TASMANIAN GOVERNMENT SUBMISSION

to the inquiry of the

Joint Select Committee of the Tasmanian Parliament
into ethical conduct, standards and integrity of elected
Parliamentary representatives and servants of the State

Tasmania
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Contents

1 Introduction

1.1 Terms of Reference

A Joint Select Committee (the 'Joint Committee') of the Tasmanian Parliament has been appointed to inquire into and report upon the issue of ethical conduct, standards and integrity of elected Parliamentary representatives and servants of the State in performing their duties with particular reference to:

- A review of existing mechanisms currently available to support ethical and open Government in Tasmania and the capacity to conduct independent investigations;
- An assessment of whether those mechanisms need to be augmented by the establishment of an Ethics Commission or by other means and if so by what means;
- Any matters incidental hereto.

1.2 Purpose

This submission presents information and issues that the Government wishes to place before the Joint Committee to assist its deliberations in identifying appropriate ethical conduct, standards and integrity frameworks and assessing the adequacy of existing arrangements.

In providing this information the Government recognises that the Joint Committee will consider a range of submissions from various groups and will make recommendations based on its analysis of all the submissions before it.

This submission does not take a final position on all aspects of an accountability framework for elected Parliamentary representatives and servants of the State but does make some specific recommendations. The final model that the Government proposes will be informed by the work of

the Joint Committee and the Government looks forward to the publication of that report.

1.3 Principles

The Government's principles for dealing with any identified gaps in the ethics, integrity and accountability frameworks that already exist for public bodies are to:

- Build on the existing structures and mechanisms;
- Recognise that prevention of unethical behaviour is as important as responding to instances of it;
- Deal appropriately with potential maladministration, misconduct and corruption and by establishing mechanisms that are commensurate with the identified behaviour;
- Be cautious about increasing the number of officials who have authorisation to exercise strong coercive investigatory powers;
- Be clear about which public bodies are to be covered, and take a consistent approach to relevant public bodies, including the Parliament and the Executive; and
- Ensure any proposed structure allows for oversight that is independent from the Government of the day.

1.4 Structure

This submission addresses each aspect of the terms of reference by considering:

- The system of government in Tasmania;
- What is meant by ethical conduct and the scope of unethical conduct;
- The mechanisms currently available to support ethical conduct, standards and integrity in Tasmania;

- The mechanisms and powers currently available to investigate and review conduct or behaviour of elected Parliamentary representatives and servants of the State;
- The application of any ethical, integrity and accountability framework to Parliamentary representatives and their staff;
- The application of any ethical, integrity and accountability framework to Ministers and their staff;
- The scope of what is meant by 'servants of the State' and the application of any ethical, integrity and accountability framework to this group; and
- The adequacy of current arrangements.

The submission presents a range of options and models that the Government believes the Joint Committee should consider as part of its deliberations and final report.

2 Background – the Tasmanian system of Government

2.1 Three arms of government

Tasmania's system of Government is derived from the traditions and conventions of the Westminster, or Cabinet, system of Government. In addition the *Constitution Act 1934* sets out some specific aspects of government in Tasmania. Specifically it includes provisions concerning the House of Assembly and the Legislative Council but does not include a detailed description of the system of government. The Constitution has very little to say about the roles and functions of Premier, Ministers or the Governor. These roles are either codified in documents, such as Letters Patent, Commissions etc or by convention.

There are three distinct but interacting arms of government: the Parliament, Executive and Judiciary.

The Parliament —which is made up of elected members and the Governor and has the power to enact laws within the scope of its constitutional power.

The Executive — which consists of the Government and its Ministers (who make up the Cabinet) and the public service whose role it is to administer and implement the policy agenda of the Government. Some, but not all, of this agenda is reflected in legislation.

The Judiciary – which is made up of the Supreme Court and subordinate courts whose function it is to apply and interpret statute and common law.

In summary, the Parliament makes the laws, the Executive implements and often proposes them and the Judiciary interprets them.

A fundamental tenet of the Westminster Government is that the Executive is accountable to the Parliament. Key doctrines of accountability are the individual and collective ministerial responsibility to Parliament. They work to

ensure that the Executive does not act irresponsibly or contrary to the will of the community (the voters).

2.2 Parliament

Tasmania has a bicameral Parliament. There are two chambers of Parliament: the House of Assembly and the Legislative Council. Parliament is a deliberative body; its central function is law making.

Parliament is both a vehicle through which the Government implements its policies through the passage of legislation, and by which the community, via the Opposition parties and independent members, holds the Government accountable for those policies and their implementation.

The House of Assembly is the House that determines the Government of the day. The political party that has the support of the majority of members in this chamber forms the Government. The Government has the opportunity and the obligation in the House to explain its policies fully and the action it intends to take to implement them. Opposition parties and independent members can scrutinise the conduct of the Government and its members. This is done through question time, questions on notice, private members business and through debates during the passage of legislation and the Budget etc.

The Legislative Council is principally a house of review as most legislation originates in the Assembly. In Tasmania, it is made up mostly of independent members and has the reputation for being one of the toughest houses of review (in parliaments of the Westminster tradition) that effectively holds the Government of the day accountable for its decisions and policy initiatives.

Members of both chambers are also involved in Parliamentary Standing and Select Committees, which conduct inquiries into a wide range of matters.

Further detail is provided about parliamentary mechanisms for review and investigation of ethical conduct, standards and integrity in section 5.1.

2.3 The Governor

The Constitutional Head of State is the Queen and the *Australia Act 1986 (Commonwealth)* provides that the Queen's representative in each State is the Governor. The office of Governor is established by Letters Patent (the current version was approved on 21 November 2005). The Governor is part of the Parliament (see section 10 of the *Constitution Act 1934*). No legislation can come into force without the consent of the Governor, as The Queen's representative. The Governor is part of the parliamentary process, although essentially a formal part, since the Governor is bound as a matter of convention to act on the advice of Ministers and so to give the Royal Assent to all Bills which go to him or her for that purpose.

The ethical, integrity and accountability framework applicable to the Governor and Governor's staff is outside the terms of reference of the Joint Committee.

2.4 The Executive

The Executive has two components:

- *The Ministry (or Cabinet)* which is the policy-making and political arm, consisting of those elected members of Parliament who are also Ministers (ie members of Cabinet) and their direct staff; and
- *The Public Service* which is the policy implementation and administration arm, staffed by public servants, whose job it is to support the Ministers and carry Government policy into effect.

2.4.1 The Ministry or Cabinet

Cabinet is central to our system of government and is the focal point of the decision-making process of the Executive. The decisions and policies of the Government are formed in and agreed by the Cabinet.

The Cabinet is not explicitly provided for in the Constitution or by any other law. It is a convention inherited from the Westminster system. (But its existence is recognised in some legislation, for example the *Freedom of Information Act 1991*).

The Cabinet comprises the Premier (as Chair) and all Ministers, but may include other people at the Premier's discretion. Section 8A of the *Constitution Act 1934* limits the number of Ministers to a maximum of nine, including the Premier, or eight if there is a person formally appointed as Secretary to Cabinet.

The long-established conventions of collective and individual responsibility of Ministers and confidentiality are hallmarks of the Cabinet system of government.

Collective responsibility

This concept involves three elements:

- *Commitment* - all members of Cabinet are bound by and taken as being responsible for a decision of the Cabinet and action taken to implement a decision;
- *Solidarity* - Ministers must not publicly speak against a decision of the Cabinet;
- *Confidentiality* - all discussion in the Cabinet and all decisions (until released) must be kept in confidence.

The substance of this convention today is that Ministers collectively support government policy and defend the policy in Parliament and public.

Individual Responsibility

In the purest sense of this principle, a Minister is individually responsible to Cabinet and to the Parliament for the general conduct of the public service department(s) for which he or she is responsible and for the acts done (or indeed left undone) by others in the name of the Minister.

Over time the convention has evolved so that the current practice is that a Minister's personal responsibility would only threaten his or her tenure insofar as the Minister is personally at fault.

The community is entitled, through the parliamentary process, to have Ministers provide full and frank disclosure on matters brought before the Parliament for which they are responsible. Under Westminster conventions, any deliberate misleading of the Parliament results in the resignation or removal of the Minister from the ministry.

2.4.2 The Public Service

Ministers are assisted in their executive functions by the public service. The public service owes its loyalty to the government of the day and its duty is to implement that government's policy program.

The public service (known in Tasmania as the 'State Service') is comprised of public servants employed in government departments and agencies. The

State Service Act 2000 defines the State Service Principles, which characterise the nature of the role and ethos of the public service, as follows:

- The State Service is apolitical, performing its functions in an impartial, ethical and professional manner;
- The State Service is a public service in which employment decisions are based on merit;
- The State Service provides a workplace that is free from discrimination and recognises and utilises the diversity of the community it serves;
- The State Service is accountable for its actions and performance, within the framework of Ministerial responsibility, to the Government, the Parliament and the community;
- The State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- The State Service delivers services fairly and impartially to the community;
- The State Service develops leadership of the highest quality;
- The State Service establishes workplace practices that encourage communication, consultation, cooperation and input from employees on matters that affect their work and workplace;
- The State Service provides a fair, flexible, safe and rewarding workplace;
- The State Service focuses on managing its performance and achieving results;
- The State Service promotes equity in employment;
- The State Service provides a reasonable opportunity to members of the community to apply for State Service employment; and

- The State Service provides a fair system of review of decisions taken in respect of employees.

The public service is discussed in more detail in section 4.5.

2.5 The Judiciary

Tasmania's court system is the third arm of government. It is also known as the Judiciary.

The functions of the Judiciary are to interpret and apply the common law and the laws made by the Parliament; review certain administrative decisions; and determine some types of disputes between citizens.

The ethical, integrity and accountability framework applicable to the Judiciary is considered outside the terms of reference of the Joint Committee.

3 Ethical conduct and unethical conduct

3.1 Ethical Conduct

Ethical conduct may be achieved through:

- Shared values; and
- Rules and accountability mechanisms.

Any ethical, integrity and accountability framework needs to incorporate both values and rules, and be supported with appropriate guidance and advice.

Values such as integrity, fairness, equality and honesty are a necessary part of a system of responsible government. A sound values-based system that permeates public life and drives decision making and action will support ethical conduct. Principles such as the State Service Principles (see section 2.4.2) and the Seven Principles of Public Life articulated by the UK Committee on Standards in Public Life in 1994 (see section 4.3.1) have been developed to guide public officers in the performance of their duties. They set out principles to assist officials to maintain the expected standards of conduct in public office and to act as a benchmark against which that conduct can be measured.

However, values alone may not be enough to guarantee ethical conduct. Accountability standards (such as regulations, rules, codes and guidelines) are also important for achieving ethical conduct. Codes of conduct are designed to regulate conduct of public officials. They can clarify the standards of conduct expected and may incorporate sanctions or other measures to compel compliance.

Supporting public officials to understand and interpret values and related rules and accountability mechanisms is essential to ensure they can put them into practice. It should be recognised that not all issues that arise in ethical

decision making are black or white and there may be a range of conduct which is acceptable within an ethical framework.

Section 4 of this submission explores the existing mechanisms for promoting and regulating ethical conduct, standards and integrity. In later sections, gaps are identified together with some possible improvements for further examination.

3.2 Unethical conduct

A broad spectrum of behaviour can be described as unethical conduct, ranging from minor administrative failings, breaches of conventions or guidelines, contraventions of legislation and ultimately, and most seriously, activity which is criminal in nature.

In any ethical conduct, standards and integrity framework the continuum of these behaviours must be addressed with proportionate responses and sanctions. Systems need to be in place to deal appropriately with each level of misbehaviour. These need to include prevention strategies that promote a culture of ethical behaviour to avoid the misbehaviour occurring in the first place, as well a series of sanctions and other regulatory tools that can be applied in the event of unethical conduct.

Legislation, guidelines and codes of conduct both local and from other jurisdictions refer to unethical behaviour in a variety of terms. Phrases such as 'official misconduct', 'fraud', 'corruption' and 'maladministration' are common.

The terminology tends to reflect the nature of the behaviour, but as may be seen in the examples below, there can be inconsistency in the meaning of terms used and some overlap of concepts.

The *Commissions of Inquiry Act 1995* defines misconduct to be 'conduct by a person that could reasonably be considered likely to bring discredit upon that person'.

The *Public Interest Disclosures Act 2004* contains a definition of 'corrupt conduct'. It is conduct of a:

- Person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions;
- Public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality;
- A public officer, a former public officer or a public body that amounts to a breach of public trust;
- A public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or
- A conspiracy or attempt to engage in conduct referred to above.

The Act then defines 'improper conduct' to mean:

- Corrupt conduct;
- A substantial mismanagement of public resources;
- Conduct involving substantial risk to public health or safety; or
- Conduct involving substantial risk to the environment.

that would, if proved, constitute a criminal offence; or reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public officer who was, or is, engaged in that conduct.

For the purposes of this submission, it is proposed that unethical conduct be classified into three categories, that is:

- Maladministration;
- Misconduct; and

- Corruption.

These terms, suitably defined, can provide a structure for considering an appropriate ethical, integrity and accountability framework for Tasmanian public sector. Furthermore, remedial actions or sanctions can be tailored to be commensurate with the severity of the unethical conduct.

3.2.1 Maladministration

The term maladministration can be used for those actions of an administrative nature that have not been performed appropriately, properly or with due regard to the law and accepted policies and practices. Maladministration would involve breaching obligations found in, for example, the financial management or audit manual of a department, the processing of a request under the *Freedom of Information Act 1991* or other requirements for administration under the *State Service Act 2000*. The conduct would encompass inefficient, incompetent and poorly reasoned decision making.

There are existing mechanisms for reviewing or dealing with maladministration. For example, the Ombudsman has a role in reviewing Freedom of Information decisions, the Auditor-General has powers to review the financial management practices of a public sector body and the State Service Commissioner can review employment-related decisions of State Service agencies.

Maladministration is less serious than misconduct and not on the same scale as corruption. The likely sanctions for this type of behaviour are admonishment, a warning or public exposure through an unfavourable report.

3.2.2 Misconduct

Misconduct is more serious than maladministration. Codes of conduct may be breached and this is likely to involve some dishonesty. It generally involves

a level of recklessness or intent beyond mere poor administration, but is less serious that corruption. It can involve deception, or an individual gaining an unjust or unfair advantage for themselves or another person. It is more than just not paying attention, not taking care or not exercising due diligence, which are better characterised as maladministration.

At the upper level of unethical behaviour, misconduct may involve criminal activity, but not necessarily. Fraud is one example of behaviour that may be categorised as misconduct. To distinguish it from corruption, misconduct would not involve entrenched systemic bad practice.

Sanctioning of misconduct may involve the removal of a person from undertaking their duties (for a period of time), a demotion or removal of privileges. If criminal activity has been involved then there would be legal sanctions associated with the offence.

3.2.3 Corruption

Corruption, in which deliberate and substantial dishonesty is a major aspect, is the most serious of the forms of unethical behaviour.

It would normally involve a breach of the criminal law and the attainment by an individual of a significant unfairly or illegally obtained financial or personal advantage. If left unaddressed corruption is likely to lead to an endemic and entrenched culture of unethical behaviour. This may involve many parties who may benefit from or be complicit in the behaviour.

Penalty provisions for corruption are likely to include a term of imprisonment and, in the case of employees, termination of employment. Where corruption is systemic, it may require broad-based investigation and inquiry through either a Parliamentary Committee or a Commission of Inquiry.

3.2.4 Summary

Although maladministration, misconduct and corruption are not mutually exclusive terms and it is difficult to accurately and unambiguously define the three concepts, they provide an indication of the range and severity of unethical behaviour. Because of the varying motivations and outcomes inherent in these different types of unethical conduct, not all such behaviour should or needs to be dealt with in the same way.

These terms can provide a structure for considering an appropriate ethical, integrity and accountability framework for Tasmanian public sector. Furthermore, remedial actions or sanctions can be tailored to be commensurate with the severity of the unethical conduct.

If these terms are helpful in classifying unethical behavior it will be important that the use of these terms in legislation, codes and guidelines is assessed and amended to ensure consistency.

They will also inform and help decide the processes that an Ethics Commission, or similar body, may need to establish, if such an entity is formed as a result of this Inquiry.

Section 5 explores the existing mechanisms for investigating and review of maladministration, misconduct and corruption.

4 Current mechanisms that regulate ethical conduct

The Tasmanian system of government already has a number of mechanisms that guide, support and promote ethical behaviour by parliamentarians, Ministers, state servants, and other office holders. The mechanisms are a mixture of legislation, guidelines and codes.

They are classified in this section according to the people to whom they apply.

4.1 Candidates for Parliament

4.1.1 The Electoral Act 2004

There are rules in the *Electoral Act 2004* in relation to candidates seeking election to the Parliament, including members of Parliament seeking re-election, concerning conduct regarding election, campaigning and advertising. These include:

- Section 187 - electoral bribery;
- Section 188 - electoral treating, that is the supply of entertainment, food or promise to donate money with the intention of influencing a person's conduct at an election;
- Section 189 - electoral intimidation;
- Section 191 - campaign material must be authorised;
- Section 196 - candidates names not to used without authority;
- Section 197 - misleading and deceptive electoral matters; and
- Section 198 - campaigning on polling day.

There are also rules in relation to electoral expenditure of candidates in respect of Local Government elections. These are detailed in Part 7 Division 6 of the *Electoral Act 2004*.

There are currently no provisions governing the disclosure of political donations, however in early 2008 a motion was passed supporting the enactment of Tasmanian law requiring the disclosure of political donations. This has been referred to the Standing Committee on the Working Arrangements of Parliament for consideration. At the same time, the Commonwealth Government is working toward reform of the electoral funding and financial disclosure at federal elections.

A Commonwealth Bill regulating political donations is currently before the Senate and a Green Paper is being prepared that will propose another set of reforms regarding political donations and campaign costs. There may soon be opportunities for law reform at a state and territory level so that a consistent set of rules can be established to deal with political donations.

4.1.2 Rules for State Servants

An officer of the State Service who is a candidate for election to either House of State Parliament must vacate the office on becoming a candidate, ie when nominations have closed, and the person is formally recognised as a candidate.

An employee of the State Service who is a candidate for election to either House of State Parliament does not have to resign prior to contesting a seat but is entitled to leave without pay for a period of up to two months for the purpose of contesting an election - Section 2(2)(b) of the *Constitution (State Employees) Act 1944*.

If elected, the *Constitution (State Employees) Act 1944* provides that service as an employee of the State Service is automatically terminated.

While on leave without pay to contest an election, care should be taken by the employee to ensure compliance with the Code of Conduct provisions as outlined in Section 9 of the *State Service Act 2000*. The State Service Code of Conduct requires state servants:

- When acting in the course of their State Service employment, to behave in a way that upholds the State Service principles (the State Service Principles assert that the 'State Service is apolitical, performing its functions in an impartial, ethical and professional manner');
- To behave in a way that does not adversely affect the integrity and good reputation of the State Service;
- To disclose and take reasonable steps to avoid conflicts of interests in connection with State Service employment; and
- To use Tasmanian Government resources in a proper manner.

Rules around the use of Government resources apply at election time and to all State Servants whether standing for election or not. For example, State Servants:

- Must not use agency resources or their positions to support particular issues or parties during the election campaign; and
- Should not use government email, faxes etc to distribute political material. This action would be a breach of the State Service Code of Conduct.

4.2 Members of Parliament

Some examples of the existing accountability mechanisms applying to members of Parliament include:

- Provisions in the Constitution Act;
- Parliamentary privilege;
- Disclosure of interests; and
- A Code of ethical conduct.

4.2.1 Constitution Act 1934

There are specific offences in the *Constitution Act 1934* that apply to members of Parliament. Some of these relate to ethical behaviour and include:

- Section 32, which provides that members cannot hold an office of profit, that is receiving money from the public accounts or because of a Government appointment.
- Section 33, which provides that any person who holds a contract or agreement with the Government of the State shall be incapable of being elected or of sitting or voting as a member of either House during the time he or she holds that contract. Further, if any member continues to hold a contract under which he or she receives benefit his or her seat will be vacant.
- Section 34, which provides that a member's seat shall be become vacant in certain circumstances including:
  - The member fails to attend for one entire session without the permission of such House; and
  - The member is attainted of treason or convicted of any crime and is sentenced or subject to be sentenced to imprisonment for any term exceeding one year unless he has received a free pardon.

4.2.2 Parliamentary Privilege

Parliamentary privilege is a term used to describe the rules relating to:

- The privileges or immunities of the Parliament; and
- The powers of the Parliament, particularly its power to hold inquiries and to punish contempt.

The term 'privilege' does not refer to benefits or entitlements enjoyed by members of Parliament but to certain immunities from ordinary law that,

together with the exercise of parliamentary powers, enables the Houses of Parliament to carry out its primary functions effectively and independently. Individuals may be punished with imprisonment for things such as refusing to answer questions put by Parliamentary Committees, obstructing members, creating a disturbance or offering bribes to members.

Parliamentary privilege in relation to Australian parliaments derives from the Westminster parliamentary tradition. This tradition is preserved and augmented by legislation in each jurisdiction. In Tasmania this consists primarily of the *Parliamentary Privilege Act 1858*, elements of the *Defamation Act 2005* and the *Criminal Code Act 1924*.

4.2.3 Disclosure of Interests

The *Parliamentary (Disclosure of Interests) Act 1996* specifies the type of interest that a member of Parliament must disclose and establishes a register of interests. Failure to provide the relevant information is punishable by contempt.

4.2.4 Code of Ethical Conduct

The Tasmanian House of Assembly has a Code of Ethical Conduct and a Code of Race Ethics contained in its Standing Orders (Part 2). When members are being sworn in after their election to the House they are required to state that they have read and subscribed to both codes.

The Code of Ethical Conduct was adopted in 1996 and contains a preamble, statement of commitment and a list of nine general declarations about a range of issues relating to enhancement of ethical conduct, preventing conflicts of interest, gifts and using public property for personal gain. Post separation employment is also dealt with in the Code.

The Code of Race Ethics comprises a number of commitments including respect of cultural beliefs, valuing diversity, help without discrimination and Aboriginal reconciliation.

4.3 Ministers/Government Members

Ministers are accountable to the Parliament for their actions. The conduct of Ministers and Government members of Parliament is further regulated under other instruments, such as a specific code of conduct, conventions about Cabinet and, in relation to Ministers, specific legislation for which they are responsible. Other general legislative provisions regulating behaviour, such as the Criminal Code, apply to Ministers as they apply to anyone else.

4.3.1 Code of Conduct

In 1998, the former Premier, Jim Bacon, introduced a code of conduct for all Government members of Parliament. The Code was revised in 2006 after the election of Paul Lennon as Premier. All Government members commit to adhere to the Code.

The Code is for the guidance of all parliamentary members of the Government. It sets out principles to assist members in observing the expected standards of conduct in public office and to act as a benchmark against which that conduct can be measured.

The Code includes a reference to the seven principles of public life set out in the first report of the UK Committee on Standards in Public Life.

Accompanying the Code is a policy on the receiving and giving of gifts, which again applies to all Government members. The policy includes provision for the register of gifts received to be tabled annually in Parliament. In addition to Government members of Parliament, the policy applies to the immediate families of Government members of Parliament (ie spouses, partners and dependent children) but only in relation to or consequential on the official duties of the member.

The ~~Seven Principles of Public Life*~~ are

Selflessness

Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.

* These Seven Principles of Public Life were set out in the first report of the UK Committee on Standards in Public Life established in 1994.

4.3.2 *Government Members Handbook*

The Department of Premier and Cabinet publishes a Government Members Handbook which provides additional guidance to Ministers and other Government members about:

- Roles and responsibilities of members;
- Application of codes of conduct;
- Receipt and giving of gifts;
- Official functions;
- Caretaker conventions;
- Allowances and benefits; and
- Ministerial entitlements.

4.3.3 *Cabinet Handbook*

In addition to the Government Members Handbook, the Cabinet Handbook produced by the Department of Premier and Cabinet's Cabinet Office provides specific guidance as to the operation of Cabinet and its conventions, such as collective decision making and confidentiality. These are discussed in section 2.4.1.

4.4 Ministerial Staff

Over time, ministerial staff have become an increasingly important feature of modern Australian government. Ministerial staff may include advisers in specific portfolio areas or electorate staff. It is now well accepted practice for Ministers to be assisted by these staff who have roles outside of the formal apolitical bureaucratic structures of the State Service.

Over the years there has been a growth in the numbers of ministerial staff, and the seniority and status of some key advisers. Some institutional

arrangements exist to support ministerial staff but it is acknowledged that there are gaps.

Ministerial staff, who are not permanent State Servants, are appointed by instruments of appointment approved by the Premier. These are known as Crown or Royal Prerogative appointments. Permanent State Servants may also be appointed as ministerial staff. In these cases employees are seconded to ministerial offices via a secondment arrangement made under Section 46(1)(b) of the *State Service Act 2000*.

The instruments of appointment detail a code of conduct for ministerial staff that reflects the wording of the State Service Code of Conduct. Staff are expected to comply with a standard of conduct necessary to ensure that the integrity and ethical standards expected of a servant of the Crown are maintained. This includes that they must:

- Behave honestly and with integrity;
- Act with care and diligence;
- Treat everyone with respect and without harassment, victimisation or discrimination;
- Comply with all applicable Australian law;
- Comply with any lawful and reasonable direction given by a person having authority to give the direction;
- Maintain appropriate confidentiality about dealings of, and information acquired;
- Disclose, and take reasonable steps to avoid any conflict of interest;
- Use Tasmanian Government resources in a proper manner;
- Not knowingly provide false or misleading information;
- Not make improper use of information gained in the course of employment or of the status, power or authority derived from the

employment in order to gain, or seek to gain, a gift, benefit or advantage for themselves or for any other person; and

- Declare a gift received in the course of employment or in relation to his/her appointment to their designated manager.

There is some guidance about current rules for ministerial staff contained in the Government Members Handbook (see section 4.3.2).

4.5 The Public Service

There are two important forces that have shaped today's public service across Australia. The first is the Westminster ideal that embraces the notions of a merit-based, politically neutral, professional career service. The second are the public sector reform objectives that emerged in the latter part of the 20th century that have included the following objectives:

- Efficiency and effectiveness;
- Open and transparent government;
- Internal equity and welfare;
- Responsiveness; and
- Accountability and responsibility.

There are a number of mechanisms and guidelines (encapsulated in legislation and codes of conduct) that are designed to ensure ethical behaviour within the public sector.

4.5.1 State Service Act 2000

In Tasmania, most public sector employees are employed on a permanent basis under the *State Service Act 2000*.

The *State Service Act 2000* sets out the way state servants are employed and their expected standards of performance. The principles that underpin the State Service are set out in section 7 of the Act.

Most importantly the Act provides for merit protection. This means that employment decisions must be based on an assessment of a person's ability to do the work involved, be objective and fair, avoid patronage and favouritism and unjustified discrimination. The Act requires that actions taken and decisions made in relation to employment are fair and equitable and are taken or made in accordance with sound personnel and management practices.

4.5.2 State Service Code of Conduct

A State Service Code of Conduct is detailed at section 9 of the *State Service Act 2000*. This establishes standards of behaviour and conduct that apply to all employees, including senior officers and Heads of Agencies. All State Servants are obliged to:

- Behave honestly, with integrity and to uphold the State Service Principles;
- Treat people with respect;
- Comply with the law;
- Avoid and declare conflicts of interest;
- Not provide false or misleading information or make improper use of information; and
- Declare gifts received.

4.5.3 Commissioner's Directions

The Act (section 17) also establishes the role of State Service Commissioner (the Commissioner's role is discussed in section 5.2.3 of this Submission).

The Commissioner may issue legally binding directions in relation to any matter relating to the Commissioner's statutory functions. Currently there are 12 Commissioner's Directions (see www.ossc.tas.gov.au). Of particular

relevance to ethical conduct are directions concerning the following aspects of public service work:

- Employment decisions in the State Service;
- State Service Principles;
- The investigation and determination of whether an employee has breached the Code of Conduct;
- Reviewing State Service actions; and
- Gifts and benefits.

4.5.4 Ministerial Directions

In addition to the directions that may be issued by the Commissioner the Minister responsible for the administration of the *State Service Act 2000* may issue Ministerial Directions that relate to the administration of the State Service.

A current Ministerial Direction of relevance to ethical behaviour is 'Internet and email use by State Service Officers and employees'. Other directions relate to administrative entitlements, such as leave and travel.

4.5.5 Financial Management

The flow of funds associated with the administration of government has always had the potential to provide opportunity for unethical conduct. Regulation of expenditure and financial audit are important tools in preventing and managing risks of maladministration, misconduct and corruption within government.

The *Financial Management and Audit Act 1990* sets the framework for the flow of funds in the Tasmanian public sector. The Act provides for the management of the public finances of Tasmania in an economical, efficient and effective manner consistent with contemporary accounting standards and financial practices, and for the audit of public finances. The statutory

office of the Auditor-General is established by this Act (the Auditor-General's role is discussed under section 5.2.2).

Under the Act, the Treasurer issues instructions about the principles, practices and procedures to be observed in the financial management of all agencies. The Treasurer has issued a range of instructions relating to appropriate procedures related to:

- Procurement and disposal of goods;
- Government contracts; and
- Financial and budget management.

The Treasurer's Instructions (TI) define ethical conduct in relation to these matters. For example, TI 1101 Procurement Principles: goods and services provides (in part) that

" (c) Government buyers must observe the Procurement Ethical Standards detailed below and abide by the Procurement Code of Conduct also detailed below.

Procurement Ethical Standards

(i) All business must be conducted in the best interests of the State, avoiding any situation which may impinge, or might be deemed to impinge, on impartiality;

(ii) Public money must be spent efficiently and effectively and in accordance with Government policies;

"public money" means money, negotiable instruments or securities of any kind for the payment of money collected, received or held by a person for or on behalf of the Crown in right of the State and includes all money forming part of, or payable to, the Public Account *(Financial Management and Audit Act 1990);*

(iii) Agencies must purchase without favour or prejudice and maximise value in all transactions;

(iv) Agencies must maintain confidentiality in all dealings; and

(v) Government buyers involved in procurement must decline gifts, gratuities, or any other benefits which may influence, or might be deemed to influence, equity or impartiality.

Procurement Code of Conduct

Buyers must:

(vi) Ensure that all potential suppliers are provided with identical information upon which to base tenders and quotations and are given equal opportunity to meet the requirements;

(vii) Establish and maintain procedures to ensure that fair and equal consideration is given to all tenders and quotations received;

(viii) Offer a prompt and courteous response to all reasonable requests for advice and information from potential or existing suppliers;

(ix) Promote fair and open competition and seek value for money for the Government;

(x) Be equitable in the treatment of all suppliers of goods and services;

(xi) Seek to minimise the cost to suppliers of participation in the procurement process;

(xii) Protect confidential information;

(xiii) Deal honestly with suppliers;

(xiv) Keep accurate records to justify the process and any decisions made;

(xv) Complete a conflict of interest declaration and take steps to avoid involvement in any procurement activity where any conflict of interest (actual or perceived) may arise; and

(xvi) Abstain from soliciting or accepting remuneration or other benefits from a supplier for the discharge of official duties.

For all purchases, agencies must ensure that the procurement process meets public sector probity requirements, that value for money is obtained and that the separation of roles and responsibilities between the contractor and agency staff is maintained for the duration of the contract.

Probity issues are dealt with in the Department of Treasury and Finance publication *Probity Guidelines for Procurement,* which can be found in the Buying for Government section of www.purchasing.tas.gov.au, under Resources (Publications).

(d) Agencies must require suppliers to act ethically and in accordance with relevant industrial relations and occupational health and safety legislation."

As another example, TI 1106 (about Goods and Services procurement valued at more than $10 000 but less than $100 000) provides:

- Agencies must ensure that persons submitting quotations are dealt with fairly and equitably during the quotation process;
- Fair and impartial procedures must be in place in relation to receiving and opening all quotations; and

- Quotations must be fairly and equitably evaluated in a manner that is consistent with the Government's procurement principles. The final decision must be able to withstand public scrutiny.

4.5.6 Personal Information Protection

As custodians of a great amount of personal information about people within the community, the public service must deal with that information ethically.

The *Personal Information Protection Act 2004* regulates the collection, maintenance, use and disclosure of personal information relating to individuals. Personal information means any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion. There are a number of principles set out in the Act that set standards and rules for the way information should be collected, used, stored and disposed of. The public sector must comply with these principles.

The Ombudsman has the responsibility for overseeing the operation of the *Personal Information Protection Act 2004*.

4.6 Caretaker Conventions

Special rules have been developed which apply to the Executive (covering both the Ministers and their staff, and the public service) during the lead up to an election.

By convention, during the period preceding an election for the House of Assembly, the government assumes a 'caretaker role'. This practice recognises that, with the dissolution of the House, the Executive cannot be held accountable for its decisions in the normal manner, and that every State election carries the possibility of a change of government.

The caretaker period begins at the time the House of Assembly is dissolved and continues until the election result is clear or, if there is a change of government, until the new government is appointed.

During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. The role of government agencies remains unchanged, the provision of all normal services continues and statutory responsibilities are not affected.

However, successive governments have followed a set of practices, known as the 'caretaker conventions', which aim to ensure that their actions do not inappropriately bind an incoming government and limit its freedom of action.

While business continues, as it applies to ordinary matters of administration, the caretaker conventions do affect some aspects of executive government. In summary, the conventions are that the government avoids:

- Making major policy decisions that are likely to commit an incoming government;
- Making significant appointments; and
- Entering major contracts or undertakings.

There are also established conventions and practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the State Service, preventing controversies about the role and work of the State Service during an election campaign, and avoiding the use of government resources in a manner to advantage a particular party.

The conventions and practices have developed primarily in the context of the relationship between Ministers and their portfolio departments. The relationship between Ministers and other bodies, such as statutory authorities, government business enterprises and State-owned companies, varies from body to body. However, those bodies should also observe caretaker conventions and practices unless to do so would conflict with their legal obligations or compelling organisational requirements.

4.7 Freedom of Information

Access to information underpins accountability mechanisms, because the public, the media and non-government members of Parliament can obtain information about government administration and decisions.

The *Freedom of Information Act 1991* gives people the right to:

- access personal information about them or their affairs that an agency or Minister may hold; and
- be provided with information held by government agencies and Ministers, unless the information is exempt from release.

The provisions of the Freedom of Information Act apply to Ministers and the public service, but also local government and other public authorities. Prior to the Act the release of information was largely at the discretion of an agency or Minister.

These following persons may make decisions under the Act about the release of information:

- Ministers;
- Heads of Agency; and
- Authorised Freedom of Information officers – these are State Servants who have been authorised by a head of agency as a Freedom of Information officer.

In general, authorised Freedom of Information officers make decisions on behalf of agencies.

There are exemptions (defined in Part 3 of the Act) to the general right to access information that prevent the release of specific information. These include *inter alia*:

- Executive Council and Cabinet information;
- Personal information about another person;

- Commercial in confidence information and trade secrets;
- Internal working information;
- Law enforcement information that may prejudice an investigation or trial of a matter and security classified information; and
- Information subject to legal professional privilege.

Some of these exemptions involve considerations of the public interest in the release of the information before a decision is made.

All states and territories have similar exemption provisions, though the wording may vary between jurisdictions.

If information is refused or exempted from release by an authorised Freedom of Information officer there is a right to have the decision reviewed by the head of the agency. If an individual is still dissatisfied there is a right of review by the Ombudsman.

4.8 Criminal Code

The Criminal Code applies to all public officers, whether elected Parliamentary representatives or servants of the State, and regulates the most serious of potential unethical conduct.

The Criminal Code includes a number of offences that apply specifically to the behaviour of members of Parliament and also individuals who may interfere with the office of a member of Parliament. References include:

- Section 69 - interfering with an executive officer (Governor or Ministers);
- Section 70 - interfering with parliament or unlawfully influencing a member of Parliament; and
- Section 71 - receiving or soliciting a bribe as a member of Parliament.

In addition, Chapter 9 of the Criminal Code deals with Corruption and Abuse of Office and relates to corruption of or extortion by a public officer.

There are a number of specific provisions of the Criminal Code that apply to the conduct and behaviour of public servants and to those trying to influence the performance of a public officer's duties. These include:

- Section 83 - corruption of public officer;
- Section 84 - extortion by public officers;
- Section 85 - knowingly hold a direct or indirect interest in a contract by or on behalf of the Crown;
- Section 86 - corruption of a valuator or arbitrator;
- Section 88 - unlawfully administering an oath;
- Section 110 - disclosure of official secrets;
- Section 111 - bargaining for public office;
- Section 115 - omitting to perform duty as a public officer;
- Section 235 - unlawfully dealing with a public register or record required to be kept by statute;
- Section 241 – blackmail;
- Section 265 - false accounting by a public officer;
- Section 266 - secret commissions;
- Section 282 - falsifying or permitting the falsification of a register or record that is required to be kept by statute; and
- Section 283 - procuring unauthorised status or fraudulently misrepresenting status.

5 Current mechanisms to review and investigate ethical conduct

5.1 Parliament

There are several parliamentary mechanisms for achieving accountability and scrutinising the behaviour of Ministers, members of Parliament and the public sector generally.

5.1.1 Question Time

Parliamentary Question Time is a powerful accountability mechanism to scrutinise Ministerial actions.

Question Time is part of the proceedings in the Parliament which allows members of the Parliament who are not Ministers to ask questions of the Premier and other Ministers which they are obliged to answer. (In the Legislative Council the Leader for the Government may provide answers on behalf of Ministers). It usually occurs daily while Parliament is sitting, though it can be cancelled in exceptional circumstances.

Questions asked by members of the opposition parties seek information from the Government about the actions and behaviour of Ministers and the public service. Providing misleading or untrue answers to questions is a serious misdemeanor for a Minister and if deliberate will result in the Minister having to resign (see section 2.4.1).

5.1.2 Debate

With few exceptions all business, including the passage of legislation is dealt with as a series of motions which are debated and decided one at a time. There are procedural rules which dictate how this occurs. Debates provide an opportunity for Parliament to scrutinise actions and policies of the Government of the day.

5.1.3 Parliamentary Committees

General

There are a number of Parliamentary Committees that oversee activities of members of Parliament, Ministers and the public service. They facilitate accountability of Government action and scrutinise proposed laws and expenditure of public funds. They include:

- Budget Estimates Committees;
- Government Business Scrutiny Committee;
- Standing Committee of Public Accounts; and
- Standing Committee of Public Works.

A number of Standing Committees examine a broad range of matters concerning public policy development and implementation - such as community development, and environment, resources and development - supplemented by Select Committees formed to investigate specific issues.

There are also committees of each House formed to consider the detail of proposed legislation each time a Bill is introduced to Parliament.

Certain committees concentrate on the workings of Parliament itself and the conduct of members of Parliament. These include:

- Privileges Committees;
- Standing Orders Committees for both Houses; and
- Working arrangements of Parliament Committee.

Two committees worthy of special mention are the Public Accounts and Public Works Committees. They have a primary function to scrutinise the public sector (in its widest sense) in terms of fiscal performance and policy decisions in respect of large or costly infrastructure projects. Both committees are established by legislation.

Standing Committee of Public Accounts

Under the *Public Accounts Committee Act 1970*, this Committee must inquire into, consider and report to the Parliament on any matter referred to the Committee by either House relating to:

- The management, administration or use of public sector finances; or
- The accounts of any public authority or other organisation controlled by the State or in which the State has an interest.

The Committee may also inquire into:

- Any matter arising in connection with public sector finances that the Committee considers appropriate; and
- Any matter referred to the Committee by the Auditor-General.

One of its current references relates to 'Television Advertisements by the Tasmanian Greens', which has a major focus on whether there have been any breaches of ethically acceptable conduct in the procurement process and use of public funds for certain advertisements.

Parliamentary Standing Committee on Public Works

Under the *Public Works Committee Act 1914*, this Committee must consider and report upon every proposed public work (with some exceptions) where the estimated cost of completing the work exceeds $2 000 000.

Often this means investigating the construction of roads, the building of schools or the refurbishment of other publicly funded buildings, including the Parliament. Probity of process is an important consideration of this Committee.

Powers of Parliamentary Committees

Parliamentary committees can exercise extensive powers. This includes the power to summon witnesses and compel them to produce documents. Again penalties for non compliance can be applied. For example, Standing Order 395 of the House of Assembly states that 'members or any other

persons, who [...] disobey any Order of [...] any Committee [...] to attend, or to produce papers, books, records, or other documents, or shall refuse to be examined, or to answer any lawful and relevant question, are liable to be summarily punished by imprisonment for any time during the continuance of the Session'.

5.1.4 Legislative Council

The Legislative Council has traditionally had a majority of independent members (that is, unaligned to a political party) and as noted previously is seen as one of the strongest houses of review among Westminster style parliaments. The Legislative Council cannot be dissolved so there are never general elections. Each member holds office for a six year period and there are periodic elections for either two or three of the 15 electorates every year.

The Leader of the Government in the Council cannot rely on a majority vote along party lines to ensure support. This means that the Legislative Council is in a position to exercise considerable influence on the work of the Parliament. Although the Council does not reject a great number of Bills, it is not uncommon for Bills to be amended, sometimes heavily.

All of this makes the Legislative Council an extremely powerful mechanism to review the actions and activities of public officials.

5.1.5 Budget Papers, Annual Reports etc

Public sector agencies are obliged to publish certain documents during the year which are tabled in the Parliament to facilitate public scrutiny of their actions.

Budget Paper No 2 publishes a range of information on each Government department. It includes information on major issues and initiatives as well as detailed financial information. This Budget Paper provides details of the Consolidated Fund appropriations that are included in the Appropriation Bill.

It is the basis for Parliament's detailed review of the Appropriation Bill, and proposed agency expenditures.

Budget Paper No 2 also includes performance indicators for each agency and provides a means of assessing the extent to which areas of an agency are contributing to its overall outcomes.

All departments are required to produce annual reports by virtue of section 36 of the *State Service Act 2000* and section 27 of the *Financial Management and Audit Act 1990*.

Annually, each head of agency, must prepare a report relating to the performance of the functions and the exercise of the powers of the head of agency under the State Service Act; and the performance of the functions and the exercise of the powers of any statutory officer employed in or attached to that agency and any State authority attached to that agency.

The annual report must include the financial statements of the department and of any board or organisation over which the agency exercises control. These must be tabled in Parliament within five months of the end of the financial year. Treasurer's Instruction 1111 also specifies certain disclosure requirements related to the procurement information that agencies are required to report in their agency annual reports.

Annual reports also report on the performance indicators set in Budget Paper No 2.

5.2 Independent statutory officers

There are a variety of independent statutory officers, supported by legislative or administrative arrangements, who have a role in reviewing and investigating the propriety of actions of the Executive.

5.2.1 Ombudsman

The Ombudsman is an independent statutory officer reporting directly to Parliament whose functions are specified by the *Ombudsman Act 1978*. The Ombudsman's role is to investigate complaints about the administrative actions of government departments, councils and public authorities.

The aim is to resolve individual complaints and to promote fairness, openness and good public administration in the state of Tasmania. This service is free, independent and impartial.

The Ombudsman also:

- Reviews decisions under the *Freedom of Information Act 1991;*
- Oversees and investigates disclosures under the *Public Interest Disclosures Act 2002;*
- Reviews decisions affecting the release of information under the *Adoption Act 1988;*
- Examines Tasmania Police compliance with the *Telecommunications (Interception)Tasmania Act 1999;*
- Reviews certain decisions of the Commissioner of Police under the *Witness Protection Act 2000; and*
- Investigates complaints under the *Personal Information Protection Act 2004*.

Powers

Section 24 of the *Ombudsman Act 1978* provides the Ombudsman with the powers to collect evidence and conduct investigations as if he or she was a Commission of Inquiry (see section 5.5).

The Government cannot prevent or obstruct records from being produced, or evidence from being given, for the purpose of an investigation by the

Ombudsman even if it would be so entitled if the investigation were a legal proceeding held before a court.

A person is not excused from giving information, or producing a record or answering a question, when required to do so by the Ombudsman on the ground that to do so would disclose legal advice furnished to a government department or other authority.

However, there are some special circumstances in which the Attorney-General may determine that disclosure of the contents of a specified record would be contrary to the public interest.

5.2.2 Auditor General

Functions

The Auditor-General is responsible for audits under the *Financial Management and Audit Act 1990*, the *Government Business Enterprises Act 1995*, the *Local Government Act 1993*, and other Acts. The Auditor-General also has responsibilities in respect of Commonwealth grants and payments to the State under Commonwealth legislation.

The Auditor General reports to Parliament and this is an important mechanism whereby the Parliament holds the Government accountable for fulfilling its financial responsibilities.

In addition to financial management the Auditor-General has a role in conducting performance audits. This is designed to achieve efficiency, effectiveness and economy within Government. Again the Auditor-General is responsible for providing reports to Parliament with assessments of the effectiveness and efficiency of public sector programs and activities. The audits also provide a mechanism to identify opportunities for improved performance.

Recent performance audits that tested agency accountability systems include:

- Procurement in government departments and Payment of accounts by government departments - November 2007;
- Corporate Credit Cards - June 2007;
- Delegations in Government Agencies, Local Government Delegations and Overseas Travel - April 2006;
- Procurement in Tasmanian Government Departments - November 2000; and
- Competitive Tendering and Contracting by Government Departments - September 1999.

Powers

For the purposes of an audit performed by the Auditor-General he or she is entitled to full and free access at all reasonable times at no cost to inspect:

- All documents and such other information and records which the Auditor-General considers necessary for the purpose of this Act; and
- Public money, other money or money of a public body; and
- Public property or other property;

that is or are in the possession, custody or control of any person.

The Auditor-General may make copies of, or extracts from, any of those documents or other information or records.

There are financial penalties for failing to produce material required by the Auditor-General.

5.2.3 State Service Commissioner

Functions

The *State Service Act 2000* provides for a State Service Commissioner. The functions of the Commissioner include:

- Upholding, promoting and ensuring adherence to the State Service Principles;
- Evaluating the application within agencies of practices, procedures and standards in relation to management of, and employment in, the State Service;
- Evaluating the adequacy of systems and procedures in agencies for ensuring compliance with the Code of Conduct;
- Investigating alleged breaches of the Code of Conduct by Heads of Agencies and to report to the Premier on the results of such investigations; and
- Undertaking reviews of actions related to the selection of a person or an employee to perform duties or of any other State Service action that relates to a person's employment in the State Service.

In addition, the Minister responsible for the *State Service Act 2000* may request the Commissioner to conduct an investigation into any matter which relates to the administration of the State Service.

Powers

The State Service Commissioner also has investigatory powers. Section 19 of the State Service Act provides for the State Service Commissioner to do all things necessary or convenient to be done for or in connection with, or incidental to, the performance of the Commissioner's functions under this Act.

In particular the Commissioner may, for the purpose of carrying out the Commissioner's functions under the State Service Act:

- Summon any person whose evidence appears to be material to any determination of the Commissioner;
- Take evidence on oath or affirmation and, for that purpose, administer oaths and affirmations; and

- Subject to some exclusions, require any person to produce documents or records in the person's possession or subject to the person's control that relate to matters of administration for the purposes of this Act.

Failure to appear, answer questions or produce material when required to do so by the Commissioner is an offence carrying a fine of up to 10 penalty units.

There are a range of sanctions (including ultimately dismissal) that may be applied if a State Servant is found to have breached the Code of Conduct.

5.2.4 Director of Public Prosecutions

The Director of Public Prosecutions (DPP) is appointed under the *Director of Public Prosecutions Act 1973* and can only be removed from office for cause (incapacity, misbehaviour or bankruptcy). The DPP has complete independence in decision-making but remains accountable to Parliament through an annual report.

The independence of the DPP is extremely important as it guarantees that decisions to prosecute are made free of any external influences.

In his annual report of 2006-07, the DPP reports that he and his office undertook the prosecution of all criminal trials, pleas of guilty, breaches of suspended sentences or conditional discharges and bail applications in the Supreme Court. The DPP and his office also conducted lower court appeals and appeals in the Court of Criminal Appeal as well as all civil litigation on behalf of the State of Tasmania. The office also provided representation and advice to Agencies and Departments involved in prosecutions and proceedings in the Magistrate Court and Tribunals and provided representation in appropriate circumstances for officers of Courts and Tribunals and other decision makers whose decision or actions were the subject of review.

In addition to these activities section 12 of the *Director of Public Prosecutions Act 1973* also allows the DPP to:

- Act as counsel for a person who is not part of the Crown on the request or direction of the Attorney-General; and
- Carry out such other functions ordinarily performed by a practitioner as the Attorney-General directs or requests.

The DPP has significant discretion in the prosecution of criminal matters and applies a transparent set of criteria in making a decision to prosecute a case. The primary consideration in the exercise of this discretion is whether there is sufficient evidence to justify the institution or continuation of a prosecution, followed by whether there is a reasonable prospect of securing a conviction. There are a number of other factors that are also taken in account when determining whether it is in the public interest to proceed with a prosecution. These include the seriousness (or triviality) of the crime, the staleness of the complaint, mitigating or aggravating factors associated with the crime. These are set out in the DPP's prosecution guidelines which are available at www.crownlaw.tas.gov.au/dpp/prosecution_guidelines.

5.3 Other legislated review mechanisms

5.3.1 Judicial Review

Tasmania has legislation that provides for the review by the Supreme Court of decisions of an administrative character made, proposed to be made, or required to be made, under a statute.

Specifically the *Judicial Review Act 2000* authorises the court to review the official actions of executive branches of government and examine whether there has been an improper exercise of power.

Section 20 states that an improper exercise of power is taken to include:

- Taking an irrelevant consideration into account;
- Failing to take a relevant consideration into account;

- An exercise of power for the purpose other than a purpose for which the power is conferred;
- An exercise of a discretionary power in bad faith;
- An exercise of a personal discretionary power at the direction of another person;
- An exercise of a discretionary power in accordance with a rule without regard to the merits of the case;
- An exercise of a power that is so unreasonable that no reasonable person could so exercise the power;
- An exercise of a power in such a way that the result of the exercise of the power is uncertain; or
- Any other exercise of a power in a way that is an abuse of the power.

Judicial review provides strong oversight of government action and executive power and a number of the criteria above are relevant to questions of ethical conduct. However judicial review only occurs if an individual who has been aggrieved by a decision applies for a review.

5.3.2 The Magistrates Court Administrative Appeals Division

The *Magistrates Court (Administrative Appeals Division) Act 2001* provides a specific appeal mechanism for decisions made under a large number of Acts. This Act consolidated a number of statutory rights of appeal to one body, namely the Magistrates Court. It also imposed a statutory duty for decision makers to give reasons for decisions and to advise of review rights.

An essential element of good administration is the need to ensure that reasons are given for administrative decision. Giving reasons ensures that decision makers are accountable for their decisions. Individuals affected by decisions are able to see the reasons for a decision and seek reviews if they feel it is necessary.

Where a matter is reviewed by the Administrative Appeals Division the matter is dealt with as a hearing *de novo*. The court essentially hears the matter afresh and may exercise all the functions of the original decision maker. The court may affirm the original decision, vary it, set it aside and make a new decision or even remit the matter to the original decision maker with directions.

In determining an application for a review of a reviewable decision, the Court must give effect to any relevant Government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case. This provides for a degree of oversight of government policy as well as specific actions.

5.3.3 Public Interest Disclosures

The purpose of the *Public Interest Disclosures Act 2002* is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies. The Act provides protection to specific persons (public officers and contractors) who make disclosures in accordance with the Act, and establishes a system for the matters disclosed to be investigated and rectifying action to be taken.

Three key concepts in the reporting system are:

- Improper conduct;
- Corrupt conduct; and
- Detrimental action.

A disclosure can be made about improper conduct by a public body or public officer. Improper conduct means conduct that is corrupt, a substantial risk to public health or safety or to the environment. If proven, this conduct must be serious enough to constitute a criminal offence or reasonable grounds for dismissal.

Under the Act, it is an offence for a person to take any detrimental action against a person in reprisal for a protected disclosure. Strict confidentiality is maintained in relation to any disclosure, even after an investigation is completed. Any information produced by an investigation is exempt from the Freedom of Information provisions.

The Act applies to all public bodies, which for this Act includes all Government departments, statutory authorities, local Government councils, Government appointed boards and committees, state-owned companies, Government Business Enterprises and the University of Tasmania.

The Act does not apply to the private sector.

5.3.4 Other Laws

The Executive is normally subject to the same legislation that applies generally in Tasmania to other entities. For example:

- *Corporations (Tasmania) Act 1990*;
- *Industrial Relations Act 1984*;
- *Land Use Planning and Approvals Act 1993*;
- *Workplace Health and Safety Act 1995*; and
- *Security Sensitive Dangerous Substances Act 2005*.

Many of these laws will contain legislative review mechanisms that can scrutinise the actions of public officials.

5.4 Tasmania Police

The *Police Service Act 2003* establishes a police service in Tasmania. The principal role of the police is to investigate criminal activity and enforce the law.

Generally, where there are allegations of criminal activity it is up to the Police to investigate. In investigating crimes, Police have a number of coercive

powers provided by way of legislation and common law. The use of these powers is guided by Police Standing Orders and the directions of the Commissioner of Police. Some examples of police powers include the power to arrest, enter property with or without warrants in certain circumstances, seize and secure property, interrogate, bail and bring persons before the courts. These powers are contained in various statutes.

In cases of criminal activity allegedly committed by police officers special arrangements exist for those investigations. There is a specific internal investigations unit established within the office of the Commissioner. It is staffed by a commander, inspector and four other police officers who report directly to the Deputy Commissioner. The unit is secure with access restricted to authorised personnel.

5.5 Commissions of inquiry

Functions

The *Commissions of Inquiry Act 1995* provides for the establishment of a Commission of Inquiry into any matter of public importance. It is the highest level of inquiry that may be instigated in Tasmania and is analogous to a Royal Commission. The Act was introduced to ensure that commissions of inquiry are conducted fairly, that witnesses are treated equitably, and that there are sufficient safeguards to prevent the unchecked exercise of the power of inquiry.

A Commission of Inquiry may only be established by the Governor-in-Council if it is deemed to be in the public interest. The Governor may, by order, if satisfied that it is in the public interest and expedient to do so:

- Direct that an inquiry be made into a matter;
- Establish a Commission to conduct and report on that inquiry;
- Appoint one or more persons as members of that Commission;

- Fix a date for the delivery of the Commission's report; and
- Provide for any other matter in relation to the inquiry, the Commission or the Commission's report as the Governor thinks fit.

The assessment of the public interest necessarily has regard to the cost of conducting a Commission of Inquiry which will nearly always be significant. It is estimated that in current dollar values the cost could be likely to be between $1-2 million.

The Commissions of Inquiry mechanism exists to provide independent investigation of matters of public concern and provide impartial advice on a wide range of matters. Even though they are established on the recommendation of the Executive, Commissions of Inquiry operate independently of the Executive once established.

On completion of its investigation a Commission makes a written report and recommendations to the Governor.

There has only been one inquiry held under the *Commissions of Inquiry Act*. This was in February 2000 when a Commission was established to inquire into the death of Mr Joseph Gilewicz, presided over by Dennis Mahoney QC.

There had previously been Royal Commissions from time to time. The last, in 1990, being a Royal Commission, presided over by the Hon W J Carter QC, was established to investigate the events surrounding and to identify those who were involved in, an attempt to bribe a member of parliament to cross the floor in the House of Assembly in Tasmania following the 1989 election.

At that time the legislation governing Royal Commissions was the *Evidence Act 1910*. Commissioner Carter expressed concern that there was inadequate legislative support available for the efficient conduct of the Royal Commission, and he requested that amendments be made to certain provisions of the Evidence Act which were enacted prior to the commencement of the Royal Commission hearings in April 1991. Ultimately it

was the experience of the Carter Royal Commission that led to the enactment of the *Commissions of Inquiry Act 1995*.

Powers

Commissions of Inquiry have wide powers available to them. A Commission of Inquiry is not a court of law, even though it has many similar powers and may often be presided over by a member or former member of the judiciary.

An important difference between a Commission of Inquiry and a court is that Commissions of Inquiry are not bound by the normal rules of evidence. A Commission, for example, may receive hearsay evidence and inform itself on any matter as it considers appropriate. Also, Commissions of Inquiry conduct their business in an inquisitorial and investigative manner rather than the adversarial style characterised by the regular courts.

A Commission established under the *Commissions of Inquiry Act 1995* has the power (section 24) to apply to a magistrate for a warrant to gain access to a document or thing in any place, building, vehicle or vessel if it considers that document or thing relevant to its inquiry. The Commission may also examine a person under oath.

A person who fails to produce a document or thing legally sought by the Commission or fails to attend before the Commission is guilty of contempt.

6 Integrity systems/models in other jurisdictions

6.1 Other states

The South Australian Parliament Research Library has published a research paper *Corruption and Integrity Systems throughout Australia* (no 2 of 2007) by Dr Zoe Gill with assistance from Alex Grove that documents how Australian states and the Commonwealth organise their integrity systems. Rather than repeat this research, the Government refers the Joint Committee to that paper.

A summary of information about the various bodies that exist in other jurisdictions is at Appendix A.

6.2 Parliamentary standards

6.2.1 UK standards in Public Life

The UK Committee on Standards in Public Life has wide terms of reference. At the time it was established the then Prime Minister John Major said of the Committee: "It is to act as a running authority of reference - almost you might say, an ethical workshop called in to do running repairs."

This aspect of the Committee's work was reaffirmed in January 2000 as part of the Cabinet Office's Quinquennial Review of the Committee, which concluded that there was a "...continuing need to monitor the ethical environment and to respond to issues of concern, which may arise."

To fulfill this role and in addition to its formal inquiries, reports and research into public attitudes, the Committee devotes time throughout the year to discussing current issues and concerns relating to standards in public life.

The Committee will take suggestions for areas of inquiry, but the remit of the Committee excludes investigation of individual allegations of misconduct. Suggestions may, and sometimes do, result in a full-scale inquiry about an

issue relating to misconduct and recommendations for change. Even where no inquiry is conducted, these are regarded by the Committee as a useful check on current standards and the effectiveness, or otherwise, of the arrangements in place to ensure the highest standards of propriety in public life.

6.2.2 *Parliamentary Commissioner for Standards, UK*

Some Westminster-derived Parliaments (eg House of Commons, Scottish Parliament, Irish Dail) have recognised the need for an officer who oversees parliamentary standards.

As an example, the Office of the Parliamentary Commissioner for Standards was set up by the House of Commons in 1995. The Commissioner's main responsibilities are:

- Overseeing the maintenance and monitoring the operation of the Register of Members' Interests;
- Providing advice on a confidential basis to individual members and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of members;
- Preparing guidance and providing training for members on matters of conduct, propriety and ethics;
- Monitoring the operation of the Code of Conduct and Guide to the Rules and, where appropriate, proposing possible modifications of it to the Committee; and
- Receiving and investigating complaints about members who are allegedly in breach of the Code of Conduct and Guide to the Rules, and reporting his findings to the Committee.

In Tasmania, some of these functions or similar tasks, such as maintaining a register of interests under the *Parliamentary (Disclosure of Interests) Act 1996,*

are currently undertaken by the Clerk of each House of the Parliament. Each House also has a standing Privileges Committee that can inquire and report into complaints about possible breaches of parliamentary privilege.

In the House of Commons, the Parliamentary Commissioner for Standards is an officer of the House and investigations into the application of the members Code of Conduct is a matter for the Commissioner and the Committee on Standards and Privileges.

6.2.3 *Office of the Conflict of Interest and Ethics Commissioner, Canada*

The Office of the Conflict of Interest and Ethics Commissioner was created as part of Canada's Federal Accountability Act. The Commissioner is an Officer of Parliament with the following mandate set out in the Parliament of Canada Act:

- To support the House of Commons in governing the conduct of its members

  Under the direction of the Standing Committee on Procedure and House Affairs, the Commissioner is responsible for administering the Conflict of Interest Code for Members of the House of Commons (the MP Code). This Code has been in effect since 2004 and was most recently amended in June of 2007.

- To administer the Conflict of Interest Act for public office holders[1].

The Commissioner provides confidential advice to public office holders and members of Parliament about how to comply with the Act and the MP Code respectively. The Commissioner is also mandated to provide confidential advice to the Prime Minister about conflict of interest and ethics issues.

The Commissioner may conduct an inquiry into whether a member of the House of Commons has contravened the MP Code on the request of another

[1] Note: This Act came into effect on 9 July 2007 and replaced the former Conflict of Interest and Post-Employment Code for Public Office Holders. In this case, Public office holders are ministers, parliamentary secretaries, and full and part-time ministerial staff and advisors, Governor in Council and ministerial appointees (deputy ministers, heads of agencies and Crown corporations, members of federal boards and tribunals).

member or on his or her own initiative where there is reason to believe that a contravention has occurred. The Commissioner may also be directed to conduct an inquiry by resolution of the House.

The Commissioner may examine whether a present or former public office holder has breached the Conflict of Interest Act on the request of a Senator or member of the House of Commons, or on her initiative, where there is reason to believe that a breach has occurred.

6.2.4 Australian Parliaments

In the New South Wales Parliament an Ethics Adviser has been appointed by an annual agreement between the Adviser and the Clerks of both Houses following a resolution in both Houses. The appointment may be extended for a further period upon the passing of a further resolution. The function of the Ethics Adviser is to advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament (including the use of entitlements and potential conflicts of interest). All information remains confidential but may be made public at the request of the member. The Adviser reports on an annual basis to the Parliament.

Recently the Australian Capital Territory established a similar office of 'ethics and integrity adviser' to advise the members of the ACT Legislative Assembly on matters such as conflicts of interest, gifts, use of office etc.

6.3 Integrity Commissioners

6.3.1 Integrity Commissioner

Another model is an ethics or integrity commissioner to provide guidance generally to public officers (not just members of Parliament) on public sector administration and ethical conduct.

Queensland has an Integrity Commissioner who in addition to a Crime and Misconduct Commission and the Office of the Public Service Commissioner

provides guidance and advice to certain officials (such as ministers and senior public servants) on matters of integrity. The Integrity Commissioner does not investigate allegations of misconduct or conduct enquiries but is there to provide advice and contribute to the public's understanding of ethics and integrity. The Commissioner's functions are set out in section 28 of the *Public Ethics Act 1994 (Qld)*.

6.3.2 *Police Integrity Commissions*

Some Australian jurisdictions, for example NSW and Victoria have police integrity commissions or bodies that have been created principally in response to endemic police corruption and misuse of police power.

In 1996 the NSW Parliament established the Police Integrity Commission on the recommendation of the Royal Commission into the NSW Police Service. It is separate from and completely independent of the NSW Police Force.

Its principal functions are to detect, investigate and prevent police misconduct, and as far as practicable, it is required by law to turn its attention to serious police misconduct by NSW police officers.

South Australia has a Police Complaints Authority. It is an independent statutory body which answers directly to Parliament. The Authority is entirely independent of the South Australia Police and none of the staff are police officers. The Police Complaints Authority has been created to:

- Receive complaints about the conduct of police officers;
- Maintain a register of complaints lodged both with the Authority and with the police;
- Oversee complaint investigations conducted by South Australia Police;
- Investigate certain complaints itself;
- Assess the merits of complaints;
- Resolve complaints by conciliation where possible;

- Recommend disciplinary or other action; and
- Report to Parliament on the handling of complaints about police.

The complaints system is intended to provide independent oversight of complaints about police.

Similarly Victoria has the Office of Police Integrity which is an independent police anti-corruption and oversight body. It has all the powers of a royal commission.

Its role includes:

- Ensuring that Victoria Police maintains the highest ethical and professional standards;
- Detecting, investigating and preventing police corruption and serious misconduct;
- Examining police practices and procedures to make sure they are effective;
- Ensuring Victoria Police continues to meet community expectations; and
- Monitoring and reviewing the way Victoria Police investigates or conciliates complaints.

The Office of Police Integrity reports direct to Parliament. It has an educational and research role. Working with Victoria Police, the Office develops and implements corruption resistant strategies to reduce the risk of corruption and serious misconduct.

An independent statutory officer, the Special Investigations Monitor, oversees the Office of Police Integrity's use of investigative powers.

Tasmania has not had the same entrenched systemic corruption and misconduct issues that other police services have endured. Tasmania has been less exposed to serious organised criminal activity than other states.

Perhaps as a small island we are less attractive to major criminals; they cannot establish large markets or distribution channels for drugs, stolen property or prostitution, our borders are more easily controlled and the opportunity for large gangs to develop is small.

The Tasmanian police service is highly regarded at both national and international levels. There is a commitment to police ethics training. Tasmania Police, in partnership with the University of Tasmania, delivers a comprehensive curriculum on police ethics to police recruits and other members of the police service undertaking professional development. This has helped to develop an organisational culture in Tasmania Police that is underpinned by knowledge, skills and attitudes that promote ethical professional practice within the service.

6.4 ICAC-type bodies

Nationally, in the latter part of the 20th century there were a number of inquiries in other jurisdictions that have exposed major crime, corruption and improper conduct in government. They have included the Western Australian Kennedy Royal Commission, the Western Australian Royal Commission into Commercial Activities of Government (WA Inc), the Fitzgerald Inquiry into Corruption in the Queensland Police Force and the Wood Royal Commission into the NSW Police Force.

The Western Australian and Queensland Royal Commissions resulted in the establishment of a Corruption and Crime Commission (CCC) -Western Australia - and a Crime and Misconduct Commission (CMC) - Queensland. The NSW Wood Inquiry (1994) led to setting up the Police Integrity Commission in that state. NSW had already in 1988 established the Independent Commission Against Corruption (ICAC) following a series of events that included the imprisonment of the Chief Magistrate and a Cabinet Minister, criminal trials of senior officers and the discharge of the Deputy Commissioner

of Police. These bodies were established in response to overwhelming public concern about significant problems with the integrity of public administration.

Roles

The roles of the various bodies are similar but not identical.

New South Wales

- Investigating, exposing and preventing corruption
- Educating public authorities, public officials and members of the public about corruption and its detrimental effects

Western Australia

- Misconduct function (Oversight and conduct of public sector misconduct investigations)
- Prevention and education function
- Organised crime function

Queensland

- Combating major crime
- Reducing misconduct and improving public sector integrity
- Research and intelligence functions and protecting witnesses

Powers

The powers of the various bodies are similar but again not identical.

New South Wales

- Can require a public authority or official to provide information or produce documents
- Power to enter and search premises and inspect and copy documents
- Can apply for warrants to search properties, use listening devices and intercept telephone calls

- Can hold compulsory examinations and public inquiries where witnesses are obliged to answer questions

Western Australia

- Can require a public authority or public officer to produce a statement of information
- Can require a person to attend before Commission and produce a record other thing
- Power to enter and search premises of public authority or officer and take copies of documents
- Can apply to Supreme Court Judge for a search warrant
- Commission may grant approval for one of its officers to acquire and use an assumed identity or to conduct a controlled operation or integrity testing

Queensland

- Enter public sector agency and inspect records or other thing and seize or take copies
- Apply to magistrate or judge for search warrant
- Apply to Supreme Court for surveillance device
- Summons person to attend hearing and give evidence and produce records or things
- Access to telephone intercept powers only through joint operations where there are federal or cross-border aspects to the investigation
- Commission can grant approval to commission officers for controlled operations and to acquire assumed identities

Costs

The annual budget for these bodies is also very significant.

In 2006-07, operating expenses ranged from $16.2m (and a staffing establishment of approx 120) for the NSW ICAC, $25.5m for the WA CCC (148 FTEs), and $35m for the Queensland CMC, which has about 270 staff in total.

Independent oversight

Each of these bodies has independent oversight – the Office of the Inspector of the ICAC in New South Wales, Office of the Parliamentary Inspector of the CCC in Western Australia, and the Parliamentary Crime and Misconduct Committee in Qld.

The cost of independent oversight of these bodies also needs to be considered. For example, in 2006-07 the annual budget for the Office of the Inspector of the NSW ICAC was $637,000.

6.5 Anti-Corruption Branch (ACB), South Australia Police

The Anti-Corruption Branch (ACB) of the South Australia Police provides another model for investigating unethical conduct. It has a charter for investigating allegations of corruption and misconduct linked to corruption against all public servants, politicians, police, local government, and the judiciary.

The ACB has its own technical support unit to assist in physical and electronic covert surveillance. It also has access to an independent telephone intercept facility to ensure the integrity of such intercepts. Legal provisions include the *Telecommunications Interception Act 1988 (SA)* and the *Listening and Surveillance Devices Act 1972 (SA)*, in respect of which applications are made by affidavit to a Judge for the issue of a warrant.

Most ACB cases involve "Abuse of Public Office" allegations, where a public official has improperly used their office to benefit themselves, or another, or has acted to the detriment of another. The offences vary from providing information, to specific kickbacks, bribery and fraud. Specific criminal offences are charged where applicable and appropriate.

South Australia does not have a reputation for corruption within the public sector or police, isolated examples of corrupt practices are generally restricted to one or two persons at a time. One example involved an official with authority to allocate minor works in relation to drafting architectural changes in government housing. In a corrupt arrangement with a friend he allegedly allocated work to his friend on the basis of 50% kick backs of invoiced amounts, totalling around $250,000. One offender has been sentenced to 5 years imprisonment, the other is awaiting trial.

Currently in Tasmania such a case would be investigated by Tasmania Police in the normal way and charges laid under existing legislation.

The ACB has an independent auditor (a former Supreme Court Justice) who reviews all investigations to provide a report to the Attorney General as to the sufficiency of the investigation. This audit process ensures the integrity of ACB investigations.

7 Potential gaps in the current arrangements

7.1 Members of Parliament

The standard of conduct of members of Parliament and parliamentary staff is critical to good governance and public confidence in parliament. Holding public office places significant obligations and responsibilities on elected representatives. Members of Parliament and their staff need to properly understand the scope of their roles and any limitations on their functions and their responsibilities.

The codification of accepted rules and consistent application to all parliamentary representatives could be enhanced. Currently government members are, by Government decision, subject to the Code of Conduct for Government Members of Parliament (2006), members of the House of Assembly have incorporated a Code of Ethical Conduct and a Code of Race Ethics into their Standing Orders. The Legislative Council has not adopted any specific code.

Members of Parliament and their staff would be greatly assisted if they had:

- Well documented sets of rules about ethical conduct;
- Ready access to guidance on standards of conduct and the interpretation and application of those rules; and
- Ready access to advice to assist them to deal with a specific matter, such as a potential conflict of interest, or an approach from a lobby group.

Adopting a consistent approach that is well documented and publicised would promote an openness and accountability in Parliament beneficial to ensure public confidence in the way members perform their duties.

The obligations set out in any code or guidelines on ethical conduct would need to be complementary to those which apply to members by virtue of

the procedural and other rules of the Parliament and rulings of the presiding officers of each House, as well as those that apply to government members who have Ministerial or other responsibilities.

7.2 Ministers and their staff

Ministers have a more onerous responsibility to act ethically.

The standard of conduct of Ministers and their advisers is vital to the maintenance of public confidence in institutions of governance. Tasmanians expect and are entitled to expect the highest standards of their Ministers. The decisions made by Ministers can have wide ranging implications for the community. Ministers must act with regard for integrity, fairness, accountability, responsibility and the public interest.

Ministers and their staff (both ministerial advisers and electorate officers) need to properly understand the scope of their roles, any limitations on their functions and their responsibilities.

As mentioned above, Ministers are covered by the Code of Conduct for Government Members of Parliament. Their advisers are appointed on instruments that include a code of conduct (which is based on the code that applies to State Servants). Additional guidance is also provided by specific Government Members and Cabinet Handbooks (prepared by the Department of Premier and Cabinet). General government guidelines and directions such as the Government procurement guidelines and caretaker conventions also apply to Ministers and their staff.

Induction and training for new Ministers, advisers and electorate staff has traditionally been ad hoc. Following a change of Government, or the appointment of new Ministers or advisers, there is usually some training provided by relevant Government officers, such as the Solicitor-General, about working in a Ministerial Office, but a more structured approach would be beneficial.

The establishment of any new ethical, integrity and accountability system should allow for the development of formal induction training and ongoing

support for Ministers and their staff to assist them with appropriate conduct and decision making.

As with members of Parliament generally, Ministers (and their staff) would benefit from the guidance and specific advice that is provided in other jurisdictions by integrity and standards commissioners or similar bodies.

7.3 Other Public Officials

Many of the comments made above in relation to Ministers and their staff also apply to those who work in the bureaucracy. Some of the options for enhancing the ethical framework within which public officials operate are discussed below in other sections.

Tasmania does not have an Integrity Commissioner like Queensland who is capable to provide guidance and advice to senior public officials on matters of integrity, or a Police Integrity Commissioner to oversee the behavior of the police and to investigate or prevent police misconduct. However there is merit in considering if these roles would be of value in Tasmania and could be properly incorporated into the functions of an Ethics Commission if one is established.

7.4 Education, Training and Advice

7.4.1 Introduction

Ethical conduct is best promoted through education, training and advice.

Commissions of inquiry and investigations are useful as a last resort in identifying systemic problems and prompting institutional reform, but the lessons learned from these events and preventive strategies also need to be disseminated in a coherent and consistent manner across the public sector.

Providing education and training to new and existing public officers is a cost but a necessary, effective and responsive way of reducing the risk of

unethical conduct. It also creates and sustains a culture of integrity and good governance.

Formal codes of conduct and guidelines for public officials have been promulgated by a variety of bodies in Government. What has been lacking is continued updating, promulgation and training about the standards of conduct outlined in these various instruments over time. Some jurisdictions, such as the UK and Queensland, have formal bodies in place to advise parliamentarians and public servants on ethical conduct. The UK has the Standards on Public Life Commission which produces guidelines for public officers and Queensland has an Integrity Commissioner who provides advice on conflict of interest issues.

Skilling up the decision makers and advisers of the Executive in ethical practice and behaviour will improve ethical performance and behaviours and encourage a strong ethical culture across all levels of Government.

One of the major advantages of a standing integrity or ethics body is the educative and support functions it provides. In other jurisdictions these include:

- Developing or providing advice about the development of guidelines and codes of conduct;
- Training;
- Producing resources for Government; and
- Civic education to schools, interest groups and the public.

Training is generally focused on:

- Recognising improper behaviour;
- Identifying and managing conflicts of interest; and
- Preventing corruption.

Often there are specific training modules developed on particular areas (for example use of government property, accepting gifts, relationship with lobbyists) or for specific entities or groups (Parliament, ministerial advisers, government buyers).

7.4.2 Existing Educative and Training Mechanisms in Tasmania

Employee Induction

State Servants

As a rule Government Departments have induction manuals for new staff. It is generally the responsibility of a manager or direct supervisor to go through the induction process with the new member of staff. This may include some discussion about the State Service Code of Conduct and other rules of conduct such as computer or motor vehicle use.

There may be opportunity for more ethics training to be provided as part of employee induction tailored to the sorts of decisions each employee will be required to make in their work.

Ministerial Advisers

Instruments of appointment for ministerial advisers specify a code of conduct that applies to their employment.

In the past where there has been a change of Government or a number of new advisers appointed there has been some training provided about working in a Ministerial Office, but this has been ad hoc.

Ministerial staffing generally could benefit from a more centralised and formal approach to recruitment, induction and ongoing support. Ministerial staff would benefit from a tailor made set of standards or advisory notes to guide them in their conduct and performance of their duties.

Members of Parliament

While there is a code of conduct for Government members there is no induction or training provided to MPs other than through party processes. Similarly guidance on ethical issues may only be dealt with by reference to the Code (which is set at a reasonably broad level) or by reference to other longer serving or senior members.

Other public officers

There is no specific training mandated for other public officers such as members of Government Boards and Committees. However, there is guidance in a Corporate Governance Handbook for Government Business Enterprises produced for members of GBE boards by the Department of Treasury and Finance. Often board members of these 'commercial' entities also attend training and workshops arranged by the Institute of Directors. Some agencies also provide other support to boards for which they are responsible.

General Training

The Department of Premier and Cabinet through the Public Sector Management Office offers a number of programs aimed at raising awareness about ethics and ethical behaviours. These include:

- Introduction to the Public Sector which includes a number of modules such as the structure and functions of government, role of the Auditor General, state service employment and the code of conduct and an introduction to ethical decision making;
- Codes of conduct in Values Principles in Practice. This is run by the Australian Public Service Commission and examines employee responsibilities, breaches of the Code of Conduct and the legislative framework; and

- Ethical Decision Making. This introduces a reflective model for ethical decision making and highlights ethical implications that flow from decisions in the workplace.

There is scope to provide more thorough induction and ongoing training and support to State Service employees, members of Parliament, ministerial staff and other public officers. This may be effectively achieved through an Ethic Commission.

7.5 Criminal Code

As previously mentioned (section 4.8), most of Tasmania's law in relation to corrupt conduct by public officials is covered in the *Criminal Code Act 1924*.

The Act was intended as a codification of the criminal law which existed at the time it was drawn up and the origins of some of its provisions go back considerably before 1924. It is obvious that much has changed since then including the way our political institutions operate.

In common with much of the Code the sections dealing with corrupt conduct are difficult for non-lawyers to understand. This may be unavoidable because of the potentially wide category of conduct which may lead to a charge of this type. However, as very few persons have ever been charged, courts have had limited opportunities to consider and clarify the meaning of the relevant sections of the Code.

The most recent opportunity was the case of *Tasmania v Green, Nicholson and White* [2007] TASSC 54. In that case the then Chief Justice spent considerable time in his judgment dealing with submissions by prosecution and defence lawyers about the proper meaning of section 69 of the Code (Interference with Governor or Minister). It has been suggested that this complexity contributed to the failure of two juries to reach a verdict.

However there is no indication in the Chief Justice's judgment that he was in any doubt about the way the law should be applied, neither did he make

any suggestions for amendments to the section. His Honour did make some comments about Parliament's intentions in enacting the various sections in the way they did which could usefully be considered in thinking about whether the provisions are adequate for today's circumstances.

The other aspect of the current law is whether it extends to all those people who might fall into the category of 'servants of the State'. [ministerial staff etc]. At a minimum these definitional issues require consideration.

So far as the technical aspects of the law it is likely that specialist expertise would be required to develop viable alternative provisions to those which currently exist in the Code and other places. This might include reference to the relevant work of the national Model Criminal Law Officers Committee.

7.6 Freedom of Information

Freedom of Information is a mechanism that supports open and transparent Government (see section 4.7).

Since its inception, there have been a number of 'housekeeping' amendments to the Tasmanian Freedom of Information Act. These include:

- Removing the exemption that applied to Forestry Tasmania in 2004; and
- The abolition of conclusive certificates on Cabinet documents in 1999.

Queensland has had a recent major review to consider reform of freedom of information legislation. The Australian Law Reform Commission has received a reference from the Australian Attorney-General to inquire in to Freedom of Information laws and practices across Australia. This follows a similar review in 1995.

The Government does not consider that the Tasmanian Freedom of Information Act has fundamental flaws or that it is being disregarded by the public or by agencies. There were more than 1700 Freedom of Information applications made in 2006-07, so it obviously continues to serve a purpose.

One of the reforms considered by other jurisdictions, including the Queensland review, is the time limit placed on the exemption applicable to Cabinet documents. In Queensland these documents are subject to a 30 year rule for release purposes. In Tasmania Cabinet documents can be released after 10 years.

Other jurisdictions are also considering the role of conclusive certificates; but as mentioned these are already abolished in Tasmania for Cabinet information.

The Ombudsman has expressed the view that the Act should be reviewed. He has also indicated that the 30 day period he has under the Act to conduct an external review is not always long enough. This reflects the complexity of some requests and also the sheer volume of material which may be involved.

The Act was ostensibly intended to allow access to specific information about specific issues. However opposition parties, other members of Parliament, academics and journalists use Freedom of Information requests to 'fish' for large numbers of general briefs prepared for specific processes such as:

- Budget Estimate briefs;
- Incoming Government/Minister briefs; and
- Question Time briefs.

This makes it difficult for agencies to manage Freedom of Information requests within the required timeframes.

The Queensland review also examined this issue and recommended that:

- Incoming ministerial briefing books;
- Annual parliamentary estimate briefs;
- Parliamentary Question Time Briefs; and
- any drafts of those documents

be exempt from disclosure.

One of the most difficult and contentious issues in Freedom of Information decision making is the application of a public interest test under some exemption criteria. This means in order to refuse access to information the agency must show that access would, on balance, be contrary to the public interest. Defining the public interest is difficult as the matters to be taken into account will vary depending on the nature of the Freedom of Information request.

Freedom of Information officers must strike an appropriate balance between the individual rights of access inherent in the objectives of the legislation and the public interest in protecting the various other interests that may be harmed if information is disclosed. Often reconciling these competing interests cannot simply be done with reference to a list of rules or precise definition of the public interest test. Assessment of the public interest requires the consideration of any number of interests that might have bearing on a particular issue or document.

Clearly this is an area where more guidance and training to Freedom of Information officers would be beneficial. Again the Queensland review devoted a great deal of attention to this issue and ways of improving decision making.

There is merit in reviewing the Tasmanian Freedom of Information Act but given the recent major reviews in other jurisdictions launching another full blown review in Tasmania is not necessarily required.

Time needs to be taken to consider the findings of reviews in the Tasmanian context. This would be more cost effective than embarking upon a new full scale review of Tasmanian Freedom of Information legislation. A new review may not be necessary because many of the issues have already been canvassed in these other recent reviews. Any amendments required to the

Freedom of Information Act following consideration of the other reviews could be accommodated in the ordinary course of Government business.

It is also clear that with the increasing volume of Freedom of Information applications and the complexity of Freedom of Information decision making, greater investment in the education, training and guidance of Freedom of Information decision-makers is warranted.

7.7 ICAC

Calls for a standing independent crime and corruption commission (ICAC) are often based on the rather simplistic argument that a number of other states have one. It is important to note that Tasmania has not had the level of corruption or criminal activity that these other states have experienced.

Historically there have been two main reasons for setting up an anti-crime corruption authority or similar body. The first has been the need for special powers to combat organised crime, especially its involvement in the drug trade. The second is a demonstrated inability of existing structures to cope with long term, structural corruption within traditional law enforcement agencies.

Neither of these situations applies in Tasmania.

The establishment of integrity institutions such as the NSW ICAC was warranted to address this culture, although recent history indicates that even the integrity entities themselves are not immune from corrupt behaviour. Some have argued that ICACs require their own watchdogs, which requires additional funds.

Tasmania may not have a history of corruption, but that is not to say vigilance is not required and appropriate mechanisms need to be available when needed.

Since the inception of responsible government in 1856 there have been 84 commissions of inquiry held in Tasmania. There are very few that can be said

to relate to misconduct and corruption or governance generally. The relevant references are:

- Proposal to make the Office of Attorney-General permanent and non political (1908);
- Police Investigation into Bribery allegations EA Rouse and Others Final Report (1991); and
- Report of the Commission of Inquiry into the Death of Joseph Gilewicz (2000).

There have been many commissions of inquiry and other inquiries into a broad range of matters relating to public health (fluoridation), urban passenger transport and rail, restrictive trade practices, education and hospitals.

As discussed in Sections 4 and 5 of this submission there are many mechanisms already in place to promote integrity and oversee the conduct of the Executive.

Taken in combination Tasmania's existing arrangements are quite cost effective in comparison with the establishment and running on a standing entity, such as an Ethics Commission or ICAC. However we do need to weigh up any additional cost against the benefit of having a more robust integrity framework and investigatory mechanisms to both prevent unethical behaviour and investigate instances of it should it occur.

The cost of operating an ICAC type body varies from state to state (see section 6.4), but is large. Based on some work by South Australia, it is estimated that a budget allocation of about $15 million would be required to establish and recurrently fund even a small corruption commission.

As a community we need to consider if this level of recurrent funding is justifiable given the scale of corruption in Tasmania was at the level of that of New South Wales, Queensland or Western Australia and a standing body,

rather than the establishment of a special purpose commission of inquiry when required, was reasonable.

Moreover one criticism which has been levied against permanent commissions which can unilaterally investigate any matter within wide terms of reference is the risk of inappropriate use of coercive powers. This criticism has resulted in the establishment and funding of additional watchdog agencies to oversee these ICAC type bodies.

8 Ethics Commission

The Government recognises that it is imperative that the behaviour of Ministers, members of Parliament and their staff be covered by a robust mechanism with appropriate powers and independent scrutiny. A suitable body is an Ethics Commission as described in this section. However, the final model that the Government proposes will be informed by the work of the Joint Committee and the Government looks forward to the publication of that report.

8.1 Roles

The Commission would have three roles:

8.1.1 Education and advice

One role of the Commission would be to:

- Develop standards and codes of conduct to guide public officials in the conduct and performance of their duties;
- Prepare guidance and provide training to public officials on matters of conduct, propriety and ethics;
- Provide advice on a confidential basis to individual public officials about the practical implementation of the rules in specific instances.

8.1.2 Investigation

The Commission's responsibilities would allow it to receive and investigate complaints about public officials who have allegedly engaged in unethical conduct.

8.1.3 Referral and Recommendation

Following an investigation the Commission would have powers to:

- Recommend a course of action; or

- Refer the complaint to another body for sanction and/or other action.

An additional role of the Commission would be to recommend legislative reforms arising out of its education, advisory or investigation activities.

8.2 Application

There are three groups of public officials that should come within the scope of an Ethics Commission.

8.2.1 Group A – Ministers and their staff

The scope of the Ethics Commission would cover Ministers and their staff to ensure proper conduct and maintain good governance and standards within Government.

In this role the Commission could:

- Develop standards to guide Ministers and their staff in the conduct and performance of their duties;
- Prepare guidance and provide training (including a formal compulsory induction) for Ministers and their staff on matters of conduct, propriety and ethics; and
- Provide advice on a confidential basis to individual Ministers or their staff about the practical implementation of the rules in specific instances.

The Government will insist that all Ministers and their staff undertake a properly designed formal induction program within 30 days of their appointment.

8.2.2 Group B – Parliament

The Commission would also coverall elected members and parliamentary staff.

In this role, the function of the Commission would be to:

- Provide education and training to members of Parliament and their staff on ethical conduct, standards and integrity in undertaking their role and public administration generally;

- Publish guidelines, codes, formal advice or recommendations for use by members of Parliament and their staff; and
- Provide advice on a confidential basis to individual members of parliament or their staff on specific issues or the interpretation of any codes or guidelines that are developed.

The Commission's responsibilities could also include the following:

- Overseeing the maintenance and monitoring the operation of the Register of Members' Interests;
- Receiving and investigating complaints about members who are allegedly in breach of the Code of Conduct or guidelines and reporting findings to the relevant Privileges Committee.

In Tasmania, some of these functions or similar tasks, such as maintaining a register of interests under the *Parliamentary (Disclosure of Interests) Act 1996,* are currently undertaken by the Clerk of each House of the Parliament. Each House also has a standing Privileges Committee that can inquire and report into complaints about possible breaches of parliamentary privilege.

In the UK House of Commons, the Parliamentary Commissioner for Standards is an officer of the House and investigations into the application of the members Code of Conduct is a matter for the Commissioner and the Committee on Standards and Privileges.

8.2.3 Group C – Public Sector

The Ethics Commission would have coverage of the officers and employees of State Service agencies and other public officers. Public officers would include statutory office holders, and members of Government Boards and Committees.

8.2.4 Public officials excluded

Under the *Constitution Act 1934* (section 10), the Governor is part of Parliament. The Governor's staff, appointed under the *Governor of Tasmania Act 1982*, are not part of Parliament. The Governor and his staff are covered by a number of existing accountability mechanisms such as the Financial Management and Audit Act, Treasurer's Instructions, and scrutiny by the Auditor-General and parliamentary Estimates Committees, and the

Government considers they should not fall within the scope of the Ethics Commission.

8.2.5 Local Government

The Government considers that Local Government should be consulted by the Joint Committee on the desirability of this tier of government coming under any new Commission.

8.3 Conduct covered

The scope of conduct or behaviours covered by the Ethics Commission is that shown diagrammatically in the diagram in section 3.2, that is:

- Maladministration;
- Misconduct; and
- Corruption.

Though, corrupt activity (involving or likely to involve criminal conduct) is likely to be dealt with by existing mechanisms, either investigation by the Police or a Commission of Inquiry established for that purpose.

8.4 Investigatory powers

In order to investigate complaints thoroughly the Ethics Commission will need a range of investigatory powers. These may be similar to the powers of inquiry of other statutory bodies and officers, for example the Ombudsman or could even be similar to law enforcement bodies.

The Joint Committee will need to look at the scope of powers that an Ethics Commission may require.

However, at the very least, it is proposed that the Ethics Commission would require powers to:

- Search and seize with a warrant and without a warrant in cases where it is highly likely that evidence may be destroyed or tampered with;
- Enter property including commercial and domestic property;
- Interview and take statements from witnesses;
- Obtain information from other institutions for example, authorised deposit taking institutions or private business records;

- Make recommendations and refer complaints to other bodies for action or sanction; and
- Deal with refusal or failure to provide information, or false statements.

It would be preferable that if a complaint of unethical behaviour is categorised as criminal activity then it should be referred to the Police for investigation. The Police have specialised skills and experience in conducting complex investigations and they also have access to a range of stronger investigatory powers, subject to appropriate authorisation and oversight, such as surveillance, arrest and use of force.

The Police may also prosecute matters or refer indictable matters to the Director of Public Prosecutions for further action.

8.5 Referral and recommendations

Following an investigation where unethical behavior has been established or is considered to have been likely, the Ethics Commission should have power to make recommendations about how the issues raised should be dealt with. This may involve referral to existing statutory bodies such as the State Service Commissioner or Ombudsman or, in less serious cases, take the form of the recommendation to a Head of Agency to rectify maladministration. In the case of the most serious or systemic complaints the Ethics Commission could make a public recommendation to the Government that it advise the Governor to establish a Commission of Inquiry to inquire into and advise on these matters.

As already mentioned above, an additional role of the Commission would be to recommend legislative reforms arising out of its education, advisory or investigation activities.

8.6 Integration with Existing Mechanisms

As already discussed, Tasmania has several existing bodies and statutory officers that oversee or review aspects of public administration and the conduct of public officials. These include the Ombudsman, Auditor-General and the State Service Commissioner.

In this model the work of the Ethics Commission and that of the Ombudsman and State Service Commissioner should be seen as part of an integrated framework or system of public sector oversight.

Potentially one or more of these independent statutory officers could be members of the Ethics Commission but still retain their separate identity, power and functions. Another option would be to fully integrate these statutory officers into the Ethics Commission.

Whatever model is chosen, given the inter-relationship with other statutory bodies and office holders (such as the Ombudsman, State Service Commissioner, Parliamentary Disclosures Act) there would be a need to review and reform their legislation to clarify powers, scope and roles to ensure consistency and avoid duplication and jurisdiction shopping.

8.7 Legislation underpinning the Commission and other bodies

Legislation is required to establish an Ethics Commission, and it should include provisions about membership, structure, powers and functions.

8.8 Parliamentary oversight

In some jurisdictions the integrity and standards mechanisms have a direct relationship with the Parliament through oversight by a Parliamentary Committee. This is a feature that could be considered, particularly if parliamentary standards are incorporated into the role of the Ethics Commission.

9 Independence of the Police Service

9.1 Relationship with the Government

Section 7 of the *Police Services Act 2003* provides that the Commissioner of Police, under the direction of the Minister, is responsible for the efficient, effective and economic management and superintendence of the Police Service.

There are two views about the operation of this section. One view is that this provision means that the Commissioner of Police discharges all his duties under the direction of the Minister and as the police service is hierarchical it follows that the entire police service is under the Minister's direction, including the conduct of investigations.

The Solicitor-General has advised differently. In particular he concludes that the power of direction conferred on the Minister by Section 7(1) of the Act is confined to the giving of directions in relation to the "*the efficient, effective and economic management and superintendence of the Police Service*", and the Minister cannot give any enforceable direction to the Commissioner in relation to the performance by the Commissioner of his duties as a police officer. In his advice, he concludes "*To the extent that the performance of the Commissioner's duties as a police officer is properly described as 'operational' then, in my opinion, the Minister is unable to give any lawful direction to the Commissioner in relation to operational matters.*"

Despite the Solicitor General's advice there is still concern about the operation of this section and therefore some amendment could be considered to clarify the relationship between the Commissioner of Police, the Premier and the Minister for Police and Emergency Management and the purported ability for the Ministers to direct the Commissioner in terms of investigations.

The section could be amended to leave no room for the argument that the directions provided by the Minister cannot go beyond matters of administrative management to the operational and investigative activities of the Police Service.

9.2 Independent Oversight

Earlier in this submission (section 6.3.2), it was noted that Tasmania Police, in partnership with the University of Tasmania, delivers a comprehensive curriculum on ethics to police recruits and other members of the police service undertaking professional development. This has helped to develop ethical professional practice within the service.

But as also mentioned in section 6.3.2 some Australian jurisdictions, have police integrity commissions or bodies to oversee the Police and where necessary investigate police misconduct.

South Australia has a Police Complaints Authority which is established to receive complaints about the conduct of police officers, oversee complaint investigations conducted by South Australia Police and investigate certain complaints itself. The complaints system is intended to provide independent oversight of complaints about police.

The Ethics Commission could take on a role of an Office of Police Integrity, but this approach would require more detailed consideration about the nature of the investigative powers and specialist resources that were provided or available to the Commission. Whether this is a step that should be taken will be better informed by the work of the Joint Committee.

Explore the possibilities