

Submission
to the Independent Review
of the Integrity Commission
Act 2009

On behalf of

CPSU (SPSFT) Inc.

March 2016

Tom Lynch
General Secretary

Executive Summary

Confidence in our public institutions is critical to the provision of public services. Since 2009 the Tasmanian Integrity Commission has been performing a vital function – educating public officials about integrity in public administration and investigating allegations of serious misconduct.

The CPSU has always been a strong advocate for a dedicated and independent integrity body and in general terms consider the operation of the Integrity Commission since its inception has been a success.

We believe this 5 year review is a valuable opportunity to fine tune the legislation to ensure it supports the effective operation of the Integrity Commission into the future.

About Us

The CPSU is a union that represents Tasmanian public sector workers, workers in a number of Government Business Enterprises, Statutory Authorities and at the University of Tasmania.

Joint Standing Committee on Integrity Three Year Review of the Integrity Commission

As a result of the timing of the state election and a number of other issues the Three Year Review of the Integrity Commission undertaken by the Joint Standing Committee on Integrity was only concluded in 2015 and the Committee decided to defer a number of matters that were considered as part of that review to this five year review.

As a result of this many of the issues raised in submission to the Joint Standing Committee Three year Review have not been resolved and therefore the submissions made to that review remain relevant to this review. The CPSU therefore seeks to include the two submissions made to the Three year Review as part of our submission to this review. Our submissions are attached as appendices.

Corruption

Submissions made to the Three Year Review including dissenting statements from Committee members such as the Member of Lyons, Mr Guy Barnett make a case to strip the Integrity Commission of powers on the basis that *'There has been no evidence of systemic corruption within the public service or organisation (sic) over which the Integrity Commission has jurisdiction'*.

The Integrity Commission was established with a different purpose to most other integrity bodies around Australia. Its focus was the prevention of misconduct through education, training and the development of capacity. It was always intended to ensure complaints of misconduct were dealt with effectively by assisting public bodies to have robust and transparent processes for dealing with complaints and that the Commission would only undertake investigatory functions itself in serious matters.

The role and functions of the Integrity Commission are different to those of, for example, the NSW Independent Commission Against Corruption (ICAC). ICAC has a mandate to expose corrupt conduct and has been provided a full suite of statutory powers to achieve this outcome. The Integrity Commission has a different mandate and lesser powers so it is wrong to assess the performance of the Integrity Commission in terms of whether or not it has uncovered evidence of systemic corruption.

Should the review take the position that the Integrity Commission should be more like an ICAC then there would need to be a review of the powers and investigatory techniques available to the Integrity Commission to undertake such a role.

Investigatory Function

As we have raised in previous submissions we continue to have concerns about the interaction between an investigation being undertaken by the Integrity Commission and the State Service Employment Direction 5 - Code of Conduct investigation process.

There seems to be general support for a Head of Agency to place an ED5 investigation on hold pending the outcome of an Integrity Commission into the same or similar matter and then relying on the outcome of the Integrity Commission investigation to determine the suspected breach.

If this is to be the process the Employment Direction will need to be amended to recognise the role of the Integrity Commission investigation while still retaining all the aspects of the process that provide employees procedural fairness.

Resources

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

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

Training and Education

The Three year review recommended compulsory misconduct prevention training for all public sector workers and Members of Parliament along with regular refresher courses. The CPSU supports this recommendation however we note that accessing to training is limited by resources and Agency budgets can't be stretched to include further training. If this training is to occur in a timely and systematic manner it will need to be specifically funded.

Appendix 1

Submission to the Joint Standing Committee on Integrity Reviewing the powers, functions and operations of the Integrity Commission on behalf of CPSU (SPSFT) Inc. , January 2014

Executive Summary

Confidence in our public institutions is critical to the provision of public services. Since 2009 the Tasmanian Integrity Commission has been performing a vital function – educating public officials about integrity in public administration and investigating allegations of misconduct.

The CPSU has always been a strong advocate for a dedicated integrity body and in general terms consider the first 3 years of operation of the Integrity Commission has been a success.

We believe this 3 year review is a valuable opportunity to fine tune the legislation to ensure it supports the effective operation of the Integrity Commission into the future.

About Us

The CPSU is a union that represents Tasmanian public sector workers, workers in a number of Government Business Enterprises, Statutory Authorities and at the University of Tasmania.

CPSU Experiences with the Integrity Commission

The views of different parties on the operation of the Integrity Commission will be influenced by their interactions with the Commission and the roles and function undertaken.

The CPSU is not a public authority under the definition of the *Integrity Commission Act 2009* and is therefore not subject to the Act. Instead the majority of interactions the CPSU has had with the Integrity Commission have been through our role of supporting or advising CPSU members who are employed within public authorities and are therefore subject to the provisions of the Act.

The CPSU is also a strong advocate for the Tasmanian public sector and therefore has an interest in maintaining the reputation of the service. From an integrity perspective this means support the highest ethical standards being maintained thereby minimising reputational risk. We have therefore watched closely the manner in which the actions of the Integrity Commission have been reported and have on occasions made public comment aimed at minimising reputational damage.

The CPSU also represents the industrial interests of the employees of the Integrity Commission and therefore our views are sometimes affected by the way in which the operation of the Act impacts those members.

Education

From our experience the vast majority of public sector employees act ethically and maintain extremely high standards in regard to matters of integrity. Despite this the CPSU believes that the best way to ensure such standards are maintained is through the provision of training and regular follow up. While the Integrity Commission has an overarching role in education and training in respect of integrity, the primary responsibility rests with employers and the Commission's time is best spent supporting trainers and auditing the provision of training. The responsibilities of employers are clear under section 32 of the Act.

The CPSU believes all employees should undertake basic training on matters of ethics and integrity as part of their induction program for new workers. This introductory training should then be regularly followed up with refresher training. The CPSU supports the modular approach developed by the Commission in its Ethics and Integrity Training program and believes the best way to ensure the necessary training is provided is for the public officers of public authorities being required to report annually to the Integrity Commission on the percentage of employees who have undertaken appropriate training.

Interaction between the State Service Act Code of Conduct and Integrity Commission

The CPSU has significant concerns about the interaction between the Integrity Commission Act and the obligations on Agencies to investigate suspected breaches of the State Service Act Code of Conduct (SSA-COC).

The SSA requires a Head of Agency who has reasonable grounds to believe an employee has breached the SSA-COC to investigate the alleged breach. This process generally has two distinct stages – the first stage being where the Head of Agency assesses whether reasonable grounds exist and then if they are found to exist, the second stage is investigating the alleged breach. As the Integrity Commission tends to operate with a high degree of secrecy it is highly unlikely a Head of Agency would be aware, at the time they initiated either stage 1 or 2, that the Integrity Commission was already undertaking an investigation into the same matter.

The CPSU understands that Agencies generally inform the Integrity Commission about SSA-COC investigations that are underway if the Agency believes the subject matter of the investigation could fit within the responsibilities of the Integrity Commission. By contrast the Integrity Commission rarely advises Agencies that complaints within their Agency have been accepted for investigation. Page 78 of the Integrity Commission submission on this review indicates that in only 21.6% of instances has the principal officer of a relevant public authority been informed that an investigation has been initiated.

Having investigations into matters being undertaken by two authorities at the same time and under distinctly different legislation is problematic. Firstly it is very confusing for the person/s the subject of the investigation and those being asked to provide evidence. Secondly, as the evidence collecting powers and rights of accused are different, it is difficult to provide advice and there is a risk that crossing between jurisdictions can impact on procedure fairness. Finally it is inefficient and could be considered double jeopardy.

In principle the CPSU supports the proposal that a matter that is the subject of an Integrity Commission investigation should not also be the subject of a SSA code of conduct investigation however there are a myriad of practical issues that arise from this proposal.

1. How does a Head of Agency know if a matter they have reasonable grounds to suspect constitutes a breach of the SSA –COC is already or will become the subject of an Integrity Commission investigation?
2. If a SSA-COC investigation involves both matters that are the subject of an Integrity Commission investigation and matters that are not being investigated by the Integrity Commission should the Head of Agency proceed with investigating those not subject to the Commission process?

If these matters are investigated by the Head of Agency can a determination be made before the Commission matters are finalised as the appropriate sanction could be dependent on the determination of all the matters?

3. If a Head of Agency begins an investigation process and is subsequently advised to place the investigation on hold pending an Integrity Commission investigation, what are they able to inform the respondent about the initial investigation process? It is worth noting that the Integrity Commission only advises officers the subject of an investigation that an investigation has commenced in 8.1% of cases.

4. Is it reasonable for a Head of Agency to rely on the findings of an Integrity Commission investigation to determine a SSA-COC breach given that the investigatory powers of the Integrity Commission significantly exceed the powers of the Head of Agency in a code of conduct investigation?
If a Head of Agency made a determination and applied a sanction based on an Integrity Commission finding would the evidence upon which the Integrity Commission based its decision be available to be tested through the appeal mechanisms open to public sector workers in the same way that a normal SSA-COC investigation is?

The CPSU believes that any resolution to these issues will involve coordinated amendments to the Integrity Commission Act, the State Service Act and a number of Employment Directions.

Confidentiality

While the CPSU understands the need for investigatory bodies to operate covertly we consider this has at times been taken too far and as a result creates unnecessary confusion and stress.

Section 44 (2) of the Act empowers the CEO, should he or she consider it appropriate to do so, to give written notice to the various parties to an investigation once a determination has been made to investigate a complaint. In 48.6% of instances the CEO has decided to inform the complainant, in 21.6% of cases to inform the principal officer and in only 8.1% of cases to inform the subject of the complaint.

Furthermore under section 98 notices issued are subject to confidentiality such that the person served with the notice must not disclose the existence of the notice, the content of the notice or any matters relating to the notice (unless a reasonable excuse exists).

As a result the CPSU has found that members who have made complaints, who have been required to provide evidence before investigations and those the subject of investigations are unclear about the process and about their rights and often become highly stressed.

The CPSU believes that unless there are very good reasons not to do so, the parties to an investigation should be informed that an investigation has commenced and should be kept informed as to the progress of the investigation.

The union would also like to see section 98 (2) (a) amended to make it very clear that a reasonable excuse to disclose includes the circumstances where a union members seeks advice, support or assistance from their union on how to comply with a notice. We understand and accept that in these circumstances the union officer to whom the disclosure has been made is then subject to the confidentiality provisions.

Replacement for State Service Commissioner on Board

The CPSU supports the proposal that the position on the Board previously filled by the State Service Commissioner be replaced by a person with experience in public sector human resources and industrial relations.

We believe this is a key skill set which should not be absorbed in the generalist position on the Board but should be allocated in the Act in the same way a the local government and law enforcement positions are allocated.

Mandatory Notifications

The CPSU shares the concerns of the Integrity Commission about the confusion that exists in regard to notifications. Given the Commission can only investigate based on complaints or own motion, it is essential that the Commission is made aware of matters of alleged misconduct at the earliest possible time.

Such a practice formally adopted through Employment Direction would assist in resolving the issues raised in this submission in regard to the interaction between the SSA-COC process and Integrity Commission investigations.

If mandatory notification is to become part of the Commission process, state sector workers will need to be provided with information on the circumstances in which they must notify and they must be protected in doing so as they may need to operate outside their normal chains of command.

Appendix 2

Supplementary Submission to the Joint Standing Committee on Integrity
Reviewing the powers, functions and operations of the Integrity Commission
on behalf of CPSU (SPSFT) Inc. , October 2014

Executive Summary

This supplementary submission is presented in response to the 'Tasmanian Government Submission' provided to the Joint Standing Committee in September 2014.

About Us

The CPSU is a union representing Tasmanian public sector employees and workers in a number of Government Business Enterprises, Statutory Authorities and the University of Tasmania.

Who is the Tasmanian Government submission from?

The submission was provided to the Joint Standing Committee by the Secretary of the Department of Justice in response to a committee invitation for a submission from the Department of Justice, but the cover letter indicates it is from the 'Tasmanian Government'.

It's not clear what this actually means. Is it a submission from the Department of Justice? Is it a submission on behalf of all government Agencies? Is it a submission on behalf of the government? Is it a submission on behalf of the Tasmanian Liberals?

It's interesting to note that, according to the submissions listed on the Committee website, none of these parties chose to make a submission in the original process.

This isn't just an esoteric question. Removing the power of the Integrity Commission to conduct investigations, as proposed in the submission, would significantly reduce scrutiny on a number of key public officers - Heads of Agency, politicians, Ministers and Ministerial staff. So do those responsible for the 'Tasmanian Government' submission have a conflict of interest in having the investigatory powers of the Integrity Commission removed?

Would the changes actually save money?

Much is made in the 'Tasmanian Government' submission of the Integrity Commission's operating costs and whether similar outcomes could be achieved 'through more cost-effective and efficient means'. The reader is led to believe that changes that may reduce the effectiveness of the Integrity Commission are acceptable because savings would be made, but the CPSU does not accept the proposed changes would actually make savings.

The submission calls for the educative, advisory and preventative role of the Integrity Commission being retained or even enhanced. The submission also calls for the Integrity Commission to continue to triage complaints. The submission proposes the establishment of a new organisation to be known as the 'Office of the Inspector General'. There's potential for additional costs associated with boosting the investigatory functions of the Auditor General and the Ombudsman.

The only savings set out in the submission are those associated with the investigatory function being removed from the Integrity Commission and, given this is only a small part of the Integrity Commission's current costs, these savings are unlikely to be sufficient to fund an enhancement of the educative, advisory and preventative role, an enhancement of the triage role, the funding of an Office of Inspector General and the boosting of the investigatory capacity of the Auditor General and Ombudsman.

Who would conduct future investigations?

If the investigatory powers of the Integrity Commission were removed and its role was just to allocate issues to other organisations it's interesting to see who is responsible for each group of public officers.

The Police, Director of Public Prosecutions, Auditor General and Ombudsman roles are clear and the Integrity Commission already refers relevant investigations to these authorities. Issues concerning public sector workers, employees of government business enterprises and Councils are referred to the head of the relevant public authority and this would continue. The significant areas of change would be in relation to issues raised concerning Heads of Agency and heads of other public authorities, Ministers, parliamentary officers, politicians and Ministerial staff.

The CPSU understands that without an investigatory power the Integrity Commission would refer allegations made against Heads of Agency, Ministers and Ministerial staff to the Premier, allegations against parliamentary officers would be referred to the Speaker of the House of Assembly or the President of the Legislative Council and allegations against other heads of public authorities would be referred to their Boards. It's far from clear how these people or organisations could conduct fair and transparent investigations into allegations, particularly as they lack resources and investigatory powers and in most cases are operating in a partisan political sphere.

Wasn't this exactly why the Integrity Commission was established in the first place – so we didn't have investigations being conducted in a political space?

The importance of investigation

It's worth considering how issues are raised with an organisation such as the Integrity Commission as it highlights the importance of an independent body having the time and capacity for a full investigation.

The CPSU understands the initial complaint that triggered the comprehensive investigation into issues in the Department of Health & Human Services was about senior managers not complying with employment practices and guidelines. Without an investigatory power the Integrity Commission would have referred these issues to the relevant heads of Agency – in this case Jane Holden and Gavin Austin. It would then have been up to these two individuals to determine whether the matters were worth investigating.

We understand it took months of careful investigation using the full suite of powers available to the Integrity Commission to uncover all the matters that eventually came to light. It's highly unlikely these important matters of public interest would have been revealed had the investigation have been left to the relevant Heads of Agency.

Role of the 5 Year Review

The *Integrity Commission Act 2009* includes a process at clause 106 for the Independent review of the Act. This must be initiated as soon as possible after 31 December 2015 and must be conducted by a judge. This independent review process was included in the

legislation to ensure the powers and functions of the Integrity Commission were not undermined by the very people the Bill was designed to oversee.

The CPSU believes significant issues such as the power of the Integrity Commission to conduct its own investigations should only be considered through a completely independent process such as a judicial review, therefore these proposals should not be progressed through the current review conducted by the Joint Standing Committee on Integrity.