

Tasmanians for a Healthy Democracy

Imagine – you can make a difference

[www.tashealthydemocracy.com](http://www.tashealthydemocracy.com)

Members of the Joint Select Committee  
Joint Select Committee on Ethical Conduct  
Parliament House  
Hobart  
TAS 7000

PO Box 3032  
West Hobart  
TAS 7000

1 August 2008

Dear Members of the Joint Select Committee,

**RE: Inadequacy of Existing Mechanisms for Ethical and Open Government in Tasmania and Recommendations for an Independent Integrity Body.**

This paper is a response by Tasmanians for a Healthy Democracy (THD) to the call for submissions to the Joint Select Committee on Ethical Conduct. THD believes that existing Tasmanian mechanisms to support ethical and open government and to conduct independent investigations are inadequate, both in combating corrupt conduct and in quelling public concerns about corruption. THD calls for the formation of an independent integrity body to address these issues. Resistance to reform will only lead to the perception that the government's main concern is to avoid scrutiny, rather than to enhance public integrity.

This submission is structured as follows:

1. The nature of "ethical conduct" and "corruption."
2. Why existing mechanisms are inadequate
3. Call for an independent integrity body
4. Discussion

For a more detailed discussion of the academic and policy literature underpinning our thinking, please see the submission by Wynne Russell (Dr/Ms), 14 Grange Ave, Taroona TAS 7053.

Thank you for your attention to this matter.

Yours sincerely,  
Marion Nicklason, Convenor  
Tasmanians for a Healthy Democracy

PO Box 3032, West Hobart TAS 7004 | Phone 0439 349 317

[www.tashealthydemocracy.com](http://www.tashealthydemocracy.com), [info.tashealthydemocracy@gmail.com](mailto:info.tashealthydemocracy@gmail.com)

## **I. The nature of “ethical conduct” and “corruption”**

Many people think that “corruption” only exists when money has changed hands or when the law has been broken. However, integrity specialists and anti-corruption bodies worldwide increasingly use a broader definition of corruption as the abuse of entrusted power for illegitimate goals—goals that may not be limited to financial abuse, but can include enhancing personal or organizational reputation or political power. By this definition, corruption encompasses practices that have previously earned the “lesser” charge of “unethical behaviour”—for instance, cronyism in recruitment practices.<sup>1</sup> THD believes that it is important to call a spade a spade, and to recognise that a wide range of misconduct, whether illegal or simply unethical, can and should be called “corrupt.”

## **II. Why existing mechanisms are inadequate**

By any definition, Tasmanians are concerned about the government’s response to corruption in the state. In a 2006 Roy Morgan poll, 60% of Tasmanians said that their state government was “not effective” in the fight against corruption, of whom 11% said that they thought that the government not only does not fight corruption, but also encourages it—the highest levels of distrust in the nation.<sup>2</sup> Since then, well-publicised allegations of interference by government officials and public servants in the regulatory process and judicial appointments have not been investigated or, when found to be true, have led to little more than slaps on the wrist, further eroding public confidence.

Existing oversight bodies and mechanisms, although doubtless highly professional, appear inadequate to the task of pursuing corrupt behaviour. Indeed, an examination of the authorizing legislation for existing oversight bodies—the Auditor General, the Ombudsman, and the State Service Commissioner—reveals issues that may limit or impede investigation of corrupt activities. For example, while the Ombudsman can investigate allegations of improper conduct on the part of public authorities, he is not entitled to question the merits of any decision made by a Minister, a court, or a person as a member of a court. Furthermore, the Director of Public Prosecutions, the Solicitor General, the Auditor General, the Tasmanian Audit Office, a judge or associate judge of the Supreme Court, or a magistrate of the Magistrate’s Court are all excluded from the definition of “public authority.”<sup>3</sup> Similarly, the determination of whether “reasonable ground” exists to investigate whether a public service employee may have breached the State Service Code of Conduct rests with the Head of their Agency, not the State Service Commissioner.<sup>4</sup> The Auditor General for his part is limited to financial matters.<sup>5</sup> Meanwhile, the Commissioner of Police discharges his duties “under the direction of the Minister”—apparently the Premier—and also does not have responsibility for investigating non-criminal offences.<sup>6</sup> Under these conditions, it is not surprising that the Director of Public Prosecutions has pointed out that the state lacks a fully independent investigating body.<sup>7</sup>

---

<sup>1</sup> See, for example, Overseas Development Institute and Transparency International, “Preventing Corruption in Humanitarian Assistance,” 2008. <http://www.odi.org.uk/hpg/papers/hpgcommissioned-corruption-TI.pdf>. For a wide-ranging definition of corrupt conduct in the Australian context, see Section 8 of the New South Wales ICAC Act.

<sup>2</sup> <http://www.roymorgan.com/news/polls/2006/4070/>

<sup>3</sup> Ombudsman Act 1978.

<sup>4</sup> State Service Act 2000, Commissioner’s Directive No. 5, 25 January 2007.

<sup>5</sup> Financial Management and Audit Act 1990.

<sup>6</sup> T.J. Ellis SC, Director of Public Prosecutions: Letter, The Mercury, 16 April 2008.

<sup>7</sup> T.J. Ellis SC, Director of Public Prosecutions: Letter, The Mercury, 16 April 2008.

### III. Call for an independent integrity body

We call on the Tasmanian government to create a clear, comprehensive, coherent integrity strategy for the Tasmanian government, legislature and public service, encompassing prevention of corrupt conduct; education about ethics and good practice; and investigation of wrongdoing. Specifically, we call on the government to establish:

**A.** A specialized, structurally independent integrity body:

- a) reporting to a Joint Standing Committee of parliament;
- b) independently assessed by an Oversight Committee reporting separately to the Joint Standing Committee;
- c) with clear delineation of responsibilities and liaison relationships in relation to the Ombudsman, Auditor General, State Service Commissioner, Heads of Agencies, and Director of Public Prosecutions;
- d) with a head appointed by the Governor on the recommendation of the Joint Standing Committee plus two outside experts, with its first head ideally a mainland appointment;
- e) adequately resourced, including
  - ◊ adequate funding provided through an independent and guaranteed budget indexed to the CPI and
  - ◊ specialized staffing;
- f) with measures to ensure transparency and accountability.

**B.** This body should be charged with three functions:

- Prevention of corrupt conduct, including input into a review of the wording and enforcement of all codes, regulations and policies dealing with public integrity and corrupt conduct.
- An integrity education component.
- An investigative capacity, including:
  - Guaranteed access to information
  - The ability to initiate inquiries where symptoms of corruption appear.
  - The ability to engage in retrospective investigation in cases where there is a continued impact on public policy
  - The ability to maintain the confidentiality of the investigative process, including whistle-blower protection and the ability to conduct hearings in camera in order to protect the privacy of those accused.

**C.** The body's proposed structural and operational model should be open to a period of public comment before legislation is drawn up.

### IV. Discussion

The following discussion outlines THD's rationale for the points raised above.

#### **A. Structure**

##### ***A specialized body***

Combating corruption is a complex task which requires specialized powers and skills different from those required for, for instance, combating maladministration, as well as a high degree of structural, functional and political independence. Most international anti-corruption regimes require members to establish specialised anti-corruption bodies precisely due to this complexity.<sup>8</sup>

---

<sup>8</sup> Organization for Economic Cooperation and Development, "Specialized Anti-Corruption Institutions: Review of Models," 2008, [http://www.oecd.org/document/31/0,3343,en\\_36595778\\_36595861\\_39972191\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/31/0,3343,en_36595778_36595861_39972191_1_1_1_1,00.html)

### ***A structurally independent body***

Only a fully structurally independent body, free of the limitations imposed on existing oversight bodies such as the Ombudsman, can be guaranteed to be able to act autonomously and impartially in relation to allegations of misconduct anywhere in the state's governance structures. Only a body possessing such freedom of action will be able to allay public concerns that the government may be shielding areas of action or individuals from scrutiny. Meanwhile, bodies with existing responsibilities do not benefit from overexpansion of their roles, which can lead to overstrain or loss of focus. For example, saddling an Ombudsman's office with the responsibility for investigating misconduct dilutes its capacity to address its other responsibility of promoting administrative fairness.

### ***Reporting to Parliament and Oversight Committee***

The body should report to a Joint Standing Committee of Parliament which shares information with the government. It should also be independently assessed by an Oversight Committee, made up of one member of the Joint Standing Committee and two outside appointments (possibly one with a judicial background and the other with knowledge of integrity structures, one of whom ideally would be from the mainland), which also reports to Joint Standing Committee.

### ***Clear delineation of responsibilities and mechanisms for liaison***

An integrity body must promote bureaucratic cooperation in the fight against corruption, rather than competition. Clear delineation of the roles of an integrity body and of all organizations with which it interacts will be necessary both to avoid turf battles and to promote cooperation and exchange of information. In particular, liaison and cooperation with the Ombudsman, Auditor General, State Service Commissioner, Heads of Agencies, and Director of Public Prosecutions will be essential. Clear delineation of roles will also help to avert resource-wasting overlap of responsibilities and duplication of effort. Clear guidelines for when issues should be referred by other organizations to the integrity body will also be necessary.

### ***Head***

The appointment of a head of an integrity body is a highly symbolic moment. In its choice of a head, the Tasmanian government will be sending messages not only on how serious it is about seeking out genuine expertise and independence, but also on the extent of its commitment to shedding its image as nurturing a "culture of coziness." To achieve the best outcome in both respects, the head should be appointed by the Governor on recommendation of the Joint Standing Committee plus two outside experts, one from the mainland; ideally, the first head should be a mainland appointment.

### ***Adequate resources***

Resourcing is the most important determiner of the success of integrity structures. Notably, Tasmania historically has under-resourced its integrity institutions. In 2004 the averaged resourcing ratios (staffing and expenditure) for the state's core watchdog bodies (the Auditor General and the Ombudsman) were the second lowest in the country; the Ombudsman, for example, was staffed on a *pro rata* basis at a level half that of the larger states.<sup>9</sup> These mistakes should not be repeated in respect to a new integrity body.

---

<sup>9</sup> Brown, A.J. and Brian Head, "Ombudsman, Corruption Commission or Police Integrity Authority?" Paper presented to Australian Political Science Association annual conference, Adelaide, September-October 2004.

*Adequate, independent and guaranteed budget:* The integrity body's funding must be independent, guaranteed and indexed to the CPI. A formula must be found for assuring that the body has adequate funding to perform its core functions, ideally through consultation with academic specialists as well as existing anti-corruption bodies interstate.

*Adequately staffed:* Personnel should be hired on term contracts and be selected on the basis of competitive, nation-wide recruitment. In selecting personnel, expertise should be balanced with motivation, dedication, and integrity.

### ***Accountability and transparency***

A lack of transparency and accountability will breed suspicion that an integrity body is abusing its position. The body should submit annual reports to parliament and the Oversight Committee, its finances should be audited by the Auditor General, and it should be answerable for the conduct of its staff. Enquiries from the public and press should be dealt with promptly and accurately. While confidentiality is essential to some areas, it should be kept to the minimum necessary. Complaints relating to the body should be referred to the Oversight Committee as well as to the Ombudsman.

## **B. Functions**

These functions and objectives need to be built into the statutory objectives and structures of the integrity body.

### ***Prevention***

A strategy of prevention of corruption in power structures includes establishing rules and restrictions and mandating and administering disciplinary action for non-compliance. An integrity body should play a key role in the prevention of corrupt conduct, including input into a review of the wording and enforcement of all codes, regulations and policies dealing with public integrity and corrupt conduct, including the State Service Principles, State Service Code of Conduct, Parliamentary Code of Conduct, and any other government- or agency-level regulations and policies at the state or local government level dealing with, among other things:

- Conflict of interest
- Assets declaration
- Regulatory systems
- Gifts and benefits
- Misconduct disclosure
- Lobbying
- Political donations
- Public procurement practices
- Licensing/permits/certificates
- Post-separation employment
- Internal and external auditing and evaluation of programs

In these duties, the body should liaise with the Ombudsman, the Auditor General, the State Service Commissioner, and the Heads of Agencies.

### ***Ethics education component***

An integrity body must have as one of its goals the eradication of any culture of corruption through education and awareness raising. In addition to educating officials at all levels of government, parliamentarians and public servants at all levels of government on codes, regulations and policies dealing with public integrity and corrupt conduct, the body can provide education on best-practice concepts of good and bad governance (regulatory capture etc.).

### ***Investigative capability***

It is not adequate to approach issues of corruption from an education angle alone; the government must be prepared to take steps to ferret out wrongdoers. As the former President of the NSW Court of Appeal, Athol Moffitt, has written, " ... the exposure of corrupt practices to

public view in itself is a powerful means of bringing them to an end, warning the public of them and gaining public support of strong action against those involved."<sup>10</sup>

An integrity body must have the powers, resources and skills needed to initiate and engage in investigations. To avoid the possibility or perception of political interference after investigations have been completed, the Director of Public Prosecutions must have independence in exercising the discretion to prosecute. As noted above, a review of anti-corruption legislation and disciplinary measures must also be undertaken to ensure that an integrity body's findings can be enforced and that penalties can be imposed for wrongdoing.

*Guaranteed access to information:* To perform investigative tasks, an integrity body must have guaranteed access to information necessary to trigger and engage in enquiries, as well as any information necessary to assess that information correctly. Among other things, it must have full access to government documents and public servants, an ability to question witnesses, and access to bank accounts and other financial records.

*Ability to initiate:* An integrity body must have the power, ability and responsibility to initiate inquiries where symptoms of corruption appear, and staff capable of recognizing such symptoms.

*Retrospection:* An integrity body's mandate should be primarily forward-looking, particularly since a new body can easily be overwhelmed by retrospective investigation, leaving current corruption unchecked. However, a blanket refusal to investigate the past will feed public perceptions of cronyism, particularly in situations where allegations of misconduct have received extensive publicity and where the alleged misconduct would have a continued distorting influence on public policy. Consequently, an integrity body must have room to engage in retrospective investigation in cases where there is the potential for continued impact on public policy. A formula to this effect can be written into the body's mandate, as has been done in the case of Hong Kong's Independent Commission Against Corruption.<sup>11</sup>

*Protection of confidentiality:* Breaches of confidentiality are an important factor in the failure of anti-corruption bodies. It is essential to extend guarantees of confidentiality both to those raising allegations and to those against whom allegations have been raised. Whistleblower protection and the ability to hold hearings in camera will be vital to protecting the identities and reputations of accusers and accused.

### **C. Broad public input**

Citizen support for an integrity body is vital to guaranteeing the body's independence, effectiveness and durability. The ultimate purpose of an integrity regime is to promote a change of values in society with regard to corruption. This cannot be achieved if integrity bodies are created and operate in isolation from the general community. Furthermore, if a new body is seen as the product of the majority in power, or an instrument that can be manipulated by political power, its credibility in the eyes of the public and potential wrongdoers will be reduced.

We recommend that the government consult with academic and other expertise—professionals in the sector, other specialists, journalists and NGOs—in drawing up the model for an integrity body. We further call for the proposed structural and operational model to be accessible for a period of public comment before legislation is drawn up.

---

<sup>10</sup> Symons, M.D. "Catch Me If You Can! A Comparison Between the Law Enforcement and Commission Approach to Corruption Investigation." Paper presented to conference "Empowering Anti-Corruption Agencies," ISCTE, Lisbon, May 2008, [ancorage-net.org/content/documents/symons.pdf](http://ancorage-net.org/content/documents/symons.pdf).

<sup>11</sup> Organization for Security and Cooperation in Europe, "Best Practices in Combating Corruption," 2004, [www.osce.org/item/13568.html](http://www.osce.org/item/13568.html).