THE POLICE, THE PREMIER AND PARLIAMENT: GOVERNMENTAL CONTROL OF THE POLICE*

LOUIS WALLER**

I

17th January 1978

STRICTLY PERSONAL AND CONFIDENTIAL

Mr H. H. Salisbury, Q.P.M.
Police Headquarters,
Angas Street,
ADELAIDE, S.A. 5000

Dear Mr Salisbury,

Following my further discussion with you earlier today on matters revealed in the initial report of the Hon. Mr Acting Justice White on Special Branch records and activities, advice has been given to His Excellency the Governor, as I foreshadowed to you.

At an Executive Council meeting just completed you were dismissed from office as Commissioner of Police in this State, with immediate effect.

As I explained to you at our meeting, the Government does not intend that you should be embarrassed financially as a result of your dismissal from office. I have instructed my officers to contact you promptly to look at any matters which may arise in this regard.

Yours faithfully,
DON DUNSTAN, Premier[1]

Harold Hubert Salisbury was appointed Commissioner of Police for South Australia "as on and from 1st July 1972"—the words used in his commission. The appointment was made under the terms of the *Police Regulation Act* 1952-1971 (S.A.). That Act provided that, in the ordinary course of events, he would be obliged to retire on 30 June next after he reached the age of 65 years; in his case in June 1980. Salisbury had an excellent record in the (London) Metropolitan Police between 1935 and 1953, reaching the rank of Superintendent. From 1953 until his appointment as Commissioner he served in the Yorkshire police service, becoming Chief Constable of a large amalgamated force, centred in York, in 1968. He was awarded the Queen's Police Medal in 1970.

* See also R. G. Fox, "The Salisbury Affair: Special Branches, Security and Subversion" (1979) 5 *Mon.L.R.* 251.

** Sir Leo Cussen Professor of Law, Monash University.

1 *Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury* 1978 (Mitchell Report) 59 (Appendix J.).

His six years of service in South Australia were marked by innovation and achievement. His work was commended by the Premier and other Ministers. He seems to have won public support and the loyalty of his subordinates.[2] He was dismissed because the Government of South Australia decided he had misled it, in the course of answering questions about the operations of the Special Branch within the South Australian Police Force.

His dismissal on 17 January 1978 produced disquiet and concern in both Houses of Parliament and in the press. Less than a month after the dismissal, Justice Roma Mitchell of the Supreme Court of South Australia was appointed as a Royal Commission to enquire into the circumstances of the dismissal.[3]

The Commission's terms of reference were enlarged, after one sitting.[4] It sat between 14 March and 20 May 1978. It reported that the dismissal of the Commissioner "was justifiable in the circumstances".[5] The Royal Commission concluded that Salisbury "misled the Government by his communications to it as to the nature and extent of the activities of the Police Special Branch".[6]

In this article I shall describe briefly the circumstances in which this occurred, as a prologue to a consideration of the relationship between the Commissioner of Police—the supreme commander of the force, epitomising the police as a service—and the Government of South Australia. There will be some reference to the position in other States.

II

Inevitably policing in Australia has been substantially influenced by English history and experiences, and sometimes planned and directed by men like Salisbury and Chief Commissioner Alexander Duncan of the Victoria Police, who had been trained and had served in English forces. But there has never been that parochialism and local control which were the characteristics of the English police forces until some years after the passage of the *Police Act* 1964 (Eng.), which followed the Report of the Royal Commission on the Police 1962. Each state has its own police force. Each police force is established by statute. Each statute provides for the organization of the force and for the appointment of a commanding officer called the Commissioner of Police in all states except Victoria, where he has the anomalous title of Chief Commissioner.[7]

[2] This is based on the Mitchell Report 11-13.
[3] Ibid. 9 and 48 (Appendix A). The Commission was issued on 10 February 1978; a fresh Commission was issued on 14 March 1978 ibid. 9, and note 4 below.
[4] Mitchell Report ibid. 3.
[5] Ibid.
[6] Ibid. and see p. 251.
[7] For South Australia, see *Police Regulation Act* 1952-1978 ss. 6 and 21(1). Cf. *Police Regulation Act* 1899 (N.S.W.) s. 4; *Police Acts* 1937 (amd.) (Queensland) s. 6; *Police Regulation Act* 1898 (Tas.) s. 8; *Police Regulation Act* 1958 (Vic.) ss. 4 and 5; *Police Act* 1892 (W.A.) s. 5.

There is an Australian Federal Police Force, recently reorganized under legislation enacted following a review of Australian police responsibilities and services by Sir Robert Mark, a former Commissioner of the Metropolitan Police.[8] In his *Report*, Sir Robert Mark condemned the separation and distribution of police forces just described; he stated that there should be a unified force, but recognized that this would probably not be established in the Australian federation in the foreseeable future.[9]

In each state the legislation establishing the police makes some clear provision for the government of the police.[10] In South Australia, until 1972, the *Police Regulation Act* 1952 (S.A.) did not provide in specific language that the Commissioner was responsible for the control of the police but subject to governmental or ministerial direction. Since 1972, the Act provides that

> "Subject to this Act and the directions of the Governor, the Commissioner shall have the control and management of the Police Force."[11]

III

Salisbury's new broom did not touch the operations of the Special Branch of the South Australian Police Force. Mr Richard Fox has described the history of the Special Branch as part of his examination of the problem of security and subversion in Australia.[12] A brief account is given here, based substantially on the historical narrative which forms Part C of the Mitchell Report.

The forerunner of the Special Branch in the South Australian Police Force was the intelligence section established in 1939, on the eve of World War II. The Premier of South Australia in 1939 was Sir Thomas Playford, who served in that office for more than 25 years. He knew and approved of this new development in the South Australian Police Force, which was effected on the orders of the then Commissioner, Brigadier-General Leane. The section operated throughout the War, and its operations seem to have ended when hostilities stopped. In 1947 a "subversive section" was established in the Police Force; this became known as the Special Branch in 1949, following a conference of the Commissioners of Police of all states.[13] Its relationship with the Australian Security Intelligence Organization was very close.[14]

[8] See *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and other Related Matters* 1978 paras 37-40. Sir Robert Mark was appointed to examine police resources after the bomb explosion at the Sydney Hilton Hotel, scene of a regional Commonwealth Heads of Government Meeting, on 13 February 1978. The statute is the *Federal Police Act* 1979 (Cth.).

[9] Ibid.

[10] See the references in fn. 7 above.

[11] See s. 21(1).

[12] R. G. Fox, "The Salisbury Affair: Special Branches, Security and Subversion" (1979) 5 *Mon.L.R.* 251, 254-259.

[13] Mitchell Report, op. cit. 16-17.

[14] See Fox, op. cit. 255-257.

In November 1977, Mr Peter Ward, who had been Executive Assistant to Mr Don Dunstan, Premier of South Australia, and who was then Adelaide Bureau Chief of the *Australian*, alleged that up to 10,000 secret dossiers on South Australians had been compiled and were being kept by the Special Branch. The State Government subsequently appointed Judge J. M. White, then an acting Justice of the Supreme Court, to enquire into the files kept by Special Branch, in order to discover what criteria were employed in the analysis of information, its recording, and its availability.[15] His Report was handed to the Premier late in December 1977, and discussed by the Cabinet on 16 January 1978. The next day the Premier announced that the Commissioner of Police had been dismissed; on the same day he published the White Report to the media. The basis for the connexion between these events was in the Report itself.

White A.J. stated that there was substantial proof in the records of the Special Branch, and in the Commissioner's records, that from 1970 onwards at least, the Premier had been given misleading answers to his particular enquiries about the existence or nature of substantial sections of Special Branch files on political and trade union matters. These enquiries were made in October 1970, July 1975, May and September 1976, and October 1977. The last three enquiries were directed to and answered by Salisbury. On each occasion the Commissioner replied in a way which concealed or did not accurately reveal the actual categories of subjects for which the Special Branch opened and maintained files. In each reply there was no mention of the existence of files on politicians, trade unionists, and academic teachers. White A.J. said that he did not bear the responsibility of allocating blame for the failures and omissions described, but reported that Salisbury and the Assistant Commissioner both said that they had never examined the files and cards maintained by the Special Branch, and rarely visited its offices. They had relied upon information supplied by the officers in the Special Branch. These officers had not provided complete information.[16] Mitchell J., however, said this in her Report:

> "From the whole of Salisbury's evidence I have reached the conclusion that he made a deliberate decision not to give information to the government concerning the work of Special Branch in what he regarded as sensitive areas; that he made no proper enquiries of his subordinates in order to ascertain whether the information which he was giving was correct, and that he showed at least an indifference to the accuracy of some of the information which he supplied. He believed that the questions which were asked were improper, that the detailed aspects of the work of Special Branch were not a matter for Government and, as I understand his evidence, had he known of the existence of the various

[15] Ibid.

[16] The foregoing is based on the Mitchell Report, 22-27. See also *Special Branch Security Records, Initial Report to the Hon. Donald Allan Dunstan, Premier of South Australia* (1977)—(White Report) paras. 21.8-21.10.

cards and files referred to by White A.J. in his report, the answers which he gave to the Government would not have been different from those which in fact he gave."[17]

A few days after his dismissal, Salisbury held a news conference. He said that if he had replied comprehensively to

"these probing questions into Special Branch work . . . I would have rendered Special Branch entirely ineffectual and caused its total dismemberment. If I had taken this course I would have merited, justified very severe criticism from responsible official quarters and from security organizations beyond Australia. I would have been instrumental in breaching an oath of secrecy, and in destroying an absolutely vital service to the nation, especially in the present state of the world. . . . Special Branch work is a continuing operation and has to go on as it has done since 1939 despite the policies of the State and Federal Governments in power. In other words, it must be and is, totally unpolitical. It serves the nation."[18]

The dismissal of the Commissioner was the subject of intense and extensive questioning and debate in both Houses of the South Australian Parliament.[19] The Premier in Parliament and out asserted that the principles which had governed the behaviour of his Cabinet and himself in its dealings with and dismissal of the Commissioner were simple: The Government of South Australia was responsible to Parliament and the people of South Australia to account for the actions of the Government and its agencies, including the police. If any officer of the Government denied this accountability, or misled the Parliament, there was no alternative but resignation or dismissal from office.[20] For the elected Government to exercise its responsibility and to render its accounting, it must never be in a position of having its authority overreached, denied or thwarted by any action of a head of an executive branch of Government by which the Government and the Parliament might be misled about the workings of that branch. Though the Police Force had some independence of operation under the *Police Regulation Act* 1952-1972 (S.A.), it was still part of the Executive branch. In a system of responsible government, there had ultimately to be a Minister of State answerable in Parliament and to Parliament for all executive actions and operations. The principles of responsible government required that no head of a branch of the Executive government—whether appointed under the public service legislation, under a special statute, or by contract—could withhold full information from the government. He could not be left

[17] Mitchell Report, ibid. 27.
[18] (Adelaide) *Advertiser* 21 January 1978.
[19] See e.g. *South Australian Plty. Debates—House of Assembly* 7 February 1978, 1360-1415; 14 February 1978, 1493-1500.
[20] The Cabinet agreed on 16 January 1978 that Salisbury should be asked to resign as Commissioner. The Premier asked him to do so; he refused (Mitchell Report 14). Similar principles were forcefully stated and followed by Mr E. G. Whitlam, Prime Minister of Australia, in the conduct of his Ministry in 1975. As a consequence, several Ministers were dismissed from office.

responsible to give misleading information to the Government concerning the nature and extent of the work of that branch or any part of it.[21]

Was the Premier right? Before considering the reasons why the Royal Commissioner said he was, I shall consider the following matters: (1) the Premier's opinion in 1970, expressed in the Vietnam Moratorium controversy of that year; (2) the views and opinions of other State Premiers and Governments on the subject, (since the police legislation in all states is very similar to that in force in South Australia); and (3) the conclusions and observations of the courts in England and Australia on the matter.

IV

In September 1970 open disagreement erupted between the Government of South Australia, led by Dunstan, and the Commissioner of Police, Brigadier J. G. McKenna (Salisbury's immediate predecessor) about proposed police action in relation to a Vietnam Moratorium march and demonstration in Adelaide. The Premier and his Cabinet had asked the Commissioner to refrain from initiating police action to interfere with the marchers even if a city intersection was occupied by them and traffic halted. The Commissioner considered the request and decided that he could not comply with it. He stated that he could not

> "condone a flagrant breach of the law and if there is any serious disruption of traffic or interference with citizens going about their lawful business . . . the police have no alternative than to take the necessary action to uphold the law. . . ."

On the day before the Moratorium march, the Premier told Parliament that

> "The Government has no power to direct the Commissioner of Police in this matter . . . *Over him we have no control.*"[22]

The Moratorium march was held on 18 September 1970. Several thousand people took part. The marchers stopped at a major city intersection and were loudly heckled. In a few instances marchers were attacked by unfriendly spectators. The police present then issued several dispersal orders. When these orders were not obeyed, police cleared the intersection and arrested a large number of the marchers. On 22 September 1970, the Government of South Australia appointed Bright J. of the Supreme Court of South Australia as a Royal Commission to enquire into the behaviour of the Moratorium marchers and the police.[23]

Bright J. made the relationship between the Government and the Police Force a central theme of his enquiry. He clearly appreciated the views of

[21] See fn. 19 above. And see *The Australian* 24 January 1978 for an example of the Premier's statements to the newspapers on relations between the Government and the Commissioner.

[22] See *Report of the Royal Commission on the September Moratorium Demonstration 1970* 1971 (Bright Report) 56-57. My italics. See also R. Wettenhall, "Government and the Police" (March 1977) 53 *Current Affairs Bulletin* 12, 14-16.

[23] Ibid.

the Commissioner, applauding his strong sense of duty expressed in his reiteration of his fidelity to his oath of office, and stated that he must be and was invested with large discretionary powers. In the general day-to-day business of law enforcement, Bright J. said, the Commissioner should be free from the control and even the guidance of the Government. But he stated that

> "In a system of responsible government there must ultimately be a Minister of State answerable in parliament and to the parliament for any executive operation. This does not mean that no senior public servant or officer of State has independent discretion. Nor does it mean that the responsible Minister can at his pleasure substitute his own will for that of the officer responsible to him. The main way in which a minister and an officer of State become identified with an important decision is by a process of discussion and communication. . . .
> [U]ltimately he will be responsible, through the minister, to the parliament—not in the sense that he will be subject to censure for exercising his discretion in a manner contrary to that preferred by the majority in parliament, but in the sense that all executive action ought to be subject to examination and discussion in parliament.
>
> To point up this discussion, a Commissioner of Police is an important executive officer of State. He is trusted to exercise powers essential to any civilized society. He necessarily exercises some discretion in the mode of exercise. It is right that he should, in important matters, especially matters which have some political colour, discuss the situation with the minister who is ultimately responsible to parliament."[24]

Soon after Bright J. presented his Report, the *Police Regulation Act* 1952-1969 (S.A.) was amended in the terms already set out, making clear provision for the Governor (i.e. the Government of the day) to issue specific directions to the Commissioner for the control and management of the police.[25] The amending legislation went on to require that a copy of any such direction made under s. 21(1) shall be laid before each House of Parliament and published in the Government Gazette.[26] Since the Premier clearly played a major role in the Government and Parliamentary discussions which accomplished these legislative changes, it is evident that the views he expressed in 1970 had been refined and clarified when he came to read the Report written by White A.J. In no other Australian state had the relation between government and police in terms of authority and responsibility been so recently and so carefully examined. In no other Australian state had accountability been so recently and so carefully examined. In no other Australian state had Parliament enacted so recently and clearly legislation expressing the subordination of the police to the executive government. In other states there had been some remarkable equivocation in Ministerial

[24] Bright Report, ibid. 79-80.
[25] See p. 251 above, where the text of s. 21(1) of the *Police Regulation Act* 1952 (S.A.) as amended by *Police Regulation Act Amendment Act* 1972 is set out.
[26] Ibid.

statements about the relations between government and the police. To these I now turn.

The relationship between government and police has been often viewed as "through a glass, darkly". The unease which surrounded the creation of the paradigm police force in England, the Metropolitan Police, encouraged imprecision and even inconsistency in both considerations and explanations of this fundamental relationship. The idea of a "political police" was anathema. Yet from that very beginning the Metropolitan Police was by its statute of establishment placed under the Secretary of State for Home Affairs, who was and is a Minister of the Crown answerable to Parliament.[27] In 1957, the Home Secretary stated in Parliament that

> "For the Metropolitan Police, it is a matter for the discretion of the Secretary of State as to how far, in discharging the duties placed upon him by Parliament, he should himself, through the Home Office interfere with the executive action which is the responsibility of the Commissioner. In practice, in respect of administration and the maintenance of discipline, it is the Secretary of State's sphere to prescribe and enforce general principles, and the Commissioner's sphere to apply them in individual cases subject only to his general accountability to the Secretary of State as the police authority."[28]

It should be unnecessary to emphasize that the Home Secretary is subject to question and criticism, and is expected to participate in debate about police matters in the House of Commons.[29] In the final Report of the Royal Commission on the Police, published in 1962, the same conclusion was clearly reached:

> "The Commissioner of Police acts under the general authority of the Home Secretary, and he is accountable to the Home Secretary for the way in which he uses his Force."[30]

The position in England is of course still complicated because of the existence of a number of local police forces (a number much reduced through large scale amalgamations following the Willinck Report of 1962). But even in respect of these forces, the *Police Act* 1964 (Eng.), passed in consequence of the Report of the Royal Commission, clearly enunciates the policy that the Home Secretary has "general authority" of a final kind over the police forces, and accordingly is properly seen as accountable for them in Parliament.[31]

[27] See T. A. Critchley, *A History of Police in England and Wales* (Rev. ed. 1978, London: Constable) 50; 268 ff. for the best short account of the foundation of the Metropolitan Police. And see G. Marshall, *Police and Government* (London, Methuen, 1965) 29-32, 56-57; L. H. Leigh, *Police Powers in England and Wales* (London, Butterworths, 1975) 8.

[28] (1957) 571 *H.C. Debates* 50 Col. 574.

[29] See T. A. Critchley, "The Idea of Policing in Britain" in J. C. Alderson and J. C. Stead (eds.), *The Police We Deserve* (London, Wolfe, 1973) 31.

[30] Cmnd. 1728 par. 91.

[31] See ss. 12 and 28-39 especially.

In Australia the available evidence on current practices in the several States suggests that relations between their governments and their police forces still remain ill defined and beset by some ambiguous statements, when statements are made at all. It is only in rare moments of sharp crisis that any attempt at rigorous delineation is attempted—as in the Salisbury affair. The subject of government and police was examined extensively after the Adelaide Vietnam Moratorium of 1970 by Rudolph Plehwe.[32] His study is directed primarily to the position in New South Wales and Victoria; in both states the police legislation clearly subjects the Commissioner or Chief Commissioner to government direction and control.[33] Plehwe stated that in Victoria, Ministers in the Liberal Party governments formed by Mr (now Sir) Henry Bolte frequently proclaimed the independence of the Chief Commissioner from governmental control, in language suggesting that a constitutional principle was involved. Successive Chief Secretaries (as the Minister who answered questions about the Victoria Police in Parliament was then entitled) maintained that the police were free even of an obligation to consult before embarking on law enforcement.[34]

But in contrast to these statements Plehwe was able to show that successive Chief Secretaries had purported to determine general policies on enforcement of the criminal law by the police. For instance, Mr R. Hamer (now Premier of Victoria) undertook to see that the police did not enforce fire-arms legislation, pursuant to a government policy of allowing a three months "amnesty" for people surrendering unlicensed guns.[35] The Labor opposition has on several occasions made it clear that its position is that police are in a position analogous to that of public servants, with the corollary of ministerial control and responsibility.[36]

In New South Wales the position is marked by unclarity. There are ministerial statements in terms similar to those employed by Victorian Chief Secretaries.[37] As Premier, Sir Robert Askin, who led a Liberal Ministry, stated that it was not his Government's policy to tell the Commissioner how to run the police; it was "willing to wait and see whether it [the disputed course of action] works out in the way that the Commissioner of Police anticipates".[38] This statement suggests that the Government might well have intervened if the course proposed had not

[32] "Some Aspects of the Constitutional Status of Australian Police Forces" (1973) 31 and 32, *Aust. J. of Pub. Admin.* 268. See also E. Campbell and H. Whitmore, *Freedom in Australia* (Rev. ed., Sydney University Press, 1973).

[33] N.S.W.: *Police Regulation Act* 1899 as amended s. 4(1); Vic.: *Police Regulation Act* 1958 as amended s. 5.

[34] See refs. to 1966-1967 *Plty Debates* 156-157 (Mr Rylah) and 1971-1972 *Plty Debates* 1635 and 5272 (Mr Hamer). The office of Chief Secretary has been abolished and replaced by that of Minister of Police and Emergency Services.

[35] See 1971-1972 *Plty Debates* 4564.

[36] See 1966-1967 *Plty Debates* 157; 1969-1970 *Plty Debates* 3332 and 3336.

[37] See e.g. 1969-1970 N.S.W. *Plty Debates* 6493.

[38] 1966-1967 N.S.W. *Plty Debates* 1166-1167.

worked. A similar attitude has been expressed by Labor in government. But Labor leaders do not regard all the Commissioner's judgments as unimpeachable. In December 1977, the Premier of New South Wales, Mr Neville Wran, stated publicly that he had given instructions that illegal gambling houses in Sydney should be shut down by police immediately. The Commissioner of Police said that he would prefer to allow the houses to remain open until the Christmas break—so that those who worked in them would not be put out of work before the holidays. The newspapers reported a clashing of views, which was ultimately denied. The gambling houses were shut down by the end of December.[39]

Queensland has produced the clearest examples of government direction and control of the police. The Commissioner is "subject to the direction of the Minister" in his superintendence of the force.[40] In a series of episodes beginning in July 1976 and ending in the resignation of the Commissioner, Mr R. W. Whitrod, in November of that year, the Premier, Mr J. Bjelke-Peterson claimed that government had authority not only to give general directions on matters of policy in law enforcement and police practices, but also to give specific instructions on the conduct of particular enquiries or the movement of particular police officers.

In July 1976, television news film of a student demonstration at the University of Queensland apparently showed a senior police officer striking a student with a baton. The Commissioner announced that there would be a police enquiry into the incident. The Minister of Police, Mr A. M. Hodges, supported this decision. But the Premier stated that there would be no enquiry, and Hodges was dismissed as Minister of Police. A similar clash of views took place over the Cedar Bay incident, in respect of which serious charges were levelled at several police officers. Whitrod's resignation was precipitated by a Cabinet decision to substitute its police promotion list for his. In the Cabinet list an inspector stationed in the country was promoted to the rank of Assistant Commissioner, immediately subordinate to the Commissioner. This officer was appointed Commissioner after Whitrod resigned.[41]

Whitrod issued a press statement after his resignation was announced, in which he was reported as saying that

> "The Government's view seems to be that the police are just another public service department accountable to the Premier and Cabinet through the Police Minister and therefore rightly subject to directions, not only on matters of general policy but also in specific cases. I believe as a Police Commissioner I am answerable not to a person, not to the Executive Council, but to the law. . . . Interference with my responsi-

[39] See *The Herald* (Melbourne) 30 November 1977, 2 December 1977: *Australian* 2 January 1978.
[40] S. 6(1) of the *Police Act* 1937 as amended.
[41] See (Brisbane) *Courier Mail* 30 November 1976.

bilities had reached a stage where I was no longer in command. I was not prepared to be merely a front for other peoples' decisions. The only way I could draw attention to the situation was by resigning."[42]

Fifteen months earlier, Whitrod had expressed similar views in the calmer ambience of the academy. In the Fourth John Barry Memorial Lecture delivered at the University of Melbourne, he examined the South Australian Moratorium and the Royal Commission recommendations.[43] He then said:

"From the police point of view, if the executive, as distinct from parliament, takes to itself the authority to instruct the police when they are not to enforce the law . . . then the rule of law could collapse, and make mockery of each officer's sworn oath to uphold the law. If this procedure of executive direction over police is accompanied also by an arrangement to relieve the individual police officer of any personal liability for wrongful use of his powers of arrest, search and detention, . . . then effective safeguards on individual citizens' rights are immediately abolished.[44]

Part of "the law" every officer is sworn to uphold is the statute providing for the establishment and government of the police. In the Australian states, police legislation clearly and unequivocally provides for government direction, though its terms and conditions are left unstated. But Whitrod was not alone in asserting the independence of the police, however that may be qualified or explained when questions about establishment, finance and the like are raised. Both he and Salisbury claimed a duty to the law and to the law alone.[45] Their views echo those expressed in the now famous judgment of Lord Denning M.R. in the first *Blackburn* case.[46] Indeed in his statement to the press following his resignation Whitrod repeated part of Lord Denning's judgment in support of his decision to resign.[47]

V

The attempt by Mr Albert Raymond Blackburn to obtain an order of mandamus against the Metropolitan Police Commissioner, to compel him to enforce the gaming laws, was both novel and unsuccessful. So was his subsequent attempt, in 1972, to compel the Metropolitan Police to enforce the law on obscene publications.[48] In both cases serious social questions were in issue. In the first the Court of Appeal, while clearly sympathetic to the applicant, declined to make the order sought. But in canvassing the

[42] Ibid.
[43] See p. 254 above.
[44] R. W. Whitrod, "The Accountability of Police Forces—Who Polices the Police?" (1976) 9 *Aust. & N.Z. Jo. Crim.* 7, 16.
[45] Ibid. And see Mitchell Report, op. cit. 19.
[46] *R.* v. *Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 Q.B. 118.
[47] See text as quoted in Wettenhall, op. cit. 20-21.
[48] See fn. 46 above. The second application is reported as *R.* v. *Commissioner of Police of the Metropolis* (No. 3) [1973] 1 Q.B. 241.

matter both Lord Denning M.R. and Salmon L.J. examined the constitutional status of the Commissioner of Police, the head of what I have called the paradigm police force. Lord Denning said:

> "His constitutional status has never been defined either by statute or by the courts. . . . 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. . . . 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 decide whether or no suspected persons are to be prosecuted. . . . [I]n 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 . . . prosecute this man or that one. . . . The responsibility for law enforcement lies in him."[49]

Salmon L.J. echoed these words:

> "Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement."[50]

Both, however, stated that the Commissioner was in an appropriate case not immune from control by the court. Lord Denning M.R. repeated his views without qualification in the later *Blackburn* case,[51] and in the landmark constitutional case of *Gouriet* v. *Union of Post Office Workers*, Lawton L.J. clearly approved them.[52]

Two earlier cases were cited by Lord Denning M.R. to support his conclusion that the Commissioner was independent of the government. In *Fisher* v. *Oldham Corporation*,[53] where the plaintiff sought damages for false arrest, McCardie J. held that the defendants were not liable as employers, for the actions of members of the local force. The police, he said, were not acting as servants or agents of the Corporation when they arrested the plaintiff. But McCardie J. also said that each police constable

49 [1968] 2 Q.B. 118, 135-136.

50 [1968] 2 Q.B. 118, 138.

51 See [1973] 1 Q.B. 241, 254. But see Roskill L.J. at [1973] 1 Q.B. 241, 262:

> "It is no part of the duty of this Court to presume to tell the respondent how to conduct the affairs of the Metropolitan Police. . . ."

The first *Blackburn* case excited the Rt. Hon. Quintin Hogg Q.C., M.P. (later Lord Hailsham of St. Marylebone L.C.) to vehement criticism in *Punch*. This led to *R.* v. *Commissioner of the Police of the Metropolis, ex parte Blackburn* (No. 2) [1968] 2 Q.B. 150 in which the applicant sought an order that Mr Hogg was guilty of contempt of court. He failed.

The indefatigable Mr Blackburn has tried once more: *Regina* v. *Metropolitan Police Commissioner, Ex parte Blackburn, The Times* 6 March 1980. He failed again to secure an order of mandamus to require the Commissioner to enforce the law on obscene publications. On this occasion Lawton L.J. said:

> "The intention of the relevant statutes was to leave the Commissioner to do his job as he thought fit and to empower the Home Secretary to remove him if he was not doing it efficiently. There was no justification for the Courts to meddle with the way he performed his duties."

52 [1977] Q.B. 729, 766 (C.A.).

53 [1930] 2 K.B. 364. See also *Enever* v. *The King* (1906) 3 C.L.R. 969 a similar decision of the High Court of Australia.

is "a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation".[54]

More recently, in *Attorney-General for New South Wales* v. *The Perpetual Trustee Company Ltd*,[55] the High Court of Australia had held that the action *per quod servitium amisit* did not lie at the suit of the Crown, where the loss of services suffered was that of a police officer injured in a road accident. In the process of reaching that conclusion, the nature of the relationship between the Crown and members of the police force was examined. But that was done in the context of the concept of *servitium* still specified in the action for loss of services. It was seen as pointing to a private, almost domestic master-servant relation, far removed from modern civil or public service relationships. The High Court was not passing upon the constitutional position of the police.[56] Nor was McCardie J., in the *Oldham Corporation* case.[57]

But it is abundantly clear from statements in the judgments of some members of the High Court that they thought that police forces, in the Australian states, were generally subject to executive direction and control. This view is most clearly put by Dixon J., then the senior puisne Justice of the Court, who accommodated concern expressed about the individual discretion invested in each police officer in, say, deciding whether or not to make an arrest—upon which aspect Lord Denning M.R. seized so firmly—as follows:

> "The police force is a disciplined body for the general government and discipline of whose members the Governor is empowered to make rules. . . .[58] So far I should have thought that everything pointed to a member of the police force occupying the position of a servant of the Crown for the loss of whose services owing to an injury caused by a wrongful act the Crown might sue the wrongdoer. But the question remains whether because a constable is entrusted by law with specific powers and given specific duties which he must execute as a matter of independent responsibility . . . the general relation between the Crown and a member of the police force is not that of master and servant. In my opinion this consequence does not follow. In most respects a member of the police force is subject to the direction and control which is characteristic of the relation of master and servant. It does not matter that there is a chain of command. That is necessary in some degree in all organizations military and civil, public and private. It is only when in the course of his duties as a servant of the Crown he is confronted with a situation involving the liberty or rights of the subject that the law places upon him a personal responsibility of judgment and action. . . .

[54] [1930] 2 K.B. 364, 371.
[55] (1952) 85 C.L.R. 237.
[56] See too the same case before the Privy Council [1955] A.C. 457.
[57] [1930] 2 K.B. 364.
[58] Dixon J. referred to s. 72 of the *Police Regulation Act* 1899-1947 (N.S.W.).

> For the foregoing reasons, if the matter were to be considered afresh, I should prefer the view in favour of the Crown's right of recovery."[59]

There is no dissent from this view in the judgments of the remainder of the majority. Williams J., who held that the action *per quod* lay at the suit of the Government of New South Wales, stated that both members of the armed forces and the police were subject to the control of, and accountable to, the Crown, which established both services:

> "Each form of service combines a high degree of obedience to the orders of superior officers with a considerable latitude of discretion in the execution of such orders."[60]

In his monograph *Police and Government*, written before the first *Blackburn* case[61] was decided, Geoffrey Marshall trenchantly criticized what he regarded as untenable conclusions derived from the simple facts and conclusions in the *Oldham Corporation*[62] case.[63] He concluded his examination of the cases by stating that "no general constitutional autonomy can be inferred from the much handled civil liability cases, including *Fisher* v. *Oldham*".[64] In the decentralized police system, he argued that each police authority, including the Home Secretary as police authority for the (London) Metropolitan Police, should be seen as empowered to issue general instructions on police activities in the enforcement of the law. Marshall explained this further by stating that intervention in routine prosecutions should be avoided, but added while

> "administrative morality ought to restrict intervention in a chief constable's sphere of decision. . . . [E]xecutive decisions may be made and policies followed which ought on at least some occasions to be open to an effective challenge by the public and their elected representatives issuing where necessary in police authority directions."[65]

In Australia, Enid Campbell and Harry Whitmore have advanced similar views, in the new edition of *Freedom in Australia*,[66] written after the first *Blackburn* case.[67] Their examination of the question of police accountability clearly applauds the conclusions reached by Bright J. in his Report on the Adelaide Moratorium in 1970,[68] which they present in sharp contrast to the views of Lord Denning M.R. They approve Bright J.'s statement that the police force is a part of the executive government for which a Minister is ultimately accountable; they support the proposition that parliament is

[59] (1952) 85 C.L.R. 237, 252. Dixon J. would have upheld the appeal of the Government of New South Wales, but decided that he was bound to follow the High Court's decision in *The Commonwealth* v. *Quince* (1944) 68 C.L.R. 227.
[60] (1952) 85 C.L.R. 237, 265. And see McTiernan J. at 255; Kitto J. at 303-304.
[61] [1968] 2 Q.B. 118.
[62] [1930] 2 K.B. 364.
[63] Op. cit. 45. See generally Chaps. 3 and 8.
[64] Ibid. 120.
[65] Ibid.
[66] Op. cit. 28-31.
[67] [1968] 2 Q.B. 118.
[68] See p. 254 above.

the appropriate public forum wherein police policies, practices and procedures may be scrutinized, questioned and also brought to the attention of the community for whose protection and welfare the police force has been established.[69] And though the first *Blackburn*[70] case was but the subject of passing reference by Viscount Dilhorne in *Gouriet's* case,[71] the whole tenor of his speech and those of other members of the Appellate Committee, is inimical to that decision.

VI

The background against which the protaganists before the Royal Commission on the Salisbury dismissal advanced their arguments has been delineated. Their arguments have been noticed in passing; the Commission's conclusion has been stated. Let me now consider more fully the Commission's findings on the relationship between the police and the government of South Australia.

In both his interview with the Premier before he was dismissed, and in his evidence before the Royal Commission, Salisbury said that the government could not lawfully direct him about Special Branch operations. It could give no directions on records to be kept nor impose a policy of destruction of files after a specified time. If such directions had been given—as happened immediately after his dismissal, upon Mr L. D. Draper's appointment as Commissioner[72]—Salisbury said he would not have obeyed them "without long discussion with the Chief Secretary and probably the Premier and also with ASIO".[73] Mitchell J. said:

> "In giving evidence he again affirmed that that was his belief and he said 'As I see it the duty of the police is solely to the law. It is to the Crown and not to any politically elected Government or to any politician or to anyone else for that matter . . .'. As I (the Commission) understand his evidence he believed that he had no general duty to give the Government information which it asked but he had regarded it as politic to give such information as, in his view, was appropriate to be general knowledge."[74]

Mitchell J. rejected this view completely. In devastating comment, interpolated in the statement set out immediately above, she said this of Salisbury's view of his duty:

> "That statement, in so far as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system of South Australia or, for that matter, of the United Kingdom."[75]

[69] Campbell and Whitmore, op. cit. 30-31.
[70] [1968] 2 Q.B. 118.
[71] [1978] A.C. 435, 495.
[72] Mitchell Report, op. cit. 36.
[73] Ibid. 19.
[74] Ibid.
[75] Ibid.

The Commission proceeded to accept as appropriate that view of the relations between government and police which was stated by Dixon J. in the *Perpetual Trustee* case (though the case is not cited).[76] Lord Denning M.R.'s statement in the first *Blackburn* case[77] was firmly placed

> "in the context of the discretion to prosecute or not to prosecute. No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of person although it is not unknown for discussions between the Executive and the police to lead to an increase in or abatement of prosecutions for certain types of offence."[78]

The conclusion reached by the Commission was that, without any qualification, the Government of South Australia had the right to be informed generally about any part of police operations. Mitchell J. referred to the statutory provisions already mentioned, especially the 1972 amendment, which gave the Governor specific authority to make regulations for the general management of the police and its particular sections or branches. She concluded by rejecting the argument (not considered in this article) that the "official secrets" provisions of the *Crimes Act* 1914 (Cth.) prohibited the Commissioner from disclosing Special Branch information. This was because Mitchell J. decided it would have been possible to answer the questions asked without disclosure of any prescribed information. And it was at least uncertain, she said, whether such transmission of information "by an Officer of a State Government to that State Government which has an interest to receive it" was prohibited by s. 79 of the Commonwealth statute.[79]

VII

It is a coincidence, which may excite speculation and conjecture, that twice within the life of the Dunstan Government in South Australia the relations between police and government should have been the subject of intense controversy and independent judicial enquiry. The dismissal of a Commissioner of Police will generally require substantial explanation and probably a judicial enquiry.[80] But the effects of both the September Moratorium and the Salisbury dismissal have been to strip away much of the uncertainty and confusion which has attended this subject of great public importance, even at government level. The conclusions which can be drawn now are

[76] (1952) 85 C.L.R. 237. See p. 261 above.
[77] [1968] 2 Q.B. 118.
[78] Mitchell Report, op. cit. 20.
[79] See ibid. 21.
[80] See D. P. Derham, F. K. H. Maher and P. L. Waller, *An Introduction to Law* (3rd ed., Law Book Co. Ltd, 1977) 12:
> "If the Chief Commissioner were to take issue with his political superiors on a police or law enforcement matter, and were to resign, an independent public inquiry into the question on which the resignation turned would almost certainly be forced upon any government."

clear. The police force is a disciplined service under the direction and control of the executive government. The statutes of the several states establishing the police forces have almost all been clearly based on this foundation, and those statutes were originally enacted long before the unsettled years in which the events described or mentioned here took place. The government, as Mitchell J. so emphatically reminded the former Commissioner, is formed as a consequence of elections for a democratic legislature, in the Westminster tradition. To parliament the government is accountable. Without its confidence the government will cede to another which can command the legislature's support. It is to parliament and in parliament that the government should answer for and about the police.

It is of great importance to notice that both Bright J. and Mitchell J. did not admit accountability to the law, through the courts, as a satisfactory alternative to or substitute for the authority of the government and its accountability to the legislature.[81] The perceptive comments made by Lord Diplock in *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.*[82] "as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers" remembering that the first is elected and answerable to the people and the second is not, are as apt in this context as they were in the case in which he delivered them.

The Mitchell Report addresses itself firmly to the question of distribution of powers in a democratic society.

> "The Commissioner of Police occupies a peculiar position in the sphere of executive government. He is not and can not be independent of the Government as the judges are and must be under our system. The judges decide cases in which the State of South Australia may be a party. It would be intolerable that a judge should be subject to being removed from office by a government which may also be a litigant. On the other hand the independence of the judges goes solely to decision making. Certainly as a result of their decisions, citizens may be deprived of liberty and subject to other penalties but the judges can do no more than give orders. Those who enforce the orders outside the court room are not under the direct control of the judge, although they are themselves subject to the judge's orders. The Commissioner of Police, however, controls the major law enforcement agency on behalf of the government. But he is not to regard himself as the law maker. Only Parliament, within its constitutional limits, occupies that position. And the Ministers are collectively and individually responsible to Parliament for the administration of the executive arm of government, of which the Police Force is an important part. A Police Force not subject to Government control would have a dangerous power. The Government is subject to election, the Police Force is not."[83]

[81] See fn. 82 below.
[82] (1974) 48 A.L.J.R. 1, 5.
[83] Mitchell Report, op. cit. 43.

Any future consideration of the relations between police and government must found itself upon that statement. It is abundantly clear, of course, that the power to exercise control and give directions does not entail the obligation to descend to the day-to-day management of the police.

VIII

When the House of Commons was debating whether a police force should be established in England, in the years following the social and political upheavals of the Napoleonic Wars, its Select Committee on the Police of the Metropolis reported in 1822 that "that perfect freedom of action and interference" which are "the great privileges and blessings of society in this country" was irreconcilable with "an effective system of police".[84] Accordingly it recommended that the creation of a police force would entail too great a sacrifice of liberty. Nonetheless, seven years later, the statute establishing the Metropolitan Police was enacted and the Peelers and Bobbies swiftly became indispensable participants in the same society which viewed a police force in abstract as the tyrant's weapon. The process of reconciliation to which the Select Committee referred pejoratively was undertaken. It is still unfinished. (Salisbury's attitude on the Special Branch reveals it is a two-way process). All this helps to explain some of the persistent uncertainty about the relations between police and government, and the constant reaffirmation that in his dealings with matters involving the liberty of the subject, the policeman must exercise his own discretion. But this clear requirement should not continue to throw a murky shroud over the subject.[85] The long and sometimes bitterly fought struggle for the establishment of responsible government and a comprehensive adult franchise has created a parliamentary system in which control of the police may be appropriately exercised, and its activities carefully scrutinized. Parliament may not be the best or most effective forum for all kinds of accounting and examination of the police—or any other branch of government.[86] But it is, in a society like ours which calls itself democratic, the best forum available.

IX

Though Mitchell J. found that the dismissal of the Commissioner by the Government was justifiable in the exercise of the prerogative power to dismiss without cause, she recommended the enactment of statutory

[84] Parl. Papers (1822) Vol. 4, 91, 226. Quoted in L. Radzinowicz, *History of English Criminal Law and its Administration from 1750* Vol. 3 (London, Stevens, 1956) 362.

[85] Cf. Menzies J. in *R.* v. *Anderson, ex parte Ipec Air Pty Ltd* (1965) 113 C.L.R. 177 and *Ansett Transport Industries (Operations) Pty Ltd* v. *The Commonwealth* (1977) 17 A.L.R. 513.

[86] Cf. Campbell and Whitmore, op. cit. 31.

provisions enunciating clearly the grounds upon which removal from office of the Commissioner might be effected. This recommendation was itself given effect by the enactment of the *Police Regulation Act Amendment Act* 1978, inserting a new s. 9B into the principal Act. It provides that the Governor may remove the Commissioner (or Deputy Commissioner) from office for incompetence, neglect of duty, misbehaviour or misconduct, or mental or physical incapacity. This legislation received the assent of the Governor on 7 December 1978.[87]

[87] Dunstan resigned as Premier of South Australia, on the grounds of ill health, on 15 February 1979.