30 October, 2014

Ms Laura Ross
Secretary
Joint Standing Committee on Integrity
Parliament House
Hobart Tasmania 7000

Dear Ms Ross

THE THREE YEAR REVIEW OF THE FUNCTIONS, POWERS AND OPERATIONS OF THE INTEGRITY COMMISSION

I refer to your email dated 22 October 2014 inviting a submission from me to the Committee.

Pursuant to s 24(1)(e) of the Integrity Commission Act 2009 ("the Act"), the Joint Standing Committee on Integrity is required to review “the functions, powers and operations of the Integrity Commission” three years after it commenced operations. The Committee has invited submissions from interested persons and organisations.

I note that a number of submissions have already been made to the Committee, including one by the Government and one by Tasmania Police. I share many of the concerns set out in those submissions.

The “integrity landscape” is well populated in Tasmania. The Integrity Commission is part of a broad set of organisations that have a role in overseeing the integrity of public institutions, officers and state servants. Other agencies with substantial roles to play include:

- Tasmania Police,
- the Auditor-General,
- the Ombudsman,
- the Coroner,
- the Director of Public Prosecutions,
the Anti-Discrimination Commissioner,

• the Children’s Commissioner, and

• Heads of Agency

This somewhat crowded landscape has led to significant duplication of effort, lack of clarity, “forum shopping”, alarming delay and significant adverse consequences for individuals and entities that have been the subject of investigations.

It is evident that the Integrity Commission has moved into spaces previously occupied by one or more of these entities and, as a result, significant issues have arisen. It should be remembered those agencies have particular expertise in their areas. When the Commission came into being, the government was very clear in setting out the principles that were said to underpin it. Those principles were:

• recognition that prevention is as important as dealing with allegations of unethical behaviour;

• the need to build on existing structures and mechanisms;

• the need for proportionality;

• a cautious approach to strong investigative or coercive powers;

• clarity and consistency about which public bodies are to be covered; and

• independence from the Government of the day.

I am strongly supportive of the Integrity Commission playing a pivotal role in education and prevention. I have attended a seminar delivered by the Commission and found it to be both useful and informative. All staff in my Office have participated in integrity training as a consequence of the efforts of the Commission. It has proved to be extremely worthwhile and I commend the Commission for its efforts which are highly professional.

I note that another of the principles was the need to build on existing structures and mechanisms. In the Second Reading Speech this role was explained out as follows:

“... if there is another accountability body which is equipped to deal with the matter it should be referred to that body and this includes referring complaints to the Ombudsman, the Auditor-General or State Service Commissioner."

This area seems to have become problematic with the Commission conducting investigations into what appears to be allegations of relatively low level misconduct that might more productively and cheaply have been undertaken by other entities. It is especially problematic when it is acknowledged that the Commission lacks any power to impose sanctions against the subject of a complaint whilst other entities have both the necessary investigative powers and the right to sanction individuals for misconduct.
Additionally, a great deal of any evidence gathered by the Commission using its extensive powers cannot be used by my Office to prosecute an offender. Indeed, it is likely any evidence gathered by coercion from the alleged offender could not even be provided to the prosecutor (see Lee v R [2014] HCA 20). Tasmania Police would be required to completely re-investigate any matter, ensuring that any alleged perpetrator and any witnesses are given the benefit of the protections extended in the criminal justice system. This stems from the coercive nature of the powers exercised by the Commission and that fact it is not bound by the rules of evidence.

I also note that any investigation of breaches of the State Service Code of Conduct undertaken by the Commission have to be re-investigated by Heads of Agency under Employment Direction 5 as the Commission’s investigation is largely unable to be used in those proceedings.

I am also concerned that in establishing the Commission, we have created a disproportionately powerful and secretive organisation. This is contrary to the principles which were said to underpin the establishment of the Commission and which demanded proportionality.

The Commission has been provided with very significant investigative and coercive powers notwithstanding that it is not law enforcement. The CEO, and through her its investigators have powers to:

- require the provision of information or explanations, including the power to require attendance to give evidence before an investigator
- require the production of records, information, material or things
- require the provision of information, explanations or answers orally or in writing
- require the provision of information on oath
- enter premises of a public authority without need for consent or a search warrant
- obtain from a magistrate a search warrant where there are reasonable grounds to suspect that material relevant to an investigation is located at the premises
- seize, take away, make copies of (including download) any record, information, material or thing
- obtain a surveillance device warrant and a corresponding device retrieval warrant (serious misconduct only)

(see s 46-54 inclusive of the Act)
These powers are extremely wide-reaching and include the power to compel the provision of information under threat of being charged with an offence punishable by a penalty of 5,000 penalty units (see s 54). In essence, a state servant or politician being investigated for misconduct of whatever nature or degree has less rights and protections than a citizen being investigated for a serious breach of the criminal law.

The powers given to the Commission are clearly disproportionate to the nature of the matters which have been brought before it and the function it is tasked with performing. The Commission is not the Crime and Misconduct Commission or the Independent Commission Against Corruption as they exist in other states. The creation of such a body was never envisaged. The Tasmanian model is substantially different and was designed to deal with misconduct and mal-administration. We have ended up with a hybrid which has some of the enormous powers of these bodies but not the role performed by them. Either the powers or the role needs to be adjusted.

I am sure that the Commission finds its extensive powers extremely useful. Indeed it seeks to have even more extensive powers. That should be resisted. In my view the powers of the Commission require no enhancement. They should be reduced given the nature of the complaints brought before it and the number of investigations conducted by it. It is not a body charged with investigating criminal activity. Investigations into corruption should be conducted, as they have been in the past, by Tasmania Police which has the expertise and all the necessary powers to undertake the task.

I also note Tasmania Police, in particular, have strong systems in place for dealing with police misconduct. It is a disciplinary offence for an officer not to report police misconduct. The Professional Standards Unit is headed by a Commander who reports directly to the Deputy Commissioner of Police. The unit consists of extremely experienced and competent investigators. Serious matters that have been investigated are reviewed by my Office, generally by myself.

I am also deeply concerned about the impact of a Commission investigation on other processes and the subjects of those investigations. The reality is that all other processes are effectively been put on hold whilst the Commission goes about its work. This leads to excessive delays in matters being resolved. As I have alluded to earlier, the need to re-investigate matters because of the way the Commission interacts with other entities, leads to even further delay and the potential for the second investigation to be tainted by the first. It must be remembered that at the heart of these matters is a person. The old adage of “justice delayed is justice denied” comes to mind. Subjects should not have to go through more than one investigation, nor should they have to wait for months, if not years, to have matters resolved. An amendment to s 9(1)(g) is required to make it clear that the Commission should not investigate matters where another integrity entity has the power to properly investigate alleged misconduct. The Commission should be informed of the allegation and monitor progress of the investigation and any outcome, but not supervise the investigation. In that way investigations can be investigated by the body that has the clear expertise in those matters.
Another concern is the cloak of secrecy that seems to surround the Commission’s investigations. The service of notices under s 98 requiring absolute silence in respect of the investigation, save and except for obtaining legal advice or complying with requirements to provide information to the Commission, imposes a very heavy burden on witnesses and subjects of investigations. Being investigated by an integrity entity is undoubtedly very stressful. Technically, a subject confiding in a family member or seeking counselling or medical assistance as a result of stress caused by the investigation cannot even reveal the cause of their stress to their family member, medical practitioner, psychologist or counsellor. This is extremely unhelpful and denies subjects rights that even persons being investigated for serious criminal offences possess. It also has the potential to lead to tragic outcomes.

It seems to me that the Integrity Commission is a very costly model for dealing with a very small number of integrity matters that may require independent investigation. In 2013-2014 it dealt with the following:

**Outcome of complaints received in 2013-14**

- Not accepted/dismissed after triage: 56
- Referred for action after triage: 39
- Accepted for assessment: 4
- Currently under consideration: 14

113

In other words, of a possible 113 complaints only 18 could possibly be the subject of an investigation. Of those 18 only four were accepted for assessment as to whether an investigation was required. The cost to the state was nearly $3 mil. For the very small number of matters that may require independent investigation due to their seriousness, nature or sensitivity, the Ombudsman could be given extended powers and resources to investigate.

The role of the Commission should be limited to the prevention, education, and the triaging of complaints. Triaging should include ongoing oversight of complaint resolution processes, including being advised of the outcome of complaints. The Commission should have the power to require explanations where no action is taken. This is extremely important to ensure that complaints are treated seriously, that proper investigations are undertaken and that breaches of standards have consequences. Accountability and transparency are both assured by such a role for the Commission.

I think it also appropriate to note that despite four years of operation, the work of the Commission is yet to result in the prosecution of any person for any offence. This is clearly indicative that the level of corruption and/or serious misconduct within government and the public sector is not as high as might be assumed. Further, I know of only two matters that have been brought to the attention of either
Tasmania Police or this Office by the Commission, involving alleged criminal conduct. In both cases there was deemed to be insufficient evidence to proceed. There was no reason why these matters could not have been investigated by Tasmania Police.

Yours sincerely

[Signature]

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS