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2 March 2016

Independent Review of the Integrity Commission Act 2009
The Honourable William Cox AC, RFD, ED, QC
GPO Box 825
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Email: integrity.review@justice.tas.gov.au

Dear Mr Cox

INDEPENDENT REVIEW OF THE INTEGRITY COMMISSION ACT 2009 CALL FOR WRITTEN SUBMISSIONS

Thank you for your recent invitation to make a written submission to the *Independent Review of the Integrity Commission Act 2009*. A written submission is attached for your consideration.

I also thank you for your invitation to make an oral submission to the public hearings. Please be advised that I do not seek to make an oral submission.

Should you require clarification of any aspects of the attached submission, please advise this office accordingly.

Yours sincerely

D L Hine
COMMISSIONER OF POLICE

SUBMISSION OF TASMANIA POLICE: INDEPENDENT REVIEW OF THE INTEGRITY COMMISSION ACT 2009

To enable consideration of –

- a) the operation of the Act in achieving its object and the objectives of the Integrity Commission;
- b) the operation of the Integrity Commission, including the exercise of its power, the investigation of complaints and the conduct of enquiries;
- c) the operation of the Parliamentary Standards Commissioner;
- d) the operation of the Joint Committee;
- e) the effectiveness of orders and regulations made under this Act in further the object of this Act and the objectives of the Integrity Commission; and
- f) any other matters relevant to the effect of this Act in improving ethical conduct and public confidence in public authorities.



Introduction

This submission has been prepared by Tasmania Police pursuant to an invitation issued by the Independent Reviewer of the Integrity Commission Act 2009, The Honourable William Cox, AC, RFD, ED, QC to Mr Darren Hine, Commissioner of Police, Department of Police and Emergency Management dated January 2016, in order to assist in an independent review of the Integrity Commission Act pursuant to s106 of the Integrity Commission Act (the Act):

- a) the operation of the Act in achieving its object and the objectives of the Integrity Commission (the Commission); and
- b) the operation of the Commission, including the exercise of its power, the investigation of complaints and the conduct of enquiries; and
- c) the operation of the Parliamentary Standards Commissioner; and
- d) the operation of the Joint Committee; and
- e) the effectiveness of orders and regulations made under this Act in further the object of this Act and the objectives of the Commission; and
- f) any other matters relevant to the effect of this Act in improving ethical conduct and public confidence in public authorities.

Tasmania Police is a public authority for the purpose of the *Integrity Commission Act 2009* (the Act). Commissioned officers of Tasmania Police are designated public officers (DPOs) for the purpose of the Act and non-commissioned police officers are a category of public officers. In addition to the general applicability of provisions of the Act to Tasmania Police, Part 8 of the Act deals with 'Misconduct by Certain Public Officers'. Division 2 of Part 8 deals specifically with the Commission's role in relation to police misconduct.

Under the terms of a Memorandum of Understanding (MoU) between Tasmania Police and the Commission, Tasmania Police is to notify the Commission:

- if a complaint has been received about a designated public officer (an officer of the rank inspector or above) or it is reasonably suspected that such an officer has engaged in misconduct or serious misconduct; and
- if a complaint has been received, or where it is reasonably suspected, that an officer has engaged in serious misconduct (as defined in IC Act s4).

This submission addresses the terms of review and, where considered relevant, provides comment in relation to the views expressed by the Commission in its submission of October 2013 to the Joint Standing Committee on Integrity (JSC) (2013).

Functions

The object of the Act (s3) is to promote and enhance standards of ethical conduct by public officers by the establishment of the Commission.

The objectives of the Commission are to –

- (a) improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and
- (b) enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- (c) enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

The Commission endeavours to achieve these objectives by: educating public officers and the public about integrity; assisting public authorities deal with misconduct; dealing with allegations of serious misconduct or misconduct by designated public officers; and making findings and recommendations in relation to its investigations and inquiries.

Some functions and powers under the Act are separately held by the Commission. The Board itself holds other powers and functions, as do assessors, investigators, authorised persons and persons appointed to assist an Integrity Tribunal, which are separate to the powers and functions of the Commission. Other powers are held separately by the CEO.¹

Tasmania Police considers that the objects and objectives as set out in s3 remain appropriate.

¹ *Submission of the Integrity Commission, October 2013, The three year review of the functions, powers and operations of the Integrity Commission - Volume 1, pg 7.*

Principles

In its submission to the JSC (2013), the Commission identified that the functions and powers of the Commission are broadly set out in s8, and also set out across various other Parts of the Act. In performing its functions and exercising its powers, the Commission is to have regard to the principles of operation, as set out in s9, to:

- raise standards of conduct, propriety and ethics in public authorities;
- work cooperatively with public authorities, integrity entities and parliamentary integrity entities to prevent or respond to misconduct;
- improve the capacity of public authorities to prevent and respond to cases of misconduct;
- ensure that action to prevent and respond to misconduct in a public authority is taken if the public authority has the capacity, and it is in the public interest, to do so;
- deal with matters of misconduct by designated public officers;
- ensure that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that it considers is appropriate; and
- not duplicate or interfere with work that it considers has been undertaken or is being undertaken appropriately by a public authority.

Further, the Commission is not bound by the rules of law governing the admission of evidence but may inform itself of any matter in such manner as it thinks fit and is to perform its functions and exercise its powers with as little formality and technicality as possible.

Having regard to the objectives, functions, powers and principles of operation, the work of the Commission falls into two broad areas:

- 1) misconduct prevention and education; and
- 2) dealing with complaints and conducting investigations in relation to misconduct (operational work).²

The Commission's submission to the JSC outlined its functions and roles which are compared and contrasted with those of integrity entities in other jurisdictions. Although there are clearly areas of similarity between the Commission's functions and roles and those of organisations interstate, there are also *significant* differences. Notably, some entities are focussed solely on activities around corrupt conduct and/or serious crime, have investigative roles regarding serious or systemic corruption as their primary object and have a principal focus on the assembly of admissible evidence for the purpose of criminal prosecution. The Commission's submission correctly notes that the Integrity Commission in Tasmania is not a 'crime commission' and highlights that whilst misconduct prevention and education is a primary focus of the Commission, misconduct prevention in the form of education is not a universal feature of integrity entities in the other jurisdictions.³

² Submission of the Integrity Commission, October 2013, *The three year review of the functions, powers and operations of the Integrity Commission - Volume 1*, pg 8.

³ Submission of the Integrity Commission, October 2013, *The three year review of the functions, powers and operations of the Integrity Commission - Volume 1*, pg 3.

A comparison of the integrity landscape between Tasmania and that of other jurisdictions, and particularly the evidence indicative of the extent of serious and systemic corrupt conduct in public sector organisations (in both a historical and contemporary context) will also identify significant differences between Tasmania and other jurisdictions. Notably, a number of integrity entities in other jurisdictions have their origins in royal commissions and inquiries that have revealed high levels of entrenched corruption of a serious nature. This has not been the case in Tasmania and, in this respect, the following quotes from the Commission's first annual report (October 2011) is considered relevant:

'During this time, the Commission has seen no evidence of any systemic corruption in any part of the public sector. Rather, the evidence before the Commission is that most complainants have concerns relating to perceptions of misconduct by individuals in the public sector.'

Moreover, whilst noting the content of the Commission's report on finalised investigations and an assessment, tabled in both Houses of Parliament on 25 June 2013 and its subsequent reports tabled in Parliament with respect to audits of Tasmania Police complaints, it is submitted that to date, evidence of systemic corruption of a serious criminal nature that is comparable to the extent of the corruption problem in some other jurisdictions, is not evident in Tasmania.

Audit of Complaints Managed by Tasmania Police

Pursuant to s88(1)(c) of the Act the Commission may, having regard to the principles stated in s9 of the Act, audit the way the Commissioner of Police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint.

Primarily, the Commission states its audits of complaints against Tasmania Police are to provide Parliament, the public and Tasmania Police itself with assurance that the agency deals with complaints adequately and in compliance with legislative requirements and internal policy. The audits are also designed to enhance Tasmania Police systems, practices and procedures around complaint-handling by highlighting areas where improvements can be made.⁴

The Commission, having regard to the principles stated in s9 of the Act, may audit the way the Commissioner of Police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint pursuant to s88(1)(c) of the Act.

Since 2013, the Commission has conducted annual 100% audits of Tasmania Police complaints finalised the previous calendar year and is currently preparing for its fourth 100% audit. The scope of the audit is determined each year. Tasmania Police has cooperated fully with each audit and will continue to do so in the spirit of mutual cooperation.

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

In support of this, in their report⁵ tabled in Parliament (2015) on the outcome of the Commission's 2015 audit of files finalised in the 2014 calendar year, the Commission's comments regarding 28 identified systemic/organisational issues was detrimental to the reputation of Tasmania Police. Tasmania Police disagreed with the Commission's definition as to what amounted to a 'systemic/organisational issue' and submitted reasons. The Commission published excerpts of the Tasmania Police response in the report, however, it is a subjective decision of the Commission to include and, if so, the extent and manner in which such responses are reported in the publication.

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

⁴ Integrity Commission Annual Report 2013-2014, pg 41.

⁵ Report of the Integrity Commission, No. 2 of 2015, An audit of Tasmania Police complaints finalised in 2014, pgs 4, 41

Operation of the Act in achieving its object and the objectives of the Integrity Commission

A review of the Commission's reports tabled in Parliament does not demonstrate activities specific to examinations of complaints management by other agencies. The demands involved with 100% audits are significant on the part of both the Commission and Tasmania Police. The Commission has indicated an intention to hire someone to undertake the bulk of the audit fieldwork for the 2016 audit.⁶

The vast majority of Tasmania Police officers conduct themselves with integrity and uphold the organisation's values. It is notable that, unlike many police agencies, the police in this state have never been the subject of large-scale corruption and malpractice scandals.⁷

It is questionable whether the Commission's extensive audit of complaints management by Tasmania Police each year is necessary and invokes consideration as to whether it is to the detriment of acquitting its obligations relating to complaints management and investigation by other public authorities pursuant to s3 (*Object and Objectives*), s8 (*Functions and powers of the Integrity Commission*) and s9 (*Principles of operation of Integrity Commission*) of the Act.

The obligations referred to involve the management of complaints by public authorities other than Tasmania Police, such as enhancing public confidence that misconduct by public officers will be appropriately investigated and dealt with (s3(2)(b)), assisting public authorities deal with misconduct (s3(3)(b)), monitoring or auditing any matter relating to the dealing with and investigation of complaints about misconduct in any public authority (s8(1)(q)), improving the capacity of public authorities to prevent and respond to cases of misconduct (s9(1)(f)) and ensuring that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person considered appropriate (s9(1)(g)).

The Reports of the Commission tabled in Parliament, including the Tasmania Police Complaints Against Police Audit Reports, are intended to highlight the significant achievements of the Commission in its educative, investigative and prevention work and provide confirmation that the Commission is working effectively, as Parliament intended, and that it is able to achieve its objectives as set out in section 3 of the Act with the powers currently available to it.

A joint review of the Tasmania Police Graduated Management Model for the management of complaints against police was finalised in July 2014. The report contained 42 recommendations and 28 suggestions 'for consideration' that centre around six key features: clarity, efficiency, accountability, transparency, fairness and ongoing learning. Tasmania Police submits that the review is another example highlighting the achievements of the Commission towards its objectives in its educative and prevention work under the Act.

⁶ (Audit) *Opening interview record* (draft), Tasmania Police and Integrity Commission, 5 February 2016, pg 2

⁷ *Joint Review of the Tasmania Police Graduated Management Model Report 2014*, Tasmania Police and Integrity Commission, pg 1

Tasmania Police submits that the powers currently available to the Commission are adequate but risks exist that the Commission's specific focus on complaints management by Tasmania Police in the application of the police specific provisions of the Act may, on balance, be to the detriment of its educative and preventative obligations and responsibilities to other agencies in the area of complaints management.

Operations of the Integrity Commission, including the exercise of its powers, the investigation of complaints and the conduct of inquiries

As indicated in the Commission's submission to the JSC (2013), and as is evinced in the Second Reading Speech for the *Integrity Commission Bill 2009*, rather than replicate integrity entities in other jurisdictions, Parliament decided to create a unique integrity structure for Tasmania that was informed by integrity entities in other jurisdictions and adapted from them. That structure was intended to:

- be complaint based;
- not duplicate the work of other relevant bodies;
- have a preventative and educative focus;
- assess and disseminate complaints to the most appropriate body for action whilst maintaining a watching brief;
- reinforce the responsibility of public sector bodies to be accountable for their own conduct issues;
- be able to make and publish findings, without having the authority to impose a sanction for misconduct;
- reserve its investigative endeavours for systemic misconduct and allegations against senior and high profile public officers and allegations of serious misconduct by senior police officers; and
- oversee and audit the way police conduct misconduct investigations.

It is clear that Parliament specifically considered what were termed '*weighty powers*' in determining what powers were to be granted to the Commission, and determined that some powers available to integrity entities in other jurisdictions would be made available to the Commission, whereas others would not. It is also relevant to note the infrequency with which the Commission has conducted own motion investigations and resorted to some of the powers that are already available to it, for example, search warrants and surveillance devices warrants.

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

Chapter 5 of the Commission's submission specifically focuses on the role, functions and structure of its Misconduct Prevention, Education and Research Unit. Tasmania Police acknowledges the beneficial nature of some of the work undertaken by the Commission in this area.

Under the general heading of *Impact on Public Authorities* the Commission's submission discusses its work in providing education and capacity building materials specific to Tasmania Police. This has included presentations provided by the Chief Commissioner and CEO of the Commission to Sergeant and Inspector Promotion Courses at the Police Academy. These particular presentations have been well received and are considered by police to be more relevant and of superior quality to presentations provided previously by the Commission.

Through the delivery of in-house and University of Tasmania (UTAS) education and training that is provided to developmental and promotional courses, Tasmania Police focusses on the development of professional conduct and a range of ethical issues confronting police. This focus predates the inception of the Commission. Ethics and integrity training is also embedded in the police training continuum at various stages from recruit to the Inspectors' Development Program, noting that the continuum is now fully aligned and unitised with the Bachelor of Social Science (Police Studies) and Professional Honours. In the recruit course this includes HSP104 *Integrity and governance in policing*.

Since 2015, the Inspectors Development Program was remodelled as the '*State Service Strategic Management Program*' (S3MP) that includes 14 state service managers [one from each government agency] and 10 police officers and culminates in the awarding of Professional Honours. One of the four themes on the program is 'ethics and integrity' with key UTAS academics, DPEM senior executives and Integrity Commission staff leading in developmental opportunities for students on the program.

Tasmania Police has also included a number of online learning resources developed by the Commission in conjunction with feedback and consultation with Tasmania Police. Both agencies continue to work together to develop improved training packages and the delivery of ethics and integrity training. Tasmania Police agrees that the Commission is performing well in terms of improving ethical conduct by adopting a strong, educative, preventative and advisory role.

The Commission's submission notes the formation (in 2011) and purpose of the '*Professional Standards Advisory Group*' which is chaired by Tasmania Police. Both Tasmania Police and the Commission are members of the Group, as is a member of the University of Tasmania (School of Philosophy). From a police perspective there have, in recent times, been relatively few meaningful agenda items listed at meetings and meetings have largely consisted of the provision of updates and information by police. From a police perspective, the meetings have been of limited value given the availability of other forums and avenues that support information exchange and the terms of reference of the Group. At the meeting of the group held on 13 November 2013 it was determined to meet on an issues/needs basis in future, rather than twice yearly. It appears that the group has not met since at least July 2014.

Operations

Tasmania Police is a progressive organisation that values integrity and professionalism and encourages ethical conduct. Tasmania Police has a low tolerance toward police misconduct, has a rigorous approach toward the investigation of police misconduct and, as evinced by the Commission's audits of police complaints, on balance is managing its complaint system well.

Tasmania Police appreciates the need for a body such as the Commission to assist public sector organisations in raising standards of ethical conduct, to provide integrity oversight of their activities and, provided the activities of the Commission are in line with the authorities granted it by Parliament, will continue to support its endeavours.

Tasmania Police notes the Commission's comments contained within its submission to the JSC (page 105) that the *'relationship between the Commission and Tasmania Police has at times been tested'* and suggests that the cause may in part be attributable to the fact that, *'...Tasmania Police has not previously been subject to the level of oversight which the Commission can perform'*.

Tasmania Police does not agree with this comment or the basis upon which it is made. Tasmania Police is not averse to appropriate oversight. Indeed, for many years the Ombudsman has performed an independent review role in relation to the administrative actions of Tasmania Police. Tasmania Police believes that the Commission's perception of tensions arises from Tasmania Police expressing legitimate concerns that the Commission has sought to exceed its statutory authority on occasions and the identification of inaccuracies within some Commission authored reports. Additionally, in many instances Tasmania Police believes the findings and conclusions are not adequately supported by the examples or case studies provided in the Commission's reports.

The case study *'injury caused by collision with police vehicle'* offered by the Commission at page 108 of its submission is a case in point. As no complaint was made in relation to the collision, the matter did not fall within the Commission's jurisdiction and Tasmania Police declined to provide the Commission with the relevant file. The Commission first publically referenced this matter in its Annual Report of 2011/2012 and provided commentary that:

'...the Commission was told by Tasmania Police there had been no internal investigation as the incident had been treated as a traffic matter.'

Whilst the Commission was advised that no internal investigation was completed, the following additional information was provided by way of letter forwarded to the Commission by the then Commander of Professional Standards:

'...the investigation into the matter was completed in accordance with the requirements of a pursuit review and police motor vehicle accident, as no evidence of misconduct was evident during the district investigation. Professional Standards was informed of the incident and based on the briefing received from Commander, was content on the action being taken within the District. A

district report was completed and assessed by Commanderin accordance with policy. The officers were interviewed and no issues arose which highlighted misconduct. A thorough investigation was conducted into the incident...'

The Commission's comments tended to portray an inadequate investigative response by Tasmania Police by understating the investigative response actually afforded the matter. Concerns were conveyed to the Commission during an Operational Liaison Group Meeting, however, despite this, the language used in the Commission's current submission is essentially the same as used previously. A further review of this matter by Tasmania Police has since confirmed that the incident was not such as to have required investigation by Professional Standards, there is no basis for concluding there was any police misconduct involved, and the parties involved have never made a complaint about police, despite having had ample opportunity to do so.

The Commission's submission also provides a case study (at pages 109 & 110) in relation to a matter involving strip searches of a 12 year old girl by police in the course of executing a search warrant for drugs. The case study highlights that the Deputy Commissioner indicated he would conduct a 'review' of the incident and that initially no 'complaint' was made in respect of the matter. The case study asserts that as the matter '*... was 'reviewed', as opposed to being made the subject of an internal investigation - it did not fall within the Commission's jurisdiction ...*', and that because the matter had not been made the subject of an internal investigation, Tasmania Police did not notify the Commission of the matter. These assertions are based on an incorrect premise. In terms of providing notification of the matter to the Commission, it is irrelevant that the matter was 'reviewed' rather than formally being made the subject of an internal investigation. Had evidence of misconduct that reached the threshold that required notification of the Commission emerged from the review (regardless of who conducted it) police would have made notification to the Commission and/or, if a complaint had been made to the Commission, its jurisdiction would have been invoked. As it was, the review determined that no misconduct was evident and the actions of police were lawful.

Following a 'complaint' later being received by the Commission, it conducted its own witness interviews and assessment before referring the matter to Tasmania Police. This resulted in an extensive review of the material supplied by the Commission and an investigation of the 'complaint'. The investigation reconfirmed that police were justified in strip-searching the 12 year old girl, and no evidence of misconduct on the part of any police officer involved was identified.

The police review of the matter also identified concerns in respect of the assessment and investigation conducted into the matter by the Integrity Commission. These included whether the 'complaint' received by the Commission actually constituted a complaint for the purpose of the Act and, contrary to what Tasmania Police would consider acceptable investigative practice, the Commission's investigators had conducted a simultaneous interview with the 12 year old and her mother (who was a material witness in her own right). The Commission has been alerted to these concerns. The Tasmania Police file in respect of this matter, which provides details in relation to police concerns, can be made available to the Reviewer.

Investigation of matters where no complaint of misconduct exists

The Commission provides a case study in its submission to the JSC (at pages 107 & 108) regarding their lack of jurisdiction to investigate matters where no complaint of misconduct is made (and in the case in question, where no indication of misconduct was evident). As with all police shootings, this matter was comprehensively investigated and reviewed by the Tasmania Police Professional Standards Command. In this case the shooting occurred as a person armed with a knife advanced upon a police officer and lunged at the officer. The offender freely admitted that it was his intention for police to shoot him. This matter proceeded to court with the Office of the Director of Public Prosecutions having carriage of the prosecution. This process provides additional scrutiny to the actions of police. In this case the presiding judge found that the officer concerned, *'...retreated until his back was against a high fence and he had no choice but to shoot the accused in self-defence. He could retreat no further.'*

In investigations relating to police shootings or where police actions give rise to life threatening injuries, the Deputy Police Commissioner assumes control of the investigation which is conducted by Professional Standards. The investigation will, as a matter of course, consider the lawfulness of police actions. Where there is any doubt in relation to the lawfulness of police actions, consistent with current protocols, the investigation file is personally reviewed by the Director of Public Prosecutions who provides advice in respect of whether any officer should be proceeded against for a breach of the law. It should be noted that in cases where death occurs as a result of police actions, the Coroner has jurisdiction over the incident and investigations are conducted on behalf of, and ultimately reviewed by, the Coroner. This provides an additional level of scrutiny of police actions in these cases.

Whilst the Commission contends it should have a role in the investigation of such matters, notwithstanding the absence of a formal complaint, Tasmania Police considers this is unnecessary and not in keeping with the role Parliament intended for the Commission.

It should be noted that despite the fact the Commission has no legislated mandate to oversight or otherwise be involved in such investigations, it has been the practice of Tasmania Police to notify the Commission of such investigations when they occur and, in some cases, to provide updates on the progress of investigations.

Powers

Discussion is provided under this heading in relation to some of the legislative amendment sought to various provisions of the Act by the Commission. Some matters relate to an expansion of the Commission's powers but some may more accurately relate to proposed increases to the Commission's functions or scope of operations.

Tasmania Police notes the case studies and comments by the Commission in its submission to the JSC that illustrate its powers can only be utilised upon receipt of a '*complaint*'. It should, however, be noted that the '*own motion*' investigative powers under sections 45 and 89 of the Act are available to the Commission and are not reliant upon a complaint being made. The Commission's submission notes that these powers are reserved for '*serious matters*' and are not often used. It is the view of Tasmania Police that the complaint based approach to activation of the Commission's authority is appropriate and in keeping with what Parliament intended, with appropriate recourse being available to conduct own motion investigations in serious cases.

Tasmania Police notes the Commission's comments in relation to the desirability of having direct electronic desktop access to Tasmania Police data systems (including IAPro, IDM and ICE), the Commission's assessment of the current legal impediments to the provision of that access and the arrangements currently in place between the Commission and Tasmania Police in relation to access to data. Tasmania Police does not believe there is any demonstrated need for the Commission to have direct access to its data systems. With reference to the issues of immediacy of access and confidentiality (discussed at page 113 of the Commission's submission) Tasmania Police is not aware of any instance where, under current arrangements, either delays in accessing information or a breach of confidentiality has proven detrimental to the Commission's operations. Regular liaison forums between the Commission and Tasmania Police provide opportunity for the examination of such issues, and no concerns have been revealed regarding immediacy being raised or of a breach of confidentiality occurring.

More fundamentally, Tasmania Police is of the view that it is not lawfully possible to permit the Commission direct access to Tasmania Police systems. A number of the data systems (including those of particular interest to the Commission) contain references to call charge data and communications intercepted pursuant to warrants issued under the *Telecommunications (Interception and Access) Act 1979* (Cth). That Act restricts access to prescribed permitted purposes. The conferral of "law enforcement agency" status upon the Commission would not circumvent those restrictions as the relevant exemptions are limited to agencies investigating criminal offences (in some cases serious criminal offences) or breaches of a law imposing pecuniary penalties. Moreover, the release of call charge records and telephone intercept material must be authorised on a case by case basis. Tasmania Police cannot give *carte blanche* access to records containing information subject to the prohibitions imposed by the *Telecommunications (Interception and Access) Act*.

Tasmania Police does not believe there is any demonstrated need for the Commission to be granted "law enforcement agency" status. It would appear that the Commission primarily seeks such status to authorise it to gain access to call charge records and to apply for

warrants under the *Telecommunications (Interception and Access) Act* and/or to gain access to communications intercepted by other agencies under such warrants. The conferral of “law enforcement agency” status upon the Commission would not, of itself, enable the Commission to access call charge records and telephone intercept material because the Commission does not investigate criminal offences or breaches of laws imposing pecuniary penalties.

Tasmania Police notes the Commission’s contention that it should retain jurisdiction over a complaint after referral to an appropriate person or entity for action. In this respect the Commission’s comments that it is unable to *‘direct the referred authority or entity in relation to action that should be taken’* and cannot currently *‘impose time frames for outcomes or actions’* are also noted. In Tasmania Police’s view, it is not desirable that the Commission be granted these authorities. It seems clear that Parliament intended the Principal Officer of the relevant authority to be responsible for the imposition of sanctions and implementing remedial measures to improve the ethical health of his/her respective organisation. It is suggested that the grant of additional powers to the Commission in this area would tend to usurp and possibly constrain the authority of the Principal Officer. It seems that the Principal Officer would also be best positioned to make determinations in respect of timeframes, having regard to the relative importance of other resourcing issues and work demands impacting upon the organisation that the Commission may not be alert to.

Tasmania Police already provide notification to the Commission of serious misconduct by police officers and misconduct by designated public officers, in line with the terms of the Memorandum of Understanding between the two organisations. Tasmania Police is not opposed to the creation of a statutory obligation in relation to the notification of misconduct by all public authorities, consistent with the arrangements that are currently in place for police.

At page 128 of its submission to the JSC the Commission offers a case study headed *‘Inability to conduct an audit of an investigation’*. Tasmania Police notes the Commission’s contention that the *‘Commissioner of Police subsequently undertook a review of the matter and committed to take action to address the systemic deficiencies identified by his review’*. Insofar as Tasmania Police is aware, the issue identified by the Commission as being of concern, was a perception that an officer who was the subject of an internal investigation had been dealt with leniently. Again, Tasmania Police does not agree with the comment that systemic deficiencies were identified, or appreciate the basis upon which it is made. This matter was reviewed, and the review identified that a report that had been provided to the then Acting Deputy Commissioner of Police was deficient in that it summarised various allegations in respect of an officer who was the subject of investigation, rather than clearly identifying which particular allegations had been proven. However, the review confirmed that the conclusions expressed in the internal investigation file were sound, and whilst the penalty ultimately awarded to the officer concerned was at the lower end of the acceptable penalty range, it was within range. Tasmania Police does not agree that this can be characterised as a systemic deficiency.

Tasmania Police notes the discussion provided in relation to the preservation of the right to claim privilege, such as the privilege against self-incrimination (page 120). Tasmania Police

(whilst cognisant of some jurisdictional variation) would not be opposed to amendment that would bring the Commission's powers into line with those of interstate jurisdictions in which integrity entities have the power to direct that privileged information be provided to the entity, on the proviso that incriminating information may not be used in any criminal proceedings against the person.

Conduct of Investigation (Require or direct a person to provide information)

Pursuant to s47 of the Act, during the conduct of an investigation under s 46(1), the investigator, by written notice given to a person, may require or direct the person to provide the investigator or any person assisting the investigator with any information or explanation that the investigator requires, attend and give evidence before the investigator or any person assisting the investigator and produce to the investigator or any person assisting the investigator any record, information, material or thing in the custody or possession or under the control of a person.

Additionally, the investigator may require or direct that the information, explanation or answers to questions be given orally or in writing, as the investigator requires.

In 2015, Tasmania Police advised the Commission of the existence of High Court decisions that may have some bearing on the conduct of investigations and requests or directions made pursuant to s47 of the Act.

In Lee v R (2014) 308 ALR 25 (*Lee No.2*), the Crown prosecutor was provided with a transcript of an examination conducted pursuant to the NSW *Crime Commission Act*, contrary to a direction by s13 of the Act which prohibits such publication. It was unlawful for the Crown prosecutor to have been provided with the transcript and although the transcript was not used in evidence it was of advantage to the prosecutor to know what the defence would be. The High Court found this amounted to a miscarriage of justice.

Additionally, *X7 v Australian Crime Commission* (2013) 248 CLR 92 determined that unless legislation clearly states that the right to silence for persons charged with or suspected of criminal offences has been abrogated the right still remains.

These High Court decisions have a significant bearing on the conduct of Tasmania Police internal investigations and the application of a direction pursuant to the *Police Service Act 2003* (the PSA) to police officers to provide any information or document or answer any question for the purpose of the investigation.⁸

It is the interpretation of Tasmania Police that 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 or she has been charged or may be charged with a criminal offence.

Unless the legislation expressly states that it removes the right of an accused person to exercise their right to silence, the provision of primary or derivative evidence arising from any directed questioning to the prosecutor provides an advantage to the prosecutor and the court is likely to find there is a miscarriage of justice or order a stay of proceedings. Therefore, a police officer could not be directed to answer a question when he or she has been or may be charged with a criminal offence.

⁸ *Police Service Act 2003*, s46(3)

As the Act does not seem to specifically enact the abrogation of the right to silence for persons charged with or suspected of criminal offences Tasmania Police submits that the issue is relevant to the conduct of investigations by the Commission, particularly given the distinct possibility of subsequent referral of potential criminal conduct to the Commissioner of Police for investigation (s38(1)(e) and potential prosecution.

It is submitted that the situation warrants the Reviewer's consideration as to the adequacy of the current provisions of the Act relating to directions to provide information during the conduct of investigations by the Commission and the right to silence for persons charged or suspected of a criminal offence.

Designated Public Officers – Referral of Minor Complaints

The provisions of s87 of the Act relate to investigation or dealing with misconduct by designated public officers. Tasmania Police commissioned officers are designated public officers (s6(1)(e)).

The Integrity Commission is to assess, investigate, inquire into or otherwise deal with, in accordance with Parts 6 and 7, complaints relating to misconduct by a designated public officer. In assessing, investigating, inquiring into or otherwise dealing with a complaint under subsection (1), the Integrity Commission may have regard to established procedures or procedures of the relevant public authority, any codes of conduct relevant to the designated public officer who is the subject of the complaint and any statutory obligations or relevant law relating to that designated public officer.

For complaints received by the Commission involving Tasmania Police commissioned officers, there is no provision for referral of minor complaints to Tasmania Police to be dealt with under the Tasmania Police disciplinary framework. Management of minor complaints involving commissioned officers is currently dealt with by way of liaison between the Commission and Tasmania Police, dismissal of the complaint and communication of the complaint to the Commissioner of Police to be dealt with through the Tasmania Police disciplinary framework and provisions of the PSA. In accordance with the MOU the outcome is then notified to the Commission upon finalisation of the investigation.

Tasmania Police submits that the same issues most probably apply to complaints involving designated public officers within other agencies and it is appropriate for the Commission to have authority to refer complaints against designated public officers of a minor nature to the relevant agency to be dealt with under the appropriate disciplinary framework or as a managerial action.

