



A submission by the Police Association of Tasmania
to the Parliament of Tasmania Joint Select Committee on Ethical Conduct

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President.

The Police Association of Tasmania (PAT) represents the industrial, political, legal and welfare interests of the sworn members of Tasmania Police. The PAT is registered under the Trade Unions Act and is affiliated with the Police Federation of Australia (PFA), Unions Tasmania and the Australian Council of Trade Unions (ACTU). The PAT has followed the debate concerning ethical and open Government in Tasmania and the capacity of current mechanisms to conduct independent investigations and makes the following submission.

The PAT contends that Tasmania Police enjoys high levels of community confidence, cooperation and respect and widespread community support. That level of support is fundamental to the effectiveness of a contemporary police service. The PAT believes that support stems in part from the high standard of ethical conduct demanded of police officers and a rigorous investigative and sanction regime which enforces that standard. Parliament has insisted that high standards apply to police officers and the PAT believes the Committee should consider these standards and their application in its deliberations.

Police officers are subject to the National Police Code of Ethics which states:

- *Police officers have a duty to their country and to their Police Service to serve the community by protecting life and property, preserving the peace and detecting and apprehending offenders.*
- *Police officers should carry out their duties with integrity and honesty and should at all times make every effort to respect the rights of all people in the community regardless of colour, social status or religion, enforcing the law justly without fear, favour, malice or ill will.*
- *It is incumbent upon all police officers to keep confidential matters of such a nature which they may learn in their official capacity, unless revelation is necessary for the administration of justice.*
- *By their conduct and performance police officers should give high priority to enhancing the reputation of their profession. Police officers should practice self discipline and restraint and should strive to improve their knowledge of the law and contemporary police practice applicable to their community.*
- *In the pursuit of their responsibilities, police will resort to the use of force only when strictly necessary and to the extent required for the performance of their duty.*
- *Police officers should be aware of these ethics and should accept the desirability of them as an integral part of their personal and professional life.*

A police officer's day to day conduct is governed by the Police Manual. This Manual provides Standing Orders and instructions to all members. The Commissioner of Police in his foreword to the Manual states that the Standing Orders and instructions are to be strictly complied with by all members, and failure to comply may render members liable to disciplinary action under the Police Service Act 2003. The Manual contains over 130 Orders which must be

complied with, over 900 pages of instructions, and has close to 250,000 words.

The Code of Ethics and compliance with the Manual is reinforced under Section 42 of the Police Service Act 2003 which states:

42. Code of conduct

(1) A police officer must behave honestly and with integrity in the course of his or her duties in the Police Service.

(2) A police officer must act with care and diligence in the course of his or her duties in the Police Service.

(3) A police officer must comply with –

(a) all orders in the Police Manual; and

(b) any lawful direction or lawful order given by a senior officer.

(4) A police officer must maintain appropriate confidentiality about any dealing made and information gained in the course of his or her duties in the Police Service.

(5) A police officer must disclose, and take reasonable steps to avoid, any conflict of interest in connection with his or her duties in the Police Service.

(6) A police officer must use the resources of the Police Service in a proper manner.

(7) A police officer, in connection with his or her duties in the Police Service, must not –

(a) knowingly provide false or misleading information; or

(b) omit to provide any matter knowing that without that matter the information is misleading.

(8) A police officer must not make improper use of –

(a) information gained in the course of his or her duties in the Police Service; or

(b) the duties, status, power or authority of the police officer –

in order to gain, or seek to gain, a gift, benefit or advantage for the police officer or for any other person.

(9) A police officer must not access any information to which the police officer is not entitled to have access.

(10) A police officer must not destroy, damage, alter or erase any official document, record or entry without the approval of the Commissioner.

(11) A police officer must not, at any time, conduct himself or herself or act in a manner that is likely –

(a) to be prejudicial to the Police Service; or

(b) to bring discredit on the Police Service.

(12) A police officer must not victimise or discriminate against another police officer because that other police officer has reported a breach of a provision of the code of conduct.

(13) A police officer must comply with any other prescribed conduct requirement.

The Police Service Act 2003 also provides for methods to investigate breaches of the code of conduct and allows for a range of sanctions if a breach is found to have occurred. Section 43 states:

43. Actions in relation to breaches of code of conduct

(1) The Commissioner must establish procedures for the investigation into any alleged breach of a provision of the code of conduct by a police officer.

(2) After considering the results of an investigation, the Commissioner must determine whether or not the police officer has breached a provision of the code of conduct.

(3) If the Commissioner determines that a police officer has breached a provision of the code of conduct, the Commissioner may take one or more of the following actions in relation to the police officer:

(a) direct that appropriate counselling be provided to the police officer;

(b) reprimand the police officer;

(c) impose a fine not exceeding 20 penalty units;

(d) direct that the remuneration of the police officer be reduced within the range of remuneration applicable to the police officer;

(e) reassign the duties of the police officer;

(f) transfer the police officer;

(g) in the case of a non-commissioned police officer, place that police officer on probation for any specified period the Commissioner considers appropriate;

(h) in the case of a non-commissioned police officer, demote the police officer;

(i) in the case of a non-commissioned police officer, terminate the appointment of the police officer;

(j) in the case of a commissioned police officer, recommend to the Minister that the appointment of the police officer be terminated or that the police officer be demoted or placed on probation for any specified period the Commissioner considers appropriate;

(k) take any other action the Commissioner considers appropriate.

In addition police officers are subject to integrity tests which may involve the use of unlawful conduct on the part of the person conducting the test. Section 48 states:

48. Integrity tests

(1) The Commissioner may conduct, or require an authorised person to conduct, a test of the integrity of a police officer if there are reasonable grounds to suspect that the police officer has engaged in, or is engaging in, or is likely to engage in, conduct that –

(a) may constitute an indictable offence or any other offence punishable by imprisonment; or

(b) is corrupt or seriously unethical.

(2) An integrity test may only involve an act or omission that, but for subsection (3), would be unlawful if –

(a) it is reasonably necessary for the conduct of the integrity test; and

(b) *it is authorised by a magistrate.*

(3) *Despite any other Act or law to the contrary and subject to subsection (2), any act done or omission made in conducting an integrity test is lawful.*

(4) *The Commissioner may issue a certificate stating that on a specified date or during a specified period a specified person was authorised to conduct or participate in an integrity test involving a specified act or specified omission.*

(5) *An authorisation under subsection (2) or a certificate issued under subsection (4) –*

(a) *is admissible in any legal proceedings; and*

(b) *is evidence of the matters specified in the authorisation or certificate.*

Police Officers may also be required to provide financial statements (Section 49) and be tested for alcohol and drugs through the provision of breath, saliva, urine and blood samples (Section 50).

It can be seen that through the Police Service Act 2003 Parliament has imposed the highest standard on the conduct of police officers.

In addition it is well established in law that Police Officers do not have a right to silence. Section 46 (3) (a) (ii) states:

“The Commissioner may...direct any police officer to ... provide any information or document or answer any question for the purposes of the investigation (of a complaint)”.

The Tasmania Police Manual at Section 13.1.14 – Obligation to answer questions – states:

"Order

Members must answer questions, submit reports and otherwise comply with the lawful directions or orders of a senior officer conducting an investigation into the breach of the Code of Conduct in accordance with Section 46 (3) (a) (ii) of the Police Service Act 2003."

Furthermore, the Procedures Manual – Guidelines for investigation of complaints against police officers states:

- Clause 10.6

"If, during an interview into relation to a possible disciplinary offence, the interviewing member forms the belief that a criminal offence may have been committed by that member, the interviewing member shall properly caution the member under investigation".

- Clause 10.7

"Where, during the course of an investigation into an alleged disciplinary offence, it is considered that a criminal offence may have been committed, an investigating officer may proceed to require the member to answer questions for the purposes of the investigation into the disciplinary offence. A member who fails or refuses to answer those questions should be directed or ordered to do so. A member who fails or refuses to answer those questions when directed to do so should be advised the failure or refusal to respond could constitute a disciplinary offence".

The provisions of the Police Service Act 2003, the Police Manual and the Procedures Manual – Guidelines for investigation of complaints against police officers are reinforced by Court decisions, particularly the case of *Commissioner of Police v. Justin* 1991 55 SASR 547, and the High Court in *Police Service Board v. Morris* 156 CLR 397, which ruled unanimously that the relevant regulations excluded the common law privilege against self incrimination even where the answers to questions posed may tend to incriminate the offender of a criminal offence. The court agreed with the decision in *Morris'* case that "*The legislature must have intended that any cause for suspicion touching a members performance of his duties could be the subject of interrogation by a superior officer and that the member would be obliged to answer the questions put to him whether or not those answers would tend to incriminate him*".

In general terms it appears that police officers in Tasmania (and for that matter in all other Australian jurisdictions) have no formal right to silence once they have been formally directed to answer a question by the Commissioner or a lawfully delegated officer who is investigating a complaint which has been made against the officer. A refusal to answer any question will inevitably result in disciplinary action.

The PAT contends that not only has a higher standard been set for police officers than any elected/public officials but also that the normal protections of the law available to all other members of the community are not afforded to police officers.

Whilst high standards have been set for police officers generally there is a weakness in the process when it relates to the office of Commissioner of Police. The Commissioner is appointed by the Governor (Section 6 Police

Service Act 2003), and thus in effect by the Government or more specifically by Cabinet, for a period not exceeding 5 years. It is almost inconceivable that under this process of appointment the Minister responsible would not have significant input.

There has been significant recent debate concerning the independence of the office of Commissioner as it relates to the Minister. The Police Service Act 2003 Section 7 clearly states that the Commissioner, under the direction of the Minister, is responsible for the efficient, effective and economic management and superintendence of the Police Service.

The Minister arguably has more control over the Commissioner than that stated in Section 7 of the Act. The standards set by the Act as they relate to police officers generally are also applicable to the office of Commissioner. The Act (Part 3 Sections 42 – 52) clearly states that the Commissioner is responsible for establishing procedures for the investigation of alleged breaches of the code of conduct, considering the results of any investigation, and taking action against the officer with a range of options from counselling to dismissal. In this Part of the Act the Commissioner is also responsible for setting procedures concerning complaints against police, conducting integrity tests, requiring financial statements and conducting alcohol and drug testing. The Act at Section 52 then states that:

This Part applies to the Commissioner as a police officer and any reference in this Part to the Commissioner is taken to be a reference to the Minister in its application to the Commissioner.

The relationship between the Minister and the Commissioner is defined by the Commissioner's appointment on a contract not exceeding five years, (Section 6), the Commissioner working under the direction of the Minister, (Section 7), and the Minister being responsible for investigating complaints, conducting integrity tests, requiring financial statements and testing for alcohol and drugs in relation to the Commissioner. (Section 52). The Minister is clearly responsible for the ethical behaviour of the Commissioner. By the nature of the working arrangements close relationships can develop which have the potential to undermine the requirements of rigorous accountability. There is clear potential for conflict in this relationship and it relies heavily on both being persons beyond reproach. History has shown that within the Australian context this has not always been the case. With no independent body in place one can only speculate as to how a Minister may handle an allegation of corruption made against a Commissioner of Police.

Tasmania Police is high profile government agency and there can be little argument that it is not regarded as part of the government or, at the very least, as having very strong relations with government, by the majority of Tasmanians.

This view is strengthened by the close public relationship between the Police Minister and the Police Service on a daily basis, particularly in Parliament and the media. Similarly the Police Service commitment to the elected government is reflected in its support for whole-of-government initiatives to current social issues such as family violence, Tasmania Together, and drug abuse and includes joint agency approaches to more traditional policing issues such as crime reduction and prevention.

This is not to say that the relationships between the Minister, the Commissioner, the Government and the Police Service are, of themselves, sinister. It is a well accepted requirement for the public sector to adhere to the mandate of government and to serve the elected government in the implementation of their policy programs. Indeed this is fundamental to public sector/government arrangements. However the PAT believes that it cannot be argued under the current framework that the independence required to conduct investigations into elected officials exists.

In Tasmania the authority to conduct criminal investigations, including the conduct of investigations into political matters potentially constituting corruption, is vested in the Tasmania Police Service which is, of course, accountable to the Commissioner of Police. No independent body, or for that matter dedicated or specialist section of the police service, exists for the purpose of the investigation and prevention of political or public sector corruption in this State.

When allegations concerning elected officials surface, ad hoc arrangements are put into effect whereby officers with the requisite skills are selected from various areas of the service, by the Commissioner, to form a task force to investigate the matters in question. In one inquiry recently officers reported directly to the Director of Public Prosecutions (DPP) who, in effect, had oversight of their investigations. There was no legal requirement for this to occur.

Whilst these arrangements may be the best that can be achieved under current circumstances, they are, nonetheless, far from satisfactory. The DPP may be well qualified to provide legal advice, however the officers have no recourse to appropriate investigative advice of a tactical or strategic nature. In cases where technical surveillance or other sophisticated approaches are required, police support services would necessarily have to be involved. The issue of funding from Government could conceivably arise. Other issues include the effect of political considerations on the officers themselves who will return to the police mainstream at the conclusion of the investigation.

The PAT also believes that various problems arise for Tasmania Police from the effects of:

- being seen as part of the Government;

- the public's poor perception of the government's endeavours to fight corruption (whether they have any basis in fact or not);
- the potential conflict of interest issues in investigating political corruption under a regime of police accountability to the Minister of Police;
- the current unsatisfactory, ad-hoc, investigative arrangements that lack a clear administrative and legislative framework; and
- a lack of transparency.

These are significant issues as they have the potential to erode public support and confidence in police.

Under the current arrangements, the absence of a standing anti-corruption body means there is little deterrent to political corruption, no educative capacity to prevent or mitigate opportunity for corrupt behaviour, and no clear guidelines or encouragement for the reporting of corruption issues. These will often only surface when the media or opposition parties highlight issues publicly. As a result, the current incidence of reported corrupt activity in this state does not provide a credible measure of the extent of the problem.

Other jurisdictions have overcome these issues through the introduction of various bodies, independent of police, to investigate corruption by public officials at both a state and local government level.

Queensland, as a result of the Fitzgerald Enquiry, created a Crime and Misconduct Commission (CMC). New South Wales implemented an Independent Commission Against Corruption (ICAC). Western Australia formed their Corruption and Crime Commission (CCC), and Victoria have instituted an Office Of Police Integrity (OPI). With the exception of the OPI, which focuses solely upon police, each authority addresses itself to public sector corruption and organised crime.

Each is independent of the executive arm of government, and also independent of the Commissioner of Police, allowing for performance of their role free from conflicts of interest and allegations of high level interference. They differ in their functions, applications and powers as shown in annexures 1, 2 and 3 respectively.

In New South Wales (NSW) for example, the ICAC is charged with this role. The ICAC is independent of the government of the day and is accountable to the people of NSW through the NSW Parliament. Similar arrangements exist in Western Australia through the CCC of Western Australia, and in Queensland via the CMC. All organisations are accountable directly to Parliament through all-party committees.

South Australia has a different arrangement with the police service's Anti-Corruption Branch responsible for the investigation of all corruption within the public sector. This includes politicians (state and local government) and

police. However, independent oversight is provided by a retired Supreme Court Justice who reports to the Attorney General.

Other jurisdictions also have various legislative provisions that provide their police commissioners with greater independence from ministerial subjection, or higher levels of Ombudsman involvement in political investigation processes than exists in Tasmania.

Further a field, in the United Kingdom, the work of the *Committee on Standards in Public Life* (originally the Nolan Committee) has seen the introduction of rigorous processes, including investigative and anti corruption strategies, designed to ensure the maintenance of the highest of standards by elected officials and civil servants.

The powers and authority of Tasmanian police officers generally have appropriate checks and balances which leave them without question the most accountable servants of the Crown in Tasmania. It is questionable whether the office of the Commissioner of Police has the same level of scrutiny. The checks and balances on the powers and authority of elected officials and high ranking public officials does not exist to the degree that it does in other jurisdictions within Australia. The PAT believes an authority which would apply the level of scrutiny and accountability similar to that which police officers are subject to is in the best interests of Tasmania.

Whilst the structure of a comparative Tasmanian authority will be the subject of ongoing debate, the following suggestions are offered as a contribution to that discussion:

- The authority should be answerable to the State Parliament with oversight principles which guarantee independence from the Executive, and independence from influence from any particular minister, political party or faction.
- The authority's function should be the investigation of corruption and/or organised or major crime associated with any public officials. (ie. state servants, police, prison officers, local government officials and representatives, judiciary, statutory bodies, persons employed by or otherwise representing government-business enterprises, state government officials and representatives).
- The authority should have oversight of the routine complaints investigation systems within the public sector.
- The authority should be resourced with qualified and experienced personnel and sufficient physical and financial resources to permit thorough investigation, surveillance, evidence preparation and litigation.
- The authority should have the power to:
 - Conduct hearings (public or in camera), and compel witnesses to attend and to produce records relevant to the proceedings.

- Apply to a court for warrants to search premises and seize evidence or other relevant material.
- Apply to a court for warrants to utilise listening devices or to carry out telephone intercepts or to capture electronic data transfer.

In conclusion the PAT argues that police officers are subject to the highest ethical and behavioural standards enforced through a rigorous framework. This high standard should be considered by the committee for application to elected and high ranking public officials. The PAT believes that the current ad hoc model of investigation is not satisfactory and places the Police Service in a difficult position. Furthermore, the relationship between the Commissioner of Police, the Minister and the Government of the day as defined by the Police Service Act and the interaction between Government and the Department, ensures that the level of independence required for investigations does not exist.

Annexure 1

<u>FUNCTIONS</u>	Major/Organised Crime	Integrity and Conduct	Research / Education	Proceeds of Crime	Witness Protection	Indigenous Liaison
Qld Crime & Misconduct Commission (CMC)	✓	✓	✓	✓	✓	✓
NSW Independent Commission Against Corruption (ICAC)	✓	✓	✓			
Vic Office of Police Integrity (OPI)		✓				
WA Corruption and Crime Commission (CCC)	✓	✓	✓			

Annexure 2

<p><u>APPLICATION</u></p> <p><i># Police Integrity Commission, then ICAC if necessary</i></p> <p><i>* Crimes only</i></p> <p><i>@ Including private prisons</i></p> <p><i>+ not unsworn members</i></p>	State Government Departments	Statutory Bodies	Local Government	Prisons	Police	Elected Officials	Judiciary
Qld Crime & Misconduct Commission (CMC)	✓	✓	✓	✓@	✓	✓	
NSW Independent Commission Against Corruption (ICAC)	✓	✓	✓	✓	✓#	✓	✓
Vic Office of Police Integrity (OPI)					✓+		
WA Corruption and Crime Commission (CCC)	✓	✓	✓		✓	✓	

Annexure 3

<p><u>POWERS</u></p> <p># <i>Magistrate approval</i></p> <p>* <i>Supreme Court approval</i></p>	Production of records	Entry, Search & Seizure (Public Offices)	Search Warrants	Conduct Public Hearings	Coercive Powers	Surveillance (inc listening devices)	Telephone Intercepts	Conduct Integrity Tests
Qld Crime & Misconduct Commission (CMC)	✓	✓	✓ #	✓	✓	✓ *		
NSW Independent Commission Against Corruption (ICAC)	✓		✓	✓	✓	✓	✓	
Vic Office of Police Integrity (OPI)								
WA Corruption and Crime Commission (CCC)	✓		✓ *	✓	✓	✓	✓	✓

