2015 (No. 15)

PARLIAMENT OF TASMANIA

JOINT STANDING COMMITTEE ON INTEGRITY

Three Year Review – Final Report

Laid upon the Tables of both Houses of Parliament pursuant to section 24 of the Integrity Commission Act 2009

MEMBERS OF THE COMMITTEE

Legislative Council	House of Assembly
Mr *Dean* (Chairperson)	Mr *Barnett*
Mr *Mulder* (Vice Chairperson)	Ms *Giddings*
Mr *Gaffney*	Mr *McKim*

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1 SUMMARY OF FINDINGS AND RECOMMENDATIONS

1.1 Scope of the Review

The Committee finds that:

- While the five year review pursuant to section 106 of the Integrity Commission Act has a wider scope than that of the three year review, the wording of s24(1)(e) is still sufficiently broad to enable the Committee to recommend changes in regards to the functioning of the Integrity Commission.
- A number of major issues should be considered during the five year review.
- Prior to the commencement of the five year review pursuant to section 106 of the Act, the Government should table in both Houses of the Tasmanian Parliament its response to this report including each finding and recommendation.

1.2 Integrity Commission Model – Investigative Functions and Powers

The Committee finds that:

- There was unanimous support for an ongoing function for the Commission in triage, assessment and monitoring of investigations and the power to hold Tribunal hearings in serious cases.
- There was not unanimous support on whether other Integrity Commission investigative functions should continue.
- Despite numerous allegations and investigations of serious misconduct, the Integrity Commission has not found evidence of systemic corruption.

The Committee recommends that:

- The question of the investigative powers and functions of the Integrity Commission should be considered as part of the five year review, with all evidence detailed by the Committee in this report to be considered by the

independent reviewer. However, until that review, the investigative functions and powers of the Integrity Commission should be retained.

- The Integrity Commission be given the authority to assess, triage and monitor all investigations relating to allegations of serious public sector misconduct.

1.3 Reinvestigation in State Service Code of Conduct Matters – ED5

The Committee finds that:

- There is currently unnecessary duplication where the Head of a public authority conducting a code of conduct investigation is not able to consider evidence obtained during an Integrity Commission investigation.

The Committee recommends that:

- ED5 be amended to enable material from the Integrity Commission to be forwarded to the relevant public authority, and that the relevant public authority is able to consider that material as part of any code of conduct investigation.

1.4 The Use of Evidence Obtained in Integrity Commission Investigations in Criminal Matters

The Committee finds that:

- Because of the methods available to the Integrity Commission to gather evidence, the capacity of the Director of Public Prosecutions or Police to subsequently prosecute criminal charges may be compromised.

The Committee recommends that:

- The Act be amended to require that, if criminality is suspected by the Integrity Commission during its triage of a complaint, the matter must immediately be referred to the Director of Public Prosecutions or Tasmania Police.

- If the Director of Public Prosecutions suspects criminality, it can refer it to the Integrity Commission, Tasmania Police or any other appropriate body for further investigation.

1.5 Referral of Complaints

The Committee finds that:

- In relation to matters referred to other agencies by the Integrity Commission, there is an issue with the Integrity Commission's authority to monitor the progress of the investigation.

The Committee recommends that:

- The Integrity Commission be given authority to monitor and request progress reports of all complaints referred to other agencies for investigation, and if necessary raise concerns of potential inaction with the Parliamentary Joint Standing Committee on Integrity.

1.6 Assessments

The Committee finds that:

- Some of the evidence supports that in some cases there has been an unduly long time taken for assessments to be concluded.

The Committee recommends that:

- The Act be amended to require assessments to be completed within 20 working days, and matters referred on as appropriate.
- In cases where the assessment cannot be completed within 20 working days, the assessment may be referred to the Integrity Commission Board, which may extend the timeline for a further 20 working days for the assessment.

1.7 Education and Misconduct Prevention Function of Integrity Commission

The Committee recommends that:

- Participation in misconduct prevention workshops provided by the Integrity Commission should be compulsory during induction programs for employees commencing work at public sector agencies, and this participation is recorded on the person's personnel file.
- Contemporary information is to be provided to public sector employees as appropriate and refresher courses be undertaken every five years.
- Members of Parliament attend an induction or refresher information session provided by the Integrity Commission after they are elected.

1.8 Oversight of Tasmania Police

Increased Oversight of Tasmania Police in Cases Where No Complaint is Made

The Committee finds that:

- The Integrity Commission has capacity to conduct own motion investigations under section 45 of the Act on any matter.

Integrity Commission Access to Tasmania Police Data

The Committee finds that:

- To date, Tasmania Police has not refused any of the Integrity Commission's requests to access Tasmania Police data, and have responded to all such requests promptly.

The Committee recommends that:

- No changes are made in this area, as the current position is adequate.

Integrity Commission Reporting on Tasmania Police Matters

The Committee finds that:

- There is a dispute between Tasmania Police and the Integrity Commission over the accuracy of an Integrity Commission report.

The Committee recommends that:

- Both agencies ensure closer collaboration and communication to avoid or minimise disputes in future reports.
- Where agreement cannot be reached, the final report of the Integrity Commission should include a response of the relevant agency.

1.9 Natural Justice/Procedural Fairness Considerations in Integrity Commission Reports

The Committee finds that:

- Concerns were raised regarding lack of natural justice and procedural fairness, particularly regarding reports tabled in Parliament.
- Identification of persons in Integrity Commission reports has the capacity to compromise that person's reputation and/or privacy.

The Committee recommends that:

- The Act be amended to provide that the response (if any) of person(s) that has been investigated is included in a report on request of that person, such report to be provided within 20 working days.

1.10 Policy Amendments Proposed by Integrity Commission

Mandatory Notifications of Serious Misconduct

The Committee finds that:

- Mandatory notifications of serious misconduct is important in assisting the Integrity Commission to achieve both its investigative and educative functions.

The Committee recommends that:

- The Act be amended to require mandatory notifications of serious misconduct to the Integrity Commission in a timely manner.

Publication of Reports

The Committee recommends that:

- The Act be amended to enable the Integrity Commission to table its reports outside of Parliamentary sitting times, by providing copies to the Clerk of the House of Assembly and the Clerk of the Legislative Council.

Confidentiality

The Committee finds that:

- There is no discretion for the Integrity Commission to allow a person involved in an investigation to discuss the matter with any other person (other than legal advice in section 98 of the Act).
- There is no discretion for the Integrity Commission to notify the Head of Agency and/or the Chair of the relevant Board of an investigation in their agency in appropriate circumstances.

The Committee recommends that:

- The Act be amended to allow for persons involved in investigations to discuss the matter with individuals deemed appropriate by the Integrity Commission.

- The Act be amended to require the Integrity Commission to notify the Head of Agency and/or Chair of a relevant Board of a matter being investigated, unless exceptional circumstances apply which mean that it would be inappropriate to do so.
- That section 98 of the Act be amended to allow for confidentiality to apply to documents other than Notices, in exceptional circumstances.

Independence of Legal Services

The Committee finds that:

- Concerns were raised by the Integrity Commission that the requirement to access Crown Law advice in accordance with TI 1118 could give rise to a conflict of interest.
- The Integrity Commission currently can seek an exemption from TI 1118.

The Committee recommends that:

- TI 1118 be amended such that where a conflict of interest exists, the Integrity Commission should have discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption.

Classification of Integrity Commission as a "Law Enforcement Agency."

The Committee finds that:

- As there has been no evidence of systemic corruption in Tasmania, an extension of the powers of the Integrity Commission as a law enforcement agency is not required.

- The Integrity Commission is not classified as a law enforcement agency in some relevant legislation.

The Committee recommends that:

- It is unnecessary for the Integrity Commission to be classified as a law enforcement agency in the relevant legislation (save and except for legislation where they are already classified as such).

Offence of Misconduct in Public Office

The Committee finds that:

- There is no specific offence of misconduct in public office in Tasmania.
- Integrity Commission investigations have not resulted in charges or convictions of any offence or crime.
- There is a disconnect in the current legislation in relation to prosecuting serious or serial misconduct and imposing an appropriate penalty due to the absence of an offence of misconduct in public office.

The Committee recommends that:

- The Government review and report upon the recommendations made by the Integrity Commission relating to the Criminal Code Act 1924 (Tas), including:
    - The Criminal Code Act 1924 (Tas) be amended to create an offence of misconduct in public office.
    - The Criminal Code Act 1924 (Tas) be amended to align the definition of "public officer" with other Tasmanian legislation.
    - A review be undertaken of the relevant sections of the Criminal Code Act 1924 (Tas) relating to aiding and abetting misconduct in public office.

1.11 Technical Amendments Proposed by the Integrity Commission

The Committee finds that:

- There were a number of technical issues identified by the Integrity Commission which needed to be considered.

The Committee recommends that, in respect of the technical amendments proposed by the Integrity Commission (as set out in the Table at Schedule 2 to this Report):

- The amendment in Item 1 be implemented.
- The amendment in Item 2 be referred to the Government for further consideration.
- The amendment in Item 3 be implemented.
- The amendment in Item 4 be implemented.
- The amendment in Item 5 be implemented.
- The amendment in Item 6 be implemented.
- The amendment in Item 7 be implemented.
- The amendment in Item 8 be referred to the Government for further consideration.
- The amendment in Item 10 be referred to the Government for further consideration.
- The amendment in Item 11 be implemented.
- The amendment in Item 12 not be implemented.
- The amendment in Item 13 be referred to the Government for further consideration.
- The amendment in Item 14 be implemented.
- The amendment in Item 15 be implemented.
- The amendment in Item 16 be referred to the Government for further consideration.
- The amendment in Item 17 be implemented.
- The amendment in Item 18 be implemented.
- The amendment in Item 19 be implemented.
- The amendment in Item 20 be implemented.

- The amendment in Item 21 be referred to the Government for further consideration.
- The amendment in Item 22 be referred to the Government for further consideration.
- The amendment in Item 23 be referred to the Government for further consideration.
- The amendment in Item 24 be implemented.
- The amendment in Item 25 be implemented.
- The amendment in Item 26 be referred to the Government for further consideration.
- The amendment in Item 27 be implemented.
- The amendment in Item 28 be implemented.
- The amendment in Item 29 be referred to the Government for further consideration.
- The amendment in Item 30 be referred to the Government for further consideration.
- The amendment in Item 31 be implemented.
- The amendment in Item 32 be referred to the Government for further consideration.
- The amendment in Item 33 be implemented.
- The amendment in Item 34 be implemented.
- The amendment in Item 35 be referred to the Government for further consideration.
- The amendment in Item 36 be implemented.
- The amendment in Item 37 be referred to the Government for further consideration.
- The amendment in Item 38 be referred to the Government for consideration.
- The amendment in Item 39 be implemented.
- The amendment in Item 40 be implemented.
- The amendment in Item 41 be implemented.

- The amendment in Item 42 be referred to the Government for further consideration.
- The amendment in Item 43 be implemented.
- The amendment in Item 45 be implemented.
- The amendment in Item 1 (Other Legislation) be implemented.

1.12 Amendments Proposed by the Law Society (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs)

The Committee finds that:

- The Law Society has raised issues in respect of the right to silence, issuing of coercive notice, claims of privilege, right to legal representation and certification of costs that need further consideration.

The Committee recommends that:

- Amendments proposed by the Law Society as detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be referred to the Government for consideration.
- Amendments proposed by the Law Society detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be considered as part of the five year review, and that the evidence obtained by the Committee in relation to this issue be considered as part of that process, and that advice is sought from all relevant experts including the Solicitor-General in relation to these proposed changes.

2 BACKGROUND AND CONDUCT OF THREE YEAR REVIEW

2.1 The Joint Standing Committee on Integrity (the Committee) is established pursuant to section 23 of the Integrity Commission Act 2009 (the Act).[1]

2.2 Pursuant to section 24(1)(e) of the Act, the Committee is required to "review the functions, powers and operations of the Integrity Commission at the expiry of 3 years…, and to table in both Houses of Parliament a report regarding any action that should be taken in relation to this Act or the functions, powers and operations of the Integrity Commission."

2.3 The three year review commenced under the previous Committee (of which the membership was Hon. Ivan Dean MLC; Hon. Craig Farrell MLC; Hon. Vanessa Goodwin MLC (Chairperson); Mr Kim Booth MP (Vice Chairperson); Mr Rene Hidding MP and Ms Rebecca White MP).

2.4 The three year review was due to commence on 1 October 2013.

2.5 On 16 November 2013, the Committee placed an advertisement in the three major daily newspapers seeking submissions to the three year review with a closing date of 17 January 2014.

2.6 The Committee also wrote to a number of stakeholders inviting them to make submissions to the review.

2.7 The Committee had received 16 submissions by the closing date of 17 January 2014.

2.8 The Committee scheduled public hearings to occur in February 2014.

2.9 On 16 January 2014, it was announced that the Parliament would be prorogued and the House of Assembly dissolved for a General Election. The Committee took the view that significant change to the composition of the Committee following the election was likely and accordingly resolved that the three year review be suspended to enable the new Committee complete carriage of the inquiry. The Committee considered such a course of

[1] Integrity Commission Act 2009 (No. 67 of 2009)

action would provide continuity of the inquiry process and avoid the likely necessity of witnesses being recalled for re-examination by the new Committee.

2.10 The public hearings scheduled for February 2014 were therefore cancelled.

2.11 Following the opening of the new Parliament on 6 May 2014, the current Members (as listed on the front page of this Report) were appointed to the Committee.

2.12 The newly constituted Committee met on 29 July 2014 to consider the conduct of the three year review and resolved to re-advertise for submissions. The Committee considered it appropriate to do so, given the length of time that had passed since the initial advertisement was placed.

2.13 On 2 August 2014, the advertisement calling for submissions appeared in the three major daily newspapers with a closing date for submissions of 22 August 2014.

2.14 Between the initial closing date for submissions set by the previous Committee of 17 January 2014, and the new closing date for submissions set by the current Committee of 22 August 2014, a further 12 submissions were received.

2.15 The Committee commenced public hearings to hear evidence in relation to the three year review on 29 September 2014.

2.16 Following the commencement of the public hearings and consequent media coverage, the Committee received a number of enquiries from interested parties which resulted in a number of late submissions being received. A further 12 late submissions were received by the Committee after the closing date for submissions of 22 August 2014.

2.17 The Committee considered it appropriate in the circumstances to receive these late submissions, given the issues raised and their relevance to the inquiry. The Committee also considered it appropriate in some circumstances to call these witnesses to give evidence at hearings.

2.18 The Committee conducted its last hearing on 17 November 2014.

2.19 In total, the Committee received 40 submissions to the three year review, and has heard evidence from 10 groups of witnesses (totaling approximately 14 hours of evidence taken at hearings).

2.20 On 26 November 2014, the Committee tabled its Progress Report on the Three Year Review, which detailed the history of the review and concluded as follows:

> *While the Committee is still to review all evidence provided and agree to detailed findings and recommendations in respect of issues raised during the course of the review, the Committee can indicate that it will be seeking to make recommendations that will improve the operation of the existing model which includes both educative and investigative functions.*[2]

2.21 Since the Progress Report was tabled, the Committee has conducted deliberations in relation to the evidence received for this final report.

2.22 In accordance with section 23(6) and Schedule 5(2) of the Integrity Commission Act 2009, all divisions recorded during the deliberations in relation to this Report are listed in this Report at Schedule 1.

2.23 All submissions, with the exception of one that was received after the Committee had concluded hearing evidence and commenced deliberations on its report, were received and taken into evidence, thus informing the Committee's deliberations.

2.24 The submissions received, taken into evidence and ordered by the Committee to be published and reported are listed in Appendix 'A'. The submissions received, taken into evidence and ordered by the Committee not to be reported are listed in Appendix 'B'.

2.25 The Committee has met on 13 occasions since its commencement of consideration of the three year review, with all these meetings being held in Hobart.

2.26 The 'default' position for the Committee hearing evidence is to examine witnesses in public. The Committee has however, resolved on occasion, to

[2] Joint Standing Committee on Integrity, Progress Report, Report No.21 of 2014, p3

hear witnesses *in camera*. The Committee has resolved not to publish or report the transcripts of evidence heard *in camera.*

2.27 Four Members (Mr *Guy Barnett MP*, Ms *Lara Giddings MP*, Mr *Nick McKim* MP and Hon *Tony Mulder MLC*) presented dissenting statements on some of the findings and recommendations in this Report. These are appended to this Report.

3 SCOPE OF THE REVIEW

3.1 The Committee has considered the scope of the three year review the subject of this report, as opposed to the five year review pursuant to section 106 of the Act.

3.2 The three year review which is the subject of this report requires the Committee to review the 'functions, powers and operations of the Integrity Commission….and table in both Houses of Parliament a report regarding any action that should be taken in relation to the Integrity Commission Act, or the functions, powers and operations of the Integrity Commission.'[3]

3.3 The five year review pursuant to section 106 of the Act is an independent review to be commissioned as soon as possible after 31 December 2015 to enable consideration of:

(a) The operation of the Act in achieving its object and the objective of the Integrity Commission; and

(b) The operation of the Integrity Commission including the exercise of its powers, the investigation of complaints and the conduct of inquiries; and

(c) The operation of the Parliamentary Standards Commissioner; and

(d) The operation of the Joint Committee; and

(e) The effectiveness of orders and regulations made under this Act in furthering the objectives of the Integrity Commission; and

(f) Any other matter relevant to the effect of this Act in improving ethical conduct and public confidence in public authorities.[4]

3.4 Some submissions to the review argued that the three year review is limited in scope, whereas the five year review was more broad, and accordingly that any major changes to the Integrity Commission should be considered as part of the five year review rather than the three year review.

3.5 The evidence of the Chief Commissioner of the Integrity Commission, Hon Murray Kellam AO, stated as follows in this regard:

[3] Integrity Commission Act 2009 (Tas), s24(1)(e)
[4] Integrity Commission Act 2009, s106

….Parliament legislated for two reviews. The first review is this one, 26(1), very limited in compass. On the other hand, Parliament also – and I would argue with good sense – provided for what is called an 'independent' review of the act via section 106, which was a much broader review…..Before all committees I have appeared before I have consistently said that the commission and the board would treat this review as an opportunity to deal with the practical ramifications the commission was funding under the act. I have said, and I will still say it now, although the government submission has changed the game plan a bit, it is not the business of the commission to say what the policy is. It is the business of the commission to say what's not working, and why it's not working. It is a matter for Parliament. We have accepted this legislation entirely as the legislation which governs us, subject to such necessary amendments…..

We would take the view that Parliament was quite right in saying that at a point in time the commission had been going long enough to be properly considered. I think the experience throughout Australia….the experience…demonstrates that bodies of these sort have difficulties over a period of time. It is new legislation; it is new to the stakeholders. The legislation often has to be worked through – and that's the experience in every jurisdiction in Australia that has legislation of this sort.

…..We would argue that five years is appropriate time to assess this act and the way it's working. When one looks at section 106, it had a broad panoply. It was the operation of the act. Was it achieving its object? Was it achieving its objectives? The operation of the standards commissioner, the operation of this committee, the effectiveness of orders and regulations made under the act. It was clearly and I would

argue correctly, the view of Parliament that that is the broad policy issues.[5]

3.6 The CPSU made a similar argument in their second submission to the review, which stated as follows:

> *The Integrity Commission Act 2009 includes a process at clause 106 for the Independent review of the Act. This must be initiated as soon as possible after 31 December 2015 and must be conducted by a judge. This independent review process was included in the legislation to ensure the powers and functions of the Integrity Commission were not undermined by the very people the Bill was designed to oversee.*
>
> *The CPSU believes significant issues such as the power of the Integrity Commission to conduct its own investigations should only be considered through a completely independent process such as a judicial review, therefore these proposals should not be progressed through the current review conducted by the Joint Standing Committee on Integrity.*[6]

Findings

The Committee finds that:

While the five year review pursuant to section 106 of the Integrity Commission Act has a wider scope than that of the three year review, the wording of s24(1)(e) is still sufficiently broad to enable the Committee to recommend changes in regards to the functioning of the Integrity Commission.

A number of major issues should be considered during the five year review.

[5] Kellam, Hansard, 17 November 2014, p1-2
[6] CPSU, Second Submission, p3-4

Prior to the commencement of the five year review pursuant to section 106 of the Act, the Government should table in both Houses of the Tasmanian Parliament its response to this report including each finding and recommendation.

4 INVESTIGATIVE POWERS AND FUNCTIONS OF THE INTEGRITY COMMISSION

4.1 Background

4.1.1 The following background information in relation to the Integrity Commission's investigative powers and functions was provided in the Integrity Commission's submission:

> *The Act is prescriptive in the way the Commission is to deal with allegations of both misconduct and serious misconduct. Part 5 (ss 33 – 43) inclusive deals with complaints and Part 6 (ss 44 – 59) deals with investigations of complaints and outcomes after investigation.*
>
> *In addition to the educative and preventative function undertaken by the Misconduct Prevention, Education and Research Unit, the Commission has a dedicated Operations unit which deals with allegations of misconduct and serious misconduct made to the Commission.*
>
> *The functions and powers of the Commission with respect to the complaint and investigation process are set out in s 8:*
>
> - *Receiving and assessing complaints or information relating to matters involving misconduct;*
> - *Referring complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action;*

- *Referring complaints of any potential breaches of the law to the Commissioner of Police, the Director of Public Prosecutions (DPP) or any other person that the Commission considers appropriate for action;*
- *Investigating any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or any other person that the Commission considers that action to be appropriate having regard to the principles set out in s 9;*
- *When conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for:*
    - *The prosecution of persons for offences; or*
    - *Proceedings to investigate a breach of a code of conduct; or*
    - *Proceedings under any other Act.*

- *Receiving reports relating to misconduct from a relevant public authority or integrity entity and taking any action that it considers appropriate; and*
- *Monitoring or auditing a matter relating to an investigation of complaints about misconduct in any public authority including any standards, codes of conduct or guidelines that relate to the dealing with those complaints….*

…..In performing its functions and exercising its powers, the Commission is to have regard to the principles of operation set out in s 9, including:

- *Working cooperatively with public authorities, integrity entities and Parliamentary integrity entities to prevent or respond to misconduct;*
- *Improving the capacity of public authorities to prevent and respond to cases of misconduct;*
- *Ensuring that action to prevent and respond to misconduct in a public authority is taken if the public authority has the*

capacity, and it is in the public interest, to do so;

- *Dealing with matters of misconduct by designated public officers;*
- *Ensuring that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that the Commission considers appropriate; and*
- *Not duplicating or interfering with work that the Commission considers has been undertaken or is being undertaken appropriately by a public authority.*

In performing its functions and exercising its powers, the Commission is not bound by the rules of law governing the admission of evidence, but may inform itself of any matter in such a manner as it thinks fit. It is to act with as little formality and technicality as possible.

Notwithstanding the powers granted to the Commission around dealing with complaints and information relating to misconduct, public authorities and

principal officers under the Act do not have a mandated obligation to report or notify misconduct to the Commission. In that sense, the Commission is dependent on complaints being made or on information being received outside the complaint process.[7]

4.2 Integrity Commission Model – Investigative Functions and Powers

4.2.1 The major structural issue that was raised during the course of the review was whether the current model of the Integrity Commission is the appropriate model, particularly with regard to its investigative functions and powers

4.2.2 Several submissions to the Committee raised issues with the current investigative functions and powers of the Integrity Commission. These can be broadly categorised as follows:

- duplication and overlap with functions of other integrity agencies;
- seriousness and proportionality in regards to matters dealt with by the Integrity Commission;
- Cost of the model;
- the need for re-investigation in State Service Code of Conduct matters following an investigation by the Integrity Commission; and
- the use of evidence obtained in Integrity Commission investigations in criminal matters.

4.2.3 Some of these submissions made proposals for changes to the existing model as a result of these concerns, with some

[7] Integrity Commission, First Submission, p67-69

recommending the removal or modification of the investigative powers.

4.2.4 However, the Committee also received contrary evidence from a number of parties who were supportive of the Integrity Commission retaining its current investigative role.

4.2.5 The Tasmanian Government raised the issue of duplication and overlap with functions of other integrity agencies. They stated as follows in this regard:

> *Tasmania is well served by a number of different entities which regulate the conduct of individual citizens and ensure ethical and appropriate conduct on the part of state servants and other officials, including the Auditor-General and the Ombudsman. Misconduct which amounts to a criminal offence is most appropriately dealt with by Tasmania Police. Government agencies regularly conduct code of conduct investigations and are already required to do this to resolve any misconduct concerns identified by the Integrity Commission.*[8]
>
> *Analysis of the complaint categories detailed earlier in this submission, and the recent reports of investigations into senior public servants, highlight the question of the effectiveness of the Integrity Commission. The Integrity Commission investigates very few complaints. There are other integrity entities and employing authorities that are able to deal with complaints and impose sanctions. For example, the following observations are made –*

[8] Goodwin, Hansard, 22 October 2014

- *Any fraudulent behaviour that may be categorised as criminal activity (e.g. stealing, or property related offences), should be investigated by Tasmania Police. The Auditor-General also has a role in financial management and dealing with systemic controls.*
- *Bullying, harassment, or behavioural matters may be investigated by Heads of Agency under a State Service Act Employment Direction (ED) 5 process or by the Anti-Discrimination Commission. This type of (mis)conduct may also fall within the remit of Workplace Health and Safety laws.*
- *Matters such as breaches of codes of conduct and failure to comply with guidelines and policies are matters for Heads of Agencies to pursue under the ED5 process.*
- *Maladministration is dealt with by the Ombudsman. The Ombudsman's role is to investigate complaints about the administrative actions of government departments, councils and public authorities.*
- *The Auditor-General also has responsibilities in conducting performance audits and examining effectiveness and efficiencies as well as holding the government accountable for fulfilling its*

financial responsibilities. Many of the Auditor-General's previous performance audits have looked into issues such as the use of government credit cards, procurement issues.

- *Following amendments in 2013 the role of the State Service Commissioner no longer exists. The Head of the State Service, on behalf of Minister administering the State Service Act 2000, is responsible for ensuring that the State Service is run effectively and efficiently. The Secretary, Department of Premier and Cabinet (DPAC) has been appointed as the Head of the State Service to hold the 'Employer' role on behalf of the Minister (the Premier). The State Service Management Office undertakes this role on a day to day basis.*

  Despite having an Integrity Commission that has a suite of extraordinary investigation powers, the following may be said –

- *All of the powers to impose sanctions or deal with malfeasance or maladministration vest in other bodies;*

- *There is duplication of these functions and the potential for concurrent investigations which may put the subject officer in an*

untenable position to create issues in terms of procedural fairness.[9]

4.2.6 A similar argument was made by the Acting Director of Public Prosecutions, Mr Daryl Coates, who stated as follows in his submission:

> *I note that a number of submissions have already been made to the Committee, including one by the Government and one by Tasmania Police. I share many of the concerns set out in those submissions.*
>
> *The "integrity landscape" is well populated in Tasmania. The Integrity Commission is part of a broad set of organisations that have a role in overseeing the integrity of public institutions, officers and state servants. Other agencies with substantial roles to play include:*
>
> - *Tasmania Police,*
> - *the Auditor-General,*
> - *the Ombudsman,*
> - *the Coroner,*
> - *the Director of Public Prosecutions,*
> - *the Anti-Discrimination Commissioner,*
> - *the Children's Commissioner, and*
> - *Heads of Agency*

[9] Tasmanian Government Submission, p10-11

This somewhat crowded landscape has led to significant duplication of effort, lack of clarity, "forum shopping", alarming delay and significant adverse consequences for individuals and entities that have been the subject of investigations.[10]

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

- *recognition that prevention is as important as dealing with allegations of unethical behavior;*
- *the need to build on existing structures and mechanisms;*
- *the need for proportionality;*
- *a cautious approach to strong investigative or coercive powers;*
- *clarity and consistency about which public bodies are to be covered; and*

[10] Director of Public Prosecutions Submission, p1

- *independence from the Government of the day.*

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

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

This area seems to have become problematic with the Commission conducting investigations into what appears to be allegations of relatively low level misconduct that might more productively and cheaply have been undertaken by other entities. It is especially problematic when it is acknowledged that the Commission lacks any power to impose sanctions against the subject of a complaint whilst other entities have both the necessary investigative powers and the right to sanction individuals for misconduct.[11]

4.2.7 Similarly, Mr Damian Bugg stated as follows:

….how many matters has the commission dealt with in three years that could have been dealt with by the other oversight mechanisms we

[11] Office of the Director of Public Prosecutions Submission, p1

have – the Auditor-General; the Ombudsman; the Public Service Commissioner…..and the police?[12]

4.2.8 The Integrity Commission rejected the argument that matters they dealt with could be dealt with by other integrity agencies, stating as follows:

We do triage our complaints. We get complaints of allegations about lots of different things and if it is appropriate we refer those allegations to somebody else to deal with, if the act says we should, we do. We are not a Commission of 150 staff; I only have a handful of investigators so where a matter can be dealt with by another agency of course we refer it on, but where it is appropriate for us to do so, then we do so. It is not a large number of matters but they are very often those precise matters nobody else does and that wouldn't get done if we didn't exist. Just because they are a small quantity doesn't mean they are not big matters, it doesn't mean that they're not important or complex matters that require a great deal of attention. There is a lot of focus on numbers in all of this but the numbers are not an accurate reflection of what is actually going on behind the scenes. Complaints are complaints. There are simple complaints, there are complex complaints, there are systemic issues, there are isolated issues. The idea that we only do the tiny weeny little things that fall through the

[12] Bugg, Hansard, 22 October 2014, p1-2

gaps is completely misleading in terms of the importance of the work that is done and the consequences of the work we do.[13]

4.2.9 Further, the Chief Commissioner of the Integrity Commission stated as follows with regard to the necessity for the Integrity Commission's investigative powers despite the existence of other integrity agencies:

Well, you'll go back to where you were before the bill was introduced in parliament. There is no oversight of a variety of bodies. For instance, in the absence of the offence of misconduct in public office, if there is a complaint about a minister and it was not a criminal complaint, who investigates it? The minister's department. That is one example. As to oversight of police, I won't speak on behalf of the commissioner but a lot of commissioners I have spoken to in other states say they are very pleased to have an independent body saying they are getting it right. Our audits demonstrate some issues. Wouldn't the public be a lot more satisfied about their police force to know that if something arises there is independent oversight? Surely the public is better serviced by that?

As to the recent Health department matter that has been the subject of so much debate, we know nothing of what happened and we know the press got involved and were basically

[13] Merryfull, Hansard, 30 September 2014, p42

fobbed off. We also know that people inside a major department were telling us they didn't feel they could make a complaint. In fact since it has all been resolved more things have come out of the woodwork. People inside departments, especially if they are misconducts of a high level, surely aren't going to deal with it in the hierarchy if they are scared about their job, but they can come anonymously to an organisation such as ours.[14]

4.2.10 Another issue raised in the evidence with respect to the current model of investigative functions of the Integrity Commission was the issue of proportionality of the powers of the Integrity Commission in comparison with the nature of matters dealt with.

4.2.11 Mr Damian Bugg's submission stated as follows in respect of this issue:

> *While there was an assurance of 'proportionality' given in the second reading Speech, that principle does not appear to be adequately reinforced in the Act. For example, direction within the Act to 'not duplicate' does not specifically advert to new matters which should be more appropriately investigated and dealt with by one of the Integrity entities or under the State Service Act. Section 9(1)(g) enjoins the Commission "to not duplicate or interfere with work that….has been or is being undertaken appropriately by a public authority. (but not new matters which could be 'undertaken' but are not yet in the hands of the*

[14] Kellam, Hansard, 7 November 2014, p22

public authority, this would probably account for most matters handled by the Commission…..The Act does not, in my view, give specific guidance to the Commission to not apply a sledgehammer to the walnut (to use the analogy referred to in the Second Reading Speech). In NSW the ICAC legislation, from memory, specifically directs the Commissioner to focus on serious incidents of corruption. I cannot see an equivalent 'non minimus' provision here.[15]

4.2.12 He further expanded on this when giving evidence before the Committee as follows:

My feeling is that, because there hasn't been any publicity of any serious matter, as I would call "serious"; that the commission has not had referred to it anything of the type that I would think was always at the background of government's intention to pass that legislation……[16]

….subsection 3(c) of section 3 says, 'Dealing with allegations of serious misconduct or misconduct by designated public officers,' and under the act 'designated public officers' are defined as people of senior rank. That is a clear mandate and a direction to the Commission that it assists public authorities in dealing with

[15] Bugg, Submission, p1
[16] Bugg, Hansard, 22 October 2014, p1

simple misconduct but it deals itself with allegations of serious misconduct. That was the reassurance I had, bearing in mind the caveat I expressed when I first gave evidence about this four years ago.

Then it can make findings and recommendations in relation to its investigations and inquiries. That quarantining of matters into serious misconduct and misconduct is not repeated throughout the act so that when you get into the sections that refer to the commission's powers and functions in considering misconduct, misconduct and serious misconduct are lumped together. So there is not a continuum of that direction. The assurance that certainly the second reading speech gave was that this was not going to be a sledge hammer to crack a nut, which was the way it was expressed during the debate. This is my first concern.

The second concern I have relates to the actual functioning of the commission in terms of just how many matters of serious misconduct has it had referred to it or alleged to it for investigation, as opposed to – what I do not want in any way to minimise by saying – simple misconduct for which there are already in existence facilities to deal with in this state. I think that needs to be examined. [17]

4.2.13 The Integrity Commission's third submission to the review responded as follows to this evidence:

[17] Bugg, Hansard, 22 October 2014, p3

With the greatest respect to Mr Bugg, there has been publicity of serious matters. The Committee is referred to the Commission's Reports No 1 of 2013 and No 1 of 2014, each tabled in Parliament. Serious misconduct is defined in the Act; s 4. The Commission disagrees with Mr Bugg's assertion that the matter he had direct knowledge of did not involve serious misconduct.

The Commission can only make public matters that it tables in Parliament or through its annual report. In the Annual Report 2013-14, the case studies for Assessment Golf, Hotel and Operation Alpha all involved allegations of serious misconduct as defined in the Act.[18]

4.2.14 The submission of the Acting Director of Public Prosecutions, Mr Daryl Coates, also referred to this issue, stating as follows:

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

The Commission has been provided with very significant investigative and coercive powers notwithstanding that it is not law enforcement.

[18] Integrity Commission, Third Submission, p1

The CEO, and through her its investigators have powers to:

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

(see s 46-54 inclusive of the Act)

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

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

I am sure that the Commission finds its extensive powers extremely useful. Indeed it seeks to have even more extensive powers. That should be resisted. In my view the powers

of the Commission require no enhancement. They should be reduced given the nature of the complaints brought before it and the number of investigations conducted by it. It is not a body charged with investigating criminal activity. Investigations into corruption should be conducted, as they have been in the past, by Tasmania Police which has the expertise and all the necessary powers to undertake the task.[19]

For people who are the subject of these investigations who may have done nothing wrong or done something that is very minor, it is a very lengthy and stressful process. They're (code of conduct provisions) very broad and can be very minor at times.[20]

4.2.15 The Integrity Commission responded to this evidence as follows:

The Acting DPP acknowledged that he had no direct knowledge of any matter that the Commission had investigated so he has no basis to provide any substantive evidence about the level of seriousness of matters which the Commission has investigated.

The Commission does not waste its limited investigative capacity on minor matters. In its view, all of the allegations it has investigated are ones that might warrant the termination of

[19] Office of the Department of Public Prosecutions Submission, p3-4
[20] Coates, Hansard, p7

the employment of the officer concerned – thus are serious misconduct in the terms of the Act.[21]

4.2.16 Some submissions also raised the cost of the Integrity Commission model as an issue and questioned whether or not the current Integrity Commission investigative model represented value for money having regard to the number of investigations carried out.

4.2.17 The Tasmanian Government submission argued as follows:

> *2012/2013 Investigations*
>
> *The Commission received 357 separate allegations of misconduct or serious misconduct involving 66 complaints.*
>
> - *41 were not accepted/dismissed after triage;*
> - *16 were referred to 35(1)(c) i.e. refer the complaint to an appropriate person for action;*
> - *One was referred 38(1) i.e. actions taken by Chief Executive Officer to dismiss, refer to integrity or Parliamentary integrity entity etc;*
> - *Two were dismissed; and*
> - *Six were subject to assessment or investigation (note two own motion investigations).*
>
> *Analysis of Integrity Commission Complaints*
>
> *The 2012/2013 Annual Report notes that primarily allegations of misconduct relate to breaches of a code of conduct or other policy or procedure. It was further noted that there was a significant*

[21] Integrity Commission, Third Submission, p23

increase in allegations concerning "fraudulent" behaviour….

Of the 356 complaints received in 2012/13:

- *22 percent relate to fraud/falsification/fabrication, up 14.8 percent on 2011/12;*
- *8.4 per cent relate to failure to act, down 7.6 per cent from 2011/12;*
- *6.4 per cent relate to inappropriate behaviour, up 0.4 per cent from the previous year;*
- *5 per cent relate to abuse of power and assault respectively.*

Interestingly, in the 2011/12 Annual Report, failure to act, improper association and stealing and theft were the three largest allegation categories. This indicates that those issues that are the purview of other entities, such as Tasmania Police as this constitutes criminal conduct, have increased. However, many issues that can be rectified with misconduct prevention education, such as failure to act, have decreased. This provides additional impetus to retain and strengthen the Integrity Commission's current education role.

Efficiency and Effectiveness of Investigations

The Integrity Commission is part of a broad set of arrangements for ensuring the integrity of Tasmania's public institutions and the ethical and lawful conduct of public officials. Other agencies with shared responsibilities in this regard include Tasmania Police, the Auditor-General, the Ombudsman, the Anti-Discrimination Commissioner and the Children's Commissioner. In

the State Service, the respective heads of agency have primary responsibility for ensuring the integrity of their department or agency and the good conduct of their staff. Heads of agency are also delegated employment powers to regulate the conduct and performance of the staff within their department or agency, including responsibility for dealing with breaches of the State Service code of conduct.

Based on the Integrity Commission's own data reported in annual reports, the vast majority of complaints it receives are triaged, that is they are dealt with by other mechanisms, such as other bodies and heads of agencies. The Integrity Commission conducts very few investigations and when compared with other State integrity bodies it spends a great deal more investigating very few complaints.

While it may be argued that Integrity Commission investigations are particularly complex, compared with the Anti-Discrimination Commission and the Ombudsman, it remains an expensive model for investigating misconduct. The Integrity Commission is a costly model for dealing with a small number of integrity matters said to require independent investigation and, for a variety of reasons, it has not proven to be an effective model for resolving such complaints.[22]

4.2.18 Similarly, the submission of the Acting Director of Public Prosecutions states as follows:

[22] Tasmanian Government Submission, p7-11

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

Outcome of complaints received in 2013-14

Not accepted/dismissed after triage	*56*
Referred for action after triage	*39*
Accepted for assessment	*4*
Currently under consideration	*14*
	113

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

…..I think it also appropriate to note that despite four years of operation, the work of the Commission is yet to result in the prosecution of any person for any offence. This is clearly

indicative that the level of corruption and/or serious misconduct within government and the public sector is not as high as might be assumed. Further, I know of only two matters that have been brought to the attention of either Tasmania Police or this Office by the Commission, involving alleged criminal conduct. In both cases there was deemed to be insufficient evidence to proceed. There was no reason why these matters could not have been investigated by Tasmania Police.[23]

4.2.19 The cost of the model was also raised by Mr Damian Bugg, who stated as follows:

I raised the question at the outset that I have had a concern all along as to whether Tasmania needs a full-time, full-blown integrity commission. I said that before the legislation…..how many matters has the commission dealt with in three years that could have been dealt with by the oversight mechanisms we have – the Auditor-General; the Ombudsman; the Public Sector Commissioner, which is now a different function and that position has been removed from ex-officio board membership of the commission – and the police? What if it's a matter involving an allegation of serious misconduct within the police department? It appears there hasn't been or we would have heard about it? Is three years a sufficient track record to have a look at

[23] Director of Public Prosecutions Submission, p5-6

it and ask, 'Do we need 14.5 persons in these tightened economic times and a six-person board to administer what is fundamentally an education process?' I then have a concern that if you're not getting matters of serious misconduct and there aren't sufficient constraints in the legislation to focus the commission's attention on those matters which are serious, and to pass off those matters which aren't to the appropriate authority or authorities, you are going to have it investigating matters it shouldn't and all you've done is create another investigative agency at considerable cost.[24]

4.2.20 The Integrity Commission responded to the above evidence as follows:

The Commission's investigation/assessment rate is not inconsistent with other integrity agencies – which all only investigate a small proportion of the complaints they receive. The Commission is operating just as similar agencies operate.

For example – NSW ICAC investigates or assesses 4.8% of complaints received; the Commission investigates 3.6%. Victoria's IBAC refers 36.7% of complaints received; the Integrity Commission refers 35.5%.[25]

[24] Bugg, Hansard, 22 October 2014, p1-2
[25] Integrity Commission, Third Submission, p15

The Commission's investigative capacity is value for money and proportionate to the size of the jurisdiction. This year the budget for its investigations team is approximately $450,000 which works out to only $11.25 per public sector employee per year.

The overall budget for the Commission going forward will be approximately 2.2 million dollars of $4.30 per person in Tasmania. This is hardly disproportionate to what other integrity bodies cost their community (for example ICAC NSW costs approximately $3.45 per person; Victoria's IBAC costs $4.69 per person; South Australia's ICAC costs $5.70 per person).[26]

4.2.21 A further issue identified was the need for reinvestigation in State Service Code of Conduct Matters by the Head of Agency following an investigation of the Integrity Commission.

4.2.22 The Tasmanian Government submission stated as follows in relation to this issue:

The Integrity Commission has no statutory authority to impose sanctions against the subject officers of a complaint. While it may deal with allegations and complaints of misconduct about public officers, it has no power to take action against the subject officer/s or to remedy the behaviour. It is vital that these powers rest with the employer, who must have ultimate responsibility and

[26] Integrity Commission, Third Submission, p15

accountability for ensuring the ethical conduct of employees.

The Integrity Commission can only make findings and recommendations in relation to its investigations. Experience to date has shown that the employing authority cannot readily use the investigation as reported (publicly or privately) in any disciplinary action. There are a growing number of examples where agencies (or other employing authorities) have had Integrity Commission reports referred, only to find it has to commence a fresh investigation in order to deal with alleged breaches of the Code of Conduct by its employees. This adds significantly to the cost and time of investigating the matter.

The Government does not support the Integrity Commission taking responsibility for all investigations or for being able to determine employment related outcomes as it would result in the effective removal of powers from employers and organisations to manage their own staff and resources. It is a long standing duty for heads of agencies to manage misconduct in their agencies. In the modern public service a range of mechanisms are available to achieve this end. For example, performance management systems encompassing the principles of accountability, and transparency in decision making, are fundamental to employee and agency productivity and performance. Standards will

not improve if an agency's own managers cannot manage misconduct because the function has effectively been devolved to a central body.

Furthermore, the need for dual investigations does not serve the interests of justice well. It can deter authorities from tackling issues earlier or taking responsibility for ethical conduct within their own organisation. Difficulties almost invariably arise when there has already been one investigation process which taints or distorts the second process, particularly if the findings have been reported publicly by the Commission.

It increases the stress for witnesses to be involved in two processes and it is also potentially unfair and highly stressful for the subject/s of the dual investigations, which inevitably take a long time to complete.

While some of these matters may relate to allegations of serious ethical failings, they are not criminal, yet the Integrity Commission has a wide range of extra-ordinary investigative powers to which 'subjects' are subjected, but with no definitive outcome. Rather, the public official against whom allegations of ethical failure or misconduct have been made has to be subjected to a further investigation.[27]

4.2.23 The Integrity Commission responded to this as follows:

[27] Tasmanian Government Submission, p7-11

Ms MERRYFULL *- …… the relationship between the Integrity Commission and employment direction 5 needs to be clarified. We have tried and tried to have this addressed. We have had numerous interactions with the State Service Management Office about ED5 and trying to get it to take account of commission matters. It is also important to remember that an ED5 is simply a document the Premier signs; it is not a law or a regulation. It can be changed with the stroke of a pen. All these problems the* Government submission refers to, which *only apply to the State Service, could also be solved if people would do something about ED5. One of the commission's functions is 'to gather evidence for proceedings for a breach of the code of conduct.' Parliament told us to do that, so Parliament clearly intended that our evidence would be used for breaches of the code of conduct. Whatever blockages there are because of ED5 can be fixed by amending ED5.*

Mr BARNETT – *Is that what you think should happen, that ED5 should be amended to provide better clarity?*

Ms MERRYFULL – *Yes, absolutely, for the use of commission evidence in code of conduct proceedings.* [28]

[28] Merryfull, Hansard, 30 September 2014, p22-23

Mr MCKIM – *The Government further says, and I will quote directly from the Government's submission, ' The need for dual investigations does not serve the interests of justice well.'*

Ms MERRYFULLL – *I would agree with that. I don't think you need two investigations.*

Mr MCKIM – *The implication being that under the current framework there are two and therefore yours needs to go.*

Ms MERRYFULL – *Ours needs to go rather than look at a way to use the evidence that we produce. Keep in mind, too – and I really need to say this – the evidence that we can gather is more than employers can gather. There seems to be this idea that the employer can get all the evidence and they don't need us, but we can get far more evidence than the employer can get. We can get bank records. We got bank records from an agency which allowed them to dismiss somebody. They could not get those records. They came to us and asked for them to help them. We can get records about people and all sorts of records and they can't, and we can use surveillance devices. It is a nonsense to think that they have the same capacity as we do to gather the evidence that is necessary to get the outcome.*

Ms JOHNSTON – *I think it is important, too, that once we give the evidence the employer is*

about disciplining the employee. We are not about that. We are about finding out why misconduct occurred in the first place. Some of the misconduct or some of the actions we find or the recommendations we make go to preventing it occurring again. It is not about dismissing an employee or somehow disciplining them. It is about ensuring the misconduct doesn't occur again, so it is a much broader remit.

Mr MCKIM – *Where the Government talks about the need for dual investigations and raises issues around the first investigation, presumably the commission's tainting or distorting the subsequent process – and I am again paraphrasing the Government's submission – that is the area in which you are submitting to the committee that a change in ED5 could resolve those issues? Is that correct just so I understand that?*

Ms MERRYFULL – *Yes*[29]

4.2.24 This issue is discussed also separately and the evidence in respect of this matter and the Committee's findings and recommendations are set out in paragraph 4.3.

4.2.25 A further issue that was raised in respect of the current investigative function of the Integrity Commission was the use of evidence obtained in Integrity Commission Investigations in criminal

[29] Merryfull/Johnston, 30 September 2014, p39

matters. The Committee heard evidence from the Acting Director of Public Prosecutions in relation to the difficulties faced in this area. This issue is discussed separately and is the subject of findings and recommendations below in paragraph 4.4.

4.2.26 Based on the above issues associated with the current investigative model raised in the evidence, some submissions to the Committee recommended that alternative models for the Integrity Commission should be considered.

4.2.27 The Tasmanian Government submission recommended that the Integrity Commission focus on its educative functions, as well as triaging and overseeing the investigation of complaints by other agencies, rather than also conducting its own investigations. The submission states as follows:

> *It is submitted that the Integrity Commission's future role should exclude its current investigatory functions and focus on providing advice on integrity and ethics issues to Ministers, Members of Parliament, senior public servants, local government and others about ethics or integrity issues, including conflicts of interest and declarations of financial interests.*[30] *The Integrity Commission should have a continuing responsibility for receiving and triaging complaints, but should no longer have an investigative or law enforcement function. Its prime focus should be in raising standards, and the education and support of public*

[30] Tasmanian Government Submission, p13

servants and authorities in discharging their duties.[31]

The effectiveness and efficiency of functions and roles in integrity based bodies should be assessed, and the powers of heads of agencies and managers, to eliminate overlap and confusion.

The overlap in functions and roles between the Commission, State Service Ombudsman, Tasmanian Audit Office, Tasmania Police, and statutory powers of heads of agencies and managers, has often created confusion for public servants, and the community about who can or should deal with a matter. In addition, this overlap has resulted in increased costs and a burden on public administration.

It is appropriate for the Integrity Commission to become a single point of contact where complaints are filtered and sent to the appropriate authority for rectification. In addition, the Government supports the Integrity Commission providing a quality assurance role in monitoring and reporting on authority's progress in addressing complaints.[32]

4.2.28 The Committee questioned the Tasmanian Government further in relation to this proposal. The following exchange occurred:

Ms GIDDINGS – *Would you agree the reason the Integrity Commission was established in the first place was because there was at least a*

[31] Tasmanian Government Submission, p15
[32] Tasmanian Government Submission, p16

perceived gap in the system that what was then the current model was insufficient?

Dr GOODWIN – *Yes, certainly there was concern about a number of high-profile cases in Tasmania and a view that we needed some sort of body to investigate those matters, or at least to take the complaints and make sure they were appropriately dealt with, and I believe that need remains. We are not suggesting that the Integrity Commission be abolished or that it shouldn't continue to do its triage function or quality assure investigations. I am raising concerns about the current way it investigates complaints, whether we are getting value for money, whether we are avoiding duplication because clearly we are not, and making sure we address those three key levels of misconduct in an appropriate way. I'm not convinced we've got that right yet.*

Ms GIDDINGS – *Most matters are triaged back, in fact that has been held as a reason you don't need an Integrity Commission, because figures of 90 per cent have been mentioned around pushing matters back. If we take it as 90 per cent, that leaves 10 per cent of matters that don't have anywhere adequately to be triaged to. Under the model put forward here, where does that 10 per cent go? I put it to you that the Integrity Commission is being gutted by having its investigative or law-enforcement functions removed – it is very clear in the recommendation that that should no long occur*

- and the new Office of Inspector-General doesn't take those levels of investigations, they're an oversight body, so for the 10 per cent or so of investigations that the Integrity Commission is undertaking, who will do that work?

Dr GOODWIN – *It depends on the nature of the matter complained about. For example, the health case came into the Integrity Commission and they did an assessment on it and then a full-blown investigation. It then came back to the relevant agency to be dealt with. Is there a streamlined process around that where it could have been dealt with sooner in the process by the relevant agency concerned? I do not know the full details of the investigation. I do not know what is involved. I do not know at what point potentially it could have been referred back to the agency to be dealt with, but my gut feeling is that there is probably a point in time where it could have gone back to the agency and we could have got a faster resolution of that matter…..Again, it gets back to the point of what do we really need the Integrity Commission for? If you think there are gaps, what are they? Is it at the serious misconduct end of the equation? Do they need to be operating all the time and have a permanent investigative function to it or do they…have the capacity to draw in resources if the need to for a particular type of investigation? Or are these matters most appropriately dealt with by*

Tasmania Police if they are criminal in nature? At the moment we are saying that we have not got the model right. The current model of investigations is not working because of this duplication issue. They are not doing many investigations. They are not doing many assessments and yet we are funding a full-blown Integrity Commission with a full-blown investigative function. I do not think that can continue because it does not seem to be working.[33]

4.2.29 Other submissions to the review provided comment on the Tasmanian Government's proposed model.

4.2.30 The Acting Director of Public Prosecutions, Mr Daryl Coates, was supportive of the Tasmanian Government's proposal that the Integrity Commission's role should be limited to the prevention, education and triaging of and overseeing of complaints referred to other agencies. Mr Coates stated as follows:

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

[33] Goodwin, Hansard, 22 October 2014, p50

breaches of standards have consequences. Accountability and transparency are both assured by such a role for the Commission. [34]

4.2.31 The Police Association of Tasmania stated as follows:

The PAT is of the view that an Integrity Commission with investigative powers/role is NOT required in Tasmania.[35]

4.2.32 Conversely, a number of parties expressed support for the current model of the Integrity Commission including the Integrity Commission retaining its current investigative functions.

4.2.33 The Integrity Commission stated as follows in respect of the Tasmanian Government's submission:

The Government's submission will put the Tasmanian community in the dark about misconduct in the public sector. I remind everybody that 89 per cent of those we surveyed in our last community perception survey said that Tasmania needs an integrity commission. Those people were not talking about an education body; they were talking about an independent body that can have the confidence to fiercely tackle misconduct in the public sector.

I am sorry, but the idea that we can leave it to the employers to deal with this is both naïve and self-serving. The fact is that employers

[34] Director of Public Prosecutions Submission, p5-6
[35] Police Association of Tasmania, Second Submission, p2

cannot and will not always deal appropriately with misconduct. I don't understand why the Government thinks the Tasmanian public sector is better than its state counterparts that deal with misconduct, that it has a modern, shiny public service that does not need a corruption commission, unlike New South Wales, Western Australia, South Australia, Victoria and Queensland. It does not explain why the Tasmanian public sector does not need extra assurance that comes from an integrity agency, but those other jurisdictions do.

The Integrity Commission will deal with matters because it is not afraid of being embarrassed. It does not answer to a minister and it does not deal with the problems that arise by paying people off and closing the door. The commission has the skilled investigators and the power to get the evidence that is needed to uncover misconduct. You will remember from the report to parliament the reference to the internal audit that was done that did not uncover misconduct. Only the Integrity Commission uncovered that misconduct.

There are plenty of other investigations we do that we do not always report on. I know a lot of emphasis has been given to the report to parliament but a lot of the work we do is not reported on. We can get information that other agencies simply lawfully cannot get. Who is going to get that information if we do not? How would allegations of misconduct against

ministers be dealt with under the proposed government regime, who would do that?

The Government's submission suggests the commission should have some kind of quality assurance over investigations as a way of ensuring the employer does the right thing. Our submission refers to the lack of capacity at the moment to follow up on investigations that are done internally, except to audit them. I am happy to give an example to the committee at some point about a recent audit we did of a departmental investigation where there response of the departmental head was simply to say 'Oh well, I've noted your views,' even though we found a number of deficiencies in their investigations.

If the Government is concerned about the way the commission is operating or concerned about whether its evidence is being able to be used then fix the problem, fix the blockages, but don't abolish the commission's investigative function. Clarify the areas of confusion, improve the processes, but don't abolish the important work we're doing.[36]

4.2.34 The CPSU was also supportive of the Integrity Commission retaining its current investigative functions, stating as follows in its second submission to the Committee:

[36] Merryfull, Hansard, 30 September 2014, p19-20

If the investigatory powers of the Integrity Commission were removed and its role was just to allocate issues to other organisations it's interesting to see who is responsible for each group of public officers.

The Police, Director of Public Prosecutions, Auditor General and Ombudsman roles are clear and the Integrity Commission already refers relevant investigations to these authorities. Issues concerning public sector workers, employees of government business enterprises and Councils are referred to the head of the relevant public authority and this would continue. The significant areas of change would be in relation to issues raised concerning Heads of Agency and heads of other public authorities, Ministers, parliamentary officers, politicians and Ministerial staff.

The CPSU understands that without an investigatory power the Integrity Commission would refer allegations against Heads of Agency, Ministers and Ministerial staff to the Premier, allegations against parliamentary officers would be referred to the Speaker of the House of Assembly or the President of the Legislative Council and allegations against other heads of public authorities would be referred to their Boards. It is far from clear how these people or organisations could conduct fair and transparent investigations into allegations, particularly as they lack resources and

investigatory powers and in most cases are operating in a partisan political sphere.

Wasn't this exactly why the Integrity Commission was established in the first place – so we didn't have investigations being conducted in a political space….

…It's worth considering how issues are raised with an organisation such as the Integrity Commission as it highlights the importance of an independent body having the time and capacity for a full investigation.

The CPSU understands the initial complaint that triggered the comprehensive investigation into issues in the Department of Health and Human Services was about senior manager not complying with employment practices and guidelines. Without an investigatory power the Integrity Commission wold have referred these issues to the relevant heads of Agency – in this case Jane Holden and Gavin Austin. It would then have been up to these two individuals to determine whether the matters were worth investigating.

We understand it took months of careful investigation using the full suite of powers available to the Integrity Commission to uncover all the matters that eventually came to light. It is highly unlikely these important matters of public interest would have been

revealed had the investigation been left to the relevant Heads of Agency.[37]

4.2.35 The CPSU also argued that the changes proposed by the Tasmanian Government would not constitute a significant cost saving. The submission stated as follows:

> *Much is made in the 'Tasmanian Government' submission of the Integrity Commission's operating costs and whether similar outcomes could be achieved 'through more cost-effective and efficient means'. The reader is led to believe that changes that may reduce the effectiveness of the Integrity Commission are acceptable because savings would be made, but the CPSU does not accept the proposed changes would actually make savings.*
>
> *The submission calls for the educative, advisory and preventative role of the Integrity Commission being retained or even enhanced. The submission also calls for the Integrity Commission to continue to triage complaints. The submission proposes the establishment of a new organisation to be known as the 'Office of the Inspector General'. There's potential for additional costs associated with boosting the investigatory functions of the Auditor General and the Ombudsman.*
>
> *The only savings set out in the submission are those associated with the investigatory function being removed from the Integrity*

[37] CPSU, Second Submission, p2-3

Commission and, given this is only a small part of the Integrity Commission's current costs, these savings are unlikely to be sufficient to fund an enhancement of the educative, advisory and preventative role, an enhancement of the triage role, the funding of an Office of Inspector General and the boosting of the investigatory capacity of the Auditor General and Ombudsman.[38]

4.2.36 The Law Society of Tasmania was supportive of the Integrity Commission retaining its investigatory role in areas where there was no overlap with other integrity entities, stating as follows in its second submission to the Committee:

> *There are matters in respect of which there is no or limited overlap between the investigatory role of the Commission and in respect of which it is desirable for the Commission to retain its investigatory role including investigations of Tasmania Police, heads of agencies and local government.*
>
> *If it is necessary to reduce the funding of the Department of Justice, it is essential that access to justice is not harmed. Rationalising the Integrity Commission's role in the manner submitted will not harm access to justice unlike reducing resources available for legal aid, the courts and law libraries which will harm access to justice.*[39]

[38] CPSU, Second Submission, p1
[39] Law Society of Tasmania, Second Submission, p1-2

4.2.37 The Committee heard evidence from Professor Malpas who was also not supportive of the complete removal of the investigative powers of the Integrity Commission, stating as follows:

> *I think that would be a retrograde step. I think it would send the wrong message in terms of the Government's position. Having been so much in favour of having a commission established in the first place, it is probably not, in public relations terms alone, the best look to then, when you are in government, wanting to strip back the investigative functions. The investigative functions are important and they have to remain, but they are not the only function of the commission nor are they necessarily the most important function. How those other functions, the educative functions, are discharged, I believe need to be discharged in a slightly different way in which the commission has been doing thus far. I think it needs the investigative powers but it also needs… the educative role as well……*[40]

4.2.38 However, Professor Malpas argued for another model for the Integrity Commission, which, while having the power to investigate would focus primarily on the educative function, and would co-opt expertise to fulfil both its educative and investigative functions rather than have the capacity to do so internally.

4.2.39 Professor Malpas had made a submission to the Joint Select Committee on Ethical Conduct which

[40] Malpas, Hansard, 22 October 2014, p19

recommended the establishment of the Integrity Commission in this regard.[41]

4.2.40 Professor Malpas' submission to the three year review stated as follows:

> *At the outset, I would draw attention to the evidence that Sir Max Bingham and I provided to [the Joint Select Committee on Ethical Conduct] and the contents of the submission on that occasion. We urged the establishment of a small Commission that would draw on the resources of other agencies and organisations rather than having a large staff of its own. We also argued for a Commission that, although having the power to initiate and undertake investigations (with powers akin to those of a Royal Commission), would be strongly oriented to the task of education and training. We quite deliberately referred to the body we had in mind as an ethics commission, and not as an integrity commission.*
>
> *I would contend that almost everything contained in our original submission, remains relevant to the present circumstances. My view was then, and remains now, that a large Commission is neither viable in Tasmania nor needed. I am also still of the view that there is a significant challenge to be met in terms of the strengthening of ethical culture and the improvement of ethical expertise within*

[41] Malpas, Submission to Joint Select Committee on Ethical Conduct, 8 August 2008

government and public organisations in Tasmania – a challenge that has not been met by the current Commission and is unlikely to be met in the future.

In my view, the key problem centers on the character of the Commission as largely focused around what I would refer to as a 'code and compliance' approach. This approach is widespread within the contemporary integrity industry (the use of the term 'integrity' being a common marker of this approach), and has increasingly become embedded in public sector organisations and culture. It is an approach which places primary emphasis on codified forms of conduct and legislative compliance. As such, it tends to reinforce hierarchical structures within organisations, undermines the capacity for judgment that is at the heart of ethical practice, and instead encourages a purely proceduralist mentality of a sort that is antithetical to genuine ethical thought and behavior.

It is precisely the adoption of such an approach that underpins the current size and cost of the Commission: the 'code and compliance' or 'integrity systems' approach (like the contemporary systems of audit and assurance with which it is associated) inevitably brings an increase in administrative costs, since it treats integrity as itself a function of an administrative system – a system based around constant

monitoring and review – rather than looking to ethical conduct as it is based in individual and collective capacities for reflection and judgment, and in the cultivation of those capacities. The code and compliance approach adopted by the Commission has also, in my view, led to an increased overlapping of the Commission's work with that of other audit bodies within government, and so to significant duplication of function.

The record of the Integrity Commission over the last three years seems to me to be fairly predictable given the nature of the Commission and the manner of its approach. The achievements that it sites in its own reports seem to me to be entirely consistent with the character of its current operation, but of little relevance to the real ethical challenges at issue. The fact that the Commission seems not to have been able to establish a significant public profile for itself a key ethical body or as a significant voice in the public arena seems to me especially telling.

I would not favor the continuation of the Commission in its current form. I believe that it could be reformed in a way that would be both less costly and more effective, but such reformation would involve quite a radical shift

in the nature of the Commission and the manner of its operation.[42]

4.2.41 Professor Malpas further expanded on this in his evidence before the Committee, stating as follows:

My view has not changed. I think we would still stand by our original submission and the original structure we set out, partly because that structure is based on a particular conception of what an ethics commission ought to be doing. We were not envisaging an ICAC; we were not envisaging that sort of large body, the sort we have seen in other states. Those bodies do have some problems of their own of course, but we did not think Tasmania needed that sort of body and we did not think Tasmania could afford that sort of model…… our proposal was for a much smaller, leaner sort of operation and organisation. We wanted a commissioner and possibly two or three people who would assist him with a very small ancillary staff. We were not envisaging the sort of large organisation that actually developed.

That was based on the idea….that there was not a significant issue of organised crime in Tasmania. Most of the significant issues that were likely to come up would be quite specific. They might not occur frequently. It also seemed to us that the most important task of

[42] Professor Jeff Malpas Submission, p1-2

the commission was going to be to not necessarily undertake itself but to direct and organise in an educative function. But we did not envisage the commission's undertaking that itself because the expertise required for that might not be vested in the commission, and, probably, it was going to be better for the commission to find other people who could undertake that work for it. We really envisaged the commission as a very small body that undertook investigative work as necessary but which also oversaw educative and training work....[43]

[in regard to resources to conduct investigations] They would co-opt them, they would second them from other agencies. They might come from the Police Service or any number of other places within the public service. We did not think it was necessary to have those sorts of investigative officers permanently as part of the budget as part of the salary of the commission. That is the first thing.

If the commission is investigating these sort of large-scales of misconduct that we're talking about, and they are going to be intermittent occasions that would seem the only way to handle it. On the educative side, our view is also that the commission should not be seen as

[43] Malpas, Hansard, 22 October 2014, p17

having a large body of people who are there all the time undertaking the educative work. We had a number of reasons for thinking that. One is the budgetary issue because we were looking at ways of trying to keep the budget under control. Second, we did not believe the commission would necessarily capable of maintaining that expertise. One of the problems with bodies like this is they can very easily develop their own internal ethos and way of doing things.

Part of the reason you don't necessarily want to want to maintain a body is precisely because you don't necessarily want a single view, single model of approach being adopted, one that isn't capable of being flexible and adjusting itself to the circumstances, so our suggestion was that you look outside for that sort of expertise as well and contract it from other bodies.[44]

4.2.42 The Integrity Commission responded to the model proposed by Professor Malpas as follows:

The Commission is an appropriate size for Tasmania……It is the Commission's experience that it would be almost impossible for a body of three people to maintain appropriate independence and expertise. There are real issues around locating appropriately trained personnel for matters. It is a problem

[44] Malpas, Hansard, 22 October 2014, p23

experienced interstate by much larger organisations, and is compounded in Tasmania.[45]

The Commission has and does co-opt expertise as required. Its investigative staff are limited in number. There is a complaints assessor, who manages the simple administration of the complaints received. There are two senior investigators, one of whom works 0.6 FTE. There is a Manager's position. Each of the senior investigators have significant experience: one is a former police officer from the UK and another has worked with the then NCA. This is not a large standing capacity by any stretch; nor is it particularly costly.[46]

The Commission has three full time staff managing the prevention and education function. Although Professor Malpas might disagree with the work they do, it is well received by agencies and widely sought after.

The Commission has used expertise at the University for its training for members of Parliament. It is not opposed to contracting with outside bodies for expertise in prevention and education when appropriate.[47]

Findings

The Committee finds that:

- **There was unanimous support for an ongoing function for the Commission in triage, assessment and monitoring of investigations and the power to hold Tribunal hearings in serious cases.**

[45] Integrity Commission, Third Submission, p11
[46] Integrity Commission, Third Submission, p12
[47] Integrity Commission, Third Submission, p13

- **There was not unanimous support on whether other Integrity Commission investigative functions should continue.**
- **Despite numerous allegations and investigations of serious misconduct, the Integrity Commission has not found evidence of systemic corruption.**

Recommendations

The Committee recommends that:

- **The question of the investigative powers and functions of the Integrity Commission should be considered as part of the five year review, with all evidence detailed by the Committee in this report to be considered by the independent reviewer. However, until that review, the investigative functions and powers of the Integrity Commission should be retained.**
- **The Integrity Commission be given the authority to assess, triage and monitor all investigations relating to allegations of serious public sector misconduct.**

4.3 Reinvestigation in State Service Code of Conduct Matters – Employment Direction 5

4.3.1 As noted above in paragraph 4.2.21 onwards, the Committee received evidence in relation to Employment Direction 5 and the need for a Head of Agency to reinvestigate matters following an investigation by the Integrity Commission.

4.3.2 The submission of the Integrity Commission states as follows in relation to this issue:

> *The interaction between the Head of Agency obligations under ED5 and the Commission, particularly with respect to the use of information and evidence obtained by the Commission for administrative and/or disciplinary proceedings need to be reviewed. It is*

apparent that there is considerable confusion amongst Heads of Agencies about their obligations to commence an ED5 when they are aware that the same matter is already under investigation by the Commission. Further, the 'admissibility' of evidence and information should be obtained by the Commission, whether under a coercive notice or by other means, should be clarified. Currently, there is confusion as to whether that information can be used in an ED5 (code of conduct) investigation. It seems pointless for the Commission to undertake an investigation and locate evidence or information about misconduct if that information cannot be used in an ED5 process.

The Commission recommends that it have the right to direct a Head of Agency not to commence an ED5 investigation where there is a risk that such investigation may impact on a Commission investigation, and that there be a clear direction (either through the ED5 process or another avenue) that information and/or evidence obtained by the Commission can be used in administrative and/or disciplinary proceedings (subject to any affected person begin afforded appropriate procedural fairness).[48]

4.3.3 The submission of the CPSU also raised this issue, stating as follows:

The CPSU has significant concerns about the interaction between the Integrity Commission Act and the obligations on Agencies to investigate suspected

[48] Integrity Commission, Submission No. 1, p137-138

breaches of the State Service Act Code of Conduct (SSA-COC).

The SSA requires a Head of Agency who has reasonable grounds to believe and employee has breached the SSA-COC to investigate the alleged breach. This process generally has two distinct stages – the first stage being where the Head of Agency assesses whether reasonable grounds exist and if they are found to exist, the second stage is investigating the alleged breach. As the Integrity Commission tends to operate with a high degree of secrecy it is highly unlikely a Head of Agency would be aware, at the time they initiated either stage 1 or 2, that the Integrity Commission was already undertaking an investigation into the same matter.

The CPSU understands that Agencies generally inform the Integrity Commission about SSA-COC investigations that are underway if the Agency believes the subject matter of the investigation could fit within the responsibilities of the Integrity Commission. By contrast the Integrity Commission rarely advises Agencies that complaints within their Agency have been accepted for investigation. Page 78 of the Integrity Commission submission on this review indicates that in only 21.6% of instances has the principal officer of a relevant public authority been informed that an investigation has been initiated.

Having investigations into matters being undertaken by two authorities at the same time and under distinctly different legislation is problematic. Firstly it is very confusing for the person/s the subject of the

investigation and those being asked to provide evidence. Secondly, as the evidence collecting powers and rights of accused are different, it is difficult to provide advice and there is a risk that crossing between jurisdictions can impact on procedure fairness. Finally it is inefficient and could be considered double jeopardy.

In principle the CPSU supports the proposal that a matter that is the subject of an Integrity Commission Investigation should not also be the subject of a SSA code of conduct investigation however there are a myriad of practical issues that arise from this proposal.

1. *How does a Head of Agency know if a matter they have reasonable grounds to suspect constitutes a breach of the SSA-CCA already or will become the subject of an Integrity Commission investigation?*
2. *If a SSA-COC investigation involves both matters that are the subject of an Integrity Commission investigation and matters that are not being investigated by the Integrity Commission should the Head of Agency proceed with investigating those not subject to the Commission process?*

   If these matters are investigated by the Head of Agency can a determination be made before the Commission matters are finalised as the appropriate sanction could be dependent on the determination of all the matters?

3. *If a Head of Agency begins an investigation process and is subsequently advised to place the investigation on hold pending an Integrity Commission investigation, what are they able to inform the respondent about the initial investigation process? It is worth noting that the Integrity Commission only advises officers the subject of an investigation that an investigation has commenced in 8.1% of cases.*
4. *Is it reasonable for a Head of Agency to rely on the findings of an Integrity Commission investigation to determine a SSA-COC breach given that the investigatory powers of the Integrity Commission significantly exceed the powers of the Head of Agency in a code of conduct investigation?*

   If a Head of Agency made a determination and applied a sanction based on an Integrity Commission finding would the evidence upon which the Integrity Commission based its decision be available to be tested through the appeal mechanisms open to public sector workers in the same way that a normal SSA-COC investigation is?

   The CPSU believes that any resolution to these issues will involve coordinated amendments to the Integrity Commission

Act, the State Service Act and a number of Employment Directions.[49]

4.3.4 This issue was further discussed in the evidence of the Integrity Commission as follows:

> ***Ms MERRYFULL*** *- ……..I absolutely wholeheartedly agree with the CPSU that the relationship between the Integrity Commission and employment direction 5 needs to be clarified. We have tried and tried to have this addressed. We have had numerous interactions with the State Service Management Office about ED5 and trying to get it to take account of commission matters. It is also important to remember that an ED5 is simply a document the Premier signs; it is not a law or a regulation. It can be changed with the stroke of a pen. All these problems the* Government submission refers to, which *only apply to the State Service, could also be solved if people would do something about ED5. One of the commission's functions is 'to gather evidence for proceedings for a breach of the code of conduct.' Parliament told us to do that, so Parliament clearly intended that our evidence would be used for breaches of the code of conduct. Whatever blockages there are because of ED5 can be fixed by amending ED5.*
>
> ***Mr BARNETT –*** *Is that what you think should happen, that ED5 should be amended to provide better clarity?*
>
> ***Ms MERRYFULL –*** *Yes, absolutely, for the use of commission evidence in code of conduct proceedings.* [50]

[49] CPSU Submission, p2-4

Mr MCKIM – *The Government further says, and I will quote directly from the Government's submission, ' The need for dual investigations does not serve the interests of justice well.'*

Ms MERRYFULLL – *I would agree with that. I don't think you need two investigations.*

Mr MCKIM – *The implication being that under the current framework there are two and therefore yours needs to go.*

Ms MERRYFULL – *Ours needs to go rather than look at a way to use the evidence that we produce. Keep in mind, too – and I really need to say this – the evidence that we can gather is more than employers can gather. There seems to be this idea that the employer can get all the evidence and they don't need us, but we can get far more evidence than the employer can get. We can get bank records. We got bank records from an agency which allowed them to dismiss somebody. They could not get those records. They came to us and asked for them to help them. We can get records about people and all sorts of records and they can't, and we can use surveillance devices. It is a nonsense to think that they have the same capacity as we do to gather the evidence that is necessary to get the outcome.*

Ms JOHNSTON – *I think it is important, too, that once we give the evidence the employer is about disciplining the employee. We are not about that. We are about finding out why misconduct occurred in the first place.*

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[50] Merryfull, Hansard, 30 September 2014, p22-23

Some of the misconduct or some of the actions we find or the recommendations we make go to preventing it occurring again. It is not about dismissing an employee or somehow disciplining them. It is about ensuring the misconduct doesn't occur again, so it is a much broader remit.

Mr MCKIM – *Where the Government talks about the need for dual investigations and raises issues around the first investigation, presumably the commission's tainting or distorting the subsequent process – and I am again paraphrasing the Government's submission – that is the area in which you are submitting to the committee that a change in ED5 could resolve those issues? Is that correct just so I understand that?*

Ms MERRYFULL – *Yes*[51]

Findings

The Committee finds that there is currently unnecessary duplication where the Head of a public authority conducting a code of conduct investigation is not able to consider evidence obtained during an Integrity Commission investigation.

Recommendations

The Committee recommends that ED5 be amended to enable material from investigations conducted by the Integrity Commission to be forwarded to the relevant public authority, and that the relevant public authority is able to consider that evidence as part of any code of conduct investigation.

[51] Merryfull/Johnston, 30 September 2014, p39

4.4 **The use of Evidence Obtained in Integrity Commission Investigations in Criminal Matters**

4.4.1 As discussed above at paragraph 4.2 of this Report, the issue of the use of evidence obtained by the Integrity Commission in investigations in criminal matters was raised as an issue during the course of the review.

4.4.2 The Acting Director of Public Prosecutions, Mr Daryl Coates, stated as follows in his submission in relation to this issue:

> *Additionally, a great deal of any evidence gathered by the Commission using its extensive powers cannot be used by my Office to prosecute an offender. Indeed, it is likely any evidence gathered by coercion from the alleged offender could not even be provided to the prosecutor (see Lee v R [2014] HCA 20). Tasmania Police would be required to completely re-investigate any matter, ensuring that any alleged perpetrator and any witnesses are given the benefit of the protections extended in the criminal justice system. This stems from the coercive nature of the powers exercised by the Commission and that fact it is not bound by the rules of evidence.*[52]

4.4.3 Mr Coates further expanded on this in his evidence before the Committee, during which the following exchange occurred:

> ***Mr COATES** - I suppose my major concern is the duplication of investigation. In my role as DPP general code of conduct investigations is not*

[52] Director of Public Prosecutions Submission, p1

really my concern, but even there if there has been an investigation by the commission it has to be reinvestigated by the head of agency. I think it is requirement number 5 under the State Service Act. The other concern I have is if there is an investigation of a criminal matter the process will take a long period of time and invariably it will have to be reinvestigated by Tasmania Police.

The most the commission can do, under section 57, would be to send their report to me or to other bodies, but specifically to me for action. The report does not have to be based on the rules of evidence. The likely result if it was forwarded to me would be that I would write to the Commissioner of Police and say, 'There has been this allegation and you may wish to investigate it', and I may put what I think the merits of it are based on the report. I would also add that if they do investigate it and make a file, not to put anything on the file that has been compulsorily acquired from the suspect because if a prosecutor sees that it may lead to either a stay for abuse of process or a successful appeal, given the recent decision of Lee v The Queen.

The procedures for investigating criminal matters is quite different to the procedure set out here under the Integrity Commission Act.

Ms GIDDINGS *- With your DPP colleagues in other states where there are ICACs and other bodies that have arguably stronger powers than the Integrity Commission, my understanding is that if an ICAC there makes a finding that somebody has misused their power or had corrupt behaviour the same problem exists for the police and the DPP in those states as well.*

Mr COATES - *It certainly does. There are two problems that exist. Firstly, these bodies are not bound by the laws of evidence. I am not saying they should be but that is no good for us; we are bound by the rules of evidence so generally speaking it would have to be sent back to the police to be investigated in any event. Secondly, the problem with Lee v the Queen is a very large problem. I understand there are numerous stay applications being made in New South Wales at the moment. How wide it is we are not certain yet but it is certainly a problem for DPPs around the country.*

Ms GIDDINGS *- This is off the back of the ICAC investigation.*

Mr COATES - *Yes. What happened there was an ICAC investigation. Their rules are a little bit different to the ones here. There was a provision that it should not be released to*

anybody unless ICAC ordered it. They did not order it, it was given to the prosecutor. It was not used in the trial but High Court found it was unfair because the prosecutor knew what the accused was going to say so she could prepare a cross-examination and so on beforehand. The interesting thing about the judgment was that they just did not limit it to the provisions of the ICAC, they said that part of common law to do with fairness of trial is that the accused person does not have to do anything to assist the prosecution and where they had been forced to and the prosecution had been assisted, it can lead to an unfair trial.

CHAIR *- In relation to the submission and the comments you have made, if the Integrity Commission was to continue in this state moving forward, what changes do you think ought to be made to cover off on those areas you raise, such as the admissibility of evidence and reinvestigation of matters? Have you a view on that, Daryl?*

Mr COATES - *My view would be if that if it is a criminal matter it should be dealt with and investigated by the police because they are the experts in the area. It would be done quicker and they do not have this lengthy procedure that is currently under the act. It seems to me we are a small population but we have numerous bodies investigating and it overlaps.*

Ms GIDDINGS *- We lived through that time from 2005 onwards where there was a lot of politicking, right or wrong, and reputations damaged through that period up until 2010 when this framework was developed to say that the other avenues open in the system have failed to deal with these matters appropriately or there was a gap in the system that was identified that the Integrity Commission was built to try to fill.*

Mr COATES - *Firstly, going back before 2005, back to 1990, in my experience investigations of senior public service, politicians and police officers have been conducted vigorously and fairly. If some of those cases arose again, even with the Integrity Commission, it would seem to me they would go back to Tasmania Police to investigate, so I don't think that is not going to resolve that.*

The Integrity Commission has a lengthy procedure of making assessments, conducting an investigation, making the person subject to the investigation compulsorily answer questions and give up documents, and then he or she is given a right to comment on the report. The report is not bound by the rules of evidence and they can forward it to one of those bodies. If it is forwarded to me, the likely result would be I would be either saying there is

no suggestion of criminal conduct here at all, so I would not forward it to anyone, or if there is, I would be forwarding it to the police for a proper criminal investigation. From a strategic point of view, conducting many criminal cases by going through the Integrity Commission you have forewarned the suspect of the investigation and so on.

On the mainland, the most useful thing for these bodies is where there is systemic corruption and it can reveal that, but it is not necessarily a useful tool to prosecute people.[53]

4.4.4 The Integrity Commission, however, argued that evidence would not be inadmissible in all circumstances and that the situation can be appropriately managed. Their third submission to the review stated as follows in relation to this issue:

In Lee v The Queen (known as Lee #2), a High Court bench of five judges quashed convictions on the basis that the trial Crown Prosecutor, and his instructing solicitor, had access to transcripts of compulsory examinations of the accused under taken by the NSW Crime Commission (not ICAC).

The basis for the decision was that while Parliament can abrogate the right to silence for non-prosecutorial purposes (by compelling a person to answer questions via coercive powers) the right to a fair trial must be protected and the product of these other

[53] Coates, Hansard, 6 November 2014, p1-2

processes ought not be disclosed to the prosecution.

This decision relates to the transcripts of the evidence of the person charged. It is a matter that all integrity agencies are aware of and which is being dealt with by them – for example, by not providing prosecutors with the relevant transcripts.

The Acting DPP acknowledges that he has no direct experience in dealing with any matters like this. However, this issue can be handled appropriately and the Commission knows that similar agencies in the other jurisdictions are doing so. It has not stopped such interviews taking place and it has not stopped prosecutions.

The court decision does not mean that any evidence obtained during an investigation by a body such as the Integrity Commission cannot be disclosed to or used by any prosecution authority.

Much of the evidence that bodies such as the Commission will obtain is admissible and able to be used in prosecutions (e.g. documentary evidence). In relation to oral evidence – the Commission is in the same position as any other investigator. When a police officer questions someone, the person will still be required to give evidence in court. If the Commission questions someone, if a matter is to be dealt with by a court, testimony will still need to be given. The Integrity Commission has in fact

obtained legal opinion about this very issue from the Solicitor-General, who stated in part:

> *Evidence law is complex – it is not possible to consider all of the factors that might make hypothetical evidence inadmissible; each instance will turn on its own facts. Nevertheless, in the general circumstances described, I am aware of no rule of evidence that will allow us to say with any certainty, that in all (or even most) cases, evidence of the s 47 information will be inadmissible.*[54]

4.4.5 The Integrity Commission stated as follows in relation to the evidence from the Acting Director of Public Prosecutions as to the need for reinvestigation by the police of matters investigated by the Integrity Commission:

> *The vast majority of the matters that the Commission deals with do not involve criminal conduct. The Acting DPP's comments only relate to the issue of criminal offences. The Commission is aware that the police would need to investigate criminal conduct and will take that into account in undertaking its work.*[55]

Findings

The Committee finds that, because of the methods available to the Integrity Commission to gather evidence, the capacity of the Director of Public Prosecutions or Police to subsequently prosecute criminal charges may be compromised.

[54] Integrity Commission, Third Submission, p22
[55] Integrity Commission, Third Submission, p22

Recommendations

The Committee recommends that:

The Act be amended to require that, if criminality is suspected by the Integrity Commission during its triage of a complaint, the matter must immediately be referred to the Director of Public Prosecutions or Tasmania Police.

If the Director of Public Prosecutions suspects criminality, it can refer it to the Integrity Commission, Tasmania Police or any other appropriate body for investigation.

4.5 Referral of Complaints

4.5.1 The Committee received evidence in relation to the referral of complaints by the Integrity Commission to other agencies, and the capacity of the Integrity Commission to monitor the outcome of these investigations.

4.5.2 The submission of the Integrity Commission provides the following background information in relation to referral of complaints to other agencies and identifies that, while the Integrity Commission has the power to monitor complaints it refers to other agencies, it does not possess any 'enforcement' powers in this area:

> *The majority of complaints, if not dismissed or accepted for assessment by the Commission, are referred 'to an appropriate person for action' pursuant to s 35(6).*
>
> *In referring the complaint to an appropriate person under sub-s (1) (c), the CEO may also –*
>
> - *Require the person to report on what action the person intends to*

take in relation to the complaint;

- *Monitor any action taken by the person in relation to the complaint; or*
- *Audit an action taken by the person in relation to the complaint.*

Referral of complaints at this stage (that is before an assessment by the Commission) is consistent with the objectives and functions under the Act to assist public authorities deal with misconduct.

Generally an appropriate person under s 35 will be the principal officer of the relevant public authority in respect of which the complaint is made. However, an appropriate person may also be another integrity entity, the police or the DPP.

When a complaint is referred to an appropriate person, the Commission does not retain any powers or jurisdiction with respect to the complaint, other than the CEO's discretionary powers under s 35(6) to seek a report, or to monitor the action taken or to audit the action taken. Notably, there is no 'enforcement' provision. That is, there is no mechanism by which the CEO can compel an 'appropriate person' to take action.[56]

[56] Integrity Commission, First Submission, p76

4.5.3 It is noted that the submission of Tasmania Police did not support this recommendation, stating as follows:

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

relation to the notification of misconduct by all public authorities, consistent with the arrangements that are currently in place for police.[57]

Findings

The Committee finds that in relation to matters referred to other agencies by the Integrity Commission, there is an issue with the Integrity Commission's authority to monitor the progress of the investigation.

Recommendation

The Committee recommends that the Integrity Commission be given authority to monitor and request progress reports of all complaints referred to other agencies for investigations, and if necessary raise concerns of potential inaction with the Parliamentary Joint Standing Committee on Integrity.

4.6 **Assessments**

4.6.1 The Committee received evidence in relation to issues surrounding the conducting of assessments by the Integrity Commission.

4.6.2 Background in relation to assessments was provided by the Integrity Commission as follows:

After a complaint undergoes the triage process and is accepted for an assessment, the CEO is required under s 35(2), to appoint an assessor 'to assess the complaint as to whether the complaint should be accepted for investigation….

…In conducting an assessment, the assessor may exercise any of the powers of an investigator pursuant to Part 6 of the Act, if the assessor considers it is reasonable to do so….The powers that can be exercised in an assessment are

[57] Tasmania Police Submission, p11

wide. Consequently, the Commission has developed internal procedures that such decisions to issue Notices by assessors must be backed by statements in support, and the Notice itself must be reviewed internally by the General Counsel and approved by the D/CEO or CEO.

Frequently the assessor may not need to use any powers – information can be obtained through open source searching, or by approaching relevant public authorities or officers for relevant information. Collection of information or data may also include searches of police databases. Where possible, the assessor will also endeavour to gain access to the relevant policy of the agency concerned in order to establish the policy framework in existence at the time of the alleged misconduct.

The framework of the Act means that every complaint retained by the Commission for 'investigation' will always go through an assessment phase first. Assessments can, and do, become lengthy and complex…..

Section 37 of the Act provides that on completion of an assessment, or 'review of a complaint', the assessor is to prepare a report of the assessment, and forward the report to the CEO. In addition, the assessor's report is to recommend that the complaint be:

- *Dismissed under section 36 or <u>not accepted</u> [emphasis added]; or*
- *Referred to the principal officer of any relevant public authority or investigation and action; or*

- *Referred to an appropriate integrity entity for investigation and action; or*
- *Referred to a Parliamentary integrity entity for investigation and action; or*
- *Referred to the Commissioner of police for investigation if the assessor considers crime or other offence may have been committed; or*
- *Referred to any other person who the assessor considers appropriate for investigation and action; or*
- *Investigated by the Integrity Commission…..*[58]

….On receipt of the report of the assessor, the CEO is to make a determination:

- *To dismiss, or <u>not accept</u> the complaint;*
- *To refer the complaint to which the report relates, any relevant material and the report to any relevant public authority with recommendations for investigation and action; or*
- *To refer the complaint to which the report relates, any relevant material and the report to an appropriate integrity entity with*

[58] Integrity Commission, First Submission, p78-79

recommendations for investigation or action; or

- *To refer the complaint to which the report relates, any relevant material and the report to an appropriate Parliamentary integrity entity; or*
- *To refer the complaint to which the report relates, any relevant material and the report to the Commissioner of Police with a recommendation for investigation; or*
- *To refer the complaint to which the report relates, any relevant material and the report to any person who the CEO considers appropriate for action; or*
- *That the Commission investigate the complaint.*[59]

4.6.3 Mr Damian Bugg commented on the assessment process in his written submission as follows:

> *….the only matter concerning the Commission of which I have any direct knowledge laboured through an assessment stage (which I would describe as being more akin to an "investigation") of 5 months after which the matter was then referred by the CEO to not one but three persons under section 38 (1), of whom*

[59] Integrity Commission, First Submission, p80-81

one is a Board member, to "investigate" and "take action."[60]

4.6.4 Mr Bugg further expanded on his evidence before the Committee, stating as follows:

> *My one direct experience of the matter – I cannot go into too much detail about it, but being anonymous about it – was that after five months of what appeared to be an investigation, it turned out to be an assessment. The result of the assessor's report was a referral made to three different entities under the act, when I think the option is only to refer to one entity. What you had was an assessment that took five months and, as a former investigator, you would know by now the pool was pretty muddy. It is referred out to three and you suddenly have potentially three investigations into the one matter with people treading on one another's toes as they try to get their gumboots into a pool that is already muddy? Why did it take five months? Having complained about that to someone else, I was informed that their experience in a similar situation was not dissimilar to mine – that is, some considerable months for what is basically intended to be…..'a triage'. That is, let us have a look at it. What is it? Should it go out for investigation by one of these agencies? [The] Second reading speech reassured me that there*

[60] Damian Bugg, Submission, p1-2

would be this discretionary filtration. Or, no it is a serious matter so we need to look at it.

This was not a serious matter. The triage process turned into an investigation in reality because the assessor has that power under the act. After five months the assessor said 'This is as far as I can take it' and the chief executive officer referred it to the Ombudsman and the head of the department and one other person to 'investigate and take action'. Then you have an unseemly rush unless there is some understanding between them. [61]

4.6.5 The following exchange also occurred in relation to this issue during Mr Bugg's evidence before the Committee:

Ms GIDDINGS – *How do you know where to draw the line in an assessment before it becomes an investigation, and can you legislate to ensure that does not happen?*

Mr BUGG – *The assessor is given all the powers to investigate under the act so that at a point there might be a seamless transition from an assessment to something that requires investigation. The assessor is therefore given investigative powers so that they can dig a little bit deeper with those powers and I do not have a problem with that.*

However, at a point the assessor can say, 'This matter should be investigated by the Integrity Commission' – that is one of the 'or's' under section 37, and is also one of the 'or's' under section 38. Then it can be investigated as a proper, full-blown investigation by the

[61] Bugg, Hansard, 22 October 2014, p2

Integrity Commission. This is to be a short, sharp triage under section 37. You do not get two bites at it and start to have a look and think, 'This is an investigation; I would like to investigate this – oh no, I have taken it as far as I think I can, let's pass it off to someone else under section 38.'

The simple answer to your question is: you need the investigative powers so that you can have a thorough assessment. But if the assessment is intended to be a triage to work out where it should go, once you put on your investigator's boots, then you need to anticipate that it may be turning into a full-blown investigation for the commission. But there is a flashing amber light up there that says, 'Hang on a minute, this is, on the face of it, not a matter of serious misconduct, and where are you heading with this?'

Mr MULDER – *That seems to be the issue, that the assessment should be about whether or not whether allegations are substantiated, but whether this is a serious matter the commission should be concerned with. If that is the key point, then we need to get around that because there is a fair amount of indication, from stories such as yours, that the commission is taking some time, in the hope they can assess the more serious it will become so that they can take it on.*

Mr BUGG – *You have just almost paraphrased the then minister's second reading speech on this subject. The assessment period was to ensure it was a triage process to filter out those matters which were not in the domain as intended by the government, which was: do not take a sledge hammer to crack a nut on matters of*

misconduct, we are looking for serious misconduct. I agree.[62]

4.6.6 The Integrity Commission responded to this evidence as follows:

Mr Bugg appears to have misunderstood the complaint framework set up under the legislation. The triage function is performed as soon as a complaint is received under s35, not during the assessment process.

The assessment process is almost exactly the same as the investigation process, the only difference being that it is the Board who determines to dismiss, refer etc, not the CEO. Contrary to Mr Bugg's assertion, had the matter he has knowledge of been subject to an investigation (as opposed to an assessment), the result would have been the same: a referral to one or more agencies.

At the conclusion of an investigation, a Board determination to refer to a head of agency, where conduct involves a breach of the state service code of conduct, would still require the head of agency to commence an investigation, because of the wording of Employment Direction 5 (ED5).

It is ED 5 which requires amendment, as previously submitted by the Commission.[63]

In relation to this matter, the time frames were:

[62] Bugg, Hansard, 22 October 2014, p11
[63] Integrity Commission, Third Submission p2-3

• the complaint was made by a deputy secretary of a state service agency (not the agency where the alleged misconduct took place);

• the complaint concerned allegations about a state servant, employed by another state service agency, but working in a statutory authority, governed by a board;

• the matter was triaged and the CEO determined to put it into assessment 8 days after receipt of the complaint;

• the assessor determined it was appropriate to exercise the powers of an investigator under Part 6;

• the relevant assessor served 17 notices under s 47 of the Act for relevant material, including to compel attendance at interview;

• the 17 notices are not all served at once: the first was served 8 days after the matter was put into assessment; the last was served 111 days later;

• thirty days after the last interview, a draft assessment report had been completed and the assessor commenced the procedural fairness process;

• it took a further 20 days for the relevant officers involved to provide their comments on the draft assessment report;

• the CEO determination to refer under s 38 was 169 days after commencement of the assessment; that period included the procedural fairness process.[64]

[64] Integrity Commission, Third Submission, p4

Findings

The Committee finds that some of the evidence supports that in some cases there has been an unduly long time taken for assessments to be conducted.

Recommendations

The Committee recommends that:

The Act be amended to require assessments to be completed within 20 working days, and matters referred on as appropriate.

In cases where the assessment cannot be completed within 20 working days, the assessment may be referred to the Integrity Commission Board, which may extend the timeline for a further 20 working days for the assessment.

5 INTEGRITY COMMISSION BOARD

5.1 The Committee received a number of submissions that commented on the structure and composition of the Integrity Commission Board.

5.2 The Integrity Commission submission provides the following background information in relation to the Board:

The Board of the Commission is established by s 12 of the Act. The Board forms part of the Commission; s7(1).

Members of the Board are:

- *The Chief Commissioner who is the Chairperson;*
- *The person holding the office of Auditor-General (ex officio);*
- *The person appointed as Ombudsman (ex officio);*
- *A person with experience in local government; and*
- *A person with experience in law enforcement or the conduct of investigations; and*
- *A person who has at least one of the following:*

- *Experience in public administration, governance or government;*
- *Experience in business management and administration whether in a government organisation or non-government organisation;*
- *Experience in legal practice; or*
- *A person who has community service experience, or experience of community standards and expectations, relating to public sector officials and public sector administration.*

In accordance with s13, the role of the Board is to:

- *Ensure that the CEO and the staff of the Commission perform their functions and exercise their powers in accordance with sound public administration practice and the principles of procedural fairness and the objectives of the Act.*
- *Promote an understanding of good practice and systems in public authorities in order to develop a culture of integrity, propriety and ethical conduct in those public authorities and their capacity to deal with allegations of misconduct; and*
- *Monitor and report to the Minister or JSC or both the Minister and the JSC on the operation and effectiveness of*

the Act and other legislation relating to the operations of integrity entities in Tasmania…

..It is clear, having regard to the roles and functions bestowed on the Board, that it has limited involvement in day to day operations of the Commission. However, it is required to have high level oversight of the CEO and the staff of the Commission by ensuring that they are acting in accordance with sound public administration practice and the objective of the Act.[65]

5.3 The Tasmanian Government submission argued that the current Board structure should be replaced with a different governance mechanism, namely an Inspector-General to oversight the Integrity Commission as well as other integrity agencies. The submission stated as follows:

The cost of the Board and senior management, as set out in the 2012/13 Annual Report, was $909,000. Four Board members are paid. This cost of the paid members was approximately $132,000. In addition, of the 10 meetings held in the 2012/13 year, there was a 93 per cent attendance rate.

While it is important that integrity bodies remain at arms-length from Government, this could be achieved through more cost-effective and efficient means, rather than a formal Board structure. For example, another oversight officer or inspectorate, who could undertake oversight of all integrity entities. This officer could be responsible for monitoring performance and dealing with complaints against integrity entities and reporting to Parliament. This office could be called the 'Office of Inspector-General'.

The introduction of an Inspector-General may remove the operational costs of the Board but would need to take on additional oversight

[65] Integrity Commission, First Submission, p11

functions to ensure that it provided value for money. An Inspectorate would require some level of resourcing in terms of staffing and office requisites. However, as the Inspectorate would have powers and functions across a number of entities, this could justify the costs.[66]

Recommendation 2 – An office of the Inspector-General could be established as an officer of the Parliament to oversight complaints and issues regarding integrity entities, administer Parliamentary disclosure of interests, and report to Parliament annually and as required.[67]

5.4 The Attorney-General, Hon Vanessa Goodwin MLC further stated in her evidence before the Committee:

….I have been concerned about what happens when someone makes a complaint about the Integrity Commission or the Ombudsman, those complaints are often made to this committee which has limited capacity to address those complaints. The usual process is to send them back to the Integrity Commission or the relevant body and say we have had this complaint but there is no external oversight of these bodies to the extent that someone can deal with complaints made against them. I think that is a gap in our current structure. It is a question of who watches the watchdog, and there are different structures to deal with that in other jurisdictions.[68]

5.5 Contrary evidence was provided by the Integrity Commission, who argued that the Board is a cost effective mechanism, and that an Inspectorate model as proposed by the Tasmanian Government would be more costly. The following exchange occurred in their evidence before the Committee:

***Ms GIDDINGS** – …..From your perspective with the Integrity Commission, how important is that board structure to oversee the work*

[66] Tasmanian Government Submission, p5
[67] Tasmanian Government Submission, p17
[68] Goodwin, Hansard, 22 October 2014, p36

the Integrity Commission does?....It is those two elements of how important is a board and do you need a board? If you do need a board, how important is it that you maintain the board as it is, or is there the ability to get rid of one or more roles on the board?

Ms *MERRYFULL* *– I think what the Government is proposing with respect to the parliamentary inspector is that they would take the place of the board and oversight the work of the integrity entities as described. Although if we are not doing any investigations then there is nothing to oversight that we are doing. Oversight the Ombudsman's investigations, oversight the Children's Commissioner, who does not do any investigations anyway, so I am not sure what they would be oversighting there. Sit over the top and report to Parliament about how these integrity entities are working.*

From our perspective, the board is a governance mechanism. The funding that has been reduced for the board across the forward Estimates is for all of the community members to go because they get $20 000 each. The funding across the forward Estimate has gone at $60 000. That is it for the community members. All that would be left on the board then is the ex-officios, which is the Ombudsman, the Auditor-General and the chief commissioner. The community members and the chief commissioner terms expire in August next year. I do not know what will happen after that.

The board is cost-effective in the context of Tasmania. It is $60 000 for the community members and last year we spent only $30 000 for Murray. It came in at just over $90 000 a year for the board. If you look at the cost of these parliamentary inspectors, they are going to be way more than $92 000.

Mr BARNETT *– That was a big reduction on what it was a couple of years ago.*

Ms MERRYFUL *– Yes. We have done a lot of work to reduce because we are about efficiency and effectiveness in the commission. We take care of taxpayer's money. We have structured our operation to be much more efficient and effective. The chief commissioner does not need to spend so much time in Hobart and the board trusts me to run the commission.*

Ms JOHNSTON *– When you say a reduction, the highest we have ever spent on the board and the chief commissioner was just under $203 000. That was the year there wasn't a chief executive officer, so somebody had to be running the place. It is $133 000, $203 000, $136 000 and $92 000 this year. That is for the board and the chief commissioner. It is a cost-effective governance mechanism.*

To answer your question, Ms Giddings, as to what role the board plays, it plays an important governance role. We will work with any governance role but it would be disastrous if it costs so much money to run the governance mechanism that we didn't have enough money to do anything to govern. There would be expensive people sitting up top looking at no work being done. From our perspective the board is quite cost effective in providing that assurance to the community about what we do. We keep the investigations away from them until they are completed. They are hands-off in operational matters so they can bring a fresh, clean look at what we have done and assure the community it has all been above board and is sound and reasoned.

Mr McKIM*– So in a way it's a further accountability mechanism for you and the employees of the commission?*

Ms MERRYFULL- *It is, absolutely.*

CHAIR *– Have you addressed any other model in relation to the board? Have you had an opportunity to address the position the Government has articulated in its submission?*

Ms MERRYFULL *– We have put in a submission to the committee about the costs and structures of some of those parliamentary inspectors. From our perspective at the commission we operate according to what Parliament tells us to do. We don't have a view at this point about which kind of governance mechanism the community and the Parliament prefers for us, but it has to be an effective mechanism and cost effective to allow us to do our job as well as providing assurance to the community.*

CHAIR *– Have you had an opportunity to look at other jurisdictions in this regard to see whether there is another model that may well be another option?*

Ms JOHNSTON *– In our first submission we set out the models the others have, so there is some information there about their operating expenses and what sort of model they work under….*[69]

Ms MERRYFULL*…We are not opposed to improved accountability and oversight for us. We believe that would be a good thing because accountability is what we are about. We welcome accountability and transparency but we are concerned about the increased cost of an accountability mechanism. If you look at our second submission, it gives you an idea of some of the costs of these public, parliamentary inspectors and special interest monitors in other jurisdictions. If the money for the funding of a parliamentary inspector came out of the*

[69] Merryfull/Johnston, Hansard, 30 September 2014, p39 - 41

Integrity Commission's already-reduced budget, you would have those people sitting there oversighting no work because we wouldn't have any money to do any investigation, so there would be nothing to oversight.[70]

5.6 The Integrity Commission provided the following information regarding Inspectorates in their written submissions to the review:

….five of the agencies – CMC, PIC, CCC and IBAC – also have a greater level of oversight from an additional separate independent office, variously referred to as an Inspector/Inspectorate or Commissioner (Inspectors). The functions of the parliamentary committees and the inspectors differ primarily in relation to the capacity to audit the operations of the various integrity agencies.

One important difference between the legislative roles of a parliamentary committee and that of an inspector is with respect of the ability to deal with complaints about the integrity entity. Each inspector can make recommendations, either to the integrity entity (with a reporting role to the parliamentary committee) or to Parliament itself.

Tasmania does not have a separate inspector. The role of the Parliamentary Standards Commissioner is quite different to that of an inspector and furthermore, is independent of the JSC and the Commission.

In the absence of an inspector in Tasmania, complaints of misconduct about Commission officers, where those officers are state service employees, are dealt with as per the State Service Act 2000.[71]

[70] Merryfull/Johnston, Hansard, 30 September 2014, p28
[71] Integrity Commission, First Submission, p20

The first submission included information about Parliamentary oversight committees in Australia. It also included brief information about Parliamentary Inspectors and Inspectorates. One of the concerns of the then Opposition, when the Integrity Commission Bill was being read, was the lack of a Public Interest Monitor. This issue may be raised in submissions to the Committee therefore it may find it instructive to consider more fully arrangements for Public Interest Monitors (PIMs) and Inspectorates interstate. A comparative analysis across the jurisdictions is provided at the conclusion of this submission. However, a more detailed analysis of Victoria is also provided below, as they are the most recent institutions to have been established.

Victorian Inspectorate

At the same time as the IBAC was created, its oversight body, the Victorian Inspectorate (VI) was established. It commenced operations on 1 July 2012, so to date there is only one annual report available. The VI took over all of the functions of the previous Special Investigations Monitor (SIM) that had oversight of the previous Office of Police Integrity.

Mr Robin Brett QC is the appointed Inspector of the VI. The VI occupies specially furnished and fitted out premises, separate and independent to the offices which is has oversight, and to ensure the security of material in its possession.

The purpose of the VI is to:

- *provide oversight of other integrity, accountability or investigatory bodies or officers, including the IBAC; and*
- *to monitor compliance by a Public Interest Monitor with the prescribed obligations; and*

- *oversight the Office of the Chief Examiner; and*
- *oversight the Department of Primary Industries; and*
- *oversight officers of the Victorian Auditor-General; and*
- *oversight of the Victorian Ombudsman.*

The Inspectorate also investigates complaints about those integrity bodies and may also conduct investigations on its own motion.

In its first annual report, it had an operating budget of $821 600. It also had a capital commitment to the value of $2.5 million for the fit-out costs of a new premises in Bourke Street. Neither the VI website, nor its annual report makes it clear how many staff it operates with.

During the only available reporting period it received ten complaints regarding IBAC or its officers. Following an assessment of each complaint (to determine both jurisdiction and whether the matter warranted investigation) the VI did not commence any investigations on the basis that in every matter the complaint lacked substance and in some cases, the complaint was in respect of events that had already been fully investigated by some other person or agency.[72]

5.7 The Committee raised the issue with the CPSU, who did not support the removal of the Integrity Commission Board, stating as follows:

It is my view that this Act was constructed around this board. It is at the heart of this Act and what gives it its credibility and what gives people confidence in it. If people do not have confidence that integrity entities are truly independent and operating for the wider good of the

[72] Integrity Commission, Submission No.2, p19-20

community it is a very dangerous thing. It is my belief that if you were going to remove the board from this bill, you would need to go back and look at the construct of the bill completely. I do not think you can just trim a piece off like that.[73]

5.8 The Committee also raised the issue with the Law Society of Tasmania, who stated as follows:

…There are good, skilled people including practitioners in the Justice department, but the skill set on the board of the Integrity Commission is far beyond what could be realistically provided with the resources of the Justice department. The separation issue is an important one and the current structure provides that appropriately.[74]

If the board of the Commission were to be replaced by an officer responsible for overseeing it and other integrity entities, the Society submits that such a person ought to be an Australian Legal Practitioner with no less than 7 year standing. This is currently the requirement for the Chief Commissioner of the Integrity Commission. Good governance of the Integrity Commission together with maintaining separation from government would be best achieved by a board of rather than an individual overseer with support staff. These matters would be of less importance if the emphasis of the Commission is limited to education and prevention and if its functions do not include the conducting of investigations.[75]

5.9 A further issue raised in relation the Board during the course of the review was the State Service Commissioner position on the Board.

5.10 At the time the Integrity Commission was established, the State Service Commissioner was the seventh member of the Board. The

[73] Lynch, Hansard, 29 September 2014, p24
[74] Mihal, Hansard, 29 September 2014, p12
[75] Law Society of Tasmania, Second Submission, p1

office of the State Service Commissioner was abolished on 4 February 2013 and removed as a member of the Board.[76]

5.11 The submission of the Integrity Commission recommended that the State Services Commissioner be replaced on the Board, stating as follows:

> *The Chief Commissioner wrote to the (then) Attorney-General, Mr Wightman, advising that the Board had reached the view that a Board consisting of seven members, including the Chief Commissioner, is the appropriate number. The Board also considered the particular skill set of the State Services Commissioner had proved to be of significant value to the Board deliberations in the past, and was likely to be required in the future. The Board suggested that a way of resolving the issue would be to amend s14(d) of the Act so as to require the appointment of a person with experience in public administration and public sector human resources and/or industrial relations.*[77]

5.12 The CPSU supported this recommendation, stating as follows:

> *The CPSU supports the proposal that the position on the Board previously filled by the State Services Commissioner be replaced by a person with experience in public sector human resources and industrial relations. We believe this is a key skill set which should not be absorbed in the generalist position on the Board but should be allocated in the Act in the same way the local government and law enforcement positions are allocated.*[78]

[76] Integrity Commission, First Submission, p10
[77] Integrity Commission, First Submission, p10
[78] CPSU Submission, p5

6 EDUCATION AND MISCONDUCT PREVENTION FUNCTION OF THE INTEGRITY COMMISSION

6.1 The Integrity Commission's submission provides the following background information on its education and misconduct prevention functions:

> *The primary objective for the establishment of the Integrity Commission is to promote and enhance standards of ethical conduct by public officers. Section 3 of the Act states the objectives of the Commission with respect to misconduct prevention, are to:*
>
> - *Improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and*
> - *Enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.*
>
> *One of the ways the Commission seeks to achieve these objectives is by educating public officers about ethics and integrity. On establishment, the Commission created a dedicated misconduct prevention, education and research (MPER) unit.*
>
> *The Act prescribes the primary functions – in s8 – which the MPER unit undertakes:*
>
> - *Developing standards and codes of conduct to guide public officers in the conduct and performance of their duties;*
> - *Educating public officers and the public about integrity in public administration;*

- *Preparing guidelines and providing training to public officers on matters of conduct, propriety and ethics;*
- *Providing advice on a confidential basis to public officers about the practical implementation of standards appropriate in specific instances; and*
- *Establishing and maintaining codes of conduct and registration systems to regulate contact between persons conducting lobbying activities and certain public officers.*

There are further specific educative, preventative and advisory functions detailed in section 31 and 32 of the Act which build on the functions under s 8. The Commission has specific functions under s 31, while principal officers of public authorities have obligations under s 32.

Under s 31, the Commission is to:

a) *Take such steps as considered necessary to uphold, promote and ensure adherence to standards of conduct, propriety and ethics in public authorities;*
b) *Review and make recommendations about practices, procedures and standards in relation to conduct, propriety and ethics in public authorities and to evaluate their application within those authorities;*
c) *Provide advice to public officers and the public about standards of conduct, propriety and ethics in public authorities;*
d) *Consult with, and provide assistance to, principal officers and public authorities in relation to the development and*

implementation of codes of conduct relevant to those authorities;

e) *Consult with, and provide assistance to, principal officers of public authorities in relation to the development and implementation of codes of conduct relevant to those authorities;*

f) *Develop and co-ordinate education and training programs for public authorities in relation to ethical conduct;*

g) *Enter into contracts, agreements and partnerships with other entities to support its educative, preventative and advisory functions;*

h) *Undertake research into matters relating to ethical conduct and investigatory processes; and*

i) *Prepare information and material and provide educative resources to increase awareness of ethical conduct in the community.*

Section 32 sets out the obligations of principal officers to educate and train their staff in relation to ethical conduct. This obligation dovetails with the work of the Commission.

The following Commission principles of operation in s 9 of the Act are particularly relevant to its MPER operations:

- *Working cooperatively with public authorities (including other integrity entities) to prevent misconduct;*
- *Improving capacity of public authorities to prevent and respond to misconduct;*
- *Ensuring that public authorities respond if they have the capacity to do so; and*

- *Avoiding duplication or interference with appropriate work of another public authority.*[79]

6.2 A number of parties expressed support for the Integrity Commission's work in this area.

6.3 The Acting Director of Public Prosecutions stated as follows in this regard:

> *I am strongly supportive of the Integrity Commission playing a pivotal role in education and prevention. I have attended a seminar delivered by the Commission and found it to be both useful and informative. All staff in my Office have participated in integrity training as a consequence of the efforts of the Commission. It has proved to be extremely worthwhile and I commend the Commission for its efforts which are highly professional.*[80]

6.4 The Secretary, Department of Justice, stated as follows:

> *From the department's point of view, this has been a real strength of the Integrity Commission and the training materials they have developed and provided. I am aware the police do have their own material but it is police-specific. I think the material that is being generated by the Integrity Commission is broadly focused across the State Service and it has been very good. I do not have the capacity to generate a lot of that in-house within the department so it has been a great advantage to take an almost off-the-shelf product that has been produced by the Integrity Commission and use it within the department. That is a very appropriate use because to me ethical conduct is best achieved by having people understand what the required standards of conduct are, embrace them, internalise them and*

[79] Integrity Commission, First Submission, p34
[80] Office of the Director of Public Prosecutions Submission, p3

behave accordingly. I think a focus on ethics and making agencies responsible for their own ethical health and their own ethical conduct is really important but there is a lot of use in having a body that can provide support around that. I think the issues across the State Service are so similar the message is the same. It does not need to be different from my department as opposed to the Department of Premier and Cabinet. I acknowledge this has been a real strength of the Integrity Commission to date.[81]

6.5 Some submissions suggested that the Integrity Commission should focus on the education and misconduct prevention function rather than also conduct investigations.

6.6 The submission of the Tasmanian Government stated as follows in this regard:

The Commission has a strong focus on education and prevention in relation to public sector misconduct and works with agencies and local governments to:

- *Strengthen standards of integrity and ethics;*
- *Improve the understanding of misconduct and how to prevent it;*
- *Build capacity to prevent misconduct through risk management and timely intervention; and*
- *Deal effectively with complaints of misconduct through internal complaint handling processes and system changes to address gaps revealed by complaints.*

[81] Overland, Hansard, 22 October 2014, p45

The Integrity Commission states its focus is on helping agencies to build their own capacity to resist and prevent misconduct through the specific educative, preventative and advisory functions under the Integrity Commission Act 2009.

The Integrity Commission has developed a range of resources, including case studies and fact sheets to assist Tasmanian public sector agencies to educate and prevent misconduct. These resources have been well received across the service. In addition, the Council actively educates local government employees about the unique challenges they face in fulfilling their roles. The primary focus of the Integrity Commission as envisaged and confirmed during the Parliamentary debate on the Integrity Commission Bill was on education, training and capacity building in order to assist public authorities prevent and deal with misconduct when it occurs.

The Commission's emphasis on research, education, training and awareness-raising should be maintained as its primary focus. The Commission has been most effective in its role as an 'agent for change', and in this context, the work of the Misconduct, Education, Prevention and Research Unit has been particularly effective.

It is important that there is no reduction of the educative, advisory and preventative functions.[82]

6.7 The University of Tasmania submission similarly stated as follows:

It is the University's submission that, given the size of the State of contemplated by the Integrity Commission Act, it might be more beneficial for the Commission to focus more closely on its educative

[82] Tasmanian Government Submission, p6

function, with the investigative function potentially being an unnecessary overlap with other agencies such as Tasmania Police and the State Ombudsman.

UTAS is ready and willing to assist in the performance of the educative function in relation to public officers, noting that there are several academics at the University that operate in this area. Such an education effort would focus on the ethical basis to issues of integrity, rather than a code and compliance mentality. A code and compliance approach is not supportive of ethical behavior – to the contrary, it can be deeply corrosive of it. UTAS could assist the Commission in raising the level of understanding in this area.[83]

6.8 The Integrity Commission responded to the evidence suggesting it should focus on its educative functions rather than also having the power to conduct investigations as follows:

The suggestion that the commission should focus on the education function, which has been made by a couple of submitters, is both misguided and misinformed. You need both. The investigations provide the incentive for agencies to take up the education and prevention stuff we do. It is a fact of life that agencies have many pressing concerns to deal with. They have a bottom line to deliver, everybody has budgetary issues. They have antidiscrimination training and workplace health and safety training. They have a lot of things on their mind and if they don't have a reason to focus on ethics and integrity it will not be focused upon. It is our investigations that give agencies the incentive to focus on education, training and prevention, otherwise it is just another tick in the box, isn't it?[84]

[83] University of Tasmania Submission, p1
[84] Merryfull, Hansard, 30 September 2014, p29

6.9 A further issue raised in the evidence was the monitoring of the training undertaken by public sector employees. The CPSU stated as follows in their submission:

> *From our experience the vast majority of public sector employees act ethically and maintain extremely high standards in regard to matters of integrity. Despite this the CPSU believes that the best way to ensure such standards are maintained is through the provision of training and regular follow up. While the Integrity Commission has an overarching role in education and training in respect of integrity, the primary responsibility rests with employers and the Commission's time is best spent supporting trainers and auditing the provision of training. The responsibilities of employers are clear under section 32 of the Act.*
>
> *The CPSU believes all employees should undertake basic training on matters of ethics and integrity as part of their induction program for new workers. This introductory training should then be regularly followed up with refresher training. The CPSU supports the modular approach developed by the Commission in its Ethics and Integrity Training program and believes the best way to ensure the necessary training is provided is for the public officers of public authorities being required to report annually to the Integrity Commission on the percentage of employees who have undertaken appropriate training.*[85]

6.10 The CPSU further expanded on this in giving evidence before the Committee, during which the following exchange occurred:

> ***MR LYNCH –*** *…..the way the Act was constructed around the Integrity Commission having an important role to play in education and also placing responsibilities on employers in regard to educating people about their rights and responsibilities we think is critical. We would like to see this*

[85] CPSU Submission, p2

area tightened further. We believe that for public sector workers in particular education around their responsibilities should be mandatory and should occur as part of their induction process so that from the first day somebody comes into the public sector they are clear about the role of the commission and their own responsibilities of ethical behavior. Our experience has shown that that sort of training should be followed up fairly regularly to make sure people are refreshed. We strongly believe that a lot of issues that arise are dealt with best at that very early stage by peer pressure, by people having a common understanding about the right and wrong thing to do. If everybody has the same message around that through training, that is a very good way of going.

CHAIR – *Are you aware whether your members have had that training at the present time? Are there repeat sessions occurring?*

Mr LYNCH – *It is very mixed. In some agencies it happens routinely and in others it doesn't. Some of it comes down to a funding issue and whether there are resources available. One of the things we would like to see included this review is a much clearly reporting on compliance. We would like to see agencies reporting on what percentage of new employees have undertaken the appropriate induction training. The training is there, the commission does a great job at providing modular training, but it is about making sure that happens, what percentage of employees have had follow up training – every year, two years, three years, or whatever is considered appropriate – and that should be reported and seen as part of*

an agency's annual responsibilities and performance of that agency.[86]

Recommendations

The Committee recommends that:

- **Participation in misconduct prevention workshops provided by the Integrity Commission should be compulsory during induction programs for employees commencing work at public sector agencies, and this participation is recorded on the person's personnel file.**

- **Contemporary information is to be provided to public sector employees as appropriate and refresher courses be undertaken every five years.**

- **Members of Parliament attend an induction or refresher information session provided by the Integrity Commission after they are elected.**

7 OVERSIGHT OF TASMANIA POLICE

7.1 The Committee received evidence in relation to the oversight of Tasmania Police by the Integrity Commission.

7.2 The Integrity Commission provided the following background in their submission:

Jurisdiction

Tasmania police is a public authority for the purposes of the Act: s5(1)(d). Tasmanian police officers of commissioned rank (i.e. inspectors and above) are designated public officers (DPOs), and non-commissioned police officers are a category of public officers.

[86] Lynch, Hansard, 29 September 2014, p16-17

Part 8 of the Act deals with misconduct by 'certain public officers,' and that includes police misconduct under Division 2. The effect of Part 8 is to create additional obligations for the Commission when dealing with misconduct by police officers (and DPOs), over and above the processes set out in previous Parts of the Act relating to complaints.

Police misconduct – Integrity Commission Act

Police misconduct is defined as 'misconduct by a police officer '. The Commission has formed the view that misconduct by a police officer is a subset of misconduct under the Act. Relevantly, police misconduct is only concerned with police officers, and does not include civilian employees who are state public servants and who fall within the general provisions in the Act concerning misconduct.

Sections 88-91 inclusive set out the Commission's obligations with respect to police misconduct.

In dealing with police misconduct, the Commission is to have regard to the principles of operation set out in s 9, which require it to perform its functions and exercise its powers in such a way that includes, but is not limited to, working cooperatively with public authorities; improving the capacity of public authorities; ensuring misconduct is dealt with expeditiously, and not to duplicate or interfere with work that is being undertaken appropriately.

With respect to police misconduct, the Commission may, in accordance with s88:

- *Assess, investigate, inquire into or otherwise deal with complaints relating to serious misconduct by a police officer in accordance with Parts 6 and 7; or*

- *Provide advice in relation to the conduct of investigations by the Commissioner of Police (the Commissioner) into misconduct; or*
- *Audit the way the Commissioner has dealt with police misconduct, in relation to either a particular complaint or a class of complaint; or*
- *Assume responsibility for and compete in accordance in Parts 6 and 7 an investigation commenced by the Commissioner into misconduct by a police officer.*

If requested by the Commission, the Commissioner is to give the Commission reasonable assistance:

- *To undertake a review or audit; or*
- *To assume responsibility for an investigation.*

If the Commission assumes responsibility for an investigation, the Commissioner must stop his or her investigation or other action that may impede the investigation if directed to do so by the Commission.

Consequently, the Commission's role with respect to complaints it receives about police misconduct is reserved for matters involving serious misconduct and misconduct in relation to commissioned police officers.

Police Misconduct – Police Services Act 2003

The management of complaints by police, about police conduct, is governed by legislative provisions contained within the Police Service Act 2003 (PS Act).

Tasmania Police advises that it will investigate complaints in accordance with the PS Act, which stipulates that all complaints must be in writing, or in a manner approved by the Commissioner, and made within six months after the conduct became known to the complainant.

Tasmania Police deals with allegations of misconduct against its officers in accordance with a set of protocols known as the 'Graduated Management Model' (GMM).

Upon receipt, some complaints may be dismissed; s46(2) of the PS Act sets out the factors which may be taken into account in determining to dismiss a complaint. Section 47 of the PS Act allows for the complaint to be resolved by 'conciliation' at any stage.

Under the GMM, complaints are categorized into two categories: 'Class 1 misconduct' or 'Class 2 misconduct.' If a complaint is not dismissed under s 46(2) of the PS or conciliated, a divisional Inspector is to decide how the complaint should be categorised. If in doubt, Professional Standards is consulted.

As a general rule, Class 2 matters are the more serious, and are subject to investigation by Professional Standards or by personnel as directed by the Deputy Commissioner of Police. Class 2 complaints will generally involve allegations of the commission of an offence or crime by a police officer.

Class 1 complaints are those which, even if proven, are likely to result in internal disciplinary measures – but not dismissal.

Upon completion of an investigation of a complaint of police misconduct, the Commissioner (or, in practice, the relevant Commander) must decide whether there has been any breach of the Tasmania Police Code of Conduct. If there has been a breach, disciplinary action may result which might extend from counselling to dismissal. If there has not been such a breach, other corrective action might still be warranted.

Memorandum of Understanding

Tasmania Police and the Commission entered into a Memorandum of Understanding (MOU) on 1 October 2010. The MOU was entered into in a 'spirit of co-operative endeavor' by both agencies in recognition of the need to deal efficiently with police and public officer misconduct in Tasmania.

While the MOU has no legislative force, the agencies agreed to work collaboratively towards:

- *Improving the culture of policing;*
- *Enhancing leadership, supervision and management;*
- *Implementing and applying appropriate misconduct and corruption prevention strategies; and*
- *Providing a better policing service to the Tasmanian community……*

……The MOU covers:

- *the exchange of information and intelligence (as permitted by law);*
- *access to Tasmania Police data;*
- *timely notification in writing of suspected misconduct involving a commissioned police officer (as a DPO);*
- *timely notification in writing of suspected serious misconduct by a police officer, whether commissioned or non-commissioned;*
- *referral of complaints to Tasmania Police;*
- *Tasmania Police related deaths;*
- *Appointment of special constables;*
- *Use of Tasmania Police audio visual recording equipment by the Commission for serious matters;*
- *Establishment of a 'Joint Agency Steering Group';*
- *Establishment of an 'Operational Liaison Group';*
- *Establishment of protocols;*
- *Appointment of liaison officers; and*

- *The provision of police officers to the Commission, pursuant to the Act….*[87]

…Complaints, notifications and audits

The Commission may receive complaints about police officers under s 33.

Where a complaint of misconduct, serious or otherwise, is made (to the Commission) against a police officer who is a DPO, it is to be dealt with in accordance with s 87.

A complaint that alleges serious misconduct by a police officer who is not a DPO (i.e. a senior sergeant or below) may be dealt with in accordance with s 88(1)(a) which, with s87, is within Part 8 of the Act.

Effectively this means that the complaint of serious misconduct can be processed in accordance with the framework set out under s 35 – 59: from triage to dismissal or non-acceptance, assessment or referral and when appropriate, investigation.

However, Part 8 does not stipulate a process by which the Commission might deal with a complaint of misconduct (as opposed to serious misconduct) against a police officer who is not a DPO. In other words, the general framework set out under s35 – 59 has no application,

[87] Integrity Commission, Submission No.1, p 102-105

with the effect that the Commission is unable to deal with a complaint of misconduct against a police officer who is not of commissioned rank. (The only recourse for the Commission would be to investigate such a complaint via an own motion investigation.)

Professional Standards – Tasmania Police

Class 2 complaints about police officers made internally to Tasmania Police, are investigated in accordance with the provisions of Division 2 and Part 3 of the PS Act and the GMM, by Professional Standards Command.

In addition, and in accordance with the MOU, where Professional Standards receive a complaint about:

- *a commissioned officer (a DPO), and it is reasonably suspected that the officer has engaged in misconduct or serious misconduct; or*
- *any non-commissioned officer and it is reasonably suspected that the officer has engaged in serious misconduct*

the complaint is notified to the Commission, as is a report on the outcome of the internal investigation by Professional Standards. The notification from Professional Standards is not mandated by the Act, but is made consequent to the MOU, as a voluntary notification.

Notification itself does not invoke the jurisdiction of the Commission – only a complaint or an own motion investigation can do so. Notification ensures the

Commission is aware of trends concerning misconduct within Tasmania Police including misconduct prevention strategies
and complaint handling.

As a matter of practice, Tasmania Police does not notify the Commission when it has
information (however received) about misconduct involving public officers who are not police
officers, and which it investigates for criminality. Accordingly, if Tasmania Police investigates
alleged/potential misconduct about a public officer and conclude there is no alleged crime or criminal offence and/or no prospect of a successful conviction, the alleged misconduct is not then advised/referred to/ or otherwise notified to the Commission.

Audit of police complaints

Section 88(1)(c) enables the Commission to audit the way the Commissioner has dealt with misconduct in relation to either a particular complaint or class of complaint.

In 2013 the Commission conducted its first audit of how Tasmania Police managed its complaints. The Commission was wide in scope, covering all complaints of police misconduct dealt with and finalized by Tasmania Police during calendar year 2012 (i.e. 1 January –31 December 2012 – the audit period). The audit was conducted with the full agreement and co-operation of Tasmania Police and the results have been made publicly available.

Being the first audit, the results provide a benchmark for future comparison and analysis. It is proposed that the Commission will conduct audits of this nature at least annually, although future audits are likely to be undertaken on a sampling basis and may focus specifically on issues such as allegation types or allegations by police district or work unit.

Similar processes are undertaken by oversight bodies in other Australian policing jurisdictions, and assist in ensuring the transparency and effectiveness of processes by which allegations of police misconduct are internally dealt with in the respective jurisdictions.[88]

7.3 The Integrity Commission further emphasised the importance of their audit function with respect to Tasmania Police in their evidence before the Committee, stating as follows:

One of the main things the commission does that nobody does with respect to police matters is that we audit the way the police handle their complaints. Internal Investigations and Professional Standards manage and deal with the way police handle their internal complaints, and who watches that? We do, by auditing their complaints each year – nobody else does that – and then publish a public report. There is more information in our public reports about how police handle their internal complaints than is ever put out by the police. Our next audit will be published shortly and once again will have an enormous amount of information about how the police handle their complaints. Without us, that information does not get into the public arena. It is not about being critical of the police, it is about being transparent and accountable. They do not

[88] Integrity Commission, Submission No.1, p110

publish that information about the way they deal with their complaints, we publish it.[89]

7.4 The Committee noted several matters raised in respect of oversight of Tasmania Police, namely:

- Suggestions in respect of increased oversight of Tasmania Police in circumstances where no complaint is made;
- Integrity Commission's access to Tasmania Police data; and
- Integrity Commission reporting of audits of Tasmania Police.

The evidence in respect of each of these matters is detailed below.

7.5 **Increased Oversight of Tasmania Police in Cases Where No Complaint is Made**

7.5.1 The Integrity Commission's submission to the Committee detailed some case studies to illustrate difficulties faced where no complaint is made. The submission stated as follows:

Case study: internal police investigation of police shooting

No mandate to audit under s 88(1)(c)

An internal police investigation commenced into a shooting of an alleged offender by a police officer. No formal complaint of misconduct was made to anyone with respect to the officer concerned. The internal police investigation, although still ongoing, had not revealed any evidence of misconduct, or suspected misconduct on the part of any officer involved. The offender admitted in a police interview that he intended that police shoot him and

[89] Merryfull, Hansard, 30 September 2014, p24

later pleaded guilty to the offence of aggravated assault with respect to the officer who shot him.

The Commission sought to obtain documentation form investigating officers relevant to the internal investigation in the purported exercise of its power under s 88(1)(c) of the Act which enables the Commission to audit the way the Commissioner has dealt with police misconduct in relation to either a particular complaint or class of complaint. Both Tasmania Police and the Commission sought legal advice to clarify the Commission's jurisdiction under s 88.

Advice provided to both agencies is that there must be a complaint (or class of complaints) made with respect to police misconduct before the Commission may, under s 88(1)(c) audit the way the Commissioner has dealt with misconduct. Further, there is no other provision in the Act that might possibly authorise the Commission to audit, monitor or oversee a police investigation (other than commencing an investigation on its own motion), in the absence of a complaint about misconduct.

Access was therefore refused to the Tasmania Police investigation on the basis that the Commission had no jurisdiction, there having been no complaint made about misconduct of any police officer.

The Act does not confer a power to monitor or audit a police investigation where there has been no

complaint. There was no complaint made against any of the officers involved in the actual shooting and investigations by police did not indicate any misconduct or suspected misconduct on their part. On that basis, there is no apparent misconduct for the Commissioner to deal with, and therefore no authority for any audit to be conducted by the Commission pursuant to the Act.

Further, the requirement that the Commission perform its functions and exercise its powers in such a way as to not duplicate or interfere with work that it considers has been undertaken or is being undertaken appropriately by a public authority suggests that even if there were a complaint about misconduct in similar matters (i.e. a police shooting), the Commission would have no business involving itself or interfering with the investigation unless it had reason to believe that the investigation was not being conducted reasonably and properly or the manner of its conduct suggested misconduct in itself.

Tasmania Police advised that it remained committed to working cooperatively with the Commission and, despite the fact that the shooting incident did not appear to involve any misconduct on the part of the police, was content for Professional Standards investigators to continue to brief Commission staff on the process of the investigation. However, the Commission was not provided was documentation

about the investigation – given the Commission had no jurisdictional mandate.

It is notable that where a person dies or is injured by a police officer discharging a firearm, Tasmania Police policy is that Internal Investigations (within Professional Standards) will conduct a full and independent investigation; Tasmania Police Manual, version 11 November 2010, 10.11 'Post Police Shooting Procedures'. However, for the reasons explained above, the ability for the Commission to have a role in such matters is doubtful.

Notwithstanding the absence of a formal complaint, the Commission considers that it should have some role to play where police investigate police, particularly for those investigations where there has been death or life threatening injury associated with police contact. This will ensure not only that proper process is followed but that it is seen to be followed. Currently the MOU does provide that the Commissioner will notify the CEO in writing as soon as possible 'in the event of a Tasmania Police related death when there is a suspicion of misconduct or serious misconduct, including but not limited to, deaths in Tasmania Police custody or presence….'[90]

….Case Study: Assessment

[90] Integrity Commission, Submission No.1, p107-108

Assessment only available where a complaint is received

In early 2012, Tasmania Police officers conducted two strip searches of a 12 year-old girl in the course of executing a search warrant as part of a drug-related investigation. No drugs were located on the girl during either strip search.

The incident was the subject of media and public comment and the Deputy Commissioner of Police announced he would conduct a review of the incident. Because the matter was 'reviewed' – as opposed to being made the subject of an internal investigation – it did not fall within the Integrity Commission's jurisdiction, and was not able to be made the subject of audit.

Initially, no complaint about the matter was made to the Commission, and no notification was provided by Tasmania Police (because Tasmania Police did not make the issue the subject of internal investigation). Subsequently, a complaint was made to the Commission about the incident and the complaint was accepted for assessment. This matter illustrates the difficulty that arises with respect to s 88 audits – as well as the

Commission's lack of jurisdictional capacity where there is no complaint.[91]

7.5.2 It is noted that Tasmania Police and the Police Association of Tasmania questioned the need for further powers to be granted to the Integrity Commission. Their general comments in this regard are set out below.

7.5.3 The submission of Tasmania Police stated as follows:

> *A comparison of the integrity landscape between Tasmania and that of other jurisdictions, and in particular the evidence indicative of the extent of serious and systemic corrupt conduct in public sector organisations (in both a historical and contemporary context) will also identify significant differences between Tasmania and other jurisdictions. Notably, a number of integrity entities in other jurisdictions have their origins in royal commissions and inquiries that have revealed high levels of entrenched corruption of a serious nature. This has not been the case in Tasmania, and in this respect the following quote from the Commission's first annual report (October 2011) is considered relevant:*
>
> > *'During this time, the Commission has seen no evidence of any systemic corruption in any part of the public sector. Rather, the evidence before the*

[91] Integrity Commission, Submission No.1, p109-110

Commission is that most complainants have concerns relating to perceptions of misconduct by individuals in the public sector.'

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

It is also submitted that these reports and past Annual Reports of the Commission, which highlight the significant achievements of the Commission in its educative, investigative and prevention work, provide confirmation that the Commission is working effectively, as Parliament intended, and that it is able to achieve its objectives as set out in section 3 of the Act with the powers currently available to it……It is clear that Parliament specifically considered what were termed 'weighty powers' in determining what powers were to be granted to the Commission, and determined that some powers available to integrity entities in other jurisdictions would be made available to the Commission whereas others would not. It is also relevant to note the infrequency with

which the Commission has conducted own motion investigations and resorted to some of the powers that area already available, for example, search warrants and surveillance devices warrants.

It is submitted that some of the amendments the Commission are seeking would significantly extend the scope of the Commission's functions beyond that envisaged by Parliament in creating the Commission. Moreover, in light of the above considerations there is a lack of demonstrated need for the functions, roles and powers of the Commission to be expanded and it is apparent that the Commission is largely able to achieve the objectives set for it by Parliament within the bounds of the current legislation. Consequently, it is the view of Tasmania Police that the JSC should adopt a cautious approach to recommending increases to the Commission's functions or powers.[92]

7.5.4 The submission of the Police Association of Tasmania stated as follows:

…members of the PAT are subject to the most scrutiny and oversight of any other employee in the State. Every decision that is made can be scrutinised by any one or more of the following areas –

- *Supervisors (from direct Supervisors all the way up through the rank to Commissioner).*

[92] Tasmania Police Submission, p3-4

- *Professional Standards (Internal Investigations).*
- *Parliamentary Inquiries.*
- *Commission of Inquiry/Royal Commission.*
- *Magistrates Court.*
- *Supreme Court (Civil and Criminal).*
- *Coroners Court.*
- *Director of Public Prosecutions.*
- *Auditor General.*
- *Ombudsman.*
- *Workplace Standards.*
- *Integrity Commission.*
- *Media.*

With the responsibilities and powers that are entrusted to our members, accountability and transparency are accepted principles in maintaining public confidence. Police however can be the easiest of all public entities to target for close scrutiny. Most of the work is already done by the police themselves when it comes to investigations, thus leaving other entities as much time as they need to dissect decisions that have been made in seconds (or less). Whilst this has negative effects, it is generally accepted by members that this is just the way of things.

This is a small State, where even going from one end to the other you are more than likely going to come across someone you know in the street. Systemic and institutionalised corruption on the part of the police does not exist. Individuals do

make mistakes, errors of judgement (both minor and profound), and some have made incredibly bad choices. Matters out outright corruption and deliberate misconduct have been few and far between over many years. Society and therefore the Police Service have both advanced beyond the infamous 'boot up the backside' style of policing from years ago.

Never in history has the Police Service come under the amount of scrutiny that it does at this point in time. In relation to the investigations of complaints against police, not at any other point in time has the scrutiny been greater, with the Integrity Commission reviewing every single complaint against police in the last calendar year.

The Integrity Commission has found very few issues with Tasmania Police and how business is conducted. This is supported by the Commission's own submission. There are points of contention, but they are more procedural and the PAT has been informed that the Commission has admitted that some of their reports have been erroneous.

It is the submission of the PAT that there is no demonstrated need in Tasmania for yet another level of scrutiny to be applied to the Police Service by additional powers being granted to the Integrity Commission. The Integrity Commission with the focus on education and the ability to audit/review complaints against police

is fulfilling the requirements of the role intended by the Parliament of Tasmania.[93]

7.5.5 In respect of the specific issue of the Integrity Commission's lack of jurisdiction where no complaint is made, both Tasmania Police and the Police Association of Tasmania opposed any changes in this area, arguing that there was no demonstrated need to change the Integrity Commission's powers in this area.

7.5.6 The submission of Tasmania Police stated as follows in this regard:

> *Tasmania Police notes the case studies and comments by the Commission that illustrate its powers can only be utilised upon receipt of a 'complaint'. It should, however, be noted that the 'own motion' investigative powers under sections 45 and 89 of the Act are available to the Commission and are not reliant upon a complaint being made. The Commission's submission notes that these powers are reserved for 'serious matters' and are not often used. It is the view of Tasmania Police that the complaint based approach to activation of the Commission's authority is appropriate and in keeping with what Parliament intended, with appropriate recourse being available to conduct own motion investigations in serious cases.*[94]

[93] Police Association of Tasmania, First Submission, p7-8
[94] Tasmania Police submission, p10

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

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

Moreover, whilst noting the content of the Commission's report on finalised investigations and an assessment, tabled in both Houses of Parliament on 25 June 2013 and its second report tabled on 25 September 2013 with respect to an audit of Tasmania Police complaints, it is submitted that to date,

evidence of systemic corruption of a serious criminal nature that is comparable to the extent of the corruption problem in some other jurisdictions, is not evident in Tasmania.

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

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

- *be complaint based;*
- *not duplicate the work of other relevant bodies;*
- *have a preventative and educative focus;*

- *assess and disseminate complaints to the most appropriate body for action whilst maintaining a watching brief;*
- *reinforce the responsibility of public sector bodies to be accountable for their own conduct issues;*
- *be able to make and publish findings, without having the authority to impose sanction for misconduct;*
- *reserve its investigative endeavors for systemic misconduct and allegations against senior and high profile public officers and allegations of serious misconduct by senior police officers; and*
- *oversee and audit the way police conduct misconduct investigations.*

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

It is submitted that some of the amendments the Commission are seeking would significantly extend the scope of the Commission's functions beyond that envisioned by Parliament in creating the Commission. Moreover, in light of the above considerations there is a lack of demonstrated need for the functions, roles and powers of the Commission to be extended as it is apparent that the Commission is largely able to achieve the objectives set for it by Parliament within the bounds of the current legislation. Consequently, it is the view of Tasmania Police that the JSC should adopt a cautious approach to recommending increases to the Commission's powers or functions.[95]

7.5.7 Similarly, the submission of the Police Association of Tasmania stated as follows in this regard:

There appears to be a concerted effort on the part of the Integrity Commission to show that extra powers are needed to investigate Tasmania Police (therefore members of this organisation). Reference has been made to 'Case Studies' in an attempt to bolster those claims.

Before making comment on those matters, it is important that comment is made on those matters, it is important that comment is made

[95] Tasmania Police Submission, p3-5

on the second reading of the Integrity Commission Amendment Bill in 2011 the Attorney General made the Attorney General made the following observation, "What is pleasing is the view taken by the Honourable Murray Kellam the Chairperson of the Commission."

He then quotes the Chairperson from the 2010-2011 Integrity Commission annual report, "The Commission has seen no evidence of any systemic corruption in any part of the public sector. Rather, the evidence before the Commission is that most complainants have concern relating to perception of misconduct by individuals in the public sector. Unfortunately 'corruption' is a word that is too often used.

It is clear that a considerable number of complaints relate to a perception of conflict of interest on the part of those complained about. It is inevitable in a state with a population the size of Tasmania that a conflict of interest will arise regularly in the course of decision-making. However, the fact of a conflict of interest arising does not, by itself, demonstrate the existence of misconduct.

What is necessary is an understanding throughout the public sector of what conflict of interest is, and what appropriate and

transparent processes are necessary to deal with conflict of interest when it is reasonably perceived to arise. The misconduct education and prevention functions of the Commission proved assistance to public sector agencies in relation to appropriate strategies and processes to ensure public confidence in terms of this issue"

The above comments were made along with reference to Tasmania Police. These references included the Chairperson's concern about the legislation 'not being sufficiently clear' as to the precise role that the Commission is to play in respect of oversight and monitoring of Tasmania Police. The Chairperson then makes the following comment, "Notwithstanding this, I wish to record my appreciation of the contribution made by the Commissioner and Deputy Commissioner of Tasmania Police, and the Commander in Charge of Professional Standards, in providing cooperation, assistance and support to the Commission in a difficult legislative environment."

Tasmania Police has entered into a Memorandum of Understanding (MOU) with the Integrity Commission in relation to notifications. Whilst the PAT does not necessarily support that memorandum, the fact that it exists clearly exceeds any requirements placed on Tasmania Police, and shows a

commitment to transparency and accountability.

The Integrity Commission states that it has the power to commence 'Own Motion Investigations' under Section 45 of the Act in relation to alleged matters of misconduct by Tasmania Police. According to the Commission's submission, only 1 such investigation has taken place. [96]

It is the submission of the PAT that the case studies quoted by the Integrity Commission do not support any notion that their powers should be extended….

….Comments made by the Chairperson of the Integrity Commission are supportive of the cooperation that is provided by Tasmania Police. Other comments made by the Chairperson also show that there is no belief that systemic corruption exists within Tasmania Police. The MOU between the two agencies clearly demonstrates the commitment of Tasmania Police to transparency and accountability.

It is further submitted that the lack of 'Own Motion Investigations' is evidence in itself that the Commission does not need any further

[96] Police Association of Tasmania Submission, p4

powers as major issues inside Tasmania Police do not exist.[97]

Findings

The Committee finds that the Integrity Commission has capacity to conduct own motion investigations under section 45 of the Act on any matter.

7.6 Integrity Commission Access to Tasmania Police Data

7.6.1 The Integrity Commission submission commented on the desirability of having direct electronic desktop access to Tasmania police data systems. The submission states as follows in this regard:

Tasmania police database systems

The MOU entered into between the Commission and Tasmania Police included a clause allowing the Commission online access to relevant Tasmania Police data, subject to all relevant legal restrictions. In 2011 the Commission sought access to Tasmania Police's internal intranet site and the online record of investigations systems (IAPro) by way of electronic desktop access at the Commission.

Currently the Commission accesses data held by Tasmania Police on a request basis, where the Commission seeks specific data about an individual and specifies on each occasion that it is for a purpose and function under the Act. The difficulties with this approach are that the Commission is unable to maintain absolute

[97] Police Association of Tasmania Submission, p6

confidentiality of information in relation to its own functions – Tasmania Police will always be aware of the information the Commission is seeking.

The lack of immediate access means that the Commission is restricted in responding to complaints – specific background information may be relevant about a particular complainant, or subject officer or witness, and therefore relevant to any determination by the Commission to assess, dismiss or investigate. For example the fact that a complainant may have a criminal history or subject to a mental health order may be relevant to meeting a complainant, or witness in person.

It is also considered that access to the relevant information will confirm sources of information and allow the Commission to independently analyse information received, and to cross reference the checks taken by Tasmania Police when the Commission audits or monitors a matter. It would also make the Commission's audits of Tasmania Police complaints much easier.

Electronic desktop access would significantly enhance the operational work undertaken by the Commission, and would be in line with access available to interstate integrity agencies

and the respective State and Commonwealth police forces.

Legal opinion is that electronic desktop access would be the grant of unlimited access to the personal information in the control of the Commissioner, and that such disclosure would not be for a purpose and in accordance with the Act. The opinion is that to grant unlimited access there must be an ascertainable purpose for the granting of that access at every point in time when access is available, not simply when access actually occurs. This is because it is the conduct of the personal information custodian (the Commissioner), rather than the Commission, which attracts the operation of the personal information protection principles in the Personal Information Protection Act 2004 (PIP Act). Accordingly, the granting of continuous access to personal information without restriction is to be treated as a continuing act of use or disclosure of the personal information by the Commissioner.

Authorisation for the Commission to have unlimited access to Police databases (electronic access, but limited to a function under the Act) would require an express statutory provision, and in the absence of that, the granting to the Commission of such unlimited access will inevitably involve a contravention of the PIP Act by the Commissioner, particularly during

periods when access is not required by the Commission to fulfil its statutory functions (i.e. when the electronic password protected database is idle).

Access to Tasmania Police databases, as per current arrangements, and any future arrangements, are subject to the Commission complying with obligations imposed by any third party providers, concerning access limitations, and fees….

Prohibition of access to certain data

..During the course of investigations conducted by Tasmania Police, whether concerning a police officer or other public officer, Tasmania Police can access certain telecommunications data, consequent to its status as a 'law enforcement agency' under the Telecommunications (Interception and Access) Act 1979 (TIA Act). In the past the Commission has sought access to certain police files in order to either progress an assessment or investigation of a complaint, or during the audit or review process.

The Commission sought clarification as to whether disclosure of relevant communications data to the Commission (and previously disclosed to Tasmania Police under Division 4 of the TIAA) can also be made to the Commission, where the

disclosure was for a purpose or function under the Act.

Advice is that it doesn't matter what the purpose of the disclosure is, or what powers the Commission is using. The Commission is not and can never be (under the present terms of the Act) in the business of enforcing the criminal law, or a law imposing a pecuniary penalty. In those circumstances the Commission is unable to consider Tasmania Police files that contain any telecommunications data. Accordingly, files disclosing telecommunications data are either identified by Tasmania Police and withheld from the Commission, or, where identified by the Commission, returned without consideration of the contents.

This has meant that in some cases, the Commission has been unable to finalise an audit or otherwise progress a complaint. Similarly, in its audit of Tasmania Police misconduct matters, files containing telephone records had to be returned to Tasmania Police without audit.[98]

7.6.2 Tasmania Police did not agree with this proposal, their submission stating as follows:

Tasmania Police notes the Commission's comments in relation to the desirability of having direct electronic desktop access to Tasmania Police data systems (including IAPro,

[98] Integrity Commission, Submission, First Submission, p112-115

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

More fundamentally, Tasmania Police is of the view that it is not lawfully possible to permit the Commission direct access to Tasmania Police systems. A number of the data systems (including those of particular interest to the Commission) contain references to call charge data and communications intercepted pursuant to warrants issued under the Telecommunications (Interception and Access)

Act 1979 (Cth). That Act restricts access to prescribed permitted purposes. The conferral of "law enforcement agency" status upon the Commission would not circumvent those restrictions as the relevant exemptions are limited to agencies investigating criminal offences (in some cases serious criminal offences) or breaches of a law imposing pecuniary penalties. Moreover, the release of call charge records and telephone intercept material must be authorised on a case by case basis. Tasmania Police cannot give carte blanche access to records containing information subject to prohibitions imposed by the Telecommunications (Interception and Access) Act.

Tasmania Police does not believe there is any demonstrated need for the Commission to be granted "law enforcement agency" status. It would appear the Commission primarily seeks such status to authorise it to gain access to call charge records and to apply for warrants under the Telecommunications (Interception and Access) Act and/or to gain access to communications intercepted by other agencies under such warrants. The conferral of "law enforcement agency" status upon the Commission would not, of itself, enable the Commission to access call charge records and telephone intercept material because the Commission does not investigate criminal

offences or breaches of laws imposing pecuniary penalties.[99]

7.6.3 Similarly, the submission of the Police Association of Tasmania states as follows:

If requested, the Integrity Commission is provided with information from Tasmania Police database systems. The Commission states that difficulties are experienced with that approach, mainly that Tasmania Police will always be aware of the information the Commission is seeking. The PAT has been informed that information requested is provided in a timely manner.

The Commission states that they are restricted to responding to complaints, and that access would allow the Commission to independently analyse information, and to cross reference checks undertaken by Tasmania Police when the Commission audits or monitors a matter. The Commission also believes it would make audits of Tasmania Police Complaints much easier.

Unlimited access is not possible as it would be a breach of the Personal Information Protection Act 2004. The Commission is also unable to access Telecommunications data under the Telecommunications (Interception and Access) Act 1979, and cannot consider any such data on

[99] Tasmania Police Submission, p10-11

files of Tasmania Police. The Commission does not have the status of being a 'Law Enforcement Agency.'

Professional Standards, which encompasses Internal Investigations, would have most, if not all dealings with the Integrity Commission on behalf of Tasmania Police. It is the understanding of the PAT that there has never been any breach of confidentiality in these dealings. There have been some disagreements about matters, but nothing that has caused the professional relationship to fall apart.

It is the PAT's submission that there is no demonstrated need or requirement to go beyond the MOU that exists between the agencies. Tasmania Police data-bases are subject to strict controls and all persons using the systems are subject audit. Even with direct access, Tasmania Police will still know who is accessing what systems, and the exact information that is being accessed and extracted.

It is further submitted that there was never any intention to set up the Integrity Commission as a law enforcement agency, with all the access and powers that come with that role. Reference to other such organisations and Commissions throughout Australia has no meaning or weight when each of those have

been set up as a result of issues pertinent to their respective States and all operate at different levels. The Integrity Commission in this State operates at a standard which the Parliament of Tasmania intended.[100]

Findings

The Committee finds that, to date, Tasmania Police has not refused any of the Integrity Commission's requests to access Tasmania Police data, and have responded to all such requests promptly.

Recommendations

The Committee recommends no changes in this area, as the current position is adequate.

7.7 Integrity Commission Reporting on Tasmania Police Matters

7.7.1 The Tasmania Police submission raised an issue with respect to the Integrity Commission's reporting on police matters, stating as follows:

The Commission provided a draft copy of their audit report to Tasmania Police and invited comment prior to publication of the final version. Written feedback was provided to the Commission which highlighted a number of concerns Tasmania Police had in relation to inaccuracies in the report and the way in which case studies were summarised and presented to the detriment of Tasmania

[100] Police Association of Tasmania Submission, p6-7

Police. It is pleasing to note in some instances the wording of the final version was altered to correspond with amendments suggested by Tasmania Police. The Commission, in a subsequent letter to Tasmania Police indicated that although the response provided by Tasmania Police had not been included as an attachment to the final report, the comments offered had been either summarised or referred to in the report '……such that the substance of your response is, we hope, sufficiently articulated'. It is Tasmania Police's view that the Commission's summary, in a number of instances, failed to adequately portray the issues raised by Tasmania Police, or explain them in context. Indeed, in a number of instances, the extent of the summary is, 'Tasmania Police disagrees with the Commission's view of this matter.'

The view of Tasmania Police is that the final version of the report (attached to the Commission's submission as Appendix 6) contains information that is incorrect. For example, the audit report (at page 9) states that '…..and the most commonly sustained Class 2 allegation was 'crime' (four allegations from four complaints).' Tasmania

Police's view is that this statement conveys that four criminal allegations were sustained against officers from Tasmania Police in the period covered by the review. The Tasmania Police position is the material audited by the Commission indicated that no criminal allegation were sustained against Tasmania Police officers. There is also an anomaly between the statistical information detailed in the chart and the accompanying explanation (19% is said to equate to 3 allegations, whereas 15% is said to equate to 4 allegations).[101]

7.7.2 The Committee sought further comment from Tasmania Police in respect of this issue during their evidence before the Committee. The following exchange occurred:

> ***Mr MULDER –*** *….Would you like to explain to the Committee how we can have that position from the police department, yet the Commission saying it relied on the very data that you challenged?*
>
> ***Mr TILYARD –*** *I wish we could explain that. In fact this is something that to this day has never actually been reconciled between us and the Commission. They made that claim about four sustained class 2 allegations of crime. We said, 'What are you*

[101] Tasmania Police Submission, p4-5

talking about', and they have never been able to come back and say they are referring to these ones. So it is still out there and unresolved.

***Mr MULDER** - At what stage in your internal database does a case get classified as sustained? If it says 'sustained' what does it mean in your database because I think this is where the problem lies. This issue was further raised with the Integrity Commission during their evidence before the Committee, during which the following exchange occurred:*

***Mr TILYARD** - It means that the allegation has been upheld.*

***Mr MULDER** - Upheld that a prima face case has been established or that we have enough to go to –*

***Mr TILYARD** - Usually it is an alleged breach of the code of conduct. On the balance of probabilities the alleged breach of the code of conduct is found to have been substantiated or upheld. It has been found there has been a breach.*

***Mr MULDER** - You are saying there were no such cases in that period classified as being under the period of review -*

***Mr TILYARD** - That's right.*

***Mr MULDER** - and then that in summary, 'Tasmania Police disagrees*

with the commission's view of this matter'. That is about the sum total of satisfaction you received for what you reckon is erroneous in fact. I won't ask you what you think that means of their investigative capacities.

***Mr TILYARD** - After that first audit they sent the draft report to us for comment. We sent back quite a comprehensive response outlining what we took issue with, didn't agree with, or corrected certain information, some of which the commission took on board in finalising their report. Basically they felt we provided too much information in response and therefore they wouldn't publish our response as part of their report.*

***Mr MULDER** - So now you give too much information?*

***Mr TILYARD** - They changed a few words in some things but the only statement was that we didn't agree with their conclusion. We explained the rationale for why we didn't agree and that was never incorporated, but that is a matter for the commission. We can respond but what they publish is a matter for them. The most recent review, the 2013 calendar year review, is in draft form at the moment and we are going through that same process of*

commenting on their report. We have raised a few issues but it is probably not appropriate to talk about the details of that because we don't know at this stage the extent to which they will change it as a result of our response. One of the issues we have had has been that in quite a number of reports the commission has produced relating to our department, be it audit reports or their annual report, there have been comments made that could easily be misconstrued or the casual reader could misinterpret. There was an example from the 2012 review. It is not a big issue but it is potentially damaging to the reputation of the department in the way it is presented.[102]

7.7.3 The Integrity Commission responded to this issue during their evidence before the Committee, during which the following exchange occurred:

> ***Mr MULDER –*** *A fairly minor matter relates to my concerns in relation to your accountability which primarily I guess is basically through your annual reports and disclosures. I will take you to a case which no doubt you have picked up in the police commissioner's submission relating to his attempt to correct the record. Your audit report at page 9 states that the most commonly sustained class 2 allegation was*

[102] Tilyard, Hansard, 22 October 2014, p58-59

'crime', with four allegations from four complaints.

Tasmania Police's view, which they put to you, was that the statement conveys that four criminal allegations were sustained from Tasmania Police in the period covered by the review. The Tasmania Police position is that the material audited by the Commission indicated that no criminal allegations were sustained against Tasmania Police officers. Then when the police commissioner took this to you, your response was that Tasmania Police disagrees with the Commission's view of this matter. I would have thought that a little bit of honesty and integrity might have explained what you meant by 'sustained allegation' and if you had it wrong you would have had the temerity to say so.

***Ms MERRYFULL** – I think you are mixing up a few things the police commissioner said in that submission.*

***Mr MULDER** – All my quotes were from page 8 of his commission report.*

***Ms MERRYFULL** – We did the audit of Tasmania Police complaints…..the paragraph you are referring to says:*

'The view of Tasmania Police is that the final version contains information that is incorrect. Tasmania Police's view is that this information sustains this.'

The Tasmania Police position is that your material doesn't say that. The paragraph doesn't say that they told us that. There were other matters in here which they told us when they responded to the audit committee report, and that is in the paragraph before, but in relation to this particular matter, when we sent them the draft of the audit report –which they had for six weeks – they did not say that was factually incorrect at that time. There were a number of other things they didn't like but that particular sentence was not drawn to our attention in the response to the audit report.

Mr MULDER – *So eventually Tasmania Police disagrees with the Commission's view of this matter. What is your view of this matter, then?*

Ms MERRYFULL – *There are a couple of possible explanations for this. One of the reasons we send draft reports to agencies is so that they can correct factual errors if we have made them. When we audited those complaints we did not have access to the IAPro printout, which we have for this year's audit. We don't have access to their database. This year's audit we have a printout of the findings and the*

allegations but last year when we did the audit we weren't given that, we only had the hard-copy files. We found this year when we had been comparing the hard-copy files to the IAPro printouts, which is where their version of the information came from, there were numerous errors, which they have acknowledged – translations between what is on the hard-copy file and what goes into IAPro. Any number of changes were made to IAPro in this year's audit reflecting the differences. Because we hadn't looked at the hard-copy files, there could have been a mistranslation and there could have also been a mistranslation in respect of the difference we now know that Tasmania Police place between an offence and a crime.

Mr MULDER – *When you talk about 'sustained', do you still hold the view that four allegations from four complaints were sustained as class 2 allegations?*

Ms MERRYFULL – *Based on our audit of the records and the information new took off the hard-copy files, that is our position.*

Mr MULDER – *And with this new information that Tasmania Police sent to you, which was that –*

Ms MERRYFULL – *Sorry, this paragraph doesn't say they have sent us that information. They said they disagreed with it.*

Ms JOHNSTON – *The first time we saw this allegation in relation to the audit was when this was published by the Committee online.*

Mr MULDER – *What I am saying now is that has all gone through, you have heard what the commissioner has had to say about 'sustained'. Do those four cases you have referred to, in your view, still fall into that category of 'sustained' class 2 allegations relating to crime by members of Tasmania Police?*

Ms MERRYFULL – *I have gone back and had a look at the records we have in relation to that and I believe that's what our records are showing. I don't have those files anymore –*

Mr MULDER – *What do you mean by 'sustained'?*

Ms MERRYFULL – *I have the complaint number.*

Mr MULDER – *What do you mean by a complaint has been 'sustained'? Do you mean you have convicted someone or you've found prima facie evidence of it?*

Ms MERRYFULL – *It has been 'sustained' by Tasmania Police. They have 'sustained',*

'exonerated', 'unfounded' and 'not sustained'. They are my records.

Mr MULDER – *So class 2 allegations around crime were 'sustained'. Were they ever prosecuted?*

Ms MERRYFULL – *I don't know.*

Mr McKIM – *You're asking the wrong person.*

Mr MULDER – *I know I'm asking the wrong person but that's what they say in their report. This is the problem with accountability.*

Ms MERRYFULL – *That is what my records show.*[103]

7.7.4 The Integrity Commission further responded to this issue in their third submission to the Committee as follows:

> *The Integrity Commission provided a draft of that report to Tasmania Police and allowed six weeks for it to provide comments or corrections. Tasmania Police did provide a detailed response of 19 pages. That response did not take issue with the finding referred to by Mr Tilyard; it did not refer to it. If Tasmania Police had questioned this finding in its response, then the Commission would have had the opportunity to correct it if necessary before the report was finalised and published.*

[103] Merryfull/Johnston, Hansard, 30 September 2014, p50-52

It was only after the report was published that the issue was (informally) raised and Tasmania Police was advised of the particular matters the Commission was referring to, however the Commission has never been asked to reconsider its findings.[104]

Findings

The Committee finds that there is a dispute between Tasmania Police and the Integrity Commission over the accuracy of an Integrity Commission report.

Recommendations

The Committee recommends that:

Both agencies ensure closer collaboration and communication to avoid or minimise disputes in future reports.

Where agreement cannot be reached, the final report of the Integrity Commission should include a response of the relevant agency.

8 NATURAL JUSTICE/PROCEDURAL FAIRNESS CONSIDERATIONS IN INTEGRITY COMMISISON REPORTS

8.1 The Committee received evidence from a number of parties raising the issue of natural justice/procedural fairness considerations in relation to reports published by the Integrity Commission which name or refer to particular persons.

[104] Integrity Commission, Third Submission, p20-21

8.2 The submission of the Integrity Commission provided the following background to this issue:

> *In conducting an investigation, an investigator is required to observe the rules of procedural fairness. What is required to comply with this obligation will depend on the facts of each matter. Generally, this would mean that where there is an adverse factual finding by the investigator/assessor, the subject person must be given the opportunity to respond to the adverse material or finding. The time for doing this will generally be at the time the investigator is finalising the report of findings under s 55(1).*
>
> *Where a person is given an opportunity to respond, the investigator has no means of attaching confidentiality obligations over any information provided to a person for the purposes of procedural fairness, as the confidentiality provisions in s 98 do not apply to such instances.*
>
> *The obligation to observe the rules of procedural fairness by the investigator before the investigator provides their report to the CEO means that adverse factual material gathered by the Commission will be put to the relevant person. As soon as that is done, the opportunity to maintain a covert investigation is lost. This may compromise the ability of the Commission to gather further evidence, particularly if the Board makes a decision under s 58(2)(d) to require further investigation.*
>
> *The CEO may provide a person with further opportunity to comment on a draft of the investigation report before it is put to the Board, by reason of s 56, but a s 98 confidentiality notice can apply to the draft report, thereby maintaining confidentiality.*

The obligations for procedural fairness during the investigation/assessment stage can be contrasted with other integrity agencies – in particular –

- *Law Enforcement Integrity Commissioner Act 2006 (Cwth) s51. Opportunity to be heard prior to publishing a report with a critical finding, but not if it will compromise the effectiveness of the investigation or action to be taken;*
- *Independent Commission Against Corruption Act 1988 (NSW) ss30 – 39. Compulsory examinations and public inquiries. The Commission may, but is not required to, advise a person required to attend a compulsory examination, of any findings it has made or opinions it has formed.*
- *Corruption and Crime Commission Act 2003 (WA) ss36 and 86. Person investigated can be advised of the outcome of the investigation, if amongst other things, the Commission considers that giving the information to the person is in the public interest; s 86 where the person who is the subject of an adverse report is entitled to make representations before the report is tabled.*[105]

8.3 The Committee received evidence from some parties who expressed the view that a person's procedural fairness response should be incorporated into the Integrity Commission's report.

8.4 The Committee raised this issue with the CPSU. The following exchange occurred:

Ms GIDDINGS – *The issue raised in the last discussion was around the process that currently exists where a complaint is made and an investigation is conducted and that information is reported to the Parliament. So far we have only had one example of that process. We*

[105] Integrity Commission, First Submission, p87

are just interested to know if you have any thoughts on that process, particularly around natural justice for the person being investigated. In the one example we have seen, a report was provided to Parliament with no opportunity for the person at the heart of it to be able to respond publicly to the report. Have you had a look at that process in terms of the completion of the investigation and what happens next?

Mr LYNCH – *I have, and I think the way the Act requires things to be done is the way things were done, so I think we need some change here. One of the principles of this Act is procedural fairness. We have written into the Act, through its construct, breaches of procedural fairness. I would like to see the Integrity Commission have greater ability to communicate where matters are at from a process point of view so that people could understand that and there is not this void of information that tends to get filled with rumor and innuendo. I believe that when any sort of final report is arrived at the person who is the subject of the report should be seeing it first and having an opportunity to provide feedback on it. I think it is a fairly common process in many other areas. The final report that is going to be on the record should either be an amended version of the initial report if there is evidence put forward that refutes some of the findings or should at least include any feedback from the subject so that the person reading that report can read the determination but also the criticism the person had about that and the reasons shy.*

Mr BARNETT – *So their feedback and defence to the allegations on the finding that have been made should be included in the report and that would then become public?*

Mr LYNCH – *I think that is procedural fairness and I can't see any circumstances why you wouldn't.*

CHAIR – *That is before the release of the report to anybody? In other words, once the Integrity Commission completes their report and before it is released to Parliament, as has occurred, that person or the persons named in it ought to be given the option of being able to report their situation back for inclusion within the report?*

Mr LYNCH – *That is my view. I don't think it is actually a report until that has occurred. I think it is a draft report at that stage and there has to be an opportunity to make sure that if there are any errors of fact that can then be substantiated are addressed in the report or issues the respondent wants to raise also become part of that report.*

Ms GIDDINGS – *Essentially the same process that the Auditor-General goes through right now.*

CHAIR – *That is exactly how it is now; it goes to the organisations and they report back before the report is released.*

Ms GIDDINGS – *And he does incorporate their view. Even when it is contrary to his own conclusion he reports it but says regardless, the Auditor-General has not changed its point of view in relation to this.*[106]

8.5 The Committee also raised this issue with Mr Anthony Mihal, President of the Law Society of Tasmania. The following exchange occurred:

> ***Mr MIHAL*** *Certainly I am troubled by the manner in which the findings of the commission were reported as findings after some sort of judicial process, when they clearly were not. Perhaps that is a communication problem rather than an actual problem with the way in which the process went forward. I have something of a concern about the way in which the published report dealt with witnesses' evidence and referred to*

[106] Lynch, Hansard, 29 September 2014, p24-25

witnesses in a de-identified way with their title and initial when anybody with any knowledge of the THOs and the people in them would be able to clearly identify these people. Those people were compelled to give evidence. There is a published report in which not very much investigation is required to determine parts of the evidence they gave. In that situation there is always the potential that that person could be prejudiced in legal proceedings down the track.

***Mr BARNETT** - … I am thinking of the process going forward and if you have any recommendations to make in that regard. Do you have a view that if they are named they should have a right to express their views in such a report in terms of their defence?*

***Mr MIHAL** – It goes to the purpose for which the report is prepared. It is not prepared for prosecution of that person; it is prepared for the benefit of Parliament. For the purpose of completeness of the report I think it is important that all the material contained be contained in it, including what was put before the commission by the people under investigation.*[107]

8.6 The submission of Tasmania Police also raised this issue in the context of the Integrity Commission's publication of their audit reports in respect of Tasmania Police. The submission states as follows in this regard:

> *The authority to publish reports that may be detrimental to an organisation or an individual and to make them publically available carries with it significant responsibility. Tasmania Police notes the Commission's recommendation that its ability to publish information about its investigations be extended in line with other interstate integrity entities. In order to provide appropriate balance, it is the position of Tasmania Police that the JSC should consider providing organisations or individuals*

[107] Mihal, Hansard, 29 September 2014, p6

who are named in reports published by the Commission with the same legislative authorities and protections that are available to the Commission, i.e., the publish a response to the Commission's comments should they wish to do so.[108]

8.7 The Integrity Commission discussed this issue during their evidence before the Committee, during which the following exchange occurred:

Ms MERRYFULL - …… *The issue of procedural fairness was raised a number of times yesterday. The committee will remember I gave you a full briefing on Operation Delta, including the full 155-page investigator's report which had all the footnotes of all the evidence we used to rely on our 27 or so findings. I also provided the committee the whole procedural fairness responses that were received from the subject offices. The investigator's report, which was provided to the Premier, contained references to those procedural fairness responses and what the officers had to say about it. The report to Parliament did not, but the report to the Premier did, which you have seen. If the committee thinks the commission should publish full investigation reports and the full responses of people in their public reports, that's fine. If you want to make those changes to the act, that will be fine, we will do that.*

Mr MCKIM – *So the commission would not have a problem with that?*

Ms MERRYFULL – *I will do whatever the legislation tells me to do.*

Mr BARNETT – *I know, but do you have a view as to the merit or otherwise?*

Ms MERRYFULL – *I think you would have to be quite careful about what you are putting in public reports. The full responses refer to the full report, so they won't make any sense unless you publish the full report. The full report has a lot of information*

[108] Tasmania Police Submission, p8-9

in it from witnesses and a lot more people are named as witnesses, so it might be difficult. It might be better to publish a redacted report in Parliament and get the officer to respond to the redacted report, so there might be a second stage. You would respond to the full investigator's report that goes to the decision-maker, which in this case was the Premier or head of agency, but could provide a smaller version of the report with some of that information taken out which we would then get them to provide a response to. I would be quite happy to do that.

Mr BARNETT – *Do you see the merit of providing the response and feedback of those who are subject to an investigation and then a report and certain findings in Parliament?*

Ms MERRYFULL – *They are not findings, they were actual findings based on the evidence. The full investigation has 27 findings that were based on the balance of probability's findings of the evidence. The issue of procedural fairness is about people having an opportunity, which is what the legislation provides, to respond to adverse findings, and they did have that opportunity to respond. What you are talking about is a different mechanism. It is not about procedural fairness, it is something else.*

Mr BARNETT – *Do you support that approach?*

Ms MERRYFULL - *I would support it.*

CHAIR – *And would that make a better report? I think you question is would that make a better report or an improved report, or would it not?*

Ms MERRYFULL – *Improved for what purpose?*

Mr MCKIM – *I think the question is would it improve procedural fairness and natural justice?*

CHAIR – *Yes, would it improve procedural fairness in doing all of that?*

Ms MERRYFULL *– I think it would make everybody feel a lot more comfortable and if people are more comfortable with our public reporting that makes me happy. I am about putting things out in the public arena. The public needs to know. I don't think anybody can seriously question that the public needs to know what is happening with their money and that the public should have known what was going on. If people have some level of discomfort about the way it has been reported I am happy to do whatever makes people more comfortable.* [109]

Findings
The Committee finds that:

Concerns were raised regarding lack of natural justice and procedural fairness, particularly regarding reports tabled in Parliament.

Identification of persons in Integrity Commission reports has the capacity to compromise that person's reputation and/or privacy.

Recommendations

The Committee recommends that the Act be amended to provide that the response (if any) of person(s) that has been investigated is included in a report on request of that person, such report to be provided within 20 working days.

9 POLICY AMENDMENTS PROPOSED BY THE INTEGRITY COMMISSION

9.1 Introduction

9.1.1 In its first submission to the review, the Integrity Commission summarises its key policy recommendations as follows:

[109] Merryfull, Hansard, 30 September 2014, p30

The Commission recommends that the six essential policy issues identified in its submission at Chapter Nine, specifically:

a. *Mandatory notifications of serious misconduct.*
b. *The broadening of the Commission's ability to publish reports, including tabling reports in both houses of Parliament outside sitting periods;*
c. *The extension of the discretion to apply confidentiality around the Commission's investigative functions;*
d. *The independence of the Commission to engage appropriate legal services;*
e. *The Commission's status as a law enforcement agency; and*
f. *Clarifying the interaction between the Commission and public authorities' investigations of breaches of code of*

conduct, particularly Employment Direction 5.

be supported in principle by the Committee for amendment to the Act (where necessary) as soon as possible.[110]

9.1.2 Each of these is discussed below, with the exception of (f), relating to ED5, which is already discussed above under paragraph 4.3 of this Report.

9.1.3 In addition to the above policy amendments, the Integrity Commission has also presented an additional proposal to the Committee, in its paper titled "Prosecuting Serious Misconduct in Tasmania: the missing link, inter-jurisdictional review of the offence of 'misconduct in public office". This is discussed below under the heading "misconduct in public office".

9.2 **Mandatory Notifications of Serious Misconduct**

9.2.1 The submission of the Integrity Commission states as follows in relation to its recommendation in respect of mandatory notifications of serious misconduct:

There is no statutory obligation on public authorities or public officers to report suspected misconduct to the Commission, nor to make a complaint about misconduct.

[110] Integrity Commission, Submission No.1, xv

Logically, public officers will generally be better placed to learn of potential misconduct than members of the public. The Commission has encouraged public authorities to notify the Commission of suspected misconduct within their agencies….

…The Commission's ability to respond to a notification of dependent upon receiving a complaint. Therefore, unless the notification of the suspected misconduct is in the form of a complaint, the Commission is restricted in its ability to respond to the matter. Notifications are subjected to the triage process and any relevant information is captured in the CMS – but a notification cannot be accepted for assessment, or otherwise dealt with under Part 5.

Notifications provide important intelligence to the Commission about misconduct and about the particular agency's capacity to manage that misconduct. They enable the Commission to work with public authorities to provide best practice advice and assistance in dealing with complaints and to increase the capacity of the authority to identify deal with and prevent misconduct. They can assist the Commission to identify emerging trends and issues that might be addressed through its education and capacity-building programs.

The Commission has published 'Guidelines for Public Authorities about the notifications process which is available online. The guiding principle for notifying the Commission is 'if in doubt, notify'. For notifications to be useful, the Commission seeks minimum information including the names of relevant officers, the nature of the allegations, circumstances giving rise to the allegations, and actions taken or proposed to be taken.

The Commission has worked with the larger agencies to make the process of reporting notifications streamlined and to embed the process with the particular agency. Most of the notifying agencies send pro forma emails to the Commission inbox with the relevant information. The Commission's experience to date is that some of the notifications follow a complaint that has already been received by the Commission independently of the agency concerned. If the Commission already has a complaint, that information is not released back to the agency as a consequence of the notification, although it may be relayed through other mechanisms in the Act.

Notifications of misconduct are also considered vital to the Commission's functions because its work of collating information concerning misconduct across the public

sector is not undertaken by any other agency in Tasmania.

By comparison to the voluntary nature of notifications made to the Commission, interstate integrity entities have specific legislation requiring a certain level of misconduct, or corruption, to be reported to them. It is notable that the Joint Select Committee on Ethical Conduct, Final Report 'Public Office is Public Trust', No 24, 2009 recommended, in relation to the creation of the Integrity Commission, at page 166, that

> *'18.14.5 The prescription that a mandatory notification system be provided to ensure that as soon as any public body identifies a serious misconduct or corruption issue, it reports immediately to the Commission.'*
>
> *That recommendation was not reflected in the Act.*[111]

The Act does not impose a statutory obligation on principal officers of public authorities, nor any public authorities or public officers, to notify the Commission of misconduct or serious misconduct. Although the Commission has consistently canvassed notifications from agencies, invariably reporting to the

[111] Integrity Commission, First Submission, p74-75

Commission has been adhoc. In other jurisdictions, notification of misconduct or corrupt conduct is mandatory, leading to a comprehensive picture of the state of misconduct across their public sector.

Mandatory notification would not mean that public agencies lose control of their own investigations but it would assist in identifying misconduct in Tasmania and contribute significantly to an understanding of underlying causes of misconduct. Notification obligations would only impose a minor administrative process on public officers or public authorities but the benefits would be significant.

The Commission recommends that minimum reporting obligations by public officers and public authorities of at least serious misconduct should be mandated by the Act.[112]

9.2.2 The submission from the Department of Education commented on this proposal as follows:

The department has noted the recommendations made by the Integrity Commission in its report to the Standing Committee. Recommendation 3 is of particular interest to the department, particularly as it relates to proposals around mandatory notifications.

[112] Integrity Commission Submission No.1, p136

We note in the body of the report that the Commission canvasses the notion of mandatory notification in regard to misconduct and serious misconduct and that the recommendation is limited to notification for serious misconduct. The department supports this limitation and would urge caution in establishing processes that duplicate existing or similar frameworks. There is a statutory process through the State Service Act to deal with alleged breaches of the code of conduct and this includes a review mechanism to the Tasmanian Industrial Commission. For a teacher who may be charged with misconduct, there is an additional layer of regulatory control through the Teachers Registration Board.[113]

9.2.3 The submission from the CPSU states as follows:

The CPSU shares the concerns of the Integrity Commission about the confusion that exists in regard to notifications. Given the Commission can only investigate based on complaints or own motion, it is essential that the Commission is made aware of matters of alleged misconduct at the earliest possible time.

Such a practice formally adopted through Employment Direction would assist in resolving the issues raised in this submission in regard to

[113] Department of Education Submission, p1

the interaction between the SSA-COC process and Integrity Commission investigations.

If mandatory notification is to become part of the Commission process, state sector workers will need to be provided with information on the circumstances in which they must notify and they must be protected in doing so as they may need to operate outside their normal chain of command.[114]

Findings

The Committee finds that mandatory notifications of serious misconduct is important in assisting the Integrity Commission to achieve both its investigative and educative functions.

Recommendations

The Committee recommends that the Act be amended to require mandatory notifications of serious misconduct to the Integrity Commission in a timely manner.

9.3 Publication of Reports

9.3.1 The submission of the Integrity Commission states as follows:

Currently the Commission (and an Integrity Tribunal) is limited with respect to publication of reports by s11 of the Act. In addition to the annual report, at any other time, the Commission may lay a report on any matter arising in connection with the performance of its functions or exercise of its powers before both Houses of the Tasmanian Parliament.

[114] CPSU Submission, p5

Separately, the Commission may also provide a report to the JSC on the performance of its functions or exercise of its powers relating to an investigation or inquiry: s11(4).

Integrity entities in other jurisdictions are also required to table reports and may also table special reports. Some, such as ICAC, also have the ability to make a recommendation that a report be made public. Invariably, other integrity entities have greater detail in their legislation about the material that can be published, including the making of findings and forming opinions, and making statements as to the reasoning applied to its findings. Generally prior to publication, entities are required to provide a person adversely affected by the report, the right to respond and they cannot publish opinion as to the commission of a criminal offence.

The Commission considers s11 of the Act to be unnecessarily limiting on its ability to publish information about its investigations and notes there has been a level of misunderstanding both in the public sector and the community about the ability of the Commission to publish reports.

The Commission recommends that its ability to publish information about its investigations be

extended in line with other interstate integrity agencies.[115]

9.3.2 The Integrity Commission further elaborated on this issue in their evidence before the Committee as follows:

The Ombudsman tables reports in Parliament as well. The Ombudsman is allowed to publish reports under protection. We do not have any of that. In our submission we talked about the possibility of being allowed to publish a report ourselves which would attract privilege and the protections you get from tabling in Parliament and we draw your attention to what we said in our submission about that.[116]

9.3.3 In respect of the ability to table reports outside parliamentary sitting times, the Integrity Commission's submission states as follows:

Section 11(3) enables the Commission to lay before each House of Parliament a report on any matter arising in connection with the performance of its functions or exercise of its powers. This limits reporting by the Commission to periods when both Houses of Parliament are sitting, which could cause a delay in reporting of several months.

The Commission considers it should have the capacity to table reports as and when they are ready, rather than as determined by the sitting schedule. It notes that the Auditor-General is

[115] Integrity Commission, Submission No.1, p136
[116] Merryfull, Hansard, 30 September 2014, p34

able to table reports if either House of Parliament is not sitting, by giving a copy of the report to the Clerk of the House of Assembly and the Clerk of the Legislative Council: Audit Act 2008 s 30(4). A report so given is taken to have been laid before each House of Parliament and to have been ordered to be published. Further, the provisions of any enactment or rule of law relating to the publication of the proceedings of the House of Assembly and the Legislative Council apply to and in relation to a report of the Auditor-General given to the Clerks. The Clerks are required to lay the report on the next sitting-day of the House after it is received. Such an arrangement protects the liability of the reporting entity and enables reports to be tabled and published in a timely manner.

The Commission recommends that its ability to table reports in both Houses of Parliament outside of sitting dates, by giving a copy to the Clerk of the House of Assembly and the Clerk of the Legislative Council, and the consequent protections with respect to publication, be supported in principle by the Committee for amendment to the Act as soon as possible.[117]

Recommendations

[117] Integrity Commission, Submission No.1, p17

The Committee recommends that the Act be amended to enable the Integrity Commission to table its reports outside of Parliamentary sitting times, by providing copies to the Clerk of the House of Assembly and the Clerk of the Legislative Council.

9.4 **Confidentiality**

9.4.1 The Integrity Commission recommended that section 98 of the Act be widened to encompass other documents not simply notices as is currently the case. The submission stated as follows in this regard:

> *Section 98 of the Act affords the Commission confidentiality over certain notices which can be given or served on a person. Specifically, a person who is served with a notice under s 98 of the Act must not disclose to another person:*
>
> - *the existence of the notice; or*
> - *the contents of the notice; or*
> - *any matters relating to or arising from the notice*
>
> *unless the person on whom the notice was served or to whom the notice was given has a reasonable excuse.*
>
> *A significant penalty of up to AUD$260,000 may apply if a person breaches the confidentiality notice without reasonable excuse. Following amendment in December 2011, an additional section was inserted into the Act to ensure that a person, who was made aware of the existence of a notice by way*

of reasonable excuse, could not themselves disclose the notice or contents of the notice, or any matters arising from the notice, without a reasonable excuse applying.

Matters relating to or arising from a notice are defined in s 98(1B) and include, but are not limited to:

- *obligations or duties imposed on any person by the notice; and*
- *any evidence or information produced or provided to the Commission or an Integrity Tribunal; and*
- *the contents of any document seized under the Act; and*
- *any information that might enable a person who is the subject of an investigation or inquiry to be identified or located; and*
- *the fact that any person has been required or directed by an investigator or an Integrity Tribunal to provide information, attend an inquiry, give evidence or produce anything; and*
- *any other matters that may be prescribed (no matters are currently prescribed).*

A reasonable excuse may be where:

- *the disclosure is made for the purpose of –*
- *seeking legal advice in relation to the notice or an offence against sub-s (1); or*
- *obtaining information in order to comply with the notice; or*
- *the administration of the Act; and*
- *the person informs the person to whom the disclosure is made that it is an offence to disclose the existence of the notice to another person unless the person to whom the disclosure was made has a reasonable excuse.*

The Commission (or a Tribunal) may advise a person in receipt of a notice that it is no longer confidential. Once that occurs, the obligations imposed by the notice and the penalty provisions will no longer apply……

The use of s 98 is limited to those sections which specifically refer to the ability of the Commission to make a particular notice confidential. However it is not just the notice which is

confidential, but the documents to which the notice is attached are also required to be kept confidential.

Currently the only discretion available is as to whether or not confidentiality should apply.

There are some sections of the Act however where confidentiality might be thought necessary, but over which a notice cannot attach. Examples include but are not limited to:

- *s 88 which sets out the Commission's role in relation to police misconduct, and which includes at s 88(3) the assumption of responsibility for a police investigation. The Commission has no ability to make those actions subject to confidentiality;*
- *s 90 where the Commissioner of Police may be given an opportunity to comment on a report which is adverse to Tasmania Police. During that process, the Commission is currently unable to require confidentiality in accordance with s 98;*
- *s 46 requires an investigator to observe the rules of procedural fairness, which might require that a subject officer be given notice of allegations made against them during an investigation. Currently the only way that can occur, and remain*

confidential, is by serving a notice under s 47 of the Act.

Of the total number of s 47 Notices (which require a person to give evidence or produce documents) issued to date, the majority (>87%) were subject to a s 98 confidentiality notice.

From the Commissions perspective, it is appropriate to apply confidentiality when the assessment or investigation is in a covert stage, and particularly if the conduct is ongoing at the time.

The Commission considers that there should be discretion available to enable other documents under the Act, not just the notices, to be subject to confidentiality. This is particularly during the assessment and investigation stages, noting that an investigation should be conducted in private unless otherwise authorised by the CEO: s 48.[118]

The extension of the discretion to apply confidentiality to actions of the Commission which do not currently attract a s98 notice has been discussed [above]. As noted, there are sections of the Act which are not covered by the confidentiality obligations but which have been identified as being a risk to the confidentiality of an investigation or assessment. In particular,

[118] Integrity Commission, Submission No.1, p116-120

the ability of an assessor or investigator to maintain confidentiality during the procedural fairness stage has already been considered and supported in principle by the JSC in its response to the Board to the previous s 13(c) report. Functions performed under other sections of the Act may also require confidentiality, depending on the facts of the case.

The Commission recommends that the discretion of the Board and the CEO to apply confidentiality with respect to its activities around investigations be extended.[119]

9.4.2 The Committee also heard evidence from some parties who expressed concern in relation to the current operation of confidentiality provisions in the Act and the effect of this on witnesses and persons being investigated.

9.4.3 The CPSU stated as follows in this regard:

While the CPSU understands the need for investigatory bodies to operate covertly we consider this has at times been taken too far and as a result create unnecessary confusion and stress.

Section 44(2) of the Act empowers the CEO should he or she consider it appropriate to do so, to give written notice to the various parties to an investigation once a determination has been made to investigate a complaint. In 48.6% of instances the CEO has decided to inform the

[119] Integrity Commission, Submission No.1, p136-137

complainant, in 21.6% of cases to inform the principal officer and in only 8.1% of cases to inform the subject of the complaint.

Furthermore, under section 98 notices issued are subject to confidentiality such that the person served with the notice must not disclose the existence of the notice, the content of the notice or any matters relating to the notice (unless a reasonable excuse exists).

As a result the CPSU has found that members who have made complaints, who have been required to provide evidence before investigations and those the subject of investigations are unclear about the process and about their rights and often become highly stressed.

The CPSU believes that unless there are very good reasons not to do so, the parties to an investigation should be informed that an investigation has commenced and should be kept informed as to the progress of the investigation.

The union would also like to see section 98(2)(a) amended to make it very clear that a reasonable excuse to disclose includes the circumstances where a union member seeks advice, support or assistance from their union on how to comply with a notice. We

understand and accept that in these circumstances the union officer to whom the disclosure has been made is then subject to the confidentiality provisions.[120]

9.4.4 The submission of the Acting Director of Public Prosecutions stated as follows in relation to this issue:

Another concern is the cloak of secrecy that seems to surround the Commission's investigations. The service of notices under s 98 requiring absolute silence in respect of the investigation, save and except for obtaining legal advice or complying with requirements to provide information to the Commission, imposes a very heavy burden on witnesses and subjects of investigations. Being investigated by an integrity entity is undoubtedly very stressful. Technically, a subject confiding in a family member or seeking counselling or medical assistance as a result of stress caused by the investigation cannot even reveal the cause of their stress to their family member, medical practitioner, psychologist or counsellor. This is extremely unhelpful and denies subjects rights that even persons being investigated for serious criminal offences possess. It also has the potential to lead to tragic outcomes.[121]

9.4.5 Mr Damian Bugg also raised the issue of confidentiality, stating as follows in relation to an

[120] CPSU Submission, p4
[121] Director of Public Prosecutions Submission, p5

investigation that took place in relation to the agency of which he was the Chair:

> *I could gain no indication or information about it. When I telephoned after three months to find out what it was about I was told it was confidential and I had recommended to me, to quote the words of the CEO, 'section 48 of the act'…… Then the question of the principles of the operation of the commission under section 9 is that it is to work cooperatively with public authorities and integrity entities. I must say I would have expected a better level of cooperation in the situation that I had that I have mentioned and will retain the level of anonymity about it.*[122]

9.4.6 The Integrity Commission responded as follows to this evidence:

> *Section 48 – Secrecy provisions are essential and of central importance to the fair and rigorous conduct of assessments and investigations. They are central to maintaining the integrity of the work undertaken by the Commission and protecting the welfare and reputation of the involved persons, particularly those subject to untested allegations….Further, s 94 requires assessors and investigators (and all employees of the Commission) to maintain confidentiality. There are significant penalties for breaching confidentiality, including imprisonment. It is only when a matter is before an Integrity*

[122] Bugg, Hansard, 22 October 2014, p3-4

Tribunal that the Act requires hearings of a Tribunal to be in public; Schedule 6 of the Act….

….The Commission…(neither its CEO or assessors or investigators) had any obligation to advise Mr Bugg as to the circumstances of its assessment, simply because he requested that information.[123]

9.4.7 The Committee also raised this this issue with the Integrity Commission during their evidence before the Committee. The following exchange occurred:

Ms GIDDINGS *- In relation to all this, another issue was raised by a person who had to be told that there was an investigation occurring within the body they were responsible for and it was frustrating to them not to know what that investigation might have been around. They were meant to be dealing with these people but all they were informed was that there was an investigation and nothing else. I wonder whether or not there needs to be within the act the ability to be able to inform, for example, a head of agency or head of organisation a little bit more so they have an element of comfort or understanding of what they are dealing with with their staff.*

Ms MERRYFULL *- We don't have a problem with that but that's not what the act says. This is another one of these practical operational*

[123] Integrity Commission, Third Submission, p7-8

difficulties that has emerged from our work and that has emerged as an issue. It was in the Delta investigation where people didn't know. I think that would be a useful amendment to the act and might alleviate some of those issues.

***Ms JOHNSTON** - One of the other issues is that there are some complex arrangements within independent statutory organisations which fall within an agency. There might be a board but the employees are State Service agencies. The board might not be responsible for disciplinary matters. At the end of our act we have the schedule of principal officers that tells us who we are able to tell and there are definitely some holes within that. It hasn't kept up with some of the amendments. We have tried to tell the board, for example, that THOs are not principal officers because they were State Service employees. In fact the principal officer, the CEO, was the Premier.*

***Ms MERRYFULL** - But even then we couldn't say too much. I guess a useful amendment would be something that gave the CEO discretion. A bit of discretion around a lot of these things rather than the prescriptive processes in the act could really help us out in terms of being more quick and flexible in what we do because it is very inflexible legislation. Some discretion would be good.*

Mr GAFFNEY *- When people give you information their name is not used but their job position may be named up in the document and they may be the only one or two people in the state who have that role. That also has created considerable stress on their lifestyle and they believe they have been compromised in giving the information. In part of the 48 recommendations or whatever, has that been raised before with you?*

Ms MERRYFULL *- There are two things there. One is that that's probably not going to be an issue except in a public report in terms of putting it out in the public. Secondly, the act currently says that at the conclusion of an investigation or assessment we have to give 'the report'. We would rather say that we can give information, because we might have our reports and our internal investigators have all the stuff in it, but it may not be suitable to give that report over to everybody, but the act says to give the report to anybody you refer it to. What we said in our amendments was for the CEO to give relevant information over to the agencies, not the full investigation report that has come to the CEO. What I am talking about here is that a bit of discretion about what you provide would go a long way to solving some of these problems.*[124]

[124] Kellam/Merryfull/Johnston, Hansard, 17 November 2014, p16-17

Findings

The Committee finds that:

There is no discretion for the Integrity Commission to allow a person involved in an investigation to discuss the matter with any other person (other than legal advice in section 98 of the Act).

There is no discretion for the Integrity Commission to notify the Head of Agency and/or Chair of the relevant Board of an investigation in their agency in appropriate circumstances.

Recommendations

The Committee recommends that:

The Act be amended to allow for persons involved in investigations to discuss the matter with individuals deemed appropriate by the Integrity Commission.

The Act be amended to require the Integrity Commission to notify the Head of Agency and/or Chair of a relevant Board of a matter being investigated, unless exceptional circumstances apply which mean that it would be inappropriate to do so.

That section 98 of the Act be amended to allow for confidentiality to apply to documents other than Notices, in exceptional circumstances.

9.5 **Independence of Legal Services**

9.5.1 Treasurer's Instruction TI 1118 provides instruction and guidance on the procurement of legal services by instrumentalities of the Crown.

9.5.2 Treasurer's Instruction TI 118 is, in common with other Treasurer's Instructions, issued pursuant to

section 23 of the Financial Management and Audit Act 1990, which provides that the Treasurer shall issue instructions with respect to principles, practices and procedures to be observed in the financial management of all Agencies.[125]

9.5.3 Pursuant to Treasurer's Instruction TI 1118, agencies must refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law. Crown Law is comprised of the Office of the Solicitor-General, the Office of the Crown Solicitor and the Office of the Director of Public Prosecutions….Services are provided free of charge to agencies (including the Tasmanian Health Organisations; excluding Statutory Authorities). There are certain circumstances where some charge may apply, such as where there are recovery rights from third parties – Crown Law will advise agencies when this may apply.[126]

9.5.4 The submission of the Integrity Commission recommended that the Integrity Commission be formally exempt from complying with TI 1118. Their submission stated as follows in this regard:

> *Although an independent statutory authority, by s 7(2)(d) the Commission is an instrumentality of the Crown and is required to comply with all relevant Treasurers Instructions (TI)151. The TIs include Treasurer's Instruction 1118 –*

[125] Financial Management and Audit Act (Tas) 1990, section 1
[126] TI. 1118 – Procurement of Legal Services: goods and services

Procurement of Legal Services: goods and services (TI 1118), which provides instruction and guidance on the procurement of legal services.

In particular, TI 1118 requires all agencies to refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law. It further mandates that all legal instructions must be provided by or through Crown Law unless otherwise agreed in writing by Crown Law. Agencies must not directly engage external counsel or commercial legal services without the written agreement of Crown Law. Any exemption from the requirement – to source legal services through a quotation or selective tender process – must be with the agreement of Crown Law and can only be approved by the Secretary of the Department of Treasury and Finance. Crown Law is comprised of the Office of the Solicitor-General, the Office of the Crown Solicitor and the Office of the Director of Public Prosecutions. The Office of the Solicitor-General is responsible for the provision of legal advice to Ministers, agencies and other government instrumentalities, while also undertaking constitutional litigation on behalf of the Crown. Advice obtained from the Solicitor-General, represents the Government's view of the subject matter of the advice and is to be followed unless Cabinet directs otherwise or it

is held to be incorrect by a court of competent jurisdiction.

The obligation to comply with TI 1118 and to follow the Solicitor-General's advice can create significant difficulty for the Commission when a public officer or public agency is in conflict with the Commission. This can occur very easily. For instance, when the width of a coercive Notice that has been issued by the Commission is challenged, the officer or agency concerned can be presumed to have sought Crown Law advice about the matter, yet the Commission itself may also require legal advice which it also has to get from Crown Law. It is also possible that an issue may emerge in which the Commission's investigative work impacts upon Crown Law itself, or an officer of or associated with Crown Law. It is reasonable to assume that there may be many occasions when Crown Law is in a position of conflict – neither the public officer nor agency concerned, nor the Commission may be aware that the other has sought legal advice, yet both are required to obtain that advice only from Crown Law.

Although the Commission does not conduct "examinations" in the manner of other integrity entities, its investigators are able to compel evidence be given subject to the issue of a s47 Notice. The Commission considers that where the evidence from the witness is likely to

be complex or where several witnesses are involved, there is a benefit to retaining a legal practitioner to assist the investigator obtain evidence. Such decisions may need to be made quickly and covertly. Further, the Act provides for the convening of an Integrity Tribunal.

When such a Tribunal is convened, it will be expected to maintain its independence and, accordingly, counsel assisting an Integrity Tribunal should be independent of Crown Law.

The potential for conflict was recognised shortly after the Commission was established and has been the subject of discussion with the Solicitor-General. The Solicitor-General has been content to deal with the matter of exemptions from TI 1118 as and when necessary.

For the avoidance of doubt, in mid-2012 the Commission sought a formal exemption from the obligation to comply with TI 1118 from the Secretary, Department of Treasury and Finance, Mr Martin Wallace. Mr Wallace's advice was, subject to the Commission receiving written agreement from the relevant officer in Crown Law that satisfies the requirements of clauses (3) and (4) of TI 1118, and if the Commission intends to engage independent legal services without undertaking the relevant competitive

procurement process prescribed in either TI 1106, TI 1107 or TI 1108, the Commission needs to satisfy the provisions of TI 1114 Direct/limited submission sourcing: goods and services.

There have been several occasions to date where the Commission has sought and been granted an exemption from TI 1118. The process is however cumbersome and necessarily involves the Commission advising the Solicitor-General of the basic circumstances justifying an exemption. It is healthy for there to be legal debate on aspects of the Commission's jurisdiction, including formal legal challenges by those subject to it. Scrutiny by the courts will assist to clarify the scope of the Commission's powers where there is doubt. The Commission considers it is appropriate that it seek the Solicitor-General's advice on constitutional matters or statutory interpretation of the Act, in accordance with TI 1118.

However, where legal services are required on specific misconduct matters the Commission strongly advocates for it to have discretion as to the legal services it retains, without the need for a formal exemption under TI 1118. It considers the ability to brief and retain legal counsel outside of Crown Law, as and when required subject to budgetary considerations,

to be essential to ensuring the independence of its work.[127]

Where legal services are required on specific misconduct matters the Commission strongly advocates that it have discretion to brief and retain legal counsel outside of Crown Law, without the need for a formal exemption under TI 1118. The ability to do so is considered essential to ensuring the independence of its work. The Commission recommends that it be excluded from complying with the obligations imposed by TI 1118 with respect to legal services.[128]

Findings

The Committee finds that:

Concerns were raised by the Integrity Commission that the requirement to access Crown Law advice in accordance with TI 1118 could give rise to a conflict of interest.

The Integrity Commission currently can seek an exemption from TI 1118.

Recommendations

The Committee recommends that TI 1118 be amended such that where a conflict of interest exists, the Integrity Commission should have discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption.

9.6 Classification of Integrity Commission as a Law Enforcement Agency for the Purposes of Relevant Legislation

[127] Integrity Commission, Submission No.1, p125-126
[128] Integrity Commission, Submission No.1, p137

9.6.1 The Integrity Commission, in its first submission to the review, recommended changes to relevant State and Commonwealth legislation to classify it as a "law enforcement agency." The submission stated as follows:

> *A key feature of interstate integrity entities is their status as an "enforcement" or "law enforcement" agencies across various pieces of both Commonwealth and State legislation.*
>
> *That status enables those entities to access significant powers generally reserved for traditional law enforcement agencies such as police forces. The reasoning behind the availability of those powers for integrity entities is to enable the entity to establish "the truth" or the facts of a matter, rather than prosecute a particular case. Further, status as a "law enforcement agency" enables an entity to share or exchange information (usually of a highly confidential nature) with other law enforcement agencies, or other agencies/entities prescribed by the relevant act.*
>
> *At the commencement of the Act, there were no consequential amendments at either State or Commonwealth level to legislative frameworks prescribing "law enforcement agency"*

One Tasmanian Act – the Australian Consumer Law (Tasmania) Act 2010, prescribes the Commission as a "law enforcement agency" under s 41. The importance of being so prescribed is the ability to share or exchange information as reasonably necessary to assist in the exercise of an agency's functions. Under that act, the other law enforcement agencies are Tasmania Police, a police force of another State or Territory (or of an overseas jurisdiction), the Australian Federal Police, the Australian Crime Commission, and any other authority or person responsible for the investigation or prosecution of offences against the laws of Tasmania or the Commonwealth, another state or territory, or an overseas jurisdiction. As a consequence of being included as a law enforcement agency in that Act, the Commission has a legislative basis to obtain or give information that would normally be characterised as confidential, so long as the information is related to the Consumer Law Act or the functions of the Commission.

The Commission is not a law enforcement agency under any other state legislation. The problems previously detailed with respect to issues under the PIP Act and online desktop access to Tasmania Police data may be resolved if the Commission was a law enforcement agency under the PIP Act.

The Commission considers its status as a law enforcement agency across Tasmanian legislation should be reviewed at the earliest opportunity. That it is not currently a law enforcement agency, has limited the Commission's ability to receive and exchange information with other agencies, particularly those prescribed as law enforcement agencies.

Commonwealth legislation uses a number of different terms to describe law enforcement agencies. Invariably the terms include the following integrity entities:

- *ACLEI;*
- *ACC;*
- *ICAC;*
- *PIC;*
- *IBAC;*
- *CMC;*
- *CCC;*
- *AFP; and*
- *a Police Force of a State or Territory.*

Other agencies referred to, depending include – CrimTrac, Customs and various intelligence agencies.

By reason of consequential amendments made since establishment, the Commission is now considered as an integrity body for the

purposes of the IBAC legislation, (this allows the IBAC to disclose information to the Commission, for example).

The Commission is a 'law enforcement agency' for the purposes of the Independent Commissioner for Corruption Act 2012 in South Australia, establishing the Independent Commissioner Against Corruption and the Office for Public Integrity in September 2013.

The Commission is also a 'designated agency' under s5 of the AML/CTF Act in order to access AUSTRAC information.

There is other legislation in which the Commission is grouped with integrity entities.

A particular area that the Commission considers should be revisited is its access to telecommunications data under the Telecommunications (Interception and Access) Act 1979 (Cwth) (TIA Act). Notwithstanding the wide scope of its functions and investigative powers, the Commission is presently unable to access telecommunications data under the TIA Act because it does not fall within the definition of an "enforcement agency". It is the Commissions contention that, as with various like-agencies operating around Australia, the capacity to request and receive telecommunications data would significantly

enhance the Commissions ability to carry out its investigative functions.

Access to and analysis of historical telecommunications data in particular, will enable the Commission to properly assess complaints and to corroborate and test the veracity of allegations. In the absence of enforcement agency status under the TIA Act, the Commission is precluded from accessing telecommunications data lawfully obtained in the course of Tasmania Police investigations or by other enforcement agencies. At a minimum level, basic call charge record analysis will provide partial corroboration of allegations.

Additionally, as the matter currently stands, the Commission is also precluded from receiving information from other integrity entities if the information has been obtained from telecommunications data under the TIA Act. While that has not occurred to date with respect to other integrity entities it has occurred with matters involving Tasmania Police. It also creates a situation where police officers who may be authorised under s 21 of the Act to assist with an investigation for the Commission, are authorised as police officers to access telecommunications data, but are unable to pass that information on to the Commission.

The Commission is the only Australian integrity entity that is not defined as an enforcement agency for the purposes of the TIA Act.[129]

The Commission recommends that there be amendments to relevant State and Commonwealth legislation to enable it to become a 'law enforcement agency' consistent with all the integrity entities across other jurisdictions, to enable it to share or exchange highly confidential information and to obtain telecommunications information.[130]

9.6.2 The Integrity Commission noted in its second submission to the review that since its first submission it had obtained status as an 'Enforcement Agency' under the *Telecommunications (Interception and Access) Act 1979* (Cth). The submission stated as follows in this regard:

The Telecommunications (Interception and Access) Act 1979 (Cth) (TIAA) sets out the circumstances in which it is lawful for interception agencies to intercept and access communications (passing over a telecommunications system) and also authorises the disclosure by carriers of telecommunications data to enforcement agencies.

[129] Integrity Commission, Submission No.1, p127-130
[130] Integrity Commission, Submission No.1, p175

Interception agencies include those State agencies declared by the Commonwealth Attorney-General (A-G) as eligible to be an interception agency under s 34 of the TIAA. The Integrity Commission is not a declared interception agency.

Enforcement agencies means those listed in the TIAA as an enforcement agency under s5(1) of the TIAA. This includes all Commonwealth and State police forces and interstate integrity/anti-corruption agencies or bodies prescribed by regulations (s5(1)(k)) or any body whose functions include administering a law imposing a pecuniary penalty or administering a law relating to the protection of the public revenue (s5(1)(n)).

The Commonwealth Attorney-General's Department (AGD) recommends to the Commonwealth A-G whether an agency should be listed as an enforcement agency in the TIAA or in the regulations. The other variety of enforcement agency is determined as such by its functions of administering a law imposing a penalty or protecting public revenue. AGD has a practice of 'vetting' agencies who consider that they are an enforcement agency by virtue of their functions.

Enforcement agencies can obtain telecommunications data from a carrier. This is

information about the process of a communication, not its content (it includes for example the sending and receiving parties, the time, date and duration of a communication). All enforcement agencies can access 'historical data' and 'criminal law-enforcement agencies' (the police/integrity agencies and any agency listed in regulations) can access prospective data. The threshold for access is that it is reasonably necessary to enforce the relevant law or protect the public revenue. An enforcement agency can also obtain stored communications (typically referred emails and text messages, but may include images or video).

When an enforcement agency has obtained telecommunications data under an authorisation, the data can only be 'on-disclosed' for certain purposes including to enforce the criminal law, to enforce a law imposing a pecuniary penalty, or to protect the public revenue.

In late 2013, following the commencement of the Independent Commission Against Corruption in South Australia (noting many of the similarities to Tasmania), the Commission sought approval from the AGD to be accepted as an 'enforcement agency' to allow access to historical data only. To access prospective data would require the Commission to be prescribed

in the regulations and would require a formal request by the relevant Tasmanian Minister.

AGD undertook a review of the Commissions functions and objectives under the Act and, on 6 March 2014, agreed that the Commission could be considered as an enforcement agency by virtue of its functions.

The Commission may thus only access historical and stored telecommunications data, and always subject to the threshold requirements for access.[131]

9.6.3 Neither Tasmania Police nor the Police Association of Tasmania supported the Integrity Commission's recommendation that it be classified as a law enforcement agency for the purposes of relevant State and Commonwealth legislation.

9.6.4 The submission of the Police Association of Tasmania states as follows:

The PAT submits there was never any intention displayed by the parliament of the day to set the commission up as a law enforcement agency with all access and powers that come with that role. Commissions in other states have been set up as a direct result of issues in those states. We all know the states I am talking about and I could go through that but I am not going to.[132]

[131] Integrity Commission, Second Submission, p2-3
[132] Allen, Hansard, 30 September 2014, p2

They were not given the powers of a law enforcement agency and it is proven at the moment that they don't need the powers of a law enforcement agency.[133]

9.6.5 The submission of Tasmania Police stats as follows:

Tasmania Police does not believe there is any demonstrated need for the Commission to be granted "law enforcement agency" status. It would appear that the Commission primarily seeks such status to authorise it to gain access to call charge records and to apply for warrants under the Telecommunications (Interception and Access) Act and/or to gain access to communications intercepted by other agencies under such warrants. The conferral of "law enforcement agency" status upon the Commission would not, of itself, enable the Commission to access call charge records and telephone intercept material because the Commission does not investigate criminal offences or breaches of laws imposing pecuniary penalties.[134]

Findings

The Committee finds that:

As there has been no evidence of systemic corruption in Tasmania, an

[133] Allen, Hansard, 30 September 2014, p14
[134] Tasmania Police Submission, p11

extension of powers to the Integrity Commission as a law enforcement agency is not required.

The Integrity Commission is not classified as a law enforcement agency in some relevant legislation.

Recommendations

It is unnecessary for the Integrity Commission to be classified as a law enforcement agency in the relevant legislation (save and except for legislation where they are already classified as such).

9.7 Offence of Misconduct in Public Office

9.7.1 During the course of the review, the Integrity Commission raised the absence of an offence of misconduct in public office in Tasmania. The Integrity Commission raised this during its evidence before the Committee, during which the following exchange occurred:

> ***Mr BARNETT –*** *Have you undertaken any investigation of any person that has led to a charge and a conviction of a crime.*
>
> ***Ms MERRYFULL –*** *No.*
>
> ***Mr BARNETT –*** *Any investigation of any person charged or convicted of corruption?*
>
> ***Ms MERRYFULL –*** *Funny you should say that because when we appeared at the last committee hearing we talked about the lack of a misconduct in public office offence in Tasmania. It is the only jurisdiction that does not have a misconduct in public office offence and how that made it difficult in terms of criminal convictions if that was said to be an*

important thing…..that was a deficiency….identified in the very first parliamentary report that recommended establishment of the commission. It was never dealt with….

CHAIR – *You haven't referred a charge of criminal activity et cetera. Is there any other matter that you have referred to another organisation, either a criminal matter or what-have-you, and to your knowledge have any of those referrals returned a charge and/or conviction for any criminal matter or any matter at all?*

Ms MERRYFULL – *Not as far as I am aware in terms of criminal.*

Ms JOHNSTON – *Not in terms of complaints. Obviously we receive voluntary notifications from some agencies, so they tell us about misconduct activity which they are investigating themselves. It is a notification to us; we don't do anything with it. It becomes part of a database and they certainly get convictions out of those. So there is misconduct that gets convictions, but insofar as complaints to us, no, not that I am aware of. I also think it is wrong to focus solely on criminal charges.*

CHAIR – *My question was around any matter referred to the police, for instance, involving criminality which you may have had. I restrict my question to that. Are you aware whether any charges of criminality have come from the*

matters that you have referred to Tasmania Police?

Ms JOHNSTON – *No, not that we are aware of.*

Ms MERRYFULL – *That is again one of the reasons we have done this work on misconduct in public office offence, which is used in other jurisdictions to achieve those results because there is a gap in the law and it does need to be plugged.*[135]

9.7.2 The Integrity Commission produced a paper on this topic titled "Prosecuting Serious Misconduct in Tasmania: the missing link, October 2014"

9.7.3 This paper noted the following background to this issue:

In 2009, the Tasmanian Parliamentary Joint Select Committee on Ethical Conduct ('the Committee') released its final report titled 'Public Office is Public Trust.' One of the outcomes of that report was the establishment of the Integrity Commission ('the Commission') under the Integrity Commission Act 2009 (Tas) ('IC Act'). In Chapter 15 of that report, the Committee recounted the difficulties experienced by the state in prosecuting police corruption offences. In that chapter, the finding of the Committee was that:

[T]here is a need for a review of the Criminal Code Act [Criminal Code Act 1924 (Tas)]. Notwithstanding the amendments made to the Act, the original statute was enacted in 1924

[135] Merryfull/Johnston, Hansard, 30 September 2014, p44

and the Committee concurs with the view that much has changed since that time.

Chapter 15 was concluded with two recommendations:

Recommendation 27 – The Committee recommends that the Attorney-General initiate a review of section 69 of the Criminal Code Act 1924 to ascertain its current applicability or the need for an amendment to remove any ambiguity or perceived ambiguity.

Recommendation 28 - The Committee recommends that the Attorney-General request the Tasmanian Law Reform Institute to examine and report upon the Criminal Code Act 1924 with a view to proposing recommendations for any necessary legislative change. Such review to be adequately funded by the Government.

Both the finding and Recommendation 28 appear to be calling for a full review of the Criminal Code Act 1924 (Tas) sch 1. However, the chapter was dealing solely with regulation of 'the most serious of potential unethical conduct' of 'public officers, whether elected Parliamentary representatives or servants of the State.'

There is no indication that any progress has been made on Recommendation 28, and it does not appear to be on the Tasmanian Law Reform Institute's agenda at this point in time.

Misconduct in Tasmania

The Commission has now been established for four years, and thus has some experience of the kind of misconduct that is commonly seen in Tasmania. In general, that kind of misconduct could often be characterised as 'mid-range' abuse of office. In the main, it does not amount to fraud and bribery, but more often involves nepotism, misuse of resources and favoritism. Some of this misconduct has been deserving only of disciplinary of administrative action. However, some of this misconduct has, in the opinion of the Commission, been serious and may have merited some form of criminal punishment.

In considering referring misconduct for prosecution, the Commission has encountered the problem identified in 'Public Office is Public Trust': the corruption provisions in the Criminal Code Tas are antiquated and difficult to understand. Moreover, the Code lacks a broad offence that captures serious abuse of public office. Indeed, the Commission has found that the criminal law of Tasmania is lacking an offence found in every other Australian jurisdiction in some form – the offence of 'misconduct in public office' (MIPO).

One of the Commission's three objectives – enhancing public confidence that misconduct

by public officers will be appropriately investigated and dealt with – has thus been hampered not only by the form of the current legislative regime, but also by the absence of a MIPO offence.[136]

9.7.4 The above paper further stated as follows:

In regard to the offence of MIPO, Tasmania is out of step with other Australian jurisdictions. While it is true that the offence did stagnate for a period in the mid-twentieth century, all other states have now recognised its value in prosecuting the kinds of public sector corruption uncovered by modern integrity agencies. As noted by Queensland's then CMC:

The reasons for this resurgence include the fact that a single change may be used to reflect an entire course of conduct, whose individual acts may be minor but which accumulate into a pattern of abuse of trust, and the offence 'may be used to reflect serious misconduct which is truly 'criminal' but which cannot be satisfactorily reflected by any other offence'

As has been the case in other jurisdictions, the Commission's work has identified a need for the offence to be introduced into Tasmania……The Commission's recommended formulation of the offence is below:

[136] Integrity Commission, "Prosecuting serious misconduct in Tasmania: the missing link, inter-jurisdictional review of the offence of 'misconduct in public office', p4-5

Recommendation 1 – It is recommended that, to bring Tasmania into line with all other Australian jurisdictions, an offence which captures 'misconduct in public office' be introduced into the Criminal Code of Tasmania.

To be true value in prosecuting modern corruption offences, it is the opinion of the Commission that the offence should be formulated in a similar manner to that found in the s83 of the Criminal Code of WA. It is therefore recommended that, in formulating the offence, regard be had to Criminal Code WA s83. It is the opinion of the Integrity Commission that this is the most satisfactory codified version of the offence of misconduct in public office. However, the offence should not require that the officer acted with any intent to gain a benefit or cause harm/detriment/loss. The Commission considers that this adversely narrows the offence, and some gross abuses of office will not be captured if an intent to benefit/cause harm is included in the offence.

The Commission also notes that the common law form of the offence does not require the officer to have been acting dishonestly, improperly or corruptly. It is acknowledged that one misconduct in public office offence under the Criminal Code WA does require the officer to have been acting corruptly, but the Commission considers this to be sufficiently broad (if it is confined to one of the three offences). The Commission does not recommend adopting the element

of 'dishonesty'; this would prevent the offence from capturing a broad range of 'abuse of office' behaviours.

In formulating the new offence, it should be ensured that it covers:

- *Former public officials;*
- *Failures and omission, as well as positive acts;*
- *Benefits and detriments going to third parties (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment);*
- *Benefits and detriments going to corporation, associations and the like (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment); and*
- *Non-pecuniary benefits and detriments (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment).*

Recommendation 2 – It is recommended that the definition of 'public officer' in the Criminal Code of Tasmania be amended to align with modern standards, other Tasmanian legislation, and community expectations.

The definition given in the Integrity Commission Act 2009 would be a suitable replacement, or at least a suitable starting point. Regard could also be had to the definition of 'public official' contained in the Criminal Code of the ACT.

In formulating the new definition, it should be ensured that it covers:

- *Employees who work under a contract of employment;*
- *Local government;*
- *Contractors;*
- *Volunteers;*
- *Statutory office holders; and*
- *Ministers and members of public.*

Recommendation 3 – It is recommended that a review be undertaken to ensure that the Criminal Code of Tasmania's aiding and abetting provisions are as robust as those in Western Australia, and that they would capture people who facilitate the commission of misconduct in public office offences.[137]

9.7.5 Section 83 of the Western Australian Criminal Code states as follows:

Any public officer who, without lawful authority or a reasonable excuse —

(a) acts upon any knowledge or information obtained by reason of his office or employment; or

(b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or

[137] Integrity Commission, "Prosecuting serious misconduct in Tasmania: the missing link, inter-jurisdictional review of the offence of 'misconduct in public office', p43-44

(c) acts corruptly in the performance or discharge of the functions of his office or employment,

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

Findings

The Committee finds that:

There is no specific offence of misconduct in public office in Tasmania.

Integrity Commission investigations have not resulted in charges or convictions of any offence or crime.

There is a disconnect in the current legislation in relation to prosecuting serious or serial misconduct and imposing an appropriate penalty due to the absence of an offence of misconduct in public office.

Recommendations

The Committee recommends that the Government review and report upon the recommendations made by the Integrity Commission relating to the Criminal Code Act 1924 (Tas), including:

- **The Criminal Code Act 1924 (Tas) be amended to create an offence of misconduct in public office.**
- **The Criminal Code Act 1924 (Tas) be amended to align the definition of "public officer" with other Tasmanian legislation.**
- **A review be undertaken of the relevant sections of the Criminal Code Act 1924 (Tas) relating to aiding and abetting misconduct in public office.**

10 TECHNICAL AMENDMENTS PROPOSED BY THE INTEGRITY COMMISSION

10.1 The technical amendments proposed by the Integrity Commission were summarised in the Integrity Commission's table titled "Identified Technical Issues, Integrity Commission Act, 2009."[138]

10.2 The Committee deliberated in respect of each of the technical amendments set out in that table.

10.3 There was a divergence of views amongst the Committee as to whether or not some of the technical amendments should be recommended.

10.4 The Committee was of the view that there were three different recommendations that could be made in respect of each of the technical amendments proposed, being as follows:

- To recommend that the amendment be implemented;
- To recommend that the amendment not be implemented; or
- Where the Committee considered that further technical advice and consideration was required, that such amendments be referred to the Government for consideration.

10.5 The Committee agreed to indicate in the Table in Schedule 2 of this Report the view of each Member in respect of each of the technical amendments, and, taking into account these positions, to agree to the recommendations contained in this section. In the case of amendments where there was no majority view, the Committee deliberated and determined an outcome in relation to each of these.

10.6 The Committee agreed to recommend that the following technical amendments set out in Schedule 2 should be implemented:

- Integrity Commission Act - Items 1, 3, 4, 5, 6, 7, 11, 14, 15, 17, 18, 19, 20, 24, 25, 27, 28, 31, 33, 34, 36, 39, 40, 41, 43, 45.
- Other Legislation - Item 1.

[138] Integrity Commission, First Submission, Volume 2, Appendix 1

10.7 The Committee agreed to recommend that the following technical amendments be referred to the Government for further consideration:

- Items 2, 8, 10, 13, 16, 21, 22, 23, 26, 29, 30, 32, 35, 37, 38 and 42.

10.8 The Committee agreed to recommend that Item 12 of "Identified Technical Issues, Integrity Commission Act 2009" not be implemented as the Committee did not agree with the proposed amendment.

10.9 In respect of this Item, the Integrity Commissions submission stated as follows:

> Item 12 –
>
> s38(1)(b) (c) (d) (3) & (f)
>
> Content:
>
> 'to refer the complaint to which the report relates, any relevant material and the report'
>
> Technical issue:
>
> 'The report referred to in s 38 is the report prepared by an assessor under s 37. It is an internally generated document which frequently contains sensitive information. Providing a copy of the assessor's report may compromise the evidence referred to in the report, particularly if the misconduct is ongoing. The reference material provided by the Commission should be discretionary such that a copy of the actual written complaint, and the assessor's report can be withheld if deemed appropriate by the CEO. Accordingly, only relevant material should be referred by the Commission.
>
> Integrity Commission Recommendation:
>
> Amend s 38 to make it clear that the CEO does not have to refer the assessor's report to the agency but, rather, is only required to refer material relevant to the misconduct allegations and the Commission's assessment of those allegations.[139]

10.10 The Committee did not agree with this technical amendment proposed as it is considered that the agency should be referred all

[139] Integrity Commission, First Submission, Volume 2, Appendix 1, p8, Item 12

relevant material and accordingly agreed to recommend that it not be implemented.

10.11 The Committee notes that some of the technical issues set out in Schedule 2 have already been considered in this Report.

10.12 Item 9 of "Identified Technical Issues, Integrity Commission Act, 2009" in the Table relates to referral of complaints. This is already covered in paragraph 4.5 of this Report.

10.13 Item 44 of "Identified Technical Issues, Integrity Commission Act, 2009" in the Table relates to s98 and confidentiality. This issue is already covered in paragraph 9.4 of this Report.

10.14 Item 46 of "Identified Technical Issues, Integrity Commission Act 2009" and Item 2 of "Identified Technical Issues, Other Tasmanian Legislation" in the Table both relate to Integrity Commission access to Tasmania Police databases. This issue is already covered in paragraph 7.6 of this Report, where the Committee has recommended that no changes be made in this area. Accordingly, the Committee does not agree with the proposed technical amendment in these items.

Findings

The Committee finds that:

- **There were a number of technical issues identified by the Integrity Commission which needed to be considered.**

The Committee recommends that, in respect of the technical amendments proposed by the Integrity Commission (as set out in the Table at Schedule 2 to this Report):

- **The amendment in Item 1 be implemented.**
- **The amendment in Item 2 be referred to the Government for further consideration.**
- **The amendment in Item 3 be implemented.**
- **The amendment in Item 4 be implemented.**
- **The amendment in Item 5 be implemented.**

- **The amendment in Item 6 be implemented.**
- **The amendment in Item 7 be implemented.**
- **The amendment in Item 8 be referred to the Government for further consideration.**
- **The amendment in Item 10 be referred to the Government for further consideration.**
- **The amendment in Item 11 be implemented.**
- **The amendment in Item 12 not be implemented.**
- **The amendment in Item 13 be referred to the Government for further consideration.**
- **The amendment in Item 14 be implemented.**
- **The amendment in Item 15 be implemented.**
- **The amendment in Item 16 be referred to the Government for further consideration.**
- **The amendment in Item 17 be implemented.**
- **The amendment in Item 18 be implemented.**
- **The amendment in Item 19 be implemented.**
- **The amendment in Item 20 be implemented.**
- **The amendment in Item 21 be referred to the Government for further consideration.**
- **The amendment in Item 22 be referred to the Government for further consideration.**
- **The amendment in Item 23 be referred to the Government for further consideration.**
- **The amendment in Item 24 be implemented.**
- **The amendment in Item 25 be implemented.**
- **The amendment in Item 26 be referred to the Government for further consideration.**
- **The amendment in Item 27 be implemented.**
- **The amendment in Item 28 be implemented.**

- **The amendment in Item 29 be referred to the Government for further consideration.**
- **The amendment in Item 30 be referred to the Government for further consideration.**
- **The amendment in Item 31 be implemented.**
- **The amendment in Item 32 be referred to the Government for further consideration.**
- **The amendment in Item 33 be implemented.**
- **The amendment in Item 34 be implemented.**
- **The amendment in Item 35 be referred to the Government for further consideration.**
- **The amendment in Item 36 be implemented.**
- **The amendment in Item 37 be referred to the Government for further consideration.**
- **The amendment in Item 38 be referred to the Government for consideration.**
- **The amendment in Item 39 be implemented.**
- **The amendment in Item 40 be implemented.**
- **The amendment in Item 41 be implemented.**
- **The amendment in Item 42 be referred to the Government for further consideration.**
- **The amendment in Item 43 be implemented.**
- **The amendment in Item 45 be implemented.**
- **The amendment in Item 1 (Other Legislation) be implemented.**

11 AMENDMENTS PROPOSED BY THE LAW SOCIETY (CHANGES TO THE RIGHT TO SILENCE, ISSUING OF COERCIVE NOTICES, CLAIMS OF PRIVILEGE, RIGHT TO LEGAL REPRESENTATION AND CERTIFICATION OF COSTS)

11.1 **Background**

11.2 A number of legislative amendments were proposed by the Law Society of Tasmania, relating to:

- The right to silence.
- Issuing of coercive notices.
- Claims of privilege.
- Right to legal representation.
- Certification of Costs.

11.3 The evidence in respect of each of these is summarised below.

11.4 **Right to Silence**

11.4.1 The submission of the Law Society of Tasmania states as follows:

> *The abrogation of the right to silence is a significant matter. That right is recognized in the common law, in the following broad terms, usefully summarised and reproduced from Report 95 of the NSW Law Reform Commission The Right to Silence (July 2000). It states that the concept "describes a group of rights which arise at different points in the criminal justice system," as follows:*
>
> *(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of*

punishment to answer questions posed by other persons or bodies.

(2) *A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.*

(3) *A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.*

(4) *A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence and from being compelled to answer questions put to them in the dock.*

(5) *A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers of persons in a similar position of authority.*

(6) *A specific immunity (at least in certain circumstances), possessed by accused persons undergoing trial, from having adverse comment made about any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.*

Here the right is removed notwithstanding Joint Select Committee recommendation it be enshrined in the Act….

…Recommendation 1 – That the right to silence be enshrined in the Act. If the right to silence is not to be enshrined in the legislation, the Society submits that section 47 notices be issued by the Chief Commissioner who must be a legal practitioner of no less than 7 years standing, rather than an investigator (who may or may not be an employee of the Commission) and that the Commission exercise its coercive powers only where necessary and in accordance with a principle of proportionality which is enshrined in the Act.[140]

11.4.2 The President of the Law Society of Tasmania further expanded on this in evidence before the Committee, during which the following exchange occurred:

Mr MIHAL *- The first recommendation we have made is that the right of silence be enshrined in the act. There are three ways in which constraints could have been put on the investigative powers of the commission. I think probably the least favoured position, from our point of view, is the one that exists now which is that there is no right to silence. A person*

[140] Law Society of Tasmania Submission, p4-7

called, a witness, is compelled to give evidence which can be used in a court against the person, but that person can claim privileges including the privilege not to incriminate him or herself but there is a complicated procedure for doing so. There is not a right for that person to have legal representation, that is subject to the discretion of the commission when, in reality, in order to exercise any of those privileges, a layperson would not be capable of doing so without any representation.

I am digressing now from the submission, but in my own practice I have come across people have come to me who have been witnesses in the commission who have come after the fact to get advice and I have told them it is too late for them to get advice now because they have given their evidence to the investigator. I note that the commission, generally, when serving the coercive notice will serve a document outlining some of the rights to the person. That is good, but I have come across situations in my own practice where people who have given evidence have felt they have been actively discouraged by the investigator from obtaining legal advice with words to the effect of, 'You're just a witness. We're here to investigate other matters not involving your conduct so there is no need for you to do that.' Whether or not that has occurred or is just the perception of the person only isn't really material to the

problem I have in that witnesses aren't understanding, despite the information that is given to them, the importance of obtaining advice beforehand so those privileges can be taken advantage of by them.

CHAIR *- As Anthony is going through, it might be more appropriate to ask questions as we go, so if members have a question of Anthony as he is moving through, please ask them.*

Ms GIDDINGS *- Have you looked at similar commissions around Australia in terms of ICACs and the like, and if you have, do any of those other investigative commissions have the right to silence as part of their powers or expectations?*

Mr MIHAL *- I haven't done a detailed analysis but my understanding is that there are three broad ways in which powers are constrained. One is the ability for there to be the right to remain silent and then for that evidence to be used against the person. The second is, and we are putting in the alternative, which is the ASIC-type model where a person is compelled, so there is no right to silence, but if evidence is given that is prejudicial to the person in a criminal proceeding that evidence is not admissible in the criminal proceeding. That does away with the need for a complicated procedure for privileges because the ultimate*

aim is to preserve a person's rights before a court and the court will make a decision about whether or not the evidence is admissible.

The provisions in the Evidence Act containing the privileges are directed towards a situation in a court where the admissibility of evidence has been considered, so a judge can listen to the person giving evidence and say, 'I'll stop you there, I think we're straying into territory where you need to be aware that you have this right. I can issue you with a certificate so this evidence can't be used against you, for example. Do you claim that privilege?'. The witness will say yes, the certificate will be given and the person carries on giving evidence. That type of procedure allows the person before an investigator to give all the evidence without having to consider whether there is a privilege and then a court will consider whether the evidence is admissible because a privilege ought to have been afforded to the person.

***Mr McKIM** - That was the second option, Anthony. So there was the right to remain silent, the ASIC model and -*

***Mr MIHAL** - Then there is the situation in the Crime Commission, for example, where there is no right to silence, no right to claim privilege, but the commission itself can prevent the publication of evidence that is contrary to a*

witness's interest in the manner I have spoken about. There is a High Court authority, a recent authority of this year - Lee v the Queen - in which the New South Wales ICAC made an order preventing the publication of particular material that was prejudicial to a person giving evidence before it. That material found its way into the hands of prosecuting authorities. It wasn't used in evidence in a trial but the High Court held that the fact the DPP had that material gave the DPP an unfair advantage that was inappropriate in the criminal prosecution. The High Court spoke about the importance of the right to remain silent and the importance of strictly complying with any provisions in legislation which derogate from that but provide controls. The controls, the court held, must be strictly complied with.

***Mr McKIM** - When you talk about the right to remain silent, are you just talking about in the context of self-incrimination or more broadly?*

***Mr MIHAL** - I am talking in general.*

***Mr McKIM** - An absolute right?*

***Mr MIHAL** - Absolute. This is what occurs in police investigations. Police invite persons of interest to participate in interviews. That person then needs to make his or her own determination as to whether it is in the person's*

interest to do that, noting that the investigator might draw an adverse inference from any decision not to participate in such an interview. A court can't, but an investigating officer might, so a person might take into account that fact. They might also take into account that if there is exculpatory evidence to be given, the best time to do that for his or her defence is at that point in the investigation stage rather than in the witness box for the first time, for example, and giving it before a court.

I have read the commission's submission and what was said in the second reading speech and I don't accept the point that having the right to silence would prejudice a witness, so we shouldn't have it for that reason. It is up to the individual to make his or her own determination about whether it is in his or her interest to speak. In many situations it will be in the person's interest in perhaps a more narrow range of situations where the person is trying to preserve their right to a fair trial and have the prosecution make its case without assistance from the defendant. In that situation the person would exercise his or her right. Being prejudiced in somebody's employment or in the course of an investigation might be the effect of preserving that right in a trial, but we say it should be up to the individual to make that determination as to what is in his or her best interest, together with his or her legal advisers.

Mr MULDER *- Don't we have to be a bit careful there. There are phase. Long before there is an adversarial court hearing there is an investigation phase and these sorts of things make findings that may or may not result in criminal prosecution.*

Mr MIHAL *- That's right. Exercising the right to silence for somebody in the employment of the Crown clearly would prejudice the person's employment so it would be a serious step and the person would need to think carefully before exercising that right so really it ought only be exercised where the person is advised that he or she needs to preserve that right. In a situation of an investigation where it's not likely that any sort of criminal matters would be uncovered or the investigation doesn't go that way, I don't see -*

Mr MULDER *- You never know until you ask the question. I speak from experience - and you get some shocks sometimes.*

Mr MIHAL *- I don't see in those situations that a person would exercise his or her right to silence.*

Mr MULDER *- What you're saying, though, is that even in the investigation phase that person should get access to professional advice about whether or not.*

Mr MIHAL *- Absolutely, and that part of the submission stands whether or not any of the constraints I am talking about are adopted. A person who is under investigation or taking part in an investigation as a witness must have a right to legal advice and to be represented by a lawyer.*

Ms GIDDINGS *- Which is the same in any investigative process outside.*

Mr MIHAL *- Yes.*[141]

11.4.3 The Integrity Commission responded to this evidence during their appearance before the Committee, during which the following exchange occurred:

Ms MERRYFULL *- ….Regarding the Law Society's evidence, with the greatest respect to the Law Society, I think they were a bit confused in their submission because on the one hand they talked about the right to silence and on the other they talked about the ASIC model where you would be able to compel evidence but not have it admissible. The president clarified that in his evidence where he said that it would be one or the other, and we absolutely agree that the idea of compelling evidence but making it not admissible is the right way to go. That is the way the other*

[141] Mihal, Hansard, 29 September 2014, p104

commissions do it and it solves all those problems of claiming privilege.

***CHAIR** - I think Mr Mihal said it should be protected - that was the word he used.*

***Ms MERRYFULL** - Yes, what they call derivative use immunity from the evidence that is given. That makes it easier for everybody. You get the evidence but it is not able to be used in criminal proceedings.*[142]

11.5 Coercive Notices

11.5.1 The Law Society of Tasmania submission made the following recommendations in respect of coercive notices:

Recommendation 2 – That only the Chief Commissioner be empowered to issue coercive notices under section 47 rather than investigators.[143]

Recommendation 3 – That the coercive powers under the Act be exercised in accordance with a principle of proportionality enshrined in the Act and that such powers be exercised only to the extent necessary to conduct an investigation

[142] Merryfull, Hansard, 30 September 2014, p22
[143] Law Society of Tasmania Submission, p7

and proportionally to the nature of the matter under investigation.[144]

The Society submits that it is also important that further protections are applied to ensure coercive powers are applied at the operational level in accordance with administrative law values of fairness, lawfulness, rationality, transparency and efficiency. The Administrative Review Council's Coercive Information – Gathering Powers of Government Agencies report, which was published in May 2008, is a useful document in this regard. This report contains 20 best-practice principles which are generally applicable to agencies with such powers. These principles seek to strike a balance between agencies' objectives in using the coercive information-gathering powers available to them and the rights of those in relation to whom the powers are exercisable.

RECOMMENDATION 4 – That the Commission should be required to adhere to these best practice principles in the application of its coercive powers and report against them.[145]

11.5.2 The President of the Law Society of Tasmania further expanded on these recommendations in his evidence before the Committee. The following exchange occurred:

[144] Law Society of Tasmania Submission, p8
[145] Law Society of Tasmania Submission, p8

Mr MIHAL *- Recommendations two, three and four really go together and they are about the issuing of a coercive notice. We are against the position where a coercive notice is issued to a person who speaks to an investigator as a matter of course. We think there ought to be a detailed analysis each time of the need to coerce somebody to give evidence and to derogate from a person's right to remain silent, that exists at common law. We think there should be a proper analysis each time that is done to force the commission to consider whether or not, in order the gather the evidence that it needs, it needs to require somebody to give that evidence. That would require an investigator speaking to somebody and asking somebody to speak to them and answer their questions without the need for the person to be compelled to do so.*

Second, if in order to gather the evidence the commission feels the person does need to be compelled, there needs to be a consideration of the importance of the matters under investigation and whether it outweighs the right of the person to remain silent. Is it necessary and is it important? They

are the two things that need to happen and we think the best person to do that would be the chief commissioner, who is a senior legal practitioner. That would make it special. It would mean that this is not an operational matter, this is something we are dealing with at a higher level because of the importance.

CHAIR *- The position there would be that you would have the investigator coming to the chief commissioner and saying, 'This is why this needs to be done because of the evidence we have gained and because of what has been said'. The chief commissioner would, I would think, be relying very heavily on what the investigator was passing onto them. I am trying to figure out why and how that would make it a better process. Can you explain how it would make it a more robust process?*

Mr MIHAL *- The investigator would have to go to the commissioner and say -*

CHAIR *- The same as you do when you go to get a warrant, to a magistrate or judge?*

Mr MIHAL *- Precisely - 'This is an important issue I'm investigating. I think Mr Smith can give this evidence to me in respect of it because of a, b and c. Mr Smith won't talk to me about those things, so I'd like to compel him to do so'. Then the chief commissioner can undertake an analysis to determine whether or not it is appropriate.*

Mr BARNETT - *Who issues the coercive notice at the moment, the CEO or the investigator?*

Mr MIHAL *- The investigator.*

Mr BARNETT - *Not the CEO or the board chairman?*

Mr MIHAL *- No. I understand that the commission's submission is that it ought to be the CEO who issues the notices. We say that to take it to a higher level, beyond the ordinary operational matters of the commission, would give it the necessary importance as well as the fact that the chief commissioner is the senior legal practitioner with the skills and knowledge.*

Mr BARNETT - *Do you mean the chief commissioner as in the police or the chair of the board you are referring to?*

Mr MIHAL *- Yes, the chair of the board.*

CHAIR *- Is it because they have a legal background your main reasoning behind that, because of their expertise in that area?*

Mr MIHAL *- Yes. Number one, it takes it out of the operational sphere and number two, the person's expertise is a senior level practitioner.*[146]

11.5.3 The Integrity Commission responded to this evidence as follows:

We made a submission to the committee that the investigator should not make the decision to issue a notice, it should be the CEO. That was one of those matters the committee deferred to consideration without supporting it at that time.

No investigator issues a notice without me signing off on it. I am a legal practitioner of more than 30 years' standing. The general counsel also looks at all the notices before they are issued and she is a legal practitioner of 15 years' standing. It is not practical for the chief

[146] Mihal, Hansard, 29 September 2014, p8-9

commissioner to look at all his notices because he works part-time, he is the chair of the board and he doesn't involve himself in operational matters. We provide that disconnect between the board that looks at investigations when they are completed and the operational side of the business.

The Law Society said that notices should be proportional to the investigation and only issued to the extent necessary to conduct the investigation. There is no evidence that we are not doing that. We do that. Notices are important to the person giving the evidence. There seems to be this idea that people are reluctantly receiving notices. Agencies like to receive notices because it relieves them of any legal problems they might have with giving us the investigation. It protects people to get a notice. They are not breaching confidentiality or the personal information requirements and it helps people make the decision to give evidence. If you just go and have a chat to people they may not be confident or comfortable talking about their fellow employees, but if you tell them they must talk to you, that relieves them of that burden of guilt of possibly dobbing in their mates because they know they have to give evidence.[147]

[147] Merryfull, Hansard, 30 September 2014, p22

11.6 **Claims of Privilege**

11.6.1 The submission of the Law Society of Tasmania states as follows:

> *The Act allows for a person to claim privilege in complying with an inspector's direction or requirement under Part 6. If privilege is claimed, then the investigator may withdraw the question, or alternatively issue a notice requiring compliance if the question is not withdrawn.*
>
> *"Privilege" is designed in the Act as including "all the privileges set out in Part 10 of Chapter 3 of the Evidence Act 2001 and the privileges of the Parliament"*
>
> *Part 10 of Chapter 3 of the Evidence Act 2001 lists the privileges that may be claimed in proceedings including:*

- *Client legal privilege;*
- *Religious confession;*
- *Medical communications;*
- *Communication to counsellor;*
- *Privilege against self-incrimination in other proceedings;*
- *Evidence regarding settlement negotiations; and*
- *Matters of state.*

The Act sets out a process for an application to be made to a judge of the Supreme Court to determine whether the claim of privilege is valid.

If an application is made and the material is determined not to be privileged, or if no application is made and the question is not withdrawn, then a person may not claim privilege as a reason to refuse to answer.
There are competing issues in examining this section and the procedure it proposes. In allowing the Supreme Court to rule on a claim for privilege, frivolous or vexatious claims intended to delay or frustrate an investigation could be avoided. However, unless the Court determines applications quickly, the further delay could diminish the efficiency of an investigation.

The procedure is different from that which is utilised in other investigative procedures, for example that utilised by ASIC. The ASIC procedure affords protection to the subject of an investigation without the delay caused by Supreme Court procedure. The protections include specific legislative provisions excluding the admissibility of evidence disclosed under compulsion in criminal proceedings. Furthermore it avoids the need to prepare and place before the Supreme Court such materials as may be necessary to enable the Court to

determine the issue, itself a task which will cause cost and possible delay.

Recommendation 5 – That consideration be given to a less complex procedure to claim privileges while maintaining protections for those compelled under a section 47 coercive notice.

The Act is silent with respect to compliance with the Evidence Act in relation to cautions and warnings and the procedures for the conduct of records of interview. This is a significant omission and derogation from established standards and appears to be an oversight.

It requires attention as another instance where the "balance" attending the investigation of criminal matters, is inexplicably disturbed. This change satisfies no obvious need, nor does it serve any public interest….

Recommendation 6 – That investigators and an integrity tribunal be bound by the provisions of the Evidence Act 2001 that relate to cautions and warnings and the procedures for the conduct of records of interview.[148]

11.7 **Right to Legal Representation**

[148] Law Society Submission, p8-9

11.7.1 The submission of the Law Society of Tasmania states as follows:

Section 66 of the Act provides that:

(1) A public officer who is the subject of an inquiry is entitled to be represented by a legal practitioner or other agent when appearing before an Integrity Tribunal during the inquiry.

(2) A witness appearing before an Integrity Tribunal may, with its approval, be represented by a legal practitioner or other agent.

First, it is noted that different "rights" are offered to public officers and witnesses. A public officer who is the subject of an investigation is entitled to be represented. This is appropriate and an important protection for people who are affected by investigations. However a witness appearing before a Tribunal is not entitled to be represented without the approval of the Tribunal . Witness is not defined which is unsatisfactory.

Furthermore the right to be represented is a "controlled right" pursuant to Section 67(1) which provides:

> *"An Integrity Tribunal may allow any person or person's legal practitioner or agent to participate in an inquiry, to the*

extent that the Integrity Tribunal considers appropriate."

The Society submits that there should be an absolute right to be represented, similar to the ASIC model. No good reason exists for constraining this right. An investigation could not be affected if the typical unlimited right to be represented is not curtailed.

In circumstances where established rights such as the entitlement to remain silent have been supplanted and a complex procedure exists in order to claim privilege, it is a matter of concern that the right to representation is not preserved in an unqualified way.

Recommendation 7 – That 'witnesses' before tribunals, once properly and broadly defined by the Act, be afforded an unqualified or uncontrolled right to legal representation.[149]

11.8 **Certification of Costs**

11.8.1 The Law Society of Tasmania submission states as follows in relation to this issue:

The funding of legal representation for a person who may be subject to adverse comment and cannot afford a lawyer is essential to support the requirements of natural justice and access to justice.

[149] Law Society of Tasmania Submission, p11

Part 7, division 5 of the Act makes provision with respect to costs and expenses of witnesses. Section 83(1) provides that "a witness may apply to the chief executive officer for financial assistance in relation to the witness's legal costs." For the purpose of the division, "witness" is defined but not elsewhere.

The discretion whether to provide "financial assistance" is vested in the CEO who is to be guided by the matters set out in section 83(2). It is noted that this section contemplates the grant of such assistance before evidence is given (see Section 82(2)(b) for example).

Financial assistance includes provision for costs and the Act stipulates those costs must be taxed by a taxing officer of the Supreme Court before being paid. This is a cumbersome requirement particularly if the costs are minimal. It is preferable to incorporate a discretion in the CEO to refer the claimed costs for taxation, rather than to make the requirement operate every time. Consistently with that discretion, the Act should include a provision which enables costs to be agreed.

Recommendation 8 – That the requirement for witnesses' costs to be taxed in the Supreme Court before being paid by the Commission be placed with a discretion for the CEO to require

that a bill of costs be taxed enabling the CEO to agree to costs.[150]

11.8.2 The Integrity Commission did not agree with this recommendation, stating as follows in their evidence before the Committee:

> ***Ms MERRYFULL*** *- ……. The Law Society's view is that I should be able to certify costs for a tribunal matter without going to Taxation. I'm sorry, it is taxpayers' money so if I get a bill from a lawyer I'm going to send it to Taxation to make sure taxpayers' money is not just handed over on the presentation of a bill.*
>
> ***Ms GIDDINGS*** *- So you don't think you would have the expertise to do that taxation process yourself, you would still need the Supreme Court to oversee that?*
>
> ***Ms MERRYFULL*** *- Yes, particularly when the kinds of matters they are talking about at a tribunal hearing would be quite expensive, I would prefer a taxation of costs. We have had legal proceedings ourselves. Somebody sued us and we went to Taxation and at least everybody can accept what the Tax officer says. It is independent. I am quite careful with taxpayers' money.*[151]

The Committee finds that:

[150] Law Society of Tasmania Submission, p11-12
[151] Merryfull, Hansard, 30 September 2014, p22

- **The Law Society has raised issues in respect of the right to silence, issuing of coercive notice, claims of privilege, right to legal representation and certification of costs that need further consideration.**

The Committee recommends that:

- **Amendments proposed by the Law Society as detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be referred to the Government for consideration.**
- **Amendments proposed by the Law Society detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be considered as part of the five year review, and that the evidence obtained by the Committee in relation to this issue be considered as part of that process, and that advice is sought from all relevant experts including the Solicitor-General in relation to these proposed changes.**

Parliament House
HOBART
18 June 2015

Hon. I.N. DEAN MLC
CHAIRPERSON

DISSENTING STATEMENT OF MR GUY BARNETT MP, MEMBER FOR LYONS

JOINT STANDING COMMITTEE ON INTEGRITY
DISSENTING STATEMENT OF THE MEMBER FOR LYONS, MR BARNETT

The following comments relate to the investigative and educative functions of the Integrity Commission and measures to improve its effectiveness and efficiency.

Committee investigations have not resulted in charges or convictions for any offence or crime. There has been no evidence of systemic corruption within the public service or organisation over which the Integrity Commission has jurisdiction. The Integrity Commission has investigated very few complaints with the vast majority of complaints received by the Integrity Commission being referred back to the relevant agency after triage. A number of witnesses were critical of the investigative role of the Integrity Commission because it led to a costly inquiry process, unnecessary duplication and delays. Both the Acting DPP and Damian Bugg (former DPP) were particularly incisive in their criticisms with the former also noting that the Integrity Commission was not bound by the rules of evidence and was concerned that we have created a disproportionately powerful and secretive organisation that is seeking to have even more extensive powers. The former said that the integrity landscape is well populated in Tasmania and this has created a "somewhat crowded landscape that has led to a significant duplication of effort lack of clarity 'forum shopping' alarming delay and significant adverse consequences for individuals and entities that have been the subject of investigations." This sentiment was expressed in evidence from other witnesses including Damian Bugg. I concur with much of this sentiment and urge the government to reduce the duplication, delays and costly processes of investigation.

I believe the role of the Integrity Commission should be largely educative. However, it should retain an investigative function for serious cases only. It should also maintain an ongoing function for triage assessment and monitoring of investigations. It should have the power to hold Tribunal hearings but only on an ad hoc basis when required for serious cases. I support the model of investigation as proposed by Professor Malpas. This model would ensure that the relevant expertise and resources were co-opted from other agencies eg Tasmania Police, as and when required. This approach would also ensure a more efficient and effective Integrity Commission with its primary focus on its educative functions.

Finally, in light of the costly functions of a significantly over populated board I recommend a reduction in the size of the board to 3 members. The board would comprise an independent chair and include both the Auditor General and Ombudsman. If efficiency and cost effectiveness cannot be achieved by this model then a one person independent chair may be adequate.

I would urge the government to note the lengthy and disappointing delay in the completion of this Three Year Review and undertake whatever reforms are necessary to ensure the improved functions and operation of the Integrity Commission. Although a legislated five year review is now required, delays in implementing relevant and urgently needed reforms should be avoided.

My views on the technical amendments proposed by the Integrity Commission are set out on the attached at Schedule 2.

Guy Barnett MP
Member for Lyons

DISSENTING STATEMENT OF MS LARA GIDDINGS MP, MEMBER FOR FRANKLIN

1.2 Integrity Commission Model - Investigative Functions and Powers

The report largely leaves the issue of investigative powers and functions of the Integrity Commission to the five year review, with the Commission to retain its investigative functions and powers until the conclusion of that review. However, the second recommendation says the Integrity Commission be given only the authority to assess, triage and monitor all investigations. I disagree with this finding as I believe that it is also important for the Integrity Commission to retain its investigative powers. I do not however, believe that the Commission needs its powers expanded beyond what they have, notwithstanding the need to tidy up the Act to make it more consistent as seen in the technical amendments section of the report.

While the Integrity Commission has not found evidence of systemic corruption, the evidence from the Commission was clear that an independent investigative body is required in Tasmania and that there must be some report back to the Commission where matters are triaged to another agency to follow through. Considering the Integrity Commission oversees state and local government, I believe that it would be a detrimental to good governance not to have an independent body capable of investigating allegations of public sector misconduct.

1.11 Technical Amendments Proposed by the Integrity Commission

I did not agree with the following technical amendments as accepted, referred for further consideration or not accepted by the majority of the committee:

26. S.54 Offences relating to investigations - I supported the Integrity Commission's recommendation

29. S.56(2) & (5) clarifying a draft report is a confidential document - I supported the Integrity Commission's recommendation

33. S.74(1) Powers of Inquiry Officer while on premises - I supported the referral of the matter to the government

37. S.80 Offences relating to Integrity Tribunal - I supported the Integrity Commission's recommendation

38. S.81 Offences relating to Inquiring Officers - I supported the Integrity Commission's recommendation

Lara Giddings MP
Member for Franklin

DISSENTING STATEMENT OF MR NICK MCKIM MP, MEMBER FOR FRANKLIN

Three Year Review

Dissenting Statement - *Mr McKim*

1. OVERVIEW

The Integrity Commission was established in response to a crisis of confidence in the integrity of the Tasmanian government of the day. We should not assume that similar circumstances will not exist in the future, and we should ensure that there is an independent authority that has the necessary investigative powers and legislative frameworks to investigate allegations of public sector misconduct and corruption in Tasmania.

The recommendations of the Joint Standing Committee on Integrity (the Committee), taken as a whole, represent a missed opportunity to increase public confidence that a strong anti-corruption watchdog exists in Tasmania with the necessary investigative powers to do its job of investigating allegations of public sector misconduct and corruption, and maximising public sector integrity in Tasmania

It is likely that the proximity of the statutory five-year review of the Integrity Commission unfortunately led to the Committee in some cases failing to make crucial recommendations to strengthen the powers and functions of the Integrity Commission, instead deferring some of those matters to the five-year review.

Given the government's policy position that the Integrity Commission be stripped of its investigative function and powers, the Committee should have made an unambiguous recommendation that that the investigative function of the Integrity Commission be retained for the foreseeable future, and stronger recommendations to adequately strengthen the investigative powers of the Integrity Commission.

The Committee should also have recommended that relevant legislation be amended to designate the Integrity Commission as a law enforcement agency, as recommended by the Integrity Commission, and that the *Criminal Code Act 1924* be amended to create the offense of misconduct in public office, as recommended by the Integrity Commission in its October 2014 report entitled *Interjurisdictional review of the offense of 'misconduct in public office'.*

An excerpt from the report is below:

"It has also emerged that Tasmania's criminal code is lacking the key misconduct offence: the offence of 'misconduct in public office' (MIPO). Every other jurisdiction in Australia – including the Commonwealth and both the territories – has some form of this offence.
In light of this, the Commission undertook to complete an interjurisdictional review of the offence, with the view to recommending it be introduced into the criminal law of Tasmania. The Commission believes that providing it with the option to recommend consideration of criminal charges in cases of the most serious misconduct would enable it to more effectively meet the objectives of the IC Act." (p2)

It is disappointing that the Committee missed the opportunity to make recommendations that, if implemented, would ensure that Tasmania does not remain the only jurisdiction in Australia without the crime of misconduct in public office.

2. SUMMARY OF FINDINGS

2.1 This dissenting statement finds that the investigative function of the Integrity Commission should be retained for the foreseeable future.

2.2 This dissenting statement finds that the investigative powers of the Integrity Commission will not be enhanced to a satisfactory level due to the failure of the Committee to recommend that enough of the technical amendments proposed by the Integrity Commission be implemented.

2.3 This dissenting statement finds that the Integrity Commission is the appropriate body to investigate allegations of public sector misconduct, and that even if criminality is suspected the Integrity Commission should conduct, and retain ultimate authority over, any investigations.

2.4 This dissenting statement finds that the Integrity Commission is a relatively inexpensive model, and that the Board should be retained at its current size.

2.5 This dissenting statement finds that leaving Tasmania as the only jurisdiction in Australia which does not have a criminal offense of misconduct in public office compromises the capacity of the Integrity Commission to effectively meet its objectives as legislated in the *Integrity Commission Act 2009*.

3. RECOMMENDATIONS

1. That the Integrity commission should retain its investigative function for the foreseeable future.

2. That the Integrity Commission be designated as a law enforcement agency in relevant Tasmanian legislation.

3. That the Integrity Commission retain ultimate authority over its investigations, even where criminality is suspected.

4. That the *Criminal Code Act 1924* be amended to create the offense of misconduct in public office.

5. That the investigative powers of the Integrity Commission be strengthened by implementing the following technical issues in the *Integrity Commission Act 2009* as recommended by the Integrity Commission in Schedule 2 to the Committee's report:

    1. Number 8, S 35(2)
    2. Number 10, S 37(1)
    3. Number 12, S 38(1) (b), (c), (d), (e) and (f)
    4. Number 13, S 38(2)
    5. Number 16, S 44(2)
    6. Number 21, S 52
    7. Number 22, S 52(3)
    8. Number 23, S 52(4) and S 51(4)(a)
    9. Number 26, S 54
    10. Number 29, S 56(2) & (5)
    11. Number 30, S 57(2)(b) & S 58(2)(b)
    12. Number 35 S 74(1)
    13. Number 37, S 80
    14. Number 38, S 81
    15. Number 42, S 96

Nick McKim MP
Member for Franklin

DISSENTING STATEMENT OF HON TONY MULDER MLC, MEMBER FOR RUMNEY

JOINT STANDING COMMITTEE ON INTEGRITY
Tony Mulder, MP
(Deputy Chair)

3 YEAR REVIEW OF THE INTEGRITY COMMISSION

SUBJECT: Dissenting statement
This is a statement of dissent to selected decisions of the Committee recorded in the report relating to the Three Year Review of the Integrity Commission (IC).

Overview of Dissent
The dissenting statements should be seen in the context of my view that the Integrity Commission has not uncovered serious or systemic corruption in the State of Tasmania, its investigative processes have not proven superior to existing arrangements, and there is a misuse of coercive powers in focussing on the status of persons rather than the serious of the alleged conduct resulting in inordinate delays in investigating relatively minor matters and sometimes injustice.

Recommendation 1.2 – IC - Investigative Function and Powers.
I dissent from the Committee's decision to not include the words "

"that the model proposed by Professor Malpas be implemented"

Professor Malpas' model proposed for the original Integrity Commission placed a greater focus on education than investigation. Evidence given to the Committee suggests that an equal focus on both has distracted from the commission's valuable work in the area of education.

Recommendation 1.2 – IC - Investigative Function and Powers.
I dissent from the Committee's decision to not include the words "some of" in the recommendation that the investigative powers of the Committee be retained.
The recommendation as it stands provides for an ongoing investigative function. As a committee member I was not persuaded that all the functions should be retained given the absence of any systemic corruption and the pressure the IC felt to get some investigative successes that led to overzealous and inordinate lengthy investigations over relatively minor matters.

Recommendation 1.2 – IC - Investigative Functions and Powers.
I dissent from the Committee's decision to include the retention of the IC's investigative powers until the 5 year review.

There is sufficient evidence for this committee to form a recommendation on this issue rather than a deferment.

I dissent from the Committee's decision to refer these important matters to the 5 year review. Sufficient concerns were raised about the secrecy of the IC and the use of coercive powers in regard to relatively minor issues. To defer these important issues, some raised by the law society, is to avoid an issue on which the IC had sufficient evidence to form a view.

Recommendation 1.9 – Natural Justice and Procedural Fairness
I dissent from the Committee's decision to continue with the recommendation that a person's legal representative can be excluded if the IC deems that person not to be "appropriate". The lost motion sought to raise the bar to require that there be 'exceptional circumstances' before denying a person this fundamental right to legal representation of their choice.

Recommendation 1.10 – Misconduct in Public Office
I dissent from the Committee's decision to recommend that the government review and report on proposals to make misconduct in public Office a Criminal Code Offence. I dissent from this proposal because the Integrity Commission's powers are inappropriate for matters that are to eventually be heard before the Supreme Court. Had it been a simple offence then that might be different matter, however to elevate matters that are not criminal, ie Code of Conduct matters, to a criminal law calls into question the whole non-adversarial approach that should be taken to code of conduct issues. If the matter was a criminal matter it should be properly investigated according to the rules of evidence and the behaviour would already be a criminal offence. If it is a breach of guidelines for which limited sanctions apply, then it should remain outside the adversarial criminal justice system. This is another example of the Commission trying to expand its role beyond that originally envisaged without having uncovered any serious or systemic corruption or having to exercise its Tribunal powers.

Recommendation 1.10 - Misconduct in Public Office
I dissent from the Committee's decision to exclude a finding to better define 'serious misconduct' beyond the current definition of conduct likely to result in dismissal.
What amounts to dismissal is a variable benchmark between agencies. Very minor conduct could result in dismissal depending on a number of issues including circumstances, previous behaviour or even personality. A definition of 'serious' that included objective criteria would ensure the Commission focused on genuinely serious matters. The history of the IC and similar bodies around Australia would

suggest that seriousness is based on the seniority of the alleged perpetrator rather than the gravity of the offence itself.

Recommendation 1.11 - Amendments to the Integrity Commission Act proposed by the Commission

Item 8.

I dissent from the Committee's recommendation that Item 8 be referred to the Government for further consideration implemented. The Integrity Commission seeks to enable its assessor to recommend other action beside further investigation. At the heart of the issues raised with the Commission is its confusion between assessment and investigation leading to inordinate lengthy assessments that almost complete the investigation. This amendment would give the Commission the power to complete the investigation before triaging. I note the Committees support for my proposal that assessments be time limited for this reason. (Recommendations at paragraph 1.6)

Item 19

I dissent from the Committee's recommendation that Item 19 be implemented

The Integrity Commission seeks the power to refuse a legal representative for a variety of reasons and seeks far greater powers than exist for persons charged with a crime. In the context of Code of Conduct investigations, this is an unnecessary power.

Item 21.

I dissent from the Committee's recommendation that Item 21 be referred to the Government for further consideration.

The Commission seeks to extend the confidentiality power to any number of persons however remotely related to an IC investigation. This power does not exist for investigation of murder and putting it into Code of Conduct investigations is unnecessary and excessive.

Item 24.

I dissent from the Committee's recommendation that Item 24 be implemented.

THE IC seeks to extend its power to obtain Listening Devices for own motion investigations. These are often referred to as fishing expeditions and are totally inappropriate to Code Of Conduct violations in respect to which there is complaint.

Item 35.

I dissent from the Committee's recommendation that Item 35 be referred to government for further consideration

The IC proposes to enable its current confidentiality provisions to extend beyond witnesses and suspects to any person on premises. These powers are already onerous and excessive and to extend them even wider cannot be supported. The current provisions do not apply to murder investigations and extending them for Code of Conduct matters is excessive.

Recommendation 1.12 Law Society Recommendations

Dissent is expressed from the Committee's finding that the amendments proposed by the Law Society be referred to the Government. The Law Society has made cogent commentary on issues relating to changes to the right to silence, co-ercive notices, claims of privilege, right to legal representation and certification of costs. All these are matters over which the IC has a special status compared to other investigative bodies and the Law Society is concerned over the nature of these provision, given that the Attorney General of the day, in the second reading speech in the House of Assembly, did not support the establishment of a Integrity Commission with the powers of of some interstate commissions, a path upon which the Integrity Commission is embarked. Referral to the Government for consideration is not appropriate for a committee that has a firm view on these matters of civil liberty.

The Law Societies recommendations should be recommended for implementation.

Hon Tony Mulder MLC
Rumney

APPENDICES

APPENDIX 'A' – Submissions Ordered to be Published

Integrity Commission – First Submission

University of Tasmania

Professor Jeff Malpas

Tasmania Police

Police Association of Tasmania

Geraldine Allen

Richard Parker

Department of Education

CPSU

Barbara Etter, BEtter Consulting

The Law Society of Tasmania

Tasmanian Government

Damian Bugg, Chair, Royal Tasmanian Botanical Gardens

Integrity Commission – Second Submission

The Law Society of Tasmania – Second Submission

Police Association of Tasmania – Second Submission

CPSU – Second Submission

Office of the Director of Public Prosecutions

Integrity Commission – Third Submission

Sven Weiner

David Smith

APPENDIX 'B' – Submissions Ordered Not to be Published

Fiona Irwin

Michael Murtagh

Malcolm Mars

Eva Gutray-Bukoven – First Submission

Wendy Edwards

Eva Gutray-Bukoven – Second Submission

Greg Todd – First Submission

Chris Barwick

Winston Archer

Sandra Wade and David Smith

David Brimble

John Hardman

Greg Todd – Second Submission

Terry Clarke

Greg Todd – Third Submission

Barry Greenberry

Glenn Lennox

PG and SM Holloway

SCHEDULE 1 – LIST OF DIVISIONS

In accordance with s23(6) and Schedule 5(2) of the Integrity Commission Act, the following divisions were recorded:

1. On the Question that the Amendment proposed by Mr *Barnett* to paragraph 1.2 to insert the words "leads to duplication" after the words "the current Integrity Commission model" in the first dot point in paragraph 1.2 of the Chair's Draft Report be agreed to.

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Ms *Giddings*
Mr *Mulder*	Mr *McKim*

It was resolved in the Negative.

2. On the Question proposed that the first dot-point in paragraph 1.2 of the Chair's Draft Report stating as follows "The current Integrity Commission model is a costly model for investigating complaints having regard to the issues that have been dealt with and the level of corruption and serious misconduct identified in Tasmania" stand part of the report.

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	*Ms Giddings*
Mr Mulder	Mr *McKim*

It was resolved in the Negative.

3. On the Question proposed that the second dot-point in paragraph 1.2 of the Chair's Draft Report stating "The Committee did not reach unanimous agreement in respect of whether changes should be made in respect of the model of the Integrity Commission in respect of its investigative power and functions" stand part of the report.

The Committee divided;

Ayes	**Noes**
Mr *Barnett*	Mr *Dean*
Mr *Mulder*	Mr *Gaffney*
	Ms *Giddings*
	Mr *McKim*

It was resolved in the Negative.

4. On the Amendment proposed by Mr *Barnett* that a new dot-point be inserted before the existing dot-points under Recommendations in paragraph 1.2 as follows:

- "That the model proposed by Professor Malpas be implemented".

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Dean*
Mr *Mulder*	Mr *Gaffney*
	Ms *Giddings*
	Mr *McKim*

It was resolved in the Negative.

5. Amendment proposed by Mr *McKim* that a new dot-point be inserted before the existing dot-points under Recommendations in paragraph 1.2 as follows:

- "That the investigative function of the Integrity Commission be retained".

On the Amendment proposed by Mr *Mulder* to insert the words "some of the" after "That the" in the proposed Amendment.

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Ms *Giddings*
Mr *Mulder*	Mr *McKim*

It was resolved in the Negative.

On the Question that the original Amendment be agreed to.

The Committee divided;

Ayes	**Noes**
Mr *Gaffney*	Mr *Barnett*
Ms *Giddings*	Mr *Dean*
Mr *McKim*	Mr *Mulder*

It was resolved in the Negative.

6. On the Question that the Amendment proposed by Mr *Gaffney* in the first dot-point under Recommendations in paragraph 1.2 by inserting the words "However, until that review, the investigative functions and powers of the Integrity Commission be retained" be agreed to.

The Committee divided;

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	Mr *Mulder*
Ms *Giddings*	
Mr *McKim*	

It was resolved in the Affirmative.

On the Question proposed, that the same paragraph as amended stating "The question of the investigative powers and functions of the Integrity Commission should be considered as part of the five year review, with all evidence detailed by the Committee in this report to be considered by the independent reviewer. However, until that review, the investigative functions and powers of the Integrity Commission should be retained" stand part of the Report.

The Committee divided.

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	Mr *Mulder*
Ms *Giddings*	
Mr *McKim*	

It was resolved in the Affirmative.

7. On the Question proposed that the second dot-point in paragraph 1.4 of the draft report stating "The Act be amended to require that, if criminality is suspected by the Integrity Commission during the triaging of a complaint, the matter must immediately be referred to the Director of Public Prosecutions or Police" stand part of the report.

The Committee divided;

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	
Mr *Gaffney*	
Ms *Giddings*	
Mr *Mulder*	

It was resolved in the Affirmative.

8. On the Question that the Amendment proposed by Mr *McKim* in the first dot-point in paragraph 1.6 of the Chair's Draft Report by deleting the word "the" and inserting the word "some" be agreed to.

The Committee divided.

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Ms *Giddings*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

9. On the Question that the third dot-point in paragraph 1.6 of the Chair's Draft Report (as amended) stating "In cases where the assessment cannot be completed within 20 working days, the assessment may be referred to the Integrity Commission Board, which may extend the timeline for a further 20 working days for the assessment" stand part of the Report.

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Mulder*
Mr *Dean*	
Mr *Gaffney*	
Ms *Giddings*	
Mr *McKim*	

It was resolved to the Affirmative.

10. On the Question that the Amendment proposed by Ms *Giddings* that a new dot-point be inserted at the start of clause 1.7 stating "The Committee finds that the Board is a relatively inexpensive model, considering that only the Chair and two community members of the Board are paid positions" be agreed to.

The Committee divided;

Ayes	**Noes**
Mr *Gaffney*	Mr *Barnett*
Ms *Giddings*	Mr *Dean*
Mr *McKim*	Mr *Mulder*

It was resolved in the Negative.

11. On the Amendment proposed by Mr *Barnett* that a new dot-point be inserted at the start of clause 1.7 stating as follows:

- "The Committee recommends that the Integrity Commission Board be reduced in size to three to include an independent Chair, the Auditor-General and the Ombudsman"

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Dean*
	Mr *Gaffney*
	Ms *Giddings*
	Mr *McKim*
	Mr *Mulder*

It was resolved in the Negative.

12. Amendment proposed by Mr *Gaffney* that the first dot-point in paragraph 1.8 be amended by deleting the words "Integrity Committee training" after "Participation in" and inserting instead "misconduct prevention workshops provided by the Integrity Commission should"

On the Question that the Amendment to the Amendment proposed by Mr *Mulder* to delete the word "provided" and insert instead "approved" be agreed to.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Dean*
Mr *Mulder*	Mr *Gaffney*

Ms *Giddings*
Mr *McKim*

It was resolved in the Negative.

On the Question that the original Amendment be agreed to

The Committee divided.

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Ms *Giddings*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

On the Question that the paragraph as amended stating "Participation in misconduct prevention workshops provided by the Integrity Commission should be compulsory during induction programs for employees commencing work at public sector agencies, and this participation is recorded on the person's personnel file" be agreed to.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Ms *Giddings*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

13. On the Question that the third dot-point in clause 1.9 of the draft report stating "This issue be considered as part of the five year review, and that the evidence received by the Committee be considered as part of that process" stand part of the report.

The Committee divided

Ayes	**Noes**
Mr *Mulder*	Mr *Barnett*
	Mr *Dean*
	Mr *Gaffney*
	Ms *Giddings*
	Mr *McKim*

It was resolved in the Negative.

14. On the Question that the Amendment proposed by Mr *Mulder* to paragraph 1.10, section titled "Confidentiality," first dot-point under "Recommendations" to delete the words "deemed appropriate by the Integrity Commission" and insert instead "unless the Integrity Commission deems there are exceptional circumstances."

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Dean*
Mr *Mulder*	Mr Gaffney
	Ms Giddings
	Mr McKim

It was resolved in the Negative.

15. On the Amendment proposed by Mr *McKim* in paragraph 1.10, section titled "Classification of Integrity Commission as a 'Law Enforcement Agency'", to insert a new dot point before the existing dot points as follows:

- "That the relevant legislation be amended to designate the Integrity Commission as a law enforcement agency as recommended by the Integrity Commission."

The Committee divided

Ayes	Noes
Mr *Gaffney*	Mr *Barnett*
Mr *McKim*	Mr *Dean*
	Ms *Giddings*
	Mr *Mulder*

It was resolved in the Negative.

16. On the Question proposed that the first dot-point under "Findings" in paragraph 1.10, section titled "Classification of Integrity Commission as a Law Enforcement Agency" stating "As there has been no evidence of systemic corruption in Tasmania, an extension of the powers of the Integrity Commission as a law enforcement agency is not required" stand part of the report.

The Committee divided

Ayes	Noes
Mr *Barnett*	Mr *McKim*
Mr *Dean*	
Mr *Gaffney*	
Ms *Giddings*	
Mr *Mulder*	

It was resolved in the Affirmative.

17. On the Question proposed that the first dot-point under "Recommendations" in paragraph 1.10, section titled "Classification of Integrity Commission as a Law Enforcement Agency" stating "It is unnecessary for the Integrity Commission to be classified as a law enforcement agency in the relevant legislation (save and except for legislation where they are already classified as such)." stand part of the Report.

The Committee divided.

Ayes	Noes
Mr *Barnett*	Mr *McKim*
Mr *Dean*	Mr *Gaffney*
Ms *Giddings*	
Mr *Mulder*	

It was resolved in the Affirmative.

18. On the Amendment proposed by Mr *McKim* in paragraph 1.10, section titled "Misconduct in Public Office" that a new dot point be inserted before the existing dot points under "Recommendations" as follows:

- "The Criminal Code Act 1924 (Tas) be amended to create an offence of misconduct in public office."

The Committee divided.

Ayes	Noes
Mr *McKim*	Mr *Barnett*
	Mr *Dean*
	Mr *Gaffney*
	Ms *Giddings*
	Mr *Mulder*

It was resolved in the Negative.

19. On the Amendment proposed by Mr *McKim* in paragraph 1.10, section titled "Misconduct in Public Office" that a new dot point be inserted before the existing dot points under "Recommendations" as follows:

- "The Criminal Code Act 1924 (Tas) be amended to align the definition of "public officer" with other Tasmanian legislation."

The Committee divided.

Ayes	Noes
Mr *McKim*	Mr *Barnett*
	Mr *Dean*
	Mr *Gaffney*
	Ms *Giddings*
	Mr *Mulder*

It was resolved in the Negative.

20. On the Question that the Amendment proposed by Mr *McKim* in paragraph 1.10, section titled "Misconduct in Public Office" that a new dot point be inserted before the existing dot points under "Recommendations" as follows:

    - "A review be undertaken of the relevant sections of the Criminal Code Act 1924 (Tas) relating to aiding and abetting misconduct in public office."

    The Committee divided.

Ayes	**Noes**
Mr *McKim*	Mr *Barnett* Mr *Dean* Mr *Gaffney* Ms *Giddings* Mr *Mulder*

    It was resolved in the Negative.

21. On the Question that the first dot-point under "Recommendations" in paragraph 1.10, section titled "Misconduct in Public Office" stating "The Committee recommends that: The Government review and report upon the recommendations made by the Integrity Commission relating to the Criminal Code Act 1924 (Tas), including:
    - The Criminal Code Act 1924 (Tas) be amended to create an offence of misconduct in public office.
    - The Criminal Code Act 1924 (Tas) be amended to align the definition of "public officer" with other Tasmanian legislation.
    - A review be undertaken of the relevant sections of the Criminal Code Act 1924 (Tas) relating to aiding and abetting misconduct in public office"

    stand part of the Report.

    The Committee divided

Ayes	**Noes**
Mr *Barnett* Mr *Dean* Mr *Gaffney* Ms *Giddings* Mr *McKim*	Mr *Mulder*

    It was resolved in the Affirmative.

22. On the Amendment proposed by Mr *Mulder* in paragraph 1.10, section titled "Offence of Misconduct in Public Office" to insert a new dot-point be inserted to follow the existing dot-points under "Findings" as follows:

    - "There is an absence of criteria for determining when there are 'reasonable grounds for terminating the public officer's appointment' in the definition of 'serious misconduct' under the Act."

    The Committee divided

Ayes	**Noes**
Mr *Gaffney* Mr *Mulder*	Mr *Barnett* Mr *Dean* Ms *Giddings*

    It was resolved in the Negative.

23. On the Question proposed that the first dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 1 be implemented" stand part of the Report.

    The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*

Mr *McKim*	Mr *Gaffney*
Mr *Mulder*	

It was resolved in the Affirmative.

24. On the Question proposed that the third dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 3 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *McKim*	Mr *Gaffney*
Mr *Mulder*	

It was resolved in the Affirmative.

25. On the Question proposed that the fifth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 5 be implemented" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

26. On the Question proposed that the seventh dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 7 be implemented" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *McKim*	Mr *Gaffney*
Mr *Mulder*	

It was resolved in the Affirmative.

27. On the Question proposed that the eighth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 8 be referred to the Government for further consideration" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	Mr *Mulder*
Mr *Gaffney*	

It was resolved in the Affirmative.

28. On the Question proposed that the tenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 10 be referred to the Government for further consideration" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	Mr *Mulder*
Mr *Gaffney*	

It was resolved in the Affirmative.

29. On the Question proposed that the eleventh dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 11 be implemented" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Gaffney*	Mr *Barnett*
Mr *McKim*	Mr *Dean*
Mr *Mulder*	

It was resolved in the Affirmative.

30. On the Question proposed that the twelfth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 12 not be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr Gaffney	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

31. On the Question proposed that the thirteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 13 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

32. On the Question proposed that the fourteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 14 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

33. On the Question proposed that the fifteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 15 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

34. On the Question proposed that the sixteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 16 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr McKim
Mr *Dean*	Mr *Mulder*
Mr *Gaffney*	

It was resolved in the Affirmative.

35. On the Question proposed that the eighteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 18 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

36. On the Question proposed that the nineteenth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 19 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	Mr *Mulder*
Mr *McKim*	

It was resolved in the Affirmative.

37. On the Question proposed that the twentieth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 20 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

38. On the Amendment proposed (Mr *McKim*) in the twenty-first dot-point under "Recommendations" in paragraph 1.11, to delete all the words after "the amendment in Item 21 be" and insert instead "implemented"

The Committee divided

Ayes	**Noes**
Mr *Gaffney*	Mr *Barnett*
Mr *McKim*	Mr *Dean*
	Mr *Mulder*

It was resolved in the Negative.

39. On the Question proposed that the twenty-first dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 21 be referred to the Government for further consideration."

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Mulder*
Mr *Dean*	
Mr *Gaffney*	
Mr *McKim*	

It was resolved in the Affirmative.

40. On the Question proposed that the twenty-second dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 22 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

41. On the Question proposed that the twenty-third dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 23 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

42. On the Question proposed that the twenty-fourth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 24 be implemented" stand part of the Report

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	Mr *Mulder*
Mr *Mckim*	

It was resolved in the Affirmative.

43. On the Question proposed that the twenty-fifth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 25 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

44. On the Question proposed that the twenty-sixth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 26 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	
Mr *Gaffney*	
Mr *Mulder*	

It was resolved in the Affirmative.

45. On the Question proposed that the twenty-seventh dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 27 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

46. On the Question proposed that the twenty-eighth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 28 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

47. On the Question proposed that the twenty-ninth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 29 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

48. On the Question proposed that the thirtieth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 30 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	
Mr *Gaffney*	
Mr *Mulder*	

It was resolved in the Affirmative.

49. On the Question proposed that the thirty-first dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 31 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

50. On the Question proposed that the thirty-third dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 33 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

51. On the Question proposed that the thirty-fourth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 34 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*

Mr *Gaffney*
Mr *McKim*
Mr *Mulder*

It was resolved in the Affirmative.

52. On the Question proposed that the thirty-fifth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 35 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	Mr *Mulder*
Mr *Gaffney*	

It was resolved in the Affirmative.

53. On the Question proposed that the thirty-sixth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 36 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

54. On the Question proposed that the thirty-seventh dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 37 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

55. On the Question proposed that the thirty-eighth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 38 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *Gaffney*
Mr *Dean*	Mr *McKim*
Mr *Mulder*	

It was resolved in the Affirmative.

56. On the Question proposed that the thirty-ninth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 39 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *McKim*	Mr *Gaffney*
Mr *Mulder*	

It was resolved in the Affirmative.

57. On the Question proposed that the fortieth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 40 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

58. On the Question proposed that the forty-first dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 41 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

59. On the Question proposed that the forty-second dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 42 be referred to the Government for further consideration" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Barnett*	Mr *McKim*
Mr *Dean*	
Mr *Gaffney*	
Mr *Mulder*	

It was resolved in the Affirmative.

60. On the Question proposed that the forty-third dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 43 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

61. On the Question proposed that the forty-fifth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 45 be implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Gaffney*	Mr *Barnett*
Mr *McKim*	Mr *Dean*
Mr *Mulder*	

It was resolved in the Affirmative.

62. On the Question proposed that the forty-sixth dot-point under "Recommendations" in paragraph 1.11 stating "the amendment in Item 1 (other legislation) implemented" stand part of the Report.

The Committee divided

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

It was resolved in the Affirmative.

63. On the Question proposed that the first dot-point under "Recommendations" in paragraph 1.12 stating "Amendments proposed by the Law Society as detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be referred to the Government for consideration" stand part of the Report.

The Committee divided.

Ayes	**Noes**
Mr *Barnett*	Mr *Mulder*
Mr *Dean*	
Mr *Gaffney*	
Mr *McKim*	

64. On the Question proposed that the second dot-point under "Recommendations" in paragraph 1.12 stating "Amendments proposed by the Law Society detailed in this section of the report (changes to the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs) be considered as part of the five year review, and that the evidence obtained by the Committee in relation to this issue be considered as part of that process, and that advice is sought from all relevant experts including the Solicitor-General in relation to these proposed changes" stand part of the Report.

The Committee divided.

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	Mr *Mulder*
Mr *McKim*	

65. On the Question proposed that the dot-point under "Findings" in paragraph 1.12 stating "The Committee finds that the Law Society has raised issues in respect of the right to silence, issuing of coercive notices, claims of privilege, right to legal representation and certification of costs that need further consideration" stand part of the Report.

The Committee divided.

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *Gaffney*	
Mr *McKim*	
Mr *Mulder*	

66. On the Amendment proposed (Mr *Mulder*) that a new dot-point be inserted to follow the existing dot-points under "recommendations" in paragraph 1.2 stating as follows:

- "The Integrity Commission be given the authority to assess, triage and monitor all investigations relating to allegations of serious public sector misconduct."

The Committee divided;

Ayes	**Noes**
Mr *Dean*	Mr *Barnett*
Mr *McKim*	Mr *Gaffney*
Mr *Mulder*	

SCHEDULE 2 – TECHNICAL AMENDMENTS PROPOSED BY INTEGRITY COMMISSION

Identified technical issues, *Integrity Commission Act 2009* (the Act)

	Section	Content	Technical issue	Integrity Committee Recommendation	Members' View	Committee Determination
1	S 4(1)	***'premises of a public authority*** means premises at which the business or operations of the public authority are conducted' [and see s 50 and s 72]	***premises of a public authority*** is used in s 50(1) in relation to an investigator's power to enter premises and in s 72(1) in relation to an inquiry officer's power to enter premises. Premises as defined in the *Search Warrants Act 1997* specifically refer to 'a place and a conveyance'. The failure of the Act to include in the definition of 'premises of a public authority' any reference to a vehicle, makes it uncertain whether a conveyance (vehicle) owned, leased or used by a public authority could be entered under s 50 or s 72. Business records, for example vehicle log books, can be held in a vehicle, and some public officers will use their agencies vehicle like an office – for example field officers.	Amend the definition of ***premises of a public authority***, s 4(1) to be consistent with the *Search Warrants Act 1997*, such that a conveyance (vehicle) owned, leased or used by a public authority could be entered under s 50 or s 72.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Ms *Giddings*, Mr *McKim*, Mr *Mulder* Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Gaffney.*	Recommend that the amendment be implemented.
2	s 16(3)	Delegations by the Board – ' Section 23AA(2), (3), (4), (5)	The reference to particular sections of the power to delegate in the *Acts Interpretation Act 1931*, provides	Amend s 16 to make it clear that all of s23AA of the *Acts Interpretation Act 1931*	All Members were in favor of referring this amendment to the	Recommend that the amendment be referred to the Government for

		and (8) of the *Acts Interpretation Act 1931* apply to a delegation made under subsection (1)'	uncertainty as to whether other sections of the *Acts Interpretation Act 1931*in relation to delegations apply – eg s 23AA(1), (6) and (7). It is not clear why only the sections referred to would be applicable. For example, s 23AA(6) of the *Acts Interpretation Act* permits a delegator to exercise a function or power notwithstanding the delegation. Currently the wording of s 16(3) of the Act makes it uncertain whether a delegator can rely on s 23AA(6).	applies.	Government for further consideration.	further consideration.
3	S 21	**Authorised persons** **(1)** The chief executive officer may make arrangements with the principal officer of any public authority for a public officer of that authority to be made available to undertake work on behalf of the Integrity Commission. **(2)** If a person is to be made available under subsection (1), the chief executive officer is to, by written notice, authorise the person to perform the functions or exercise the powers under this Act that are specified in the notice. **(3)** An arrangement made	The Commission has used s 21 Authorisations for a number of personnel undertaking work for the Commission, both within and outside of Tasmania. Initially it was thought that Authorisations should be made for Department of Justice IT staff and Supreme Court transcription staff, both of whom provide a service to the Commission [IT staff under a Service Level Agreement, and transcription staff on a fee for service basis]. Both IT and transcription staff have access to confidential material created or used by the Commission. The Department of Justice and the Commission have received advice that an Authorisation under s 21 can only be for the exercise of the Commission's functions or powers and that transcription of recordings or proceedings or the maintenance of the Commission's computer network is not in the performance or exercise of any statutory power or function.	Amend s 21(1) and (2) so that persons undertaking any work for the Commission, irrespective of whether they are exercising a power or function, can be Authorised.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Gaffney*.	Recommend that the amendment be implemented.

		under subsection (1) may allow the authorised person to remain an employee of the public authority, but to report to the chief executive officer or other person nominated by the chief executive officer in relation to the work being undertaken on behalf of the Integrity Commission. **(4)** At the request of the chief executive officer, the Commissioner of Police is to make available, in accordance with an agreement referred to in subsection (10), police officers to undertake investigations and assist with inquiries on behalf of the Integrity Commission. **(5)** The chief executive officer may make arrangements with a law enforcement authority (however described) of the Commonwealth or another State or a Territory for officers or	The issue that arises is the inability of the Commission to ensure that administrative work undertaken by persons who are not designated officers and employees [see s 20] and which supports the functions or powers of the Commission are not adequately able to retain appropriate confidentiality given the sensitive nature of the work undertaken. Section 21(1) refers to 'work' but s 21(2) effectively means the work is restricted to work undertaken by a person performing or exercising powers or functions of the Commission. Other jurisdictions have overcome this issue by requiring those undertaking work for the agency to swear an oath, which binds the person to the confidentiality obligations under the particular act. This should be read in conjunction with the limitations under s 94 & 95. See for example: S 35, 36 & 37 of the *Independent Broad Based Anti-Corruption Act 2011* (Vic) --- Section 21(4) and (5) limits the arrangements with either the Commissioner of Police or a law enforcement authority to complaints which are in investigation or before an Integrity Tribunal. This means that a s 21 Authorisation cannot be made under	--- Amend s 21(4) and (5) so that arrangements can be made with the Commissioner of Police or a law enforcement authority (in and outside of Tasmania) for officers or employees to be made available irrespective of whether the complaint is in assessment, or an own motion investigation, or an investigation, or an inquiry.		

		employees of that authority to be made available to undertake investigations and assist with inquiries on behalf of the Integrity Commission. **(6)** If a person is to be made available under subsection (4) or (5), the chief executive officer is to, by written notice, authorise the person to perform the functions or exercise the powers of an investigator or inquiry officer under this Act. **(7)** While undertaking work on behalf of the Integrity Commission, an authorised person who is a police officer continues to have the functions and powers of a police officer but reports to the chief executive officer, or other person nominated by the chief executive officer, in relation to the work being undertaken on behalf of the Integrity Commission. **(8)** Nothing in this section or the *Police*	s 21(4) or (5) if a complaint is in the assessment phase nor if there is an own motion investigation pursuant to s45 or 89. While s 21(1) might be used by 'making arrangements', it does not have the same force as s 21(4), which is directory to the Commissioner of Police and further, is limited to public authorities within Tasmania, so cannot be used in place of s 21(5). This is contrasted to interstate integrity entities who are not so limited, for example – ○ Ability to engage persons or bodies to perform services – s 17, *Police Integrity Act 2008* (Vic) ○ Ability to second or otherwise engage persons to assist the Commission – s181, *Corruption and Crime Commission Act 2003* (WA) ○ Ability to second persons – s 255 *Crime and Misconduct Act 2001*			

		Service Act 2003 requires a police officer who is made available under subsection (4) to report to, provide information to or take direction from the Commissioner of Police or any senior officer within the meaning of that Act. **(9)** The Commissioner of Police is to appoint, with or without restrictions, as a special constable any person made available under subsection (5) unless the Commissioner of Police lodges a written objection with the Chief Commissioner stating the grounds of the objection. **(10)** The Commissioner of Police and the chief executive officer are to enter into a written agreement concerning the provision of police officers to undertake investigations and assist with inquiries on behalf of the Integrity				

		Commission.				
4	S 26	**Report to Parliament** **(1)** By 30 November in each year the Joint Committee is to make a report of its proceedings under this Act and cause a copy of the report to be laid before both Houses of Parliament. **(2)** If the Joint Committee is unable to comply with subsection (1) because a House of Parliament is not sitting on 30 November in any year, the Joint Committee is to on or before that day, provide a copy of the report to the Clerk of the Legislative Council and the Clerk of the House of Assembly. **(3)** Upon presentation to the Clerk of the Legislative Council and the Clerk of the House of Assembly the report is taken to have been laid before each	The Act requires the JSC to report under the Act by 30 November each year. However, by s 11, the Commission is required to report on or before 31 October each year. The Commission's report is also a report under s 36 of the *State Service Act 2000*, so it is unlikely to be laid before Parliament much before that date. The one month turn-around is insufficient for the Committee to properly consider the Commission report (and any other report from an integrity entity) and then prepare its own. Amending this section to a later date (say, by 30 March in the following year) will permit the JSC to report in a more fulsome manner.	Amend either or both s 11 and s 26 so that there is sufficient time for the JSC to consider the report of each integrity entity before having to prepare its own report.	All Members were in favor of recommending that this amendment be implemented.	Recommend that the amendment be implemented.

		House of Parliament and ordered to be printed. **(4)** The Clerk of the Legislative Council and the Clerk of the House of Assembly are to cause a copy of the report to be laid before each House of Parliament within the first 3 sitting-days after receipt of the report.				
5	S 30 (a)	The chief executive officer is to – (a) monitor the operation of the Parliamentary disclosure of interests register, declarations of conflicts of interest register and any other register relating to the conduct of Members of Parliament; and (b) …	The Parliamentary disclosure of interests register is prescribed under Part 4 of the *Parliamentary (Disclosure of Interests) Act 1996*. The form of the register itself is the returns (both primary and ordinary) lodged by Members within the previous 8 years, filed in alphabetical order. Effectively it would appear that the obligation under the Act to monitor is an obligation to monitor the primary and ordinary returns of Members and the actual declarations of interest rather than the registers themselves. 'Monitor' is not defined in the Act, and in the absence of any other legislative mandate, the Commission is merely limited to observing critically whether the returns and other declarations comply with prescribed forms. Currently there is no mandate for the Commission to make any recommendations or to effect greater	Amend s 30(a) so that the actual returns and declarations are monitored rather than just the register itself, and to enable the CEO to make recommendations to either or both the individual Members and to the Clerk of each House of Parliament.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.

			transparency if that is required.			
6	S 32	**Public officers to be given education and training relating to ethical conduct** **(1)** The principal officer of a public authority is to ensure that public officers of the public authority are given appropriate education and training relating to ethical conduct. **(2)** In particular, the education and training must relate to – **(a)** the operation of this Act and any Act that relates to the conduct of the public officer; and **(b)** the application of ethical principles and obligations to public officers; and **(c)** the content of any code of conduct that applies to the public authority; and **(d)** the rights and obligations of public officers in relation to contraventions of any	Although the Act directs public authorities to given appropriate education and training on ethical conduct to public officers, there are no provisions requiring a public authority to report on whether this obligation is being undertaken. This is in direct contrast to other obligations on public authorities pursuant to legislation or Employer/Ministerial directions (noting that Employer/Ministerial directions may not apply to all public authorities as defined by the Act). See for example: *Right to Information Act 2009* s 53 – Reporting *Public Interest Disclosures Act 2006* s 86 – Annual reports by public body Employment Direction No 28 – Family Violence – Workplace arrangements and requirements. Reports to SSMO each year.	Amend s 32 to require public authorities to report each year on education and training in relation to ethical conduct.	All Members were in favor of this amendment being implemented.	Recommend that the amendment be implemented.

		code of conduct that applies to public officers.				
7	S 35(1)(d) & s 38(1)	'Recommend to the Board that the Board recommend to the Premier that a commission of inquiry be established under the *Commissions of Inquiry Act 1995* in relation to the matter' _____ **S 38(1)** **Actions of chief executive officer on receipt of assessment** **(1)** On receipt of a report from an assessor prepared under section 37, the chief executive officer is to make a determination – ….	The recommendation to the Board that there be a Commission of Inquiry can occur on receipt of a complaint (refer also to s 57(3) which was inserted in the last miscellaneous amendment to enable the Board to receive a recommendation under s 35(1)(d)), but if a complaint is accepted for assessment under s 35(1)(b), a recommendation to the Board about a commission of inquiry can only occur after the complaint has been assessed and then investigated. There is no apparent ability to recommend a commission of inquiry other than on immediate receipt and consideration of a complaint under s 35, or following a final investigation. However information may be uncovered during an assessment which would indicate that a Commission of Inquiry be immediately recommended to the Board.	Amend the Act so that the CEO can recommend to the Board that a commission of inquiry be established at any stage of the complaint process, rather than wait until completion of the process. This may involve consequential amendments to s35, 38, 57 and 58.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Gaffney*.	Recommend that the amendment be implemented.
8	S 35(2)	**'**If the chief executive officer accepts a complaint for assessment, the chief	This appears inconsistent with and to limit the activities of the assessor when contrasted with s 37, where an assessor prepares a report with	Amend s 35(2) to remove the inconsistency with s 37, and the limitation on an assessor to only assess a complaint for determination of accepting	Members in favor of recommending that the amendment be	Recommend that the amendment be referred to the Government for

		executive officer is to appoint an assessor to assess the complaint as to whether the complaint should be accepted for investigation'	recommendations which include dismissal, referral or accepting for investigation. In making the recommendations to the CEO under s 37, the assessor is not confined to assessing a complaint to determine whether it should be investigated.	for investigation.	implemented: Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Gaffney*, Ms *Giddings*. Members in favor of recommending that the amendment not be implemented: Mr *Mulder*.	further consideration.
9	S 35(1)(c) & s 38(1)(b) – (f) inclusive & ss 39 – 43 inclusive	**Referral of complaints** **S 35(1)** On receipt of a complaint, the chief executive officer may – … **(c)** refer the complaint to an appropriate person for action; or … **S 38(1)** On receipt of a report from an assessor prepared	The Commission is able to exercise its powers under Part 6 (ie the power to produce documents in s 47) when a complaint is retained for assessment or investigation. However, the Commission has formed the view, that once a complaint is referred to a person or other entity for action, the Commission exhausts its powers with respect to that complaint. This means that if action taken by the referred person/entity is inadequate, or uncovers other matters which should be investigated by the Commission, the Commission has no jurisdiction to deal with the complaint again.	Amend Part 5 and Part 6 so that the Commission retains jurisdiction over a complaint, even after referral to an appropriate person or entity for action, such jurisdiction to include the use of powers.	n/a	n/a This issue is already covered in the Report.

		under section 37, the chief executive officer is to make a determination – … (b) to refer the complaint to which the report relates, any relevant material and the report to any relevant public authority with recommendations for investigation and action; or (c) to refer the complaint to which the report relates, any relevant material and the report to an appropriate integrity entity with recommendations for investigation and action; or (d) to refer the complaint to which the report relates, any relevant material and the report to an appropriate Parliamentary integrity entity; or (e) to refer the complaint to which the report relates, any relevant material and	The Commission can seek progress reports, monitor or audit the referred complaint, but in doing so, cannot use its powers under Part 6. By way of example, in the past, the Commission has audited the investigation of a referred complaint, and made recommendations of further action which should occur, which recommendations include obtaining further evidence by the use of powers. However the Commission is reliant on the agency to make a new complaint, or must seek an own motion from the Board in order to enliven its jurisdiction again, all of which delays resolution of the complaint. It is preferable that the Commission retain jurisdiction throughout the referral, until resolution of the complaint.			

		the report to the Commissioner of Police with a recommendation for investigation; or (f) to refer the complaint to which the report relates, any relevant material and the report to any person who the chief executive officer considers appropriate for action; or				
10	S 37(1)	'On completion of an assessment <u>or review</u> of a complaint, the assessor is to prepare a report of his or her assessment and forward that report to the chief executive officer'	The reference to a 'review' by an assessor in s 37 is the only time a review is mentioned, in the context of an assessment of a complaint. It is confusing having regard to the use of the term 'review' in the definition of 'audit' in s 4(1), and the further use of the term 'review' in s 88(2)(a) which refers to the Commissioner of Police giving reasonable assistance to the Commission to undertake a review. Further, it is noted that s 35(2) confines the actions of the CEO to accepting a complaint for assessment and the appointment of an assessor to an assessment, both actions without reference to a 'review of a complaint'.	Amend s 35 to enable the CEO, on receipt of a complaint to 'review a complaint', and to appoint an assessor to 'review a complaint', or alternatively amend the reference to 'review' in s 37, and include a definition to reduce confusion as to an assessor's functions and powers.	Members in favor of recommending that the amendment be implemented: Mr *McKim,* Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr Barnett, Mr *Dean*, Mr *Gaffney*, Ms *Giddings*.	Recommend that the amendment be referred to the Government for further consideration.
11	S 37(2)(e)	**'**The report of the assessor is to recommend that the	This section is inconsistent with s 38(1)(e) in that it appears to limit a recommendation by the assessor to	Amend s37(2)(e) to enable a referral to the Commissioner of Police may also be recommended where a complaint	Members in favor of recommending that the amendment be	Recommend that the amendment be

		complaint – … **(e)** be referred to the Commissioner of Police for investigation if the assessor considers a crime or other offence may have been committed; or …'	refer a complaint to the Commissioner of Police to a situation where a crime or offence may have been committed. However, a referral to the Commissioner of Police may need to be recommended where a complaint involves a police officer, but no crime or other offence is apparent. The wording also appears inconsistent with the outcome of a referral under s 42.	involves a police officer, but no crime or other offence is apparent.	implemented: Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett,* Mr *Dean*.	implemented.
12	S 38 (1) (b)(c)(d)(e) & (f)	'to refer the complaint to which the report relates, any relevant material and the report…'	'The report' referred to is s 38 is the report prepared by an assessor under s 37. It is an internally generated document which frequently contains sensitive information. Providing a copy of the assessor's report may compromise the evidence referred to in the report, particularly if the misconduct is ongoing. The reference material provided by the Commission should be discretionary such that a copy of the actual written complaint, and the assessor's report can be withheld if deemed appropriate by the CEO. Accordingly only relevant material should be referred by the Commission.	Amend s 38 to make it clear that the CEO does not have to refer the assessor's report to the agency but, rather, is only required to refer material relevant to the misconduct allegations and the Commission's assessment of those allegations.	Members in favor of recommending that the amendment be implemented: Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*. Members in favor of recommending that the amendment not be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *Mulder*.	Recommend that the amendment not be implemented.

13	S 38(2)	'The chief executive officer is to give written notice of his or her determination under subsection (1) to the principal officer of any relevant public authority and may…'	The CEO's determination under subsection (1) includes dismissal of a complaint, or that the Commission investigate the complaint. While the dismissal of a complaint may be information which assists a public authority to build capacity, written notification of a determination to investigate may prejudice or compromise the investigation, notwithstanding the ability to treat the notice as a confidential document. However the use of the word 'is' is directory, instead of enabling the CEO to use discretion. This section should be contrasted with s 44(2) where written notice of the determination to investigate is discretionary.	Amend s 38 so that it is consistent with s 44 such that written notice of the CEO's determination is discretionary.	Members in favor of recommending that the amendment be implemented: Mr *McKim*, Mr *Gaffney*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Ms *Giddings*, Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.
14	S 39(2)	'If a complaint is referred to a relevant public authority under section 38(1)(b), the chief executive officer is to notify the principal officer of that public authority in writing that the chief executive officer is to be informed of the outcome of the investigation, including any action taken, or to be taken, by the public authority. **(2)** The chief executive officer may	On referral the Commission is entitled to seek progress reports, or monitor the conduct of the investigation, or audit a completed investigation conducted by the public authority. 'Audit' includes to examine, investigate, inspect and review [s 4(1)]. The use of the word 'or' may have the effect of restricting the Commission to one function after referral, however there are complaints where the Commission may require progress reports and monitor the investigation while it is ongoing, and also seek to audit the investigation once completed. Section 39(2) only enables the Commission to monitor the 'conduct of	Amend s39 so that the language is consistent with s 42 & 43, to enable the Commission to monitor the investigation rather than the 'conduct of the investigation'. In addition an amendment to s 39 should remove any possible limitations imposed by the use of the word 'or' on the actions of the CEO to only obtain progress reports or monitor or audit.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.

		also – **(a)** require the relevant public authority to provide progress reports on the investigation at such times as the chief executive officer considers necessary; or **(b)** monitor the conduct of the investigation; or **(c)** audit the investigation after it has been completed'	the investigation' – contrasted with s 42 and s 43 which enable the Commission to monitor the investigation, rather than the conduct.			
15	S 42(2) & 43(2)	The chief executive officer may also – **(a)** require the Commissioner of Police [or the person] to provide progress reports on the investigation at such times as the chief executive officer considers necessary; or **(b)** monitor the investigation; or **(c)** audit the investigation after it has been completed.	See previous point – the same issues with the use of the word 'or' arise, in that it may have the effect of restricting the power of the CEO to one function after referral, rather than a combination of actions from the referral.	See previous point – amend s 42 and 43 to remove any possible limitations imposed by the use of the word 'or' on the actions of the CEO. .	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett.*	Recommend that the amendment be implemented.

16	S 44(2)	'If a determination to investigate a complaint is made, the chief executive officer may, if he or she considers it appropriate, give written notice to – **(a)** the principal officer of any relevant public authority; and **(b)** the complainant; and **(c)** any public officer who is the subject of the complaint – <u>that an investigator has been appointed to investigate the complaint</u>'	This section, although discretionary, appears unnecessary given the obligations (both directory and discretionary) under s 38(2) [noting the recommendations in relation to s 38]. An investigator must be appointed under s 44(1) but it serves no purpose to advise that 'an investigator has been appointed to investigate the complaint', given that notification has been given of the determination to conduct an investigation. As per the observations regarding s 38, notice of a determination to move to an investigation should be discretionary, as there may be good reasons why the Commission's activities around a complaint should be kept confidential – particularly if the misconduct alleged is systemic or ongoing.	Amend s 44 so that it is consistent with s 38 and that any discretionary notice by the Commission about a determination is comprised of relevant material.	Members in favor of recommending that the amendment be implemented: Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Gaffney*, Ms *Giddings*. Members in favor of recommending that the amendment not be implemented: Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.
17	S 46(1)(c) S 55(1)	**S 46 Procedure on investigation** **(1)** Subject to this Act and any directions issued by the chief executive officer under subsection (4), an investigator – **(a)** may conduct an investigation in any lawful manner he or she considers appropriate; and	In conducting an investigation, an investigator and an assessor exercising the powers of an investigator pursuant to s 35(4), are required to observe the rules of procedural fairness. What is required to comply with this obligation will depend on the facts of each matter. However, the investigator/assessor must have observed the rules of procedural fairness by the time s/he reports on the findings to the chief executive officer. This means that where this is an adverse factual finding by the investigator/assessor, the person	Amend s 46 with respect to the mandatory obligations to observe the rules of procedural fairness during the investigation/assessment stage of a complaint.	All Members were in favor of this amendment being implemented.	Recommend that the amendment be implemented.

		(b) may obtain information from any persons in any lawful manner he or she considers appropriate; and **(c)** must observe the rules of procedural fairness; and **(d)** may make any investigations he or she considers appropriate. **55. Investigator's report** **(1)** On completion of an investigation, the investigator is to prepare a report of his or her findings for the chief executive officer. **(2)** The chief executive officer is to submit a report of the investigation to the Board.	must have been given the opportunity to respond to the adverse material or finding. The time for doing this will generally be at the time the investigator/assessor is finalising the report of findings under s 55(1). Where a person is being given an opportunity to respond, the investigator/assessor has no means of attaching confidentiality obligations over the information forwarded to a person for the purposes of procedural fairness. The obligation to observe the rules of procedural fairness at the investigator stage means that adverse factual material gathered by the Commission will be put to the relevant person. As soon as that is done, the opportunity to maintain a covert investigation is lost. This may compromise the ability of the Commission to gather further evidence, particularly if the Board makes a decision under s 58(2)(d) to require further investigation. In that event, any further adverse material or findings must again be put to the person concerned. The chief executive officer provides a person with further opportunity to comment, by reason of s 56, but a s 98 confidentiality notice can apply to the draft report, thereby maintaining confidentiality. The obligations for procedural fairness during the investigation/assessment stage can be contrasted with other integrity agencies.			

			See for example: *Law Enforcement Integrity Commissioner Act 2006* (Cwth) s 51 – Opportunity to be heard prior to publishing a report with a critical finding, but not if it will compromise the effectiveness of the investigation or action to be taken. *Independent Commission Against Corruption Act 1988* (NSW) ss 30 – 39 Compulsory examinations and public inquiries. The Commission may, but is not required to advise a person required to attend a compulsory examination of any findings it has made or opinions it has formed. *Corruption and Crime Commission Act 2003* (WA) s 36 Person investigated can be advised of the outcome of the investigation, if amongst other things, the Commission considers that giving the information to the person is in the public interest; s 86 where the person who is subject to an adverse report is entitled to make representations before the report is tabled.			
18	S 47	'In conducting an investigation under section 46(1), the investigator, by written notice given to a person, may require or direct the person to do any or all of the	A notice under s 47 is a coercive notice with significant implications for a person who is served with that notice. Whilst the Commission has developed internal procedures around the issue of coercive notices, it is considered that legislative amendment should occur such that the notices are issued by the CEO, rather than an investigator (who	Amend s 47 so that notices are issued by the CEO consistent with s 50 where an authorisation must be from the CEO. Having s 47 notices issued by the CEO is consistent with the exercise of similar powers in other integrity jurisdictions.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*.	Recommend that the amendment be implemented.

		following…'	may or may not be an employee of the Commission). This seems to be a sensible safeguard of the use of significant powers, consistent with the issue of coercive notices in other integrity jurisdictions. See for example: *Corruption and Crime Commission Act 2003* (WA) s95 ('The Commission') *Crime and Misconduct Act 2001*(Qld) s72 (The chairperson) *Law Enforcement Integrity Commissioner Act 2006* (Cwth) ('The Integrity Commissioner')		Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	
19	S 49	'A person required or directed to give evidence or answer questions as part of an investigation may be represented by a legal practitioner or other agent'	The wording of s 49 fails to take into account that an agent (or a legal practitioner) representing the person under direction, may themselves be the subject of a complaint or investigation. The Commission has had direct experience where two people who were served with notices each requested representation by the same agent, who was implicated in the original complaint. Other integrity jurisdictions enable the agency to refuse representation by someone who is involved or otherwise compromised. See for example: *Corruption and Crime Commission Act 2003* (WA) s142(4) *Police Integrity Act 2008* s76(2)	Amend s 49 in line with other integrity entities, so the Commission can refuse representation by a particular person (whether as a legal practitioner or other agent) who is already involved or suspected of being involved in an investigation.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Mulder*.	Recommend that the amendment be implemented.

20	S 51	**(1)** For the purpose of conducting an investigation, an investigator may apply to a magistrate for a warrant to enter premises. **(2)** The magistrate may, on application made under this section, issue a search warrant to an investigator if the investigator satisfies the magistrate that there are reasonable grounds to suspect that material relevant to the investigation is located at the premises. **(3)** A search warrant authorises an investigator and any person assisting an investigator – **(a)** to enter the premises specified in the warrant at the time or within the period specified in the warrant; and **(b)** to exercise the powers in section 52.	Inconsistent language has been used between s 51(3)(b) and s 51(4)(a) as the powers under the Part are not limited to the powers of an investigator under s 52. And see: *Search Warrants Act 1997* s6	Amend s 51 so that the powers authorised by a search warrant are consistent with those stated in the warrant.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Gaffney*.	Recommend that the amendment be implemented.

		(4) The warrant must state – **(a)** that the investigator and any person assisting the investigator may, with any necessary force, enter the premises and exercise the investigator's powers under this Part; and **(b)** the reason for which the warrant is issued; and **(c)** the hours when the premises may be entered; and **(d)** the date, within 28 days after the day of the warrant's issue, of the warrant's expiry. **(5)** . . . . . . **(6)** Except as provided in this section, the provisions in respect of search warrants under the *Search Warrants Act 1997* extend and apply to warrants issued under this section.				
21	S 52	**(1)** An investigator or any person	Section 98 of the Act imposes obligations of confidentiality on persons	Amend s 52 so that the confidentiality provisions under s 98 will extend to	Members in favor of recommending that	Recommend that the amendment be referred

			assisting an investigator who enters premises under this Part may exercise any or all of the following powers: … (j) to require or direct any person who is on the premises to do any of the following: (i) to state his or her full name, date of birth and address; (ii) to answer (orally or in writing) questions asked by the investigator relevant to the investigation; (iii) to produce any record, information,	to whom certain notices under the Act have been served (for example, notices under s 47). The obligations of confidentiality are a means of not only keeping a complaint confidential, but of protecting a person required or directed to respond to the Commission. The s 98 confidentiality provisions do not extend to persons on premises if those premises are entered under s 50 or s 51. Although a search of premises would usually be an overt stage of an investigation process, it can occur during a covert stage. Persons at the premises who are directed or required to respond to an investigator, or person assisting an investigator, should have the protections afforded by the confidentiality provisions of s 98.	persons on premises and afford them the protection associated with confidentiality if they are required or directed to respond to a Commission officer.	the amendment be implemented: Mr *Gaffney*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Ms *Giddings*. Members in favor of recommending that the amendment not be implemented: Mr *Mulder*.	to the Government for further consideration.

		material or thing; (iv) to operate equipment or facilities on the premises for a purpose relevant to the investigation; …				
22	S 52(3)	**Powers of investigator while on premises** … **(3)** If an investigator takes anything away from the premises, the investigator must <u>issue a receipt in a form approved by the Board</u> and – **(a)** if the occupier or a person apparently responsible to the occupier is present, give it to him or her; or **(b)** otherwise, leave it on the premises in an envelope addressed to the occupier.	The requirement to issue a receipt in a form approved by the Board seems inconsistent with Part 6 of the Act. For example during an investigation the power to enter premises under s 50 is only available with a written notice of authorisation from the chief executive officer and similarly, the chief executive officer must approve an application for use of a surveillance device under s 53. Furthermore, the form of a receipt is an operational matter, with such matters properly vested in the chief executive officer, in accordance with s 18 of the Act.	Amend s 52 to be consistent with the remainder of Part 6, such that the form of a receipt is approved by the chief executive officer.	Members in favor of recommending that the amendment be implemented: Mr *Gaffney,* Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Ms *Giddings*, Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.

23	S 52(4) [and s 51(4)(a)]	**52. Powers of investigator while on premises** **(4)**An investigator and any assistants authorised to enter premises under a search warrant may use such force as is reasonably necessary for the purpose of entering the premises and conducting the search. ……. **51. Search warrants** **(4)** The warrant must state – **(a)** that the investigator and any person assisting the investigator may, with any necessary force, enter the premises and exercise the investigator's powers under this Part;	The wording of s 52(4) is inconsistent with s 51(4)(a), which on its face indicates that necessary force can be used to exercise powers under Part 6.	Amend s 52 with respect to the use of force so that the language of the force necessary and its purpose is consistent with the use of force in s 51 for the exercise of powers under Part 6.	Members in favor of recommending that the amendment be implemented: Mr *Gaffney,* Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Ms *Giddings*, Mr *Mulder*.	Recommend that this amendment be referred to the Government for further consideration.
24	S 53(1)	In the case of a complaint of serious misconduct, an investigator with the approval of the chief executive officer may apply for a warrant under Part 2 of the	A warrant can only be applied for if a complaint under s 33 has been received, which means that the Commission would be unable to apply for a warrant under s 53 if there was an own motion investigation, either under s 45 or s 89, even if the misconduct was	Amend s 53 to enable a warrant to be applied for under Part 2 of the *Police Powers (Surveillance Devices) Act 2006* where there is a complaint, as well as an own motion investigation under s 45 or s 89, subject to the own motion investigation concerning serious	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*.	Recommend that the amendment be implemented.

		Police Powers (Surveillance Devices) Act 2006 …	serious.	misconduct.	Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Mulder*.	
25	S 53(2)	Division 3 of Part 5 of the *Police Powers (Surveillance Devices) Act 2006* applies to the Integrity Commission as if the Integrity Commission were a law enforcement agency within the meaning of that Act.	Section 53(2) of the Act makes the Commission's records in relation to surveillance devices warrants subject to inspection by the Ombudsman as if the Commission was a law enforcement agency under the Police Powers Act, but does not impose any obligation on the Commission to maintain the same records as law enforcement agencies are required to do. The Commission, having consulted with the Ombudsman, has written to the Minister for Justice raising the issue. The same issue is replicated in s 75, which enables an application for a surveillance device during an inquiry.	The issue of appropriate amendments to s 53 and/ or the *Police Powers (Surveillance Devices) Act 2006* was raised with the Department of Justice for consideration in September 2012. Consider similar amendments to s 75.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett.*	Recommend that the amendment be implemented.
26	S 54	**Offences relating to investigations** **(1)** A person who, without reasonable excuse, fails to comply with a requirement or direction under section 47 within 14	Subsections (1) and (3) are restricted to s 47 matters involving an investigator – the Commission considers that those subsections would be more appropriately situated within section 47, consistent with other provisions within the Act – see s 52. Subsection (2) does not protect a	Amend s 54 to make it clear that the threat of violence or other detriment is included as an offence. In addition the offences should extend to any matter related to a complaint, be it during an investigation or assessment (where an assessor may exercise the powers of an investigator), and	Members in favor of recommending that the amendment be implemented: Ms *Giddings*, Mr *McKim*. Members in favor of	Recommend that the amendment be referred to the Government for consideration.

		days of receiving it commits an offence. Penalty: Fine not exceeding 5 000 penalty units. **(2)** A person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage to another person for or on account of that other person having given evidence to an investigator or produced or surrendered any record, information, material or thing to an investigator. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year. **(3)** A person must not obstruct or hinder an investigator or any person assisting an investigator in the performance of a function or the exercise of a power	person from being threatened (by violence or other way) on account of providing information to an investigator. Further, it restricts protection to matters concerning an investigator, rather than production to a person assisting an investigator, or to the Commission itself. For example, if a person is directed by a person assisting an investigator under s 52, to answer questions, and is subsequently threatened by another person (who may or may not be a public officer) for complying with that direction, there is no applicable offence in the Act. In the current format, it would not create an offence relating to an assessment, notwithstanding that an assessor can exercise the powers of an investigator pursuant to s 35(4). And see: *Independent Commission Against Corruption Act 1988* (NSW) s50 ('…because a person is assisting the Commission, the safety of the person or any other person may be prejudiced or the person or any other person may be subject to intimidation or harassment…') *Public Interest Disclosures Act 2002* s19 ('…the person takes or threatens to take the action…') *Corruption and Crime Commission Act 2003* (WA) s175 -	irrespective of whether it involves an investigator or a person assisting an investigator or assessor (including a person authorised under s 21).	recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Gaffney*, Mr *Mulder*.	

		under section 47. Penalty: Fine not exceeding 2 000 penalty units.	('…threaten to prejudice the safety…')			
27	s 55(1)	On completion of an investigation, the investigator is to prepare a report of his or her findings for the chief executive officer.	The investigator should prepare a report of the investigation, which sets out the factual material obtained by the investigation, rather than findings (which suggests that judgments and decisions arising from factual material). The investigator is not the appropriate person to be making such decisions or judgments.	Amend s 55 to provide that the investigator should prepare a report of the investigation to the CEO.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.
28	S 56(1) & 57(1)	**56. Opportunity to provide comment on report** **(1)** Before finalising any report for submission to the Board, the chief executive officer may, if he or she considers it appropriate, give a draft of the report to – **(a)** the principal officer	Under s 57(1), the 'report of the investigation' includes the investigator's report under s 55. Accordingly, a draft report of the CEO referred to in s 56(1) will include the investigator's report. It may not be appropriate for the entirety of the investigator's report to go to the relevant public authority – for example the report may cover the actions of a number of authorities and may not be appropriate to reveal the contents of matters concerning one agency (before it has had a chance to	Amend s 56(1) so that the CEO need only provide relevant information on the outcome of the investigation to public authorities etc & 57 so that the CEO is required to provide to the Board a report on the outcome of the investigation (rather than the investigator's report itself) and has capacity to make observations and recommendations on the investigation and future action..	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the	Recommend that the amendment be implemented.

		of the relevant public authority; and **(b)** the public officer who is the subject of the investigation; and **(c)** any other person who in the chief executive officer's opinion has a special interest in the report. **(2)** A notice may be attached to a draft of a report specifying that the draft of the report is a confidential document. **(3)** A person referred to in subsection (1)(a), (b) or (c) may give the chief executive officer written submissions or comments in relation to the draft of the report within such time and in such a manner as the chief executive officer directs. **(4)** The chief executive officer must include in his or her report prepared under section 57 any submissions or comments given to the chief executive officer under subsection (3) or	comment) to another agency. Similarly with respect to any public officer or officers, there could be privacy concerns. There may also be a range of confidential material in the investigator's report that need not be seen by the public authority or public officer concerned (eg evidence of collateral misconduct by others outside of authority/ongoing investigations). The investigator's report is one piece of material that will be relevant to the CEO's recommendation to the Board. It is however most accurately described as a working or operational document and may be of considerable length and detail. As the CEO has responsibility for making the recommendation to the Board, the CEO should only be legislatively required to report to the Board on the outcome of the investigation (the Board can always require the CEO to produce the full investigation report if it wants it) and any submissions in response to the draft and a recommendation. The report of the chief executive officer under s 57 appears limited when compared with the investigator's report under s 55, which refers to a report of findings. The chief executive officer is not empowered to make any findings nor observations beyond the recommendations under ss 57(2).		Government for further consideration: Mr *Barnett*.	

		a fair summary of those submissions or comments. **(5)** Section 98 applies to a notice under subsection (2) if the notice provides that the draft of the report is a confidential document. …… **57. Report by chief executive officer** **(1)**The chief executive officer is to give to the Board a report of the investigation that includes – (a) the investigator's report; and (b) submissions or comments given under section 56; and (c) a recommendation referred to in subsection (2).				
29	S 56(2) & (5)	**(2)** A notice may be attached to a draft of a report specifying that the draft of the report is a confidential	Although the notice in subsection (2) provides that the draft report is confidential, the provisions of s 98 only apply to the notice – not to the draft report, or to any relevant material accompanying the report. By way of	Amend s 56 to make it clear that the obligations of confidentiality imposed by s 98 apply to the draft report, not just the notice accompanying the report. Consequential amendment may need to be considered for s 98 so that it applies	Members in favor of recommending that the amendment be implemented: Ms *Giddings*, Mr	Recommend that the amendment be referred to the Government for further consideration.

		document. **(5)** Section 98 applies to a notice under subsection (2) if the notice provides that the draft of the report is a confidential document.	contrast, s 47 documents are themselves notices, such that s 98 provisions re confidentiality actually apply to the notice to produce, or attend or to give evidence [and see also s 35(5) which has similar wording].	not just to the notice, but to any relevant documentation the notice is attached to. (And see the discussion re s 98)	*Gaffney*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Mulder*.	
30	S 57(2)(b) & s 58(2)(b)	**57. Report by chief executive officer** **(2)** The chief executive officer is to recommend – **(b)** that the report of any findings and any other information obtained in the conduct of the investigation be referred to – …… **58. Determination of Board** **(2)** The Board may – **(b)** refer the report of the investigation and any information obtained in the conduct of the investigation to –	The 'report of any findings' is the investigator's report under s 55(1). The investigator's report is an internal working document (see discussion above at point 24). The material accompanying a referral should be limited to any allegations of misconduct (either from the complaint or the investigation process) and other relevant material (transcripts, other documents, etc). It also appears inconsistent with the fact the CEO has a discretion to seek comment on the CEO draft report prior to submission to the Board (s 56(1)). This comment may lead to changes to findings or recommendations that are inevitably matters for the Board's decision. The current reference to the CEO recommending the referral of the 'investigator's report' is also inconsistent with s 58(2)(b) by which the Board may refer 'report of the investigation' which is the CEO's report under s 57, for referral. Any determination of the Board to refer that is therefore immediately contrary to the CEO's recommendation for a referral to	Amend s 57 and 58 so that the recommendation which can be made by the CEO to the Board and any decision by the Board, about what material is referred is discretionary (for example, that only certain material arising from the investigation is referred for action to some agencies but not to others). In particular, the investigator's report should not automatically be referred nor should any recommendation by the CEO to the Board form part of the material that might be referred.	Members in favor of recommending that the amendment be implemented: Mr *McKim.* Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *Mulder.*	Recommend that the amendment be referred to the Government for further consideration.

			include the investigator's report. There may be an issue if the recommendation by the chief executive officer is not the same as the determination of the Board. In that circumstance, it may be inappropriate for the Board to refer the CEO report of the investigation to a public officer, or authority when it has a different recommendation to the Board.			
31	S 58(2)(a)	**(2)** The Board may – **(a)** dismiss the complaint; or	The investigation considered by the Board may be an own motion investigation commenced under s 45 or 89 – the inconsistent language means that an own motion investigation can't be dismissed after consideration by the Board, but it also provides no other closure for an own motion investigation if the outcome is not to continue – that is, if the own motion investigation will not be referred or further investigated, nor proceed to an inquiry.	Amend s 58(2) to enable the Board to both dismiss a complaint and/or cease an own motion investigation where further referral, investigation or an inquiry is not appropriate.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.
32	S 68	**Directions conference** (1) Before an inquiry is held, an Integrity Tribunal may conduct a directions conference in relation	Substantial fines apply to all other offences under the Act, accordingly, the 10 penalty units applicable here, seems inconsistent with the remainder of the Act – see for example: ○ S 52(5) – 2 000 penalty units ○ S 54(1) – 5 000 penalty units ○ S 74(5) – 2 000 penalty units	Amend s 68 so that the penalty is consistent with other penalties in the Act.	All Members were in favor of recommending that the amendment be referred to the Government for further consideration.	Recommend that the amendment be referred to the Government for further consideration.

		to the inquiry. (2) An Integrity Tribunal, by written notice, may require or direct any person to – (a) attend a directions conference; and (b) provide and produce any specified record, information, material or thing at a directions conference. (3) A person, without reasonable excuse, must not fail to comply with a requirement or direction notified under subsection (2). Penalty: Fine not exceeding 10 penalty units. (4) A directions conference is to be held in private. (5) An Integrity Tribunal may give any directions it considers necessary to ensure that the inquiry is conducted fairly and expeditiously. (6) An Integrity Tribunal may adjourn a	○ S 80(5) – 5 000 penalty units			

		directions conference from place to place and from time to time.				
33	S 74(1)	**Powers of inquiry officer while on premises** **(1)** An inquiry officer who enters premises under this Part may exercise any or all of the following powers: …	Section 74 replicates the powers of an investigator while on premises under s 52, but limits the powers to an inquiry officer (an inquiry officer is defined under s 4). However s 73 which permits an inquiry officer to apply to a magistrate for a warrant to enter premises refers to the inquiry officer 'and any person assisting the inquiry officer' – s 73(4)(a). In particular, s 73 (4)(a) requires the warrant to state that a person assisting the inquiry officer may exercise the inquiry officer's powers. This is consistent with the language in s 52 which also refers to a person assisting. For consistency, a person named in the warrant under s 73 as assisting an inquiry officer should also have the ability to exercise the powers under s 74, noting that they are authorised to use reasonable force under s 74(4) as an 'assistant'.	Amend s 74(1) and (2) to enable persons assisting an inquiry officer to exercise the relevant powers, in accordance with the terms of the warrant applied for under s 73.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Ms *Giddings*.	Recommend that the amendment be implemented.
34	S 74(3)	**Powers of inquiry officer while on premises** … (3) If an inquiry officer takes anything away from the premises, the inquiry officer must issue a	Under Part 7 of the Act, it is the Board that has the power to convene an Integrity Tribunal and the Chief Commissioner who issues directions as to the procedure for conducting the inquiry. The power to enter premises and apply for search warrants requires authorisation or approval from the Chief Commissioner. However, the Integrity Commission, as	Amend s 74(3) so that the receipt is in a form approved by the chief executive officer, or the Chief Commissioner or the relevant Integrity Tribunal.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of	Recommend that the amendment be implemented.

		receipt in a form approved by the Integrity Commission and – …	referred to in s 74 is defined by s 7 to include the staff, and the chief executive officer amongst others. For consistency with this Part, the form should be approved by the chief executive officer (who has responsibility for operational matters pursuant to s 18), or the Chief Commissioner or an Integrity Tribunal.		recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	
35	S 74(1)	**(j)** require or direct any person who is on the premises to do any or all of the following: **(i)** to state his or her full name, date of birth and address; **(ii)** to answer (orally or in writing) questions asked by the inquiry officer relevant to the inquiry; **(iii)** to produce any record, information, material or thing; **(iv)** to operate equipment or facilities on the premises for a purpose relevant to the inquiry;	Section 98 of the Act imposes obligations of confidentiality on persons to whom certain notices under the Act have been served (for example, notices under s 47 and 65). The obligations of confidentiality are a means of not only keeping a complaint confidential, but of protecting a person required or directed to respond to the Commission or to a Tribunal. The s 98 confidentiality provisions do not extend to persons on premises if those premises are entered under s 74. Although a search of premises would usually be an overt stage of an inquiry process, it can occur during a covert stage. Persons at the premises who are directed or required to respond to an investigator, or person assisting an investigator, should have the protections afforded by the confidentiality provisions of s 98 when considered necessary.	Amend s 74 so that the confidentiality provisions under s 98 will extend to persons on premises and afford them the protection associated with confidentiality if they are required or directed to respond to an inquiry officer.	Members in favor of recommending that the amendment be implemented: Mr *Gaffney*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Ms *Giddings*. Members in favor of recommending that the amendment not be implemented: Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.

		(v) to provide access (free of charge) to photocopying equipment on the premises the inquiry officer reasonably requires to enable the copying of any record, information, material or thing; **(vi)** to give other assistance the inquiry officer reasonably requires to conduct the inquiry; …				
36	S 78(1) &(2)	**(1)** At the conclusion of an inquiry, an Integrity Tribunal may make a determination in relation <u>to the complaint</u> or matter that was the subject of the inquiry. **(2)** An Integrity Tribunal may do any	See s 65 which refers to the 'allegation of misconduct'. It is clear from s 61 that the function of the Integrity Tribunal is to 'conduct an inquiry into a matter in respect of which the Board has determined under section 58 that an inquiry be undertaken', not an inquiry into a 'complaint'. An own motion investigation which is the subject of an Integrity Tribunal	Amend s 78 and consider any relevant consequential amendments to s 58 so that the language as to what the function of an inquiry undertaken is consistent. Consider whether there should be an opportunity to dismiss or otherwise cease further consideration of an investigation which arose from an own motion investigation.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that	Recommend that the amendment be implemented.

		one or more of the following: **(a)** dismiss the complaint;	cannot be dismissed under subsection (2).		the amendment be referred to the Government for further consideration: Mr Barnett.	
37	S 80	**Offences relating to Integrity Tribunal** **(1)** A person must not intentionally prevent or intentionally try to prevent a person who is required by an Integrity Tribunal to appear before it from attending as a witness or producing any record, information, material or thing to the Integrity Tribunal. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year. **(2)** A person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage in relation to another person for or on account of – **(a)** that other person	An Integrity Tribunal is defined under s 4 to mean a Tribunal convened under s 60 (and which appears to be restricted to the persons who comprise the actual tribunal), but does not include an inquiry officer. Offences against inquiry officers are dealt with separately at s 81. However Part 7, which deals with inquiries by an Integrity Tribunal also refers to 'a person designated by the Integrity Tribunal' – s 71(1)(b) and appointing other persons to take evidence to be provides to the Integrity Tribunal – s71(2). The Act does not capture offences which might occur against anyone other than the Tribunal members and inquiry officers. Subsection (2) does not protect a person from being threatened (by violence or other way) on account of producing or surrendering a record, information, material or a thing to an Integrity Tribunal, or a person designated by a Tribunal or appointed to take evidence.	Amend s 80 to include offences against persons other than the Tribunal members, or inquiry officers, and make it clear that the threat of violence or other detriment is included as an offence.	Members in favor of recommending that the amendment be implemented: Mr *Gaffney*, Ms *Giddings*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Dean*, Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.

		having given evidence before an Integrity Tribunal or produced or surrendered any record, information, material or thing to an Integrity Tribunal; or **(b)** any evidence given by that other person before an Integrity Tribunal or any record, information, material or thing produced or surrendered by that other person to an Integrity Tribunal. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year. …				
38	S 81	**Offences relating to inquiry officers** **(1)** A person who, without reasonable excuse, fails to comply with a requirement or direction of an inquiry officer within 14 days of receiving it commits an offence. Penalty:	Subsections (1) and (3) are restricted to matters involving an inquiry officer, although the Act also refers to persons assisting inquiry officers (s 73) and to persons designated or appointed (see previous discussion re s 80). Accordingly there is no apparent offence if a person fails to comply with the requirements or directions of a person assisting an inquiry officer or appointed or designated by a Tribunal. Subsection (2) does not protect a	Amend s 81 to make it clear that the threat of violence or other detriment is included as an offence. Ensure that offences against persons assisting, appointed or designated in addition to inquiry officers, are captured .	Members in favor of recommending that the amendment be implemented: Mr *Gaffney*, Ms *Giddings*, Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for	Recommend that the amendment be referred to the Government for further consideration.

		Fine not exceeding 5 000 penalty units. **(2)** A person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage in relation to another person for or on account of that other person having given evidence to an inquiry officer or produced or surrendered any record, information, material or thing to an inquiry officer. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year. **(3)** A person must not obstruct or hinder an inquiry officer or any person assisting an inquiry officer in the performance of a function or the exercise of a power under section 74. Penalty: Fine not exceeding	person from being threatened (by violence or other way) on account of providing information to an inquiry officer. (And see the discussion re offences relating to investigators under s 54 where similar issues arise).		further consideration: Mr *Barnett*, Mr *Dean*, Mr *Mulder*.	

		5 000 penalty units.				
39	S 87	**Investigation or dealing with misconduct by designated public officers** **(1)** The Integrity Commission is to assess, investigate, inquire into or otherwise deal with, in accordance with Parts 6 and 7, complaints relating to misconduct by a designated public officer. **(2)** In assessing, investigating, inquiring into or otherwise dealing with a complaint under subsection (1), the Integrity Commission may have regard to – **(a)** established procedures or procedures of the relevant public authority; and **(b)** any codes of conduct relevant to the designated public officer who is the	This section was amended on 22 December 2011, with the reference to Parts 6 and 7 included in subsection (1). Since amendment, the Solicitor-General has flagged a potential issue that the failure to include Part 5 of the Act (which deals with assessment of a complaint) with Parts 6 and 7, will mean that any complaint dealing with a designated public officer, cannot be assessed. Instead each complaint must be investigated and a report forwarded to the Board, even where a complaint is vexatious or without substance. This appears contrary to the wording throughout the section which refers to 'assessing' or 'otherwise dealing with' a complaint. The obligation to investigate every complaint involving a designated public officer will be onerous, and is an unintended consequence of the December 2011 amendment.	Amend s 87 to include a reference to Part 5, so that the Commission is able to deal with a complaint about a DPO consistently with other complaints.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*, Mr *Gaffney*.	Recommend that the amendment be implemented.

		subject of the complaint; and **(c)** any statutory obligations or relevant law relating to that designated public officer.				
40	S 94	**94. Information confidential** **(1)** This section applies to a person who is or has been – **(a)** a member of the Board; or **(b)** the Parliamentary Standards Commissioner; or **(c)** an officer or employee of the Integrity Commission; or **(d)** a person authorised or appointed under section 21 to undertake work on behalf of the Integrity Commission; or **(e)** an assessor or investigator; or **(f)** a member of the Joint Committee; or	The persons who are required to keep information confidential are listed in s 94 and are separate to any notices served or delivered under the Act which may be kept confidential under s 98. However the list of people does not take into account persons who might have access to confidential information, but not be a staff member or otherwise authorised because they do not perform any functions. For example the Commission has a Service Level Agreement with the Department of Justice which provides for IT services. The Commission and the Department of Justice have received legal advice that employees of the Department of Justice, performing IT services for the Commission, do not have the same obligations to keep information held by the Commission, which they have ready access to, confidential, notwithstanding the sensitive nature of the information. Further, they are not subject to the same sanctions that a Commission officer would be subject to if information is released inappropriately. Instead sanctions are limited to a breach of the Code of Conduct if the person is a state	Amend s 94 to include personnel who perform services for the Commission or a Tribunal and who have access to extremely confidential information, but do not fall with the class of persons identified.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.

		(g) a member of an Integrity Tribunal; or **(h)** an inquiry officer or other person appointed to assist an Integrity Tribunal.	servant.			
41	S 95	**95. Protection from personal liability** (1) No civil or criminal proceedings lie in respect of any action done, or omission made, in good faith in the exercise or intended exercise of, any powers or functions under this Act by the following persons: (a) the Board; (b) any members of the Board; (c) the Parliamentary Standards Commissioner; (d) an Integrity Tribunal; (e) any persons appointed to assist the Integrity Tribunal; (f) legal representatives of any	See the references to s 94 – the same considerations apply to s 95, in that personnel who perform sensitive work for the Commission, or who through their work have access to sensitive information from the Commission, are not protected from personal liability unless they fall within the class of persons nominated, and are exercising powers or functions. Some people (ie transcription staff employed by the Supreme Court) are not exercising a power or function, but should nevertheless have protection from personal liability where they are acting in good faith.	Amend s 95 to protect personnel from personal liability where they undertake work involving sensitive or confidential information, for the Commission or Tribunal but do not actually exercise a power or function.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.

		witness at an inquiry; (g) the chief executive officer; (h) an assessor, investigator or inquiry officer; (i) officers and employees of the Integrity Commission; (j) any persons authorised or appointed under section 21 to undertake work on behalf of the Integrity Commission.				
42	S 96	**96. False or misleading statements** A person, in making a complaint, giving any information or advice or producing any record under this Act, must not – (a) make a statement knowing it to be false or misleading; or (b) omit any matter from a statement knowing that without that matter the statement is false or	On its face, s 96 makes the giving of a false or misleading statement an offence. However the language used, in particular 'giving any information or advice' is inconsistent with the sections where an officer of the Commission can direct or require a statement – see for example s 47. Although there are offences under s 54 with respect to s 47, those offences do not include the giving of a false or misleading statement (see also s 52) The language used in s 47 is to provide information or explanation, to attend and give evidence and to produce. In s 52(1)(j) a person is required to answer or to produce or to give other	Amend s 96 so that it is clear that a person who makes a false or misleading statement or omits any matter from a statement knowing that it would then be false or misleading, in compliance with a requirement or direction under the Act, commits an offence.	Members in favor of recommending that the amendment be implemented: Mr *McKim*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnet*t, Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *Mulder*.	Recommend that the amendment be referred to the Government for further consideration.

		misleading. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.	assistance. Similar considerations apply to the giving of evidence before an integrity tribunal under s 71.			
43	S 97	**97. Destruction or alteration of records or things** A person must not knowingly destroy, dispose of or alter any record or thing required to be produced under this Act for the purpose of misleading <u>any investigation or inquiry</u>. Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.	Section 97 is limited to an investigation or inquiry, and therefore appears to omit a record or thing required to be produced during an assessment of a complaint, although s 35(4) enables an assessor to utilise the powers of an investigator under Part 6 of the Act. Furthermore, if a complaint is referred to an agency for investigation, either following an assessment, or an investigation by the Commission, destruction or alteration of records or things after referral would not be an offence.	Amend s 97 so that the destruction or alteration of records or things while an assessor is using the powers of an investigator, is an offence. Consider development of a further offence regarding destruction or alteration of records or things relevant to an allegation of misconduct, following referral by the Commission.	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.
44	S 98	**98. Certain notices to be confidential documents** (1) A person on whom a notice that is a	Refer to Point 25, which is also concerned with confidentiality provisions under s 98. The use of s 98 is limited to those sections which specifically refer to the	Amend s 98 so that the Commission can ensure confidentiality over its actions beyond the notices referred to at particular sections of the Act.	n/a	n/a This issue is already covered in the Report.

		confidential document was served or to whom such a notice was given under this Act must not disclose to another person – (a) the existence of the notice; or (b) the contents of the notice; or (c) any matters relating to or arising from the notice – unless the person on whom the notice was served or to whom the notice was given has a reasonable excuse. Penalty: Fine not exceeding 2 000 penalty units. (1A) A person to whom the existence of a notice that is a confidential document was disclosed must not disclose to another person – (a) the existence of that notice; or (b) the contents of the notice; or (c) any matters relating to or arising from the	ability of the Commission to make a particular notice confidential. However it is not just the notice which is confidential, but the documents to which the notice is attached which should be confidential. As an example, s 88 sets out the Commissions role in relation to police misconduct, which includes at s 88(3) the assumption of responsibility for a police investigation, but no ability by the Commission to make those actions subject to confidentiality. Again, at s 58, the Board can make a determination to refer an investigation to an agency and while the determination to refer can be subject to a s 98 confidentiality notice, the referral of the report of the investigation may not be so subject. A further example is s 90 where the Commissioner of Police may be given an opportunity to comment on a report which is adverse to Tasmania Police. During that process, the Commission is currently unable to require confidentiality in accordance with s 98.			

		notice – unless the person to whom the existence of the notice was disclosed has a reasonable excuse. Penalty: Fine not exceeding 2 000 penalty units. (1B) For the purposes of subsections (1) and (1A), matters relating to or arising from a notice include but are not limited to – (a) obligations or duties imposed on any person by the notice; and (b) any evidence or information produced or provided to the Integrity Commission or an Integrity Tribunal; and (c) the contents of any document seized under this Act; and (d) any information that might enable a person who is the subject of an investigation or inquiry to be identified				

		or located; and (e) the fact that any person has been required or directed by an investigator or an Integrity Tribunal to provide information, attend an inquiry, give evidence or produce anything; and (f) any other matters that may be prescribed. (2) It is a reasonable excuse for a person to disclose the existence of a notice that is a confidential document if – (a) the disclosure is made for the purpose of – (i) seeking legal advice in relation to the notice or an offence against subsection (1); or (ii) obtaining information in order to comply with the notice; or (iii) the administration of this Act; and (b) the person informs the person to whom				

		the disclosure is made that it is an offence to disclose the existence of the notice to another person unless the person to whom the disclosure was made has a reasonable excuse. (3) The Integrity Commission or an Integrity Tribunal may advise a person on whom a notice was served or to whom a notice was given under this Act that the notice is no longer confidential. (4) If the Integrity Commission or an Integrity Tribunal advises a person referred to in subsection (3) that a notice is no longer confidential, subsections (1) and (1A) do not apply.				
45	S 99	**99. Injunctions** (1) The Supreme Court may, on application made by the Integrity Commission, grant an	Injunctions are limited to investigations or 'proposed investigations'. The language used appears inconsistent with the Act, in that nowhere else is the term 'proposed investigation' used. Accordingly this section may not capture an assessment. It is not	Amend s 99 so that the Commission can seek an injunction restraining any conduct which affects an allegation of misconduct within the jurisdiction of the Commission.	Members in favor of recommending that the amendment be implemented: Mr *Gaffney*, Ms *Giddings*, Mr *McKim*,	Recommend that the amendment be implemented.

		injunction restraining any conduct in which a person (whether or not a public authority or public officer) is engaging or in which such a person appears likely to engage, if the conduct is the subject of, or affects the subject of – (a) an investigation or proposed investigation by an investigator; or (b) an inquiry or proposed inquiry by an Integrity Tribunal. (2) The conduct referred to in subsection (1) does not include conduct relating to a proceeding in Parliament.	inconceivable that the need for an injunction could arise during an assessment phase, for example to prevent destruction of documents. Furthermore, if an allegation of misconduct has been referred to an agency for that agency's investigation, the current wording does not allow the Commission to seek an injunction.		Mr *Mulder*. Members in favor of recommending that the amendment not be implemented: Mr *Barnett*, Mr *Dean*.	
46	S 102	**Personal information may be disclosed to Integrity Commission** A personal information custodian, within the meaning of the *Personal Information Protection Act 2004*, is authorised to disclose personal information,	The Commissioner of Police is a personal information custodian within the meaning of the PIP Act. The Commission seeks information from Tasmania Police database on a regular basis. The information is required to enable the Commission to fulfill its functions under the Act. The Commission and Tasmania Police have a Memorandum of Understanding	Amend the *Personal Information Protection Act 2004* and/or the IC Act to enable to appropriate Tasmania Police databases.	n/a	n/a This issue is already covered in the Report.

		within the meaning of that Act, to the Integrity Commission for the purpose of and in accordance with this Act.	which has a clause allowing the Commission online access to relevant police-held data, subject to all relevant legal restrictions. Currently the information is accessed by the Commission on a request by request basis, with Commission investigators required to attend at Police HQ. The Commission seeks specific data about an individual and specifies on each occasion that it is for a purpose and function under the Act. This has presented difficulties for both Tasmania Police and the Commission in that the Commission is unable to maintain absolute confidentiality of information in relation to its own functions simply because Tasmania Police are advised of the information sought. A not insignificant percentage of complaints are about police. Further, the lack of immediate accessible data has restricted the Commission when responding to complaints. Specific background information, such as is held by Tasmania Police may be relevant about a particular complaint, subject officer, witness or complainant and important to any determination by the Commission to dismiss, assess or investigate. The Commission is also conducting an audit of all police complaints finalized in 2012 but can only look at the hard copy files of the matters rather than examining the records electronically (in the IAPRO database). This is cumbersome and time consuming.			

			Access to appropriate data will confirm sources of information and allow the Commission to independently analyse information received and to cross reference the checks taken by police when the Commission audits or monitors a matter. It is considered that electronic desktop access at the Commission (with appropriate passwords, and audit trails) will significantly enhance the operational work undertaken by the Commission. It is also in line with access available to interstate integrity agencies and the respective State and Commonwealth police forces. Tasmania Police and the Commission have obtained legal advice that electronic desktop access at the Commission would be the grant of unlimited access to the personal information in the control of the Commissioner of Police, and that such disclosure would not be for a purpose of and in accordance with the Act. Authorisation for the Commission to have unlimited access to Police databases (electronic access, but limited to a function under the IC Act) would require an express statutory provision, and in the absence of that, the granting to the Commission of such unlimited access, will inevitably involve a contravention of the PIP Act by the Commissioner of Police, particularly during periods when access is not required by the Commission to fulfil its statutory functions (ie when the			

			electronic password protected database is idle). Section 9 of the PIP Act does provide that some clauses in the Schedule detailing the Personal Information Protection Principles do not apply to any law enforcement information collected or held by a law enforcement agency if it considers that non-compliance is reasonably necessary – **(a)** for the purpose of any of its functions or activities; or **(b)** for the enforcement of laws relating to the confiscation of the proceeds of crime; or **(c)** in connection with the conduct of proceedings in any court or tribunal. The Commission is not a law enforcement agency for the purposes of the PIP Act (noting however that it is a law enforcement agency for the purposes of the *Australian Consumer Law (Tasmania) Act 2010*).			

Identified technical issues, other Tasmanian Legislation

	Section	Content	Technical issue	Recommendation	Members' View	Committee Determination
	Corrections Act 1997 **Rights of Prisoners to make a complaint to the Commission**					

1	S 29(1)(l)	**Rights of prisoners and detainees** (1) Every prisoner and detainee has the following rights: … (l) the right to send letters to, and receive letters from, the Minister, the Director, an official visitor, the Ombudsman or an officer of the Ombudsman without those letters being opened by prison staff;	Currently prisoners and detainees are unable to make a complaint of misconduct to the Commission without the written complaint being opened and read by an authorised prison staff member. The *Corrections Act 1997* exempts certain forms of communication from being opened unless staff reasonably suspect that the letter contains an unauthorised item. The exemptions relate to the Office of the Ombudsman, Official Visitors, Members of Parliament, the Parole Board, Legal Practitioners and others. As prisoners or detainees are uniquely placed to experience or observe misconduct by prison staff, and noting that the Integrity Commission Act requires complaints about misconduct to be in writing, the Commission submits that it should be included in the list of exempt correspondence. In addition to the Corrections Act, the Ombudsman also has a specific provision in the *Ombudsman Act 1978*, s 18, which facilitates the making of a complaint by a person in custody. While the Integrity Commission Act has provisions which facilitate the giving of information to an investigator where a detainee or prisoner is served with a coercive notice, it does not go as far as facilitating complaints from detainees or prisoners.	Amend s 29(1)(l) of the *Corrections Act 1997* to include the Integrity Commission as an exempt entity with respect to correspondence to and from prisoners and detainees. In addition, make consequential amendments to the *Integrity Commission Act 2009* similar to those in s 18 of the Ombudsman Act, so that a person detained in custody who wishes to make a complaint to the Commission, will be assisted to make that complaint. [For example, see s 47(4) of the Act which is along similar lines in that it facilitates the giving of information to an investigator where a detainee or prisoner is served with a s 47 Notice but does not go as far as facilitating complaints from detainees or prisoners].	Members in favor of recommending that the amendment be implemented: Mr *Dean*, Mr *Gaffney*, Ms *Giddings*, Mr *McKim*, Mr *Mulder*. Members in favor of recommending that the amendment be referred to the Government for further consideration: Mr *Barnett*.	Recommend that the amendment be implemented.
	Personal Information Protection Act 2004					

	Access to data held by Tasmania Police					
2	S 9 & Schedule 1	**S 9. Law enforcement information** Clauses 1(3), (4) and (5), 2(1), 5(3)(c), 7, 9 and 10(1) of Schedule 1 do not apply to any law enforcement information collected or held by a law enforcement agency if it considers that non-compliance is reasonably necessary – (a) for the purpose of any of its functions or activities; or (b) for the enforcement of laws relating to the confiscation of the proceeds of crime; or (c) in connection with the conduct of proceedings in any court or tribunal. ---------- **Schedule 1** **2. Use and disclosure**	See the discussion re s 102 of the IC Act.	Amend the *Personal Information Protection Act 2004* and/or the IC Act to enable to appropriate Tasmania Police databases.	n/a	n/a This issue is already covered in the Report.

		(1) A personal information custodian must not use or disclose personal information about an individual for a purpose other than the purpose for which it was collected unless – **…** **(f)** the use or disclosure is required or authorised by or under law; or **(g)** the personal information custodian reasonably believes that the use or disclosure is reasonably necessary for any of the following purposes by or on behalf of a law enforcement agency: **(i)** the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction; **(ii)** the enforcement of laws relating to the confiscation of the				

		proceeds of crime; **(iii)** the protection of the public revenue; **(iv)** the prevention, detection, investigation or remedying of conduct that is in the opinion of the personal information custodian seriously improper conduct; **(v)** the preparation for, or conduct of, proceedings before any court or tribunal or implementation of any order of a court or tribunal; **(vi)** the investigation of missing persons; **(vii)** the investigation of a matter under the *Coroners Act 1995*; or …				