

Tasmanian Government Submission

Independent review of the *Integrity Commission Act 2009*,
pursuant to section 106

March 2016

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1. Background

In 2008 the Joint Select Committee on Ethical Conduct identified that there was a need for a new entity to address deficiencies in examining alleged breaches of conduct by public officials and to raise standards of ethical conduct through education of public officials and servants.¹ This resulted in the development of the *Integrity Commission Act 2009* (the Act), that was passed by Parliament with the support of all parties.

During the Joint Select Committee's deliberations and in the course of Parliamentary debate on the Integrity Commission Bill, a set of principles was also enunciated by the Government of the day to underpin its model for the Integrity Commission. Those principles are:

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

This Government remains committed to these principles and believes that they should continue to guide the functions of the Commission. In addition, this Government is committed to ensuring that:

- accountability and responsibility for ethical conduct should be primarily vested within agencies and, secondarily, other entities responsible for the identification and/or investigation of misconduct including – Tasmania Police, the Ombudsman, Health Complaints Commissioner, the Auditor-General, State Service Management Office, Parliamentary Committees; and

¹ Parliament of Tasmania, Joint Select Committee on Ethical Conduct, Final Report, *Public Office is Public Trust*, NO. 24, 2009

- there is a triage function to ensure that investigations are not duplicated and entities are clear about who is responsible for the conduct of investigations.

Inquiry of the Joint Standing Committee on Integrity of the Tasmanian Parliament Review of the Functions, Powers and Operations of the Integrity Commission

The Joint Standing Committee on Integrity (the Committee) was required pursuant to section 24(1)(e) of the Act to review the functions, powers and operations of the Integrity Commission at the expiry of three years of operation 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 and powers of the Integrity Commission. This is referred to as the 'Three Year Review'.

The Three Year Review commenced under the previous Government in November 2013. The then Government announced its intention to call an election in January 2014 and the 47th Tasmanian Parliament was prorogued on 12 February 2014. Committee hearings were suspended and following the formation of this Government, a new Committee was constituted which resolved to call for fresh submissions, hear evidence and deliberate on the matters.

The Three Year Review was finalised and laid upon the tables of both Houses of Parliament in June 2015. The Three Year Review contains four dissenting statements from Committee members. The findings and recommendations highlight the complexity of dealing with misconduct by public officials in a robust, appropriate and proportionate manner.

Response by the Tasmanian Government

This Five Year Review, required pursuant to section 106 of the Act, had to commence as soon as possible after 31 December 2015. Given the proximity of the completion of the Three Year Review Report and the commencement of this Review, and the lack of consensus on many of the recommendations made in the Three Year Review Report, the Government only made an interim response, leaving many key issues to be dealt with in this Review.

In that interim response, the Government noted the findings and recommendations of the Three Year Review, in particular that a number of the major policy and legal issues highlighted by the work of the Committee should be considered by this Review.

The Government indicated that it remains committed to the principles set out above in dealing with misconduct in public life. In addition, the Government indicated its commitment to ensuring that:

- the Integrity Commission retains the capacity to conduct investigations, but that the concerns which have been raised by various stakeholders around process, timeliness and interaction with existing investigative processes should be addressed as part of the Five Year Independent Review;
- there remains a focus on educating public officials about misconduct prevention and changing behaviour, where appropriate;
- the Integrity Commission achieves its legislative objectives efficiently and effectively;

- integrity systems operate with openness, transparency and fairness;
- modern public sector employment practices are promoted; and
- the Integrity Commission assists public authorities to carry out their duties with respect to dealing with misconduct and maladministration.

The Government considered that the Integrity Commission should maintain a strong focus on education and prevention in relation to public sector misconduct and work with public entities to:

- strengthen standards of integrity and ethics;
- improve the understanding of misconduct and how to prevent it;
- build capacity to prevent misconduct through risk management and timely intervention; and
- deal effectively with complaints of misconduct through internal complaint handling processes and system changes to address gaps revealed by complaints.

A summary of the Government's response to the key findings and recommendations of the Three year Review is provided at Appendix 1.

2. Terms of Reference for the current review

The terms of reference for this current review are provided by section 106 of the Act that states:

The Minister for Justice must commission an independent review of the 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.*

This submission will address each of the separate terms in turn.

a) **The operation of the Act in achieving its object and the objectives of the Integrity Commission**

The Act provides the object and objectives at section 3:

(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;*
- b) enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and*
- c) enhance the quality of, 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;*
- b) assisting public authorities deal with misconduct;*
- 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*

The Government considers that these objects and objectives remain appropriate.

Parliamentary debate during the passage of the Bill in 2008 established that the primary focus of the Integrity Commission should be on education, training and capacity building to assist public authorities in the prevention of misconduct. The Integrity Commission has developed a range of resources, research material, including case studies and fact sheets, to assist Tasmanian public sector agencies in misconduct prevention through education. These resources have been well received across the State Service and in other public bodies subject to the Integrity Commission's jurisdiction.

The Government believes that accountability and responsibility for ethical conduct should be primarily vested within agencies and, secondarily, other entities responsible for the identification and/or investigation of misconduct. Accordingly, the Integrity Commission's emphasis on research, education, training and awareness-raising should be maintained as its primary focus. The Government maintains that the Integrity Commission should continue to exercise an investigative function, but will address options for reform later in the submission which could address some of the criticisms raised by stakeholders about the current approach.

The Report of the Independent Advisory Panel that conducted the Review of the Crime and Misconduct Act and related matters (Queensland)² noted that the, "...proliferation of agencies concerned with the integrity of government and its activities can lead to a lack of clarity as to which agency has particular responsibilities and therefore a lack of

² Conducted by the Hon Ian Callinan AC and Professor Nicholas Aroney – tabled in the Queensland Parliament on 18 April 2013

accountability by bodies concerned with public sector integrity when there is a serious failure in an agency.”³

The Government will canvass options to improve the co-ordination of the activities of the various Tasmanian integrity agencies later in this submission.

The Independent Advisory Panel continued to make a series of important observations.

“Moreover, there is a tendency, because these numerous agencies have been established to concern themselves with integrity, for the managers within the public sector either to regard themselves as obliged to refer any possible misconduct, no matter how minor and no matter how implausible the complaint might be, to one or more of those bodies. The result is that the manager may in practice be divested of, or abdicate, their fundamental duty to supervise staff. A culture of complaint-making evolves, in which office disputes can be elevated to a level which they do not warrant, the integrity unit themselves become inundated with complaints, the time within which complaints are dealt with become longer, and, ultimately, the integrity bodies become lost in a sea of (often trivial) complaints. The result too often is a loss of perspective, where every complaint is treated as serious or potentially so, with the inevitable consequence of a lack of proportionality in the treatment of them.”⁴

The Government reiterates its objective of ensuring that public agencies in Tasmania follow contemporary public sector practice and assume full responsibility for the conduct of their own staff, including for preventing misconduct and taking primary responsibility for dealing with alleged misconduct by staff. Integrity bodies should support this fundamental responsibility of each public agency. The dangers of doing otherwise have been summarised above.

The Government reaffirms its position that the Integrity Commission’s role should focus primarily on prevention and building investigative capacity in agencies, and only in limited and appropriate cases, conducting investigations of misconduct complaints. Options for ensuring its investigative function is appropriately focussed will be discussed later in this submission.

The role of the Board

There is scope to improve the governance of the Integrity Commission based on experience of the first five years of its operation. The current governance arrangements and legal authorities established under the Act have not proven to be optimal. For example, it would appear that the Board has little opportunity or ability to influence the conduct of assessments and investigations by the Integrity Commission. The Integrity Commission’s discharge of its assessment and investigative functions has been the subject of some criticism in the Three Year Review and elsewhere.

³ Ibid p10

⁴ Ibid p10.

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.

The Act legislates membership of the Board and this is also problematic. The Ombudsman and the Auditor-General are ex-officio Board members, but given their primary statutory roles, they may find themselves in actual or perceived situations of conflict under the current model. This would best be avoided by excluding them from the Board. Their inclusion on the Board was, in large part, to ensure appropriate co-ordination between these bodies and the Integrity Commission. Co-ordination may be achieved in a different manner and this will be elaborated on below in addressing the next ground of review.

The other members of the Board bring particular expertise to the role, however to the extent it needs to, the Integrity Commission can access such expertise via other means.

Part 2, Division 2 of the Act deals with the establishment and role of the Board. The current role of the Board is set out at section 13.

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*
- (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.*

As noted earlier, experience would indicate that the Board has little capacity to discharge its responsibilities under sections 13(a) and (b). As indicated above, the Board only becomes involved in the assessment and investigation functions on receipt of a report from the CEO, under section 57.

The Government intends no criticism of the current Board of the Integrity Commission. While it has played an important role in the establishment and operation of the Integrity Commission over its first five years, its role has been limited by the legislation under which it has operated.

The Government will recommend other reform options to be considered with respect to the exercise of coercive powers and the discharge of investigative functions by the Integrity Commission. This will be expanded on below and in the following section of this submission.

The Government considers that an option for reform of the Integrity Commission to address many of the concerns expressed during the Three Year Review is to amend the Act so that the Chief Commissioner - and not the CEO - has legal authority and responsibility for:

- the authorisation to use the Integrity Commission's coercive powers; and
- oversight of the Integrity Commission's staff in the use of those powers and with respect to its assessment and investigative functions generally.

The CEO would continue to be responsible for the day-to-day management of the Integrity Commission, but with direct accountability to the Chief Commissioner for the conduct of assessments and investigations. Further, under this option the Chief Commissioner would need to be satisfied that the exercise of coercive powers in an assessment or investigation was justified and appropriate in all the circumstances. The Chief Commissioner would be required to specifically and expressly authorise the use of such powers in each instance.

The advantages of this option are that it makes better use of the position of Chief Commissioner, who under the Act chairs the Board and is available for Integrity Panels, but otherwise, like the Board, has little direct power to ensure he/she discharges his/her responsibilities under section 13.

The Government believes this option could include establishing a new position of Inspector-General, to provide independent oversight of the authorisation and use of these extraordinary powers. This legislative option is more consistent with the approaches taken in other jurisdictions and recognises that a senior and highly experienced lawyer should be responsible for authorising the use of coercive powers by an integrity entity and for the conduct of its investigative functions. Further, this recommendation would, in effect, have an independent person to 'watch the watchers', in the form of an Inspector-General.

Oversight would be improved under the proposed arrangement, with the Chief Commissioner having stronger powers and better capacity to exercise those powers with respect to the operation of the Integrity Commission than the current Board enjoys. Further, independent oversight could be provided through the new role of Inspector-General.

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.

If this option were to be recommended, then there are questions about the continuing requirement for a Board and what functions a Board should perform. It may be that a Board is unnecessary given these other changes that could provide more effective oversight of the operation of the Integrity Commission. The CEO, as a head of agency, would continue to

have normal public sector accountabilities regarding financial and human resource management.

An alternative option if a Board is retained is to re-configure its membership, omitting the Ombudsman and the Auditor-General for the reasons outline above and adding more legal expertise and providing the Board with clearer legislative means of 'governing' the organisation. For example the Board might be able to issue policy statements with respect to the manner in which the Integrity Commission discharges its functions and to hold the CEO accountable against that policy framework. It is also an option to empower an appropriately structured Board to authorise the exercise of the coercive powers.

The Government acknowledges that there may be other views about the effectiveness of the current governance arrangements and options for improvement. The models it is currently suggesting are options, but there may well be others.

Status as a law enforcement agency

The Integrity Commission is not currently defined as a law enforcement agency and the Government's current view is that this status should not change. This is consistent with the Government's belief that the Integrity Commission should primarily focus on misconduct prevention and capacity building in public authorities and that alleged breaches of the criminal law should be referred to the appropriate authority, which in most cases will be Tasmania Police.

The Government has, to date, not been persuaded that giving the Integrity Commission status as a law enforcement agency and allowing it to mount criminal investigations and commence prosecutions and to potentially access intrusive surveillance powers is justified. Tasmania Police, or federal law enforcement agencies, have all of these capacities. There is insufficient evidence to suggest that the current integrity arrangements for public authorities are deficient to the extent that further expansion of investigative powers in Tasmania is justified. For example, there has been no evidence of systematic and endemic corruption since the commencement of Integrity Commission.

Misconduct in public office

This offence has its origins from the common law and it has, after a long period of relative disuse, found more recent favour in a number of Australian jurisdictions, as an offence appropriate for instances of alleged serious public misconduct where other criminal offences cannot be charged. The use of this offence has generally been controversial and prosecutions have been difficult and contentious.

The Government is of the view that the Tasmanian Criminal Code and other Acts currently provide a range of offences that might be charged. The internal disciplinary processes of public authorities also provide for a range of serious sanctions, including dismissal from employment.

Technical amendments to the current Act requested by the Integrity Commission

The Government is supportive in principle of technical amendments where required to clarify or improve the operation of the current Act, but will give further consideration to these in the context of your findings and recommendations.

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

The Government submits that there are reforms that could be made to the operation of the Act with respect to the Integrity Commission's investigative functions, as set out below.⁵

Reform of the investigative powers and function

As stated above, the Government submits that one option for consideration is for the Chief Commissioner to have the legal authority and responsibility for the authorisation of the use of the Integrity Commission's coercive powers and for overseeing the Integrity Commission's staff in the use of these powers with respect to its assessment and investigative functions.

The power to compel an individual to answer questions that might expose him or her to criminal, civil or administrative liability is an extra-ordinary one. Two High Court decisions in 2013⁶ have confirmed the extra-ordinary nature of these powers, as they are inimical to the fundamental right to silence (or to not incriminate one-self). The High Court has made clear that Parliaments must be absolutely clear in their legislative intent in order to effectively over-ride this important right. If there is doubt on the construction of the statute, the courts will read down the power.

While the Government contends that there remains justification for the availability of such powers to investigate serious official misconduct by public officials, placing responsibility for the authorisation and use, in the first instance, with the Chief Commissioner or a revamped Board, more appropriately reflects the serious decision to abrogate this important right. Equally, it is the Government's view that these powers should only be used when necessary and then sparingly. There are examples available of the negative impact on individual public servants subjected to Integrity Commission investigations and particularly when the coercive powers have been used. This includes public servants caught up as witnesses, not subject to any allegation of wrongdoing on their own part.

As a general rule the Government believes that witnesses should not be coercively questioned. If the witness is reluctant or won't co-operate or there is reason to believe the witness will not be or has not been truthful, then the use of these powers may be justified. Equally, there may be instances when they should not be used with respect to the person

⁵ The term 'investigative' functions covers the assessment and investigation functions established by Parts 5 and 6 of the Act

⁶ X7 v Australian Crime Commission [2013] HCA 29 and Lee v New South Wales Crime Commission (2013) 251CLR196.

who is the subject of the investigation. These powers should be used as a last resort, not as a standard method of operation.

The Government has been made aware of instances where public officers, against whom no allegation of misconduct has been made, have been called before the Integrity Commission and compelled to answer questions and been subjected to a confidentiality notice. This has caused these 'witnesses' very significant stress as they are totally unfamiliar with these processes, have not understood the basis on which they were being questioned and then have not been able to discuss the experience with anyone because of the confidentiality provisions. This has created serious risks for the health and safety of public officers and would appear, *prima facie*, to not be a justified use of these powers.

To this end, it may be worth considering legislating to require the authoriser to actively consider whether the assessment or investigation requires the exercise of the coercive powers in the circumstances. For example, this could be a requirement to consider whether there is a basis for believing that 'normal' investigative techniques would not be successful in ascertaining the required information.

Further, giving the Chief Commissioner or Board responsibility for overseeing Integrity Commission investigations should also ensure that appropriate regard is had to procedural fairness being afforded to public officers subjected to the use of those powers. For example, a public official subject to the coercive powers should have access to legal advice and representation and should, as far as possible, be properly advised of the allegation/s he or she is facing, so as to be able to account for his or her conduct. The Chief Commissioner could also be responsible for ensuring the timely progress of investigations, to address another of the concerns raised about current practices of the Integrity Commission.

Again, it may be appropriate to make clear in the legislation that when coercive powers are being used, rules of procedural fairness continue to apply, for example the right to seek legal advice and to be properly put on notice as to the nature of any allegation/s relevant to the person subject to the coercive powers. This would require careful consideration and drafting so as to balance procedural rights with the need to ensure effective investigations.

An added protection, should this option be adopted, is provided through the establishment of the role of Inspector-General, to oversight the authorisation and use of the coercive powers. The Inspector-General could review each instance where such powers are authorised and used and make recommendations to the Chief Commissioner and, if necessary, to report to the Minister and/or Joint Committee where he/she believes there is an issue or problem with the exercise of coercive powers. This may be on an individual case, but not at such a time or in such a manner as to compromise an investigation. Otherwise the Inspector-General could also provide an annual report to the Joint Committee and/or Minister on these matters generally, including whether he or she is satisfied with the manner in which these powers have been used in the preceding 12 months.

The Inspector-General could also act as a complaints mechanism for Integrity Commission investigations. In the first instance the Chief Commissioner taking on the recommended roles should reduce complaints about the conduct of Integrity Commission investigations,

but in the event a complaint is made this could be handled by the Inspector-General. The Inspector-General would be able to make recommendations to the Chief Commissioner and if necessary make a report to the Minister and/or Joint Committee on an individual case, but not so as to compromise an investigation. The Inspector-General could also make an annual report on any complaints in the preceding 12 months and the outcomes, but not so as to compromise an investigation.

The scope of the Integrity Commission's investigations

Consistent with other options for reform suggested in this submission, the Government believes there may also be benefit in providing clearer legislative direction about the matters the Integrity Commission should investigate. This would assist in preventing potential overlap with the jurisdictions of other integrity agencies and reinforce the principle that public authorities are primarily responsible for managing the conduct of their own staff.

As stated earlier, the Government is of the view that any potential criminal matter coming to the attention of the Integrity Commission should be immediately referred to the appropriate authority, which in most cases will be Tasmania Police. It is not appropriate for any authority, other than the appropriate law enforcement agency to initially assess a criminal allegation to determine whether it warrants further investigation. This may be worthy of specific legislative requirement to ensure that any potential criminal matters are referred on to the appropriate law enforcement agency.

Consistent with the Government's views as set out in this submission, most misconduct matters should be left with the responsible public authority in the first instance. Only those matters that an authority is unable to deal with should be referred to the Integrity Commission for investigation. Examples where a referral should be made to the Integrity Commission are where the allegation concerns the head of the organisation, and potentially its deputies because of perceptions of conflict of interest. Equally, where an allegation concerns certain statutory office holders, it would be more appropriate for the Integrity Commission to conduct the investigation.

Apart from these limited instances, the Government suggests that the appropriate manner of dealing with scope is to leave the decision to refer a misconduct or integrity matter to the agency concerned. As will be elaborated further below, the Government will recommend that the Integrity Commission should be notified of all such matters. In addition to the reasons for this that will be expanded upon below, a notification requirement will place the responsibility and accountability where it belongs, i.e. with the respective agency head.

The Integrity Commission should be able to report to the Parliamentary Joint Committee where it considers it appropriate to do so. This could include advising the Committee where it believed authorities had failed to deal properly with a misconduct or integrity matter.

Integrity Tribunals

Part 7 of the Act provides for Integrity Tribunals. To the Government's knowledge the provisions of this part have not been used, but it is submitted it remains an appropriate option to deal with alleged serious misconduct. If the option to reform the governance as outlined above are recommended then consequential amendments would be required to this part. For example, it would be for the Chief Commissioner to determine that an Integrity Tribunal is justified and appropriate. Equally, if the Chief Commissioner were conflicted on a matter there should be a power for an independent senior legal practitioner to be appointed in the Chief Commissioner's place on the Integrity Tribunal.

Otherwise the Government submits that this part of the Act should remain. When enacted it was not intended that the provisions of this part would be extensively used. They provide an option for a more formal response than an investigation, but stop short of a Commission of Inquiry. The Government believes this remains an appropriate option in limited circumstances, as originally intended.

Triaging of complaints

A review of the Integrity Commission's annual reports reveals that throughout its operation it has received and referred on many complaints of public misconduct to other authorities.

Consistent with the Government's position that accountability and responsibility for unethical conduct should remain vested within agencies and other entities responsible for the investigation of misconduct, the Integrity Commission should continue to refer most matters brought to its attention to the relevant authority. Because of the real potential for overlap with other integrity related bodies, it is suggested that administrative arrangements should be developed whereby there is regular liaison between the Integrity Commission, the Ombudsman, the Auditor-General and perhaps Tasmania Police, to ensure no duplication or overlap in jurisdictions.

Public authorities and the Ombudsman and Auditor-General should, however, also be able to refer matters to the Integrity Commission. The Integrity Commission could determine to investigate the referral or return it to the referring agency for its attention.

Part of the Integrity Commission's consideration of whether to accept a referral should relate to its capacity to progress and finalise an investigation expeditiously. Timely resolution of such matters is important for maintaining public confidence in public authorities. It is also important that the subject/s of investigations are not left in a state of uncertainty as to their fate for longer than is absolutely necessary. Being the subject of an investigation, particularly one involving the exercise of coercive powers, is potentially stressful and the State has a responsibility to ensure that these matters are brought to a speedy resolution to minimise the stress placed on individuals.

Intersection with Employment Direction 5

Employment Direction No. 5 - *Procedures for the investigation and determination of whether an employee has breached the Code of Conduct* (ED5) details how alleged breaches of the State Service Code of Conduct by state servants are to be investigated and reposes responsibility in the Head of the respective agency (principal officer) for the conduct of an investigation of an alleged breach and for determining any breaches and appropriate sanction/s. There can be overlap between allegations that might be investigated by the Integrity Commission and matters falling within ED5.

Section 58 of the Act provides the option for the Board to refer a matter assessed and/or investigated by the Integrity Commission to the principal officer of the relevant public authority. This includes instances of alleged misconduct by State Servants requiring application of ED5, by the principal officer in order to determine whether a breach has occurred and if so the appropriate penalty.

There is currently some uncertainty about the extent to which the principal officer can rely on the Integrity Commission investigation for the purposes of ED5. Currently, while it appears use can be made of the investigation report and other material provided by the Integrity Commission, there is often a complete new investigation. This results in duplication of effort, delay and additional stress for all the participants who have to submit to a second process.

It is submitted that there could be an amendment to the Act to provide legislative authority for the use of investigations conducted by the Integrity Commission by the principal officer for the purpose of determining whether a breach of the State Service Code of Conduct has occurred. It is submitted that inclusion of a legislated authority will place this question beyond doubt. The principal officer would not be limited to the Integrity Commission investigation, but should be permitted to rely on it.

For example, the principal officer may elect to re-investigate some or all of the matters relevant to the alleged breach of the Code of Conduct, if required in the circumstances. This may be required where the subject of the investigation submits that a particular issue has not been addressed and the principal officer should be able to investigate that issue in a subsequent investigation, while still relying on the Integrity Commission investigation. Obviously, the other provisions of ED5 relating to procedural fairness would still need to be followed, particularly ensuring the subject is given an appropriate 'hearing'.

c) the operation of the Parliamentary Standards Commissioner

The Government submits that the current arrangements with respect to the Parliamentary Standards Commissioner are generally appropriate, although there perhaps should be greater transparency around the Commissioner's discharge of his functions.

d) the operation of the Joint Committee

The Government submits that the current arrangements with respect to the Joint Committee are appropriate. If the recommendations to establish a position of Inspector-General with the proposed functions are adopted, then the functions and powers of the Joint Committee set out at section 24 of the Act, should be amended to include receiving and considering reports from the Inspector-General.

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

The Government submits that current arrangements are satisfactory, but will consider any matters in the light of recommendations made by this review.

f) any other matters relevant to the effect of this Act in improving ethical conduct and public confidence in public authorities.

The Government has no submission to make with respect to this ground.

APPENDIX 1 - Interim Response to Summary of Key Findings and Recommendations

The following is the Government's response to the summary of key findings to the Three Year Review.

Investigative Functions and Powers

The Government's view is that the Integrity Commission should retain the capacity to conduct investigations, but that the concerns which have been raised by various stakeholders around process, timeliness and interaction with existing investigative processes should be addressed. This is a matter which should form part of the Five Year Independent Review.

Reinvestigation of State Service Code of Conduct Matters – Employment Direction No 5

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 Integrity Commission investigations should be considered as part of the Five Year Independent Review.

The use of evidence obtained in Integrity Commission investigations in subsequent criminal matters

The Government notes the Committee finding that there is capacity for criminal prosecutions to be compromised because of evidence gathering methods utilised in Integrity Commission investigations and that these issues will be examined further in the Five Year Independent Review.

The Government considers that the Integrity Commission should refer instances of criminal behaviour to Tasmania Police for investigation, as currently provided for by the Act.

Referral of complaints

The Government notes the findings and comments of Three Year Review Report and considers that the question of complaints referral and monitoring should be considered as part of the Five Year Independent Review.

Assessments

The Government notes the findings and comments of the Three Year Review Report and considers that the question of complaints referral and monitoring should be considered as part of the Five Year Independent Review.

Education and Misconduct Prevention Function of the Integrity Commission

The Government notes the findings and comments of the Three Year Review Report and considers that the education and misconduct prevention function of the Integrity Commission should be considered as part of the Five Year Independent Review. However, the Government is of the view that a key focus of the Integrity Commission should continue to be education and misconduct prevention. The Government also acknowledges the work already undertaken by its agencies in induction and other training related to integrity and ethical decision making.

Oversight of Tasmania Police

The Government notes the findings and comments of Three Year Review Report in relation to Tasmania Police and considers that the relationship between Tasmania Police and the Integrity Commission and the Integrity Commission Reporting on Tasmania Police matters should be considered as part of the Five Year Review.

Natural Justice/Procedural Fairness Considerations in Integrity Commission Reports

The Government notes the findings and comments of Three Year Review Report and agrees that procedural fairness and preservation of a person's reputation are key considerations in any investigation process. The Tasmanian Government will consider these issues further as part of the Five Year Review.

Policy and Technical Amendments proposed by the Integrity Commission

The Government notes the matters raised by the Integrity Commission and findings of Three Year Review Report, and will consider these issues in more detail as part of the Five Year Review.

The Government agrees with the findings of the Three Year Review that it is unnecessary for the Integrity Commission to be classified as a law enforcement agency.

Offence of Misconduct in Public Office

The Government notes the matters raised by the Integrity Commission and findings of Three Year Review.

The Government will consider these issues and whether a specific 'public misconduct' offence should be included in Tasmania's criminal laws in more detail as part of the Five Year Review.

In the interim, the Government notes that there are many policy and legal issues to consider in making changes to the Act and criminal law including –

- Current Tasmanian law which captures a broad range of criminal behaviours such as stealing, bribery, dishonestly acquiring a financial advantage and fraud. In particular, section 253A of the Criminal Code provides for a general and serious crime of fraud which covers a broad range of behaviours and actions.
- The need for proportionate legal responses and the maintenance of the principle of legality.
- The impact of recent High Court cases on coercive powers to obtain information and abrogating the right to silence where criminal charges may result. As found in the Three Year Review, the capacity to question a person without a caution in disciplinary or other inquiries can impact on the criminal justice processes, to the extent that evidence may be inadmissible or tainted in some circumstances.
- The impacts and costs across the whole criminal justice system including investigation by Tasmania Police, subsequent prosecution of matters, impacts upon the Court and sentencing systems and representation of accused.
- Comparisons with other jurisdictions can be problematic as not all states are Code-based and some, like New South Wales, rely on the common law. The Western Australia Criminal provisions do not require a mental element, only an action, and whether this is appropriate in the Tasmanian context requires additional consideration.

Amendments proposed by the Law Society of Tasmania

The Government notes the matters raised by the Integrity Commission and the findings of the Three Year Review Report. In particular the finding that the Law Society of Tasmania has raised issues in respect of the right to silence, issuing of coercive notice, claims of privilege, rights to legal representation and certification of costs and the Committee found that these need further consideration.

The Tasmanian Government will consider these matters as part of the Five Year Review.

