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PARLIAMENT OF TASMANIA

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**JOINT STANDING COMMITTEE ON  
INTEGRITY**

**Report on the  
Integrity Commission Report under section  
13(c) of the Integrity Commission Act 2009**

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*Laid upon the Tables of both Houses of Parliament pursuant to the provisions  
of the Integrity Commission Act 2009*

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**MEMBERS OF THE COMMITTEE**

**Legislative Council**

**Dr Goodwin (Chairperson)**  
Mr Dean  
Mr Farrell

**House of Assembly**

Mr Booth  
Mr Hidding  
Ms White

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## **1 INTRODUCTION**

### **Joint Standing Committee on Integrity**

- 1.1 The Joint Standing Committee on Integrity (the Committee) is established pursuant to section 23 of the Integrity Commission Act 2009<sup>1</sup> (the Act).

### **Functions**

- 1.2 The Committee has the following functions:
- (a) to monitor and review the performance of the functions of an integrity entity;
  - (b) to report to both Houses of Parliament, as it considers appropriate, on the following matters:
    - (i) matters relevant to an integrity entity;
    - (ii) matters relevant to the performance of an integrity entity's functions or the exercise of an integrity entity's powers;
  - (c) to examine the annual reports of an integrity entity and any other report of an integrity entity and report to both Houses of Parliament on any matter appearing in or arising out of such reports;
  - (d) to report to the Legislative Council or House of Assembly on any matter relevant to an integrity entity's functions that is referred to it by the Legislative Council or House of Assembly;
  - (e) to review the functions, powers and operations of the Integrity Commission at the expiration of the period of 3 years commencing on the commencement of this section 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;
  - (f) to provide guidance and advice relating to the functions of an integrity entity under this Act;
  - (g) to refer any matter to the Integrity Commission for investigation or advice;
  - (h) to comment on proposed appointments to be made under section 14(1)(e), (f) or (g), section 15 and section 27.<sup>2</sup>

## **2 SECTION 13(C) REPORT OF THE INTEGRITY COMMISSION**

- 2.1 At the meeting of the Committee held on 19 June last, the Committee received and took into consideration the report of the Integrity Commission made pursuant to section 13(c) of the Integrity Commission Act which detailed the content; the technical issue/s arising from the current prescription; and the recommended remedy

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<sup>1</sup> Integrity Commission Act 2009 (No. 67 of 2009)

<sup>2</sup> Ibid, section 24(1).

by way of suggested amendments to the Act each of which are detailed hereunder. The findings of the Committee in respect of each item are also detailed.

- 2.2 The Committee supports 'in principle' many of the amendments but determined that it needed to seek further advice from the Chief Commissioner and the Attorney-General in relation to some of the amendments.
- 2.3 Specifically, the Committee wanted some assurance that relevant agencies, in particular Tasmania Police, had been consulted on the amendments. After reviewing the responses provided by the Chief Commissioner and Attorney-General (which are appended to the Report), the Committee concluded that it would be beneficial to further consider those amendments as part of the 3 year review. This will provide an opportunity for stakeholder feedback on the proposed amendments.
- 2.4 Suggested amendments are as follows:-

**Item 1 - Section 4(1)**

Content

*'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]

Technical Issue

The Commission submitted that "*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.

Recommendation

The Commission submitted that the definition of *premises of a public authority*, s 4(1) be amended 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.

**Committee Finding**

***The Committee supported in principle the proposed amendment.***

## Item 2 – Section 16(3)

### Content

Delegations by the Board – ‘Section 23AA(2), (3), (4), (5) and (8) of the Acts Interpretation Act 1931 apply to a delegation made under subsection (1)’

### Technical Issue

The Commission submitted that the reference to particular sections of the power to delegate in the Acts Interpretation Act 1931, provides 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).

### Recommendation

The Commission submitted that s 16 be amended to make it clear that all of s 23AA of the Acts Interpretation Act 1931 applies.

***The Committee will further consider this Item under the scope of the inquiry prescribed by section 24(1)(e) (the ‘Three Year Review’)***

## Item 3 - Section 21

### Content

#### **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 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 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 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.

#### Technical Issue

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.

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 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*

#### Recommendation

The Commission submitted that s 21(1) and (2) be amended so that persons undertaking any work for the Commission, irrespective of whether they are exercising a power or function, can be Authorised.

The Commission submitted that s 21(4) and (5) be amended 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.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### Item 4 - Section 26

##### Content

##### **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 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.

##### Technical Issue

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.

##### Recommendation

The Commission submitted that either or both s 11 and s 26 be amended so that there is sufficient time for the JSC to consider the report of each integrity entity before having to prepare its own report.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment and requests the Attorney-General to introduce legislation as soon as possible to effect this proposed amendment.***

#### Item 5 - Section 30(a)

##### Content

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) ...

#### Technical Issue

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 transparency if that is required.

#### Recommendation

The Commission submitted that s 30(a) be amended 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.

***The Committee will further consider this Item under the scope of the ‘Three Year Review’.***

#### **Item 6 - Section 32**

##### Content

##### **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 code of conduct that applies to public officers.

#### Technical Issue

Although the Act directs public authorities to give 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.

#### Recommendation

The Commission submitted that s 32 be amended to require public authorities to report each year on education and training in relation to ethical conduct.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 7 - Section 35(1)(d) & s 38(1)**

##### Content

‘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 –

....

##### Technical Issue

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.

##### Recommendation

The Commission submitted that the Act be amended 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.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

**Item 8 - Section 35(2)**

Content

'If the chief executive officer accepts a complaint for assessment, the chief executive officer is to appoint an assessor to assess the complaint as to whether the complaint should be accepted for investigation'

Technical Issue

This appears inconsistent with and to limit the activities of the assessor when contrasted with s 37, where an assessor prepares a report with 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.

Recommendation

The Commission submitted that s 35(2) be amended to remove the inconsistency with s 37, and the limitation on an assessor to only assess a complaint for determination of accepting for investigation.

**Committee Finding**

***The Committee supported in principle the proposed amendment.***

**Item 9 - Section 35(1)(c) & s 38(1)(b)–(f) inclusive & ss 39–43 inclusive**

Content

**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 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 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

#### Technical Issue

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.

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.

#### Recommendation

The Commission submitted that Part 5 and Part 6 be amended 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.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

#### **Item 10 - Section 37(1)**

##### Content

'On completion of an assessment or review of a complaint, the assessor is to prepare a report of his or her assessment and forward that report to the chief executive officer'

##### Technical Issue

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'.

#### Recommendation

The Commission submitted that s 35 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 11 - Section 37(2)(e)**

##### Content

'The report of the assessor is to recommend that the 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 ...'

##### Technical Issue

This section is inconsistent with s 38(1)(e) in that it appears to limit a recommendation by the assessor to 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.

##### Recommendation

The Commission submitted that s37(2)(e) be amended to enable a referral to the Commissioner of Police may also be recommended where a complaint involves a police officer, but no crime or other offence is apparent.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

#### **Item 12 - Section 38(1)(b)(c)(d)(e) & (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.

#### Recommendation

The Commission submitted that s 38 be amended 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.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

#### **Item 13 - Section 38(2)**

##### Content

'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...'

##### Technical Issue

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.

##### Recommendation

The Commission submitted that s 38 be amended so that it is consistent with s 44 such that written notice of the CEO's determination is discretionary.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 14 - Section 39(2)**

##### Content

'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 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'

#### Technical Issue

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 the investigation' – contrasted with s 42 and s 43 which enable the Commission to monitor the investigation, rather than the conduct.

#### Recommendation

The Commission submitted that s39 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 15 - Section 42(2) & 43(2)**

##### Content

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.

##### Technical Issue

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.

#### Recommendation

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.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

##### **Item 16 - Section 44(2)**

#### Content

‘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 –

that an investigator has been appointed to investigate the complaint’

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 44 be amended so that it is consistent with s 38 and that any discretionary notice by the Commission about a determination is comprised of relevant material.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

##### **Item 17 - Section 46(1)(c) & 55(1)**

#### Content

#### **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



- (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.

#### Technical Issue

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 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.*

#### Recommendation

The Commission submitted that s 46 be amended with respect to the mandatory obligations to observe the rules of procedural fairness during the investigation/assessment stage of a complaint.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 18 - Section 47**

##### Content

‘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 following...’

##### Technical Issue

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 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')*

##### Recommendation

The Commission submitted that s 47 be amended 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.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

**Item 19 - Section 49**

Content

'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'

Technical Issue

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)*

Recommendation

The Commission submitted that s 49 be amended 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.

**Committee Finding**

***The Committee supported in principle the proposed amendment.***

**Item 20 – Section 51**

Content

(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.

(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.

#### Technical Issue

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

#### Recommendation

The Commission submitted that s 51 be amended so that the powers authorised by a search warrant are consistent with those stated in the warrant.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 21 - Section 52**

##### Content

(1) An investigator or any person 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, material or thing;

(iv) to operate equipment or facilities on the premises for a purpose relevant to the investigation;

...

#### Technical Issue

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). 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.

#### Recommendation

The Commission submitted that s 52 be amended 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 a Commission officer.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 22 - Section 52(3)**

##### Content

##### **Powers of investigator while on premises**

...

(3) If an investigator takes anything away from the premises, the investigator must issue a receipt in a form approved by the Board 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.

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 52 be amended to be consistent with the remainder of Part 6, such that the form of a receipt is approved by the chief executive officer.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 23 - Section 52(4)[and s 51(4)(a)]**

##### Content

##### **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;

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 52 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 24 - Section 53(1)**

##### Content

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 *Police Powers (Surveillance Devices) Act 2006* ...

##### Technical Issue

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 serious.

##### Recommendation

The Commission submitted that s 53 be amended 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 misconduct.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 25 - Section 53(2)**

##### Content

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.

##### Technical Issue

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.

##### Recommendation

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.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

## Item 26 - Section 54

### Content

#### **Offences relating to investigations**

(1) A person who, without reasonable excuse, fails to comply with a requirement or direction under section 47 within 14 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 under section 47.

Penalty:

Fine not exceeding 2 000 penalty units.

### Technical Issue

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 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 -

(‘... threaten to prejudice the safety...’)

#### Recommendation

The Commission submitted that s 54 be amended 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 irrespective of whether it involves an investigator or a person assisting an investigator or assessor (including a person authorised under s 21).

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 27 – Section 55(1)**

##### Content

On completion of an investigation, the investigator is to prepare a report of his or her findings for the chief executive officer.

##### Technical Issue

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.

##### Recommendation

The Commission submitted that s 55 be amended to provide that the investigator should prepare a report of the investigation to the CEO.

***The Committee will further consider this Item under the scope of the ‘Three Year Review’.***

#### **Item 28 - Section 56(1) & 57(1)**

##### Content

##### **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 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 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).

#### Technical Issue

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 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).

#### Recommendation

The Commission submitted that s 56(1) be amended 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.

### **Committee Finding**

#### ***The Committee supported in principle the proposed amendment.***

##### **Item 29 - Section 56(2) & (5)**

#### Content

(2) A notice may be attached to a draft of a report specifying that the draft of the report is a confidential 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.

#### Technical Issue

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 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].

#### Recommendation

The Commission submitted that s 56 be amended 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 not just to the notice, but to any relevant documentation the notice is attached to.

(And see the discussion re s 98)

## **Committee Finding**

***The Committee supported in principle the proposed amendment.***

**Item 30 - Section 57(2)(b) & s 58(2)(b)**

### **Content**

#### **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 –

### **Technical Issue**

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 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.

### **Recommendation**

The Commission submitted that s 57 and 58 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 31 - Section 58(2)(a)**

##### Content

(2) The Board may –

(a) dismiss the complaint; or

##### Technical Issue

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.

##### Recommendation

The Commission submitted that s 58(2) be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 32 - Section 68**

##### Content

##### **Directions conference**

(1) Before an inquiry is held, an Integrity Tribunal may conduct a directions conference in relation 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 directions conference from place to place and from time to time.

#### Technical Issue

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
- S 80(5) – 5 000 penalty units

#### Recommendation

The Commission submitted that s 68 be amended so that the penalty is consistent with other penalties in the Act.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 33 - Section 74(1)**

##### Content

##### **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:

...

##### Technical Issue

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'.

#### Recommendation

The Commission submitted that s 74(1) and (2) be amended 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.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

##### **Item 34 - Section 74(3)**

#### Content

##### **Powers of inquiry officer while on premises**

...

(3) If an inquiry officer takes anything away from the premises, the inquiry officer must issue a receipt in a form approved by the Integrity Commission and –

...

#### Technical Issue

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 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.

#### Recommendation

The Commission submitted that s 74(3) be amended so that the receipt is in a form approved by the chief executive officer, or the Chief Commissioner or the relevant Integrity Tribunal.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

##### **Item 35 - Section 74(1)**

#### Content

- (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;
- (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;

...

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 74 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 36 - Section 78(1) & (2)**

##### Content

- (1) At the conclusion of an inquiry, an Integrity Tribunal may make a determination in relation to the complaint or matter that was the subject of the inquiry.
- (2) An Integrity Tribunal may do any one or more of the following:
  - (a) dismiss the complaint;



### Technical Issue

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 cannot be dismissed under subsection (2).

### Recommendation

The Commission submitted that s 78 be amended 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.

## **Committee Finding**

***The Committee supported in principle the proposed amendment.***

### **Item 37 - Section 80**

#### Content

##### **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 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.

...

#### Technical Issue

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 provided to the Integrity Tribunal – s 71(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.

#### Recommendation

The Commission submitted that s 80 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 38 - Section 81**

##### Content

##### **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:

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 5 000 penalty units.

#### Technical Issue

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 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).

#### Recommendation

The Commission submitted that s 81 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 39 - Section 87**

##### Content

##### **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 subject of the complaint; and

(c) any statutory obligations or relevant law relating to that designated public officer.

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 87 be amended 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.

#### Committee Finding

***The Committee supported in principle the proposed amendment.***

#### **Item 40 - Section 94**

##### Content

##### **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
  - (g) a member of an Integrity Tribunal; or
  - (h) an inquiry officer or other person appointed to assist an Integrity Tribunal.

##### Technical Issue

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 servant.

#### Recommendation

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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 41 - Section 95**

##### Content

##### **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 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.

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 95 be amended 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.

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 42 - Section 96**

##### Content

##### **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 misleading.

##### Penalty:

Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.

#### Technical Issue

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)(i) a person is required to answer or to produce or to give other assistance. Similar considerations apply to the giving of evidence before an integrity tribunal under s 71.

#### Recommendation

The Commission submitted that s 96 be amended 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.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### **Item 43 - Section 97**

##### Content

##### **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 any investigation or inquiry.

Penalty:

Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.

##### Technical Issue

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.

#### Recommendation

The Commission submitted that s 97 be amended 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.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

#### **Item 44 - Section 98**

##### Content

##### **98. Certain notices to be confidential documents**

(1) A person on whom a notice that is a 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 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.

#### Technical Issue

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 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.

#### Recommendation

The Commission submitted that s 98 be amended so that the Commission can ensure confidentiality over its actions beyond the notices referred to at particular sections of the Act.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

#### Item 45 - Section 99

##### Content

##### **99. Injunctions**

(1) The Supreme Court may, on application made by the Integrity Commission, grant an 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.

##### Technical Issue

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 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.

##### Recommendation

The Commission submitted that s 99 be amended so that the Commission can seek an injunction restraining any conduct which affects an allegation of misconduct within the jurisdiction of the Commission.

#### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### Item 46 - Section 102

##### Content

##### **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, within the meaning of that Act, to the Integrity Commission for the purpose of and in accordance with this Act.

##### Technical Issue

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 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*).

#### Recommendation

The Commission submitted that the *Personal Information Protection Act 2004* and/or the IC Act be amended to enable to appropriate Tasmania Police databases.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

## **Schedule 2 – identified technical issues, other Tasmanian Legislation**

### *Corrections Act 1997*

#### **Rights of Prisoners to make a complaint to the Commission**

##### **Item 1 - Section 29(1)(l)**

#### Content

#### **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;

#### Technical Issue

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.

#### Recommendation

The Commission submitted that s 29(1)(l) of the Corrections Act 1997 be amended 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].

### **Committee Finding**

***The Committee supported in principle the proposed amendment.***

#### ***Personal Information Protection Act 2004***

#### ***Access to data held by Tasmania Police***

#### ***Item 2 - Section 9 & Schedule 1***

##### Content

##### **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

(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

...

#### Technical Issue

See the discussion re s 102 of the IC Act.

#### Recommendation

The Commission submitted that the *Personal Information Protection Act 2004* and/or the IC Act be amended to enable to appropriate Tasmania Police databases.

***The Committee will further consider this Item under the scope of the 'Three Year Review'.***

## 3 ATTORNEY-GENERAL'S ADVICE

- 3.1 On 19 June 2013, the Committee resolved to seek advice from the Attorney-General about a number of the suggested amendments, in particular Items 2, 7 and 43.

- 3.2 The Attorney-General responded to this request by way of letter dated 29 July 2013. The advice of the Attorney-General in relation to the matters raised by the Committee is summarised below.

**General Comments**

- 3.3 In general terms, with respect to the consideration of any legislative amendments, the Attorney-General's letter stated as follows:

*I note your request for my advice in respect of some of the technical issues that have been raised by the Integrity Commission Board (the Board) in their correspondence to the Joint Standing Committee and I dated 3 April 2013. I reply as follows.*

*First, I note that pursuant to section 24 of the Integrity Commission Act 2009, the role of the Joint Standing Committee is to review the functions, powers and operations of the Integrity Commission at the expiration of 3 years from the commencement of the Act. This review is timed to commence and report after 1 October 2013. As I indicated during the Budget Estimates hearings I would prefer to await the final report of the Joint Standing Committee before I commit to any reform or introduce amending legislation.*

*As you may be aware the Government's legislative program and Parliamentary sitting schedule are such that there is limited time left in this year to prepare and introduce new Bills. Further it would seem preferable and a more efficient use of resources that any amendment legislation deal with all substantive issues that may be raised by the Joint Standing Committee's review process. Given the matters raised by the Hon Murray Kellam AO in his letter of 4 April 2013 are of a technical nature, it is my opinion that they do not require urgent amendments to be progressed at this time. However, I am prepared to make some initial comments regarding the items you have referred to in the Integrity Commission Board's Report dated 4 April 2013.<sup>3</sup>*

**Item 2**

- 3.4 With respect to Item 2, the Committee requested the Attorney-General to provide the following information:

*Advice as to why Section 16(3) of the Integrity Commission Act 2009 (the Act) omits the application of Section 23AA(1), (6) and (7) of the Acts Interpretation Act 1931 in respect of delegations by the Board and what, if any, reasons would preclude an amendment to the Act to prescribe the application of all of section 23AA of the Acts Interpretation Act 1931.*

- 3.5 The Attorney-General provided the following advice:

*With respect to your specific queries regarding item 2 of the Board's Report I advise that it is not my intention to release any legal advice or*

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<sup>3</sup> Letter to the Committee from the Attorney-General dated 29 July 2013, p1

opinion that may have been received in respect of the operation of the Acts Interpretation Act 1931 with respect to authorisations.

However, I draw your attention to section 4(1) of the Acts Interpretation Act, which provides *inter alia* that the Acts Interpretation Act only applies where its provisions are not inconsistent with the true intent of the particular Act. Based on this it would seem that sub-sections 23AA(1), (6) and (7) do not apply to a delegation made by the Board under section 16(1) to other persons, but do apply to any delegations the Board may make to the Chief Executive Officer (CEO) under section 16(2). Therefore any delegation of power to the CEO may be concurrently exercised by the Board.

It would appear that the intent of the section, as passed by the Parliament, was to provide that once the Board delegated a specific task or function to another member of the Board, a member of staff or other person (other than the CEO) then it could not also purport to exercise the same power as granted under the delegation, unless the delegation had revoked or had expired. This may have been done to ensure that the exercise of a delegated power to such persons as described in section 16(1) could not be fettered or interfered with by the Board, or to ensure that any delegation of a specific power should be exercised at arm's length from the Board.

It is my view that whether all the provisions of section 23AA should apply to a section 16(1) delegation is a matter of policy, rather than a purely technical issue, that would require additional consideration following any further submissions from the Board or findings of the Joint Standing Committee about how the current section is impeding the operation of the Board's or Integrity Commission's functions.<sup>4</sup>

#### Item 7

- 3.6 With respect to Item 7, the Committee requested the Attorney-General to provide the following information:

*Advice as to the need and benefits, if any, of such an amendment.*

- 3.7 The Attorney-General provided the following advice:

With respect to item 7, I make the following preliminary comments. As you are aware, the establishment of a Commission of Inquiry is set out in the Commissions of Inquiry Act 1995. In general, Commissions of Inquiry are creatures of Executive Government, established on an *ad hoc* basis to inquire into matters of public interest. Once established, however, they operate independently of the Executive. Their purpose is usually to ascertain factual circumstances and make recommendations.

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<sup>4</sup> Letter to the Committee from the Attorney-General dated 29 July 2013, p1-2



With respect to the Board and the Integrity Commission generally, if the Board recommends that a Commission of Inquiry be established, it does not automatically follow as a matter of course that a Commission of Inquiry will be set up. The decision to initiate such inquiry remains with the Government of the day and is based on a range of evidentiary and public policy factors.

Section 4 of the Commissions of Inquiry Act provides that a Commission of Inquiry may only be established by the Governor-in-Council if it is deemed to be in the public interest and expedient to do so. In my view, in considering the public interest it is always necessary to have regard to the cost of conducting such an inquiry, which will nearly always be significant. I draw your attention to the Tasmanian Government Submission to the Joint Select Committee on Ethical Conduct (available on the Parliament website submission number 25A) and comments about costs of setting up and running a Commission of Inquiry. In 2009 the costs were estimated in the vicinity of \$1-2 million dollars and this could be greater depending on the scope of the inquiry.

As you also know, Commissions of Inquiry involve the exercise of a wide range of powers and can intrude on the public and private lives of individuals. I understand that at the time the Integrity Commission legislation was being developed it was considered appropriate that any recommendation about the establishment of such an inquiry should be made either:

- a) at the commencement of an assessment phase (given the gravity of the allegations and a desire not to taint witnesses or evidence); or
- b) at the end of an investigation process (where there was enough evidence available to support such a recommendation) - rather than during the assessment of a complaint.

I would be interested to review the findings of the Joint Standing Committee and to consider further advice about why it is considered necessary for the Board to be able to recommend a Commission of Inquiry during the 'assessment phase' of a complaint, before I commit to developing legislative amendments directed to this end.<sup>5</sup>

#### **Item 43**

- 3.8 With respect to Item 43, the Committee requested the Attorney-General to provide the following information:

Details of the second-mentioned proposed amendment relating to a new offence regarding destruction or alteration of records or things relevant to an allegation of misconduct following referral by the Commission.

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<sup>5</sup> Letter to the Committee from the Attorney-General dated 29 July 2013, p. 2.

3.9 The Attorney-General provided the following advice:

*With respect to item 43 I draw the Joint Standing Committee's attention to the provisions in the Archives Act 1993 which set out responsibilities associated with dealing with State records, including penalty provisions for unauthorised destruction or disposal. There are also some provisions in the Criminal Code Act 1924 that deal with public records such as section 235 'unlawfully dealing with a public register or record required to be kept by statute,' section 265 'false accounting by a public officer' and section 282 'falsifying or permitting the falsification of a register or record that is required to be kept by statute.'*

*Again, I do not wish to commit to the development of further offence provisions that are specific to the destruction of records relevant to investigations until I have an opportunity to consider the Joint Committee's report and any particular evidence or submissions raised during the Committee's deliberations indicating that there is a serious public policy reason why such amendments may be required.<sup>6</sup>*

## 4 RECOMMENDATION

- 4.1 The Committee recommends that the Legislative Council and the House of Assembly note the findings of the Committee in respect of the amendments proposed by the Integrity Commission to the Integrity Commission Act 2009.

Parliament House  
HOBART  
19 November 2013

Hon. Dr. Vanessa Goodwin MLC  
CHAIRPERSON

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<sup>6</sup> Letter to the Committee from the Attorney-General dated 29 July 2013, p. 3.

## **Appendices**



Our Ref: AD000089/2013/001296

19 July 2013

Hon. Dr. Vanessa Goodwin MLC  
Chair  
Joint Standing Committee on Integrity  
Parliament House  
Hobart TAS 7000

Dear Chair

**Re: Section 13(c) Report of the Board**

Thank you for your letter of 21 June 2013 setting out the Committee's consideration of the report provided by the Board, under s 13(c) of the *Integrity Commission Act 2009* (the Act). The Board notes that the Committee has indicated in principle support for a significant proportion of the issues raised and expresses its appreciation for that support.

It is noted that the Committee is seeking additional information about Items 2 and 7.

The information about other Items, requested of the Commission, is provided below.

**Item 5**

***Functions of chief executive officer in relation to Members of Parliament***  
**Section 30**

*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) ...

**Technical issue**

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 the Commission's (CEO's) 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 would appear to be 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 transparency if that is required.

### Recommendation

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.

### Committee response

That the Chief Commissioner be requested to provide:

- a) detail of the perceived deficiency of the Act as it is currently prescribed;
- b) detail of any proposed amendments; and
- c) detail of how the Commission would envisage any such amended s 30(a) would operate in practice.

### **Response**

#### **a) perceived deficiency**

The Act provides no greater specificity for the CEO's role other than to 'monitor' and the Commission's practice is to inspect each member's annual return and note if the information disclosed complies with the applicable requirements of the *Parliamentary (Disclosure of Interests) Act 1996* (the Disclosure Act). The inspection regime instituted by the Commission does not seek to verify the accuracy of the information provided nor that it constitutes a full disclosure.

If any return does not comply with the Act, it is unclear what the CEO is to do with that information. The Act does not provide for the CEO to raise deficiencies with the Member, officers of the Parliament or the Parliament itself.

The Commission's 2011 and 2012 inspections noted a number of errors in the completion of the forms. Some errors were substantive (failure to provide a postal address for real property as prescribed by the Disclosure Act; failure to specify the nature of an interest in real property). Other errors were more procedural (leaving fields blank, instead of writing 'nil').

After the 2011 inspection, the then Acting CEO of the Integrity Commission wrote to the Clerks and Presiding Officers of both Houses of Parliament drawing the errors to their attention and suggesting that some form of additional guidance be provided through the Clerks' offices to assist members to accurately complete the forms. This course of action by the CEO was not prescribed by the Act. The officers did not believe that it was appropriate for the Clerks to provide any additional guidance to members, although the Clerk of the House of Assembly did undertake to circulate a memorandum to MHA's informing them of the errors noted by the Commission.

The 2012 recent inspection disclosed further errors in the forms. After this inspection the CEO wrote the Premier suggesting that the returns themselves might be re-drafted to assist members to complete them more accurately. However, again this course of action by the CEO is not contemplated by the Act.

**b) detail of any proposed amendments:**

The Commission suggests that at the least, the Act should provide for some outcome from the CEO's monitoring of the Member's returns.

**c) detail of how the Commission would envisage any such amended s 30(a) would operate in practice:**

As noted above, an amendment that the CEO was to inspect each member's return annually would clarify what was required, as would an amendment to allow the CEO to draw any deficiencies in a return to the attention of the Member. In relation to notifying the Clerks, there may need to be a further amendment, to require the Clerks to act on the information provided by the CEO.

**Item 9**

***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 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 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*

...

And see ss 39 – 43 inclusive.

**Technical Issue**

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.

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.

#### Recommendation

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.

#### Committee response

That the Chief Commissioner be requested to provide detail of what consultation, if any, was undertaken with public authorities in respect of such amendments.

#### **Response**

The Commission has not undertaken consultation with any public authorities in respect of such amendments.

The recommendation arises solely from experience after almost 3 years of operation, greater clarity about the provisions of the Act arising from legal advice<sup>1</sup> and having regard to other jurisdictions. The problem is self-evident – if a complaint is referred to an agency then the Commission loses its jurisdiction to investigate the complaint itself even if it is of the view that the agency's actions have been insufficient. The only way that the Commission can 'get back' its jurisdiction is for the Board to determine to conduct an own motion investigation or for another complaint to be made to the Commission. There is unavoidable delay, if that occurs.

Even though the functions and powers of the Commission under s 8(l) are meant to enable the Commission to assume responsibility for, and complete, an investigation into misconduct commenced by a public authority or integrity there is no mechanism in the Act to allow the Commission to legally do this.

<sup>1</sup> The Commission has received legal advice that the only allegations over which it is able to use its powers are for complaints received pursuant to s 33 or for an own motion investigation commenced under s 45 or 89.

In other jurisdictions, invariably the integrity entity retains 'jurisdiction' over the allegations of misconduct, notwithstanding a referral to an agency to deal with the misconduct. See for example –

*Corruption and Crime Commission Act 2003 (WA)*, s 39. Despite having made a decision to refer, the CCC may at any time decide to act, ie to investigate and has a separate power to direct an agency not to take action.

*Crime and Misconduct Act 2001 (Qld)*, s 48. The CMC is able to assume responsibility for and complete an investigation by a public official into official misconduct.

*Law Enforcement Integrity Commissioner Act 2006 (Cwth)*, s 42. The Commissioner is able to reconsider how to deal with a particular corruption issue at any time, including directing the agency involved not to investigate the issue.

*Independent Commission Against Corruption Act 1988 (NSW)*, s 57. The Commission may revoke a referral or vary a recommendation, requirement or direction.

*Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*, s 79. The IBAC may determine to investigate a complaint or notification that has been referred or withdraw the referral at any time. If a person or body receives a notice withdrawing a referral they must cease their investigation and cooperate with IBAC, including providing any evidence in their possession.

*Independent Commissioner Against Corruption Act 2012 (SA)*, s 37(5)<sup>2</sup>. The Commissioner may decide to exercise the powers of an inquiry agency in respect of a matter referred to the agency and if so, the agency must refrain from taking action in respect of the matter. Further, the Commissioner may at any time revoke a referral to an agency or revoke or vary any directions or guidance given to an agency.

## **Item 11**

### ***Report of assessor***

#### ***s 37(2)(e)***

*The report of the assessor is to recommend that the 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 ...*

### **Technical Issue**

This section is inconsistent with s 38(1)(e) in that it appears to limit a recommendation by the assessor to 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 possible misconduct by 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.

### **Recommendation**

Amend s37(2)(e) to enable a referral to the Commissioner of Police may also be recommended where a complaint involves a police officer, but no crime or other offence is

<sup>2</sup> The ICAC in South Australia does not commence until 1 September 2013.



apparent.

#### Committee response

That the Chief Commissioner be requested to provide detail of what consultation, if any, was undertaken with public authorities, in particular, the Commissioner, Tasmania Police in respect of such amendments.

#### **Response**

The Commission has not undertaken consultation with any public authorities, or the Commissioner Tasmania Police, in respect of this recommendation.

The Commission has identified an inconsistency with the Act in the recommendations that can be made by an assessor, when the recommendation is about police officers. Complaints of misconduct do not necessarily disclose a crime or an 'offence'.

#### **Item 12**

##### ***Actions of chief executive officer on receipt of assessment s 38 (1) (b)(c)(d)(e) & (f)***

...

*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.

#### 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.

#### Committee response

That the Chief Commissioner be requested to provide examples illustrating why the current prescriptions are deficient.

## Response

During the assessment, an assessor is able to exercise the powers of an investigator – s 35(4). During the assessment phase, assessors have in the past obtained financial information relative to a subject officer, from banking institutions. Evidence collection at this stage can be very wide and reveal private information that is ultimately not directly relevant to the misconduct alleged. In one matter, financial information revealed that a family member of the subject officer had a significant gambling issue. That information was irrelevant to the subject allegations but is recorded by the assessor in their internal report, as are all avenues of inquiry.

In another example, there can be occasions where allegations against multiple officers will require some of the complaint be referred to the relevant agency for their own investigation, but other allegations may be retained by the Commission for investigation. If the misconduct is current and ongoing, referring all of the assessor's report may cause inappropriate information to be released, creating difficulties with the investigation.

Other jurisdictions deal with this aspect on the basis of 'information sharing' –

*Law Enforcement Integrity Commissioner Act 2006* (Cwth), s 44. The Commissioner has an ongoing obligation to give the head of the agency investigating the corruption issue, information or documents that relate to the issue being investigated, if they are in the control of the Commissioner and if the agency does not already have the information.

*Independent Commission Against Corruption Act 1988* (NSW), s 53(4) when a matter is referred the Commissioner may communicate to the relevant authority any information which ICAC has obtained during the investigation of conduct connected with the matter. The information communicated can be subject to the secrecy provisions (s 111).

*Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s 77. IBAC may provide any information that it has in relation to the matter referred. [And see s 41, IBAC may at any time, provide or disclose any information acquired by reason of, or in the course of, the performance of its duties and functions or the exercise of its powers, if it considers that the information is relevant to the performance of the duties and functions of that person or body.]

*Corruption and Crime Commission Act 2003* (WA), s 37(2). The CCC, may refer an allegation to another agency and the allegation may be accompanied by a report which may include recommendations for action, time frames for action and such information as the CCC considers would assist the agency or authority to take the action.

*Independent Commissioner Against Corruption Act 2012* (SA), s 38(5)<sup>3</sup>. In referring a matter to a public authority, the Commissioner may disclose information that the Commissioner has in respect of the matter.

<sup>3</sup> The ICAC in South Australia does not commence until 1 September 2013.

**Item 18****Conduct of investigation****s 47**

(1) *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 following...*

**Technical Issue**

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 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) s 95 ('The Commission')

*Crime and Misconduct Act 2001*(Qld) s 72 (The chairperson)

*Law Enforcement Integrity Commissioner Act 2006* (Cwth) ('The Integrity Commissioner')

**Recommendation**

Amend s 47 so that notices are issued by the CEO consistent with s 50 where an authorisation to enter to enter the premises of a public authority 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.

**Committee response**

That the Chief Commissioner be requested to provide examples illustrating why the current prescription is deficient.

**Response**

Investigators currently have the power to issue notices under s 47, apparently without restriction, although the CEO can make directions in relation to the conduct of investigations – s 46(4). Investigators are not necessarily employees or staff of the Commission; an investigator could for example, be an expert in a particular matter, outside of the Commission, the state service or Tasmania. The Commission has authorised external personnel to be investigators. Given that powers exercisable by an investigator under s 47 are coercive, there is a risk, that an investigator might issue a notice without any internal Commission oversight.

The exercise of this power without restriction is inconsistent with other powers under the Act, where it is the CEO or Tribunal who authorises the power. Further, interstate integrity entity powers are invariably exercised by the relevant Commissioner(s).

**Item 27*****Investigator's report******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.*

**Technical Issue**

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.

**Recommendation**

Amend s 55 to provide that the investigator should prepare a report of the investigation to the CEO.

**Committee response**

That the Chief Commissioner be requested to provide examples illustrating why the current prescription is deficient.

**Response**

An investigator is assigned to find out the facts of what has occurred so that the CEO can make a recommendation to the Board as to what should happen with that information (eg referral to the Police; the agency; the DPP). This is provided for in the Act (s 57). The Board then considers the recommendations of the CEO and makes the ultimate decision. The Board has recently confirmed that it considers it is the appropriate body to make judgments about the factual material presented by the investigator, considering the recommendations of the CEO. This amendment would formalize that arrangement.

**Item 43*****Destruction or alteration of records or things******s 97***

*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 any investigation or inquiry.*

*Penalty:*

*Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.*

**Technical Issue**

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.

### Recommendation

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.

### Committee response

That the Chief Commissioner be requested to provide details of the second-mentioned proposed amendment relating to a new offence regarding destruction or alteration of records or things relevant to an allegation of misconduct following referral by the Commission.

### **Response**

Referral of complaints occurs at certain defined points – in accordance with s 35, shortly after a complaint has been received; after an assessment, s 38; following completion of an investigation; s 58. Ultimately, unless a complaint proceeds to an Integrity Tribunal, it will be referred to a relevant public authority at some point (or dismissed).

Generally, 'records or things' relevant to the assessment or investigation will be gathered by the Commission as part of its investigative processes. Referral of complaints is in accordance with the Commission's objective to build capacity within agencies. Referral will not necessarily mean that a matter has been assessed/investigated exhaustively. In any event, on referral an agency is required to take its own action to respond to the referral. The Commission may seek to audit the way in which the agency has handled the referred complaint, or simply to monitor or seek reports. On referral, the complaint can still be characterised as an allegation concerning misconduct. While there are offences related to destruction of official documents, destruction of records which would support an allegation of misconduct in the agency appears not be covered by the Act, and it is doubtful that other legislation makes it an offence.

### **Item 44**

#### ***Certain notices to be confidential documents***

#### ***s 98***

*(1) A person on whom a notice that is a 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 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.

### Technical Issue

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 which should be confidential.

As an example, s 88 sets out the Commission's 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.

#### Recommendation

Amend s 98 so that the Commission can ensure confidentiality over its actions beyond the notices referred to at particular sections of the Act.

#### Committee response

That the Chief Commissioner be requested to provide advice as to how a third party, who obtained confidential documents in ignorance of their status, would be treated.

#### **Response**

Although we consider this to be a drafting issue to be explored if an amendment is agreed, (which may benefit from formal legal advice) the Commission does consider that a person obtaining confidential documents in ignorance of their status, would not fall within s 98 on the basis that the provisions relating to confidentiality have not been disclosed to that person. The s 98 confidentiality provisions are designed to enforce confidentiality when it is required, and in order for the section to apply, the relevant person must have notice of the provisions, whether from the Commission, or the person disclosing the information.

#### **Item 46**

##### ***Personal information may be disclosed to Integrity Commission s 102***

*A personal information custodian, within the meaning of the Personal Information Protection Act 2004, is authorised to disclose personal information, within the meaning of that Act, to the Integrity Commission for the purpose of and in accordance with this Act.*

#### Technical Issue

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 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 finalised 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 have the effect of granting 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 PIP Act.

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 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*).

#### Recommendation

Amend the *Personal Information Protection Act 2004* and/or the Act to enable to appropriate Tasmania Police databases.



### Committee response

That the Chief Commissioner be requested to provide detail of what consultation, if any, was undertaken with the Commissioner, Tasmania Police in respect of such amendments.

#### **Response**

There has been significant consultation with the Tasmania Police about the issue of online access to databases. The Commission has not consulted with any agencies, including Tasmania Police about what particular amendment would need to be made to achieve online access.

As advised, the Commissioner and CEO entered into an MOU, on establishment of the Commission, which envisaged online access to police databases subject to all relevant legal restrictions.<sup>4</sup> Both Tasmania Police and the Commission explored the issue of access extensively amongst themselves and with the Office of the Solicitor-General. The Commission understands that the only impediment to obtaining online access is the legal advice that the Commissioner, Tasmania Police, would be committing an offence under the PIP Act if he allowed it.

It is the Commission's recommendation that online access should be enabled, and our dialogue with Tasmania Police to date is that they agree with this proposition. However, the legal advice is that this can only occur with legislative amendment. The Commission understands that should an amendment be drafted, such amendment will be subject to comment by the relative agencies as per the normal progress of Bills.

### **Schedule 2, Item 2**

#### ***Personal Information Protection Act 2004***

#### ***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***

*(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*

<sup>4</sup> Legal restrictions will include restrictions by third party providers concerning access, confidentiality, storage etc.

*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*

#### Technical Issue

See the discussion re s 102 of the IC Act.

#### Recommendation

Amend the *Personal Information Protection Act 2004* and/or the IC Act to enable to appropriate Tasmania Police databases.

#### Committee response

That the Chief Commissioner be requested to provide detail of what consultation, if any, was undertaken with the Commissioner, Tasmania Police in respect of such amendments.

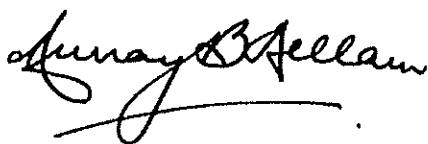
#### **Response**

This is the same issue as with respect to the immediately preceding one, Item 46. The Committee is requested to refer to the previous response.

I trust that the above (enclosed) responds sufficiently to your queries. Should there remain any outstanding issues please feel free to contact me for further clarification.

While the Commission is currently undertaking valuable work, the state of its Act is such as to require a significant number of technical amendments to ensure that is operating as effectively as it possibly can and in accordance with Parliament's intentions. Early attention to the range of amendments identified in the Board's report will have a real and beneficial impact on the Commission's operations. On behalf of the Board, I commend the amendments to you and urge the Committee to support them.

Yours sincerely



**Hon. Murray Kellam AO**  
Chief Commissioner

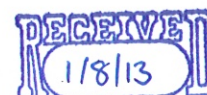
Attorney-General  
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Min/13/830

Hon Dr Vanessa Goodwin MLC  
Chair  
Joint Standing Committee on Integrity  
Parliament House  
HOBART TAS 7000



20 JUL 2013

Dear Dr Goodwin

Thank you for your letter as Chair of the Joint Standing Committee on Integrity (Joint Standing Committee) dated 21 June 2013.

I note your request for my advice in respect to some of the technical issues that have been raised by the Integrity Commission Board (the Board) in their correspondence to the Joint Standing Committee and I dated 3 April 2013. I reply as follows.

First, I note that pursuant to section 24 of the *Integrity Commission Act 2009*, the role of the Joint Standing Committee is to review the functions, powers and operations of the Integrity Commission at the expiration of 3 years from the commencement of the Act. This review is timed to commence and report after 1 October 2013. As I indicated during the Budget Estimates hearings I would prefer to await the final report of the Joint Standing Committee before I commit to any reform or introduce amending legislation.

As you may be aware the Government's legislative program and Parliamentary sitting schedule are such that there is limited time left in this year to prepare and introduce new Bills. Further it would seem preferable and a more efficient use of resources that any amendment legislation deal with all substantive issues that may be raised by the Joint Standing Committee's review process. Given the matters raised by the Hon Murray Kellam AO in his letter of 4 April 2013 are of a technical nature, it is my opinion that they do not require urgent amendments to be progressed at this time. However, I am prepared to make some initial comments regarding the items you have referred to in the Integrity Commission Board's Report dated 4 April 2013.

With respect to your specific queries regarding item 2 of the Board's Report I advise that it is not my intention to release any legal advice or opinion that may have been received in respect of the operation of the *Acts Interpretation Act 1931* with respect to authorisations.

However, I draw your attention to section 4(1) of the *Acts Interpretation Act*, which provides *inter alia* that the *Acts Interpretation Act* only applies where its provisions are not inconsistent with the true intent of the particular Act. Based on this it would seem that sub-sections 23AA(1), (6) and (7) do not apply to a delegation made by the Board under section 16(1) to other persons, but do apply to any delegations the Board may make to the Chief Executive Officer (CEO) under section 16(2). Therefore any delegation of power to the CEO may be concurrently exercised by the Board.



It would appear that the intent of the section, as passed by the Parliament, was to provide that once the Board delegated a specific task or function to another member of the Board, a member of staff or other person (other than the CEO) then it could not also purport to exercise the same power as granted under the delegation, unless the delegation was revoked or had expired. This may have been done to ensure that the exercise of a delegated power to such persons as described in section 16(1) could not be fettered or interfered with by the Board, or to ensure that any delegation of a specific power should be exercised at arm's length from the Board.

It is my view that whether all the provisions of section 23AA should apply to a section 16(1) delegation is a matter of policy, rather than a purely technical issue, that would require additional consideration following any further submissions from the Board or findings of the Joint Standing Committee about how the current section is impeding the operation of the Board's or Integrity Commission's functions.

With respect to item 7, I make the following preliminary comments. As you are aware, the establishment of a Commission of Inquiry is set out in the *Commissions of Inquiry Act 1995*. In general, Commissions of Inquiry are creatures of Executive Government, established on an ad hoc basis to inquire into matters of public interest. Once established, however, they operate independently of the Executive. Their purpose is usually to ascertain factual circumstances and make recommendations. With respect to the Board and the Integrity Commission generally, if the Board recommends that a Commission of Inquiry be established, it does not automatically follow as a matter of course that a Commission of Inquiry will be set up. The decision to initiate such an inquiry remains with the Government of the day and is based on a range of evidentiary and public policy factors.

Section 4 of the Commissions of Inquiry Act provides that a Commission of Inquiry may only be established by the Governor-in-Council if it is deemed to be in the public interest and expedient to do so. In my view, in considering the public interest it is necessary to have regard to the cost of conducting such an inquiry, which will nearly always be significant. I draw your attention to the Tasmanian Government Submission to the Joint Select Committee on Ethical Conduct (available on the Parliament website submission number 25A) and comments about costs of setting up and running a Commission of Inquiry. In 2009 the costs were estimated in the vicinity of \$1-2million dollars and this could be greater depending on the scope of the inquiry.

As you also know, Commissions of Inquiry involve the exercise of a wide range of powers and can intrude on the private and public lives of individuals. I understand that at the time the Integrity Commission legislation was being developed it was considered appropriate that any recommendation about the establishment of such an inquiry should be made either:

- a) at the commencement of an assessment phase (given the gravity of allegations and a desire not to taint witnesses or evidence); or
- b) at the end of an investigation process (where there was enough evidence available to support such as recommendation) -

rather than during the assessment of a complaint.

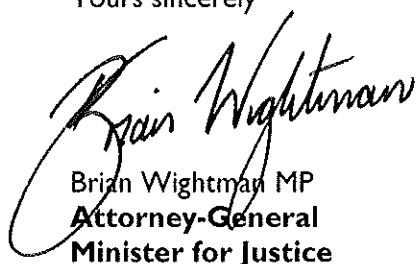
I would be interested to review the findings of the Joint Standing Committee and to consider further advice about why it is considered necessary for the Board to be able to recommend a Commission of Inquiry during the 'assessment phase' of a complaint, before I commit to developing legislative amendments directed to this end.

With respect to item 43 I draw the Joint Standing Committee's attention to the provisions in the *Archives Act 1993* which set out responsibilities associated with dealing with State records, including penalty provisions for unauthorised destruction or disposal. There are also some provisions in the *Criminal Code Act 1924* that deal with public records such as section 235 'unlawfully dealing with a public register or record required to be kept by statute', section 265 'false accounting by a public officer' and section 282 'falsifying or permitting the falsification of a register or record that is required to be kept by statute'.

Again I do not wish to commit to the development of further offence provisions that are specific to the destruction of records relevant to investigations until I have an opportunity to consider the Joint Committee's report and any particular evidence or submissions raised during the Committee's deliberations indicating that there is serious public policy reason why such amendments may be required.

Thank you once again for raising this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Wightman', is written over the typed name and title. The signature is fluid and cursive, with the first name 'Brian' being more prominent.

Brian Wightman MP  
**Attorney-General**  
**Minister for Justice**