The three year review of the functions, powers and operations of the Integrity Commission
Introduction

This submission has been prepared by Tasmania Police pursuant to an invitation issued by the Joint Standing Committee on Integrity (JSC) to the Department of Police and Emergency Management, dated 25 November 2013, in order to assist the JSC in its review of ‘the functions, powers and operations of the Integrity Commission’.

Tasmania Police is a public authority for the purpose of the Integrity Commission Act 2009 (the Act). Commissioned officers of Tasmania Police are designated public officers for the purpose of the Act (DPOs) and non-commissioned police officers are a category of public officers. In addition to the general applicability of provisions of the Act to Tasmania Police, Part 8 of the Act deals with ‘Misconduct by Certain Public Officers’. Division 2 of Part 8 deals specifically with the Commission’s role in relation to police misconduct.

This submission addresses the terms of review and, where considered relevant, provides comment in relation to the views expressed by the Integrity Commission in its submission of October 2013 to the JSC.
Functions

The mandate for the Integrity Commission is derived from the Act, which passed into law following consideration by Parliament as to what that mandate should be. The objectives of the Commission are to improve the standards of conduct, propriety and ethics in public authorities in Tasmania. It is to do so by adopting a strong educative, preventative and advisory role as well as conducting investigations in accordance with the Act.

The Commission’s submission to the JSC contains an outline of its functions and roles which are compared and contrasted with those of integrity entities in other jurisdictions. Although there are clearly areas of similarity between the Commission’s functions and roles and those of organisations interstate, there are also significant differences. Notably, some entities are focussed solely on activities around corrupt conduct and/or serious crime, have investigative roles regarding serious or systemic corruption as their primary object and have a principal focus on the assembly of admissible evidence for the purpose of criminal prosecution. The Commission’s submission correctly notes that the Integrity Commission in Tasmania is not a ‘crime commission’ and highlights that whilst misconduct prevention and education is a primary focus of the Commission, misconduct prevention in the form of education is not a universal feature of integrity entities in the other jurisdictions.

A comparison of the integrity landscape between Tasmania and that of other jurisdictions, and particularly the evidence indicative of the extent of serious and systemic corrupt conduct in public sector organisations (in both a historical and contemporary context) will also identify significant differences between Tasmania and other jurisdictions. Notably, a number of integrity entities in other jurisdictions have their origins in royal commissions and inquiries that have revealed high levels of entrenched corruption of a serious nature. This has not been the case in Tasmania and, in this respect, the following quote from the Commission’s first annual report (October 2011) is considered relevant:

‘During this time, the Commission has seen no evidence of any systemic corruption in any part of the public sector. Rather, the evidence before the Commission is that most complainants have concerns relating to perceptions of misconduct by individuals in the public sector.’

Moreover, whilst noting the content of the Commission’s report on finalised investigations and an assessment, tabled in both Houses of Parliament on 25 June 2013 and its second report tabled on 25 September 2013 with respect to an audit of Tasmania Police complaints, it is submitted that to date, evidence of systemic corruption of a serious criminal nature that is comparable to the extent of the corruption problem in some other jurisdictions, is not evident in Tasmania.

It is also submitted that these reports and past Annual Reports of the Commission, which highlight the significant achievements of the Commission in its educative, investigative and prevention work, provide confirmation that the Commission is
working effectively, as Parliament intended, and that it is able to achieve its objectives as set out in section 3 of the Act with the powers currently available to it.

As indicated in the Commission’s submission, and as is evinced in the Second Reading Speech for the Integrity Commission Bill 2009, rather than replicate integrity entities in other jurisdictions, Parliament decided to create a unique integrity structure for Tasmania that was informed by integrity entities in other jurisdictions and adapted from them. That structure was intended to:

- be complaint based;
- not duplicate the work of other relevant bodies;
- have a preventative and educative focus;
- assess and disseminate complaints to the most appropriate body for action whilst maintaining a watching brief;
- reinforce the responsibility of public sector bodies to be accountable for their own conduct issues;
- be able to make and publish findings, without having the authority to impose a sanction for misconduct;
- reserve its investigative endeavours for systemic misconduct and allegations against senior and high profile public officers and allegations of serious misconduct by senior police officers; and
- oversee and audit the way police conduct misconduct investigations.

It is clear that Parliament specifically considered what were termed ‘weighty powers’ in determining what powers were to be granted to the Commission, and determined that some powers available to integrity entities in other jurisdictions would be made available to the Commission, whereas others would not. It is also relevant to note the infrequency with which the Commission has conducted own motion investigations and resorted to some of the powers that are already available to it, for example, search warrants and surveillance devices warrants.

It is submitted that some of the amendments the Commission are seeking would significantly extend the scope of the Commission’s functions beyond that envisioned by Parliament in creating the Commission. Moreover, in light of the above considerations there is a lack of demonstrated need for the functions, roles and powers of the Commission to be expanded and it is apparent that the Commission is largely able to achieve the objectives set for it by Parliament within the bounds of the current legislation. Consequently, it is the view of Tasmania Police that the JSC should adopt a cautious approach to recommending increases to the Commission’s functions or powers. (Further discussion regarding recommended amendments to the Act is provided under the heading ‘Powers’.)

Chapter 5 of the Commission’s submission specifically focuses on the role, functions and structure of its Misconduct Prevention, Education and Research Unit. Tasmania Police acknowledges the beneficial nature of some of the work undertaken by the Commission in this area.

Under the general heading of Impact on Public Authorities the Commission’s submission discusses its work in providing education and capacity building materials specific to Tasmania Police. This has included presentations provided by the Chief Commissioner and CEO of the Commission to Sergeant and Inspector
Courses at the Police Academy. These particular presentations have been well received and are considered by police to be more relevant and of superior quality to presentations provided previously by the Commission.

Through the delivery of in-house education and training that is provided to developmental and promotional courses, Tasmania Police focusses on the development of professional conduct and a range of ethical issues confronting police. This focus predates the inception of the Commission. Ethics and integrity training is also embedded in the recruit training program and the Academy Training Module, Integrity, Professionalism, Governance, is part of the UTAS unit HSP104 Integrity and Governance in Policing, which forms part of the Bachelor of Social Science academic programs. Tasmania Police has also developed a number of in-house online learning resources and the Commission, through feedback and consultation with Tasmania Police, has embraced the quality learning practices embedded within Tasmania Police and both agencies continue to work together to develop improved training packages.

The Commission’s submission notes the formation (in 2011) and purpose of the ‘Professional Standards Advisory Group’ which is chaired by Tasmania Police. Both Tasmania Police and the Commission are members of the Group, as is a member of the University of Tasmania (School of Philosophy). From a police perspective there have, in recent times, been relatively few meaningful agenda items listed at meetings and meetings have largely consisted of the provision of updates and information by police. From a police perspective, the meetings have been of limited value given the availability of other forums and avenues that support information exchange and the terms of reference of the Group. At the meeting of the group held on 13 November 2013 it was determined to meet on an issues/needs basis in future, rather than twice yearly.
Operations

Tasmania Police is a progressive organisation that values integrity and professionalism and encourages ethical conduct. Tasmania Police has a low tolerance toward police misconduct, has a rigorous approach toward the investigation of police misconduct and, as evinced by the Commission’s recent audit of police complaints, is ‘managing its complaint system well’.

Tasmania Police appreciates the need for a body such as the Commission to assist public sector organisations in raising standards of ethical conduct, to provide integrity oversight of their activities and, provided the activities of the Commission are in line with the authorities granted it by Parliament, will support its endeavours.

Tasmania Police notes the Commission’s comments contained within its submission (page 105) that the ‘relationship between the Commission and Tasmania Police has at times been tested’ and suggests that the cause may in part be attributable to the fact that, ‘…Tasmania Police has not previously been subject to the level of oversight which the Commission can perform’.

Tasmania Police does not agree with this comment or the basis upon which it is made. Tasmania Police is not averse to appropriate oversight. Indeed, for many years the Ombudsman has performed an independent review role in relation to the administrative actions of Tasmania Police. Tasmania Police believes that the Commission’s perception of tensions arises from Tasmania Police expressing legitimate concerns that the Commission has sought to exceed its statutory authority on occasions and the identification of inaccuracies within some Commission authored reports.

The case study ‘injury caused by collision with police vehicle’ offered by the Commission at page 108 of its submission is a case in point. As no complaint was made in relation to the collision, the matter did not fall within the Commission’s jurisdiction and Tasmania Police declined to provide the Commission with the relevant file. The Commission first publically referenced this matter in its Annual Report of 2011/2012 and provided commentary that:

‘…the Commission was told by Tasmania Police there had been no internal investigation as the incident had been treated as a traffic matter.

Whilst the Commission was advised that no internal investigation was completed, the following additional information was provided by way of letter forwarded to the Commission by the then Commander of Professional Standards:

‘…the investigation into the matter was completed in accordance with the requirements of a pursuit review and police motor vehicle accident, as no evidence of misconduct was evident during the district investigation. Professional Standards was informed of the incident and based on the briefing received from Commander ….., was content on the action being taken within the District. A district report was completed and assessed
by Commander ….. in accordance with policy. The officers were interviewed and no issues arose which highlighted misconduct. A thorough investigation was conducted into the incident…”

The Commission’s comments tended to portray an inadequate investigative response by Tasmania Police by understating the investigative response actually afforded the matter. Concerns were conveyed to the Commission during an Operational Liaison Group Meeting, however, despite this, the language used in the Commission’s current submission is essentially the same as used previously. A further review of this matter by Tasmania Police has since confirmed that the incident was not such as to have required investigation by Professional Standards, there is no basis for concluding there was any police misconduct involved, and the parties involved have never made a complaint about police, despite having had ample opportunity to do so.

The Commission’s submission also provides a case study (at pages 109 & 110) in relation to a matter involving strip searches of a 12 year old girl by police in the course of executing a search warrant for drugs. The case study highlights that the Deputy Commissioner indicated he would conduct a ‘review’ of the incident and that initially no ‘complaint’ was made in respect of the matter. The case study asserts that as the matter “… was ‘reviewed’, as opposed to being made the subject of an internal investigation - it did not fall within the Commission’s jurisdiction …’; and that because the matter had not been made the subject of an internal investigation, Tasmania Police did not notify the Commission of the matter. These assertions are based on an incorrect premise. In terms of providing notification of the matter to the Commission, it is irrelevant that the matter was ‘reviewed’ rather than formally being made the subject of an internal investigation. Had evidence of misconduct that reached the threshold that required notification of the Commission emerged from the review (regardless of who conducted it) police would have made notification to the Commission and/or, if a complaint had been made to the Commission, its jurisdiction would have been invoked. As it was, the review determined that no misconduct was evident and the actions of police were lawful.

Following a ‘complaint’ later being received by the Commission, it conducted its own witness interviews and assessment before referring the matter to Tasmania Police. This resulted in an extensive review of the material supplied by the Commission and an investigation of the ‘complaint’. The investigation reconfirmed that police were justified in strip-searching the 12 year old girl, and no evidence of misconduct on the part of any police officer involved was identified.

The police review of the matter also identified concerns in respect of the assessment and investigation conducted into the matter by the Integrity Commission. These included whether the ‘complaint’ received by the Commission actually constituted a complaint for the purpose of the Act and, contrary to what Tasmania Police would consider acceptable investigative practice, the Commission’s investigators had conducted a simultaneous
interview with the 12 year old and her mother (who was a material witness in her own right). The Commission has been alerted to these concerns. The Tasmania Police file in respect of this matter, which provides details in relation to police concerns, can be made available to the JSC.

The Commission’s submission (page 110) also refers to the audit of police complaints that it recently conducted. The audit covered every complaint finalised in the 2012 calendar year. The audit report was tabled in Parliament and is publicly available. The majority of the complaints audited were of a minor nature.

The Commission provided a draft copy of their audit report to Tasmania Police and invited comment prior to publication of the final version. Written feedback was provided to the Commission which highlighted a number of concerns Tasmania Police had in relation to inaccuracies in the report and the way in which case studies were summarised and presented to the detriment of Tasmania Police. It is pleasing to note that in some instances the wording of the final version was altered to correspond with amendments suggested by Tasmania Police. The Commission, in a subsequent letter to Tasmania Police indicated that although the response provided by Tasmania Police had not been included as an attachment to the final report, the comments offered had been either summarised or referred to in the report, ‘...such that the substance of your response is, we hope, sufficiently articulated’. It is Tasmania Police’s view that the Commission’s summary, in a number of instances, failed to adequately portray the issues raised by Tasmania Police, or explain them in context. Indeed, in a number of instances, the extent of the summary is, ‘Tasmania Police disagrees with the Commission’s view of this matter’.

The view of Tasmania Police is that the final version of the report (attached to the Commission’s submission as Appendix 6) contains information that is incorrect. For example, the audit report (at page 9) states that ‘...and the most commonly sustained Class 2 allegation was ‘crime’ (four allegations from four complaints)’. Tasmania Police’s view is that this statement conveys that four criminal allegations were sustained against officers from Tasmania Police in the period covered by the review. The Tasmania Police position is that the material audited by the Commission indicated that no criminal allegations were sustained against Tasmania Police officers. There is also an anomaly between the statistical information detailed in the chart and the accompanying explanation (19% is said to equate to 3 allegations, whereas 15% is said to equate to 4 allegations).

The authority to publish reports that may be detrimental to an organisation or an individual and to make them publically available carries with it significant responsibility. Tasmania Police notes the Commission’s recommendation that its ability to publish information about its investigations be extended in line with other interstate integrity entities. In order to provide appropriate balance, it is the position of Tasmania Police that the JSC should consider providing organisations or individuals who are named in reports published by the Commission with the same legislative authorities and protections that are
available to the Commission, i.e., to publish a response to the Commission’s comments should they wish to do so.

The Commission provides a case study (at pages 107 & 108) regarding their lack of jurisdiction to investigate matters where no complaint of misconduct is made (and in the case in question, where no indication of misconduct was evident). As with all police shootings, this matter was comprehensively investigated and reviewed by the Tasmania Police Professional Standards Command. In this case the shooting occurred as a person armed with a knife advanced upon a police officer and lunged at the officer. The offender freely admitted that it was his intention for police to shoot him. This matter proceeded to court with the Office of the Director of Public Prosecutions having carriage of the prosecution. This process provides additional scrutiny to the actions of police. In this case the presiding judge found that the officer concerned, ‘...retreated until his back was against a high fence and he had no choice but to shoot the accused in self-defence. He could retreat no further.’

In investigations relating to police shootings or where police actions give rise to life threatening injuries, the Deputy Police Commissioner assumes control of the investigation which is conducted by Professional Standards. The investigation will, as a matter of course, consider the lawfulness of police actions. Where there is any doubt in relation to the lawfulness of police actions, consistent with current protocols, the investigation file is personally reviewed by the Director of Public Prosecutions who provides advice in respect of whether any officer should be proceeded against for a breach of the law. It should be noted that in cases where death occurs as a result of police actions, the Coroner has jurisdiction over the incident and investigations are conducted on behalf of, and ultimately reviewed by, the Coroner. This provides an additional level of scrutiny of police actions in these cases.

Whilst the Commission contends it should have a role in the investigation of such matters, notwithstanding the absence of a formal complaint, Tasmania Police considers this is unnecessary and not in keeping with the role Parliament intended for the Commission.

It should be noted that despite the fact the Commission has no legislated mandate to oversight or otherwise be involved in such investigations, it has been the practice of Tasmania Police to notify the Commission of such investigations when they occur and, in some cases, to provide updates on the progress of investigations.
Powers

Discussion is provided under this heading in relation to some of the legislative amendment sought to various provisions of the Act by the Commission. Some matters relate to an expansion of the Commission’s powers but some may more accurately relate to proposed increases to the Commission’s functions or scope of operations.

Tasmania Police notes the case studies and comments by the Commission that illustrate its powers can only be utilised upon receipt of a ‘complaint’. It should, however, be noted that the ‘own motion’ investigative powers under sections 45 and 89 of the Act are available to the Commission and are not reliant upon a complaint being made. The Commission’s submission notes that these powers are reserved for ‘serious matters’ and are not often used. It is the view of Tasmania Police that the complaint based approach to activation of the Commission’s authority is appropriate and in keeping with what Parliament intended, with appropriate recourse being available to conduct own motion investigations in serious cases.

Tasmania Police notes the Commission’s comments in relation to the desirability of having direct electronic desktop access to Tasmania Police data systems (including IAPro, IDM and ICE), the Commission’s assessment of the current legal impediments to the provision of that access and the arrangements currently in place between the Commission and Tasmania Police in relation to access to data. Tasmania Police does not believe there is any demonstrated need for the Commission to have direct access to its data systems. With reference to the issues of immediacy of access and confidentiality (discussed at page 113 of the Commission’s submission) Tasmania Police is not aware of any instance where, under current arrangements, either delays in accessing information or a breach of confidentiality has proven detrimental to the Commission’s operations. The regular Operational Liaison Group Meetings between the Commission and Tasmania Police provide a forum for the examination of such issues, and the minutes of these meetings do not reveal concerns regarding immediacy being raised or of a breach of confidentiality occurring.

More fundamentally, Tasmania Police is of the view that it is not lawfully possible to permit the Commission direct access to Tasmania Police systems. A number of the data systems (including those of particular interest to the Commission) contain references to call charge data and communications intercepted pursuant to warrants issued under the Telecommunications (Interception and Access) Act 1979 (Cth). That Act restricts access to prescribed permitted purposes. The conferral of “law enforcement agency” status upon the Commission would not circumvent those restrictions as the relevant exemptions are limited to agencies investigating criminal offences (in some cases serious criminal offences) or breaches of a law imposing pecuniary penalties. Moreover, the release of call charge records and telephone intercept material must be authorised on a case by case basis. Tasmania Police cannot give carte blanche access to records containing information subject to the prohibitions imposed by the Telecommunications (Interception and Access) Act.
Tasmania Police does not believe there is any demonstrated need for the Commission to be granted “law enforcement agency” status. It would appear that the Commission primarily seeks such status to authorise it to gain access to call charge records and to apply for warrants under the *Telecommunications (Interception and Access) Act* and/or to gain access to communications intercepted by other agencies under such warrants. The conferral of “law enforcement agency” status upon the Commission would not, of itself, enable the Commission to access call charge records and telephone intercept material because the Commission does not investigate criminal offences or breaches of laws imposing pecuniary penalties.

Tasmania Police notes the Commission’s contention that it should retain jurisdiction over a complaint after referral to an appropriate person or entity for action. In this respect the Commission’s comments that it is unable to ‘direct the referred authority or entity in relation to action that should be taken’ and cannot currently ‘impose time frames for outcomes or actions’ are also noted. In Tasmania Police’s view, it is not desirable that the Commission be granted these authorities. It seems clear that Parliament intended the Principal Officer of the relevant authority to be responsible for the imposition of sanctions and implementing remedial measures to improve the ethical health of his/her respective organisation. It is suggested that the grant of additional powers to the Commission in this area would tend to usurp and possibly constrain the authority of the Principal Officer. It seems that the Principal Officer would also be best positioned to make determinations in respect of timeframes, having regard to the relative importance of other resourcing issues and work demands impacting upon the organisation that the Commission may not be alert to.

Tasmania Police already provide notification to the Commission of misconduct by police officers, in line with the terms of the Memorandum of Understanding between the two organisations. Tasmania Police is not opposed to the creation of a statutory obligation in relation to the notification of misconduct by all public authorities, consistent with the arrangements that are currently in place for police.

At page 128 of its submission the Commission offers a case study headed ‘Inability to conduct an audit of an investigation’. Tasmania Police notes the Commission’s contention that the ‘Commissioner of Police subsequently undertook a review of the matter and committed to take action to address the systemic deficiencies identified by his review’. Insofar as Tasmania Police is aware, the issue identified by the Commission as being of concern, was a perception that an officer who was the subject of an internal investigation had been dealt with leniently. Tasmania Police does not agree with the comment that systemic deficiencies were identified, or appreciate the basis upon which it is made. This matter was reviewed, and the review identified that a report that had been provided to the then Acting Deputy Commissioner of Police was deficient in that it summarised various allegations in respect of an officer who was the subject of investigation, rather than clearly identifying which particular allegations had been proven. However, the review confirmed that the conclusions expressed in the internal investigation file were sound, and whilst the penalty ultimately awarded to the officer concerned was at the lower end of the acceptable penalty range, it was within range. Tasmania Police does not agree that this can be characterised as a systemic deficiency.
Tasmania Police notes the discussion provided in relation to the preservation of the right to claim privilege, such as the privilege against self-incrimination (page 120). Tasmania Police (whilst cognisant of some jurisdictional variation) would not be opposed to amendment that would bring the Commission's powers into line with those of interstate jurisdictions in which integrity entities have the power to direct that privileged information be provided to the entity, on the proviso that incriminating information may not be used in any criminal proceedings against the person.