TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 31060
YOUR REF:

29 February, 2016

The Hon. William Cox AC RFD ED QC
Independent Reviewer
GPO Box 825
Hobart Tasmania 7001

Dear Sir

Independent Review of the *Integrity Commission Act 2009*

Thank you for your letter of 1 February 2016 inviting me to make a submission to your independent review of the *Integrity Commission Act 2009* ("the Act").

I enclose a copy of my submission of 29 October 2014 to the Joint Standing Committee on Integrity which was made in response to their three-year review of the functions of the Integrity Commission (Annexure A).

Since that time my opinion has not changed. 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.

At pages 3 to 4 of the submission I outline the extensive powers of the Commission. In particular, the Chief Executive Officer has the power to:

- require the provision of information or explanations, including the power to require attendance to give evidence before an investigator
- require the production of records, information, material or things
- require the provision of information, explanations or answers orally or in writing
- require the provision of information on oath
- enter premises of a public authority without need for consent or a search warrant

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- obtain from a magistrate a search warrant where there are reasonable grounds to suspect that material relevant to an investigation is located at the premises

- seize, take away, make copies of (including download) any record, information, material or thing

- obtain a surveillance device warrant and a corresponding device retrieval warrant (serious misconduct only)

(see ss 46-54 inclusive of the Act)

These powers are extraordinarily wide. Thus, the Integrity Commission can require public servants to attend to be interviewed without being informed of the subject matter of the interview and require them to not inform anybody that they are being interviewed (see ss 47 and 98). They can be required to give information on oath and supply their emails without warrant. Further, they can enter the premises of any public authority without a warrant and search, seize anything they wish and require anybody on the premises to answer questions and produce records (see ss 50 and 52). Finally, they can obtain a warrant to search any property if a magistrate is satisfied evidence is likely to be found that will assist their investigation. All these powers can be used to investigate misconduct. 'Misconduct' is defined to include a breach of the Code of Conduct. Section 9 of the *State Service Act 2000* defines the State Service Code of Conduct. It is extremely wide. As expected it attempts to codify employment conduct. A very minor breach of the Code of Conduct would amount to misconduct pursuant to the Act, allowing for the above powers to be used, including the power to obtain a warrant to enter and search private premises. There is no proportionality between the powers and the type of conduct being investigated. These powers have been used for very minor misconduct causing considerable distress to those subject to or witnesses in the investigation, including compulsory examination and the searching of the emails of senior public officers not subject to complaint. The powers are indeed far wider than other bodies such as Tasmania Police have to investigate serious offences, e.g. Tasmania Police cannot enter premises without a search warrant, they can only obtain a search warrant when a justice is satisfied by information on oath that there is evidence at a premises or will be within 72 hours relating to an offence (see s 5 *Search Warrants Act 1997*), they cannot demand a person attend premises to be interviewed in secret and they cannot require that documents be handed over unless an offence is suspected and they have a search warrant. Further, despite these extraordinarily wide powers the Integrity Commission is accountable to nobody for its decisions or conduct. This is in contrast to other bodies with broad powers such as Tasmania Police which has a strong Professional Standards Unit, Police Appeals Tribunal and outside scrutiny from the Director of Public Prosecutions, the Anti-Discrimination Commissioner, the Ombudsman, the Children's Commissioner and, in many cases throughout the year, both the Magistrates Court and the Supreme Court.

It may be thought that the role of oversight was given to the Board. Section 13(a) of the Act 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;"

However, the Act provides no provision for a supervisory role of the Chief Executive powers nor a complaint mechanism for the Board to supervise the Chief Commissioner.

Another problem is that 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 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.

In August 2015, the outgoing Chief Commissioner, the Hon Murray Kellam AO, issued a press release in which he stated a number of investigations conducted by the Integrity Commission could have resulted in charges if the *Criminal Code* had *"an offence of 'misconduct in public office'"* (Annexure B). I wrote to the Chief Executive Officer, Ms Diane Merryful, stating that I was of the view that conduct captured by the public misconduct provisions in other States would necessarily be a breach of the *Criminal Code* and I requested that she forward these matters to me pursuant to s 8(1)(b) of the *Integrity Commission Act 2009*. I enclose a copy of my letter dated 11 August 2015 (Annexure C). She responded by letter of 14 August 2015 refusing to forward me the materials (Annexure D). I wrote again to her on 17 August 2015 (Annexure E). Ms Merryful did not respond to that letter. Despite me raising this matter in my Annual Report to Parliament, I have yet to be given any material from the Integrity Commission. This is also despite the fact that the Parliamentary Joint

Standing Committee on Integrity in its final report for its three-year review recommended that if criminality was suspected at the triage stage the matter be immediately referred to the Director of Public Prosecutions or Tasmania Police. One can only conclude either no material exists or, alternatively, the Commission believes relatively minor misconduct which would generally be dealt with by internal disciplinary proceedings should be made criminal.

Indeed, in its paper entitled "Interjurisdictional review of the offence of misconduct in public office", the Commission suggests that a broad range of conduct including low level misconduct be included in such an offence. Further, the paper suggests that the offence did not require proof of dishonesty. I enclose a copy of my advice to the Attorney-General dated 23 January 2015 (Annexure F).

Thus, it would appear in the five years of its existence the Commission has not unearthed any serious misconduct leading to criminal charges.

I have grave doubts, given the small number of investigators and the wide range of criminal behaviour that could be committed, that they have the necessary expertise to conduct such investigations. For example, in the one matter that was referred to Tasmania Police by the Commission, a complaint was received by the Integrity Commission in May 2012 concerning travel claims made by a public servant. The alleged offender was not interviewed by the Commission until December 2012. On 31 May 2013, the then Chief Commissioner wrote to the Deputy Commissioner of Police offering to send a prosecution brief to Tasmania Police. The Deputy Commissioner responded requesting the brief in August 2013. It did not arrive until July 2014. The file was incomplete but, more importantly, the alleged offender was not cautioned prior to being interviewed by the Commission, rendering admissions made as inadmissible. No explanation was given as to why it was not initially referred to Tasmania Police.

Given the decision of *X7 v Australian Crime Commission*[1], it is likely to be unlawful and a contempt of court for the Commission to exercise coercive powers on a person whom they suspect of having committed a criminal offence. Indeed, given the subsequent decision in *Lee v R*[2] (*Lee No. 2*), even if they could use such powers if evidence is known to the prosecution or a witness involved in the investigation of the prosecution this will result in the accused not having a fair trial. As a result of these decisions Tasmania Police no longer exercise compulsory powers under the *Police Service Act 2003* when investigating police officers until criminal proceedings are determined. I enclose a copy of my advice dated 9 April 2015 (Annexure G). Therefore, matters of a serious nature where a person may be charged with an offence will require the matter to be independently re-investigated by Tasmania Police causing considerable delay. Further, it also gives the alleged suspect forewarning of an imminent police investigation. At the very least there needs to be an amendment to s 9(1)(g) of the Act making it clear that the Integrity Commission should not investigate matters where another integrity unit has the power to do so.

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[1] (2013) 248 CLR 92
[2] (2014) 308 ALR 25

Subjects should not have to go through more than one investigation nor should they have to wait months, if not years, for an investigation to finish.

The general utility of bodies like the Integrity Commission is to unearth systemic corruption rather than find evidence for criminal prosecutions or look at low-level employee misconduct. The Commission has found no evidence of systemic corruption, its investigations have not produced one criminal prosecution. Thus, the Commission has turned its attention to more low-level misconduct which is most often, and better, investigated by the Departments as code of conduct violations.

It has been suggested, particularly in the three-year review, one of the advantages of having the Integrity Commission is that it would be able to deal with senior public servants or politicians who are alleged to have committed offences. In my 30 years' experience at the Office of the Director of Public Prosecutions, including 12 years as the Assistant or Acting Director of Public Prosecutions, I can say where allegations of serious misconduct have been made against politicians, senior public servants, senior police officers and businessmen, they have been vigorously investigated and pursued. In fact, at times the investigations have been criticised for being too vigorous.

In any event, given its lack of utility, it would seem very expensive to keep such a body for those rare occasions, particularly for the reasons outlined above that when they do occur these matters will involve a criminal investigation and will therefore require a police investigation and, ultimately, advice from the Director of Public Prosecutions. If at any time evidence of the possibility of serious systemic corruption does come to light a far more efficient and cost-effective response would be to have a Commission of Inquiry rather than have a continuous commission with wide powers and no serious work to do.

In summary, therefore, the Commission takes up significant resources. It has found little or no evidence of serious misconduct in the Tasmanian public sector. It has been uncooperative with this Office although I would concede that since Mr A G Melick AO RFD SC and Mr M Easton have become Chief Commissioner and Acting Chief Executive Officer, respectively, there has been a much more cooperative dialogue between this Office and the Commission. Of course, from time to time, public officers will commit offences of misconduct. However, in the past five years when such offences have occurred they have been investigated by Tasmania Police and minor matters are dealt with under the Code of Conduct. As I said in my submission to the Joint Standing Committee, there are numerous bodies to which public sector employees are accountable. There is simply no need for such a large, unaccountable body as the Integrity Commission.

A possible path forward would be to give the Ombudsman greater powers to triage complaints and to oversee or obtain responses from other bodies, such as Tasmania Police and the Secretaries of State Service Departments, concerning their investigations. This would remove the need for such a wide-ranging body with draconian powers. It would leave any investigations to those specialising in such investigations whilst at the same time giving complainants confidence that their complaints are being heard. Alternatively, if it is thought the Integrity Commission

should remain, its investigative role and powers could be removed. This would leave its educative function. Further, it could be a clearing house for complaints and oversee or obtain responses from other bodies, such as Tasmania Police, in respect to complaints the Commission has referred to those bodies, again leaving complainants with the confidence that their complaints are being heard.

Finally, with regard to the suggestion of an offence of misconduct in public office, as you will note from my advice of 23 January 2015, I see little need for it. However, if one is to be inserted in the *Criminal Code* it should only be for cases of serious misconduct with a dishonest mental element.

If you have any queries I would be only too happy to discuss my submission with you.

Yours sincerely

D G Coates SC
DIRECTOR OF PUBLIC PROSECUTIONS

Encl.

Annexure A

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 31060
YOUR REF:

COPY

29 October, 2014

Ms Laura Ross
Secretary
Joint Standing Committee on Integrity
Parliament House
Hobart Tasmania 7000

Dear Ms Ross

THE THREE YEAR REVIEW OF THE FUNCTIONS, POWERS AND OPERATIONS OF THE INTEGRITY COMMISSION

I refer to your email dated 22 October 2014 inviting a submission from me to the Committee.

Pursuant to s 24(1)(e) of the *Integrity Commission Act 2009* ("the Act"), the Joint Standing Committee on Integrity is required to review "the functions, powers and operations of the Integrity Commission" three years after it commenced operations. The Committee has invited submissions from interested persons and organisations.

I note that a number of submissions have already been made to the Committee, including one by the Government and one by Tasmania Police. I share many of the concerns set out in those submissions.

The "integrity landscape" is well populated in Tasmania. The Integrity Commission is part of a broad set of organisations that have a role in overseeing the integrity of public institutions, officers and state servants. Other agencies with substantial roles to play include:

- Tasmania Police,
- the Auditor-General,
- the Ombudsman,
- the Coroner,
- the Director of Public Prosecutions,

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- the Anti-Discrimination Commissioner,
- the Children's Commissioner, and
- Heads of Agency

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

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

- recognition that prevention is as important as dealing with allegations of unethical 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.

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

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

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

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

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

I also note that any investigation of breaches of the State Service Code of Conduct undertaken by the Commission have to be re-investigated by Heads of Agency under Employment Direction 5 as the Commission's investigation is largely unable to be used in those proceedings.

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

The Commission has been provided with very significant investigative and coercive powers notwithstanding that it is not law enforcement. The CEO, and through her its investigators have powers to:

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

(see s 46-54 inclusive of the Act)

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

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

I am sure that the Commission finds its extensive powers extremely useful. Indeed it seeks to have even more extensive powers. That should be resisted. In my view the powers of the Commission require no enhancement. They should be reduced given the nature of the complaints brought before it and the number of investigations conducted by it. It is not a body charged with investigating criminal activity. Investigations into corruption should be conducted, as they have been in the past, by Tasmania Police which has the expertise and all the necessary powers to undertake the task.

I also note Tasmania Police, in particular, have strong systems in place for dealing with police misconduct. It is a disciplinary offence for an officer not to report police misconduct. The Professional Standards Unit is headed by a Commander who reports directly to the Deputy Commissioner of Police. The unit consists of extremely experienced and competent investigators. Serious matters that have been investigated are reviewed by my Office, generally by myself.

I am also deeply concerned about the impact of a Commission investigation on other processes and the subjects of those investigations. The reality is that all other processes are effectively been put on hold whilst the Commission goes about its work. This leads to excessive delays in matters being resolved. As I have alluded to earlier, the need to re-investigate matters because of the way the Commission interacts with other entities, leads to even further delay and the potential for the second investigation to be tainted by the first. It must be remembered that at the heart of these matters is a person. The old adage of "justice delayed is justice denied" comes to mind. Subjects should not have to go through more than one investigation, nor should they have to wait for months, if not years, to have matters resolved. An amendment to s 9(1)(g) is required to make it clear that the Commission should not investigate matters where another integrity entity has the power to properly investigate alleged misconduct. The Commission should be informed of the allegation and monitor progress of the investigation and any outcome, but not supervise the investigation. In that way investigations can be investigated by the body that has the clear expertise in those matters.

Another concern is the cloak of secrecy that seems to surround the Commission's investigations. The service of notices under s 98 requiring absolute silence in respect of the investigation, save and except for obtaining legal advice or complying with requirements to provide information to the Commission, imposes a very heavy burden on witnesses and subjects of investigations. Being investigated by an integrity entity is undoubtedly very stressful. Technically, a subject confiding in a family member or seeking counselling or medical assistance as a result of stress caused by the investigation cannot even reveal the cause of their stress to their family member, medical practitioner, psychologist or counsellor. This is extremely unhelpful and denies subjects rights that even persons being investigated for serious criminal offences possess. It also has the potential to lead to tragic outcomes.

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

Outcome of complaints received in 2013-14

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

In other words, of a possible 113 complaints only 18 could possibly be the subject of an investigation. Of those18 only four were accepted for assessment as to whether an investigation was required. The cost to the state was nearly $3 mil. For the very small number of matters that may require independent investigation due to their seriousness, nature or sensitivity, the Ombudsman could be given extended powers and resources to investigate.

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

I think it also appropriate to note that despite four years of operation, the work of the Commission is yet to result in the prosecution of any person for any offence. This is clearly indicative that the level of corruption and/or serious misconduct within government and the public sector is not as high as might be assumed. Further, I know of only two matters that have been brought to the attention of either

Tasmania Police or this Office by the Commission, involving alleged criminal conduct. In both cases there was deemed to be insufficient evidence to proceed. There was no reason why these matters could not have been investigated by Tasmania Police.

Yours sincerely

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS

Annexure B

INTEGRITY COMMISSION

My five year term as Chief Commissioner of the Integrity Commission ends on 16 August 2015, and yesterday I chaired my last meeting of the Board of the Integrity Commission. It is therefore appropriate that I make some remarks to the Tasmanian community about the Commission and my time as Chief Commissioner.

The Commission 'opened its doors' on 1 October 2010 and its progress and achievements since then have been considerable. It successfully navigated a number of early challenges – most of which were to be expected in establishing a new organisation with a new jurisdiction.

It has recruited skilled and experienced staff in the areas of misconduct investigations, education prevention and training and business operations.

It has established practices and procedures to enable it to conduct a number of significant investigations into allegations of misconduct, relative to its size. Some of those investigations have been made public – many have not. Its legislation is quite specific that the usual practice of the Commission should be to conduct its investigative work in private.

It has established a very active and well respected education and misconduct prevention program. In particular, its local government work has been groundbreaking and very well received in the sector.

The Commission staff is energetic, creative, hardworking and entirely focussed on its key objective – improving the standard of ethical conduct in the Tasmanian public sector.

The members of the Board that I have been privileged to lead, are similarly skilled and dedicated to the same outcome.

Unfortunately, there have been some significant obstacles in the Commission's way.

The Government's decision to make a significant reduction in the Commission's budget was based on a mistaken understanding about complaint numbers – both their number and significance. The error was brought to its attention repeatedly but it would not take account of the clear evidence in making its decision to impose a 20% cut to the Commission's funding. Recently the Attorney-General has said that the Commission has enough money to conduct the limited number of investigations it undertakes per year. The fallacy of this argument is obvious – the Commission is actually limited in the number of investigations it undertakes by its available funding.

The Commission has laboured under a manifestly inadequate legislative framework since the day it opened its doors. That is not surprising as the Act establishing it was passed through the Parliament in a matter of weeks. Furthermore, my experience in other jurisdictions is that the legislation establishing similar new bodies usually requires early amendment for a variety of reasons once practical operations commence.

However, since its commencement the Commission has tried time after time to convince governments (of any persuasion) to remedy its legislation, to no avail. The Joint Standing

Committee on Integrity supported in principle most of the technical amendments the Commission proposed back in November 2013. The then Government took no action, deciding to wait until the Committee reported on its Three Year Review of the Commission. The current Government also decided to await the Committee's report.

Unfortunately that Report was not delivered until June 2015 and the members of the new Committee decided to reconsider all of the amendments considered (including those supported) by the previous Committee and made a range of different decisions. Some of those decisions were to refer the amendments back to the Government to consider. It appears that there is now no time for any amendments before the independent Five Year Review commences in January 2016.

The fact that the Three Year Review was not conducted in a timely manner is disappointing. Regrettably, neither the Committee nor the Government has dealt adequately with the need for the Commission to have a fully workable piece of legislation with which to conduct its operations.

It is also regrettable that the Parliamentary Committee has failed to advance its consideration of a code of conduct for members of Parliament despite the endeavours of both the Parliamentary Standards Commissioner and mine to provide such assistance as might be required. The Commission prepared and tabled, in the Parliament, a draft code of conduct for MPs over four years ago but the code has not yet been adopted or even debated in the Parliament. The community would be rightly entitled to question the commitment of its elected representatives to ethical conduct when those representatives apparently see no urgency or value in holding themselves accountable to a code of conduct.

If the elected representatives of the community will not adopt a code of conduct then what message does that send to the Tasmanian public sector (most of whom are actually bound by quite strict codes) about the importance that should be placed on high standards of ethical behaviour?

The Integrity Commission is the only institution focussed on raising the ethical standards of the Tasmanian public sector. However, its strong and independent stance is clearly not welcomed by powerful interests, whether in the Government or in the bureaucracy. Those interests have sought to limit the Commission's work by reducing its budget, calling for removal of its investigative functions, not remedying its deficient legislation, and by not supporting its work. One example of that is the failure of the Government to, as recommended by the Commission, amend the Criminal Code of Tasmania to include an offence of 'misconduct in public office'. Tasmania is the only State in Australia not to have such an offence on its statute book. A number of investigations conducted by the Integrity Commission could have resulted in prosecution, had such an offence been in existence in this State. It must be clearly understood that, should allegations of the nature of the recent ICAC investigation into alleged ministerial misconduct in New South Wales arise in Tasmania, no prosecution could ensue. There appears to be complacency in government and in the bureaucracy that allegations of corruption of the nature that have recently resulted in prosecutions being commenced in New South Wales, Victoria and South Australia, after investigations by their integrity bodies, will not occur in Tasmania. This complacency is not however shared by the public, as a survey conducted on behalf of the Integrity Commission recently revealed. Whilst it was gratifying, and consistent with the experience of the

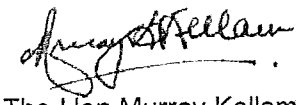
Commission, to observe that 85% of those members of the public surveyed considered that 'most people in Tasmania's public sector are honest' the survey also revealed that 88% agreed that 'people in Tasmania's public sector are just as likely to behave unethically as people in the public sector anywhere else in Australia'.

It is simply naïve to assume that Bass Strait forms some sort of a barrier to corruption and it is naïve of the Government to, as it has, assert that other bodies such as Tasmanian Police have the capacity to detect and investigate such public sector corruption. That has not proved to be the case anywhere else in Australia. I fear that such complacency and naivety will in the future prove to have given the 'green light' to corruption in this State.

However, the Commission will not be deterred from the important task that the Tasmanian community expects of it.

I am proud of the courage and dedication shown by the staff and Board of the Integrity Commission and proud to have made a contribution to its essential work.

No doubt an announcement will be made in the future about who is to succeed me. I wish him or her well in continuing the important work of the Commission.



The Hon Murray Kellam AO
Chief Commissioner

7 August 2015

Annexure C

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

COPY

INQUIRIES: Mr D G Coates SC
OUR REF: 31060
YOUR REF:

11 August, 2015

Ms Diane Merryful
Chief Executive Officer
Integrity Commission
GPO Box 822
Hobart Tasmania 7001

Dear Madam

CRIMINAL PROSECUTIONS

I read with quite some alarm the statement of the Chief Commissioner of the Integrity Commission of 7 August 2015, wherein he stated:

> "The Integrity Commission is the only institution focussed on raising the ethical standards of the Tasmanian public sector. However, its strong and independent stance is clearly not welcomed by powerful interests, whether in the Government or in the bureaucracy. Those interests have sought to limit the Commission's work by reducing its budget, calling for removal of its investigative functions, not remedying its deficient legislation, and by not supporting its work. One example of that is the failure of the Government tom as recommended by the Commission, amend the Criminal Code of Tasmania to include an offence of 'misconduct in public office'. Tasmania is the only State in Australia not to have such an offence on its statute book. A number of investigations conducted by the Integrity Commission could have resulted in prosecution, had such an offence been in existence in this State. **It must be clearly understood that, should allegations of the nature of the recent ICAC investigation into alleged ministerial misconduct in New South Wales arise in Tasmania, no prosecution could ensue.**" (my emphasis)

The highlighted sentence of the above quote, as I will outline shortly, is plainly wrong.

Of more concern, however, is the sentence preceding that, "*A number of investigations conducted by the Integrity Commission could have resulted in prosecution had such an offence been in existence in this State.*" What are these investigations and, if they exist, why have they not been referred to me or the Commissioner of Police if the Commission was of the view that the conduct was so serious as to warrant criminal sanction? Section 8(1)(h) of the *Integrity Commission Act 2009* provides:

> "(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 –
> ....

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> (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 ..."

Therefore, it is a requirement for the Commission to refer a matter concerning a potential breach of the law not only in cases where it concludes there has been a breach.

I have viewed your paper entitled 'Prosecuting Serious Misconduct in Tasmania'. It seems to me that, with respect, the Commission does not understand the *Criminal Code* and that conduct captured by the public misconduct provisions in other States is captured by various offences under the *Criminal Code*. Indeed, your research paper wishes to amend the law by including a provision for public servants that requires no proof of any mental element. You specifically recommend that it not require proof of any intention to gain a benefit or cause a detriment and, similarly, that it not require proof that an accused person acted dishonestly. This is quite contrary to the provisions in other States and would greatly expand the types of conduct that would, traditionally, face criminal prosecution.

It is difficult to know to what cases the Commissioner may have been referring when he stated they could have been prosecuted if there had been a 'misconduct in public office' provision in the *Criminal Code*. However, from your research paper it seems the types of conduct intended to be criminalised by the enactment of a new provision would include nepotism, misuse of resource, favouritism, wilful neglect of duty, use of information gained in public office for private benefit and conflict of interest.

Some of the more serious forms of the above types of conduct could be the subject of prosecution under the *Criminal Code*. Such provisions include:

- s 83 - corruption of public officer
- s 85 - public officers interested in contracts
- s 234 - stealing
- s 252A - acquiring a financial advantage
- s 257 - computer-related fraud
- s 266 - secret commissions (a public servant was prosecuted under this section recently)

Finally, and most importantly, in September 2013, s 253A was added to the *Criminal Code*, creating the crime of fraud. This provision was not even mentioned in your research paper.

The 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."*[1] The words "fraudulent" and "dishonest" are often used interchangeably in this context.[2] 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."[3]

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.[4] 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. Obviously, the specific factual scenario would determine whether a jury would be satisfied that what an accused public servant did was dishonest. To convict, a jury would need to be satisfied that they intentionally acted in a way that was contrary to the standards expected of them to such an extent that what they did was dishonest.

To take a general example from the Integrity Commission paper *"An investigation into allegations of nepotism and conflict of interest by senior health managers"*, 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. An accused would probably argue that their conduct was not dishonest. I assume that is why the research paper recommends not including an element of dishonesty in any newly

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[1] *Graham-Helwig v Western Australia* (2005) 154 A Crim R 326 at [14].
[2] *Scott v Metropolitan Police Commissioner* [1975] AC 819 at [839]
[3] *Peters v R* 192 CLR 493 per McHugh J at [84]
[4] *Jovanovic v R* (2007) 172 A Crim R 518 ; *Peters v R* (1998) 192 CLR 493

enacted crime. However, it would be very unusual to have a serious indictable crime, such as that proposed, without the need for some proof of criminal intent. To ask a jury whether an accused in the factual scenario outlined used fraudulent means, or behaved dishonestly, is the sort of question that we commonly trust juries to determine.

Although you do not mentioned this, it seems that the vast majority of the interstate provisions do require proof of some variance of dishonest intent. Proof of dishonesty is a requirement under the Commonwealth Criminal Code,[5] the Criminal Code of the ACT,[6] and the Model Criminal Code.[7] Similarly, the Queensland Criminal Code[8] requires proof of *"intent to dishonestly gain a benefit...or dishonestly cause a detriment"*.

The *Criminal Law Consolidation Act* (SA)[9] requires proof that a public officer acted improperly and with the intent of securing a benefit or incurring a detriment. It has been held that a jury should be directed that an accused acted improperly under that provision if they acted contrary to the standards generally and reasonably expected by ordinary decent members of the community and that they knew they were acting improperly or were reckless as to whether they were acting improperly.[10] The definition applied by the Court of Criminal Appeal of South Australia to the word "improperly" is essentially the same as the definition applied by the Court of Criminal Appeal of Tasmania to the word "dishonestly" [11] under the *Criminal Code* in this State.

The common law offence which operates in Victoria and NSW requires proof that an accused *"wilfully and intentionally"* commit *"culpable misconduct."* This offence requires proof of intentional serious misconduct. *"Wilfully and intentionally"* means an intention to do an act or refrain from doing an act with knowledge of the consequences, which is knowledge that the act amounted to misconduct.[12] Practically speaking, this seems almost indistinguishable from a dishonest intent.

The West Australian *Criminal Code Act Compilation Act 1913*[13] makes it a crime to without lawful authority or reasonable excuse;

(a) act on knowledge or information obtained by reason of public office, or

(b) discharge the functions of public office in relation to a matter where they hold a pecuniary interest, or

(c) act corruptly in relation to the performance or discharge of their employment.

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[5] *Criminal Code Act 1995 (Cth) s 142.2*
[6] *Criminal Code 2002* (ACT) s 359
[7] *Model Criminal Code s 3.6.5*
[8] *Criminal Code Act 1899* (Qld) section 92A
[9] *Criminal Law Consolidation Act* section 251
[10] *R v Austin* [2013] SASCFC 133 at [21]
[11] *Jovanovic v R* (2007) 172 A Crim R 518
[12] *Blackstock v R* [2013] NSWCCA 172.
[13] Section 83

"Corruptly" means improperly,[14] and it could therefore be said that corrupt conduct is less serious than dishonest conduct, but the degree of distinction will depend on the factual scenario. It was held in *Willers v R*[15] that a trial judge had not erred by directing a jury that they would be satisfied that an accused had acted corruptly if satisfied that he acted dishonestly. Consequently in Western Australia it is only the first two limbs of section 83 of their Criminal Code, being use of information gained through public office, or the discharge of the functions of public office in relation to a matter where an accused holds a pecuniary interest, that do not require an improper intent. As explained in most cases a corrupt or improper intent will be almost indistinguishable from the use of fraudulent means, which is a dishonest intent.

Therefore, it seems that the crime of fraud under the *Criminal Code* requires proof in a general sense of the same elements as the various crimes enacted throughout the country and referred to in the research paper. Obviously the crime of fraud does not require proof that an accused held public office. It is a crime that can apply to any member of the community. However, it would be the requirement of State Service regulations or procedures which in some circumstances would make his or her behaviour dishonest or fraudulent.

Thus, in my view, the *Criminal Code* does make unlawful the type of conduct that is captured by the various interstate public service misconduct provisions and to suggest otherwise is quite misleading.

Having said that, however, I would not see it in the public interest to pursue as criminal matters those matters that are normally, and appropriately, dealt with by internal discipline, achieved in respect of the public service by the Code of Conduct pursuant to s 9 of the *State Service Act 2000*, and bearing in mind s 10 of the Act allows a minister or his delegate to impose significant penalties for workplace misconduct including a significant fine, reduction in salary or dismissal. Similar provisions also apply in the *Police Service Act 2003*.

Bearing the above principles in mind, I would ask that, as a matter of urgency, you refer any matters where the Commission is of the view that criminal conduct **may have** occurred and could you also please advise why you have not referred these matters to me or to the Commissioner of Police previously as the Commission is plainly required to do under s 8(1)(h) of the *Integrity Commission Act 2009*? The section does not only refer to actual breaches of the law but **potential** breaches. Thus, it is not for the Commission to make a decision as to whether or not there has been a breach of the law before a referral is required.

Yours sincerely

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS

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[14] *Willers v R* (1995) 81 A Crim R 219
[15] (1995) 81 A Crim R 219

Annexure D

INTEGRITY COMMISSION

Our ref: AD000777
Your ref: 31060

14 August 2015

Mr D G Coates SC
Acting Director of Public Prosecutions
GPO Box 825
Hobart TAS 7001

Dear Mr Coates

Misconduct in public office

Thank you for your letter of 11 August 2015 concerning the recent statement by the outgoing Chief Commissioner of the Integrity Commission (the Commission), the Hon. Murray Kellam AO, which addressed, in part, the issue of an offence of misconduct in public office in Tasmania.

Your views about the Commission's report 'Prosecuting Serious Misconduct in Tasmania: the Missing Link', including its recommendations, have been noted. However, it is a matter now for the Government as to what, if any, action it wishes to take in relation to that report.

Your views about the current adequacy of the *Criminal Code Act 1924* in this regard are also noted.

You have drawn attention to one of the functions which the Commission may perform, among a wide range of functions referred to in s 8(1) of the *Integrity Commission Act 2009* (the Act), being to refer potential breaches of the law to the Commissioner of Police, the DPP, or other person that the Commission considers appropriate. Other functions which it has with respect to complaints, as set out in s 8(1), are to refer a complaint to a relevant public authority – s 8(1)(g); to investigate a complaint itself or in cooperation with a public authority – s 8(1)(i); and to assume responsibility for an investigation into misconduct commenced by a public authority. However, quite clearly, s 8(1) of the Act does not require or mandate the Commission to undertake any particular function in respect of any particular complaint. The Commission decides which of these possible options it should employ to deal with a complaint, taking into account the considerations set out elsewhere in the Act. There is no basis for any suggestion that there is some particular mandatory quality to the Commission's function under s 8(1)(h) of the Act, as opposed to any of its other functions referred to in that section.

Please be assured that the Commission keeps under consideration the option of referring potential breaches of the law to appropriate persons, including the DPP, when dealing with matters that come to its attention. However, it should be noted that the Chief Commissioner's comments in this regard were directed to gaps in the current law.

Yours sincerely

Diane Merryfull
Chief Executive

Annexure E

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 31060
YOUR REF: AD000777

17 August, 2015

COPY

Ms Diane Merryful
Chief Executive Officer
Integrity Commission
GPO Box 822
Hobart Tasmania 7001

Dear Ms Merryful

MISCONDUCT IN PUBLIC OFFICE

Thank you for your letter of 14 August 2015.

With respect, your response concerning s 8(1)(h) of the *Integrity Commission Act 2009* is misguided. The section states "*... 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...*" It does not appear to give you a discretion. The only discretion is to which person the potential breach of the law should be referred.

As I pointed out in my letter of 11 August 2015, I am of the view, given the provisions as outlined in that letter, that serious forms of misconduct by public servants can be prosecuted under the *Criminal Code*. Even if I am wrong about s 8(1)(h) being mandatory, I would have thought, given the Commissioner's complaint that public servants are escaping criminal convictions, you would at the very least have a moral duty to comply with that section.

I would again ask that you refer these matters of misconduct to which the Chief Commissioner referred in his press release that could have resulted in prosecution.

Yours sincerely

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS

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Y:\op\dpp\work\31060\cg014567.DOC cmh

Annexure F

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 31060
YOUR REF:

COPY

23 January, 2015

The Hon. Dr Vanessa Goodwin MLC
Attorney-General
Level 10, 10 Murray Street
Hobart Tasmania 7000

Dear Attorney

Interjurisdictional review of the offence of misconduct in public office

I refer to the above paper prepared by the Integrity Commission dated October 2014 which claims there is deficiency in the Tasmanian Criminal Code in respect to misconduct by public servants. Strangely, I have not been asked by the Commission for my views in respect to the adequacy of the laws that apply to criminal behaviour of public servants. Indeed, many provisions of the Criminal Code which can be utilised to prosecute public servants such as s 253A (fraud) have simply not been mentioned in the paper.

More alarmingly, the paper states, "*However, some of this misconduct has, in the opinion of the Commission, been serious and may have merited some form of criminal punishment*"[1]. However, I have not been consulted nor has an opinion been sought from me as to whether any conduct investigated by the Commission amounted to serious criminal conduct. This is despite the fact that this Office has prosecuted public servants in recent years for a wide range of crimes under the Criminal Code including stealing, bribery dishonestly acquiring a financial advantage by deception and other offences of dishonesty.

The research paper recommends amending the Criminal Code to include the crime of misconduct in public office. The recommendation is to include within the Criminal Code a crime which would capture a much broader range of misconduct, including lower level misconduct. The recommendation also seems to be that this new crime should not require proof of any mental element. It is specifically recommended that it not require proof of any intention to gain a benefit or cause a detriment and, similarly, that it not require proof that an accused person acted dishonestly. It would be unusual to amend the Criminal Code to include a crime of

[1] See p 4 of the paper

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dishonesty, such as misconduct in public office, which did not require proof of some dishonest intent.

Further, the paper appears to recommend criminalising behaviour that would generally be regulated by internal disciplinary proceedings. This would be quite contrary to other professions that serve the public, for example the legal and medical professions who regulate professional misconduct, not amounting to a crime, by internal discipline. In the case of the public service, this is achieved by the Code of Conduct pursuant to section 9 of the *State Service Act 2000*. Section 10 of the *State Service Act 2000* allows a Minister or his delegate to impose significant penalties for workplace misconduct including a significant fine, reduction in salary or dismissal. Similar provisions apply in the *Police Service Act*. Yet the Integrity Commission wish to make such a breach of workplace standards a crime without any mental element.

In the ordinary course when a significant amendment to the law is proposed the proposition would be investigated by the Tasmanian Law Reform Institute. This ensures that an unbiased and independent report is available for everyone with an interest in the topic to review and allows any member of the community the opportunity to make a submission to the Institute about the issue. The transparency of this process ensures thorough scrutiny of significant changes to the law in Tasmania prior to the enactment of those changes. For example, the paper mentions offences interstate. The Law Reform Commission could look at how often these offences are actually used and what sort of conduct they are being used for. Further, whether such conduct is being adequately dealt with in Tasmania under other provisions of the Criminal Code.

Without specific factual scenarios, it is difficult to assess whether specific examples could be the subject of prosecution under the law as it stands in Tasmania at present. The starting point in deciding whether new criminal laws are required should be an assessment of whether the conduct intended to be criminalised can at the present time be dealt with by the law.

The crimes contained in Chapter IX of the Criminal Code, such as corruption under s 83, allow for the prosecution of more serious offences of corruption and bribery. I do not believe there is any demonstrated need for amendment of those provisions apart from widening the definition of "public officer", upon which I will enlarge later.

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
- misuse of resources
- favouritism
- wilful neglect of duty
- use of information gained in public office for private benefit
- conflict of interest

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."*[2] The words "fraudulent" and "dishonest" are often used interchangeably in this context.[3] 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."[4]

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.[5] 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. Obviously, the specific factual scenario would determine whether a jury would be satisfied that what an accused public servant did was dishonest. To convict, a jury would need to be satisfied that they intentionally acted in a way that was contrary to the standards expected of them to such an extent that what they did was dishonest.

To take a general example from the Integrity Commission paper *"An investigation into allegations of nepotism and conflict of interest by senior health managers"*, 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

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[2] *Graham-Helwig v Western Australia* (2005) 154 A Crim R 326 at [14].
[3] *Scott v Metropolitan Police Commissioner* [1975] AC 819 at [839]
[4] *Peters v R* 192 CLR 493 per McHugh J at [84]
[5] *Jovanovic v R* (2007) 172 A Crim R 518 ; *Peters v R* (1998) 192 CLR 493

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. An accused would probably argue that their conduct was not dishonest. I assume that is why the research paper recommends not including an element of dishonesty in any newly enacted crime, but as I have said it would be very unusual to have a serious indictable crime, such as that proposed, without the need for some proof of criminal intent. To ask a jury whether an accused in the factual scenario outlined used fraudulent means, or behaved dishonestly, is the sort of question that we commonly trust juries to determine.

It seems that the vast majority of the interstate provisions do require proof of some variance of dishonest intent. Proof of dishonesty is a requirement under the Commonwealth Criminal Code,[6] the Criminal Code of the ACT,[7] and the Model Criminal Code.[8] Similarly, the Queensland Criminal Code[9] requires proof of *"intent to dishonestly gain a benefit...or dishonestly cause a detriment."*

The *Criminal Law Consolidation Act* (SA)[10] requires proof that a public officer acted improperly and with the intent of securing a benefit or incurring a detriment. It has been held that a jury should be directed that an accused acted improperly under that provision if they acted contrary to the standards generally and reasonably expected by ordinary decent members of the community and that they knew they were acting improperly or were reckless as to whether they were acting improperly.[11] The definition applied by the Court of Criminal Appeal of South Australia to the word "improperly" is essentially the same as the definition applied by the Court of Criminal Appeal of Tasmania to the word "dishonestly" [12] under the Criminal Code in this State.

The common law offence which operates in Victoria and NSW requires proof that an accused *"wilfully and intentionally"* commit *"culpable misconduct."* This offence requires proof of intentional serious misconduct. *"Wilfully and intentionally"* means an intention to do an act or refrain from doing an act with knowledge of the consequences, which is knowledge that the act amounted to misconduct.[13] Practically speaking, this seems almost indistinguishable from a dishonest intent.

The West Australian *Criminal Code Act Compilation Act 1913*[14] makes it a crime to without lawful authority or reasonable excuse;

a. act on knowledge or information obtained by reason of public office, or

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[6] *Criminal Code Act 1995 (Cth) s 142.2*
[7] *Criminal Code 2002* (ACT) s 359
[8] *Model Criminal Code s 3.6.5*
[9] *Criminal Code Act 1899* (Qld) section 92A
[10] *Criminal Law Consolidation Act* section 251
[11] *R v Austin* [2013] SASCFC 133 at [21]
[12] *Jovanovic v R* (2007) 172 A Crim R 518
[13] *Blackstock v R* [2013] NSWCCA 172.
[14] Section 83

b. discharge the functions of public office in relation to a matter where they hold a pecuniary interest, or

c. act corruptly in relation to the performance or discharge of their employment.

"*Corruptly*" means improperly,[15] and it could therefore be said that corrupt conduct is less serious than dishonest conduct, but the degree of distinction will depend on the factual scenario. It was held in *Willers v R*[16] that a trial judge had not erred by directing a jury that they would be satisfied that an accused had acted corruptly if satisfied that he acted dishonestly. Consequently in Western Australia it is only the first two limbs of section 83 of their Criminal Code, being use of information gained through public office, or the discharge of the functions of public office in relation to a matter where an accused holds a pecuniary interest, that do not require an improper intent. As explained in most cases a corrupt or improper intent will be almost indistinguishable from the use of fraudulent means, which is a dishonest intent.

Therefore it seems that the crime of fraud under the Criminal Code requires proof in a general sense of the same elements as the various crimes enacted throughout the country and referred to in the research paper. Obviously the crime of fraud does not require proof that an accused held public office. It is a crime that can apply to any member of the community. However, it would be the requirement of State Service regulations or procedures which in some circumstances would make his or her behaviour dishonest or fraudulent.

In my view, it would be an over-reaction to amend the Criminal Code so that relatively trivial acts of misconduct, such as minor acts of nepotism or favouritism without any dishonest intent would be prosecuted in the Supreme Court before a jury. In my view, such conduct is adequately covered by the Code of Conduct and the more serious conduct is adequately covered by the Criminal Code.

The second recommendation of the research paper is that the definition of 'public officer' in the Criminal Code be expanded. There is merit in this suggestion. It would not involve a major change to the Criminal Code, but rather an expansion of the class of individuals who could be subject to prosecution for crimes such as official corruption and bribery of a public officer. Arguably the public would expect that anyone employed by the State would have an obligation not to act corruptly and therefore it would be appropriate to expand this definition.

The third recommendation is that a review be undertaken to determine whether the Criminal Code provisions relating to aiding and abetting could be utilised to prosecute those who "facilitate" the commission of misconduct in public office offences. The research paper makes reference to the factual scenario dealt with by the West Australian Court of Appeal in *Kalani v The State of Western Australia.*[17]

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[15] *Willers v R* (1995) 81 A Crim R 219
[16] (1995) 81 A Crim R 219
[17] [2013] WASCA 132

Section 3 of the Criminal Code allows for the prosecution of people who aid, abet (which means encourage) or instigate others to commit a crime. There are also additional pathways to accessorial liability, such as section 4 of the Criminal Code. Section 7 of the West Australian Criminal Code is in very similar terms to our section 3.

There is no doubt that the current provisions of the Criminal Code could be utilised to prosecute those who commit misconduct in public office offences provided that they aided, encouraged or instigated the commission of that offence. The law is almost identical in Western Australia. While there is no recommendation to amend section 3 or the other provisions of the Criminal Code covering accessorial liability it should be avoided as it would have implications for the entire scheme of the Criminal Code. Further, the section as it currently stands has been extensively litigated over many years. Consequently its meaning has been authoritatively pronounced. Changing the section could lead to uncertainty in its meaning and application and therefore lead to appeals and subsequent retrials.

The factual scenario from *Kalani v The State of Western Australia* was that the principal accused was employed by the Department of Health as a project manager. In that role he engaged the second accused as a project administrator for various works that were being carried out for the Department. The second accused then engaged the principal accused to carry out some of that work. The fact that the principal accused was carrying out some of the work for which he had engaged the secondary accused was concealed from the Department. The second accused used some of the money that he was paid by the Department to pay the principal accused. This was also concealed from the Department. The prosecution case was that the second accused knowingly aided the principal accused by:

a. arranging for invoices rendered to the principal accused to be rendered in names that would hide the fact that it was the principal accused who was completing that work,

b. invoicing the department in sums of less than $10,000 so that the principal accused could authorise those amounts,

c. requesting a letter of introduction from the principal accused to indicate falsely that others did the work

d. paying on invoices issued in the false names when he knew the money was going to the principal offender

e. paying on invoices for work that he knew could not have occurred

f. altering the description of works of previously issued invoices

g. sending correspondence to the principal offender using the false names.

As the law currently stands in Tasmania the principal offender could be prosecuted for committing the crime of fraud contrary to section 253A of the Criminal Code and the second offender could be prosecuted for aiding and/or abetting the commission

of that crime. Alternatively, they could be prosecuted for dishonestly acquiring a financial advantage contrary to section 252A of the Criminal Code.

If there is to be any amendment to the Criminal Code the matter should first be looked at by the Law Reform Institute of Tasmania, although it is my view that, apart from expanding the definition of 'public officer', the Criminal Code is adequate for dealing with serious misconduct of public servants.

Yours sincerely

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS

Annexure G

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 31449
YOUR REF:

COPY

9 April, 2015

Mr D L Hine
Commissioner of Police
Commissioner's Office
Tasmania Police
47 Liverpool Street
Hobart Tasmania 7000

Mr Simon Overland
Secretary
Department of Justice
GPO Box 825
Hobart Tasmania 7001

Mr M O'Farrell SC
Solicitor-General
L 8, 15 Murray Street
Hobart Tasmania

Dear Gentlemen

Recent High Court decisions in relation to bodies pursuant to legislation that attempts to abrogate the right to silence

X7 v Australian Crime Commission[1].

On 26 June 2013 the High Court brought down its decision in the above case. This was the first in a series of cases which have serious implications for the conduct of investigations by police where a crime or misconduct commission is used or where compulsory powers directing police officers to answer questions are used under the *Police Service Act 2003*. Further significant issues will arise for the prosecuting of any persons where such powers have been used.

The issue in *X7* is that the *Australian Crime Commission Act 2002* vests powers in examiners appointed under the Act to conduct examination of individuals. It is compulsory for a witness to answer any questions in any such examination. I will not set out the complex legislation underpinning these powers, but suffice to say the Australian Crime Commission ("the ACC") may only use these powers of compulsory examination when the Board of the ACC has determined that ordinary police methods are not likely to be effective to lead to the laying of charges (see s 7C(3) of the Act) in respect of Commonwealth matters.

X7 was arrested and charged with various drug offences contrary to the *Criminal Code* (Cth). After his arrest he was served with a summons issued under s 28 of the Act. Initially unrepresented, he answered some questions in respect to matters arising out of the charges. However, upon receiving legal advice he refused to answer any further questions. As a result a case stated went to the High Court for determination as to whether he was required under the Act to answer any questions.

[1] (2013) 248 CLR 92

The majority (Hayne, Kiefel and Bell JJ) ruled that the Act did not require him to answer the questions on the basis of the principle of legality. That is:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of the law without expressing its intention with irresistible clearness; and to give any such effect to general words simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

(see *X7 v ACC* (supra) per Hayne and Bell JJ at [86])

In other words, unless the legislation clearly expressed that it was removing a fundamental right it would be interpreted by the court that it did not.

The majority found that the right to silence was a fundamental right for persons suspected of offences but not yet charged. This right was in addition to the right not incriminate oneself. At [105], Hayne and Bell JJ stated:

> "The notion of an accused person's "right to silence" encompasses more than the rights that the accused has at trial. It includes the rights (more accurately described as privileges) of **a person *suspected of, but not charged* with, an offence**, and the rights and privileges which that person has between the laying of charges and the commencement of the trial." (my emphasis)

Whilst Kiefel J stated at [160]:

> "The common law principle is fundamental to the system of criminal justice administered by courts in Australia, which, as Hayne and Bell JJ explain, is adversarial and accusatorial in nature. The accusatorial nature of the system of criminal justice involves not only the trial itself, but also pre-trial inquiries and investigations. This is recognised by the statutory provisions to which their Honours refer."

Further, Hayne and Bell JJ observed at [124]-[125]:

> "Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.
>
> As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that

> kind, compelling answers to questions about the subject matter of the pending charge would be a contempt."

The majority held that there was no express reference to examine a person who had been charged **but there had been for a person who had been suspected of committing an offence**. (If there had been no reference to this a person suspected of committing an offence but not charged would have likely been held not to be required to answer any questions.) See *QAAB v CC*[2] per Logan J at 26 and 37.

In particular, in relation to this issue, Hayne and Bell JJ, state at [83]:

> "First, there is no express reference, anywhere in the ACC Act, to examination of a person who has been charged with, but not tried for, an offence about the subject matter of the pending charge. Contrary to the assumption that necessarily underpinned the submissions made by the ACC and the Commonwealth, the reference in s 25A(9) (and the similar reference in s 29A(2)) to prejudice to "the fair trial of a person who has been, or may be, charged with an offence" does not deal specifically with the case of the person being examined having also been charged with an offence. The words used are sufficiently general to include that case, but they do not deal directly or expressly with it. **The words used in s 25A(9) (and in s 29A(2)) have ample work to do in respect of the examination of persons who may be suspected of wrong-doing but who, before examination, have not been charged with any offence. It is the generality of the words used in the ACC Act, including in ss 25A(9) and 29A(2), and the absence of specific reference to examination of a person who has been charged about the subject matter of the pending charge, which presents the issue for determination in this case**. (my emphasis)

And at [147]:

> The ACC may therefore execute its function of investigating matters relating to federally relevant criminal activity by using the extraordinary processes of compulsory examination only when the Board of the ACC has determined that ordinary police methods are not "likely to be effective" to lead to the laying of charges. The performance of that investigative function is in no way restricted or impeded if the power of compulsory examination does not extend to examination of a person who has been charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. **The general provisions made for compulsory examination, when read in their context, do not imply, let alone necessarily imply, any qualification to the fundamentally accusatorial process of criminal justice which is engaged with respect to indictable Commonwealth offences**. (my emphasis)

Thus, although the High Court held that even though there may have been some general implications in the legislation to suggest an examination of a charged person could take place, the Act did not expressly state that was the case and the intention of the legislation was that such examinations would only take place where normal law enforcement investigations were not likely to be effective to lead to the laying of charges. Thus, by implication, the Act did not intend to abolish such a fundamental right when a person was charged but did so when a person was only suspected of the offence.

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[2] [2014] FCA 747

Thus, in summary,

> "The majority in X7 started from the following propositions:
>
> a. That, subject to statutory exceptions, there existed a privilege against self-incrimination;
>
> b. Again, subject to statutory exceptions, there was a *"right to silence"* which was related to, but independent of the privilege against self-incrimination;
>
> c. The processes of the criminal law were adversarial and accusatorial;
>
> d. The principle of legality applied to the construction of the ACC Act.
>
> It therefore followed, in the view of the majority, that the statute ought to be read so as not to remove the right to silence. Therefore, the examiner's powers were limited to examining persons who had not been charged."

(see "The Right to Silence: Implications from the X7 case", P J Davis QC)

Lee v NSW Crime Commission[3]

The next decision of the High Court was *Lee v NSW Crime Commission* (*"Lee No. 1"*) brought down in October 2013. This case concerned the *Criminal Assets Recovery Act 1990* (NSW). It would be similar to our *Crime (Confiscation of Profits) Act 1993*. It allowed for compulsory examination. Again, I will not outline the legislation.

The NSW Crime Commission made application to the New South Wales Supreme Court seeking orders for the compulsory examination of Mr Lee. At the time Mr Lee had been charged with criminal offences. It was obvious that their examination would cover issues relating to the criminal proceedings. The primary judge refused the application. The Court of Appeal allowed it. It went to a seven-bench High Court which held by majority that the Act did allow for compulsory examination despite the fact that Mr Lee had been charged. The majority found that the Act expressly removed the right to silence of a charged person and therefore he could be compulsorily examined.

It should be noted, however, that both the majority and minority upheld the ratio of the decision of *X7*, that of the principle of legality. However, clearly the High Court was saying this could be excluded by express terms of the legislation. Gaegler and Keane JJ state at [313] - [314]:

> "Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified

[3] (2013) 251 CLR 196

> legislative objects by means within the constitutional competence of the enacting legislature.
>
> The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that "[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve".

The other judges also expressed the view that the principle of legality can be overturned by expressed words or clear implication. The Chief Justice expressed the test in this way at [30]:

> "The courts do not interpret a statute to permit such questioning [of a person accused in criminal proceedings] unless it is expressly authorised or permitted as a matter of necessary implication."

Hayne JA said:

> "The accusatorial process of criminal justice reflects the balance that is struck between the power of the State and the place of the individual. Legislative alteration to that balance may not be made without clear words or necessary intendment."

Crennan J expressed the test similarly to the Chief Justice, at [126], namely:

> "Two important rules of constructions do, however, apply. The first is the settled principle that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect."

Bell J articulated the principle "*... the legislature does not intend to abrogate or restrict a fundamental right or freedom except by words of clear intendment*".

The only real difference between the majority and the minority is the majority were more willing to draw the conclusion that the legislature had overridden the principle of legality than were the minority.

Tasmanian legislation

The decisions in *X7* and *Lee No. 1* have the potential for considerable impact in Tasmania.

Division 2 of the *Police Service Act 2003* ("the PSA") deals with investigations into complaints in respect of police officers. The purpose of such investigations appears to be for the Commissioner to determine if he should take any action pursuant to s 43(3) of the PSA when there has been a breach of the Code of Conduct (see s 47(2)).

Section 46(3) provides:

> "(3) The Commissioner may –
>
> (a) direct any police officer to –
>
> (i) assist in the investigation of a complaint; and
>
> (ii) provide any information or document or answer any question for the purpose of the investigation; and
>
> (b) conduct the investigation in any manner the Commissioner considers appropriate."

The requirement that a police officer can be directed to answer a question is only for the purposes of a breach of the Code of Conduct. There is nothing in the PSA that explicitly excludes the privilege against self incrimination or the right to silence. Therefore, a police officer could not be directed to answer a question when he has been charged with a criminal offence. Further, however, if the dicta in *X7* is adopted and applied here, that **a statute is not intended to remove the right to silence** (unless by clear intention of the statute) where a person is suspected of committing an offence then as the Act is silent on the matter and if *X7* extends to this proposition, a police officer would not be required to answer a question **where he is suspected of committing an offence**. There is judicial authority to this effect (see *Beckett v R*[4]). This may lead to the absurd result that the police officer could never be directed to answer a question because he is continually suspected of committing an offence although there is not sufficient evidence to charge the officer with any offence.

A suspicion is a relatively low level of satisfaction and certainly significantly lower than the level required to charge a person or even caution them under the *Evidence Act 2001* (see s 139(5)) The authorities state the following:

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion, but without sufficient evidence ... Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence."

See *George v Rockett*[5], referring to *Queensland Bacon Pty Ltd v Rees*[6] per Kitto J at 303:

> "The state of mind is more than a mere surmise. Applying a similar approach as has been applied with respect to search warrant legislation, it is one arrived at on the basis of material that is capable of supporting the formation of an opinion, even if only a slight opinion, that the person in question (the accused) could have committed the offence." (the equivalent legislative section in NSW reads "*an offence*".)

See *R v Taouk*[7].

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[4] [2014] NSWCCA 314
[5] (1990) 179 CLR 104 at 115-116
[6] (1966) 115 CLR 266

A suspicion must be "*...more than a mere possibility unsupported at that stage by any factual basis ...*"

See *Doklu v R*[8]; *R v JG (No. 2)*[9]; *R v Villa*[10]; and *Western Australia v Dean*[11].

Invariably Police Standards investigations are joint investigations in both criminal and Code of Conduct matters. Often a police officer will be cautioned, he will refuse to answer questions and then be directed to do so on the understanding that such answers would not be admissible in any criminal proceedings. Often a police officer will give his explanation and that will be the end of the matter. The question arises, can he be so directed under the legislation?

Similarly, the *Integrity Commission Act 2009* allows for an investigator to direct a person to answer questions. The investigator may order such answers to be on oath. See s 47(7) of the Act. Again, there is nothing explicit in the Act removing the privilege against self incrimination or the right to silence for a person who is charged **or suspected** of committing an offence. Although it may be argued that is the intention because the investigation can be made into a serious offence it may well be read down that it could compel other people (who are not suspected of committing an offence) to answer questions but not the person suspected of committing the offence.

Solution

I have not looked at all Tasmanian legislation to see if any other Acts offend the principles enunciated in *X7*. Basically, I have looked at the *Police Service Act 2003*, the *Integrity Commission Act 2009* and the *Crime (Confiscation of Profits) Act 1993* which appear to expressly abrogate the right to silence (see s 93(6) of the *Crime (Confiscation of Profits) Act 1993*).

A possible solution at present is to do nothing and wait and see whether the High Court narrows the *obita dicta* of *X7* of the principle of legality applying to a person suspected of committing a crime. Alternatively, we could await the reaction of other States to the decision. However, while doing so, if any person takes the point we may face a challenge to the legislation if it is attempted to enforce such a direction. Further, we could face challenges in relation to a number of cases which arise from the decision in *Lee No. 2* (which arose out of the decisions of *X7* and *Lee No. 1* but is slightly different).

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[7] (2005) 154 A Crim R 69 at [160]
[8] (2010) 208 A Crim R 333 at [26]
[9] [2009] NSWSC 1055 at [32]-[38]
[10] [2005] NSWCCA 4
[11] [2010] WADC 7 at [29]

Lee No. 2

Lee v R[12] *("Lee No. 2")*, unlike the other two cases, is a criminal case. Mr Lee, prior to being charged, was examined under the NSW *Crime Commission Act*. A transcript of his examination was given to the Crown prosecutor contrary to a direction given by the Commission pursuant to s 13 of the Act. It was conceded by the Crown that it was unlawful for the Crown prosecutor to have been provided with the transcript. Although the transcript was not used in evidence it was clearly of advantage to the prosecutor to know what the defence would be. The High Court found this amounted to a miscarriage of justice.

The joint judgment of French CJ, Crennan, Kiefel, Bell and Keane JJ stated at [46] and [51]:

> "In *X7*, it was held that the compulsory examination of a person with respect to an offence with which the person stands charged would be a departure, in a fundamental respect, from that principle. *X7* was ultimately concerned with questions of statutory construction. Nevertheless, the point it makes about what may amount to a fundamental departure from a criminal trial as it is comprehended by our system of criminal justice is relevant to this case. It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges. It cannot be said that the appellants had a trial for which our system of criminal justice provides and which s 13(9) of the NSWCC Act sought to protect. Rather, their trial was one where the balance of power shifted to the prosecution.
>
> The circumstances of this case involve the wrongful release and possession of evidence. However, its effects cannot be equated with the use of evidence illegally or improperly obtained. The question whether such evidence should, as a matter of discretion, be admitted does not arise. Clearly, s 18B(2) of the NSWCC Act provided that the appellants' evidence before the Commission was inadmissible at their trial. Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused."

Thus, the High Court held that contrary to the provisions of the Act, the prosecutor was provided with the transcript of the accused's evidence causing an imbalance in the trial process and therefore a miscarriage of justice.

The principle does not apply at least where the legislation **expressly** authorises the release of the examination to the prosecution. In *R v Jacobson*[13], Kaye J stated at [37]-[38]:

> "For those reasons, I have reached the conclusion that the possession and use by the prosecution of the s 19 examination of the accused was authorised by the ASIC Act. I accept that the provision of the transcript, in the present case, to the DPP,

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[12] (2014) 308 ALR 25
[13] [2014] VSC 508

> pursuant to the provisions of the ASIC Act, does alter an important aspect of the process of a criminal trial. However, as I have concluded, the provision of the accused's s 19 examination to the DPP in this case was authorised by the ASIC Act. On that basis, the case is distinguishable from the decision of the High Court in *Lee*.
>
> Thus, there was nothing improper or illegal about the possession and use by the prosecution of that material. In that way, the case is relevantly distinguished from the circumstances in Lee, in which the prosecution had possession and use of the s 19 material, and which the High Court held constituted a miscarriage of justice."

(See also *Bartlett v R*[14])

The Tasmanian enactments certainly do not prohibit the release of such information and it is therefore 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. In *Zhao & Jin v Commissioner of the Australian Federal Police*[15], the Victorian Full Court stated at [57]:

> "In this case, the question is whether s 319 of the POC Act abrogates the privilege against self-incrimination to the extent of taking away the right of the accused to require the Crown to prove its case without the accused's assistance. Ex facie, the section is not inconsistent with it having that effect. As *Jo* shows, however, and in our view *Lee No 2* now tends to confirm, the section is not sufficiently clear in terms or as a matter of necessary implication to compel that conclusion. There is work for the section to do in cases where its application would not result in abrogation of the right of an accused to require the Crown to prove its case without the accused's assistance; as, for example, where the subject matter of forfeiture proceedings is different to the subject matter of criminal proceedings or perhaps where the subject matter is severable and there are severable parts of the forfeiture proceedings which may be explored without trenching upon the accused's right to require the Crown to prove its case without the accused's assistance."
>
> "**Where, therefore, a question arises as to whether a statutory provision abrogates the right of an accused to require the Crown to prove its case without the accused's assistance, but the provision fails to state with sufficient clarity or necessarily to imply that it does abrogate the right, we take it that the court is bound to proceed on the basis that the right has not been abrogated and to do what the court can to protect it.** [55] (my emphasis)

Thus, as the prosecution were **not expressly authorised** to have the transcript it interfered with the accused having a fair trial, even though there was no express prohibition.

Prior to *Lee No. 2*, the practice was for the prosecutor to receive such transcripts. Recently we had a matter where a police officer was convicted of rape. The Crown prosecutor was provided with the transcript of an interview from Police Internal Investigations wherein he had been directed to answer questions. Indeed the

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[14] [2014] WASC 277
[15] [2014] VSCA 137

defence counsel wanted Crown counsel to tender the interview as part of the Crown case even though, prima facie, it was inadmissible. She refused. This case is now before the Court of Criminal Appeal. It is yet to be heard. However, it would appear the appellant would have an arguable case that the trial was unfair.

Since *Lee No. 2*, in relation to police matters, I have been supplied with directed interviews of police officers when determining whether an officer should be charged. Often, as a result of the directed interview, I determine that the police officer should not be charged. If I make a determination that the officer should be charged the interview is removed from the file and not provided to the prosecutor. Such an approach has been endorsed by the courts as in such circumstances there is no unpractical fairness. See *R v Seller*[16], which was upheld by the High Court in [2013] HCA transcripts 204, *Bartlett v R* (supra), and *R v Jacobson* (supra) per Kaye J at [39]-[40] where he stated:

> "Further, I am not satisfied that the possession of the s 19 material, by the prosecution, has resulted in any practical prejudice or unfairness to the accused. As Mr Rapke pointed out, each of the matters, suggested by Dr Wilson as constituting relevant prejudice, were unsupported by evidence and were matters of speculation. No evidence was adduced, on behalf of the accused, as to whether Mr Flynn or Ms Argitis had made any, and if so what, use of the s 19 material. Nor has the defence demonstrated how any potential use of the material by the prosecution might be unfair to the accused, in light of my conclusion that the ASIC Act authorised the possession of and use by the prosecution of the material.
>
> In those circumstances, the accused has failed to establish that there has been, or would be, any unfairness in the prosecution of the case, that should entitle him to a stay of the proceeding. The application for a stay must therefore be refused."

The reason being that there is no practical unfairness because Crown counsel conducting the case is unaware of the defence case.

However, as investigations are currently conducted there may still be grounds for a stay of proceedings in criminal matters because the investigators who investigate the criminal matter are aware of the contents of the compulsory questioning. In *Bartlett v R* (supra), Heenan J stated at [41]-[42]:

> "A question may arise as to how far the isolation and the quarantine should reach. Should it reach to police officers or investigators who have knowledge of the results or contents of the compulsory examinations and who may be witnesses at the retrial? Should it reach to investigators or prosecutors involved in the investigation or prosecution of suspected offences of persons other than the examinees who may have been involved in or connected with the offences alleged against these examinees? Should it extend to clerical staff and/or senior officers of the DPP who became aware of the contents of the compulsory examinations who, in the case of senior staff, may be responsible for the oversight of the prosecution being conducted by the new team? It is true that these questions are, at the moment, hypothetical and in some instances may be difficult to resolve. Uncertainty about some of them was noticed by Logan J in *QAAB v Australian Crime Commission* at [39]–[40]. However, at least in relation to one aspect of them, counsel for the present applicants did not suggest that an officer of the ACC in the present case, who was aware of the

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[16] [2013] NSWCCA 42

> contents of the compulsory examinations of Messrs Bartlett and Sayers before the ACC, and had received and read and who has access to transcripts of those examinations, and who was a witness for the prosecution at the first trial of these accused, would in any way be prevented from giving evidence at this retrial or, for that matter, assisting in its prosecution.
>
> The submission for the applicants was that, for present purposes, it was unnecessary to explore or determine the breadth of the necessary isolation or quarantine of those who had received and were aware of the results of the compulsory examinations of Messrs Bartlett and Sayers beyond the actual counsel and solicitors who appeared for the prosecution at the retrial. **Nevertheless, implicit in this stance is a tacit acceptance that the degree of isolation and quarantine of personnel with knowledge of the compulsory examination product is, at least to some extent, dependent upon the effect or potential effect which that knowledge may have or may appear to have on the ability to achieve a fair trial according to law.**" (my emphasis)

In *R v Seller* (supra), Bathurst CJ stated at [115] that the knowledge of an accountant of an examination may lead to the exclusion of his evidence.

Thus arguments will be mounted that police officers investigating criminal charges will need to be quarantined from such evidence, as will witnesses. Given that almost all police internal investigations could amount to criminal conduct as well as Code of Conduct complaints, such an approach would be extremely onerous and would require a complete change in the way internal investigations are conducted.

I understand that Queensland, at least, is planning legislation explicitly authorising the release of such material.

The above matters were raised at the recent meetings of both the Australian Directors of Public Prosecutions and Solicitors-General and they are likely to be included on the COAG agenda.

The matters have serious implications for the administration of justice in this State. I suggest we meet to discuss the implications of the decisions and a way forward.

Yours sincerely

D G Coates SC
ACTING DIRECTOR OF PUBLIC PROSECUTIONS