



TASMANIA

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Independent Review of the  
Integrity Commission Act 2009

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**REPORT OF THE INDEPENDENT REVIEWER**

The Hon William Cox AC, RFD, ED, QC

May 2016

Pursuant to Section 106 of the *Integrity Commission Act 2009*



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## Glossary of Terms and Abbreviations

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**ACC** - Australian Crime Commission

**Act/IC Act** – The *Integrity Commission Act 2009*

**Board** - The Board of the Commission established by section 12 of the Act

**CCC** - Crime and Corruption Commission, WA

**CEO** - The Chief Executive Officer of the Integrity Commission appointed under section 17 of the Act

**Chief Commissioner** - The Chief Commissioner of the Integrity Commission appointed under section 15 of the Act

**Commission** - The Integrity Commission established by section 7 of the Act

**CMC** - Crime and Misconduct Commission, Qld

**CPSU** – The Community and Public Sector Union (SPSFT) Inc.

**DPO** - Designated Public Officer, as defined in section 6 of the Act

**DPP** – The Director of Public Prosecutions

**ED5** – Employment Direction No 5 issued under the *State Service Act 2000*

**Five Year Review** – The Independent Review commissioned by the Minister for Justice under section 106 of the Act, this Review.

**FTE** - Full-Time Equivalent

**IBAC** - Independent Broad-based Anti-corruption Commission, Victoria

**ICAC** - Independent Commission Against Corruption, NSW

**ICAC Act** – The *Independent Commission Against Corruption Act 1988* (NSW)

**Independent Reviewer** – The person appointed by Her Excellency the Governor to undertake the Five Year Review, the Hon William Cox AC, RFD, ED, QC

**JSC** - The Joint Standing Committee on Integrity of the Tasmanian Parliament established by section 23 of the Act

**Law Society** - The Law Society of Tasmania

**LGAT** - Local Government Association, Tasmania

**MPER** - Misconduct Prevention, Education and Research, a Branch of the Commission

**Parliamentary Standards Commissioner** – The Parliamentary Standards Commissioner established by section 27 of the Act

**PAC** – The Public Accounts Committee of the Tasmanian Parliament

**PAT** – The Police Association of Tasmania

**PID Act** – The *Public Interest Disclosures Act 2002*

**RTI Act** – The *Right to Information Act 2009*

**State Service Code of Conduct** – The Code of Conduct specified in section 9 of the *State Service Act 2000*

**State Service Commissioner** – An office established previously under the *State Service Act 2000*, which no longer exists

**Three Year Review** – The Review undertaken by the JSC under section 24(e) of the Act.

**TI** – Treasurer’s Instruction

**TIA Act** – The *Telecommunications (Interception and Access) Act 1979* (Cth)

**Tribunal/Integrity Tribunal** – A Tribunal convened by the Chief Commissioner under section 60 of the Act

**University** – University of Tasmania

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# 1 INTRODUCTION

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1.1 By section 106 of the *Integrity Commission Act 2009* (the Act) it is provided:

**" 106 Independent Review of Act**

- (1) *The Minister must commission an independent review of this Act as soon as possible after 31 December 2015 to enable consideration of –*
  - (a) *the operation of the Act in achieving its object and the objectives of the Integrity Commission; and*
  - (b) *the operation of the Integrity Commission, including the exercise of its powers, the investigation of complaints and the conduct of inquiries; and*
  - (c) *the operation of the Parliamentary Standards Commissioner; and*
  - (d) *the operation of the Joint Committee; and*
  - (e) *the effectiveness of orders and regulations made under this Act in furthering the object of this Act and the objectives of the Integrity Commission; and*
  - (f) *any other matters relevant to the effect of this Act in improving ethical conduct and public confidence in public authorities.*
- (2) *The independent review is to be undertaken by a person appointed by the Governor.*
- (3) *Before a person is appointed to undertake the independent review, the Minister is to consult the Joint Committee or, if the Joint Committee has not been appointed or Parliament has been prorogued, the Minister is to consult –*
  - (a) *the President of the Legislative Council; and*
  - (b) *the Parliamentary leader of each political party represented in the House of Assembly.*
- (4) *The person who undertakes the independent review must invite submissions relevant to the review from the public and give due consideration to the content of any such submissions.*
- (5) *The person who undertakes the independent review must give the Minister a written report of the review.*
- (6) *The Minister is to –*
  - (a) *transmit a copy of the report of the independent review to the President of the Legislative Council and the Speaker of the House of Assembly; and*
  - (b) *cause a copy of that report to be laid before each House of Parliament within 14 sitting-days of receiving it.*
- (7) *In this section –*

***independent review*** *means a review undertaken by a person who –*

  - (a) *holds or has held office as a judge of a court of the Commonwealth or of an Australian State or Territory; and*
  - (b) *is not otherwise employed by this State, a State Service Agency or a statutory authority."*

1.2 By Instrument under her hand dated 27 November 2015, Her Excellency the Governor having recited that I have held office as Chief Justice of the Supreme Court of Tasmania and am not employed by the State of Tasmania, or a State Service agency, or a statutory authority of the State of Tasmania, and further that the Parliamentary Joint Standing Committee on Integrity (JSC) had been consulted by the Minister of Justice about my appointment, appointed me as the Independent Reviewer to undertake the Review in accordance with section 106 of the Act commencing on 1 February 2016 and expiring on 31 May 2016.

- 1.3 On 16 January 2016 I caused to be published in the *Mercury Newspaper*, the *Examiner Newspaper* and the *Advocate Newspaper* an advertisement inviting submissions relevant to the review from the public requiring that they be received by close of business on Friday, 5 (sic) March 2016. On 30 January 2016 I caused the advertisement to be republished in the above newspapers amending only the date for receipt of such submissions to Friday, 4 March 2016.
- 1.4 Submissions were received from the persons and entities listed in Attachment 1 to this report.
- 1.5 By s 24(1)(e) of the Act it was provided that a function of the JSC was to review the functions, powers and operations of the Integrity Commission (the Commission) at the expiration of the period of three years commencing on the commencement of that section, and to table in both Houses of Parliament a report regarding any action that should be taken in relation to the Act or the functions, powers and operations of the Commission. For a number of reasons this review (the Three Year Review) was not completed until 18 June 2015. The JSC in its review recommended that several issues be left for consideration by this review (the Five Year Review) and others, the subject of recommendations to government by the JSC for implementation, were in turn referred for consideration by the conductor of the Five Year Review, that review being at that stage less than a year away. It has been necessary for me therefore to review many of the issues and submissions considered in the Three Year Review, as well as those in response to the advertisements.
- 1.6 As the principal stakeholder in this review is the Commission itself and it has lodged the most comprehensive of the submissions which I have received, I propose to address the issues it raises largely in the order which it has followed. That format conforms with the terms of reference set out in section 106. Under each term of reference, the submission provides a heading that indicates the relevant issue and sub-headings relating to the Commission's position on the issue, discussion of the issue and references to the Three Year Review and the State Government's response to it. The submission refers to and draws upon the Commission's previous submissions to the Three Year Review which are attached to its current submission.

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## 2 THE OPERATION OF THE ACT IN ACHIEVING ITS OBJECT AND THE OBJECTIVES OF THE INTEGRITY COMMISSION

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2.1 Section 3 of the Act is as follows:

**" 3 Object and objectives**

- (1) *The object of this Act is to promote and enhance standards of ethical conduct by public officers by the establishment of an Integrity Commission.*
- (2) *The objectives of the Integrity Commission are to –*
  - (a) *improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and*
  - (b) *enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and*
  - (c) *enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.*
- (3) *The Integrity Commission will endeavour to achieve these objectives by –*
  - (a) *educating public officers and the public about integrity; and*
  - (b) *assisting public authorities deal with misconduct; and*
  - (c) *dealing with allegations of serious misconduct or misconduct by designated public officers; and*
  - (d) *making findings and recommendations in relation to its investigations and inquiries."*

2.2 The first and obvious observation is that my task is not to review the object or objectives of the Act, nor to suggest any amendment of them. My task is to consider the terms of the Act other than s 3(1) and (2), and whether those terms operate to give effect to that object and those objectives. I should seek to identify any alteration to the scheme and provisions of the Act which is likely to be more appropriate in bringing about Parliament's expressed object and the objectives it has imposed upon the entity it has created.

2.3 For the reasons I will later advance, I make the following recommendations for amendment to the Act, together with my other recommendations. I recommend that:

- [1] That the Auditor-General and Ombudsman be removed as members of the Board (ie delete paragraphs (b) and (c) of section 14(1) of the Act).
- [2] That a person with experience in public sector human resources and industrial relations should be added as a member of the Board, making a total of five members including the Chief Commissioner. Alternatively, the list in paragraph (g) of section 14(1) should be amended by the addition of subparagraph (v): "A person with experience in public sector human resources and industrial relations". This will leave a total of four members.
- [3] That a quorum at a meeting of the Board be reduced from four to three (ie amend Schedule 3, clause 4(1) of the Act).

- [4] That Schedule 2, clause 8(2)(g) of the Act be amended by substituting the words "has been guilty of misconduct" with "has been guilty of conduct or an attempt to engage in conduct which, if engaged in by a public officer, would amount to misconduct".
- [5] That the Chief Commissioner and CEO be excluded as designated public officers (ie amend section 6(1)(d) of the Act by adding at the end thereof the words "other than the Chief Commissioner and chief executive officer").
- [6] That the Act be amended by substituting for the present section 13(a) the following (or words to this effect):
- " Facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that the chief executive officer and the staff of the Integrity Commission perform their functions in accordance with sound public administration practice and principles and the objectives of this Act and by issuing such guidelines to them as it considers appropriate."
- [7] That the Act be amended so that an assessor is to submit his or her report to the CEO within 40 working days of the assessor's appointment pursuant to section 35 or within such further time as the Board may allow having regard to all the circumstances.
- [8] That section 35(4) of the Act be amended to permit the assessor to exercise only the power of an investigator under section 47(1)(c) if the assessor considers it reasonable to do so.
- [9] That the interpretation section of the Act be amended by adding a definition of "offence of a serious nature" as one punishable by X years' imprisonment (or a fine not exceeding Y penalty units, or both).
- [10] That the Commission expedite the processing of complaints by:
- (a) adopting a robust attitude to the triaging of complaints;
  - (b) so far as practicable confining its investigative function to serious misconduct by public officers, misconduct by designated public officers, and serious misconduct by police officers under the rank of inspector.
- [11] That the Act be amended to require mandatory notification by public authorities of serious misconduct and misconduct by DPOs to the Commission in a timely manner.
- [12] That:
- (a) Where the Commission is assessing or investigating misconduct of a public officer involving a breach of the State Service code of conduct, the CEO shall, unless he or she is of the opinion that to do so might compromise such assessment or investigation, promptly advise the Head of Agency of that officer of the nature of that misconduct on a confidential basis.

- (b) When any such assessment or investigation is concluded and a determination by the CEO under section 38, or one by the Board under section 58, or one by the Integrity Tribunal under section 78 has been made, and the complaint referred back to the Head of Agency, the latter may treat the evidence gathered by the Commission as part of any code of conduct investigation.
- [13] That Employment Direction 5 should be amended to provide:
- (a) That where the Head of Agency is advised by the Commission that it is assessing or investigating misconduct of a public officer of that agency involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.
- (b) That where, in accordance with Recommendation [11], the Head of Agency notifies the Commission of serious misconduct of a public officer involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.
- [14] That the Act be amended to require that before any referral by the CEO pursuant to section 38 of a complaint to a public authority for investigation and action, any adverse material contained in the assessor's report be disclosed to the officer the subject of the complaint, that the latter be given the opportunity to comment upon it and that any submission or comment in relation thereto by the subject officer be attached to the material referred to the public authority.
- [15] That in accordance with item 9 of Attachment 2, Parts 5 and 6 of the Act 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 powers within those Parts.
- [16] That the Act be amended to require that if criminal conduct by a public officer other than a designated public officer or a police officer is suspected by the Commission during its triage of a complaint, the matter must immediately be referred to Tasmania Police.
- [17] That the Act be amended to delete the words "or DPP" from sections 57(2)(b)(iv), 58(2)(b)(iv) and 78(3)(d).
- [18] That the Act be amended to provide for the Commission to retain jurisdiction over matters referred to public authorities where after action by a public authority (or a failure by a public authority to take appropriate action) it is apparent that further action by the Commission is required.
- [19] That the privilege against self-incrimination be excluded from the Act. This might be achieved by amending section 4 to except that particular privilege from paragraph (a) of the definition of "privilege".

- [20] That the Act be amended to provide that any statement or document made or produced by a witness under compulsion shall be inadmissible against that person in any civil or criminal proceedings against him or her, other than proceedings for an offence against the Act or perjury in respect of that statement without his or her consent.
- [21] That the Act be amended so that any coercive notice issued under section 47 be signed by the Chief Commissioner, but that he or she may delegate this power to the CEO to be exercised when he or she is not available.
- [22] That the Act be amended to afford any witness required to attend and give evidence at an Integrity Tribunal hearing, and who may be subject to allegations of wrongdoing thereat, protection similar to that provided by section 18 of the *Commissions of Inquiry Act 1995*, including the right to representation by counsel and not being made the subject of any adverse finding as provided therein.
- [23] That section 49 of the Act be amended to enable the investigator to prohibit a person required to give evidence or answer questions, as part of an investigation, from being represented by a person who is already involved in an investigation or is involved or suspected to be involved in a matter being investigated.
- [24] That the Act be amended to enable the Integrity Tribunal to refuse to allow a public officer who is the subject of an inquiry, a witness referred to in section 66(2), or a person permitted to participate in an inquiry pursuant to section 67(1) to be represented before the Tribunal by a person who is already involved or suspected to be involved in a matter being investigated.
- [25] That section 83(3) of the Act be amended to permit the CEO to agree the quantum of legal costs at his or her discretion in lieu of having to have them taxed in the Supreme Court.
- [26] That complaints of misconduct by DPOs, once identified as such, be immediately made the subject of investigation under Part 6, and those of misconduct by non-commissioned police officers be referred in the first instance to the Commissioner of Police for action.
- [27] That complaints of serious misconduct by a police officer not a designated public officer which are not dealt with by the Commission under section 88(1)(a) be referred to the Commissioner of Police for action. A way of achieving this would be to add a new paragraph (ab) in section 88(1) to the following effect: "(ab) refer a complaint relating to serious misconduct by a police officer to the Commissioner of Police for action; or ...".
- [28] That the Act be amended to delete the words "assess" and "assessing" wherever they appear in sections 87 and 88.
- [29] That consideration be given to the adoption of the Model Codes of Conduct for Members of Parliament and Ministerial staff in Tasmania presented to Parliament by the Commission in June 2011.

- [30] That the Act be amended to permit the Parliamentary Standards Commissioner, at any time, to provide a report to Parliament on the performance of his or her function.
- [31] That clause 3(2) of Schedule 5 to the Act be repealed.
- [32] That an order be made under s 104(1)(b) to insert the University of Tasmania and under s 104(2) to insert the Vice Chancellor as principal officer into Schedule 1 of the Act, with a consequential amendment to Part 2 of Schedule 1 if required.
- [33] That the definition of "misconduct" set out in section 4 of the Act be retained.
- [34] That Treasurer's Instruction 1118 be amended such that where a conflict of interest exists, the Commission should have a discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption, as sought by the Commission.
- [35] That the Commonwealth be asked to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) so as to grant the Commission the status of a criminal law enforcement agency for the purposes of that Act.
- [36] That no compelling case has been made for the inclusion within the *Criminal Code* of an offence of Misconduct in Public Office.
- [37] That the definition in the Act of "public officer" be amended to specifically reference volunteers and officers exercising statutory functions or powers.
- [38] That section 46 of the Act be amended to provide that where a person has been appointed to assist an investigator, the CEO may also authorise that person to exercise any of the powers of an investigator set out in section 47.
- [39] That the Act be amended by adding the words "or own motion investigation, as the case may be" after the word "complaint" in section 58(2)(a).
- [40] That section 94 of the Act be subject to further consideration of the proper definition of what material needs the protection of confidentiality and the limits of appropriate disclosure.
- [41] That sections 98(1A) and 98(2) be amended so that confidentiality responsibilities are placed on persons to whom the existence of, contents of and matters relating to or arising from the notice have been disclosed, and further so that a person to whom any such information has been disclosed but who has not been informed by the person making the disclosure that it is an offence to disclose that information without a reasonable excuse to any other person, will him or herself have a reasonable excuse for the disclosure made by him or her.
- [42] That the Act be amended so that "assessments" be included in section 98(1B)(d) of the Act and "assessors" be included in section 98(1B)(e).
- [43] That section 98(2)(a)(i) of the Act be amended by adding after the words "offence against subsection (1)" the words "or subsection (1A)".

- [44] That section 98(2) of the Act be amended to clarify that the list of reasons given is not exhaustive.
- [45] That section 98(2) of the Act be redrafted to exonerate persons to whom disclosures have been made but who have not been informed that to disclose them further without reasonable excuse is an offence.
- [46] That section 98 of the Act be amended to provide that where the Commission or Integrity Tribunal has finally dealt with a complaint or own motion investigation, a person served with a notice that it or any document referred to therein or attached to it is a confidential document, may apply to the Commission or Integrity Tribunal for advice that such document is no longer a confidential document.
- [47] That section 98(1) of the Act be amended to read:
- "(1) A person on whom a notice that it or any document referred to therein or attached thereto 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 that confidential document; or
- (b) the contents of the confidential document; or
- (c) any matters relating to or arising from the confidential document –
- unless the person on whom the confidential document was served or to whom it was given has a reasonable excuse."
- [48] That the *Local Government Act 1993* be amended to provide for referrals from the Commission to be dealt with without the requirements of sections 28V(3)(b), (f) or (g) of that Act, and that amendments be made to that Act to ensure that such referrals be made directly to the Executive Officer and (as has been recommended in Recommendation [12(b)] in relation to ED5) on such referral the Code of Conduct Panel may treat the evidence gathered by the Commission as part of its investigation.
- [49] That Audit Panels be included explicitly in the definition of a local authority in section 4(1) of the Act
- [50] That the recommendations of the Commission in Attachment 2 to this report opposite the item numbers appearing in the first column thereof be implemented in respect of the following items: 1, 2, 3, 4, 5, 6, 7, 8, 11, 14, 15, 20, 22, 23, 24, 25, 26, 27, 28, 33, 34, 37, 38, 40, 41, 42, 43 and 45.
- [51] That section 37(1) of the Act be amended by deleting the words "or review".
- [52] That section 46(1)(c) of the Act be repealed and in lieu thereof a requirement to observe the rules of procedural fairness should be included in section 55.

- [53] That an amendment to the Act to ensure the confidentiality of events arising out of the execution of a search warrant, or the exercise of any powers of an investigator under section 52 of the Act, be formulated by the Commission and implemented if approved by the JSC.
- [54] That sections 57(2)(b) and 58(2)(b) of the Act be amended to allow the CEO in any recommendation to the Board and the Board in its determination to specify such parts of the report and any other information obtained in the course of the investigation should not be included in the referral to the persons mentioned in sections 57(2)(b)(i-vi) and 57(2)(b)(i-vi), or section 58(2)(b)(i-vi).
- [55] That an amendment to the Act to ensure confidentiality over the actions of the Commission of those persons subject to any lawful requirements made by it under the Act be formulated by the Commission and implemented if approved by the JSC.



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### 3 THE OPERATION OF THE INTEGRITY COMMISSION, INCLUDING THE EXERCISE OF ITS POWERS, THE INVESTIGATION OF COMPLAINTS AND THE CONDUCT OF INQUIRIES

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#### 3.1 Governance

##### 3.1.1 The Commission has submitted as follows:

###### *" Commission position*

*The governing body of the Commission should continue to be a Board.*

*The Board should comprise of a Chief Commissioner and two or three other members who have a range of skills and expertise which will contribute to the deliberations of the Board (similar to those in the current Integrity Commission Act). However the Board should not include ex officio members from other integrity entities.*

*The Commission recognises that its relationship with other integrity entities and investigatory bodies in regard to their respective roles and responsibilities is important to ensuring that the highest levels of cooperation are achieved and needs to be maintained into the future.*

###### **Discussion**

[42] *The Commission plays an essential role in enhancing public confidence in the oversight of all public bodies and public officials in relation to integrity and ethics.*

[43] *The governance structure of the Commission is somewhat different to other Australian integrity entities.<sup>1</sup> However it is an appropriate model for the administration of the organisation given the intent of Parliament in establishing the Commission in 2009, and the objectives of the Integrity Commission Act.*

[44] *The object and objectives of the Integrity Commission Act are primarily concerned with promoting and enhancing standards of ethical conduct by public officers. Ethical conduct is not easy to define and the Commission must operate differently to similar organisations in other jurisdictions, where the requirement may be to deal with crime and corruption. In Tasmania, the Commission's jurisdiction includes over 44,000 public officers who inevitably have different interpretations, knowledge and understanding of the concept of ethical conduct.*

[45] *Any entity which is established to deal with the integrity of public officers must be independent of government and be seen to be independent by the public.*

[46] *As provided under the Integrity Commission Act, the Board is made up of a senior legal practitioner as Chief Commissioner, the Auditor-General, the Ombudsman and three persons with significant and specific expertise and experience at a senior public sector policy development and decision making level.<sup>2</sup> The Chief Commissioner and the three expert appointments are appointed following consultation with the JSC. The Board has undertaken its role in accordance with the Integrity Commission Act,<sup>3</sup> and made decisions with a general collegiate view based on a sound understanding of public administration practices and the principles of procedural fairness.*

[47] *The current governance of the Commission in Tasmania has worked well, and has provided a platform for robust discussion about the role of the Board; its relationship with management; its interactions with other integrity, regulatory and parliamentary bodies; and its capabilities to increase the awareness of the community and adherence of public servants to integrity and ethics best practice.*

[48] *There have been issues which have arisen over time which required the Board to review and re-assess its governance and operation; however such issues have been addressed and resolved. In particular, the Commission considers that the regard that Government, public*

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1 Integrity Commission, Third Written Submission to Three Year Review (2014).

2 Integrity Commission Act, s 14.

3 Integrity Commission Act, s 13.

*officers and the broader public have for the Commission has been shown to have increased significantly in recent years.*

[49] *Further detailed discussion relating to the responsibilities and roles of the Board is provided below.*

### **The Board**

[50] *There are a number of possible governance structures for the Commission, including:*

- *a single Commissioner;*
- *a single Commissioner with an Advisory Committee for support and advice; or*
- *a Board (of varying possible compositions).*

[51] *The possible outcomes (both positive and negative) of having a single Commissioner can be seen from other jurisdictions. While all actions can be taken to ensure that a single Commissioner will operate effectively, it has been seen that, in fact and in perception, the decisions and actions of that single person can be questioned.*

[52] *A model that involves a single Commissioner should necessarily consider the range of powers of the Commissioner, including the Commissioner's involvement in the day-to-day operations of the Commission as ultimately provided in the Integrity Commission Act. It may also require further consideration of appropriate oversight of the Commission.*

[53] *The establishment of an advisory committee to support a single Commissioner would provide additional knowledge and expertise to the Commissioner in decision making (similar to that provided by the independent members of the current Board). However, such a committee would be 'advisory' and, while it may have considerable public respect, could be ignored. Additionally, the non-accountability of an advisory committee may be problematic given the Commission's involvement in confidential and sensitive matters.*

[54] *Given the broad range of strategic, operational, budget, risk-related, compliance and communication roles that the Board could and does undertake, the Commission believes that the wisdom and expertise of a small group of persons, headed by a Chief Commissioner, remains the best model for both perception and actual operational reasons. A statutory Board of, say, three or four persons providing a range of input, views and expertise to the Commission's activities has the benefits and accountability of a "board" directed and led organisation.*

### **Constitution of the Board**

[55] *The current Board is provided with advice from the CEO and staff, plus the views each of the other members, providing a very broad range of views and interpretations on which to make decisions. In addition to the obvious benefits of having the Auditor-General and Ombudsman 'around the table', the Chief Commissioner and independent members of the Board have provided a very broad range of knowledge and expertise (legal skills, State Government, statutory/business enterprises, local government, police and investigations, governance, strategic policy, performance measurement, integrity and "fair play", stakeholder relationships, understanding of the Tasmanian context). This range of input into the Board's deliberations has ensured that there has been a balanced and well-informed response by the Commission to its investigatory, preventative and educational activities.*

[56] *The independent members have provided expertise and input based on their professional backgrounds which has enabled the Board, Chief Commissioner and CEO to better understand the circumstances surrounding actions/decisions subject to investigation, the ways to implement change, and the impacts of certain decisions and actions proposed to be undertaken by the Commission.*

[57] *The inclusion of the Auditor-General and Ombudsman on the Board has provided the benefits of their respective activities and experiences, ensuring a sharing of knowledge, reducing duplication of effort and better outcomes, particularly throughout the early years of the Commission's establishment.*

[58] *The Commission notes that issues relating to information sharing between the Commission and the offices of the Auditor-General and the Ombudsman have now been resolved, given changes to the respective legislation. This allows for the three entities to, subject to the public interest, share and discuss what might otherwise have been confidential information.*

[59] *The Commission also acknowledges that, on a number of occasions, there has arisen a possible conflict of interest resulting from complaints involving the offices of the Auditor-General and*

*the Ombudsman. While any conflicts have been appropriately managed and the issues resolved, there remain conflicting statutory obligations that suggest that the ongoing involvement of the ex officio members may be problematic e.g. the Commission's annual financial statements are subject to audit by the Auditor-General, the Auditor-General may wish to include the Commission in an investigation, or either of the officers may be required to support policies recommended by the Commission that differ to those implemented by their respective offices.*

[60] *The direct working relationships between the Auditor-General and Ombudsman in relation to complaints and other matters raised with the Commission have been developed through considered discussion and cooperation. This would, of course, be possible into the future.*

[61] *Consequently, it is considered that the benefits received from the composition of the original Board have been achieved. Given the legislative and operational activities of the three integrity entities are such that opportunities for cooperative effort are optimised, and the outcome of reducing any risk of future conflicts of interest, it is considered that the Board should no longer include either the Auditor-General or the Ombudsman.*

[62] *It is therefore considered that a three or four person Board, comprised of a Chief Commissioner and a number of independent members with a range of skills and expertise (similar in aggregate to those specified by the current Integrity Commission Act), would provide an optimal context for the application and implications of integrity matters in the Tasmanian public sector."*

3.1.2 Both the Auditor-General and the Ombudsman have made submissions to me, and both agree with the Commission's submission at paragraph [61] that the Board should no longer include either of them. The Auditor-General comments:

*" now that the [Commission] has operated for some years, I consider that, for reasons of conflict of interest, and because the Audit Act now enables consultation with the Board and with the [Commission], statutory inclusion of the [Auditor-General] on the [Commission] Board should cease. Examples of areas for potential or actual conflict include:*

- a the [Commission] is a state entity under the Audit Act and, therefore, its annual financial statements are subject to audit by the [Auditor-General]. To overcome this conflict I delegate the audit to my Deputy. However, I acknowledge that this 'delegation' does not fully address this conflict.*
- b As a State entity, the [Commission] could be selected, under the [Auditor-General's] discretionary powers, for the conduct of a performance audit, compliance audit, investigation or other project determined by the [Auditor-General] to be carried out. I would not want to avoid including the [Commission] in projects of this nature because I am on its board. In this regard, my investigative powers are broad and I would not want to be in a position where I am requested to, or wish to, investigate a matter concerning the [Commission], but then withdraw due to that membership or be in a position where there is a perception that I avoid looking into matters regarding the [Commission] that perhaps I should.*
- c Similarly, there may be occasions where the [Commission] has requested, or it chooses to, investigate me or my Office requiring me not to attend a particular meeting or part of a meeting or to participate in a discussion regarding the scope of [a Commission] inquiry.*
- d There has been one occasion when the [Commission] has initiated a project involving multiple agencies including my Office resulting in a public report. As a member of the board, I supported:
  - i the project being undertaken*
  - ii inclusion of the Tasmanian Audit Office in the project scope*
  - iii the underlying principles underlying the recommendations made by the [Commission] in its public report but not necessarily, in every detail, the proposed policy framework subsequently promoted by the [Commission].**

*This placed me in a position whereby as [a Commission] board member I found that I was required to comply with a policy framework different from one implemented in my Office.*

*Overall therefore, and while I believe that most conflicts of interest can be sensibly managed, on balance I think it best that the [Auditor-General] no longer be a member of the [Commission] board."<sup>4</sup>*

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4 Submission from the Auditor-General, Mike Blake, pages 1 and 2.

3.1.3 The Ombudsman's comment is this:

*" The Commission's administrative actions come within my jurisdiction, and I come within the Commission's. The potential difficulties that this could give rise to, I respectfully submit, are clear. For example, this Office has received complaints concerning the Commission, and at least one complainant has cynically questioned whether I am competent to deal with the complaint objectively and impartially because of my position on the Board.*

*The Commission and my Office have complimentary but different functions, and our policies, methodology and procedures vary significantly. There have been occasions when I have not endorsed the findings of the Commission on particular matters, nor the manner in which it proposed to report those findings. Being in the minority, however, I could do no more than register my position.*

*I am concerned that some of the reports of the Commission which I have not endorsed, especially those which have received negative comment, have been assumed to have the imprimatur of this Office when they do not. This gives rise to a further concern as to the possible ramifications for the reputation and standing of the Office and of me as Ombudsman.*

*I acknowledge that the Commission is now differently constituted, but in my submission, the potential for conflict remains."<sup>5</sup>*

3.1.4 The Tasmanian Government supports the exclusion of both those officers from the Board.<sup>6</sup>

3.1.5 The submission of the General Secretary of the CPSU was that:

*" the CPSU supports the proposal that the position on the Board previously filled by the State Service Commissioner be replaced by a person with experience in public sector human resources and industrial relations"<sup>7</sup>.*

3.1.6 The submission of the Tasmanian Government suggested a number of options. It noted that the Board as presently established:

*" has little opportunity or ability to influence the conduct of assessments and investigative functions of the Integrity Commission."<sup>8</sup>*

Further:

*" The Act effectively reposes the authority for the use of coercive powers in the Integrity Commission's assessments and investigations in the CEO. The oversight capacity of the Board has proven to be severely limited with respect to its operations and use of these extra-ordinary powers. The Board doesn't become engaged until a report is forwarded to it, pursuant to section 57 at the end of the investigative process. The Board has a range of options open to it specified in section 58, but these relate to actions it can take with respect to the report furnished by the CEO. There is effectively little the Board can do prior to receiving and considering a report and only limited actions it can take with respect to the investigation report."<sup>9</sup>*

3.1.7 The Tasmanian Government also suggested that the Chief Commissioner, and not the CEO, should have legal authority and responsibility for the authorisation to exercise the Commission's coercive powers, and oversight of the Commission's staff in the use of those powers, and with respect to its assessment and investigative functions generally.

3.1.8 The Tasmanian Government also advanced the concept of a new position of Inspector-General to provide independent oversight of the authorisation and use of the coercive powers, noting that this option is more consistent with the approaches taken in other

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5 Submission from the Ombudsman, Richard Connock, pages 1 and 2.

6 Tasmanian Government submission, page 8.

7 CPSU submission, page 9

8 Tasmanian Government submission, page 7.

9 Ibid page 8.

jurisdictions. The recommendation would, it is contended, in effect have an independent person to "watch the watchers". The submission suggests that:

*" if an Inspector-General role is to be established it would need to be filled by an appropriately qualified person, a lawyer with significant experience. The workload would be determined by the Integrity Commission's use of its coercive powers and any complaints, but it is anticipated that this would only be a part-time role."<sup>10</sup>*

If such a position were established the continuance of the Board (whether or not including the Ombudsman and Auditor-General) would need to be considered.

3.1.9 Professor Jeff Malpas in his submission touched briefly on the governance structure of the Commission. He opined:

*" In general, I would suggest that the Act has resulted in the establishment of a relatively large and costly bureaucracy that has no demonstrated effectiveness in addressing the issues concerning public ethics that gave rise to the original legislation. I would note that the Act itself, and so also the Commission, is very different from that which Sir Max Bingham and I proposed in the public discussion leading up to the formulation of the legislation in 2009. We had argued for a small Commission that would deal only with cases of serious misconduct; that would draw on staff seconded from other agencies in order to carry out investigations; and that would have an important role in organizing education programmes in ethics to be delivered, not by the Commission itself, but by other bodies contracted by the Commission. I continue to think that this would have been a more effective structure than that which was actually established under the Act."<sup>11</sup>*

3.1.10 Likewise, Damian Bugg AM QC in his submission states:

*" The Commission has established very useful training modules on integrity issues, but surely this could have been done by another body/institution.*

*The governance model is clumsy and one which will inevitably face problems. The 'Commission', because of its corporate status, is an all inclusive term, resulting in the Board, the CEO, staff, investigators and assessors constituting the 'Commission' and exercising the powers of the Commission, yet the Board, the governing body, does not appear to have sufficient authority to establish a framework around the day to day operation of the Commission."<sup>12</sup>*

3.1.11 In considering the Tasmanian Government's submission in respect of the appointment of an Inspector-General with a consequential diminution in the need for a board, it is of assistance to bear in mind the words of the Honourable Ian Callinan AC QC and Professor Nicholas Aroney in their review of the Crime and Misconduct Act of Queensland (28 March 2013) where they said (at page 25) of the Commission in that State (CMC) which has some similar roles to those of the Tasmanian Commission:

*" The CMC is a useful adjunct to good public administration in Queensland. It is not however a court. It is essentially a special investigative body with powers of scrutiny over the police, but it is not itself a police force. It is not a prosecutorial body like the Director of Public Prosecutions. It is not a constitutionally established fourth arm of government, distinct from the Legislature, the Executive and the Judiciary. It is, in terms and substance, a creature of statute which performs important functions. It is subject to the rule of law as determined by the Courts and is not above public and other scrutiny and criticism. Police and their operations are much more closely scrutinized; their activities are often recorded on closed circuit television for this purpose. The CMC exercises police powers, indeed special powers that are not generally available to the police, but is not subject to the same degree of scrutiny of its operations. So the question arises: 'Quis custodiet ipsos custodes?'"<sup>13</sup>*

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10 Government submission, page 9.

11 Submission from Professor J Malpas, page 2.

12 Submission from Damian Bugg AM QC, page 2

13 "Who shall guard the guards themselves?" Juvenal, Satire VI (attributed).

- 3.1.12 It is to be noted when exploring potential avenues for supervising the conduct of the Commission and its officers, including the Chief Commissioner and the CEO, that the Commission (which includes the staff) is not a public authority for the purposes of the Act. Nor are the Chief Commissioner, the CEO, nor the staff, public officers as defined under s 4(1) of the Act. This raises an initial conundrum. Misconduct as defined in s 4(1) consists of "conduct or an attempt to engage in conduct, of or by a public officer that is or involves" activity which has a quality about it which is contrary to the public interest (emphasis added). It is essential that it be committed by a public officer. If, then, none of the Commission's officers or staff are public officers they are incapable of committing the conduct which is subject to the Commission's jurisdiction.
- 3.1.13 However the Solicitor-General has pointed out that under s 5(1)(k) of the Act, a public authority includes the holder of a statutory office. As both the Chief Commissioner and the CEO are holders of a statutory office by virtue of having been appointed by the Governor or a Minister (s 4(1)), it can be argued that by reason of s 6(1)(d) they are designated public officers (DPOs) within the meaning of the Act. The inclusion of the Commission in the list in s 5(2) of those entities which are not public authorities for the purposes of the Act, and hence excludes them from being public officers, may well flow over into section 6 thereby excluding them from being DPOs. But if this is not so and they are to be treated as DPOs, this makes for totally unworkable results.
- 3.1.14 Complaints against DPOs are to be dealt with in accordance with Parts 6 and 7 of the Act. These Parts impose obligations on each officer. In the case of the CEO, he or she has no power to appoint an investigator under section 44 which only applies if the CEO makes a determination under s 38(1)(g) (which is in Part 5) that the Commission should investigate a complaint. As to Part 6, proceedings before an Integrity Tribunal, the Chief Commissioner is required by section 60 of the Act to convene the Tribunal which is to consist of the Chief Commissioner sitting alone, or the Chief Commissioner and not more than two other persons appointed by the Chief Commissioner who the Chief Commissioner considers have requisite experience and expertise relevant to the inquiry to be undertaken by the Integrity Tribunal. Thus a complaint against the CEO or the Chief Commissioner would meet insurmountable barriers in being processed as a complaint against a DPO.
- 3.1.15 The JSC has been given (*inter alia*) the following relevant powers in section 24, namely:

**"24 Functions and powers of Joint Committee**

(1) *The Joint 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; ..."*

3.1.16 The Commission is an integrity entity (see s 4(1)). The JSC has powers to summon witnesses and to hear evidence. The Solicitor-General opines that:

*" it is arguable that the Act intends the Joint Committee to exercise supervisory powers over the Commission to the exclusion of others".*<sup>14</sup>

Further:

*" although the Chief Commissioner and the CEO are, by definition, designated public officers, it was not intended that they would be exposed to the substantive provisions of the Act relating to investigations and inquiries under Parts 6 and 7. The better view is that where the conduct of the Chief Commissioner or the CEO is called into question the solution is more likely to be political; advanced by way of a complaint to the Minister Administering the Act or the Joint Committee".*<sup>15</sup>

The Chief Commissioner (and any member of the Board) may at any time be removed from office by the Governor by resolution of each House of Parliament (clause 8(1) of Schedule 2 to the Act). The Governor may suspend the Chief Commissioner (and any member of the Board) from office if the Governor is satisfied that he or she:

- " (e) has been convicted, in Tasmania or elsewhere, of a crime or offence punishable by imprisonment for a term of 12 months or longer or a fine of 300 penalty points or more or*
- (f) has contravened clause 8 of Schedule 3<sup>16</sup>; or*
- (g) has been guilty of misconduct."*

A suspended member of the Board is to be restored to office unless a statement of the grounds of the member's suspension is laid before each House of Parliament during the first seven sitting days of the House following the suspension; and each House of Parliament, during the session of the House in which the statement is laid, and within 30 sitting days of the statement being so made passes a resolution requesting the removal of the member from office (clause 8(2) of Schedule 2 to the Act).

3.1.17 As to complaints against other staff of the Commission, the CEO is the Head of Agency for the purposes of the *State Service Act 2000* (s 18(3) of the IC Act) and could deal with those complaints in accordance with the State Service Act, but would not be able to exercise any jurisdiction in respect of them under the subject Act. Similarly, alleged staff misconduct could be referred to another agency or authority. As the Solicitor-General has pointed out:

*" for example, if the conduct potentially involved criminal conduct it could be reported to police. It may also be that a complaint could be made separately to the Auditor-General in the case where public funds are in issue, or the Ombudsman where there is some questionable administrative conduct."*<sup>17</sup>

In really serious cases, especially where either the Chief Commissioner or the CEO is the subject of credible allegations of wrongdoing, and where police powers of investigation are not adequate, recourse may be had to the *Commissions of Inquiry Act 1995*. Misconduct under the latter Act is defined as:

*" conduct by a person that could reasonably be considered likely to bring discredit upon that person."*<sup>18</sup>

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14 From advice attached to the submission from the Secretary, Department of Treasury and Finance.

15 Ibid

16 That is, failure to disclose interests

17 From advice attached to the submission from the Secretary, Department of Treasury and Finance.

18 Section 3 of the Commissions of Inquiry Act

3.1.18 I have concerns that the JSC's powers are not sufficient to exercise any supervision over any member of the Commission in respect of conduct outside the purview of the Commission's jurisdiction, ie conduct, or an attempt to engage in conduct, which, if engaged in by a public officer would amount to misconduct as defined in the Act. These powers are circumscribed by s 24(2) which provides:

" (2) Nothing in this Part authorises the Joint Committee –

- (a) to investigate any matter relating to a complaint that is being dealt with by the Integrity Commission; or
- (b) to review a decision of the Integrity Commission to investigate, not investigate or discontinue an investigation or inquire into or not inquire into a particular complaint; or
- (c) to make findings, recommendations, determinations or decisions in relation to a particular investigation or inquiry of a complaint that is being or has been dealt with by the Integrity Commission."

3.1.19 One can anticipate that a complaint against a staff member would be summarily dismissed because it did not allege conduct by a public officer. Referral of it to the JSC would arguably require a review of that decision not to investigate the complaint and preclude the JSC from dealing with it. Furthermore, any review under the *Public Interest Disclosures Act 2002* (PID Act) of "improper" or "corrupt conduct" as defined in that Act (which in some circumstances is co-extensive with "misconduct" as defined in the IC Act) would not be available as the Commission is not a public body for the purposes of the PID Act.

3.1.20 I think the original intention of Parliament was to treat all members of the Commission as not susceptible to discipline pursuant to the Act in the same way as those excluded therefrom by s 5(5), such as the Governor and judges. The "guards" are not above the law and are answerable through the courts for crimes and offences. The Chief Commissioner and members of the Board may be dismissed by Parliament in the circumstances referred to in Schedule 2, clause 8(1). The CEO is accountable to the Board, which in turn is accountable as a functionary of the Commission to Parliament. There is power under the *Commissions of Inquiry Act 1995* to deal with misconduct as defined by that Act on the part of any of the Commission's constituent parts; and as for the rank and file of the Commission, they are subject to the supervision and disciplinary functions of the CEO as Head of Agency. The Commission's administrative decisions are subject to review under the *Ombudsman Act 1978* and it is, as the Auditor-General has pointed out, subject to scrutiny under the *Audit Act 2008*. The Commission's decisions<sup>19</sup> (with two exceptions set out in Schedule 1 of the *Judicial Review Act 2000*) are also subject to the Judicial Review Act. In these circumstances the addition of a further tier of authority seems otiose and provides no better answer to Juvenal's question "Who guards the guards?"

3.1.21 I make the following recommendations:

- [1] **That the Auditor-General and Ombudsman be removed as members of the Board (ie delete paragraphs (b) and (c) of section 14(1) of the Act).**

- [2] That a person with experience in public sector human resources and industrial relations should be added as a member of the Board, making a total of five members including the Chief Commissioner. Alternatively, the list in paragraph (g) of section 14(1) should be amended by the addition of subparagraph (v): "A person with experience in public sector human resources and industrial relations". This will leave a total of four members.
- [3] That a quorum at a meeting of the Board be reduced from four to three (ie amend Schedule 3, clause 4(1) of the Act).
- [4] That Schedule 2, clause 8(2)(g) of the Act be amended by substituting the words "has been guilty of misconduct" with "has been guilty of conduct or an attempt to engage in conduct which, if engaged in by a public officer, would amount to misconduct".
- [5] That the Chief Commissioner and CEO be excluded as designated public officers (ie amend section 6(1)(d) of the Act by adding at the end thereof the words "other than the Chief Commissioner and chief executive officer").

3.1.22 The Commission's submission continues:

***"Relationships with statutory officers, public authorities and other key stakeholders***

...

[65] *The Commission seeks to work with, and supplement where necessary, the educational and investigatory roles of other bodies with similar roles and powers.*

[66] *Entities such as Tasmania Police, heads of public authority, Ombudsman, Auditor-General and the Anti-Discrimination Commissioner all have complementary, and sometimes overlapping, roles. Whilst these relationships have been managed adequately, the need for an integrity commission to pick up issues which 'fall between the cracks' is clear."*

...

***"Relationships between the Board, Chief Commissioner, CEO and staff of the Commission:***

...

[70] *The Commission notes that the Chief Commissioner currently has no legislated power to involve him or herself in the day-to-day operations of the Commission, which has the potential to not allow the full benefit of the Chief Commissioner's expertise and/or experience.*

[71] *It is also possible that the expertise of individual Board members could be used to a greater extent by providing advice and support to the CEO and staff in particular aspects of the operations, whilst ensuring that they are not being involved in actual investigations, or leading to tainted Board deliberations."*

3.1.23 The role of Board is set out in section 13 which provides:

**" 13 Role of Board**

*The role of the Board is to –*

- (a) *ensure that the chief executive officer and the staff of the Integrity Commission perform their functions and exercise their powers in accordance with sound public administration practice and principles of procedural fairness and the objectives of this Act; and*

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<sup>19</sup> That is, decisions of an administrative character made, proposed to be made, or required to be made, under an enactment – s 4(1) Judicial Review Act

- (b) *promote an understanding of good practice and systems in public authorities in order to develop a culture of integrity, propriety and ethical conduct in those public authorities and their capacity to deal with allegations of misconduct; and*
- (c) *monitor and report to the Minister or Joint Committee or both the Minister and Joint Committee on the operation and effectiveness of this Act and other legislation relating to the operations of integrity entities in Tasmania."*

3.1.24 The manner in which the objectives are to be realised, set out in s 3(3) of the Act, illuminates the primary scope of the Commission's powers and responsibilities. It focuses on four aspects:

- education;
- assisting public authorities to deal with misconduct;
- dealing itself with specified areas of misconduct, viz serious misconduct or misconduct by DPOs; and
- processing the investigations and inquiries conducted by it which are otherwise authorised by the Act.

3.1.25 The Second Reading Speech with its emphasis on proportionality in dealing with complaints appears to be mirrored in the first parts of the function and powers of the Commission's provision, s 8(1) of the Act, which provides:

**" 8 Functions and powers of Integrity Commission**

- (1) *In addition to any other functions that are imposed on the Integrity Commission under this or any other Act, the functions of the Integrity Commission are to –*
- (a) *develop standards and codes of conduct to guide public officers in the conduct and performance of their duties; and*
  - (b) *educate public officers and the public about integrity in public administration; and*
  - (c) *prepare guidelines and provide training to public officers on matters of conduct, propriety and ethics; and*
  - (d) *provide advice on a confidential basis to public officers about the practical implementation of standards of conduct that it considers appropriate in specific instances; and*
  - (e) *establish and maintain codes of conduct and registration systems to regulate contact between persons conducting lobbying activities and certain public officers; and*
  - (f) *receive and assess complaints or information relating to matters involving misconduct; and*
  - (g) *refer complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action; and*
  - (h) *refer complaints or any potential breaches of the law to the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate for action; and*
  - (i) *investigate any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate; and*
  - (j) *on its own initiative, initiate an investigation into any matter related to misconduct; and*
  - (k) *deal with any matter referred to it by the Joint Committee; and*
  - (l) *assume responsibility for, and complete, an investigation into misconduct commenced by a public authority or integrity entity if the Integrity Commission considers that action to be appropriate having regard to the principles set out in section 9; and*

- (m) when conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for –
  - (i) the prosecution of persons for offences; or
  - (ii) proceedings to investigate a breach of a code of conduct; or
  - (iii) proceedings under any other Act; and
- (n) conduct inquiries into complaints; and
- (o) receive reports relating to misconduct from a relevant public authority or integrity entity and take any action that it considers appropriate; and
- (p) if the Integrity Commission is satisfied that it is in the public interest and expedient to do so, recommend to the Premier the establishment of a Commission of Inquiry under the Commissions of Inquiry Act 1995; and
- (q) monitor or audit any matter relating to the dealing with and investigation of complaints about misconduct in any public authority including any standards, codes of conduct, or guidelines that relate to the dealing with those complaints; and
- (r) perform any other prescribed functions or exercise any other prescribed powers."

3.1.26 It will be noted that the first five functions (s 8(1)(a) to (e)) fall within the educative role contemplated by s 3(3), while the next three (s 8(1)(f) to (h)) fall within the assessment and referral role. The remaining substantive paragraphs (s 8(1)(i) to (q)) deal with investigations into misconduct generally. Of the remaining substantive paragraphs (s 8(1) (i) to (q)), sub-paragraphs (i) and (j) deal with investigations into misconduct generally in contradistinction to the focus expressed in s 3(3)(c) which deals with serious misconduct or misconduct by DPOs. This remit is presumably that contemplated by s 3(3)(d), but it opens up an unrestricted area of operations and sits uncomfortably with the Second Reading Speech. The principles of operation set out in section 9 afford little guidance as to how proportionality is to be achieved. Nor is the Board having regard to the role set out for it in section 13 in any position to enforce restraint before matters reach Board level.

3.1.27 As Mr Bugg AM QC observes:

*" The Act does not give the Board any role in defining the parameters of the Commission's role in dealing with complaints of misconduct (as opposed to serious misconduct) or any capacity to limit the conduct of the Commission within the confines of proportionality and avoidance of duplication which the public and the Parliament were assured of in the Second Reading Speech."*<sup>20</sup>

3.1.28 And further:

*" The Board does not appear to have any meaningful control over the day to day conduct of the CEO and staff. If the Board has the high governance role suggested within s 13, I do not believe that the Act provides it with sufficient power to give directions and guidelines for the exercise of the functions in section 8 when the Board's role under section 13 is confined to performing functions and exercising powers in accordance with the objectives of the Act which are considerably narrower than the functions and powers of the Commission under section 8.*

*Section 18 provides that the CEO is responsible to the Board for the general administration, management and operations of the Integrity Commission, a usual corporate governance function, yet the Board's powers appear to be constrained by the provisions referred to in the previous paragraph."*<sup>21</sup>

3.1.29 I think the disconnect between the functions of the Commission (section 8) and the role of the Board (section 13) might be ameliorated by the amendment of the latter

<sup>20</sup> Submission from Damian Bugg AM QC's submission, page 3.

<sup>21</sup> Ibid page 6.

section so as to bring in a direct reference to the functions in section 8. One way of achieving this may be to amend s 13(a) by deleting the word "ensure" and substituting the words "facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that ... ". That part of the section would then read:

*" The role of the Board is to –*

- a) facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that the CEO and the staff of the Integrity Commission perform their functions and exercise their powers in accordance with sound public administration practice and principles and the objective of this Act and ... ."*

3.1.30 It is not until an investigation has been submitted to the Board with the CEO's recommendations that the Board is directly involved in any real decision-making. Up until that point the CEO has a wide variety of powers and, without wishing to stifle his or her initiative, I think the Board needs statutory authority to tighten its control over the CEO and staff.

3.1.31 I recommend:

**[6] That the Act be amended by substituting for the present section 13(a) the following (or words to this effect):**

**" Facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that the chief executive officer and the staff of the Integrity Commission perform their functions in accordance with sound public administration practice and principles and the objectives of this Act and by issuing such guidelines to them as it considers appropriate."**

## **3.2 Investigative functions**

3.2.1 The Commission has submitted as follows:

### ***" Commission position***

*The Commission must retain its investigative capacity as provided under the Integrity Commission Act, subject to the technical amendments to be considered as part of this submission.*

*The Commission's investigative powers complement its educative and preventative roles, and play an important role in enhancing public confidence that misconduct will be appropriately dealt with.*

*The Commission seeks to provide an efficient and timely response to complaints recognising that the need to obtain information from external sources and to thoroughly examine all received information takes time, and is ultimately governed by the Commission's available resources.*

### ***Discussion***

*[72] The Commission's ability to investigate allegations of misconduct provides the public with confidence that misconduct will be appropriately dealt with. The Commission has particular powers that enable it to investigate allegations of misconduct; these powers are not available to other public authorities.*

*[73] The Commission has a dedicated investigative capability within its Operations team, including investigators with knowledge, expertise and experience to undertake investigations into serious and systemic misconduct. In the Commission's experience, other public authorities generally do not have the expertise or experience to undertake investigations into serious misconduct. This is conveyed to the Commission by public officers via professional support groups such as the Investigator Support Network (facilitated by the Commission). The lack of*

capacity has also become evident through the Commission's audits of complaint investigations undertaken by public authorities.

[74] *The Commission's investigative role complements and is a necessary adjunct to its educative and preventative roles. To a large extent, the functions are symbiotic and naturally complement each other. It is the Commission's contention that prevention and education without the ability to oversee and investigate is ineffective, and that authorities that have been subject to investigation are more proactive about prevention and education.*

...

[79] *The Government, in its response to the Three Year Review report of the JSC, supported the retention of the Commission's investigative powers, subject to concerns relating to 'process, timeliness and interaction with existing investigative processes' being addressed in the Five Year Review.<sup>22</sup> ...*

### **Process**

[80] *The Commission interprets this term to relate to procedures it follows while undertaking investigations, and particularly the use of coercive notices.*

[81] *The Commission, in undertaking investigative actions, is bound by the rules of procedural fairness.<sup>23</sup> This provides a platform for subject officers of such actions to be given the opportunity to comment on any adverse findings in a report prepared by the Commission.*

[82] *The Commission utilises coercive notices only as necessary to achieve the relevant outcome. This may occur where it is necessary in order to obtain confidential information e.g. copies of emails or personnel files, or where it is important for the purposes of gathering evidence to interview a person under oath. The Commission will, where appropriate, generally seek information informally in the first instance, and rely upon the general confidentiality conventions and as provided in employee codes of conduct to protect the integrity of the matter.*

[83] *The Commission acknowledges the potential impact upon recipients of notices issued pursuant to s 47 of the Integrity Commission Act. ..."*

### **Timeliness**

[84] *The Commission recognises the need to deliver outcomes on matters that are timely and efficient. The length of time a matter takes has a potential impact upon individuals (complainants, subject officers and witnesses) and on public authorities who may be seeking to take further action."*

...

### **Interaction with existing investigative processes**

[86] *The Commission interprets this issue to apply on two levels: interaction with processes undertaken by other integrity entities (the Ombudsman and Auditor-General) and Tasmania Police; and interaction with processes undertaken by public authorities which do not otherwise have investigation of misconduct as a primary function.*

[87] *In relation to the first level, the Commission notes that, '[i]n establishing the Commission, the Parliament did not simply duplicate the roles of the integrity entities already in existence'.<sup>24</sup> While sharing similar interests in relation to policy and practice, and noting that it does refer matters to the Auditor-General or the Ombudsman if the matter is more appropriately within their jurisdiction, the Commission's jurisdiction extends beyond that of those integrity entities.*

...

[93] *The Commission has previously acknowledged its triage role, and the need to refer matters where appropriate. This means public authorities are frequently directly involved in the investigation of allegations of lower-level misconduct, or at least addressing allegations to determine whether there is a suitable explanation for the conduct. This results in a smaller number of matters being accepted by the Commission for assessment and possible investigation. In its oral submission to the Three Year Review the Commission noted:*

*It is not a large number of matters but they are very often those precise matters nobody else does and that wouldn't get done if we didn't exist. Just because they are a small*

<sup>22</sup> Tasmanian Government Response to the JSC Three Year Review Final Report (2015), pages 4, 7.

<sup>23</sup> Integrity Commission Act, s 46(1)(c). Note that the Commission has sought to clarify the need for procedural fairness for reports prepared by an assessor under Part 5 of the Act.

<sup>24</sup> Integrity Commission, Submission to Three Year Review (2013), volume 1, 13.

*quantity doesn't mean they are not big matters, it doesn't mean that they're not important or complex matters that require a great deal of attention.<sup>25</sup>"*

3.2.2 The JSC in its Three Year Review was unanimous in support of an ongoing function for the Commission in triage, assessment and monitoring, investigations and the power to hold Tribunal hearings in serious cases. There was not however unanimous support for other investigative functions. It recommended that the issue be addressed in the Five Year Review<sup>26</sup>. The Tasmanian Government's response to the Three Year Review was that the Commission should retain the capacity to conduct investigations, but that the concerns which had been raised by various stakeholders around process, timeliness and interaction with existing investigative processes should be addressed in the Five Year Review.

3.2.3 Mr Richard Bingham, the Queensland Integrity Commissioner, in his submission advocated restricting the Commission's investigative jurisdiction. His views are as follows:

*" In my view the Integrity Commission should retain the absolute right to decide whether a matter warrants investigation by it. I consider that this assessment or triage function is centrally important to an effective integrity system. It should require that a robust decision is made early in the process of dealing with a complaint.*

*I note that the 3 year review suggest that some assessments have taken an 'unduly long time' to be concluded.*

*It is entirely understandable that the Integrity Commission will wish to defer an assessment decision until (for example) more evidence becomes available, but in my view this will lead to inefficiency and second-guessing. It is preferable that early decisions are made, and if the nature of a matter changes during the course of an investigation, the investigating body can and should refer it back to the Integrity Commission.*

*In my view, some provisions, which I outline below, are likely to act as an incentive for the Integrity Commission to continue involvement with less important matters. These provisions should be rethought.*

*In summary, the system should make an early informed decision about which body should handle a matter (ie triage), and let that body deal with the matter. The system should expect that the body will refer on to a colleague body if investigation reveals that the matter is really of a different nature.*

***The Integrity Commission should deal only with corruption or serious misconduct***

*At present, a complaint may be made to the Integrity Commission about 'alleged misconduct'. Misconduct is defined very broadly as including, for example, any breach of an applicable code of conduct, and the improper exercise of functions.*

*In my view this jurisdiction is unnecessarily broad. The integrity Commission should be limited to investigating corruption or serious misconduct, not matters that are essentially administrative or disciplinary.*

*It is notoriously difficult to establish definitions of these concepts, but legislation from other jurisdictions is instructive. For the most part, these definitions provide the relevant agency with a more limited jurisdiction than that under the Tasmanian Act.*

*As a reflection of this definitional issue, and consistently with the need for rigorous initial assessment, the jurisdictions of the various integrity bodies should be kept separate to minimise overlap, and to keep accountabilities clear.*

*For example, it is arguable that the existing oversight arrangements foster a temptation for the Integrity Commission to monitor matters with which it should not be involved.*

*Further, as matter of principle it is not productive to have one body 'monitor' or 'audit' the investigations of another. Differing foci of different bodies (eg prosecuting corruption as opposed to remedying maladministration) means they set out to do different things under their enabling*

<sup>25</sup> JSC Three Year Review – Final Report (2015), page 31.

<sup>26</sup> JSC Three Year Review – Final Report (2015), page 1

legislation, and experience shows that it is administratively inefficient for one body to remotely 'direct' an investigation by another.

The individual accountability requirements for each body should make sure each does their job properly.

**Administrative or disciplinary investigations should be the responsibility of the Head of the State Service**

In my view, government departments often do not have the expertise or the incentive to manage administrative or disciplinary investigations properly. This is because:

- they don't have internal investigators on staff, so they need to hire costly consultants
- they don't like admitting to mistakes, so investigations may be less than rigorous
- it doesn't satisfy the 'perception of independence' test for a department to investigate itself.

In addition, it is easier for departments to take any necessary hard decisions at the end of an investigation if that investigation has been conducted independently.

The Act apparently envisages that departmental administrative or disciplinary matters may be referred to the relevant department as a 'relevant public authority' with the investigation overseen by the Integrity Commission under s39 of the Act.

In my view, this option should be removed. Either an administrative or disciplinary matter is sufficiently serious for the Integrity Commission to investigate it itself because it may involve corruption or serious misconduct, or it should be referred to the Head of the State Service to be dealt with under the State Service Act 2000. The Integrity Commission should not continue to have any formal role in relation to matters which only warrant referral to departments.

**Police complaints**

I believe that a similar model should operate in respect of police complaints. Either a complaint against police is sufficiently serious for the Integrity Commission to investigate it itself, or it should be referred to the Commissioner of Police to be investigated without oversight by the Integrity Commission."<sup>27</sup>

3.2.4 Mr Damian Bugg AM QC in his submission states:

" Tasmania does not need an Integrity Commission of the size, cost and complexity of the one established under the Integrity Commission Act 2009 I believe that an informed and objective analysis of the Investigations/Assessments the Commission has undertaken in the last 5 years will show that most, if not all, matters investigated or assessed could have been dealt with within existing agencies available to investigate and 'deal with' the matters considered. The legislation is clumsy, establishes an unworkable governance model and does not give sufficient direction for the Commission to stay focussed on its core functions. This criticism is confirmed by the somewhat misguided use by the Commission of its investigative and assessment powers, matters appear to have been 'investigated' at length and then determined to be 'assessments', referred to the employer agencies to deal with as code of conduct breaches by the staff member(s) under investigation, when the assessment process, referred to as a 'triage' in the second reading speech, appears to have been both heavy handed and a quasi 'investigation' without focus or control."<sup>28</sup>

3.2.5 The current Director of Public Prosecutions, Mr Daryl Coates SC, states in his submission:

" I am of the view the Commission is expensive, secretive, ineffectual and its powers are too broad for the type of conduct it investigates. There are a myriad of other agencies that can and do cover the work for which the Integrity Commission competes.

...

... the Integrity Commission with a budget of approximately \$2.5 million is an expensive mechanism for dealing with complaints in respect of public service misconduct. The Commission's 2014-15 Annual Report states that they received 132 complaints. Of those, 90 complaints were not accepted for assessment and were dismissed when triaged. After triage, 33 complaints were referred to other agencies, presumably to Departmental Secretaries, to conduct their own code of conduct enquiries

<sup>27</sup> Submission from Richard Bingham, pages 4 and 5

<sup>28</sup> Submission from Damian Bugg AM QC, page 1

*under the State Service Act. As a result, the Commission investigated only four matters. Similarly, in 2013-14 they investigated only four matters.*

*In my experience investigations conducted by the Secretaries of State Service Departments for code of conduct breaches under the State Service Act are carried out fairly and efficiently. Similarly, in my experience, the Professional Standards Unit of Tasmania Police is staffed by extremely experienced detectives whose investigations are vigorous and without favour. As Director of Public Prosecutions, I am forwarded the file concerning any serious allegation of misconduct by a police officer to determine whether any charges should be laid. The allegations are always thoroughly and professionally investigated.*

*Since the inception of the Integrity Commission I know of only two matters that have been referred to this Office or Tasmania Police by the Commission in respect of a criminal allegation. In both instances there was found to be insufficient evidence to proceed. Since 2013, when I became Acting Director, no matters whatsoever have been referred to me."<sup>29</sup>*

### 3.2.6 Professor Jeff Malpas also comments on the investigative operations of the Commission:

*"1 The Commission accepts complaints and undertakes investigations in a way that suggests no real discrimination between levels of misconduct nor with regard to whether cases of minor misconduct can be dealt with through existing processes. The result is an excessive (and apparently increasing) burden of cases being dealt with, and what appears, anecdotally, to be significant delay in dealing with individual cases. At the same time, in spite of the large number of investigations undertaken, the Commission has yet to unearth the level or type of misconduct that one might expect would be commensurate with such a relatively high level of investigation."<sup>30</sup>*

### 3.2.7 Mr Pat Allen, President of the Police Association of Tasmania (PAT), in his submission to me referred to the submission his organisation had made to the Three Year Review. In the latter it was submitted that the Commission's annual reports clearly show:

*" that the organisation is effectively meeting its own objectives, alongside the principles laid down by Parliament which underpinned the formation of the Commission.*

*It is further submitted that the Parliament of the day clearly accepted that the role of the Integrity Commission did not include the fact that it would be another large scale investigative agency. That was on the basis that there was no demonstrated need for an entity that mirrored similar Commissions/organisations in any other State."<sup>31</sup>*

### 3.2.8 In Mr Allen's present submission he says:

*" The PAT believes that the Act (including the orders and regulations made under the Act) adequately supports and outlines the powers and functions of the Integrity Commission and supports the objectives of the Commission based on the intention of the Parliament of the day as outlined in the 2<sup>nd</sup> reading speech of the then Attorney-General (Lara Giddings) in 2009 regarding the Integrity Commission Bill ...*

*Having stated the above regarding the Act, I must point out that there is a growing view amongst the membership that funding for the Integrity Commission could be better utilised in other areas of Government, particular [sic] in expanding the role of the Ombudsman's Office to be able handle [sic] the very few matters being investigated by the Integrity Commission, and to expand the role of Professional Standards within Tasmania Police to allow for completion of investigations in a timely manner.*

*...*

*Based on the 2014-2015 annual report of the Integrity Commission, particularly relating to a single own motion investigation as well as the number complaints [sic] received balanced against the number of complaints actually investigated the PAT now questions the relevance of an Integrity Commission in this State."<sup>32</sup>*

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29 Submission from the Director of Public Prosecutions, Daryl Coates SC, pages 1 and 3.

30 Submission from Professor J Malpas, page 1.

31 Submission from Police Association of Tasmania to the Three Year Review January 2014 at Section 4.

32 Submission from Police Association of Tasmania to the Five Year Review, page 2.

3.2.9 On behalf of the Tasmanian Labor Party, the Honourable Lara Giddings MP who, as Attorney-General, had introduced the Integrity Commission Bill in 2009 and served on the JSC during the conduct of the Three Year Review, has submitted:

*" At the time of developing the bill, there was quite a debate within government about how far the powers of an Integrity Commission should extend, and the balance between giving adequate powers to a new body, but also protecting the rights and liberties of individuals. While the powers of the Integrity Commission are not as strong as other similar bodies in other states, the Integrity Commission was given the capacity to recommend to the Premier that a commission of inquiry be established, where stronger powers can be applied.*

*Generally, the commission was given similar investigative powers as exercised by other officers such as the Ombudsman. These included the power to enter property, search for and seize material and to question witnesses.*

*At no time did we believe that there was any evidence of corruption in Tasmania that would warrant the establishment of an Independent Commission Against Corruption (ICAC). While there have been cases of misconduct investigated by the Integrity Commission, we are still of the view that there is no reason for an ICAC style of body in Tasmania. However, there is sufficient evidence of some misconduct to warrant the retention of the Integrity Commission with its existing powers.*

*You will note my dissenting report as part of the Three Year Review of the Integrity Commission by the Joint Standing Committee on Integrity, which relates to the future of the Integrity Commission and its powers. The report largely leaves the issue of investigative powers and functions of the Integrity Commission to the Five Year Review, with the Commission to retain its investigative functions and powers until the conclusion of that review. However, the second recommendation says the Integrity Commission be given only the authority to assess, triage and monitor all investigations. I disagree with this finding as I believe that it is also important for the integrity Commission to retain its investigative powers. I do not however, believe that the Commission needs its powers expanded beyond what they have, notwithstanding the need to tidy up the Act to make it more consistent as seen in the technical amendments section of the report.*

*While the Integrity Commission has not found evidence of systemic corruption, the evidence from the Commission was clear that an independent investigative body is required in Tasmania and that there must be some report back to the Commission where matters are triaged to another agency to follow through. Considering the Integrity Commission oversees state and local government, I believe that it would be detrimental to good governance not to have an independent body capable of investigating allegations of public sector misconduct."<sup>33</sup>*

3.2.10 A submission from the University of Tasmania states in respect of the investigative functions of the Commission:

*" ... the investigative function is important, but it has not been demonstrated that the commission is best placed to carry out that function.*

*A key feature of the commission was to be its preliminary 'assessment' process. Under that process, the commission would, quickly and relatively informally, assess a complaint to see if there appeared to be any substance such that the complaint should be investigated. If so, the commission was then to determine either to investigate the complaint itself or to refer the complaint to another investigative body.*

*In practice, this initial assessment process can in fact take months – almost 6 months in one case concerning the university, where on the face of the complaint, if the nature of a university had been understood, it should have been immediately clear that there was no reasonable ground to proceed."<sup>34</sup>*

3.2.11 On behalf of the Tasmanian Greens, Ms Rosalie Woodruff MP, submitted that her Party's policy position is to provide adequate powers to the Commission to enable it to act as an effective independent commission against corruption. She attached recommendations advocated by Mr Nick McKim (who was at the time a member of the

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<sup>33</sup> Submission from Tasmanian Labor Party, page 2.

<sup>34</sup> Submission from University of Tasmania, page 1.

Tasmanian Parliament) in a dissenting report when he was a member of the JSC Three Year Review.

They were to this effect<sup>35</sup>:

- " 1 *That the Integrity Commission should retain its investigative function for the foreseeable future.*
- 2 *That the Integrity Commission be designated as a law enforcement agency in relevant Tasmanian legislation.*
- 3 *That the Integrity Commission retain ultimate authority over its investigations, even where criminality is suspected.*
- 4 *That the Criminal Code Act 1924 be amended to include the offence of misconduct in public office.*
- 5 *That the investigative powers of the Integrity Commission be strengthened by implementing the following technical issues in the Integrity Commission Act 2009 as recommended by the Integrity Commission in Schedule 2 to the Committee's report:*
  - 1 *Number 8, S 35(2)*
  - 2 *Number 10, S 37(1)*
  - 3 *Number 12, S 38(1)(b), (c), (d), (e) and (f)*
  - 4 *Number 13, S 38(2)*
  - 5 *Number 16, S 44(2)*
  - 6 *Number 21, S 52*
  - 7 *Number 22, S 52(3)*
  - 8 *Number 23, S 52(4) and S 51(4)(a)*
  - 9 *Number 26, S 54*
  - 10 *Number 29, S 56(2) & (5)*
  - 11 *Number 30, S 57(2)(b) & S 58(2)(b)*
  - 12 *Number 35 S 74(1)*
  - 13 *Number 37, S 80*
  - 14 *Number 38, S 81*
  - 15 *Number 42, S 96"*<sup>36</sup>

3.2.12 In contrast, the Commissioner of Police, Mr D L Hine APM said of the Commission's bid for increased powers in respect of investigations:

*" ... it is submitted that some of the amendments the Commission sought would significantly extend the scope of the Commission's functions beyond that envisioned by Parliament in creating the Commission. Moreover, in light of the above considerations there is a lack of demonstrated need for the functions, roles and powers of the Commission to be expanded and it is apparent that with a considered approach the Commission is largely able to achieve the objectives set for it by Parliament within the bounds of the current legislation. Consequently, it is the view of Tasmania Police that the Reviewer should adopt a cautious approach to consideration of recommended changes to the Act that increases the Commission's functions or powers."*<sup>37</sup>

3.2.13 In a joint submission, Ms Anja Hilkeijer and Mr Michael Stokes, both lecturers at the Faculty of Law at the University, submitted:

*" If the Commission were to be stripped of its investigatory powers, as the Government is proposing, scrutiny of government officials would return to the inadequate situation identified by the Joint Select*

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<sup>35</sup> JSC Report of the Three Year Review – Dissenting Statement of Mr Nick McKim MP, Member for Franklin, pages 263-4.

<sup>36</sup> These amendments are dealt with in this report in Section 8.

<sup>37</sup> Submission from Commissioner of Police, Darren Hine APM, page 9.

Committee. In fact, Tasmanians would be in a worse position than in 2009, because since that time the office of the independent State Service Commissioner has been abolished.

According to the Tasmanian government and the Attorney General the Commission's investigatory functions and powers should be removed because of duplication and overlap with those of other integrity agencies specifically the Ombudsman, the Auditor-General, the Tasmanian Police as well as Government agencies themselves. While there may be some limited overlap, the Integrity Commission in fact performs a number of investigatory functions that are not within the powers of any of these bodies and, unlike some of these bodies, is independent of government. Removal of the Commission's investigatory powers would mean that these important functions would simply not be performed in Tasmania. This is a matter of great concern.

Importantly, the Joint Select Committee recognised that corruption extends beyond criminal offences, including, for example, abuses of power such as cronyism in recruitment practices, 'sweet-heart deals' and 'regulatory capture'. The Committee recognised that this kind of wrongdoing is difficult to uncover without an independent body with powers to investigate:

*There is clearly a need for the ability to investigate and expose conduct by public officers that whilst not illegal is nevertheless contrary to the public interest and necessarily constitutes a breach of public trust.*

...

*That the need for independent scrutiny extended to conduct at the highest levels of government was made abundantly clear in the Bill's Second Reading Speech: '[t]he Government takes the view that there are certain categories of public official whose conduct should be subject to direct scrutiny by the Integrity Commission.*

*Included in this category were: 'Members of Parliament; Parliamentary staff; Ministers and their staff; State Service employees; holders of senior executive office; Police; Local Government councillors; Local government employees; Government House staff; GBEs and their employees; State owned companies and their employees; statutory authorities and their staff; and statutory officers and other government appointees.'*

*In terms of being able to investigate misconduct at all levels of government, the powers of the Ombudsman, the Auditor General, Tasmania Police and Heads of Agencies fall well short of what is required:*

...

*If the Integrity Commission were no longer to have the power to investigate, opportunities for people to lodge a complaint about misconduct against the full range of government officials would be severely diminished. This would have serious repercussions for public confidence in the administration of government."<sup>38</sup>*

3.2.14 The Law Society, to whose submission I will return in detail later, makes the general comment in the present context:

*" The Law Society of Tasmania recognises the need for broad investigative powers to reside within an effective integrity commission. There is the need for appropriate balances and controls particularly when such powers are used for executive rather than judicial processes. The Society has a number of reservations about the framework within which these powers sit at the controls which attach to them."<sup>39</sup>*

3.2.15 From these submissions it is clear that there is a wide range of views as to the need for a separate integrity commission and the extent of its powers. In reviewing the operation of the Commission, including the exercise of its powers and the investigation of complaints, important questions are whether or not – assuming there is a need for a separate body – the triage function of the Commission is working satisfactorily, the assessment process has become top heavy and laborious, and the supervision of the Board has been sufficiently engaged.

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<sup>38</sup> Submission from Ms Anja Hilkmeyer and Mr Michael Stokes, pages 1 and 2.

<sup>39</sup> Submission from the Law Society of Tasmania to the Three Year Review 18 August 2014, page 2.

3.2.16 Great store was set in the Second Reading Speech on the need for prompt attention to complaints and the discernment of whether they should be summarily dismissed, become the subject of an assessment or further investigation, or whether they should be referred to an appropriate body for action by it. As Mr Bingham has said, a robust decision must be made early in the process of dealing with a complaint. There have been several criticisms of the time taken by the Commission to even reach the stage of completing an assessment. In section 2.3 of the Commission's submission it is said at paragraphs 98 and 99:

" [98] *The Commission's practice has been to hold matters in the assessment phase to enable a greater understanding of the alleged misconduct before making this determination, given an assessor (as appointed by the CEO) can exercise all of the investigative powers of an investigator in carrying out the assessment i.e. the Commission's coercive powers are available to the assessor.*<sup>40</sup>

[99] *More recently, the Commission has sought to minimise the period of time that any given matter is held within the assessment phase. The aim of assessments is to ensure the assessor has sufficient information to recommend an appropriate course of action to the CEO (via an assessment report)<sup>41</sup> and for the CEO to accordingly make an informed determination. This may result in a larger number of matters being progressed to investigation which otherwise may have been held in assessment; however it is considered that this was the intent of Parliament in structuring the Integrity Commission Act as it is."*

### 3.3 Assessment

3.3.1 The beginning of the process of dealing with complaints is section 35 which provides:

**" 35 Assessment of complaint**

- (1) *On receipt of a complaint, the chief executive officer may –*
  - (a) *dismiss the complaint under section 36; or*
  - (b) *accept the complaint for assessment; or*
  - (c) *refer the complaint to an appropriate person for action; or*
  - (d) *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.*
- (2) *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.*
- (3) *If the assessor conducts an assessment in relation to a complaint about a public officer, the assessor may, if he or she considers it appropriate, give written notice of his or her intention to conduct the assessment to –*
  - (a) *the principal officer of the relevant public authority; and*
  - (b) *the complainant; and*
  - (c) *any public officer to whom the complaint relates.*
- (4) *In conducting an assessment under subsection (3), the assessor may exercise any of the powers of an investigator under Part 6 if the assessor considers it is reasonable to do so.*
- (5) *Section 98 applies to a notice under subsection (3) if the notice provides that it is a confidential document.*

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<sup>40</sup> Integrity Commission Act, s 35(4).

<sup>41</sup> Integrity Commission Act, s 37(2).

- (6) *In referring the complaint to an appropriate person under subsection (1)(c), the chief executive officer may also –*
- (a) *require the person to provide a report on what action the person intends to take in relation to the complaint; or*
  - (b) *monitor any action taken by the person in relation to the complaint; or*
  - (c) *audit an action taken by the person in relation to the complaint."*

3.3.2 There is some confusion as to the precise meaning of the word "assessment". For the purposes of the section it means the process of appointing an assessor to assess as to whether the complaint should be accepted for investigation and investing him or her with the coercive powers of an investigator. But in another sense every complaint has to be assessed to determine whether or not any of the other options set out in section 35 should be utilised. The CEO cannot dismiss a complaint under section 36 without applying his or her mind to the considerations set out in that section, many of which may not be apparent on the face of the complaint and may require further information. Referral of the complaint may likewise require the acquisition of further material by somebody other than the CEO. The identity of the person the subject of the complaint may need clarification (does it concern a public officer or a DPO?) and it is hard to imagine a responsible recommendation concerning the establishment of a commission of inquiry without acquiring and assessing further information.

3.3.3 The Commission in fact recognises this distinction and its "Standard Operating Procedure for Triaging Complaints" lays down a procedure for consideration by the CEO of the options of referral or dismissal.

The relevant part is as follows:

**" Phase 1: Initial review by CEO**

<b>Step</b>	<b>Action</b>
1	<i>Following registration, the complaint is reviewed by the CEO.</i>
2	<p><i>The CEO considers the matter for assessment, referral or dismissal in accordance with the following criteria:</i></p> <p><u>Assessment</u></p> <ul style="list-style-type: none"> <li>• <i>Is there evidence of serious misconduct?</i></li> <li>• <i>Is the subject officer a designated public officer?</i></li> <li>• <i>Is there evidence of systemic misconduct and/or a culture of misconduct?</i></li> <li>• <i>Does the Commission have a special capacity to obtain evidence?</i></li> <li>• <i>Does the misconduct involve multiple agencies?</i></li> </ul> <p><u>Referral</u></p> <ul style="list-style-type: none"> <li>• <i>Is the matter within jurisdiction? If so, is another agency better placed to take action/investigate?</i></li> </ul> <p><u>Dismissal</u></p> <ul style="list-style-type: none"> <li>• <i>Is the complaint:</i> <ul style="list-style-type: none"> <li>◦ <i>frivolous or vexatious?</i></li> <li>◦ <i>not made in good faith?</i></li> <li>◦ <i>lacking substance or credibility?</i></li> <li>◦ <i>not relating to the functions of the Commission?</i></li> </ul> </li> <li>• <i>Is investigating the complaint would [sic] be an unjustifiable use of resources?</i></li> <li>• <i>Is it is [sic] not in the public interest for the Commission to investigate the complaint? Or</i></li> <li>• <i>In the case of a complaint about misconduct occurring after the commencement of the Act, has the complainant had knowledge of the subject matter of the complaint for more than a year and failed to give a</i></li> </ul>

<b>Step</b>	<b>Action</b>
	<i>satisfactory explanation for the delay in making the complaint.</i>
3	<i>The CEO provides direction to MO for determination of the complaint. The CEO may seek further information on the complaint from the Complainant or the relevant public agency, and may consider the complaint at the weekly Operations Team meeting prior to making her determination."</i>

- 3.3.4 If the complaint is not dismissed or referred it then enters the assessment stage.
- 3.3.5 The assessor is required by section 37 of the Act to report to the CEO and to make recommendations as to dismissal, referral or investigation by the Commission. Section 38 then requires the CEO to make a determination which recommendation to accept. If the subject of a complaint is only at this stage identified as a DPO, section 87 of the Act requires that the complaint be dealt with under Parts 6 and 7 which require the appointment of an investigator.
- 3.3.6 If the CEO accepts a recommendation that the Commission investigate the complaint, an investigator is to be appointed (s 44(1)). The investigator has extensive coercive powers, some of which may have been exercised already by the assessor. It is at the stage of his or her report to the CEO that the latter places the responsibility for the further progress of the complaint onto the Board (section 55).
- 3.3.7 It is difficult to lay down firm timelines for the different stages of processing complaints. Most are dismissed or referred within a week or two (71% of complaints during the current financial year according to the evidence of Mr Easton, the Acting CEO), and the current average time taken until completion of assessments has been reduced from over 160 days in 2013 to 42.5 days in 2016.
- 3.3.8 I can see no case for abolishing the assessment stage, nor for substituting some other form of acquiring the information necessary for the CEO to make an informed determination under section 38 of the Act if he or she is unable to dismiss or refer a complaint at the triage stage. However while a case can perhaps be made for using the coercive powers of an investigator to procure necessary documents held by someone other than the subject of the complaint before an assessment can properly be made, I see no sufficient reason to use such powers on the subject himself or herself. I am told this has never been done. It has been said that witnesses other than the subject of the complaint may be reluctant to co-operate with an assessor by "dobbing in" a mate, but that the use of a coercive notice will assuage that reluctance. But if the allegation on its face is serious and cannot be progressed without the use of those coercive powers, it should be assessed promptly for investigation. If it is not serious it should be passed to the relevant Head of Agency for action.
- 3.3.9 The Three Year Review recommended that the Act be amended to require assessments to be completed within 20 working days, and matters referred on as appropriate, with power in the Board to extend the time for a further 20 working days.<sup>42</sup> I accept that

<sup>42</sup> JSC Report of the Three Year Review, page 3.

there may be some delays which are unavoidable (eg the Commission cites one case where production of the required material was delayed by over six weeks due to the absence from work of a person best placed within the relevant public authority to covertly facilitate its production).<sup>43</sup> The Commission opposed this recommendation as unrealistic and could not nominate any given time which would be reasonable. I appreciate that the circumstances could vary considerably. However the laying down of an initial timeline should reinforce the sense of urgency and alert the Board to the delay. The Board should have the power to extend time generally rather than to an arbitrary limit of 20 days.

3.3.10 I accordingly recommend:

**[7] That the Act be amended so that an assessor is to submit his or her report to the CEO within 40 working days of the assessor's appointment pursuant to section 35 or within such further time as the Board may allow having regard to all the circumstances.**

3.3.11 I also consider that the assessor's power to utilise all of the powers granted an investigator under Part 6 should be restricted to the production to the investigator or any person assisting the investigator any record, information, material or thing in the custody or possession or under the control of a person as set out in s 47(1)(c).

3.3.12 I therefore recommend:

**[8] That section 35(4) of the Act be amended to permit the assessor to exercise only the power of an investigator under section 47(1)(c) if the assessor considers it reasonable to do so.**

### 3.4 Serious Misconduct

3.4.1 Another crucial question is whether or not the Commission should confine itself to the investigation of serious misconduct. Misconduct is defined in section 4 of the Act as follows:

*" misconduct means –*

*(a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –*

*(i) a breach of a code of conduct applicable to the public officer; or*

*(ii) the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or*

*(iii) a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or*

*(iv) a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or*

*(b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –*

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<sup>43</sup> Integrity Commission submission Paragraph [103].

*but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament; ...*

...

**serious misconduct** means misconduct by any public officer that could, if proved, be –

(a) a crime or an offence of a serious nature; or

(b) misconduct providing reasonable grounds for terminating the public officer's appointment; ..."

3.4.2 It is obvious that misconduct simpliciter can encompass very minor infringements of the code of conduct applicable to the public officer.

3.4.3 As to what constitutes an offence of a serious nature, I think some guidance is required from the Act. The penalty is usually indicative of the seriousness the legislature attaches to the offence itself so I would recommend as follows:

**[9] That the interpretation section of the Act be amended by adding a definition of "offence of a serious nature" as one punishable by X years' imprisonment (or a fine not exceeding Y penalty units, or both)<sup>44</sup>.**

3.4.4 I have already cited the provisions of ss 3(3), 8, 9 and 13 which deal with the manner of achieving the objectives of the Act, the functions and powers of the Commission, the principles of operation of the Commission and the role of the Board respectively. Although the main focus of s 3(3) seems to be the Board's obligation to deal with allegations of serious misconduct by any public officer and any misconduct by a DPO, it cannot be denied that the Commission is given power to investigate misconduct not amounting to serious misconduct by public officers who are not DPOs (see in particular s 8(l)(i) and (j), (l) and (m), s 45(1) which deals with own motion investigations of (a) misconduct by a public officer, (b) misconduct by a DPO and (c) misconduct or serious misconduct generally, and section 89 which deals with own motion investigations into police misconduct generally). As I have said, this kind of investigation is countenanced by s 3(3)(d). It cannot be said that there is any implied prohibition in the Act on investigating misconduct falling short of serious misconduct by public officers who are not DPOs. The Commission justifies its retention of this role on the basis (*inter alia*) that what may appear to be a relatively minor act of misconduct may turn out to be "the tip of the iceberg" which, if fully investigated, may demonstrate widespread and serious misconduct. How one selects which acts of misconduct should be investigated on the off chance that they may represent the tip of the iceberg is problematic but no doubt the Commission has intelligence sources which render its conduct of any given investigation appropriate.

3.4.5 Nevertheless, provisions such as s 9(1)(g) requiring the Commission to perform its functions and exercise its powers in such a way as to:

*" not duplicate or interfere with work that it considers has been undertaken or is being undertaken appropriately by a public authority"*

reinforce my view that wherever possible the Commission should avoid embarking on the investigation of non-serious complaints (other than in respect of DPOs). It should,

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<sup>44</sup> I leave it to Parliament to determine the appropriate value of X and Y.

unless they are dismissed under section 36, refer them to the appropriate person for action.

- 3.4.6 I have already cited Mr Bingham's view that the Commission should not have the power after referral to monitor or audit the action of the authority to which the matter is referred. However, in a small jurisdiction like Tasmania where there may be a lack of expertise in some agencies to efficiently conduct an investigation, the Commission has a role to play in assisting such agencies and it should retain the power of supervision set out in s 35(6) of the Act, namely a power to require a report on what action is intended and powers of monitoring and auditing action taken. The Commission should be a clearing house for complaints of non-serious misconduct. The public is entitled to know that their complaints will be classified by the Commission promptly and dealt with by the most appropriate person.

### 3.5 **Mandatory notifications of serious misconduct and misconduct by designated public officers**

- 3.5.1 The Commission has submitted as follows:

*“ Commission position*

*Notification of serious misconduct by public authorities to the Integrity Commission is an essential element of the Commission's capacity to monitor the integrity landscape of Tasmania.*

*The Commission endorses the recommendation of the JSC that the Integrity Commission Act be amended to require mandatory notification by public officers and public authorities of serious misconduct. The Commission further submits that this should be extended to include any misconduct by designated public officers (DPOs).*

**Discussion**

[109] *At present, notifications may be optionally made by public authorities to the Commission about allegations of misconduct that are being dealt with in the authority. Notifications may be received at the beginning of a matter (allowing the Commission to monitor the type of misconduct that occurs throughout the state) and again at finalisation of the process (allowing the Commission to monitor the way misconduct is being addressed by public authorities).*

[110] *Notifications are not complaints and do not trigger a Commission investigation. Rather they provide valuable intelligence to the Commission to help staff better understand misconduct risk in the Tasmanian public sector and enable the Commission to assist public authorities to respond to misconduct as it arises and to improve their ethical framework.*

[111] *The Commission currently receives a small number of optional notifications, usually relating to the investigation of public officers under ED 5 or similar processes. However it is not possible to rely only on complaints and ad hoc notifications from a small number of public authorities to build a picture of the level and types of misconduct in Tasmania. In order to comprehensively measure the misconduct risks associated with the state public sector, compulsory notification of serious misconduct by all public authorities is essential.*

[112] *Since 1 October 2010 the Commission has received 275 notifications from 16 different public authorities. However 90% of all notifications have been received from only three public authorities. This is not sufficient to provide the Commission with an accurate cross-section of the public sector.*

[113] *Notification to relevant integrity agencies is mandatory in other jurisdictions.<sup>45</sup>*

[114] *The Commission would not, unless appropriate to the particular circumstances, seek to assume responsibility for investigating matters which are notified. The main role of*

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45 See: Corruption and Crime Commission, Guidelines for Notification of Serious Misconduct for Principal Officers of Notifying Authorities (2015), 1.

*notifications is to allow the Commission to monitor misconduct across the state, and to provide public authorities with advice and assistance where required.*

[115] *The Commission's MPER team tailors ethical resources and training to suit the needs of public authorities. Mandatory notification will facilitate the delivery of customised materials of increased relevance to recipients based on the misconduct risks identified in notifications.*

[116] *Given the important role of DPOs in the management of public authorities, and their seniority within the respective authorities, it is considered that all allegations of misconduct of such officers should be notified to the Commission."*

3.5.2 The JSC's Three Year Review found that mandatory notification of serious misconduct is important in assisting the Commission to achieve both its investigative and educative functions, and recommended that the Act be amended to require mandatory notifications of serious misconduct to the Commission in a timely manner.<sup>46</sup> On the face of it this seems a sound recommendation but I am troubled by the fact that (see paragraph [110] above) the notification is said not to be a complaint and not to trigger a Commission investigation. I see no reason however why a notification could not form a sound basis for an own motion investigation under section 45.

### **3.6 Employment Direction No 5**

3.6.1 Employment Direction 5, paragraph 7, provides that should a Head of Agency have reasonable grounds to believe that a breach of the State Service code of conduct may have occurred, he or she must appoint a person to investigate the alleged breach of the code. Such a breach could amount to serious misconduct. The problem of duplication which this requirement under the *State Service Act 2000* presents is addressed by the Commission later in its submission and it is convenient to deal with it now.

3.6.2 The Commission has submitted as follows:

#### ***“ Commission position***

*The Commission has special powers and capacities to undertake investigations into alleged misconduct that are unavailable to public authorities. The Commission agrees with the recommendation of the JSC that Employment Direction No 5 ('ED5') should be amended to provide for evidence collected by the Commission to be used by State Service heads of agencies in proceedings relating to breaches of the State Service Code of Conduct.*

*The Commission submits that, in order to minimise risk of duplication of process and/or to impact upon those involved in a matter, ED5 should be amended to allow a head of agency to delay commencement of an ED5 investigation where there is a risk that such an investigation may impact on a Commission investigation.*

#### ***Discussion***

[275] *This issue relates to the interaction between the Commission's functions and the investigative action which may be undertaken by a State Service head of agency in accordance with the State Service Act 2000 ('State Service Act') and, particularly, ED5.<sup>47</sup> The issue was raised by the Commission in its written submissions to the Three Year Review,<sup>48</sup> discussed before the JSC,<sup>49</sup> and responded to by the JSC and the State Government (see below).*

[276] *In essence, the key issue is the potential duplication of processes relating to breaches of the code of conduct under the State Service Act. The Commission submits that, firstly, heads of agencies considering action involving breaches of the State Service Code of Conduct should not*

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<sup>46</sup> JSC Three Year Review Final Report, page 6

<sup>47</sup> ED5 was issued by the Employer (the Minister) on 4th February, 2013 pursuant to s 17(1) of the State Service Act 2000 and had effect from that date.

<sup>48</sup> Integrity Commission, Submission to Three Year Review (2013), volume 1, pages 130, 138; Integrity Commission, Third written submission to Three Year Review (2014), pages 3, 5, 13, 15–16.

<sup>49</sup> JSC Three Year Review Final Report, pages 46–51; 72–79.

*commence or proceed with any investigation of the allegations where they are aware that an investigation of the same or substantially the same matter is also being conducted by the Commission (or Tasmania Police).*

[277] *Secondly, the Commission submits that, where a head of agency determines that action is to be taken on a matter relating to a breach of the code, ED5 should provide for the head of agency to rely on the information or evidence obtained by the Commission (or Tasmania Police) without having the appointed investigator gather that information all over again, noting that the Head of Agency, through the appointed investigator, is required to afford the employee procedural fairness. The Commission notes that it has special powers and capacity to undertake investigative work that are unavailable to agencies.<sup>50</sup> The Commission may also assume responsibility for an investigation into misconduct commenced by a public authority;<sup>51</sup> however is yet to exercise this power in relation to an ED 5 investigation.*

[278] *As noted above, this issue is canvassed in associated documents, and the discussion is not repeated in this submission. However the Commission's submissions remain the same. The Commission notes that this issue only arises for public officers within the State Service, whereas the Commission's jurisdiction extends well beyond the State Service.*

### **Reference information**

*Report of Joint Standing Committee on Three Year Review*

*Findings*

*That:*

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

*Recommendations*

*That:*

*The Committee recommends that ED5 be amended to enable material from investigations conducted by the Integrity Commission to be forwarded to the relevant public authority, and that the relevant public authority is able to consider that evidence as part of any code of conduct investigation.<sup>52</sup>*

*Government response to Three Year Review*

*That:*

*The Government notes the findings and comments of the Three Year Review Report and considers that the interaction between State Service Act 2000 Employment Direction No 5 and the Integrity Commission investigations should be considered as part of the Five Year Independent Review.<sup>53</sup> "*

- 3.6.3 Misconduct, serious or not, by a member of the State Service should not be investigated twice. If it is not serious misconduct and a complaint made to the Commission is triaged back to the Head of Agency, as should normally be the case, then no problem arises. If it is "misconduct" of some gravity, although not amounting to, nor yet determined to be, serious misconduct as defined in the Act, if it is considered by the CEO to be of sufficient gravity to warrant processing by the Commission, assessment and investigation may be done covertly, and some mechanism is required to prevent an ED5 investigation covering the same ground and possibly obstructing the Commission's investigation.
- 3.6.4 There may be situations where the Head of Agency is the subject of the complaint, or his or her spouse is, or another officer in a position to learn of the information being passed to the Head of Agency is involved in the complaint and it would not be desirable

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<sup>50</sup> JSC Three Year Review Final Report, page 50.

<sup>51</sup> Integrity Commission Act, s 8(1)(l).

<sup>52</sup> JSC Three Year Review Final Report, page 79.

<sup>53</sup> Tasmanian Government Response to the JSC Three Year Review Final Report, page 7.

for the Commission to risk compromising its own investigation by advising the Head of Agency. Some discretion must therefore be retained by the Commission.

- 3.6.5 If no complaint is made to the Commission but the possibility of serious misconduct comes to the notice of the Head of Agency who thereupon notifies the Commission, then the Commission, if it thinks fit, should have power to treat it as a complaint and process it, thereby relieving the Head of Agency from his or her obligation to proceed with an investigation under ED5. In my view, once this has been dealt with and the matter referred back to the Head of Agency, the latter, upon resumption of his investigation, should be at liberty to treat the evidence gathered by the Commission as part of any code of conduct investigation.
- 3.6.6 A problem may arise if the Head of Agency has reasonable grounds for embarking upon the investigation required by ED5 but is unaware that a complaint has been made to the Commission. Prompt triaging back to the agency will resolve any problem, but if the Commission is not in a position to complete an assessment for any significant time, then there needs to be a mechanism to stop the Head of Agency investigation from proceeding immediately. I have expressed the view that notification of serious misconduct should be mandatory, but it would be "overkill", in my view, to require the notification of every allegation of misconduct on the off chance that the Commission is already assessing or investigating it covertly.

3.6.7 I make the following recommendations:

**[10] That the Commission expedite the processing of complaints by:**

- (a) adopting a robust attitude to the triaging of complaints; and**
- (b) so far as practicable confining its investigative function to serious misconduct by public officers, misconduct by designated public officers, and serious misconduct by police officers under the rank of inspector.**

**[11] That the Act be amended to require mandatory notification by public authorities of serious misconduct and misconduct by DPOs to the Commission in a timely manner.**

**[12] That:**

- (a) Where the Commission is assessing or investigating misconduct of a public officer involving a breach of the State Service code of conduct, the CEO shall, unless he or she is of the opinion that to do so might compromise such assessment or investigation, promptly advise the Head of Agency of that officer of the nature of that misconduct on a confidential basis.**
- (b) When any such assessment or investigation is concluded and a determination by the CEO under section 38, or one by the Board under section 58, or one by the Integrity Tribunal under section 78 has been made, and the complaint referred back to the Head of Agency, the latter**

may treat the evidence gathered by the Commission as part of any code of conduct investigation.

[13] That Employment Direction 5 should be amended to provide:

(a) That where the Head of Agency is advised by the Commission that it is assessing or investigating misconduct of a public officer of that agency involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.

(b) That where, in accordance with Recommendation [11], the Head of Agency notifies the Commission of serious misconduct of a public officer involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.

### 3.7 Procedural Fairness

3.7.1 The Commission has, in its submissions, raised this issue in relation to an assessor's report. In a supplementary submission<sup>54</sup> it is stated:

*" The Commission's view is that the rules of procedural fairness, as they apply to Commission processes, provide for a person who is the subject of an adverse comment or finding in an Integrity Commission report to be given the opportunity to respond. The rule essentially allows for a right of be heard, and is a chance to correct any inaccuracies."*

3.7.2 Where an assessor does not recommend further investigation under Part 6 of the Act, there is presently no express obligation that the rules of procedural fairness should apply to his or her report. If investigation is recommended to and determined upon by the CEO, the investigator is obliged to observe those rules (s 46(1)(c)) as the investigation is conducted and the subject, where appropriate, given the opportunity to comment on the report (section 56). In this way the subject of the investigation is given protection, but, as there is no protection offered while the assessor makes his or her assessment, the subject remains at risk of having the complaint referred to the principal officer of the relevant authority for further investigation and action, accompanied by the assessor's report which may contain adverse material.

3.7.3 If my **Recommendation [8]** (restricting the coercive powers of the assessor) is acted upon, the assessor will not have procured any coerced admissions, but other adverse material from uncoerced sources may have been included. There is a case, therefore, for requiring that before referral the assessor's report (or such part as may contain that material) be disclosed to the officer subject to the complaint so as to afford that officer the opportunity to respond.

3.7.4 The acting CEO in the supplementary submission has opined:

*" A complication arises where an assessment or investigation report is referred to a public authority for investigation. If that public authority is subject to ED5, then clause 7.4 of ED 5 will require the subject officer to be notified before any further investigation can take place. This may replicate the issues*

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<sup>54</sup> Integrity Commission further written submission dated 27 April 2016, section 4.

*with covert inquiry, and may warrant consequential amendment. Alternatively, ensuring that a Commission assessment or investigation could constitute a replacement for an ED5 investigation would similarly alleviate this problem.*

*The issue outlined above may also arise where a Commission investigation report is given to the person subject to adverse comment for response, and the Board then determines that the matter requires further investigation by the Commission."<sup>55</sup>*

3.7.5 I think that if the disclosure of the assessor's report is only to be required where the CEO is content to refer the complaint to the public authority for investigation and action, no real complication is likely to arise.

3.7.6 If the authority is subject to ED5 and my **Recommendations [12] and [13]** are acted upon, the material contained in the assessor's report will merely be a part of the evidence which the Head of Agency has to consider. I do not think any case can be made for replacing an ED5 investigation with an assessment or investigation conducted by the Commission, nor that the fact that clause 7.4 of ED5 requires the subject officer to be notified before further investigation can take place compromises anyone in any way. If the assessor's report contains material adverse to the subject officer, it is only right that it be disclosed to him or her, and that he or she should have the opportunity to be aware of it before the commencement of an investigation pursuant to ED5. This accords with the spirit of fairness in clause 7.4 of ED5.

3.7.7 I recommend:

**[14] That the Act be amended to require that before any referral by the CEO pursuant to section 38 of a complaint to a public authority for investigation and action, any adverse material contained in the assessor's report be disclosed to the officer the subject of the complaint, that the latter be given the opportunity to comment upon it and that any submission or comment in relation thereto by the subject officer be attached to the material referred to the public authority.**

### 3.8 Referrals of suspected criminal conduct

3.8.1 The Commission has submitted as follows:

***“ Commission position***

*The Commission should maintain its existing jurisdiction and ability to handle matters that may involve criminal allegations in a discretionary manner.*

***Discussion***

*[117] The Commission currently has discretion to either deal with potentially criminal allegations, or to refer them to another entity at various stages in its processes.<sup>56</sup>*

*[118] The Commission respectfully submits that the JSC recommendations on this matter (see below) have resulted from confusion about this issue.*

***Background***

*[119] The second reading speech for the Integrity Commission Bill 2009 indicates that, in some rare cases, it was intended that the Integrity Commission undertake investigations into conduct that could be characterised as criminal in nature.<sup>57</sup>*

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<sup>55</sup> Integrity Commission supplementary written submission dated 27 April 2016.

<sup>56</sup> Integrity Commission Act, s 8(1)(h).

<sup>57</sup> Integrity Commission Bill 2009, Tasmania Parliament, Second Reading Speech, pages 13, 15.

- [120] *As noted during the Three Year Review, the vast majority of matters handled by the Commission do not involve any criminal allegations.*<sup>58</sup>
- [121] *Even serious misconduct such as nepotism and undue influence is not always capable of being characterised as criminal in nature.*<sup>59</sup> *This is particularly the case because of the lack of a 'misconduct in public office' offence in Tasmania (refer section 6.5 of this submission).*

#### **Case law and abrogation of legal privileges**

- [122] *The confusion on this issue appears to have stemmed from the oral evidence given by the then Acting Director of Public Prosecutions (DPP) during the Three Year Review hearings. The Acting DPP referred to Lee v The Queen<sup>60</sup> ('Lee No 2'), which he submitted meant that he would have difficulty prosecuting matters that had been investigated by the Integrity Commission.*<sup>61</sup>
- [123] *Lee No 2 is one of a series of High Court cases which have had an ongoing impact on integrity and anti-corruption entities throughout Australia. The cases revolve around entities that are able to abrogate legal privileges, and generally involve coercive interviews – in abrogation of the privilege against self-incrimination – of persons that have already been charged with offences.*<sup>62</sup> *They do not involve other material collected by such entities, such as documentary evidence (even though it is sometimes 'coercively' acquired).*
- [124] *Generally, entities that are able to abrogate the privilege against self-incrimination balance this against a guarantee that any evidence given will not be used in subsequent prosecutions. This can cover both primary and derivative use of that evidence. This can create difficulties when the persons being interviewed have already been charged with relevant offences.*
- [125] *The Commission is aware of these cases. However, unlike most equivalent entities in Australia,<sup>63</sup> the Commission is not able to abrogate privileges, including the privilege against self-incrimination.*<sup>64</sup> *The Commission therefore does not consider that these cases pose any imminent threat to the use of its interview (or other) material in the prosecution of offences.*
- [126] *In other jurisdictions, the case law has resulted in substantial legislative amendments, and changes to internal policies and procedures. However it has not prevented the relevant entities from continuing to meet the objectives of their respective Acts, nor has it resulted in police services having to entirely reinvestigate matters to allow them to be prosecuted. These entities continue to collect evidence that is later used in prosecutions.*<sup>65</sup> *Consequently, even if the Commission did have the power to abrogate privileges, it does not anticipate that the case law would pose an insurmountable barrier to its work.*
- [127] *Further, the Commission has obtained legal advice from the Solicitor-General on the admissibility of evidence obtained under s 47 of the Integrity Commission Act ie evidence obtained coercively, but not in abrogation of privileges. The advice stated that there is no general rule that would prohibit such evidence from being admissible, and that 'each instance will turn on its own facts'."*<sup>66</sup>

### **3.8.2 The JSC recommendations were:**

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

*If the Director of Public Prosecutions suspects criminality, it [sic] can refer it to the Integrity Commission, Tasmania Police or any other appropriate body for investigation "*<sup>67</sup>

### **3.8.3 The Director of Public Prosecutions relied on his previous submission to the Three Year Review in which he said:**

<sup>58</sup> Integrity Commission, Third written submission to Three Year Review, page 22.

<sup>59</sup> Email from George Brouwer to Sandy Cook, 3 January 2016; Letter from the Hon Murray Kellam AO to Sandy Cook, 5 January 2016.

<sup>60</sup> Lee v The Queen [2014] HCA 20.

<sup>61</sup> JSC Three Year Review Final Report page 80.

<sup>62</sup> The High Court is currently considering a case in which those being compelled to give evidence at a public hearing have not been charged, see R & Anor v Independent Broad-Based Anti-Corruption Commissioner [2016] HCATrans 7.

<sup>63</sup> Integrity Commission, Submission to Three Year Review (2013), volume 2, appendix 7, pages 103–105.

<sup>64</sup> Integrity Commission Act, s 92.

<sup>65</sup> Integrity Commission, Third written submission to Three Year Review (2014), page 22.

<sup>66</sup> Ibid.

<sup>67</sup> JSC Three Year Review Final Report page 88.

*" ... A great deal of any evidence gathered by the Commission using its extensive powers cannot be used by my office to prosecute an offender. Indeed, it is likely any evidence gathered by coercion from the alleged offender could not even be provided to the prosecutor (see Lee v R (2014) 308 ALR 252). Tasmania Police would be required to completely reinvestigate any matter ensuring that any alleged perpetrator and any witnesses are given the protections extended in the criminal justice system. This stems from the coercive nature of the powers exercised by the Commission and the fact that it is not bound by the rules of evidence."*<sup>68</sup>

3.8.4 I note the Commission's contention that the Act is distinguishable from legislation considered by the High Court in such cases as *Lee No 2* (above) and *X7 v Australian Crime Commission* (2013) 248 CLR 92, but there is no doubting the importance the High Court attaches to any unauthorised departure from the mode of trial which our system of criminal justice requires that an accused person have. Hence in that case, although admissions made by an accused person were lawfully obtained under compulsion, admittedly, by statute, not admissible against him on his trial, the unauthorised disclosure of transcripts of that evidence to the prosecutor was a fundamental departure from that standard. The Act does not prohibit the release of such information, and Mr Coates SC argues that it is not unlawful to provide such information to the prosecutor.

*" However in such cases unless the legislation expressly states that it takes away the right of an accused person to have the State prove its case without the assistance of the accused by expressly providing that statements of any directed questioning be provided to the prosecutor the court is likely to find there is a miscarriage of justice or, where it is known prior to trial, order a stay of proceedings."*<sup>69</sup>

3.8.5 It is not for me to say what I think would be likely to happen should such disclosure be made in a criminal prosecution in Tasmania, but I can understand the apprehension of Mr Coates.

3.8.6 The Commission should not be criticised if its investigations have not resulted in the conviction of any person. Its prime object is to enhance standards of ethical conduct by public servants. While it needs coercive powers to investigate misconduct and to ensure that it is appropriately dealt with, it does not have a primary purpose of securing convictions or providing assistance to the police to acquire evidence by the use of coercive powers not available to the latter. If Parliament is of the view that material gathered in this manner should be made available to the DPP for the purposes of aiding the prosecution of crimes and offences of a serious nature, then the Act should be amended to so provide. As Kiefel J said in *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153:

*" The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question whether to so abrogate or restrict and has determined to do so."*

3.8.7 I make no recommendation one way or the other.

3.8.8 Is there a case, apart from the DPP's misgivings, for the investigation of misconduct which could, if proved, be a crime or an offence of a serious nature to be immediately referred to Tasmania Police for action? Section 87(1) of the Act presently requires such form of serious misconduct to be investigated by the Commission in accordance

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<sup>68</sup> DPP's submission to the JSC Three Year Review (29 October 2014) page 3.

<sup>69</sup> DPP's submission to the Five Year Review, Annexure G, page 9.

with Parts 6 and 7 where it is engaged in by DPOs. I see no reason to alter that. As commissioned officers of police are DPOs, it would be inappropriate to refer complaints against them to the police for action. The Commission seeks to justify its retention of the function to investigate crimes or offences of a serious nature as follows:

**" Investigation of criminal matters by Tasmania Police and the DPP**

[128] *The JSC recommended that Commission matters that potentially involve criminal allegations be immediately referred to the police or the DPP.*

[129] *The DPP is not an investigative body. It would therefore not be appropriate – or possible – for the Commission to refer potential criminal matters to the DPP for investigation.*

[130] *The Commission respectfully submits that the recommendation of referring potentially criminal complaints to the DPP at the initial triage phase (the initial review of the allegations arising from a complaint), and then having them referred back to it, would be neither practical nor timely. Due to the Commission losing jurisdiction of a complaint on its referral, this process would also restrict the Commission's handling of re-referred complaints. It could not, for example, subject such complaints to an assessment under the Integrity Commission Act.*

[131] *In regard to referring matters to the police, the Commission agrees that, in most instances, Tasmania Police is the most appropriate body to investigate criminal complaints. However, this is not true of all complaints that contain potentially criminal allegations for the following reasons:*

- *Police do not focus on public sector misconduct as the Commission does – they have other competing priorities. Police simply do not always have the time or resources to prioritise public sector misconduct in the same manner as the Commission. It is not, nor should it be, the core of their focus or objectives.*
- *It does not necessarily follow that an immediate police investigation is the best option for all complaints that contain potentially criminal conduct. The alleged criminal aspects of some matters are easily dismissed, or they are minor in nature in comparison to the misconduct (and thus it would not be in the public interest to pursue them as criminal complaints). In other jurisdictions, public hearings are often held into serious misconduct cases prior to the consideration of criminal charges by those entities. 'Shining a light' on the conduct, and the culture and policies that allowed it to happen, is seen to be the priority in many of these cases.<sup>70</sup>*
- *As suggested by the second reading speech for the Integrity Commission Bill 2009, Tasmania Police will not always be the most appropriate body to investigate criminal allegations against its own members.<sup>71</sup> This would most notably be the case if those members were very senior within the service."*

3.8.9 I agree with the points made at paragraphs [128] and [129]. As to paragraph [130], the alleged loss of jurisdiction over a complaint on its referral could be overcome by amendments sought in accordance with Item 9 of Annexure 2<sup>72</sup> of the Integrity Commission's submission, a table of technical issues, namely to:

*" 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 powers."*

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70 See, eg, public hearings held by Victorian Independent Broad-based Anti-Corruption Commission, <http://www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-ord>; <http://www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-fitzroy>; <http://www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-ross-public-examinations>.

71 Integrity Commission Bill 2009, Tasmania Parliament, Second Reading Speech, page 15.

72 This Annexure is replicated in Attachment 2 of this report.

3.8.10 The Commission is in the process of developing protocols that involve potentially criminal conduct. Its submission continues:

**" Protocols that involve potentially criminal conduct**

[132] *In the past, the Commission has not had a formal process for liaison with Tasmania Police and the DPP on matters that involve potential criminal conduct. The Commission identified that this approach has resulted in some problems and needed improvement.*

[133] *To address this, the Commission is now working to put in place protocols with both Tasmania Police and the DPP about the handling of Commission matters that include a potential breach of the law. The aim of these protocols is to ensure that such matters are handled in the most appropriate manner, taking into account all of the circumstances of each case.*

[134] *In line with the protocols, the Commission would seek to liaise with the most appropriate entity, depending on the complaint handling stage at which the criminal allegations emerge. For instance, if they were evident in the initial complaint, it is envisaged that the Commission would initially liaise with Tasmania Police to decide, for example, if the matter should be immediately referred to police. If, however, the criminal allegations were to emerge toward the end of an investigation when all the evidence had been collected, the DPP would likely be the preferred liaison body to determine, for example, whether the Commission should put together a brief of evidence for the DPP's assessment.*

[135] *The Commission envisages that the protocols will facilitate timely and useful discussions, and allow such matters to be handled in the most appropriate manner possible, taking into account the public interest, and the aims and objectives of each of the three entities."*

3.8.11 In relation to paragraph [134], considerable care needs to be exercised to avoid the dangers of causing an unfair trial contemplated by cases such as *Lee (No 2)*.

3.8.12 I think on balance that the recommendation of the JSC "that the Act be amended to require that, if criminality is suspected by Integrity Commission during its triage of a complaint the matter must immediately be referred to the DPP or Tasmania Police"<sup>73</sup> is sound, save that the complaint should not be one against a DPO or a police officer suspected of criminality (and hence serious misconduct), and save that any referral to the DPP should be excluded. The Commission would then retain its powers and responsibilities in respect of DPOs and those police officers suspected of criminality. As to other police officers suspected only of misconduct not amounting to serious misconduct, it will be my recommendation that they be referred to the Commissioner of Police for action and the Commission will then have the ability, in those rare cases mentioned in paragraph [131], to resume jurisdiction over them.<sup>74</sup> Hopefully the protocols will refine the division of effort and avoid duplication.

3.8.13 If the Commission is to retain jurisdiction over criminal matters, then there should be consequential amendments to the Act which do not require the referral of such matters directly to the DPP. This is to avoid the complications envisaged by him by virtue of *Lee's* case and other High Court decisions. Their referral to the Commissioner of Police where prosecution is anticipated should enable his officers to sift out the material which, if delivered to the DPP, might compromise any subsequent trial. A brief can be prepared after any further inquiries are conducted by the police to substitute admissible material for that which has been deleted by virtue of its coercive provenance, and the brief then referred to the DPP.

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<sup>73</sup> JSC Three Year Review Final Report, page 2

<sup>74</sup> See Recommendation [18] of this report.

3.8.14 I make the following recommendations:

- [15] **That in accordance with Item 9 of Attachment 2, Parts 5 and 6 of the Act 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 powers within those Parts.**
- [16] **That the Act be amended to require that if criminal conduct by a public officer other than a designated public officer or a police officer is suspected by the Commission during its triage of a complaint, the matter must immediately be referred to Tasmania Police.**
- [17] **That the Act be amended to delete the words "or DPP" from sections 57(2)(b)(iv), 58(2)(b)(iv) and 78(3)(d).**

### 3.9 Monitoring progress of referred complaints

3.9.1 The Commission has submitted as follows:

*“ Commission position*

*The Integrity Commission Act should be amended to provide for the Commission to retain jurisdiction over matters referred to public authorities where, after action by a public authority (or a failure by the public authority to take appropriate action), it is apparent that further action by the Commission is required.*

*Discussion*

[136] *One of the principles of operation of the Commission is to 'improve the capacity of public authorities to prevent and respond to cases of misconduct'.<sup>75</sup> This principle is achieved, in part, through the referral of complaints to public authorities for action.*

[137] *When the Commission refers complaints for action the CEO may:*

- *require the person (to whom the referral is made) to provide a report on what action the person intends to take in relation to the complaint;*
- *monitor any action taken by the person in relation to the complaint; or*
- *audit an action taken by the person in relation to the complaint.<sup>76</sup>*

[138] *It has been the experience of the Commission that public authorities, on occasion, fail to take appropriate action in relation to referred complaints. This arises due to a number of factors, including a lack of capacity to properly investigate a complaint. For example, public authorities do not have any special powers to obtain evidence in the way the Commission does.*

[139] *Under the Integrity Commission Act, the Commission has no capacity to compel action or to assume responsibility for dealing with the complaint where a public authority fails or refuses to take appropriate action.*

[140] *The Integrity Commission Act gives the Commission the ability to 'assume responsibility for, and complete, an investigation into misconduct commenced by a public authority or integrity entity if the Integrity Commission considers that action to be appropriate ...'.<sup>77</sup> However the Integrity Commission Act does not provide an adequate mechanism through which the Commission can exercise this function in relation to referred complaints.*

[141] *As an example: a 2013 complaint relating to, inter alia, an alleged disclosure of confidential information was referred to the principal officer of the relevant State Service agency. The Commission was subsequently advised that, on the basis of the agency's investigation, it was found that the alleged disclosure did not involve misconduct. The Commission exercised its*

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75 Integrity Commission Act 2009, s 9(1)(c).

76 Integrity Commission Act 2009, s 35(6).

77 Integrity Commission Act, s 8(1)(l).

power to audit the action taken, and identified a number of deficiencies in the investigation including a failure to obtain or consider highly relevant evidence. Despite this, the Commission was notified by the agency approximately five months later that no further action was to be taken.

[142] The JSC sought to address this issue by recommending that the Commission be given authority to monitor and request progress reports of referred complaints (see below). The Commission respectfully submits that this recommendation largely replicates the existing powers of s 35(6) which do not sufficiently provide for the Commission to retain jurisdiction over referred complaints.

#### **Reference information**

Report of Joint Standing Committee on Three Year Review

Findings

That:

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

#### **Recommendations**

That:

The Integrity Commission be given authority to monitor and request progress reports of all complaints referred to other agencies for investigation, and if necessary raise concerns of potential inaction with the Parliamentary Joint Standing Committee on Integrity.<sup>78</sup>

3.9.2 I agree that the Commission should have this power and have partly addressed it in **Recommendation [15]**. In the course of verbal submissions to me by the Honourable Lara Giddings MP, this exchange occurred:

*" Ms GIDDINGS - ... Out of our three-year review, the frustration we heard coming loud and clear from the commission was that there is not any follow-up that is part of the legislative framework which ensures that when a matter is referred back to a department for resolution, that resolution occurs.*

*I did feel the parliamentary committee had a role to play that is not formalised at the moment, of being the backstop for the Integrity Commission so that when they are frustrated that they do not have the level of feedback, commitment or resolution they expected from a government department. They have a parliamentary body to come to which can call the head of that department to account. It is important that if it is not dealt with adequately by a secretary of a department there are other avenues we can use in the parliamentary sense to out that bad behaviour. In that respect it is important we have a role on an individual case, but that is post-investigation and conclusions around it. It is more the finalising of the resolutions that were expected to be found or resolved.*

*Mr COX – Yes. The commission put in its submission to me the need for it to be able to take back things it reviews. There is one suggestion which I think formed part of the three-year review recommendations, that if the commission is not satisfied that the matter is being properly resolved or incorrect action has been taken, or no appropriate action has been taken, it can draw the matter back for further review and direction. It may need to be, at that stage, that the joint committee has a look at it.*

*Ms GIDDINGS – That would be appropriate at that stage."*

3.9.3 I think that the Commission should be able to report to the JSC the fact that complaints have not been adequately dealt with by public authorities to which they have been referred, but I think that without infringing the requirements of s 24(2) not to investigate decisions of the Commission, nor inquire into any particular complaint, the JSC's functions set out in s 24(1) are broad enough to enable such a report to be considered by that body. Section 11(4) seems to contemplate such a course.

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<sup>78</sup> Joint Standing Committee on Integrity, Parliament of Tasmania, Three Year Review – Final Report (2015), page 91.

It provides:

" (4) *The Integrity Commission may, at any time, provide a report to the Joint Committee on the performance of its functions or exercise of its powers relating to an investigation or inquiry.*"

3.9.4 I recommend:

**[18] That the Act be amended to provide for the Commission to retain jurisdiction over matters referred to public authorities where after action by a public authority (or a failure by a public authority to take appropriate action) it is apparent that further action by the Commission is required.**

### 3.10 Amendments proposed by the Law Society of Tasmania

3.10.1 The Commission has addressed each of the issues raised by the Law Society to the Three Year Review, given that each issue is identified in the report of the JSC resulting from that review.

#### *“ Right to silence*

##### ***Commission position***

*Given its legislated focus on misconduct, the Commission considers the Integrity Commission Act provides an appropriate balance regarding the right to silence and its concomitant 'group of rights'.<sup>79</sup> The Commission does not support enshrining an absolute right to silence within the Integrity Commission Act; the ability of the Commission to use (at least) limited coercive powers must be preserved in order for the Commission to achieve its legislated objectives.*

##### ***Discussion***

[143] *While the Commission does have an ability to compel persons to provide information, it cannot abrogate legal privileges, including the privilege against self-incrimination. The Commission's ability to override the right to silence is therefore limited.*

[144] *In its submission to the JSC, The Law Society outlined its concerns in relation to the lack of an absolute right to silence in Commission investigations.*

[145] *The Law Society's concerns about this issue were associated with other matters; those matters are dealt with below. The Commission considers that many of the Law Society's concerns about the right to silence would be eliminated if those other matters were addressed – most notably, the right to legal representation.*

[146] *The ability to compel the production of information and evidence is essential to the Commission's investigative work. It is frequently used to obtain records both from public authorities, where the authority provided by a notice may assist an otherwise reluctant release of the information. Notices are also used to obtain information from the private sector (such as banks), and to compel the production of call charge records.<sup>80</sup>*

[147] *The Commission's limited coercive powers provide significant motivation for persons subject to interview to cooperate with the Commission (in instances in which that cooperation would not override a legal privilege). It is the Commission's experience that people may be unlikely to cooperate in such circumstances, unless compelled to do so; this is particularly the case where a person knows they have done something wrong. Direct evidence from subject officers and witnesses is far more compelling than any adverse inferences that may be drawn by a refusal to cooperate with interviews.*

[148] *An inability to compel persons to produce information and attend to give evidence would significantly hamper the Commission's work. It would substantially reduce its ability to:*

- a thoroughly and independently investigate misconduct;*
- b identify and expose misconduct; and*

<sup>79</sup> See: Law Society of Tasmania, Submission to Three Year Review, submission 1, 6 (quote from NSW Law Reform Commission Report July 2000).

<sup>80</sup> See discussion on Telecommunications (Interception and Access) Act 1979 (Cth) in section 6.3, paragraphs [270]–[273].

c uncover organisational and systemic issues which allowed the conduct to occur.

[149] *The preservation of an absolute right to silence within the Integrity Commission Act would be analogous to a complete removal of the Commission's coercive powers. This would seriously degrade Commission investigations, and would likely lead to the investigations being less effective than an investigation which an authority could itself conduct. The Commission therefore disagrees with any perceived necessity to strengthen such rights within its Integrity Commission Act.*

[150] *The Commission notes that all integrity entities in other Australian jurisdictions<sup>81</sup> can compel evidence however that evidence is not admissible in court. For example, the powers available to the Australian Securities and Investment Commission allow it to compel evidence. Such a regime requires careful consideration, from both legislative and policy perspectives, of the series of High Court cases discussed elsewhere in this submission.<sup>82</sup>"*

### 3.10.2 The Law Society repeats its position on the Right to Silence set out in its submission to the Three Year Review. It is to this effect:

*" The Act confers a broad range of coercive powers available with significant sanctions for non-compliance with these powers and affords limited rights to witnesses. The Society is concerned that there is a lack of an appropriate balance between robust public scrutiny and the protection of the rights of participating individuals under the Act.*

*While the Society acknowledges the need for coercive powers for investigations and inquiries into corruption, it considers that these powers should be seen as exceptional due to their intrusive impact on an individual's rights. This is particularly the case here where such powers are used in executive rather than judicial processes analogist to powers conferred under the Commonwealth Royal Commission Act 1901 and similar legislation.*

*The abrogation of the right to silence is a significant matter. That right is recognised in the common law, in the following broad terms, usefully summarised and reproduced from Report 95 of the NSW Law Reform Commission The Right to Silence (July 2000). It states that the concept 'describes a group of rights which arise at different points in the criminal justice system', as follows:*

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.*
- (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.*
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.*
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence and from being compelled to answer questions put to them in the dock.*
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.*
- (6) A specific immunity (at least in certain circumstances), possessed by accused persons undergoing trial, from having adverse comment made about any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.*

*Here the right is removed notwithstanding Joint Select Committee recommendation it be enshrined in the Act. The Government acknowledged this departure from that recommendation, in terms which, with great respect, are unconvincing. The Attorney General in her second reading speech said:*

*" The Joint Select Committee recommended giving witnesses a right to silence and I can see what they were trying to achieve with that. In the end though it may put a person in a worse position if they are allowed to maintain their right to silence but there is nothing to prevent an investigator or Tribunal from drawing an adverse inference as a result."*

81 Integrity Commission, Submission to Three Year Review (2013), volume 2, App 7, pages 103–105.

82 Refer to discussion about *Lee v The Queen* [2014] HCA 20, section 2.5, [122]–[123].

*The Attorney General acknowledged that this is a difficult area, and it is one in respect of which we take the view that that difficulty is itself evidence of the extreme care which should be taken before choosing to interfere with established principles of law intended for the protection of individuals, many of whom will be vulnerable to the difficulties attending involvement in these processes.*

*Furthermore, this applies in the context of an act which confers limited access to assistance any person, or any person skilled in advising in respect of such matters. There is no justification for this.*

**Recommendation 1**

*That the right to silence be enshrined in the Act.*"<sup>83</sup>

- 3.10.3 In my view, a body such as the Commission must have some coercive powers, including the power to compel answers – not only from witnesses but from the person who is the subject of the complaint. The main thrust of the Law Society's objection is to the interrogation of the person who is the subject of the complaint and any possible accomplice. Although the right to silence is clearly abrogated by the Act, the claims of privilege set out in Part 10 of Chapter 3 of the *Evidence Act 2001*, spousal privileges and the privilege of Parliament have been preserved (s 92(2) of the IC Act). These privileges (see section 4 of the IC Act) include client legal privilege, religious confession, medical communications, communications to counsellor, privilege against self-incrimination, evidence regarding settlement negotiations and matters of State. It might be said that the privilege against self-incrimination is sufficient protection against any harm which might ensue from coercive interrogation, but the reality is that many people are ignorant of the extent of the privilege, do not understand the circumstances which constitute a waiver of the privilege, or the consequences of that waiver, and can be compromised by the perception that a claim to privilege is tantamount to an irrevocable admission of guilt. It is not surprising that it is rarely claimed, especially if the person questioned is not represented by a solicitor. Furthermore, as the Law Society points out elsewhere in its submission, the mechanism of challenging rejection of the claimed privilege (by way of application to the Supreme Court for a ruling) is somewhat cumbersome, possibly beyond the comprehension of an unrepresented person, and potentially expensive to one who is represented.
- 3.10.4 The Commission annexed as Attachment 3 to its submission a notice entitled "*Important Information for Recipients of a Notice under Section 47(1)*", and included the advice under the heading "*Claims of privilege*":

*" The powers conferred on the Commission by section 47(1) of the Act may not automatically be avoided by a claim of privilege.*

*If you seek to claim privilege in respect of any requirement or direction arising from the Notice, the Commission may withdraw the requirement or direction in accordance with section 92(3) of the Act. If the requirement or direction is not withdrawn, a further written Notice to comply with the requirement or direction will be issued. You will be obliged to comply with that further Notice within 14 days, or make application to the Supreme Court to determine the claim of privilege. Section 92 of the Act sets out the procedure that is to be followed to determine a claim of privilege.*

*As the recipient of this Notice, you should consider, where necessary, seeking appropriate legal advice as to whether a third party may be able to assert privilege over any documents you are required to produce."*

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83 Law Society submission to the three Year Review, 18 August 2014, pages 6 and 7.

- 3.10.5 With respect, I think this statement is not particularly illuminating and does little to acquaint the average public officer of the extent of the privilege.
- 3.10.6 Other jurisdictions have sought to ameliorate the use of coercive powers by providing that admissions or documents produced by a witness under compulsion are not (with some exceptions such as in proceedings for an offence against the Act in question or perjury) admissible in evidence against a witness in any civil or criminal proceedings, or in any disciplinary proceedings; but substantially abrogate most claims for privilege, especially that against self-incrimination (see for example *Independent Commission Against Corruption Act 1988* (NSW), sections 21, 22, 26 and 37). In some legislation provisions such as these are conditional upon the witness first raising an objection.
- 3.10.7 *Lee's* case has made it clear that the making of self-incriminating evidence inadmissible will not alone ensure the fairness of any subsequent trial, and that to ensure fairness material of that kind would usually require that the Commission quarantine it from persons involved in the prosecution of any charges arising. Although there are grounds for the view that *Lee's* case is distinguishable and that under the present regime evidence produced under coercion may still be admissible and not subject to the constraints of that case, it is the view of the present DPP that it would be dangerous to rely on material of that kind and unwise not to quarantine it from his officers. Furthermore, I think it would be consonant with my **Recommendations [16] and [17]** that the Act be amended to conform more closely with the regimes for coercion devised in other Australian jurisdictions by rendering material obtained by coercion from a witness inadmissible against him or her in any civil or criminal proceedings, other than proceedings for an offence against the Act or perjury. This would obviate the need to preserve the privilege against self-incrimination and be more likely to give protection to witnesses unfamiliar with the special rules relevant to the exercise of that privilege. It would also avoid the need for the Supreme Court to determine whether or not that privilege was applicable in any given case. I see no reason to exclude any of the other privileges referred to in section 4; nor do I see any reason to require that raising an initial objection be a pre-condition to the inadmissibility of any incriminating material. There should be room for admission by consent as it not infrequently happens that an accused person will want to have an admission which includes exculpatory material placed before the court on the trial.
- 3.10.8 It may be thought to be a very drastic course to recommend the abolition of the privilege against self-incrimination, especially when none of the submissions I have received has initially advocated it, but I believe it can provide better protection to the vulnerable by doing so, and providing that what they reveal will not be used as evidence against them in subsequent court proceedings. Persons given this kind of reassurance may be more frank with an investigator than those who believe that what they say against their interest may be given in court against them and are therefore tempted to prevaricate, if not perjure themselves.

3.10.9 I make the following recommendations:

**[19] That the privilege against self-incrimination be excluded from the Act. This might be achieved by amending section 4 to except that particular privilege from paragraph (a) of the definition of "privilege".<sup>84</sup>**

**[20] That the Act be amended to provide that any statement or document made or produced by a witness under compulsion shall be inadmissible against that person in any civil or criminal proceedings against him or her, other than proceedings for an offence against the Act or perjury in respect of that statement without his or her consent.**

### **3.11 Coercive notices**

3.11.1 The Law Society submits that if the right to silence is not to be enshrined in the Act, section 47 notices should be issued by the Chief Commissioner (who must be a legal practitioner of not less than seven years' standing) rather than an investigator or an assessor, and that the Commission exercise its coercive powers only where necessary and in accordance with the principle of proportionality which is enshrined in the Act.

3.11.2 The Commission has submitted as follows:

***“ Commission position***

*The Commission submits that it is neither necessary nor constructive to amend the Integrity Commission Act in relation to coercive notices.*

***Discussion***

*[151] The decision to issue coercive notices is made judiciously and in recognition of the powers provided to the Commission under the Integrity Commission Act. The Commission only uses coercive notices where they are necessary to the undertaking of an assessment or investigation.*

*[152] An assessor or investigator cannot issue a notice without justifying its need and purpose to the CEO. The Commission utilises a number of checks, including a process that requires the CEO to sign off on the use of all notices.*

*[153] Issuing a notice is currently the only mechanism with which the Commission can ensure confidentiality over its dealings with witnesses and relevant public officers. Many public authorities prefer to receive coercive notices, as it protects them from any issues relating to the release of information.*

*[154] All notices are accompanied with detailed information relating to rights and obligations relating to the notice and the recipient's involvement in the Commission's assessment or investigation. Notices to attend to give evidence are generally served in the Commission's offices following a discussion about the notice and the rights of the recipient."*

3.11.3 I have no reason to doubt any of the above claims, but, in my view, the issue of coercive notices, though necessary, is so much of an interference with civil rights that it should be seen to be under the direct control of an official of considerable standing. Just as the issue of search warrants requires, even under the Act, the authority of a magistrate, so, in my view, does the issue of a coercive notice under section 47 require the imprimatur of an official of the same minimum standing at the bar as is required of a magistrate. The restriction of this function to the Chief Commissioner would therefore be

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<sup>84</sup> I see no reason for consequential amendments to section 92 as that regime will still apply to other bases for privilege, most of which are likely to be rare.

appropriate and would provide a further desirable opportunity for Board oversight. Presently I understand such notices are signed by the assessor or investigator, after consultation with and approval from the CEO. There are however practical difficulties in mandating signature by the Chief Commissioner. The Chief Commissioner is a part-time officer and may not be readily available to satisfy him or herself of the appropriateness of the recommended use and to formally sign the notice. This power would have to be subject to delegation. The CEO, in my view, is the appropriate person to exercise the power if the Chief Commissioner were not available. As the Chief Commissioner has no general power of delegation, a specific power to delegate this function to the CEO could be included in section 16.

3.11.4 I recommend:

**[21] That the Act be amended so that any coercive notice issued under section 47 be signed by the Chief Commissioner, but that he or she may delegate this power to the CEO to be exercised when he or she is not available.**

### **3.12 Right to legal representation**

3.12.1 The Law Society's position is set out in its submission as follows:

*" Section 66 of the Act provides that:*

- (1) A public officer who is the subject of an inquiry is entitled to be represented by a legal practitioner or other agent when appearing before an Integrity Tribunal during the inquiry.*
- (2) A witness appearing before an Integrity Tribunal may, with its approval, be represented by a legal practitioner or other agent.*

*First it is noted that different 'rights' are offered public officers and witnesses. A public officer who is the subject of an investigation is entitled to be represented. This is appropriate and an important protection for people who are affected by investigations. However a witness appearing before a Tribunal is not entitled to be represented without the approval of the Tribunal. Witness is not defined which is unsatisfactory.*

*Furthermore the right to be represented is a 'controlled right' pursuant to Section 67 (1) which provides:*

*'An Integrity Tribunal may allow any person or any person's legal practitioner or agent to participate in an inquiry, to the extent that the Integrity Tribunal considers appropriate.'*

*The Society submits that there should be an absolute right to be represented, similar to the ASIC model (see endnote). No good reason exists for constraining this right. An investigation could not be affected if the typical unlimited right to be represented is not curtailed.*

*In circumstances where established rights such as the entitlement to remain silent have been supplanted and a complex procedure exists in order to claim privilege, it is a matter of concern that the right to representation is not preserved in an unqualified way.*

#### **Recommendation 7**

*That 'witnesses' before tribunals, once properly and broadly defined by the Act, be afforded an unqualified or controlled right to legal representation."<sup>85</sup>*

### 3.12.2 The Commission's position is as follows:

#### **" Commission's position**

*The Commission agrees that the current inconsistency between the rights of public officers and witnesses to be represented by a legal practitioner should be addressed.*

*The Commission must have discretion to prevent certain individuals from representing public officers or witnesses in certain cases. Such a discretion should apply to assessments, investigations and tribunals.*

#### **Discussion**

[157] *Section 49 of the Integrity Commission Act provides for a person required or directed to give evidence or answer questions as part of an investigation to be represented by a legal practitioner or other agent.*

[158] *Similarly, section 66(1) allows for a public officer who is the subject of an inquiry to be represented by a legal practitioner or other agent when appearing before an Integrity Tribunal during an inquiry.*

[159] *Section 66(2) provides the same right to witnesses appearing before an Integrity Tribunal, except that the exercise of that right must be approved by the Integrity Tribunal.*

[160] *Issues have been encountered during investigations where a person required to give evidence sought to be represented by an individual whom the Commission considered to have a conflict of interest in relation to that investigation. In such circumstances the Commission should have discretion to require a person to obtain an alternative representative (or if they wish, to not then be represented).*

[161] *The Commission's discretion in this respect would relate only to the specific representative; not the person's right to be represented. This position should be reflected in ss 49 and 66 consistently."*

3.12.3 I note that the Law Society did not refer to section 49, no doubt because it does not purport to restrict the right of any person directed to give evidence or answer questions to be represented by a legal practitioner. The Law Society submits that the word "witness" is not defined and that this is unsatisfactory. However, in my view, the word "witness" does not need to be defined – it simply bears its ordinary meaning, namely a person who gives evidence.

3.12.4 The law generally does not give an unqualified right to witnesses to be represented by counsel. The Act, by s 66(2), gives a discretion to the Integrity Tribunal to extend that privilege to witnesses, as does the *Commissions of Inquiry Act 1995*, section 15. However the latter Act goes further by providing that where an allegation of misconduct involving a person has been or should be made to the inquiry, and that person should be required or is likely to be required to give evidence in the inquiry, the Commission of Inquiry is to give that person notice of the allegation and the substance of the evidence supporting the allegation (s 18(1)). The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation (s 18(2)), and the person may respond by making submissions to the Commission, giving evidence thereat, cross-examining his or her accuser and calling witnesses as to matters relevant to the allegation or evidence (s 18(3)). Subsection (4)(b) provides that "the person may be represented by counsel as of right". Subsection (6) provides that the Commission must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with the section (which includes the opportunity to be represented by counsel).

3.12.5 The Law Society, in a supplementary submission, contends:

*" With regard to witnesses, the Society's view is that given that a witness is able to be compelled, and the evidence that he or she gives can be used in evidence against that witness, then that witness should be able to be represented.*

*It is acknowledged that there exists a process for claiming privilege under section 92. However a lay witness is likely to be unaware of the existence of that process or have difficulty in understanding not only the process of claiming privilege but also when they might be entitled to claim a privilege. It is conceivable that a witness may very well become the subject of evidence or allegations made by other witnesses that could lead the Integrity Tribunal to make adverse findings against the original witness and lead to a criminal prosecution.*

*It is on this basis that the Society maintains that a witness should have the opportunity, as of right, even if he or she is not a public officer, to test such evidence or allegations and ensure that any exculpatory evidence is led.*

...

*Fundamentally, the Society's position on this aspect is that it should not be a matter for the discretion of the Integrity Tribunal as to whether or not a witness is to be represented. This is particularly relevant given that witnesses are compellable, their answers may be used in evidence against them, and the procedure for claiming privilege under section 92 is far from simple. It should be a matter for individual witnesses to determine if they ought be represented, have their counsel examine them and cross examine other witnesses and to what extent that should occur, not a matter for the discretion of the Integrity Tribunal."<sup>86</sup>*

3.12.6 If my **Recommendations [19] and [20]** are adopted and coerced evidence is to be inadmissible in any subsequent trial while the privilege against self-incrimination is abrogated, the risk of harm to the witness in the circumstances postulated by the Society would be lessened, but witnesses may be called who are not the direct subject of a complaint and who may not even be public officers, and they may be accused of wrongdoing in the course of a Tribunal hearing. There may be suggestions of complicity with the subject of the complaint, or claims by the latter, that the witness is solely to blame for the misconduct alleged against him. I think protection similar to the *Commissions of Inquiry Act 1995*, section 18, should be afforded to such a witness, whether or not **Recommendations [19] and [20]** are adopted.

3.12.7 I recommend:

**[22] That the Act be amended to afford any witness required to attend and give evidence at an Integrity Tribunal hearing, and who may be subject to allegations of wrongdoing<sup>87</sup> thereat, protection similar to that provided by section 18 of the *Commissions of Inquiry Act 1995*, including the right to representation by counsel and not being made the subject of any adverse finding as provided therein.**

3.12.8 As to s 67(1) of the Act, this enables persons who, though neither the subject of an inquiry nor a witness, nevertheless have a special interest in the inquiry, having regard to the considerations set out in subsection (2), to participate in the conduct of the inquiry. Such a person may make a case to do so either personally or by counsel, but the Integrity Tribunal must be permitted to keep control of the degree of participation to be afforded. There is no justification for any absolute right to participate or to representation if participation is permitted.

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<sup>86</sup> Law Society supplementary submission to the Five Year Review, 21 April 2016

<sup>87</sup> I am not suggesting identical language as "misconduct" within the meaning of the Integrity Commission Act is insufficient to cover the kind of conduct about which adverse findings could be made, especially if the witness is not a public officer. As I have noted above (at paragraph 3.1.17) misconduct under the *Commissions of Inquiry Act* is more broadly defined.

3.12.9 As to the main thrust of the Commission's submission in paragraphs [160] and [161], I agree that this is desirable. The *Corruption, Crime and Misconduct Act 2003* (Qld) has a provision which could be adapted to cover the right of representation at the stages of investigation (section 47) and of any Integrity Tribunal hearing (section 66). It reads as follows:

**" 142 Legal representation for witnesses and others**

(1) *When appearing at an examination a witness may be legally represented.*

...

(4) *The Commission may refuse to allow a witness to be represented before the Commission by a person who is already involved in an examination or is involved or is suspected to be involved in a matter being investigated."*

3.12.10 I make the following recommendations:

**[23] That section 49 of the Act be amended to enable the investigator to prohibit a person required to give evidence or answer questions, as part of an investigation, from being represented by a person who is already involved in an investigation or is involved or suspected to be involved in a matter being investigated.**

**[24] That the Act be amended to enable the Integrity Tribunal to refuse to allow a public officer who is the subject of an inquiry, a witness referred to in section 66(2), or a person permitted to participate in an inquiry pursuant to section 67(1) to be represented before the Tribunal by a person who is already involved or suspected to be involved in a matter being investigated.**

### **3.13 Certification of costs**

3.13.1 The Law Society makes the following submission:

*" The funding of legal representation for a person who may be subject to adverse comment and cannot afford a lawyer is essential to support the requirements of natural justice and access to justice.*

*Part 7, division 5 of the Act makes provision with respect to costs and expenses of witnesses. Section 83(1) provides that 'a witness may apply to the chief executive officer for financial assistance in relation to the witness's legal costs'. For the purpose of the division, 'witness' is defined but not elsewhere.*

*The discretion as to whether to provide 'financial assistance' is vested in the CEO who is to be guided by the matters set out in section 83(2). It is noted that this section contemplates the grant of such assistance before evidence is given (see Section 82(2)(b) for example).*

*Financial assistance includes provision for costs and the Act stipulates those costs must be taxed by a taxing officer of the Supreme Court before being paid. This is a cumbersome requirement particularly if the costs are minimal. It is preferable to incorporate a discretion in the CEO to refer the claimed costs for taxation, rather than to make the requirement operate every time. Consistently with that discretion, the Act should include a provision which enables costs to be agreed.*

**Recommendation 8**

*That the requirement for witnesses' costs to be taxed in the Supreme Court before being paid by the Commission be replaced with a discretion for the CEO to require that a bill of costs be taxed enabling the CEO to agree costs."<sup>88</sup>*

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88 Law Society submission to the three Year Review, 18 August 2014, pages 11 and 12.

3.13.2 The Commission submits that it is satisfied with the existing provisions of the Act for the taxation of costs for financial assistance in Integrity Tribunals. I think the Law Society's recommendation has merit. It is an enabling device which in many cases can avoid additional expense, and the CEO will retain a discretion to require that costs be taxed where he or she thinks that should prudently be done.

3.13.3 I recommend:

**[25] That section 83(3) of the Act be amended to permit the CEO to agree the quantum of legal costs at his or her discretion in lieu of having to have them taxed in the Supreme Court.**

### **3.14 Integrity Commission reporting on Tasmania Police matters**

3.14.1 The Commission has submitted as follows:

***“ Commission position***

*The Commission considers its role in relation to overseeing and auditing complaints of police misconduct to be of fundamental importance to the achievement of its objectives under the Integrity Commission Act, and to enhancing public confidence that misconduct will be appropriately investigated and dealt with.*

*The Commission seeks to work cooperatively with, but with independence from, Tasmania Police. This applies equally to handling of complaints of police misconduct, and to the Commission's annual audits of the way the Commissioner of Police has dealt with misconduct.*

***Discussion***

***Background***

*[163] Over the past several years, the Commission has improved its engagement and cooperation with Tasmania Police. The agencies interact both in accordance with the statutory requirements of their respective legislation, and under a voluntary memorandum of understanding. The memorandum of understanding covers issues such as exchange of information, notification of alleged misconduct, and the appointment of special constables.<sup>89</sup> The agencies are also working on a joint protocol for Commission matters that may involve breaches of the law.*

*[164] Where the Commission receives complaints about police directly from complainants, it considers whether to take further action, or to refer the matter to police for consideration. Under the memorandum of understanding, Tasmania Police also notify the Commission of certain internally handled complaints on an ongoing basis.<sup>90</sup> Although it has the ability to do so,<sup>91</sup> to date the Commission has not assumed responsibility for a misconduct investigation commenced by the Commissioner of Police.”*

3.14.2 As will be seen in section 3.16 of my report, I have recommended that the Commission should initially refer all cases of misconduct by non-commissioned police officers to the Commissioner of Police. The Commission will retain its right to take over the conduct of the Commissioner of Police's investigation pursuant to s 88(1)(d).

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<sup>89</sup> Memorandum of Understanding between Integrity Commission and Tasmania Police, effective 1 October 2010.

<sup>90</sup> For more information on the memorandum of understanding, see: Integrity Commission, Submission to Three Year Review (2013), volume 1, 104.

<sup>91</sup> Integrity Commission Act, s 88(3).

### 3.15 Audits of complaints about the police

#### 3.15.1 The Commission has submitted as follows:

" [165] *The 'dispute between Tasmania Police and the Integrity Commission over the accuracy of an Integrity Commission report allegedly mistaken content in an early Integrity Commission audit report' (see JSC finding, below) was discussed at length during the Three Year Review.<sup>92</sup> The Commission does not intend to revisit the issue.*

[166] *Since that time, the Commission has significantly improved its audit process. The Commission has learnt a great deal about police processes, both in regard to complaints and more generally. It has also increased its engagement with Tasmania Police throughout the course of the audit.*

[167] *The Commission seeks to include police in the preparation of the audit plan prior to commencing each audit. For the current audit, police were invited to comment on and select specific issues to be addressed, prior to the drafting of the audit plan. The aim of this additional level of engagement was to enhance the usefulness of the audit to police in improving their internal procedures. Engagement and communication with police is ongoing throughout the audits. Each draft audit report is given to Tasmania Police for four weeks, to allow it time to provide comment. Extensions to this timeframe have, in the past, been provided on request. The previous two audit reports have included the official Tasmania Police response in full. For the last two years, the Commission has also given police a detailed written explanation as to why its comments have or have not impacted on the final version of the audit report."*

#### 3.15.2 The Commissioner of Police has made the following submissions in respect of audits:

" *The authority to publish reports that may be detrimental to an organisation or an individual and to make them publically available carries with it significant responsibility. Tasmania Police noted the Commission's recommendation to the JSC that its ability to publish information about its investigations be extended in line with other interstate integrity entities. In order to provide appropriate balance, it is the position of Tasmania Police that the Reviewer should consider legislation providing organisations or individuals who are named in reports published by the Commission with the same legislative authorities and protections that are available to the Commission, ie, to publish a response to the Commission's comments should they wish to do so.*

*In support of this, in their report tabled<sup>93</sup> in Parliament (2015) on the outcome of the Commission's 2015 audit of files finalised in the 2014 calendar year, the Commission's comments regarding 28 identified systemic/organisational issues was detrimental to the reputation of Tasmania Police. Tasmania Police disagreed with the Commission's definition as to what amounted to a 'systemic/organisational issue' and submitted reasons. The Commission published excerpts of the Tasmania Police response in the report, however, it is a subjective decision of the Commission to include and, if so, the extent and manner in which such responses are reported in the publication.*

*In all other respects, Tasmania Police considers that the legislation relating to audits is appropriate."*

#### 3.15.3 I do not think this issue requires statutory intervention. I am sure that common sense on the part of the Commission's officers and the police in the future will ensure that the views of the subject agency, if it is criticised, will be adequately reflected or annexed to the Commission's report.

### 3.16 Investigation of misconduct and serious misconduct of police

#### 3.16.1 The Commission has submitted as follows:

***" Commission position***

*The Integrity Commission Act should be amended to allow the Commission to investigate 'misconduct' by police officers.*

<sup>92</sup> See: Integrity Commission, Third written submission to Three Year Review (2014), 19–20; JSC Three Year Review Final Report pages 158–169.

<sup>93</sup> Report of the Integrity Commission No 2 of 2015, An audit of Tasmania Police complaints finalised in 2014, pages 4, 41

## **Discussion**

- [170] *In regard to police misconduct, the Commission is restricted to only assessing, investigating or otherwise dealing with complaints of serious misconduct, and complaints against police officers who are DPOs. It cannot assess or investigate complaints of misconduct (that is not serious) against police officers who are not DPOs ie a senior sergeant or below.*
- [171] *The Commission may receive complaints about police officers pursuant to s 33 of the Integrity Commission Act. Where a complaint of misconduct, serious or otherwise, is made (to the Commission) against a police officer who is a DPO, it is to be dealt with in accordance with s 87.*
- [172] *A complaint that alleges serious misconduct by a police officer who is not a DPO may be dealt with in accordance with s 88(1)(a) which, with s 87, is within Part 8 of the Integrity Commission Act. Effectively this means that the complaint of serious misconduct can be processed in accordance with the framework set out under ss 35–59: from triage to dismissal or non-acceptance, assessment or referral and when appropriate, investigation.*
- [173] *However, Part 8 does not stipulate a process by which the Commission might deal with a complaint of misconduct (as opposed to serious misconduct) against a police officer who is not a DPO. In other words, the general framework set out under ss 35–59 has no application, with the effect that the Commission is unable to deal with a complaint of misconduct against a police officer who is not of commissioned rank. (The only recourse for the Commission would be to investigate such a matter via an own motion investigation.)*
- [174] *Section 88(1)(a) therefore prevents the Commission from investigating 'misconduct' by non-DPO police officers, even in circumstances where the alleged misconduct appears to be systemic. The Commission therefore has reduced powers in relation to police misconduct, as opposed to misconduct by other public officers.*
- [175] *It is also to be noted that, by virtue of ss 88(1)(c)–(d), the Commission does have some powers in relation to all police misconduct. This includes to:*
- *provide advice in relation to the conduct of investigations by the Commissioner of Police (s 88(1)(b)); and*
  - *audit the way the Commissioner of Police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint (s 88(1)(c)).*
- [176] *It would appear to be an anomaly that the Commission has the above-mentioned powers in relation to all police misconduct, but is limited in terms of its investigative powers."*

3.16.2 There are two views open as to the proper interpretation of Part 8 of the Act which is headed "Misconduct by Certain Public Officers", and which then deals in Division 1 with DPOs, and in Division 2 with Police misconduct. On the one hand the view has been taken and, on this advice, acted upon by the Commission that the requirement in s 87(1) and s 88(1)(a) to "assess, investigate, inquire into or otherwise deal with" complaints relating to misconduct by DPOs or serious misconduct by a police officer "in accordance with Parts 6 and 7" does not preclude the use of some sections of Part 5. Specifically the view was that the words "in accordance with Parts 6 and 7" in s 89(1) (and in s 88(1)(a)) are not to be read as excluding any powers available to the Commission and (in particular to the CEO) under Part 5, except to the extent that the retention of such powers is inconsistent with the injunction that it is the Commission and no other body which is to assess, investigate, inquire into and otherwise deal with complaints about DPOs (and police officers alleged to have committed serious misconduct), such investigation and inquiry being conducted in accordance with Parts 6 and 7. Such powers as would be excluded under Part 5 for that reason would be, on this view, all the powers of referral of the complaint to another body, but leaving the power to dismiss or not accept the complaint, and to appoint an assessor.

- 3.16.3 The other view is that once a complaint has been identified as misconduct by a DPO or serious misconduct by a police officer the matter should proceed to investigation and action by the Board under Part 6 or, if it goes this far, investigation and action by an Integrity Tribunal under Part 7. This view does not preclude the dismissal by the CEO of a complaint which is not identified as involving a DPO, or one relating to serious misconduct by a police officer. Before that stage has been reached an assessor may well have been appointed by the CEO, but once it has been so identified the matter must go to investigation and become the responsibility of the Board. This view is in stark contrast to that expressed in paragraph [172] of the Commission's submission, namely that complaints of serious misconduct by any police officer (whether or not of commissioned rank) can be processed in accordance with the framework set out in sections 35 to 59; from triage to dismissal or non-acceptance, assessment or referral, and when appropriate investigation.
- 3.16.4 Section 87(1) is quite explicit that complaints relating to misconduct by DPOs (who include commissioned police officers) are to be assessed, investigated, inquired into or otherwise dealt with in accordance with Parts 6 and 7. I fail to see how such a complaint can be investigated and dealt with in accordance with those parts if it has already been dismissed, or referred, or dealt with under Part 5. Those powers are exercisable by the CEO, but the powers under Part 6 (sections 44 to 59) which deal with investigations are vested in the Board, while those under Part 7 (sections 60 to 86) are initiated by the Board and carried to fruition by the Integrity Tribunal. My own view is that Parliament determined that in respect of all DPOs (who include senior police officers) who may have committed misconduct of any kind, and other police officers who may have committed serious misconduct, these complaints should be dealt with by the Board, and that the power of the CEO to summarily dismiss them or to refer them would not be exercisable by him or her. This accords with the Second Reading Speech of the then Attorney-General who said:

*" The Government takes the view that there are certain categories of public official whose conduct should be subject to direct scrutiny by the Integrity Commission.*

*In this bill these officers include Members of Parliament, Local Government councillors, CEOs such as heads of agency, members of the Senior Executive Service, statutory office holders and police officers at or above the rank of inspector.*

*Because of the seniority of these officers there is a strong public interest in the Integrity Commission running the investigation of any allegations against these senior public officers.*

*The bill doesn't give all investigations of police misconduct away to the Integrity Commission – that would be overkill – but it recognises the special place of police in the community by allowing the Commission to oversee or audit the way police investigate alleged Police Service code of conduct violations.*

*This responds to concerns that have been expressed from time to time about the undesirability of police officers investigating other police officers.*

*Where a police officer is suspected of having engaged in criminal conduct the Integrity Commission may investigate the matter or maintain oversight of the investigation by Police. This is to ensure not only that proper process is followed but that it is seen to be followed."<sup>94</sup>*

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94 Integrity Commission Bill 2009 (No 85) Second Reading Speech, the Hon Lara Giddings MP, extract from Hansard 3 November 2009.

3.16.5 Where misconduct as opposed to serious misconduct is alleged against a non-commissioned police officer, it is true that (apart from own motion investigations by the Board), there is no mechanism provided for it to be dealt with by the Commission in the same way as cases of misconduct by other public officers are dealt with, but that was, I think, intentional. The Police Service is subject to the disciplinary proceedings provided for in the *Police Service Act 2003*, a far more stringent process than those pertaining to other public officers. Section 88 sets out the Commission's role in relation to police misconduct of non-commissioned police officers. It provides:

**" 88 Integrity Commission's role in relation to police misconduct**

- (1) *The Integrity Commission may, having regard to the principles stated in section 9 –*
  - (a) *assess, investigate, inquire into or otherwise deal with complaints relating to serious misconduct by a police officer in accordance with Parts 6 and 7; or*
  - (b) *provide advice in relation to the conduct of investigations by the Commissioner of Police into police misconduct; or*
  - (c) *audit the way the Commissioner of Police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint; or*
  - (d) *assume responsibility for and complete in accordance with Parts 6 and 7 an investigation commenced by the Commissioner of Police into misconduct by a police officer.*
- (2) *If requested by the Integrity Commission, the Commissioner of Police is to give the Integrity Commission reasonable assistance –*
  - (a) *to undertake a review or audit; or*
  - (b) *to assume responsibility for an investigation.*
- (3) *If the Integrity Commission assumes responsibility for an investigation, the Commissioner of Police must stop his or her investigation or any other action that may impede the investigation if directed to do so by the Integrity Commission."*

3.16.6 The principles of operation of the Commission provided in s 9(1) of the Act include (e) a requirement that it deal with matters of misconduct by DPOs, and by contrast (f) a requirement to ensure that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that it considers appropriate, and (g) a requirement that it does not duplicate or interfere with work that it considers has been undertaken or is being undertaken appropriately by a public authority.

3.16.7 In dealing with serious misconduct by a police officer not of commissioned rank, the Commission is not obliged by s 88(1)(a) to deal with the matter in accordance with Parts 6 and 7, but has a discretion to do so. The principles in section 9 which I have cited may well justify not proceeding in accordance with that paragraph. Paragraphs (b), (c) and (d) contemplate that the Commissioner of Police will deal with complaints of misconduct by police officers. They further provide for meaningful oversight by the Commission, as does section 89 which provides for own motion investigations under Parts 6 and 7 in respect of any matter which is relevant to police misconduct.

3.16.8 As section 87 requires that the Commission proceed under Parts 6 and 7, the use of the word "assess" in that section seems otiose. In the context of Part 5 of the Act, matters are assessed to determine what course is recommended for the CEO to adopt under section 38. But, as I have said, the courses open are limited by the fact that an investigation is required, and that is really the starting point of any inquiry into the

matter. By the time Part 8 comes into play the subject matter of the complaint will have been assessed as relating to misconduct by a DPO.

3.16.9 I think the confusion caused by the lack of any express mechanism to deal with complaints of misconduct by non-commissioned police officers received by the Commission, or to refer a complaint of serious misconduct by such an officer where s 88(a) is not utilised, would be obviated by providing for them to be referred to the Commissioner of Police for action. I see no reason for the Commission to assume responsibility for otherwise processing these complaints. To do so does not accord with the general policy, which I have recommended, minimising so far as possible the Commission's activities to major matters. I believe the policy of the Act was to keep the Commission's role to one of general oversight (own motion investigations being the fall-back position in exceptional circumstances), and an unnecessary increase in the Commission's workload is to be avoided. As the then Attorney-General said in her Second Reading Speech:

*" The Bill does not give all investigations of police misconduct away to the Integrity Commission – that would be overkill".*

3.16.10 I make the following recommendations:

**[26] That complaints of misconduct by DPOs, once identified as such, be immediately made the subject of investigation under Part 6, and those of misconduct by non-commissioned police officers be referred in the first instance to the Commissioner of Police for action.**

**[27] That complaints of serious misconduct by a police officer not a designated public officer which are not dealt with by the Commission under section 88(1)(a) be referred to the Commissioner of Police for action. A way of achieving this would be to add a new paragraph (ab) in section 88(1) to the following effect:  
"(ab) refer a complaint relating to serious misconduct by a police officer to the Commissioner of Police for action; or ...".**

3.16.11 To achieve **Recommendations [26] and [27]**, amendments to the Act would be required to ensure the early appointment of an investigator to conduct an investigation of a complaint against a DPO and, if the Commission determined to exercise its power under s 88(1)(a) to investigate a non-commissioned police officer in respect of serious misconduct, to ensure the appointment of an investigator for that purpose. A specific direction that complaints of misconduct simpliciter against police officers upon receipt are to be referred to the Commissioner of Police is also required. Consequential amendments to the interpretation section, section 4, where the definition of "investigator" is presently confined to sections 44 or 45 would need to be made to include any new sections enabling the appointment of an investigator. I notice that no mechanism is provided for the appointment of an investigator where the Commission determines to conduct an investigation on its own motion pursuant to section 89, unlike section 45.

3.6.12 I recommend:

**[28] That the Act be amended to delete the words "assess" and "assessing" wherever they appear in sections 87 and 88.**

3.16.13 Before leaving Part 8 I should record that I have given consideration to a suggestion that the definition of DPOs is unnecessarily wide and embraces tiers of authority such as the holders of senior executive offices and lower ranked commissioned police officers which do not need to be embraced by the strictures of section 87. Inspectors of Police were, it was suggested, unnecessarily included. The Commission opposes any reduction in the categories of DPOs and, on reflection, I do not think it necessary to make such a recommendation. The Commission, however, sought a variation to the regime envisaged in section 87 by suggesting that it should have the discretion to refer particular matters involving DPOs to relevant public authorities for action and investigation. This, it was suggested:

*" would provide the Commission with the option of referring matters where the nature and seriousness of the alleged misconduct is minor, or the authority is simply better placed to handle the matter. Allowing the Commission to retain jurisdiction over referred matters would assist to alleviate any concerns with this process".<sup>95</sup>*

I do not agree. Section 87 is quite specific that all matters of misconduct by DPOs are to be dealt with under Parts 6 and 7, and the Second Reading Speech does not contemplate any exceptions to this regime.

### **3.17 Integrity Commission access to Tasmania Police data**

3.17.1 The Commission has submitted as follows:

***" Commission position***

*The Commission should have live access to Tasmania Police databases for the purposes of its operations under the Integrity Commission Act. This is consistent with arrangements for other Australian integrity entities, and would significantly enhance its ability to collate data about, and successfully progress investigations into, serious misconduct. It would also enhance various aspects of its audits of complaints against Tasmania Police. Amendments to the Personal Information Protection Act 2004 ('PIP Act') would facilitate the Commission's ability to access Tasmania Police data.*

***Discussion***

*[177] The justification for the Commission's position on this matter was discussed in detail in its submission to the Three Year Review.<sup>96</sup> The Commission does not intend to revisit this issue in depth, except to reiterate that the issues detailed in its earlier submission with respect to issues under the PIP Act and online desktop access to Tasmania Police data may be resolved if the Commission were a law enforcement agency for the purposes of the PIP Act.<sup>97</sup>*

*[178] The Commission notes that this issue was raised in the Three Year Review, and may have been seen by some as the Commission seeking the power to go on 'fishing expeditions'. As previously stated by the Commission, its access to such databases would be auditable, and only availed to access records where there was a valid, documented and justifiable authorisation.*

*[179] In relation to the Commission's annual audits of complaints against police, the Commission anticipates that an ability to actively monitor and run searches on the complaints database (IAPro) would significantly reduce any perceived burden on Professional Standards Command. It would also enhance the Commission's ability to perform targeted and efficient audits, through a focus on specific issues within identified files. It may also reduce the necessity for the*

<sup>95</sup> Commission supplementary submission section 5.

<sup>96</sup> Integrity Commission, Submission to Three Year Review (2013), volume 1, 112-115.

<sup>97</sup> Integrity Commission, Submission to Three Year Review (2013), volume 1, 128; volume 2, 29-30.

*Commission to annually undertake complete audits of all police misconduct files finalised in each year.*

**Reference information**

*Report of Joint Standing Committee on Three Year Review*

*Findings*

*That:*

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

*Recommendations*

*That:*

*No changes are made in this area, as the current position is adequate.<sup>98</sup>*

3.17.2 I am not persuaded that the JSC's finding that the current position is adequate is incorrect. Mr Easton, the Acting CEO, has confirmed in oral evidence that the Commission can get access to the database on a case by case basis, but claimed it would improve the Commission's efficiency especially in relation to police audits. I make no recommendation to alter the current position.

### **3.18 Misconduct prevention and education**

3.18.1 The Commission has addressed each of the recommendations of the JSC arising from the Three Year Review.

#### *Compulsory participation in induction programs*

3.18.2 The Commission has submitted as follows:

***“ Commission position***

*The Commission supports the recommendation of the JSC for compulsory participation in induction programs in principle, subject to this being implemented in such ways as to:*

- *minimise resourcing costs on public authorities;*
- *provide efficient methods for recording and reporting of completions by individual public officers; and*
- *address information security and privacy of the completion data of individual public officers.*

***Discussion***

*[180] Pursuant to s 32 of the Integrity Commission Act, principal officers are responsible for ensuring that public officers receive education in ethics and integrity generally. The Integrity Commission Act also provides topics that are to be included in this education. The Integrity Commission Act does not provide specific requirements as to when principal officers are to fulfil this obligation, nor any details regarding recurrence i.e. if/when follow-up education should be provided, or how compliance with this obligation is to be recorded and reported. This lack of clarity would need to be corrected to support any change to compulsory participation.*

*[181] The Commission has placed significant effort into resources that support the obligations of principal officers pursuant to s 32. The Commission has provided public authorities with a comprehensive range of education resources that enable in-house delivery of training. These resources are regularly reviewed and improved to ensure that they convey contemporary learnings in ethics and integrity, while also fulfilling a compliance role, as per the Integrity Commission Act. Codes of conduct are one aspect of this, as required by the Integrity*

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98 Joint Standing Committee on Integrity, Parliament of Tasmania, Three Year Review – Final Report (2015), page 158.

*Commission Act, but there is also strong educative emphasis on individual behaviour, personal judgement and actions.*

- [182] *An educative emphasis on codes of conduct and compliance with such codes is required by the Integrity Commission Act.<sup>99</sup> Codes of conduct are, however, only one aspect of the Commission's approach to prevention and education.<sup>100</sup> The Commission's educational design ethos and pedagogical practice include significant emphasis on individual behaviours and actions, personal judgement and personal decision making by public officers; codes of conduct are but one aspect of this. Any move toward compulsory training across the public sector must be fully cognisant of these issues. The Commission submits that the education of public officers in ethics and integrity should not be driven toward a simplistic 'read and tick' compliance only approach that, by its nature, detracts from the achievement of quality learning outcomes and, in turn, the ability of public officers to make sound ethical judgements.*
- [183] *The Commission has undertaken an extensive needs analysis and design work to increase the flexibility of training for all public authorities and public officers. The Commission, for example, provides a free and centralised e-learning module (which addresses the requirements of s 32) that is adaptive to each public authority and public officer. This training is available 24/7 and fully supported by Commission staff, thus providing a highly flexible and low-cost solution for public authorities to fulfil their obligations under the Integrity Commission Act.*
- [184] *The Commission has regularly and widely communicated the availability of resources, and the obligations of principal officers under the Integrity Commission Act, to all public authorities under its jurisdiction.*
- [185] *While adoption of training resources across the public sector has generally been pleasing, there are still public authorities that are yet to engage with or request any of the Commission's education resources. Some public authorities have requested the resources but then have not reported on their use – as is a requirement in the terms of use. A minority of public authorities report against their obligations under s 32 in annual reports. Consequently, the Commission cannot quantify with a high degree of confidence the uptake of education and compliance with s 32 across the public sector as a whole.*
- [186] *The Commission considers that, if induction training is to be mandatory, it is imperative that public authorities are provided with low-cost and efficient solutions for delivering training, recording completions and reporting on compliance in general. The Commission's work in this regard is already providing a significant level of assistance and efficiencies. However mandatory training, recording and reporting (including recurrency training) across the whole public sector will be a significant extra resourcing load on the Commission and this could not feasibly be managed under current resourcing and staff levels.*
- [187] *The Commission does not seek to perform a centralised data collection and reporting role. This would likely be seen as a significant compliance impost on public authorities and could potentially be counter-productive in the Commission's prevention and education work.*
- [188] *It is the Commission's view that data on training completions should be recorded and held by each public authority and not held centrally by the Commission. The Commission could provide data collection and reporting tools, and provide aggregated reporting only at a sector level. This would provide some protections of the privacy of public officers and the security of information about public officers.*
- [189] *In order to validate the 'compulsory' aspect of this recommendation, public authorities would need to formally and regularly report on completions of induction and refresher training by public officers. This could perhaps become part of each public authority's annual report. This requirement should be made clear under s 32 of the Integrity Commission Act."*

3.18.3 The inclusion in the Act of section 32 is rather curious. On the face of it, it does not impose any specific obligation on the Commission to provide the education which the principal officer of any given public authority is to ensure its public officers are to receive, and gives little help in determining what form that education is to take, nor with what frequency. The Commission is under a general obligation spelt out in section 3 to educate public officers and the public about integrity and more specifically entrusted with educative functions by section 31. However, the thrust of section 32 is

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<sup>99</sup> Integrity Commission Act, ss 8, 32.

<sup>100</sup> For further discussion on this issue, see JSC Three Year Review Final Report pages 66–67, 71.

more a statement of a desideratum than a legislated programme of education. The Commission has in its submission indicated what it has done to fulfil its mission, and there has been little criticism of its efforts and achievements in this regard, but it is obviously constrained by the resources at its disposal and its inability to enforce the performance of the duties imposed by section 32 on the principal officers of other authorities. I do not feel able to make a recommendation for legislation to clarify the position. The Commission's suggestion in paragraph [189] that public authorities be required to regularly report on completion of induction and refresher training by public officers would be a start, but a satisfactory outcome would require considerable liaison and co-operation within the whole public sector and the provision of the resources demonstrated to be needed by the Commission.

### *Contemporary information and refresher training*

3.18.4 The Commission has submitted as follows:

***“ Commission position***

*The Commission supports the recommendation of the JSC in principle, subject to the definition and requirements of refresher training being made specific in the Integrity Commission Act.*

***Discussion***

- [190] *There are presently no requirements for recurrent training, or ‘refresher training’, in the Integrity Commission Act. Under current arrangements therefore it is possible that existing public officers never receive any form of training in ethics and integrity, and, even if they do receive training at a point in time, that they never again receive training in the future. This could mean that public officers serve for considerable lengths of time without any training or refresher training. This is a significant flaw in current arrangements.*
- [191] *Without refresher training, public officers are not appropriately informed of emerging and contemporary ethics issues and misconduct risks, and therefore not empowered to handle these issues.*
- [192] *Refresher training would arguably be more appropriate every three years, given the importance of managing ethical risks and being cognisant of emerging risks. However this needs to be balanced against the overall time cost for each public authority, and, the support load on the Commission with approximately 15,000 public officers potentially undertaking refresher training in their respective public authorities each year.*
- [193] *Responsibility to identify when a public officer is due for a refresher course should be with each public authority. Similarly the recording and reporting of completions should rest with each public authority – as per discussion in [187].*
- [194] *The Integrity Commission Act should be clear on whether refresher training is compulsory or otherwise.*
- [195] *Use of contemporary information is addressed by the Commission as a matter of course with new materials from time-to-time and with regular reviews and updates to all existing materials. MPER integrates information on emerging and contemporary ethics and integrity issues, and misconduct risks, into training resources. MPER also applies contemporary learning design into resources, including ongoing evaluation and continuous improvement.”*

3.18.5 Once again whether or not every public officer needs refresher training and whether or not it should be compulsory cannot, I think, be addressed by legislation. Conscientious public officers seeking to do their jobs efficiently will not be slow to avail themselves of the opportunity of keeping abreast with current developments in contemporary ethics issues and misconduct risks. The Commission should continue to provide the service outlined in paragraph [195] above to the limits of its resources.

## Members of Parliament induction and refresher training

### 3.18.6 The Commission has submitted as follows:

#### ***“ Commission position***

*The Commission supports the recommendation of the JSC in principle that Members of Parliament attend an induction or refresher information session provided by the Integrity Commission after they are elected, subject to dependent clarifications and definitions.*

#### ***Discussion***

*[196] The Commission has provided significant induction training opportunities for Members of Parliament with workshops in 2011 and 2014.*

*[197] The Commission outsources the delivery of training to facilitators with significant parliamentary experience, while carefully managing the logistics and quality of delivery.*

*[198] Attendance at workshops has been, and is currently, optional for Members of Parliament. Workshops were attended by 24 Members of Parliament in 2011 and 15 Members of Parliament in 2014.*

*[199] To support the efficient implementation of this recommendation, the Commission suggests the following issues should be addressed:*

*a clarity regarding the meaning of ‘Members of Parliament attend...’ is needed, i.e. whether induction training for new Members of Parliament is to be compulsory or not; and whether refresher training for returning Members of Parliament is to be compulsory or not. Given the earlier recommendation for compulsory participation in induction and refresher training for all public officers, this would align with that recommendation – given that Members of Parliament are also public officers as defined in the Integrity Commission Act; and*

*b clarity regarding the meaning of ‘after they are elected’ is needed. The Commission suggests a requirement that training be undertaken within three months of a Member of Parliament being elected or re-elected.*

*[200] The Integrity Commission Act, as it currently stands, takes a strong position with regard to the role of codes of conduct in the prevention of, and investigations into, misconduct. The Commission supports this position and has undertaken extensive work to embed and improve codes of conduct across the public sector. The Commission’s broad experience in the training of public officers and local government elected representatives suggests that – where a code of conduct applies to those persons – the design and delivery of training is more efficient, straightforward and supports higher order learning outcomes, such as the role of individual judgment and decision making in ethical situations. Given that a code of conduct does not currently apply to Members of Parliament, the Commission submits that this is a relevant consideration in any improvements in training for Members of Parliament.”*

### 3.18.7 The JSC recommended that:

*“ Members of Parliament attend an induction or refresher information session provided by the Integrity Commission after they are elected”.<sup>101</sup>*

3.18.8 In my view, it would be quite inappropriate for me to recommend that all members of Parliament be required to attend such courses after their election. However to the extent that it has the resources to do so I would recommend that the Commission provide such courses for members of Parliament who wish to attend. What is perhaps of more immediate concern is that members of Parliament should give consideration to the adoption of codes of conduct for members of Parliament, Ministers and Ministerial staff in Tasmania. At present I understand that there are the following codes of conduct which qualify as codes of conduct for the purposes of s 28(1)(a) and (d) of the Act:

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101 JSC Three Year Review Final Report, page 4.

- Standing Rules and Orders adopted by the House of Assembly which include a "Code of Ethical Conduct for Members of the House of Assembly" (SO 3), and a "Code of Race Ethics for Members of the House of Assembly" (SO 4). The responsibility for compliance with these codes rests with the House of Assembly'.
- There is no code of conduct applying to Members of the Legislative Council (unless they are Ministers). The Legislative Council has adopted Standing Order 103 which requires the declaration of a pecuniary interest, with consequences for the possibility or effect of a vote.
- The "Code of Conduct for Ministers" issued April 2014 by the current Premier.
- The "Code of Conduct for Ministers – Receipt and Giving of Gifts Policy" issued April 2014 which is applicable to all Ministers and other members of Cabinet.

3.18.9 In 2010-2011 Draft Model Codes of Conduct for Members of Parliament, Ministers and Ministerial Staff were prepared with close collaboration between the Parliamentary Standards Commissioner, Rev Prof Michael Tate AO, the previous Chief Commissioner, the Hon Murray Kellam AO, and various members of the Commission's staff. They were presented to members of Parliament in June 2011 but, so far, the possible adoption of a code of conduct for members of Parliament has not been presented to either House of Parliament.

3.18.10 I recommend:

**[29] That consideration be given to the adoption of the Model Codes of Conduct for Members of Parliament and Ministerial staff in Tasmania presented to Parliament by the Commission in June 2011.**<sup>102</sup>

3.18.11 Before leaving the topic of education, I cite Professor Jeff Malpas who, in his submission, said:

*" The approach to ethical training taken by the Commission is essentially based in an audit and compliance model – one that puts a strong emphasis on codes of conduct. There is very little evidence, however, that such approaches are successful in significantly improving ethical conduct, and some evidence that they may have an opposite effect. One of the reasons for this is that such approaches often fail to address the preconditions of misconduct, including the organizational preconditions, but also because they typically ignore, not only the critical capacities on which ethical conduct depends, but also the effects of various forms of cognitive dissonance (for instance, the tendency for individuals systematically to over-estimate their own capacities to make judgments in consistent and unbiased fashion)."*<sup>103</sup>

3.18.12 The Commission agreed with the thrust of Professor Malpas' submission that ethics should not be reduced to a mechanical rule-based system that serves organisational or political motivations rather than ethical behaviour. Its view is that there ought to be a balance, particularly with codes of conduct, that while individual judgment is really important, public officers and elected members of Parliament need things like codes of conduct to provide the base level of guidance for making these judgments.

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<sup>102</sup> I understand that the 'Code of Conduct for Ministers' and the 'Code of Conduct for Ministers – Receipt and Giving of Gifts Policy' approved by the Premier in April 2014 are based on the model codes developed by the Commission in 2010-2011

<sup>103</sup> Submission from Professor J Malpas, point 3.

3.18.13 I also record my impression that given the resources available to them, the staff of the Commission are doing a very commendable job in fulfilling their educative responsibilities.

### 3.19 Resources

3.19.1 The Commission has submitted as follows:

***“ Commission position***

*On the basis of its current resources, the Commission struggles to meet the objectives of the Integrity Commission Act and to adequately address misconduct in the public sector. The Commission’s investigative capacity and timeliness in delivering outcomes are limited by its inability to adequately fund its operations area. The Commission’s educative and preventative activities are, to a large extent, necessarily limited to the provision of generic and template-based materials that must be delivered and prerationalized by public authorities themselves.*

*Given the Commission’s current resources, the Commission has been unable to retain an in-house legal capability. This potentially impacts upon its ability to undertake its operations in accordance with the Integrity Commission Act (and particularly to undertake an Integrity Tribunal) and the principles of procedural fairness, and may result in adverse impacts on subject officers of complaints and other persons involved in investigations undertaken by the Commission.*

**Discussion**

[201] *This section updates key areas of the Commission’s submission to the Three Year Review.<sup>104</sup> Substantial portions of that submission remain relevant and are not repeated here.*

**Human resources**

[202] *A chart of the Commission’s current organisational structure is provided in Attachment 4. The structure results from the impact of reductions in budget allocations since 2013–14 (see [213] – [221]).*

[203] *The following table provides a breakdown of the staffing structure (full-time equivalents [FTE]) by business unit since the Commission’s establishment. The Commission is continually monitoring its staffing to ensure that the structure best meets its emerging needs within its budgetary capacity.*

**Actual FTEs – part time arrangements and vacancies**

	<i>As at 30 June 2011</i>	<i>As at 30 June 2012</i>	<i>As at 30 June 2013</i>	<i>As at 30 June 2014</i>	<i>As at 30 June 2015</i>	<i>As at 30 June 2016 (est)</i>
<i>Executive*</i>	2.4	1.4	2.2	1.1	1.1	1.4
<i>Business Support Services</i>	5	5	4	4	3.8	3.8
<i>Misconduct, Prevention and Education</i>	3	3	3	3	3	4
<i>Complaints and Investigation</i>	5	4	3	5	4.6	4.6
<i>Legal</i>	1	1	1	1	0.6	0
<i>Communications</i>	1	1	0.6	0.6	0	0
<i>Graduate</i>	-	1	1	0	0	0
<b>Total</b>	<b>17.4</b>	<b>16.4</b>	<b>14.8</b>	<b>14.7</b>	<b>13.1</b>	<b>13.8</b>

\* Includes Chief Commissioner

- [204] *The Commission has struggled to meet its basic legislative requirements within its annual appropriation. The Commission aims to fully expend its annual appropriation however has returned portions of that allocation due to periodic staff vacancies. Whilst the turnover has lessened since 2012, there are unavoidable delays in filling vacant positions under the State Service Vacancy Control process. In addition, due to budget uncertainty (particularly from 2014–15), there have been intentional delays in filling some positions. The Commission has not been in the position of having a full establishment, apart from briefly in 2015.*
- [205] *As noted, the Commission has the authority to second additional staff from relevant agencies should a short-term increase in workload require it. No specific funding has been allocated for secondment arrangements, however, and any such costs would have to be absorbed from within the current budget allocation which may have an impact on the Commission's ability to meet its costs, and, more importantly, to properly fulfil its functions under the Integrity Commission Act, in future years. Should a major new initiative arise such as a significant investigation or an inquiry, there is provision under the Integrity Commission Act to submit a request for additional funding to meet those costs.*
- [206] *In addition, the original 2010–11 budget and forward estimates did not include fees or costs for non-ex officio members of the Commission's Board or any external legal costs. The Board costs have been absorbed annually from salary savings arising from temporary staff vacancies.*
- [207] *While the Commission has sought to fulfil its statutory requirements with fluctuating staffing levels, there is a clear impact on the activities of the Commission. Impacts may include, but are not limited to:*
- *consideration of resourcing in determining whether matters should progress to investigation;*
  - *delays in finalisation of matters;*
  - *delays in the rollout of educative initiatives and products; and*
  - *the inability to tailor training to specific public authority needs.*
- [208] *The Commission is continually monitoring its staffing to ensure that the structure best meets its emerging needs within its budgetary capacity.*

### **Staffing reductions**

#### **General Counsel**

- [209] *General Counsel provided advice to all business units of the Commission, including: confidential advice on investigative and operational matters to the Operations Unit; policy development and review for Corporate Services; and review and guidance on information to be released to the public by the MPER unit. It is noted that MPER is moving towards a greater consulting and advisory role to the public sector in 2016, where accurate and timely legal advice will be essential. While the Commission may access Crown Law Services for general and legislative advice, it remains vulnerable in relation to confidential Commission matters and to policy matters that require urgent advice, specific to the Commission.*
- [210] *It is unlikely that the Commission would consider undertaking an Integrity Tribunal<sup>105</sup> without in-house legal capability.*

#### **Operations**

- [211] *The Operations unit has been reduced by 0.4 FTE (to 3.6 FTE) which impacts on the number and timeliness of assessments and investigations undertaken by the Commission. This has a direct impact upon the public through a potential reduction in the Commission's capacity to accept complaints, and on the timeliness of outcomes of any assessment and/or investigative actions. Delays in such work can also have an adverse effect on subject officers and other witnesses who may be involved in a matter.*

#### **Communications/Media Advisor**

- [212] *The position provided expert and crucial support in: the production and finalisation of public reports, including the Annual Report and other research/investigation reports released by the Commission; website development and maintenance; media liaison; communications strategy and facilitation; and general research. The above has been absorbed into the Commission's MPER unit. This has taken time and resources from the core focus of this business unit and is*

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105 Integrity Commission Act, Part 7.

difficult to sustain in the medium to long term without significant impact on the unit's output. There has been a significant loss of expertise in this area.

### Financial resources

[213] The Commission's recurrent Consolidated Fund Allocations since establishment are provided in the following table:

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16*	2016-17 forward estimates	2017-18 forward estimates
Allocation (\$,000)	2,909	2,983	3,026	2,934	2,418	2,360	2,290	2,346
% change from 2010-11 allocation		2.0	4.0	8.0	(17.0)	(19.0)	(21.0)	(19.0)
Net change in funding from forward estimates allocations (\$,000)		5	(30) <sup>1</sup>	(60) <sup>1</sup> (118) <sup>2</sup>	(100) <sup>1</sup> (120) <sup>2</sup> (500) <sup>3</sup> (32) <sup>4</sup>	(124) <sup>2</sup> (600) <sup>3</sup> (53) <sup>4</sup>	(600) <sup>3</sup> (53) <sup>4</sup> (60) <sup>5</sup>	(600) <sup>3</sup> (53) <sup>4</sup> (60) <sup>5</sup>

\*Excludes \$60,000 for costs associated with the Five Year Review, administered by the Department of Justice.

<sup>1</sup> Agency saving target; <sup>2</sup> Removal of payroll tax; <sup>3</sup> Commission efficiency; <sup>4</sup> Salary savings; <sup>5</sup> Removal of Board funding

[214] Since 2012–13 the Commission has been required to meet considerable savings targets, which are cumulative through the forward estimates. The reductions have been particularly significant since 2014–15. As indicated in the above table, the Commission was required to achieve a savings target of \$500,000 in 2014–15 in addition to a reduction of \$100,000 included in the forward estimates in 2012–13 which had already impacted on 2014–15. It can be seen that the Commission's appropriation has been further reduced from 2015–16 onwards due to government identified saving of \$600,000 in 2015–16 and over the forward estimates.

[215] The Commission has also been impacted by the wages policy decision where appropriations were reduced for a proposed wages freeze which did not eventuate, so whilst the appropriation was reduced, the salary costs were not decreased. Note the removal of payroll tax funding however had a neutral effect as agencies were also no longer required to pay payroll tax.

[216] Funding was also removed from forward estimates for sitting fees of non-ex officio members of the Commission's Board from 2016–17. Depending upon the outcome of the current review, the Commission shall need to request additional funding in future budget submissions.

[217] The 2012–13 budget allocation advice indicated the forward estimates in 2015–16 to be \$3,194,000 however the actual allocation in 2015–16 following the cumulative savings targets is \$2,360,000, a reduction of \$834,000 or 26%.

[218] In order to meet the savings targets, all non-salary items were reviewed, including negotiating cheaper accommodation costs at the Commission's current premises. The Commission has made substantial savings in a number of areas including legal and IT consulting, supplies and consumables and travel. It is difficult to envisage that further savings can be found in non-salary expenditure without significant and far-reaching impacts on the operations of the Commission.

[219] The Commission has also needed to substantially reduce its salary costs to achieve the savings targets. It has done so by a 1.6 FTE reduction in the establishment costs by not filling the vacant positions of General Counsel and the Communications/Media Advisor (0.6 FTE). The functions performed by these roles have either been absorbed by other staff which has impacted on the Commission's core operational areas, or in some cases are not satisfactory being performed, such as expert in-house legal advice. In addition, all staff were offered the opportunity to enter into part-time arrangements, with three staff members taking this opportunity.

[220] *The Chief Commissioner was included in the staff establishment at 0.8 FTE to June 2012, 0.6 FTE in 2013, and 0.2 FTE from 2014 onwards. However the Chief Commissioner's actual hours have been lower than originally included in the establishment with 0.4 FTE to 2013 and less than 0.2 FTE in 2014 and 0.1 FTE in 2015 onwards, which also assisted the Commission to meet its savings targets.*

[221] *As the Commission is now operating under reduced staff capacity, the magnitude of the reduction in budget and its impact on the Commission's ability to perform its core functions is becoming explicit."*

3.19.2 The CPSU submission made this comment under the heading "Resources":

*" Integrity bodies need to be independent of governments in order to be able to conduct their functions properly. Independence is more than just not having direct reporting lines. The CPSU is concerned that the way in which the Integrity Commission is currently funded leaves it open to political interference. Its budget has already been significantly reduced to the stage where it is arguable whether it is able to meet all of its obligations. It should not be open to a government to 'penalise' the Integrity Commission by cutting its budget because it doesn't like the way it is performing its independent role.*

*The CPSU would like the review to consider alternate funding models for the Integrity Commission. A model based on the approval of a work plan similar to that of the Auditor-General may be suitable."*<sup>106</sup>

3.19.3 As I understand it the Auditor-General's work plan which requires the approval of the Public Accounts Committee (PAC) enables that officer to discuss work priorities extending into the future with the Committee so that provision can be made for prioritised work. The Committee overseeing the Commission's activities, the JSC, has a different role from the PAC, and the Commission is not in a position to predict how many investigations it might have, or how many own motion projects it might contemplate as worthy of being undertaken. In these circumstances it seems that there is no need for this kind of approval for its work.

3.19.4 The Commission's written submissions in relation to resources, which I have set out in full, speak for themselves. I respectfully urge the Government to give them full consideration.



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## 4 THE OPERATION OF THE PARLIAMENTARY STANDARDS COMMISSIONER

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### 4.1 The Commission has submitted as follows:

#### *“ Commission position*

*The Commission supports the office and function of the Parliamentary Standards Commissioner.*

*The Commission submits that the Parliamentary Standards Commissioner should provide an annual report to Parliament on the activities undertaken by the Parliamentary Standards Commissioner.*

*The Commission supports amendment of the Integrity Commission Act to provide for the possibility for persons over the age of 72 years to be the Parliamentary Standards Commissioner.*

#### *Discussion*

[222] *The office of Parliamentary Standards Commissioner is established pursuant to s 27(1) of the Integrity Commission Act. The Parliamentary Standards Commissioner is an independent statutory office and operates independently of the Commission. The current Parliamentary Standards Commissioner was re-appointed to the office in 2015 for a further five year term.*

[223] *The Parliamentary Standards Commissioner provides assistance to Members of Parliament on ethical issues, and provides advice on parliamentary ethical matters to various entities, including the Commission. This advice may be provided on a confidential basis pursuant to s 28(2) of the Integrity Commission Act.*

[224] *The Commission may consult with the Parliamentary Standards Commissioner on: significant matters relating to the exercise of its powers and functions with the Parliament; matters relating to the operation of Parliamentary registers; and the provision of training for Members of Parliament. The Parliamentary Standards Commissioner and the former Chief Commissioner undertook extensive work to develop draft Codes of Conduct for Members of Parliament in 2010–2011.*

[225] *The Commission facilitates the payment of a stipend and remuneration for minor costs to the Parliamentary Standards Commissioner under the Commission’s budget, in accordance with the Parliamentary Standards Commissioner’s instrument of appointment. The allocation for the Parliamentary Standards Commissioner in 2015–16 is \$16,462. The Commission provides no other formal administrative assistance to the Parliamentary Standards Commissioner.*

[226] *The Commission submits that, in the interests of public awareness of the role of the Parliamentary Standards Commissioner, the Parliamentary Standards Commissioner should provide a report to Parliament on the activities of the office each year, subject to the confidentiality provision in s 28(2) of the Integrity Commission Act.”*

### 4.2 In addition to his work on the compilation of Model Codes of Conduct for Parliamentarians referred to in section 3.18, the Parliamentary Standards Commissioner advised me as follows:

*“ I have held private meetings for Members of Parliament alerting them to the requirements of the Parliamentary (Disclosure of Interests Act) and the various relevant Codes of Conduct. These have been given in an educative or precautionary mode.*

*I have provided a number of specific Advices under s 28. Several have been able to be given over the telephone or in a face to face meeting with the Member concerned. A larger number have been written Advices.*

*With one exception, both oral and written Advices have been provided to the Member concerned on a confidential basis as provided for by s 28 (2) of the Act. If the Advice has been sought with that understanding, whilst I regard myself as bound by it, I have assumed that a Member may choose to disclose the fact of the Advice or its content if it suited the interest of the Member. So far that has not occurred.*

*The relationship of s 28 (2) to s 94 and, the exact scope of s 94 have not been tested.*

*As indicated, there has been one instance where the Advice sought was intended to be made public. On 18 September 2014, the President of the Legislative Council, the Honourable Jim Wilkinson MLC, sought my Advice concerning '... the possible impact of Legislative Council Standing Order No 103 on the participation of an Honourable Member in a vote on the Crown Employees (Salaries) Bill 2014'. The Advice was not sought on a confidential basis and, in fact, was published in the Legislative Council Hansard of 24 September 2014.*

*There have been several instances where I have declined to give Advice sought. From the commencement of my appointment as Parliamentary Standards Commissioner, I have refrained from giving Advice under s 28 (1) (d) of the Act relating to the operation of any code of conduct applying to Members of Parliament when that Advice has been sought by a Member other than the one who is seeking guidance about his or her own conduct or possible future conduct. This was intended to give confidence to Members that I was not 'providing ammunition to the other side' whilst the Member concerned took the opportunity to seek and consider any Advice given by me on a confidential basis (s 28 (2) of the Act)."<sup>107</sup>*

#### 4.3 The Queensland Integrity Commissioner, Mr Bingham, in his submission wrote:

*" In my experience, it is essential for individual officers faced with an ethical dilemma to have access to confidential practical advice tailored to the situation which has actually arisen, rather than to rely simply on broad awareness training.*

*This is the reason for the existence of the office which I currently hold, and I believe this office provides a valuable service to public officers in Queensland.*

*In providing advice on specific situations, there is a significant conflict risk if the body giving the advice is also the one which will need to investigate any subsequent complaint.<sup>108</sup> This risk currently is recognised in s29 of the Integrity Commission Act, which restricts the assessment and investigation functions of the Parliamentary Standards Commissioner where the Commissioner has provided advice about a matter that relates to a complaint.*

*In addition to this conflict risk, in my experience public officers are less likely to seek advice if the body giving the advice may also investigate a complaint against them. They will be naturally reticent to fully disclose a matter which puts them at risk of further action.*

*For these reasons I believe it is not appropriate for the specific advisory function to fall within the responsibilities of the Integrity Commission.*

*In the Tasmanian context, the need for specific advice could be addressed if the jurisdiction of the Parliamentary Standards Commissioner were to include giving ethics and integrity advice to designated public officers, as that term is defined in s6 of the Act.*

*I appreciate that this would require a change in the nature of the Parliamentary Standards Commissioner role, but there does not appear to be any inherent reason why such a change could not be made. Indeed my office provides ethics and integrity advice to both members of Parliament and public sector officers."<sup>109</sup>*

#### 4.4 I invited Rev Professor Tate to comment on this suggestion and he responded:

*" Whilst I see merit in Mr Bingham's observations about 'conflict risk' where the one body has both advisory and investigative functions such that a designated public officer might be reluctant to seek advice from that body, I do wonder whether the establishing of a separate officer or office to provide advice to such high level officials might be to over-engineer what is required.*

*Certainly, I would not take on such a role. I believe that being readily accessible as a source of advice to parliamentarians has proved invaluable and in large part depends on the trust built up by way of personal rapport with members of all parties or none in the parliament. This is less likely to be the case if the role is but one of many tasks undertaken by a Commissioner with a wider remit and presumably well remunerated within a bureaucratic structure with administrative support.*

*In any case, I would query the number of instances where such advice would be sought. Given the educative task already undertaken by the Integrity Commission, and given its well publicised report on the receiving of gifts and benefits, one would wonder whether there would be many situations where an ambiguity or lack of clarity would require an independent authority to give advice. What are the numbers of such advices given in Queensland to those who would fall within our definition of*

107 Submission from the Parliamentary Standards Commissioner, Rev Prof Michael Tate AO, pages 2-3.

108 Mr Bingham notes that s8(1)(d) of the Integrity Commission Act specifies that a function of the Integrity Commission is 'to provide advice on a confidential basis to public officers about the practical implementation of standards of conduct that it considers appropriate in specific instances'."

109 Submission from Queensland Integrity Commissioner, Richard Bingham, pages 1-2.

*'designated public officer', and given the smaller number of such officers in Tasmania, would the setting up of this independent authority be justified?'*<sup>110</sup>

4.5 In my opinion the role of the Parliamentary Standards Commissioner does not need to be expanded to provide ethics and integrity advice to DPOs. Any further bureaucratic expansion is to be avoided. As to the submission by the Commission that the Parliamentary Standards Commissioner should provide an annual report to Parliament, I see little need for this to be done. The role is primarily to give advice to individual members of Parliament and to the Commission, and much of it would be given in confidence. On the other hand, there may be general debate about the interpretation of relevant codes of conduct or other issues where the Parliamentary Standards Commissioner sees a need to make a public statement of advice. There is no specific provision for a report to be made to Parliament on such issues, and I think something of this nature is desirable. The ability to report as given to the Commission itself by s 11(4) should be extended to the Parliamentary Standards Commissioner.

4.6 I recommend:

**[30] That the Act be amended to permit the Parliamentary Standards Commissioner, at any time, to provide a report to Parliament on the performance of his or her function.**

4.7 The Commission has submitted that the Parliamentary Standards Commissioner should not be obliged to retire at the age of 72 years. Ms Giddings, on behalf of the Labor Party, opposed this. It is a matter of policy for Parliament to determine whether such an officer, like judges, magistrates and various other public officials should be unable to hold office after attaining that age. I make no recommendation one way or the other.



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## 5 THE OPERATION OF THE JOINT COMMITTEE

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5.1 The Commission has submitted as follows:

*“ Commission position*

*The Commission supports the role and function of the JSC, and seeks to work with the Committee to achieve the objectives of the Integrity Commission Act.*

*Discussion*

[228] *The Commission notes the role and functions of the JSC pursuant to the Integrity Commission Act. The JSC has undertaken a review of the functions, powers and operations of the Commission pursuant to s 24(1)(e) of the Integrity Commission Act.<sup>111</sup>*

[229] *The Commission seeks to work cooperatively with the JSC to maximise the potential to achieve the objectives of the Integrity Commission Act.*

[230] *Beyond the provisions of the Integrity Commission Act, the Commission and the JSC, in 2011, sought to establish a protocol to govern communications between the two entities. The protocol is currently the subject of review by the parties, with the intent of providing a better understanding of how and when relevant issues may be discussed between the parties.”*

5.2 The Commission advised that the protocol proposed in paragraph [230] has now been signed.

5.3 The Clerk of the House of Assembly, Mr Shane Donnelly, has drawn my attention to Schedule 5 of the Act which makes provisions for meetings of the JSC. Clause 3 relevantly is in these terms:

*“ 3 Evidence before Joint Committee*

*(1) The Joint Committee may summon witnesses to appear before it to give evidence and to produce documents, and for that purpose has all the power and authority of a Select Committee of the House of Assembly.*

*(2) A witness who is summoned to appear, or who appears, before the Joint Committee has the same protection and privileges as a witness in an action tried in the Supreme Court.*

*...”*

5.4 Mr Donnelly states:

*“ This provision appears to be a reproduction of section 7(2) of the Public Accounts Committee Act (No. 54 of 1970) and in comparison to all other Parliamentary Committees, prescribes first, a unique status upon any witness to these two Committees and second, a unique legal responsibility upon each of these Committees and their Members. Regrettably, the passage of the Public Accounts Committee Act occurred prior to the advent of 'Hansard' and I am unable to provide any assistance to you as to why such a provision was made in the first place. I can find nothing that would assist an understanding of the motivation for including the provision in the Act the subject of review. I suspect it was included for no other reason than that it appears in the last statute enacted that dealt with Committees, albeit 39 years previously.*

*By virtue of this provision, there is a prescribed expectation then that the committee is both aware of and is able to properly apply the rules of evidence prescribed in the Evidence Act and consequently would not seek to adduce testimony contrary to such rules. Moreover, the committee is expected to be proactive in advising witnesses of their rights, the protections and immunities afforded to them under the Evidence Act.*

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111 JSC Three Year Review – Final Report (2015).

*Unlike other Parliamentary committees whose proceedings are protected by Article 9 of the Bill of Rights 1689, the statutory constitution of this committee arguably makes its proceedings justiciable in some respects.*

*At the risk of stating the obvious, the proceedings of Parliamentary committees are not conducted in the same manner as legal proceedings are conducted. The body of practice which attends the proceedings of committees together with the advice that is provided to them, comes from Parliamentary officials with many years' experience of Parliamentary processes and proceedings but not usually, legal expertise. Given a want of technical legal experience of members of the Committee or its Secretariat, I am very concerned that the provision in respect of the privilege afforded to witnesses in my view, places an unrealistic expectation of compliance and a potential exposure to legal challenge.*

*Second, this provision provides, in certain circumstances, a witness with the capacity to refuse to answer a question, a privilege not afforded to witnesses in other Parliamentary Committees, except obviously, the Public Accounts Committee. Putting to one side any argument that this Committee should have an ability to compel an answer from a witness, I would submit to you that equity of treatment of witnesses and uniformity of practice across all Parliamentary Committees should be a fundamental expectation of the Parliamentary process."*

5.5 I agree that there is no occasion to make special rules in respect of witnesses, many of whom, because of the complex nature of evidentiary law, may be difficult for the Chair of the Committee and his or her Parliamentary advisers to interpret and apply. The JSC should be permitted to operate as other committees of Parliament operate, and witnesses before it accorded the same rights and privileges as are witnesses before those other committees.

5.6 I have drawn attention to other aspects of the JSC's operations in paragraphs 3.1.15 - 3.1.19 and 3.9.1 to 3.9.3.

5.7 I recommend:

**[31] That clause 3(2) of Schedule 5 to the Act be repealed.**

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## 6 THE EFFECTIVENESS OF ORDERS AND REGULATIONS MADE UNDER THIS ACT IN FURTHERING THE OBJECT OF THIS ACT AND THE OBJECTIVES OF THE INTEGRITY COMMISSION

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6.1 The Commission has submitted as follows:

***Orders***

[231] *To date the only order made in relation to the Integrity Commission Act is the Administrative Arrangements Order 2015 which specifies at Part 3 of Schedule 1 that the Attorney-General/Minister for Justice is responsible for the administration of enactments under the Integrity Commission Act.*

[232] *The Justice and Related Legislation (Miscellaneous Amendments) Act 2012 amended section 5(1) of the Integrity Commission Act to include the University of Tasmania as a public authority under the Integrity Commission Act.*

[233] *Schedule 1 of the Integrity Commission Act outlines the principal officers of public authorities. There is currently no reference to the University of Tasmania in the schedule.*

[234] *It is necessary for an order to be made under s 104(1)(b) to insert the University of Tasmania, and under s 104(2) to insert the Vice Chancellor as principal officer.*

***Regulations***

[235] *There have been no regulations made under the Integrity Commission Act."*

6.2 One issue which arises under this heading is the status of the University of Tasmania as a public authority for the purposes of the Act. The University was not originally included in the list of public authorities set out in s 5(1). It was included as (ia) by an amendment in 2011. The University has now submitted that it should be removed from the jurisdiction of the Commission and s 5(1)(ia) be repealed. The Commission opposes this course.

6.3 The University has submitted as follows:

*"... the investigative function is important, but it has not been demonstrated that the commission is best placed to carry out that function.*

*A key feature of the commission was to be its preliminary 'assessment' process. Under that process, the commission would, quickly and relatively informally, assess a complaint to see if there appeared to be any substance such that the complaint should be investigated. If so, the commission was then to determine either to investigate the complaint itself or to refer the complaint to another investigative body.*

*In practice, this initial assessment process can in fact take months – almost 6 months in one case concerning the university, where on the face of the complaint, if the nature of a university had been understood, it should have been immediately clear that there was no reasonable ground to proceed.*

*...*

*In relation to how the commission relates to the University, the University's experience has been that the commission is public service in outlook. It does not understand that a University operates in a different way, not in a way in which unethical behaviour is countenanced but in a way that recognises that there are differing requirements and context in which a university makes decisions – particularly in relation to the employment practices of a university that is the only university in the State. The process for creating senior roles for senior academics is quite different from rearranging a public service department's staffing profile to accommodate a partner, for instance.*

*Universities are very different in their composition, purpose and endeavour from public sector bodies and local government authorities. By its very nature, the governance of a university should be*

separate from the governance that applies to the public sector and local government sectors, and oversight by bodies such as the commission of the governance of a University is therefore inappropriate.

*The governing body of the University includes a majority of members external to the University, ie not students or staff. Those external members are appointed either by the Minister or by the Council, but in consultation between them. This brings into University governance the perspectives of senior people who have lifelong experience in public service and in many wider community sectors, in contrast to the governance arrangements for public service agencies.*

*Further, the University of Tasmania is a signatory to the Magna Charta Universitatum, which celebrates university traditions and encourages bonds amongst universities. The signing of that statement illustrates that this university, like the other signatories, is one of a special breed of organisations that has survived over the ages with the pursuit of truth as a cornerstone. The Magna Charta Universitatum references the fundamental values and principles of a university, in particular the ideals of institutional autonomy and academic freedom."*

#### 6.4 The University argues that:

*" The capture of the University of Tasmania under the State Integrity Commission legislation seems to be a direct contradiction of that of institutional autonomy. It is also unnecessary, given that the University is already covered by numerous other external bodies with investigative or similar powers, including –*

- *the Tertiary Education Quality and Standards Commission*
- *the Commonwealth Department of Education and Training*
- *the Australian Research Council (in relation to research misconduct)*
- *the Fair Work Commission*
- *Worksafe*
- *the Ombudsman*
- *the Anti-Discrimination Commission*
- *the Equal Opportunity Commission*
- *and of course Tasmania Police and Australian Federal Police for matters that are contrary to the law."*<sup>112</sup>

#### 6.5 The Commission's response:

*" The Integrity Commission views its on-going relationship with the University of Tasmania ('the University') and the general application of the Commission's investigative and preventive/educative functions to the University, as an important element in the overall improvement of conduct, propriety and ethics in Tasmania's public sector.*

*The University has a relatively large workforce of both academic and professional staff and is a significant business providing education and research services in the state, interstate and internationally – including services for many international students. As with any type of public authority, the tertiary education sector has unique ethical risks and challenges and some of these are well documented in cases of serious misconduct in Australian universities in recent years. The University of Tasmania, as with any other university in Australia, is not immune to these risks.*

*The Commission therefore maintains the view that the University is an important part of the public sector in Tasmania and it is in the public interest to ensure that the University maintains and further develops its business while at the same time continuing to develop a strong ethical framework and integrity across the organisation."*<sup>113</sup>

#### 6.6 The University may be unique in comparison to other public sector organisations in Tasmania, but it is not significantly different from other Australian universities, most of which do have oversight from integrity bodies similar to the Commission, and, like other tertiary institutions throughout Australia, it is subject to investigation by the first

<sup>112</sup> University of Tasmania submission, pages 1-2.

<sup>113</sup> Integrity Commission supplementary submission – Statement of Position University of Tasmania, April 2016

three entities mentioned in its submission<sup>114</sup>. Likewise, the jurisdiction of the Fair Work and Worksafe Authorities, Ombudsman, Anti-Discrimination and Equal Opportunity Commissions and Police is not confined to the University, but is applicable to all public sector institutions.

6.7 I am not persuaded that the University should be removed as a public authority for the purposes of the Act. I adopt the recommendation in the Commission's submission for orders to amend Schedule 1 of the Act which specifies the principal officers of public authorities.

6.8 I recommend:

**[32] That an order be made under s 104(1)(b) to insert the University of Tasmania and under s 104(2) to insert the Vice Chancellor as principal officer into Schedule 1 of the Act, with a consequential amendment to Part 2 of Schedule 1 if required.**

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<sup>114</sup> see paragraph 6.4 of this report.



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## 7 OTHER MATTERS RELEVANT TO THE EFFECT OF THIS ACT IN IMPROVING ETHICAL CONDUCT AND PUBLIC CONFIDENCE IN PUBLIC AUTHORITIES

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### 7.1 The Commission's role in relation to corruption

#### 7.1.1 The Commission has submitted as follows:

*“ Commission position*

*The Commission is concerned that there are misconceptions about its role in dealing with corruption in the public sector. As it stands, the Commission deals with misconduct and serious misconduct, both of which have the potential to relate to corrupt conduct; however, 'corruption' and 'corrupt conduct' are not mentioned in the Integrity Commission Act.*

*The Commission believes that there needs to be detailed consideration of whether and how corruption and corrupt conduct should be dealt with in relation to the Commission's functions, particularly in relation to its investigative powers and resourcing. This would include consideration of the interrelationships between the term 'misconduct' in the Integrity Commission Act with the terms 'corrupt conduct' and 'improper conduct' in the Public Interest Disclosures Act 2002 ('PID Act').*

*The Commission takes no further position on whether it should, or should not, have the powers and resourcing to investigate systemic or institutionalised corruption. Ultimately it is for the Government of the day and the Tasmanian community as a whole to debate the issue, and to subsequently ensure that the Commission has the appropriate legislation and resources to achieve the objectives of the Integrity Commission Act.”<sup>115</sup>*

7.1.2 I shall not reproduce in full the lengthy discussion in paragraphs [236] to [264] of its submission, but the substance of it is that the Commission's jurisdiction is confined to what falls within the Act's definition of "misconduct". It is not empowered to investigate corruption, corrupt conduct, institutionalised corruption or systemic corruption, notwithstanding that Recommendation 29 of the "Public Office is Public Trust" Report of the Select Committee on Ethical Conduct stated that an objective of the Commission would be to "enhance public trust that misconduct, including corrupt conduct, will be investigated and brought to account".

7.1.3 The submission notes that there are disparate understandings of the words "corrupt" and "corruption" and that these terms have been used interchangeably with "misconduct". There is no universally accepted definition of corruption, and the matter is complicated by the fact that in the PID Act "corrupt conduct" is defined and specified as one form of "improper conduct", another term not used in the IC Act, and that it has been criticised by some members of the Tasmanian community for not seeking to find and expose corruption as they understand it, when the Commission has no remit to do so and has dismissed complaints to it which, while not amounting to "misconduct", would qualify as "corrupt conduct" under the PID Act.

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115 Integrity Commission submission, section 6.1.

7.1.4 The Commission submits in paragraph [253]:

*" [253] It is apparent that some members of the public were expecting Parliament to create an entity that could, and would, pursue corruption. What was ultimately provided in the Integrity Commission Act is an entity that is to prevent and deal with misconduct. Consequently, in the Commission's opinion, there remains a significant disjunct between what was expected by some members of the public (a focus on corruption), and what Parliament delivered (a focus on misconduct). The Commission submits that this disjuncture, and the dissatisfaction and confusion it has caused in the public, should be specifically addressed in this review."*

7.1.5 In a submission to a review by the Victorian Parliament's Independent Broad-Based Anti-Corruption Commission Committee, the previous Chief Commissioner, the Hon Murray Kellam AO QC, stated:

*" First, as much as the proposed amendments contain positive changes to the serious corrupt conduct jurisdiction of IBAC, the issue remains as to whether the threshold should be extended beyond criminal offending. My experience in Tasmania was that serious misconduct could arise in circumstances whereby there was no breach of the criminal law. Non-disclosure of serious conflicts of interest or of close relationship with a contractor, or providing preferential treatment to friends or relatives in employment by the provision of questions to be asked at interview, which questions are not provided to other applicants, are examples of serious misconduct by senior members of a Department which may not be in breach of the criminal law, but which on any view are clear examples of misconduct deserving of the description of being corrupt."<sup>116</sup>*

7.1.6 At paragraphs [261] and [262] the Commission states:

*" [261] The Commission's view is that corruption cannot be dealt with by criminal law alone. The referral of potential corruption matters to the police and the DPP can only be effective in cases where a law has been suspected to have been breached. Criminal law, of itself, does not codify and address all of the ways in which corruption can occur, especially where questions of ethical judgment and behaviour are paramount. In matters involving corrupt conduct, potential criminal conduct is a subset of (and extends beyond) corrupt conduct, and not vice-versa, and should be dealt with as such.*

*[262] The Commission cannot, and does not at this point in time, take a position on whether systemic corruption does or does not exist in Tasmania. Given that the Commission does not have the powers or resources to conduct such investigations, this question is likely to remain unanswered."*

7.1.7 It is obvious that if the ambit of the Commission's jurisdiction is extended from misconduct as presently defined to include the broader concept of corruption considerably greater resources will have to be found. As the Commission states:

*"... interstate experiences that show that investigation of systemic corruption requires staff with particular expertise eg forensic accountants, physical and technical surveillance operatives, and intelligence analysts. The Commission does not have access to other important tools used by interstate anti-corruption bodies to detect corruption e.g. telephone interception powers and capacity, access to police databases, ability to abrogate privileges, use of assumed identities, and integrity testing programs. Consequently, under existing resourcing levels and capability, 'finding' and 'dealing' with systemic corruption (beyond that of the Commission's current level of work in dealing with misconduct) is implausible."<sup>117</sup>*

7.1.8 Mr Alan Cook in his submission<sup>118</sup> urged that the Act be amended to give a clear definition of corruption such as that in the NSW *Independent Commission Against Corruption Act 1988* (the ICAC Act) arguing that the term "corruption" should be used to describe unacceptable behaviour by public servants. He advocated heavy penalties for and zero tolerance of infringements.

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116 Letter from Hon Murray Kellam AO to Sandy Cook, 5 January 2016

117 Integrity Commission submission paragraph [244].

118 Submission from Mr A Cook, 10 February 2016

7.1.9 There is already confusion due to the different definitions of conduct the subject of the Commission's jurisdiction and that of the Ombudsman and other authorities nominated in the PID Act.

7.1.10 "Corrupt Conduct" in the PID Act is defined as follows:

*" corrupt conduct means –*

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

7.1.11 Improper conduct is defined as follows:

*" improper conduct means –*

- (a) conduct that constitutes an illegal or unlawful activity; or*
- (b) corrupt conduct; or*
- (c) conduct that constitutes maladministration; or*
- (d) conduct that constitutes professional misconduct; or*
- (e) conduct that constitutes a waste of public resources; or*
- (f) conduct that constitutes a danger to public health or safety or to both public health and safety; or*
- (g) conduct that constitutes a danger to the environment; or*
- (h) misconduct, including breaches of applicable codes of conduct; or*
- (i) conduct that constitutes detrimental action against a person who makes a public interest disclosure under this Act –*

*that is serious or significant as determined in accordance with guidelines issued by the Ombudsman; ... ."*

7.1.12 Part 2 of the PID Act deals with disclosures of improper conduct or detrimental action. Section 6 provides:

**" 6 Disclosures about improper conduct or detrimental action**

- (1) A public officer who believes that another public officer or a public body –*
  - (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or*
  - (b) has taken, is taking or proposes to take detrimental action in contravention of section 19 –**may disclose that improper conduct or detrimental action in accordance with this Part.*
- (2) A contractor who believes that the public body with which the contractor has entered into a contract –*
  - (a) has engaged, is engaging or proposes to engage in improper conduct in its capacity as a public body; or*

*(b) has taken, is taking or proposes to take detrimental action in contravention of section 19 –*

*may disclose that improper conduct or detrimental action in accordance with this Part."*

7.1.13 Section 7 details the persons to whom disclosure may be made. By s 7(1) it is provided:

**" 7 Persons to whom disclosures may be made**

*(1) Subject to this section, a disclosure under this Part may be made to –*

*(a) the Ombudsman; or*

*(b) if the disclosure relates to a member, officer or employee of a public body other than the Police Service, that public body, the Integrity Commission or the Ombudsman; or*

*(c) if the disclosure relates to a member, officer or employee of a public body that is a State Service Agency, that public body, the Integrity Commission or the Ombudsman; or*

*(d) the Integrity Commission."*

7.1.14 Other subsections permit disclosures that relate to members of the Police Service, the Commissioner of Police, members of Parliament and other officials to be made to designated persons. For example, one relating to the Commissioner of Police is to be made to the Ombudsman, while one relating to the Ombudsman is to be made to the JSC.

7.1.15 Section 7A provides that a person to whom a disclosure may be made under Part 2 may, if the person considers that it would be in the public interest to do so, treat any other person who is not a public officer or a contractor as a contractor for the purposes of the PID Act.

7.1.16 Part 3, s 14 provides that a disclosure made in accordance with Part 2 is a protected disclosure. Section 19 gives protection from reprisal by making it an offence to take detrimental action against a person in reprisal for a protected disclosure. Where a disclosure is made in accordance with Part 2, this must, in due course, be dealt with in accordance with Part 5. That Part requires that the Ombudsman, or the public body to whom the disclosure may be made, determine within a reasonable time whether the disclosure is a public interest disclosure – see ss 30(1) and 33(1). This bears upon whether the disclosure is investigated under the Act – see ss 39 and 63(a).

7.1.17 For a disclosure to be a public interest disclosure, the Ombudsman or public body must be satisfied that the disclosure shows or tends to show that a public officer or public body –

*" (a) has engaged, is engaging or proposes to engage in inappropriate conduct in their [sic] capacity as a public officer or public body, or*

*(b) has taken or proposes to take detrimental action in contravention of s 19."*

7.1.18 The Ombudsman in the guidelines laid down by him pointed out that the term "improper conduct" is central to the rights created by section 6 and to the issue of whether a disclosure can be found to be a public interest disclosure under either section 30 or section 33. Hence, it is central to the question of whether a disclosure which is made under Part 2 is investigated under the PID Act. The guidelines' purpose

was to give guidance on whether conduct or misconduct which falls within the definition of "improper conduct" is "serious or significant".

7.1.19 The guideline for determining this issue is as follows:

**" 2 Determining seriousness or significance**

- 2.1 *Determining whether conduct or misconduct is serious or significant in nature involves judgement. Minds might reasonably differ on whether conduct or misconduct in a given situation is of such a nature that one or both of these descriptions might reasonably be applied to it.*
- 2.2 *In deciding whether conduct or misconduct is serious or significant, it is necessary to consider all of the relevant circumstances. For instance, an isolated incident of misconduct might not merit such a description, but an incident which is one of a number of repeated incidents or which is part of a course of misconduct might qualify. Similarly, the seriousness or significance of conduct or misconduct may depend on the nature of the role of the public officer against whom the disclosure is being made. For example, the expectations of a public officer who has charge of children differ from those of a public officer who manages public monies.*
- 2.3 *It will also assist to consider whether the conduct or misconduct is such that the disclosure of the conduct or misconduct deserves to be dealt with under the Act, having regard to the protections which the Act provides to protected disclosures, and having regard to the special processes which apply to them.*
- 2.4 *Factors which may bear upon the judgement as to whether particular conduct or misconduct is serious or significant include –*
  - *whether the conduct or misconduct involves a crime or an offence which carries a significant penalty*
  - *whether the conduct or misconduct might merit serious disciplinary or other consequences, if proven.*
  - *the level of trust, confidence or responsibility to which the public officer who is subject to the allegation is subject*
  - *the amount or potential amount of money involved*
  - *any apparent premeditation*
  - *any apparent consciousness of wrongdoing in the public officer who is subject to the allegation*
  - *whether the public officer who is subject to the allegation should have appreciated that the conduct or misconduct was wrong*
  - *what the public officer who is subject to the allegation ought properly to have done*
  - *the level of risk posed to others or to the State*
  - *the harm or potential harm associated with the conduct or misconduct*
  - *the degree to which the public officer who is subject to the allegation was acting in concert with others, and the nature of his or her complicity or involvement*
  - *the benefit or potential benefit derived from the conduct or misconduct, by the public officer who is subject to the allegation or by others*
  - *how the conduct of the public officer who is subject to the allegation might reasonably be viewed by his or her professional peers*
  - *the content of any applicable codes of conduct or policies.*
- 2.5 *This list is not exhaustive, and is provided as a guide to the types of consideration that may bear upon the decision.*<sup>119</sup>

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<sup>119</sup> Guideline No 1/2010 Guidelines and Standards for the purpose of determining whether improper conduct is serious or significant issued by Simon Allston, Ombudsman, 1 October 2010.

7.1.20 In one sense the conduct the subject of the PID Act is wider in scope than that the subject of the IC Act, for it embraces (within the definition of "corrupt conduct") conduct that amounts to a breach of public trust and (within that of "improper conduct") conduct that constitutes maladministration, professional misconduct, a waste of public resources, a danger to public health, a danger to the environment or detrimental action against a person who makes a public interest disclosure. On the other hand, all the activities which constitute improper conduct (which includes corrupt conduct that would also fit within the definition of "misconduct" for the purposes of the IC Act) must pass the test of being serious or significant as determined in accordance with the Ombudsman's guidelines. This exemption of non-serious or less than significant behaviour is not present in the IC Act.

7.1.21 Part 4A deals with disclosure made to the Commission. The relevant sections are as follows:

**" PART 4A - Disclosure made to Integrity Commission**

**29A Action by Integrity Commission on receipt of disclosure**

*If a person makes a disclosure to the Integrity Commission in accordance with [Part 2](#), the Integrity Commission may –*

- (a) deal with the disclosure under the Integrity Commission Act 2009; or*
- (b) refer the disclosure to the Ombudsman or a public body, as the case may require, to be dealt with as if it were a disclosure made to the Ombudsman or public body in accordance with Part 2.*

**29B Referral of disclosure to Integrity Commission**

*If a person makes a disclosure to the Ombudsman or a public body in accordance with Part 2 and the Ombudsman or public body considers that the disclosure relates to misconduct as defined in the Integrity Commission Act 2009, the Ombudsman or public body may refer the disclosure to the Integrity Commission.*

**29C Action by Integrity Commission on referred disclosure**

*If a disclosure is referred to the Integrity Commission by the Ombudsman or a public body under section 29B, the Integrity Commission may –*

- (a) deal with the disclosure under the Integrity Commission Act 2009; or*
- (b) refer the disclosure to the Ombudsman or public body, as the case may require, to be dealt with as if it were a disclosure made to the Ombudsman or public body in accordance with Part 2.*

**29D Notice of referral**

- (1) If the Ombudsman or a public body refers a disclosure to the Integrity Commission under this Part, the Ombudsman or public body must, within a reasonable time, notify the person who made the disclosure of that referral.*
- (2) If a disclosure is referred to the Integrity Commission under section 29B, the Integrity Commission must, within a reasonable time, notify the referring body and the person who made the disclosure of its decision made under section 29C.*
- (3) This section does not apply in respect of a person who made an anonymous disclosure."*

7.1.22 In a submission from Mr Greg Todd<sup>120</sup>, he argued that the Commission was thereby given authority and responsibility equal to the Ombudsman and other public bodies to process disclosures made to it, and complained of the Commission's failure to do so. I do not agree with this argument. Part 4A merely permits the Commission to process a

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<sup>120</sup> Submission from G Todd, 8 March 2016, and additional material provided subsequently.

disclosure made to it using the machinery of the IC Act provided that the disclosure is of misconduct within the meaning of the Act. If it does not fall within that definition it is to be referred to the Ombudsman or a public body as the case may require. Similarly, if the disclosure is initially made to the Ombudsman or a public body, if either thinks it relates to "misconduct" each may refer it to the Commission. On receipt, the Commission may deal with it under the IC Act or refer it back. That is so because the Commission has no jurisdiction over conduct which may be "improper conduct" but not "misconduct" as defined by the respective Acts. This becomes more apparent when we consider Part 5, wherein disclosures are determined to be public interest disclosure or not so determined. Division 1 thereof deals with determination by the Ombudsman, and Division 2 with that by public bodies. The Integrity Commission is not a public body for the purposes of the PID Act (s 4(3)(c)), and hence cannot make such a determination. Only disclosures found to be public interest disclosures are investigated under that Act.

- 7.1.23 Furthermore, Mr Todd's reliance on section 7A does not justify his claim, as I understand it, that virtually anyone can make a disclosure because, if the matter disclosed can be said to amount to improper conduct, it must appear to any reasonable person to be in the public interest to enable him or her to disclose it. In the first place, before any conduct can be described as improper it must be serious or significant within the Ombudsman's guidelines. Not every type of improper conduct would pass this test. In the second place, under s 6(2), contractors, unlike public officers who may make a disclosure about another public officer or a public body, may only make a disclosure about a public body.
- 7.1.24 There is still confusion within the Commission as to what should be done if the matter disclosed to the Commission is determined by it not to be misconduct but could be improper conduct. If it is dismissed because it is not "misconduct" does the Ombudsman lose jurisdiction over it? Does the person who discloses it have any protection if he or she is not a public officer or a contractor and has not been treated as a contractor pursuant to section 7A? In my view, the answer to both questions is "no". I think the matter could be referred back to the Ombudsman for further processing under the PID Act even after dismissal, but the safer course may be to refer it back before finally being "dealt with" by a formal dismissal. The second question must be answered in the negative because only disclosures made in accordance with Part 2 become protected disclosures, and only public officers, contractors and deemed contractors under section 7A may make them. Where the maker of the disclosure is a public officer or contractor, or the Commission considers that it would be in the public interest to treat someone who is neither as a contractor, the protection afforded by section 19 will remain available to him or her. No further action is required under the PID Act to ensure this protection, but, unless the Ombudsman or other relevant public body is informed that the Commission is not processing the matter disclosed under the IC Act, no further action under Parts 6 and 7 is likely to occur. I do not think that any legislative amendments are required to either Act to ensure that protected disclosures, made or referred to the Commission, of improper conduct not falling within its remit are dealt with by the Ombudsman or other public body. It is essentially a matter of

housekeeping and sound administration that the complainant/discloser and the responsible authorities fulfilling the duties imposed on them by the PID Act be kept informed of the progress of the matter by the Commission.

7.1.25 Mr Todd also claimed that the decision of the High Court of Australia in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (*Cunneen*) has implications for the definition of "misconduct" in the Act and "corrupt conduct" in the PID Act. As to the former definition, it includes conduct by a public officer "(b) ... that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer". Under the PID Act, corrupt conduct includes "(a) conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions". Section 8(1)(a) of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) has almost identical terms, namely:

**" 8 General nature of corrupt conduct**

(1) *Corrupt conduct is:*

- (a) *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- (b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person."*

7.1.26 The respondent Cunneen was a public official who allegedly, with intent to cause a perversion of justice, encouraged a friend to pretend to have chest pains to prevent investigating police from obtaining evidence of the latter's blood alcohol level at the scene of a motor vehicle accident. Proceedings were brought against Cunneen in reliance, not upon s 8(1)(a) above, but upon s 8(2), where the relevant category of corrupt conduct was defined as "any conduct of any person (whether or not a public official) that adversely affects or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters ... ." There followed a lengthy list of crimes and offences. The significant difference between s 8(1) and (2) of the ICAC Act is that in the former there is a requirement that dishonesty and impartiality on the part of the public official must be established, whereas in the latter what is to be adversely affected is not "the honest or impartial exercise of official functions" by a public official but "the exercise of official functions". The High Court determined by a majority of 4 to 1 that, notwithstanding the absence of the words "honest and impartial" in s 8(2), "it is more logical and textually symmetrical to read 'adversely affect' in s 8(2) as confined to having an injurious effect upon or otherwise detracting from the probity of the exercise" of the official function in any of the senses defined by s 8(1) (b-d) (at page 19[46]). The consequence was that

although the performance of the duties of the police might have been adversely affected by the telling of the lie, their own honesty or impartiality would not have been affected by it. Probity, not efficacy, was the test. As neither of the Tasmanian Acts contains a similar provision, *Cunneen's* case has no implication on their effectiveness.

7.1.27 Mr Todd has submitted that the 2014-2015 Annual Report of the Commission discloses actions which are unauthorised. The section to which he refers states:

**" COMPLAINTS AGAINST THE COMMISSION**

*People may make a complaint about the actions of the Commission or its officers. Such complaints may be made either directly to the Commission or to the Joint Standing Committee on Integrity. The Committee may refer a complaint to the Commission for response back to the Committee."*<sup>121</sup>

7.1.28 Mr Todd contends that the reception by the JSC of a complaint is in conflict with s 24(2) which provides:

" (2) Nothing in this Part authorises the Joint Committee –

- (a) to investigate any matter relating to a complaint that is being dealt with by the Integrity Commission; or
- (b) to review a decision of the Integrity Commission to investigate, not investigate or discontinue an investigation or inquire into or not inquire into a particular complaint; or
- (c) to make findings, recommendations, determinations or decisions in relation to a particular investigation or inquiry of a complaint that is being or has been dealt with by the Integrity Commission."

7.1.29 Furthermore, he disputes that the JSC has any power of referral back to the Commission, and contends that every complaint against the Commission's activities must go to the Ombudsman. I think the Annual Report is not talking about complaints of misconduct. For reasons already given, the Commission is incapable of misconduct within the meaning of the Act, but it is subject to administrative review by the Ombudsman, notwithstanding that it is not a public authority for the purposes of the IC Act. By section 4A of the *Ombudsman Act 1978*, it is provided that if a person makes a complaint to the Ombudsman about an administrative action taken by a public authority, the Ombudsman may refuse to investigate that complaint if the person has not previously raised the complaint with the public authority to which the complaint relates. Thus, it is not surprising that the Commission may, on occasion, be called upon to address complaints against an administrative action taken by it. As to the JSC, it has a responsibility under s 24(1) to monitor and review the performance of the functions of an integrity entity, of which the Commission is one, and this may call for referral back to the Commission and a response from it in respect of complaints. The JSC must not however infringe the requirements of s 24(2), which is essentially a prohibition on "second guessing" the Commission's disposition of complaints or investigations of misconduct.

7.1.30 By section 62A of the PID Act, the principal officer of a public body is required, among other things, to:

- prepare procedures for approval by the Ombudsman (s 62(a)), and

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121 Integrity Commission Annual Report 2014-2015, page 38.

- ensure the promotion of the importance of public interest disclosures, including general education of all staff about the legislation, and to ensure easy access to information about both the legislation and the public body's procedures (s 62(e)).

Because Mr Todd points to some apparent shortcomings on the part of some principal officers who allegedly have not fulfilled all their obligations in this regard, or who have permitted publication of possibly inaccurate summations of relevant legislation, he suggests that they have committed corrupt conduct insofar as their conduct has adversely affected the honest performance of a public officer's or public body's functions. He draws this to my attention because he believes that the Commission has a responsibility to deal with all cases received by or referred to it of improper conduct within the meaning of the PID Act. I have already expressed the view that this is not so.

7.1.31 I am required to review the IC Act not the PID Act, or any other Act. I have made comments about the PID Act and noted Mr Todd's comments about it insofar as it may impinge upon the operation of the IC Act. Some parts of the PID Act impose responsibilities upon the Commission and I have endeavoured to deal with them and to define the extent of them, but I do not propose to embark upon a review of the PID Act, nor to traverse the alleged shortcomings in its administration which Mr Todd raises.

7.1.32 The Parliament in 2009 had to determine what kind of model it should establish. Various models had been canvassed by the Joint Select Committee on Ethical Conduct<sup>122</sup>, ranging from an organisation tasked with rooting out what was understood as systemic corruption, and resourced accordingly, to a modest organisation primarily devoted to educating the public service in ethical standards. A compromise was reached in the Act by charging the Commission with both an ethical role and an investigative one. Conscious that the PID Act had set out the areas of wrongdoing by public officials and public bodies which should be investigated, and to which "whistle blower" protection should be offered in its definitions of corrupt and improper conduct, the ambit of the conduct within the remit of the IC Act was defined as "misconduct", a definition which may well fall short of what the public regard as "corruption", but in the absence of any evidence of entrenched wrongdoing within the public sector, I see no reason to expand the kind of wrongful conduct the Commission should target or to re-write its nomenclature as "corruption".

7.1.33 I recommend:

**[33] That the definition of "misconduct" set out in section 4 of the Act be retained.**

## 7.2 Legal services

7.2.1 The Commission has submitted as follows:

***“ Commission position***

*The Commission should be excluded from the requirement to comply with Treasurer's Instruction (TI) 1118 with respect to legal services.*

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<sup>122</sup> Joint Select Committee on Ethical Conduct Final Report 'Public Office is Public Trust'.

### **Discussion**

[265] This issue was canvassed in the Commission's submission to the Three Year Review.<sup>123</sup> The Commission does not intend to revisit the issue in depth, as the statements made in its previous submission still stand in full and its position has not changed.

[266] In regard to the JSC's recommendation on this issue (see below), the Commission wishes to clarify that it was seeking a blanket exemption from TI 1118 in relation to specific misconduct matters (not in relation to constitutional matters or statutory interpretation of the Integrity Commission Act). The Commission respectfully submits that, if the JSC recommendation were to be implemented, it appears that the Commission would only be exempted from TI 1118 where a 'conflict of interest' had already been identified. As may be gathered from the Commission's previous submission, such a conflict may not always be immediately apparent, and may only emerge at later stages of the handling of a matter.

[267] The Commission therefore submits that its exemption from TI 1118 should not be restricted to cases in which there is an identified conflict of interest.

### **Reference information**

Report of Joint Standing Committee on Three Year Review

Findings

That:

Concerns were raised by the Integrity Commission that the requirement to access Crown Law advice in accordance with TI 1118 could give rise to a conflict of interest.

The Integrity Commission currently can seek an exemption from TI 1118.

### **Recommendations**

That:

The Committee recommends that TI 1118 be amended such that where a conflict of interest exists, the Integrity Commission should have discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption.<sup>124</sup>

7.2.2 The Tasmanian Government response to the JSC's recommendation was that it would consider it, along with a number of other policy amendments, following the completion of this Review. It seems to me to be a sound recommendation which has not been specifically opposed and I therefore adopt it.

7.2.3 I recommend:

**[34] That Treasurer's Instruction 1118 be amended such that where a conflict of interest exists, the Integrity Commission should have a discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption, as sought by the Commission.**

## **7.3 Classification of Integrity Commission as a Law Enforcement Agency for the purposes of relevant legislation**

7.3.1 The Commission has submitted as follows:

### ***Commission position***

*The Commission submits that there be amendments to relevant state and Commonwealth legislation to recognise it as an 'enforcement agency' consistent with all the integrity entities across other jurisdictions, to enable it to share or exchange highly confidential information and to obtain telecommunications information.*

<sup>123</sup> Integrity Commission, Submission to Three Year Review (2013), volume 1, pages 125–6.

<sup>124</sup> Joint Standing Committee on Integrity, Parliament of Tasmania, Three Year Review – Final Report (2015) pages 201, 207.

## **Discussion**

[268] *The background to this issue is covered in some depth in the Commission's submission to the Three Year Review.<sup>125</sup> Although there have been some legislative amendments since that submission, the recommendation made by the Commission – and the basis for that recommendation – still stands.*

[269] *In this submission, the Commission has addressed only the substantive changes to the operation of the Commonwealth telecommunications interception regime since the Three Year Review, and the specific recommendation made by the JSC in its final report.*

### **Update on the operation of the Telecommunications (Interception and Access) Act 1979 (Cth) ('TIA Act')**

[270] *Subsequent to the preparation of its first submission to the Three Year Review, in early 2014 the Commission was advised that – contrary to previous advice – it did in fact have 'enforcement agency' status under the then TIA Act. This meant, for example, that the Commission was able to request historical telecommunications data (such as call charge records) from telecommunications providers under the TIA Act.*

[271] *However, as part of a suite of new federal data retention laws, on 13 October 2015 significant amendments were made to the TIA Act. These amendments essentially caused the Commission to lose its new-found status as an enforcement agency under the TIA Act. The agencies that now have such status include the integrity agencies of every state of Australia except Tasmania;<sup>126</sup> along with other agencies, these integrity entities are defined as 'criminal law enforcement agencies' under the TIA Act s 110A(1). Agencies not defined as a criminal law enforcement agencies within the TIA Act are able to be granted 'enforcement agency' status by way of a legislative instrument under the TIA Act s 176A(3). Enforcement agency status also allows an agency to access telecommunications data under the TIA Act.*

[272] *During the brief time in which it was able to do so, the Commission did have cause to use its ability to access historical telecommunications data under the TIA Act.*

[273] *The Commission was advised that, despite losing its status under the TIA Act, it was still able to request historical telecommunications records utilising its existing notice to produce powers pursuant to s 47 of the Integrity Commission Act under s 280(1)(b) of the Telecommunications Act 1997 (Cth). This does not, however, substantially resolve the issues cited in the Three Year Review relating to auditing and reviewing Tasmania Police files that contain telecommunications data.<sup>127</sup>"*

7.3.2 The Three Year Review considered that it is unnecessary for the Commission to be classified as a law enforcement agency in the relevant legislation (save and except for legislation where it is already classified as such). It formed this view because it said there was no evidence of systemic corruption in Tasmania and therefore no need for an extension of the Commission's powers as a law enforcement agency. The Commission does not regard the existence or otherwise of systemic corruption as relevant to this issue, but regards the ability to access historical telecommunications data as important to the attainment of its overall objectives, and does not seek it as a tool to facilitate the prosecution of criminal conduct. I think there is merit in expanding the Commission's powers in this regard.

7.3.3 I recommend:

**[35] That the Commonwealth be asked to amend the *Telecommunications (Interception and Access) Act 1979 (Cth)* so as to grant the Commission the status of a criminal law enforcement agency for the purposes of that Act.**

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125 Integrity Commission, Submission to Three Year Review (2013), volume 1, pages 127–130.

126 SA: ICAC; NSW: ICAC; Vic: IBAC; WA: CCC; Qld: CCC.

127 Integrity Commission, Submission to Three Year Review (2013), volume 1, page 128.

## 7.4 Employment Direction No 5

7.4.1 I have already discussed this issue at section 3.6 of this report.

## 7.5 Offence of Misconduct in Public Office

7.5.1 The Commission has submitted as follows:

### *“ Commission position*

*The Commission acknowledges that the introduction of an offence of misconduct in public office is a policy decision for the Government of the day.*

*The Commission’s view is that the lack of such an offence in Tasmania amounts to a significant gap in the state’s public sector accountability framework. This is a gap found in no other Australian jurisdiction. It leaves the state with less recourse in situations where public office and resources are abused, and reduces the chances that serious abuse of office will be appropriately dealt with.*

### **Discussion**

[279] *The Commission has explained its position on this matter in detail in its paper, Prosecuting Serious Misconduct in Tasmania: The missing link – Interjurisdictional review of the offence of ‘misconduct in public office’.*<sup>128</sup>

[280] *In releasing that paper, the Commission highlighted a serious gap in the state’s Criminal Code. The absence of a misconduct in public office offence means that there is significantly less chance of people being prosecuted as a result of Commission investigations and tribunals, and referrals of matters to police to investigate. The introduction of such an offence would not in any way enhance or extend the Commission’s jurisdiction or powers, but rather would enhance the state’s ability to appropriately handle serious abuse of public office. This includes matters that are investigated by the police, as well as those investigated by the Commission.*

[281] *As an example, it is of interest to note that, in New South Wales, the only charges laid against former government ministers, Mr Eddie Obeid and Mr Ian MacDonald, arising from their alleged serious corrupt conduct thus far have been for misconduct in public office.*<sup>129</sup> *This suggests that, were such conduct to occur in Tasmania, the state would be left with few – if any – options for prosecution.*

[282] *The Office of the DPP has recently released some public information about this matter.*<sup>130</sup> *In relation to the issues raised in this information, the Commission does not consider that Tasmania’s new fraud offence in s 253A of the Criminal Code*<sup>131</sup> *sufficiently covers misconduct in public office. For instance, as stated above, it is unlikely to cover much of the conduct displayed by Mr Obeid and Mr MacDonald in New South Wales. The nexus between the official’s position and the intent to abuse that position is missing from the s 253A fraud offence. Misconduct in public office does not necessarily include an intent to deceive, nor is it necessarily ‘fraudulent’; it may be a misuse of power or a failure to perform a duty. The fraud offence is in the ‘Crimes Relating to Property’ chapter of the Criminal Code, and is likely to be interpreted in that light.*

[283] *Examples of misconduct in public office cases which would not necessarily be covered by the Criminal Code include (but are not limited to):*

- *a case in which a uniformed police officer stood by and watched someone get kicked to death;*<sup>132</sup>
- *nepotism that had been effected through use of position, rather than through lying or deceit;*<sup>133</sup> *and*
- *cases where those in positions of power (community workers, police) have preyed on vulnerable people they have come into contact with in their role, and pressured them into sexual acts.*<sup>134</sup>

128 Integrity Commission (2014).

129 <http://www.abc.net.au/news/2016-02-24/eddie-obeid-trial-jury-dismissed/7195254>; <http://www.smh.com.au/nsw/former-labor-minister-ian-macdonald-prosecuted-over-doyles-creek-mine-deal-20141119-11qbch.html>

130 See, Office of the Director of Public Prosecutions, Annual Report 2014–2014/15, 3–4 & Annexure A.

131 Criminal Code, schedule 1.

132 R v Dytham [1979] QB 722.

133 See, eg: Integrity Commission, An investigation into allegations of nepotism and conflict of interest by senior health managers, Report No 1 (2014).

[284] *The Commission considers that some of the conduct recounted in its report, An investigation into allegations of nepotism and conflict of interest by senior health managers,<sup>135</sup> may have been capable of amounting to misconduct in public office.*

[285] *The Commission is available to speak further about particular cases which may have amounted to misconduct in public office in camera.*

[286] *The Commission respectfully rejects the notion that, in its misconduct in public office paper, it was recommending a misconduct in public office offence be formulated in Tasmania without an intent element, nor does it believe that the paper should be read in a way that supports such a proposition. In support of its general position on misconduct in public office, the Commission refers to recent extensive scholarly reviews of the need for such an offence.<sup>136</sup>*

7.5.2 The Commission's paper, mentioned in paragraph [279], concluded with the following recommendation:

*" It is recommended that, to bring Tasmania into line with all other Australian jurisdictions, an offence which captures 'misconduct in public office' be introduced into the Criminal Code of Tasmania.*

*To be of true value in prosecuting modern corruption offences, it is the opinion of the Commission that the offence should be formulated in a similar manner to that found in the s 83 of the Criminal Code WA. It is therefore recommended that, in formulating the new offence, regard be had to Criminal Code WA s 83. It is the opinion of the Integrity Commission that this is the most satisfactory codified version of the offence of misconduct in public office. However, the offence should not require that the officer acted with any intent to gain a benefit or cause harm/detriment/loss. The Commission considers that this adversely narrows the offence, and some gross abuses of office will not be captured if an intent to benefit/cause harm is included in the offence.*

*The Commission also notes that the common law form of the offence does not require the officer to have been acting dishonestly, improperly or corruptly. It is acknowledged that one misconduct in public office offence under the Criminal Code WA does require the officer to have been acting corruptly, but the Commission considers this to be sufficiently broad (if it is confined to one of the three offences). The Commission does not recommend adopting the element of 'dishonesty'; this would prevent the offence from capturing a broad range of 'abuse of office' behaviours."*

7.5.3 A footnote to the concluding sentence which I have quoted reads:

*" For instance, in situations of nepotism, the public officer may genuinely believe that they [sic] are doing the right thing by all parties involved – including their [sic] employer – and may not actually have any 'dishonest' intent."*

7.5.4 The DPP contends that the existing provisions of the Code are adequate to cover misconduct by public officers which is sufficiently reprehensible to warrant punishment as a crime, and should not be extended to criminalise behaviour that would generally be regulated by internal disciplinary proceedings. The apparent lack of a need for dishonesty on the part of the accused, which the paper proposes is also of concern.

7.5.5 Mr Coates SC points out that the crimes contained in Chapter IX of the *Criminal Code*, such a corruption under section 83, allow for prosecution of more serious offences of corruption and bribery, and that from the research paper it seems that the type of conduct intended to be criminalised by the enactment of a new provision would include:

- nepotism;

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134 For recent examples of such behaviour in other jurisdictions, see Predatory behaviour by Victoria Police officers against vulnerable persons at <http://www.ibac.vic.gov.au/publications-and-resources/article/predatory-behaviour-by-victoria-police-officers-against-vulnerable-persons> ; <http://www.bbc.com/news/uk-england-34466842> ; <http://www.bbc.com/news/uk-england-cornwall-21848519>

135 Integrity Commission, An investigation into allegations of nepotism and conflict of interest by senior health managers, Report No 1 (2014).

136 See: David Lusty, Revival of the common law offence of misconduct in public office (2014) 38 Crim LJ 337; Graham McBain, Modernising the Common Law Offence of Misconduct in a Public or Judicial Office (2014) Journal of Politics and Law, volume 7, no 4.

- misuse of resources;
- favouritism;
- wilful neglect of duty;
- use of information gained in public office for private benefit;
- conflict of interest.

#### 7.5.6 Mr Coates SC contends that:

*" Some more serious forms of the above conduct could be the subject of prosecution under the Criminal Code as currently enacted. In September 2013, s 253A was added to the Criminal Code, creating the crime of fraud. This provision allows for the prosecution of a diverse range of fraudulent or dishonest conduct. The crime of fraud is committed if any person 'with intent to defraud, or by deceit or any fraudulent means' gains a benefit, pecuniary or otherwise, for any person. 'Fraudulent means' has, in the context of the West Australian Criminal Code, been defined as 'means which are not in the nature of a falsehood or a deceit; they encompass all other means which can properly be stigmatised as dishonest.' The words 'fraudulent' and 'dishonest' are often used interchangeably in this context. In a similar offence, conspiracy to defraud, the High court stated the following:*

*'In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by:*

- *making or taking advantage of representations or promises which they knew were false or would not be carried out;*
- *concealing facts which they had a duty to disclose; or*
- *engaging in conduct which they had no right to engage in.*

*In the latter class of case, it will often be sufficient for the Crown to prove that the defendants used dishonest means merely by the Crown showing that the defendants intended to engage in a particular form of wrongful conduct.'*

*Therefore, if a public servant or other member of the community, by fraudulent means (which means dishonestly), gains a benefit for themselves or someone else they are guilty of fraud. A jury would be directed to assess whether the means used by the particular accused were fraudulent means, or were dishonest in comparison with the current standards expected of ordinary, decent people. Therefore, it is possible to envisage the prosecution of those accused of more serious acts of nepotism or the use of information gained in public office for private benefit."<sup>137</sup>*

7.5.7 Three examples of conduct allegedly not necessarily covered by the *Criminal Code* are advanced in paragraph [283] of the Commission's submission.

7.5.8 The first case, based on *R v Dytham* [1979] QB 722, where a policeman stood by and watched someone get kicked to death, would appear to be amply covered by section 115 of the Code which relevantly provides:

**" 115 Omission by public officer to perform duty**

(1) *Any public officer who wilfully and without lawful excuse omits to do any act which it is his duty to do as such officer is guilty of a crime.*

...

*Charge:*

*Omitting to perform duty as a public officer."*

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137 Letter from DPP to Attorney-General, 23 January 2015, page 3.

7.5.9 As to the second example of nepotism effected through the use of position rather than through lying or deceit, I find it hard to envisage a situation where such a case would be said to warrant punishment as criminal behaviour. The footnote referenced the conduct criticised in the Commission's Report No 1 2014 concerning senior health managers as an example. However, as Mr Coates SC points out:

*"... if a State servant was to employ a friend on behalf of their agency on terms and conditions and salary that was outside the applicable State Service framework without properly advertising the position or disclosing their relationship with that person, a jury could readily conclude that they had used fraudulent means to gain a benefit for their friend. It could be said he concealed facts which he had a duty to disclose or engaged in conduct which he had no right to engage in and therefore he used dishonest means which were fraudulent. Obviously it would depend on the detail of the admissible evidence in any particular case but it is likely that that type of conduct could be prosecuted under s 253A of the Criminal Code."*

7.5.10 Something more than giving a friend or relation a benefit would normally need to be shown before classing it as criminal conduct and in the example referenced the conduct to which Mr Coates SC referred appears to have been present.

7.5.11 The third example footnotes a paper "*Predatory Behaviour by Victoria Police Against Vulnerable Persons*" which contains a number of instances of sexual harassment and the improper cultivation of relationships leading to sexual activity by police officers in the course of their duties with women vulnerable, for a number of reasons, including domestic violence and misuse by them of drugs or alcohol. Many of the instances given led to prosecution for crimes other than misconduct in public office, while others were dealt with as disciplinary matters. None of the latter, in my view, while reprehensible and warranting dismissal in some cases, called for criminal sanctions.

7.5.12 There is no denying that some public officers, whether or not in the Police Service, may engage in such predatory behaviour as do some clergymen, teachers and others who have close contact with children or other vulnerable persons, but the existing law provides for serious cases of such conduct. These cases are serious because they involve absence of consent on the part of the victim, or because the age of the victim is such that consent is no defence.

7.5.13 The *Criminal Code*, section 2A, defines consent as "free agreement" and goes on to provide a number of instances in which a person does not agree freely. These instances include:

*" (e) agrees or submits because he or she is overborne by the nature or position of another person; or  
(f) agrees or submits because of the fraud of the accused; or ... ."*

7.5.14 It seems to me that there is no more reason to create a special offence for a public official to prey on a vulnerable person for sexual favours than to do so for clergymen, teachers or others in positions of trust or power.

7.5.15 Sexual harassment or sexual activity falling short of being non-consensual within the meaning of the *Criminal Code* engaged in by public officers with vulnerable people should be dealt with as disciplinary matters.

7.5.16 I recommend:

**[36] That no compelling case has been made for the inclusion within the *Criminal Code* of an offence of Misconduct in Public Office.**



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## 8 TECHNICAL AND OTHER REQUIREMENTS

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Several technical issues concerning various sections of the Act are set out in the Commission's submission in two attachments<sup>138</sup>.

### 8.1 Section 4: Definition of public officer

8.1.1 The Commission has submitted as follows:

*“ Commission position*

*Amend the definition of ‘public officer’ in s 4 to specifically reference volunteers and officers exercising statutory functions or powers*

*Discussion*

[287] *There is currently a lack of clarity as to the scope of the definition of ‘public officer’. For example, it is unclear whether a person who is a volunteer ‘holds any office, employment or position in a public authority’.*

[288] *The legislation applicable to volunteers varies according to which public authority a person volunteers to. This situation invites inconsistency in relation to whether or not volunteers fall within the definition of ‘public officer’.*

[289] *Given volunteers play a significant role in performing the functions of several public authorities e.g. Tasmania Fire Service or Ambulance Tasmania, it would be appropriate to specifically refer to volunteers within the definition of ‘public officer’.*

[290] *It is similarly unclear whether officers who exercise statutory functions and powers e.g. surveyors or council audit panels, fall within the definition in its current form.*

*Existing content*

*4(1) Public officer means a person who is a public authority or a person who holds any office, employment or position in a public authority whether the appointment to the office, employment or position is by way of selection or election or by any other manner but does not include a person specified in section 5(2)”.*

8.1.2 I adopt the submission and recommend:

**[37] That the definition in the Act of "public officer" be amended to specifically reference volunteers and officers exercising statutory functions or powers.**

### 8.2 Section 8(h): referrals to the DPP

8.2.1 The Commission has submitted as follows:

*“ Commission position*

*The Commission supports clarification of s 8 of the Integrity Commission Act to ensure that it cannot be read as imposing any mandatory courses of action upon the Commission.*

*Discussion*

[291] *The DPP has suggested that this provision imposes a mandatory obligation on the Commission to refer to his office all complaints concerning a potential breach of the law.<sup>139</sup>*

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<sup>138</sup> Attachments 1 and 2 to the Commission's submission.

<sup>139</sup> DPP Annual Report 2014-15, Annexure A.

[292] *The Commission does not consider this to be an accurate interpretation of the Integrity Commission Act. Such an interpretation would create contradictions and insurmountable difficulties in the practical application of the Integrity Commission Act.*

[293] *For instance, s 8(1)(g) states that one of the functions of the Commission is to 'refer complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action'. The language is the same as s 8(1)(h). If s 8(1)(g) were to be read as a mandatory requirement – as the DPP's suggested interpretation of s 8(1)(h) would require – the Commission would have to refer all complaints it received for action. This would necessarily include, for example, all dismissed, vexatious, trivial and unintelligible complaints. The same problem would apply to s 8(1)(h) itself. If the provision in relation to referring potential breaches of the law were to be read as mandatory, it must follow that the provision in relation to referring complaints is also mandatory. This interpretation would mean that the Commission would be required to refer all complaints to the police, the DPP or other person.*

[294] *In the opinion of the Commission, s 8(1) does not impose on the Commission an obligation to take any specific action, but rather sets out what is within the Commission's power to do, should it judge the action to be warranted.*

[295] *The Commission and the DPP have had discussions about developing a memorandum of understanding in relation to Commission matters that involve potential breaches of the law. It is hoped that this agreement will be put in place sometime within 2016.*

#### **Existing content**

8(1) *In addition to any other functions ... the functions of the Integrity Commission are to –*

...

(h) *refer complaints or any potential breaches of the law to the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate for action; ... ."*

8.2.2 This issue stemmed from a public statement by the previous Chief Commissioner on 7 August 2015 to the effect that a number of investigations conducted by the Commission could have resulted in prosecution had the offence of misconduct in public office been included in the Tasmanian *Criminal Code*. The Acting (at the time) DPP pointed out that no such investigation had been referred to him for advice as to whether or not such an investigation could have resulted in a prosecution under the existing provisions of the Code. The question arose whether s 8(1)(h) was mandatory or merely an option. In my view, it is clearly not mandatory, but if the investigation had revealed conduct so serious as to warrant, in the Commission's view, criminal sanctions, I must say it is surprising that it was not referred to the DPP for advice. Hopefully a memorandum of understanding can be advanced to encourage more cooperation.

8.2.3 I make no recommendation for an amendment to the section.

### **8.3 Section 27(4): Maximum age of Parliamentary Standards Commissioner**

8.3.1 The Commission has submitted as follows:

#### **“ Commission position**

*Amend s 27(4) to provide for the possibility for persons over the age of 72 years to be the Parliamentary Standards Commissioner.*

#### **Discussion**

[296] *The Integrity Commission Act currently provides a mandatory age limit for the Parliamentary Standards Commissioner. This is based upon age limits in other jurisdictions e.g. Judges of the Supreme Court.*

[297] *It is submitted that the current age limit potentially restricts the availability of candidates who may be suitable for the role.*

**Existing content**

*27(4) A person is not eligible to be the Parliamentary Standards Commissioner unless that person is under the age of 72 years."*

8.3.2 As already mentioned in paragraph 4.7 of this report this is a matter of policy and I make no recommendation.

**8.4 Sections 44(1) & 46(3): Appointment of investigator**

8.4.1 The Commission has submitted as follows:

***“ Commission position***

*Amend s 46 to provide that, where a person has been appointed to assist an investigator, the CEO may also authorise that person to exercise any or all of the powers of the investigator.*

***Discussion***

*[298] It is unclear from this section whether more than one investigator may be appointed to investigate a complaint.*

*[299] On commencement of an investigation the CEO is required by s 44(1) to appoint an investigator. It is only this person who is authorised to exercise powers under ss 47 and 51, even in a situation where the CEO has authorised a person to assist the investigator under s 46(3). If an investigator is unavailable, there is no capacity for the powers under ss 47 or 51 to be exercised.*

*[300] It would be appropriate for the CEO to be able to authorise the person assisting the investigator (authorised under s 46(3)) to exercise those powers where appropriate*

***Existing content***

*44(1) If the chief executive officer makes a determination that the Integrity Commission should investigate a complaint, the chief executive officer is to appoint an investigator to conduct an investigation of the complaint.*

*46(3) The chief executive officer may authorise any person to assist an investigator”.*

8.4.2 I consider this an appropriate amendment which could expedite investigations.

8.4.3 I recommend:

**[38] That section 46 of the Act be amended to provide that where a person has been appointed to assist an investigator, the CEO may also authorise that person to exercise any of the powers of an investigator set out in section 47.**

**8.5 Section 46(3): Procedure on investigation**

8.5.1 The Commission has submitted as follows:

***“ Commission's position***

*Amend Part 6 to provide for the CEO to exercise powers in that Part in relation to an assessor exercising the powers of an investigator.”*

8.5.2 The submission here was that it is unclear whether the CEO may authorise a person to assist an assessor (see s 46(3) which only deals with assisting an investigator) and whether an assessor exercising the powers of an investigator must observe the rules of procedural fairness. I have already recommended (**Recommendation [8]**) that assessors should not have all the powers of an investigator, but may only use the coercive power under s 47(1)(e) to require the production of documents and the like.

8.5.3 At section 3.7 I have addressed the issue of procedural fairness in respect of assessor's reports and made **Recommendation [14]**, which is in keeping with the present submission which does not need to be dealt with further.

## 8.6 **Section 58(2): Dismissals of own-motion investigations by the Board**

8.6.1 The Commission has submitted as follows:

*“ Commission position*

*Amend s 58 of the Integrity Commission Act to allow the Board to dismiss a matter arising from an own motion investigation.*

*Discussion*

*[303] The Board may only determine to dismiss a 'complaint' under s 58. This does not cover the situation where the report provided to the Board for determination relates to an own motion investigation (which is not a complaint).*

*Existing content*

*58(2)The Board may –*

*Dismiss the complaint; ... .”*

8.6.2 This oversight should be rectified and I recommend:

**[39] That the Act be amended by adding the words "or own motion investigation, as the case may be" after the word "complaint" in section 58(2)(a).**

## 8.7 **Section 87(1): Investigation or dealing with misconduct by designated public officers**

8.7.1 The Commission has submitted as follows:

*“ Commission position*

*Amend s 87 of the Integrity Commission Act to provide for the Commission to assess a complaint about a DPO under Part 5 of the Integrity Commission Act.”*

8.7.2 For the reasons given in section 3.16, my view is that once complaints have been identified under Part 5 as relating to misconduct by DPOs they are to be dealt with in accordance with Parts 6 and 7 as recommended in **Recommendations [26] and [28]**.

8.7.3 I do not endorse the Commission's position as stated above.

## 8.8 **Section 88(1)(a): Investigation or dealing with serious misconduct by police officers**

8.8.1 The Commission has submitted as follows:

*“ Commission position*

*Amend s 88(1)(a) to include reference to Part 5.*

8.8.2 See above and **Recommendation [27]**.

8.8.3 I do not endorse the Commission's position as stated above.

## 8.9 Section 94: Protection of confidential information

### 8.9.1 The Commission has submitted as follows:

#### *“ Commission position*

*Amend s 94 to include appropriate confidentiality protections relating to the release of information by the Commission for proceedings in court or other proceedings.*

#### *Discussion*

[307] *It is currently possible for confidential information held by the Commission to be obtained under a subpoena for proceedings in a court.*

[308] *The Ombudsman Act 1978 protects the Ombudsman from being compelled to produce documents under subpoena (pursuant to s 26(5) of that Act). The Commission does not have such protection – its confidentiality provisions can be over-ridden by the requirements of another law (pursuant to s 94(2) of the Integrity Commission Act).*

[309] *It is inconsistent that documents in the possession of the Ombudsman are protected from production in such circumstances but those of the Commission are not. The Commission notes confidentiality provisions in other Australian jurisdictions:*

- *Independent Commission Against Corruption Act 1988 (NSW), s 111: no requirement to disclose information unless under proceedings pursuant to that Act*
- *Independent Broad-based Anti-corruption Commission Act 2011 (Vic), ss 45–48: no compulsion to produce protected documents or things*
- *Independent Commissioner Against Corruption Act 2012 (SA), ss 54(1)(a) & (b): no requirement to disclose information unless for purposes of criminal proceedings or the function of the Commissioner under another Act*
- *Corruption, Crime and Misconduct Act 2003 (WA), s 152(7): no requirement to produce or disclose any official information in or to any court except for the purposes of a prosecution or disciplinary action*
- *Crime and Corruption Act 2001 (Qld), s 213 (4): no requirement to disclose or produce information unless for investigation underway by commission or proceedings under the Criminal Organisation Act 2009*

#### *Existing content*

*94(2) A person to whom this subsection applies must preserve confidentiality in respect of all matters that come to the person’s knowledge in the course of employment or duties under this Act and if the person discloses, without authorisation from the Board, the chief executive officer or an Integrity Tribunal, any information as to matters of that kind to any person, except –*

- (a) As may be required in connection with any proceedings under this Act, any other written law or the Criminal Code [the person is guilty of an offence].*

*...”*

8.9.2 I am in considerable doubt about this submission. The statement in paragraph [308] that the Commission's confidentiality provisions can be over-ridden by the requirements of another law pursuant to s 94(2) of the Act is something of an overstatement. That subsection releases a Commission officer from liability for disclosure of confidential material to any person, except as may be required in connection with any proceedings under the Act, any other written law or the *Criminal Code*. The disclosures must be required. Any evidence must be relevant, admissible and not the subject of any privilege against non-disclosure. They must be made in proceedings under the Act or the *Criminal Code*, or proceedings under any other written law (which is not specified). Proceedings are presided over by judicial officers charged with the responsibility of doing justice according to law. Before disclosure can be required in such proceedings those officers must be satisfied that it is proper and in the interests of justice that such disclosure should be made.

8.9.3 If my **Recommendation [20]** is accepted, disclosure of admissions made or procured under compulsion by an accused person will not be admissible against him or her, but what if the disclosure is exculpatory? Is it to be embargoed? Does every piece of information collected by the Commission's officers have to remain forever confidential? Why does it need to be protected in this way? Most of the interstate investigative bodies cited in paragraph [309] allow for disclosure in criminal proceedings, at least those instituted as a result of an investigation by the investigating authority. Only Victoria has specified the type of material which ought to be protected from disclosure. The *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 46, defines a protected document or thing not to be disclosed by reference to its likelihood of revealing the identity of an informer or witness, or other person at risk of personal safety; of placing at risk an investigation under that Act or being conducted by other authorities or of risking the disclosure of any secret investigative method used by the investigators; and a general catch-all is that which "is otherwise not in the public interest". The presiding judge is charged with the responsibility of determining whether or not the document or thing is protected and, if so, it is not admissible.

8.9.4 I am inclined to the view that something after the style of the Victorian Act would best address the problem but it needs careful study. Unless the parameters of what material needs the protection of stringent confidentiality are determined I think we must be content to rely on the judicial arm to "require" only material which it adjudges to be in the interests of justice as between the state and the citizen.

8.9.5 I do not endorse the Commission's submission but make the following recommendation:

**[40] That section 94 of the Act be subject to further consideration of the proper definition of what material needs the protection of confidentiality and the limits of appropriate disclosure.**

## **8.10 Section 98: Certain notices to be confidential documents**

8.10.1 The Commission has submitted as follows:

***" Commission position***

*Amend s 98 of the Integrity Commission Act as follows:*

- A Amend ss 98(1A) and 98(2) so that confidentiality responsibilities are placed on persons to whom the existence, contents and matters relating to or arising from the notice have been disclosed.*
- B Include 'assessments' in s 98(1B)(d), and 'assessors' in s 98(1B)(e).*
- C Include in s 98(2)(a)(i) a reference to s 98(1A).*
- D Redraft s 98(2) to clarify that the list of reasons given is not exhaustive.*
- E Redraft s 98(2) to clarify that all persons who disclose on the basis of a reasonable excuse must meet the obligation imposed by s 98(2)(b) – regardless of whether their reasonable excuse was one of the listed examples.*

**Discussion**

[310] *The Commission has advice from the Office of the Solicitor-General on s 98 that is relevant to the discussion below.*

**Position A**

[311] *Section 98(1A) creates responsibilities on the part of a person to whom the existence of a notice is disclosed (per s 98(1)(a)). It does not currently apply to a person to whom the contents of, or any matters relating to or arising from, the notice, are disclosed (per ss 98(1)(b)–(c)).*

[312] *Similarly, s 98(2) only mentions the 'existence' of a notice."*

8.10.2 A problem can arise if the person to whom disclosure is made is not told of the existence of the notice but is told b) the substance of its contents, or c) any matters relating to or arising from the notice. The further disclosure by that person does not seem to be covered. Furthermore, where disclosure is made to another and that other is not advised by the former of the contents of s 98(2)(b), the latter, if left in a state of ignorance of those facts, is not afforded a reasonable excuse by reason of that ignorance.

8.10.3 I recommend:

**[41] That sections 98(1A) and 98(2) be amended so that confidentiality responsibilities are placed on persons to whom the existence of, contents of and matters relating to or arising from the notice have been disclosed and further so that a person to whom any such information has been disclosed but who has not been informed by the person making the disclosure that it is an offence to disclose that information without a reasonable excuse to any other person will him or herself have a reasonable excuse for the disclosure made by him or her.**

**" Position B**

[313] *Section 98(1B) includes a list of 'matters relating to or arising from a notice'. The Commission does note that the list is not exhaustive. However, the list contains no reference to assessments or assessors. For the sake of clarity – given that investigations and tribunals are listed – they should be included."*

8.10.4 I accept the submission and recommend:

**[42] That the Act be amended so that "assessments" be included in section 98(1B)(d) of the Act and "assessors" be included in section 98(1B)(e).**

**" Position C**

[314] *Section 98(2)(a)(i) includes as a 'reasonable excuse' the 'seeking legal advice in relation to the notice or an offence against subsection (1)'. It does not include as a reasonable excuse the seeking of legal advice in relation to an offence against subsection (1A)."*

8.10.5 I agree and recommend:

**[43] That section 98(2)(a)(i) of the Act be amended by adding after the words "offence against subsection (1)" the words "or subsection (1A)".**

**" Position D**

[315] Section 98(2)(a) lists a number of potential 'reasonable excuses'. It would be impractical if the excuses were read to be exhaustive. For instance, it would disallow somebody discussing a notice with their GP or counsellor."

8.10.6 I agree and recommend:

**[44] That section 98(2) of the Act be amended to clarify that the list of reasons given is not exhaustive.**

**" Position E**

[316] Section 98(2)(b) imposes on the person making the disclosure – for one of the three listed reasonable excuses – an obligation to inform 'the person to whom the disclosure is made that it is an offence to disclose the existence of the notice to another person unless the person to whom the disclosure was made has a reasonable excuse'. The drafting of the provision suggests that this obligation under s 98(2)(b) would not be imposed on a person if they were to disclose for a reason other than the three listed in s 98(2)(a) (although they would still be subject to s 98(1A))."

8.10.7 The submission is that s 98(2) should be redrafted to clarify that all persons who disclose on the basis of a reasonable excuse must meet the obligation imposed by s 98(2)(b), regardless of whether their reasonable excuse was one of the listed examples. I agree with the spirit of the suggested amendment, but the problem I have mentioned under position A still needs to be addressed. If a person has confidential material disclosed to him or her, but is not told it is an offence to further disclose it without a reasonable excuse, how can he or she be expected to advise a person to whom further disclosure is made that it is an offence to make yet further disclosure without a reasonable excuse?

8.10.8 I recommend:

**[45] That section 98(2) of the Act be redrafted to exonerate persons to whom disclosures have been made but who have not been informed that to disclose them further without reasonable excuse is an offence.**

8.10.9 While I am dealing with section 98 I will deal with an issue raised by Mr Todd. He contends that the justification for section 98 has been the need to keep such matters confidential whilst the "investigation" or "assessment" is undertaken ... "however if a complaint matter is dismissed under section 36, then surely any records held by the complainant should cease automatically to be subject to the suppression order arising under section 98". I do not understand what sort of records held by a complainant he is referring to. Section 98 only applies to notices which are expressly declared to be confidential documents, and there is a limited number of such documents (eg a notice by an assessor of his or her intention to document an assessment which may be given to a complainant under section 35 and may provide that it is a confidential document; a similar notice by an investigator under section 44; a coercive notice under section 47 to produce documents and give evidence etc which could be served on a complainant although this is less likely as a complainant would presumably be happy to provide the required information without the need for such a notice; an investigator's draft report to the CEO under section 59 to, among others, persons with a special interest in the matter; a notice of an inquiry by an Integrity Tribunal under section 65 (but this is

given to the subject of the inquiry, not the complainant); a coercive notice under section 71 by an Integrity Tribunal which could affect the complainant; a search warrant under section 73 and a determination by an Integrity Tribunal under section 78). While I have difficulty in understanding Mr Todd's concern over the indefinite suppression order or any of the above notices which may have been served on a complainant, I consider that some reviewable mechanism should be provided for it to be terminated when an investigation has been concluded. There may well be sound reasons for maintaining it beyond that time. By the same token, s 98(3) empowers the Commission or Integrity Tribunal to advise a person to whom a notice was given that it is no longer confidential, thereby releasing him or her from the obligation not to make disclosures concerning it. However, if express power is given to a person subject to a confidential notice to apply to the Commission for advice releasing him or her from a requirement of confidentiality, the Commission will bear the onus of demonstrating some good reason for not doing so and such an administrative decision would be reviewable.

8.10.10 I recommend:

**[46] That section 98 of the Act be amended to provide that where the Commission or Integrity Tribunal has finally dealt with a complaint or own motion investigation, a person served with a notice that it or any document referred to therein or attached to it is a confidential document, may apply to the Commission or Integrity Tribunal for advice that such document is no longer a confidential document.**

8.10.11 Another problem has arisen in respect of section 98 because of its applicability to the notice which is given to a person, as opposed to any document which is included within it or attached to it. Thus, in section 55, for example, subsection (1) provides that before finalising any report the CEO may give a draft of the report to various people for comment. Subsection (2) provides that a notice may be attached to the draft specifying that the draft is a confidential document. Subsection (3) provides that section 98 applies to a notice under subsection (2) if the notice specifies that the draft of the report is a confidential document. When we get to section 98 the section only speaks of the notice not the document specified as a confidential document. To overcome this problem I recommend a re-wording of s 98(1). This re-wording may require some amendments to accommodate other amendments to section 98 which I have recommended.

8.10.12 I recommend:

**[47] That section 98(1) of the Act be amended to read:**

**"(1) A person on whom a notice that it or any document referred to therein or attached thereto 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 that confidential document; or**

- (b) the contents of the confidential document; or
- (c) any matters relating to or arising from the confidential document

-

**unless the person on whom the confidential document was served or to whom it was given has a reasonable excuse.”**

8.10.13 Consequential amendments would be required to the remaining subsections to target the confidential document rather than the notice.

## **8.11 Local Government Act 1993: Code of Conduct panels**

8.11.1 In relation to Section 28V of the Local Government Act: Making Code of Conduct Complaint against Councillor, the Commission has submitted as follows:

### **" Commission Position**

*The Commission supports amending the Local Government Act 1993 ('LG Act') to provide for referrals from the Commission to be dealt with by a Code of Conduct panel without the requirements of ss 28V(3)(b),(f) or (g) of that Act. Associated amendment of that Act would be required to ensure that such referrals could be made directly to the Executive Officer and for the information received from the Commission to be used by the panel in any Code of Conduct investigation.*

### **Discussion**

[317] *When the Commission conducts an investigation, the Board may determine to refer the report of the investigation and any information obtained in the conduct of the investigation to the principal officer of the relevant public authority for action.<sup>140</sup>*

[318] *When an investigation involves a Councillor (or Alderman), the relevant principal officer is the Mayor.*

[319] *On receipt of such a referral from the Commission, the Mayor has no means of taking action other than to initiate a Code of Conduct process under the LG Act. The procedure outlined in the LG Act does not align with the Integrity Commission Act for a number of reasons:*

- *Since a Code of Conduct panel is the only mechanism for action to be taken in relation to a referred investigation, the Mayor (in receipt of the referral in their capacity as principal officer) will have to become a 'complainant' in order to initiate the Code of Conduct process.*
- *There may be issues (particularly concerning confidentiality) arising from the fact that the Mayor, as complainant, is required to submit the complaint to the General Manager for assessment under s 28Y.*
- *The Code of Conduct process does not provide for anonymous complaints (s 28V(3)(b)) requires the complaint to state the name and address of the complainant).*
- *A complaint must be made within six months of the conduct to which the complaint relates (s 28V(3)(f)) which may not be possible if the matter has first been subject to an assessment and investigation by the Integrity Commission. The Commission notes that, given Councillors are DPOs for the purposes of the Integrity Commission Act, complaints about them cannot be referred at any stage before a Board determination (following an investigation) pursuant to s 58.*
- *A complaint, in accordance with s 28V(3)(g), must be accompanied by a prescribed fee. This is not appropriate where a Mayor may, as a result of a Commission referral, incur a pecuniary cost in order to take the required action.*

[320] *If it is considered that the Mayor is not to become the 'complainant' for the purposes of the LG Act, there is a lack of clarity in relation to the officer or person responsible for dealing with the matter.*

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140 Integrity Commission Act, s 58(2)(b)(i).

[321] *An alternative to the process outlined above is for referrals made by the Commission under s 58(2) to be made directly to the Executive Officer as if that referral had been made under s 28Z(1)(a). It is considered that, provided such an amendment clearly stipulated that such a referral from the Commission would not need to comply with the requirements of s 28V(3), this approach would alleviate the above issues.*

[322] *Section 28ZE(2) provides the Code of Conduct Panel with a broad discretion as to the evidence it may consider in relation to a complaint. For the sake of clarity, it may be appropriate to specifically provide for evidence obtained by the Commission to be utilised by the Code of Conduct Panel.*

#### **Existing content**

- 28V (1) *A person may make a complaint against one councillor in relation to the contravention by the councillor of the relevant council's code of conduct.*
- (2) *A person may make a complaint against more than one councillor in relation to the contravention by the councillors of the relevant council's code of conduct if all the councillors complained against behaved on a particular occasion in such a manner as to commit the same alleged contravention of the code of conduct.*
- (3) *A complaint is to –*
- (a) *Be in writing; and*
  - (b) *State the name and address of the complainant; and*
  - (c) *State the name of each councillor against whom the complaint is made; and*
  - (d) *State the provision of the relevant code of conduct that the councillor has allegedly contravened; and*
  - (e) *Contain details of the behaviour of each councillor that constitutes the alleged contravention; and*
  - (f) *Be lodged with the general manager of the relevant council within 90 days after the councillor or councillors against whom the complaint is made allegedly committed the contravention of the code of conduct; and*
  - (g) *Be accompanied by any prescribed fee."*

8.11.2 I consider that these suggestions are sound, and recommend:

**[48] That the *Local Government Act 1993* be amended to provide for referrals from the Commission to be dealt with without the requirements of sections 28V(3)(b), (f) or (g) of that Act, that amendments be made to that Act to ensure that such referrals be made directly to the Executive Officer and (as has been recommended in Recommendation [12(b)] in relation to ED5) on such referral the Code of Conduct Panel may treat the evidence gathered by the Commission as part of its investigation.**

## **8.12 Local Government: other matters**

8.12.1 LGAT made a submission which included a request that General Managers and Mayors should be clearly provided with the ability to notify their council when an investigation involving their organisation is being undertaken, noting that this can be done without advising of the specifics of the investigation. The Association further noted that in small councils responding to a complaint can be resource intensive and divert senior staff from other activities. It was claimed that the General Manager or Mayor should be able to explain this to his or her council.

8.12.2 While I am sympathetic to Council officers put in this position, I do not consider that legislation is required to rectify the problem. The Commission must be able to contain

the spread of information by means of confidential notices during the covert stage of its investigations. I believe the Commission is conscious of the need to lift confidential bans as soon as this can prudently be done to avoid compromising any investigation.

8.12.3 LGAT also raised the issue of whether section 102, in which reference is made to the PID Act, should be amended to make reference also to the *Right to Information Act 2009* (RTI Act). The Commission is given a general exemption from the applicability of that Act by s 6(1)(d) thereof. Furthermore, the Commission points out that records that would warrant an application under the RTI Act can currently be obtained by the Commission under its Act. An amendment to section 102 seems unnecessary.

8.12.4 LGAT also raises a query whether s 4(1) of the IC Act which contains a definition of local authority should be amended to include a reference to Local Government Audit Panels established under section 85 of the Local Government Act. The Commission supports the explicit inclusion of Audit Panels within the definition of a local authority.

8.12.5 I recommend:

**[49] That Audit Panels be included explicitly in the definition of a local authority in section 4(1) of the Act.**

### **8.13 Previous technical amendments considered by the JSC Three Year Review**

8.13.1 The submission of the Integrity Commission to my Review has an attachment that itemises a number of technical amendments considered by the Three Year Review and referred to me by the Government. I attach it to my Review as Attachment 2 and will make a recommendation covering those items which I consider ought to be amended as requested without additional reasons to those advanced in the Attachment.

8.13.2 I recommend:

**[50] That the recommendations of the Commission in Attachment 2 to this report opposite the item numbers appearing in the first column thereof be implemented in respect of the following items: 1, 2, 3, 4, 5, 6, 7, 8, 11, 14, 15, 20, 22, 23, 24, 25, 26, 27, 28, 33, 34, 37, 38, 40, 41, 42, 43 and 45.**

8.13.3 I now address the items in Attachment 2 which have not been mentioned in **Recommendation [50]**.

#### *Item 9*

8.13.4 This issue has been addressed in my **Recommendation [15]**.

*Item 10*

8.13.5 The suggested amendments seem to me to further confuse the problem stated. If this is a problem I would have thought the appropriate amendment would be to delete the words "or review".

8.13.6 I recommend accordingly:

**[51] That section 37(1) of the Act be amended by deleting the words "or review".**

*Item 12*

8.13.7 This item was not recommended for implementation by the Three Year Review. All the material can be made subject to confidentiality under s 98. In my view, it is imperative that the complaint be forwarded to the principal officer because that is the subject of the inquiry to be conducted.

8.13.8 As to the report itself, the CEO has a discretion not to reveal it to the person the subject of the complaint, and s 98 can preserve confidentiality on the part of the principal officer who receives it. I do not endorse the recommendation.

*Item 13*

8.13.9 Under s 38(1), the CEO is to give written notice of his or her determination to the principal officer, and has a discretion to give it to the complainant and the officer the subject of the complaint. Under section 44, if the determination is to investigate, the CEO has a discretion to disclose to the same persons the fact that an investigator has been appointed to investigate the complaint. Under subsection (3) he may include details of the complaint and any report of the assessor. The principal officer, having received the advice under section 38 that the CEO has determined to refer the complaint and the report and any relevant material, by the time that the investigator has in fact been appointed, will probably have received this material as the CEO is obliged to provide him. The apparent grant of a discretion under s 44(2)(a) to provide it at this stage is inconsistent with section 38, but so far as the complainant and officer subject to the complaint are concerned, assuming the CEO exercises his or her discretion under s 38(2) to notify them, they will only have notice of the determination, not the documents which the principal officer is obliged to be given. Section 44 authorises their release to those persons. Section 44(2)(a), which includes the principal officer as the discretionary recipient of the material, is therefore otiose and inconsistent with the mandatory requirement in section 38 that he or she be a recipient of it. This may justify (although it is harmless) the repeal of s 44(2)(a) as otiose, but does not justify a repeal of the requirement to give the notice of determination and to supply the material which is to be referred to the principal officer under section 38 but to leave it discretionary. I do not endorse the recommendation.

*Item 16*

8.13.10 For the reasons advanced under item 15, I do not endorse the recommendation.

*Item 17*

8.13.11 I have dealt with procedural fairness in respect of assessors' reports in **Recommendation [14]**. With respect to the investigative stage, as the subject of the complaint is afforded the opportunity by section 55 to comment on the CEO's report which is compiled in reliance upon the investigator's report before it goes to the Board, I think the requirement for procedural fairness laid down in section 44 is unnecessary at that stage. However, the opportunity for comment is still discretionary under section 55 and if s 46(1)(c) were repealed, a requirement to observe procedural fairness should be inserted in section 55.

8.13.12 I recommend:

**[52] That section 46(1)(c) of the Act be repealed and in lieu thereof a requirement to observe the rules of procedural fairness should be included in section 55.**

*Item 18*

8.13.13 I refer to my **Recommendation [21]**.

*Item 19*

8.13.14 I refer to my **Recommendation [23]**.

*Item 21*

8.13.15 I agree with the general thrust of this recommendation but I query the practicality. The confidential provisions are contained in section 98 but are all dependent upon the giving of notices which have been made confidential documents.

8.13.16 The prohibition is against disclosure of the existence of the notice, its contents or any matters relating to or arising from the notice. (I have recommended in **Recommendation [47]** that "confidential documents" be substituted for "notice" where appearing in section 98).

8.13.17 I am uncertain what it is that the Commission wants to clothe with confidentiality. Is it a document (the warrant)? Is it the fact that it has been issued and/or executed? Is it all the circumstances surrounding its execution, including the questions asked or orders given which were or were not complied with by the bystanders? Some of these matters may be kept confidential by an appropriate notice, but I think the concept needs further consideration. I note that although the warrant issued under section 73 may be made subject to section 98, there is now no such provision in respect of one issued under section 51, it having been removed therefrom by Amendment Act No 55 of 2011.

8.13.18 I recommend:

- [53] That an amendment to the Act to ensure the confidentiality of events arising out of the execution of a search warrant, or the exercise of any powers of an investigator under section 52 of the Act, be formulated by the Commission and implemented if approved by the JSC.**

*Item 29*

8.13.19 I have dealt with this issue in my **Recommendation [47]**.

*Item 30*

8.13.20 The recommendation here is, in my opinion, too heavily reliant on the discretion of the CEO. I have already recommended (**Recommendation [52]**) that a requirement for procedural fairness be inserted in section 55 so that although the CEO has a discretion to seek comment on his or her draft report prior to submission to the Board, the requirement of procedural fairness would in some cases demand that the discretion should be exercised so as to enable that comment to be made and considered by the Board. So as not to restrict the CEO's recommendations, s 57(2)(b) could be amended to provide that they could include a recommendation that only certain parts of the report or other material be referred. Likewise, s 58(2)(b) could be amended to enable the exclusion of parts of the report or other material from what is referred to another authority or entity.

8.13.21 I recommend:

- [54] That sections 57(2)(b) and 58(2)(b) of the Act be amended to allow the CEO in any recommendation to the Board, and the Board in its determination to specify such parts of the report and any other information obtained in the course of the investigation should not be included in the referral to the persons mentioned in sections 57(2)(b)(i-vi) and 58(2)(b)(i-vi), or section 58(2)(b)(i-vi).**

*Item 31*

8.13.22 This matter has already been dealt with in my **Recommendation [39]**.

*Item 32*

8.13.23 This item complains of inconsistency between the penalty for not attending a directions hearing under section 68 and not producing any specified record, information, material or thing at the conference, on the one hand, and most of the other offences against the Act (eg 10 penalty units compared with 2,000 or 5,000 penalty units for breach of confidentiality under section 98, or disrupting the hearing of an Integrity Tribunal). I think there is a significant difference in the degree of gravity between failing to co-operate at a directions hearing which is designed to facilitate and expedite the principal hearing of an Integrity Tribunal and the other examples, but it is

a matter for the Parliament to determine how grave the former is and what an appropriate penalty is. I make no recommendation.

*Item 35*

8.13.24 See item 21 above where I dealt with a similar issue under s 51. I repeat **Recommendation [53]** in respect of search warrants issued under s 73.

*Item 36*

8.13.25 I endorse this recommendation and refer to my **Recommendation [39]** which may be of assistance to the parliamentary drafter.

*Item 39*

8.13.26 I refer to the discussion of the Commission's submission under the heading "2.9 *Investigation of misconduct and misconduct of police*" which culminated in my **Recommendations [26], [27] and [28]**.

8.12.27 I do not endorse the Commission's recommendation under this item.

*Item 44*

8.13.28 This raises issues similar to those raised under item 21, and I repeat the substance of my **Recommendation [53]**. I recommend:

**[55] That an amendment to the Act to ensure confidentiality over the actions of the Commission of those persons subject to any lawful requirements made by it under the Act be formulated by the Commission and implemented if approved by the JSC.**

*Item 46*

8.13.29 While I have recommended in **Recommendation [35]** that an amendment be sought to the TIA Act so as to grant the Commission the status of a criminal law enforcement agency for the purposes of that Act, I am not persuaded that classification as a law enforcement agency within the meaning of the *Personal Information Protection Act 2004* is warranted. The information is available to the Commission on a case by case basis so long as, in each case, it is for the purpose of and in accordance with the Act (section 102). I do not endorse the Commission's recommendation.

8.13.30 This issue is again raised in item 2 of the second part of Attachment 2 entitled "*Identified technical issues, other Tasmanian legislation*" recommending the same outcome. I do not endorse it.

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## 9 OTHER SUBMISSIONS NOT SPECIFICALLY ADDRESSED

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9.1 I have received a number of submissions which I do not propose to publish at large. Some contain material which adversely reflects upon individuals who have not had the opportunity to respond. Others are outside my terms of reference, and some seek to revisit decisions of the Commission with which they do not agree. To the extent that I regard them as bearing upon my task as Independent Reviewer of the Act, I have taken them into account in addressing individual issues. It must be understood however that my role is not to sit as a court of appeal from the Commission and to review their decisions in individual cases. I do not doubt that these submissions have been made by people with a *bona fide* desire to see significant improvement in the standard of conduct, propriety and ethics of public authorities, and to ensure that all the objectives of the Act are achieved.

9.2 The general issues raised in these submissions included:

- the appropriate entity or procedure to follow if a person is aggrieved about a decision of Integrity Commission staff, particularly decisions to dismiss a complaint;
- the scope of the Integrity Commission to deal with corruption and the intersection between the PID Act and the IC Act;
- resources of the Integrity Commission;
- the ability of the Commission to investigate conduct that may be legal, but nevertheless questionable from an integrity perspective;
- the manner in which Commission staff undertake some of their functions;
- procedural fairness, particularly in informing those people who are the subject of complaints about the nature of the complaints being investigated; and
- the care required in ensuring reputational damage is not aggravated by the public airing of allegations before the completion of any proceedings by the Commission or the relevant principal officer have been completed.

I have dealt with some of these matters in the main body of my report.

9.3 I refer in particular to sections 3.1 Governance, 3.7 Procedural fairness, 3.19 Resources and 7.1 The Commission's role in relation to corruption. I have also recommended at **Recommendation [6]** that the Board be able to issue guidelines to the Commission staff to ensure that they perform their functions in accordance with sound public administration practice and principles, which I think is an appropriate way to deal, if required, with matters of concern about the manner in which Commission staff have conducted their business.

- 9.4 Some of the issues raised by the authors of these submissions betray misconceptions about where remedies not available under the Act may be more profitably pursued. Disappointment in a Ministerial or other administrative decision may engender a belief that the outcome resulted from some form of foul play. If a complaint to the Commission in turn results in dismissal due to the absence of tangible proof of misconduct, a remedy may yet be available under the *Ombudsman Act 1978*, or the *Judicial Review Act 2000*, or the *Public Interest Disclosure Act 2002* as discussed at paragraph 3.1.20.
- 9.5 Given the definition of misconduct in the Act some matters of complaint fail to enliven the jurisdiction of the Commission. There are many actions which some may criticise as less than perfect and may merit comment in the public and political arenas, but which are not only not within the jurisdiction of the Commission but are not, on any reasonable view, sufficiently injurious and contrary to the public interest to be included in the Commission's remit by an expanded definition of "misconduct" or "corruption". Still other complaints arise because planning decisions and the like which a complainant finds objectionable are not made the subject of appeals under planning law and are pursued in the wrong forum.
- 9.6 In relation to appropriate complaint mechanisms for people aggrieved by decisions of the Integrity Commission staff, I make the following observations. I think it is open to the Board to undertake an administrative review as part of its role which, if my **Recommendation [6]** is accepted, by section 13(a) would include to:
- “ Facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that the chief executive officer and the staff of the Integrity Commission perform their functions in accordance with sound public administration practice and principles and the objectives of this Act and by issuing such guidelines to them as it considers appropriate.”*
- 9.7 Further, the Ombudsman under the *Ombudsman Act 1978* is able to investigate any administrative action taken by or on behalf of a public authority, or any matter that the Ombudsman has power to deal with under this Act that is referred to the Ombudsman by the Commission. The Commission is a public authority for the purpose of the Ombudsman Act (s 4(1)) and its actions are not excluded from investigation by the Ombudsman by virtue of clause 6 of Schedule 2 to that Act, except for the action taken by an Integrity Tribunal. If my **Recommendation [1]** is accepted the Ombudsman will not be a member of the Board of the Commission, removing any potential conflict of interest in him or her undertaking such an investigation.
- 9.8 Apart from a decision made by the CEO in relation to a determination to dismiss a complaint under section 38 of the Act, and a report of an assessor under section 37 of the Act recommending that a complaint be dismissed under section 36 (see clause 4A and 4B to Schedule 1 of the *Judicial Review Act 2000*), the provisions of that Act also apply to decisions of the Commission.
- 9.9 The JSC is prevented from reviewing decisions of the Commission to investigate, not investigate or discontinue an investigation, or inquire into or not inquire into a particular complaint, and making findings, recommendations, determinations or decisions in relation to a particular investigation or inquiry of a complaint. However it

is empowered to monitor and review the performance of the functions of an integrity entity, including the Commission, and so it can consider general issues about the manner in which the Commission conducts its business.

- 9.10 I would urge the Commission, where complaints are dismissed, to acquaint the complainant with the possibility of alternative remedies and to seek legal advice. I do not consider it appropriate to impose a legal obligation on the Commission to do so and thereby impose something akin to the legal practitioner's duty of care to his client when advising the latter.
- 9.11 The submissions including those which I do not release publicly will be delivered with this report to the Minister on a confidential basis.

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## **ACKNOWLEDGEMENTS**

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I would like to express my appreciation to a number of people who have been of great assistance to me in the preparation of this Report. I thank the Hon the Chief Justice for kindly permitting me the use of a spare set of Chambers at the Supreme Court and access to the Judges' Library. I thank Ms Ann-Marie Nuttall, Executive Assistant at the Judges' Chambers for typing the Report in its many iterations. I thank the President of the Legislative Council and the Speaker of the House of Assembly for granting me the use of a Committee Room to hear oral evidence and providing the services of Hansard, and Mr Todd Buttsworth, Second Clerk-Assistant in the House of Assembly for facilitating the process of conducting hearings. Lastly I express my gratitude to Mr Philip Foulston who has been my Executive Officer and who has provided me with invaluable administrative assistance.

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## **1 SUBMISSIONS TO THE FIVE YEAR REVIEW**

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Written submissions were received from twenty nine entities or individuals.

Auditor-General  
Bell, C  
Bugg AM QC, D  
Clerk of the House of Assembly  
Cook, A  
CPSU  
Department of Treasury and Finance  
Director of Public Prosecutions  
Fitch, I  
Forsyth, J  
Hilkemeijer, A and Stokes, M  
Integrity Commission  
Joint Standing Committee on Integrity  
Law Society of Tasmania  
Local Government Association Tasmania  
Malpas, J  
Mars, M  
Marsh, J  
Ombudsman  
Parliamentary Standards Commissioner  
Police Association of Tasmania  
Queensland Integrity Commissioner  
Tasmanian Government  
Tasmanian Greens  
Tasmanian Labor Party  
Tasmania Police  
Todd, G  
University of Tasmania

One other person who made a written submission requested that it remain confidential.

The following entities and individuals made oral submissions:

Bugg AM QC, D  
Director of Public Prosecutions  
Integrity Commission

Law Society of Tasmania  
Tasmanian Labor Party  
Todd, G

## 2 TECHNICAL ISSUES WITH LEGISLATION IDENTIFIED BY THE INTEGRITY COMMISSION

	Section	Content	Technical Issue	Integrity Commission Recommendation
1	S 4(1)	<p><b>'premises of a public authority'</b> means premises at which the business or operations of the public authority are conducted'</p> <p>[and see s 50 and s 72]</p>	<p><b>'premises of a public authority'</b> 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.</p> <p>Premises as defined in the <i>Search Warrants Act 1997</i> specifically refer to 'a place and a conveyance'.</p> <p>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.</p>	<p>Amend the definition of <b>'premises of a public authority'</b>, s 4(1) to be consistent with the <i>Search Warrants Act 1997</i>, such that a conveyance (vehicle) owned, leased or used by a public authority could be entered under s 50 or s 72</p>
2	S 16(3)	<p>Delegations by the Board – 'Section 23AA(2), (3), (4), (5) and (8) of the <i>Acts Interpretation Act 1931</i> apply to a delegation made under subsection (1)'</p>	<p>The reference to particular sections of the power to delegate in the <i>Acts Interpretation Act 1931</i>, provides uncertainty as to whether other sections of the <i>Acts Interpretation Act 1931</i> 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 <i>Acts Interpretation Act</i> 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).</p>	<p>Amend s 16 to make it clear that all of s23AA of the <i>Acts Interpretation Act 1931</i> applies.</p>
3	S 21	<p><b>Authorised persons</b></p> <p>(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</p>	<p>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</p>	<p>Amend s 21(1) and (2) so that persons undertaking any work for the Commission, irrespective of whether they are exercising a power or function, can be Authorised.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>Commission.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(7) While undertaking work on behalf of the Integrity</p>	<p>service basis]. Both IT and transcription staff have access to confidential material created or used by the Commission.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>This should be read in conjunction with the limitations under s 94 &amp; 95.</p> <p>See for example:  <i>S 35, 36 &amp; 37 of the Independent Broad-Based Anti-Corruption Act 2011 (Vic)</i></p> <p>-----</p> <p>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</p>	<p>-----</p> <p>Amend s 21(4) and (5) so that arrangements can be made with the Commissioner of Police or a</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p>	<p>assessment phase nor if there is an own motion investigation pursuant to s45 or 89.</p> <p>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).</p> <p>This is contrasted to interstate integrity entities who are not so limited, for example –</p> <ul style="list-style-type: none"> <li>○ Ability to engage persons or bodies to perform services – s 17, <i>Police Integrity Act 2008</i> (Vic)</li> <li>○ Ability to second or otherwise engage persons to assist the Commission – s181, <i>Corruption and Crime Commission Act 2003</i> (WA)</li> <li>○ Ability to second persons – s 255 <i>Crime and Misconduct Act 2001</i></li> </ul>	<p>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 inquiry.</p>
4	S 26	<p><b>Report to Parliament</b></p> <p>(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.</p> <p>(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</p>	<p>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 <i>State Service Act 2000</i>, 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.</p>	<p>Amend either or both s 11 and s 26 so that there is sufficient time for the JSC to consider the report of each integrity entity before having to prepare its own report.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>and the Clerk of the House of Assembly.</p> <p>(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.</p> <p>(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.</p>		
5	S 30(a)	<p>The chief executive officer is to –</p> <p>(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</p> <p>(b) ...</p>	<p>The Parliamentary disclosure of interests register is prescribed under Part 4 of the <i>Parliamentary (Disclosure of Interests) Act 1996</i>. 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.</p> <p>'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.</p>	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.
6	S 32	<p><b>Public officers to be given education and training relating to ethical conduct</b></p> <p>(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.</p> <p>(2) In particular, the education and training must relate to –</p>	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).	Amend s 32 to require public authorities to report each year on education and training in relation to ethical conduct.

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>(a) the operation of this Act and any Act that relates to the conduct of the public officer; and</p> <p>(b) the application of ethical principles and obligations to public officers; and</p> <p>(c) the content of any code of conduct that applies to the public authority; and</p> <p>(d) the rights and obligations of public officers in relation to contraventions of any code of conduct that applies to public officers.</p>	<p>See for example:</p> <p><i>Right to Information Act 2009</i> s 53 – Reporting</p> <p><i>Public Interest Disclosures Act 2006</i> s 86 – Annual reports by public body</p> <p>Employment Direction No 28 – Family Violence – Workplace arrangements and requirements. Reports to SSMO each year.</p>	
7	S 35(1)(d) & s 38(1)	<p>‘Recommend to the Board that the Board recommend to the Premier that a commission of inquiry be established under the <i>Commissions of Inquiry Act 1995</i> in relation to the matter’</p> <p>-----</p> <p><b>Actions of chief executive officer on receipt of assessment</b></p> <p>38(1) On receipt of a report from an assessor prepared under section 37, the chief executive officer is to make a determination –</p> <p>....</p>	<p>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.</p>	<p>Amend the Act so that the CEO can recommend to the Board that a commission of inquiry be established at any stage of the complaint process, rather than wait until completion of the process. This may involve consequential amendments to s35, 38, 57 and 58.</p>
8	S 35(2)	<p>‘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’</p>	<p>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.</p>	<p>Amend s 35(2) to remove the inconsistency with s 37, and the limitation on an assessor to only assess a complaint for determination of accepting for investigation.</p>
9	S 35(1)(c) & s 38(1)(b) –	<p><b>Referral of complaints</b></p> <p>35(1) On receipt of a complaint, the chief executive officer</p>	<p>The Commission is able to exercise its powers under Part 6 (ie the power to produce documents in s 47) when a</p>	<p>Amend Part 5 and Part 6 so that the Commission retains</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
	(f) inclusive & ss 39 – 43 inclusive	<p>may –</p> <p>...</p> <p>(c) refer the complaint to an appropriate person for action; or</p> <p>-----</p> <p>38(1) On receipt of a report from an assessor prepared under section 37, the chief executive officer is to make a determination –</p> <p>...</p> <p>(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</p> <p>(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</p> <p>(d) to refer the complaint to which the report relates, any relevant material and the report to an appropriate Parliamentary integrity entity; or</p> <p>(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</p> <p>(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</p>	<p>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.</p> <p>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.</p>	<p>jurisdiction over a complaint, even after referral to an appropriate person or entity for action, such jurisdiction to include the use of powers.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
10	S37(1)	'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'	The reference to a 'review' by an assessor in s 37 is the only time a review is mentioned, in the context of an assessment of a complaint. It is confusing having regard to the use of the term 'review' in the definition of 'audit' in s 4(1), and the further use of the term 'review' in s 88(2)(a) which refers to the Commissioner of Police giving reasonable assistance to the Commission to undertake a review. Further, it is noted that s 35(2) confines the actions of the CEO to accepting a complaint for assessment and the appointment of an assessor to an assessment, both actions without reference to a 'review of a complaint'.	Amend s 35 to enable the CEO, on receipt of a complaint to 'review a complaint', and to appoint an assessor to 'review a complaint', or alternatively amend the reference to 'review' in s 37, and include a definition to reduce confusion as to an assessor's functions and powers.
11	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 ...'	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.	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 apparent.
12	S 38 (1) (b)(c)(d) (e) & (f)	'to refer the complaint to which the report relates, any relevant material and the report...'	'The report' referred to is s 38 is the report prepared by an assessor under s 37. It is an internally generated document which frequently contains sensitive information. Providing a copy of the assessor's report may compromise the evidence referred to in the report, particularly if the misconduct is ongoing. The reference material provided by the Commission should be discretionary such that a copy of the actual written complaint, and the assessor's report can be withheld if deemed appropriate by the CEO. Accordingly only relevant material should be referred by the Commission.	Amend s 38 to make it clear that the CEO does not have to refer the assessor's report to the agency but, rather, is only required to refer material relevant to the misconduct allegations and the Commission's assessment of those allegations.
13	S 38(2)	'The chief executive officer is to give written notice of his or her determination under subsection (1) to the principal officer of any relevant public authority and may...'	The CEO's determination under subsection (1) includes dismissal of a complaint, or that the Commission investigate the complaint. While the dismissal of a complaint may be information which assists a public authority to build	Amend s 38 so that it is consistent with s 44 such that written notice of the CEO's determination is discretionary.

	Section	Content	Technical Issue	Integrity Commission Recommendation
			<p>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.</p> <p>This section should be contrasted with s 44(2) where written notice of the determination to investigate is discretionary.</p>	
14	S 39(2)	<p>'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.</p> <p>(2) The chief executive officer may also –</p> <p>(a) require the relevant public authority to provide progress reports on the investigation at such times as the chief executive officer considers necessary; or</p> <p>(b) monitor the conduct of the investigation; or</p> <p>(c) audit the investigation after it has been completed'</p>	<p>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.</p> <p>'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.</p> <p>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.</p>	<p>Amend s39 so that the language is consistent with s 42 &amp; 43, to enable the Commission to monitor the investigation rather than the 'conduct of the investigation'.</p> <p>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.</p>
15	S 42(2) & 43(2)	<p>The chief executive officer may also –</p> <p>(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</p> <p>(b) monitor the investigation; or</p> <p>(c) audit the investigation after it has been completed.</p>	<p>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.</p>	<p>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.</p>
16	S 44(2)	<p>'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 –</p>	<p>This section, although discretionary, appears unnecessary given the obligations (both directory and discretionary) under s 38(2) [noting the recommendations in relation to s</p>	<p>Amend s 44 so that it is consistent with s 38 and that any discretionary notice by the</p>

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		<p>(a) the principal officer of any relevant public authority; and</p> <p>(b) the complainant; and</p> <p>(c) any public officer who is the subject of the complaint –</p> <p><u>that an investigator has been appointed to investigate the complaint'</u></p>	<p>38].</p> <p>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.</p>	<p>Commission about a determination is comprised of relevant material.</p>
17	S 46(1)(c) S 55(1)	<p><b>46 Procedure on investigation</b></p> <p>(1) Subject to this Act and any directions issued by the chief executive officer under subsection (4), an investigator –</p> <p>(a) may conduct an investigation in any lawful manner he or she considers appropriate; and</p> <p>(b) may obtain information from any persons in any lawful manner he or she considers appropriate; and</p> <p>(c) must observe the rules of procedural fairness; and</p> <p>(d) may make any investigations he or she considers appropriate.</p> <p>-----</p> <p><b>55. Investigator's report</b></p> <p>(1) On completion of an investigation, the investigator is to prepare a report of his or her findings for the chief executive officer.</p> <p>(2) The chief executive officer is to submit a report of the investigation to the Board.</p>	<p>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).</p> <p>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.</p> <p>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</p>	<p>Amend s 46 with respect to the mandatory obligations to observe the rules of procedural fairness during the investigation/assessment stage of a complaint.</p>

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			<p>concerned.</p> <p>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.</p> <p>The obligations for procedural fairness during the investigation/assessment stage can be contrasted with other integrity agencies.</p> <p>See for example:</p> <p><i>Law Enforcement Integrity Commissioner Act 2006</i> (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.</p> <p><i>Independent Commission Against Corruption Act 1988</i> (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.</p> <p><i>Corruption and Crime Commission Act 2003</i> (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.</p>	
18	S 47	‘In conducting an investigation under <u>section 46(1), the investigator</u> , by written notice given to a person, may require or direct the person to do any or all of the following...’	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	Amend s 47 so that notices are issued by the CEO consistent with s 50 where an authorisation must be from the CEO. Having s 47 notices issued by the CEO is consistent with the exercise of similar powers in other integrity jurisdictions.

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			<p>integrity jurisdictions.</p> <p>See for example:</p> <p><i>Corruption and Crime Commission Act 2003</i> (WA) s95 ('The Commission')</p> <p><i>Crime and Misconduct Act 2001</i> (Qld) s72 (The chairperson)</p> <p><i>Law Enforcement Integrity Commissioner Act 2006</i> (Cwth) ('The Integrity Commissioner')</p>	
19	S 49	'A person required or directed to give evidence or answer questions as part of an investigation may be represented by a legal practitioner <u>or other agent</u> '	<p>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.</p> <p>Other integrity jurisdictions enable the agency to refuse representation by someone who is involved or otherwise compromised.</p> <p>See for example:</p> <p><i>Corruption and Crime Commission Act 2003</i> (WA) s142(4)</p> <p><i>Police Integrity Act 2008</i> s76(2)</p>	Amend s 49 in line with other integrity entities, so the Commission can refuse representation by a particular person (whether as a legal practitioner or other agent) who is already involved or suspected of being involved in an investigation.
20	S 51	<p>(1) For the purpose of conducting an investigation, an investigator may apply to a magistrate for a warrant to enter premises.</p> <p>(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.</p> <p>(3) A search warrant authorises an investigator and any person assisting an investigator –</p> <p>(a) to enter the premises specified in the warrant at</p>	<p>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.</p> <p>And see:</p> <p><i>Search Warrants Act 1997</i> s6</p>	Amend s 51 so that the powers authorised by a search warrant are consistent with those stated in the warrant.

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		<p>the time or within the period specified in the warrant; and</p> <p>(b) to exercise the powers in section 52.</p> <p>(4) The warrant must state –</p> <p>(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</p> <p>(b) the reason for which the warrant is issued; and</p> <p>(c) the hours when the premises may be entered; and</p> <p>(d) the date, within 28 days after the day of the warrant's issue, of the warrant's expiry.</p> <p>(5) .....</p> <p>(6) Except as provided in this section, the provisions in respect of search warrants under the <i>Search Warrants Act 1997</i> extend and apply to warrants issued under this section.</p>		
21	S 52	<p>(1) An investigator or any person assisting an investigator who enters premises under this Part may exercise any or all of the following powers:</p> <p>...</p> <p>(j) to require or direct any person who is on the premises to do any of the following:</p> <p>(i) to state his or her full name, date of birth and address;</p> <p>(ii) to answer (orally or in writing) questions asked by the investigator relevant to the investigation;</p> <p>(iii) to produce any record, information, material or thing;</p>	<p>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.</p> <p>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.</p>	<p>Amend s 52 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.</p>

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		(iv) to operate equipment or facilities on the premises for a purpose relevant to the investigation;  ...		
22	S 52(3)	<b>Powers of investigator while on premises</b>  ... (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.	The requirement to issue a receipt in a form approved by the Board seems inconsistent with Part 6 of the Act. For example during an investigation the power to enter premises under s 50 is only available with a written notice of authorisation from the chief executive officer and similarly, the chief executive officer must approve an application for use of a surveillance device under s 53.  Furthermore, the form of a receipt is an operational matter, with such matters properly vested in the chief executive officer, in accordance with s 18 of the Act.	Amend s 52 to be consistent with the remainder of Part 6, such that the form of a receipt is approved by the chief executive officer.
23	S 52(4) [and s 51(4)(a)]	<b>52. Powers of investigator while on premises</b> (4) An investigator and any assistants authorised to enter premises under a search warrant <u>may use such force as is reasonably necessary for the purpose of entering the premises and conducting the search.</u>  <b>51. Search warrants</b> (4) The warrant must state – (a) that the investigator and any person assisting the investigator may, <u>with any necessary force, enter the premises and exercise the investigator's powers under this Part;</u>	The wording of s 52(4) is inconsistent with s 51(4)(a), which on its face indicates that necessary force can be used to exercise powers under Part 6.	Amend s 52 with respect to the use of force so that the language of the force necessary and its purpose is consistent with the use of force in s 51 for the exercise of powers under Part 6.
24	S 53(1)	In the case of <u>a complaint</u> of serious misconduct, an investigator with the approval of the chief executive officer may apply for a warrant under Part 2 of the <i>Police Powers (Surveillance Devices) Act 2006</i> ...	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.	Amend s 53 to enable a warrant to be applied for under Part 2 of the <i>Police Powers (Surveillance Devices) Act 2006</i> where there is a complaint, as well as an own

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				motion investigation under s 45 or s 89, subject to the own motion investigation concerning serious misconduct.
25	S 53(2)	Division 3 of Part 5 of the <i>Police Powers (Surveillance Devices) Act 2006</i> applies to the Integrity Commission as if the Integrity Commission were a law enforcement agency within the	Section 53(2) of the Act makes the Commission's records in relation to surveillance devices warrants subject to inspection by the Ombudsman as if the Commission was a law enforcement agency under the Police Powers Act, but does not impose any obligation on the Commission to maintain the same records as law enforcement agencies are required to do. The Commission, having consulted with the Ombudsman, has written to the Minister for Justice raising the issue.  The same issue is replicated in s 75, which enables an application for a surveillance device during an inquiry.	The issue of appropriate amendments to s 53 and/ or the <i>Police Powers (Surveillance Devices) Act 2006</i> was raised with the Department of Justice for consideration in September 2012.  Consider similar amendments to s 75.
26	S 54	<b>Offences relating to investigations</b>  (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.	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).	Amend s 54 to make it clear that the threat of violence or other detriment is included as an offence.  In addition the offences should extend to any matter related to a complaint, be it during an investigation or assessment (where an assessor may exercise the powers of an investigator), and irrespective of whether it involves an investigator or a person assisting an investigator or assessor (including a person authorised under s 21).

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		<p>(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.</p> <p>Penalty: Fine not exceeding 2 000 penalty units.</p>	<p>And see: <i>Independent Commission Against Corruption Act 1988</i> (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...’) <i>Public Interest Disclosures Act 2002</i> s19 (‘...the person takes or threatens to take the action...’) <i>Corruption and Crime Commission Act 2003</i> (WA) s175 - (‘...threaten to prejudice the safety...’)</p>	
27	S 55(1)	On completion of an investigation, the investigator is to <u>prepare a report of his or her findings</u> for the chief executive officer.	The investigator should prepare a report of the investigation, which sets out the factual material obtained by the investigation, rather than findings (which suggests that judgments and decisions arising from factual material). The investigator is not the appropriate person to be making such decisions or judgments.	Amend s 55 to provide that the investigator should prepare a report of the investigation to the CEO.
28	S 56(1) & 57(1)	<p><b>56. Opportunity to provide comment on report</b></p> <p>(1) Before finalising any report for submission to the Board, the chief executive officer may, if he or she considers it appropriate, <u>give a draft of the report</u> to –</p> <p>(a) the principal officer of the relevant public authority; and</p> <p>(b) the public officer who is the subject of the investigation; and</p> <p>(c) any other person who in the chief executive officer's opinion has a special interest in the report.</p> <p>(2) A notice may be attached to a draft of a report specifying that the draft of the report is a confidential document.</p>	<p>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.</p> <p>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.</p> <p>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</p>	Amend s 56(1) so that the CEO need only provide relevant information on the outcome of the investigation to public authorities etc & 57 so that the CEO is required to provide to the Board a report on the outcome of the investigation (rather than the investigator’s report itself) and has capacity to make observations and recommendations on the investigation and future action.

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		<p>(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.</p> <p>(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.</p> <p>(5) Section 98 applies to a notice under subsection (2) if the notice provides that the draft of the report is a confidential document.</p> <p>-----</p> <p><b>57. Report by chief executive officer</b></p> <p>(1) The chief executive officer is to give to the Board a report of the investigation that includes –</p> <p>(a) the investigator's report; and</p> <p>(b) submissions or comments given under section 56; and</p> <p>(c) a recommendation referred to in subsection (2).</p>	<p>authority/ongoing investigations).</p> <p>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.</p> <p>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).</p>	
29	S 56(2) & (5)	<p>(2) A notice may be attached to a draft of a report specifying that the draft of the report is a confidential document.</p> <p>.....</p> <p>(5) Section 98 applies to a notice under subsection (2) if the notice provides that the draft of the report is a confidential document.</p>	<p>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].</p>	<p>Amend s 56 to make it clear that the obligations of confidentiality imposed by s 98 apply to the draft report, not just the notice accompanying the report. Consequential amendment may need to be considered for s 98 so that it applies not just to the notice, but to any relevant documentation the notice is attached to.</p>

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				(And see the discussion re s 98)
30	S 57(2)(b) & s 58(2)(b)	<p><b>57. Report by chief executive officer</b></p> <p>(2) The chief executive officer is to recommend –</p> <p>(b) that the <u>report of any findings</u> and any other information obtained in the conduct of the investigation be referred to –</p> <p>-----</p> <p><b>58. Determination of Board</b></p> <p>(2) The Board may –</p> <p>(b) refer the <u>report of the investigation</u> and any information obtained in the conduct of the investigation to –</p>	<p>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.</p> <p>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.</p> <p>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.</p>	Amend s 57 and 58 so that the recommendation which can be made by the CEO to the Board and any decision by the Board, about what material is referred is discretionary (for example, that only certain material arising from the investigation is referred for action to some agencies but not to others). In particular, the investigator’s report should not automatically be referred nor should any recommendation by the CEO to the Board form part of the material that might be referred.
31	S 58(2)(a)	<p>(2) The Board may –</p> <p>(a) dismiss <u>the complaint</u>; or</p>	The investigation considered by the Board may be an own motion investigation commenced under s 45 or 89 – the inconsistent language means that an own motion investigation can’t be dismissed after consideration by the Board, but it also provides no other closure for an own motion investigation if the outcome is not to continue – that is, if the own motion investigation will not be referred or further investigated, nor proceed to an inquiry.	Amend s 58(2) to enable the Board to both dismiss a complaint and/or cease an own motion investigation where further referral, investigation or an inquiry is not appropriate.

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32	S68	<p><b>Directions conference</b></p> <p>(1) Before an inquiry is held, an Integrity Tribunal may conduct a directions conference in relation to the inquiry.</p> <p>(2) An Integrity Tribunal, by written notice, may require or direct any person to –</p> <p>(a) attend a directions conference; and</p> <p>(b) provide and produce any specified record, information, material or thing at a directions conference.</p> <p>(3) A person, without reasonable excuse, must not fail to comply with a requirement or direction notified under subsection (2).</p> <p>Penalty: Fine not exceeding 10 penalty units.</p> <p>(4) A directions conference is to be held in private.</p> <p>(5) An Integrity Tribunal may give any directions it considers necessary to ensure that the inquiry is conducted fairly and expeditiously.</p> <p>(6) An Integrity Tribunal may adjourn a directions conference from place to place and from time to time.</p>	<p>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:</p> <ul style="list-style-type: none"> <li>○ S 52(5) – 2 000 penalty units</li> <li>○ S 54(1) – 5 000 penalty units</li> <li>○ S 74(5) – 2 000 penalty units</li> <li>○ S 80(5) – 5 000 penalty units</li> </ul>	<p>Amend s 68 so that the penalty is consistent with other penalties in the Act.</p>
33	S 74(1)	<p><b>Powers of inquiry officer while on premises</b></p> <p>(1) An inquiry officer who enters premises under this Part may exercise any or all of the following powers:</p> <p>...</p>	<p>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</p>	<p>Amend s 74(1) and (2) to enable persons assisting an inquiry officer to exercise the relevant powers, in accordance with the terms of the warrant applied for under s 73.</p>

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			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'.	
34	S 74(3)	<p><b>Powers of inquiry officer while on premises</b></p> <p>...</p> <p>(3) If an inquiry officer takes anything away from the premises, the inquiry officer <u>must issue a receipt in a form approved by the Integrity Commission</u> and –</p> <p>...</p>	<p>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.</p> <p>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.</p>	Amend s 74(3) so that the receipt is in a form approved by the chief executive officer, or the Chief Commissioner or the relevant Integrity Tribunal.
35	S 74(1)	<p>(j) require or direct any person who is on the premises to do any or all of the following:</p> <p>(i) to state his or her full name, date of birth and address;</p> <p>(ii) to answer (orally or in writing) questions asked by the inquiry officer relevant to the inquiry;</p> <p>(iii) to produce any record, information, material or thing;</p> <p>(iv) to operate equipment or facilities on the premises for a purpose relevant to the inquiry;</p> <p>(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;</p> <p>(vi) to give other assistance the inquiry officer</p>	<p>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.</p> <p>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.</p>	Amend s 74 so that the confidentiality provisions under s 98 will extend to persons on premises and afford them the protection associated with confidentiality if they are required or directed to respond to an inquiry officer.

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		reasonably requires to conduct the inquiry;  ...		
36	S 78(1) &(2)	<p>(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.</p> <p>(2) An Integrity Tribunal may do any one or more of the following:  (a) dismiss <u>the complaint</u>;</p>	<p>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'.</p> <p>An own motion investigation which is the subject of an Integrity Tribunal cannot be dismissed under subsection (2).</p>	<p>Amend s 78 and consider any relevant consequential amendments to s 58 so that the language as to what the function of an inquiry undertaken is consistent.</p> <p>Consider whether there should be an opportunity to dismiss or otherwise cease further consideration of an investigation which arose from an own motion investigation.</p>
37	S 80	<p><b>Offences relating to Integrity Tribunal</b></p> <p>(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 <u>to the Integrity Tribunal</u>.</p> <p>Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.</p> <p>(2) A <u>person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage</u> in relation to another person for or on account of –</p> <p>(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</p> <p>(b) any evidence given by that other person before</p>	<p>An Integrity Tribunal is defined under s 4 to mean a Tribunal convened under s 60 (and which appears to be restricted to the persons who comprise the actual tribunal), but does not include an inquiry officer. Offences against inquiry officers are dealt with separately at s 81. However Part 7, which deals with inquiries by an Integrity Tribunal also refers to 'a person designated by the Integrity Tribunal' – s 71(1)(b) and appointing other persons to take evidence to be provides to the Integrity Tribunal – s71(2). The Act does not capture offences which might occur against anyone other than the Tribunal members and inquiry officers.</p> <p>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.</p>	<p>Amend s 80 to include offences against persons other than the Tribunal members, or inquiry officers, and make it clear that the threat of violence or other detriment is included as an offence.</p>

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		<p>an Integrity Tribunal or any record, information, material or thing produced or surrendered by that other person to an Integrity Tribunal.</p> <p>Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.</p> <p>...</p>		
38	S 81	<p><b>Offences relating to inquiry officers</b></p> <p>(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.</p> <p>Penalty: Fine not exceeding 5 000 penalty units.</p> <p>(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.</p> <p>Penalty: Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.</p> <p>(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.</p> <p>Penalty: Fine not exceeding 5 000 penalty units.</p>	<p>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.</p> <p>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).</p>	<p>Amend s 81 to make it clear that the threat of violence or other detriment is included as an offence.</p> <p>Ensure that offences against persons assisting, appointed or designated in addition to inquiry officers, are captured</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
39	S 87	<p><b>Investigation or dealing with misconduct by designated public officers</b></p> <p>(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.</p> <p>(2) In assessing, investigating, inquiring into or otherwise dealing with a complaint under subsection (1), the Integrity Commission may have regard to –</p> <p>(a) established procedures or procedures of the relevant public authority; and</p> <p>(b) any codes of conduct relevant to the designated public officer who is the subject of the complaint; and</p> <p>(c) any statutory obligations or relevant law relating to that designated public officer.</p>	<p>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.</p> <p>The obligation to investigate every complaint involving a designated public officer will be onerous, and is an unintended consequence of the December 2011 amendment.</p>	Amend s 87 to include a reference to Part 5, so that the Commission is able to deal with a complaint about a DPO consistently with other complaints.
40	S 94	<p><b>94. Information confidential</b></p> <p>(1) This section applies to a person who is or has been –</p> <p>(a) a member of the Board; or</p> <p>(b) the Parliamentary Standards Commissioner; or</p> <p>(c) an officer or employee of the Integrity Commission; or</p> <p>(d) a person authorised or appointed under section 21 to undertake work on behalf of the Integrity Commission; or</p> <p>(e) an assessor or investigator; or</p> <p>(f) a member of the Joint Committee; or</p> <p>(g) a member of an Integrity Tribunal; or</p> <p>(h) an inquiry officer or other person appointed to assist an Integrity Tribunal.</p>	<p>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</p>	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.

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			is a state servant.	
41	S 95	<p><b>95. Protection from personal liability</b></p> <p>(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:</p> <ul style="list-style-type: none"> <li>(a) the Board;</li> <li>(b) any members of the Board;</li> <li>(c) the Parliamentary Standards Commissioner;</li> <li>(d) an Integrity Tribunal;</li> <li>(e) any persons appointed to assist the Integrity Tribunal;</li> <li>(f) legal representatives of any witness at an inquiry;</li> <li>(g) the chief executive officer;</li> <li>(h) an assessor, investigator or inquiry officer;</li> <li>(i) officers and employees of the Integrity Commission;</li> <li>(j) any persons authorised or appointed under section 21 to undertake work on behalf of the Integrity Commission.</li> </ul>	<p>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.</p>	<p>Amend s 95 to protect personnel from personal liability where they undertake work involving sensitive or confidential information, for the Commission or Tribunal but do not actually exercise a power or function</p>
42	S 96	<p><b>96. False or misleading statements</b></p> <p>A person, in making a complaint, giving any information or advice or producing any record under this Act, must not –</p> <ul style="list-style-type: none"> <li>(a) make a statement knowing it to be false or misleading; or</li> <li>(b) omit any matter from a statement knowing that without that matter the statement is false or misleading.</li> </ul>	<p>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.</p> <p>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)</p> <p>The language used in s 47 is to provide information or</p>	<p>Amend s 96 so that it is clear that a person who makes a false or misleading statement or omits any matter from a statement knowing that it would then be false or misleading, in compliance with a requirement or direction under the Act, commits an offence.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>Penalty:</p> <p>Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.</p>	<p>explanation, to attend and give evidence and to produce. In s 52(1)(j) a person is required to answer or to produce or to give other assistance. Similar considerations apply to the giving of evidence before an integrity tribunal under s 71.</p>	
43	S 97	<p><b>97. Destruction or alteration of records or things</b></p> <p>A person must not knowingly destroy, dispose of or alter any record or thing required to be produced under this Act for the purpose of misleading <u>any investigation or inquiry</u>.</p> <p>Penalty:</p> <p>Fine not exceeding 5 000 penalty units or imprisonment for a term not exceeding one year.</p>	<p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p>
44	S 98	<p><b>98. Certain notices to be confidential documents</b></p> <p>(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 –</p> <p>(a) the existence of the notice; or</p> <p>(b) the contents of the notice; or</p> <p>(c) any matters relating to or arising from the notice –</p> <p>unless the person on whom the notice was served or to whom the notice was given has a reasonable excuse.</p> <p>Penalty:</p> <p>Fine not exceeding 2 000 penalty units.</p> <p>(1A) A person to whom the existence of a notice that is a confidential document was disclosed must not</p>	<p>Refer to Point 25, which is also concerned with confidentiality provisions under s 98.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>Amend s 98 so that the Commission can ensure confidentiality over its actions beyond the notices referred to at particular sections of the Act.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		<p>disclose to another person –</p> <ul style="list-style-type: none"> <li>(a) the existence of that notice; or</li> <li>(b) the contents of the notice; or</li> <li>(c) any matters relating to or arising from the notice –</li> </ul> <p>unless the person to whom the existence of the notice was disclosed has a reasonable excuse.</p> <p>Penalty: Fine not exceeding 2 000 penalty units.</p> <p>(1B) For the purposes of subsections (1) and (1A), matters relating to or arising from a notice include but are not limited to –</p> <ul style="list-style-type: none"> <li>(a) obligations or duties imposed on any person by the notice; and</li> <li>(b) any evidence or information produced or provided to the Integrity Commission or an Integrity Tribunal; and</li> <li>(c) the contents of any document seized under this Act; and</li> <li>(d) any information that might enable a person who is the subject of an investigation or inquiry to be identified or located; and</li> <li>(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</li> <li>(f) any other matters that may be prescribed.</li> </ul> <p>(2) It is a reasonable excuse for a person to disclose the existence of a notice that is a confidential document if –</p>	<p>Commission is currently unable to require confidentiality in accordance with s 98.</p>	

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		<p>(a) the disclosure is made for the purpose of –</p> <p>(i) seeking legal advice in relation to the notice or an offence against subsection (1); or</p> <p>(ii) obtaining information in order to comply with the notice; or</p> <p>(iii) the administration of this Act; and</p> <p>(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.</p> <p>(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.</p> <p>(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.</p>		
45	S 99	<p><b>99. Injunctions</b></p> <p>(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 –</p> <p>(a) an investigation or proposed investigation by an investigator; or</p> <p>(b) an inquiry or proposed inquiry by an Integrity Tribunal.</p> <p>(2) The conduct referred to in subsection (1) does not include conduct relating to a proceeding in</p>	<p>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.</p>	<p>Amend s 99 so that the Commission can seek an injunction restraining any conduct which affects an allegation of misconduct within the jurisdiction of the Commission.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
		Parliament		
46	S 102	<p><b>Personal information may be disclosed to Integrity Commission</b></p> <p>A personal information custodian, within the meaning of the <i>Personal Information Protection Act 2004</i>, 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.</p>	<p>The Commissioner of Police is a personal information custodian within the meaning of the PIP Act.</p> <p>The Commission seeks information from Tasmania Police database on a regular basis. The information is required to enable the Commission to fulfil 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.</p> <p>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.</p> <p>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</p>	<p>Amend the <i>Personal Information Protection Act 2004</i> and/or the IC Act to enable to appropriate Tasmania Police databases.</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
			<p>monitors a matter.</p> <p>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.</p> <p>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.</p> <p>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).</p> <p>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 –</p> <ul style="list-style-type: none"> <li>(a) for the purpose of any of its functions or activities; or</li> <li>(b) for the enforcement of laws relating to the confiscation of the proceeds of crime; or</li> <li>(c) in connection with the conduct of proceedings in any court or tribunal.</li> </ul> <p>The Commission is not a law enforcement agency for the</p>	

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			<p>purposes of the PIP Act (noting however that it is a law enforcement agency for the purposes of the <i>Australian Consumer Law (Tasmania) Act 2010</i>).</p>	

## Technical Issues with other Tasmanian Legislation identified by the Integrity Commission

	Section	Content	Technical Issue	Integrity Commission Recommendation
<b>Corrections Act 1997 - Rights of Prisoners to make a complaint to the Commission</b>				
1	S 29(1)(l)	<p>Rights of prisoners and detainees</p> <p>(1) Every prisoner and detainee has the following rights:</p> <p>...</p> <p>(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;</p>	<p>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 <i>Corrections Act 1997</i> 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.</p> <p>In addition to the Corrections Act, the Ombudsman also has a specific provision in the <i>Ombudsman Act 1978</i>, 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.</p>	<p>Amend s 29(1)(l) of the Corrections Act 1997 to include the Integrity Commission as an exempt entity with respect to correspondence to and from prisoners and detainees.</p> <p>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].</p>

	Section	Content	Technical Issue	Integrity Commission Recommendation
<b>Personal Information Protection Act 2004- Access to data held by Tasmania Police</b>				
2	S 9 & Schedule 1	<p><b>S 9. Law enforcement information</b></p> <p>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 –</p> <ul style="list-style-type: none"> <li>(a) for the purpose of any of its functions or activities; or</li> <li>(b) for the enforcement of laws relating to the confiscation of the proceeds of crime; or</li> <li>(c) in connection with the conduct of proceedings in any court or tribunal.</li> </ul> <p>-----</p> <p><b>Schedule 1</b></p> <p><b>2. Use and disclosure</b></p> <p>(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 –</p> <p>...</p> <ul style="list-style-type: none"> <li>(f) the use or disclosure is required or authorised by or under law; or</li> <li>(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: <ul style="list-style-type: none"> <li>(i) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction;</li> <li>(ii) the enforcement of laws relating to the</li> </ul> </li> </ul>	See the discussion re s 102 of the IC Act.	Amend the <i>Personal Information Protection Act 2004</i> and/or the IC Act to enable to appropriate Tasmania Police databases

	Section	Content	Technical Issue	Integrity Commission Recommendation
		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 <i>Coroners Act 1995</i> ; or		