (*Griffiths v Haines*)[541] and the other two are from Canada; a single judge decision of the Alberta Court of Queen's Bench in 1993 (*Rutherford v Swanston*)[542] and a decision of the Supreme Court of Canada in 1999 (*R v Campbell and Shirose*).[543]

There are also other judicial decisions in which legislation containing Cowper provisions was discussed and applied that need to be referred to, as those decisions have been regularly cited in support of police independence from government. They are the decisions in two Australian cases; the 1906 High Court decision *Enever v R*[544] and the 1952 High Court[545] and 1955 Privy Council[546] decisions in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd).*

However, the judicial discussion in those cases did not relate to the relevant Cowper provision or to the extent of the government direction power contained in that provision.[547]

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[540] *Police Regulation Act 1862* (NSW). See Chapter 3.2.
[541] [1984] 3 NSWLR 653.
[542] [1993] 6 WWR 126.
[543] [1999] 1 SCR 565.
[544] (1906) 3 CLR 969.
[545] (1952) 85 CLR 237
[546] (1955) 92 CLR 113.
[547] *Police Regulation Act 1898* (Tas) s 8 in relation to *Enever* and *Police Regulation Act 1899* (NSW) s 4(1) in relation to *Perpetual Trustees*. In *Envever* s 8 was not referred to and in *Perpetual Trustees*, the Privy Council did not discuss s 4 while in the High Court, only Kitto J made any reference to s 4 when he seemed to acknowledge the extent of governments power of direction it appears to provide (1952) 85 CLR 237, 304:

> It is worth mentioning, too, that the ultimate direction of the police force is vested, by s 4 of the Police Regulation Act, not in the Crown but in the Minister; and, although in a political sense this may come to much the same thing, the

Both decisions considered police constables 'independent', but that independence was not considered in the context of the constitutional relationship between the executive and a Police Commissioner. It was relevant to whether individual constables were in a master and servant relationship, which was the necessary factor in determining any liability in damages that the circumstances in each case gave rise to.[548]

It is also important to recognise that these cases did not decide that the constables could not be made subject to a direction where a statutory power purportedly allowed that to happen, or that the statutory powers present in those cases, the Cowper provisions, were not sufficient for that purpose. Indeed, those decisions seem to demonstrate that the judges who mentioned this issue may have had no difficulty with a constable being made subject to a direction.

For example, in *Enever*, Griffith CJ seemed to have no have difficulty with a constable receiving a 'direction of a superior officer'[549] and O'Connor J seemed to indicate that he may have reached a different view of the government- police relationship had the constable in question made the wrongful arrest following a government direction. This can be seen from his observations that: 'He made the arrest in the discharge of his duty as holder of the office of constable, and not by the direction or under the control of the Government' and 'It is not contended here that there were any direct instructions from the Government to make this arrest'.[550] And in the High Court in *Perpetual Trustees* Kitto J observed that 'It is worth mentioning, too, that the *ultimate direction* of the police force is vested by s 4 of the *Police Regulation Act*, not in the Crown but in the Minister'.[551]

As to the three decisions in which the Cowper provisions were considered, those discussions were also not in the context of a consideration of the constitutional relationship between the police force and the government. Like *Enever* and *Perpetual Trustees*, they concerned civil liability issues. In *Griffiths v Haines*, the issue was whether the NSW government owed a duty of care to police officers and, like *Enever*, whether the government is vicariously liable for the negligent actions of constables. In *Rutherford v Swanson* and *R v Campbell*, the issue was whether the Royal Canadian Mounted Police is an agent of the Crown entitling it to Crown immunity.

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distinction exists in point of law. Indeed a similar provision relating to the police force in England was selected by Maitland to give point to his observation that "To a very large extent indeed England is now ruled by means of statutory powers which are not in any sense, not even as strict matters of law, the powers of the King": Maitland, Constitutional History of England, pp. 415, 417.

[548] The issue considered in *Enever* was whether the Crown was liable in damages for the wrongful arrest by a constable ((1906) 3 CLR 969, 974) and in *Perpetual Trustees,* whether the Crown could sue for damages as a result of the loss of services of a police officer: (1952) 85 CLR 237, 242. The legal question in dispute in both cases concerned whether constables were officers, agents or servants of the Crown, not the extent to which a Police Commissioner can be subject to government directions on operational matters.

[549] (1906) 3 CLR 969, 980.

[550] Ibid 990 & 994.

[551] (1952) 85 CLR 237, 304 (emphasis added).

Griffiths v Haines[552] is a decision of Lee J of the NSW Supreme Court in 1982 who found, consistently with *Enever* and *Perpetual Trustees*, that no duty of care existed and that the government was not vicariously liable as the relationship between the government and the constable was not that of a master and servant. Lee J did raise the applicable Cowper provision[553] but considered 'The section … plays no part in the present inquiry'.[554] His views, therefore, regarding the correct interpretation of Cowper provisions seem clearly *obiter dicta*. They were also not extensive, being limited to one page of his decision.

His reasoning was as follows.

First he cited and quoted *Enever* and *Perpetual Trustees* (in which the Cowper provision was not discussed) as well a series of cases, including *Blackburn* (which did not contain a Cowper provision) to support the independence of NSW police.

He then quoted the preamble to the *Metropolitan Police Act 1829* (UK) (which contained a Peel, rather a Cowper, direction power) and its reference to Police Commissioners '*acting under the immediate Authority of one of His Majesty's Principal Secretaries of State'.* He observed that:

> the presence of the words emphasized has not prevented the conclusion in England that the constable – and the Commissioner as well – acts independently and with original authority and it can safely be concluded from the decision of the Privy Council in … *Perpetual Trustees* … that s4 of the New South Wales Act also in no way operates to impinge upon the independence of a constable in the exercise of his duties as a constable'.[555]

From that he concluded that 'it is clear from the authorities cited in this judgment that such a [government] direction could not be given so as to affect the exercise by the Commissioner of his discretion in regard to the enforcement and upholding of the laws of the land'.[556]

There are number of difficulties with Lee J's analysis, the first of which concerns his entirely uncritical use of the 'authorities cited' and his failure to recognise the academic criticism from Marshall[557] and others of the concept of police independence, which is discussed later.[558] The second is that three of the cases that he relied on did not contain any ministerial direction provision of any sort[559] and only one of the cases he cited, *Blackburn*, involved consideration of the scope of a direction power as against the independence of a constable.

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[552] [1984] 3 NSWLR 653.
[553] *Police Regulation Act 1899* (NSW) s 4(1).
[554] [1984] 3 NSWLR 653, 661.
[555] Ibid.
[556] Ibid.
[557] Marshall (1965), above n 53.
[558] Chapter 10.
[559] *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270; *Fisher v Oldham Corporation* [1930] 2 KB 364; *Ridge v Baldwin* [1964] AC 40.

And Lee J failed to recognise or address the significant difficulties in the analysis in *Blackburn* referred to earlier.[560] Furthermore, as he conceded, the Privy Council decision on which he based his safe conclusion made 'no specific reference' to the Cowper provision.[561]

Lee J also omitted a number of salient considerations relevant to his safe consideration. That is:

- He did not refer to the language of the *Metropolitan Police Act 1829* other than the preamble. In particular he did not refer to the language of s 1 of that Act which contained the direction power (the Peel provision). He seems to have ignored that provision.
- He did not recognise the significance of the different statutory language used in NSW as compared to that which Lord Denning had considered. Lee J did not consider this issue but based his view on what seems nothing more than an assumption that the differing statutory language is of no consequence.
- Finally, and of most concern, Lee J reached his 'safe' conclusion without referring to the legislative history of either the NSW policing legislation or the 1829 Act. He made no attempt to ascertain the legislative intent underlying either direction power, but instead read down plain statutory language based on authorities which did not deal with that language. As seen earlier (in Chapters 3.3 and 5.1), both the NSW and the UK Parliaments introduced Peel and Cowper direction provisions with the intention of subjecting police to government control, a factor that Lee did not consider in his analysis.

These failures in Lee J's analysis are inconsistent with the orthodox standards of statutory interpretation discussed in Chapter 2.3. Not only does he seem to have regarded judicial decisions as a substitute for the text of legislation,[562] but his conclusion is open to the criticism that it amounts to little more than uncritical cherry picking of authorities to support a particular conclusion, ignoring the inconvenient material that does not support that conclusion. That, and the *dicta* nature of his comments minimise the significance of his views on the police-government relationship.

In the second decision, *Rutherford v Swanson*,[563] the discussion was also short, but, unlike *Griffiths*, the discussion was part of the decision's *ratio*. Bielby J was considering whether

[560] See Chapter 8.2. This may be because Lustgarten's criticism of Blackburn was not published until 1986.
[561] [1984] 3 NSWLR 653, 661.
[562] Contrary to the view expressed by the Privy Council in *Ogden Industries v Lucas* [1970] AC 113, being the 'error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself'. Also see *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)
[563] [1993] 6 WWR 126.

the police was an agent of the Crown for the purpose of her consideration of the availability of Crown immunity and took a very literal view of the Cowper provision. Relying on Canadian Supreme Court authority that 'the greater the control, the more likely it is the person will be recognized as a Crown agent',[564] and observing the ministerial power of direction in the Cowper provision (s 5(1) *Royal Canadian Mounted Police Act* (Can)), Bielby J found that 'the RCMP is directly under the control of a Minister of the Crown. That is sufficient control to find that the RCMP is an agent of the Crown'.

This decision, of course, can be subject to similar criticisms to those made in relation to *Griffiths v Haines*. Not only did she not refer to or the legislative history of the Cowper provision, but she made no attempt to consider any other authorities which dealt with the issue of whether the police is an agent of the Crown including *Enever* and *Perpetual Trustees* or consider authorities which indicate either generally or in relation to particular functions that the police is not subject to government control (such as *Blackburn*).

Rutherford was also disapproved by the third decision regarding Cowper provisions, the decision in 1999 of the Canadian Supreme Court in *R v Campbell & Shirose.*[565] Binnie J, who delivered the judgment of the Court, considered that Bielby J had 'failed to differentiate the different functions the RCMP perform and the potentially different relationship of the RCMP to the Crown in the exercise of those different functions.[566]

In *Campbell*, Binnie J relied, like Lee J in *Griffiths,* on an uncritical adoption of *Enever*, *Perpetual Trustees*, *Ridge v Baldwin*[567] and *Blackburn*, as well as an early Canadian Supreme Court authority, *McCleave v City of Moncton,*[568] for the proposition that 'an RCMP officer in the course of a criminal investigation, and in that regard are independent of the control of the executive government'. [569] The court in *McLeave* found the City of Moncton not liable for the acts of its police constables and relied predominately for its conclusion on a United States authority *Buttrick v The City of Lowell.*[570] In that US decision Bigelow CJ of the Supreme Court of Massachusetts found that 'Police officers can in no respect be regarded as agents or officers of the city …. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts'.[571] However neither Binnie J nor Strong CJ (in *McLeave*) considered whether the statutory framework in *Buttrick*

[564] *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551.
[565] [1999] 1 SCR 565.
[566] Ibid 592.
[567] [1964] AC 40.
[568] (1902) 32 SCR 106.
[569] [1999] 1 SCR 565, 589.
[570] 1 Allen [Mass] 172.
[571] Quoted in (1902) 32 SCR 106, 108.

paralleled that applicable to Canada and, in particular, whether there was any government direction provision relevant to the City of Lowell police.

There are other difficulties with Binnie J's approach. He did not consider the legislative history of the Cowper provision that he was interpreting. And his reliance on judicial authority is less compelling than it appears. Like Lee J in *Griffiths*, only one of the cases relied on involved a consideration of a government direction provision (*Blackburn*) and there was no recognition or consideration of the logical flaws in the reasoning in that case that have been referred to.[572] As to the other cases he relied on, either the reasoning in those cases did not involve consideration of the applicable Cowper provision,[573] or there was no government direction provision in the relevant policing legislation.[574] Accordingly, these authorities are marginal at best to the issue that Binnie J was considering – the meaning and effect of a Cowper provision.

Moreover, Binnie J seems to have limited police independence to the circumstance of the case before him. Thus he refers to police independence 'when the police are engaged in law enforcement'[575] or 'in the course of a criminal investigation'[576] while accepting than in its other roles 'the RCMP could be acting in an agency relationship with the Crown'[577] and therefore subject to government direction. This limited independence, is clearly inconsistent with *Blackburn* where Lord Denning considered that the independence of the Metropolitan Police Commissioner was extensive.[578] Binnie J did not explain why, if he considered *Blackburn* was applicable to Canada, he also considered the scope of police independence to be much narrower than in England and Wales.

One element, however, of the *McLeave* judgment that Binnie did not refer to, despite its apparent relevance, is the following passage from Strong CJ's decision:

> in respect to torts, the law of Quebec may be quite different and that, therefore, the decision in this case ought not bind this court in any cases of a similar nature occurring in the Province of Quebec. We have here to apply the common law as to torts as administered by the English courts solely, while in Quebec such matters are governed wholly by the provisions of the Civil Code.[579]

The significance of this passage is that Strong CJ recognised that the court was there applying the common law and Quebec was not. Although he only referred to the civil law of

[572] See Chapter 5.1.
[573] *Enever* and *Perpetual Trustees.*
[574] *Buttrick*, *McLeave* and *Ridge v Baldwin*.
[575] [1999] 1 SCR 565, 588.
[576] Ibid 589.
[577] ibid.
[578] As pointed out in Chapter 5.1, Lord Denning considered that the MET Commissioner was only subject to the 'orders of the Secretary of State' in the few circumstances compelled by the *Police Act 1964 (UK*). [1968] 2 QB 118, 135, which was also a misinterpretation of that Act as it had limited application to that force, unlike other forces in the England and Wales.
[579] (1902) 32 SCR 106, 110.

Quebec, his reasoning seems to indicate that if, like Quebec, any other province, or Canada as whole, qualified or replaced the common law by a legislative measure, the reasoning in *McLeave* would need to be altered so as to accord with the legislative measure.

The consequence of this is that, with the introduction of a Cowper provision, *prima facie*, the common law position regarding police independence appears altered; a position that required close examination to determine the degree to which the common law position survived. This did not happen in *Campbell*.

This seems to be acknowledged and accepted by the Quebec Court of Appeal in *Re Bisaillion and Keable*.[580] Although that court was dealing with Quebec legislation which did not contain a Cowper provision, the observations Turgeon JA regarding the lack of applicability of common law regarding police independence seem to be intended to have a broader applicability than Quebec. Turgeon JA, after referring to *Perpetual Trustees* and *Blackburn* and to certain pieces of Quebec legislation[581] concluded that:

> The powers which the law accords to the Attorney-General are in keeping with the spirit of this institution in Canada; as the guardian of public order, the Attorney-General is responsible, for the functions which might be other otherwise allocated in England.
>
> Therefore, the contention that the peace officer has an independent position with respect to the executive power, an argument based on English jurisprudence … is not in accordance with our law.[582]

Binnie J, however, did not refer to Turgeon JA's views[583] and seems to have merely assumed that the common law independence concerning criminal investigations survived, regardless of the statutory language or the intention underlying the Cowper provision. His explanation for the common law limiting what seem to be the plain words of the direction provision went no further than uncritical, but limited, reliance of *Blackburn*. He might have relied on a qualifying legislative provision, or the police oath, or an expression of parliamentary legislative intent. But he did not, with the result that his conclusion is clear, but not how he got there.

One provision that is available in many Australian jurisdictions was not available to assist Binnie J. That is, a provision that provides the common law constable powers and privileges to members of the force, including the Commissioner (such as s 6(2) *Police Regulation Act*

[580] (1980) 127 DLR (3d) 368.
[581] *Montreal Urban Community Act* 1969 (Que) c 84; *Police Act RSQ* 1977, c P-13; *Attorney-General's Prosecution Act* RSQ 1977, c S-35.
[582] (1980) 127 DLR (3d) 368, 378. And see page 397 where L'Heureux-Dube JA agreed with Turgeon JA's views on the 'comparison he makes between British institutions and our system of justice.'
[583] The decision in *Bisaillon and Keable* was appealed to the Supreme Court of Canada which made no finding or observations regarding Turgeon JA views on this issue: [1983] 2 SCR 60.

1899 (NSW) that was quoted and possibly relied on in *Griffiths*).[584] In view of what Denning in *Blackburn* considered as the powers and privileges of constables, this provision provides a clear basis on which it can be argued, at least, that a ministerial direction power needs to be read down to protect those powers and privileges. This issue will be discussed in more detail later.[585] However there is no such provision in RCMP Act.[586]

There is, however, one additional aspect of *Campbell* that may indicate that this decision has an additional dimension beyond that of the other decisions discussed. That is, Roach considers that the Supreme Court decision in *Campbell* has 'arguably elevated police independence in criminal investigations from a constitutional convention that in practice restrains the exercises of ministerial powers to a component of one of Canada's organizing constitutional principles, namely the rule of law'[587] In Roach's view, 'the case raises the possibility that courts might enforce the principle of police independence as part of the unwritten constitutional principle of the rule of law'.[588]

This is a significant view in that, if Roach is correct, *Campbell* would have raised police independence, in Canada at least, to an enforceable constitutional obligation. Roach did not expand on how he saw this occurring; however, it is apparent[589] that he was referring to the view previously expressed by the Canadian Supreme Court that, in that country, the rule of law, is an underlying constitutional principle and 'may in certain circumstances give rise to substantive legal obligations … which constitute substantive limitations on government action'.[590]

That issue, and its relevance to police independence in Australia is discussed elsewhere.[591] What is considered here is how Roach formed his view that *Campbell* was arguably based on the rule of law.

The doctrine is discussed in the *Campbell* decision, Binnie J using the expression 'rule of law' on eight separate occasions. However, the first seven concerned a very different issue from police independence (being the equality before the law which 'excludes the idea of any exemption of officers or others from the duty of obedience to the law').[592]

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[584] [1984] 3 NSWLR 653, 657.
[585] Chapter 7.4.
[586] There is, however, a provision which provides the powers and privileges of peace officers to all commissioned officers including the Commissioner (s 11.1 RCMP Act). This, however, seems insufficient for these purposes as it does not expressly relate to the common law powers and privileges of constables and does not apply to those members of the force below Commissioned officers. It would seem odd that if the provision was intended to preserve the common law constable powers and privileges that such preserved powers and privileges were not preserved for contemporary constables.
[587] Roach (2007) above n 59, 19.
[588] ibid 28.
[589] from Roach's footnote 37, ibid 28 and 86.
[590] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[591] Chapter 7.3.
[592] [1999] 1 SCR 565, 583 referring to and quoting *Attorney-General of Canada v Lavell* [1974] SCR 1349, 1366.

The expression was used only once, and seemingly *en passant*, in relation to police independence. That occurred when Binnie J refers to *McLeave*:

> The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v City of Moncton.*[593]

And that is it. Binnie J then went on for two pages to refer to, quote and seemingly adopt various police independence decisions (such as *Perpetual Trustees* and *Blackburn*) indicating that he considered that police independence as substantially, if not entirety, based on the reasoning in those decisions. This is not to reject the possibility that police independence could have, or possibly has, in Canada at least, a foundation on the rule of law. However, Binnie's very sparse reference to that doctrine, particularly in the context of the authorities that he discussed, makes it difficult to accept that he considered police independence to be founded on the rule of law.

6.3 – Analysis in and of Judicial Decisions

The analysis in the three decisions was not, as has been seen, extensive. And, despite the different conclusions reached, there are some common themes regarding the limitations in the reasoning in those cases.

The first concerns the use to which authorities supporting police independence (police independence decisions), particularly *Enever*, *Perpetual Trustees* and *Blackburn* have been put. In *Rutherford* these cases were not referred to and the judge's reasoning was simply a literal interpretation of the Cowper provision. However *Griffiths* and *Campbell,* which reached the opposite conclusion, relied on those police independence decisions, but did so in an uncritical manner. In those two decisions there was no attempt to review or challenge the reasoning in the police independence decisions or to assess the actuality of the claimed or assumed historic independence of constables, the basis of those decisions. There was also no recognition that none of the police independence decisions relied on or involved a judicial consideration of the scope of a Cowper provision. And there was, in relation to the only police independence decision that involved the consideration of government direction provision (*Blackburn*), no recognition or consideration of any defects in the reasoning in that decision or any reference to the academic writings critical of police independence, particularly of Marshall[594] and Lustgarten.[595]

[593] [1999] 1 SCR 565, 589.
[594] Marshall (1965), above, n 53 and Marshall (1984), above n 5, ch 8; Marshall (1978), above n 53 , 51 and Marshall and Loveday (1994), above n 53, 295.

The second theme reflects a further defect in the three cases in that none of the decisions considered that an examination of the legislative intent was relevant to the issue. None of the judges asked or answered the question – what was the particular parliament seeking to do when it enacted a Cowper provision?

The third theme is that in none of the decisions was the constitutional relationship between the police and the government the central issue that the court was considering. In each case the court was considering the relationship for the purpose of resolving a different question, whether it be the availability of Crown immunity or privilege for the actions of the police[596] or whether the Crown is vicariously liable for the actions of a police constable.[597] Moreover, in none of those decisions did the judges consider the requirements of the doctrine of responsible government to the police-government relationship.[598]

6.4 - Inquiry Reports - Australia

Inquiries in both Australia and Canada have also discussed the effect of Cowper provisions, for the purpose of examining the constitutional relationship. However, as examination of the various inquiry reports demonstrates, those inquiries have not led to any consistent conclusion. Most favoured some degree of police independence as the desirable policy conclusion. However, on whether Cowper provisions allowed, as a matter of law, police independence to exist, they divide into two groups: one group in favour and the other against police independence.

In this Chapter the reports of Australian inquiries will be examined followed by an examination of Canadian inquiries. The first Australian inquiry discussed, however, is of importance less due to the findings of the inquiry, than to the variety and range of views expressed in the expert evidence received.

6.4.1 - Tasmania Parliamentary Committee, 2009

The diversity and nature of views and arguments regarding the police-government relationship can be seen from the evidence given to the Tasmanian Parliament's Joint Select Committee on Ethical Conduct in its 2008 inquiry into public sector ethical conduct and

[595] Lustgarten, above n 54.
[596] *Campbell* and *Rutherford.*
[597] *Griffiths.*
[598] This is discussed in Chapter 10.

standards.[599] This Committee received evidence regarding the meaning to be given to the Tasmanian Cowper provision,[600] and in particular whether the expression 'under the direction of the Minister' applies to operational matters.[601] Of that evidence, four expert or informed witnesses need to be considered: the Solicitor-General, Leigh Sealy SC and the then Police Commissioner, Jack Johnston APM,[602] who both considered that the Cowper provision does not interfere with police independence; and the then Director of Public Prosecutions (DPP), TJ Ellis SC and Sir Max Bingham QC, former Deputy Premier and Attorney-General of Tasmania[603] and later the founding chair of the Queensland Criminal Justice Commission,[604] who both argued strongly for the contrary position.

The basis of the arguments of the 'anti-independence' view differed between its proponents although the two bases can be seen as complementary. The DPP's approach[605] was a straightforward application of literal statutory interpretation, subject to[606] the 'Golden Rule' of interpretation to avoid the consequence of absurd results, relying on *Grey v Pearson*[607] as the basis of his approach.[608]

And he also relied on the observation of the New Zealand judge, Cooke J[609] in *Reid v Reid* that the 'natural and ordinary meaning of what is actually said in the Act must be the starting point'.[610]

With that approach, he considered that the 'ordinary and natural meaning' of s 7 to be 'quite plain':

> The Commissioner is under the direction of the Minister. 'Direction' is also plain. In its ordinary and natural meaning it does not mean 'policy direction' or 'non-operational direction'.

He also considered[611] that to qualify or limit the direction power in s 7 to non-operational issues was incorrect, relying on the statutory interpretation proposition of Lord Mersey in

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[599] This inquiry led to its 2009 '*The Tasmanian Report'* above n 43.
[600] *Police Service Act 2003* (Tas), s7.
[601] *Tasmanian Report*, above n 43, 84.
[602] It is noted that Mr Johnston stood down from his office in the same month that he made his submission to the committee (August 2009) as a result of a prosecution brought by the Director of Public Prosecutions for disclosing official secrets, a prosecution that failed. See *State of Tasmania v Johnston* [2009] TASSC 60.
[603] Tasmania, Parliament of Tasmania from 1856, *Ministers - House of Assembly - 1950 to 1989*, http://www.parliament.tas.gov.au/history/tasparl/haMinistersp2.htm. Bingham was Tasmania's Attorney-General from May 1969 to May 1972 and from May 1982 to 1984. During the first of those periods he was also the Police Minister and in the second of those periods he was the Deputy Premier.
[604] Criminal Justice Commission Queensland, *Annual Report* (1990) 1. Bingham was the Commission's the chair between 1989 to 1990.
[605] T J Ellis SC, *Submission to the Joint Select Committee on Ethical Conduct* (2008) ('*The Ellis Submission'*) 8-20.
[606] Ibid 11.
[607] (1857) 6 HLC 61. This decision is discussed in Chapter 2.
[608] Ibid 106. That is:

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

[609] Later Baron Cooke of Thornton, a member of the House of Lords and the Judicial Committee of the Privy Council.
[610] [1979] 1 NZLR 572, 594.
[611] *Ellis Submission*, above n 605, 12.

Thompson v Gould that 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of a clear necessity, it is a wrong thing to do'.[612] [613]

Accordingly, the DPP's view was simply that s 7 'means what it says'.[614] The weakness in Ellis's analysis was that he, like of the others, did not refer to the statutory history of Cowper provisions or to contrary judicial authority, particularly *Blackburn* and *Campbell*.

Bingham's approach was not one of statutory interpretation, but of historical analysis. In his view, the Australian policing experience, and Tasmania's in particular, was not built on Peel's English MET model, but on the Irish approach where the police were part of paramilitary force subject to direct government control.[615] There are, however, difficulties with the Bingham approach in that his historic analysis seems unsound. In particular, his statement: 'Sooner or later the penny is going to drop, I think, and people will recognise that our history is not the English police one but the Irish paramilitary one'.

Bingham seems to be referring to either or both of the centralised police forces in Ireland in the 19th century, the Peace Preservation Force (PPF) (established in 1814)[616] and its successor, the Royal Irish Constabulary (RIC) (established in 1836).[617] He considered that the structures of those forces were the basis for policing in Tasmania, rather than the 1829 London MET discussed earlier.[618] There were clear differences between the two forces, even though the first of the Irish forces, the PPF, was created at the initiative of Sir Robert Peel, like the later MET. Those two Irish police forces were centralised, militarised and barracked forces subject to the control of government, very different to the lightly armed officers on the beat established for London in 1829. As Conway describes it:

> The distinctions between policing in both countries are clear. Ireland had a centralised, hierarchical structure entirely funded and directly answerable to government. In England policing was locally organised, only partially funded by government with an oversight body to ensure a certain level of professionalism was maintained. In Ireland the police function was to maintain order, while in England it was to prevent crime'.[619]

Bingham appears, therefore, to have adopted the views of some academics, such as Sturma, that the priority of Australian colonial police, particularly mounted police, was

[612] [1910] AC 409, 410.
[613] See the discussion Pearce & Geddes, above n 146, 69.
[614] *Ellis Submission*, above n 605, 17.
[615] *Tasmanian Report,* above n 43, 88.
[616] Breathnach, above n 207, 24; *An Act to provide for the better Execution of the Laws in Ireland, by appointing Superintending Magistrates and additional Constables in Counties, in certain Cases* (54 George III, c 131) (1813) (UK).
[617] *Constabulary (Ireland) Act* 1836 (UK).
[618] See Chapter 5.1.
[619] Conway, above n 207, 14.

primary based on the Irish model as the objective of Irish force and Australian police was, as Sturma puts it, '"civilising" the frontier'. [620]

However Bingham seems to have paid little close attention to the historical development of policing models in Tasmania during the 19th century in forming his view. As Sturma points out, Tasmania was the only Australian colony that did not impose police centralisation in the 1850's and 1860's, a move which he considers placed police in those other colonies 'in closer conformity with the Irish Constabulary.'[621] Tasmania, instead, from 1857 decentralised police, establishing municipal control of police in Hobart and Launceston. Municipal control was further extended to other Tasmanian municipalities in 1865.[622] This decentralised approach parallels the English and Welsh policing model (outside of London) - which was to establish, county, borough and city forces under municipal control once the Peel's 1829 MET model had established its effectiveness.[623] This decentralised model has continued in England and Wales during the 20th and 21st centuries.[624]

Centralisation did not occur in Tasmania until 1898 with the passage of the *Police Regulation Act 1898* (Tas). By that stage, the 'civilising the frontier' priority of Tasmanian policing would seem to have ended in view of that colony's genocidal treatment of its indigenous population during that century.[625]

Bingham seems not to have appreciated Tasmania's maintenance of police decentralisation until the late 19th century. His misunderstanding can be seen from his observation: 'when the act says, "under the control of the Minister", historically it is simply referring to what all of the previous acts said, back to the middle of the nineteenth century'.[626]

Neither the phase, 'under the control of the minster' nor any variation of it, was used in relation to the control of police in Tasmanian legislation until 1898. Bingham's view that the phraseology used in the 2003 Act was merely a reprise of the wording used in that State's legislation since the middle of the nineteenth century is clearly incorrect and his view that the Irish model was the prevailing model for policing in Tasmania in the 19th century is highly questionable. His historical assessment, therefore, unlike Ellis' legal analysis, seem an

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[620] Michael Sturma, 'Policing the Criminal Frontier in mid-nineteenth century Australia, Britain and America' in Finnane (1987), above n 117, 15, 28. Sturma wrote:

> Here Ireland perhaps offers more striking parallels than Britain or America. As Hazel King points out, the Australian mounted police forces shared many characteristics with the constabulary that evolved in Ireland during the 1820s and 1830's. Both were paramilitary in organisation and designed for dealing with rural disorder. Both were more involved in imposing authority than managing relationships.

The reference to King was: Hazel King 'Some Aspects of Police Administration in New South Wales, 1825-51' (1956) 42(5) *Journal of the Royal Australian Historical* Society 211, 223.

[621] Sturma, above n 620, 28.

[622] *Police Regulation Act 1865* (Tas) s 2.

[623] This is discussed in Critchley, above n 102, chs 3 and 4.

[624] Police UK, List of Police Forces, https://www.police.uk/forces/

[625] Tom Lawson, *The Last Man: A British Genocide in Tasmania* (Tauris, 2014).

[626] *Tasmanian Report*, above n 43, 88.

unsatisfactory basis on which to found an argument that 'there is no statutory basis for independence of the police' in Tasmania.

The 'pro-independence' view was advanced by the then Tasmanian Police Commissioner, Jack Johnston, who considered the DPP's views 'misconceived'.[627] Johnston used a number of authorities in support of his position.[628] Predominant among them were *Blackburn*, *Enever* and *Perpetual Trustees* which, like all but one of the other authorities he referred to[629] either did not involve a Cowper provision or the interpretation of a Cowper provision. He did, however, refer to *Griffiths v Haines*[630] but he did not consider the weaknesses in its reasoning (which have been discussed earlier). He also did not refer to the Canadian authorities discussed earlier[631] which could have assisted his argument.

Johnston also sought to rely on two other inquiry reports (the NSW Wood Inquiry and the Victorian Johnson Report which are discussed below), without apparently realising that they do not actually support his position on this issue.[632]

Johnston's submission was based, therefore, on citing authorities that he considered supported his position without acknowledging, or possibly realising, the limited support that those authorities provide. He did not seek to explain why the words in s 7 should not be given the plain meaning that the DPP asserts. This difficulty was, however, addressed by the Tasmanian Solicitor-General in his evidence to the committee.[633]

Sealy drew attention to s 83 of the Act which provides Tasmanian police officers including the Police Commissioner[634] with the 'power, privileges and duties of a constable at common law'. He considered that in exercising 'his functions as a police constable he [the Police Commissioner] is accountable to no one other than the law itself'.[635]

He therefore considered that the words used in s 7, 'efficient effective and economic management and superintendence of the Police Service' do not relate to the functions of the Commissioner gained under s 83, but relate to 'administrative matters'.

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[627] Tasmania Police, Media Release, Police Confirm Investigation, 11 April 2008 included as Appendix 1 to *Ellis Submission*, above n 605. This indicates some tension between the two offices no doubt caused by the prosecution that the DPP was shortly to be brought by the DPP against the Police Commissioner.
[628] J Johnston, *Submission to the Joint Select Committee of the Legislative Council and Hose of Assembly on ethical conduct, standards and integrity of the elected Parliamentary representatives and servants of the State*, August 2008, 4-8.
[629] He also referred to *R v Chief Commissioner of Devon and Cornwall Constabulary ex parte CEGB* [1982] QB 458; [1981] 3 All ER 826 and *O'Malley v Keelty* [2004] FCA 1688, neither of which involved a Cowper provision.
[630] [1984] 3 NSWLR 653.
[631] Particularly *Campbell.*
[632] That is, they both either accepted that a legal direction power under a Cowper provision is not limited by police independence, or that the position is sufficiently unclear and amending legislation is required to protect police independence. See discussion below in Chapters 6.4.4 & 6.4.6.
[633] The Solicitor-General seems not to have made a written submission to the committee.
[634] *Police Service Act 2003* (Tas) s 3 defines 'police officer' as including a member of the 'police service' which is defined in ss 3 and 4 as including the Police Commissioner.
[635] Sealy's views are quoted in *Tasmanian Report,* above n 43, 87-88.

He did, however, concede that the s 7 direction power can affect 'operational aspects', However, he seems of the view that this can only occur indirectly such as 'starving the police service of resources affects the sort of operational decisions that a Commissioner might make about the deployment of his constables, what he investigates and what he does not investigate'.

He did not explain in his evidence the basis for his view regarding the common law powers of constables, although it is highly likely that he was relying on the views expressed in *Blackburn*[636] where similar views were expressed, although not in relation to a Cowper provision. He did not, like all of the other judicial or inquiry examinations relying on *Blackburn* for support, examine the merits of that *dicta* or consider its weaknesses. There was also nothing in his evidence to indicate that he had undertaken any separate investigation of the history of the office of constable to ascertain the accuracy of his view that at common law a constable is not subject to direction. And he did not seek to align the common law position that he had uncritically determined with the legislative intention for the introduction of Cowper provisions.

The DPP, in his submission, anticipated the argument that s 7 should be qualified by s 83, when he drew attention to s 35. Section 35(1) provides that a police officer 'is subject to the direction and control of the Commissioner' and s 35(2)(c) provides that a police officer 'must comply with a lawful direction' of senior officer. He considered that if the s 7 direction power was qualified by s 83, then so must be s 35, with the result that the 'junior officers could pick and choose which directions' they should obey.[637] It would seem that the Solicitor-General's analysis may have supported this interpretation: for if a direction from a Minister regarding an operational matter is 'unlawful' due to s 83, as the Solicitor-General's evidence indicates that it would be,[638] then so would be a direction regarding operational matters given to an ordinary constable by the Commissioner under s 35 given the common law privileges of the constable. The result is that, if the Solicitor-General is correct in his view regarding ss 7 and 83, the Tasmanian Police Commissioner may have no operational control over the Police Force, a conclusion which it is difficult to believe that any Parliament would have intended.

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[636] [1968] 2 QB 118.
[637] *Ellis Submission*, above n 605, 14.
[638] The Solicitor-General made specific reference to a ministerial direction regarding prosecutions as being 'unlawful' - Parliament of Tasmania, above n 66, 88. And see Tasmanian Government, *Submission to the inquiry of the Joint Select Committee of the Tasmanian Parliament into ethical conduct, standards and integrity of elected Parliamentary representatives and servants of the* State (2008) ('*Tasmanian Government Submission*') 107 where a passage from an advice from the Solicitor-General is quoted :

> To the extent that the performance of the Commissioner's duties as a police officer is properly described as 'operational' then, in my opinion, the Minister is unable to give any *lawful* direction to the Commissioner in relation to operational matters [emphasis added].

The Parliamentary Committee was, not surprisingly, confused about the correct interpretation of s 7, finding that it is ambiguous and recommending that it be amended to 'properly reflect the convention that the Executive cannot direct Tasmania on matters of an operational nature'.[639] This recommendation seems to indicate that the committee considered that police independence operates on the basis of convention, not law, but considered that it should have a legal basis.

The committee's recommendation for clarifying the legislation is understandable given the conflicting evidence received, particularly as the Tasmanian government's submission made such a recommendation to the committee.[640] It is odd, then, that no amendments have been made to the Tasmanian Act to limit s 7 to nonoperational matters. The reason, however, can be found in a statement later provided by the Tasmanian Attorney-General, Dr Goodwin, in 17 March 2015. She made it clear that she and the Tasmanian government rejected the earlier government position:

> Section 7 of the *Police Service Act 2003* does not authorise the Minister to give any direction to the Commissioner of Police other than a direction relating to the 'efficient, effective and economic management and superintendence of the [Tasmania] Police Service'. To the extent that the performance of the Commissioner's duties as a police officer is properly described as 'operational' the Minister and Government is unable to give any lawful direction to the Commissioner in relation to operational matters.
>
> The Government has considered the matter since coming into office and both the Government and the Commissioner of Police have no doubt as to the operational independence of the Police Commissioner including the maintenance of order; enforcement of the law; the investigation and prosecution of offences; and police officers and it is not considered that amendments are required at this time.[641]

Of the other reviews of Cowper provisions in other States, only two reached unequivocal conclusions and both of those assessments came from NSW. However the conclusions of those two reviews were diametrically opposed.

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[639] *Tasmanian Report*, above n 43, 90. The issue of a convention regarding operational matters is discussed in Chapter 8.

[640] The Tasmanian Government Submission considered that:

> Despite the Solicitor-General's advice there is still concern about the operation of the section and thereof some amendment could be considered to clarify the relationship between the Commissioner of Police, the Premier and the Minister for Police and Emergency Management and the purported ability for Ministers to direct the Commissioner in terms of investigations. The section could be amended to leave no room for the argument that the directions provided by the Minister cannot go beyond matters of administrative management to the operational and investigative activities of the Police Service.

Tasmanian Government Submission, above n 638, 107-108.

[641] Tasmania, *Parliamentary Debates*, Legislative Council 17 March 2015.

6.4.2 – NSW, Lusher Report, 1981

The first was the conclusion reached by Lusher J in the 1981 Royal Commission into New South Wales Police Administration.[642] Lusher accepted that the direction words in s 4(1)[643] *Police Regulation Act 1899* (NSW) 'mean what they say', but, like Sealy's later interpretation of the Tasmanian *Police Service Act*, he considered that those words were qualified by the powers of a constable 'reposed in him by the common law'.[644]

Lusher's analysis, as Sealy's seemed to have done, relied heavily on *Blackburn,* although in Lusher's case, his reliance seemed approaching the point of veneration. He quoted extensively from the decision and spent thirteen pages of his report[645] criticising two South Australian Royal Commissioners: Bright J who had recommended a Cowper provision for South Australia[646] and Mitchell J who had discussed police independence when considering the sacking of Commissioner Salisbury.[647] This criticism was largely based on his view of their lack of understanding of the *Blackburn* decision. He accepted without qualification Salmon LJ's view of the effect of *Blackburn*, that: 'Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue an order to the police in respect of law enforcement'.[648]

He also relied on other decisions, including two Australian matters that involved legislation that included Cowper provisions: *Enever* and *Perpetual Trustees.*

Lusher's analysis suffered from similar weaknesses to those of Sealy's later Tasmanian analysis. That is, he did not examine the legislative history of the direction power in NSW to ascertain the legislative intention underlying the use of Cowper provisions. Neither did he recognise any of the logical, legal or historical flaws in *Blackburn* (that are discussed elsewhere)[649] or that the observations in that case on the constitutional issues were *obiter dicta* or that that the provision considered in *Blackburn* was not a Cowper provision.

In addition, unlike Sealy, the fundamentals of Lusher's argument seem insecure. That is, he did not identify how the common law powers of constable were 'reposed' in the Commissioner other than by referring to ss 6(2) and 27. Those two provisions, however, were limited in that their function was to protect the common law and statutory powers, privileges, advantages, duties and responsibilities of constables and provide them to

[642] *Lusher Report,* above n 41.
[643] When the *Police Regulation Act 1899* (NSW) was enacted the direction power was located in s 4(2). That provision was repealed in 1935 being replaced by a substantially identical provision, s4(1).
[644] *Lusher Report,* above n 41, 710.
[645] Ibid, 695-708.
[646] This Report is discussed in Chapter 5.2.
[647] This Report is discussed in Chapter 6.4.
[648] *Lusher Report*, above n 41, 699 quoting from [1968] 2 QB 118, 138.
[649] Chapter 5.1.1.

'constables' appointed by the Governor under s 6(1). But s 6(1) also allowed the Governor to appointed sergeants. And as there was nothing in the *Police Regulation Act 1899 (NSW)* which, in 1981, provided those common law constable powers to those sergeants or to higher ranks, much less the Police Commissioner, it seems clear that the legislative intention was to confine common law constable powers and privileges to constables alone, and not to provide them to higher ranks. The 1899 NSW Act can clearly be distinguished from other policing Acts such as its 1990 successor[650] and the Tasmanian *Police Service Act* 2003 (Tas) where the common law powers privileges etc. of constables are provided to all members of the respective forces including the Commissioner.[651]

Lusher did refer to the oath taken by all members of the 'police force',[652] a term which included the Police Commissioner'.[653] That oath, however, makes no reference to the common law powers of constables, a distinction which Lusher sought to minimise on the basis that it is 'consistent with and follows the common law position of constables'.[654] Consistency, however, does not deal with the contrary indications not considered by Lusher. That is, the oath provision applied specifically to each 'member of the force', while the section providing common law constable powers applied only to constables appointed under s 6(1), indicating a clear legislative intention for the different provisions to have different coverage. This seems more to undermine Lusher's position than confirm it. Lusher also failed to recognise, as discussed in Chapter 7.4.2, that the form of the NSW police oath altered in 1850. Prior to that date NSW police swore 'to act as constables' as English constables always have. But from 1850, the NSW oath was to keep the peace, not to act as a constable; a further indication that the NSW oath was not intended to provide police with common law constable independence.

6.4.3 – NSW, Parliamentary Committee, 1993

The opposite conclusive conclusion was reached in 1993 by a NSW Parliamentary Joint Select Committee. The committee was considering the successor to the 1899 Act, the *Police Service Act 1990* (NSW) and its direction power.[655] One of the effects of the 1990 Act was to remove one of the weaknesses in Lusher's analysis in that it was now clear under the 1990 Act that the Commissioner has all of the 'functions' of a common law constable.[656]

[650] *Police Service Act 1990* (NSW).
[651] Ibid s14; *Police Services Act 2003* (Tas) s83. It should, however, be noted that s 14 relates to 'functions', while s 83 refers to 'powers, privileges and duties'. Whether this distinction has significance will be discussed in Chapter 7.4.
[652] *Lusher Report,* above n 41, 711.
[653] *Police Regulation Act 1899* (NSW) ss 3 & 9 -as amended by the *Police Regulation (Amendment) Act 1935* (NSW).
[654] *Lusher Report*, above n 41, 711.
[655] S 8(1).
[656] See s 14 of that Act combined with ss 3 (definitions of 'police officer' and 'Police Service) and 5.

Nonetheless, this committee expressed its unambiguous view which, although not referring to Lusher, rejected his analysis and conclusions:

> The Committee wishes to record its disquiet that there is a widely held misapprehension that the Minister for Police in this State is unable to direct the Commissioner for Police on operational policing issues. This is not the case and the Committee wishes to emphasise that any such belief is patently wrong.[657]

This Committee also was also 'under no doubt that this empowers the Minister to direct the Commissioner on operational issues'.[658]

This review was of some practical relevance as it followed a dispute between Police Minister Pickering and Police Commissioner Lauer during which the Commissioner emphasised his independence,[659] leading to the Minister's resignation. Nonetheless, Commissioner Lauer accepted, in his evidence to the Committee that: 'If the direction was quite clear and specific and impinged upon an operational sphere, I believe that legislation provides the ability to the Minister and I would accept it'.[660]

This review took, like the Tasmanian DPP's later view, a literal approach to the Cowper provision and represents a politically bipartisan parliamentary understanding of the operation of the provision at that time. The committee was composed of ten members from both Houses and included members of all parties[661] and one independent. And it included one members who had been Minister for Police[662] and one member who became the State's Attorney-General between 1995 and 2000 and subsequently a Supreme Court Judge.[663]

The weakness in this assessment, however, is that the committee may well have taken no more than superficial examination of the issue. This can be seen from the Committee's adoption of a passage from a book by a former NSW Police Commissioner, John Avery, who wrote:

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[657] *The JSCPA Report,* above n 44, 7. Quoted in Ellis Submission, above n 605, 9; and see New South Wales, *Parliamentary Debates,* Legislative Assembly, 13 May 1993, Michael Yabsley MP.
[658] *The JSCPA Report,* above n 44, 8.
[659] See for example Parliament of New South Wales, *First Report of the Joint Select Committee upon Police administration on the circumstances which resulted in the resignation of the Hon E P Pickering MLC as Minister and Emergency Services*, 31 March 1993, Annexure 45.
[660] Quoted in ibid 220.
[661] The committee was made up of 10 members; 3 members of the Australian Labor Party, 3 members of the Liberal Party, 2 members of the National Party, one Australian Democrat and one independent.
[662] Hon Peter Anderson, Minister for Police between October 1981 and May 1982, and Minister for Police and Emergency Services between May 1982 and February 1986. Parliament of New South Wales, *Former Members,* https://www.parliament.nsw.gov.au/members/formermembers/pages/former-members-index.aspx
[663] Hon Jeffrey Shaw QC, Attorney-General from 1995 to 2000 and Supreme Court Judge from 2003 to 2004.

> A strict interpretation of the legislation indicates that the Minister has the power to give directions to the Commissioner if that direction does not require the Commissioner to neglect his or her statutory duty by act or omission.[664]

The committee considered that that passage 'best expressed' the Committee's view but in doing so seems not to have considered what Avery was referring to when he referred to the Commissioner's obligation not to neglect the Commissioner's statutory duty. Avery's book did not explain what he meant by that reference, but his book did discuss the independence of constables 'in the performance of his duty of enforcing the law and maintaining the peace, and irrespective of what duties he is given by the Commissioner, when it comes to the crucial point of taking action to enforce the law'.[665] So it may well be that Avery considered that the Commissioner's statutory duty included this form of independence - with the result that he considered that the ministerial direction power does not impact on at least some operational matters. This would not be a view shared by the committee.

The committee also did not seem to consider any factors other than a literal reading of the section, including the impact of the common law constable powers of the Commissioner, the decisions in *Blackburn*, *Enever*, *Perpetual Trustees* or, most importantly, *Griffith v Haines*.[666] And, like other reviews, the committee failed to consider the original legislative intent for the introduction of the Cowper provision.

Six other Australian reviews have also examined, in varying depths and with varying levels of clarity, Cowper provisions and their scope. And in five,[667] the reviewers appear of the view that operational independence was the desirable result but that legislative change was necessary as the relevant Cowper provision did not achieve that independence or was unclear. The sixth, the Mitchell Report,[668] is *sui generis*.

6.4.4 – NSW, Wood Report, 1997

Although Wood's consideration of this issue was very short (barely two pages) he seems to have relied on the opinion of the then NSW Solicitor-General, Keith Mason QC . Mason, like Lusher and Sealy,[669] considered that the ministerial direction power under a Cowper provision does not extend to certain operational matters, but his view of police independence

[664] This quotation was contained in the *The JSCPA Report,* above n 44, 8. It did not refer to the source, but the passage is substantially the same as a passage from Avery, above n 68, 71. There is a variation between the quotation and the book in that the book does not refer to 'his or her'.
[665] Avery, above n 68, 65.
[666] (1984) 3 NSWLR 653.
[667] Those reviews are: the NSW *Wood Report,* above n 125; the Qld *Fitzgerald Report,* above n 36; and three Victorian Reports – the *Neesham Report,* above n 363; the *Johnson Report,* above n 42 and the *Rush Report,* above n 38.
[668] *The Mitchell Report,* above n 40.
[669] *The Wood Report,* above n 125, 237.

may not extend beyond 'the laying of criminal and disciplinary charges'.[670] Nonetheless, Wood remained 'concerned at the terms of section 8(1)' of the *Police Services Act 1990 (NSW)* (the successor to s 4(1) of the *Police Regulation Act 1899* (NSW)) and recommended that NSW repeal that provision and replace it with a provision to the same effect as the direction provision in the *Australian Federal Police Act 1979* (Cth).[671] The Commonwealth provision limits the government direction power to general policy matters.[672]

This recommendation was not adopted and s 8(1) remains unchanged.

6.4.5 – Queensland, Fitzgerald Report, 1989

The Queensland Fitzgerald report delivered in 1989 took a similar approach. Like Wood's later 1997 report, Fitzgerald did not attempt to provide an explanation of the correct interpretation of the relevant Cowper provision, although in his examination of the operation of *Police Act 1937* (Qld) he did refer to 'Bjelke-Petersen interference in police operational matters'.[673] However, he did not discuss or question the legality of the 'Bjelke-Petersen interference' or discuss the merits or otherwise of the legal justification for the role of the government in its relationship with the police as set out in a ministerial statement made on 30 November 1976 by the Minister for Police (T G Newbery) to the Queensland Legislative Assembly. This statement was made following the resignation of Commissioner Whitrod[674] and set out Minister Newbery's views as to the scope of the powers under the then operative Cowper provision in that State:[675]

> The Commissioner runs the force subject to the direction of his Minister. The degree of Ministerial direction required primarily on the performance of the Commissioner, the trust the Minister has in his Commissioner and the willingness of the Commissioner to keep his Minister properly advised and informed. This is necessary from any Minister who is responsible to his Government, to the Parliament and to the citizens of this State.
>
> ….
>
> What Mr Whitrod considers to be political interference is, as I see it, only responsible interest and concern by the Government. After all the Government is responsible to the people; the Commissioner is

[670] Ibid.
[671] Ibid 238. The Australian Federal Police Act provision was, at the time the recommendation was made was s 13, but is now s 37 *Australian Federal Police Act 1979* (Cth). The provisions are the same.
[672] *Australian Federal Police Act 1979* (Cth) s 37(2). See Chapters 3.2 and 9.
[673] *Fitzgerald Report,* above n 36, 42. These 'interference' issues are discussed in Chapter 9 below.
[674] Discussed in Chapter 9 below.
[675] *Police Act 1937* (Qld) s 6(1).

not. There is no more political control over police than there is over any other arm of the Public Service.[676]

Fitzgerald did not question these views (which must have been known to him). Instead, he argued for a different statutory regime which was to include the following three elements:

- The Commissioner *'remain* answerable to the Minister for Police for the overall running of the Police Force';
- The Commissioner '*continue* to have independent discretion to act or refrain from acting against an offender';
- The Minister '*should* have no power to direct the Commissioner to act or not to act in any matter coming within the Commissioner's discretion under laws relating to police powers'.[677]

Fitzgerald did not otherwise consider the correct operation of Cowper provisions as his objective was primarily to recommend a better statutory formulation for the police – government relationship. Nonetheless, his failure to challenge the legal accuracy of Newbery's views or the validity of Bjelke-Petersen's 'interference', combined with the use of the word 'should' in the third element[678] and the absence of any indication that Fitzgerald considered that that element to be a continuation of the current legal arrangements, indicates that he accepted the substance of Minister Newbery's view of the legal effect of the Cowper provision. That is, he accepted that Cowper provisions allow ministerial directions regarding all police operational matters.

6.4.6 - Victorian Reports – (Neesham 1985, Johnson 2001 and Rush 2011)

The police–government relationship was discussed by three Victorian inquiry reports. The consideration by Neesham occurred in 1985 but was a minor part of his wide-ranging inquiry into Victoria Police.[679] Neesham accepted the desirability of police independence, considering that the conclusions and reasoning of Lords Denning[680] and Scarman[681] should be applicable to Victoria. His analysis was based, at least in part, on his unchallenged acceptance of Denning and the incorrect view (as demonstrated earlier)[682] that Peel's

[676] Queensland*, Parliamentary Debates,* Legislative Assembly, 30 November 1976, 1901.
[677] *Fitzgerald Report*, above n 36, 383-4, from Recommendations 35 and 37 (emphasis added).
[678] indicating an intention for future action, rather than a continuation of current arrangements.
[679] Neesham's views on police independence can be found in *Neesham Report,* above n 363, Executive Summary 1-2; and Vol 1, 19-35.
[680] Ibid Vol 1 23.
[681] Ibid 35. Lord Scarman discussed police independence in his report on the Brixton riots and his comment are discussed in Chapter 10.2. Lord Scarman, *The Scarman Report, The Brixton Disorders, 10-12 April 1981* (Penguin 1982) ('*The Scarman Report*') 104-5.
[682] Chapter 5.1.

'Commissioners of the new force were independent of the executive'.[683] As to the status of Victorian law, his view was more ambivalent:

> The position of a Chief Commissioner in Victoria *may be ambiguous* as the resignations and dismissals [sic] of police commissioners in Queensland and South Australia seem to indicate. While possessing the original authority of a constable (Section 11), the Chief Commissioner is administratively accountable for the overall efficiency of the force and the use of resources entrusted to him.[684]

He seemed to accept that the Cowper provision then in force[685] empowered the government to direct police on all matters, but that change was necessary: 'for more operational … decisions, we regard it as not only desirable but essential that the police should not be or be seen to be tools of the Executive.'[686]

The consideration in the other two Victorian reports was no more clear. Unlike the Wood and Fitzgerald reports, they both discussed the legal basis for police independence, with Johnson referring to *Blackburn*[687] and both referring to the *Enever*[688] and *Perpetual Trustee*[689] decisions. And while both favoured police independence, Johnson's assessment did not include its desirability as that result was required by the terms of reference of his inquiry.[690]

Johnson considered that 'were the question of the Chief Commissioner's status in government to be raised here, a similar finding [to *Blackburn*] may be made'.[691] The use of 'may', rather than 'would', may indicate a degree of uncertainty as to the application of *Blackburn* in Victoria. This uncertainty seems amplified when he also referred to observations of Dixon J in *Perpetual Trustees*[692] and Marshall J in *Konrad v Victoria Police Force*[693] who both considered that, but for precedent, they would have considered police to be employees. As the non-employment status of police was an essential element and basis for the findings in both *Enever* and *Perpetual Trustees*, the preferred views of Dixon and Marshall would not have supported or led to conclusions regarding police independence.

Johnson's apparent uncertainty was also supported by University of Melbourne Centre for Comparative Constitutional Studies discussion paper to which he referred. That paper

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[683] *Neesham Report,* above n 363, Vol 1, 23.
[684] Ibid 35 (emphasis added).
[685] *Police Regulation Act 1958* (Vic) s 5.
[686] *Neesham Report,* above n 363, Vol 1, 35.
[687] [1968] 2 QB 118.
[688] (1906) 3 CLR 969.
[689] (1952) 85 CLR 237.
[690] The terms of reference of the Johnson Report required him to the terms of references required him to make recommendations to 'better establish the operational independence' of the Victorian Police. *Johnson Report*, above n 42, v.
[691] *Johnson Report,* above n 42, 35.
[692] Ibid.
[693] [1998] FCA 16.

queried *Blackburn*, describing it as 'an extreme view, not consistently accepted by the bench nor by subsequent judicial inquiries'.[694]

Johnson's conclusions reflect similar doubts judging by his opinions as expressed in the Report's Executive Summary. He adopted Finnane's views of the 'legislative subjection of the police to government direction'[695] and that police independence is founded in convention rather than law. That can be seen from his observation that:

> operational independence is widely accepted [but] its application in specific instances can be quite vexed and create confusion because it relies on convention and accepted practice rather than legislation.[696]

The Cowper provision and its operation, however, seems far from central to his deliberations as he did not refer to either the provision or *Blackburn* in his Executive Summary. Nonetheless, his conclusions on the conventional rather than legal basis of operational independence seems a clear indication that he did not consider that the scope the Cowper direction power is subject to any legal qualifications and that he did not regard Lord Denning's *dicta* from *Blackburn* as a reflection of Victorian law.

The analysis in the Rush Report was shorter and less clear than the Johnson Report. Rush's discussion was far from extensive as he omitted to consider the leading cases on this issue (*Blackburn, Griffiths* or *Campbell)* the academic criticism of police independence[697] or any of the relevant Australian or Canadian reports other than the Johnson report. However, Rush did refer to *Enever* and *Perpetual Trustees* to support what Rush considered as 'the longstanding recognition' that police are independent and not subject to direction.[698] This indicates that Rush considered, as matter of law, that the direction power in s 5 *Police Regulation Act 1958* (Vic) would not apply, at least, to operational matters.

However, in the following paragraphs he seems to have disregarded this legally based view of police independence as the discussion rests on the convention base of operational independence. He discussed the 'tension between democratic accountability of the police … and the independence of police' and that it is resolved 'largely' by 'unwritten convention'.[699] 'Largely' is not explained. Had he considered that the Cowper direction provision did not relate to operational matters, the tension between democratic accountability of police and

[694] *CCCS Report* above n 45, 5. Quoted in *Johnson Report*, above n 42, 36. That paper also questioned the relevance of the British understanding to Victoria, observing that the 'evolution of the role of British police has been affected significantly by its link with local government …. This link does not exist in Australia'. *CCCS Report,* 3.
[695] Finnane (1994), above n 117, 39 quoted in *Johnson Report,* above n 42, 4.
[696] *Johnson Report,* above n 42, 4.
[697] Such as Marshall or Lustgarten.
[698] *Rush Report,* above n 38, 42.
[699] Ibid.

police independence would have been resolved by law, rather than convention - as there would have been no legal basis to direct police on such matters.

Rush then further confused the position in his discussion of the nature of the applicable convention, which he regarded as one which entitles the Minister to have 'a general right to seek and obtain information' from the police,[700] rather than one which provides police independence. In that regard he quoted a sentence from the Johnson report, rather than its executive summary. That sentence is very similar to the Johnson sentence quoted above with the notable exception that it does not refer to operational independence being convention based:

> While this principle is widely accepted, its application in specific instances can be quite vexed and create confusion between Government and the Police and, consequently, the community.[701]

It may be that Rush was attempting a different conclusion from that of Johnson. Unlike Johnson, who seems of the view that the restriction on the power of direction is conventional rather than legal, Rush may have considered that the Cowper direction power does not extend to operational matters, but that a convention has arisen to provide the police Minister with a conventional entitlement to operational information.

However, Rush's views on this issue are uncertain as at no stage did he answer the relatively simple question – does s 5 allow the Governor in Council to make directions regarding operational matters? Instead he discussed the operation of conventions in an opaque manner rendering his reasoning on the effect of the Cowper provision as unsatisfactory and confusing.[702]

6.4.7 – South Australia, Mitchell Report, 1978

The only other Australian inquiry examining the scope of a Cowper Provision was conducted in 1978 by Dame Roma Mitchell in South Australia. It is difficult to categorise the approach taken in that report as its reasoning and conclusions seems, like that of Rush, confused and inconsistent.

[700] Ibid.
[701] *Johnson Report,* above n 42, 37, quoted in *Rush Report,* above n 38, 42.
[702] It is, however, probably fair to say that Rush's primary objective was to describe the lack of clarity in the legal/conventional relationship between the Minister and the Chief Commissioner and to suggest a preferable model rather than to provide a precise diagnosis of current weaknesses.

Dame Roma's consideration of the provision was criticised by Lusher,[703] and with some justification.

She was considering the validity of the dismissal of Police Commissioner Salisbury by the State Government. In that context she received evidence from Salisbury whether he considered that, after the introduction of the ministerial direction power[704] in 1972[705] he would have been obliged to comply with government directions on operational matters of the Force's Special Branch. Salisbury was of the view that the Cowper provision 'did not entitle the Government to give him, as Commissioner of Police, direction with regard to the operation of the Special Branch. Mitchell considered such a view 'untenable'.[706] Earlier in her report she also considered Salisbury's view that '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.' Mitchell considered such a view as one that 'suggests an absence of understanding of the constitutional system of South Australia, or, for that matter, of the United Kingdom'.[707] Lusher however, questioned that assessment as he considered, accurately, that Salisbury's view 'seems to be founded upon the views of Lord Denning and Lord Justice Salmon in *Blackburn's* case.'[708]

This, of course, might indicate that Mitchell had roundly rejected the merit of *Blackburn*, but for her comments in the next paragraph. There Mitchell accepted the police's sole obligation 'to the law' and referred to it being 'adverted' to in *Blackburn*. But she also asserted that that obligation was of limited application as Lord Denning's views were in the context of 'the discretion to prosecute or not prosecute'.[709] However, as Lusher again correctly observed, Lord Denning's observations were not so constrained as the passage from his judgment quoted earlier[710] more than adequately demonstrates. As Lusher put it: 'His Lordship was endeavouring to spell out with some clarity and force the constitutional position as he saw it of the Commissioner of Police in relation to the Government' and he relied on *Fisher v Oldham Corporation*[711] and *Perpetual Trustees,*[712] decisions 'not concerned with discretion to prosecute'.[713]

Nonetheless, in paragraph 53 of her report, Mitchell seemed prepared to accept police independence, but only in relation to decisions to prosecute, presumably based on

[703] *Lusher Report,* above n 41.
[704] *Police Regulation Act 1952* (SA) s 21.
[705] *Police Regulation Amendment Act* (SA) s 3.
[706] *Mitchell Report,* above n 40, 36.
[707] Ibid 19.
[708] *Lusher Report,* above n 41, 703.
[709] *Mitchell Report,* above n 40, 20.
[710] See Chapter 5.1.1.
[711] [1930] 2 KB 364.
[712] [1955] AC 457.
[713] *Lusher Report,* above n 41, 704-5.

Blackburn. Yet later in her report, in paragraph 173, after stating that the Police Commissioner 'is not and cannot be independent of Government as the judges are' went on to apparently undermine that comment and indicate that her view as to police independence is greater than decisions to prosecute by stating that the Police Commissioner's 'independence in *carrying out the law* cannot properly be impugned by the Government'.[714] She did not indicate what she meant by 'impugn' or 'in carrying out the law', but as Lusher observed, this passage 'seems to be an acceptance of the view contended for by Lord Denning and Lord Justice Salmon' in *Blackburn*.[715]

The result of all this is that it is simply not clear what Mitchell's views were of the scope of the direction power in s 21 *Police Regulation Act 1952* (SA), as her views seem to have ranged from complete rejection to complete acceptance of police independence and *Blackburn*.

6.5 - Australian Review Conclusions

These reviews reflect a significantly divided position. A majority seem to have considered that, as a matter or law, the direction power under Cowper provisions is not constrained by police independence. This was the unequivocal view of the NSW Parliamentary Committee in 1993 and by the evidence of the Tasmanian DPP in 2008. It was also the apparent view of the Wood, Neesham, Fitzgerald and Johnson inquiries (and possibly the Rush inquiry), although the reasoning in each instance was either not extensive or cohesive.

To the contrary conclusion are the Lusher inquiry in 1981, the evidence of the Tasmanian Solicitor-General in 2009, the Tasmanian Attorney-General in 2015 and the NSW Solicitor-General in 1995 - that the Cowper provisions are limited and police cannot be directed regarding some or all police operational matters.[716]

The research and reasoning contained in all the inquiries and opinions, however, seems inadequate. Some clearly were concentrating on the desired structure of a new statutory model rather than the effect of the current model,[717] while others either demonstrated either an uncritical acceptance of the reasoning and claimed consequences of *Blackburn, Enever* and *Perpetual Trustees*[718] or failed to consider those decisions at all.[719] And, with the

[714] *Mitchell Report,* above n 40, 43 (emphasis added).
[715] *Lusher Report,* above n 41, 707.
[716] Mason SG considered that the constraint seemed limited to laying criminal or disciplinary charges. – see *Wood Report,* above n 125, 237.
[717] Such as Rush.
[718] Such as Lusher.
[719] Such as Fitzgerald.

exception of Lusher and Mitchell, there was little attention given to legislative history, and none considered the legislative intention of Cowper provisions. As a result, none the conclusions reached by these various Australian reviews can be regarded as being based on satisfactory research, reasoning or analysis.

6.6 - Inquiry Reports - Canada

6.6.1 - McDonald Report, 1981

In 1981 McDonald J completed and presented the second volume of his Royal Commission report into the 'Certain Activities of the Royal Canadian Mounted Police'[720] in which he provided what Roach has described as 'Canada's most sustained and considered examination of the proper relationship between the government and the police'.[721] Unfortunately, the importance of this report has gone largely unnoticed as none of the three judicial decisions that reviewed the scope of or Cowper provisions referred to earlier or any of the Australian inquiry reports have referred to it.[722]

McDonald acknowledged that there had never previously been 'a study in depth, by an independent body, of the interrelationships between the Force and the Government' and accepted that his analysis would be the first.[723] He regarded it as 'axiomatic that in a democratic state the police must never be allowed to be a law unto themselves' and considered that just as the military forces must be subject to civilian control, police forces must 'operate in obedience to' responsible governments.[724]

As to the Minister's direction power as provided by the relevant Cowper provision (s 5 *Royal Canadian Mounted Police Act*) 'the language of the pertinent Acts of Parliament does not brook much doubt as to where the ultimate authority of direction lies.'[725]

He referred to *Blackburn* and *Perpetual Trustees* but doubted their applicability to Canada. He made specific reference to the 'oft-repeated claim that, by the very nature of their office, police officers acquire the privilege of independence from the executive branch'[726] but considered it a:

[720] *McDonald Report*, above n 48.
[721] Roach (2007), above n 59, 35.
[722] although the submission of the Tasmanian DPP, TJ Ellis to the 2009 Tasmanian Parliamentary Committee did refer to and rely on this report. See *Ellis Submission*, above n 605, 13.
[723] *McDonald Report,* above n 48, 1005.
[724] Ibid 1005-6.
[725] ibid 1008.
[726] Ibid.

> serious mistake to assume that the conclusions of English judges and Royal Commissioners[727] correctly describe the constitutional status of police officers in Canada, and particularly so with reference to the Royal Canadian Mounted Police whose powers, responsibilities and relationships to the appropriate Minister of the Crown are the subject of *express statutory definition*.[728]

With particular reference to the views of Lord Denning in *Blackburn,* he considered that they have been 'unfortunately … consistently transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts'.[729] In that regard he drew attention to the distinctions between the statutory regimes in the UK and Canada when he observed that in Britain there is no power to issue directions to police forces[730] while in Canada 'section 5 RCMP Act[731] clearly empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force and all matters connected therewith"'.[732]

Whether this direction power encompassed operational issues, such as laying an information or decisions to arrest, his preferred policy position was that it should not. Whether, as a matter of law, s 5 was so restricted he was unsure, as he considered that the English and French formulations were open to slightly different meanings (Canada being a bilingual country).[733] In his view s 5, in its English formulation, was ambiguous. That is, he considered that the words 'all matters connected therewith' could relate to either the 'the force' (in which case the direction power would cover all operational issues), or to the 'control and management of the force', in which case the answer was, to him, less clear. McDonald, however, did not explain why he considered that the Commissioner's power of control and management without the addition of the words 'and all matters connected therewith' was not sufficient to allow the Police Commissioner to direct operational issues in the force.

In any case, when he considered the French translation of the provision (which he considered to be 'equally authentic' under the *Official Languages Act 1970* (Can)),[734] he found no ambiguity. According to that translation, he concluded that the:

> Commissioner has full authority over the Force, that the exercise of that authority is subject to the direction of the Minster, and that the Commissioner's authority extends to the management of all matters connected with the Force.[735]

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[727] In this regard he was referring to the *Willink Report*, above n 52.
[728] *McDonald Report*, above n 48, 1010 (emphasis added).
[729] Ibid 1011.
[730] Thereby repeating the error of Lord Denning regarding the MET referred to earlier. This is discussed in Chapter 5.1.
[731] McDonald was considering the *Royal Canada Mounted Police Act* RSC 1970, c R-9.
[732] *McDonald Report,* above n 48, 1011.
[733] *Official Languages Act* RS, 1985, c. 31 (4th Supp).
[734] RSC 170 ch 0-2, s 8(1).
[735] *McDonald Report,* above n 48, 1012.

Nonetheless, as Roach has observed, McDonald did not reject 'the concept of police independence from government in its entirety'[736] as he proposed amendments to 'eliminate any ambiguity 'and ensure that 'the Minister should have no right of direction with respect to the exercise by the RCMP of the powers of investigation, arrest and prosecution'.[737] In McDonald's view, should such amendments be made: 'To that extent, and to that extent only, should the English doctrine expounded in … *Blackburn* be made applicable to the RCMP'.[738]

It should, however, be noted that McDonald's recommendations regarding s 5 were not adopted. It was not until 2013, some 30 years after his report, that s 5 was amended, but possibly in ignorance of McDonald's report as his name and report were not mentioned during the parliamentary debate.[739] The amending Act, the *Enhancing Royal Canadian Mounted Police Accountability Act 2013* [740] replaced s 5(1) of the *Royal Canada Mounted Police Act 1985*[741] and removed the supposed ambiguity that McDonald had identified, but not in the way that McDonald recommended. In the new s 5(1) the Commissioner remained with the control and management of the Force, but the phrase 'and all matters connected therewith' was replaced by 'and all matters connected with the Force'. This phrase adopts the meaning of the French text referred to by McDonald. The result is that s 5(1) does not, based on McDonald's analysis, restrict the ministerial direction power or the Commissioner's control and management of the force in any way. And, to adopt McDonald's words, 'the English doctrine expounded in … *Blackburn* [is] inapplicable to the RCMP'. Whether this was apparent to the Canadian Parliament when it passed the 2013 measure is not apparent as there seems to have been no reference in the parliamentary debate to the change to s5(1).

McDonald's report is not immune from some criticism. Like the other reviewers in Canada and Australia his review did not consider the original legislative intent for the introduction of a Cowper provision. And he also did not consider whether there are any provisions in the *RCMP Act* which would indicate a legislative intention to read down s 5. Nonetheless, this report examines this subject more thoroughly and in more depth than any of the Australian reports.

[736] Roach (2007), above n 59, 35.
[737] *McDonald Report,* above n 48.
[738] Ibid 1013.
[739] Canada, *Parliamentary Debates,* House of Commons, 20 June 2012, 17,18 & 19, September 2012, 5 November 2012, 12 December 2012, 11,12 & 28 February 2013, 6 March 2013 and Canada, *Parliamentary Debates,* Senate, 7 May 2013, 19 March 2013, 16,17 & 18 April 2013, 7 May 2013 and 8, 23, 28 & 29 May 2013, 4 June 2013.
[740] SC 2013, c 18.
[741] RSC 1985, c R-10, the Act that re-enacted the 1970 Act that McDonald was interpreting (RSC 1970 c R-9).

6.6.2 - Marshall Report, 1989[742]

This Nova Scotia Royal Commission concerned among other things, a departmental direction to the RCMP which led to consideration of police independence and the operation of the relevant Cowper provision. The Royal Commission considered that the RCMP have an obligation to be 'independent and impartial' and that its:

> reluctance to proceed with politically sensitive criminal investigations without clear authorisation from the Department of Attorney-General is not only a dereliction of duty, but also indicates a failure to adhere to the principle of police independence.[743]

The report, however, undertook no assessment of the legislation or gave any consideration to judicial authorities, but had the benefit of opinion papers prepared by Professor Edwards, one of which discussed the police independence of the RCMP. Edwards considered, after discussing the McDonald Commission, that 'Constitutionally, it should be universally understood that the strongest presumption exists against the responsible Minister taking any part in these quasi-judicial areas of police discretion'.

However, he also accepted that 'Under Canadian legislation relating to police it is impossible to maintain this principle to its utmost length. To do so would be to deny the hierarchical system in which constable's are required to obey the lawful directions of their superior officers'.[744]

Directions could be given, in Edward's view, regarding operational issues 'where 'corrective action' is required.[745] He said nothing of the making of operational directions in other circumstances, but it is difficult to see, from his discussion, any legal, as distinct from policy or conventional reason, why such directions could not be made.

After the McDonald and Marshall Reports, the Supreme Court delivered its decision in *Campbell* in 1999. That decision, as discussed earlier, reached a very different conclusion to that reached by McDonald - accepting that the Canadian Cowper provision did not allow directions in relation to 'law enforcement'. As also discussed earlier, the reasoning in *Campbell* about how that conclusion was reached is far from clear.

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[742] *Marshall Report,* above n 49, 1-4.
[743] Ibid 14-15.
[744] Nova Scotia, Royal Commissioner on the Donald Marshall Jr Prosecution, Vol 5, *Walking the Tightrope of Justice, A Series of Option Papers* (1988) ('*Marshall Vol 5*') 26.
[745] Ibid.

Subsequently there have been three inquiry reports which have, in essence, accepted the conclusions reached in *Campbell*, but have not sought to further explain the basis for its conclusions. Those inquiries are:

- The APEC Report (2001)
- The Arar Inquiry (2006)
- The Ipperwash Inquiry (2007)

6.6.3 - APEC Report, 2001

This investigation was conducted by Commissioner Hughes and concerned, among other things, allegations of interference by the Prime Minister's Office into the RCMP's security arrangements for an APEC[746] conference in Vancouver, Canada in 1997.[747] As such, the relationship between the police and the government was an essential element of the inquiry.[748]

The inquiry was conducted after *Campbell* which Hughes considered resolved the issue of the independence of the police - at least in relation to criminal investigations:

> In respect of criminal investigations and law enforcement generally, the *Campbell* decision makes it clear that, despite section 5 of the *RCMP Act*, the RCMP are fully independent of the executive. The extent to which police independence extends to other situations remains uncertain.[749]

Hughes seemed only concerned with the conclusion in *Campbell* rather that its reasoning as he did not seek to clarify the uncertainties regarding the basis for Binnie J's decision in *Campbell*, or consider the defects in the *Blackburn* reasoning, or seek to align those two decisions.

He was, however clear that he considered that there are 'compelling public policy reasons' not to extend police independence beyond the level accepted in *Campbell*, relying on the McDonald report.[750]

[746] Asia-Pacific Economic Cooperation.
[747] *APEC Report,* above n 50.
[748] Pue, (ed) (2000) above n 60 for the background for this inquiry.
[749] *APEC Report,* above n 50, 83.
[750] Ibid.

6.6.4 - Arar Commission, 2006

This inquiry was conducted by Ontario's Chief Justice, Dennis O'Connor and concerned the rendition and torture of a Canadian citizen by the United States. It involved consideration of the involvement of member of the Royal Canadian Mounted Police in that rendition. For that purpose, O'Connor considered the independence of the RCMP from ministerial direction. Like Hughes before him in the APEC inquiry, O'Connor accepted the *Campbell* conclusion that police 'are fully independent' in relation to 'criminal investigations and law enforcement'.[751] He did not explain how this sits with what seems to be the broad language of s 5 other than that limitation derives from 'the doctrine of police independence'.[752]

6.6.5 - Ipperwash Inquiry, 2007

This inquiry concerned the killing of a First Nations indigenous citizen, Dudley George, by the Ontario Provincial Police (OPP). The inquiry was conducted by Ontario's former Chief Justice, Sidney Linden. While his report is very informative regarding policy issues regarding police independence, Linden's legal analysis on the police-government relationship was, like that of Hughes in the APEC inquiry and O'Connor in the Arar Commission, limited.

Like them he accepted and followed the *Campbell* conclusion. He considered that *Campbell* had delivered 'legal certainty'[753] to the extent of police independence where a Cowper provision exists. This was, however, an odd position for Linden to apply in the context of the legislation that he was dealing with. The Ontario statutory regime that he was considering differed significantly from the regime dealt with in *Campbell*, so its conclusion may not have been applicable to the Ontario Cowper provision.

The OPP were subject to the Ontario *Police Services Act* which, like the *Royal Canadian Mounted Police Act*, contained a Cowper provision, s 17(2). That section read and reads:

> Subject to the Solicitor-General's direction, the Commissioner has the general control and administration of the Ontario Provincial Police and the employees connected with it.

However, that *Police Services Act* also deals with municipal police forces in Ontario, which are subject to the direction of police boards. There is a specific limitation to the direction

[751] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for RCMP's National Security Activities* (2006) 461.
[752] The doctrine of police independence and its sources is discussed in Chapter 10.1.
[753] *Ipperwash Report,* above n 51, 318.

power of the police boards. Section 31(4) is, as Linden recognised, explicit[754] on police independence in that it states that a police board 'shall not direct the chief of police with respect to specific operational decisions or with respect to the day-day operation of police.' By making this explicit reference to police independence in relation to municipal police and failing to make a similar express reference in relation to the OPP, it is at least arguable that the legislature has considered the question of police independence and has restricted it to municipal police (*expressio unius est exclusio alterius*).

Linden recognised this potential argument but did not accept that it distinguished the Ontario legislation from the legislation dealt with in *Campbell*. He did not explain why he did not do so and did not consider the impact of s 31(4) other by recognising that 'As a practical matter, … it is likely that most provincial policy-makers believe that the s 31(4) also applies to the provincial Solicitor-General in his or her dealings with the OPP as well'.[755]

How those provincial policy-makers could have reached that conclusion, given the statutory, language, Linden did not explain.

Linden also recognised that the scope of police independence in *Campbell* was narrower than that set out in *Blackburn*,[756] but did not attempt to align those decisions. Neither did he recognise the defects in the reasoning in *Blackburn;* explain how what Linden accepted was 'plain language',[757] could be given a limited effect; or consider legislative intent in his consideration of the relevant Cowper provision.

6.7 - Analysis and Conclusion

Aside from the extensive review conducted by the McDonald Report, which indicates that, as a matter of law, Cowper provisions provide no basis for police independence, the consideration and analysis the Australian and Canadian judicial decisions and inquiry reports has been limited. Few have given any significant attention to the requirements of the statutory form of Cowper provisions in reaching their conclusions and there has been no attention given to the legislative intent for their introduction. Moreover, for those decisions and reports that have relied on Denning's *dicta* in *Blackburn* and constabulary independence, there has been no consideration of constabulary history and practice.

[754] ibid 313.
[755] Ibid.
[756] ibid 312.
[757] ibid 314.

Nonetheless, the law regarding the scope of Cowper provisions and police independence is, in Canada, regarded as settled, although the underlying basis for that settled conclusion is far from clear. That is, it seems accepted in that country that, despite McDonald, the direction power in Cowper provisions does not extend to criminal investigations, but otherwise allows Ministers to direct Police Commissioners. The judicial decisions and reports in that country, however do not explain how this conclusion has been reached and how an apparent broad direction power has been significantly read down. All that is apparent is that in Canada, there has been a limited acceptance of the effect of *Blackburn*, but with no explanation to justify that limited approach.

The Australian position is even less clear as there is, unlike Canada, no conclusive legal position on the effect of Cowper provisions. And it is noticeable that in none of the Australian considerations of the issue have the Canadian authorities or inquiry reports been considered. The only Australian authority (*Griffiths*) that has considered this issue in any depth seems to have reached the same view as the Canadian conclusion, but the analysis in that case is similarly inadequate.

The conclusions of the Australian inquiry reports are also mixed, ranging from Lusher's complete and unequivocal acceptance of police independence based on Denning's *dicta* to its complete rejection by the 1993 NSW parliamentary report. Moreover, most of the Australian inquiry reports, both before and after *Griffiths*, with similar limited analysis, have at least expressed some doubt about any legal limitations on the scope of Cowper provisions and have recommended legislative changes to achieve such limitations. The acceptance of those recommendations has also been mixed. In NSW those recommendation have not been accepted to date, while they have been rejected in Tasmania as unnecessary based on an interpretation of Cowper that, in Australia at least, is only held in that state. Meanwhile the jurisdiction that has made the broadest changes to limit government's alibility to direct police (Victoria) did so on the basis of what seems to be a most inadequate consideration of the subject involving a limited or no examination of the history, legislative intent, judicial consideration and inquiry reports regarding the scope of Cowper provisions.

Given this lack of consistency and limited analysis these various judicial and inquiry examinations demonstrate, the next Chapter will review the possible bases upon which the 'plain language'[758] used in Cowper provisions could or should be read down.

[758] ibid 314.

7 Broad Direction Powers (Cowper) – Legal Constraints

7.1 Introduction

As the discussion in Chapter 6 demonstrates, aside from any express limitations included in the relevant legislation,[759] the legal effect of Cowper provisions appears unlimited. And this unlimited effect accords with what parliamentary views expressed regarding the intended operation of Cowper provisions. This is most obvious from the apparent inventor of Cowper provisions, Sir Charles Cowper in NSW in 1861 and from the most recent introduction of such provisions in South Australia, in 1972.[760]

Despite the wording and apparent intention of Cowper provisions, Cowper provisions have been interpreted as having a lesser effect. A number of justifications for such limitations have been claimed and this Chapter examines the merit of those justifications.

In essence, the source of any limitation on the operation of Cowper provisions has been claimed to come from one or more of three sources:

- the separation of powers doctrine;
- the rule of law; and/or
- the office of constable.

7.2 – Separation of Powers

7.2.1 - Separation of Powers - Arguments

Unlike the other two claimed bases for a limited scope of Cowper provisions, arguments based on the doctrine of separation of powers are largely based on propositions advanced by some police members and Ministers.

For example, in 2002 the then Victorian Minster for Police and Emergency Services, Andre Haermeyer, advised the Victorian Legislative Assembly, 'As there is a separation of powers between the role of government and the role of Victoria Police these matter are left to the Chief Commissioner to determine'.[761]

[759] Such as South Australia's limitation on the power to direct to prevent directions in relation to the appointment, transfer, remuneration or termination of particular persons – *Police Act 1998* (SA) s 7.
[760] See Chapter 3.
[761] Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2002.

Three years later, the successor in that portfolio, Tim Holding said: 'We take the view that separation of powers is actually important. We take the view that providing Victoria Police with directions as to whom they might charge is outrageous'.[762]

While some of the views[763] expressed may merely indicate areas in which a police Minister should not direct, others seem to indicate that Ministers are constitutionally restrained by the doctrine of separation of powers. For example, in 1991 the Victorian Minister, Mal Sandon, stated that he did 'not involve myself in day-to-day matters with which the Chief Commissioner has to involve himself with. In my view *that area is sacrosanct'*.[764] Similarly, the Queensland Police Minister between 1974 and 1976, Mal Hodges, stated that 'There's been that *division of power for centuries* and you can't interfere with it'.[765]

Ministers have, however, provided little reasoning to support such views other than some confused statements such as following from Hodges:

> I kept away as far as possible because I still believe in the three tiers of responsible Government and police as an area of the executive. I wasn't going to get my finger burnt in that area I kept away from the police department and only on rare occasions did I visit headquarters to discuss anything.[766]

Some former Police Commissioners have expressed similar views, with no greater clarity than that shown in Australian parliaments. One example is former Queensland Police Commissioner, Jim O'Sullivan (between 1992 and 1996) who was of the view that the doctrine was the basis of police independence. He considered that:

> There must be no interference with the role of constable, as the police service is applicable to the separation of powers. Whilst the government sets the law it is for the police to administer the law.[767] `

His predecessor, Ray Whitrod, in his autobiography,[768] also relied on that doctrine, referring to Premier Bjelke-Petersen's direction to him not to conduct an inquiry[769] 'as having breached the doctrine of the separation of powers'.[770] This seems to reflect his very strong police independence position expressed in his post resignation statement in 1976 'as a

[762] Ibid, 6 October 2005.
[763] See for example similar views expressed in Tasmania, *Parliamentary Debates,* Legislative Assembly, 24 October 2004 (Paul Lennon & David Llewellyn); Western Australia, Parliamentary Debates, *Legislative Assembly,* 23 October 2003 (Mrs M H Roberts MP).
[764] Victoria, Parliamentary Debates, *Legislative Assembly,* 14 May 1991 (Mr Mal Sandon MP) (emphasis added).
[765] Quoted in Pitman (1998), above n 76, 114 (emphasis added).
[766] Ibid.
[767] Quoted in ibid 163. Another example was provided by the WA Police Commissioner, Barry Matthews who advised ABCs WA Stateline program in April 2004 of the need to 'uphold the separation of powers between the Government and the service under his control'. ABC News, *Police chief won't apologise for differences with Govt,* 24 April 2004.
[768] Whitrod (2001) above n 122.
[769] Discussed in Chapter 3.2.
[770] Whitrod (1976), above n 8, 180.

Police Commissioner, I am answerable not to a person, not to the Executive Council, but to the law'.[771]

Whitrod's position on this is undermined by other observations that he has made that clearly acknowledged the ability of the police minster to direct the Commissioner. This can be seen from his 1971 Newsletter to members of the police service which discussed the relationship between the police and the Minister. In that article he acknowledged that the 'legal and organisational principle' was that the Commissioner was under the direction of the Minister:

> it is one of the bulwark's of our democratic system of ministerial responsibility. To claim otherwise is to demonstrate a failure to understand first principles of governmental administration.[772]

The former Victorian Chief Commissioner of Police, Christine Nixon, also considered that the doctrine is a constitutional impediment on the government's power of direction. In her autobiography she stated that 'political power, and the direction and control it [ie the government] wields, is constitutionally limited',[773] a limitation that she considers is based on her 'strong appreciation of the separation of powers, and the requirement to maintain the independence in policing.'[774]

However, Nixon's views are muddied by another observation that 'The very idea of a police force immune from political direction and control is not feasible *or even desirable*.'[775]

While the conclusion reached by these examples regarding the significance of the doctrine to the independence of police is clear, there is a lack of supporting reasoning – and this deficit is not assisted by academic writings. Aside from sweeping and unsupported assertions, such as that from Bayley and Stenning, that '"Police independence' was modelled on a similar doctrine for the judiciary',[776] academic writings provide little support for separation of powers as a basis for police independence. One occasion, however, when this issue was discussed and apparently supported in academic writings was in Pitman's doctoral thesis, *Police Minister and Commissioner Relationships*.[777] In it Pitman addressed the issue of police independence and its origin, referring to the doctrine throughout his thesis

[771] Quoted in Roger Wettenhall, 'Government and the Police' (March 1977) *Current Affairs Bulletin* 12, 20 and Russell Hogg and Bruce Hawker, 'The politics of police independence Pt 1' (1983) 8(4) *Legal Services Bulletin* 160,161.
[772] Bolen, above n 80, 87.
[773] Nixon, above n 67, 246.
[774] Ibid 245.
[775] Ibid (emphasis added).
[776] Bayley and Stenning, above n 20, 46.
[777] Pitman (1998), above n 76.

as a, or the, basis for police independence.[778] Pitman relied on a number of judicial decisions,[779] to conclude[780]

> The second approach was to employ the notion of a separation of powers. The police were to be accountable to the judiciary and the law but independent of the executive. The second approach became the legal view in the late 19th to the early 20th century.[781]

The significant difficulty with this conclusion is that none of the judicial decisions relied on were based on or even mentioned separation of powers. Furthermore, Pitman did not support his conclusion from other sources of legal opinion or advice, such as inquiry reports or any legal texts. There is, therefore, simply no basis for Pitman to conclude that 'separation of powers … became the legal view'.[782]

Even if Pitman had not made that error, a review of the doctrine demonstrates that it is not a basis that could justify police independence at state level or in the United Kingdom.

The doctrine of separation of powers is a constitutional law concept that identifies different branches of government. It is regarded[783] as having its modern origin in the writings of the 18th century French lawyer and philosopher Charles-Louis de Secondat, Baron de La Brède et de Montesquieu. In Chapter 6 of his 1748 *The Spirit of the Laws*, Montesquieu described his views of the Constitution of England and in that context identified 'three sorts of power'.[784] They were: the legislative, the power to 'enact … temporary or perpetual laws'; 'the executive in respect to things dependent on the law of nations', which he referred to as 'the executive power of the state'; and the 'executive in relation to matters that depend on the civil law' which he referred to as 'the judicial power'.[785]

Montesquieu also indicated that there needs to be strict separation between branches. In his view, not only 'is there no liberty if the judiciary power be not separated from the legislative and executive', but also that 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty'.[786]

The latter observation indicates that, despite Montesquieu's intention, his observations were not an accurate reflection of the British constitution, under which Ministers are drawn from,

[778] Ibid, 41,84, 96,114, 141, 149,163, 170, 187, 242.
[779] *Blackburn* [1968] 2 QB 118; *Enever* 3 CLR 969. and *Perpetual Trustees* (1952) 85 CLR 237 (HC); (1955) 92 CLR 113 (PC) as well as *R v Chief Constable of the Devon and Cornwall Constabulary ex parte CEGB* [1982] QB 458.and *Fisher v Oldham Corporation* [1930] 2 KB 364.
[780] These cases are referred to in Pitman (1998), above n 76, 72, 73, 74 and 77
[781] Ibid, 41.
[782] It is also to be noted that in Dr Pitman's publications on police independence (Pitman & Pitman (1997), above n 76 and Pitman (2004), above n 76 he made no further reference or relied on the concept of separation of powers.
[783] For example see David Clark, *Introduction to Australian Public Law* (LexisNexis 5th edition 2016) 80-73.
[784] Charles de Montesquieu, *The Spirit of Laws* (Thomas Nugent, trans, Digireads 2010).
[785] Ibid, chapter 6.
[786] Ibid.

and are not separated from the legislature. Indeed, the person generally regarded as Great Britain's first Prime Minister, Robert Walpole, held that role for over 20 years, between 1721 and 1742 (during the period during which Montesquieu composed his work which was published in 1748). And for that entire period Walpole was a member of the House of Commons.[787]

There is, in actuality, no strict separation of powers between any of the branches of government under the 'constitution of England'[788] as is demonstrated by one of the most ancient offices of State in that country, the office of Lord Chancellor. Until recent reforms to that office,[789] the Lord Chancellor operated as part of all three branches of government. That is, in addition to being a Minister and member of cabinet, the 'Lord Chancellor also acted as Speaker of the House of Lords and therefore sat on the Woolsack. The Lord Chancellor was also head of the judiciary and the senior judge of the House of Lords in its judicial capacity'.[790]

Despite the inaccuracies of his views, Montesquieu had some influence on the design of the United States Constitution, under which strict separation operates between the three branches of its constitution;[791] James Madison, in the *Federalist Papers* referring to Montesquieu as the 'oracle who is always consulted and cited on this subject'.[792]

In Australia, federally, the Commonwealth Constitution is designed around the three Montesquieu branches. Chapter 1 relates to the Legislature, Chapter 2 the Executive and Chapter 3, the Judiciary and the High Court has determined that there is strict separation between the judicial and the other branches.[793] However s 64 of the Commonwealth Constitution requires that the United Kingdom no strict separation approach applies to the relationship between the executive and legislative branches[794] as it requires that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'.

In relation to the States and Territories, the three Montesquieu branches are recognised in the various constitutions.[795] However, judicial decisions have made it clear for both the

[787] B W Hill, *Sir Robert Walpole, 'Sole and Prime Minister'* (Hamish Hamilton, 1989).
[788] Peter Leyland, *The Constitution of the United Kingdom* (Hart, 2016) 72.
[789] *Constitutional Reform Act 2005* (UK).
[790] Lord Chancellor, www.parliament.uk, http://www.parliament.uk/site-information/glossary/lord-chancellor/. Also see Norman Wilding and Philip Laundy, *An Encyclopaedia of Parliament* (Cassell, 1961) 366.
[791] With the one notable exception of the Vice President presiding over the Senate – Constitution of the United States, Article 1 s 3(4).
[792] James Madison, 'Federalist No 47, The Particular Structure of the New Government and the Distribution of Powers Among its Different Parts', in Alexander Hamilton, John Jay and James Madison, *The Federalist Papers* (Race Point, 2017) 253, 254.
[793] *NSW v Commonwealth* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[794] Also see *Victoria Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.
[795] See for example *Constitution Act 1975* (Vic) under which Part II (the Parliament) applies to the Legislative Branch; Parts III and IIIAA apply to the Judicial Branch and Parts I (the Crown) and IV (the executive) apply to the Executive.

states[796] and the Northern Territory,[797] that there is no strict separation between the three branches. As McHugh J said in *Kable v DPP*[798] when discussing the NSW Constitution, that constitution:

> is not predicated on any separation of legislative, executive and judicial power although no doubt it assumes that the legislative, executive and judicial power of the State will be exercised by institutions that are functionally separated. Despite that assumption, I can see nothing in the New South Wales Constitution nor the constitutional history of the State that would preclude the State legislature from vesting legislative or executive power in the New South Wales judiciary or judicial power in the legislature or the executive. Nor is the federal doctrine of the separation of powers - one of the fundamental doctrines of the Constitution - directly applicable to the State of New South Wales.[799]

There is, however, one notable exception to this which was also recognised in *Kable* under which the effect of the Commonwealth strict separation is applied to State Courts exercising federal jurisdiction under s 71 of the Commonwealth Constitution. As McHugh J put it:

> although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations *the effect* of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.[800]

For the doctrine of separation of powers to be the basis for police independence preventing government from directing the police, the doctrine would need to involve the police being a separate branch from the government (the executive), and for the separation between the two branches to be strict – as in the United States and in the Montesquieu model. However, neither of those elements is applicable in Australia.

There is no indication that the courts in Australia have accepted that there is anything other than the three Montesquieu branches. This is reflected in the views expressed by the former High Court Chief Justice, Murray Gleeson AC, given when speaking extra-judicially in his earlier role as Chief Justice of NSW. He considered that the police are part of the executive:

> The operations of the defence forces and of the police forces are accepted as responsibilities of the executive government. In different communities, the division of functions between the military and the

[796] *Clyne v East* (1967) 68 SR(NSW) 385, 395 (Heron CJ), 400 (Sugerman JA) ; *JD & WG Nicholas v State of Western Australia* [1972] 1 WAR 168, 175 (Burt J); *Gilbertson v South Australia* (1976) 15 SASR 66, 85 (Bray CJ), affd [1978] AC 772, 783; *Building Construction Employees and Builders Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ), 400 (Kirby P), 407 (Glass JA), 410 (Mahoney JA), 419-20 (Priestley JA); *Collingwood v Victoria (No 2)* [I9941 1 VR 652, 663 (Brooking J).
[797] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 617, (Gageler J) & 632 (Keane J).
[798] (1996) 189 CLR 51.
[799] Ibid 109.
[800] Ibid 118 (emphasis added).

> police may vary but, whatever the precise division that is adopted in any place or at any time, the maintenance of internal peace and security is an essential, and indeed basic, aspect of executive power.[801]

Even if that was not correct, the judicial authority is clear: there is, at the state and territory level,[802] no strict separation between branches. As such, even if the police can be regarded as a separate branch, there is no constitutional reason based on separation of powers, for that branch to be protected from executive direction.

In addition the *Kable* exception can have no relevance to police forces as they cannot be regarded as 'courts' or as courts exercising 'the judicial power of the Commonwealth'. To be regarded as court, a body needs to be a tribunal with, according to Griffith CJ in *Huddart Parker & Co v Moorehead*[803] 'the power to give a binding and authoritative decision'.[804] As Gleeson said:

> it is no part of the function of the police to exercise judicial power. It is for the judiciary, not the police, to determine whether people are guilty or innocent of crimes, and it is for the judiciary, not the police, to punish citizens who have broken the law.[805]

There is, however, one author who has discussed separation of powers in a constitutional law sense in relation to police independence. Bersten[806] considered that the doctrine of separation of powers 'does not describe or prescribe the position of the police in the Australian system of government'[807] and argued for a codification of the relationship. This codification, however, was not to establish the police as a fourth branch, but to 'put beyond doubt the fact that the doctrine of the separation of powers does not describe or prescribe the position of the police in the system of government in Australia'.[808]

Bersten considered that this codification was necessary to correct what he referred to as 'the misconception', largely in public media, that the doctrine describes or prescribes the position of the police in relation to political institutions. He accepted that the doctrine of separation of powers (by which he meant strict separation of powers) 'does not apply in the Australian States'[809] and that in Australia 'the doctrine is only concerned with the relationship between the Parliament, the Executive and the Judiciary'.[810] However, he considered that 'Until these misconceptions are corrected it is not possible to cogently understand the actual legal

[801] A.M. Gleeson AC, 'Police Accountability and Oversight: An Overview', *Pedestrian Council of Australia*, http://www.walk.com.au/pedestriancouncil/Page.asp?PageID=339.
[802] Which is the level of most relevance in this context as that is the level where Cowper provisions currently operate – NSW, SA, Tasmania and the Northern Territory.
[803] (1909) 8 CLR 330.
[804] Ibid 357.
[805] Gleeson, above n 801.
[806] Bersten, above n 79.
[807] Ibid.
[808] Ibid 316.
[809] Ibid 304.
[810] Ibid 303.

arrangements surrounding the police in relation to the Parliament, the Executive and the Judiciary'.[811]

Why constitutional educational would not be better course than constitutional reform when the error to be corrected is not constitutional effect, but illiteracy, Bersten did not consider. In any case, there is nothing in his article to validate the position that police constitutes a separate branch of government or that the doctrine of separation of powers is the basis for the independence of police, a concept that Bersten expressly rejected.[812]

7.2.2 - Separation of Powers - Conclusion

While the doctrine of separation of powers is often used by some Police Commissioners and Police Ministers and occasionally elsewhere, in the context of the independence of the police that usage is, at best, a misuse of the term based on limited understanding of the constitutional basis of that doctrine. However, it has become, to adopt the words of Raz from a different context: 'A slogan used by supporters of ideals which bear little or no relation to the one it originally designated'.[813]

The judicial authorities have made it clear that the doctrine of separation of powers is limited in Australia to three branches and that there is no strict separation between the branches at the state/territory level. Accordingly, even if a police force does form a separate branch from the executive, there would still be no constitutional restriction on the executive based on that doctrine from directing that branch.[814]

Fortunately, not all Police Commissioners rely on separation of powers as the basis for the independence of police. In 2014, the then Chief Commissioner of the Victorian Police, Ken Lay, expressly and correctly rejected the concept in *A Vision for Victoria Police in 2025*:[815]

> The police are, and always have been, part of the executive branch of government. There is no constitutional separation of powers between police and the elected government of the day.[816]

[811] Ibid 303.
[812] Bersten above n 79, 304.
[813] Joseph Raz. 'The Rule of Law and its Virtue' in Joseph Raz (ed) *The authority of law: Essays on law and morality* (Oxford, 1979) 210.
[814] Unless that branch is court exercising federal jurisdiction which police forces are not.
[815] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (Victoria Police, 2014).
[816] Ibid 11.

7.3 – Rule of Law

7.3.1 – Rule of Law - Issues

The second claimed basis for limitation on Cowper provisions is the rule of law and was put baldly by Pue: 'Shielding police from politicians is the foundation of the rule of law'.[817]

This relevance of this doctrine was raised, as pointed out in Chapter 6, by Roach who considered that the finding of the Canadian Supreme Court in *R v Campbell & Shirose*[818] was based on the rule of law.[819] In discussing that decision, Roach expressed the view that the *Campbell* decision 'arguably elevated police independence … from constitutional convention … to a component of Canada's organising principles, namely the rule of law; and that the case raises the possibility that courts might enforce police independence 'as part of the unwritten principle of the rule of law'.[820]

A number of issues arise from Roach's observation. The first, is whether the Canadian Supreme Court in *Campbell* did, in fact, base its decision regarding police independence on the rule of law. For the reasons specified in Chapter 6, it is considered that the Roach conclusion is more speculative than an accurate reflection of what the Supreme Court decided.

Whether that is correct or not the other two questions remain. And they are:

- Would the courts in Australia follow the Canadian lead and apply the rule of law as a constitutional limitation – as a 'substantive legal obligation … which constitutes substantive limitations on government action'?[821] and
- Is the provision of government directives to the police force inconsistent with the rule of law?

To answer these two questions requires an understanding of the doctrine, although it is accepted that a wholesale review of the doctrine is well beyond the scope of this thesis.[822] Accordingly, the discussion of the doctrine will not attempt to repeat the research and analysis of earlier works on this subject. It will, however, rely on and refer to the previous

[817] Pue (2000), above n 63, 12.
[818] [1999] 1 SCR 565.
[819] Roach (2007), above n 59,19, 26, 28, 54, 57-8; Bayley and Stenning, above n 20, 47.
[820] Ibid 28.
[821] *Reference Re Secession of Quebec* [1998] 2 SCR 217, 249.
[822] It is also unnecessary in view of the recent and excellent review of the application of the doctrine in Australia conducted by Crawford. Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation, 2017).

work conducted in this area commencing with Dicey[823] and more recently by authors including Walker,[824] Raz,[825] Bingham[826] Crawford,[827] Allan[828] and Tamanaha.[829]

7.3.2 – Rule of Law – The Doctrine

Despite Pue's assessment of the rule of law quoted earlier, there is little in his article to support his proposition - which is more polemic than an expression of legal analysis. His discussion of rule of law is, itself, short, commencing with the questionable proposition that 'Canada has well developed mechanisms that are supposed to protect the police from political interference'[830] and goes on to a remarkably simplistic graphical representation of the rule of law:

> *Line A: Rule of Law*
>
> Constitution ->Queen in Parliament-> police -> Courts -> citizen
>
> *Line B: Despotism*
>
> Prime Minister -> flunky's decree ->police ->truncheon -> citizen[831]

Other authors have given more thought to rule of law and its uncertain meaning. However, there is no agreement as to what it entails. As a result, as Tamanaha observed, 'the rule of law is analogous to the notion of the 'good,' in the sense that everyone is for it, but have contrasting convictions about what is.[832]

Nonetheless, the one point of general agreement of theorists is that the modern understanding of the doctrine[833] began with A V Dicey and his 1885 *The Law of the Constitution.*[834]

Dicey considered that the rule of law has three elements. First, 'the absolute supremacy or predominance of regular law as oppose to the influence of arbitrary power'.[835] He

[823] Dicey, above n 346.
[824] Geoffrey De Q. Walker, *The Rule of Law, Foundation of Constitutional Democracy* (Melbourne University Press 1988).
[825] Raz, above n 813, 212.
[826] Tom Bingham, *The Rule of Law* (Penguin, 2010).
[827] Crawford, above n 822.
[828] TRS Allan, *Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford, 2013).
[829] Brian Z Tamanaha, *On the Rule of Law, History, Politics Theory* (Cambridge, 2004).
[830] Pue (2000), above n 63
[831] Ibid, 17.
[832] Tamanaha, above n 829, 'Introduction'.
[833] Ibid; Crawford, above n 822, 15; Bingham, above n 826, chapter 1; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467, 470; Murray Gleeson, 'Courts and the Rule of Law', in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation, 2003) 178, 179; Andrew Sykes, 'The "Rule of Law" as an Australian Constitutionalist Promise' (2002) 9/1 *Murdoch University Electronic Journal of Law* 2, para 8; Walker, above n 824, 19; Allan, above n 828, 89.
[834] Dicey had earlier referred to the concept in at least one journal article in 1875. David Clark, above n 783, 69.

distinguished this element from 'wide discretionary authority on the part of the government'.[836]

His second element related to 'equality before the law;'[837] and the third, more nebulous element[838] concerned the rights of individuals which, in Dicey's view, were inherently derived from the framework of the English constitution. [839]

Although there have been criticisms of these three concepts and their application (that are largely not relevant to this study but are well addressed in other works),[840] Dicey's three elements remain the starting and reference point for most considerations of the doctrine. Theorists have charted different paths from this starting point to the meaning of the doctrine – both on the scope of the doctrine and whether it imposes formal or formal and substantive restrictions.

As to the *scope* of the doctrine, many scholars and commentators since Dicey have expressed their differing views as to what it requires. While the doctrine has been regarded, as by Greenwald, in simple, if not simplistic terms, as 'the prime equalizing force, the ultimate guardian of justice',[841] the doctrine is much more complex and difficult.

Raz has observed, 'If government is, by definition, government authorized by law the rule of law seems to amount to an empty tautology'.[842] And to avoid such difficulties, he and other scholars have set about analysing the doctrine's requirements, often preparing lists of their views of its essential elements.

A summary of the different lists and differing views from notable scholars, Raz, Fuller, Walker, Tamanaha, Bingham, Saunders and Le Roy and Stephen is provided in Table 7.1 below identifying the various elements in the different academic assessments. This comparison demonstrates both the complexity of the doctrine and the little consistency between scholars as to the meaning of the concept.[843] As can be seen from the Table is

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[835] Dicey, above n 346, 198.
[836] Ibid.
[837] Ibid.
[838] Craig above n 833, 473 considered that the third element 'does not sit easily with previous two'.
[839] Dicey, above n 346, 198-199.
[840] Such as Walker, above n 824; Craig, above n 833; Tamanaha, above n 829; Bingham, above n 826; Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect; theoretical considerations, criticisms and justifications for the rule of law' [2004] 4 *Macquarie Law Journal* 135.
[841] Greenwald's simplistic approach equates equality before the law with equality under the law: that is equating 'the uniform application of a set of pre-existing rules to everyone' with 'the demand that all be treated equally under the law' without seeming to appreciate the distinction. Glenn Greenwald, *With Liberty and Justice for Some. How the Law is used to Destroy Equality and Protect the Powerful* (Metropolitan Books, 2011) 3 & 6.
[842] In that 'Actions not authorized by law cannot be the actions of the government as a government. They would be without legal effect and often unlawful'. Raz, above n 813, 212.
[843] Raz, above n 813; Lon Fuller, *The Morality of Law* (Yale, 1969); Walker, above n 824; Tamanaha, above n 829; Bingham above n 826; Cheryl Saunders and Katherine Le Roy 'Perspectives on the Rule of Law' in Saunders and Le Roy (eds), above n 833, 1; Ninian Stephen, 'The Rule of Law' (2003) 22(2) Dialogue 8 in George Williams, Sean Brennan & Andrew Lynch (eds), *Australian Constitutional Law and Theory Commentary and Materials* (Federation, 6th ed, 2014) 24.

that the only area in which all of the scholars express agreement is that they all considered that the doctrine includes a requirement for clarity and stability of the law. Aside from that, all that is clear, as Crawford has recently observed, is that although commentators may 'disagree about its meaning, we clearly agree that the rule of law means something important'.[844]

Table 7.1 – Rule of Law – Comparative Academic Views

	Raz[845]	Bingham[846]	Fuller[847]	Tamanaha[848]	Walker[849]	Saunders & Le Roy[850]	Stephen[851]
Equality before the law		▨		▨	▨	▨	▨
Clarity & stability of law	▨	▨	▨	▨	▨	▨	▨
Accessible Courts	▨	▨	▨		▨		▨
Judicial Independence	▨				▨	▨	▨
Natural Justice	▨				▨		
Limitations on Exercise of Power		▨			▨	▨	
Discretion limitations	▨	▨	▨		▨		
Human Rights		▨			▨		
Congruence of law and social values					▨		
Integrity of Legality					▨		

The elements in these lists relate to the elements of the rule of law, not the legal validity of a law that does not comply, as Crawford observed. Crawford, above n 822, 21-22.

[844] Crawford, above n 822, 39.
[845] Raz, above n 813, 214-218
[846] Bingham, above n 826, 37, 48, 55, 60, 66, 85 & 90.
[847] Fuller, above n 843, 39.
[848] Tamanaha, above n 829, chapter 9.
[849] Walker, above n 824, 24-41.
[850] Saunders & Le Roy, above n 843, 5.
[851] Stephen, above n 843, 24.

Aside from the differing elements in the lists, their views also differ regarding the *nature* of the doctrine. That is, whether it imposes only very formal or 'thin' obligations so that, in the words of Raz, the 'law may … institute slavery without violating the rule of law';[852] or 'thicker' obligations which Bingham described as requiring the doctrine to include moral elements protecting human rights.[853] While there are other variations in the differing academic views of the elements of the doctrine, most would not disagree with Bingham's concession that the rule of law is subordinate to the doctrine of parliamentary sovereignty. Accordingly, despite his 'thick' views as to the scope of the doctrine, Bingham also accepted that:

> Parliament may … legislate in a way which infringes the rule of law; and in which the judges, consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed.[854]

Beyond those views are those of scholars like Dworkin[855] and Allan[856] who have, or have been taken[857] as given the doctrine both a 'thick' meaning and one which is essential to a law's validity. In Allan's view, 'the rule of law amounts to a theory of legitimate government'.[858] 'It is a value internal to law itself', [859] and requires 'compliance with those conditions under which each person's freedom (or liberty) is secured, consistently with the enjoyment of a similar freedom for everyone'.[860]

The merit of these different and differing views of the rule of law are beyond the scope of this thesis. What is relevant is whether the rule of law operates to narrow the effect of Cowper provisions so that they do not allow interference with police independence. This could occur in two circumstances.

First, if Allan is correct in his view that the rule of law is essential to the validity of law and if the provision of government directions to police is inconsistent with the rule of law.

Second, if Allan is not correct, but that Cowper provisions are considered ambiguous and the doctrine is used to resolve that ambiguity, and if the provision of government directions to police is inconsistent with the rule of law. Such usage of the doctrine would occur in accordance with the principle of legality (which some have also treated as interchangeable

[852] Raz, above n 813, 221
[853] Bingham, above n 826, 66-84.
[854] Ibid 168.
[855] Ronald Dworkin, *Law's Empire* (Harvard 1986).
[856] Allan, above n 828.
[857] Crawford makes the point that 'Dworkin is credited with articulating a substantive theory of the rule of law. However, "one finds virtually no mention of the phrase "rule of law" as such within [Dworkin's] major work on legal theory"'. Crawford above n 822, 31 & Craig, above n 833, 478.
[858] Allan, above n 828, 119.
[859] Ibid 88.
[860] Ibid 89.

with the rule of law).[861] The principle of legality was defined by the United States Chief Justice Marshall in 1805:

> Where rights are infringed where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.[862]

Legality has been well established by the High Court since O'Connor J's adoption of Marshall's views and language in *Potter v Minahan*[863] in 1908.

The common element in both circumstances is that the provision of government direction to the police is contrary to the rule of law. That issue is discussed below in Chapter 7.3.4. Before it is discussed, however, it is necessary to consider the other conditions for the two circumstances. The first is whether the Allan version of the rule of law is an accurate reflection of the state of the law in Australia. That issue, due its complexities, is discussed in Chapter 7.3.3 below.

The second is a simpler question: are the Cowper provisions unclear? It is not uncommon for commentators to refer to the vague and ambiguous nature of Cowper provisions. Examples can be found in the observations of Pitman,[864] Finnane,[865] Fleming,[866] Manison[867] and in the Neesham Report.[868] This is, however, a puzzling assessment, as those who take that view seem to ignore the plain meaning of the words used in Cowper provisions,[869] the legislative intent, particularly as expressed by Cowper himself[870] and in South Australia in 1972,[871] and the contrary of assessment by notable scholars[872] whose analysis involved an examination of those words and their intended meaning. To repeat the views of Waller[873] who wrote in 1980 of the clarity of the Cowper provision enacted by South Australia: 'In no other Australian state had Parliament enacted so recently and clearly legislation expressing the subordination of the police to the executive government'.[874]

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[861] Stephen McLeish and Olak Ciolek, 'The Principle of Legality: Constitutional Innovation' in Dan Meager & Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation, 2017) 27, 29.
[862] *United States v Fisher* 6 US 358,390.
[863] (1908) 7 CLR 277. More recent examples can be found, such as *Bropho v Western Australia* (1990) 171 CLR 1, 18 and *X7 v Australian Crime Commission* (2013) 248, 92.
[864] Pitman (1998), above n 76, 63 & 125.
[865] Finnane (1994), above n 117, 39.
[866] Fleming, above n 83, 61 & 63.
[867] Manison, above n 78, 499.
[868] *Neesham Report,* above n 363, Vol 1, 30.
[869] In the Neesham Report, the Commissioner seemed to base his interpretation not on the words used, or the parliamentary intent, but instead on 'the resignations [sic] and dismissals [sic] of police commissioners in Queensland and South Australia'. Ibid 35.
[870] See Chapter 3.2.
[871] Ibid.
[872] such as by Waller, Plehwe and Wettenhall and the Canadian McDonald Report. Waller, above n 55, 255; Plehwe and Wettenhall, above n 56, 80 and *McDonald Report,* above n 48, 1008 & 1012.
[873] Then Leo Cussen Professor of Law at Monash University.
[874] Waller above n 55, 255.

Similarly, Campbell and Whitmore, both notable academics in the fields of constitutional and administrate law, referred to the 'clear statutory mandate for ministerial direction' existing in most States.[875] Those matters and views were not considered by the commentators who assert that Cowper provisions are vague or ambiguous. Their conclusions seem to be little more than unsubstantiated assertions based on irrelevant factors[876] or misrepresentations.[877] Indeed the most puzzling of those views is the reliance expressed in the Neesham Report on 'the resignations and dismissals [sic] of Police Commissioners in Queensland and South Australia'[878] for the supposed ambiguity of the Victorian provision, rather than the standard statutory interpretation methodology.

As discussed in Chapter 2, the method of statutory interpretation adopted by the High Court and Supreme Courts in Australia is primarily literalist, relying on the words used. As stated by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority:*[879]

> The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation.

Given the clarity of the language used in Cowper provisions, which, as the McDonald Report said of the Canadian equivalent, 'does not brook much doubt as to where the ultimate authority of direction lies',[880] the provisions cannot be regarded as ambiguous. Accordingly, unless there is some other indication in a particular policing Act of a contrary legislative intention,[881] there seems no reason why Cowper provisions should be read as anything other than what they plainly say.

7.3.3 – Rule of Law – Constitutional Limitation

7.3.3.1 - Canada

The issue of whether the rule of law can be the basis for the invalidity of laws is the subject matter of Crawford's recent study of the rule of law. She rejected that potential, concluding

[875] Enid Campbell & Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1973) 28.
[876] For example, Fleming's assertion that 'The law is ambiguous' derives from the lack of consistency in legislation and from local custom and practice varying between jurisdictions'. It is apparent that Fleming cannot distinguish between ambiguity and variety. Fleming above n 83, 61.
[877] Fleming asserts that Finnane asserted that the South Australia legislation 'introduced further ambiguity', when Finnane made no such assertion. See ibid, 63 and Finnane (1994) above n 117, 39.
[878] *Neesham Report,* above n 363, 19.
[879] (2008) 233 CLR 259, 270.
[880] *McDonald Report.* above n 48, 1008.
[881] Provisions need to be interpreted in the context in which they are found – and one potential issue which might indicate a contrary intention are provisions found in some policing Acts providing the common law powers and provides of constables to police commissioners. This issue is discussed below in Chapter 7.4.

that 'the rule of law is unsuited to judicial enforcement, at least within the Australian constitutional framework'.[882]

It is not intended to repeat or review Crawford's analysis other than to observe that while she made reference to certain United Kingdom decisions,[883] she gave only a superficial examination to Canada[884] where the Courts have not only discussed the issue but seem also to have applied it – in a manner consistent with Allan. Accordingly, it is necessary to examine the Canadian decisions and their applicability to Australia.

The decision of the Supreme Court of Canada in *Campbell*, if Roach is correct, applies the rule of law as a 'substantive limitation on government action'. By substantive, Roach was referring to the invalidity of a law inconsistent with the doctrine.[885] As noted earlier, this is problematic interpretation of the reasoning in *Campbell*, but the issue remains: has the Canadian Supreme Court accepted that the rule of law can invalidate laws?

In the earlier 1998 decision in *Reference Re Secession of Quebec*[886] the Supreme Court recognised the rule of law as one of the 'four foundational constitutional principles that are most germane for resolution of this Reference'.[887] The Court considered that those foundation constitutional principles can be used beyond the function of 'assist[ing] in the interpretation of the text and the delineation of spheres of jurisdiction'.[888] While the Court considered that the constitutional principles 'could not be taken as an invitation to dispense with the written text of the Constitution' it considered that they:

> may in certain circumstances give rise to *substantive legal obligations* (have 'full legal force', as we described in the *Patriation Reference*[889] …) which constitute *substantive limitations* upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and government.[890]

Despite the apparent breadth of those comments, Elliot in his assessment of that decision, considered that 'The question of whether the rule of law can function on its own as the basis

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[882] Crawford, above n 822, 197.
[883] Such as *R (Jackson) v Attorney-General* [2006] 1 AC 262, [107] where Lord Hope stated that 'the rule of law enforced by the courts is the ultimate controlling factor on which [the constitution] is based' as well as subsequent decisions expressing the contrary traditional view, such as *R (on the application of Miller and Don Santos) v Secretary of State for Exiting the European Union* [2017] 1 All ER 158 & [2017] UKSC 5. Ibid 2-3.
[884] Ibid 2.
[885] There is a certain terminology source of confusion by the use of the word 'substantive' in the context of the rule of law – in that the word 'substantive is used in the 'thick/thin' debate regarding the nature of the doctrine to determine whether the doctrine refers to issues beyond those of form, such as human rights. This is a different use of the word 'substantive' from Roach's use of that term - referring to the validity of a law.
[886] [1998] 2 SCR 217.
[887] Ibid 248. The others are federalism, democracy and constitutionalism.
[888] Ibid.
[889] *Reference re Resolution to Amend the Constitution (Patriation Reference)* [1981] 1 SCR 753, 845.
[890] [1998] 2 SCR 217 249 (emphasis added).

upon which the validity of legislation can be challenged was not addressed in the *Quebec Secession Reference'*.[891]

This seems a questionable view. Not only does the language used by the Court seem to clearly indicate that the rule of law can be used as a *substantive limitation* upon government action, but the Court also relied on an earlier Supreme Court authority in which the rule of law was given substantive operation to limit the effect of the plainly written constitutional text.

In *Re Manitoba Language Rights Reference*[892] the Canadian Supreme Court considered the failure of Manitoba to have complied with a constitutional obligation for bilingual legislation for over a century. The Court recognised that failure to comply with the constitutional obligation meant:

> (i) … that the unilingual Acts of the Manitoba Legislature be declared to be invalid and of no force or effect, and (ii) without more, such a result *would violate the rule of law*.[893]

The latter conclusion requires some examination as the Court seems to have reached the counter intuitive view that compliance with a documented constitutional requirement 'would violate the rule of law.'

The basis for this view is that the Court considered that:

> The rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principles of normative order. Law and order are indispensable elements of civilised life. 'The rule of law in this sense implies … simply the existence of public order'.[894]

It is, however, somewhat difficult to identify the particular normative order interpretation of the rule of law that the court applied from the various and varied views of the theoreticians of the rule of law referred to earlier. Nonetheless, the Court sought to rely on the very 'thin' theorist, Raz who they quote as saying:

> '"the rule of law" means literally what it says: the rule of the law … It has two aspects: (1) that people should be rules by the law and obey it, and (2) that the law should be such that people will be able to be guided by it'. The rule of law simply cannot be fulfilled in a province that has no positive law.[895]

The last sentence in that passage, however, was not from Raz and it is not apparent from his 'thin' approach that he would necessarily have endorsed it.

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[891] Robin Elliot 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' [2001] 80 *Canadian Bar Review* 67, 115.
[892] [1985] 1 SCR 721. The decision in the *Manitoba Language Reference* was specifically referred to in the *Quebec Secession Reference,* [1998] 2 SCR 217, 249 & 257-8.
[893] [1985] 1 SCR 721, 752-3 (emphasis added).
[894] Ibid 749. In that passage the Court was quoting W I Jennings, *The Law and the Constitution* (1959).
[895] Ibid 750. In this passage the Court was quoting J Raz, above n 813, 212-13.

It is important to observe that in *Manitoba* the Court did not use the rule of law as tool in the interpretation of the constitutional provision. The Court accepted that Manitoba's unilingual legislation 'are, and always have been, invalid and of no force or effect',[896] but used its view of the rule of law to develop and apply a 'de facto doctrine of necessity' to deem the invalid laws 'temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing'.[897]

> The doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead used *to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution*.[898]

Analysis of that approach is well beyond the scope of this study. The importance and relevance of the decision to this aspect of this study is that it demonstrates the willingness of the Canadian Supreme Court to give the rule of law a substantive or constitutional role in preference to the clear unambiguous and acknowledged wording of a constitutional provision.

From these decisions it appears clear that the rule of law in Canada, at least, has constitutional effect, capable of both supporting and invalidating law by itself.

7.3.3.2 – Rule of Law – Constitutional Limitation in Australia?

While Canada appears to have endorsed the rule of law as the basis for substantive limitations on legislative provisions, the next question is whether the High Court would give the rule of law the same operation. The short answer to that question is no.

The Canadian cases seem to have been based on a combination of an express reference to the rule of law in the preamble to the Canada's Constitution (the *Constitution Act 1982* (Can)) with a judicial acknowledgement that the rule of law is a 'fundamental postulate of our constitutional structure'.[899]

There is no Australian equivalent to the expression of the rule of law found in Canada's constitutional preamble: *Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.*

However, there can be found some equivalents to the expressions found in Canadian decisions regarding the inherent nature of the rule of law to the constitution. So just as the

[896] Ibid 767.
[897] Ibid.
[898] Ibid 766 (emphasis added).
[899] *Roncarelli v Duplessis* [1959] SCR 121, 142 (Rand J).

Canadian Supreme Court has regarded the rule of law as 'one of the fundamental and organizing principles' of the Canadian Constitution[900] which is 'implicit in the very nature of a Constitution'[901]and which 'infuse our Constitution and breathe life into it'[902] some views have been expressed in the High Court that have some similarity. The predominant Australian view is the often repeated and referred to view of Dixon J in the *Communist Party Case:*[903]

> it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.[904]

While less dramatically expressed than its Canadian equivalents, Dixon's view expressed that the rule of law has a role in the constitution. The consequences of this statement in Australia are not, however, clear as the High Court has not considered, as Gummow and Hayne JJ observed in *Kartinyeri v Commonwealth,*[905] 'all that may follow'[906] from Dixon's comment. While their Honours' comment leaves the door open for further expansion subsequent judicial consideration seems not to have further clarified the role of the rule of law or indicated that it can be the basis for invalidity.[907] The furthest than any of the subsequent justices have gone is Kirby J who, in 2003, stated that 'Dixon J recognised … our Constitution is … framed to give effect to the traditional conception of the rule of law as one of its fundamental assumptions.'[908] While this statement is closer to the Canadian use of the rule of law, it is, as Crawford observed, 'not what Dixon J said'.[909]

Crawford also emphasised that 'It is not clear what Dixon J meant' by the reference to 'assumption' [910] but analysed its use in the *Communist Party Case*. She observed that 'Dixon J distinguished between those "conceptions" to which the Constitution "gives effect," and conceptions that are "simply assumed"'. From that distinction she 'suggests that, unlike the separation of powers, the rule of law is not given effect by the Constitution. Thus it might be described as an ideal or objective that it was hoped the Constitution would serve, but which lacks legal force'.[911]

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[900] *Quebec Secession Reference* [1998] 2 SCR 217, 240.
[901] Ibid 248.
[902] Ibid.
[903] *Australian Communist Party v Commonwealth* (1950) 83 CLR 1.
[904] Ibid 193.
[905] (1998) 195 CLR 337.
[906] Ibid 381.
[907] See *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 351 and *Thomas v Mowbray* (2007) 233 CLR 307, 342 and Crawford discussion. Crawford, above n 822, 75.
[908] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, [168]; (2003) 77 ALJR 1165, 1193.
[909] Crawford, above n 822, 75.
[910] Ibid 1.
[911] Ibid 73.

On that basis, whatever Dixon meant by 'assumption' it seems that it was much less than the effect given to the rule of law in Canada as a stand alone constitutional standard.

It should however be noted that there is one Australian decision that has been claimed to have used the rule of law as the basis for the invalidation of legislation. Sykes claims that in *Chu Keng Lim v Minister for Immigration*,[912] the High Court 'struck down [the law] for being inconsistent with Dicey's first element of the rule of law and the separation of powers'.[913] It is, however, suggested that this is a misinterpretation of the decision. While it is true that Brennan, Deane and Dawson JJ made one reference to Dicey in their judgment, their joint decision, with which Gaudron J agreed, was clearly based on separation of powers. The provision in question was rejected, not on the basis of inconsistency with the rule of law, but as 'an impermissible intrusion into the judicial power which Ch.III vests exclusively in the courts which it designates'.[914]

The absence of any mention of the doctrine in the Australian constitution is the salient difference between the relevance and significance of the doctrine in those constitutions. As the Canadian Supreme observed in the *Quebec Succession Reference:*

> we also observed in the *Provincial Judges Reference*[915] that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*,[916]. In the *Provincial Judges Reference*,[917] we determined that the preamble 'invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text'.[918]

7.3.4 – Rule of Law – Relevance to the role of the police.

It seems, therefore, that the necessary conditions for the two formulations for the rule of law to limit Cowper provisions are unlikely to be satisfied as:

- Cowper provisions seem clear and unambiguous; and
- The rule of law seems not a constitutional basis to invalidate legislation in Australia.

However, if either of those conclusions is incorrect, a final question remains for examination. And that is: is the rule of law inconsistent with the power of the government to direct police?

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[912] (1992) 176 CLR 1.
[913] Sykes, above n 833, [20].
[914] (1992) 176 CLR 1, 28 & 37 (Brennan, Deane & Dawson JJ) & 53 (Gaudron J).
[915] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3 (*Provincial Judges Reference*).
[916] [1985] 2 SCR. 455, at pp 462-63.
[917] *Provincial Judges Reference*, above n 902, para 104.
[918] [1998] 2 SCR 217, 249.

There are difficulties with the application of the rule of law to police independence, the first of which relates to the discretion of police. The police have broad discretion in the way that they exercise their operational powers and any exercise of those direction powers by the government would have the effect of limiting the exercise of discretion by the police. As Galligan has observed, police discretion includes 'whether to investigate, to question, to search, to arrest, to caution, to charge, to prosecute: what charge to bring, whether to negotiate over pleas and other matters, and which judge or bench of magistrates to bring the case before'.[919]

As a matter of pragmatism, such discretions are seen by many as 'inevitable and essential'[920] although, as Bronnitt and Stenning observe: 'The exercise of discretion, finally, involves discrimination'.[921] By this they were referring to choice and were discussing means of controlling the exercise of that choice – to draw a 'line between acceptable and unacceptable discrimination'.[922]

Such wide discretion, however, is inconsistent with at least some formulations of the rule of law, including that of Dicey. As Tamanaha observed, 'Discretion and law, for Dicey, are antithetical'.[923] Thus:

> Wherever there is discretion there is room for arbitrariness and … discretionary authority on the part of the government must mean insecurity for legal freedom on the part of it subjects.[924]

Others, including Allan[925] have shared Dicey's concern with discretion; Maitland stating that:

> Caprice is the worst vice of which the administration of justice can be guilty; known general laws, however bad interfere less with freedom *than decisions based on no previously known rule*.[926]

Dicey's views on discretion and arbitrariness have, however, been criticised, as failing to appreciate the role that discretion plays in the administration of justice.[927] Nonetheless, from a 'Dicey purist' position at least, it seems difficult to accept that a civilian means of directing and possibly limiting the exercise of police discretion could be a breach of the rule of law when Dicey would have regarded the discretion itself as inconsistent with the rule of law.

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[919] As quoted in Simon Bronitt and Phillip Stenning, 'Understanding discretion in modern policing' (2011) 35 *Criminal Law Journal* 319.
[920] Ibid 325.
[921] Ibid 321.
[922] Ibid 322.
[923] Tamanaha, above n 829, chapter 5. Also see Bingham, above n 826, 48.
[924] Dicey, above n 346, 184.
[925] Allan, above n 828, 89.
[926] Frederic William Maitland, *A Historic Sketch of Liberty and Equality* (1875) quoted in Tamanaha, above n 829, chapter 5 (emphasis added).
[927] Craig, above n 833, 470.

The second objection is not Dicey specific and relates to Roach's explanation of how the rule of law is inconsistent with government direction. It should be noted that the Canadian Supreme Court did not express any view on this issue or explain why, if it did consider that the rule of law applied in this context, how it would do so. Roach attempted to fill this gap, but did not do so in any great depth. His view was that the rule of law is inconsistent with the ability of the government to direct police based on what can be referred to as the impartiality element of the doctrine. That is, 'the importance of impartially applying the law to all and especially to those who hold state and government power'.[928]

Roach did not further expand on the issue. The difficulty with the Roach view is that it is not entirely clear that the impartiality element of the rule of law as described by him is, according to the various and varied descriptions of the doctrine discussed earlier, actually an essential part of the doctrine.

Impartiality is described in the various formulations, but seemingly, only in the context of an impartial judiciary.[929] Walker and Raz, however, did give impartiality a broader application, so as to include 'impartial and honest enforcement'.[930] However, by this, they were concerned that, in the words of Walker, 'The discretion of law enforcement agencies or of other government officials or of political office holders should not be allowed to pervert the law. Nor should perjury by police officers ….'[931]

They seem concerned, therefore, with the appropriate exercise of power, not with who exercises it.

The unstated assumption of Roach seems to be that a direction from the government to the police will, of itself, be such as to pervert the law. Roach does not explain this or why a government direction to the police to take a particular action makes that police action less impartial than a police action based on a police officer's own assessment or an action based on a direction of a superior police officer.

The contrary position was indicated by Borovoy when discussing what can be regarded as the 'lawful/awful' distinction in police action.[932]

> Suppose instead that the activity involved is obviously lawful but arguably awful…. At Fort Erie, the police physically searched the more than one hundred patrons they found in the lounge; the women were herded into washrooms, stripped, and subjected to vaginal and rectal examinations. In Toronto's bathhouses, the police arrested some three hundred adult patrons whose offence involved nothing more

[928] Roach (2007), above n 59, 28.
[929] Stephen's second point, Walker's 7th & 8th points and Raz's 4th point. Stephen above n 843, 24; Walker, above n 824, 29-37; Raz, above n 813, 216.
[930] Walker's 11th point & Raz's 8th point. Walker, above n 824, 40; Raz, above n 813, 218.
[931] Walker above n 824, 40-41.
[932] Commentary by A Alan Borovoy in Beare and Murray, above n 59, 128.

> than consensual sex …. [W]hen these incidents occurred, the behaviour of police was likely lawful. But wasn't it nevertheless awful?[933]
>
> The key questions is whose view of 'awful' should prevail, that of the police or that of the government? Suppose the relevant Minister found out beforehand what the police were going to do. Would it be so 'highly inappropriate' for these civilian masters to contact police chiefs and direct them to desist? After all the politicians, not the police are elected.[934]

In making this observation Borovoy recognised both the responsibilities and accountabilities of Ministers for the actions taken in their areas of responsibility as well as the expectation that in a democratic society police should not 'perform partisan duties at the behest of any politician'. There is a tension between those two elements which Borovoy seeks to resolve by asking the following two questions which Roach's unanalysed application of the rule of law does not consider or answer:

> Why should we assume that only the government has improper political motives?[935]

And:

> As between the appointed police and the elected government, why should the police have the right to make the last mistake?[936]

It is suggested that there seems no reason to make that assumption or conclude that police have the final say. And this is particularly so if one of the elements included in the Bingham understanding of the rule of law is accepted as properly part of the doctrine. That element is, that 'Ministers and pubic officers at all level must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred.'[937]

Bingham's point reflects the earlier position of Walker and Raz regarding impartiality – that, other than in relation to the judiciary, the rule of law is concerned not with who exercises power, but with the appropriate use of the power. This Bingham element has the effect that if a Police Minister is empowered to direct the police, the rule of law is satisfied so long as that power is not misused to direct the police in a partisan or improper manner.

Moreover, it is also suggested that there is nothing fundamental in the rule of law, or any of the 'surfeit of definitions'[938] than have been provided, that compels police to be independent

[933] Similar 'awful' but lawful activities were undertaken by the Victoria Police in 1994 at the Tasty Nightclub – activities for which VicPol apologised in 2014. The Victorian Premier at the time Jeff Kennett considered the raid 'horrifying and extreme' but no action was taken to direct the police to prevent such actions. Tony Nicholls, 'Victoria Police apologise for 1994 raid on Tasty nightclub to 'make up for sins of the past' *ABC News*, 5 August 2104, http://www.abc.net.au/news/2014-08-05/victoria-police-apologise-for-1994-tasty-nightclub-raid/5649498?pfmredir=sm.
[934] Borovoy, above n 932, 129.
[935] Ibid 130.
[936] Ibid.
[937] Bingham, above n 826, 60.
[938] Tamanaha, above n 829, chapter 9.

of government direction. None of the formulations that have been examined[939] or discussed makes any reference to the police other than in the course of ensuring that their powers are not misused or perverted. Aside from the well established area of the independence of the judiciary, it is the nature of the decision that is of importance to the rule of law, not the maker of the decision. Accordingly, empowering the government to direct police, particularly if that power is subject to parliamentary and public scrutiny seems no more inconsistent with the rule of law than a statutory empowerment of a Police Commissioner to have command and control of a police force.

7.3.5 – Rule of Law – Conclusions

The foregoing analysis demonstrates that the rule of law is not, in Australia, a sound basis upon which *Cowper* provisions are to be limited. This is because:

- The finding in *Campbell* regarding police independence was not based on the rule of law, despite the views of Roach;
- There is no indication that the Canadian approach of giving the rule of law a constitutional effect has been or will be accepted as a correct approach by the High Court;
- Cowper provisions are also not ambiguous, with the consequence that there is no basis to use the rule of law as method of interpretation to limit their operation; and
- The better view of the rule of law is that it does not require police independence from government direction.

[939] See table 7.1.

7.4 – Office of Constable

7.4.1 – Introduction

The final potential basis to limit the scope of Cowper provisions is the 'office of constable'.

In essence, the claimed limitation is founded in the powers and privileges of the office of constable which, the argument runs, is an ancient common law office, the powers and privileges of which are original, are not subject to direction and continue in modern police forces and are not to be limited by the statutory language of Cowper provisions.

What those ancient powers and privileges of the office of constable are, or were, is the issue discussed in 7.4.3 below. Chapter 7.4.2 deals with more mechanical issues: How are the common law powers and privileges of the office of constable applicable to offices created by statute?

7.4.2 – How does this concept apply?

There is much judicial[940] and academic work[941] which supports the continuation of the office of constable in modern police forces and for the powers and privileges of that office as the basis for the independence of police. The method by which a ministerial power of direction can be limited by such powers and privileges was referred to in the 1997 New South Wales Wood Royal Commission when it was said that:

> Section 8(5)[942] makes it plain that the power of ministerial direction must yield to contrary indications elsewhere in the Act and regulations. This unusual express qualification of a statutory power to give ministerial directions reflects the special history of the relationship between the Police Service and the Executive. Although statutes in NSW and elsewhere have recognised the Commissioner's subjection to ministerial direction since the nineteenth century, there is a long history of judicial emphasis on the independence of the police force from executive control, at least in relation to the laying of criminal and disciplinary charges.[943]

As to the location of the contrary indications that Wood was referring to, each of the judicial considerations of Australian Cowper provisions have been made in the context of statutory provisions which relate the powers of members of the police force to the common law constable powers and privileges. Those provisions were not always referred to or discussed in all judgments, but they were an essential part of the statutory framework that was being

[940] *Blackburn, Fisher, Enever, Perpetual Trustees, Griffiths, Campbell*.
[941] For example see Ascoli, above n 107, 8; Avery, above n 68, Part IV; Jefferson & Grimshaw, above n 71, 23; Joseph Carabetta, 'Employment Status of the Police in Australia' (2003) 27 *MULR* 1; Chakrabarti, above n 364; Cull, above n 58; Gillance & Khan above n 72, 55.
[942] *Police Act 1990* (NSW) – 'This section is subject to the other provisions of this Act and regulations'.
[943] *Wood Report,* above n 125, 237.

interpreted and were expressly relied on by at least some members of the court in each decision. Thus in *Enever*, O'Connor J referred to and relied on two types of provision[944] to support the continuation of the common law constable powers and privileges. First, a 'powers and privileges provision', being a provision that provides the common law powers and privileges of constables to members of the Police, such as the provision relevant to that decision, s 15 *Police Regulation Act 1898* (Tas). [945]

Second, he referred to the oath that all members of the Tasmanian Police Force were obliged to take which obliged them to 'well and truly serve Our Sovereign Lady the Queen in the office of constable'.[946]

Similarly, in the two later Australian cases regarding Cowper provisions, *Perpetual Trustees*[947] and *Griffith v Haynes*[948] which both concerned the NSW Police Service, reliance was placed on statutory provisions as a basis for the continuation of the common law powers and privileges of the office. The relevant powers and privileges provision, (s 6(2) of the *Police Regulation Act 1899* (NSW)), was referred to in their discussions of the relationship between government and police,[949] and the Privy Council also referred to the oath provision that members of the NSW force were obliged to take.[950]

In non-Cowper provision cases dealing with police independence, statutory provisions have been relied on as the basis for the continuation of the common law constable powers and privileges. This can be seen in the reliance by McCardie J in *Fisher v Oldham*[951] on a powers and privileges provision, s 191(2) *Municipal Corporations Act 1882* (UK) and the oath that constables took to 'act as a Constable.'[952] The *dicta* in *Blackburn*[953] which applied the common law constable power and privileges to a Police Commissioner can also be related to the statutory continuation of the common law constable powers and privileges. While there was no reference to such provisions by Lord Denning or Salmon LJ, Lord Denning at least, who spent more time discussing police independence, seemed to basing his view on statutory continuation of the common law constable powers and privileges.

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[944] (1906) 3 CLR 969, 991.
[945] That section reads:

> Every Member of the Police Force appointed under the authority of this Act shall have such powers and privileges and be liable to all such duties as any Constable duly appointed now has or hereafter may have either by the Common Law or by virtue of any Act of Parliament now or hereafter to be in force in Tasmania.

That section's predecessor, s 22 *Police Regulation Act 1865* (Tas), was similarly worded, but omitted reference to the common law.
[946] *Police Regulation Act 1898* (Tas) s 16 and Schedule (2).
[947] (1952) CLR 237 (HC); (1955) 92 CLR 113 (PC).
[948] [1984] 3 NSWLR 653.
[949] (1955) 92 CLR 113, 116; [1984] 3 NSWLR 653, 657.
[950] (1955) 92 CLR 113, 116-117.
[951] [1930] 2 KB 364.
[952] Ibid 367, 370.
[953] [1968] 2 QB 118.

First, he relied on both *Fisher* and the Privy Council decision in *Perpetual Trustees,* both judgments having relied on statutory provisions for the continuation of the common law powers and privileges of constables.[954] Secondly, Lord Denning's 'no hesitation in holding that, like every constable in the land, he should be, and is independent of the executive'[955] was based on his view, as pointed out earlier,[956] of the Commissioner of the Metropolitan Police having the same status as Chief Constables and having his relationship with the government subject to the *Police Act 1964* (UK). While this view was incorrect, Denning by having that misunderstanding, accepted that the Commissioner of the Metropolitan Police would, like Chief Constables, would be subject to a statutory regime that included both a powers and privileges provision and an oath provision that continued the common law constable powers and privileges.[957]

There are, however, two other judgments that seem to take a different view – indicating that no statutory provision is necessary. The first is Griffith CJ's judgment in *Enever*[958] where he seemed to have placed little or no emphasis on statutory language for the independence of the Tasmanian Police, relying on the office itself. In his view 'Now the powers of a constable, *qua* peace officer, whether conferred by common law or statute, are exercised by *him by virtue of his office*, and cannot be exercised on the responsibility of any person but himself.'[959]

Earlier in that judgment he said, in a passage later approved of by the Privy Council in *Perpetual Trustees*,[960] that:

> At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. *But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute*.[961]

Later he said that, in his opinion, the Tasmanian police legislation of 1865 and 1898:[962]

> were intended merely to deal with the appointment and disciplinary control of constables, leaving the nature of their powers and duties and the responsibility for their actions to be governed by the common law as modified by the Statutes (if any) dealing with the subject.[963]

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[954] Ibid 136.
[955] Ibid 135.
[956] Chapter 3.4.1.
[957] *Police Act 1964* (UK) ss18 and 19 .
[958] *Enever v R* (1906) 3 CLR 969.
[959] Ibid 977 (emphasis added).
[960] *Attorney-General (NSW) v Perpetual Trustee Company (Ltd)* (1955) 92 CLR 113, 118.
[961] (1906) 3 CLR 969, 975 (emphasis added).
[962] *Police Regulation Act 1898 (*Tas) and *Police Regulation Act 1865* (Tas).

In these passages, Griffith seems of the view that the common law powers and privileges of a constable would apply to all Tasmanian constables as a result of being appointed as member of the Tasmania Police without identifying any statutory basis. It is, however, puzzling that Griffith's discussion entirely omitted reference to relevant provisions in Tasmanian legislation, particularly the 'powers and privileges provision' referred to earlier, s 15 *Police Regulation Act 1898* (Tas).

From that provision it is clear that the common law powers and privileges of constables applied to every member of the Tasmanian Police Force as a result of the expressed operation of Tasmanian legislation. As a result, if Griffith was of the view that those powers and privileges would have applied as a result of appointment unless statutorily excluded or limited, those observation seems to be, if not *dicta*, at least unnecessary in reaching his conclusion.[964]

The second decision is the Canadian Supreme Court decision in *Campbell.*[965] Binnie J, who gave the decision on behalf of the court while relying on *Blackburn*,[966] *Enever*[967] and *Perpetual Trustees*,[968] included no reference in the judgment to any statutory basis for the maintenance of the common law powers and privileges of constables. Moreover, an examination of the *Royal Canadian Mounted Police Act 1985* (Can) indicates that there is no reference in that Act to members of the RCMP being constables, having the powers and privileges of constables or to take any oath or affirmation requiring them to serve in the office of constable. There is, however, s 11.1, which preserves the powers of peace officers:

> 11.1 (1) Every officer is a *peace officer* in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law until the officer ceases to be an officer [emphasis added].

There is no equivalent provision in Australian policing legislation and the expression 'peace officer' is largely unused in Australian legislation.[969] While it is beyond the purpose of this thesis to explore the intricacies of terminology used in legislation in other countries where there is no direct Australian relevance, it is apparent from the work of Stenning, especially

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[963] (1906) 3 CLR 969, 979.
[964] Barton J endorsed Griffith's views without any further discussion or consideration. His judgment, however, was primarily limited to the question before the court, whether the Crown is responsible for the acts of a constable, rather than the broader issue of any constitutional independence of the police from government direction. His analysis was concerned in with the question of whether the Tasmanian Police were in a master –servant relationship and his conclusion was primarily based on drawing analogies between police on the one hand and stevedores or sheep inspectors on the other rather than the broader issues that Griffith CJ was discussing. Ibid 980.
[965] [1999] 1 SCR 565.
[966] Ibid 591.
[967] Ibid 590.
[968] Ibid.
[969] other in the context of the *Peace Officer Act* 1925 (Cth).

his 1981 *Legal Status of the Police,*[970] that the term 'peace officer' has a long history in Canada and Canadian legislation and that:

> the status of 'peace officer', which is the basic status accorded to most RCMP members by the RCMP Act, has for centuries been recognized as the central component of the office of constable, and has its origins in the common-law status of 'conservator of the peace'.[971]

Stenning has also noted many instances of the connection between the two terms 'constable' and 'peace officer' in Canada, one of which was in the Canadian *Criminal Code* where 'peace officer' was defined to include 'constables'.[972] Another was expressed in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Police Association*[973] in which Henry J considered that: 'As a peace officer, he has the independent status and the positive duty described by Lord Denning in' *Blackburn*.[974]

The difficulty with s 11.1 is that it only applies only to 'officers' while the *Royal Canadian Mounted Police Act* draws a clear distinction between officers and members, [975] the latter being those below the rank of Inspector.[976] Under that Act, the Commissioner is an officer and therefore will be a peace officer; but it seems odd, if s 11.1 was intended to continue the common law powers and privileges of constables, that it did not provide those powers and privileges to the modern Canadian equivalent of constables, the ordinary members of the RCMP.

Moreover, Binnie did not refer to s 11.1, presumably because the issue that he was dealing with, and rejecting, was the Crown's claim to immunity for the actions taken by one Corporal Reynolds,[977] who was a member, but not an officer of the RCMP. Section 11.1 seems, therefore, not the basis for Binnie's reasoning which remains obscure.

Whatever the position is in Canada, a legislative basis can be located in Australian policing legislation as the basis for the application of common law powers and privileges to members of police forces. Provisions that would or could have that effect are:

1. Provisions which expressly apply the common law powers and privileges of constables to certain members of the particular force. Such provisions are referred to as *powers and privileges provisions*; and

[970] Stenning (1981) above n 60.
[971] Ibid 68.
[972] Stenning (1981) above n 60, 13.
[973] (1974) 5 OR (2d) 285.
[974] Stenning (1981), above n 60, 118.
[975] See *Royal Canadian Mounted Police Act* (Can) ss 2(1), 5, 6, 6.1 & 7.
[976] Ibid s6.1.
[977] [1999] 1 SCR 565, 573-574.

2. Provisions which oblige certain members of the force to take an oath before commencing duties which incorporates the powers and privileges of constables. Such provisions that are referred to as *oath provisions*.

There is also a third type of provision that could have this effect, being a provision which empowers the appointment of persons to 'act as constables'. This type of provision was used in the early NSW policing legislation[978] and may have had the effect of providing the relevant individuals with the common law powers and privileges attached to the position in which they were acting. However, 'constable' in those provisions could have been used as a reference to either a rank or the office; and it would only be in the latter case that 'constable' could it bring with it the common law constable powers and privileges, whatever they may be. In any case, this form of terminology has long ceased to be used in Australia, with the result that the remaining discussion will relate to the other two types of provisions: oaths and powers and privileges provisions.

The use of oaths and powers and privileges provisions to maintain the common law powers and privileges of constables can be seen in the 1829 English Act.[979] That Act included s 4 which served both of those purposes. It provided that:

> a sufficient Number of fit and able Men shall from Time to Time, … be appointed as a Police Force for the whole of such District, *who shall be sworn in by One of the said Justices to act as Constables* for preserving the Peace, and Preventing Robberies and other Felonies, and apprehending Offenders against the Peace; and the Men so sworn shall … *have all such Powers, Authorities, Privileges, and Advantages, and be liable to all such Duties and Responsibilities, as any Constable duly appointed now has or hereafter may have within his Constablewick by virtue of the Common Law of this Realm,* or of any Statutes [emphasis added].

That provision, however, seems to have qualified those powers and privileges as it concludes with an obligation for those sworn in constables to 'obey all such lawful Commands as they may from Time to Time receive from any of the said Justices for conducting themselves in the Execution of their Office'.

The legislation in the various Australian Colonies and then States and Territories and then federally also adopted either or both of these approaches, but with certain variables.

[978] 1833 and 1838.
[979] *Metropolitan Police Act 1829* (UK).

7.4.2.1 - Powers and privileges provisions -

The legislation in Australian jurisdictions initially included provisions that were based on, or at least related to, powers and privileges provision included in the 1829 English Act. This can be seen in **Table 7.2** below**.** The formulations adopted varied over time and one jurisdiction, Western Australia ceased to include such a provision in 2006.

Table 7.2 - Constable Common Law Privileges

Jurisdiction	**Year/Act/Sctn**	**Provision**	**Notes**
NSW	1833 – Sydney Police Act • Section 4.	a sufficient number of fit and able men as a police force for the said Town and port who shall be sworn … *to act as constables* for preserving the peace and preventing robberies and other felonies and apprehending offenders as well as for preventing nuisances and obstructions in the a said town and port and the men so sworn shall obey all such lawful commands as they may from time to time receive from the said Justices for conducting themselves in the execution of their office.	The MET model with the common law element removed.
	1838 – *Police Act* • Section 4.	a sufficient number of fit and able men as a police force for any of the said towns … who shall be sworn … *to act as constables* for preserving the peace and preventing robberies and other felonies in the towns aforesaid and apprehending offenders as well as for preventing nuisances and obstructions in the a said towns and the men so sworn shall obey all such lawful commands as they may from time to time receive from the said Justice for conducting themselves in the execution of their office.	The MET model with the common law element removed.
	1850 – *Colonial Police Act*	all such Chief Constables and Constables shall have *all such duties and responsibilities as any Constable duly appointed now has or hereafter*	New formulation with addition of common law duties

	• Section 5	*may have either by the Common Law* or by virtue of any Statute now or hereafter to be in force….	and responsibilities. Chief Constable was a rank, not the head of the force.
	1852 – *Police Regulation Act* • Section 4.	such Chief and other Constables shall *… have all such powers authorities privileges and advantages and be liable to all such duties and responsibilities as any Constable duly appointed now has or hereafter may have either by the Common Law* or by virtue of any Statute or Act now or hereafter to be in force …	Continuation of the 1850 model but replaced 'duties and responsibilities' with 'powers authorities privileges and advantages'.
	1862 – *Police Regulation Act* • Section 5.	such Constables shall … have *all such powers privileges and advantages and be liable to all such duties and responsibility as any Constable duly appointed now has or hereafter may have either by the Common Law* or by virtue of any Statute or Act of Council now or hereafter to be in force …	Continuation of the 1852 model with 'authorities' omitted.
	1899 – *Police Regulation Act* • Section 6(2)	Such constables shall … have *all such powers, privileges and advantages and be liable to all such duties and responsibility as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Statute or Act of Council now or hereafter to be in force…	Continuation of the 1862 model
	1990 – *Police Service Act* • Section 14(1).	In addition to any other functions, a police officer has *the functions conferred or imposed on a constable by or under any law (including the common law)* of the State.	Replaces 'powers, privileges and advantages' with 'functions'
Victoria	1853 – *Police Regulation Act* • Section 4.	such Constables shall … have *all such powers, authorities, privileges, and advantages, and be liable to all such duties and responsibilities as any Constable duly appointed, now has or hereafter may have either by the common law* or by virtue of any Statute or Act of Council now or hereafter to be in force …	Adopted the NSW 1852 model

	1865 – *Police Regulation Statute* • Section 6	such constables shall … have *all such powers, authorities, privileges, and advantages, and be liable to all such duties and responsibilities as any constable duly appointed, now has or hereafter may have either by the common law* or by virtue of any statute or Act of Parliament now or hereafter to be in force …	Continuation of the NSW 1852 model.
	1873 – *Police Regulation Act* • Section 9	Every constable shall have such powers and privileges and be liable to *all such duties as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Act of Parliament now or hereafter to be in force	Continuation of NSW 1852 model with 'authorities' but with 'advantages' omitted.
	1890 - *Police Regulation Act* • Section 9	Every constable shall have such powers and privileges and be liable to *all such duties as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Act of Parliament now or hereafter to be in force	Continuation of the 1873 model.
	1915 – *Police Regulation Act* • Section 10	Every constable shall have such powers and privileges and be liable to *all such duties as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Act of Parliament now or hereafter to be in force in Victoria, and any member of the police force of higher rank than a constable shall have all the powers ad privileges of a constable whether conferred by this Act or otherwise.	Continuation of the 1873 – but with the extension to higher ranks.
	1928 - *Police Regulation Act* • Section 10	Every constable shall have such powers and privileges and be liable to *all such duties as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Act	Continuation of the 1915 model.

		of Parliament now or hereafter to be in force in Victoria, and any member of the police force of higher rank than a constable shall have all the powers ad privileges of a constable whether conferred by this Act or otherwise.	
	1958 – *Police Regulation Act* • Section 11	Every constable shall have such powers and privileges and be liable *to all such duties as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of any Act of Parliament now or hereafter to be in force in Victoria, and any member of the police force of higher rank than a constable shall have all the powers ad privileges of a constable whether conferred by this Act or otherwise.	Continuation of the 1915 model.
	2013 – *Victoria Police Act* • Section 51(a)	A police officer who has taken and subscribed the oath or made and subscribed the affirmation under section 50 has – (a) *the duties and powers of a constable at common law*;	New model removing the word 'privileges'.
Qld	1863 - *Land Police Act* • Section 6.	all Sergeants and Constables of whatever grade shall so long as they continue members of the said force have *all such powers privileges and advantages and be liable to all such duties and responsibility as any Constable duly appointed now has or hereafter may have either by the Common Law* or by virtue of any Statute or Act of Council now or hereafter to be in force…	Continuation of the NSW model extended to include Sergeants.
	1937 – *Police Act* • Section 10.	all Sergeants and Constables of whatever grade shall so long as they continue members of the said force have *all such powers privileges and advantages and be liable to all such duties and responsibility as any Constable duly appointed now has or*	Continuation of the 1863 model

		hereafter may have either by the Common Law or by virtue of any Statute or Act of Council now or hereafter to be in force…	
	1990 – *Police Service Administration Act* • Section 3.2.	(2) A noncommissioned officer or a constable has and may exercise the *powers,* and has and is to perform the *duties of a constable at common law* or under any Act or law. (3) An officer other than one referred to in subsection (2) had and may exercise *the powers of a constable at common law* or under any other At or law.	New formulation which removes the ' privileges' and 'advantages' and distinguishes between constables and sergeants who have common law powers and duties while officers have only common law powers.
Tasmania	1838 – 2 Vic, No 22. • Section 58	Such constables so sworn shall within this Island and its Dependencies have *all the powers authorities privileges and advantages as any constable duly appointed now has or hereafter may have by virtue of any law now in force* or hereafter to be in force in this Island and shall obey all such lawful commands as they shall receive for the apprehending offenders or otherwise conducting themselves in the execution of their office..	Adopting of the MET model with the omission of constabulary 'duties and responsibilities'.
	1857 – *Municipal Police Act* • Section 8	The Superintendent, Sub-Inspectors, Sergeants, and other Constables so appointed shall be sworn as Constables …and all Constables so appointed and sworn shall throughout the *Colony have all such powers and privileges and be liable to all such duties and responsibilities, as any Constable now has or hereafter may have in this Colony,* and shall obey all such lawful commands as the may from time tit time receive from the Mayor or any Justice of the Peace.	Continuation of the MET formulation extended to all ranks.
	1865 – *Police Regulation Act*	The Superintendent, Sub-Inspectors, Sergeants, and other Constables so appointed shall be sworn as Constables …and all Constables so appointed and	Continuation of the 1857 model

	• Section 22	sworn shall throughout the Colony have *all such powers and privileges and be liable to all such duties and responsibilities, as any Constable now has or hereafter may have in this Colony,* and shall obey all such lawful commands as the may from time tit time receive from the Mayor or any Justice of the Peace.	
	1898 – *Police Regulation Act* • Section 15.	Every Member of the Force appointed under the authority of this Act shall have *such powers and privileges and be liable to all such duties as any Constable duly appointed now has or hereafter may have either by the Common Law* or by virtue of any Act of Parliament now or hereafter to be in force in *Tasmania*.	New formulation similar to the 1873 NSW model.
	2003 – *Police Service Act* • Section 83.	A police office has *the powers, privileges and duties of a constable at common law* or under any other Act or law.	New formulation. 'Police officer' defined to include Police Commissioner (ss3 & 4(2)).
South Aust	1841 -5 Vic, No 3. • Section 5	and the men so sworn shall have all *such powers authorities privileges, and advantages as any constable duly appointed now has or hereafter may have by virtue of any law* or statute now made or hereafter to be made and shall obey all such lawful commands as they shall from time to time receive from the said Commissioner or other officer respectively for conducting themselves in the execution of their offices	This formulation adopts the 1829 MET formulation with the omission of 'duties and responsibilities'.
	1844 – 7 & 8 Vic, No 19. • Section 5	No 'powers and privileges' provision. However, persons were to be sworn to '*act as Constables* for preserving the peace, and preventing robberies and other felonies and apprehending offenders, as well as for preventing	Adopts the NSW 1833 formulation.

		nuisances and obstructions; in and the men so sworn shall obey all such lawful commands as they may from time to time receive from the said Justices for conducting themselves in the execution of their office'.	
	1863 – *Police Act* • Section 5	Such chief constables, sergeants, or other constables *shall have all such powers and privileges and be liable to all such duties and responsibilities as any constable duly appointed now has, or hereafter may have.*	Reinsertion of a powers and privileges provision apparently using the Tasmanian 1857 formulation, but with no express subordinate obligation.
	1869 – *Police Act* • Section 6	such sergeants and constables shall *have all such powers and privileges and be liable to all such duties and responsibilities as any constable duly appointed now or hereafter may have, or be liable to, either by the common law*, or by virtue of any statute law now or hereafter to be in force in the said Province.	Continuation of the 1863 formulation.
	1916 – *Police Act* • Section 7(2)	Such sergeants and constables shall *have the same powers and privileges and be liable to all such duties and responsibilities as any constable duly appointed may have, or be liable to, either at common law,* or by virtue of any statute law in force in the State.	Continuation of the 1863 formulation
	1936 – *Police Act* • Section 8(2)	Such sergeants and constables shall have *the same powers and privileges and be liable to all such duties and responsibilities as any constable duly appointed may have, or be liable to, either at common law*, or by virtue of any statute law in force in the State.	Continuation of the 1863 formulation
	1953 – *Police Offences Act,* subsequently renamed the *Summary*	A police officer has, in addition to the powers, privileges, duties and responsibilities conferred or imposed by this or any other Act*, all such powers, privileges, duties and responsibilities as*	

	Offences Act. • Section 82	*a constable has by the common law.*	
WA	1849 –*Police Ordinance* • ss 2 & 3	No 'powers and privileges' provision. However, members of the force were *appointed as 'constables' and the oath referred to the 'office of constable'* –	
	1861 – *Police Ordinance*	No 'powers and privileges' provision. However, members of the force were *appointed as 'constables' and the oath referred to the 'office of constable'* – s 4	Continuation of 1849 formulation
	1892 – *Police Act*	such non-Commissioner officers and constables shall have *all such powers and privileges, and be liable to all such duties and obligations as any constable duly appointed now or hereafter may have, or be liable to, either at common law,* or by virtue of any statute law or hereafter in force in the said Colony. – s7 However, the 'powers and privileges' wording was repealed in 2006	Adoption of the 1869 SA formulation with 'obligations' relacing 'responsibilities'
N Territory	1923 – *Police and Police Offences Ordinance*	No express powers and privileges provision However section 9B provides that a member of the force 'shall perform such duties and obligations and have such powers and privileges as, by any law in force in the Territory, are conferred or imposed upon a person holding the rank which that member holds'.	Section 9B may incorporate common law constable powers and privileges although there is nothing in the Ordinance to require members of the force to hold the office of constable or to relate the membership of the force to that office. Section 9B added in 1953.
	1979 – *Police Administration Act*	No express powers and privileges provision However section 25 provides that a	Continuation of the 1953 formulation

		member of the force 'shall *perform the duties and obligations and have such powers and privileges as are, by any law in force in the Territory, conferred or imposed on him'.*	
Cth **- Cth Police (Version 1)**	1917 - *Commonwealth Police Force Order* • Cl 6	Every member of the Police Force shall, in relation to the laws of the Commonwealth, have *all such powers, privileges and advantages and be liable to all such duties and responsibilities as any constable duly appointed now has or hereafter may have either by the common law* or by virtue of an Act or State Act.	Adoption of the NSW 1862 formulation
- Peace Officers	1925 – *Peace Officers Act* • section 2(2)	Shall have *all such powers privileges and immunities and be liable to all such duties and responsibilities as are conferred or imposed upon them or upon any constable or other officer of police by or under any law of the Commonwealth or as are possessed by any constable or other officer of police under the common law* or by virtue of any law in force in that part of the Commonwealth in which they exercise their powers. –	New formulation adds new term – 'Immunities' and linked the 'powers and privileges, at least in part to the 'law in force in that part of the Commonwealth in which they exercise their powers'.
- ACT Police	1927 – *Police Ordinance*	No 'powers and privileges' provision	
- Cth Police (Version 2)	1957 – *Commonwealth Police Act* • s 6(1)(b)	In addition to any other powers and duties, a Commonwealth Police Officer has – (b) in relation to- (i) the laws of the Commonwealth; (ii) matters in connexion with property of the Commonwealth or of an authority of the Commonwealth; and (iii) matters arising on or in connexion with land or premises owned or occupied by the Commonwealth or an authority of the Commonwealth, *the like powers and duties as are conferred or imposed on a constable,*	Continues the relationship between the powers and duties with the jurisdiction in which they are acting. Privileges, immunities and responsibilities no longer used.

		or on an officer of police of the same rank as the Commonwealth Police Officer, in the place in which the Commonwealth Police Officer is acting.	
AFP	1979 – *Australian Federal Police Act* • S 9 (1)	In addition to any other powers and duties, a member has– (c) in relation to the following: (i) the laws of the Commonwealth; (ii) matters in connection with property of the Commonwealth or of an authority of the Commonwealth; (iii) matters arising on or in connection with land or premises owned or occupied by the Commonwealth or an authority of the Commonwealth; (iv) the safeguarding of Commonwealth interests; (iva) the investigation of State offences that have a federal aspect; *the powers and duties that are conferred or imposed, in the place in which the member is acting*, on: (v) a constable or an officer of police; or (vi) a constable, or an officer of police, of a particular rank, if a declaration under subsection (2B) is in force that the member is of that rank for the purposes of this subparagraph.	Similar provision to s6(1)(b) *Commonwealth Police Act*.

The variations in the models used in the different jurisdictions have related to the types of privileges provided and the ranks of the officers who were subject to the provisions. Those variations are next examined.

Types - The 1829 provision used a complex phrase which included six concepts: the 'Powers, Authorities, Privileges, and Advantages, and be liable to all such Duties and Responsibilities' of constables. The various Australian jurisdictions used, at different times, those six concepts, although not always at the same time. Some have also, at various times included different concepts, such as the word 'obligations' which was used in relation to the Western Australian Police Force between 1892 and 2006 and the Northern Territory Police

since 1953. Another word that was not included in the 1829 formulation, was 'immunities', which was used, but only for Commonwealth Peace Officers.

What distinctions are to be drawn from the use of these different terms is an issue for debate. It is, however, clear that the terminology used in some Australian legislation relating to police forces seems considerable narrower than that used in the 1829 Act. Thus, we have moved from 'Powers, Authorities, Privileges, and Advantages, and be liable to all such Duties and Responsibilities' in 1829 to the current position where:

- there is no such provision in Western Australia;
- in NSW, the provision refers only to the 'functions' conferred or imposed on a constable;[980]
- in Victoria and the AFP, the concepts referred to are limited to the 'duties and powers' of a constable.[981]

It is only with South Australia, Tasmania and Northern Territory, that the terminology currently has anything like the breadth of the original 1829 MET model:

- South Australian police members have common law constable 'powers, privileges, duties and responsibilities'[982]
- Tasmanian police have the powers, privileges and duties of a constable at common law;[983] and
- The Northern Territory Police can have the 'duties and obligations' and 'powers and privileges'.[984]

The Northern Territory provision, however, is narrower than the provisions in the other jurisdictions as it does not empower police members. Instead it merely recites that police members will have particular functions if they are 'by any law in force in the Territory, conferred or imposed on him'.[985] It is therefore, necessary to identify such conferring a law before the members are empowered – and none has been identified in this study.

Ranks - The other distinction between the 1829 model and the various Australian provisions is the level of police who are provided with the common law 'powers and privileges' of the constables. While the 1829 model was limited to constables, the various Australian

[980] *Police Service Act 1990* (NSW), s 14(1).
[981] *Victoria Police Act 2013* (Vic) s 50; *Australian Federal Police Act 1979* (Cth) s 9.
[982] *Summary Offences Act 1953* (SA) s 82.
[983] *Police Regulation Act 2003* (Tas) s 83.
[984] *Police Administration Act* (NT) s 25.
[985] Ibid.

jurisdictions that have kept a 'powers and privilege' provision, have progressively expanded their application. The result is that in six of the seven forces where such provisions have been retained, their application now extends to the relevant Police Commissioner.[986]

Queensland has the odd distinction between non-commissioned officers and constables on the one hand, who have the 'powers … and duties of a constable at common law'[987] and other 'officers' (a term that appears to include the Police Commissioner)[988] who only have the common law powers of a constable.[989] The position is made more complex by another provision which provides that the legislation does not 'derogate from the powers, obligations and liabilities of a constable at common law'.[990]

There are many issues of debate arising from the different statutory forms of the 'powers and privileges' provisions applicable to the various Australian jurisdictions, but most are beyond the scope of this study. What is relevant to this aspect of this study is the effect of such provisions in jurisdictions where there is, currently, a Cowper provision; that is New South Wales, South Australia, Tasmania and the Northern Territory.

In South Australia and Tasmania the language of the powers and privileges provisions is closely related to the language used in the 1829 Act keeping either four or three of the terms used in the 1829 Act and, it is suggested, the most relevant terms in relation to any independence of a constable – 'powers' and 'privileges'. In New South Wales, the term used is seemingly more narrow: 'functions' conferred or imposed on constables under the common law.[991] However, the word 'functions' is defined by s 3(2) of the *Police Act* with a broader meaning so that, in that Act, 'a reference to a function includes a reference to a power, authority and duty'.[992] It therefore seems that members of the New South Wales Police Service would, like their Tasmanian and South Australian counterparts, have, subject to any variation made by any other statutory provision, similar common law constable 'powers and privileges' to those provided by the 1829 Act.

[986] That is, in New South Wales (*Police Act 1990* (NSW) ss 3, 5 & 11(4)), South Australia (*Summary Offences Act 1953* (SA) s 82 applies to 'police officers', a term not defined in that Act or in the *Police Act 1988* (SA). However, from the definition of 'senior police officer' in *Summary Offences Act 1953* (SA) s 3 it appears that that concept includes the Commissioner and is a subset of the 'police officer' class), Victoria (*Victoria Police Act 2013* (Vic), s 3), and Tasmania (*Police Service Act 2003* (Tas) ss 3 & 4(2)), the current powers and privileges provisions apply to 'a police officer', a term defined in jurisdiction to include the Police Commissioner. Similarly, the term 'a member of the force' in the Northern Territory (*Police Administration* Act (NT) ss 4 & 6) and 'member of the Australian Federal Police' (*Australian Federal Police Act* (Cth) s4) is similarly defined.
[987] *Police Service Administration Act 1990* (Qld) s 3.2(2).
[988] Ibid ss 1.4 & 2.2.
[989] Ibid s 3.2(3).
[990] Ibid s 3.2(4).
[991] *Police Act 1990* (NSW) s 14(1).
[992] Ibid s 3(2)(a).

The other Cowper provision jurisdiction is the Northern Territory and, as noted earlier in this section, the 'powers and privileges provision' in that Territory requires another law to confer powers and privileges on a police member before such powers and privileges will be available. As no such provision has been identified, the Northern Territory police officers seem not provided with the common law powers and privileges of a constable.

7.4.2.2 - Oath Provisions

The other potential statutory source of the common law powers and privileges of a constable is the oath or affirmation that the police members are required to take. Under the 1829 Act no format was prescribed, but s 4 required that the 'fit and able Men … appointed as a Police Force … be sworn in … to act as Constables', and it seems at least arguable that the obligation to be sworn in to 'act as Constables' incorporated the common law powers and privileges of that office. The current form of oath applicable to English and Welsh police members is that they to swear to be 'serve the Queen in the office of constable'.

> I.....of.....do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.[993]

The approach to oaths in New South Wales,[994] South Australia,[995] Tasmania[996] and Western Australia[997] initially followed the 1829 model obliging sworn officers to 'act as constables'. Those oath requirements were limited initially limited in each of the three jurisdictions to being taken by those with the rank of constable, although from 1861 in Western Australia the oath required of all constables sergeants, sub-inspectors and inspectors required that they 'well and truly serve our Lady the Queen in the Office of Constable'.[998]

From 1850 in New South Wales, the practice changed and a new form of oath was adopted, which became uniform across the various colonies by 1892. This form concentrated on the functions to be performed and ceased to follow the English practice of referring to a common law office. It required police members to:

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[993] *Police Act 1996* (UK), s 29 and schedule 4.
[994] *Sydney Police Act 1833* (NSW) s 4; *Police Act 1838* (NSW) s 4.
[995] *An Act for regulating the Police Force of the Province of South Australia (*1841) (SA) s 5.
[996] *An Act to regulate the Police in certain Town and Ports within the Island of Van Diemen's Land and to make more effectual provision for the preservation of the peace and good order throughout the said Island and its Dependencies generally* (*2 Vic No 22)* (1838) (Tas) s 58.
[997] *An Ordinance for regulating the Police in Western Australia 1849* (WA) s 3.
[998] *Police Ordinance 1861* (WA) s 4.

> see and cause Her Majesty's peace to be kept and preserved and … [to] prevent to the best of my power all offences against the same and …to the best of my skill and knowledge discharge all the duties thereof in the execution of warrants and otherwise faithfully according to law ….[999]

The first versions of this form of oath in NSW in 1850 and 1852 also required the police officer to not be a Freemason, although this element was omitted from later versions of the oath.

The NSW form of oath (without the Freemason exclusion) has been the form used in Victoria since 1853,[1000] in Tasmania since 1857,[1001] in South Australia and Queensland since 1863,[1002] in Western Australia since 1892[1003] and in the Northern Territory since, at least, 1953.[1004] Similarly, the very long AFP oath makes no reference to the common law office of constable, but includes a passage relating to maintaining the peace, but only when acting in the Australian Capital Territory.[1005]

There was, however one significant variation in relation to Tasmania until 2003. The Tasmanian version between 1857 and 2003, while using the NSW 1850 format, also required the police officers taking it to swear to serve 'in the office of constable'. That oath was to be taken, in 1857 by all ranks from constable to superintendent, and from 1898, by all ranks including the Commissioner.[1006] Accordingly all ranks were swearing to hold the 'office of constable' and thereby indicating that they would have the powers and privileges of that office, whatever they may be.

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[999] *Colonial Police Act 1850* (NSW) s 10.

[1000] *Police Regulation Act 1873* (Vic) s 11 and First Schedule; *Police Regulation Act 1890* (Vic) s 11 and Second Schedule; *Police Regulation Act 1915* (Vic) s 12 and Second Schedule; *Police Regulation Act 1928* (Vic) s 12 and Second Schedule; *Police Regulation Act 1958* (Vic) s 13 and Form A Second Schedule; *Victoria Police Act 2013* (Vic) s 50(2) and Form 1 Second Schedule.

[1001] *Municipal Police Act 1857* (Tas) s 8 and Schedule; *Police Regulation Act 1865* (Tas) s 22 and Schedule; *Police Regulation Act 1898* (Tas) s 16 and Schedule; *Police Service Act 2003* (Tas) s 36 and Schedule 1.

[1002] *Police Act 1863* (SA) s 22; *Police Act 1869* (SA) s 9; *Police Act 1916* (SA) s 10 & Second Schedule; *Police Act 1936* (SA) s 11; *Police Regulation Act 1952* (SA) s 16; *Police Act 1998* (SA) s 25 & *Police Regulations 2014* (SA) Schedule 3.

[1003] *Police Act 1892* (WA) s 10.

[1004] *Police and Police Offences Ordinance 1923* (NT), first schedule which was substituted in 1953 by *Police and Police Offences Ordinance 1953* (NT) s 20.

[1005] *Australian Federal Police Act 1979* (Cth) s36 & *Australian Federal Police Regulations 1979* (Cth) Schedule 1

> I, , [*swear/*promise]:
> That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law.
> That I will faithfully and diligently exercise and perform all my powers and duties as [*the Commissioner/*a Deputy Commissioner/*a person declared to be a member under section 40B of the Act/*a special member] of the Australian Federal Police without fear or favour, affection or ill will, from this date until I cease to be [*the Commissioner/*a Deputy Commissioner/*a person declared to be a member under section 40B of the Act/*a special member] of the Australian Federal Police.
> That, whenever performing duty in the Australian Capital Territory, I will cause Her Majesty's peace to be kept and preserved, and prevent, to the best of my power, offences against that peace.
> And that, while I continue to be [*the Commissioner/*a Deputy Commissioner/*a person declared to be a member under section 40B of the Act/*a special member] of the Australian Federal Police, I will, to the best of my skill and knowledge, faithfully discharge all my duties according to law.
> So help me [*God/*a god recognised by his or her religion]!
> * Delete if not applicable

[1006] The oath under the 1898 Act applied to 'every Member of the Force'.

This was different from the approach taken in other forces. In the other State and Territory forces, where the oath specified the office held, it was done in a manner that indicated that the reference to the office was to the rank held, rather than, as was the case in Tasmania, the common law office of constable. Thus in NSW in 1850, the oath referred to serving the Queen 'in the office of Inspector General of Police Provincial Inspector of Police Chief Constable or Constable (as the case may be)'.[1007] Similarly, the format in Victoria from 1873 referred to serving 'as a member of the Police Force of Victoria in such capacity as I may be herein appointed, promoted, or reduced to'.[1008]

From 2003 Tasmania altered its oath requirement so it now refers to 'the office of police officer'. As a result, in each State and Territory force the oath or affirmation requires those who take it to serve either as a member of the particular force, or in a particular rank, and that service does not require that member or holder of the rank to hold the common law office of constable.[1009]

The remaining question is whether the wording used is, nonetheless, sufficient to incorporate the common law constable powers and privileges.

Stenning observed, in his review of the origins of the office of constable, that the preservation or conservation of the peace was 'the central component'[1010] of that office. Thus, it might be argued that the task that police officers swear to undertake - to 'see and cause Her Majesty's peace to be kept and preserved' - is to swear to undertake the functions and responsibilities of a common law constable, and thereby to 'act as a constable'. There is, however, a distinction between functions and a particular office with particular powers and privileges that has conducted those functions.

[1007] *Colonial Police Act 1850* (NSW) s 10.

[1008] *Police Regulation Act 1873* (Vic) First Schedule; *Police Regulation Act 1890* (Vic) Second Schedule; *Police Regulation Act 1915* (Vic) Second Schedule; *Police Regulation Act 1928* (Vic) Second Schedule; *Police Regulation Act 1958* (Vic) Second Schedule, Form A.

[1009] Currently the oaths/ affirmations in the various forces speak of serving in:

- NSW – 'as a police officer'. *Police Regulations 2015* (NSW) reg 7.
- Victoria – 'as a member of the Police Force of Victoria'. *Victoria Police Act 2013* (Vic) s 50(2) & Form 1 Second Schedule.
- South Australia – 'as a member of the South Australian Police'. *Police Regulations 2014* (SA) Schedule 3.
- Western Australia – 'in the office of [Commissioner of Police, inspector, sub-Inspector, or other officer, or constable (as the case may be)]. *Police Act 1892* (WA) s 10.
- Queensland – 'in the office of constable or in such other capacity as I may be hereafter appointed, promoted, or may be reduced'. *Police Service Administration Act 1990 (Qld)* s3.3 & *Police Service Administration Regulation 1990 (Qld)* reg 2.2.
- the Northern Territory – 'as a member of the Northern Territory Police Force'. *Police Administration Act* (NT) ss 26 & 32 & Schedule 1.
- Tasmania - in 'the office of police officer in Tasmania'. *Police Service Act 2003* (Tas) s 36 & Schedule 1.
- the AFP - duties as '[the Commissioner/a Deputy Commissioner/a person declared to be a member under section 40B of the Act/a special member] of the Australian Federal Police'. *Australian Federal Police Act 1979 (Cth)* s 36 & *Australian Federal Police Regulations 1979 (Cth)* Reg 9 Schedule 1.

[1010] Stenning (1981), above n 60, 13.

This can be seen from the observations of Lord Blackburn in *Coomber v Justices of Berks,*[1011] whose words were endorsed and adopted by McCardie J in *Fisher.*[1012] Lord Blackburn considered that the preservation of order and prevention of crime is 'of common right' a function of the Crown:

> I do not think it can be disputed that the administration of justice, both criminal and civil, and preservation of order and prevention of crime by means of what is now call the police, are among the most important functions of Government, nor that by the constitution of this country these functions do, of common right, belong to the Crown.[1013]

So if holding the functions of preserving the peace renders the holder of those functions as 'acting as a Constable', then on the basis of what Lord Blackburn said and McCardie J endorsed, it seems that the Crown must be a constable.

The better view, however, is that functions are different from the office that exercises or has exercised them and that, unless it can be argued that functions can only be exercised in one particular manner, there is no justification for concluding that the provision of functions to an office holder necessitates that any powers and privileges of a former holder of those functions at common law were also provided. Accordingly, it is not considered that the oath and affirmation formulations currently in place in any of the Australian jurisdictions cause the police who take those oaths to undertake the common law 'office of constable'. As such, the oath and affirmation provisions in any of the current Australian police forces cannot be used as a basis to conclude that the members of those forces have the common law powers and privileges of a constable (whatever they may be).

7.4.2.3 - Conclusion

So to return to the question specified earlier in relation to the four Australian Cowper provision police forces:[1014]

- the Northern Territory police have not been provided with the common law constable powers and privileges as Northern Territory policing legislation contains no effective powers and privileges provision. The legislative requirement is that there be another law which confers or imposes powers, duties, obligations and privileges, and no law has been identified that provides the common law constable powers and privileges to the members of the Northern Territory police.

[1011] (1883) 9 App Cas 61.
[1012] [1930] 2 KB 364, 369.
[1013] (1883) 9 App Cas 61, 67.
[1014] How are the common law powers and privileges of the office of constable applicable to offices created by statute?

- However, in relation to the South Australian, Tasmanian and New South Wales Police Services, it is considered that their members do have the common law constable powers and privileges as a result of the 'powers and privileges' provisions in those States, which seem to cover the powers and privileges of a constable and extend in each force to the Police Commissioner.

Whether those common law powers and privileges of constables render constables immune from direction is now the question that will be examined.

7.4.3 – Office of Constable – what are the powers and privileges of that office?

To understand the historic basis of the office of constable, this study has relied on previous examinations of the history of police and constables in England, particularly those undertaken by Critchley,[1015] Simpson[1016] and Lee.[1017] Reliance has also been given to studies that have examined particular elements of policing history, such as Beattie's study of Bow Street Runners [1018] and studies that have examined and commented on the earlier historical studies, particularly the work of Reith,[1019] Ascoli,[1020] Emsley[1021] and Stenning's 1981 examination of the legal status of police.[1022]

From these various studies two factors regarding the history of the office of constable are clear. First, there is much uncertainty regarding the origins and nature of the office and secondly, there is very little to support the idea that when the powers and privileges of constables were provided to the constables in the Metropolitan Police Force in 1829, that those powers and privileges included or were intended to include independence from direction.

7.4.3.1 – The Norman-Saxon Constable

The uncertainty regarding the office includes the origins and meaning of the word 'constable'. There are two supposed derivations of the word and no one is clear as to whether either is accurate. The first meaning is said to be a Norman introduction after 1066 based on the Anglo-Saxon words '"Conning," a king, and "Stapel," a stay or prop, and to

[1015] Critchley, above n 102.
[1016] H Simpson, 'The Office of Constable' (1895) 10 *English Historical Review*, 625.
[1017] Lee, above n 105.
[1018] Beattie, above n 110.
[1019] Reith (1956) above n 104.
[1020] David Ascoli, above n 107.
[1021] Emsley (2009), above n 108; Emsley (1996), above n 108.
[1022] Stenning (1981), above n 60.

signify "king's right hand man"'.[1023] This is the origin that Lambarde presented in the earliest English language known study of the office of constable in 1582.[1024] However, Blackstone writing some 180 years later preferred a different a derivation. He considered that 'constable' is 'plainly derived from the Latin words 'comes stabuli' an office 'well known in the empire … to regulate all matters of chivalry, tilts, tournaments, and feats of arms'.[1025] Lee favoured the Blackstone derivation as he considered the Lambade derivation as 'unlikely' as the Normans 'despised the Anglo-Saxon language, and would not use a word which was partly derived from that tongue'.[1026] Simpson despite being critical of some other aspects of Blackstone's analysis, also accepted the Latin derivation of the term considering it representing 'originally a high official in the Frankish court'.[1027]

Uncertainty also relates to the nature of the office of constable. Simpson observed that the office existed in other European counties representing 'military officers of a lower rank'[1028] and noted 'Instances …in English from the thirteenth to the fifteenth century of the use of the word to denote any chief officer of an army or of a household, or even a merely a subordinate officer'.[1029]

The office of constable is also referred to in the *Magna Carta* (1215), (which most police histories omit to mention) and in some early statutes identified by Simpson[1030] as indicating a judicial or quasi-judicial officer rather than as a keeper of the peace. 'Constable' is included in ss 24, 28, 29 and 45 of the *Magna Carta*, the contemporary translations of which are:

> 24 - No sherriff, constable, coroners or other of our bailiffs will hold pleas of our crown.
>
> 28 - No constable or any other of our bailiffs will take any man's corn or other chattels unless he pays cash for them at once or can delay payment with the agreement of the seller.
>
> 29 - No constable is to compel any knight to give money for castle guard, if he is willing to perform that guard in his own person or by another reliable man ….
>
> 45 - We shall not make justices, constables sheriffs or bailiffs who do not know the law of the realm and wish to observe it well. [1031]

The office of constable was also referred to in 1242,[1032] in what has been referred to as either a writ or ordinance,[1033] for the first time in a manner more similar to the contemporary

[1023] Lee, above n 105, 55.
[1024] Lambarde, above n 113, 5. Lambarde's spelling was somewhat different from that of Lee – 'Cuning (or Cyng)'.
[1025] William Blackstone, *Commentaries on the Law of England* (1765-69) Book 1, chapter 9.
[1026] Lee, above n 105, 55.
[1027] Simpson, above n 1016, 626.
[1028] Ibid.
[1029] Ibid 627.
[1030] Ibid 632. The statutes are: *Statute De Districtione Scaccarii* (51 Hen III, stat 5) (1266) (UK) s9 and 2 Edw III, cap 3 (1328) (UK).
[1031] Nicholas Vincent, *Magna Carta, A Very Short Introduction* (Oxford, 2012) Appendix.

usage of the term. Lee considered that the 1242 writ was the 'first mention of petty constables'[1034] which he described as 'assistants to High Constables'.[1035] The Stephenson and Marcham translation includes the following passage, which relates to two types of constable: the chief or high constable, and a constable of another and seemingly a lesser status, presumably the petty constable.

> In each of the other vills, moreover, there shall be established one or two constables, according to the number of the inhabitants and the decision of the aforesaid [officials]. Besides, in each hundred there shall be established a chief constable, at whose command all men sworn to arms in his hundred shall be assembled; and to him they shall be obedient in carrying out necessary measures for the conservation of our peace. The chief constables of the various hundreds, moreover, shall be obedient to the sheriff and the two knights aforesaid, in coming at their command and in carrying out necessary measures for the conservation of our peace.[1036]

According to Simpson the writ:

> provided that in each township … one constable or two, according to its population, should be appointed …, and in each hundred one chief constable …, who were to have special care for the view of arms and for the preservation of the peace. They were given for this purpose equal authority with the mayors or the bailiffs … of boroughs, and were specially responsible for the proper carrying out of the hue and cry.[1037]

In Simpson's view the writ did not create the office of constable in this form, but 'enforced and elaborated earlier provisions of the law'.[1038] He regarded the 'constable' as named in the 1242 writ as the same person and the same office as the Saxon offices of borsholder, head-borough or tithing man.[1039] They were freedman elected by 'tythings'[1040] or 'boroes'[1041] and were responsible for a community obligation to maintain the King's Peace under the system that became known under (and possibly before)[1042] the Normans as 'frankpledge'.[1043] And according to Blackstone, the tything man was 'supposed the discreetest man in the borough, town or tithing'.[1044]

[1032] Most authors state the date as 1252, based on Simpson who relied on 7th edition of Stubbs Charters, and other authors relied on Simpson. Simpson, above n 1016, 630 refers to page 371 of the 7th edition. Lee, above n 105, 55; Stenning (1981), above n 60, 20; Ascoli, above n 107,16, although for no apparent reason Ascoli dates the writ to 1251 not 1252. Stubbs, in later editions altered the date to 1242 as is seen in William Stubbs, *Select Charters And Other Illustrations Of English Constitutional History From The Earliest Times To The Reign Of Edward The First* (Oxford, 9th edition, 1913) 364.
[1033] C Stephenson & F G Marcham, *Sources of English Constitutional History* (Harper 1937) 139 who dates the ordinance to 1242. Milte, above n 8, 14.
[1034] Lee, above n 105, 55.
[1035] Ibid 56.
[1036] Stephenson & Marcham, above n 1031, 139.
[1037] Simpson, above n 1016, 630. The writ was written in Latin.
[1038] Ibid.
[1039] Ibid 631.
[1040] A 'thythig consisted of the inhabitants of ten homesteads' Lee, above n 105, 4; Blackstone ,above n 1023, Introduction, Sec 4.
[1041] Stenning (1981), above n 60, 15.
[1042] Ibid.
[1043] Critchley, above n 102, 2-4; Lee above n 105, 4.
[1044] Blackstone, above n 1023, Introduction, Sec 4.

The tything man had, according to Stenning 'special authority over and above his general obligations as a member of the tythings' with the result that their 'successor, the constable was a "conservator of the peace by common law"'.[1045] It also appears that the office evolved so that while more authority and responsibility were added over time, 'powers were gradually transformed into duties',[1046] so failure to perform those tasks rendered the tything man liable to pecuniary penalty or imprisonment.[1047] Stenning makes the point that tything men had 'considerable status and prestige' as the elected representatives of their community.[1048]

One change that the Norman's introduced related to the appointment of constables. According to Stenning, a tything man was 'no longer elected by his peers, but appointed by his overlords', the manorial court or 'court leet'.[1049]

7.4.3.2 – The Constable between the 13th and 18th centuries.

Another significant development in relation to 'constable' occurred in 1285 with the *Statute of Winchester*[1050] which Critchley described as the 'only general public measure of consequence enacted to regulate the policing of the country between the Norman Conquest and the *Metropolitan Police Act 1829',*[1051] establishing principles regarding policing in England that lasted for 600 years. Those principles, in Critchley's view included the 'duty of everyone to maintain the King's peace', that it was open to any citizen to arrest an offender' and that an 'unpaid, part time constable had a special duty to do so, and in towns he was assisted in this duty by his inferior officer, the watchman'.[1052]

It is, however, somewhat difficult to ascertain how Critichley reached his view regarding constables, as there was very little reference in the Statute to that office. The statute only discussed constables in s 6 which repeated some of the obligations of the 1242 writ, requiring each 'hundred'[1053] to elect two constables to 'enforce the ordinance for the keeping of arms'.[1054] Moreover there is a dispute between Critchley and Lee on the one hand and Simpson on the other as to the status of those constables. Simpson, considered that 'It is not improbable that one of the two constables was the officer afterwards known as high

[1045] Stenning (1981), above n 60, 16.
[1046] Ibid 17.
[1047] Ibid.
[1048] Ibid.
[1049] Ibid 19.
[1050] 13 Ed 1 stat 2 (1285).
[1051] Critchley, above n 102, 7.
[1052] Ibid.
[1053] Which was made up of ten tythings. Blackstone, above n 1023, Introduction, Sec 4.
[1054] Simpson, above n 1016, 633.

constable'[1055] while Critchley and Lee believed that both were high constables who 'supervised the activities of petty constables'.[1056]

The distinction between the two offices is important in that it is generally accepted that the current office of constable is derived from the petty or parish constable, rather than the high constable.[1057] High constables originally had, as the 1242 Ordinance demonstrated, considerable responsibility, but over time, their duties became nominal and in the eighteenth century, they became, according to Critchley, 'a general factotum, inspecting weights and measures and roads and bridges … but spending most of his time as collector of the county rates'.[1058]

As to the independence of the high and petty constables, Stenning spent some time in his analysis to emphasise that petty constables were not subject to the direct command of high constables. They were not appointed by the high constable, but were appointed by the court leet or manorial court, and were initially 'more or less autonomous officers vis-à-vis one other'.[1059] Sir Francis Bacon in his 1608 study of the office of constable supports that view with two unequivocal statements as to the independence of the petty constable:

> I do not find the petty Constable is subordinate to the high Constable to be ordered or commanded by him.[1060]
>
> Nor is the petty constable subordinate to the head constable for any commandment that proceeds from his own authority.[1061]

Blackstone, writing in 1758, however seems of a different view, stating that 'Petty constables are inferior officers in every town and parish subordinate to the high constable'.[1062]

He also did not accept the view that a constable was simply the successor or 'modern' version of tythingman and distinguished that office from the office of constable. He considered that petty constables 'have two offices united in them; the one ancient and the other modern'. The ancient office that Blackstone referred to was as headborough or tythingman, while the more modern office is that of constable 'in order to assist the high constable'.[1063] In his view, tythingmen were 'made to serve as petty constables'[1064] and that the peace keeping function of petty constables derives from the inferior constable office, rather than the office of tythingman. Thus, based on Blackstone's interpretation of the office,

[1055] Ibid. He also based his conclusion on 'analogy' and 'reasonable conjecture'.
[1056] Critchley, above n 102, 6; Lee above n 105, 55.
[1057] Critchley, above n 102,14-15; Lee, above n 105, 55-56; Simpson, above n 1016, 625, 636 & 639.
[1058] Critchley, above n 102, 15.
[1059] Stenning (1981), above n 60, 21; Francis Bacon (1844) above n 112, 316.
[1060] Bacon (1844), above n 112, 315.
[1061] Ibid 317.
[1062] Blackstone, above n 1025, Book 1, chapter 9.
[1063] Ibid.
[1064] Ibid.

the peace keeping function of petty constables is subordinate to, and it would seem, subject to, direction from the high constable. He also seemed to emphasise the direction powers of Justices of the Peace over constables when discussing one of the principal duties of constables, 'to keep watch and ward in their respective jurisdictions.' He wrote that 'the manner of doing which is left to the discretion of the justices of the peace and the constable'.[1065]

Simpson considered that Blackstone's account was 'historically inaccurate'. In his view constable 'represented an office of remote antiquity, on which had been impressed in comparatively modern times a character that it could only have gained at a period when local custom was being superseded by the law'.[1066]

However, this conclusion was based on 'reasonable hypothesis',[1067] an approach that seems to confirm the uncertainty of the nature of the office. So while Simpson was an experienced legal historian and his views can find some support from Bacon's 1608 views, it remains unclear why his hypothesis based views should be favoured over Blackstone's informed legal observations.

It is also worth identifying a slightly different position taken by Jefferson and Grimshaw on the historic basis of police independence from direction. They were strong supporters of police independence, but in their 'thematic analysis' they considered that it arose from the royal authority provided by the Normans, rather than from the more ancient Saxon office of tythingman.[1068] And to that extent, their position seems to align more with the Blackstone separation than Simpson. Their views can however be criticised as they seem entirely based on an interpretation of one secondary source, Critchely's police history.[1069]

Stenning added that the high constable 'did, particularly after the introduction of justices of the peace, develop a more or less supervisory role with respect to petty constables within his "constablewick"',[1070] although that role then seems to have diminished. According to Critchely, 'There could have been little enough scope for the high constable once justices of the peace had firmly established their ascendency over parish constables.'[1071]

It is also worth observing that in the two studies conducted in the 1500s and 1600s of the office of constable, by Lambarde and Bacon, neither considered that constables were completely immune from direction as both distinguished between the original and

[1065] Ibid.
[1066] Simpson, above n 1016, 626.
[1067] Ibid.
[1068] Jefferson and Grimshaw, above n 71.
[1069] Ibid 26 and Critchley, above n 102, 5.
[1070] Stenning (1981), above n 60, 22.
[1071] Critchley, above n 102, 15.

subordinate powers of constables.[1072] As Bacon wrote when addressing the authority or power of constables 'so again it is original, or additional; for either it was given by the common law or by divers statutes. And as for subordinate power, wherein the constable is only to execute the commands of the justice of the peace'.[1073]

Similarly, Lambarde wrote of constables acting 'by their own authorie or under the authority of others'.[1074] Stenning who discussed this aspect of Bacon's and Lambardes's writings in his 1981 study, considered that 'No one reading these early authors could possibly come away with the impression that in the performance of the duties as peace officers, constables were not subject to direction or instructions from others'.[1075]

One other issue not referred to in the various police histories is the significance of the 1242 writ or ordinance regarding the subordination of constables. In the translated passage quoted above it is clear that the chief or high constable was to command all men at arms, presumably including the petty constable, and was also in a subordinate position in relation to the sheriff and the knights. That is, he 'shall be obedient to the sheriff and the two knights aforesaid, in coming at their command and in carrying out necessary measures for the conservation of our peace'.[1076] What this document indicates, consistently with the view expressed by Blackstone, is that the constables, high and petty, in relation to the conservation of the peace, were in a subordinate role and obliged to receive and take direction.

The *Justices of the Peace Act 1361* also had a significant impact on the role on constables and their independence, with Critchley considering that 'Inevitably the advent of the justice of the peace degraded the constable's office'.[1077]

The 'ancestors of the justice of the peace were certain knights commissioned by Richard I in 1195 to take security to keep the peace from everyone over the age of sixteen' and 'the knights came to be known as *custodes pacis*, or keepers of the peace'.[1078] In Critchley's view, the Act of 1361 'formally recognised them as justices. At the same time it defined their responsibilities in a way which led to their unique position in the shires as holders of a mixture of police, judicial and administrative authority'.[1079] The effect on constables was, in

[1072] Stenning (1981), above n 28, 116.
[1073] Bacon (1844), above n 112, 316.
[1074] Lambarde, above n 113, 11.
[1075] Stenning (1981), above n 60, 116.
[1076] Stephenson & Marcham, above n 1031, 139.
[1077] Ibid 10.
[1078] Ibid 8.
[1079] Ibid.

Stenning's view very great as 'within a relatively short time the constables found themselves in a position of almost complete subservience to the justices of peace'.[1080]

According to Lee, 'The subordination of petty constables to Justices was from the first generally understood and acted upon, but the custom did not receive definite official sanction until the seventeenth century, when it was tardily recognised by statute'.[1081] The statute of 1662 that Lee was referring to[1082] empowered two justices to appoint constables 'until the Lord of the leet should hold court' a change that was considered necessary, according to Critchley, as a result of numerous failures of Court leet to make appointments.[1083]

Similar views as to the growing subservience of constables were made by other police historians. Simpson observed that 'by the end of the fourteenth century the constables in the matter of keeping the peace were beginning to lose their initiative and becoming the mere subordinates of the local Ministers of the crown'.[1084] And Critchley refers to constables becoming 'a general factotum in carrying out the authority of the justice'.[1085] Lee also notes that 'these officers were appointed annually by the jury of the Court Leet,[1086] but their control was vested almost entirely in the hands of the magistrates who swore them in, and who afterwards directed their actions'.[1087]

Critchley also discussed the significance of the constable justice relationship which he regarded as reaching its zenith under the Tudors[1088] and becoming degraded under the Stuarts. That zenith, however, did not involve constabulary independence: 'With Crown-appointed justices of the peace exercising authority over the parish constables, the whole stemmed ultimately from the sovereign, and the periphery derived authority from the centre'.[1089]

The legislative recognition in 1662 of the subordination of the office of constable was also matched by the degradation of the office due to what Critchley refers to as 'the contempt into which the office of constable had fallen'.[1090] The office was unpaid and, during the sixteenth century wealthier merchants, farmers and tradesmen were unwilling to undertake the sometime onerous requirements of the office. For those who could afford to, a number of

[1080] Stenning (1981), above n 60, 25.
[1081] Lee, above n 105, 59. The statute referred to is *An Act for the better Releife of the Poore of this Kingdom* (13 & 14 Car. II c 12 (UK)) (1662) s15. Also see Simpson, above n 1016, 638.
[1082] 13 & 14 Car. II c 12.
[1083] Critchley, above n 102, 17.
[1084] Simpson, above n 1016, 635
[1085] Critchley, above n 102, 9.
[1086] That is, the manorial court. See Lee, above n 105, 17.
[1087] Lee, above n 105, 54. Also see Simpson above n 1016, 635 & 639 and Critchley above n 102, 8-9 and 17.
[1088] Critchley, above n 102, 8.
[1089] Ibid 16. And see Ascoli, above n 107, 20.
[1090] Critchley, above n 102, 18 and 10.

devices were available to allow them to avoid duty, the simplest being the engagement of deputies to fulfil the role. And it seems that as Critchley observed: 'The deputies themselves would often pay deputies in turn, with the result that the office came to be filled by those who could find no other form of employment'.[1091] Alternatively, fines could be paid, which seems to have become a source of parish revenue[1092] or there was ability to purchase a statutory immunity or 'Tyburn ticket' from serving in parish offices.[1093] As a result, as Lee observed, the person who served as 'parish constable of later years, … only served because he could not help it, or because he was poor enough to bear another man's burden for a paltry pecuniary consideration'.[1094] Constables became, in Critchley's words 'at best illiterate fools, and at worst as corrupt as the criminal classes from which not a few sprang'.[1095]

As early as 1608 Bacon recognised the 'inferior, yea, of base condition' of the men then holding the office 'which is a mere abuse or degenerating for the first condition'.[1096] One hundred and fifty years later that degeneration had not improved with Blackstone, suggesting that in view of the low standard of men then holding the office of constable and the extent of their 'very large powers, of arresting, and imprisoning, of breaking open houses, and the like … it is perhaps very well that they are generally kept in ignorance'[1097] of the extent of those powers.

The office of petty constable, therefore, seems to have gone through a degenerative process; commencing with men of high standing in their respective communities exercising independent and original powers to maintain and enforce the King's Peace, into men 'scarcely removed from idiotism'[1098] subject to the control and direction, initially from High Constables but later, from the fourteenth century, Justices of the Peace.

Justices of the Peace themselves were also not independent of government. In the Tudor period, Justices of the Peace were centrally controlled and directed. As Ascoli wrote:

> The Tudors, mindful of the disarray into which the state had fallen during the civil wars, rode the country on a tight reign. "The function of the Tudor Privy Council," writes Trevelyan, "was to teach not only Parliament to legislate but justices of peace to govern".' [1099]

[1091] Ibid 10.
[1092] Ibid.
[1093] Ibid 18. Lee, above n 105, 214. A Tyburn ticket was an assignable certificate granted to a successful prosecutor of certain felons, who, as a result of 10&11 Will III c 23, was exempted from all manner of parish and ward offices within the parish or ward where the felony has been committed. P Colquhoun, *Treatise on the Police of the Metropolis* (Baldwin, 6th edition, 1800). Also see evidence of Nathaniel Conant, Chief Magistrate of Bow Street in Clements's Official Edition of the Police Report, *Report from the Committee of the State of the Police of the Metropolis* (1816) 9.
[1094] Lee, above n 105, 57.
[1095] Critchley, above n 102, 18-19; also see Lee above n 105, 57.
[1096] Bacon (1844), above n 112, 316.
[1097] Blackstone, above n 1025, Book 1 Chapter 9. Critchley, above n 102, 17.
[1098] Critchley, above n 102, 18.
[1099] Ascoli, above n 107, 20.

And that office also went through a significant degree of degradation following the revolution of 1688-9, where the holders of the office ceased to be from the notable county families. Their successors were 'justices of mean degree' or 'trading justices' as they sought to make 'the administration of justice self-supporting by exacting a fee for every act performed'.[1100] And in order for 'London to be delivered out of the hands of corrupt justices' a new institution of stipendiary magistrate was introduced modelled, according to Critchley, on the first Chief Magistrates at Bow Street.[1101] And with that new institution came subordination to central government, with stipendiary magistrates being subject to Home Office control.

7.4.3.3 – Constable usage in 1829.

The *Middlesex Justices Act 1792* established seven police offices in London, each staffed with three stipendiary magistrates and six constables.[1102] The functions of these offices and magistrates was both judicial and investigatory and involved close connection with and direction by the Home Office, although little coordination with each other. An example can be seen in the investigations into the Ratcliffe Highway murders in 1811[1103] when the Magistrates regularly consulted with the Home Secretary throughout the course of the investigation including attending on him to seek his views on the best means of dealing with the body of a suspect who had committed suicide while in custody.[1104]

These offices were modelled on the Bow Street Office conducted by Henry and then James Fielding who introduced its foot patrol known as the 'Bow Street Runners'.[1105] Bow Street was closer with the Home Office than the other police offices - becoming, under the Chief Magistracy of Richard Ford,[1106] in the early 1800's a virtual extension of that department. Ford had an office in the Home Department, 'so that he could attend daily to be on hand to deal immediately with suspects brought in for examination'.[1107] In Beattie's view, Ford was 'acting as a third-secretary in all but name'.[1108]

Bow Street also had many more staff than the other seven offices and had a variety of different types of officer for the keeping the peace reporting to the magistrates. The most

[1100] Critchley, above n 102, 19.
[1101] Ibid 20. Also see Ascoli, chapter 1.
[1102] Beattie above n 110, 167. Ascoli above n 107, 51. The Thames River Police was added in 1800 by the *Thames River Police Act* (UK). Critchley above n 102, 42-43.
[1103] These were particularly brutal murders which have been overshadowed by the even more brutal murders committed by 'Jack the Ripper' later in the century. P D James and T A Critchley, *The Maul and the Pear Tree, The Ratcliffe Highway Murders 1811* (Faber 2011).
[1104] Ibid, chapter 8.
[1105] Beattie above n 110, 168.
[1106] Ibid 169, 187-189.
[1107] Ibid 188.
[1108] Ibid. He was, according to Critchley 'ever ready to act on the Home Secretary's directions in appointing constables as spies and informers to deal with enemy aliens during the Napoleonic Wars.' Critchley above n 102, 43.

famous were 'the runners' of about 100 men.[1109] The Fielding brothers instituted this 'entirely new element in the policing forces in the metropolis … [which] distinguished them fundamentally from the existing peace-keeping forces of night watchmen and parish constables.'[1110] They were the 'first quasi-official thief-takers' – able to be hired out, but also sent at no cost to the victim to investigate and arrest when Fielding judged it in the public interest.[1111]

The runners, however, had no official title because, as Beattie points out, their office had no official standing. [1112] Many, but not all, were constables:

> From the beginning, some of the leading Bow Street officers were serving constables, typically men who were willing to serve as constables for those whose turn it was, but who chose to avoid the duty by paying a substitute. …. Men who brought the authority of the constable's office were very valuable .... [f]or … there were clearly many policing situations that required much greater authority than the ordinarily citizen possessed. When it came to breaking down doors, it was essential to have a constable present if any arrest was to withstand legal challenge. The continuing appointment as constables of Westminster of men willing to remain attached to the Bow Street office was relatively straightforward to arrange because they were appointed directly by the magistrates rather than (as in the City of London) being elected by their neighbours.[1113]

Bow Street also introduced a uniformed mounted Horse Patrol, from 1805[1114] and an Unmounted Horse Patrol from 1821, with a total strength of up to 150 constables.[1115] Both mounted and unmounted branches, according to Critchley 'acted under direct authority of the Home Secretary … [and] were commanded by a Home Office official named William Day'.[1116] Ascoli considered that the Horse Patrol was 'an extraordinary departure from the tradition which time and public obduracy had hallowed; for the Horse Patrol was, by any definition, a French style *gendarmerie*'.[1117] Bow Street also had, from 1822, a twenty-seven strong uniformed day patrol which was introduced 'as a preventative force against daylight robbery'.[1118]

As a result of these different forces and patrols, prior to the formation of the Metropolitan Police Force in 1829, in addition to the parish constables of various levels of competence

[1109] Ibid 44.
[1110] Beattie above n 110, 2.
[1111] Ibid 3.
[1112] Ibid and see 56-57.
[1113] Beattie above n 110, 20-21. Emsley (2009) above n 108 considers that they were all sworn as constables of Westminster.
[1114] Ascoli above n 107, 56. Lee above n 105, 194 & 224. Critchley above n 102, 43. It consisted of, according to Ascoli, 2 inspectors and 52 constables and operated on the principle roads within twenty miles of London.[1114]
[1115] Critchley, above n 102, 43; Lee above n 105, 224. Ascoli above n 107, 57 refers to it as the 'Dismounted Horse Patrol'.
[1116] Critchley above n 102, 44.
[1117] Ascoli above n 107, 57. By referring to gendarmerie, Ascoli was probably referring to the English disparaging understanding of the term which Emsley defines as 'essentially despotic, even totalitarian, since they represented force directed downwards from rules on the ruled'. Clive Emsley, *Gendarmes and the State in Nineteenth-Century Europe* (Oxford, 1999) 3.
[1118] Critchley above n 102, 44.

operating in the various parishes, there were, at Critchley's estimate, 450 men, most of whom would have been constables 'directly under the control of the Home Secretary'.[1119]

The 1962 United Kingdom Royal Commission on Police recognised the 'historical subordination of the constable to the justice', taking a different view from Lord Denning as to police independence. It considered that subordination of constables 'was the legal form of control over the police favoured by Parliament in enacting 19th century statutes *which still govern their constitutional position*; but it is a control which in this century has virtually fallen into disuse'.[1120]

What this summary of the obscure and confusing history of the office of constable demonstrates is that the office has operated in different ways with different responsibilities at different times so that a legislative reference to that office and its common law powers and privileges in legislation today or in 1829 could refer to a number of different types of constable. The question that must be asked, therefore, is what particular variation of the office of constable is the legislation referring to?

Is it to the office of constable in its earliest form in England, being either a military rank or a quasi-judicial office as referred to in the *Magna Carta*? Or is it to the office of high constable, in either its original or degraded rate collector form? Or is it to petty or parish constable? As the essential functions of both contemporary and petty or parish constables relate to peace keeping it is a reasonable conclusion that, despite the lack of any other indication from the various statutory provisions, that the parish or petty constable is the form of office that the provisions are referring to. This, however, leads to a secondary question. Has the office of constable evolved from the independent autonomous officer, as successor to the tythingman, as the office may have been, into a lesser subordinate office as a result of centuries of subjugation and direction by, initially high constables and then justices of the peace; or has the office retained its ancient powers and privileges including its independence whether exercised or not?

The position is far from clear although, as noted above, Blackstone would seem to have accepted that constable has always been a subordinate office, subject to direction. He separated the office of constable from that of tythingman and seemed to consider that the peace keeping role of constables was in the context of the inferior office of constable who was subject to direction by the high constable and justice of the peace. This position also is consistent with at least one interpretation of the earliest documented reference in 1242 of the office of constable in relation to the conservation of the peace.

[1119] Ibid 45.
[1120] *Willink Report,* above n 52, 12 (emphasis added).

This conclusion is also supported by historic practice, as the various police histories have demonstrated that constables have operated as inferior offices subject to direction at least since 1662, and probably for many centuries before. As a result, this lengthy period of subservience to direction can be argued to have altered the nature of the office reducing its powers and privileges to accord with its well established inferior status.

There is no clear means of resolving this historical/legal question with any greater certainty. The issue, however, can also be examined by looking to legislative intent. That is, instead of trying to resolve the legal-historic obscurity of the common law powers and privileges of the office, to examine what the parliamentary intention was when it was decided to preserve and maintain those common law powers privileges.

As was said in *Project Blue Sky Inc v Australian Broadcasting Authority* 'the duty of a court is to give words of a statutory provision the meaning the legislature is taken to have intended them to have'.[1121] This question will normally be resolved by 'the grammatical meaning of the provision';[1122] but, as has been seen, the obscurity of the history of the office of constable requires reference to sources beyond the words of the statute and the context in which they are found.

This, however, leads to a preliminary question – at what stage is the question posed? There are, as Table 7.2 partially demonstrates, many legislatures that have sought to preserve the common law powers and privileges of constables, although the language of doing so has varied. However, in the context of policing it is suggested that reference should be made to earliest of the modern police forces, Peel's 1829 Metropolitan Police Force and the understandings then in place as to the powers and privileges of constables. Any other approach would lead to the absurd result of having different ancient English common law powers and privileges in different jurisdictions.

The selection of 1829 is also appropriate for three other reasons. First, the 1829 model is the primary example of new policing that modern police forces are said to be modelled on. Second, the decision in *Blackburn*, which contains the most unambiguous statement of police independence and which has impacted on judicial and other understandings of police independence in Australia and other countries, was based on an interpretation of the 1829 Act. And finally, there are records from the period which indicate relatively clearly what was expected of constables and Commissioners in the newly created force.

[1121] (1998) 194 CLR 355, 384 per McHugh, Gummow, Kirby and Hayne JJ.
[1122] Ibid, and see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 129, 161 (Higgins J).

If 1829 is the relevant date, the consequence seems clear: that the parliamentary intention was not to establish police immune from government direction.

Reference has already been made in Chapter 5 to three parliamentary committees in the 1830s (each of which included Sir Robert Peel) which examined the actions of the Metropolitan Police in the years immediately after 1829, including the Minister/Commissioner relationship and accepted and endorsed as 'constitutionally'[1123] correct, the control by Ministers of the force through direction to Commissioners. This indicates that the committees and Peel accepted that, whatever other powers and privileges that the 1829 Act preserved, they did not include independence from direction of constables or Police Commissioners.

Another means of identifying the original intention in 1829 is to examine the instructions provided to Metropolitan Police constables when that force was established. Although the instructions are often mistakenly claimed to be the creation of Sir Robert Peel and to contain the 'Peel Principles of Policing', both those views are incorrect. As Lentz and Chaires have demonstrated, the Peel principles were 'invented'[1124] based on principles the policing scholar, Charles Reith, extracted as a summation of the evolution of British police founded on those principles.[1125]

The authors of the Instructions were the first two Commissioners of the MET, Colonel Charles Rowan and Richard Mayne.[1126] Why the Instructions are relevant is because, if the police were understood to be free from direction as a result of their common law powers and privileges saved by s 4 of the 1829 Act, the instructions that the Police Commissioners prepared under Peel's oversight would have discussed or at least referred to that issue.

A copy of the General Instructions in their original form is attached as *Appendix A*. In those instructions, there is much that relates to the powers of constables in relation to members of the community – when they can be arrested, when they can be searched, and so forth. But there is nothing that indicates that constables were independent on any issue or immune from direction on any matter. The instructions indicate otherwise. This can be seen, not only from instructions as to when constables 'must' exercise the power arrest, as in the case of a person seen committing a felony,[1127] and when 'it is not desirable the law should be enforced

[1123] *1834 Report,* above n 443, 21.
[1124] Susan A Lentz & Robert Chaires, 'The invention of Peel's principles: A study of policing 'textbook' history' (2007) 35 *Journal of Criminal Justice* 69, 70.
[1125] Ibid 73.
[1126] Reith (1956), above n 104, 133; Lee, above n 105, 241.
[1127] In the 1862 version of the General Instructions constables were also given detailed instructed instructions that police were to prevent 'as much as in their power' the nuisances of 'boys flying kites', 'trundling hoops', the 'dangerous practice' of the 'game of "Cat"', 'children playing with fire', 'throwing stones at Railways', 'running alongside omnibuses in the streets turning Summersaults', 'little girls dancing on poles', 'persons with monkeys'. However, constables were also instructed that when passing through a park, they were not to walk on the grass 'unless there be necessity to do so for the proper performance of some duty' and, more importantly, that 'Gentlemen stopping and speaking to females at night are not to be interfered with'.

against the offenders'. It is also seen in the obligation in the instructions on each constable to:

> readily and punctually obey the orders and instructions of the serjeants, inspectors, and superintendents. If they appear to his either unlawful or improper, he may complain to the Commissioners, who will pay due attention to him….[1128]

Moreover, that instruction continues that 'any refusal to perform the commands of his superiors, or negligence in doing so, will not be suffered'. The indication here is that even if a constable viewed an instruction as unlawful, he was still obliged to comply – an obligation that seems fundamentally at odds with constables being regarded as being independent from direction.

Another item in the instructions also seems revealing as to the perceived narrowness of a constable's powers and individual discretion: 'In the novelty of the present establishment, particular care is to be taken that the constables of the police do not form false notions of their Duties and powers'.

7.4.3.4 – Constable - Conclusion

What these sources indicate is that when the Metropolitan Police Force was newly created, its driving force, Sir Robert Peel, his successor as Home Secretary, Lord Melbourne, the three Parliamentary Committees that examined the early operation of the force, the first two Police Commissioners and the constables that made up the force all operated on the understanding that the police force and the Police Commissioners were under the direct control of government. This, combined with centuries of subordination of petty constables to, initially, high constables and then to justices of the peace makes the preservation of the common law powers and privileges of constables by the 1829 Act unlikely to have been intended to include any independence from government direction.

It therefore appears, despite the confusing and incomplete history of the office of constable, that the conclusion reached by Stenning in his 1981 study of the relevance of the office of constable to the supposed independence of the police is correct:

> If the concept of police independence propounded by Lord Denning and others is to be justified … it must seek such justification elsewhere than in the history of the constable in English common law.[1129]

General Regulations, Instructions and Orders for the Government and Guidance of the Metropolitan Police Force (Eyre and Spottiswoode, 1862) 85, 98, 100,1119, 154, 166, 182, 201, 237.

[1128] Appendix A – in the second paragraph under the heading Police Constable. Similar obligations are also included for Sergeants and Inspectors, although an Inspector's obligation, unlike that of sergeants, is limited to 'lawful directions'. See second paragraph under the heading Inspector and the first paragraph under Sergeant.

7.5. – Limitations on Cowper- Conclusion

This review of the argument for legal bases to limit the operation of Cowper Direction provisions to provide independence to police from government directions, leads to the following conclusions:

- That neither the rule of law nor the doctrine of separation of powers operates as a limitation on the operation of Cowper provisions; and
- The office of constable, if it potentially limits the effectiveness of Cowper provisions, will only have that effect in three of the four Australian police forces subject to Cowper provisions (South Australia, Tasmania and NSW), as the relevant Northern Territory provision requires separate legislation and none has been identified.
- The common law powers and privileges of constables can be applied to police by way of three types of statutory provision. However, in contemporary Australia, only one of those types (a 'powers and privileges provision') operates. The format of the oath provisions in relation to each of the Australian Forces differs from the format used in the UK and does not purport to require the police member to have the powers and privileges of a common law constable.
- However, a review of the uncertain history of the office of constable indicates:
    - The office may never have involved independence of action;
    - But, if it did, the office seems to have lost its early independence of action as a result of degradation of the holders of the office combined with centuries of subordination, initially to high constable and later to justices of the peace who, themselves, were subject to government direction;
- That any uncertainty regarding this issue should be removed by considering and applying to later legislation, what was understood when the 1829 Act provided common law constable powers and privileges to members of the MET. Contemporary materials from the 1820s and 1830s demonstrate that force was subject to government direction on all matters and that this level of control was accepted as appropriate by both Parliament and the police force.
- Accordingly, the powers and privileges of constables in the original Peel model did not include any independence from government direction.

These conclusions, lead to the result that:

[1129] Stenning (1981), above n 60, 116.

- the rule of law, separation of powers and the office of constable provide no legal basis to read down or limit the scope of the four Cowper provisions currently in operation (Tasmania, NSW, South Australia and the Northern Territory).

This does, however, not mean that the scope of those provisions has not been limited by practice or convention, a subject that is discussed in Chapter 8.

8 – Broad Direction Powers (Cowper) – Conventional Limitations

8.1 - Conventions and Practices – Their Nature

Having ascertained in Chapter 7 that there is not a sound legal basis to limit the operation of Australian Cowper provisions, this Chapter considers whether there are any 'conventional' limitations on those provisions. By 'conventional' the reference is to the concept of constitutional convention, which Forsey defined as 'the acknowledged, binding, extra-legal customs, usages, practices and understandings by which our system of government operates'.[1130]

It is not intended to undertake a review of the concept of constitutional convention in this thesis. The author relies on previous work he[1131] and others[1132] have undertaken relating to that concept.

Conventions are an essential element of Westminster based constitutions which operate with the understanding that they incorporate conventions.[1133] Conventions operate to alter the way the constitution and laws operate. They do this by qualifying how laws are applied, create bodies unknown to law (such as Cabinet) and can (but very rarely) negate the operation of legal operations or rights.[1134]

They are also something more detailed than statements of general constitutional principal. Their role is to provide guidance and direction on the course to be followed and the course to be avoided.[1135]

A convention has three, or possibly four, essential elements.

First, a convention is not a law. Instead, it is a non-legal obligation that courts will recognise, but not enforce.[1136]

Second, despite not being a law, conventions are regarded by those subject to them as being politically, if not legally 'binding'.[1137]

[1130] E A Forsey, 'The Courts and the Conventions of the Constitution (1984) 33 *UNBLJ* 11.
[1131] Killey, above n5.
[1132] Marshall (1984), above n 5; Heard (2014), above n 140; W I Jennings, *The Law and the Constitution* (University of London Press, 1938); W I Jennings, Cabinet Government (Cambridge, 1947); E A Forsey, 'The Royal Power of Dissolution in the British Commonwealth' *in Evatt and Forsey on Reserve Powers* (Legal Books, 1990); George Winterton, *Monarchy to Republic* (Oxford 1994).
[1133] As a consequence, the text of Westminster based constitutions are very misleading, omitting entirely or substantially concepts that are fundamental to such constitutions (such as responsible government, the office of Prime Minister and Cabinet), while indicating that the executive power of the jurisdiction is in the hands of an unfettered Henry VIII like Governors or Governors –General.
[1134] Killey, above n 5, 15.
[1135] Ibid 31-32.
[1136] Ibid 11-20. *Egan v Willis* (1998) 195 CLR 424; *Patriation Reference* [1981] 1 SCR 753; *Wells v Department of Premier and Cabinet* (2001) 18 VAR 293.
[1137] Killey, above n 5, 20-24.

Third, the existence and scope of conventions is determined by being acknowledged by the participants in the constitutional process. They are 'what the actors believe them to be'.[1138] The category of 'actors' or 'participants' seems limited to 'anyone who is obliged to make or not make decisions which are subject to a conventional rule',[1139] a requirement which excludes courts and, according to Jennings, 'text book writers'.[1140] Those non-participants are convention observers or assessors, not convention makers or acknowledgers.[1141]

As to how conventions are acknowledged, this can be done by precedents demonstrating 'consistently applied or understood practices of contemporary participants'[1142] or by express agreement between the participants.[1143]

The fourth and most problematic element of the concept is that many consider that a convention needs to be supported by a good constitutional reason.[1144] This author has, however, previously doubted that this element is an essential requirement.[1145] In this thesis this issue will not be reviewed but will operate on the basis of the conclusion previously reached:

> If constitutional reasons are necessary for a practice to be a convention, those reasons are related to the function of conventions, which is to resolve uncertain issues in the constitutional structure by providing accepted and binding practices or procedures. That is, to 'fill in the gaps'.[1146]

The benefit of a convention is to provide flexibility and elasticity so a constitution may become what McWhinney described as 'a "living tree" capable of continuing growth and creative adaptation to changing historical conditions.'[1147] The difficulty with that living tree, however, is that flexibility brings with it a certain amount of uncertainty concerning what the conventional rules are. Conventions have, as Lord Hailsham observed, numerous 'grey areas and frayed edges'[1148] - which provide ample opportunity for differences and disputes between constitutional participants and advisers.

The final thing to note about conventions is that they tend to be jurisdiction specific. While different jurisdictions may have similar conventions, differing constitutional frameworks and understandings in different jurisdictions means that a convention on the same subject may,

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[1138] Andrew Heard, *Canadian Constitutional Conventions* (Oxford, 1991) 12. Jennings (1938), above n 1132, 130. Heard, however, in the second edition of his work queried the limitation of the test as it ignores the 'enormous scholarly and journalistic literature that discusses political events'. Heard (2014) above n 140, 16.
[1139] Killey, above n 5, 25.
[1140] Jennings (1947), above n 1132, 7. In his view 'they are not persons of authority for this purpose'
[1141] Killey, above n 5, 25.
[1142] Ibid 26.
[1143] As occurred at the Australian Constitutional Convention in 1983 and 1985. Killey (2012), above n 5, 30 and 309.
[1144] Heard considers that this element is the 'least problematic' element, a view with which I disagree – for the reasons stated elsewhere. Heard (2014), above n 140, 17; Killey (2012), above n 5, 36.
[1145] Killey, above n 5, 30-46.
[1146] Ibid 44.
[1147] E McWhinney, *The Governor-General and the Prime Minister* (Ronsdale Press, 2005) 45.
[1148] Hailsham of St Marylebone, *Lord Hailsham, On the Constitution (*Harper Collins, 1992) 13.

in one jurisdiction be different to the convention in a different jurisdiction. This concept is exemplified by caretaker conventions – conventions that operate while an election is conducted. This convention is well established in Australia and the UK, but seems almost completely unknown in Canada,[1149] despite the same constitutional issue being present in the different jurisdictions.[1150] Moreover, there are marked differences in the convention in the jurisdictions where it does operate. This can be seen from both the content and detail in documentation issued by different Australian states before each election detailing the conventional standards.[1151] And it can be seen from the practice in the UK where in recent elections the name of the convention is now known as the 'purdah' convention.[1152]

Consequently, statements and precedents from other jurisdictions may be of little relevance to the operation of a convention without first examining the practices and understanding of the convention in the jurisdiction in question.

8.2 - Police-Government Conventions – Their History

This thesis does not intend to undertake a detailed review of the development of conventions and practices in each Australian jurisdiction regarding the police-government relationship. This is largely due to the difficulty of locating sufficient information to demonstrate changing conventional understandings in seven different jurisdictions over more than 150 years, combined with the limited relevance that such an examination would provide to the central issues examined by this thesis. The intention is to assess the current status of the understanding of conventions and practices regarding that relationship, and the earlier history is only referred to when it assists in appreciating the current status

Nonetheless, it is worth appreciating that conventions regarding police independence seem a 20th century, indeed, second half of the 20th century development.

Reference is made to the earliest instances of government power over police in both England and NSW discussed earlier[1153] which both indicate that the establishment of police forces did not bring with it any convention or understanding of police independence. By

[1149] Killey, above n 5, 252-254. There is no mention of this convention in either edition of Heard. Heard (1991), above n 1138 & Heard (2014), above n 140.
[1150] That is, that during the election period there is no parliament to which the government is accountable and the electorate may decide to change governments.
[1151] Killey, above n 5, Ch 10; A Tiernan and J Menzies, *Caretaker Conventions in Australia, Minding the Shop for Government* (ANU EPress, 2007).
[1152] Although the official UK convention documentation only uses that term once and only in a passing reference. Cabinet Office, *General Election Guidance 2015* (30 March 2015) 10. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419219/General_Election_Guidance_2015_for_civil_servants.pdf
[1153] That is, the practices in London in the 1830's discussed in Chapter 5.1 and of Sir Henry Parkes in the 1860's discussed in Chapter 6.

1888, in London in relation to the MET, the essence of a limited convention seems to have developed, based on the observations made by the former Home Secretary, Sir William Harcourt,[1154] quoted in Chapter 5. Harcourt's view was that a Minister would be unwise to instruct a Police Commissioner who is 'the man who knows the Force under him, what is its work, and how it can be best accomplished'.[1155] However, that expertise did not render the Commissioner independent, as he was 'no more independent of the authority of the Secretary of State than the Under Secretary of State for the Home Department'.[1156]

This understanding was that Ministers exercised their legal authority with restraint due to their respect for the professionalism of the police, and is reflected in the 1909 observation of Winston Churchill. He considered that 'I could have sent any order and it would have been immediately acted on, but it was not for me to interfere with those who were in charge on the spot'.[1157]

The later development of a broader police independence convention was observed by the English scholar whose works have best explained the concept of constitutional conventions, Geoffrey Marshall.[1158] In 1965 Marshall examined the status and accountability of the English police and expressed his concern that 'a novel and surprising thesis' regarding police independence has been contrived, essentially based on *Fisher,*[1159] 'which is sometimes now to be heard intoned as if it were a thing of antiquity with its roots alongside *Magna Carta'*.[1160] His examination demonstrated the constitutional weakness of the concept, yet conceded that 'it has almost taken on the character of a new principle of the constitution whilst nobody was looking'.[1161] By 1977[1162] however, he seems to have altered his view:

> If therefore, in the field of law enforcement we have to give a calculated and unprejudiced answer in 1977 to the question whether civil liberties and impartial justice are more to be expected from chief constables than from elected politicians … many liberal democrats would feel justified in placing more trust in the former than in the latter. If that is so then whether or not the theory of police independence as traditionally set out has any sound legal foundation (and it almost certainly has not) it may be possible to defend it as a constitutional and administrative convention.[1163]

[1154] United Kingdom, *Parliamentary Debates*, House of Commons, 14 November 1888, vol 330 3rd series, 1162-3.
[1155] Ibid 1164.
[1156] Ibid 1163.
[1157] Churchill, above n 461, 45.
[1158] His most important works in this field are Marshall (1984), above n 5 & Marshall (1989), above n 1.
[1159] [1930] 2 KB 364.
[1160] Marshall (1965), above n 53, 33.
[1161] Ibid 120.
[1162] Marshall (1978), above n 53, 51.
[1163] Ibid 61.

This has been interpreted by some, including Lustgarten, as 'revisionism',[1164] 'recanting his earlier views in favour of greater democratic control'.[1165] In Roach's view, Marshall had 'lost faith in politicians and democracy' being 'prepared to abandon democratic policing for full police independence'.[1166]

However, the extent of any movement by Marshall may not have been as extensive as his comments[1167] do not seem to indicate that he recognised that a police independence convention had developed. Instead, he seems to have given conditional approval for the development of a convention for some degree of police independence. Roach seems to have misunderstood Marshall, as his misquotation omitted all of Marshall's qualifying expressions. Marshall's 1984 cautious words: 'If that is so, then the thesis of police independence may, despite its uncertain legal foundations, be something that it is now necessary to defend';[1168] were converted by Roach into the very definitive, 'despite its uncertain legal foundations … it is now necessary to defend.'[1169]

Whatever Marshall's views were, an examination of the literature on police-government relations indicates that, by the second half of the 20th century, an understanding and possibly a convention regarding police independence had developed in Australia.

Events that seem to have contributed to this view include:

- The development of the supposed doctrine of constabulary or police independence in England which, Walker suggests, occurred over the first half of the 20th century. In his view, that doctrine, while 'of uncertain origin and … never free of controversy …. emerged as the major premise … upon which conventional understandings of the limits of political involvement in policing rested…. [T]he doctrine came to represent in the modern constitutional order the paradigm of the state's response to the underlying paradox of police governance'.[1170] The relevance of that doctrine to Australia is discussed below in Chapter 10.
- Lord Denning's *dicta* in *Blackburn*[1171] and unchallenged acceptance of its conclusion,[1172] even if not its basis;[1173]

[1164] Lustgarten, above n 54, 167.
[1165] Ibid 165.
[1166] Roach (2007), above n 59, 61. Also see Sossin, above n 125, 96, 144 fnt 85 and Neil Walker, *Policing in a Changing Constitutional Order (*Street and Maxwell, 2000) 55 fnt 50.
[1167] which he substantially repeated in his 1984 book on constitutional conventions. Marshall (1984), above n 5, 144.
[1168] Ibid.
[1169] Roach (2007) above n 59, 91, fnt 94. Roach also seems to have ignored Marshall's changed views between 1977 and 1984. He quotes Marshall as having 'argued that "many liberal democrats" would trust the police than the responsible Minister' ignoring the fact that this distinction was no longer in the 1984 book, being replaced by a distinction between 'party politicians' and a 'body of rules and conventions'.
[1170] N Walker, above n 1166, 45.
[1171] .[1968] 2 QB 118.
[1172] For example, the consideration of *Blackburn* by the *Lusher Report*, above n 41, 691.

- Regional Policing in the England and Wales in relation to which central government had little statutory control, combined with the *Fisher* decision[1174] which found that the watch committees to which the regional forces were accountable, had little direction powers over those regional forces;
- In Stenning's view, police independence in Australia being 'fostered by a few senior English police officers who have been recruited to senior police executive positions in Australia over the last thirty to forty years; [1175]
- An acceptance of views incorrectly attributed to Sir Robert Peel.

The last issue requires some expansion. Positions supposedly taken by Peel, but which cannot be found in Sir Robert's biographies,[1176] and are never supported by sources, are regularly included in academic works on the police-government relationship as well as inquiry reports. This includes the apocryphal view, discussed in Chapter 5, that Peel 'created a doctrine of constabulary independence'.[1177]

Another incorrect position attributed to Peel is the view that he developed the 'Peel principles of policing'[1178] as part of the General Instructions to Police, and that those Instructions

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[1173] For example in the Victorian Johnson Report, *Blackburn* was relied on, but Johnson still seemed of the view that police independence was based on convention, rather than law. *Johnson Report,* above n 42, 36-37. See Chapter 5.

[1174] [1930] 2 KB 364. Discussed in Chapter 5.1.1.

[1175] Stenning (2007) above n 60, 226. This may, however, be something of an overstatement as a review of Police Commissioners indicates that very few Australian Police Commissioners appointed since 1900 were from United Kingdom forces. They are:

1. NSW – Peter Ryan, Commissioner between 1996-2002. From the Lancashire Police, Norfolk Police
2. Vic – Alexander Duncan, Chief Commissioner between 1937-1954. From the London Met.
3. SA – Harold Salisbury, Commissioner between 1972-78. From Metropolitan Police; North Riding, Yorkshire Police; York and North East Yorkshire Police
4. Qld – William Cahill, Commissioner between 1905 – 1916. From the Royal Irish Constabulary; and
5. CPF/APF – Colin Woods, Commissioner between 1979-82. From the London Met.

Of the five commissioners appointed from such forces, only two were appointed from regional forces in England where the degree of ministerial control is minimal – and one of those, was appointed to the NSW police where, as discussed below, there remains a tradition of activist Ministers. It is, therefore, considered that the primary direct English influence seems limited to that of Sir Robert Mark (whose origin was in the Leicester Police and then the Metropolitan Police) as the designer of the AFP model, and the terminated SA Commissioner Harold Salisbury, rather than the unnamed 'few senior English Police' referred to by Stenning.

[1176] Gash (Secretary Peel), above n 192 and Hurd, above n 192.

[1177] Chakrabarti, above n 364, 368.

[1178] See, for example the *Johnson Report,* above n 42, 405; Bolen, above n 80, 131; Bronitt & Stenning, above n 919, 323. The principles are:

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
4. To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
5. To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.
6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

included both police independence and the concept of 'policing by consent'.[1179] Even as late as 2016, Bayley and Stenning were still referring to 'Sir Robert Peel's famous words, the consent of the public in enforcing the law'[1180] without providing any source for such famous words. The pervasiveness of these fictional unsourced Peel views can be seen from similar unfounded reliance littered through various inquiry reports into police, including Victoria's Johnson and Neesham Reports,[1181] the NSW Lusher Report,[1182] and a recent House of Commons Committee report.[1183]

The General Instructions, as pointed out earlier,[1184] were not prepared by Peel, but by the first two Commissioners of the Met.[1185] Moreover, as Lentz and Chaires[1186] have demonstrated in 2007, the Peel principles themselves were 'invented' by 20th century authors, predominately Charles Reith.[1187] Furthermore, although Reith considered that the principles were 'merely a collected and numbered tabulation compiled from references and definitions found in public records, in official handbooks, and in the works of earlier writers on the subject'[1188] and that 'Nothing has been added to them in substance by the present writer', there is much that is in the so called Peel principles that cannot be sourced to either the General Instructions[1189] or elsewhere.

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7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary, of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.
9. To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

[1179] or that 'the power of the police coming from the common consent of the public, as opposed to the power of the state'. Home Office, FOI Release, Definition of policing by consent (10 December 2012) https://www.gov.uk/government/publications/policing-by-consent/definition-of-policing-by-consent.
[1180] Bayley and Stenning, above n 20, 137.
[1181] *Johnson Report*, above n 42, 405. 'That the "principles of policing" enunciated by Sir Robert Peel in 1829 will remain as relevant in twenty years time as they are today and were when first drafted'. Also see *Neesham Report,* above n 363, Executive Summary, 7 and Vol 1 19.
[1182] *Lusher Report,* above n 41, 701.
[1183] *Home Affairs Report, above n 367,* 28.
[1184] Chapter 7.4
[1185] As recently as 2011, the former Victorian Chief Commissioner, Christine Nixon expressed her version of the apocryphal history with her own triple errors of fact when she said that the 'principles were articulated by Peel and later reinforced by the first Commissioner of the London Met, Sir Richard Maynard'. The statement incorrectly attributes the principles to Peel; omits one of the first two Commissioners of the Met, Charles Rowan; and incorrectly names the other – whose name was Richard Mayne, not Maynard. Nixon, above n 67, 159.
[1186] Lentz & Chaires, above n 1124.
[1187] Ibid 73-74. They referred in particular to Reith (1956), above n 104, which included the principles in its Appendix; Charles Reith, *The Blind Eye of History, A Study of the origins of the present Police Era* (Faber, 1952) in which Reith, in chapter 10, provides a basis for each of the nine principles. That work does not identify a year of publication, but Reith's subsequent 1956 work provides 1952 as the year for that earlier work. Other works of significance by Reith are Charles Reith, *The Police Idea, Its History and Evolution in England in the Eighteenth Century and After* (Oxford, 1938) and Reith (1943) above n 190.
[1188] Reith (1952), above n 1187, 154. The writers that he referred to were Lee, above n 105 and Sir John Moylan, *Scotland Yard and the Metropolitan Police* (Putnam,1929).
[1189] The original 1829 version is included as **Appendix A** to this thesis.

In particular, a phrase often attributed to Peel[1190] and included as part of the seventh policing principle – 'the police are the public and the public are the police' is found nowhere in the General Instructions or any the other sources that Reith referred to.[1191] Neither is there any mention of the concept of 'policing by consent' in either the General Instructions or in any of Reith's nine Peel principles.

As to police independence, the fifth policing principle refers to police 'demonstrating absolute impartial service to the Law, in complete independence of policy'.[1192] This passage appears to indicate support for police independence from direction. However, Reith[1193] provided no source for this passage, and there is nothing in the General Instructions that supports it. Moreover, in the commentary that Reith provided in his 1952 book relating to this principle, he was solely concerned with 'the personal services rendered … by the police irrespective of all social and class differences'[1194] and that police are not 'the fence which the rich have erected round themselves to protect themselves from the poor'.[1195] He made no reference to the relationship between police and the government. Moreover, in other references Reith seems not a supporter of police independence. This can be seen in Reith's 1943 book[1196] in which discussed, in some detail, the early development of the London Met based on examination of primary documents. There, he was highly critical of Lord Melbourne,[1197] but that criticism did not relate to the active involvement of Lord Melbourne in directing the operations of the MET,[1198] which would be expected if Lord Melbourne's actions varied from Reith's assessment of the expectations and designs of Peel. Moreover, instead of a police force independent from the government, Reith favoured something very different:

> A Minister of Public Security with statutory power of control of police administration [who] would be able to exert it more openly, vigorously, and advantageously, and would be helped by the public which would accompany the exercise of his full responsibility to Parliament, instead of being hindered, as the Home Secretary is, at present, by the anomalous nature of his immense powers, and by the effects of a widely-

[1190] For example in the *Neesham Report* above n 363, Executive Summary, 7 the report quotes, without citation, Sir Robert Peel 'the founder of the Metropolitan Police' as stating that 'the Police are the Public and that the Public are the Police'. Similarly, see Nixon, above n 67, 68.
[1191] Although Lentz and Chaires considered that Reith provided no reference to the origin of this concept, (Lentz and Chaires above n 1124, 74) that view is not entirely correct as Reith clearly related that concept to what he referred to as 'kin-police' of Saxon times (Reith (1952), above n 1187, 163-4) ignoring the tortured and confusing history of the office of constable and its subordinate and degraded role discussed in Chapter 7.4.
[1192] Reith (1952), above n 1187, 160.
[1193] Reith was described by Emsley as adopting a Whig interpretation of police history to present the development of the New Police as essential to preserve society. In Emsley's view, Reith was extremely industrious in amassing material, 'yet few would probably dispute now that his conclusions were often naïve and uncritical'. Clive Emsley, *Policing and its Context, 1750-1870* (Macmillan, 1983) 4-5.
[1194] Reith (1952), above n 1187, 160.
[1195] Ibid 161.
[1196] Reith (1943), above n 190.
[1197] Reith described Lord Melbourne as 'a young man with the reputation of being a vapid and effete society lounger' as well as being 'sulky and irritable' and 'capable of being extremely unpleasant and deceitful'. Ibid 55 & 77.
[1198] Reith refers to instances of ministerial direct control with no criticism - Ibid 82, 140, 146 & 156.

> held but erroneous belief that local control of police Forces, as it exists at present, can be a check on abuse of power by central government.[1199]

The two authors that Reith relied on in the preparation of the Peel principles (Lee and Moylan)[1200] also provide no support for police independence. Lee made it clear that he considered that the General Instructions were prepared by Commissioner Mayne[1201] and made no observation regarding the government's relationship with the new force other than to observe, without any criticism, the instructions that Lord Melbourne provided to the Police Commissioners[1202] regarding the Coldbath Fields incident.[1203] Moylan, Receiver for the Metropolitan Police District,[1204] was more expansive on the government relationship with the police when he wrote in 1929. In a chapter entitled 'State Control of the Metropolitan Police' he wrote that the Metropolitan Police 'are the one exception to the principle of local control which characterises the police system of Great Britain' and that 'The Metropolitan police are under the control of the Home Secretary'.[1205] Like Lee, Moylan expressed no objection to this degree of control. He acknowledged that 'The Commissioner is … subject to the directions of the Secretary of State in the execution of all his duties',[1206] the only limitation being those of practicality, rather than lack of power.[1207]

Moylan also added information on Peel's attitude to police-government relationship which is remarkable by both its content and by its omission from police histories.

> It is on record that in July, 1829, Peel told the newly appointed Commissioners of Police that their office might develop into a 'sort of Ministry of Police,' by which he meant that it might become the headquarters of a national police force.[1208]

The phrase 'sort of Ministry of Police' is not one that would be regarded as applicable to a body intended to be independent of government.

It seems apparent therefore, whatever interpretations that the Reith composed Peel principles are open to, that neither the ostensible author, Peel; the actual author, Reith; nor the authors that Reith relied on, Lee and Moylan, supported in any way the concept of police independence from government control.

The largely unchallenged or undisputed acceptance of the apocryphal views of Peel has contributed to an incorrect understanding of his intention that has contributed to a belief that

[1199] Ibid 261.
[1200] Reith (1952), above n 1187, 154.
[1201] Lee, above n 105, 242.
[1202] Ibid 256-257 & 259.
[1203] Discussed in Chapter 5.1.
[1204] but whose work seems ignored by previous commentators on police-government relationship.
[1205] Moylan, above n 1188, 63.
[1206] Ibid 80.
[1207] Ibid 79.
[1208] Ibid. Unfortunately, Moylan does not state where this idea is on record.

the appropriate constitutional role for a police force in England, Wales and elsewhere, is to be independent of government. There is, however, no evidence that has been located that supports Sir Robert having such views and what evidence that is available points very much in the opposite direction.

8.3 – Conventions and Practices - Misunderstandings

Another issue that needs recognition regarding any police independence convention is that discussions and commentary regarding the police government relationship often contains observations and views regarding conventions that are in error or unduly simplistic.

These errors go beyond the possible misinterpretation of Marshall's 'revisionism' referred to earlier.[1209] Of more significance are a number of references to conventions in Dr Pitman's 1998 influential thesis into the police – government relationship. First is his belief that conventions are 'common law conventions',[1210] seemingly to fail to appreciate that a convention is not a law, enforceable by the courts, but is flexible, non legal, but binding, constitutional practice. A related misunderstanding was made by Pitman and others who propose legislation to 'more accurately define … the conventions'[1211] without recognising the impossibility of that recommendation – in that defining a convention in a statute will have the effect of not merely defining a convention, but will also codify the convention. That is, it will convert the convention into a law. This has two consequences. First, that the flexibility and capacity for evolutionary development that conventions bring with them will be lost when the content of the codified conventions becomes fixed in legislative terminology. And secondly, the codified conventions, as laws, will become enforceable by courts unless some form of non-justiciability provision, as was included in the *Constitution Alteration (Establishment of Republic) 1999* (Cth),[1212] is attempted. Both of those consequences might be capable of being justified, but to recommend codification of conventions without recognising and considering the consequences indicates a superficial and unsatisfactory analysis.

[1209] See Chapter 8.2. And others appear of little significance, such as Bayley and Stenning's reference to conventions being 'designed' to achieve certain results, failing to appreciate that most, if not all conventions arise through an evolutionary process driven by political factors rather than a design process. (Bayley and Stenning ,above n 20, 63). However, considering that conventions arise from a design process allows the implication that any deviation from that non-existent design is breach of the convention, which in turn leads the commentator to misunderstand the operation of the conventions as well as actions which are seen to be at odds with that 'design'.

[1210] Pitman (1998), above n 76, 3.

[1211] Ibid 239. The Tasmanian Parliamentary Committee seems to have operated on a similar view in that it recommended legislation to 'properly reflect the convention that the Executive cannot direct Tasmania Police on matters of an operational nature'. *Tasmania Report,* above n 599, 90. Codification was also recommended by the Wood Royal Commission without considering the consequences of such codification. *Wood Report,* above n 125, 237.

[1212] *Constitution Alteration (Establishment of Republic) 1999* (Cth) Sch 3 cl 8 provided that:

> The enactment of the Constitution Alteration (Establishment of Republic) 1999 does not make justiciable the exercise by the President of a reserve power referred to in section 59 of this Constitution if the exercise by the Governor-General of that power was not justiciable.

Another concern with Pitman's understanding of conventions is that he conducted his examination of the constitutional status of Australian police forces in light of what he regarded[1213] as the 'authoritative English conventions'[1214] that have been 'transported into the Australian Westminster system'.[1215] This indicates that he believed that a convention developed in England automatically applies in its former colonies; failing to recognise that a convention only operates in a jurisdiction if it accords with the constitutional and statutory framework in that jurisdiction and is accepted in that jurisdiction. Precedents from other jurisdictions may be influential, but they are neither definitive nor 'authoritative'. Accordingly, Pitman's analysis, in so far as it purports to assess the constitutional status of Australian police is flawed by its limited understanding of the concept of constitutional conventions.[1216]

Another confused understanding on conventions was made in the Victorian reports by Rush and Johnson which both refer to a convention as being a 'rule of thumb'.[1217] Rush relies[1218] on Johnson for this expression and Johnson provides no source. Neither define what they mean by this phrase, but if they intended the Oxford dictionary meaning ('a broadly accurate guide or practice, based on practice rather than theory')[1219] this indicates little understanding by either of the nature of conventions, the role they play or their importance to operation of Westminster based constitutions. To regard conventions as a 'rule of thumb' is to regard such fundamental constitutional concepts in Westminster based constitutions as ministerial responsibility, the reserve powers or the office of Cabinet as nothing more than a means of approximating what a rule is or should be. Those concepts are, however, much more than that, as are all conventions that make Westminster based constitutions operate. And it is of some concern that the reform of the police-government in Victoria, which replaced conventional independence with legal independence and by doing so significantly minimised ministerial control over a publicly funded quasi-military force, being based on such simplistic views of the State's constitutional arrangements.[1220]

[1213] adopting the words Plehwe and Wettenhall, although without citation - Plehwe & Wettenhall, above n 56, 76.
[1214] Pitman (1998), above n 76, 60.
[1215] Ibid 51.
[1216] Whether Pitman would fall into the category that Forsey describes as a 'plausible constitutional quacks, or authors rich in learning but poor in judgement' whose efforts serve to further 'muddy the waters' rather than clear them, I will leave others to decide –Forsey (1984), above n 1130, 37.
[1217] *Johnson Report,* above n 42, 3 & 37; *Rush Report,* above n 38, 42.
[1218] *Rush Report,* above n 38, 42.
[1219] *Oxford Dictionary,* above n 182, Loc 611490 (Kindle edition).
[1220] The Rush inquiry, further demonstrated its lack of appreciation of the significance and effectiveness of conventions in Westminster based constitutions when it seemed to write off the concept with the sweeping view that 'over-reliance on convention can create confusion and may obscure certainty and transparency'. Ibid 42.

8.4 – Conventions and Practices – Operational Independence

Despite those errors in the understanding of conventions, it is clear that there is a widely accepted view in Australia and comparable jurisdictions including Canada and the UK, that police are or should be 'operationally independent' of government which has conventional status. This has given police and others a belief of what Bayley and Stenning refer to as the 'operational prerogative'[1221] of the police and that there is such a thing as 'the legal theory of the operational independence of the Commissioner'.[1222]

8.4.1 – Operational Independence – Parliamentary and Inquiry Views

This understanding can be seen from academic literature,[1223] inquiry reports[1224] and from the Hansard record in the various Australian jurisdictions, regardless of the statutory model in force. However, that convention or practice may well be of relatively recent derivation. Plehwe, in his perceptive 1973 analysis, observed that 'One cannot speak of a constitutional convention that establishes and defines the independence of the Commissioner, since the major parties exhibit considerable differences in their attitudes on the subject'.[1225]

Possibly the most direct recent parliamentary view of this understanding was expressed in 2016 by the South Australian Police Minister, Peter Malinauskas.[1226] In answer to a parliamentary question he said:

> I regard that all matters involving police operations are a matter for the Police Commissioner. There is a longstanding tradition within government across the Westminster system that governments should not be seeking to interfere or impose upon Police Commissioners, or those leading the South Australian police force, how to do their job.
>
> It is reasonable for the South Australian public to take confidence in the fact that it is for the government to make sure that the South Australian police force is adequately resourced to be able to meet reasonable expectations, but I do believe passionately that the independence of the police force to be able to conduct themselves operationally as they see fit is something that's worth preserving.[1227]

[1221] Bayley and Stenning, above n 20, 4.
[1222] Dupont, above n 82, 22; Bayley and Stenning, above n 20, 56.
[1223] see for example Pitman (1998), above n 76, 44; Pitman (2004), above n 76,116; Fleming, above n 83, 67-68. Lister, above n 75; Hewitt, above n 73, 321; Gary Ellis, 'The Police Executive and Governance: Adapting Police Leadership to an Increase in Oversight and Accountability in Police Operations' (2014) 2 *Salus Journal* 2.
[1224] See for example the *Johnson Report,* above n 42, 4; the *Rush Report,* above n 38, 42; the *Wood Report,* above n 125, 237; The *Tasmanian Report,* above n 43, 90. *Home Affairs Report,* above n 367, 17; Her Majesty's Inspectorate for Constabulary for Scotland, *Governance and Accountability of Policing in Scotland, Abridged Report* (2011) ('*The HMICS Report*') 9; *Patten Report,* above n 127, 32-33; *Ipperwash Report,* above n 51, 327.
[1225] Plehwe(1973), above n 56, 279.
[1226] Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety. Minister Malinauskas, in making this statement seems blissfully unaware of the legislative intention expressed when that State first adopted a Cowper provision in 1972 and when it was reenacted in 1998 as discussed in Chapters 3.2.2 and 5.2.2.
[1227] South Australia, *Parliamentary Debates,* Legislative Council*,* 24 February 2016.

Police independence was also forcefully expressed in 2013 by Victoria's then shadow Minister for Police, Jane Garrett, with the doubtful but definitive view that:

> the operational independence of the Chief Commissioner is one of the absolute cornerstones of a functioning and healthy democracy that protects its citizens. It is a key pillar of a justice system that protects the rights of all.[1228]

Similar views, if less dramatically expressed, are found in the Hansard of other Australian parliaments over recent years in both Cowper[1229] and non Cowper jurisdictions (where there is either no power[1230] or only a limited power of government to direct police).[1231]

Inquiry reports have also recognised police independence as a convention. An example is Bright's 1970 South Australian report in which he considered that a convention had been 'firmly established in this State now. It provides that in matters of ordinary law enforcement the Minister will seldom, if ever, advise the Commissioner, although he may consult him'.[1232]

Bright's view seems qualified by the words – 'ordinary law enforcement', the scope of which he did not define. Moreover he used the word 'seldom' indicating that he considered that ministerial direction could occur in some circumstances – which he later explained as meaning where 'a political element' is present – another concept which he did not further explain.[1233]

While operational independence seems widely accepted, its meaning, both in Australia and other countries, is also far less clear. Indeed, as HMICS[1234] bluntly observed:

[1228] Victoria, *Parliamentary Debates,* Legislative Assembly, 27 November 2013.

[1229] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 2013 (Barry O'Farrell) and New South Wales, *Parliamentary Debates*, Legislative Council, 20 August 2013, (Michael Gallacher), who said 'One thing that one learns about the Commissioner of Police in this State is that no-one tells him what to do. Andrew Scipione – who the Opposition chose as Commissioner of Police – makes up his own mind on what he will do as Commissioner of Police.' Tasmania, Parliamentary Debates, *Legislative Assembly*, 19 August 2008 (Jim Cox).

[1230] That is, Western Australia. In 2012 the then Western Australian Premier, Colin Barnett advised the Western Australian Legislative Assembly that 'The police commissioner has independence on operational matters, which is obviously the correct situation'. Western Australian, *Parliamentary Debates,* Legislative Assembly, 17 October 2012.

[1231] In Victoria, in addition to the views of Jane Garrett quoted above, n 1228, see the views of the current Victorian Premier, Daniel Andrews (Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016).
Similar views were expressed in relation to the AFP by both sides of the federal parliament. Senator Linda Reynolds advised the Senate on 29 March 2017 that:

> The AFP does act independently of this government. They determine what is within their jurisdiction to investigate and carry out their duties according to the law of this land. When those opposite suggest otherwise, despite their protestations that they are not, there is simply no conclusion any of us in this place can reach, considering the comments of those opposite and the nature of the question, other than that they are querying the integrity of the Australian Federal Police. There is no basis to their claim that the government in any way directed or attempted to influence the AFP on their investigation into this matter. They do act independently.(Commonwealth of Australia, *Parliamentary Debates, Senate,* 29 March 2017.)

And the current Commonwealth Shadow Attorney, Mark Dreyfus QC has also been quoted (by Senator Reynolds) as expressing similar views:

> at all times, we need to make sure that the Australian Federal Police and all our agencies are absolutely independent of political interference.

[1232] *Bright Report,* above n 32, 81.

[1233] Bright also may have limited the scope of what he was discussing by the use of 'advise', not 'instruct' or 'direct', although later in that paragraph he used the word 'direction' indicating that oddly he may not have seen any distinction between 'advice' and 'direction'.

[1234] Her Majesty's Inspectorate of Constabulary for Scotland.

> Issue is not taken with the notion of their operational discretion *per se*. Concern centres on the absence of consensus around exactly it means, how far it extends, and what effect such lack of clarity has on others' ability to hold them democratically (or otherwise) to account.[1235]

This uncertainty arises from two sources – what 'operational' means, and the dichotomy between 'operational' and 'policy'.

8.4.2 – Operational Independence – Basis

The basis for operational independence is derived from Lord Denning's *dicta* in *Blackburn,*[1236] who considered police independent in all police law enforcement activities.[1237] Although Lord Denning was discussing what he considered as the legal limitations on ministerial directions over the Commissioner of the MET, his views, as Bayley and Stenning observed,[1238] have been 'routinely referred to in government reports and white papers, reports of commissions of inquiry,[1239] memoirs of police chiefs,[1240] and academic treatises[1241] across the Commonwealth as encapsulating the proper relationship between police and government'.

Denning gave police independence considerable scope, but it is a scope which some have further exaggerated. Stenning interpreted Denning as considering police 'immune from political direction *and* from political accountability'.[1242] Stenning seems to have reached this view from Denning's comment that a chief constable is 'answerable to the law and to the law alone'.[1243] However, to interpret Denning in this way ignores the context in which this *dicta* was delivered and the remaining words that Lord Denning used. Lord Denning's discussion was in the context of the decision making independence of chief constables and all of his other comments in his often quoted *dicta* were related to the making of such decisions, not to whether a chief constable was unaccountable in any way thereafter. In that regard, it should be recalled that the *Blackburn* dispute related to whether a writ of mandamus should be issued to compel the Police Commissioner to enforce the law against gaming houses,[1244] not the extent of the Commissioner's accountability for his actions or inactions. And the salient words used by Lord Denning in his famous (or infamous) *dicta*, aside from the closing

[1235] *HMICS Report,* above n 1224, 9.
[1236] [1968] 2 QB 118, 135. This *dicta* is discussed in Chapter 5.1.1 above.
[1237] Ibid 137. 'The responsibility for law enforcement lies on him'.
[1238] Bayley and Stenning, above n 20, 51-52.
[1239] See the *Lusher Report,* above n 41, 686-689, 692, 700 & 704-707 and the *Johnson Report,* above n 42, 35. .
[1240] Such as the biographies of Robert Mark and Ian Blair. Mark (1978), above n 260, 283; Blair (2009), above n 65, 46-7.
[1241] Such as Pitman (1998) above n 76, 72-4; Jefferson and Grimshaw, above n 71, 22-23; Bronitt & Stenning, above n 919, 322; Dupont, above n 82, 17; Gillance & Khan, above n 72, 61-2; Manison, above n 78, 497; Roach (2011) 122; Finnane (1994), above n 117, 41-2 and Milte, above n 8, 206.
[1242] Stenning (2011), above n 60, 253 (emphasis original). And see Bayley and Stenning, above n 20, 58 & 161.
[1243] Ibid.
[1244] [1968] 2 QB 118.

words (that Stenning relied on), seem limited to the issue that Lord Denning was considering:

> He is not subject to the orders of the Secretary of State….
>
> He must take steps to post his men ….
>
> He must decide whether or not suspected persons are to be prosecuted….
>
> he is not the servant of anyone, save the law itself.
>
> No Minister of the Crown can tell his that he must, or must not ….
>
> Nor can any police authority tell him so.
>
> The responsibility for law enforcement lies on him.[1245]

Each of those statements or phrases relate to what Lord Denning was discussing: the immunity of chief constables from direction – and had nothing whatever to do with the accountability for police actions. Accordingly, the phrase 'answerable to the law and to the law alone' should be read in that light, and not given a meaning that Lord Denning seemed not to have considered or even speculated about.[1246]

Another, but different, example of a broad understanding of police independence was expressed by the former Prime Minister of Canada, Pierre Trudeau in 1977.[1247] Trudeau expressed the view that 'the policy of this Government, and I believe the previous governments in this country, has been that they … should be kept in ignorance of *the day-to day operations of the police force*'.[1248]

This 'ignorance is preferable' view, is, as Roach observed, 'obviously influenced' by *Blackburn*; but it is also another unjustified inflation of Denning. It goes 'beyond' those views, as nothing Lord Denning said referred to the disentitlement of government from police information.[1249]

[1245] Ibid 135-136.

[1246] Despite the unsound basis of this inflated view, according to Bayley and Stenning, it 'has persisted in four or our six countries (Australia, Britain, Canada, and New Zealand) to this day'. (Bayley and Stenning, above n 20, 161). The accuracy of this observation is beyond the scope of this thesis to examine, but it serves to demonstrate the impact that Lord Denning's poorly researched views have had on what is understood by the scope of police independence in Australia and related countries.

[1247] Roach felt that the position adopted by Trudeau requires particular attention as Trudeau was Prime Minster when the statement was made, had been Minister of Justice and had been an academic, although Roach somewhat inflates his academic credentials when he described him as a former constitutional law professor. Roach (2007), above n 59, 32. Trudeau had been, according to the Encyclopedia Britannica, an 'assistant professor of law at the University of Montreal from 1961 to 1965'. https://www.britannica.com/biography/Pierre-Elliott-Trudeau.

[1248] quoted in Roach (2007), above n 59, 33 (emphasis original).

[1249] Ibid 34. Roach also points out that the McDonald Commission and Professor Edwards who advised that Commission took issue with Prime Minister Trudeau's views, pointing out that 'undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much a fault as undue interference in the work of police'. John Edwards, *Ministerial Responsibility for National Security* (1980) 97.

The scope of the police independence has also been given wide interpretation by others. According to Bayley and Stenning, a police authority in England 'acceded to a request of the chief constable for additional money to pursue a criminal investigation' which 'treated it as an operational matter'.[1250] And although prior to *Blackburn*, an incident from Canada is also relevant as revealing the development of broad claims of police independence in the second half of the 20th century. In 1959, Commissioner Nicholson of the RCMP resigned when the Minister 'refused to follow his recommendation' regarding the deployment of fifty officers to Newfoundland, a decision which the Minister was statutorily empowered to make. Commissioner Nicholson, according to Roach, resigned in protest as he felt the matter was a 'matter of law enforcement' that should be 'isolated and dealt with on its own merits'.[1251]

One means of assessing the Australian understood meaning of police independence, is to examine election promises regarding police made by political parties. Whether those election promises are fulfilled or not, they demonstrate an understanding of the extent to which politicians and parties consider that government can exercise its powers if and when the promising party gets into power.

A review of election policies in Australian jurisdictions since 2000 examined electoral pledges[1252] and how they relate to police independence. From the policies locates it appears that electoral policies have avoided overt direction on police operational issues and tended to be confined to resourcing issues and to working with, rather than directing police. There was, however, a contrary common theme regarding political promises on police deployment.

This can be seen in the following election pledges, each of which relates to police operational activities:

- Tasmania:
  - the 2014 Liberals pledge to establish a Public Order Response Team and a Serious and Organised Crime Unit;[1253]
  - the 2014 Labor promise to institute a 'Adopt-a-Cop' program, under which 'Every school will receive six two-hour visits a year from their local police, with every Tasmanian primary school student having the opportunity to talk to their 'adopted cop';[1254]
- Queensland

[1250] Bayley and Stenning, above n 20, 122.
[1251] Quoted in Roach (2007), above n59, 30.
[1252] The survey was conducted by locating electoral policies from various locations on the internet and covered each state and the Northern Territory and covered elections between 2000 and 2016 and examined the election policies of the Liberal, National, Labor and Green Parties where they could be located. The election policies examined are listed in the **bibliography.**
[1253] Tasmanian Liberals, *Rebuilding the Police Service* (2014).
[1254] Tasmanian Labor, *Keeping Tasmanians Safe* (February 2104) 3.

- The National-Liberal 2001 promise to ensure 'commissioned officers of Inspector rank spend a portion of each year on operational duties' and creating a rapid response strategy, including Mobile Patrols';[1255]
- The National's 2006 promise to 'Ensure the Queensland Police Services' counter terrorism police intelligence and response capacity is significantly expanded';[1256]

- NSW
  - The 2003 Liberal-National promise to:
    - roster locally based and locally led front line Police to police stations downgraded by Labor across the State;
    - restoring designated beat policing rosters for local police;[1257]
- WA
  - The 2001 ALP pledge to 'establish five new "Flying Squads"', one of which is to be located in Bunbury.[1258]
  - The 2008 Liberal promise to re-establish the Rural Crime Squad;[1259]
  - The 2013 Liberal pledge that 'police will be deployed in targeted roles that will deliver a more responsive, effective, visible and engaged police service';[1260]
  - The 2017 ALP pledge to keep 3 rural police stations open 24 hrs a day;[1261]
- Victoria
  - The 2002 Liberal promise to 'expand the role of the Victorian Police Force Response Unit to deal with incidents or situations in known crime "hot spots"'.[1262]
  - The 2002 National's policy to:
    - Significantly increase established strengths of police numbers in country centres;
    - Upgrade stations to 24 hour police where appropriate;
    - Maintain all single officer police stations;
    - Reinstate regional Stock Investigations Units;
    - Expand anti drugs activities in country areas;[1263]
  - The 2006 ALP pledge that 'at least 50 of the additional police are allocated[1264] to an operational pool'.
  - The 2006 Liberal pledge to:

[1255] Dr David Watson MP, *National-Liberal Coalition Policy, Your Community – Your Police* (2001) 3.
[1256] The Nationals *Policy Platform* (July 2006) 42.
[1257] NSW Liberal and Nationals, *A Fresh Approach* (2003) 5.
[1258] WA ALP, *More Police, Better Pollicising in Regional WA (*2001) 1.
[1259] WA Liberals, *Liberal Plan for Police* (2008) 3.
[1260] WA Liberal, *The Liberals' Police Enhanced Response Program* (2013) 3.
[1261] ABC News, *WA election 2017: Labor promises more 24/7 police stations, Minister slams plan* (2 Jan 2017) http://www.abc.net.au/news/2017-01-02/wa-labor-promises-more-24-hour-police-stations/8157746.
[1262] Victorian Liberals, *The Liberal Plan for safer communities* (2002) 7.
[1263] Victorian National, *The Vic Nats Plan for Police and Emergency Services* (2002) 4.
[1264] Victorian ALP, *Police for the 2006 Victorian Election, Community Safety* (2006) 8.

- Re-establish the police in school's program; and
- Introduce 'Cops in Shops' program;[1265]

- The 2010 National's pledge for a safer train network with 'officers at every station'.[1266]
- The 2010 Green's pledge 'ensuring all Victorian Police stations are fully staffed with well-trained and appropriately selected public-contact Police';[1267]
- The 2014 Greens policy to:
  - Prohibit the use of electroshock weapons and Tasers
  - Prohibit racial profiling and the arbitrary use of racial descriptors by police.[1268]

What is notable is that these promises are from all the major political parties and, aside from the 2014 Victorian Green's policy, each relates to police deployment. This survey commenced in the year 2000 and the number and extent of such deployment pledges seems to have reduced over time. This might be because the direction regime in the particular jurisdiction has altered, as in Victoria in 2013, making such pledges not possible to implement without legislation.[1269] However, this does not explain the various WA election pledges where there is, and never has been, any statutory power to implement such promises; or the 2014 Tasmanian pledges where the Tasmanian government's position regarding its Cowper provision (unlike other States) is that it does not allow directions on operational matters.[1270]

Whatever the basis for these policy proposals is, the number and consistency of these election pledges seems to indicate a common view: that deployment issues are matters that governments believe they can influence and direct.[1271]

The meaning of operational independence has also been raised in some inquiry reports and academic discussions, although rarely to any great length or clarity.[1272] Royal Commissioner Wood included a short discussion of what 'operation' covered in his 1997 report. He gave

[1265] These pledges seem somewhat inconsistent with another Liberal Party pledge from that year to 'establish a clear separation of powers between Victorian Police and Government'. Liberal Victoria*, A Liberal Government Plan for Victoria Police: Our Streets, Our Homes, Our Force* (2006) 10, 13.
[1266] Victorian Nationals, *Policy, 1600 Additional Police to Make our Streets Safe Again* (6 April 2010) 3,
[1267] Australian Greens Victoria, *Justice Policy* (2010) 2.
[1268] Australian Greens Victoria, *Justice Policy* (2014) 2.
[1269] The Green's 2014 pledge presumably intended that legislation would be used to implement the pledge, although this was not made clear by the policy.
[1270] See the discussion in Chapter 6.
[1271] It should be pointed out that the WA Liberal Party may take a different view as has been reported, during the recent election that they considered that 'decision to allocate resources, warning it could lead to political interference. "It is fraught with danger for politicians to start directing resources like this," Corrective Services Minister Joe Francis said'. ABC News, WA election, above n 1259.
[1272] Most other commentators refrain from defining their views of the scope of 'operational independence' with any detail. See for example the Rush Report which went no further in defining operational independence than being in relation to 'operational matters and decisions concerning individuals employees'. *Rush Report,* above n 38, 44.

the concept a broad interpretation, and one that seems consistent with its natural meaning. He considered that, in relation to:

- the particular location of police officers;
- the opening or closing of a police station;
- the creation of a Task Force; and
- the targeting of a particular category of conduct and the means by which it should be achieved -

'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'.[1273]

The first two items in Wood's list, however, are inconsistent with the electoral policy survey which indicates that deployment issues are regarded by political parties as matters which governments can properly control.

Despite the broad meaning given to the natural meaning of the concept of 'operational' given by Wood, practice also indicates a more narrow scope of independence. Pitman, in his 1998 thesis discussed the understanding of the police independence convention and interviewed a number of then current or former Police Commissioners and Ministers from both New South Wales and Queensland.

Pitman observed that 'Although "operational independence" was acknowledged, the implications for holistic accountability resulted in greater control or influence into the operational setting'[1274] and that 'politicisation of the police through ministerial control was a major issue'.[1275] He also found 'The reality regarding political interference in the decision-making process did occur on operational issues and from both political ideologies'[1276] and that while police Ministers 'believed in operational independence … Commissioner interviews supports the notion that political involvement in operational issues was always present'.[1277] His interviews with Police Commissioners also revealed their view that they were 'more than often subject to "ministerial control" … particularly on policy and administrative matters'.[1278] As a result, he considered that '"operational independence" is a myth'.[1279]

[1273] *Wood Report,* above n 125, 237.
[1274] Pitman (1998), above n 76, 153.
[1275] Ibid 154.
[1276] Ibid 191.
[1277] Ibid 193.
[1278] Ibid 230.
[1279] Ibid 230.

Similar uncertainty has been seen in other studies. Fleming in 2004 wrote of her 'brief survey' of relations between Police Ministers and Commissioners which, although 'not exhaustive', displayed regular evidence of 'fraught relations' which included uncertainty as to the scope of the concept of 'operational'.[1280] One instance cited by Fleming highlighted this uncertainty concerned a decision made in 1997 by the then NSW Police Commissioner, Peter Ryan, who announced the creation of 'an elite anti-terrorism squad', a decision which the Wood understanding and the natural meaning of the words would seem clearly 'operational'. However, the Police Minister (Paul Whelan) had a different view as seen by his rebuking of Ryan, warning him that 'he should limit himself to operational issues'.[1281]

Broad uncertainty has also been seen in other jurisdictions. For example, in 2010 Her Majesty's Inspector of Constabulary (HMIC) in the United Kingdom reported.

> Whilst the concept of operational independence has been widely accepted, the definition of it has remained so broad it provides limited practical guidance. The concept is, by its nature, fluid and context driven. As a result it is sometimes arguable where the governance responsibilities of police authorities end and the operational responsibilities of the chief constable begin.[1282]

8.4.3 – Operational Independence – Operations-Policy Distinction

To gain clarity, an additional aspect - an area of supposed exclusivity for government – has also been added to the mix. Such an exclusive area supposedly allows certainty of where the responsibilities of government end and the operational responsibilities of the police begin. The additional element is that 'policy' is now considered reserved for government, while 'operations' is a matter for police.

This division was referred to in the 1997 Wood Report which referred to 'a recognised convention that the Minister is concerned with matters of 'policy' and not with 'operational' matters'.[1283] And the 2001 Victorian Johnson Report accepted the 'widely accepted' convention, as being that 'the Government is responsible for policy and Victoria Police for policing operations or enforcement',[1284] a view that Rush later accepted and adopted in 2011.[1285] However, neither attempted to explain the meaning of the two terms and how they work together.

[1280] Fleming, above n 83, 67.
[1281] Ibid.
[1282] United Kingdom, Her Majesty's Inspector of Constabulary, *Police Governance in Austerity: HMIC Thematic Report into the Effectiveness of Police Governance* (2010) (*HMIC Report*) 17.
[1283] *Wood Report,* above n 125, 237.
[1284] *Johnson Report,* above n 42, 4 & 37
[1285] *Rush Report,* above n 38, 42. Tasmanian 2009 Parliamentary Committee Report also seems to have recognised the distinction. *Tasmanian Report,* above n 43, 90.

It should be observed that this distinction is not related to the 'policy' role of government discussed by Home Secretaries Matthews and Harcourt in 1888. As pointed out earlier in Chapter 5.1.4, Matthews and Harcourt observed and later in 1928, Sir Edward Troup acknowledged, that 'for the policy of the police … the Secretary of State must be responsible'. However, that understanding, as that Chapter indicates, was not intended to exclude government from operational issues. In any case, the recent discussions of a policy/operational division have not referred to the Matthews, Harcourt, Troup observations, with the result that whatever was intended in the 19th and early 20th centuries is of no relevance to the contemporary understanding of the division between the two concepts.

The difficulty with the contemporary policy/operations dichotomy is that it reflects a further instalment of the confused thinking that has given rise to the doctrine of police independence. And that confused thinking is apparent when it is appreciated that the distinction is based on a flawed premise and seems to lead to a result diametrically opposed to its supposed objective.

The flawed premise relates to assumption which is the basis for the distinction: that there is or should be separate areas inviolable for both the Minister and the Police Commissioner. By doing so, it treats the issue to be resolved as if it was a territorial dispute between parties of the same status. Indeed, in some commentary, the issue is discussed in terms of 'border' or 'boundary' disputes,[1286] or refers to 'sacrosanct' areas for Police Commissioners. This assumes a significant alteration to the constitutional status of Police Commissioners, placing them as constitutionally equal with Ministers.

However, the statutory model established in 1829 and followed in all Australian jurisdictions,[1287] is that a Police Commissioner is a subordinate officer responsible to the Minister. There may be certain tasks over which a Minister has no power to direct; but this does not mean that the Minister is not responsible to Parliament and the electorate for all the operational services that the police provide, or that the Minister is not required to take whatever remedial action, within the powers available to the Minister, where it is considered that the services for which the Minister is responsible have not been appropriately delivered.[1288] However, by seeking separate areas of responsibility, the distinction will also, if successful, be identifying areas in relation to which accountability to Parliament will diminish or disappear. Such a result is not desirable and is not one that should be sought without

[1286] For example, Bayley and Stenning, above n 20, 53; Fleming, above n 83, 68 & 70; Sossin, above n 125, 97.
[1287] including Western Australia where there is no statutory direction power.
[1288] This emphasis on border disputes between Police Ministers and Police Commissioners reflects a wider issue in most considerations of the police-government relationship. That is, the minimal or lack of emphasis given to the doctrine of Ministerial responsibility - which is examined in Chapter 10.

considering its constitutional consequences, an objective that seems untouched in any Australian discussions of police-government relationship.[1289]

The second and more important defect with the policy/operations distinction is that its results are even more confusing than reliance on the concept of operations alone; or, if it provides any clarity, it seems to be clarity that empowers, rather than limits executive government control.

While the distinction appears, at least superficially, to assist in defining the respective roles for government and police, it will not achieve that end unless there is some certainty about the scope of at least one of the terms. Although the literature is somewhat sparse in resolving this distinction, one way of dealing with it was recently suggested by Bayley and Stenning who consider that the distinction 'between *ad hoc* and general political directiveness … is implicit in the separation of policy from operational directives'.

> Policy directives are general guidelines for police activity; operational directives apply to actions police should take in specific situations'.[1290]

Such a distinction would ensure that a Police Minister cannot direct the police in its core operational tasks (such as the powers to arrest, charge, prosecute, investigate and use of weapons). Similarly, looking at the four items referred to by Wood mentioned earlier, each of those would still be 'operational' as they each refer to specific situations. This distinction, however, is less clear when, for example, a Minister directs that all police stations or all police stations in one region are to be open 24 hours a day 365 days a year and are to be fully staffed. Does such a direction relate to 'specific situations' or is it a 'general guideline'?[1291]

However, other observations made by Bayley and Stenning indicates that the *ad hoc*/general means of distinguishing between policy and operational has not been applied in practice. In their study of the police government relationship, Bayley and Stenning found that in all of the six countries examined[1292] 'there is a consensus that the ultimate authority to make decisions should be allocated exclusively to politicians at the extreme policy end of the spectrum and to the police at the extreme operational end of the spectrum'.[1293] However

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[1289] In 1981 the Canadian McDonald Report however touched on this issue when it identified an additional difficulty with the operations/policy distinction: its impact on governance. He considered that:

> a distinction between policy and operations leads to insurmountable difficulties in application, and even worse, it results in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview. *McDonald Report,* above n 48, 868.

[1290] Bayley and Stenning, above n 20, 147.

[1291] It is not clear why Bayley and Stenning, have used the word 'guideline to refer to a ministerial direction which, by its very nature is something to be complied with, not merely a non-compulsory guide.

[1292] UK, USA, Australia, Canada, New Zealand and India.

[1293] Bayley and Stenning, above n 20, 202.

they went on to add that 'Between these two "sacrosanct" extremes, … lies a wide range of governance decisions with respect to which a bright line between "policy" and "operations" cannot be drawn'.[1294] It is, however, difficult to see how such a line would not be present if the *ad hoc*/general distinction operated. While there may be some instances when the issue of the generality or the specificity of the direction may be ambiguous, it is suggested that in most instances it would not be difficult to determine whether the matter involved had specific consequences to determine whether it was 'operational'.

It appears that Bayley and Stenning and their interviewees were not distinguishing between 'policy' and 'operations' applying the *ad hoc*/general distinction, but used less clear distinguishing factors related to the nature of the matter directed. Did it concern 'policy' or was it 'operations'? Such a distinction seems a means to cloud rather that clarify the distinction in that, as Bayley and Stenning elsewhere observed: 'decisions about policy can so profoundly affect operations'.[1295] Without clear dividing criteria, such as the *ad hoc*/general distinction, the policy/operational dichotomy cannot assist in determining separate roles for government and police as those terms are related and are not contradictory.

It is not possible to, as Roach observed, 'to draw a bright line between policy and operational matters' as 'operations … can often raise important policy issues'.[1296] As Kemp[1297] observed when considering the policy/operations separation in a non-police context: 'All policy work has an element of execution and all executive work has an element of policy'.[1298] And that is because policy and operations are linked. They are related and overlapping terms: one relates to activity and the second relates to rationale for such activity. And, as Bayley and Stenning observed, 'if there were not such links between policy and operations, policies would be useless'.[1299]

Policy-operations links and effects can be either direct or indirect. Direct links can be seen, from a policy specifying, for example, when and where particular police tactics or weapons are to be used, or even the priority to be attached to targeting of particular categories of conduct. Indirect effect on operations can arise from policy directions concerning such matters as budget, resources or the provision of police facilities. As can be seen, operational decisions are not made in a contextual policy vacuum and it seems that only the most banal are not relevant to both policy and operations.

[1294] Ibid.
[1295] Ibid 193. Also see ibid 202. Roach similarly observed that there is 'much policy in policing'. Roach (2007), above n 59, 65.
[1296] Roach (2007), above n 59, 60.
[1297] Between 1988 and 1992 Peter Kemp was Project Manager to oversee the establishment of Next Steps agencies in the United Kingdom, agencies with the purpose of carrying out the functions of government. Woodhouse (1994), above n 1, 219.
[1298] Quoted in Ibid 249.
[1299] Bayley and Stenning, above n 20, 202.

As a result of this inherent inter-relationship, the primary effect of the operations/policy dichotomy is not to clarify the meaning of the widely accepted operational independence concept, but to further obscure the relationship. The secondary effect, however, is more significant. That is, if policy decisions are the reserve of government and if policy decisions with operational consequences are, or can be consistent with the 'convention', then the policy/operational dichotomy has the effect of undermining police independence. Either all policy decisions including those with operational consequences are conventional or there is no means of determining which are conventional and those which are not. Either way, the artificial policy/operations distinction, without more, seems not only to confuse the relationship, but also to empower government in operational matters.

Sossin, like Roach, also rejected the distinction in his advice to the Ipperwash Commission, considering that the dichotomy 'obscures more than it reveals about the executive-police relationship'.[1300] He considered suggestions that 'government's interests may be neatly packaged into a "policy" compartment and not spill over into an "operational" compartment' as a 'dubious claim which appears to resonate with few people who have even a passing acquaintance with policing or government.[1301]

Nonetheless, he acknowledged that the distinction is the accepted understanding, but for pragmatic reasons. That is it is 'maintained not because it accords with a readily identifiable boundary, but because we have yet to discover any other way of distinguishing legitimate government interests from illegitimate ones.'[1302]

Of the various considerations of the police-government relationship, the 2007 Ontario Ipperwash Inquiry seems the only one which has tried to give practical sense to the policy-operational distinction by attempting to explain 'what type of decisions would likely fall into' the two categories. The Commissioner[1303] spent two pages of his report describing various criteria but conceded they were not 'definitive or exhaustive benchmarks for the demarcation between policy and operations'. Details of these non-exhaustive criteria are not included here as they are subject to so many undefined vagaries that the Commissioner's distinguishing criteria provides no guidance as to what is conventional and what is not.[1304] Moreover the Commissioner also included the view that 'Governments will also always have

[1300] Ibid.
[1301] Ibid 103-104.
[1302] Sossin, above n 125, 99.
[1303] Sidney B Linden.
[1304] The vagaries include 'Depending on the circumstances', 'in most circumstances', 'In some circumstances', when 'normal police "operational" decision making processes or structures are deemed to be inappropriate or insufficient to address an issue'. *Ipperwash Report,* above n 51, 327-328.

the right to make policy decisions within areas of their legal authority'[1305] without seeming to recognise the operational consequences of such a governmental 'right'.

The Ipperwash Commissioner consideration was, therefore, unable to provide clarity to the distinction which, he accepted has 'conceptual and practical difficulties'[1306] and inherent vagaries and uncertainties. He expressly acknowledged that the vague criteria that he had identified 'should not be considered definitive or exhaustive' and that 'policy and operation will always be fluid concepts, subject to reasonable interpretation and reinterpretation depending on the context'.[1307] And thereby he confirmed that the operational/policy distinction seems inherently incapable of providing any clarity or certainty to the police independence convention. The most it seems to do is to further muddy the waters.

8.5 – Is it a Convention?

The uncertainty in the requirements of any convention is also seen in the different practices in the various Australian jurisdictions. The variation has ranged from the apparent lack of any use of the Victorian Cowper provision during its 140 year lifespan,[1308] indicating a well established basis for a police independence convention in that State, to instances of highly activist Ministers in other states, particularly in Queensland and New South Wales.

The Queensland pre-Fitzgerald practice can be seen in Minister Newbery's statement to the Queensland Legislative Assembly in 1976.[1309] Active Police Ministers have also been present in NSW where, according to Fleming, 'Traditionally, … the Minister provided strong direction to the Police Commissioner'.[1310] Activism was demonstrated by Parkes in 1866[1311] and has continued in that State until the 21st century. Examples include Premier Askin's claimed direction to a police superintendent in 1966 which is popularly understood to be to 'run over the bastards'[1312] and Minister Hills' 1969 direction to the Police Commissioner that telephone tapping without ministerial approval was contrary to government police and should cease.[1313] A more recent activist police Ministers were Ministers Whelan[1314] and Costa, the

[1305] Ibid 328.
[1306] *Ipperwash Report*, above n 51, 327.
[1307] Ibid 329.
[1308] Between 1873 and 2014 – see Table 3.1. *Rush Report*, above n 38, 42.
[1309] quoted earlier in Chapter 6.4.5.
[1310] Fleming, above n 83, 67. Also see Plehwe (1973), above n 56, 276-277 for discussion of NSW practices in the 1950s and 1960s.
[1311] See Chapter 6.
[1312] In reference to political demonstrators to US President Johnson. It was however was the slightly less dramatic 'Well drag them off and I don't care if they get gravel backsides'. David Clune and Ken Turner (eds*), The Premiers of New South Wales Vol 2 1901–2005* (Federation, 2006) 356.
[1313] New South Wales, *Parliamentary Debates,* Legislative Assembly 10 September 1969 831 (Patrick Hills). Also see Plehwe (1973), above n 56, 276-277 for further discussion of other activist NSW Ministers from the 1960s.
[1314] Discussed in Chapter 8.4.2.

NSW Ministers between 1995 and 2001 and between 2001 and 2003[1315] respectively. Costa's activist activities included, according to Sue Williams, the biographer of Police Commissioner Ryan,[1316] the immediate closure of the eleven police regions, a move that Ryan opposed.[1317] Eventually, the Minister agreed to keep five regions but he, rather than the Commissioner, publicly announced the restructure of the force which included the Minister's requirement that 'every police officer, including the Commissioner, would have to do shifts on the beat.'[1318]

Costa's hands on approach is clearly inconsistent with any perception of the operational independence of the police. And it led Commissioner Ryan to advise a parliamentary committee, in answer to a question as to whether he was Commissioner of Police – 'Probably not, no. I have doubts these days'.[1319]

Whether the Minister's actions constituted any breach of a convention, Priest and Basham recognised that 'as Minister he was expected traditionally to confine himself to matters of 'policy' and leave 'operational' matters to the Police Commissioner'. However, as 'the line between the two had never been clearly been drawn', this allowed Costa to occupy himself 'working overtime to try to solve the myriad problems in promotions, morale, training, investigative expertise, police numbers and delivery of police services',[1320] all issues with direct operational relevance.

The significance of the extent of variable practice to the existence of conventions seems not recognised by previous commentators. Pitman, in particular, in his 1998 thesis made particular observations regarding the application of conventions and the comparison of practice as against convention that deserves examination. His thesis involved extensive interviews with former Police Commissioners and Ministers and the two statements of interest were made in the context of his interview with the former Queensland Commissioner Newnham.

The statements are: 'The theory of how this convention works is quite different from how it operates in practice' and 'Conventions are often ignored and the interrelationship between administration and operations is not well understood politically or administratively'.[1321]

[1315] Tim Priest & Richard Basham, *To Protect and to Serve, The untold truth about the New South Wales Police Service* (New Holland, 2003) 240.
[1316] Peter Ryan was NSW Police Commissioner between 1996 and 2002.
[1317] Ryan wanted the then eleven regions gradually reduced to seven, but Minister Costa wanted them all closed as his discussions with 'constables in police stations he had visited had complained that regions were taking up all the resources for what they considered to be little effect in terms of crime fighting'. Williams, above n 121, 310-311.
[1318] Ibid 312-313.
[1319] Ibid 313.
[1320] Priest and Basham, above n 1315, 248.
[1321] Pitman (1998), above n 76, 149 and 150

By these statements, Pitman failed to appreciate the essential requirements of a convention. That is, a convention exists if it has been accepted as a convention – and this is generally seen from practice, precedent and occasionally agreement in the relevant jurisdiction.[1322] If a practice consistently varies from an understanding, as Pitman's observations suggest, it is likely that the academic understanding of the nature and scope of that convention is not correct and that the observed practice better reflects the convention.

Variable practice in different jurisdictions may also indicate that there are differing conventional standards in different jurisdictions – so that the differing use of the power to direct in different States may indicate, for example, that the police in South Australia have greater conventional independence than police in New South Wales.[1323]

However, the broadly accepted but vague understanding of 'operational independence' seems to have confused the position. The existence and extent of a convention is determined not only by precedents, but also by the accepted understanding of the participants. And as there is a widely accepted understanding among participants that 'operational independence' is a convention, but no consistent view as to that term's meaning, a more fundamental difficulty with the operational independence understanding seems present. And that is whether 'operational independence' convention can be a 'convention'.

A convention serves the purpose of, according to Dicey, providing 'rules for determining the mode in which the discretionary powers of the Crown … ought to be exercised'.[1324] Although Dicey's view was too narrow,[1325] his essential concept was correct. As previously written:

> the primary function of conventions [is] to provide the 'rules of the game' where the law is not clear concerning the balance between the potentially competing elements in the constitution.[1326]

The operational independence 'convention' however, by having such a variable application and understanding of its requirements, seems no more than a general principle which provides little or no direction on the appropriate course to take. Such general principles are not considered as conventions as they do not serve to provide the 'rules of the game', even rules with 'grey areas and frayed edges'.

[1322] See Killey, above n 5, ch 2.
[1323] Failure to exercise a legal power does not, however, necessarily indicate that the power does not exist or cannot be exercised. For example, the reserve powers of Governors-General and Governors, particularly the power to dismiss the head of government, have rarely been used, but they are generally been accepted as powers that can be used in limited circumstances. See Killey, above n 5, ch 7.
[1324] Dicey, above n 346, 418.
[1325] as this author has previously written. Killey, above n 5, 9.
[1326] Ibid, 10.

Marshall, however, has taken a different view on the need for conventions to provide some clear rules, as he considered that a convention can be formulated 'on the basis of some acknowledged principle of government which provides some reason for it',[1327] and used as an example the principle that in 'the British constitutional system … that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way.'[1328] Elsewhere this author has challenged that view on the basis that the principle referred to by Marshall is not a convention and has never been regarded as such.[1329] The reason for that disagreement is that 'no matter how relevant to the constitution, a broad underlying principle will not be a convention unless the participants accept it as one and this will only occur if the participants perceive it as providing guidance as to the correct course of action'.[1330]

This issue, however, does not need to be resolved for the purpose of determining whether and what convention operates in the context of Australian Cowper provisions. And that is because, whether Marshall is correct on this issue or not, the final and related difficulty with this 'convention' is that it seems almost impossible to determine whether it has been breached or not due to the uncertain scope of the term 'operational', made more unclear by the nebulous nature of the distinction between 'policy' and 'operations'.

It might be that the core elements of policing, such as the power to arrest, charge, investigate and prosecute particular individuals could be within the scope of any police independence convention. Those matters are clearly operational and there seems no incident, since the second half of the 20th century at least, where such matters have been made the subject of ministerial direction in any Australian jurisdiction. However, the understanding of the scope of convention seems to be both that it goes beyond those core elements (but to an uncertain and unclear extent) and also that it is confined as a result of the governmental policy function. As discussed earlier, the effect of the incorporation of 'policy' as a government function into the 'convention' (if that is what it is) seems to have largely undermined any inviolable conventional operational status due to the overlap between that concept and that of 'policy', and the lack of any accepted limitations on the meaning of 'policy'. The result is confusion and disarray: an 'operational independence' convention that seems to allow any government direction including any affecting operational matters, as being, at least arguably, conventional.

[1327] Marshall (1984), above n 5, 9.
[1328] Ibid.
[1329] Killey, above n 5, 31.
[1330] Ibid 32.

8.6 – Conventions - Conclusions

The consequence of this discussion is that while there is a widely accepted understanding of police being 'operationally independent', there is no certainty as to what that phase means. Furthermore, the addition of the policy/operations dichotomy, although intended to provide clarity, has in fact confused the issue, seeming to allow government to issue policies regarding any operational matters, thereby undermining conventional police independence.

As a result, it seems that no convention exists that provides any clear rules limiting the government powers under Cowper provisions to direct police. Either the police operational independence convention is so flexible that virtually any ministerial direction, despite its effect on operational decision making, is conventional, or the accepted practice is not sufficiently prescriptive to constitute a binding constitutional convention. On either basis, there seems no effective conventional limitation on government power to direct police under Cowper provisions and the current arrangements provide insufficient clarity or certainty to assist either police or government in determining the nature of their interrelationship.

It should be pointed out that this confused 'conventional' position was brought about, not due the nature of conventions or even by supposed 'over-reliance'[1331] on conventions referred to by Rush. Instead, it arose due to the confused legal, constitutional and historical thinking that has accompanied consideration of the police government relationship in the 20th century.[1332] However, that confused position remains. And to remedy that confusion it seems necessary, (in the absence of a defining event, such as a clarifying superior court decision), to accept Rush's view that 'new police legislation should articulate clearly the relationship'. Whether the nature of the clearly articulated relationship would be the same as that recommended by Rush will be considered in Chapter 12.

[1331] *Rush Report,* above n 38, 42.
[1332] As seen in seen in 8.2, 8.3 and 8.4 above and further discussed and developed in other parts of this thesis, particularly Chapters 7 and 10.

9 – Limited Direction Provisions

9.1 – The Provisions

The third approach to police and government relations in Australia is the *Limited Direction Type.* This approach was first used with the newly created Australian Federal Police in 1979,[1333] followed by the Queensland Police in 1990[1334] and, most recently, the Victorian Police in 2014.[1335] What distinguishes this approach is that it involves an express power of direction given to government, (in each case to the relevant Minister), but that power is heavily restricted in relation to both extent and form.

What is also relevant is that each of the three limited direction provisions was enacted to fulfil recommendations of an inquiry: the Mark Report[1336] into the Federal Police, the Fitzgerald Report[1337] in Queensland and the Rush Report[1338] in Victoria.

This Chapter examines the scope and operation of the three Australian limited direction provisions, their differences and the reasons for their introduction.

9.1.1 – The AFP

Section 37 of the *Australian Federal Police Act 1979* (Cth) allows the 'Minister'[1339] to give directions to the Police Commissioner[1340] (and obliges the Commissioner to comply with those directions)[1341] but only if:

- the directions are 'with respect to general policy to be pursed in relation to the performance of the functions' of the force;
- the Minister has previously has obtained and considered the advice of both the Commissioner and the Secretary of the Department;[1342]and if
- the direction is in writing.[1343]

[1333] *Australian Federal Police Act 1979* (Cth) s 37. When the Act was passed, the direction provision was s 13. That section is substantially the same as the current s 37.
[1334] *Police Service Administration Act 1990* (Qld) s 4.6.
[1335] *Victoria Police Act 2013* (Vic) s 10.
[1336] *The Mark Report,* above n 34.
[1337] *The Fitzgerald Report*, above n 36.
[1338] *The Rush Report,* above n 38.
[1339] which means the 'Minister, or any of the Ministers, administering the provision on the relevant day, in relation to the relevant matter'. *Acts Interpretation Act 1904 (*Cth) s 19.
[1340] *Australian Federal Police Act 1979* (Cth) s 37(2).
[1341] Ibid s 37(4).
[1342] which refers to 'the Department of State of the Commonwealth that is administered by the Minister or Ministers administering that provision in relation to the relevant matter, and that deals with that matter' (*Acts Interpretation Act 1904* (Cth) s 19A).
[1343] *Australian Federal Police Act 1979* (Cth) s 37(2).

The limitations on the Minister's power of direction have the result that directions have been of a very general nature, as is typified by the Ministerial Direction issued by Minister Keenan on 12 May 2014.[1344] The direction relates to the Minister's 'expectation' that the AFP will 'deliver' in relation to a number of 'key strategic priorities'[1345] without specifying how the AFP is to 'deliver' and what the Minister's expectations are. The direction then goes on to 'encourage' the AFP in its various functions. The result is that the 'direction' is an anodyne two pages, saying very little and directing even less.

As a result the AFP is largely free from ministerial direction. The AFP has, however, voluntarily surrendered its independence from direction in at least one operational area: in the AFP's dealings with overseas police forces where the application of the death penalty is relevant. In the *AFP National Guideline on international police-to-police assistance in death penalty situations*[1346] issued by the AFP's Deputy Commissioner Operations, it is stated that the 'AFP is authorised to provide assistance and cooperate with foreign law enforcement agencies'[1347] but that 'ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty'.[1348] Although paragraph 6 of this Guideline states that the authorisation was made 'in accordance with' the AFP Act and the Ministerial Direction there seems nothing in either document that necessitates such an authorisation. Moreover, requiring the Minister to approve of the provision of police assistance to a foreign force goes well beyond the scope of the directions that s 37 allows a Minister to make, as it is hardly a 'general policy direction'.

Given the clear legislative intent evident in s 37 that the Minister should have no direct control over the law enforcement decisions in individual cases, the AFP's willingness to voluntarily surrender the force's statutory independence from ministerial direction, even in this limited and confined area, seems problematic, being inconsistent with the independence that the AFP Act established. A more appropriate way of taking into account the government's desires in a manner consistent with s 37 would have been to require the Commissioner to consult with the Minister prior to providing material to foreign forces, but to leave the final decision to the Commissioner, rather than the Minister.

[1344] https://www.afp.gov.au/about-us/governance-and-accountability/governance-framework/Ministerial-direction.
[1345] ranging from threat of terrorism to cyber-crime.
[1346] https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20on%20international%20police-to-police%20assistance%20in%20death%20penalty%20situations.pdf.
[1347] Ibid para 6.
[1348] Ibid para 7.

9.1.2 – Queensland

In 1990, the *Police Service Administration Act 1990* (Qld) also included a limited direction provision. Section 4.6(2) allows the Minister to direct the Commissioner, who is obliged to comply.[1349] However, as is the case with the AFP, there are restrictions as to both the scope and form of any directions made. The restrictions are that:

- directions must be in writing;
- the Minister must first have had regard to advice received from the Police Commissioner; and
- the directions must only relate to one or more of the following subject matters:
    - the overall administration, management and superintendence of, or in the police service;
    - policy and priorities to be pursued in performing the functions of the police service;
    - the numbers and deployment of officers and staff members and the number and location of police establishments and police stations.[1350]

Those constraints are similar to those imposed earlier in relation to the AFP in terms of both extent and form, with the notable exception being that the Queensland Police Commissioner, unlike the AFP Commissioner, is subject to ministerial directions regarding police establishments, numbers and deployment.[1351]

In addition, a further restriction was imposed in Queensland. Section 4.7 requires the Police Commissioner to keep a register which includes, among other things,[1352] 'all directions given in writing to the Commissioner under s 4.6(2).'[1353] The Commissioner is required,[1354] annually, to provide a certified copy to the chair of the relevant integrity body[1355] who is required,[1356] within 28 days, to provide that copy, with or without comment, to the relevant parliamentary committee[1357] the chair of which is to table that copy and any comments within 14 days of receipt.[1358]

[1349] *Police Service Administration Act 1990* (Qld s 4.6(3).
[1350] Ibid s 4.6(2).
[1351] Ibid s 4.6(2)(c).
[1352] The register also requires all reports and recommendations made to the Minister (Ibid s 4.7(1)(a)).
[1353] Ibid s 4.7(1)(b).
[1354] Ibid s 4.7(2).
[1355] Initially in 1990 it was the Criminal Justice Commission, but is now the Crime and Corruption Commission.
[1356] *Police Service Administration Act 1990* (Qld) s 4.6(3).
[1357] Initially, in 1990 it was the Parliamentary Criminal Justice Committee, but is now the Parliamentary Crime and Corruption Committee of the Queensland Legislative Assembly.
[1358] *Police Service Administration Act 1990* (Qld) s 4.6(4).

The implementation of this elaborate process began in 1992 with a disagreement between the then police Commissioner[1359] and the chair of the Criminal Justice Commission (CJC)[1360] as to the requirements of the register. The Commissioner considered that the register was merely a list, while the CJC chair considered that the register required the actual documents themselves. This issue was resolved by a legal advice provided by Kerry Copley QC who agreed with the CJC.[1361]

The result was that the register and the tabled documents for the years 1991 to 1996 (tabled in the years 1992 to 1997) encompassed hundreds of pages and this included the thirteen ministerial directions listed in **Table 9.1**. From an examination of those directions, seven[1362] relate to a direction power not expressly available in relation to the AFP (police numbers, deployment and establishments). As to the other six, it is apparent that during these six years, despite the similarity between the AFP restrictions and the Queensland restrictions, Queensland Police Ministers applied a more expansive approach to the direction power, directing the Commissioner on a range of issues.[1363] The register also includes a direction dated 2 July 1991 that the police accepted as a ministerial direction even though it was from the Minister's private secretary.

Table 9.1 - Queensland Ministerial Directions to the Police Commissioners – Tabled in Parliament between 1991 & 1996

Tabling Year	***Date***	***Direction***	***Provider of Direction***
1992	***2/4/91***	Senior police academy staff recruiting to be deferred. Teaching positions to be occupied by temporary staff.	Minister Mackenroth
	6/9/91	Pilot installation process for computer tender to be commenced as soon as possible. Direction specified membership of steering committee and provided responsibility for the overall conduct of the project to the steering committee.	Minister Mackenroth
	24/5/91	Closure of Adavale Police Station not approved. An officer is to be stationed at	Minister Mackenroth

[1359] Noel Newnham APM.
[1360] Sir Max Bingham QC.
[1361] Kerry Copley QC, *Opinion Re: Police Service Administration Act 1990, Sections 4.6 and 4.7 Ex parte Parliamentary Justice Committee*, 5 March 1992, 3 which can be found in the *1992 Certified Copy,* above n 276.
[1362] Those marked in bold italics in Table 9.1.
[1363] ranging from tender processes for booze busses, installation of computers and community conferencing to the timing of advice to the Minister.

		Adavale to service the local community	
	1/5/91	Minister to be notified of intended dismissal from police service prior to press reports	Minister Mackenroth
	2/7/91	Any decision on composition of police personnel strength to be referred to the Minister.	Garry Hannigan – Private Secretary
	3/6/91	Tenders for 2 booze busses to be allocated to most suitable Qld tenderer	Minister Mackenroth
	19/9/91	Police Service is to comply with Cabinet's decision to implement the standard financial system Police Service is to comply with any requirement which Treasury Department makes on implementation process.	Minister Mackenroth
1993	***15/12/92***	No appointment and no changes to staffing of Police Media Unit prior to Public Sector Management Review without joint Minister/Commissioner approval.	Minister Braddy
	23/12/92	Any changes in police hours to be advised by Commissioner to Minister. No police stations are to close without ministerial consent.	Minister Braddy
1996	***16/8/95***	Qld Police Service should seek to increase number of Aboriginal and Torres Strait persons	Minister Braddy
	3/11/95	Qld Police Service to conduct face to face community conferencing and evaluate trials.	Minister Braddy
	3/11/95	Qld Police Service to implement implementation plans for election commitments.	Minister Braddy
1997	8/10/96	Minister to received timely advice on issues of concern	Minister Cooper

After 1997, the use of the Commissioner's certified register became formulaic and limited. In the registers tabled from 1998 to 2001 the sole entry in the register each year was:

> Criteria developed by the Criminal Justice Commission are used for identifying communications required to be recorded in the register kept by me pursuant to section 4.7 of the *Police Service Administration Act 1990*. During [the year] … no communications were made which qualify under those criteria for recording in the register.

In the registers tabled in the years 2002 to 2016, the formula changed slightly to refer to 'Criterial developed in 1993 by the then General Counsel for the Criminal Justice Commission'. Otherwise, the formula was the same.[1364] As a result of the adoption of this criteria, unlike the bulky registers tabled in the years 1992 to 1997, from 1998 no information was contained in the Commissioner's certified register.

Lewis, who examined this issue in 2010,[1365] raised concerns to this sudden reduction of information to parliament, noting that in the six years before 1998, 67 matters were included in the register, while in the following 12 years nothing. She discounted the content of the criteria as the cause as she noted that the assessment criteria[1366] had existed since 1993.[1367] Instead, she considered that the cause might have been either that from 1997 there had been no directions to and no reports and recommendations from the Commissioner. Alternatively, she considered that the Commissioner adopted a 'too narrow' interpretation of 'how a "report" and/or "recommendation" is being defined'; or 'police Ministers may have neglected their ministerial obligation'.[1368]

Another understanding is, however, derived from the Criminal Justice Commission Criteria. Paragraph 4 of the Criteria sets out the 'Criteria to be satisfied for inclusion in register as section 4.6(2) material', which include paragraphs 4.7 and 4.8:

> 4.7 The Minister's direction must be made by a formal notice to this effect.
>
> 4.8 The formal notice must be in the prescribed form II.[1369]

The form restriction imposed by paragraphs 4.7 and 4.8 indicates that, while they may have existed since 1993, they were not operational prior to 1997, as the form of the directions in the certified registers in the first six years did not comply with the Criteria. Tabled directions ranged from a very formal approach adopted by Minster Brady, particularly in 1995, to the various letter and memorandum forms adopted by or on behalf of Ministers Mackenroth and Cooper.

The Criteria form requirement only applies to the register required by s 4.7. It establishes 'Criteria to be satisfied *for inclusion in register* as s 4.6(2) material' [emphasis added]. It does not purport to be an added requirement for the provision of directions under s 4.6(2). Accordingly, the only effective result of the Criteria form requirement is to ensure, not that the only valid directions are those made in the form prescribed by the criteria, but that a

[1364] From 2002 there was also an additional paragraph as to there being no 'reasons' tabled under s64 *Crime and Misconduct Act* 2001 (Qld), which is not relevant to the issue of ministerial directions.
[1365] Colleen Lewis (2010) above n 8, 95.
[1366] Which was included as an appendix to her chapter. Ibid 115.
[1367] Ibid 108.
[1368] Ibid 109.
[1369] Ibid 117. Lewis did not include the prescribed form.

direction validly given under s 4.6 is only included in the register and made public if it is in the 'prescribed form'. In other words, the form requirement has undermined the intended purpose of s 4.7 – to make transparent the exercise of the ministerial directions power.

9.1.3 - Victoria

The last and most complex of the limited direction provisions has operated in Victoria since 2014.[1370]

The Victorian provision empowers the Minister to give the Chief Commissioner directions subject to restrictions similar to those imposed in relation to the AFP and the Queensland police. That is, the directions:

- must be in writing;
- must be preceded by consultation with the Chief Commissioner; and
- can only relate to the 'policy and priorities to be pursued' in the performance of police functions.[1371]

However, the section also adds additional restrictions on what directions can cover. It provides that directions regarding certain matters[1372] *cannot be given,* while directions in relation to other matters can only be given if preceded by a report from certain bodies[1373] and the Minister considers that the Commissioner has not responded adequately to that report.[1374]

The matters in relation to which a direction cannot be given are:

- the preservation of the peace and the protection of life and property in relation to any person or group of persons;
- the enforcement of the law in relation to any person or group of persons;
- the investigation or prosecution of offences in relation to any person or group of persons;
- decisions about individual members of the force, including decisions in relation to discipline.[1375]

[1370] Following the enactment and commencement of the *Victoria Police Act 2013* (Vic).
[1371] *Victoria Police Act 2013* (Vic) s 10(1).
[1372] Ibid s 10(2).
[1373] including Independent Broad-based Anti-corruption Commission (IBAC) the coroner, the Auditor-General, a parliamentary committee and a Royal Commission. *Victoria Police Act 2013* (Vic) s 10(4).
[1374] Ibid *s*s 10(2) & (3).
[1375] Ibid s 10(2)(a),(b),(c) & (d).

These restrictions prevent the Minister from making any direction relating in any way to the preservation of peace, the protection of life, the enforcement of law or the investigation or prosecution of offences if the phrase 'group of persons' is read as encompassing all Victorians. This is the natural reading of the words, but it gives the restriction a very broad operation. What was intended by the phrase 'group of persons' was not clarified or discussed in the explanatory memorandum to the Victoria Police Bill 2013 or in the parliamentary debate[1376] and neither was the formulation included in the Rush Report, the recommendations of which were the basis of the new Act.[1377] However, the formulation seems to have been adopted from the New Zealand statutory model. The *Policing Act 2008* (NZ) was enacted with the clear intent of, as the Law and Order Committee of the New Zealand Parliament noted, 'to preserve the constitutional separation of the Police from the Government'.[1378] Section 16(2) of that Act, the final form of which was recommended by that committee,[1379] provides that the New Zealand Police Commissioner 'is not responsible to and must act independently of the Minister of the Crown' regarding a formulation remarkably similar to the wording of ss 10(2)(a)–(d) *Victoria Police Act 2013* (Vic):

> (a) the maintenance of order in relation to any individual or group of individuals; and
>
> (b) the enforcement of the law in relation to any individual or group of individuals; and
>
> (c) the investigation and prosecution of offences; and
>
> (d) decisions about individual Police employees.[1380]

Given that intent, it seems that New Zealand police independence was to operate broadly. As the New Zealand Minister said during the second reading of the Policing Bill:

> It is a fundamental principle, in my view, of a police force in our kind of democratic society that they are operationally independent of the political system - … but they are not directed by Parliament or the Government in the way that they operate.[1381]

Given the commonality of the terminology between the New Zealand and the Victorian legislation and the apparent intent underlying the New Zealand Act, it seems that the phrase 'group of persons' should be given the broadest natural reading that it is open to those words, covering all Victorians.

The matters that require a report and inadequate response before a Victorian direction can be given are:

[1376] In particular Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October 2013 & 27 November 2013.
[1377] Ibid, 16 October 2013 (Kim Wells MP, Minister for Police and Emergency Services).
[1378] Law and Order Committee, New Zealand Parliament, *Policing Bill, Commentary* (2008) 3.
[1379] Ibid 14.
[1380] *Policing Act 2008* (NZ) s 16(2).
[1381] New Zealand, *Parliamentary Debates*, House of Representatives, Vol 649, 17735, 5 August 2008, Dr M Cullen. The problematic nature of this view is discussed below in footnote 1462.

- police organisational structure;
- deployment of force members;
- police training, education and professional development programs;
- the content of any internal grievance resolution procedures.[1382]

As to the form of any directions, in addition to being in writing, s 10(6) requires directions to be published in the Government Gazette, although the provision does not indicate whether that publication is a condition precedent to the effectiveness of the direction or is a lesser procedural requirement. And s 10(7) requires the Commissioner to include a copy any direction on the police internet site.

An examination of Victoria Police's internet site[1383] and the Government Gazette.[1384] reveals no directions, indicating that no ministerial directions have been made since 2014.

This could merely be a continuation of the pre 2014 practice in Victoria of governments of not exercising the old power of direction.[13851386] Or it could be because the many restrictions on the scope and form of any directions that can be made under the 2013 Act render the directions power largely unusable.

If the latter, this lack of use of power in Victoria, combined with the apparent failure to use the limited power of direction in Queensland since 1997 and the minimalist (in terms of substance) use of the power to direct the AFP, indicates that the limited direction powers have effectively established the three forces as substantially, if not totally, immune from direct ministerial control.

9.2 – Why they were made.

9.2.1 – AFP

The AFP Act was based on a review undertaken by Sir Robert Mark, the former Commissioner of the Metropolitan Police in London.[1387] The choice of Sir Robert to undertake this review was, in some respects, justified as he was very much a reformist police officer who had done a great deal to remove corruption from the Metropolitan

[1382] *Victoria Police Act 2013* (Vic), s 10(2) & (3),(f),(g) & (h).
[1383] https://www.vicpolicenews.com.au/.
[1384] http://www.gazette.vic.gov.au/gazette_bin/index.cfm?bct=home.
[1385] under *Police Regulation Act 1958* (Vic) s 5(1).
[1386] *Rush Report*, above n 38, 42.
[1387] Australian Federal Police Bill 1979, *Explanatory memorandum and Notes on Clauses*, 1; Commonwealth, *Parliamentary Debates,* House of Representatives, 10 May 1979, (John McLeay MP).

Police.[1388] On the other hand, he had, if not extremist, then strident views on police independence; views that led him to resign from the MET in protest at what most would say today, and then, as the self-evidently sensible move of empowering bodies outside of the MET to investigate police corruption.[1389] He was also a serious critic of the adversary justice system (and lawyers) and also the 'right to silence'[1390] from a perspective which one Australian academic has colourfully described as being 'very close to fascism'.[1391]

What was very surprising about Mark's review[1392] was that it was completed within two months.[1393] What was not surprising, given Mark's well publicised views,[1394] was that the model that it recommended was one of greater police independence than in any other Australian jurisdiction at the time other than Western Australia. What was also not surprising, given the time to complete it, was that it was very short (28 pages excluding appendices). Yet that promptly delivered (possibly hurried) and slight report was the basis for the establishment and design of the AFP and the introduction of the Limited Direction Type into Australia.

In developing the limited direction concept it is apparent that Mark did not base it on existing models in Australia or other jurisdictions. Neither did he give any consideration to respective constitutional roles of a Police Minster and Police Commissioner,[1395] or give any consideration to the doctrine of ministerial responsibility and its application to police forces. His consideration also did not discuss any of the judicial authorities[1396] or the then recent South Australian inquiry reports[1397] on the subject of police independence or academic writings on that subject.[1398]

Mark's discussion in his report was largely confined to his consideration of how to combine the functions of two forces, the ACT Police and the Commonwealth Police.[1399] On why the newly proposed AFP should be independent from government direction, he considered that

[1388] Ascoli, above n 107, 318-322.
[1389] Ibid 338; Mark (1978), above n 260, 209 & 213. He preferred to retire 'rather than administer an Act I regarded as repugnant'.
[1390] Mark (1977), above n 3, 39-40.
[1391] Michael Head, 'Book Review' (1980) 11 *Federal Law Review* 255.
[1392] *Mark Report,* above n 34.
[1393] The terms of reference were issued on 1 March 1978 and Sir Robert signed off on the report on 6 April 1978. Ibid 1 and 30. There also seems some unnecessary hast in the preparation of the report as on the title page Sir Robert's honour (GBE) was incorrectly stated as 'GBR'!
[1394] Mark (1978), above n 260; Mark (1977) ,above n 3.
[1395] He did, however, refer to his own assessment of the police's 'long tradition of constitutional freedom from political interference' in an appendix to his report. *Mark Report,* above n 34, 51.
[1396] Such as *Blackburn* or *Fisher.*
[1397] The *Bright* and *Mitchell Reports.*
[1398] Such as Marshall and Lustgarten.
[1399] *Mark Report,* above n 34, 4-5. In doing so he rejected, quite properly, giving the Commonwealth Police functions to the ACT Police as this 'is clearly objectionable on constitutional grounds'. As to providing the functions of the ACT Police to the Commonwealth Police, he considered that this 'course has controversial implications'. Unfortunately, he did not pause to identify those 'controversial implications'; but that did not prevent him rejecting that option without any further discussion and to conclude, in a stunning leap, that '*There is therefore no choice but to create a new force that incorporates the two forces as soon as reasonably possible'* (emphasis original).

the new force 'cannot command public confidence and respect without certain prerequisites' one of which was 'it should be seen to be as free as possible from political influence in its operational polices and decisions'.[1400] That view seems to have based on the underlying belief that he brought to the inquiry, but at no point examined or established, of the police's 'long tradition of constitutional freedom from political interference'.[1401] That belief, however, as Chapters 5.1 and 7.3 demonstrate, is problematic at best.

He did, however, acknowledge that the police cannot be completely independent as he also recommended: 'That it should be administratively accountable, and willing to be accountable, to government and public alike, both by law and by a well-publicised system for the investigation of complaints against the police'.[1402]

He recognised the difficulty of distinguishing between the elements of predecessor of the policy/operations dichotomy, 'operational' and 'administrative' matters, considering that 'policing a free society begins with the drawing of a nice distinction between' the two concepts.[1403] However, his report did little to define either of the two concepts or assist in providing means by which that 'nice distinction' can be drawn. Moreover, he used vague terms such as 'as far as is possible' and that operational decisions should not be 'unduly subject' to 'political influence'[1404] with nothing to clarify with any certainty what he was referring to. He did, however, promise some clarification when he stated that the chief police officer 'and he alone should make operational decisions save in exceptional circumstances on which I will dwell later',[1405] a promise his report did not keep.

Mark's recommendations for a newly formed AFP and for its operational independence from government were clear;[1406] but his hurried reasoning and justification in his short report were not well considered, or developed or satisfactory. Despite its conclusions, there is nothing in the report to justify operational independence other than Mark's untested assertion that such independence is necessary to obtain public confidence.[1407] Marks's report cannot be regarded as a considered view of what is appropriate for police forces or for the future exercise of the functions then currently exercised by the Commonwealth Police and seems nothing more than a rehash of his previously expressed views concerning police independence applied to Australian circumstances.[1408] It is, therefore, somewhat surprising that his conclusions were so quickly and readily adopted with the enactment of the

[1400] Ibid 6.
[1401] Ibid 51.
[1402] Ibid 6.
[1403] Ibid 7.
[1404] Ibid 8.
[1405] Ibid.
[1406] Ibid 72-79.
[1407] Ibid 6.
[1408] Mark (1977), above n 3; Mark (1978), above n 260.

Australian Federal Police Act in 1979, particularly with the responsible Minister inflating Mark's inadequate reasoning into '*the philosophy* that the force should be operationally independent yet administratively accountable'.[1409]

However, that 'philosophy' seems only partially adopted. Indeed, it may be that the model that Mark recommended for the AFP was based on a fundamental misunderstanding of the nature of Australian police forces: that they are largely unarmed and are not quasi military bodies.[1410] This remains the case with police forces in the United Kingdom[1411] but is hardly the case now or in 1978, with the compulsory arming of all Australian operative police officers.

Mark, whose report was sought and provided after the February 1978 Hilton bombing, considered one necessary prerequisite for public confidence in police was that 'It should not enjoy any more power or authority than is strictly necessary for the fulfilment of its function.'[1412]

This prerequisite included, in his view, minimal arming of police. He made the point that 'the arming of police should always clearly be seen to be for defensive purposes only',[1413] and that the killing of terrorists by police 'will give the impression that the police are a paramilitary organisation [which] …. Is not a good basis on which to build the ideal relationship between police and the public'.[1414] In a copy of a speech that he appended to his report,[1415] he was strongly of the view that 'police represent government by consent' and that:

> In the legal and constitutional framework in which society requires us to enforce the laws enacted by its representatives, the most essential weapons in our armoury are not firearms … but the confidence and support of the people on whose behalf we act.[1416]

In that speech he distinguished the role of the police from that of the army, observing that the army 'does not act as a police force, on behalf of the community as a whole, but on the orders of its political masters to whom it is, through its command structures, accountable.'[1417] In the Mark view of the world, police operate very differently, being responsible to the community and the law and 'are not the servants of the government at any level'.[1418] Leaving aside the merits of that understanding, it is clear that Mark's desire for police to be

[1409] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1979 (John McLeay MP) (emphasis added).
[1410] *Mark Report,* above n 34, 17.
[1411] Vikram Dodd, 'Police in England and Wales to be asked if they want to carry a gun', *The Guardian*, 27 July 2017.
[1412] Ibid 6.
[1413] Ibid 16.
[1414] Ibid 17.
[1415] Ibid, Appendix F. This speech is also included in Mark (1977), above n 3, 23.
[1416] Ibid 51.
[1417] Ibid 54.
[1418] Ibid 52.

immune from government control was part of a package of measures which included, as an essential element, the police having limited or no firearms:

> We are unarmed, clearly and locally accountable for our actions by legal procedures, well established and widely understood and we are strictly impartial in that we do not act for the government, for any one party or sectional interests.[1419]

Police in Australia, however, do fit Mark's picture of an unarmed or lightly armed forces and probably did not do so when he wrote his report. Sarre examined police use of firearms in Australia and demonstrated widespread firearms allocation to police as common in Australian forces in the 1970s, becoming standard by the 1990's.[1420] In the AFP, according to an answer to a parliamentary question in 2015, all operational sworn officers are currently required to carry firearms and to undertake annual operational safety, the certification failure or expiry of which renders the officer non-operational.[1421]

As minimal arming was seen by Mark as a prerequisite for the public confidence in an operationally independent AFP it seems that the increasing arming of that force to standard arming of all operational officers indicates that Sir Robert's prerequisite has ceased to be satisfied and may never have been complied with. The result seems, therefore, that Sir Robert may not have considered his operational independent relationship design appropriate for Australia's armed police forces.

9.2.2 – Queensland

The 1990 Queensland limited model was also enacted[1422] to fulfil recommendations of an inquiry report, the Fitzgerald Royal Commission.[1423] Fitzgerald's consideration of the issue of police independence was, however, very short, limited to two pages[1424] of his 388 page report. And like Mark's earlier report regarding the formation of the AFP, Fitzgerald did not discuss or consider judicial authorities, inquiry reports or academic discussion of the subject

[1419] Ibid 61.
[1420] Ricke Sarre, *Police Use of Firearms Issues is Safety* (Australian Institute of Criminology 1993) http://www.aic.gov.au/media_library/conferences/ncv2/sarre.pdf; Rick Sarre, *Firearms Carriage by Police in Australia, Polices and Issues*, May 1996, http://www.criminologyresearchcouncil.gov.au/reports/sarre.pdf. Also see Philip Alpers and Conor Twyford, *Small Arms in the Pacific, Occasional Paper No 8* (Small Arms Survey, 2003) 15.
[1421] Senate Standing Committee on Legal and Constitutional Affairs, Attorney-General's Portfolio, Group 3, Other Agency, *Question No SBE/15/110* (Senator Xenophon, 20 October 2015), file:///C:/Users/s4523116/Downloads/AGD-SBE15-110%20(2).pdf.
[1422] Queensland, *Parliamentary Debates,* Legislative Assembly, 20 March 1990, 449 (T M Macenroth MP, Minister for Police and Emergency Services).
[1423] *Fitzgerald Report*, above n 36.
[1424] Ibid 278-279.

of police independence, or discuss statutory models from other jurisdictions or consider the doctrine of ministerial responsibility in the context of police-government relationships.[1425]

Fitzgerald concentrated in his short discussion of police 'Relations with Government' on the development of a clear statutory formulation to overcome what he regarded as failings in the operations of Queensland's Cowper provision.[1426] This concern, however, seems misplaced as Fitzgerald was not able to identify any exercise of the Cowper provision power, much less one that operated contrary to the police operations or the public interest.

Fitzgerald did not set out to undertake any form of investigation of the most appropriate constitutional relationship between police and government. His conclusions and recommendations were based on either unstated reasoning or on unstated assumption, rather than a considered and explained rationale.

The Queensland Parliamentary debate in 1990 on the Police Service Administration Bill also did not discuss the justification for the introduction of the limited direction model - other than that Fitzgerald had recommended it.[1427] As a result, Queensland's adoption of the limited direction model is based on an uncertain foundation, unconnected with any clearly expressed historical or constitutional theory or analysis - which is an unfortunate basis upon which to implement a new form of police-government relationship.

9.2.3 - Victoria

The last of the Australian limited direction models is the Victorian 2014 model. The changes to the police government relationship introduced by that Act were not only the most complex of the Australian limited direction arrangements, but they also required Victoria to move from a well settled arrangement whereby the power to direct the police seem never been exercised during its 140 years life (since 1873).[1428]

[1425] Unlike Mark, however, there is some justification for this abridged treatment of the issue bearing mind the scope of the other matters that Fitzgerald was required to investigate and report upon. The scope of the Fitzgerald Inquiry is detailed in Orders in Council dated 26 May 1987, 24 June 1987 and 25 August 1988 which are included in ibid A25, A27 and A29. The priority for the inquiry was prostitution, unlawful gambling and the sale or disposal of illegal drugs by certain named individuals and the involvement of members of the police force in those activities. However, the terms of reference also included a 'catch all' clause which was amended in 1988 to read:

> Any other matter or thing appertaining to the aforesaid matters or any of them or concerning possible criminal activity, neglect or violation of duty, or official misconduct or impropriety the inquiry into which to you shall seem meet and proper and in the public interest.

[1426] *Police Act 1937* (Qld) s 6(1).

[1427] Queensland, *Parliamentary Debates,* Legislative Assembly, 20 March 1990.

[1428] *Rush Report,* above n 38, 42. See table 3.1 & *Police Regulation Act 1873* (Vic) s 5; *Police Regulation Act 1890* (Vic) s 5; *Police Regulation Act 1915* (Vic) s 5; *Police Regulation Act 1928* (Vic) s 5; *Police Regulation Act 1958* (Vic) s 5 which sets out the provisions which empowered the Governor in Council to direct Victoria Police Commissioner, an arrangement that ran from 1873 to June 2014.

The bill making the changes was to 'give effect' to government's commitments to the recommendations the Rush report.[1429] That report was extensive in its coverage,[1430] but not length (106 pages). Moreover, like Fitzgerald, Rush devoted only a few pages to the examination of the constitutional relationship between the police and government[1431] and did not include any consideration of the relevance of the doctrine of ministerial responsibility. Rush did, however, unlike Mark and Fitzgerald, give some attention to some of the judicial authorities, if only in passing.[1432] And unlike Mark and Fitzgerald, he gave some consideration to statutory models in other jurisdictions although that consideration was somewhat limited and superficial. This can be seen from his misunderstanding of the scope of the South Australian ministerial direction power[1433] which Rush incorrectly regarded as being limited to administrative matters.[1434] Rush also considered some of the earlier considerations of the police-government constitutional relationship, but unfortunately this did not include the Bright, Mitchell or Lusher reports, consideration of which would have corrected his basic misunderstanding regarding South Australia.

Rush seems to have considered only two inquiry reports despite the many reports examining this issue prior to 2013,[1435] one of which was Fitzgerald as this is referred to in his bibliography,[1436] but not discussed in his report. Rush gave more attention to and relied on the 2001 Johnson report into Victoria Police[1437] which also recommended a limited direction model,[1438] a recommendation very similar to Rush's.[1439]

Johnson's consideration of the police-government relationship was more extensive than Rush's or Mark's or Fitzgerald's as he considered earlier inquiry reports, judicial authorities and various statutory models. Johnson's attention to the various models used in other States was also more extensive than Rush's, but he, like Rush (and Fitzgerald and Mark), did not give any consideration to why the different models were enacted. In particular they did not seek to ascertain why Cowper introduced his model in 1862 or why Dunstan adopted it in

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[1429] *Rush Report*, above n 38; Victoria, *Parliamentary Debates,* Legislative Assembly, 16 October 2013, (Kim Wells MP, Minister for Police and Emergency Services).

[1430] *Rush Report*, above n 38, vii. The terms of reference of the Rush report required the SSA to:

> To inquire into the following matters relating to the structure, operations and administration of the senior command of Victoria Police:
> 1. The effectiveness and functions of the senior structure of Victoria Police command.
> 2. The extent to which the senior command structure of Victoria Police provide the future capabilities to deliver best practice policing.
> 3. The extent to which Victoria Police has the command management structures to deliver major IT and administrative functions.

[1431] Ibid 41-44.

[1432] *Enever* and *Perpetual Trustees* which were footnoted in Rush Report, above n 38, 42 fnt 111. Rush, oddly did not refer to or consider *Blackburn*.

[1433] *Police Act 1998* (SA) s 6.

[1434] *Rush Report,* above n 38, 44.

[1435] See for example the reports discussed in Chapter 3.4.3.

[1436] as that report is included in Rush's bibliography. Rush Report, above n 38, 94.

[1437] *Johnson Report,* above n 42. John C Johnson was a former Deputy Commissioner of the ACT Police.

[1438] Ibid 56 (Recommendation 7).

[1439] *Rush Report,* above n 38, 44 (Recommendation 13).

1972. Johnson and Rush also did not include any examination or assessment of the constitutional basis or appropriateness of or need for police independence. For Johnson, that concept was a 'given' in his report as the terms of reference that he operated under commenced with the obligation to 'consider and recommend appropriate protocols between Government and Victoria Police which better establish the operational independence of Victoria Police.'[1440]

As to the first of the significant changes introduced by Victoria's limited direction provision, (the change from Governor in Council to ministerial direction), Rush says very little. For him, his slightly inaccurate survey of other statutory models and reliance on Johnson seem sufficient. For Johnson, however, the issue was more complex.

Johnson commenced his consideration of this aspect of the issue with the observation that Victoria Police's Force Command saw no need to alter the Governor in Council direction power then in place as it:

> accommodates 'Ministers' historical caution about taking action that could be interpreted as "political interference" in the administration of justice'.[1441]

The Police Association however favoured a ministerial direction power, requiring directions to be tabled in Parliament,[1442] a view accepted by Johnson. He seems to have been influenced in reaching this view by the fact that direction powers in all other Australian jurisdictions were with the relevant Minister, rather than the Governor[1443] or Governor in Council and by a view expressed by the Centre for Comparative Constitutional Studies (CCCS).[1444] That Centre had advised the Police Board of Victoria in 1998 regarding Governance and Victoria Police and in the course of that advice had expressed the following view:

> The involvement of the Governor-in-Council does acknowledge the seriousness of such action, and may allow the Cabinet to play a role. However, it may also act to blur the actual role of the relevant Minister in such a situation, *and so potentially undermine ministerial responsibility for such an action*.[1445]

The CCCS report did not specify how ministerial responsibility could be 'blurred' by the maintenance of this very widely used process for significant decisions that do not require primary legislation, and it is difficult to see how it could. Section 87E of the *Constitution Act 1975* (Vic) requires the Governor to be advised by the Executive Council when the Governor is bound by law or convention to act in accordance with advice and when permitted or

[1440] *Johnson Report,* above n 42, v.
[1441] Ibid 52.
[1442] Ibid 53.
[1443] In South Australia, the power of direction was with the Governor between 1992 and 1998; see Table 3.1.
[1444] *CCCS Report,* above n 45, referred to in *Johnson Report,* above, n 42, 54.
[1445] *CCCS Report,* above n 45, 10 (emphasis added).

required to act 'in Council'. And s 87B of that *Constitution* makes clear that the Executive Council is only comprised of current Ministers. Unless it was assumed that the Governor in Council would operate without or contrary to or in the absence of the responsible Minister's advice (in which case the problems facing the Minister and the government would be far greater that any blurring of ministerial responsibility), there seems nothing in the Governor in Council requirement that can or could undermine that responsibility. As a matter of practice the Executive Council only operates on ministerial advice[1446] and requiring a Minister to go through the Executive Council process does nothing to undermine the Minister's role or responsibility. What it is does is to impose a 'check and balance' to ensure that minster does not entertain particular decisions lightly, a requirement that operates successfully as a regular feature in Victorian legislation.

Nonetheless, Johnson accepted the CCCS's view. The reason for this may be because he misunderstood the role of the Minister and the sources of a Minister's power and authority. This can be seen from Johnson's statements that 'the Minister has almost no formalised role within the' Act` and that 'the Governor in Council has a significant role in police governance'.[1447] Johnson, however, failed to put those two elements together and appreciate that, when the Governor in Council, like the Governor, operates conventionally,[1448] he or she will only act on the basis of advice from the responsible Minister.[1449] As a consequence, the Governor in Council's role in police governance is an expression of the Minister's function. No doubt this misunderstanding arose as this relationship is not based on statute, but on convention and long-standing practice; but this does not mean, as Johnson put it, that the Minister has no formalised role. By giving the Governor in Council the direction function, this necessarily provides the Minister with the 'significant role' of being the one who can initiate the Governor in Council role in police governance and without whose actions that activity will not occur.

Johnson did, however, acknowledge that the shift to Ministerial direction would 'remove the implicit safeguard … from potentially precipitate action' but offset this by stating that 'nothing in the proposed shift would preclude the Minister from seeking Cabinet endorsement or at least informing Cabinet of his/her intention to issue a proposed direction'.[1450] What relevance that has to the removal of the safeguard preventing misuse of the power of direction Johnson did not make clear. It may be that Johnson did not appreciate the

[1446] The author of this thesis was appointed as a Clerk of the Victorian Executive Council on 8 April 2003.
[1447] *Johnson Report,* above n 42, 32.
[1448] Killey above n 5, chapter 7.
[1449] That is, the Minister who the Premier has allocated responsibility for particular legislation by what is known as the 'General Order' issued by the Premier. The current General Order can be located on the website of the Victorian Department of Premier and Cabinet - http://www.dpc.vic.gov.au/index.php/policies/legal/machinery-of-government/general-orders-and-supplements.
[1450] *Johnson Report,* above n 42, 54.

significant difference between the functions of Cabinet and the Executive Council and the difference between a legal obligation to undertake an Executive Council process as compared to a non-legal option to inform Cabinet.

Regarding the second element of the new limited direction power, the restrictions on the scope of the power to direct, both Johnson and Rush both based their views on their dissatisfaction with the conventional basis of police independence. Johnson considered that the only limitation on the scope of legal power to direct under Victoria's 1958 Cowper provision was conventional, not legal[1451] and was concerned regarding the effectiveness of conventional restrictions. He expressed the view that their application 'can be quite vexed and create confusion between Government and the Police and, consequently, within the community'[1452] even though 'Force Command in its submission to the Review noted that the governance of policing in Victoria is heavily dependent on conventions that are so widely respected that they are accepted as part of the informal constitutional of the State'.[1453] Disregarding Force Command's opinion, he considered that scope of the power to direct should be codified to be 'broadly defined to observe the convention on operational independence'.[1454]

Rush expressed similar views regarding the basis of the conventional limitations on police independence[1455] and, reflecting the views of Johnson, considered that overreliance on convention is undesirable as it can 'create confusion and may obscure certainty and transparency in the relationship in the relationship' between police and government.[1456] On that basis, and although unaware of any occasion when the power of direction in Victoria had been exercised,[1457] he, like Johnson, recommended that the relationship be codified[1458] into a limited ministerial direction model.

Regarding the third significant element of the Victorian limited direction model (the complexities in the nature of the restrictions on the power of direction), both recommended that the minster's power of direction be 'qualified'. In Rush's words, to be 'qualified so as to safeguard the independence of the Chief Commissioner in relation to operational matters and decisions concerning individual employees'[1459] while Johnson expressed the qualification as a 'safeguard [of] the operational independence and accountability of the

[1451] The issue is discussed in more detail in Chapter 6.4.6.
[1452] *Johnson Report,* above n 42, 37.
[1453] Ibid 34.
[1454] Ibid 55.
[1455] Ibid 56.
[1456] *Rush Report,* above n 38, 42; Ibid 37.
[1457] Ibid 42.
[1458] Ibid 44.
[1459] Ibid recommendation 13.

Chief Commissioner'.[1460] Neither however defined their understanding of 'operational' nor specified how this qualification could be implemented other than Johnson's alternative suggestion of 'a non-exhaustive list of the matters on which it is not permissible for the Minister … to issue directions'.[1461] How a 'non-exhaustive' list of limitations could be legislated was not explained and seems to defy explanation.

As to the nature of those 'qualifications', neither Rush nor Johnson recommended the complexities that were later enacted as s 10(2) *Victoria Police Act 2013* (Vic). That section, as has been seen, prevents Ministers from directing the police on some matters and only allows directions on other named matters if, and only if, an integrity or similar body has made a report and the Minister had concluded that the police has not responded appropriately.

That approach may well have been derived, in part at least, from the New Zealand *Policing Act 2008* (NZ), which Rush referred to, but did not discuss in any detail.[1462] However, there is nothing in the New Zealand Act or in either the Rush or Johnson reports that anticipates the additional restrictions in ss 10(2)(e)-(h) and (3).

What can be seen is that in 2013 Victoria adopted its version of the limited direction model of the police – government relationship based on what seems to be a combination of limited analysis with a series of errors and misunderstandings. This seems to have commenced with Johnson's misguided intention in 2001 of not blurring ministerial responsibility,[1463] and has led to a provision with limited Minister's power of direction to such an extent that provisions for the civilian control of the force is now either unusable or ineffective

[1460] *Johnson Report,* above n 42, 56, recommendation 7.
[1461] Ibid 55.
[1462] *Rush Report,* above n 38, 44, 45, 46 and Appendix c (to that report). Under the New Zealand provision, *Policing Act 2008* (NZ) s 16(2), the Police Commissioner is expressly required to act independently in relation to 'the maintenance of order ….the enforcement of law, …. the investigation and prosecution of offences; and decisions about individual Police employees', restrictions that appear mirrored in Victoria's s 10(2)(a)-(d). This provision was seemingly based on a 1998 recommendation of the then New Zealand Police Commissioner Peter Doone who was seeking a 'better definition of the constitutional relationship between the Police and the Minister'. (Commissioner of Police, *Final Report on the Review of Police Administration and Management Structures*, (November 1998)). There was, however, no discussion in the Police Commissioner's report as to how he reached this view, and there is no indication that he had considered judicial authorities, reports from other jurisdictions or any academic writings on the subject or had given any consideration of the doctrine of ministerial responsibility. He was, however, commenting on another report, by an Independent reviewer. At that stage, the New Zealand Police Commissioner/Minister relationship was of a Cowper type, although based on regulation, rather than primary legislation (*Police Regulations 1992* (NZ), reg 3) which Professor Orr analysed and considered as meaning that the Minister had 'a power … to exercise control over the Commissioner of Police in respect of police law enforcement duties' and that 'It is not correct that in New Zealand the police are independent of the executive and are "accountable to the law and the law alone"'. (Orr above n 57, 53. Professor Orr analysed the predecessor to reg 3, *Police Force Regulations 1959* (NZ), reg 7. There are, however, no significant differences between the two regulations.) Nonetheless, such views seem to have been disregarded as the Independent Reviewer, without any evidence of any academic research or analysis, considered that the Police Commissioner had 'constitutional independence' although 'its boundaries have not been defined'. (Report of Independent Reviewer, *Review of Police Administrative and Management Structures* (6 August 1998) paras 37 and 38). Those views seem to have been accepted by the responsible Minister for the 2008 Bill who advised the NZ Parliament that 'under this bill, we are continuing the tradition of an operationally independent police force'. The lack of apparent analysis and reasoning underlying the 2008 Act indicates that little can be derived from the New Zealand model as to the rationale for the aspects of s16 seemingly based on the New Zealand Act other than those limitations met what the New Zealand Police Commissioner, in 1998, felt should be within the scope of police independence.
[1463] *Johnson Report,* above n 42, 54.

Furthermore, this model was developed based on a problematic view of the role and application of conventions[1464] and without any consideration of what would normally be the most relevant factors in legislative and constitutional reform. That is with:

- no discussion or consideration of the underlying theoretical basis of the legal issues involved in the change, in this case, the application of the doctrine of ministerial responsibility to police forces and the constitutional nature of, appropriateness of and need for police operational independence;[1465]
- no resolution of the salient terms involved in the change, in that there was no consideration of or agreed definition of the concept of 'operational independence';
- not taking into account or ignoring the views of the main stakeholder, as the change is contrary to the 2001 views of Force Command;
- only limited and superficial examination of previous enquiries and judicial authorities;
- at most a superficial and partially misunderstood understanding of the statutory models in other Australian jurisdictions;[1466] and
- no consideration of the legislative intent for the replaced provisions, in this case, the Cowper provisions.

And it was enacted without any historical justification, as the previous apparently unlimited Governor in Council direction model had operated for 140 years without ever being exercised.

9.3 - Conclusion

From the above analysis, it is clear that three Australian police forces, the AFP, the Queensland Police Service and the Victoria Police Force have been made subject to limited direction provisions, the effect of which has been to markedly limit the scope of the legal power of the responsible Minister to directly control those forces. This limitation is to the point that the Queensland Minister may not have exercised the Queensland power for 20 years,[1467] the Victorian Minister has never exercised the Victorian power[1468] and the Commonwealth Minister's use has been minimalist in the extreme.

[1464] This issue is discussed in more detail in Chapter 8.
[1465] Discussed further in Chapter 8.
[1466] In particular the South Australian model.
[1467] However, as pointed out in 9.1.2, the Queensland arrangements in place since 1998 have rendered the transparency arrangements in that State far from transparent with the result that ministerial directions may have been made since 1998 that are not known to the public.
[1468] This could, of course, be merely a continuation of the pre 2013 pattern when the existing Cowper power of direction had never been exercised.

By doing so, these provisions have, in the words of the Victorian responsible Minister, sought to 'safeguard the operational independence of the'[1469] Police Commissioner. However, it is also clear, that the reasoning underpinning each of those significant changes was far from adequate. In addition to involving, at best, limited research and analysis, it seems to have been based on, in Queensland's case, unstated assumptions; in the AFP's case, a preconceived understanding of the nature of police independence and an incorrect understanding of Australian policing firearms methodologies; and in Victoria's case, by a combination of superficiality and error.

This, of course, does not mean that the underlying objective of the limited direction provisions, 'to safeguard the operational independence of the' Commissioner is incorrect. Whether the limited direction method of achieving that end is the most appropriate, given the various factors not considered by the three reports that recommended the changes is another matter and will be further discussed in Chapter 12.

[1469] Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, (Kim Wells MP, Minister for Police and Emergency Services). Also see Commonwealth, *Parliamentary Debates,* House of Representatives, 10 May 1979 (John McLeay MP) and Queensland, *Parliamentary Debates,* Legislative Assembly, 20 March 1990 (Jim Elder MP).

Chapter 10 - Doctrines of Police Independence and Ministerial Responsibility

10.1 The Doctrines

The previous Chapters have demonstrated the different legal approaches to the police-government relationship used in Australia and the way that those approaches have been developed and understood. As has been seen, each legal approach, regardless of and despite differing language and parliamentary intent, is regarded as giving rise to a varying and unclear degree of police independence, either as a matter of law or convention.

This Chapter is concerned with two doctrines associated with the police-government relationship. The first is what Pitman has referred to as the 'legal doctrine of "operational independence"'[1470] which, has formed the basis for the current conceptions of police independence.

The other is the doctrine of ministerial responsibility which scholarship on the police-government relationship is notable for minimising or ignoring.

The suggestion in this Chapter is that the understandings of the police-government relationship are in their current confused status as a result of this misapplication of these two concepts or doctrines.

10.2 – The 'doctrine' of Police Independence and the 'mythology of police independence.

What Pitman calls the doctrine of police independence has become regarded, in his words, as being 'the conventional constitutional wisdom', covering 'the entire range of "policing policy" decisions – what crimes to concentrate on and what crimes turn a blind eye to, which areas to deploy them, how to handle demonstrations and so on'.[1471] He defined the doctrine by a paraphrase, or gloss, of Lord Scarman – 'the power to make law enforcement decisions without political influence'.[1472]

This doctrine, however, is founded on a combination of, often unstated, policy considerations, desires and concerns (such as the professionalism of the police and the risk to the public if police powers are politically motivated - factors that are considered in Chapter

[1470] Pitman (1998) above n 76, 84.
[1471] Ibid 70.
[1472] Ibid. Lord Scarman, The *Scarman Report,* above n 681, 104. The particular flaws in Lord Scarman's reasoning are discussed in Chapter 12. Also see Whitrod's definition: 'This doctrine of the independence of police commissioners and chief constables follows the traditional Anglo-Saxon doctrine that law enforcement should be carried out in a manifestly impartial manner, and should be shielded from even the appearance of politically motivated interference'. Whitrod (1976), above n 8, 14.

12 below) and, as this study has identified, flawed assessments of both law and history, based on questionable scholarship and reasoning.

The flawed nature of the reasoning that supports this doctrine is seen in both the majority of academic works on the police-government relationship and in inquiry reports on that subject. Further, it is suggested that the fallacies and errors that support this doctrine are so, on inspection, clearly obvious, that that this 'doctrine' could be better described as the 'mythology of police independence'.

By 'mythology', the reference is not to the popular or everyday usage of the term, which Flood[1473] describes as 'a myth is taken to be an untrue account of events, or simply a collective belief which is or was given the status of truth by a group of people'.[1474]

Instead, it is used in a similar, technical manner to that which Flood adopts of a concept that becomes 'a sacred truth for the community of believers'.[1475] The term is used, as Ritter used the term in 'The Myth of Sir Owen Dixon':[1476]

> a belief structure that is clothed in the language of the actual, but distorts, condenses, disguises and exaggerates its subject. Such 'myths' perform a powerful ideological ad socio-cultural function, acting to explain and justify positions and events while simultaneously frustrating interrogation. The recitation of a myth can confer legitimacy, removing the further need for specific description of a subject or the explanation of a proposition.[1477]

The distortions, exaggerations and so forth regarding this concept that give it its mythical status can be seen from its flawed foundations and the arguments that are used to support the concept and the omissions from those arguments. Many of the flaws and distortions of the arguments underpinning the doctrine have been identified by earlier authors,[1478] but the doctrine remains, despite and seemingly impervious to those defects. The mythological nature of the doctrine allows statements as to its invulnerable nature, such as that by Oliver who wrote, both arrogantly and incorrectly, that the doctrine has been reinforced 'to a point where any doubts about its validity have been dispelled'.[1479]

The flawed basis of the doctrine has been discussed throughout the thesis, and the following summarises those defects. The first of those defects concerns the supposed legal basis for its existence which arises from analysis which largely or totally ignores the significance of the language of the different statutory models, their meaning and their legislative intent.

[1473] Christopher G Flood, *Political Myth* (Routledge, 2013).
[1474] Ibid 6.
[1475] Ibid 8.
[1476] David Ritter, 'The Myth of Sir Owen Dixon' (2004) 9 *Australian Journal of Legal History* 249.
[1477] Ibid 250.
[1478] Particularly Marshall and Lustgarten.
[1479] Oliver, above n 69, 20. Also see Lustgarten, above n 54, 67.

As noted earlier, the interpretive approach of the High Court and other senior courts[1480] is to 'start… and end with the statutory text when considered in light of its context and purpose'.[1481] It is apparent, however, that this interpretive approach has had little or no relevance in the analysis of the police-government relationship in Australia, whether in academic journals, inquiry reports or even judicial consideration. Aside from the examination of the supposed effects of the different statutory models by Plehwe and Wettenhall in 1979,[1482] and some superficial observations by Manison in 1995[1483] there seems to have been little consideration by academics, inquiry reports or judicial authority comparing the text and different meanings of the different statutory models. Indeed, some discussions seem to give the statutory language no consideration at all.[1484]

The legislative intent for 'Cowper provisions', as Chapters 3 and 5 demonstrate, which first became operative in NSW in 1862, were based on the clearly expressed intent of providing government with 'power of control over the force'.[1485] Similar parliamentary views were expressed in even more detail when South Australia adopted its Cowper provision in 1972.[1486] Despite the purpose expressly given for this type of provision in parliamentary debate in both jurisdictions, commentators and inquiry reports have ignored those expressions of parliamentary intention.[1487] For example, the recommendations for the replacement of Cowper provisions in both Victoria and Queensland by the Johnson, Rush and Fitzgerald[1488] reports were made without giving *any* consideration to the legislative intention for the replaced provisions.

Instead of relying on statutory interpretation principles, reliance has been placed on:

- marginally relevant and/or flawed judicial authority; and
- problematic historical and legal analysis.

The first and most significant of the irrelevant or flawed judicial authority is, as referred to in Chapter 5.1.1, Lord Denning's *dicta* in *Blackburn.*[1489] As pointed out there, great reliance has been placed in Australia[1490] and elsewhere[1491] on that decision 'as encapsulating the

[1480] Chapter 2.
[1481] *Attorney-General v Glass* [2016] VSCA 306 (Warren CJ, Beach and Ferguson JJA).
[1482] Plehwe & Wettenhall, above n 56, 77
[1483] Manison, above n 78. Manison's consideration is considered superficial in that it is limited to less than one page and contains notable errors, particularly the error that the an implied power of ministerial direction existed in the pre 2014 Victorian model and in Western Australia.
[1484] For example, in Dr Flemings analysis, her concern regarding the law was with 'law and practice', and it is not clear whether she appreciated the difference between the two concepts or the importance of statutory language. Fleming, above n 83, 61.
[1485] *Sydney Morning Herald*, November 28 1861, 3.
[1486] See Chapter 3 & *Police Regulation Act Amendment Act 1972* (SA).
[1487] An exception is Waller, above n 55.
[1488] *Johnson Report,* above n 42; *Rush Report,* above n 38 and *Fitzgerald Report*, above n 36.
[1489] [1968] 2 QB 118.
[1490] See for example, *Griffiths v Haines* [1984] 3 NSWLR 653, 659; *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747. [33]; Milte, above n 8, 206; Finnane (1994), above n 117, 41-42; Bolen, above n 80, 8 & 15;

proper relationship between police government'.[1492] And this is despite the statutory model that Lord Denning was discussing being very different from the statutory models used in Australia, and despite the numerous technical difficulties in Denning's analysis, particularly those identified by Lustgarten.[1493]

The other largely irrelevant cases routinely referred to[1494] in support of police independence in Australia are discussed in Chapters 5.1 and 6.2. They are:

- *Fisher v Oldham Corporation*[1495] although dealing with a statutory model not used in Australia and despite McArdie J being only concerned with the police being independent of the local watch committee, having accepting that a police constable was 'a servant of the State, a ministerial officer of the central power'.[1496]
- *Enever v R*[1497] and *Attorney General for NSW v Perpetual Trustees,*[1498] even though those cases were considering the commercial consequences of the relationship between the police and the state, not the constitutional relationship between the police and the government.[1499] This limited perspective was made clear by both the High Court and the Privy Council in *Perpetual Trustees* who considered that a 'constable is not in principle distinguishable from that of a soldier.'[1500] Thus, if these decisions meant that police are independent from government, the military would have a similar independence from government, a conclusion that not even the most enthusiastic supporter of police independence would be prepared to accept or adopt. For example, Sir Robert Mark accepted that 'the army … represents the ultimate sanction of force under the command of the government'.[1501] In his view, it 'does not act, as a police force does, on behalf of the community as a whole, but on the orders of its political masters to whom it is, thorough its command structure, accountable'.[1502]

Avery, above n 68, 69; Whitrod (1976), above n 8, 13; Waller, above n 55, 260; Manison, above n 78, 497; Dupont, above n 82, 17; Bronitt & Stenning, above n 919, 32; Plehwe (1973), above n 56, 269; Pitman (1998), above n 76, 72.

[1491] See for example, Oliver, above n 69, 20-21; J C Alderson, 'The Principles and Practice of the British Police' in J C Alderson and Philip John Stead, *The Police We Deserve* (Wolfe, 1973) 39, 43; Jefferson and Grimshaw, above n 71, 22-23; Blair (2009), above n 65, 46; Gillance & Kahn, above n 72, 60; Hewitt, above n 73, 325; Bayley & Stenning, above n 20, 51; Roach (2007), above n 59, 19; Stenning (2000), above n 60, 92.

[1492] Bayley and Stenning, above n 20, 52.

[1493] Lustgarten, above n 54, 62-67.

[1494] See, for example, Pitman (1998), above n 76, 77; Milte, above n 8, 208-209; Avery, above n 68, 64; Manison, above n 78, 498; Gillance & Khan, above n 72, 58; Oliver, above n 69, 8-9; *Johnson Report,* above n 42, 35; *Rush Report,* above n 38, 42; *Lusher Report,* above n 41, 711; Whitrod (1976), above n 8, 14 and Finnane (1994), above n 117, 45.

[1495] [1930] 2 KB 365.

[1496] Ibid 371.

[1497] (1906) 3 CLR 969.

[1498] (1952) 85 CLR 237 (HC) & (1955) 92 CLR 113 (PC).

[1499] These cases are discussed in more detail in Chapters 5 and 6.

[1500] This issue is discussed in more detail in Chapter 5.1.1.

[1501] Mark (1978), above n 260, 244.

[1502] Mark (1977), above n 3, 26; *Mark Report,* above n 34, 51, Appendix F. Avery expressed similar views, Avery, above n 68, 65.

As to questionable historical and legal analysis, an example can be found in a recent study into the governing responsibilities of police conducted by Bayley and Stenning.[1503] They considered that a:

> shift … has taken place … from the long held view that police governance is *sui generis* – requiring different principles from those which apply to other departments and agencies of governance – to the view that it should generally reflect the same principles as are applied in all other areas of government.[1504]

This study has, however, indicated very much the reverse – that police governance in and around 1829 reflected the standard that it did what it was told; and that police forces have now moved into a *sui generis* position of legal or conventional operational independence.

The 1829 'normality' of the police government relationship can be seen from the interrelationship between the second Home Secretary with responsibility for Peel's New Police, Lord Melbourne, with the first two Commissioners of the MET discussed in Chapter 5.1.3 and the post 1829 activities outlined in Chapter 5.1.4. It can also be seen in the relationship between the Home Office and the various pre 1829 London Magistrates Offices, particularly Bow Street, discussed in Chapter 7.3.4. To suggest, as Bayley and Stenning do, that 'political independence was initially achieved by putting police under the supervision of magistrates rather than politicians'[1505] ignores the subordinate role of magistrates in the 18th and 19th centuries, including Bow Street Chief Magistrate Richard Ford, who, according to Beattie, was 'the secretary of state's principal advisor on policing issues,[1506] had an office in the Home Office[1507] and was its 'third-secretary in all but name'.[1508] It also ignores such persons as William Day who, despite being a Home Office official, commanded the Bow Street Horse Patrol.[1509] And their suggestion that the justices were merely subject to 'some supervision by the Home Secretary'[1510] is simply an understatement of the 19th century police-government relationship. This is a relationship which the first two Commissioners of the MET referred to, in evidence to a Parliamentary Committee, as acting under the Minister's 'directions' or 'orders';[1511] the Parliamentary Committee referred to as 'carrying into effect the instructions they received from the Secretary of State';[1512] and the Home Secretary accepted as the police acting 'entirely under the control of the Home Department'.[1513]

[1503] Bayley and Stenning, above n 20.
[1504] Ibid 160.
[1505] Ibid 160-1.
[1506] Beattie, above n 110, 169.
[1507] Other Bow Street Chief Magistrates also had offices in the Home Office. Ibid.
[1508] Ibid 188.
[1509] Critchley, above n 102, 218; Beattie above n 110, 234.
[1510] Bayley and Stenning, above n 20, 161.
[1511] *Coldbath Fields Report*, above n 429, 8-9.
[1512] Ibid 3.
[1513] Ibid 192.

As to the current position of police forces, this study has demonstrated that far from their management reflecting 'the same principles as are applied in all other areas of government', three of Australia's seven police forces have now been provided with a statutory basis for their independence.[1514] Furthermore, the concept of 'operational independence' of police has become widely accepted throughout the country as the appropriate basis for police-government relationship, even if the meaning of that term is far from settled and its application is not uniform across the country.[1515]

To reach the *sui generis* conclusions, Bayley and Stenning adopted a selective misreading of the historical and current record of police – government relationships. And it is suggested that their methodology is representative of the flawed reasoning underlying the current confused relationship between police and government in Australia.

Other instances of poor legal and/or historical analysis which have been identified in this study of the police-government relationship in Australia are:

- *Reliance on Peel's supposed intention and design.* This study has identified an established belief that Peel designed London's Metropolitan Police with the intention that the police be independent of government. However, as Chapter 5.1 has shown, events leading up to and following 1829 demonstrate that the MET was not designed with that intent, did not operate in that manner and that Peel endorsed that subordinate role of Police Commissioners to government.
- *Reliance on the 'Peel principles'*. This study has referred to a well established, but apocryphal view that Peel also composed the 'Peel' principles of policing which support the independence of police from government. This study, in Chapter 8, acknowledges the work of Lentz and Chaires,[1516] whose work established that Peel was not the author of the principles, and that those principles were predominantly the work of a 20th century police scholar, Charles Reith, who based those principles on the General Instructions issued to police from 1829. A related, but equally ill-founded belief was that Peel composed the General Instructions. However, as shown in Chapters 7 and 8, they were composed by the first two Commissioners of the MET. Moreover, while Reith asserted that the 'Peel principles' were based on the General Instructions, Chapter 8 demonstrates that there is much in the 'Peel principles' that cannot be found in the

[1514] The AFP, Queensland Police and Victoria Police.
[1515] See chapter 8.4 of this thesis.
[1516] Lentz & Chaires, above n 1124.

General Instructions (including justifications for police independence and the concept of 'policing by consent').[1517]

- *Ignoring elements of Peel's Model* - Scholars in Australia who place emphasis on the Peel principles as a basis for police independence do not seem to recognise that those principles and the Peel model for the MET, were designed for an unarmed or a lightly armed police force, ignoring references in Reith to that issue.[1518] Moreover, as pointed out in Chapter 9.2, they also ignore that the first model for a limited direction Australian police force designed by Sir Robert Mark with that intention as an inherent element for an independent police force. As Australian police forces have long since abandoned minimal arms, as pointed out in that Chapter, any intended police independence inherent in Peel's or Mark's designs should also have no relevance to Australian Police forces.
- *Reliance on an inflated ahistorical 'tradition' of the office of constable*[1519] – A view held by many police scholars is that the 'traditional' powers of constables renders them immune from government direction. However, as Chapter 7.3 demonstrates, that view is one that requires selective use of history of the office of constable. That history is both obscure and vague, and it is one that indicates a long-standing subordinate role of constables from as early as the 1500s. Moreover, during the following centuries the office became so degraded in both terms of the standing of its holders and of its subordinate position to other offices, that by the time that Peel's MET was established in 1829, constables were clearly subect to Justices of the Peace, who were clearly and obviously subordinate to the Home Office and the Home Secretary. Scholarly views of the 'traditional' independence of constable ignore the long standing subordinate role of constables and to do so requires selective use of historical records involving, for example, favouring the views of a relatively minor 19th century historian (Simpson)[1520] over the legal analysis of Sir William Blackstone.[1521]
- *The lack of appreciation of constitutional doctrines and concepts.* In addition to the lack of recognition of, or the willingness to minimise, the relevance of the doctrine of ministerial responsibility, to the police government relationship (discussed below)[1522] there have been other failures to appreciate constitutional doctrines and concepts. This can be seen from:

[1517] Chapter 8 also makes it clear that and that, whatever meaning is today given to the terminology in the principles, it is apparent that the author of the principles, Reith, was no more in favour of police independence than Peel.
[1518] For example Reith wrote in 1943 (in the midst of the Second World War) that 'British Police are unarmed only because they find they can achieve their ends without the need of arms…. They regard even the baton with misgiving. Perhaps the fundamental difference between them and the police of other countries lies in the fact that the British police acquire power by making the public like them, while the others rely too readily on making the public fear them.' Reith (1943), above n 190, 10. See also Robin Fletcher and Kevin Stenson, 'Governance and the London Metropolitan Police Service' (2009) *Policing* 12, 14.
[1519] For example, Milte, above n 8, 206; Manison, above n 78, 498; Bersten, above n 79, 309; Hewitt, above n 73, 322; Avery, above n 68, 64; Jefferson & Grimshaw, above n 71, 26.
[1520] Simpson, above n 1016.
[1521] Blackstone, above n 1025, Book 1, chapter 9.
[1522] Chapter 10.3.

- *The willingness to assert that police independence derives from one or either of the doctrines of separation of powers or rule of law*. However, as demonstrated in Chapter 7 neither doctrine can have that effect. There is no 'strict' separation of powers at state level and police does not constitute a separate arm of government; and the rule of law, if it is consistent with police independence (a problematic proposition) does not, in Australia, constitute a substantive constitutional limit on exercises of power. As a result, neither doctrine can form the basis of any legal form of police independence from government direction.
- *A lack of appreciation of the nature, function and operation of conventions.* This is discussed in Chapter 8 and includes:
    - a failure of some to appreciate that conventions are not laws;[1523]
    - an incorrect belief that English conventions are 'authoritative' in other common law jurisdictions;[1524]
    - the failure of most commentators to appreciate that conventions are jurisdiction specific and that practice at variation from an understanding might indicate not a breach of convention, but an example of the convention;
    - the Rush and Johnson view that minimised conventions as 'rules of thumb'; and
    - the Rush view which indicates a lack of appreciation of the central and essential role that conventions play in Westminster constitutions: 'over-reliance on convention can create confusion and may obscure certainty and transparency'.[1525]

The combined effect of the uncritical acceptance of these numerous and repeated technical failures has allowed the mythology or 'sacred truth' to prosper and continue in Australia, (as well as in England, Canada and New Zealand) regarding the respective positions of the police and government. And this is despite the clear cogent and largely non-disputed views[1526] of the few who have previously examined the defects in the police independence model, such as Marshall,[1527] Lustgarten[1528] and Plehwe.[1529] It is a not un-common position

[1523] Pitman (1998), above n 76, 3.
[1524] Ibid 60.
[1525] *Rush Report,* above n 38, 42.
[1526] The only instance that located of an attempted response to Marshall's criticisms of police independence was the attempt made by Jefferson and Grimshaw. Jefferson & Grimshaw, above n 71, 50. In essence Jefferson and Grimshaw's method was to refashion Marshall's argument from lack of historical basis for constabulary independence into a proposition about incompatibility about obligations, historical uncertainty and choice, allowing them to assert that Marshall's arguments were based on what Marshall favoured view rather than what the historical record revealed. This approach seems to reflect Reiner's assessment of their methods of revisionist argument in other areas, as 'forced' and 'tenuously stretched'. Reiner (1992) above n 84, 11-12.
[1527] Marshall (1965) above n 53; Marshall (1978) above n 53; Marshall (1984) above n 5 and Marshall and Loveday (1994) above n 53.
[1528] Lustgarten, above n 54.

for academics and commentators to observe such criticism, particularly Lustgarten's criticism of *Blackburn* and, instead of analysing those criticisms and recognising the unsound legal basis of the doctrine, merely note the 'withering'[1530] critique and then move on as if it that commentary not been made or had no significance.[1531]

And this, rather than the application of sound principles of statutory interpretation,[1532] has formed the basis of what many scholars and police officials refer to as the constitutional independence of police or the doctrine of police independence. There is, however, as this thesis demonstrates, no justification for the continuation of this mythological based doctrine as a legal concept; although there may be justification for the continuation of the concept, stripped of its tenuous legal and historical supports. This issue is considered in Chapter 12 below.

10.3 – Doctrine of Ministerial Responsibility.

While the 'doctrine' of police independence, despite its many legal and historical flaws, has been accepted as the basis for police independence, another doctrine, the doctrine of ministerial responsibility is notable for its absence, or minimisation in most Australian discussions of the police-government relationship. This section will examine the relevance of that the doctrine had or should have had to that relationship.

This doctrine is, as Woodhouse has put it, 'the fundamental principle of the British Constitution … that the government is accountable through its Ministers to Parliament'.[1533] It also forms part of Australian constitutions and, as Mulgan has recently written 'ministerial responsibility remains a key constitutional convention in Australia, as in all Westminster-derived systems'.[1534]

Ministerial responsibility forms part of a broader doctrine, the doctrine of responsible government – which was described by Lord Haldane, in words that Isaacs J endorsed in the *Engineers'* decision[1535] and in *Commonwealth v Kreglinger & Fernau*[1536] as:

[1529] Plehwe (1973), above n 56.
[1530] Bayley and Stenning, above n 20, 51.
[1531] See for example ibid; Pitman (1998), above n 76, 74; Manison, above n 78, 498; Blair (2009), above n 65, 46-7; and Bronitt & Stenning, above n 919, 322 fnt 16. Hewitt was worse in that he omitted Lustgarten's criticism of *Blackburn*, but then went on to quote his views regarding the 'embedded' nature of the doctrine and that is 'inconceivable that, without parliamentary intervention, the courts would resile from the position they have reached' thereby presenting Lustgarten as a supporter of police independence, even if only pragmatically. See Hewitt, above n 73, 329 and Lustgarten, above n 54, 67.
[1532] Discussed in Chapter 2.
[1533] Woodhouse (1994), above n 1, 3.
[1534] Richard Mulgan, 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU EPress, 2012) 177.
[1535] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('Engineers' case') (1920) 28 CLR 129.
[1536] (1926) 37 CLR 393, 413.

> the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the Legislature.

Isaacs went on in the latter decision to observe that the doctrine is 'part of the fabric on which the written words of the Constitution are superimposed',[1537] words later accepted by Mason CJ in *Australian Capital Television v Commonwealth.* Mason added that the:

> principle of responsible government - the system of government by which the executive is responsible to the legislature - is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution.[1538]

That doctrine was described by Parker[1539] as being the 'Westminster syndrome' and having four precepts:

> that Ministers should be in parliament and responsible to it; that the bureaucracy should be distinct from the political appointees; that Ministers in office should have final authority over the bureaucracy; and that lines of accountability should run from official to Minister to cabinet to parliament to voters, without short cuts.[1540]

Ministerial responsibility, which can be seen predominately in Parker's third precept, is also a complex concept. According to Marshall, it is not a single doctrine but is a 'complicated bundle of distinct though related principles'.[1541] In his view, it includes:

- A responsible executive, 'legally and constitutionally non-autonomous, removable by the legislative branch';
- The collective responsibility of Ministers; and
- The individual responsibility of Minister.[1542]

It is in relation to the last of those elements that ministerial responsibility has relevance to the police-government relationship as that element includes ministerial responsibility for the actions of those for whom the Minister is accountable,[1543] which Blackham and Williams refer to as 'the performance of people and entities within their portfolios'.[1544] This is not merely those within the public service, which seems confirmed by two relatively recent and notable

[1537] Ibid.
[1538] (1992) 177 CLR 106, 135.
[1539] R S Parker, 'Responsible Government in Australia' in Weller & Jaensch (eds), above n 96, 11.
[1540] Ibid 12.
[1541] Marshall (1989), above n 1, 1.
[1542] Ibid.
[1543] Ibid 6-9.
[1544] Alysia Blackham and George Williams, 'The Appointment from Outside of Parliament' (2012) 40 *Federal Law Review* 253 258.

decisions of the High Court: *Lange v Australian Broadcasting Corporation*[1545] and *Egan v. Willis*[1546] in which the following observation was made or endorsed:

> [T]he conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature. In, *British Steel v Granada Television*[1547] Lord Wilberforce said that it was by these reports that effect was given to '[t]he legitimate interest of the public' in knowing about the affairs of such bodies.[1548]

The 1976 Coombs Royal Commission into Government Administration[1549] also made the following discerning observation regarding the function of Ministers in relation to statutory bodies that has apparent relevance to police forces.

> The fact that a statutory body has been brought into being frequently signifies that a deliberate decision has been taken to place the performance of a particular function outside the political sphere of influence or to relieve a Minister and his department of immediate responsibility for it. *But the fact that certain powers are reserved to the Minister means that it is the Parliament's intention that the abdication of ministerial authority should not be complete* and sometimes also that Parliament desires that the activities of the body should be subordinated to broad policies enunciated from time to time by the government.[1550]

Ministers have, therefore, the constitutional responsibility for the actions of those who are engaged to fulfil the functions for which the Minister is accountable. As such, one would have expected that discussions of the police government relationship would have given a central or predominant role to consideration of how this doctrine can or should operate consistently with concepts of police independence.

10.3.1 – Consideration of the Doctrine

It is, therefore, odd that in most studies and discussions of the police-government relationship, the involvement of minsters is not seen as an essential constitutional role. Instead, it is presented as political 'interference'[1551] or 'meddling'[1552] with and politicising the police force.[1553] Indeed some seem to endorse the quoted views of Alan Goodson:[1554] 'Once

[1545] which concerned the Commonwealth Constitution. (1997) 189 CLR 520.
[1546] which concerned the NSW Constitution. (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ).
[1547] [1981] AC 1096 at 1168.
[1548] (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[1549] Royal Commission into Government Administration, *Report,* (1976) ('*The Coombs Report*'). The significance of this report relates to both its subject matter and its commissioners which included its Chair, the economist H C Coombs and the constitutional and administrative lawyer, Professor Enid Campbell.
[1550] Ibid 86 (emphasis added).
[1551] For example, Bayley and Stenning, above n 20,100; C Lewis (2010), above n 8, 95; Fleming above n 83, 64; and numerous examples in Pitman (1998) above n 76, including 14, 16, 17, 58 & 78.
[1552] For example, Bayley and Stenning, above n 20, 14; R H Simmonds, 'Commentary', in Beare & Murray (ed), above n 59, 78.
[1553] Pitman (1998), above n 76, 154.
[1554] Former Chief Constable of Leicester.

you allow political interference to play *any part at all* you are changing the complete nature of policing'.[1555]

In most academic treatments, the doctrine is omitted from consideration, minimised,[1556] or, at most, is presented as being balanced[1557] as against operational independence, without any recognition of either the fundamental role that the first doctrine plays in Westminster democracies or the tenuous basis of the second.

For example, Pitman, in his 1998 thesis wrote of the need to reconcile ministerial responsibility and operational independence which he oddly referred to the 'two sources of power', and which he also considered 'according to all the case studies "lies at the centre of modern government"'.[1558]

Pitman minimised the significance of this doctrine, writing that it 'In practice …has probably never been literally true'.[1559] He did not express why he expressed that view, but it may be that he shared the view of the Canadian scholar Sossin that 'the main principles underlying ministerial responsibility in its original formulations now appear out dated or naive'.[1560] Sossin took that position, considering that 'the principle that Ministers should resign in response to errors or misdeeds of public servants … seem to have lost currency in Canada' and that the 'notion that the Minister may be personally responsible for all decisions taken in the ministry presumes a level of knowledge and control over the actions of government that is no longer realistic given the volume and complexity of government action'.[1561]

That understanding is, however, a common misconception of the doctrine of ministerial responsibility convention that fails to distinguish between responsibility and 'blameabilty'. A Minister is accountable for all action in his or her department including being, 'responsible for every stamp stuck on an envelope'.[1562] This does not, however, render the Minister 'blameable' or liable for termination for each and every error in the department.[1563] That liability arises from the actions or inactions of the Minister. Sir Billy Snedden[1564] in 1966

[1555] Pitman (1998), above n 76, 58 (emphasis added) who obtained this passage from Jefferson and Grimshaw, above n 71. However, the citation provided (Jefferson and Grimshaw 79) does not include this passage.
[1556] For example in Bayley and Stenning's 2016 study the doctrine was mentioned only twice and only in passing with no discussion or explanation - Bayley and Stenning, above n 20 ,188 & 200. Similar minimal or non treatment of the doctrine can be seen in other academic discussions, such as Fleming (2004), above n 83; Stenning (2011), above n 60; Plehwe (1973), above n 56; Plehwe and Wettenhall, above n 56; Wettehhall, above n 771; Milte, above n 8.
[1557] Pitman (1998), above n 76, 41, 44, 66, 82 & 233; Beare & Murray, above n 59, 4; Roach (2007), above n 59, 76; Gordon Christie, 'Police-Government Relations in the Context of State-Aboriginal Relations' in Beare and Murray (eds), above n 59, 147, 171.
[1558] Pitman (1998), above n 76, 226-227.
[1559] Ibid 66. In the same context he also wrote 'If the convention of ministerial responsibility for a police department is to retain any validity at all…'[1559]
[1560] Sossin, above n 125, 120.
[1561] Ibid 121. Also see Bersten, above n 79, 302 & 308.
[1562] Lord Morrison, quoted in Killey, above n 5, 105.
[1563] Diana Woodhouse, *In Pursuit of Good Administration* (Clarendon, 1997) 10.
[1564] Commonwealth Attorney-General 1964-66; Treasurer 1971-72; Speaker of the House of Representatives 1976-83; Leader of the Opposition 1972-75.

demonstrated that distinction when he said 'There is no compulsion to resign [if] … the Minister is free from personal fault and could not by reasonable diligence in controlling the department have prevented the mistake'.[1565]

As a result of this distinction, there have been few ministerial resignations due to departmental errors.[1566] Whether a more robust application of the doctrine might have led to more resignations is an open question which is beyond the scope of this thesis to examine. But what is of relevance to this study is that the potential liability of Ministers for departmental error is not determinative of the scope of the responsibility of a Minister to parliament and the electorate for the actions taken within the Minister's portfolio.

Further, the commentary has included observations on ministerial responsibility which are confused or simply wrong. As an example of the latter, in 1997 Pitman and Pitman observed that:

> The general view of some authors would seem to be that a minister cannot be held accountable for decisions made by a Commissioner of police if they are independent on operational matters.[1567]

There are two difficulties with this proposition. The first is that the three sources cited by the Pitmans, do not support the concept.[1568] The second difficulty is that it assumes that ministerial responsibility equates with the power to direct and ignores the ministerial remedial powers that are available even if the Minister cannot direct the action. It is not uncommon for a Minister to have limited direction powers in relation to particular statutory bodies excluding certain of its functions - and if the proposition advanced by Pitman and Pitman was correct, there would be no accountability to parliament for such actions.[1569] However, the Minister still has responsibility of monitoring the actions of the body to ensure that negative actions regarding that function do not occur and are not repeated. And that may require taking remedial actions such as removing and replacing those who constitute the statutory body.

[1565] Quoted in J Uhr, *Deliberative Democracy in Australia, The Changing Place of Parliament* (Cambridge, 1998) 196. Similarly, Jack Straw, when Home Secretary in the United Kingdom, said:

> If a cell door has been left open by accident it is not assumed that I am culpable, guilty of that act. However, I am responsible for checking whether the right procedures are in place and that effective management decisions have been made … to ensure that that sort thing doesn't happen again. (quoted in Killey, above n 5,112.

[1566] See Killey, above n 5,106-7.

[1567] Pitman and Pitman (1997), above n 76, 24.

[1568] The sources cited were Marshall (1984), above n 5, 146; Plehwe & Wettenhall, above n 56, 83; Waller, above n 55, 263. In each case the author was discussing the extent of the power of government to direct police or to obtain information from police, not the accountability of government for the police actions.

[1569] For example, the ministerial power to direct Ambulance Victoria does not extend to directions that relate to a 'service provided or proposed to be provided by an ambulance service to a particular person'. Section 34B *Ambulance Services Act 1986 (*Vic). Thus, Ambulance Victoria cannot be directed in relation to specific services provided to specific persons, and, if Pitman and Pitman are correct, the Minister is not accountable to parliament for such service even if those services are badly performed. The Minister may not have been able to direct Ambulance Victoria in relation to this specific service, but the Minister still has responsibility of monitoring the actions of the body concerned to ensure that such negative actions are not repeated and that may require taking remedial actions such as removing and replacing those who constitute the statutory body. Killey, above n 5, 113.

One of the few instances of an examination of the police government relationship that included some attention to the doctrine was in Bersten's 1990 article.[1570] That treatment, however seems to reflect a particularly individual interpretation of the doctrine and of conventions. Bersten seems to consider the doctrine not to have general application, being not applicable to the police-government relationship due to the 'paucity of applicable precedents'.[1571]

By saying this, Bersten seems to be ignoring the fundamental nature of the doctrine to Westminster based constitutions, as recognised by the various decisions of the High Court and by both Mulgan and Woodhouse referred to earlier and seemingly by the Ministers to whom Bersten refers. It is, however, suggested that the doctrine, due to its long standing recognition as a fundamental element of Westminster based constitutions, has received sufficient acceptance to render it as the default position in determining the responsibility of Ministers that must be disproved if it is not to be a conventional requirement. It does not need to be established, Minister by Minister, or portfolio by portfolio, as a necessary conventional obligation.

The lack of attention to the doctrine of ministerial responsibility in academic literature can also be seen in the lack of consideration given to the 1972 South Australia legislative amendments. These were the most significant legislative amendments regarding the police government relationship made in Australia prior to the introduction of the limited direction models from 1979. What is significant about the South Australian reforms is that they were designed to support ministerial responsibility by providing legislative authority to government to direct police but only through a transparent process. These reforms were intended to implement the recommendations of the Bright Royal Commission report and to limit police independence. In the words of the then responsible Minister, Len King QC: 'This amendment makes it clear that in exercising that control and management the Commissioner is to be subject to any directions of the Governor'.[1572]

Given that the South Australian reforms were deliberately intended to increase ministerial control, rather than restrict it, one would have expected that academic literature and inquiry reports would give some attention to both the intention underlying the South Australian reforms and their operation. Unfortunately, that has not been the case. Academic papers in

[1570] Bersten, above n 79 (1990).
[1571] Ibid 307. 'For the same reason, the relationship between the Minister responsible for the police and the Parliament in terms of ministerial responsibility for the police is a matter of usage. It may be that Ministers responsible for police generally regard themselves as answerable to the Parliament. But it is submitted that the requirements which must be satisfied before a convention arises are not met. This is due to the paucity of applicable precedents available for consideration before a convention can be said to apply in a particular case. Further complications arise because the notion of ministerial responsibility is unsettled and uncertain in content'.
[1572] South Australia, *Parliamentary Debates,* Legislative Assembly, 14 March 1972 (Len King QC) 3830.

the late 1970s and early 1980's did spend some time discussing the South Australian reforms.[1573] However, later discussions have either ignored the South Australian reforms,[1574] minimised them[1575] (or misrepresented them)[1576] and none has sought to assess whether the expansion of governmental direction powers has had any negative effect on the police – government relationship.

Pitman's appreciation of South Australian circumstances seems particularly poor as he stated in both his thesis, and in an article written more than a decade later, that Police Commissioner McKinna had been dismissed by the Dunstan government.[1577] This is simply not accurate as McKinna was not dismissed, but retired in 1972.[1578]

The most extensive consideration of the South Australia legislation in academic discussion from the mid 1980s onwards was in discussions by Fleming[1579] and by Stenning.[1580] Fleming's discussion however, was largely about the dispute between the Dunstan government and Commissioners McKinna and Salisbury that led to Salisbury's dismissal. Her discussion of the legislative reforms was limited to acknowledgement of the existence of the legislative changes and her acceptance of the views of the criminologist Finnane which she expressed as: 'the legislation introduced further ambiguity'.[1581] Finnane, however, did not actually express such view.[1582] Moreover, Fleming also ignored the views of the noted constitutional scholar, Lois Waller, regarding the clarity of the South Australian amendments, even though she had cited his article for other purposes.[1583]

Fleming's article also included the following puzzling sentence:

> By suggesting the Minister and the Commissioner define the limits to their respective areas of responsibility, the arrangement created the potential for further disagreement.[1584]

[1573] Waller, above n 55; Plehwe and Wettenhall (1979), above n 56; Plehwe (1973), above n 56; Hogg and Hawker (1983), above n 771; Matthew Goode, 'The Sacking of Salisbury' (April 1978) L*egal Services Bulletin* 49; Wettenhall, above n 771.
[1574] See for example, Pitman and Pitman above n 76; C Lewis above n 8; Bronitt and Stenning above n 919; Dupont above n 82; Bayley and Stenning, above n 20, 59 (which mentioned the Bright Report, but not the reforms that it lead to).
[1575] Bersten, above n 79; Manison, above n 78; Whitrod (1976), above n 8; Finnane (1994), above n 117, 39.
[1576] Misrepresentation or misunderstanding seems present in Dr Pitman's thesis when he stated that 'Bright J said, the Commissioner should be free from the control, and even the guidance of the government'. Pitman (1989) above n 76, 63. However, Bright said no such thing: 'The Chief Secretary ought to be willing to advise *and direct* the Commissioner of Police in any such case' (emphasis added). Pitman also ignored Bright's recommendation that a Cowper provision be enacted and the ministerial intent as expressed by Minister King. *Bright Report,* above n 32, 80-82.
[1577] Pitman (1998), above n 76, 80 & Pitman (2004), above n 76, 123.
[1578] Don Dunstan, *Felicia, The Political Memoirs of Don Dunstan* (Macmillan 1981) 185; *Mitchell Report* above n 40, 11; Stenning (2007), above n 60, 211.
[1579] Fleming, above n 83, 62-64.
[1580] Stenning (2007), above n 60, 208-214.
[1581] Fleming, above n 83, 63.
[1582] Finnane actually said that 'ambiguity remained', not that the amendments created further ambiguity. Finnane (1994), above n 117, 39.
[1583] Fleming, above n 83, 74. Waller wrote (above n 55, 255) words that clearly indicate his views as to the unambiguity of the 1972 amendments:
> In no other Australian state had Parliament enacted so recently and clearly legislation expressing the subordination of the police to the executive government.
[1584] Fleming, above n 83, 63.

What Fleming here seems to be referring to is Bright's recommendation that, in addition to the government being provided with the legislative power to direct the police, that a convention be established 'with regard within which any such written direction may properly be given'.[1585] Why this should create 'the potential for further disagreement' or why 'its legacy was a degree of tension between police and government'[1586] Fleming did not make clear. And neither did she identify any instances of actual tension to validate her concerns, even though she was writing more than 30 years after the South Australian amendments had been made. It may be that had she referred to or been aware of the views of former Police Commissioner, David Hunt, who wrote in 1994,[1587] that 'In my state, I think we have got the balance about right'[1588] her views may have altered. Moreover, she did not acknowledge that, with the clear statutory language of the 1972 reforms there was now a clear default position should such tensions arise. That is, the government has the power to direct and the Commissioner's powers are subject to those directions.[1589]

Stenning's 2007 advice to the Ipperwash Royal Commission[1590] also spent some time discussing the South Australian changes but was equally limited to historic recitation with little or no analysis of the significance of the changes. In particular, Stenning did not assess the merits of the South Australian changes or discuss the significance and effect of its transparency requirements. Although Stenning was discussing the various legislative packages introduced in Australia from 1970's onwards, he seems not to have recognised that the direction of the South Australian legislative changes is opposite to that of the AFP or Queensland changes[1591] or to have assessed the relative merits of the different approaches. So while Stenning was correct, when he observed that 'the modern debate over police independence in Australia really began' with the South Australian changes, his discussion ignored the significance of those changes.

The three integrity reports that led to the limited direction models in Australia[1592] also demonstrate similar lack of attention to the doctrine (and the South Australian reforms). Each report made their significant recommendations regarding the police government relationship but did so without giving any attention to the South Australian model, the

[1585] *Bright Report,* above n 32, 82.
[1586] Fleming, above n 83, 63.
[1587] after more than 10 years as South Australia's Police Commissioner.
[1588] David Hunt, 'Police Authority, Police Responsiveness and the Rights of the Individual: What is the Right Balance' in Moore and Wettenhall (eds), above n 132, 67,68.
[1589] *Police Act 1998* (SA) s6.
[1590] Stenning (2007), above n 60, 208-214.
[1591] The Victorian reforms were not enacted until 2013.
[1592] The Mark, Fitzgerald and Rush Reports discussed in Chapter 9.

considerations that were taken into account in developing that model[1593] and *with no analysis of the doctrine of ministerial responsibility* and its impact on police independence.

In the report that led to the creation of the AFP, Sir Robert Mark made no reference to the doctrine. His view of the constitutional relationship between police and government seemed limited to views seemingly influenced by both Denning and Reith's Peel's principles. That is 'police represent government by consent' relying on the 'confidence and support of the people' and that 'police are not the servants of the government at any level'.[1594]

There were, however, a number of references to 'ministerial responsibility' in the Queensland Fitzgerald Report, but only in the limited sense of mentioning the responsibility of particular Ministers or portfolios – not to discuss, explain or even refer to the scope of the doctrine, its broader constitutional significance or its impact on the Minister's relationship with the police.[1595] This is particularly odd as Fitzgerald did not take the opportunity, as pointed out earlier,[1596] to comment on the statement made to the Queensland Parliament made by Minister Newbery in 1976 in which the Minister expressed the 'traditional' views of the doctrine and its effect.[1597] even though those comments were made in the context of a subject with which Fitzgerald's report was closely concerned – the interrelationship of Police Commissioner Whitrod with the Queensland government.

The Victorian Rush report included one solitary reference to the doctrine, and one which indicates that its author had little appreciation of the subject:

> There is no recognition in the Act of the Minister's responsibility to Parliament for the performance of Victoria Police. There is no established process in the Act by which the Minister can direct Victoria Police to pursue specific policy objectives or require it to account for its performance.[1598]

As to the first of those sentences, the *Police Regulation Act*[1599] included numerous references to 'Minister' and those references mean, according to the *Interpretation of Legislation Act 1984* (Vic): 'the responsible Minister of the Crown for the time being administering the provision in which, or in respect of which, the expression is used….'[1600]

[1593] The Rush Report referred to South Australian policing legislation, but only in the context of its perceived commonalities with the regimes in other Australian jurisdictions, and not to discuss the effect of its Cowper provision and the reason for its introduction. See for example *Rush Report,* above n 38, 44 and 46.
[1594] *Mark Report,* above n 34, 51& 52.
[1595] See *Fitzgerald Report,* above n 36, 35,103,110,112, 126,138, 278, 309 & 347.
[1596] in Chapter 6.4.5.
[1597] That is that a Police Commissioner is 'subject to the direction of his Minister' which is 'necessary from any Minister who is responsible to his Government, to the Parliament and to the citizens of this State'. Queensland, *Parliamentary Debates,* Legislative Assembly, 30 November 1976, 1901.
[1598] *Rush Report,* above n 38, 42.
[1599] Now renamed the *Police Regulation (Pensions) Act 1958* (Vic).
[1600] *Interpretation of Legislation Act 1984* (Vic) s 38.

Why there needs to be any further recognition in the Act regarding the Minister's responsibility to Parliament for the performance of Victoria Police was not made clear by Rush, and none seem apparent. As to Rush's second sentence, he seems not to appreciate that in the absence of a power to direct, direction is not possible.[1601] As the *Police Regulation Act* included no ministerial power to direct, it needed no procedure for the exercise of that non-existent power.

Rush may, however, have been relying on the earlier Johnson report in which there was some discussion of ministerial responsibility. Johnson's discussion included the view that ministerial responsibility did not apply to operational issues when he stated: 'The question of ministerial responsibility in relation to policing is complicated by the principle that there should be no political interference in law enforcement or operational decision making'.[1602]

However, the only source for this understanding of the doctrine was another misrepresentation of the views of the criminologist Finnane,[1603] rather than from a constitutional scholar.

This position is to be contrasted with the South Australian report that recommended the introduction of a Cowper provision to that State, the Bright report. In that report, while the discussion of the doctrine was not extensive, Bright J made his understanding of the importance of the doctrine clear:

> In a system of responsible government there must ultimately be a Minister of State answerable in parliament and the parliament for any executive operation…. But ultimately he [ie a public servant] will be responsible, through the Minister, to the parliament, … in the sense that all executive action ought to be subject to examination and discussion in parliament'….
>
> I believe, further, that where such advice … is tended to the Commissioner of Police [by a Minister] two consequences should ensure-
>
> (a) that he ought to act in accordance with that advice and direction as long as the assumptions upon which the advice and direction was tendered remain valid;
> (b) that the Commissioner of Police is not to be treated as being in breach of his duty in so acting.[1604]

10.3.2 – The Doctrine in Practice – Case Studies

It is also worth observing the lack of operation of the doctrine, in practice, by examining two case studies; one in Victoria and one in New South Wales. Both involve examining the

[1601] See Chapter 4.
[1602] *Johnson Report*, above n 42, 34.
[1603] who did not say that the doctrine did not apply to operational issues but that there was 'ambiguity' on that issue. Finnane (1994), above n 117, 39.
[1604] *Bright Report,* above n 32, 79-80.

attitude of Ministers and the respective parliaments to police operations which involved loss of civilian life and to the responsibility of Ministers for those operations. The incidents are the Lindt Café siege in Sydney on 15-16 December 2014, and the Bourke Street tragedy that occurred on 21 January 2017 in Melbourne. The actions of the police in both incidents can be subject to some criticism.[1605]

Despite the very different statutory regimes in the two jurisdictions (NSW has a Cowper provision and a history of activist Police Ministers[1606] while Victoria operates under an extreme limited direction provision), the attitude of the two parliaments regarding the responsibility of the respective police Ministers seems largely the same. That is, in both jurisdictions Ministers did not accept responsibility for police actions and both parliaments did nothing, or almost nothing, to challenge that view.

The only significant distinction is that the then NSW Premier, Mike Baird, initially claimed to have 'worked alongside Deputy Commissioner Catherine Burn throughout the entire siege'[1607] before retreating to the operational independence position most definitively put by the Police Minister, Troy Grant:

> Decisions about what police have and do not have; what they need and do not need; where things go or do not go are not things that governments do—never have and never will.[1608]

That position indicates that Minister Grant knew nothing of NSW's colonial and recent history, being seemingly unaware of Premier Cowper's reason for the introduction of the direction provision,[1609] or its implementation by his predecessors as Police Minister, from Parkes[1610] to Costa.[1611] His view, however, is consistent with the academic understanding of police independence in Australia[1612] and the Victorian statutory regime.

It is, however, something of a surprise that of the two Parliaments it was in the Victorian Parliament that there seemed some expression that government should accept some responsibility for the poor police actions. This, it should be pointed out, was from only one relatively junior member of the opposition coalition parties in the Legislative Council, and his observations regarding the responsibility might be more related to the availability of bail, than for police actions. However, those observations can also be read to encompass government

[1605] Mark Kenny, Lindt café siege: 'Man Monis was the murderer but face it, our system failed too' *The Age* 25 May 2017; Tammy Mills & Cameron Houston, 'Police Tailed alleged CBD killer "for hours" before Bourke Street rampage', *The Age* 23 January 2017.
[1606] As discussed in Chapter 8.
[1607] a statement made in January 2015 by Mike Baird quoted by David Shoebridge MLC, New South Wales, *Parliamentary Debates,* Legislative Council, 23 August 2016, and by Guy Zangari MLA, New South Wales, *Parliamentary Debates*, *Legislative Assembly,* 24 August 2016.
[1608] New South Wales, *Parliamentary Debates,* Legislative Assembly, 24 August 2016, Troy Grant MLA.
[1609] See Chapter 3.
[1610] See Chapter 6.
[1611] See Chapter 8.
[1612] See Chapters 8.4 and 10.2.

responsibility for any police operational failures. Luke O'Sullivan MLC considered that the Bourke Street tragedy:

> represents a systemic failure of the system on so many levels. This tragedy did not need to happen. It could have been stopped several times prior to the tragedy occurring. This was clearly a failure of the bail justice system, which released the alleged perpetrator when police requested remand. This was a failure of our justice system, which allowed this man to remain on the streets after a number of serious offences. He was well known to police. This was a failure of police command, who should have authorised Victoria Police officers to stop this tragedy before it happened. This was a failure of police command, who failed to allow the car to be rammed after many requests from police on the ground. *This was a complete failure of the zero-harm policy adopted by the government and police command*, which has in part contributed to the death of six people and 30 more being injured. *This was a failure of the Labor government, which has a soft approach to crime*.[1613]

In the NSW Parliament, the only statement of relevance to Ministerial responsibility in relation to the Lindt incident is what seems an exasperated interjection made by a back bencher during the answer to a parliamentary question by Minister Grant on 25 August 2016. The Minister had advised the Legislative Assembly of the respective roles of police and government:

> It is their job to determine what they need, why they need it and how they are going to use it. It is the job of the Government—which members opposite probably do not understand …—to find the money within Treasury to fund it.[1614]

After that answer, the backbencher, Mr Ron Hoenig, a lawyer,[1615] apparently recognising the minimal role that the Minister had given to himself and his role as Minister for Police, interjected 'Are you accountable to Parliament?' Other than the Minister's acknowledgement that he is, in fact, accountable to parliament, there seems no further consideration in the NSW parliament of the relevance of ministerial responsibility in the context of the Lindt incident.

Otherwise, parliamentary consideration in both Victoria and NSW did not seek to align responsibility to Ministers – indicating that in both parliaments, the doctrine of ministerial responsibility currently plays virtually no part in parliament's consideration of the police – government relationship regarding 'operational matters' – regardless of the statutory regime.[1616]

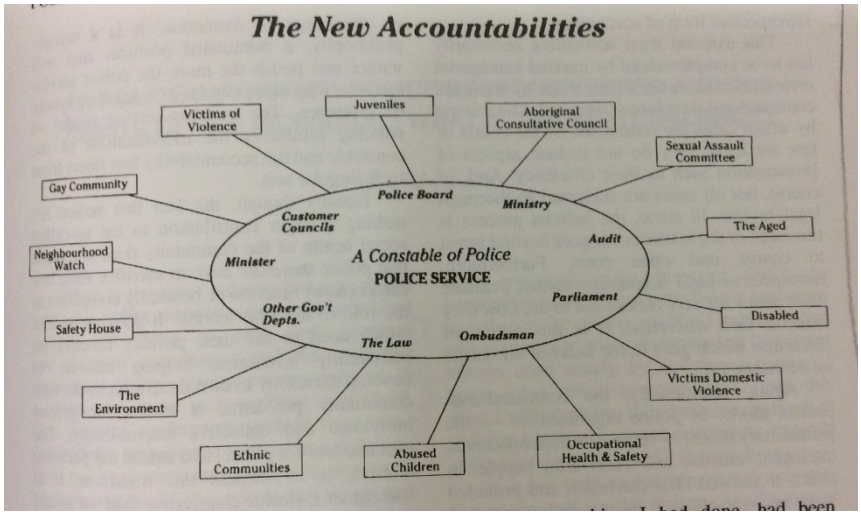
[1613] Victoria, Parliamentary Debates, *Legislative Council*, 7 February 2017 (emphasis added).
[1614] New South Wales, Parliamentary Debates, *Legislative Assembly*, 25 August 2016, (Troy Grant).
[1615] https://www.parliament.nsw.gov.au/members/Pages/member-details.aspx?pk=97
[1616] It can also be observed that whatever relevance that the doctrine still has, it might be more regarded as means of political attack rather than as a constitutional doctrine. In the two incidents in the case study, both involved a member of the Labor Party and a member of the National Party; one a Minister and the other a backbencher. And while the position of the Ministers in each incident was identical, not taking any responsibility for police operational actions, and the positions of the two backbenchers was also identical seeming to take the opposing view, the relative positions of the two parties in the two incidents

10.3.3 - Accountability and the Doctrine

One of the significant consequences of the doctrine is that it establishes the primary means by which there is accountability for the actions of the police. That is, if the doctrine is applicable to police forces, in the words of Parker, accountability would 'run from official to minister to cabinet to parliament to voters'.[1617] However, if the police and the Police Commissioner are independent in operational matters, whatever 'operational' means, does that independence mean that there is no accountability for such matters?

There have been arguments that the police are accountable in a variety of other and different ways in the absence of ministerial responsibility. As an example, the 1990s NSW Police Commissioner A R Lauer considered that 'The profession of policing has never been more accountable'[1618] and illustrated this view by his diagram *The New Accountabilities* which lists, together with the Minister and the Ministry,[1619] a number of other forms of supposed accountabilities to which he considered the police are now accountable.

Fig 10.1 - Lauer New Accountabilities Diagram[1620]



The AFP designer, Sir Robert Mark, also accepted that police 'must be willing to accept a high degree of supervision and accountability' for its actions.[1621] Unlike Lauer, however, he

was reversed – as the NSW Minister, Troy Grant, was from the National Party while the Victorian Minister (Lisa Neville) is a member of the ALP and the NSW backbencher Ron Hoenig is from the ALP, while the Victorian backbencher is a National.

[1617] Parker, above n 1539, 12.

[1618] Lauer (1994), above n 137.

[1619] It is not clear why Lauer added this distinction.

[1620] Lauer (1994), above n 137, 65.

[1621] Mark (1977), above n 3, 21. Also see Mark (1978) above n 260, 145. Also see *The Scarman Report,* above n 681,104.

was less clear as to how this alternative accountability operated, although he seemed to have located it in three sources – 'The laws, the courts, the organs of public opinion'.[1622]

Those and other forms of 'alternative accountability' are discussed below.

10.3.3.1 - The Law (and the Courts) - The first two of Mark's categories can be taken together as they are related and concern the legal consequences of police acting incorrectly. As Mark pointed out:

> If we exceed our powers we can be prosecuted or sued and if a citizen suffers wrong from a policeman who cannot be identified his chief officer can be found liable for that wrong doing. We are taught at the outset that obedience to orders affords no defence for wrongdoing or misuse of authority.[1623]

It is, however, not clear why liability for prosecution or civil liability for excessive use of powers should be the basis for independence from direction, as all other members of the public sector are subject to similar obligations. Nonetheless, this supposed source of accountability seems closely based on Lord Denning's *dicta* in *Blackburn*.[1624]

There are also a number of difficulties with the 'law' basis for police accountability. As Sossin points out, in jurisdictions where there is a Cowper or Peel type of direction provision:

> Paradoxically, the law to which police owe their loyalty appears expressly to validate the supervision of the political executive over the police…. [as] most of the statutory authority empowering Police Commissioners stipulates that the responsibility for 'direction' resides with the Minister'.[1625]

The second difficulty relates to the discretion available to the police force, something that Mark avoided discussing. Indeed he seems to have been quite misleading on this issue when he said: 'society requires us to enforce the laws enacted by its elected representatives.[1626] In fact society makes no such 'requirement' but provides police with a very broad discretion in the exercise of their powers. Indeed Jefferson and Grimshaw have interpreted Mark as believing that a broad discretion is appropriate for non partisan police as their objective is 'the impartial enforcement of the law, in the interests of the great majority of people', and that those interests might be better served 'occasionally' by using that discretion 'by ignoring the law'![1627]

Police discretion relates to, according to Goldstein:

[1622] Mark (1977), above n 3, 25.
[1623] Ibid 13.
[1624] [1968] 2 QB 118, 135.
[1625] Sossin, above n 125, 118.This, however, does not take into account any provision that might limit the scope of the direction power, such as a provision providing the common law constable powers to police members as discussed in Chapter 6.4.3.
[1626] Mark (1977), above n 3, 24.
[1627] Jefferson & Grimshaw, above n 71, 75.

- Choosing objectives
- Choosing methods of intervention
- Choosing how to dispose of cases
- Choosing investigative measures
- Choosing field procedures
- Issuing permits and licenses.[1628]

The literature on police discretion regards the breadth of the discretion as being, in the words of Bronitt and Stenning, both 'necessary and legitimate' as well as 'inevitable and essential' for four reasons:

1. No legislature has succeeded in formulating laws which encompass all conduct intended to be made criminal and which clearly exclude all other conduct;
2. Failure to eliminate poorly drafted and obsolete legislation renders the continued existence of discretion necessary for fairness;
3. Discretion is necessary because limited resources make it impossible to enforce all laws against all offenders; and
4. The strict enforcement of the law would have harsh and intolerable results.[1629]

Whether Bronnitt and Stenning's assessment of what is necessary and legitimate is correct or not is beyond the scope of this thesis. But their assessment and discussion demonstrates the breadth of the flexibility available to on the police in applying the law. Moreover, as observed by Milte: 'The police … exercise their discretion on a 'low visibility' basis, with their decisions rarely being subject of scrutiny; but their actions have a profound influence upon the entire criminal justice process'.[1630]

Lustgarten recognised this when discussing the 'discretion to not enforce the law' particularly in the context of public order matters. He made the point that notions of breach of the peace and the like are 'so wide that virtually any action can … be plausibly branded criminal so as to justify arrest.' In such cases 'the police invariable under-enforce the law' due to 'simple common sense, essential to avoid dragging the law into disrepute'.

> Yet the result is to turn conventional thinking about policing on its head. The equation of policing with enforcement of the Law – the august embodiment of state sovereignty – becomes untenable. For most less serious offices under-enforcement is the norm; precisely for that reason, enforcement can be a serious abuse of power. The 'common sense' which tempers full enforcement may readily become a cloak for conscious or unconscious discrimination on the basis of political opinion, personal appearance,

[1628] Cited in Bronitt & Stenning, above n 919, 320.
[1629] Ibid 323. Avery, above n 68, 66. Both seem to have relied on Wayne Le Fave 'The Need for Discretion' in G Sykes and T Drabek (eds), *Law and Lawless* (Random House, 1969).
[1630] Milte, above n 8, 244.

> demeanour, social status or race. Under-enforcement becomes selective enforcement….The result is to leave the police with vast power which can be abused with no possibility of legal review.[1631]

Given such a broad 'low visibility' discretion allowed by the law to the police in enforcing and applying the law which includes, if Jefferson and Grimshaw are correct, the ability to ignore the law,[1632] 'the law' in itself plainly provides no basis for police accountability. The law, and how it is to be applied in any particular circumstances is, to a large extent (that is, in the absence of a clear and obvious instance of a breach of the law), whatever the individual constable assesses and determines. As Avery has observed: 'The reality of the situation is that, in many ways … the decisional latitude necessarily afforded police in dealing with the diverse situations encountered on duty makes them miniature policy forming administrators beyond the scope of normal bureaucratic control.'[1633] As a result, the accountability to the law seems only to mean not much more than police being answerable to no-one other than themselves.

This is not a measure of accountability that is beneficial to any person other than the person assessed.

The *Blackburn* decision also demonstrates the limitations of the 'law' as means or measure of police accountability. While Lord Denning and Salmon LJ recited the responsibility of the police to the law, Denning also considered that with many of the discretions made available to the Police Commissioner by the law, 'the law will not interfere'.[1634] As a result, as Lustgarten observed 'The much-vaulted answerability to the law has in practice meant leaving chief constables virtually a free hand'.[1635]

10.3.3.2 - Public and the press

Mark refers to the 'organs of public opinion' as a form of police accountability. He did not further expand on that subject matter, but it appears that by that phrase he was referring to the media. He considered that 'if the force as a public service is to be properly accountable for its actions the public has the right to the fullest possible knowledge of its activities' in the

[1631] Lustgarten, above n 54, 15-16. Lustgarten made reference to *Arrowsmith v Jenkins* [1962] 2 QB 561 where the Divisional Court dismissed arguments as to selective application of the law in 'half a sentence: so long as personal guilt was established, non-enforcement against others was legally irrelevant'. Lustgartens' reference to 'no possibility of legal review' may be now going a little too far as decisions such as *DPP v Kaba* [2014] VSC 52 demonstrate that there are now some ways to allow excessive use of police powers based on racial profiling to be successfully challenged. Nonetheless, breadth of the discretion availability combined with the complexities and cost of litigation will often make such method of challenge to police actions little more than a theoretical option.
[1632] Jefferson & Grimshaw, above n 71, 75.
[1633] Avery, above n 68, 66.
[1634] [1968] 2 QB 118,136.
[1635] Lustgarten, above n 54, 66.

context of an instruction to the MET to make 'every effort should be made to develop and maintain good relations with news media.[1636]

Skolnick and McCoy, in the context of policing in the United States, also observed:

> If the public is to have the capacity to review police behaviour and elicit the aid of powerful institutions, including media as well the courts, citizens must appreciate the potentialities and limits of police departments - and how police officers can reasonably be expected to carry out their duties. The media can supply the information from which such knowledge grows.[1637]

How effectively this form of accountability operates seems not to have been studied in Australia or the United Kingdom. However, Skolnick and McCoy undertook a study of the media coverage of police forces by conducting 'an exploratory analysis of the adequacy of media coverage of police by interviewing a sample of 25 articulate police chiefs and 6 carefully chosen journalists'. They found the 'scarcely surprising, perhaps inevitable, conclusion: that the public is too often exposed to reports about events (crime, protest, or scandal) associated with policing and too little introduced to the institution of policing and the administrative issues implicit in the policing process.'[1638] That is, 'that the public misses the complexities of major criminal justice policy issues because newspapers adhere to a practice of simplistic crime reporting'.[1639]

They also found that 'It is evident … that – whatever the media's responsibility for heightening police accountability – that result will not be achieved unless further specialization is encouraged'.[1640]

That study was undertaken over 30 years ago and in another continent, and further work is necessary to assess whether the findings in that explanatory study are reflected in contemporary Australian journalism and its impact on police accountability. However, the apparent reduced number of print journalism opportunities in recent years,[1641] combined with a smaller number of media institutions and products in Australia indicates that Australian media provides a similar limited and superficial method of police accountability.

[1636] Mark (1977) above n 3, 123.
[1637] Jerome H Skolnick and Candice McCoy, 'Police Accountability and the Media' (1984) 9 *American Bar Foundation Research Journal* 521, 527.
[1638] Ibid 530.
[1639] Ibid 554.
[1640] Ibid 557.
[1641] Kylar Loussikian, 'As journalism jobs go, how will graduates find work?' *Crikey* 18 June 2013. https://www.crikey.com.au/2013/06/18/as-journalism-jobs-go-how-will-graduates-find-work/.

10.3.3.3 - Parliament and Integrity Bodies

Most of the other forms of 'new accountability' in Lauer's diagram, particularly those on the outer ring, can be regarded as stakeholders (or stakeholder issues) – those who have an interest in police and their function, but have no means of directing the force, or means of investigating the force or being responsible for the activities of the force – rather than bodies who are properly accountable for police. It might be that they represent what Manison has referred to as 'community accountability', based on the Reith/Peel concept of 'kin police';[1642] a type of accountability the discussion of which emphasises its form ('the police have an obligation to be accountable to the community they serve') but avoids discussing any means of assessing or enforcing its obligation.[1643]

Another of Lauer's new accountability types, Police Boards, has no current applicability in Australia, the last of which ceased operation in 1999.[1644]

However, two of the bodies listed in the Lauer diagram that have the powers and functions of a body to which the police can be accountable are the parliament (and its committees) and the ombudsman, a reference that can be taken and this discussion will use, as including other integrity and/or anti-corruption bodies more generally.

Parliamentary committees have been used in the United Kingdom as bodies which have overseen the operations of police forces, although not, it seems since the 1830s. Parliamentary Committees examining operational issues are seen in the parliamentary committees discussed in Chapter 5.1.[1645] Those investigations were conducted in the 1830s and it appears that since then, from an examination of the current parliamentary committees practice in both Australia and the United Kingdom, that parliamentary committees on police have confided themselves to organisational issues. In the United Kingdom, the House of Commons Home Affairs Committee undertake ongoing inquiries regarding policing, including *Policing in London* and the *Work of the Metropolitan Police* which involve receiving evidence on a twice-yearly basis[1646] from the MET Commissioner of Police, as well as London's Lord Mayor. The matters the committee is concerned with, however, are studiously non-

[1642] Manison, above n 78, 503.
[1643] Ibid.
[1644] Police Boards operated in NSW and Victoria. In NSW they were introduced in 1983 by the *Police Board Act 1983* (NSW) as a result of the Lusher Report's recommendations, but were removed in 1996 as a result of the recommendations of the Wood Report. *Police Legislation Further Amendment Act 1996* (NSW) sch 1 cl 8. The Victorian Police Board was introduced in 1992 modelled on the NSW Board, but was removed in 1999. *Police Regulation Act (Amendment) Act 1992* (Vic) s 6 & *Police Regulation Act (Amendment) Act 1999* (Vic) s 5.
[1645] *Cold Bath Report,* above n 429 & *Popay Report,* above n 440.
[1646] Keith Vaz, Chair, Home Affairs Committee, evidence to the Home Affairs Committee, House of Commons, 23 February 2016. http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/the-work-of-the-metropolitan-police/oral/29627.html.

operational. When such matters arose, as stated by Stephen Greenhalgh, London's Deputy Mayor: 'These operational matters are a matter for the police'.[1647]

In Australia, parliamentary committees have even less involvement with policing.

As an example, a search of the Victorian Parliamentary Papers data base,[1648] reveals no instance of a committee investigating police operational issues or undertaking any ongoing monitoring of the police. In the 19th century there was, however, a practice of the Parliaments receiving reports on the deployment of the police.[1649]

Where operational issues were to be considered, the Victorian Parliament seems to have relied on Royal Commissions[1650] or, more recently, integrity bodies.[1651] Integrity body investigation and reports can and have had significant effect on police. Examples from Victoria demonstrate that effect:

- The Office of Police Integrity (OPI) investigation and report - *Victorian Armed Offenders Squad - a case study* which led to the closure of the Armed Offences Squad and the prosecution of a number of its members;[1652] and
- The Victorian Ombudsman (VO) report - *Investigation into an allegation about Victoria Police crime statistics*[1653] - which was tabled in parliament on the day prior to and may have been the catalyst for, the resignation of Chief Commissioner Overland.[1654]

There are, however, certain difficulties with integrity bodies as a means of police accountability which relate to the independence and the breadth of the jurisdiction of those bodies. Integrity bodies are generally independent of government as a result of statutory or

[1647] Stephen Greenhalgh, Deputy Mayor of London, evidence to the Home Affairs Committee, House of Commons, 13 January 2015. http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/policing-in-london/oral/17577.html.
[1648] which is an electronic data base containing all parliamentary papers since 1855. http://www.parliament.vic.gov.au/vufind/. There was, however, a parliamentary select committee in 1852 (before the introduction of responsible government) that inquired on the Police. That report concentrated on organisational issues. Victoria, *Report from the Select Committee on Police,* 17 September 1852.
[1649] This included the seemingly pointless report in 1890 into police on duty at places of amusement which required Parliament being informed of the 'number of members of the Police Force in Melbourne who are allowed to perform extra duties at theatres, concerts, football matches &c. for which they receive payment over and above ordinary wages, and the amount received by each member for the last three months'. *Parliamentary paper (Victoria Parliament);* 1890, no. C 7.
[1650] Including the Royal Commission on Police: *Special report on the Detective Branch* (1883); Police Commission: *second progress report of the Royal Commission of Enquiry into the circumstances of the Kelly outbreak, the present state and organization of the Police Force, etc.* (1881); Report of the Board of Inquiry appointed to inquire into certain allegations and complaints made against certain members of the Police Force, including the Chief Commissioner of Police (1933).
[1651] which in Victoria have included the Victorian Ombudsman (VO), the former Office of Police Integrity (OPI) and the Independent Broad-based Anti-corruption Commission (IBAC).
[1652] Session 2006–08 P.P. No.134 (October 2008).
[1653] Session 2010 – 11 P.P. No. 43 (June 2011).
[1654] Chief Commissioner Overland was responsible for the issue of incorrect crime statistics immediately prior to the 2010 State election, although he denies that the report caused his resignation. *Overland denies he quit over crime stats*, ABC News, 16 June 2011. http://www.abc.net.au/news/2011-06-16/overland-denies-he-quit-over-crime-stats/2760482.

constitutional provisions[1655] with the result that they have considerable discretion regarding the matters investigated and the means by which the investigation is conducted. While IBAC is subject to oversight by another statutory body (the Victorian Inspectorate)[1656] and a Parliamentary committee,[1657] that oversight is relatively minimal. The Inspectorate claims to perform its functions 'without interfering in the operational business of' IBAC[1658] and the parliamentary committee cannot 'review any decision by the IBAC … to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act'.[1659]

As a result, there seems little control or means to control the manner in which IBAC allocates its resources and what matters it investigates. This is of particular concern in Victoria where the Minister's police direction power is heavily constrained, providing few areas in which the Minister can issue such a direction.[1660] Under those restrictions, even banal subject matters, that would normally not seem beyond the range of issue that a responsible Minister should take an interest, such as 'the organisation structure' of the force or the training programs to police[1661] are beyond the Minister's power of direction unless an integrity body has first reported on the issue and the Minister considers that the force has not responded adequately to that report. This ministerial direction power is, therefore, unusable unless an integrity body has first reported, yet the body with primary integrity body with operational responsibility for the oversight of the police, IBAC, cannot be directed to undertake an investigation into even these arguably commonplace organisational issues.[1662]

Moreover, unless the integrity body has a specialist police oversight jurisdiction, like the NSW Law Enforcement Conduct Commission[1663] or the former Victorian Office of Police Integrity, the investigative resources of the body will need to be spread over subjects beyond the police. The result can be, as with Victoria's IBAC, which has a public sector wide corruption jurisdiction combined with a police oversight role[1664] that most police complaints are investigated by the police. As the IBAC Commissioner, Stephen O'Bryan QC said in his 2015/16 Annual Report:

[1655] In Victoria the provisions include: *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 18 and 19 and *Constitution Act 1975* (Vic) s 94E.
[1656] The Victorian Inspectorate. *Victorian Inspectorate Act 2011* (Vic) s 11(2).
[1657] The IBAC Committee. *Parliamentary Committees Act 2003* (Vic) s 12A.
[1658] Victorian Inspectorate, *Annual Report 2015-16*, 9.
[1659] *Parliamentary Committees Act 2003* (Vic) s 12A(A)(b).
[1660] See Chapter 9.
[1661] *Victoria Police Act 2013* (Vic) ss10 (2)(e) and (g).
[1662] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 18 states that 'The IBAC is not subject to the direction or control of the Minister in respect of the performance of its duties and functions and the exercise of its powers'.
[1663] *Law Enforcement Conduct Commission Act 2016* (NSW).
[1664] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 51 & 52.

> The majority of police complaints are assessed by IBAC as appropriate for investigation by Victoria Police, as they primarily concern customer service or operational performance issues.[1665]

The majority of police complaints are referred back to the police force to investigate. It should be noted that the IBAC Annual Report is not entirely transparent as to how many of complaints this involves. However, reports from IBAC indicate that:

- in 2014/15, IBAC received 1600 complaints and notifications involving Victoria Police involving 2960 separate allegations;[1666]
- IBAC commenced between 19 and 24 investigations each year;[1667]
- that 65% of complaints received year are police complaints;[1668] yet
- of the investigations conducted only 47% are police investigations,[1669]

These figures indicate that the maximum number of police investigations conducted each year by IBAC is no more than 12, a number remarkably low in comparison with the amount of complaints and allegations received, but also, proportionally low in relation to all complaints received.

What is also concerning is the police handling of the matters referred back by IBAC. IBAC recognises it has a role in overseeing police internal investigations and does this by reviewing selected cases. In 2015 this involved reviewing 96 of the matters referred back to police for investigation,[1670] a process which revealed that the investigation and handling of 36 percent of those matters by police were 'deficient', a percentage that is significantly greater than in the previous year (16 percent).[1671] From the figures from IBAC reports it seems that no less than 780 allegations[1672] were referred back to Victoria Police for management and investigation in 2014/15 and if the 36 percent defective figure is applied to that number it seems than no less than 280 allegations against police were, according to IBAC's assessment, badly conducted by the police in that year and the trend appears to be worsening. Yet there seems nothing in IBAC's reports as to how those defective complaints can be remedied or how the figure will be reduced in subsequent years. Moreover, as both

[1665] IBAC *2015/16 Annual Report*, ('*The IBAC Annual Report*') 5.
[1666] IBAC, *Special report concerning police oversight* (August 2015) ('*The IBAC Special Report*') 12.
[1667] *IBAC Annual report*, above n 1665, 18.
[1668] Ibid 17.
[1669] Ibid 19.
[1670] Ibid 5.
[1671] Ibid. In the *IBAC 2016/17 Annual Report, 7 & 36* IBAC reported that it had reviewed fewer police matters than in the previous year (73), but found that the percentage of investigations found defective, although high, had fallen to 27%.
[1672] The *IBAC Special Report*, above n 1666, indicates that in 2104/15 1206 allegations were allegations about police (a figure notably less than the previous and following years – 1783 and 1523) and if the percentage referred reflected the distribution of police and non police complaints then 780 (or 65%) of the 1206 allegations were referred to police.

IBAC and Victoria police are both independent of government direction, the Minister has not taken or been called to account for what seems a serious issue regarding police conduct.

While the IBAC Commissioner considers that the referral 'approach is consistent with established best practice oversight principles that police managers must retain primary responsibility for ensuring the integrity and professional conduct of their own employees',[1673] it is also one which demonstrates that the oversight by integrity body of police, in Victoria at least, is inadequate. Not only does it allow the police to manage the vast number of complaints made against it, but also allows it to conduct those matters badly and with little or no effective external oversight by the overseeing body.

It should however be observed that such a result seems inevitable in the absence of both a specialist police integrity body with far greater ability to conduct a far greater range of investigations regarding the police than IBAC currently has.

10.3.4 - *Ex Post facto*

Each of the alternative accountabilities, therefore, have limitations on their operation and effectiveness. But one additional limitation that they all share is that they are all operate after the fact. None provide any means to prevent police from undertaking what Borovoy referred to as lawful but awful decisions.[1674] Police have a very broad discretion in the exercise of their powers which can, while being entirely lawful, have serious and negative impacts on members of the society. A responsible Minister whose powers of direction are neither legally nor conventionally restricted, would be not only responsible for the operational decisions of police and accountable where the operational decisions were both lawful and awful, and would also have the means of stopping them before they occur. None of the 'new accountabilities' have that prevention ability.

Borovoy, however, has raised 'The key question' of 'whose view of 'awful' should prevail, that of the police or that of the government?'[1675]

[1673] *IBAC Annual Report,* above n 1665, 5.
[1674] See discussion in Chapter 7.3.5.
[1675] Borovoy, above n 932, 129.

10.3.5 - Politicisation, Police State and Transparency

That question can be answered by consideration of the perceived risk of ministerial responsibility to the functions of the police. The assumption underlying the concept of police independence seems to be that subjecting police to government direction by a responsible Minister allows police to be politicised; and is, therefore, a risk that must be avoided. At its highest, the risk is the creation of a 'police state' – defined by former RCMP Commissioner, Robert Simmonds, as a state that 'emerges when a government uses its police agencies as instruments of repression against the citizens of the state'.[1676]

Similar risks have been raised by other authors[1677] but with little or no analysis to support those risks or any assumptions that support those risks. Milte[1678] and Whitrod,[1679] however, have referred to the work of Brian Chapman[1680] in relation to the concept of a 'police state' and to the words of Reichsmarschall Goering as the high point of the risks associated with government control of police. Goering emphasised the need for Germany's Nazi government to control and direct the police:

> It seemed to me of the first importance to get the weapon of the police firmly into my hands. Here it was that I made the first sweeping changes. Out of 32 police chiefs I removed 22. Hundreds of Inspectors and thousands of police sergeants followed in the course of the next month.[1681]

However, such extreme concerns were largely dismissed by the 1962 United Kingdom Royal Commission into the Police when considering risks inherent in the creation of a national police force for England. That Commission seems one of the few who have done anything more than accepting the accuracy of the risk on face value. While rejecting the need for a national police force, that Commission rejected the politicisation of police as a basis for that decision or as a constitutional reason for not allowing government to control police.

> To place the police under the control of a well-disposed government would be neither constitutionally objectionable nor politically dangerous; and if an ill disposed government were to come to office it would without doubt seize control, of the police however they might be organised.[1682]

That Commission recognised the concern that if government had operational control over police, 'Orders could be given for the arrest of persons ill-disposed to the Government'. However, it considered that while 'the citizen is protected by the rule of law and the

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[1676] Quoted in Beare and Murray, above n 59, 'Introduction' 9.
[1677] Colleen Lewis (2010), above n 8, 95; Fleming ,above n 83; Pitman (1998) above n 76, 59; Pitman (2004), above n 76, 117; Bayley and Stenning, above n 20, ch 2.
[1678] Milte, above n 8, 243.
[1679] Whitrod (1976), above n 8, 23.
[1680] Brian Chapman, *Police State*, (Pall Mall, 1970) referred to in Milte, above n 8, 243. Chapman identified 3 types of police state, the traditional, the modern and the totalitarian, the variable between each type being the way in which the state uses and controls the police force (see Chapman 116-119). There is a different way in which 'police state' have used, being where the state has no power over a police force. This variable is discussed below.
[1681] Quoted in Milte, above n 8, 243.
[1682] *Willink Report,* above n 52, 46.

independence of the judiciary we believe the risk of such mischief in this country to be remote'.[1683] Moreover, it accepted that if a dictatorship came to power 'the police would, *ex hypothesi*, be compliant to its commands' and the fact that the government 'controlled the police initially would be unimportant; it would control them finally'.[1684]

The argument that the politicisation risks inherent in government control over police seems to equate government control over police with illegitimate or improper influence over the police and with 'political interference' with the force. It seems to assume that the exercise of government control regarding police is inherently wrong or dangerous, seemingly to have confused the availability of the power of direction with the belief that use will be misuse. Moreover, where such discussions have sought justification for the assumptions, they have tended to do so based on problematic history and selective analysis. For example, Pitman suggested that the changes to the South Australian model in 1971 which subjected police to a Cowper provision 'potentially politicised their actions'[1685] but did not refer to, or respond to, the observations of Bright J, who recommended the changes as being ones which will remove from the Police Commissioner the obligation to 'take sole responsibility for making what may reputable citizens regard as a political type decision'[1686] even though Pitman did refer to Bright for other reasons.[1687]

Otherwise, the academic discussions where such risks are presented seems to assume that the risks of misuse of ministerial responsibility are so obvious that they require the abandonment or minimisation of the constitutional function with no further explanation or demonstration and without any assessment or testing of those assumptions. While there are, no doubt instances of excessive uses of the power of direction, academic discussions on the police government relationship seem to have reached their conclusion of the supposed benefit of police independence without considering or analysing three apparently relevant issues. That is: what constitutional role the doctrine has in relation to statutory bodies; whether a direction power regarding police has operated in jurisdictions where it has not been misused and if so how; and any means by which ministerial responsibility can operate with minimal or no risk of a 'politicising' police.

Had the discussions considered those questions they would have ascertained not only the fundamental role that ministerial responsibility plays in Westminster democracies as

[1683] Ibid.
[1684] Ibid.
[1685] Pitman (2004), above n 76, 116.
[1686] *Bright Report,* above n 32, 80. Discussed in Chapter 5.2.2.
[1687] Pitman's selective analysis is also apparent where he refers to a criminologist, Finnane for his view that even after the 1972 changes 'ambiguities remained as to areas as to the areas of responsibility of the government', but ignored the view of noted legal scholar Waller that the 1972 amendments constituted 'clearly legislation expressing the subordination of the police to the executive government', even though Pitman had cited Waller for other purposes. Waller, above n 55, 255.

discussed earlier, but also they would have observed two Australian examples where the government direction powers have operated for many years without any indication of misuse. That is, the Cowper provisions in Victoria that operated for 140 years between 1873 and 2014 which seem never to have been used.[1688] And the South Australian provisions since 1972[1689] under which the only directions given seem to be very complex directions limited to isolated areas of the force.[1690]

These arrangements can be distinguished from the direction provisions in other jurisdictions where broad use of the government's direction power or influence may have occurred – such as under Queensland's Bjelke Petersen government,[1691] or where activist police Ministers, such as NSW's Minster Costa have operated.[1692] And the distinguishing factor is transparency.

In Queensland before Fitzgerald reforms and in NSW, ministerial directions were or are not required to be in writing or publicised. However, in 'old Victoria'[1693] and South Australia transparency arrangements are or were in place. Although there were differences in the requirements, both required directions to be in writing and both involved a degree of publication. The publicity in the pre 2014 Victorian arrangements derived from the requirement that police directions be made by the Governor in Council,[1694] a process that required a formalized documentation process. In South Australia between 1972 and 1998, directions of the Governor and since 1998, ministerial directions, had to be included in the government gazette within eight days and tabled within six sitting days of their making.[1695]

Although academic discussions of the police government relationship have been prepared to accept the politicisation risk of government directions powers with little or no analysis, the benefit of the South Australian process has been recognised by one notable supporter of police independence. That is, the former Queensland Police Commissioner Ray Whitrod. In his press conference following his resignation from the Queensland Police in 1976[1696] Whitrod, after endorsing the Lord Denning's *Blackburn* view of police independence[1697] accepted that police should not be completely independent but that there 'ought to be a minimum of interference by the political authority'. This, in his view could be achieved by the

[1688] *Rush Report,* above n 38, 42.
[1689] See Table 3.1.
[1690] South Australian *Government Gazette* (8 July 1999) 174 which concerned the Operations Intelligence Division; South Australian *Government Gazette* (8 July 1999) 176 & (5 August 1999) 663 which concerned the Anti-Corruption Branch; South Australian *Government Gazette* (29 May 2008) 1807; (21 January 2010) 257; (22 October 2015) 4613 which concerned the State Protective Security Branch.
[1691] Discussed in Chapters 6.4.5 & 11.3.1.
[1692] See Chapter 8.
[1693] That is, before the 2014 reforms.
[1694] See Table 3.1.
[1695] Ibid.
[1696] See Chapter 3.2.
[1697] Wettenhall, above n 771, 20.

transparency of the South Australian method: 'One method by which political interference is kept to a minimum was introduced recently in South Australia where any political direction given to their Commissioner must be in writing and tabled in Parliament'.[1698]

The reason that transparency has the benefits that Whitrod identified is that the obligation to make directions public requires Ministers to take responsibility and be scrutinized by the public and the parliament, for those directions; which can also have a dissuading effect to the holder of the power, preventing reckless or excessive uses of the power. This scrutiny, which is much less likely to be present if the direction power is not transparent, is entirely consistent with the Minister's responsibility to the parliament for the policing of the jurisdiction and for the maintenance and efficiency of the police force. Transparency, of course, also has the effect of ensuring that, if the police force takes or proposes some form of action that is considered contrary to the public interest,[1699] the Minister can also be scrutinised and criticised for failing to intervene with the force, just as the Minister can be scrutinised and criticised for failing to intervene in relation to any other statutory body for which the Minister is responsible.

'Police state' also has another contrasting application that requires consideration, covering, in the words of Stenning, 'the police … not subject to any control or accountability'. Stenning typified this version by the 'classic example of J Edgar Hoover when he was Director of the FBI, who abused his independence to intimidate and blackmail politicians'.[1700] Another example (but one which has not been considered in academic discussions of the police-government relationship in this country) is the Los Angeles Police Department (LAPD). The LAPD became independent to avoid what Toobin refers to as the 'sinister influence of elected officials'[1701] when the Los Angeles City Charter was altered in 1937 to provide what Toobin refers to as a 'cast iron shield of civil-service law around police officers'. The result was, in Joe Domanick's words, that the LAPD became:

> A quasi-military organization … [that] declared itself independent of the rest of city government and placed itself outside the control of the police commission, City Hall, or any other elected public officials, outside the democratic system of checks and balances'.[1702]

The full effect of these changes was not crystallised until 1950 when the designer of the reforms, Bill Parker, became police chief, a post he held for the next 15 years. According to Domanick, during Parker's term he 'combined the city charter protections virtually guaranteeing his lifetime tenure as chief with the cunning of a junior-league Machiavelli to

[1698] Quoted in ibid 21.
[1699] or fails to take action that the parliament considers it should have taken.
[1700] Stenning (2011), above n 60, 254-5.
[1701] Jeffrey Toobin, *The People v O J Simpson* (Arrow 2016) ch 2.
[1702] Joe Domanick, *To Protect and To Serve. The LAPD's Century of War in the City of Dreams* (Pocket Books, 1994) 95.

make the commission a virtual rubber stamp for him and his successors'.[1703] Parker began as a police reformer, and made his independent force famous for its efficiency and effectiveness as a crime fighting force, symbolised in popular culture in the 1950's and 1960's by the fictional Sergeant Joe Friday in *Dragnet* and later by other television programmes based on a fictionalised version of the LAPD including *Mod Squad* and *Adam 12*. And while the efficiencies and reforms were real, the independence of the LAPD also allowed it to become the home for institutionalised, racism fuelled, excessive violence imposed on minority racial groups combined with inherent internal sexism. Its use of excessive violence was evident from numerous incidents including the LAPD's handling of the Watts riots in 1965 and the shooting and killing of the unarmed Afro-American Leonard Deadwyler in 1966 for running a red light while driving his pregnant wife to hospital. It was not, however, until 1992 when a somewhat brave or foolish bystander videoed three LAPD officers beating another unarmed Afro-America motorist, Rodney King whilst being watched by a sergeant and crowd of other LAPD officers that the full risks and dangers of an independent police force became public.[1704]

To return to the Borovoy question referred to earlier, it seems clear that academic consideration of the police government relationship in Australia, by operating on the basis of untested assumption, has not identified any reasoning to justify the police's view of 'awful' as preferable to that of government.[1705] Further, by minimising consideration the relevance of the doctrine of ministerial responsibility and the effects of transparency (as well as by avoiding difficult examples such as the LAPD), academic discussions and inquiry reports have concentrated on only one form of 'police state'. And the result of this limited analysis is that any proposed solutions advanced to avoid that form of police state may well have followed the LAPD path and have increased the risk of the other form of police state arising.

10.4 - Conclusion –

The doctrine of ministerial responsibility, which plays a fundamental part in Westminster democracies, has been substantially omitted from consideration in the academic literature on the police government relationship and the practical operation of that relationship. The emphasis has, instead, been on a concept or doctrine with a flawed legal and historical basis

[1703] Joe Domanick, *Blue, The LAPD and the Battle to Redeem American Policing* (Simon & Schuster, 2015) (Kindle edition) Loc 1707.
[1704] The Rodney King beating and the racism in the LAPD was investigated by the Independent Commission on the LAPD – *Report of the Independent Commission on the Los Angeles Police Department* (1991) ('*The Christopher Commission*') which led to significant alterations to the LAPD's independence aimed at making the LAPD more 'responsive to the Police Commission and the City's elected leadership, but also must be protected against improper political influences'. *Christopher Commission,* xxii.
[1705] Borovoy, above n 932, 129.

and on the risks that government control would cause the politicisation of police –arising from what seems an untested assumption: that government power over police is improper as it is likely to be misused. There seems no consideration in academic police-government literature of the actuality of the risk or of means by which the doctrine of ministerial responsibility can operate without politicising police forces.

The lack of attention given to the doctrine of ministerial responsibility is particularly relevant to the three inquiry reports referred to earlier which led to the introduction of limited direction models. The Mark report, the Fitzgerald report, and the Rush report recommended limited direction models but *with no analysis of the doctrine of ministerial responsibility and with no consideration of the South Australian model*[1706] where government control over police has operated since the 1970s with no evidence of politicisation.

The omission to give any substantive consideration of the doctrine of ministerial responsibility, in terms of theory or practice, in the context of the police – government relationship in Australia, while relying on a legally and historically flawed 'doctrine' indicates that the examination of the relationship in this country, to date, has been inadequate and that any legislative alterations based on these assessments needs to be reviewed.

[1706] The Rush Report referred to South Australian policing legislation, but only in the context of its perceived commonalities with the regimes in other Australian jurisdictions, and not to discuss the effect of its Cowper provision and the reason for its introduction. See for example *Rush Report,* above n 38, 44 and 46.

11 – Police Independence - Indirect Control

11.1 – Means of Indirect Control

This thesis is predominately concerned with government's ***direct*** control of police forces.

There are also means of ***indirect*** control of police which can operate inconsistently with and undermine the effect of any independence gained from direct government control. To appreciate police independence in Australia, therefore, an understanding of indirect methods of governments is necessary, particularly those forms of indirect influence that have particular application to the police. There are numerous methods of indirect control and influence over police - including the relative strengths of character of the Minister and the Commissioner and government's control over police financing. Most of those methods are similarly applicable to other government relationships with independent or quasi-independent bodies or individuals, such as the judiciary, Royal Commissions and integrity bodies, and because of that broader application they are not examined in this study. The purpose of this Chapter is to examine methods of indirect influence that have particular significance to police forces, being the security of tenure of Police Commissioners and control over police staffing.

11.2 - Control over staffing

When the various police forces were established in the 19th century in colonial Australia, police staffing was entirely or substantially controlled by governments.[1707] The most control that the first colonial Commissioners had were in Queensland, Western Australia and South Australia, where they were empowered to appoint and dismiss lower ranks (although, in both Queensland and Western Australia dismissal of those ranks still required the government approval).[1708]

This method of indirect influence has now been largely surrendered by the various Australian governments as the process for hiring and firing members of police forces, other than senior staff (assistant and deputy Commissioners), has become largely one for Police Commissioners. There are some variations between jurisdictions, but they are relatively minor as is demonstrated by the following tables:[1709]

[1707] *Sydney Police Act 1833* (NSW) ss 4 & 5; *An Act for the Regulation of the Police Force 1853* (Vic) ss 3, 4 & 5; *Police Act 1863* (Qld) s 4 & 6; *An Act to regulate the Police in certain Towns and Ports within the Island of Van Diemen's Land and to make more effectual provision for the preservation of the peace and good order throughout the said Island and its Dependencies generally 1838* (Tas) s 58; *Police Act 1892* (WA) ss 6, 7 & 8; *An Act for regulating the Police Force of the Province of South Australia 1841* (SA) s 5.

[1708] *Police Act 1863* (Qld) s 6; *Police Act 1892* (WA) s 8.

[1709] These tables deal with the legal processes for appointment and termination and do not deal with conventional limitations on those processes.

Table 11.1 – Extent of current government control of police appointment process

Force	Deputy Commissioners	Assistant Commissioners	Commissioned Officers	Non-commissioned officers & constables
NSW[1710]				
Qld[1711]				
Victoria[1712]				
SA[1713]				
AFP[1714]				
NT[1715]				
Tas[1716]				
WA[1717]				

Key: Appointment is made by the:

Governor[1718] or Minister	
Governor on Commissioner's recommendation	
Another process not involving direct government control.	

[1710] *Police Act 1990* (NSW) ss 36 & 64.
[1711] *Police Service Administration Act 1990* (Qld) ss 5.3 & 5.6.
[1712] *Victoria Police Act 2013* (Vic) ss 21(1), 24 & 27.
[1713] *Police Act 1998* (SA) ss 14(1), 15(1) & 20.
[1714] *Australian Federal Police Act 1979* (Cth) ss 17(1) & 24.
[1715] *Police Administration Act* (NT) ss 7, 8 & 16.
[1716] *Police Service Act 2003* (Tas) ss 9(1), 10(1), 11 and 12.
[1717] *Police Act 1892* (WA) ss 6 & 7.
[1718] This category also refers to the Governor-General, in the case of the Commonwealth, the Administrator in the case of the Northern Territory and the Governor in Council.

Table 11.2 – Government control of police dismissal process of particular ranks

Force	Deputy Commissioner	Assistant Commissioner	Commissioned Officers	Non-commissioned officers and constables
Qld[1719]				
Vic[1720]				
AFP[1721]				
SA[1722]				
NSW[1723]				
Tas[1724]				
WA[1725]				
NT[1726]				

Key: Removal is made by the

Governor[1727]	
Governor on Commissioner's recommendation[1728]	
Commissioner, with Ministerial Approval	
Commissioner	

As can be seen from Tables 11.1 & 11.2, the only ranks over which governments continue to exercise significant control are the classifications of Deputy and Assistant Commissioner. An example of the difficulties that such control can lead to is seen from the appointment of Terry Lewis as Queensland Assistant Commissioner in 1976, contrary to the

[1719] *Police Service Administration Act 1990* (Qld) s 7.4(3).
[1720] *Victoria Police Act 2013* (Vic) Ss 9(2), 12(2), 16, 70, 132 & 136 and cl 9 Prt 2 Sch 1 and cl 16 Pt 3 Sch 1.
[1721] *Australian Federal Police Act 1979* (Cth) ss 22(1) & 28.
[1722] *Police Act 1998* (SA) ss 17, 40, 45 & 46.
[1723] *Police Service Act 1990* (NSW) ss 51(1)(a), (b) and 181D.
[1724] *Police Service Act 2003* (Tas) ss 15, 29, 30, 31 & 43(3) & (4).
[1725] *Police Act 1892* (WA) ss 8(1) & (2).
[1726] *Police Administration Act* (NT) ss 9(1)(b), 78 & 84D.
[1727] Also refers to Governor-General, in the case of the Commonwealth, the Administrator in the case of the Northern Territory and the Governor in Council.
[1728] This includes, in the case of Western Australia, the Commissioner having first undertaken a 'no confidence' removal action in relation to the officer concerned.

recommendations of Commissioner Whitrod. The Fitzgerald inquiry[1729] considered that Commissioner Whitrod 'correctly saw it [as making] his situation intolerable'. According to Fitzgerald, Whitrod's 'operational control of the Police Force could be seriously undermined by the direct access which could occur between Lewis and [the Premier] who could even countermand Whitrod's instructions'.[1730] There are difficulties with these conclusions, which are discussed below.[1731] Nonetheless, Fitzgerald's assessment demonstrates how lack of control over senior appointments can be seen as undermining the independence of a Police Commissioner.

Another example is the Victorian appointment of the English senior policeman, Sir Ken Jones, as Deputy Commissioner in 2009. This led to tension between Jones and Chief Commissioner Overland as well as complaints to and investigations with conflicting conclusions by the Office of Police Integrity and the Victorian Ombudsman.[1732]

Rush considered that the appointment of Deputy Commissioners by the government was undesirable as it can create 'confusion about where a Deputy Commissioner's accountability lies'.[1733] He agreed with the position favoured by the former Victorian Police Commissioners Overland and Nixon who 'were strongly of the view that the appointment of Deputy Commissioners should be a matter for the Chief Commissioner'.[1734] However, Sir Ken Jones, who had considerable senior policing experience in other countries[1735] before coming to Victoria was very much to the contrary view. He considered that allowing the Chief Commissioner to control the employment of Deputy Commissioners can lead to 'collusive cultures' within the force.[1736]

Rush, nonetheless, recommended that the Chief Commissioner be the employing body for Deputy Commissioners,[1737] which was one of the few Rush recommendations not accepted by the Victorian government. The government's response to the Rush recommendation was that Chief Commissioner should not be the employer of the deputy Commissioner, but that the Minister's advice to the Governor-in-Council[1738] should be 'based on the

[1729] *The Fitzgerald Report*, above n 36.
[1730] Ibid 45.
[1731] Chapter 11.3.1.
[1732] The Ombudsman and OPI reports were subsequently reviewed by IBAC in IBAC, *Special report concerning allegations about the conduct of Sir Ken Jones QPM*, January 2014, PP 299, Session 2010–14 (2014).
[1733] *Rush Report*, above n 38*,* 50.
[1734] Ibid 49.
[1735] Positions and offices that Sir Ken previously held include: World Regional Chair of the International Association of Chiefs of Police; Chief Constable, Sussex Police; Chief Constable and President - Association of Chief Police Officers England, Wales, Northern Ireland; Defence & Security Advisor - British Embassy, Washington DC and Senior Investigator at Independent Commission Against Corruption (ICAC) Hong Kong.
[1736] *Rush Report*, above n 38*,* 50.
[1737] Ibid 51.
[1738] That is, the Governor with the advice of the Executive Council –s 38 *Interpretation of Legislation Act 1984* (Vic).

recommendations of the Chief Commissioner'.[1739] However, when this response became legislation the Chief Commissioner's role was reduced to being consulted before the making of the Minister's recommendation.[1740]

11.3 Security of Tenure

Whatever independence that is statutorily provided to a Police Commissioner may be effectively undermined if that Commissioner is removable at will, or is required to regularly recontest the position. Such a Commissioner, like any person seeking to remain employed, may adjust his or her behaviour and actions to suit what is perceived as the best means of achieving that end – which they may believe is satisfying the interests and desires of the government.

The security of tenure of Commissioners of Australian police forces has changed over time; starting with little and currently with little more. However, for periods of time in between, some Commissioners secured lengthy terms of appointment as well as statutory protections from arbitrary removal.

In each Australian colony in the 19th century when a police force was formed, the Commissioner was appointed by the Governor 'at will',[1741] a position that has remained in Western Australia.

In the other states (as the Australian colonies had all become at federation in 1901) provisions providing security of employment were added from the 1930s. Those provisions related to:

- periods of appointment; and
- limited grounds for removal.

11.3.1 - Periods of appointment – In three States (NSW, SA and Qld) legislative changes were made during the 1930's to secure the employment of Police Commissioners to the age

[1739] *Government response to the Inquiry into the command, management and functions of the senior structure of Victoria Police* (March 2012) 12.
[1740] *Victoria Police Act 2013* (Vic) s 21(2).
[1741] *Sydney Police Act 1833* (NSW) s 1; *An Act for the Regulation of the Police Force 1853* (Vic) s 2; *Police Act 1863* (Qld) s 3 (Note, in the Queensland Act there was no express power of Commissioner removal and it seems that the power of removal was considered to be in the hands of the appointer (the Governor-in Council) and, in the absence of its exercise, the appointment was for life); *An Act to transfer certain Duties appertaining to the Office of Chief Police Magistrate to other Officers 1857* (Tas) s 1; *An Act for regulating the Police Force of the Province of South Australia* 1841 (SA) s 1; *Police Act 1892* (WA) s 5.

of 65.[1742] Tasmania and Victoria added similar provisions in 1954[1743] and 1958.[1744] It is only in Western Australia where Commissioners have never been provided with any statutory guarantee of security of tenure.

The reverse change of direction began with the last state to provide secure periods of employment. In Victoria in 1971, a term of five years was introduced[1745] because, as the responsible Minister, Dick Hamer, said:

> In recent years it has become increasingly obvious to the Government that the person holding the office of Chief Commissioner is subject to such mental and physical pressures that it is desirable that he should be appointed to the office for periods not exceeding five years rather than to the age of 65 as at present.[1746]

The catalyst for the measure seems to have been the early retirement of the then Chief Commissioner, Noel Wilby, due to ill health. But it is noted that the rest of the amending Act concerned reforms recommended in the broad review of Victoria Police conducted by Eric St Johnston, who made no recommendation regarding the term of office of the Commissioner.[1747]

The next force to adopt the limited term of appointments was the newly formed AFP in 1979 with a maximum term of seven years.[1748] As discussed earlier,[1749] the form of the AFP was based on recommendations from Sir Robert Mark; however there is nothing in Mark's report that relates to the Commissioner's term. In the same year, the current form for the Northern Territory Police was enacted which provided the NT Commissioner with security of tenure until retirement at age 55.[1750] The Territory, however, followed Victoria's lead almost 20 years later when the Administrator was empowered to determine that the Commissioner holds office for a fixed period.[1751]

The other states, aside from Western Australia, also followed Victoria's limited term lead, although, like the Northern Territory, it took some decades for them to do so. In 1990 both NSW[1752] and Queensland[1753] introduced re-appointable five year terms, as did South Australia in 1998[1754] and Tasmania in 2003.[1755]

[1742] *Police Regulation Act 1899* (NSW) s 4 added by s 2 of the *Police Regulation (Amendment) Act 1935* (NSW); *Police Act 1937* (Qld) s 6(2); *Police Act 1936* (SA) ss 6(1).
[1743] *Police Regulation Act 1898* (Tas) s 9A added by *Police Regulation Act 1954* (Tas) s 3.
[1744] *Police Regulation Act 1958* (Vic) s 42(1)(c).
[1745] *Police Regulation (Amendment) (No 2) Act 1971* (Vic) s 3(a)(i).
[1746] Victoria, *Parliamentary Debates,* Legislative Assembly, 31 August 1971, 57.
[1747] See Sir Eric St Johnston, *A Report on the Victorian Police Force* (1971).
[1748] *Australian Federal Police Act 1979* (Cth) s 17(2).
[1749] Chapter 9.
[1750] *Police Administration Act* (NT) s 10(1).
[1751] *Police Administration Act* (NT) s 9(3A) added by *Police Administration Act 1997* (NT) s 6.
[1752] *Police Act 1990* (NSW) s 24(1) & 26(1).

As to the reason why limited terms were introduced, what little literature there is on the subject[1756] would have it that this move was adopted in line with the employment practices in other parts of the public sector. Fleming and Dupont, who each wrote in the early 2000s, both considered that term appointments for Police Commissioners began at some stage from the early[1757] to mid 1980s[1758] in line with employment practices in other parts of the public sector (omitting from their analysis the Victorian and AFP introduction of limited terms in the 1970s).

There is little clear evidence why the other jurisdictions adopted the Victorian approach. Indeed, of the three inquiry reports that have recommended significant changes to the police – government relationship in Australia, two (Mark and Rush) have ignored the issue. Rush did discuss the process by which Chief Commissioners are chosen and 'had no difficulty with the selection of the Chief Commissioner of Victoria Police being a decision for the elected Government of the day';[1759] and also that the maximum term of Deputy and Assistant Commissioners should remain at 5 years.[1760] But he gave no attention to the length of term of the Chief Commissioner.

Fitzgerald, however, considered the issue and felt that 'on balance, it would be preferable if the Commissioner were contracted for a term of three to five years'. He took that view as considered that the current legislative formula, (appointment 'conditional on good behaviour, effectively until attaining the age of 65 years') 'has proven unsatisfactory'.[1761] He did not explain how he reached that conclusion, although it seems that it arose from his consideration of the three most recent Queensland Commissioners prior to his investigation. That is, Frank Bischof, Commissioner between 1958 and 1969; Ray Whitrod, Commissioner between 1970 and 1976; and Terry Lewis, Commissioner between 1976 and 1987.

Fitzgerald was concerned about the corruption in the Queensland police during the terms of Commissioners Bischof and Lewis which, he considered, had involved both

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[1753] *Police Service Administration Act 1990* (Qld) s 4.4.
[1754] *Police Act 1998* (SA) s 13(2)(a).
[1755] *Police Service Act 2003* (Tas) s (1).
[1756] The only authors who seem to have addressed this issue seem to be Dupont and Fleming. Fleming, above n 83; Dupont, above n 82.
[1757] Dupont above n 82, 21 'early 1980s'.
[1758] Fleming above n 83, 70, 'For almost 20 years'.
[1759] *Rush Report*, above n 38, 48.
[1760] Ibid 52, Recommendation 52. Rush's reasoning for the recommendation regarding the term of assistant and deputy commissioners seems puzzlingly inadequate, as it seems to relate to assistant commissioners alone. That is, Rush considered that Assistant Commissioners are considered to be 'executives' under the *Public Administration Act 2004* (Vic), and were employed by contract under that Act. As the maximum term of an executive under the *Public Administration Act* is five years, it seems that Rush considered that the same limitation should also apply to Assistant Commissioners. Rush, however, seems to have given no consideration to whether employment under the Public Administration Act is appropriate for Assistant Commissioners. Moreover, he applied the same conclusions to Deputy Commissioners even though the *Public Administration Act* did not allow Deputy Commissioners to be employed on contract (see *Public Administration Act 2004* (Vic) s 104(3)(c) prior to the changes made by *Victoria Police Amendment (Consequential and Other Matters) Act 2014* (Vic).
[1761] *Fitzgerald Report,* above n 36, 278.

Commissioners.[1762] It seems that Fitzgerald regarded lengthy periods of leadership by corrupt Commissioners as allowing corruption to grow within the force and that security of tenure provisions contributed to that danger.[1763]

In relation to Commissioner Whitrod, Fitzgerald examined the period which he described as the 'Downfall of Whitrod and the Rise of Lewis'.[1764] When Whitrod joined Queensland Police in 1970[1765] he had been warned by Police Minister Hodges that there was an element of corruption in Queensland Police[1766] which involved a group of police officers referred to as the 'Rat Pack' which included, among others, Terry Lewis.[1767] It is not clear whether Whitrod appreciated the significance of Lewis's involvement in the Rat Pack as there is no evidence that Whitrod took any steps to investigate Lewis or to have him disciplined or removed from the force. The indications are very much to the contrary as Lewis was promoted to Inspector in 1973, upgraded to Inspector grade 2 in 1975 and sufficient confidence was held in Lewis's policing skills that he was entrusted with leading the Queensland police contingent in assisting recovery from cyclone Tracey in 1974.[1768]

Nonetheless, Whitrod transferred Lewis to the very remote Charleville in 1976 for, in Whitrod's words, 'the good of the force'.[1769] Whitrod's concerns with Lewis at that stage seem more based on Lewis's divisive activities within the force and networking abilities with Ministers than any corruption concerns.

During Whitrod's period as Commissioner, he attempted to reform the force but, as Fitzgerald identified, he was subject to a number of incidents of 'interference' from the Minister or the Premier. These led to Whitrod's resignation in 1976. The interference incidents Fitzgerald referred to are:

1. following Whitrod's decision to conduct an investigation into police behaviour during a street demonstration in July 1976, Premier Bjelke Petersen directed Whitrod not to conduct the investigation.[1770] Whitrod complied, even though the Premier had no statutory direction powers. Powers to direct the Police Commissioner existed, but

[1762] Ibid chapter 2.
[1763] Of course, there was no overseeing police integrity agency during the terms of both Commissioners which might have minimised police corruption. Moreover, Lewis was forced to resign as a result of allegations of corruption in 1987, (and latter spent 10 years in prison) - which indicates, to some extent at least, that the security of tenure provision did not prevent corruption from being identified, investigated and remedied.
[1764] See in particular ibid 42-46.
[1765] Whitrod, had been previously the Commonwealth Police Commissioner and then Police Commissioner in Papua New Guinea when he was recruited to head the Queensland Police in 1970.
[1766] *Australian Biography, Ray Whitrod,* Full Interview transcript, Interviewer: Robin Hughes; Recorded: October 20, 2000, tape 8, http://www.australianbiography.gov.au/subjects/whitrod/interview10.html ('*Whitrod interview*)'.
[1767] Ibid.
[1768] *Fitzgerald Report,* above n 36, 42.
[1769] Quoted in Phil Dickie, *The Road to Fitzgerald* (UQP 1988) 41.
[1770] *Fitzgerald Report,* above n 36, 43.

were held by the Minister, not the Premier.[1771] Moreover, there is nothing to indicate that Whitrod complained or pointed out the Premier's lack of power to direct police. According to Whitrod, he complied with the Premier's directive not due to that directive, but because he considered that he did not have 'the cooperation' of the force's Motor Traffic Branch and was not prepared to charge any officers who had 'mutinied'.[1772]

2. In August 1976, the new Police Minister Newbery gave a 'dressing down' to a member of Whitrod's Central Intelligence Unit.[1773] However, there is no evidence that Whitrod complained or took any steps to protect his staff.
3. In September 1976 Whitrod initiated an investigation of police behaviour during a raid of a 'hippy community' at Cedar Bar.[1774] According to Whitrod, Bjelke Petersen 'decreed that I was not to send any officers north of Cairns to investigate', a decree which he ignored.[1775] Fitzgerald paints a slightly but significantly different picture of this incident. He recognised that the investigation was contrary to the Premier's wishes, but did not identify any direction purportedly made by the Premier.[1776]
4. Finally, in November 1976, Terry Lewis was appointed as Assistant Commissioner, contrary to Whitrod's recommendation. This promotion, in Fitzgerald's view, made Whitrod's positon 'intolerable' and prompted Whitrod to resign. It is difficult to see why, given that the Commissioner had no formal role in appointments of Assistant Commissioners as the operative provision[1777] made clear. Further, the appointment of Lewis was not an operational matter (unless an extremely broad definition of that term is given)[1778] and Whitrod seems to have had no corruption concerns with Lewis at the time. As to whether Fitzgerald's 'intolerable' assessment is justifiable, a parallel instance from the United Kingdom[1779] is of relevance. This instance, which was not considered by Fitzgerald, concerns the appointment of one of the great supporters of police independence, Sir Robert Mark, as an Assistant Commissioner in the Metropolitan Police Force. This appointment was made by the Home Secretary contrary to the desires of the then head of that force (who did not resign as a result).[1780]

[1771] *Police Act 1937* (Qld) s 6(1).
[1772] Whitrod (2001) above n 122, 180. This accepted failure to be able to control the force that he was charged to command indicates that Whitrod's problems as Police Commissioner were more deep set, more entrenched and more widespread than any caused by any interference by the Premier.
[1773] *Fitzgerald Report,* above n 36, 43.
[1774] Ibid.
[1775] Whitrod (2001), above n 122, 180.
[1776] *Fitzgerald Report,* above n 36, 43.
[1777] *Police Act 1937* (Qld) s 7AA.
[1778] The scope of operational matters is discussed in Chapter 8.4.
[1779] Although conventions and practices from the United Kingdom are not definitive in Australian jurisdictions, as discussed in Chapter 8, they are informative given the reliance in Australian jurisdictions on the English police model and culture.
[1780] Ascoli, above n 107, 299-302.

It is questionable whether these incidents are sufficient to indicate that the appointment to age 65 conditional on good behaviour process has proved unsatisfactory. Had Whitrod remained in office, instead of resigning, there would have been a number of significant advantages to Queensland and the Queensland Police Force. First, Lewis would not have been appointed Commissioner. Second, Whitrod, whilst not wanting Lewis as an Assistant Commissioner, was statutorily empowered to direct Lewis in terms of duties to be undertaken and the location in which they were to be conducted.[1781] And he would have been able to have Lewis's behaviour monitored and to discipline him for any inappropriate action. Whitrod also considered, based on the language used in the *Police Act 1937*, and his understanding of 'constabulary independence',[1782] that he is not subject to any direction from the Premier on any subject (as the Premier had no statutory power to direct the Commissioner)[1783] and would only have been subject to the Police Minister's direction on nonoperational matters. That view may have been contested by the Minister, but at least Whitrod would have been able to identify the issue and contest any broader interpretation of the power to direct. Furthermore, the provision that Fitzgerald considered as have proven 'unsatisfactory' would have been protected Whitrod from dismissal until the age of 65 so long as he demonstrated good behaviour.[1784]

Whitrod chose not to take advantage of these powers and protections but resigned when his recommendations regarding the appointment of an Assistant Commissioner were not accepted. And he did this even though, as he conceded in his autobiography, he knew that his resignation, 'meant that Lewis could be appointed Commissioner at a very young age with many years in the position before him'.[1785]

What the decisions and actions taken during the Whitrod and Lewis period demonstrate, therefore, was not the failure of statutory protections, but rather the failure of a Police Commissioner to make best use of those protections, and this failure was to the public's disadvantage. There were, no doubt, good personal reasons for Whitrod's actions, but it is difficult to conclude that the process that was open to Whitrod in 1976, but which he chose not to exercise, is indicative of the a process that has 'proven unsatisfactory'. Moreover, it is difficult to accept that the untried process would have been less in the public interest than the process that Fitzgerald advocated - of ending the Commissioner's term after 5 years. That course, if available at the time would, like the resignation course adopted by Whitrod,

[1781] *Police Act 1937* (Qld) s 7AA(6).
[1782] See Colleen Lewis (2010) above n 8, 95 & 99.
[1783] *Police Act 1937* (Qld) s 6(1).
[1784] Ibid s 6(2).
[1785] Whitrod (2001), above n 122, 185.

have left the Commissioner position open, allowing Lewis to be appointed as Commissioner.[1786]

It seems, therefore, necessary to doubt Fitzgerald's conclusion as to the 'unsatisfactory' nature of the pre-existing nature of the terms of the Commissioner's appointment (ie 'conditional on good behaviour, effectively until attaining the age of 65 years') and, as a result, his on balance preference for the appointment of the Commissioner to be for a fixed limited term.

11.3.2 - Limited Grounds of Removal

Limited grounds for the removal of Australian Police Commissioners were first introduced in NSW in 1935 when a complex process was added to the *Police Regulation Act 1899* (NSW).[1787] In addition to providing appointment to age 65, the 1935 reforms also added:

- a list of criteria that rendered the office vacant;[1788]
- a suspension process that allowed the Governor to suspend the Commissioner for 'misbehaviour or incompetence';[1789] and
- a removal process that required a suspended Commissioner to be restored to office unless, within 21 days of the suspension, each house declares that the Commissioner ought to be removed, in which case the Commissioner is removed from office.[1790]

Since then, limited grounds lists for dismissal have been introduced (and in some cases also removed) for all Australian police forces other than Western Australia and the Northern Territory.[1791]

In Queensland, two years after NSW, a similar list of office vacating criteria was added.[1792] That change also provided that the Commissioner continue in office while 'he is of good

[1786] It should, however, be added, that the potential negative effects of a fixed term are to some effect offset in Queensland by another of the Fitzgerald reforms. That is, that the appointment of a Police Commissioner now based on the recommendation of the chair of Crime and Corruption Commission). *Police Service Administration Act 1990* (Qld) s 4.2. Nonetheless, as matter of constitutional reality and responsible government, no decision is made by a Governor (other than in relation to the narrow field of reserve powers) without the advice of a Minister. (See Killey, above n 5, chapter 7 for a discussion and explanation of the 'reserve powers' of a Governor). As such, the approval of the Minister is still required for the appointment or re appointment of a Police Commissioner – so the degree of protection provided by this reform may be more illusory than substantial.
[1787] *Police Regulation Act 1899* (NSW) s 4 as added by the *Police Regulation (Amendment) Act 1935* (NSW) s 2.
[1788] Such as bankruptcy, absence without leave, insanity and resignation. Ibid s 4(5)
[1789] Ibid s 4(4)(a).
[1790] Ibid s 4(4)(b).
[1791] *Police Administration Act 1979* (NT) s 9(1)(b) allows the NT Commissioner to hold office 'on such terms and conditions as the Administrator, from time to time, determines'.
[1792] *Police Act 1937* (Qld) s 6(4).

behaviour' and until he reaches 65, but did not specify any process for assessing the Commissioner's good behaviour or for removing a Commissioner.[1793]

Victoria also added a similar office vacating criteria list, but many years later in 2013.[1794] In that year it also added a provision which empowered the Governor in Council to remove or suspend the Commissioner where other grounds are present, including misconduct, incapacity, being found of an indictable offence, outside employment and bringing Victoria Police into disrepute.[1795] This was not a Rush recommendation as the Rush Report 'sees no need to prescribe in legislation the grounds on which the Chief Commissioner may be removed or suspended from office'. Rush felt that this was unnecessary as the government would be 'politically accountable' for such removal and, it seems, that he felt that the public scrutiny that would also occur would be sufficient to limit the removal power's use.[1796] Rush, however, seems not to have given any consideration to the effect of a *threatened* use of removal – which would be unlikely to be subject to any public or parliamentary scrutiny.

The AFP, South Australia and Tasmania in 1979, 1978 and 2003 respectively also added provisions which empowered the Governor to remove the Police Commissioner if specific grounds were present. In South Australia and in the AFP, the grounds were similar to the grounds in the NSW list of office vacating criteria,[1797] while the Tasmanian grounds are more subjective, being the Minister's satisfaction that the Commissioner is not suitable to continue in office having regard to the Commissioner's competence and integrity or the lack of community confidence.[1798]

Each of those jurisdictions, therefore provided significant, but varied, security of tenure to Police Commissioners. However, in two of those jurisdictions, that security was later significantly reduced.

The first to reduce this form of security was Queensland. The post Fitzgerald reforms made the removal of the Commissioner as being subject to fairly complex processes involving the Governor in Council, the Parliament and the Crime and Corruption Commission (CCC).[1799] The process allows the Governor in Council to remove the Commissioner on the recommendation of the chair of the CCC, or by the Governor on receipt of an address of the Legislative Assembly praying for the Commissioner's removal. Those methods are only

[1793] *Police Act 1937* (Qld) s 6(2).
[1794] Effective in 2014. *Victorian Police Act 2013* (Vic) s 17(2), Sch 1 cl 2 & 3.
[1795] *Victorian Police Act 2013* (Vic) s 17(2), Sch 1 cl 4 & 5.
[1796] *Rush Report,* above n 38, 53.
[1797] *Police Regulation Act 1952* (SA) s9b as added by *Police Regulation Act Amendment Act 1978* (SA) s 3. The current provision is *Police Act 1998* (SA) s 17(1). *Australian Federal Police Act 1979* (Cth) s 22.
[1798] *Police Service Act 2003* (Tas) s 30(5) & (6).
[1799] *Police Service Administration Act 1990* (Qld) s 4.5.

available if at least one of the grounds specified in the office vacating criteria list 'exists'.[1800] These methods appear to provide the Police Commissioner considerable security of tenure. However, the Act also provides another basis of Police Commissioner removal – 'pursuant to the contract that governs the Commissioner's employment of it the Commissioner has breached the contract of employment'.[1801] This contractual basis is expressed to operate separately from the bases that allow removal by the Governor or Governor in Council and not to be in any way limited by grounds specified in the office vacating criteria list. It, therefore, provides a seemingly broad and flexible means of termination that can allow the very formal processes involving the Governor the CCC and the Parliament to be entirely bypassed.

The logic for this inconsistent approach can be traced directly to the 1989 Fitzgerald report.

Fitzgerald considered that the 'position of Police Commissioner does require secure tenure so that it is insulated against potential political interference'[1802] and for that reason he recommended that there should be two means of termination; one from the Act, which would allow for termination 'for good reason', and one in the contract of employment, based on 'established disability or misconduct'.[1803] He did not explain why the basis for termination should be divided, but he stated that contractual basis for termination should only proceed on the basis of a recommendation of an integrity body endorsed by the relevant Parliamentary committee.[1804] There is, however, nothing in the *Police Service Administration Act* that limits termination based on contract to the grounds discussed by Fitzgerald or requires the process recommended by him. As a result, the contractual basis for termination is considerably broader than what Fitzgerald recommended and has become an unjustified non-transparent means of termination undermining the stringent legislative basis for termination.

NSW also markedly reduced the security of tenure provided to its Police Commissioner. When the *Police Service Act 1990* (NSW) was enacted, it preserved the essential elements of the 1935 protections.[1805] However those protections were progressively removed, commencing with the removal of the Parliamentary role in 1993.[1806] These changes were

[1800] *Police Service Administration Act 1990* (Qld) s 4.5(3) & (4).
[1801] *Police Service Administration Act 1990* (Qld) s 4.5(2).
[1802] *Fitzgerald Report,* above n 36, 278.
[1803] Ibid.
[1804] Ibid.
[1805] ie, the necessity for the existence of defined grounds and Parliamentary involvement before the Commissioner could be removed. *Police Service Act 1990* (NSW) s 27 (as in force until 12 July 1993).
[1806] Amendments for this purpose were made by *Police Service (Management) Amendment Act* 1993 (NSW) Sch 1(1) and *Police Legislation Further Amendment Act 1996* (NSW) Sch 1(14).

part of a scheme of measures, which, as the Minister Griffiths said in his second reading speech in 1993 were:

> to make the Commissioner clearly responsible to the Minister in the same way as other department heads are responsible to their Ministers [and to] ensure that the Police Service is responsive to the Government's commitment to high-quality customer service and to changing needs and community expectations, is properly accountable to government and the people, is managed competently and efficiently, and is capable of flexible response no matter what the demands. [1807]

As to grounds for removal, since 2002 NSW has dispensed with any limited criteria for removal as the Commissioner can now be removed by the Governor on the recommendation of the Minister at any time 'for any or no reason and without notice'.[1808] The only limitation is that the Minister must, before making a removal recommendation, notify the Law Enforcement Conduct Commission (LECC) of the proposed recommendation and give the LECC a reasonable opportunity to comment.[1809] Subject to that minor impediment, the security of tenure of the NSW Police Commissioner has reverted, like that of his Queensland counterpart, to its 19th century position, which is essentially none.

The following diagram (**Table 11.3**) illustrates the changing security of tenure of Australian state Police Commissioners by identifying in three years, their guaranteed term of office and means of removal. The years are 1930, 1970 and 2017.[1810] The table compares the essential requirements of the different state processes.[1811]

Aside from the unchanged position in WA, Commissioners of the other five state forces had achieved considerable security of tenure by 1970, as all were appointed until 65 and two were protected from arbitrary removal from office. Since then, the length of term of all Commissioners has fallen to five years and the two jurisdictions that protected Commissioners from arbitrary removal have removed that protection. The other three (Victoria, South Australia and Tasmania), however, have gained dismissal protection although not to the extent formerly held by NSW Commissioners.

[1807] NSW, *Parliamentary Debates*, Legislative Assembly,31 March 1993, the Hon Terrance Griffiths,1042.
[1808] *Police Act 1990* (NSW) s 28(1) as amended by the *Public Sector Employment and Management Act 2002* (NSW) Sch 7.6[1].
[1809] *Police Act 1990* (NSW) s 28 (3).
[1810] The AFP and the NT Police are not included in this diagram as neither force was in existence in 1930.
[1811] And for that purpose the contractual basis for the removal of the Queensland Police Commissioner is taken as one that can allow removal on the basis of any grounds.

Table 11.3 – State Police Commissioner Security of Tenure Diagram – Comparison 1930, 1970 and 2017

State	Term			Required Grounds for Removal		
	At Pleasure	5 years	To age 65	Any Grounds	Minimal List	Extensive List
NSW[1812]						
VIC[1813]						
Qld[1814]						
SA[1815]						
Tas[1816]						
WA[1817]						

Key:

2017	
1970	
1930	

The effect of these changes is something that few studies have considered. One who has considered the issue is Dupont who, in his analysis, suggests that the reason for the introduction of term appointments was 'to minimise any possible form of resistance from the police hierarchy'.[1818] Similarly, Bayley and Stenning in their study consider that term appointment has had a 'dramatic implications for more recently appointed police chief's perceptions of their political "independence".'[1819] And that from their interviews with interviewees in Australia and New Zealand, Police Commissioners now consider that 'resisting government demands was much more risky, since doing so would likely result in their contract not being renewed'.[1820] They also observed that:

[1812] *Police Regulation Act 1899 (NSW)* s 4; *Police Regulation (Amendment) Act 1935* (NSW) and *Police Act 1990* (NSW) ss 26, 28 & 30.
[1813] *Police Regulation Act 1928* (Vic) s 4; *Police Regulation Act 1958* (Vic) ss 4(1) & 42(1)(c); *Victoria Police Act 2013* (Vic) Sch 1 Part 1.
[1814] *Police Act 1863* (Qld) s 3; *Police Act 1937* (Qld) s 6; *Police Service Administration Act 1990* (Qld) ss 4.4 & 4.5(2).
[1815] *Police Act 1916* (SA) s 5; *Police Regulation Act 1952* (SA) ss 6 & 7; *Police Act 1998* (SA) ss 13(2)(a) & 17.
[1816] *Police Regulation Act 1898* (Tas) s 11; *Police Regulation Act 1898* (Tas) s 9A as added by the *Police Regulation Act 1954* (Tas) s 3; *Police Service Act 2003* (Tas) ss 6(1) & 30(5) & (6).
[1817] *Police Act 1892* (WA) s 5.
[1818] Dupont above n 82, 21. Also see Fleming, above n 83, 70.
[1819] Bayley and Stenning, above n 20, 89.
[1820] Ibid 119.

> The chiefs in our sample also generally agreed that fixed-term contracts lessen political leverage compared with appointments 'at pleasure.' Fixed-term contracts however, increase leverage compared with tenured appointments in which incumbents can only be terminated 'for cause'.[1821]

What these observations indicate is that whatever overt elements that are now included in police legislation or police culture to establish or reinforce police independence, the reductions to security of appointment of Police Commissioners have allowed the police to be subject to government influence to a similar degree to that of the Commissioners of the Metropolitan Police when that force was established in 1829. The only distinction is that today's influence cannot be exercised directly and can only be exercised indirectly and therefore, with no transparency.

11.4 – Indirect Influence – Conclusions

This Chapter has examined two forms of indirect influence on police forces and found that while one has almost completely disappeared (government control over staffing), the other (lack of security of tenure) is alive and well in all Australian state police forces. Lack of security of tenure for Police Commissioners arises from appointments being for a limited term, as all Australian state Commissioners are now appointed either for five years or at pleasure. This is combined, in most states, with no statutory protection from dismissal, as most Commissioners can now be dismissed for any reason,[1822] or for highly subjective reasons.[1823] It is now only the Victorian and South Australian Police Commissioners who can only be dismissed or have their offices deemed vacant based on specific and limited statutory grounds.

This Chapter has also identified a clear direction in changes to policing legislation, largely from the 1990s, to reduce the security of tenure of Police Commissioners. The reason for such changes seems unclear and they been made during the same period that legislative measures were also made to increase police independence from direct influence. Little attention, however has been given to indirect influence and its effects in assessments of the police government relationship in academic papers or inquiry reports and what little attention has been inadequate or, in the case of Fitzgerald's recommendation regarding grounds of removal, ignored or misinterpreted. Moreover, when the effects of reduced tenure have been examined,[1824] the intuitive view that reduced security leads to reduced independence appears confirmed. This seems to undermine legislative measures designed to provide

[1821] Ibid 152.
[1822] NSW, Qld and WA.
[1823] Tas.
[1824] Such as by Bayley and Stenning.

independence to Police Commissioners from direct influence in two ways. Not only does it allow influence to occur, but it does so in a manner that is less open to public scrutiny than direct influence.

It is surprising, therefore, that assessments of the police – government relationship have not given greater attention to indirect as well as direct influence. It is considered that any future model for the police – government relationship needs to give close attention to both forms of influencing Police Commissioners so as to ensure that indirect influence can be minimised or prevented so as to not undermine the primary responsibilities in that relationship.

12. - Legislative Reform – Ministerial Responsibility Model

12.1 – Elements of an Alternate Model

The previous Chapters have demonstrated that the different statutory provisions governing the police-government relationship in Australia are unsatisfactory. This is because they are interpreted in accordance with and/or based on a supposed doctrine or mythology of police independence; a doctrine which gives rise to unclear results and, more importantly, has its origins in both poor legal and historical analysis. Those Chapters while dispelling that myth, do not argue that police independence is an objectionable concept. However, they do demonstrate that the current understandings of police independence in the police-government relationship are ill founded.

Given this imperfect nature of the contemporary statutory police-government relationship, this Chapter is devoted to the **secondary objective** of this thesis - which was, originally, to identify possible statutory models or designs for a clear constitutional relationship between police and government.

However, for the reasons outlined in Chapters 1 and 2, the scope of the thesis has concentrated on the primary thesis objective. This Chapter relates to the secondary thesis objective but in a more limited manner than the consideration given to the primary thesis objective. It is limited to discussing the factors necessary for and elements of an alternate police-government model, the empirical effects of which will need to be further examined and developed in subsequent research.

In discussing those factors, this study does not consider alterations to the nature of the government-police relationship, such as imposing an intervening body between police and government or transferring control of police to local government. Both methods are widely used in the UK, the USA and Canada[1825] with some limited Australian use.[1826] However, they

[1825] Police forces in England and Wales are based on a city, or regions with external control related in differing ways to local government. There are currently 43 of such forces; two for the city of London, 37 for the rest of England and four for Wales. *(Police Act 1996* (UK) Schedule 1 lists the 41 non London forces) Similarly, in Canada aside from the Royal Canadian Mounted Police which has national policing responsibilities and conducts regional policing on contract to certain cities and provinces, policing is regionally based. Bayley and Stenning, in their recent study, estimated the number of Canadian forces at 'approximately 179 or 340 police services depending on what is counted as a police service'. (The larger figure includes the various regions for which the RCMP provides policing services based on contract as separate police services.) In the United States regional policing is taken to the extreme, if not to the point of absurdity with Bayley and Stenning estimating that there are approximately 17,000 police forces in that country.(Bayley and Stenning, above n 20, 77). The responsibility for these forces is to the relevant local council body or to an appointed or elected police board.

[1826] Police Boards have had some limited usage in both New South Wales and Victoria. They were introduced in 1983 (*Police Board Act 1983* (NSW)) and 1992 (*Police Regulation (Amendment) Act 1992* (Vic) s 6) respectively and they had relatively short lives, being were abandoned in each jurisdiction - in 1996 (*Police Legislation Further Amendment Act 1996* (NSW) sch 1 cl 8 and 1999 (*Police Regulation (Amendment) Act 1999* (Vic) s 5). Establishing police on a locality basis is discussed in Chapter 3, which happened in Tasmania between 1857 and 1898 (*Municipal Police Act 1857* (Tas) s 6; *Police Regulation Act 1865* (Tas) ss 2 & 22. The local government control over Tasmanian police was ended by the *Police Regulation Act 1898* (Tas), s 8) and in NSW between 1833 and 1850 (*Sydney Police Act 1833* (NSW) s 1; *Police Act 1838* (NSW) s 1; *Seaman and Water Police Act 1840* (NSW) s 1. NSW local forces ended with *Colonial Police Act 1850* (NSW)). The difference between the Tasmanian and NSW local forces is that the NSW forces were subject to central government control.

are not considered in this study, as neither will provide any automatic resolution to the problematic issue with Australian police forces – whether they can be subject to direction.[1827] Instead, the discussion in this Chapter concerns changes necessary to make the existing Minister or Governor relationship with police clear, coherent and constitutional.

In order to construct alternative models, the factors to be considered should put to one side the questionable legal and historical factors that have been used to support the doctrine/mythology of police independence.

Instead, the first factor that should be considered is policy. That is, a decision needs to be made regarding the extent to which police should be subject to government direction. It is clear, that in 1829, 1862 and 1972, Sir Robert Peel, Sir Charles Cowper and Don Dunstan and the parliaments in which they sat, formed policy views regarding the police-government relationship and in each case formed the view that police should be predominantly if not totally subject to government direction. This, of course, should not be definitive for the creation of a new statutory relationship. And it is considered that further study involving empirical examination of police and government officials is necessary to ascertain the appropriate level of police independence.

However, the second element to be considered is likely to provide at least preliminarily guidance on the level of police independence. That element concerns the factors that were not considered in the current assessment of the police–government relationship, the most important of which is the doctrine of ministerial responsibility.

There has been academic work developing alternative models to improve the police-government relationship. However, those academic models are limited as the variable elements used were confined to one or two factors; generally the extent to which control can

[1827] Police Boards, can be set up to make the Police independent of direction, as can be seen from the Ontario Police Board which is prevented from directing the chief of police 'with respect to specific operational decisions or with respect to the day-to day operation of the police force'. *Police Services Act* RSO 1990 Chapter P 15, s 31(3). However, this does not need to be the case. Historically, Police Boards were very interventionist. In Brogden's study of the Liverpool 19th century Watch Committee, he found that 'During the first eleven years of the force the constraints, and directions by the Watch were severe. A sub-committee of the Watch met daily to supervise police operations. During the first five years, the Watch issued an average of one order a week for the direct placement of police officers'. Michael Brogden, *The Police: Autonomy and Consent* (Academic Press, 1982) 62. As late as 1962, the Association of Municipal Corporations in England was still arguing that 'a police authority has power to do whatever seems to it necessary to police its area efficiently' and that it is 'entitled to give the chief constable instructions, for example, to take steps to enforce the law more vigorously or as to his methods in dealing with a political demonstration; stopping short, however, of interfering with the application of the criminal law in particular cases'. *Willink Report,* above n 52, 27. And the current English arrangements for locally elected Police and Crime Commissioners (PCCs) under the *Police Reform and Social Responsibility Act 2011* (UK) also seems ambivalent. While the *Policing Protocol Order 2011* (UK) issued under s 79 of that Act specifically renders Chief Constables as 'operationally independent' (schedule cl 13), reciting the problematic proposition that' operational independence of the police is a fundamental principle of British policing' (schedule cl 30 and see cls 19, 22 and 23(j)) cl 37 seems to undermine that fundamental principle:

> In order to respond to the strategic objectives set by the PCC and the wide variety of challenges faced by the police every day, the Chief Constable is charged with the direction and control of the Force and day-to-day management of such force assets *as agreed by the PCC* (emphasis added).

Bayley and Stenning claim that this provision causes many chief constables to express concern that this provision 'will increase rather than reduce the likelihood of disputes between chef constables and their PCC'. Bayley and Stenning, above n 20, 189.

be exercised,[1828] and accountability for that control.[1829] Omitted from those academic models are any of the defects in current justifications for police independence as identified in this study. And it is with two of those defects that this Chapter concentrates for the construction of an alternate model.

The first of those two omissions relates to the constitutional basis for the police-government relationship, as the current models and the way that they are understood, discounts or ignores the relevance of the doctrine of ministerial responsibility.[1830] The second relates to the effect of the model. As pointed out in Chapter 11, current legislative models generally provide means to indirectly influence police due to limited periods of appointment and lack of security of tenure for Commissioners. This can undermine overt requirements and understandings of police independence. The suggested alternative model will need, in order to be effective, to, at least, minimise such undermining indirect measures.

12.2 – Capacity of Legislation

There is, however, a preliminary argument presented by certain academics, such as Pitman[1831] and Fleming,[1832] that needs to be considered in designing a new model: that legislation does not allow the complexities in the police-government relationship to be accurately codified. As Fleming wrote the 'boundaries of the responsibilities and role of Police Commissioners and Police Ministers are not amendable to definition'[1833] and that 'There can be no definitive legal statement of Police Commissioner's and a Police Minister's role and responsibilities'.[1834]

Those views were expressed before the 2013 Victorian legislative changes. Those reforms, while open to criticism regarding their rationale and extent,[1835] cannot be criticised on the basis of clarity of expression. Plain English drafting has made it clear that under the Victorian model the Minister has minimal direction powers which can only be exercised in very limited and well defined circumstances. Bayley and Stenning, whose work is more recent than that of Pitman and Fleming, praised the Victorian model as 'the most specific of any of any such legislative provisions currently in effect, but also the most restrictive in terms

[1828] See for example, Roach (2007), above n 59, 54-64; Pitman (1998), above n 76, 50-101, Sossin, above n 125, 99-101.
[1829] Stenning (2007), above n 60 185; Bayley and Stenning, above n 20, 123.
[1830] See Chapter 10.
[1831] Pitman (1998), above n 76.
[1832] Fleming, above n 83.
[1833] Ibid 70.
[1834] Ibid. Similarly see Pitman (1998), above n 76, 234 who considered that 'legislating roles and functions in itself does not reduce tensions between Police Ministers and Commissioners'
[1835] See Chapter 9.

of the matters where political direction is not permitted'.[1836] However, they seem to have shared the Pitman and Fleming view, when they said that 'Legislative specification … is not the 'silver bullet' that will eliminate all possible opportunities for disagreement between chiefs and their political supervisors'.[1837]

There is, however, no reason why a legislative solution needs to provide such a 'silver bullet'. The resolution of the police government relationship is not to be achieved by 'eliminating all possible opportunities for disagreement' or to 'reduce tensions' between Ministers and Commissioners. It is inevitable that tensions and disagreements occur between office holders when their roles and functions are related. What is needed, however, is a resolution process to be followed when such tensions arise to make clear whose will prevails or, as Beare and Murray put it, 'Who's calling the shots?'[1838]

The question is whether legislation can provide such a mechanism. The 2013 Victorian changes seems to provide a clear process to resolve any tensions between Ministers and Commissioners. Nonetheless, Bayley and Stenning considered that, in relation to the Victorian changes, 'Even with such detailed allocation of responsibilities there will still be room for, and need for, some negotiation with respect to matters that the allocation does not clearly specify'.[1839] This is, however, a puzzling observation as s 10 of the *Victoria Police Act 2013* (Vic) is not about the allocation of responsibilities between the police force and the Police Minister (as if there were established fields for their respective actions with uncertain and flexible boundaries) which they are both empowered to resolve by negotiation. It is about the extent to which a Minister is empowered to direct the Police Commissioner and when this can occur. If a Minister wants to direct a Police Commissioner on a particular subject matter, the first question that needs to be answered is not whether the Minister can convince the Police Commissioner to take directions on that subject matter, but whether there is a power to direct on that subject matter. Either the power to direct is sufficiently broad or it is not; and this is not a matter for negotiation, as a Minister cannot exercise a power to direct which he or she has not been legislatively empowered to exercise, just as a Police Commissioner cannot accept being directed in relation to a function that the legislature has determined cannot be subject to direction. It should also be repeated that the power to direct has not been exercised under the 2014 model or during the 140 years of its Cowper predecessors. As such, from both theoretical and practical perspectives, it is difficult to see any 'room for, and need for, some negotiation' under the Victorian model as Bayley and Stenning propose.

[1836] Bayley and Stenning, above n 20, 82.
[1837] Ibid 189.
[1838] Beare and Murray, above n 59.
[1839] Bayley and Stenning, above 20, 188.

Fleming's observations made particular reference to the 1979 AFP model which clearly limits the Minister's direction power to 'general policy'.[1840] She considered that the AFP provisions still did not protect police independence having observed a 2004 interrelationship between the then AFP Commissioner, Mick Keelty and the Prime Minister's Chief of Staff and the Secretary of the Department of Prime Minister and Cabinet.

Commissioner Keelty had made a public statement which had been interpreted as having contradicted a government position regarding risks of terrorist attacks. Within 48 hours Keelty issued a 'clarification' statement which, according to Fleming, had been 'Vetted and altered by the PM's office'.[1841] Keelty maintained that his original words had been 'taken out of context'.[1842] This vetting seems to relate to police operational decision-making and well beyond the power to direct regarding 'general policy' matters. Fleming expressed concern about the limited effect of those words due to the ambiguity of the word 'policy'.[1843] However, she failed to recognise that the formal power to direct had not been exercised.[1844] Keelty, issued his clarification at the request (or demands) of the Prime Minister's chief of staff and head of department, despite his statutorily protected independence and without requiring the power to direct to be exercised. This instance, therefore, seems irrelevant to an assessment of the capacity of legislation to define the respective roles of Ministers and Commissioners, but may be very relevant to the practical effectiveness of those defined roles and to the issue of indirect influence.

There seems, therefore, no reason to conclude that legislation cannot provide an appropriate solution to the police-government relationship provided it is accepted that the function of resolving that relationship is not to remove tensions and disagreements between Police Commissioners and Ministers, but to provide a clear mechanism to determine whose word is final and when.

Those who consider legislation cannot define the police-government relationship also seem to have made their comments without considering statutory models for the government relationship with other types of body. An examination of the statute book indicates that the lack of clarity that has plagued the police-government relationship in Australia and other countries has not impacted on the relationships with other types of bodies, some of which have functions not too dissimilar to those of police.

[1840] *Australian Federal Police Act 1979* (Cth) s 37.
[1841] Fleming above n 83, 60.
[1842] Ibid.
[1843] Ibid 61.
[1844] *Australian Federal Police Act 1979* (Cth) s 37(2) requires that the directions must be from the Minister and be made in writing and be proceeded by advice from the Commissioner, and there is no evidence that any of those elements was present in this instance.

In other types of government-statutory body relationship, the extent of a government's power to direct is resolved by the use of statutory formula – and the extent of the power to direct is determined by the type of body involved. Some are subject to complete control, while others are subject to none, while there are other types where only limited forms of direction are allowed. And in each case, the confusion that has surrounded the police- government relationship seems not present.

Australia has a long history in the use of statutory bodies. The pattern began in the second half of the 19th century, in a somewhat different manner from the methods used in England, with greater use of statutory boards for practices that would have been conducted by departments and Ministers in the United Kingdom. As Finn has pointed out, Victoria 'set the fashion in Australia, for the last decades of the century and beyond'[1845] in relation to the use of statutory boards and Ministers 'had statutory relationships with particular bodies ranging from the remote to dominating'.[1846] One of the reasons for creating these separate statutory relationships was, as Finn pointed out, 'to remove the conduct of one of the then great functions of government from the corrosive effects of political influence'.[1847]

The intended level of government control over statutory bodies has been, therefore, an essential element in the design of such bodies. While it is beyond the scope of the current thesis to closely examine or analyse the modelling or design process for the creation of statutory models in Australia, an examination of the statute book (using the Victorian legislation primarily for this purpose) indicates that, in relation to government power over statutory bodies, there are four basic models.

First, there are statutory bodies where government has no direct power of direction. In such statutory bodies, government influence is expressed by government members on the governing board of the statutory body, or by indirect means influence.[1848] This type of model is used when independence is seen as desirable and there is a low government risk from such independence. Examples of this approach are universities[1849] and other educational or research bodies[1850] where there is no government direction power, but there are government appointed members on the governing board of the statutory body.[1851]

[1845] Paul Finn, above n 101, 95. This observation related to the creation of the Victorian Railway Commissioners.
[1846] Ibid 99.
[1847] Ibid 97.
[1848] Such as over employment, resources and budget.
[1849] such as the University of Melbourne (*University of Melbourne Act 2009 (*Vic)) and Victoria University, (*Victoria University Act 2010* (Vic)).
[1850] such as the Victorian Institute of Forensic Medicine (*Victorian Institute of Forensic Medicine Act 1985* (Vic)) and the Victoria Law Foundation (*Victoria Law Foundation Act 2009* (Vic)).
[1851] *University of Melbourne Act 2009* (Vic) s 12; *Victoria University Act 2010* (Vic) s 12; *Victorian Institute of Forensic Medicine Act 1985* (Vic) s 67(2)(e),(f),(h),(j) and(k) and *Victoria Law Foundation Act 2009* (Vic) s 7(1)(d).

Second, there are bodies where the legislation expressly prevents government from directing the body. This is applied to integrity bodies, such as the IBAC.[1852] The legislation that establishes that body contains the following specific statement of the body's independence from government direction: 'The IBAC is not subject to the direction or control of the Minister in respect of the performance of its duties and functions and the exercise of its powers'.[1853]

The third type of body is one where the statutory body is to be managed by a governing board or council, but the governing board is expressly made subject to any directions that the responsible Minister might give. Victorian examples of this type of body are the Council of Trustees of the National Gallery of Victoria[1854] the Library Board of Victoria[1855] and the Museums Board of Victoria.[1856] In such bodies, the legislation establishing the statutory body specifically subjects the statutory body to ministerial direction and control.[1857]

The final type, which seems applicable to bodies with financial or emergency services type functions (other than police), subjects the governing board to a limited form of ministerial direction. A formulation routinely used in Victoria is to subject the governing body of a statutory body to the 'general' directions of the Minister. That formulation is used in relation to fire brigades,[1858] the Victoria State Emergency Service Authority,[1859] the Victorian Funds Management Corporation[1860] the Victorian Arts Centre Trust[1861] and the Victorian Managed Insurance Authority.[1862] A variation of that limited direction power is used for Ambulance Victoria, the board of which is subject to ministerial directions which must be in writing and must not:

(a) refer to the service provided or proposed to be provided by an ambulance service to a particular person; or

(b) refer to the employment or engagement of a particular person by an ambulance service; or

[1852] Independent Broad-based Anti-corruption Commission established by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).
[1853] Ibid s18.
[1854] *National Gallery of Victoria Act 1966* (Vic).
[1855] *Libraries Act 1988* (Vic).
[1856] *Museums Act 1983* (Vic).
[1857] For example s 5B *National Gallery of Victoria Act 1966* (Vic) reads:
> In performing its functions and exercising its powers under this Act, the Council is subject to the direction and control of the Minister.

Similar provisions are *Libraries Act 1988* (Vic) s21; *Museums Act 1983* (Vic) s 22A.
[1858] *Metropolitan Fire Brigades Act 1958* (Vic) s8 and *Country Fire Authority Act 1958* (Vic) s 6A.
[1859] *Victoria State Emergency Service Authority Act 2005* (Vic) s 8(1).
[1860] *Victorian Funds Management Corporation Act 1994* (Vic) s 10(1).
[1861] *Victorian Arts Centre Trust Act 1979* (Vic) s 4(2).
[1862] *Victorian Managed Insurance Authority Act 1996* (Vic) s 8(1).

(c) require the supply of goods or services to an ambulance service by any particular person or organisation.[1863]

It is also worth identifying two Commonwealth organisations as points of comparison with police forces. One, the Reserve Bank, has almost complete independence, while the Australian Security Intelligence Organisation (ASIO), although being similar in operation to police forces, does not have its supposed independence. However, the statutory formula in each instance, while being very different, acknowledges the importance of ministerial responsibility as the ultimate source of direction and control.

The Reserve Bank has substantial, but not total independence from government. The Reserve Bank is managed by its Governor[1864] and is not subject to ministerial direction. The federal government does, however, have one limited and complex form of direct influence over the bank, provided by s 11 *Reserve Bank Act 1959* (Cth). This section applies when there is disagreement between the Bank and the Commonwealth Treasurer over whether a policy determined by the Bank is 'directed to the greatest advantage of the people of Australia'. The section obliges the Treasurer and the Bank to endeavour to reach agreement, but in the absence of agreement, s 11(4) enables the Treasurer to make a recommendation to the Governor-General who, with the advice of the Federal Executive Council, may determine the policy to be adopted by the Bank. The Bank then becomes obliged to give effect to that policy[1865] and the Treasurer becomes obliged to table the relevant documents within 15 sitting days.[1866]

What is of relevance is the legislative endorsement of the government's responsibility for the Governor-General's direction. Section 11(5) provides that

> The Treasurer shall inform the relevant Board of the policy so determined and shall, at the same time, *inform the relevant Board that the Government accepts responsibility* for the adoption by the Bank of that policy and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy [emphasis added].

This provision, which seems never to have been exercised, was considered by the Campbell Inquiry into the Australian Financial System in 1981.[1867] That inquiry considered that it was important to separate the Bank from government, but that a fully independent bank was 'unacceptable to democracy'.[1868] Accordingly it considered that:

[1863] *Ambulance Services Act 1986* (Vic) s 34B.
[1864] *Reserve Bank Act 1959* (Cth) s 12(2).
[1865] Ibid s 11(6).
[1866] Ibid.
[1867] *Final Report of the Committee of Inquiry into the Australian Financial System* (September 1981) ('*The Campbell Inquiry*').
[1868] David Lewis, above n 99, 365.

> If the Bank believes it is being pushed beyond reasonable limits it has the discretion and obligation to hold firmly to its view and ensure its concerns are brought to the attention of the Parliament. Ultimately, however, the Bank cannot rise above the source of its powers – the government and Parliament – and must be responsive to the direction which government may deem fit to give.[1869]

As to ASIO, it is a police like body established by Commonwealth legislation and seems subject to total government control. The Director-General of ASIO is subject to a provision, remarkably similar to the format of Cowper provisions:

> in the performance of the Director-General's functions under this Act, the Director-General is subject to the directions of the Minister.[1870]

This direction power is, however subject to certain limitations. First, there are two substantive limitations:

- the minster is not empowered to direct the Director-General as to the nature of advice that ASIO is to provide.
- the Minister is also not empowered to override the opinion of the Director-General in relation to certain matters regarding particular persons other than by a direction in writing setting out the Minister's reasons, a copy of which must also be given to the Prime Minister.[1871]

There are also two form limitations:

- the Minister's direction must be in writing if requested by the Director-General;[1872] and
- written directions must be provided, as soon as practicable, to the Inspector General of Intelligence and Security.[1873]

While it is not within the scope of this thesis to examine the merit of the reasoning underlying the various limitations on government direction powers over statutory bodies, it is apparent that each of the various arrangements described here were designed to meet the particular needs of the individual relationship and any restrictions on government's direction powers were consistent with those needs. And the legislative arrangements in each case have provided a relatively clear legislative description of those powers.

Moreover, no instance has been found of any perceived need for any degree of independence for the statutory body based on equality with the Minister, or negotiation to

[1869] *The Campbell Inquiry*, above n 1867, 21 quoted in ibid 366.
[1870] *Australian Security Intelligence Organisation Act 1979* (Cth) s 8(2).
[1871] Ibid s 8(5) & (6).
[1872] Ibid s 8(3).
[1873] Ibid s 8(6) – established by the Inspector-General of Intelligence and Security Act 1986 (Cth).

resolve 'border disputes'. With both ASIO and the Reserve Bank, the ultimate authority of the government to direct was acknowledged.

What these examples demonstrate is that with other types of organisation, ministerial responsibility is the prevailing element in the each relationship, and that the level of government control over the statutory body will vary, depending on the nature of that statutory body.

12.3 – Element 1 - Ministerial Responsibility

As discussed in Chapter 10, ministerial responsibility is the basis for the relationship between government and the public sector, including statutory bodies in Westminster based constitutions. Moreover, as seen in Chapter 5, the intention underlying both Peel and Cowper provisions was to give effect to that doctrine by empowering responsible Ministers to direct police. It is considered that, consistent with Westminster constitutional design and with Peel's actual, rather than apocryphal, original intention, the doctrine should be the central element in a statutory model for a clear police-government relationship. This Chapter discusses the use of that doctrine for that purpose.

12.3.1 – Ministerial Responsibility – Extent Limitations

As ministerial responsibility is to be the acknowledged constitutional basis in the alternate police-government relationship, the starting point in designating the relationship is that the Minister has access to everything the body does and be able to direct everything the body does. Those powers and entitlements can, however, be subject to limitation; but any restrictions on those powers and entitlements need to be clearly defined in the empowering legislation supported by clear justification.

Accordingly, what areas of direction over the police, if any, should be removed from a Minister's control? Few scholars have assessed this process from such perspectives, one of which is Brogden[1874] whose 1982 views were interpreted by Bayley and Stenning as listing the following areas that should be the exclusive prerogative of Police Commissioners:

> Legality of actions
> Judicial knowledge of the prosecution process
> Strategies and tactics of law enforcement

[1874] Brogden, above n 1826.

Use of resources

Equity in the application of the law.[1875]

This is a very broad list which Bayley and Stenning acknowledged as 'obviously a generous view of what should be sacrosanct to police judgment'.[1876] Instead, they defined 'the scope of police independence' by identifying eight subjects of decision making[1877] - a list which serves as a useful means by which limitations can be considered in this study:

1. Resourcing
2. Appointments
3. Organization structure and management
4. Organizational policies
5. Priority setting
6. Deployment
7. Appointments and promotions
8. Specific operational decision making.

They surveyed six comparative jurisdictions[1878] and concluded that the 'accepted norm in most common law jurisdictions is now that the least police independence is conceded with respect to the decisions at the upper end of the list, and the most for those at the lower end of the list'.[1879]

They also considered that there was 'virtually no disagreement' that decisions of types 7 and 8 in the above list 'are the sacrosanct areas of police responsibility, not to be 'interfered' with or influenced by politicians'.[1880]

Nonetheless, if ministerial responsibility is to be the starting point in developing the new model, consideration needs to be given not to why a Minister should 'interfere' with such decisions, but which of the type 7 and 8 decisions are of such a kind that they should be, despite the doctrine of ministerial responsibility, removed from the Minister's direct control.

To examine that question it is necessary to break down items 7 and 8 to assesses what elements falling within those two items should be removed from ministerial direction and why.

[1875] Bayley and Stenning, above n 20, 190 relying on Ibid 236. It is not entirely clear whether the Bayley and Stenning's list accurately reflects Brogden's views, or that Brogden intended the view he expressed to be an expression of his view as to the exclusive powers of Police Commissioners.
[1876] Ibid.
[1877] Ibid 186.
[1878] Australia, New Zealand, India, Canada, United States and the United Kingdom.
[1879] Bayley & Stenning, above n 20, 186-7.
[1880] Ibid 187. It is, however, unlikely that Police Commissioners would have given ministerial accountability any consideration in forming their views.

Type 7 decisions relate to appointments and promotions. While decisions of that type were subject to government control in the 19th century police forces[1881] it seems accepted public sector practice for such matters to be now removed from the direct control of the Minister other than at the most senior level.[1882] For example, in the Victorian *Public Administration Act 2004*, the public service body head,[1883] is specifically required to be 'not subject to direction in relation to the exercise of his or her employer powers … in respect of any individual but must act independently'.[1884] This is, presumably, because the processes of employment and promotion are now based on a merit process and any involvement of a Minister could, or could reasonably be perceived as doing more to, negatively affect that process than advance it. A similar exclusion is seen in the police–government relationship in South Australia, where the sole statutory exemption from the Cowper provision in that State is also a type 7 decision:

> No ministerial direction may be given to the Commission in relation to the appointment, transfer, remuneration, discipline or termination of a particular person.[1885]

Consistently with contemporary public sector practice[1886] it is suggested that Ministers need not to have any involvement in decisions regarding the employment of individuals within the police force[1887] and that, in the proposed model, an exclusion based on the South Australian legislation should be included.

Type 8, relates to 'specific operational decision making' and encompasses 'how a particular operation will be handled and managed'.[1888] Of the 8 Bayley and Stenning types, it is the category that relates to the use of police powers impacting directly on members of the community. This can be seen from the different types of decision that type 8 seems to cover:

- To arrest or not arrest;
- To charge or not charge;
- To prosecute or not prosecute;
- To investigate or not investigate;
- To use particular weapons or tactics or not;

[1881] see Chapter 11.
[1882] such as Deputy Commissioners in police forces.
[1883] that is a department head.
[1884] *Public Administration Act 2004* (Vic) s 15(1).
[1885] *Police Act 1998* (SA) s 7.
[1886] See for example, *Government Sector Employment Act 2013* (NSW), s 31; *Public Service Act 2008* (Qld), s 110; *Public Sector Act 2009* (SA) Part 6, Div 3; *Public Sector Management Act 1994* (WA) s 53 which deals with the employment of executives in state public services where the function is not provided to the Minister or Governor.
[1887] with the possible exception of Deputy Commissioners. It is noted that the Rush committee recommended that Deputy Commissioners be appointed by the Chief Commissioner and this is one of the few Rush recommendations that the Victorian government did not accept. This issue is, however beyond the scope of this thesis. See *Rush Report*, above n 38, xvi, recommendation 16 and *Victoria Police Act 2013* (Vic) s 21.
[1888] Bayley and Stenning, above n 20, 186.

- To conduct a particular operation or not.

There are two apparent justifications why the various decisions relating to type 8 should be made by police members and not by the Minister: professionalism and politicisation.

The professionalism and expertise justification: police officers are trained and experienced experts in policing and are in the best position to make policing decisions in complex law enforcement situations. Lord Scarman used professionalism as the basis for police independence in his 1981 report into the 'Brixton Disorders', considering that 'The exercise of police judgement has to be as independent as the exercise of professional judgement by a doctor or a lawyer.[1889] Scarman's professional parallel, however, seems to have avoided the final element in any professional relationship – who has the final say.

Doctors and lawyers are in a service type relationship with their clients who cannot tell the doctor or lawyer what to advise. However, those clients are generally in a position to make the final decision as to what course is to be taken. Lord Scarman has argued that police are also in such a relationship, but not with any politicians, who, according to Lord Scarman may not 'tell the police decisions to take or what methods to employ'. In his view, the professional relationship is with 'the community' as the police are the 'servants of the community'. The unresolved difficulty with Lord Scarman's approach is that he did not advise how, in the absence of a democratically elected Minister speaking for that nebulous group, 'the community' can instruct the police that its advice is rejected, just as a patient or client can instruct his or doctor or lawyer of unwelcome advice.

While there is no doubt that Police Commissioners have expertise in policing, it is not clear why that expertise cannot be subject to ministerial direction. As seen from Chapter 5.1 and 6, in the 19th and early 20th century, the expertise of Police Commissioners was recognised, but this was not seem as making them immune from ministerial direction. Moreover police are not the only experts employed in the public sector; but they seem to be the only group asserting independence based on that expertise.[1890]

The politicisation justification: is the risk that politicians directions will be 'political', allowing police powers to be used improperly, particularly against the government's political opponents.[1891] To avoid such results it is necessary, according to Lister, to 'ensure that its governance and accountability processes are hard-wired into democratic structures without

[1889] *Scarman Report,* above n 681, 104.
[1890] As seen from the earlier discussion, other experts or professions in the public sector do not make this claim whether they be ASIO agents, fire brigades, art galleries or central banks – all places when government services are provided by highly experienced experts in their respective fields. The only exception in bodies that form part of the executive branch seems to be integrity agencies. However, the immunity from direction in their case is based less on their professionalism, but on the positive decision of legislatures as to the constitutional role that integrity bodies play.
[1891] Lister, above n 75, 239.

its resources being captured by sectarian or elite interests'.[1892] By 'sectarian or elite interests' Lister seems to be referring to democratically elected Police and Crime Commissioners in England and Wales, but this argument would seem consistent with also excluding democratically elected Police Ministers.

The politicisation argument seems based on the premise that Ministers are inherently untrustworthy, being unworthy of the trust that the doctrine of ministerial responsibility places in their hands. Despite ministerial responsibility being a fundamental element of Westminster based constitutions, the politicisation argument seems to assume that an independent police force is more fair and impartial than a police force subject to civilian control in a system of government responsible to the parliament. While it would be disingenuous to deny that empowering governments to control police forces provides a means that can be misused, removing that power and providing it to the statutory body which itself may be misusing the power seems to be the basis of a far greater public risk as the independence of the LAPD referred to in Chapter 10 seems to demonstrate.

Why, therefore is it not consistent with ministerial responsibility and the rule of law[1893] for a democratically elected government to have ultimate responsibility and control over the policing body and its use of its discretionary powers over citizens rather than it to leave it to control of the body itself?[1894] This is a question that needs further consideration in subsequent analysis. But is suggested that for the purpose of the preparation of the alternative model, Type 8 decisions are of the sort that should be within scope of Ministers to direct, other than any particular instances where the benefit to the community would be better achieved by putting the matter beyond the power of government to control.

And there are certain decisions where it can also be argued that the ministerial interest could or should be minimised or excluded. That is, decisions with particular application to individual members of the community or the force. As has been seen in relation to other forms of emergency service bodies, the responsible Minister's direction powers are confined to general directions, policy matters or directions that do not relate to the activities of the particular emergency service in relation to the needs and requests of individual members of the community. The justification for this seems to be that Ministers have no necessary interest in such individual matters and that their involvement in those matters may be

[1892] Ibid 242.
[1893] even allowing for the uncertain meaning of that term. See Chapter 7.3.
[1894] Marshall made this point in 1978 when discussing watch committees he said:

> Suppose that a chief constable were making no attempt to put down widespread public disorder, or the police were reacting in an over-violent way to political demonstrations, or were ignoring traffic offences, would the watch committee be helpless and could they not in such circumstances properly issue instructions to secure the proper enforcement of the law? Since the law itself gives no precise guidance as to the general policies of enforcement what could it mean to say that the chief constable was 'answerable to the law alone'?

Marshall (1978), above n 53, 51 & 53.

counterproductive in the handling of those matters and the conduct of an effective emergency service.

The contrary position is that the potential for ministerial involvement in such matters is desirable as a means of control over the police force and its powers over the community, to ensure avoidance of poor practice. Nonetheless, in relation to certain of the type 8 decisions, the potential involvement of a Minister as a means of scrutiny to prevent poor policing practice seems unnecessary and possibly undesirable, where the process regarding those actions involves judicial examination. That is, in relation to decisions:

- to arrest or not arrest;
- to charge or not charge; and
- to prosecute or not prosecute.

Each of these types of decisions is based on the exercise of discretion by a police member. And each will involve, unless that discretion is altered in favour of the citizen, judicial involvement, whether it be in determining whether the individual obtains bail, is committed for trial or is properly tried and his or her liability for conviction of any offence for which that person has been charged is appropriately and fairly assessed. Given the necessary judicial involvement in the processes for these types of decisions, little if any additional protection to the community can be gained by ministerial direction and, accordingly, exclusion of these types from ministerial control can be justified.

Decisions regarding investigations, however, seem different. It is not unknown for certain Ministers to have the power to direct certain public bodies to conduct particular investigations.[1895] Initiating inquiries and investigations is, therefore, not something inherently alien or improper for Ministers and there seems no reason why a similar power should not be available in relation to investigations conducted by police. The decision to conduct police investigations is an exercise of discretion that is open to police members to initiate and for which the Police Minister is responsible. As such, if a Police Minister considers that a matter should be investigated it is not inconsistent with his or her constitutional role to ensure that such an investigation be conducted. Similarly, if a police Minister considers that the police force has spent far too much time and resources on a particular investigation, particularly if it is seen as unproductive, there seems not inappropriate for the Minister to direct that such an investigation should cease.

[1895] For example, in Victoria, aside from statutory authority for the establishment of Royal Commissions and Boards of Inquiry (*Inquiries Act 2014* (Vic)), statutory authority also exists to allow Ministers to appoint commissioners to investigate local councils (*Local Government Act* (Vic) s 209) and to allow the Premier to require direct the Public Sector Commission to conduct an inquiry into any matter relating to a public sector body (*Public Administration Act 2004* (Vic) s 56).

There may need to be qualifications to this suggested power, which a subsequent study should examine. Two qualifications, however, seem appropriate. First, a Minister's direction should go only to the decision to conduct or not conduct an investigation, not how the investigation is conducted. This is a significant qualification which ensures that the police are free to conduct investigations in the manner they see fit. It also recognises that while police have expertise in the conduct of investigations which the Minister does not share, both the police and the Minister have an appropriate role in determining whether an investigation should occur and/or continue.[1896] The Minister's role derives from his or her constitutional responsibility for the policing of the state, and the police force's role derives its statutory functions. But where there is a disagreement, the Minister's view, as the responsible Minister, would prevail.

The second qualification is the form and transparency restrictions discussed below.

As to the last two of the type 8 functions - police operations and the use or non-use of particular weapons or tactics, it is also suggested that ministerial control is consistent with a Minister's constitutional responsibility.

As discussed in Chapters 7 & 10, police powers are highly discretionary and police operations can be both 'lawful' but 'awful'. If a responsible Minister believes that certain of the operations of a statutory body for which the Minister is responsible are inappropriate it seems both consistent and desirable in the public interest for the Minister to intervene to prevent such operations. And it is suggested that the model being developed for the police-government relationship should operate on the same basis: that the Minister's constitutional responsibility should not be hampered by limiting the Minister's power to direct police from undertaking such 'awful' actions. Similarly, it may occur that a Police Commissioner considers that a particular police action that could lawfully be undertaken should not be undertaken and the police Minister may take the opposite view. It is suggested that providing the police Minister is willing to accept responsibility for directing policing actions in the publicly transparent manner discussed below, the Minister should be able to direct the Police Commissioner, the exercise of Minister's control being entirely consistent with the Minister's constitutional role and responsibility.

Concerning weapons and tactics, the government's ultimate responsibility for policing the jurisdiction is consistent with the Minister having ultimate responsibility for, at least,

[1896] This limitation seems reflected in the statutory formula used for the Irish police. Section 25 *Garda Siochana Act 2005* (Republic of Ireland) allows the Minister to issue written directives to the Garda Commissioner regarding 'any matter relating to the Garda Siochana' (that is the police force). However, s 25(4) limits the Minister's power of direction which:

> may not be exercised to limit the independence of a member of the Garda Siochana in performing functions relating to the investigation of a specific offence or the prosecution of an offence ….

preventing the use of police weapons or tactics which the Minister considers incompatible with the public interest.[1897]

A local example can be seen from the recent press report that Victoria Police intends to alter their approach in hostage situations from negotiation to hostage rescue based on the police force's assessment of the risk of terrorism. This change of direction includes 'general duties police who would be the first on the scene … being trained in active-shooter tactics – which may mean taking immediate action rather than waiting for counter-terror police to arrive'.[1898] However, as not all hostage situations are caused by terrorist actions, this change of approach may, by requiring general duties police to take 'immediate action' in hostage situations, rather than negotiate, endanger more Victorians than it protects. Yet, in that State, with its statutorily independent police force, if the police adopt this new methodology the possible increased risk to the public that it may lead to will have occurred by a decision process that did not involve the responsible Minister.[1899]

In the suggested alternative model the responsible Minister would be empowered to either direct the police force to conduct or not conduct particular actions or, at least, to direct police to cease particular types of operations, tactics or use of weapons which the Minister considers not in the public interest.

There is, however, an arguable disadvantage to the approach. That its clarity will bring with it, not only an increase the range of 'operational' matters in which a Minister *could* be involved, but also an increase in matters that Ministers *will* become involved with. This, however, seems only be a risk to public interest if the ministerial power is used recklessly or for improper purposes, and that consequence seems to be capable of limitation by the form and transparency restrictions discussed below. A subsequent study will need to assess the effectiveness of such measures, although the history of form requirements in Victoria and

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[1897] As an example of police policies over which civilian control should have existed, but did not, were certain LAPD policies or lack of policies that endangered the well-being of citizens. According to Domanick:

> '[between] the fifties and until 1977 … there was no shooting policy,' says Jack White, a former LAPD commander and Police Commission chief investigator. 'And this was by design. It was felt that a shooting policy would limit an officer's activities in a department [with] a proactive morality of seeking out the criminal and take action. [Consequently], we shot people running away from us for a long time'. As a result, among the police departments of the six largest cities in the United States, the LAPD ranked number one in killing or wounding the largest number of civilians, when adjusted for the number of officers on the force.

The LAPD did have a policy for its police dogs. Until 1992:

> 'Find and bite', it was called. Most other police departments used a 'circle and bark' approach, where the dog is trained to circle one it's found its suspect not to bite.

As a result, again according to Domanick:

> In the three years, from January 1989 to January 1992, the dogs had bitten nine hundred people. The Philadelphia PD had twice the number of dogs deployed as did the LAPD during the same period, but the number of suspects bitten totalled just twenty.

Domanick, (2015), above n 1703, Part 1, Loc 1181, 1505 & 1510 (Kindle edition).

[1898] John Silvester, 'Direct action plans for terror attacks', *The Age*, 26 November 2016.

[1899] A similar issue arises from plans to amend Victoria's firearms laws to allow the 'Chief Commissioner, at his discretion, … [to] be able to impose an order on a person that means they, as well as their cars and property, can be searched at any time' without the need for the judiciary to issue any warrant. Tammy Mills, 'No warrant needed: Extraordinary search powers to tackle terrorism, shootings in Victoria', The Age 16 June 2017. http://www.theage.com.au/victoria/no-warrant-needed-extraordinary-search-powers-to-tackle-terrorism-shootings-in-victoria-20170615-gwrq8t.html?btis

South Australia indicates that high transparency in the exercise of broad powers limits the use of those powers.

12.3.2 – Ministerial Responsibility – Form & Transparency Restrictions

Given the confusion prevalent in the current police government relationship arrangements, it is considered that a new model should address clarity and transparency in three ways. In addition to clarifying the scope of the direction power, it will also need to make it clear:

- Who can direct;
- How directions need to documented; and
- How directions needs to be publicised.

The benefit of these form requirements is twofold. First, they add clarity and certainty to the operation of the power and, second, as United States Supreme Court Justice Louis Brandeis wrote, before his time on that court 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'.[1900]

This reflects the Bentham observation: 'the more strictly we are watched, the better we behave'.[1901]

This study operates on the basis that Brandeis and Bentham were correct and that an obligation to make directions public is a significant disincentive to the misuse the power of direction. However, it is necessary to recognise that some studies have recently questioned whether transparency brings with it all the benefits that are often claimed, almost as an 'article of faith'[1902] in public policy discussions.[1903] It is beyond the scope of this study to undertake an assessment of the benefits and effects of transparency, but it is apparent, as is discussed below, in Chapter 12.3.2.3, that in Australian jurisdictions where transparency requirements have been required, government powers of direction have either been not used, or they have been confined to very limited circumstances.[1904]

[1900] Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (Stokes, 1914) 92. (Originally published in *Harper's Weekly*).
[1901] Jeremy Bentham, 'Farming defended' in Michael Quinn (ed) *The Collected Works of Jeremy Bentham, Writings on the Poor Laws, vol. 1* (Oxford, 2001) 276, 277.
[1902] Tom Skladzien, 'Book Review, Transparency: The Key to Better Governance' (2007) *Economic Record* 491, 491.
[1903] Amitai Etzioni, 'Is Transparency the Best Disinfectant' (2010) 18 *Journal of Political Philosophy* 389.
[1904] See in particular 12.3.2.3

12.3.2.1 - Who can direct?

In all Australian jurisdictions where a Minister has a power to direct,[1905] there is no express legislative requirement to ensure that a direction can only be made by the Minister.

This issue is important as, if not made clear a statutory direction power may be able to be used on the Minister's behalf by departmental or ministerial staff without the Minister's knowledge or approval. This can allow misuse of the power and can lead to uncertainty among police as to whether a communication from ministerial or department staff has the obligatory status of a direction. This problem appears to have occurred in 1997 Canada during the APEC Economic Leaders meeting when a senior aide to Prime Minister Chretien, one Jean Carle, either directed the RCMP in their handling of public protests, or was taken by the RCMP as having directed them.[1906] The RCMP's actions included preventing protest signs being displayed, pepper spraying protesters and journalists and strip searching female protesters.[1907]

One way to prevent misuse of a power to direct is to require that the only person empowered to exercise such a power should be at ministerial or gubernatorial level and that the power cannot be delegated. Such a restriction makes plain to all concerned that a direction can come from only one person and it will empower the police to reject any purported directions from ministerial and departmental staff as being *ultra vires*.

The legislation in the seven Australian jurisdictions with ministerial direction powers[1908] is silent on this issue, although, the nature of the power seems to indicate that directions can only be made by the Minister. However, Queensland under the post Fitzgerald reforms, seems to have accepted that the ministerial direction power can be exercised on behalf of the Minister. One of the tabled ministerial directions in 1991 was not from the Minister himself,[1909] but was from his private secretary - despite the statutory formula that limits the power of direction to 'The Minister, having regard to advice of the Commissioner first obtained, [who] may give, in writing, directions to the Commissioner'.[1910] The result that flows from this is that the problems facing Canada may also face Australian police.

While it can be strongly argued that the Queensland interpretation was incorrect, the fact that a purported direction had been made by the Minister's private secretary that seems

[1905] Currently all Australian police forces other than Western Australia.
[1906] Pue quotes the *National Post* of 28 August 1999: 'According to an RCMP source audio tapes of police radio transmissions at APEC were punctuated with "Jean Carle wants this" and "Jean Carle wants that". The tapes have gone missing, and on Monday Mr Carle admitted shredding most of his APEC memos, too'. Pue (ed) (2000), above n 63, xvi.
[1907] Ibid, xv-xvi.
[1908] (NSW, Tasmania, Queensland, Victoria, South Australia, the Northern Territory and the Commonwealth in relation to the AFP).
[1909] The Minister at that time was Terry Mackenroth MP.
[1910] *Police Services Act 1990* (Qld) s4.6(2)

accepted by the Minister, the police force and the Criminal Justice Commission as being sufficient to satisfy the legislative requirement for a ministerial direction indicates that more precise drafting is necessary. The form of the drafting should be left to the expertise of the legislative draftsperson – but it should have the result that:

- the only person empowered to exercise a ministerial power of direction in relation to the police is the person holding or acting in the office of the Minister with responsibility for the legislative provision empowering directions to the police; and
- the power to direct the police is not one that can be delegated.[1911]

12.3.2.2 – Documentation of the directions

One of the only areas where the parliamentary committees of the 1830s seem to have implied some criticism of Lord Melbourne and his control of the Metropolitan Police was in relation to his unwillingness to document his directions to the Police Commissioners.[1912] This is a practice that Lord Melbourne followed and, as demonstrated in relation to his instructions concerning the Cold Bath Fields protest, it led the Commissioners to document the instructions as they understood them,[1913] a process that allowed confusion to arise and allowed Lord Melbourne to deny the accuracy of the Commissioners' memorandum.[1914]

In two Australian Cowper jurisdictions (NSW[1915] and Tasmania[1916]) there also remains no obligation to document ministerial directions. In the other five jurisdictions with ministerial direction powers[1917] directions must be in writing.[1918]

The benefit of documenting directions is to avoid the uncertainty of Lord Melbourne's practice, ensuring clarity in the understanding of any directions given and to enable assessment of compliance with directions. The ideal police – government relationship should follow the practice followed in most current Australian jurisdictions and require government directions to police to be documented.

[1911] Stenning (2000), above n 60, 114 discussed the uncertainty in Canada as to whether there was any accepted view in that country as to whether directions could only be made by the Minister.
[1912] See in particular to question 4790 put to Lord Melbourne on 8 August 1833 and his answer. *Cold Bath Report,* above n 429, 192 when Lord Melbourne was asked whether he had ever found any 'public inconvenience to have arisen from verbal instructions having been given' a proposition that Lord Melbourne denied. See Chapter 5.1.
[1913] Ibid 15, Question 108.
[1914] Ibid, Question 113.
[1915] *Police Act 1990* (NSW) s 8(1).
[1916] *Police Service Act 2003* (Tas) s 7(1).
[1917] Victoria, Queensland, South Australia, the Northern Territory and the Commonwealth in relation to the AFP.
[1918] *Victoria Police Act 2013* (Vic), s 10(1); *Police Service Administration Act 1990* (Qld) s 4.6(1)(b); *Police Act 1998* (SA) s 6; *Police Administration Act* (NT) s 14(2); *Australian Federal Police Act 1979* (Cth) s 37(2). Note, the Rush Report in its examination of this issue misunderstood the Northern Territory requirement as it did not recognize the obligation for government directions in the Territory to be in writing. *Rush Report,* above n 38, 44.

12.3.2.3 - Publicity of directions

The final and most important of the proposed form restrictions is for any directions made by the government to be made transparent – to allow scrutiny, criticism and debate. This can be achieved by requiring gazettal and parliamentary tabling within a required number of days. This requirement could also be supplemented by an additional requirement that any government direction will not come into force until either or both of the tabling and the gazettal has occurred.

Currently, in the seven Australian jurisdictions with government direction powers, only three have publicity requirements.[1919]

In South Australia, since 1972, government directions since must be tabled within six sitting days and gazetted within eight days of their making.[1920] The provisions, however, do not deal with the consequences of failure to table or gazette or specify whether those steps are required before a direction became operative.

The Victorian publicity requirements are slightly different. Since 2014, ministerial directions must be published in the Government Gazette and included in the police force's website, but there is no statutory time line for those two steps. And, as in South Australia, the provision does not specify whether those steps operate as a condition precedent to the validity of the direction, or specify the consequences of failure to take those steps.

Different publicity obligations operate in Queensland which, despite their apparent comprehensiveness and complexity, seems to have been undermined by administrative arrangements in that State. The requirement is for Police Minister directions to be kept by the Police Commissioner in a register, a certified copy of which is to be provided, annually, to the Crime and Corruption Commission - which is then to table that certified copy in the Queensland Legislative Assembly within 14 days of receipt. As discussed in Chapter 9, the effectiveness of this arrangement seems to have been seriously undermined since 1998 by administrative arrangements of the Crime and Corruption Commission, its predecessor, the Criminal Justice Commission and the Queensland Police that have limited the reporting of directions to those in the form established by those administrative arrangements. Since 1998 it is unclear as to whether any ministerial directions have been made, or only that no directions in the required form, have been made – as the tabled register since 1998 has not

[1919] South Australia – *Police Act 1998* (SA) s 8; Victoria – *Victoria Police Act 2013* (Vic) ss 10(6) & (7); and Queensland - *Police Service Administration Act 1990* (Qld) s 4.6(2),(3) & (4)).
[1920] *Police Regulation Act 1952* (SA) s 21(2) &(3) (as added by the *Police Regulation Act Amendment Act 1972* (SA); *Police Act 1998* (SA) s 8.

included any directions – unlike the earlier years, 1992 to 1997, in which thirteen ministerial directions in various forms were included in the tabled register. Given the effect of the Queensland administrate arrangements to limit the transparency of the Queensland requirements, it is not considered that this model provides an appropriate level of transparency or should be the exemplar for an ideal police-government relationship.

The benefit of the Victorian and South Australian publicity arrangements can be seen by the apparent effects in those two jurisdictions. In South Australia, since transparency requirements for directions were first introduced, ministerial directions have been limited to lengthy directions regarding one issue - the scope of the operations of the Intelligence Section of South Australian Police, the dissemination of the records of that section and the auditing arrangements of that section.[1921] In Victoria, the use of the direction power is even more confined as that power has not been used.[1922]

The benefit of transparency requirements is that they reinforce the certainty achieved by the earlier documentation requirement and ensure that if a power to direct is exercised, the responsible Minister will be seen publicly to take responsibility for his or her directions – and will be subject to scrutiny and criticism if the directions are considered inappropriate.[1923] Its effect, judging by the use of the South Australian and Victorian direction powers, is to dissuade the holder of the power from using that power recklessly or excessively. This scrutiny, which is much less likely to be present if the direction power is not transparent, is entirely consistent with the Minister's responsibility to the parliament for the policing of the jurisdiction and for the maintenance and efficiency of the police force.

One related area that subsequent study should, however, consider is the effect of non compliance with the transparency arrangements, and whether a direction will not be effective until the publicity arrangements are complied with.

[1921] *South Australian Government Gazette*, 22 October 2015, 4631; 21 January 2010, 257; 29 May 2008, 1807; 5 August 1999, 663; 8 July 1999.
[1922] As determined by examination of VicPol Annual Reports. See *Victoria Police Act 2013* (Vic) s 10(7) and Chapter 7.1. The Victorian non-use result may need to be discounted somewhat as the failure to use the direction process may be less an effect of the transparency arrangements than a continuation of the unwillingness in that State to use any direction power over the police. As noted earlier, the previous power of the Governor in Council to direct the Victoria Chief Commissioner of Police (itself a relatively transparent power), a power that had existed since 1873, seems never to have been exercised. Nonetheless, there remains no evidence in the two jurisdictions with express direction powers subject to transparency requirements of any excessive, reckless or improper use of the government's power of direction.
[1923] The availability of scrutiny also has the benefit of ensuring that if the police force takes some form of action that is considered contrary to the public interest (or fails to take action that the parliament considers it should have taken), the Minister can also be scrutinised and criticised for failing to intervene with the force, just as the Minister can be scrutinised and criticised for failing to intervene in relation to any other statutory body for which the Minister is responsible.

12.4 – Element 2 – Minimise indirect Influence

As discussed in Chapter 11, the various Australian current police-government arrangements are all subject to indirect government influence arising from Police Commissioners with weak security of tenure. Element 2 of an alternate model would seek to minimise this risk by requiring that Police Commissioner are not appointed for short periods and that they are not subject to arbitrary dismissal.

12.4.1 - Grounds for Termination

The requirements in Victoria [1924] and South Australia[1925] (and to a lesser extent Tasmania)[1926] make the termination of the services of their Police Commissioners difficult as specific justification is required for termination of office – with the legislation in each State listing particular circumstances causing the office to becomes vacant or empowering the relevant Governor to terminate the Commissioner. In the other jurisdictions there is no similar statutory requirement for cause based termination. NSW had, until 1993, the greatest statutory protections for its Commissioner. However, since 2002, the NSW Commissioner can be dismissed 'at any time for any or no reason and without notice'[1927]. This seems to allow arbitrary termination of the Commissioner or termination for overtly political reasons. However, this seems not significantly worse than WA, were the Commissioner is appointed at pleasure,[1928] or Queensland or the Northern Territory where appointment can be ended in accordance with whatever is in the terms and conditions of appointment.[1929]

To provide increased security of tenure, it is considered that an alternative police-government arrangement should provide similar security and adopt the form and content similar to the current Victorian or South Australian termination provisions, subject to one alteration.

That is, that the grounds for termination should include failure to comply with a ministerial direction. This ground would reinforce the subordinate role of the Commissioner to the Minister, the obligation of the Minister to monitor the operations of the force and the ability and responsibility of the Minister to act when the Minister considers that the police's actions require direction.

[1924] *Victoria Police Act 2013* (Vic) Sch1 cls 4 and 5.
[1925] *Police Act 1998* (SA) s 17(2).
[1926] *Police Services Act 2003* (Tas) s 30(5).
[1927] *Police Act 1990* (NSW) s 28(1).
[1928] *Police Act 1892* (WA) s 5.
[1929] *Police Service Administration Act 1990* (Qld) s 4.5(2). *Police Administration Act* (NT) s 9(1)(b).

12.4.2 – Term of Office.

As also seen from Chapter 11, the term of office of all State Police Commissioners was, when the forces were established, at pleasure. Later, Commissioners of all states other than Western Australia, were appointed till aged 65. However, commencing with Victoria in 1970, they are all now appointed on the basis of a re-appointable fixed five-year term.[1930] As that Chapter has also demonstrated, this is a form of appointment that can allow indirect and non-transparent influence of Police Commissioners and is regarded as such by them.

To overcome this method of indirect influence will require a means of providing Police Commissioners with a longer period of employment. This could be done in, essentially two ways.

First, returning to appointment to the age 65. This may, however, be associated with the risk that a Police Commissioner's permanent employment provides, both within the force and publicly, a disproportionate significance relative to the Police Minister inconsistent with the Commissioner's statutory role. That is, that a Police Commissioner with secure employment to the age 65, may be able to use that position in a similar manner to that in which J Edgar Hoover allegedly used his long standing position as Director of the Federal Bureau of Investigations not only as a source of independence from the Minister, but to influence and control of his political masters to the point that none were willing or able to remove him from office.[1931]

To avoid that risk, an alternative would be to adopt a methodology used in relation to statutory office holders who are intended to be immune from government direction.

Table 12.1 details the security of tenure of 21 integrity agency offices, three from each State and three from the Commonwealth – being the Ombudsman, the Auditor-General and the head of the state or Commonwealth anti-corruption body or its equivalent. Each of these offices was designed as independent of government and some, such as the Victorian Ombudsman and Auditor-General, have their independence constitutionally entrenched.[1932] To demonstrate how likely each of those offices would be subject to government influence

[1930] The AFP Commissioner is also appointed for fixed term, being a re-appointable 7 year term. *Australian Federal Police Act 1979* (Cth) s 17(2). And the Northern Territory Commissioner can be appointed for a fixed period, but the relevant legislation places no restrictions on the setting of such a fixed period. *Police Administration Act* (NT) s 9(3A).
[1931] Summers quoted President Truman as saying, 'We want no Gestapo or secret police. FBI is tending in that direction. They are dabbling in sex-life scandals and plain blackmail…J. Edgar Hoover would give his right eye to take over, and all congressmen and senators are afraid of him.' Anthony Summers, 'The Secret Life of J. Edgar Hoover' *The Guardian*, 1 January 2012. https://www.theguardian.com/film/2012/jan/01/j-edgar-hoover-secret-fbi. This degree of immunity from political pressure also allowed Hoover, according to Weiner, to 'subtly undermine presidents' as well as to 'refuse[] to execute illegal orders from President Nixon'. Tim Weiner, *Enemies A History of the FBI* (Ransom House, 2012) xvi.
[1932] *Constitution Act 1975* (Vic) ss 94B & 94E.

through employment related matters, Table 12.1 summarises the period of appointment and maximum length of appointment for each.

Table 12.1 – Security of Tenure for Integrity Agency office holders

		Term			Max Term				
		5 years	7-8 years	10 Years	5 years	7-8 years	10 years	Unlimited	To 65
NSW	Chief Commissioner, Law Enforcement Conduct Commission[1933]	■			▨				
	Ombudsman[1934]		■					■	
	Auditor-General[1935]		■			▨			
Vic	IBAC Commissioner[1936]	■			▨				
	Ombudsman[1937]			■			▨		
	Auditor-General[1938]		■					■	
Qld	Crime and Corruption Commissioner[1939]	■					■		
	Ombudsman[1940]	■					■		
	Auditor-General[1941]		■			▨			
Tas	Integrity Commission Chief Commissioner[1942]	■						■	
	Ombudsman[1943]	■						■	
	Auditor-General[1944]			■			▨		
SA	ICAC Commissioner[1945]		■				■		
	Ombudsman[1946]								▨
	Auditor-General[1947]								▨
WA	Corruption and Crime Commissioner[1948]	■					■		
	Ombudsman[1949]	■						■	
	Auditor-General[1950]			■			▨		
Cth	Law Enforcement Integrity Comm'r[1951]	■				■			
	Ombudsman[1952]		■					■	
	Auditor-General[1953]			■			▨		

Key

Maximum term	▨

[1933] *Law Enforcement Conduct Commission Act 2016* (NSW) Sch 1 cl 3.
[1934] *Ombudsman Act 1974* (NSW) s 6(2).
[1935] *Public Finance and Audit Act 1983* (NSW) s 28(1).
[1936] *Independent Broad Based Anti-Corruption Commission Act 2011* (Vic) s 24(1)&(2).
[1937] *Ombudsman Act 1973* (Vic) s 10(4).
[1938] *Constitution Act 1975 (Vic)* s 94C(1).
[1939] *Crime and Corruption Act 2001* (Qld) s 231(1) & (2).
[1940] *Ombudsman Act 2001* (Qld) s 61.
[1941] *Auditor-General Act 2009* (Qld) s 10.
[1942] *Integrity Commission Act 2009 (*Tas) Sch 2 cl 2.
[1943] *Ombudsman Act 1978* (Tas) s 5(2).
[1944] *Audit Act 2008 (*Tas) Sch 1 cl 1.
[1945] *Independent Commission Against Corruption Act 2012 (*SA) s 8(1) & (2).
[1946] *Ombudsman Act* 1972 (SA) s 10(1).
[1947] *Public Finance and Audit Act 1987* (SA) s 27
[1948] *Corruption, Crime and Misconduct Act 2003* (WA) Sch 2 Cl 1.
[1949] *Parliamentary Commissioner Act 1971* (WA) s 5(3). There is no mention of reappointment in the Act, but it appears that in the absence of any prohibition, that the Parliamentary Commissioner can be reappointed.
[1950] *Auditor-General Act 2006* (WA) Sch 1 cl 1(4)&(5).
[1951] *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 175(3).
[1952] *Ombudsman Act 1976* (Cth) s 22.
[1953] *Auditor-General Act 1997* (Cth) Sch 1 cl 1(1) & (4).

While there is some variation between the models for integrity agency heads, it is to be noted that of the 21 offices, only three[1954] are appointed on the same basis as most Australian police chiefs – 5 year appointments with eligibility for reappointment.

Seven, however, are appointed on the basis that they are not re-appointable[1955] and one is re-appointable but the maximum term for that office is five years.[1956] Of those seven, four – the Victorian Ombudsman and the Commonwealth, Western Australian and Tasmanian Auditors-General, are appointed on the basis of a ten year, non re-appointable, term.

The effect of the prevention of reappointment is that it reduces or removes the ability for a government to promise reappointment or threaten non-renewal of appointment as a means of indirectly influencing or controlling a Police Commissioner – as re-appointment is simply not possible. This, however, does not prevent other offers of employment.

This is a form that seems appropriate for a Police Commissioner. It allows sufficient time for the Commissioner to have significant impact on the operations and culture of the force under his or her control while being immune from one substantial form of indirect influence and control. Moreover, it makes the position of Police Commissioner desirable for strong candidates - providing security of tenure for a substantial but not indefinite term.

This is important as Police Commissioners seem to seek and obtain that office at some age from their late 40s to their mid 50s. That can be seen from the list of the last seven Victorian Chief Commissioners[1957] as listed below in Table 12.2, including their age on appointment.

Table 12.2 - Victorian Chief Commissioners – 1977 – 2017 -Age on Commencement

Name	Period of Term	Age on commencement
Graham Ashton	From 2015	52
Ken Lay	2011 - 2015	55
Simon Overland	2009 - 2011	47
Christine Nixon	2001-2009	48
Neil Comrie	1993-2001	46
Kel Glare	1987-1993	49
Mick Miller	1977-1987	51

[1954] The Chief Commissioner of the Tasmanian Integrity Commission, and the Tasmanian and Western Australian Ombudsmen.
[1955] The Victorian IBAC Commissioner, the Victorian Ombudsman, the NSW, Qld, Tasmanian, WA and Commonwealth Auditors-General.
[1956] The NSW Chief Commissioner, Law Enforcement Conduct Commission.
[1957] Using Wikipedia as source for their ages.

This is an age of continuing family and financial obligations and when most will want to both use their employment to complete their career objectives and to maximise their final earnings before retirement. In such circumstances, the office holder can be more prone to indirect influence than in later or earlier stages in their careers.

It is, therefore, considered that this form of appointment, combined with limited grounds for termination, is an appropriate basis for the appointment of Police Commissioners in the alternative police-government model – although a subsequent study should enquire further into the effectiveness of re-appointment restrictions.

12.5 – Conclusion - The Alternate Model

The discussion in this Chapter relates to the elements that are considered essential for an alternate police-government model based on Westminster constitutional principles. The concepts discussed here, however, require additional examination in subsequent study to further examine the suggested factors and to assess their practical effect.

The proposed model does not rely on the supposed doctrine of police independence. Instead, it relies on factors that are deficient in the current arrangements: the doctrine of ministerial responsibility and the inclusion of minimisation of indirect influence.

The intended benefit of this approach is to clarify the ultimate constitutional power to direct police forces by making it clear that it lies with the government. At that same time, the suggested model would limit the use of such direct powers by ensuring that such exercises are open for scrutiny and criticism by the use of transparency requirements. And it would seek to minimise indirect government influence over police by removing one means of indirect influence that is currently available by providing greater security of tenure of appointment for the Police Commissioners than is available to current Police Commissioners.

The following are the elements of an alternate police-government model for assessment in a subsequent study regarding their effect and consequences. In the proposed model:

- Police Commissioners would be subject to ministerial direction other than in relation to a limited range of decisions. The suggested limitations are:
    - The South Australian exclusion: the appointment, transfer, remuneration, discipline or termination of a particular person; and

- Decisions regarding the use of police powers regarding individuals, which are suggested to be:
    - Decisions to arrest, prosecute or charge individuals
    - Decisions to not arrest, prosecute or charge individuals
    - Decisions to use particular weapons or tactics
    - Decisions to conduct a particular operation.
    - Decisions regarding the method of an investigation.

- The power to direct would only be exercised by the Minister or Governor and cannot be delegated.
- All ministerial directions to be publicised within a specific number of days after the direction. Subsequent study should consider the most appropriate methods of publicity and periods of time before a direction needs to be made public. The suggested forms are: in the Government Gazette, in the government's website and being tabled in parliament. Subsequent study should also consider whether the direction should not be operative until it is publicised.
- Police Commissioners to be given greater security of tenure, by:
    - Being employed for fixed period of appointment. The suggested period for consideration in subsequent study is a non re-appointable period of 10 years; and
    - Being protected from termination by a limited list of grounds of termination, one of which is failure to comply with a ministerial direction.

      Subsequent studies should develop elements of such a list and whether they are to provide a basis for the exercise of the power of termination or deem the office vacant.

13 - Conclusions

This thesis was designed to answer a series of overall, sub and discrete research questions relating to the police-government relationship as discussed in Chapter 1. A summary of the consideration of the overall and sub questions is provided below. The discrete questions were also discussed throughout the thesis,[1958] and the conclusions reached in the relation to the overall and sub questions reflect the resolution of those discrete questions relevant to those questions.

13.1 – Conclusion - legally and constitutionally coherent understanding

The **central objective** of this thesis is to ascertain a legally and constitutionally coherent understanding of the police and government relationship in the context of Australian jurisdictions.

As a result of the limited scope of this study, as discussed in Chapters 1 & 2, this objective was ascertained primarily by resolving the overall thesis question (i). That is:

(i) Are Australian Police Forces independent of government direction and control?

To answer that question this study has ascertained that:

- The police-government relationship in Australia varies, with three different types of relationship currently in operation in relation to the power of government to ***directly*** control police forces:
    - One jurisdiction, Western Australia, has a police force that is not subject to direct government control. This issue is discussed in Chapter 4.
    - Four jurisdictions (Tasmania, New South Wales, South Australia and the Northern Territory) allow governments broad powers to exercise direction

[1958] The thesis discusses these various issues throughout the thesis and that consideration contributes to the conclusions reached above. They have been predominately discussed in the following Chapters.

a) The application of the doctrine of ministerial responsibility to statutory bodies generally and the police forces specifically. This issue is discussed in Chapters 8 and 10.3
b) Origins and sources of 'police independence' and the related concept of 'operational independence'. These issue are discussed in Chapters 8.4 and 10.2
c) The elements and effect different statutory models in Australia and other jurisdictions. This issue is discussed in Chapters 3 to 7.
d) The practice of and understandings of the interrelationship between police and government in Australian jurisdictions. This issue is discussed in Chapter 8.
e) Effectiveness of alternative forms of accountability for independent police forces. This issue is discussed in Chapter 10.3.3
f) The adequacy of a 'conventional' nature of police independence. This issue is discussed in Chapter 8.

power over police as a result of Cowper type provisions. This issue is discussed in Chapters 5, 6, 7 & 8. In relation to these jurisdictions:

- Only one, South Australia, also includes transparency requirements – requiring directions to be written and publicised. These arrangements are described in Chapter 3.2.2.
- The legislative intent and the ordinary and natural meaning of the language used in these provisions indicates, applying orthodox principles of statutory interpretation,[1959] that they allow government to control and direct all functions police.
- However, the scope of the government's direction power has been read down to exclude 'operational' decisions. Despite the form and text of the police-government relationship in those four jurisdictions being essentially the same:
    - it is only in Tasmania where the government and police consider that the limitation is regarded as a legal limitation, seemingly derived from the common law powers and privileges of constable (see 6.4.1). However, a review of the history of that office does not support the conclusion that the powers and privileges of that ancient office were exercised independently and not subject to direction (see 7.4). And neither does the rule of law or separation of powers provide a legal basis to read down the express words of Cowper provisions (see Chapters 7.2 and 7.3).
    - In South Australia and NSW (and before the 2014 amendments, Victoria) where constables also have the common law powers and privileges of constables, the restriction seems based on convention, rather than law. This also seems to be the basis in the Northern Territory where police do not have the common law powers and privileges of constables. This issue is discussed in Chapters 6.4 and 8.
- Whatever basis there is for reading down the government's power to direct to 'operational independence', the meaning of that term is most unclear, which is not assisted by differing practices in different States. The meaning of that term is further confused by an additional element, which seems widely accepted, of having 'policy' as a

[1959] As discussed in Chapter 2.3.

function reserved for government. As policy and operations are not inconsistent terms, this addition further confuses the arrangements as it allows government to issue policy directions with operational consequences. This is discussed in Chapters 8.4, 8.5 and 8.6.

- As such, this study has concluded that there is no clear or consistent basis for any degree of police independence in these four jurisdictions with the result that legislation is necessary to articulate a clear basis for the police government relationship (see Chapter 7.5).

- The final 3 police forces (the AFP and the police forces in Queensland and Victoria) are subject to express, but very limited, ministerial powers of direction. There is, however, considerable variation between the three jurisdictions, with Victoria's powers the most limited. In addition, these limited direction powers are also subject to transparency requirements in each jurisdiction which vary with, again, Victoria's requirements the most extensive. Moreover, the apparently extensive Queensland transparency requirements have been limited, since 1997, by administrative arrangements which have undermined those requirements and has made the transparency requirements an apparently ineffective means of assessing the extent to which the direction power have been used in that State. This issue is discussed in Chapter 9.
- The reasoning for the introduction of the limited direction powers for the AFP, Queensland and Victorian police, and for the reading down of the express powers in Tasmania, New South Wales, South Australia and the Northern Territory is derived from the doctrine or mythology of police or constabulary independence.[1960] However, the scholarship underlying that 'doctrine' is flawed, (as seen from academic writings and inquiry reports), being based on poor legal and constitutional analysis, poor and selective use of the historical record and poor understanding of the concept of constitutional conventions. The various elements of flawed reasoning are discussed, in particular, in Chapter 10. 2.
- Furthermore, consideration of the police-government relationship in academic writings and inquiry reports has given either minimal attention to the relevance of the doctrine of ministerial independence to the relationship despite the important function that that doctrine plays in Westminster democracies. The significance of that doctrine is discussed in Chapter 10.3.

[1960] See for example Pitman (1998) above n 76, 4, 44, 69 & 80.

- Australian Police forces can also be subject to various other forms of government influence which is less obvious because it is ***indirect***. This study, particularly in Chapter 11, has identified and examined types with particular relevance to police forces being:
    - Governments' control over the staffing of the staffing of police forces which, with the notable exception of governments' control over the appointment of Deputy Commissioners, is a type of indirect government influence that has largely disappeared. (See Chapter 11.2).
    - The security of tenure of Police Commissioners, which the study assessed by examining the following two types of indirect influence:
        - The period of appointment; and
        - Methods for termination of appointment of Police Commissioners (See Chapter 11.3).
    - The degree to which police could be influenced indirectly regarding those two types has varied over time.
        - When Australian police forces were created in the 19th century, Police Commissioners were appointed 'at pleasure'. Accordingly, they had neither any guaranteed period of appointment nor any statutory protection
        - From the 1930s considerable security was provided to most state forces according to one or both of those types.
        - However, during the last few decades of the 20th century and the first decade of the 21st century, when legislative changes were made to limit government power to *directly* influence three Australian police forces and when arguments were also advanced for the limiting effect of the doctrine of police independence in other forces, legislative changes were also being made to increase the ability of government to *indirectly* influence police by limiting the security of tenure of Police Commissioners. As a result, in all of the state police forces, other than Western Australia, the term of appointment is now a re-appointable period of 5 years, and only two Commissioners have any significant statutory protections regarding removal from office.[1961]
        - This has produced a readily available non-transparent means of indirect influence over police forces potentially undermining the

[1961] South Australia and Victoria.

legislative and/or conventional independence that that police now appear to have.

- Despite the contradictory nature of legislative treatment of direct and indirect influence this study has found that:
    - few of the academic considerations or inquiry reports regarding the police-government relationship in Australia have given any attention to the significance of indirect influence on police-government relationship; and
    - what attention that has been given has indicated that Police Commissioners regard limited security of tenure as also limiting their independence;
    - the recommendations of one of the few inquiry reports that did consider the significance of indirect influence, the Queensland Fitzgerald Inquiry, have been misunderstood or ignored. Fitzgerald recommended procedural limitations that limit the use of contractual process for terminating employment of Police Commissioners to prevent the arbitrary use of that power. However, those procedural limitations were not enacted, with the result that the Queensland Police Commissioners can be subject to any arbitrary dismissal provided for in the contract of employment. (This is discussed in Chapter 11.3).

As a result, the current position in each of the Australian police forces is that each can be regarded as having, in different ways and to differing extents, elements from the worst of all possible worlds: – an overt position, being legal and/or 'conventional' assertion of police independence based on (other than in Western Australia) bad history and poor legal and constitutional analysis, while being undermined by legislative provisions regarding the leadership of the force which encourage subordination to non-transparent indirect political influence.

The reason for this confused situation is that most studies in Australia, to date, of this relationship have been from a perspective of political science, criminology or police studies with limited interest or understanding of underlying constitutional and legal concepts. This has been insufficient to allow an accurate assessment to be drawn of the police-government relationship in Westminster based constitutions. And where those with constitutional and legal expertise have been involved, either their conclusions have been similarly inadequate

due to limited consideration of the subject matter,[1962] or they have been ignored[1963] in subsequent studies.

This study of what is a confused and contradictory relationship reaches the following conclusions on the central objectives of this thesis that:

- there is no legally and constitutionally coherent understanding of the police government relationship in Australia.
- legislative reform is necessary to establish a clear legal and constitutional relationship.
- that legislative reform should not be based on the various erroneous legal and historical concepts identified by this research that have been drawn on to date.

While the scope of this thesis has been largely confined to the examination of the overall thesis question (i), issues relating to the necessary legal and constitutional reform to achieve a legally and constitutionally coherent relationship are raised in the discussion of thesis question (ii) below in Chapter 13.2**,** but largely as areas for further research and consideration.

13.2 - Conclusions – Legislative Reform

13.2.1 – Alternate Model

The **secondary objective** of this thesis, when it was planned, was to identify possible statutory models or designs to establish a clear constitutional relationship between police and government. And that objective was to be resolved by answering the *second overall thesis question,* which is*:*

> *(ii) should such forces be independent of such direction and control?*

and by resolving sub question C:

> *What legislative changes are necessary to add clarity and certainty to the constitutional relationship between police and government?*

[1962] For example, Fitzgerald expressed his views on this subject matter in the course of dealing with a much greater and more complex range of other related issues. While his views can be criticised, as seen in Chapters 6.3.4.5, 7.2.2 & 9.3, any questionable assessments on the police-government relationship, are understandable given the scope of the matters he was dealing with. Similarly, the view expressed in the Rush Report, which can also be subject to much criticism, (see Chapters 7.2.3), those views were reached in what can be seen as a somewhat rushed report (it was conducted over only six months in 2011) and covered a wider range of issues than the police-government relationship. See *Rush Report,* above n 38, vii.
[1963] Views ignored include those of Marshall (1965), above n 53, (1884) above n 5; Lustgarten, above n 54, and Waller, above n 55.

However, for the reasons outlined in Chapters 1 and 2, the scope of the thesis has concentrated on the primary thesis objective and overall thesis question (i). As such, consideration of the secondary objective is confined to Chapter 12 which is devoted to the restricted task of developing the elements for an alternate model for further analysis.

The elements considered necessary for the alternate model are derived from the defects in the current police-government arrangements. That is, the current legislative and academic models:

- place little or no significance on the doctrine of ministerial responsibility; and
- ignore legislative measures that indirectly undermine overt measures to support police independence.

Ministerial responsibility is considered the **key element** in the police-government relationship, as it is the basis for Westminster based democracies, and was the legislative intent for the operation of 1829 London Metropolitan Police, the force which is the model for modern Australian police forces - rather than the unclear and flawed doctrine of police independence.

On that basis, government should have complete control over the police, subject to restrictions imposed by legislation, rather than government justifying why it should 'interfere'. For the purpose of determining limits on government power over police forces, Chapter 12 sought to determine whether there are any types of police decision that should be outside of government control – and concluded that the following are the appropriate exclusions for the alternate model:

- The South Australian exclusion: the appointment, transfer, remuneration, discipline or termination of a particular person; and
- Certain decisions regarding the use of police powers regarding individuals, which are suggested to be:
    - Decisions to arrest, prosecute or charge individuals;
    - Decisions to not arrest, prosecute or charge individuals;
    - Decisions to use particular weapons or tactics;
    - Decisions to conduct a particular operation;
    - Decisions regarding the method of an investigation.

This provides the government with broad powers to direct policing decisions. To prevent the misuse or reckless use of those broad powers additional restrictions are also suggested. They relate to the form of the directions and the transparency of exercises of the power to

direct. These restrictions are aimed at ensuring that that if a Minister is to direct the Police Commissioner, that Minister can be subject to public and parliamentary scrutiny for such directions. The suggested restrictions are that:

- The power to direct would only be exercised by the Minister or governor and cannot be delegated.
- All government directions to be publicised within a specific number of days after the direction. Subsequent study should consider the forms of publicity and the length of time before a direction needs to be made public. The suggested forms are: in the Government Gazette, in the government's website and being tabled in parliament. Subsequent study should also consider whether the direction should not be operative until it is publicised.

The **second element** in the alternate model is an element largely ignored in other studies and in inquiry reports relating to the police-government relationship. That element is the lack of security of tenure of Police Commissioners, which can allow governments to influence Police Commissioners, indirectly and non-transparently, an ability inconsistent with legal and conventional propositions making Police Commissioners independent.[1964]

To prevent such indirect influence:

- Police Commissioners should be given greater security of tenure, by:
    - Being employed for fixed period of appointment. The suggested period for consideration in subsequent study is a non-re-appointable period of 10 years; and
    - Being protected from termination by:
        - a limited list of grounds of termination, one of which should be failure to comply with a government direction.

Subsequent studies should consider the various grounds for such a list and whether they will provide a basis for the exercise of the power of termination or deem the office vacant.

[1964] One report that did seem to consider this issue and seems to have favoured indirect influence as an appropriate means of controlling a Police Commissioner was the Christopher Commission which examined the LAPD in the 1990's and recommended reducing the Police Commissioner's term, from appointment to age 65 to a renewable 5 year term. The Commission seems to have favoured indirect influence when it wrote:

> The Chief of Police must be more responsive to the Police Commission and the City's elected leadership, but also must be protected against improper political influences. *To achieve this balance,* the Chief should serve a five-year term, renewable at the discretion of the Police Commission for one additional five-year term (emphasis added). *Christopher Commission,* above n 1704, xxii.

13.2.2 - Subsequent Study

Although the alternate model would establish the police-government relationship on a sounder constitutional and historical basis than the current models and other theoretical models, its elements require further examination to assess their impact. In particular, further study should include examination and assessment of:

- police decisions that should be removed from government control;
- the most appropriate means for making exercises of government direction powers transparent;
- the effect of transparency in preventing or limiting misuse of power;
- the effect of fixed term appointments on decision making of Police Commissioners; and
- whether a parliamentary process should be required for the removal of Police Commissioner.[1965]

For that purpose, further research and analysis would be required into both employment practices in other statutory bodies as well as police forces, as well as empirical research into the perceived effect of the elements in the proposed alternate model on the police-government relationship from the perspectives of both Police Commissioners and Police Ministers.

[1965] as was the NSW requirement between 1935 and 1993. See Chapter 11.3.

Appendix A

General Instructions to the Metropolitan Police - 1829

Source – *The Times* Friday 25 September 1829 page 3.

NEW POLICE INSTRUCTIONS.

The following provisional instructions for the different ranks of the police force are not to be understood as containing certain rules of conduct under every variety of circumstances that may occur in the performance of their duty; something must necessarily be left to the intelligence and discretion of individuals; and according to the degree in which they show themselves possessed of those qualities, and to the zeal, activity, and judgment they display on all occasions, will be their claims to future promotion and reward.

It should be understood at the outset, that the object to be attained is "the prevention of crime."

To this great end every effort of the police is to be directed. The security of person and property, the preservation of the public tranquillity, and all the other objects of a police establishment, will thus be better effected than by the detection and punishment of the offender after he has succeeded in committing the crime. This should constantly be kept in mind by every member of the police force, as the guide for his own conduct. Officers and police constables should endeavour to distinguish themselves by such vigilance and activity as may render it impossible for any one to commit a crime within that portion of the town under their charge.

When many offenders are committed, it must appear to the commissioners that the police is not properly conducted in that division; and the absence of crime will be considered the best proof of the complete efficiency of the police. In a division where this security and good order have been effected, the officers and men belonging to it may feel assured that such good conduct will be noticed by rewards and promotion.

LOCAL DIVISIONS.

1. The metropolitan police district will be formed into police divisions.

2. That part of the district which is taken under the charge of the police force, in the first instance, comprising a large proportion of town, is formed into five regular police divisions.

3. The number of men and officers, and the constitution of the force, are the same in each division: but in laying out the division, attention has been paid to local and other circumstances determining the number of men required, so that the superficial contents of the divisions differ greatly, and consequently that portion of each committed to the care of one man.

4. Each division is again divided into eight sections.

5. Each section into eight beats.

6. The limits of each of these is clearly defined; each is numbered, and the number entered in a book to be kept for the purpose.

7. Each division has an appropriate local name, and is also designated by a letter of the alphabet.

8. There is in every division a station or watch-house, placed as conveniently for the whole as may be, according to circumstances. From this point all the duty of the division is carried on.

9. The men belonging to each section shall, as far as may be found practicable, lodge together near to the place of their duty, in order to render them speedily efficient, in case the services of such as are off duty should be required for any sudden emergency.

...emergency.

POLICE FORCE.

1. The Police force consists of as many companies as there are Police Local Divisions, one company being allotted to each division.

2. Each company is formed as follows :—1 Superintendent, 4 Inspectors, 16 Serjeants, and 144 Police Constables.

3. The company is divided into sixteen parties, each consisting of one serjeant and nine men.

Four serjeants' parties, or one-fourth part of the company, form an inspector's party.

4. The whole company is under the command of the superintendent.

5. Each man is conspicuously marked with the letter of his division, and a number, corresponding with his name in the books, so that he can at all times be known to the public.

6. The first 16 numbers in each division denote the serjeants.

7. A smaller police company is attached to the office of the commissioners, for the duty in the immediate neighbourhood, and is also applicable to general purposes.

CONDITIONS.

The conditions upon which each man is to be admitted into the Police Force are stated here, that no complaint may be made hereafter upon their being enforced. The Commissioners of Police desire it to be understood at the same time, that they reserve their power to alter or annul any of these; and also to make such new rules as may be found expedient.

1. He shall devote his whole time to the police service.

2. He shall serve and reside wherever he is appointed.

3. He shall promptly obey all lawful orders which he may receive from the persons placed in authority over him.

4. He shall conform himself to all the regulations which may be made, from time to time, for the good of the service.

5. He shall not, upon any occasion, or under any pretence whatsoever, take money from any person without the express permission of the commissioners.

6. He shall get such articles of clothes as the commissioners shall direct, from the respective contractors, and pay for them, ready money, or by deductions made from his weekly pay, under the directions of the commissioners.

7. He shall furnish himself with new clothes whenever the commissioners may direct.

8. He shall, at all times, appear in his complete police dress.

9. He shall allow a deduction of 1*s.* a week to be made from his pay, if unmarried, when lodging are found for him.

10. If married, when lodgings are found, an agreement will be made in each particular case.

11. He shall pay all such debts contracted by him, as the commissioners shall direct.

12. He shall receive his pay weekly, on such day as shall be appointed.

13. His pay as common constable is 3*s.* per day, subject to the deductions above mentioned, for clothes and lodgings.

14. He shall be supplied with an account-book, which he is to have to produce at all times, when required.

15. He shall not quit the police force, without giving a month's previous notice; in case he quit without such notice, all pay then due shall be forfeited.

16. He shall not use, nor allow to be used, the baton, marked "Police Force," except while he belongs to the police service.

Each police constable is liable to dismissal, or such other punishment as may by law be inflicted for the breach of any of the foregoing rules. Also, the Commissioners will, if they shall think fit, dismiss him without assigning any reason.

OUTLINE OF GENERAL DUTY.

1. The duty will commence each evening at an hour regulated by the setting of the sun: when any change becomes necessary, it will be specified in orders.

2. One part of the force, for duty from the commencement of the evening till midnight, may be called the first night relief; and from midnight till morning, the second night relief; in like manner may be a first and second day relief.

3. One half of the entire force will be on duty at night, consisting of two inspectors and eight serjeants, with their respective parties, at one time; and these will be relieved by the other half, at the hours and in the manner hereinafter specified.

4. Each serjeant's party, when on duty, will have charge of its respective section of the division, each police constable having a beat appropriated to him, within the section.

5. In case any constable should be absent from sickness or any other cause, his place will be supplied from the reserve of his section.

6. There will be nine men belonging to each serjeant's party, and only eight beats in a section; thus one man of each section will remain at the division station, forming a reserve of eight men for the whole division, to supply occasional absences, and to be ready for such duties as may be required there.

7. If from sickness of the men, or any other cause, the reserve men at the division station be required for duty, their place must be supplied by the men of the relief going off duty; when this becomes necessary, the reserve party, formed of the men going off duty, will be permitted to take their rest at the station, as far as circumstances will permit.

8. The man of each section will in turn be left as the reserve at the station.

9. The Superintendent, or Senior Inspector, must name the individuals who are to remain at the Division Station, from the off-going relief, when that is required.

10. The men who are off duty are to consider themselves liable to be called on at all times, and will always prepare themselves, when required, at the shortest notice.

11. With a view to such sudden emergencies, that the men may be fully efficient, they will be lodged in, or as near as possible to, their respective sections.

12. A certain number, when so ordered by their officers, must sleep in their clothes, to be in perfect readiness when called on.

13. The serjeant must live in the house with the men of his section, or close to it, as permission is given him. He will always go on duty with his party, and have the general charge and superintendence of it at all times.

14. The men of the relief for duty will individually assemble at the division station before or precisely at the hour fixed for that purpose in the orders, and will form in order in their respective parties. Their names will be called, and an inspection made by their respective serjeants, to ascertain that they are all perfectly sober, and correctly dressed and appointed. Each man will be furnished with a card, with his name, and the number of the beat he is to take charge of written upon it.

ten upon it.

The name of the man opposite to the beat he is to take charge will be entered in a book. The serjeant will then read and explain, if necessary, the orders of the day, if there be any; and having done so, he will make his report to the inspector, who will give to each serjeant in writing the hours he is to make his patrols round his section, also the time of reporting to him at a central point, and will order them to march the men off to their respective stations.

Of the two inspectors who will be on duty together, one will take the general charge of the duty throughout the division, visiting the men, and seeing as much of it as possible; receiving the reports of the several serjeants, as before-mentioned, so as frequently to hear from them the state of all parts of the division. The other inspector will remain in the division station, to receive charges, complaints, and all applications for assistance, &c. They will either relieve each other, exchanging the duty for half the entire period of continuing on duty, or arrange it as may be mutually agreed on.

In case of any riot or disturbance in the streets, which might be likely to call too many of the constables from their respective beats, the Inspector will send to the division station of the reserve party, or, if requisite, to the nearest residence of the party off duty in the section; but this should be done only in cases of necessity.

At the hour for relieving the men, no one shall leave his beat until the relief has actually arrived on the beat; the constable relieved will then go to a particular spot appointed in each section for that purpose. When all the party relieved of the section are assembled, they are to be inspected by the Serjeant as when going on duty, that he may ascertain whether they are perfectly sober and correctly dressed, as when he posted them. The Serjeant will then dismiss the party, and proceed to make his final report to the inspector at the appointed place.

The inspectors will deliver a written report according to the printed form, at o'clock, to the Superintendent of their division.

The Superintendent will send in at o'clock each morning to the office a report and return, according to prescribed forms, detailing the occurrences of the night within his division; and he will also send all persons given in charge or apprehended in the night, under the care of to such of the police magistrates' offices as may be fixed on for the division. The officer who takes charge of the constables to the office will attend to their several cases, and make a report, in writing, of the result of each to the Su-

perintendent, who will send a report of the same to the office on that day, if he shall deem it requisite, or the following morning, with the other reports.

SUPERINTENDENT.

It is desirable that he should reside as near to the division station as circumstances permit: his duty will require his frequent attendance there. Applications for assistance and instructions made at the station will be referred to him; and a more speedy communication of all orders may be effected through him, if he shall be near the station, to which in the first instance they must be transmitted from the office. He will be responsible for the general conduct and good order of the officers and men under his charge. He should make himself well acquainted, by frequent personal intercourse, with the inspectors and serjeants, and through them, with the character and conduct of every man in the company under his orders; and by a firm, but kind and conciliating behaviour towards them on all occasions, make them understand, that while neglect of duty can in no instance be passed over, every indulgence consistent with their general efficiency will be at all times shown to them.

He will take care that the standing orders and regulations, and all others given out from time to time, are promptly and strictly obeyed. It is expected that he should himself actually see a great deal done; but he must understand that he may be much more efficient by giving instructions to the officers under him, and making them do their duty, than he can be by attempting to do every thing himself. He must see that the duty is done, and will, if necessary, immediately report any neglect to the commissioners.

He is responsible generally for every thing relating to the police of his division (keeping in mind that the grand object is the prevention of crime in every part of it). It is not wished to lay out any precise course for the superintendent, nor to say how much of his time is to be passed in the active performance of his duties; but he will feel the importance of visiting some part of his division at uncertain hours every day and night.

He will make a daily inspection of the books at the division station, to see that they are kept correctly; carefully examine and sign all reports and returns sent to the office, and forward them punctually at the appointed hours.

He will, according to his discretion, grant immediate assistance from the men on duty at his station to all persons requiring it, where there is not time to refer to the office for instructions.

In cases of complaints made against any of his men, if of a trivial nature, he will award some punishment to the man, and satisfaction to the party complaining, and report the whole immediately to the commissioners; or if the offence be of a more serious nature, he should at once report the whole to the commissioners, taking such immediate step, by suspending the man, or otherwise, as may appear necessary.

It will be expected that he should at all times be able to furnish the commissioners with particular information respecting the state of every part of his division.

In observing, with especial attention, the actions of all suspected persons within the division, and in giving directions to his men for this purpose, he will keep in mind that the prevention of crime, the great object of all their exertions, will be best attained by making it evident to all such that they are known and strictly watched, and that certain detection will follow any attempt they may make to commit the crime.

Upon any alarm of fire within the division, it becomes the duty of the superintendent immediately to repair to the spot, and take the entire control of the police force that may be assembled, sending for those who are off duty. Immediate notice must be given to the several fire-offices. If the keys of the parish engines are at the division station, they will be procured, and the engines got out and brought to the fire; rendering such assistance as may be in his power, from knowing of fire-plugs, procuring water, &c.

The police will, perhaps, be most useful in procuring a free scope for the firemen's exertions, and the parties more immediately interested; with this view he will clear the street or ground in the immediate vicinity of the fire of all persons not actively and usefully employed, taking care that all the adjoing streets, as far as may be practicable, are kept clear of obstructions by crowds or carriages, waggons, carts, &c., that the engines may not be delayed on their road.

Every assistance possible must be given to the removal of property, conformably with the wishes and suggestions of the proprietors; and, if desired, such property may be conveyed to the nearest police station or residence, placing it under the protection of the police.

A special attention must be directed at such times to the thieves and pickpockets who are usually in the crowd.

Whenever the men may be called away from their beats by fire or any sudden necessity, they shall be directed to return to their regular duty as soon as they can be spared; and the serjeant will be sent with them, to see that no delay occurs in their return. He should make it his duty to collect upon the spot all the information he can obtain relative to the cause of the fire, which, together with the circumstances attending it, the conduct of the police under his orders, and the time they were employed, he will report fully, as soon as may be, to the commissioners.

INSPECTOR.

The Inspector will reside at the place appointed for him.

He is to receive his orders and instructions from, and make his reports to, the superintendent.

He must strictly and promptly obey all lawful directions for the execution of his duty, as he will expect the same submission from the officers and men placed under his command.

Each Inspector will have under him four serjeants and thirty-six men, and he will be responsible for their general conduct and good order.

It is expected that by constant personal intercourse with them all, he shall make himself well acquainted with the talents and general moral character of each individual.

He should immediately report to the superintendent any circumstances which he observes in the conduct of the men requiring notice.

If upon complaint made, or otherwise, he shall think any

If upon complaint made, or otherwise, he shall think any punishment ought to be inflicted on the men, he will, as soon as possible, communicate the whole matter to the superintendent for his decision, taking any immediate step, by suspension of the man from duty, if the case requires that.

He will take care that the standing orders and regulations, and all others given out from time to time, are promptly and strictly obeyed by those under him.

It is expected that he shall be able and ready to give instructions to the serjeants and men, on all points relating to their duty.

Any neglect of duty must immediately be reported. Of the four inspectors belonging to each company, two will always be on duty at the same time—one remaining in the division-station for the purposes stated hereafter, the other doing the general duty in the streets; these two may arrange mutually the times for relieving each other, or that shall be fixed by the superintendent. The inspectors for duty will be at the division station punctually at the hour appointed in orders; each will inspect his several parties going on duty, and make all the necessary preparations in silence and good order, receive the reports from the serjeants of the state of their respective parties, give the serjeants, in writing, the hours for making their patrols round the section, and the point at which he will receive reports from them of the state of the section; he will then give orders to the serjeants to march off their parties to their several stations.

The inspector on the street duty will see as much of the division as possible at uncertain hours; and it is desirable that he should see every part of it once at least during his tour of duty. He will make a note of the reports of the serjeants, at the appointed times and places; and if any serjeant do not appear to make his report, inquiry should be immediately made to ascertain the cause.

In the event of any felony or rioting, or upon any sudden emergency, he will send for such assistance as may be required, either to the division station, or the residence of the section, but to the latter only in case of necessity; if he judges it expedient, he will also send to the superintendent. A printed form of report of the occurrences of the night will be filled up and forwarded to the superintendent at o'clock each morning.

In the event of a fire taking place, the inspector, if the superintendent be absent, will taken upon himself the entire direction of the police, and act in conformity with the instructions for that purpose already given to the superintendent.

The inspector on duty at the division station will keep good

The inspector on duty at the division station will keep good order there; he will be held responsible for the constant readiness of the reserve party, not allowing drinking either by them or other persons; he is to receive all charges brought to the station, entering them in a book according to a printed form If any property be brought to him, either taken from persons apprehended or otherwise, he will immediately make an entry of the same in the property-book, and state it shortly in his report to the superintendent; the articles of property themselves should be marked the instant they are received, so that they can be afterwards certainly known to be the same; they should be taken by the inspector himself from the party bringing them, and not allowed to be out of his sight until marked in the manner directed; they should then be locked up by the inspector in the place kept for that purpose, and of which he alone has the key; he will take care that all persons brought under charges are securely confined; if the offence with which they are charged be only a petty misdemeanour, he may set them at liberty, taking a recognizance for their appearing next day at the sitting magistrate's office, unless that should be a Sunday, Christmas-day, or Good Friday; then on the following day, at the same hour; he will find directions in the recognizance-book as to the manner in which this is to be done.

In case application is made to him for assistance, he will, according to the best of his judgment, render all in his power, either from the reserve party, or by calling up those off duty; but this last is only to be done in cases of necessity, and notice should immediately be sent to the superintendent; he should, before he grants any, be satisfied with the grounds upon which it is demanded, that the party has a right to demand it, &c.

An immediate entry is to be made by him, in the book of occurrences, and included in the following morning's report to the superintendent.

He will pay particular attention to all complaints made against any individual of the police force; if made in person, requesting the party to sign such account of it as the inspector shall enter in his book, except in cases where an immediate step is necessary: such complaint shall be merely forwarded to the superintendent in next morning's report, for his decision.

Previous to his being relieved, he shall make up his report fully, and deliver or send it to the superintendent; he must appear at the office of the sitting magistrates, to substantiate any charge, if necessary.

He will at all times be required, by every means in his power, to obtain such information as the superintendent desires, upon all matters relating to police.

SERJEANT.

He will reside in the section in the house appointed. He is to obey all orders given him by the superintendent or inspectors of his company. He is expected to set the best example to the men in alacrity and skill with which he shall perform his own duties.

Each serjeant has under him nine men, and he will be held responsible for their general conduct and good order. He will live much with them, and is expected to make himself thoroughly acquainted with the character of every individual. He will keep in his own hand-writing a journal, according to a prescribed form, of any misconduct or fault they may be guilty of; this book shall be laid before the inspectors and superintendents at stated periods, and will always be consulted before any individual shall receive any reward, or be promoted. The serjeants will therefore feel the importance of entering in this book, fully and fairly, every circumstance which may enable their officers to form a just opinion of the individual's character: in no instance will any neglect or misstatement by the serjeant in such particulars be passed over.

The serjeant for duty will arrive at the division station before the hour fixed by his orders, form his party into ranks, and inspect them, taking care that every man is perfectly sober

and correctly dressed. He will read and explain to the men the orders, if any have been given out that day He will enter in a book the hour the party goes on duty, and the name of each man opposite the number of the beat in his section that such man is to take charge of; he will then report to the inspector, and receive his orders. He marches with his men to the section, and goes round it, and sees every man relieve the man previously on duty. Having done so, he will repair to the spot fixed on for making his first report to the inspector. This report should include any irregularity or disorderly conduct in the men relieved, as well as any other particular.

He is constantly to patrol his section to ensure the performance of their duty by his men. He always at night carries a dark lantern. If at any time he finds a man absent from his duty on the beat, he will have him replaced as quickly as possible, sending for another from the reserve at the station, or from the section residence; but this last only in case of necessity. He should immediately ascertain the cause of the man's absence, and report it to the inspector; in case of any felony or disturbance, he will send for such assistance as may be necessary, either to the division station or section residence—never to the latter except in cases of urgent necessity.

He will give all assistance in his power to persons applying to him; he will learn, from his general duties as a constable, in what way he is to interfere, either in arresting people, entering houses, or taking property from suspected persons; noticing hackney-coaches and other vehicles at night.

In case of fire, in the absence of the superintendent and inspector, he will act according to the instructions already given for their guidance, taking immediate steps to acquaint them, and give notice to the division station.

He will feel that it is particularly desired by his superiors that he should be civil and obliging to every body, and render every information and assistance in his power when called on.

He is to notice and receive reports also from the men as to the state of the gas lamps, whether any are dirty or extinguished, and report the same to his inspectors.

When the men are relieved, he will collect them at the appointed place, and inspect them in the same manner as when going on duty, and report their state. In case the serjeant be absent from illness or any other cause, his place is to be supplied by one of the men in his party, who shall be named generally for that purpose.

Every police constable in the force may hope to rise by intelligence and good conduct to the superior stations; it is therefore recommended to each man to endeavour, by studying these instructions, and by reflecting upon the nature of the duty he has to perform, to qualify himself for such promotion. But at the commencement he will most certainly recommend himself to notice by a diligent discharge of his own duties, and a strict obedience to the commands of his superiors, recollecting that he who has been accustomed to submit to discipline, will be considered best qualified to enforce it hereafter.

He will reside in the section, at the house appointed: he will devote the whole of his time and abilities to the service. He is at all times to appear neat in his person, and correctly dressed in the established uniform: his demeanour should be respectful towards his officers. He shall readily and punctually obey the orders and instructions of the serjeants, inspectors, and superintendents: if they appear to him either unlawful or improper, he may complain to the commissioners, who will pay due attention to him; and any refusal to perform the commands of his superiors, or negligence in doing so, cannot be suffered.

When he has to go on duty, he will take care to be at the appointed place, if not before, precisely at the prescribed hour. He is to fall in with the others of his party; and after inspection by the serjeant, and receiving any orders that may be necessary, he is to be marched by his serjeant to the section. A particular portion of the section is committed to his care; he will have previously received from his serjeant a card with the names of the streets, &c. forming his beat. He will be held responsible for the security of the lives, and safety of all property, of every person within his beat, and for the preservation of the peace and general good order of the whole, during the time he is on duty.

He must understand what powers he possesses to effect these objects, either by arresting criminals, disturbers of the peace, and evil-disposed persons, by entering houses when he is requtred, by taking bundles, and other articles carried at night by suspicious persons; and he is recommended to read carefully the instructions given to him respecting the general duties of a constable.

But it is likewise indispensably necessary that he should make himself perfectly acquainted with all the parts of his beat or section, with the streets, thoroughfares, courts, and houses.

He will be expected to possess a knowledge also of the inha-

He will be expected to possess a knowledge also of the inhabitants of each house It must be obvious to him that he will be much assisted in the performance of his duties by making himself acquainted with all such particulars; without knowing them he cannot hope to be a really efficient police-officer, nor expect to rise in the service. He will be able to see every part of his beat, at least once in ten minutes or a quarter of an hour; and this he will be expected to do: so that any person requiring assistance, by remaining in the same spot for that length of time, must certainly meet a constable.

This regularity of moving through his beat shall not, however, prevent his remaining at any particular place, if his presence there be necessary to observe the conduct of any suspected person, or for any other good reason; but he will be required to satisfy his serjeant, or superior officers, that there was a sufficient cause for such apparent irregularity. He will also attend at the appointed times, to make a report to his serjeant of any thing requiring notice.

All his duty will be carried on in silence: he is not to call the hour.

When he takes any one into custody, he will immediately repair to a spot, appointed for the purpose, in the section, and remain there with the prisoner until some constable comes who can supply his place, while he carries the party to the division station; he will take care to return again to his duty as soon as possible; or he may deliver over his prisoner to the serjeant or other constable, and immediately return to his beat.

It will generally be most desirable that he should accompany the party to the division station, in order to substantiate the charge; and when he takes property from any one, he should not suffer it to be out of his sight, until he delivers it to the inspector at the division station, and receives from him a proper receipt for the same.

A temporary lock-up room will be provided, in different parts of each division, in which, in cases of necessity, from danger of rescue, or the constable being required again to return to his beat to suppress rioting, or capture other offenders, or the like, a prisoner may be confined; but this is to be done as seldom as possible, and the party should be taken afterwards to the division station, whenever circumstances will permit.

permit.

He is not to quit his beat during his tour of duty, unless under the circumstances already mentioned, or some others rendering it necessary; he shall not enter any house except in the execution of his duty; he will pay a particular attention to all public houses in his beat, reporting the hours at which each is closed, and whether they appear to be kept according to good order.

On no pretence shall he enter any public house except in the immediate execution of his duty; he is to recollect that now the publican is subject to a severe fine for allowing him to remain in his house.

No liquor of any sort shall be taken from a publican without paying for it at the time. If at any time he requires immediate assistance, and cannot in any other way obtain it, he must spring his rattle, but this is to be done as seldom as possible, for though he is provided with one, and may sometimes find it necessary to use it, such alarm often creates the mischiefs it is intended to prevent, by assembling a crowd, thus giving an opportunity of escape to the criminals; he will be required to report to the serjeant of his party every occasion of his using his rattle.

If, during the tour of their duty, he observes any danger or inconvenience likely to arise from any cause whatever, he must report it to the serjeant; he will be civil and obliging to all people, of every rank and class, and be ready to give information and assistance when required; but he must not enter into conversation while on duty with any one, except on matters relating to his duty.

He must be particularly cautious not to interfere idly or unnecessarily, in order to make a display of his authority; when required to act, he will do so with decision and boldness; on all occasions he may expect to receive the fullest support in the proper exercise of his authority. He must remember that there is no qualification so indispensable to a police-officer as a perfect command of temper, never suffering himself to be moved in the slightest degree by any language or threats that may be used; if he do his duty in a quiet and determined manner, such conduct will probably excite the well-disposed of the by-standers to assist him, if he requires them; but unless in cases of urgency, he ought not to interfere without having a force sufficient to prevent any opposition.

In case of a fire taking place, the constable at the spot will

In case of a fire taking place, the constable at the spot will give immediate alarm, and always spring his rattle for that purpose. He should, as soon as possible, send information to the division station; and until the arrival of some superior officer, from whom he may receive further orders, he will exert himself in any way likely to be most useful, as in keeping the space near the spot clear, assisting in removing property, sending for police from the nearest section residences, giving notice to the fire-offices, engine-keepers, turncocks, &c,

No man at any great distance from the fire should leave his beat, for depredators might take advantage of his absence on such an occasion.

For his exertions upon these or any extraordinary occasions the commissioners may recommend him to the Secretary of State for a reward, if he shall be considered deserving; but upon no pretence whatsoever shall he receive a gratuity from any person for any thing relating to his duty; this will always be visited with immediate dismissal. Further instructions will be given to any constable who may find himself in need of them.

PROVISIONAL INSTRUCTIONS.—PART II.

It is intended here to state such parts of the law relating to the office of a constable as may be sufficient for the general instruction of the police force.

Each individual will bear in mind the extreme importance of making himself perfectly acquainted with this subject; it is necessary to enable him, with a due regard to his own safety, to act efficiently for the protection of the public.

In the novelty of the present establishment, particular care is to be taken that the constables of the police do not form false notions of their duties and powers.

Though they may be more numerous and better appointed than constables were formerly, they must not suppose they possess any powers beyond those which the law expressly gives them; but the powers of a constable, as will appear hereafter, are, when properly understood and duly executed, in truth, very great. He is regarded as the legitimate peace-officer of his district; and both by the common law and many acts of Parliament, he is invested with certain powers, and has imposed on him the discharge of many public duties.

Thus he is authorized and required in many cases to act, in the execution of his office, either—

By arresting a party, charged with or suspected to be guilty of some offence;

To enter a house, in pursuit of an offender—to quiet an affray, or search for stolen goods;

Or to take from another goods, which, from some circumstances of suspicion, are supposed to have been stolen.

It therefore becomes necessary that the constable should inform himself in what cases he ought so to interfere; and what legal powers he possesses to effect the object, in case he meets with resistance. To assist the police constables in the discharge of their duties on these occasions, the following observations are prepared for their attentive perusal.

We shall begin by showing him for what offences of more ordinary occurrence a party may be arrested and taken into custody. With this object offences may be divided into—

FELONIES AND MISDEMEANOURS.

Murder, house-breaking, robbery, stealing, picking pockets, receiving stolen goods knowing them to have been stolen, as-

saulting any one with intent to rob, setting fire to any church, house, or other buildings, are some of the principal felonies, besides a great many more too numerous to be inserted here.

Persons guilty of any of these offences are called felons.

Smaller faults and omissions of less consequence, such as common assaults, affrays, and mere riots, have the gentler names of misdemeanours.

As it is more important to prevent and punish the commission of great crimes than of the lesser offences, the constable has a greater power in cases of felonies than in those of mere misdemeanours.

But the first duty of a constable is always to prevent the commission of a crime.

We shall therefore now shew him what power he has to arrest a party, whom, from his situation and character, the law judges to be likely to commit some felony.

Thus the constable may arrest one whom he has just cause to suspect is about to commit a felony.

As when a lunatic, or a drunken person, or a man in a violent passion, threatens the life of another, or when people are fighting furiously, or breaking into a house, or doing such things which are likely to lead to the commission of any felony, the constable should interfere and arrest the parties.

So any person having in his possession any pick-lock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or offensive weapon, or having upon him any instrument, with intent to commit any felonious act.

Every one being found in any dwelling-house, warehouse, coach-house, out-house, or stable, or in any enclosed yard, garden, or area, for any unlawful purpose;

Every suspected person, or reputed thief, frequenting any river, canal, dock, or any wharf or warehouse near thereto, or any street, highway, or place adjacent, with intent to commit a felony, may be arrested.

In each of these cases the constable must judge from the situation and behaviour of the party what his intention is. In some cases no doubt can exist, as when the party is a notorious thief, or acting with those who are thieves, or when the party is seen to try people's pockets in a crowd, attempt to break into a house, or has endeavoured to carry off any property secretly from another; but the constable shall not act hastily, if the intentions are not thus clear, but content himself with watching closely the suspected party, and he will probably soon discover what his intentions really are.

The constable must arrest any one he sees in the act of committing a felony.

Also any one whom another positively charges with having committed a felony.

So upon the suspicions of another, if the grounds of the suspicion appear to the constable to be reasonable, and the party entertaining them go with the constable.

So, though no charge be made, yet if the constable suspect a person to have committed a felony, he should arrest him; and if he have reasonable grounds for his suspicion, he is justified, even though it should afterwards appear that no felony was in fact committed.

But the constable must be cautious in thus acting upon his own suspicions.

Yet, generally, if the arrest was made discreetly and fairly, in pursuit of an offender, and not from any private malice or ill-will, the constable need not doubt but that the law will protect him.

If after sunset, and before sun-rising, the constable shall see any one carrying a bundle, or goods, which he suspects were stolen, he should stop and examine him first, and may detain him; but here also he should judge from all the circumstances —the appearance and manner of the party, his account of himself, and so on,—whether he has really got stolen goods, before he actually takes him into custody.

The constable must make every exertion to effect the arrest, and the law gives him abundant power for the purpose. If the felon or party accused fly, he may be immediately followed wherever he goes; and if he take refuge in a house, he, the constable, may, first stating who he is, and his business, break open the doors, if necessary, to get in. But the breaking open outer doors is so violent and dangerous a proceeding, that the constable never should resort to it except in extreme cases, and when an immediate arrest is necessary.

There are cases, however, in which a constable may and ought to break into a house, although no felony has been committed,—that is, from the necessity of the cases, which will not admit of delay; as when persons are fighting furiously in a house, or a house has been entered by others with a felonious intent, and a felony will probably be committed unless the constable interfere, and he cannot otherwise get into the house; but except in such cases, the constable usually ought to wait till he gets a warrant from the magistrate.

If the constable find his own exertions, or those of the other constables there. insufficient to effect the arrest, he ought to require all persons present to assist him, and they are bound to do so.

If a prisoner should escape, he may be retaken; and on immediate pursuit, the constable may follow him anywhere, or into any house, whether his own or another's, in which he has taken refuge.

In cases of actual breaches of the peace, as riots, affrays, assaults, and the like, committed within the view of the constable, he should immediately interfere (first giving public notice of his office, if he be not already known), separate the combatants, and prevent others from joining in the affray. If the riot, &c. be of a serious nature, or if the offenders do not immediately desist, he should take them into custody, securing first the principal instigators of the tumult, and do every thing in his power to restore quiet. So if persons go about at night armed, or in any other such manner so as to excite great suspicion that a breach of the peace is intended; or if there be a disorderly noise and drinking, in a house at an unseasonable hour of the night, it is the duty of the constable to arrest the parties. So he may equally, as in other assaults, arrest any one assaulting or opposing him in the execution of his duty.

If a person forcibly enter the house of another, the constable may, at the request of the owner, turn him out directly. If he have entered peaceably, the constable should first request him to go out; and unless he do so, he should turn him out: in either case using no more force than is necessary for that purpose. So when the offence has not yet been committed, but when a breach of the peace is likely to take place, as when persons are openly preparing to fight, he should take the parties concerned into custody. If they fly into a house, or are making such preparations to fight within the house, the constable should enter the house to prevent them, and likewise take the parties into custody; and should the doors be closed, he may break them open, if admission is refused, after giving notice of his office, and his object in entering.

If any party threathen another with immediate personal violence, offer to strike, or draw a weapon upon another, the constable should take him into custody; but if persons are merely quarrelling or insulting each other, the constable has no right to take them into custody, but should admonish them to refrain.

The constable cannot, in cases of misdemeanour, arrest a party after the matter has happened, upon the charge of another; though if another deliver to him a person whom he charges with having committed such a breach of the peace, the constable is bound to take charge of him.

If a party, charged with a misdemeanour, escape out of custody, he may be pursued immediately any where; and if he take refuge in a house, the doors may be broken open after demand of admission, and notification by the constable of his office and object in coming.

After the arrest the constable is in all cases to treat a prisoner with kindness and humanity, and impose no constraint upon him but what is necessary for his safe custody.

In all cases it is desirable to take the prisoner as soon as convenient before the sitting magistrate, who will dispose of the case. At night he is to be taken to the division station, or, in cases of necessity, to the nearest place of safety.

It will frequently be more advisable for the constable to get a warrant from a magistrate before he acts in taking parties into custody. The constable is bound to follow the directions contained in the warrant, and to execute it with secrecy and despatch; in doing so he has equal power as when he acts without a warrant, in the manner that has been already stated.

If the warrant cannot be executed immediately, it should be within a reasonable time afterwards. He must execute the warrant himself, or when he calls in assistance must be actually present. Upon all occasions he ought to state his authority if it be not generally known, and should show his warrant when required to do so; but he should never part with the possession of the warrant, for it may be material for his own justification afterwards.

When the constable gets within reach of a party against whom he has a warrant, he should, in order to make the arrest, touch his person, or shut him up in a room, stating at the same time that he makes him his prisoner. When the person to be taken is not personally known to the constable, he should in some way be able to identify him, as, by taking some one with him to whom the party is known, or by some marks, &c., previously given him. Upon the arrest being made, the prisoner is to be taken before the magistrate as soon as convenient. When the prisoner is brought to the justice, he still remains in custody of the constable until his discharge or committal.

The constable may enter a house to search for stolen goods, having got a search-warrant from a magistrate for that purpose. He should in general execute it in the day-time. If he finds the goods mentioned, he is to take them to the magistrate, and, when the warrant so directs, the person also in whose possession they are found: to avoid mistakes, the owner ought to attend at the search to identify the goods.

In the classes of offences which are now to be enumerated, there frequently occur cases in which it is not desirable that the law should be enforced against the offenders; the constable will therefore not notice them, unless when the offence may be committed with such circumstances of aggravation or mischief and offence to the public as to require his immediate interference, or unless he receives a special command from his officers. But he should know that he has power to apprehend and carry before a justice of the peace—

Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner.

Every petty chapman or pedler wandering abroad without being duly licensed, or otherwise authorized by law.

Every person wandering abroad or placing himself or herself in any public street or highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do, all such being declared by the law idle and disorderly persons,

Any person committing any of the foregoing offences a second time after a former conviction.

Every person professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive or impose on any of his Majesty's subjects.

Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself.

Every person wilfully exposing to view in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition.

Every person wilfully, openly, lewdly, and obscenely exhibiting his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female.

Every person wandering abroad and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms.

Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence.

Every person playing or betting, in any street, road, highway, or other open or public place, at or with any table or instrument of gaming, at any game, or pretended game, of chance.

If any carter, drayman, carman, waggoner, or other driver, shall ride upon his cart, dray, car, or waggon, in London, or

within ten miles thereof, not having some other person on foot, to guide the same, he may be stopped, apprehended, and carried before a magistrate as soon as may be convenient. If the driver of any carriage shall, by negligence or wilful misbehaviour, interrupt the free passage of His Majesty's subjects, he may be apprehended and conveyed before a justice. Also, if the coachman, guard, or other person having the care of any coach, or other carriage, shall by intoxication, or wanton or furious driving, or any other wilful misconduct on the public highway, injure or endanger any person, he may be apprehended.

So it is lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just reason to suspect of any evil designs, and all persons whom he shall find between sunset and the hour of eight o'clock in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this act who shall be in attendance at the nearest watchhouse, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law; or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail.

No shop, room, or place for the sale of ready-made coffee, tea, or other liquors, shall be kept open after 11 o'clock at night, during any part of the year; nor opened before four in the morning between Lady-day and Michaelmas, or before six in the morning between Michaelmas and Lady-day.

If any such are open, or, being shut, any persons during the said hours shall be found therein, except the persons actually dwelling there, or having lawful excuse for being there, master, mistress, waiter, or other person having care or management of such shop, &c., the constable should make complaint, next day, to the sitting magistrate.

Any one blowing any horn, or using any noisy instrument, for the purpose of hawking, selling, or distributing any articles whatsoever, constables may apprehend.

If any person in any public street or place beats or drums

If any person in any public street or place beats or dusts carpets, or drives any carriage for the purpose of breaking or exercising, or trying horses; or shall ride any horse for the purpose of trying or showing it for sale in such a manner as to cause danger or great annoyance to passengers; or throws any ashes, dirt, rubbish, dung, or any filth upon the carriage or footway; or shall slaughter or cut up any beast, swine, or sheep, so near any public street that any blood or filth shall flow upon the pavement; or rolls or drives upon the footway of any street any waggon, cart, or other carriage, or wheel a wheelbarrow or truck, or any cask or barrel, or rides or drives any horse or other beast upon any of the footways; the constable may apprehend the party and take him before the Magistrate; but if he know the party, or can discover his residence, the best way is for the constable to lodge his complaint with a magistrate, who will then issue a summons for the party to appear.

If any person slack or sift lime in the steeets, unless he can show the consent of the Commissioners of the Pavements for so doing, complaint may be made to a magistrate; if entrances to coal-holes and cellars are not properly secured, so as to prevent danger to passengers, complaint should likewise be made; if any scavenger or any person sweeps or places the mud, dirt, or rubbish, into any of the drains or sewers, complaint may be made in the same way.

During or after a fall of snow, or any frost, if the occupier of any house or building do not once in every day, except Sunday, before the hour of ten o'clock in the forenoon, sweep and cleanse the foot-way along the front or sides of their premises, complaint is to be made.

Any person carrying in any cart through the street soap lees, night soil, slop or filth, without having a proper covering to prevent the same from spilling in the streets, or driving any cart with such soap lees, &c., in it through the streets, at any time between the hours of 6 o'clock in the morning and 8 in the evening, may be taken into custody at the time, or they may be summoned afterwards before a magistrate.

If any person empty any bog-house, or take away any night soil from any house in the streets, except between the hours of twelve o'clock in the night and five in the morning, from Lady-day to Michaelmas, or before six o'clock from Michaelmas to Lady-day, or if any person shall put any night-soil in or near any of the public streets, the constable should apprehend them immediately, and keep them in confinement till they can be conveniently carried before a magistrate, and may take their horses, carts, &c., to some place of security, to be kept till the decision of the matter. In most of these cases it is desired that the constables should only ascertain the party, and take the means of finding him afterwards, and report the case to the superior officer, and directions will be given him for his further guidance.

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