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The Hon William Cox AC, RFD, ED, QC
The Independent Reviewer
PO Box 825
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Tasmania 7001

Dear Hon Mr William Cox

Submission to the Five-Year Independent Review of the Integrity Commission Act, 2009

The Integrity Commission was established by Parliament in 2010, in response to the findings of the Parliamentary Joint Select Committee on Ethical Conduct's 2009 report "Public Office is Public Trust". That report concluded that a new body was required with investigative functions because existing integrity agencies had limited mandates and inadequate powers.

If the Commission were to be stripped of its investigatory powers, as the Government is proposing, scrutiny of government officials would return to the inadequate situation identified by the Joint Select Committee. In fact, Tasmanians would be in a worse position than in 2009, because since that time the office of the independent State Service Commissioner has been abolished.

According to the Tasmanian government and the Attorney General the Commission's investigatory functions and powers should be removed because of duplication and overlap with those of other integrity agencies specifically the Ombudsman, the Auditor-General, the Tasmanian Police as well as Government agencies themselves.¹ While there may be some limited overlap, the Integrity Commission in fact performs a number of investigatory functions that are not within the powers of any of these bodies and, unlike some of these bodies, is independent of government. Removal of the Commission's investigatory powers would mean that these important functions would simply not be performed in Tasmania. This is a matter of great concern.

Importantly, the Joint Select Committee recognised that corruption extends beyond criminal offences, including, for example, abuses of power such as cronyism in recruitment practices, 'sweet-heart deals' and 'regulatory capture'.² The Committee recognised that this kind of wrongdoing is difficult to uncover without an independent body with powers to investigate:

There is clearly a need for the ability to investigate and expose conduct by public officers that whilst not illegal is nevertheless contrary to the public interest and necessarily constitutes a breach of public trust.³

¹ Parliamentary Joint Standing Committee on Integrity, Final Report of the 3-year Review, pp. 24-25.

² Joint Select Committee on Ethical Conduct, Final Report 'Public Office is Public Trust', pp. 17-25 particularly at p. 20.

³ Ibid. p. 9.

The Committee recommended that the Integrity Commission achieve its objectives by, inter alia:

- 1...
2. investigating allegations of corrupt or inappropriate behaviour made against public officials in Tasmania; and
3. making findings in relation to those investigations and taking the appropriate action.⁴

That the need for independent scrutiny extended to conduct at the highest levels of government was made abundantly clear in the Bill's Second Reading Speech: "[t]he Government takes the view that there are certain categories of public official whose conduct should be subject to direct scrutiny by the Integrity Commission."⁵

Included in this category were: "Members of Parliament; Parliamentary staff; Ministers and their staff; State Service employees; holders of senior executive office; Police; Local Government councillors; Local Government employees; Government House staff; GBEs and their employees; State owned companies and their employees; statutory authorities and their staff; and statutory officers and other government appointees."⁶

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

- The *Ombudsman's Act*, (Tas) 1978 does not apply to members of parliament, ministers or ministerial advisers. Nor does the Ombudsman have the power to conduct surveillance operations. In fact, the Ombudsman must give notice of an investigation as well as of any proposed entry of premises. This severely curtails the ability of the Ombudsman to conduct covert investigations of alleged misconduct.
- The Auditor General's ability to investigate misconduct at all levels of government is hampered in a number of respects. First, the Auditor General does not accept, or act on, complaints by members of the public. Secondly, the Auditor General's mandate is limited to examining financial probity and does not extend to any other type of misconduct. Finally, the Auditor General powers do not extend to conducting surveillance operations or compelling witnesses to secrecy.
- The Tasmanian Police, except in relation to its own employees, has no role to play in the investigation of misconduct falling short of criminal conduct.
- Heads of Agencies have no role to play in investigating misconduct of parliamentarians, ministers or ministerial advisers. While Heads of Government Agencies may investigate misconduct by employees, they are not independent nor do they have investigatory powers (e.g. cannot access bank records or obtain surveillance warrants). Furthermore people may be reluctant to complain of misconduct by senior members of the public service to the Head of an Agency due to fear of reprisal.

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

Just six years ago, the Joint Standing Committee on Ethics, considered a wide range of submissions and found that accountability for ethical conduct by those in government in

⁴ Recommendation 29, Joint Select Committee Report at p. 16.

⁵ Tasmanian Parliament, Second Reading Speech, at p. 14

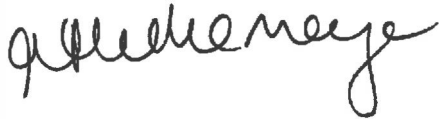
http://www.parliament.tas.gov.au/bills/Bills2009/pdf/notes/85_of_2009-SRS.pdf.

⁶ Ibid. p. 19.

Tasmania was lacking. The findings of the Joint Select Committee still stand, and the Integrity Commission should retain its investigatory functions and powers.

If there are concerns about how previous office holders of the Integrity Commission conducted their investigations, then rather than abolish its investigatory functions, it would be preferable to explore reform options used in other States, such as the appointment of a Parliamentary Inspector to act as a 'check' on the Commission.

Yours sincerely,



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Attachment A: Analysis of Powers of various bodies to investigate misconduct in Tasmanian Government.

Auditor General

The Auditor General is an independent statutory officer who reports directly to Parliament.

The primary function of the Auditor General is to scrutinise government financial statements with a view to assessing the 'efficiency, effectiveness or economy of an entity audited'. The Auditor General has power to investigate fraudulent activity that may be categorised as criminal activity, e.g. theft.

In terms of independent investigation of misconduct at all levels of government the functions and powers of the Auditor General are restricted in a number of respects.

1. The Auditor General's mandate is limited to the conduct of financial audits. As a former Auditor General explained:

My mandate is to conduct financial audits. Those are the things that I have to do. My mandate also gives me discretionary power to conduct audits of efficiency, effectiveness and economy. It also enables me to carry out investigations. Again, that is also discretionary, but only in relation to matters that affect the accounts of the Treasurer or of any public body and where it may affect public money or public property.⁷

2. The Auditor General's function is not directed to investigating misconduct of government officials that falls short of criminal conduct. As the former Auditor General explained:

In discussing something with a minister I can then only do so as it relates to my mandate. So I can only talk to that minister in relation to the mandate I have and that is, in this case, the investigative powers which are in relation to the accounts of the Treasurer or a public body or in relation to public expenditure. If the minister may have done something that was inappropriate but did not involve the expenditure of money, I then could not inquire into that minister.⁸

3. The Auditor General may examine compliance by a state entity (including government departments) with written laws and its own policies (s23 *Audit Act (Tas)* 2008) but nothing in the Act requires the Auditor General to investigate possible misconduct by an individual within government.
4. There is no facility for a person to make a complaint to the Auditor General about misconduct of government officials.
5. The Auditor General does not have power to 'audit' members of parliament.
6. The Auditor General has extensive powers, including the power to compel evidence, to enter and search premises without a warrant and without notice and to deny people the right not to incriminate themselves. However, the Auditor General does not have the power to conduct surveillance operations, nor to compel witnesses to secrecy.

Ombudsman

The Ombudsman is an independent statutory officer who reports directly to Parliament.

In terms of independent investigation of misconduct at all levels of government the powers of the Ombudsman are restricted in the following respects:

⁷ Joint Select Committee on Ethical Conduct, Final Report 'Public Office is Public Trust, p. 69.

⁸ Op.cit.

1. The *Ombudsman Act (Tas) 1978* (s 4) does not apply to:
 - o Members of Parliament;
 - o Ministers;
 - o Ministerial advisers;
 - o Government House employees;
 - o Clerks and their staff of the Houses of Parliament.
2. The Ombudsman is only able to review administrative actions (s 12). Whilst such a review may reveal evidence of nepotism, bribery or other misconduct, a direct complaint about such matters could not be considered.
3. Only those personally affected by a particular administrative action may make a complaint (s 14). This would mean that a member of the public or an employee of a government department or agency who becomes aware of misconduct which does not concern them personally, may not have a sufficient interest in the matter to make a complaint to the Ombudsman.
4. The Ombudsman may refuse to investigate if a person has not previously raised a complaint to the public authority to which it relates (s4A). Whilst the Ombudsman has the discretion to consider complaints that have not been first addressed to the relevant public authority, knowing they may be asked to make a complaint directly may deter members of the public or government employees from making a complaint to the Ombudsman.
5. The Ombudsman's ability to investigate misconduct within government is limited because s/he must give notice of both investigations (s23) and searches (s25) thereby removing any element of surprise. The Ombudsman cannot conduct surveillance operations.

Tasmanian Police

Police are tasked with investigating crimes but not breaches of Codes of Conduct or other misconduct that may fall short of satisfying all the elements of a crime.

The Tasmanian Police does conduct internal investigations of complaints of misconduct on the part of its officers.

Head of State Service

The Head of State Service, until February 2013, was the independent statutory office of the State Service Commissioner. The State Service Commissioner provided independent oversight and advice to Heads of Departments as well as Ministers directly on matters relating to state public servants. Complaints by state employees regarding appointments and other employment matters could be directed to the State Service Commissioner.

Since the abolition of this office, the Head of State Service is no longer an independent role. Most of the functions of the State Service Commissioner are now performed by the Secretary of the Department of Premier and Cabinet (i.e. they are no longer performed by an independent body).

Some of the functions of the State Service Commissioner have been directed to the Auditor General who may "examine the performance and exercise of the [State] Employer's functions and powers under the State Service Act"⁹ and the Tasmanian Industrial Commission which can hear State employee complaints regarding selection for

⁹ Current version of *State Service Act (Tas) 2000* s 18(3)

employment. However, the Industrial Commission cannot hear complaints of misconduct against government officials from members of the public nor conduct its own motion investigations.

A number of independent scrutiny and advisory functions carried out by the State Service Commissioner have been removed from the State Service Act and are no longer carried out. These included:

- taking any steps necessary to uphold or promote State Service principles;
- providing advice to the Minister on any matter relating to state service;
- evaluating the adequacy of systems and procedures to comply with Codes of Conduct.¹⁰

Heads of Agencies

Breaches of Codes of Conduct and failure to comply with guidelines and policies (including bullying, harassment or behavioural matters) are a matter for heads of agencies under Employment Direction 5.

Heads of Agencies (i.e. Secretaries of Government Departments) are not independent from the government employees against whom complaints may be brought.

Heads of Agencies have limited powers of investigation. They cannot access records such as bank records nor obtain warrants for the use of surveillance devices.

There is a concern that complaints against higher-level public service employees are unlikely to be made to an in-house review body for fear of reprisals. The perception would also be that any in-house review body may not be at arms length from the persons against whom a complaint is made.

This obstacle was recognised in the Second Reading speech where it was noted that:

Because of the seniority of these officers there is a strong public interest in the Integrity Commission running the investigation of any allegations against these senior public officers.¹¹

Indeed, academic literature suggests that the practice of integrity commissions referring most complaints back to the relevant department for investigation and resolution is a “sleeper issue that has been inadequately recognised in the debate in most locations”.¹²

¹⁰ See s 18 (1) of the *State Service Act (Tas)* 2000 prior to the 2012 amendments.

¹¹ Tasmanian Parliament, Second Reading Speech, at p 14
http://www.parliament.tas.gov.au/bills/Bills2009/pdf/notes/85_of_2009-SRS.pdf.

¹² Tim Prenzler and Nicholas Faulkner, Towards a Model Public Sector Integrity Commission, *Australian Journal of Public Administration*, 2010, pp. 255-262 at 256.