INTEGRITY COMMISSION

Our Ref:2016/000811

24 June 2016

The Hon Vanessa Goodwin MLC
Minister for Justice
Attorney-General
Level 10
10 Murray Street
HOBART 7000

Dear Minister,

Response to recommendations of Independent Reviewer

Thank you for providing the Commission with the opportunity to review the recommendations of the Independent Reviewer arising from the recent review of the *Integrity Commission Act 2009*. Please find attached the Commission's response to the recommendations.

We can advise that, of the Reviewer's 55 recommendations, the Commission:

- agrees with 38 recommendations
- agrees in principle with 12 recommendations
- disagrees with five recommendations

We have provided a reasoning where we disagree with a recommendation, and an alternative course of action where we believe there may be a better way of achieving the desired outcome.

Please note that we would be happy to discuss our response further with you if required.

Yours sincerely,

AG Melick AO RFD SC
Chief Commissioner

Michael Easton
(Acting) Chief Executive Officer

Response of the Integrity Commission to recommendations of the Independent Reviewer

In this response:

- 'The Act' means *Integrity Commission Act 2009*
- 'Reviewer' means the Independent Reviewer

[1] That the Auditor-General and Ombudsman be removed as members of the Board (ie delete paragraphs (b) and (c) of section 14(1) of the Act).

The Commission agrees with this recommendation.

[2] That a person with experience in public sector human resources and industrial relations should be added as a member of the Board, making a total of five members including the Chief Commissioner. Alternatively, the list in paragraph (g) of section 14(1) should be amended by the addition of subparagraph (v): "A person with experience in public sector human resources and industrial relations". This will leave a total of four members.

The Commission agrees with this recommendation. However the Commission notes that the addition of a fourth remunerated Board member will require additional resources to be provided to the Commission.

The Commission also notes that the proposed new subparagraph should not include '*A person with*' as these words are already present in s 14(1)(g).

[3] That a quorum at a meeting of the Board be reduced from four to three (ie amend Schedule 3, clause 4(1) of the Act).

The Commission agrees with this recommendation.

[4] That Schedule 2, clause 8(2)(g) of the Act be amended by substituting the words "has been guilty of misconduct" with "has been guilty of conduct or an attempt to engage in conduct which, if engaged in by a public officer, would amount to misconduct".

The Commission agrees with this recommendation.

[5] That the Chief Commissioner and CEO be excluded as designated public officers (ie amend section 6(1)(d) of the Act by adding at the end thereof the words "other than the Chief Commissioner and chief executive officer").

The Commission agrees with this recommendation.

[6] That the Act be amended by substituting for the present section 13(a) the following (or words to this effect):

> ***"Facilitate the performance of the functions of the Integrity Commission set out in section 8 by ensuring that the chief executive officer and the staff of the Integrity Commission perform their functions in accordance with sound public administration practice and principles and the objectives of this Act and by issuing such guidelines to them as it considers appropriate."***

The Commission agrees with this recommendation.

[7] That the Act be amended so that an assessor is to submit his or her report to the CEO within 40 working days of the assessor's appointment pursuant to section 35 or within such further time as the Board may allow having regard to all the circumstances.

The Commission agrees with this recommendation.

[8] That section 35(4) of the Act be amended to permit the assessor to exercise only the power of an investigator under section 47(1)(c) if the assessor considers it reasonable to do so.

The Commission agrees with this recommendation.

The Commission notes that [3.3.8] of the Reviewer's report contains an inaccuracy. The statement, 'I am told this has never been done' (relating to an assessor's use of the coercive powers of an investigator under s 47(1)(b) of the Act, to interview the subject officer of a complaint during an assessment) is likely based on a comment made by the Commission during private hearing. This comment was not correct: the Commission has previously interviewed a subject officer during an assessment; however this is no longer the Commission's practice.

[9] That the interpretation section of the Act be amended by adding a definition of "offence of a serious nature" as one punishable by X years' imprisonment (or a fine not exceeding Y penalty units, or both).

The Commission agrees in principle with this recommendation, with the qualification of the discussion at Recommendation 16.

The Commission refrains from suggesting figures for 'X' and 'Y' in the recommendation, however notes that a suitable definition could be '*as one punishable by imprisonment, including suspended sentences*'. If the threshold for 'serious misconduct' is set too high, realistically the Commission will not be able to focus on serious misconduct (as recommended by the Reviewer in Recommendation 10).

[10] That the Commission expedite the processing of complaints by:

> ***(a) adopting a robust attitude to the triaging of complaints;***
>
> ***(b) so far as practicable confining its investigative function to serious misconduct by public officers, misconduct by designated public officers, and serious misconduct by police officers under the rank of inspector.***

The Commission agrees in principle with this recommendation. However the Commission qualifies that agreement by referring to its discussion at Recommendation 16.

The Commission also notes that it is unclear as to whether this is a recommendation for legislative amendment or merely an exhortation. The Commission notes that it has developed extensive standard operating procedures to guide its approach to dealing with of complaints, and that 'triage' is not a term used in the Act.

In relation to Recommendation 10(b), the Commission notes that not all matters initially present as 'serious misconduct'. The Commission's experience is that serious individual misconduct and systemic issues are sometimes only identified upon an investigation into (what at first appears to be) simple misconduct.

[11] That the Act be amended to require mandatory notification by public authorities of serious misconduct and misconduct by DPOs to the Commission in a timely manner.

The Commission agrees in principle with this recommendation.

The Commission notes that the amendment should require notification of '*reasonably suspected serious misconduct and reasonably suspected misconduct by DPOs …*'. To do otherwise would only require the public authority to notify at the end of the relevant process, and contradicts the intent of the amendment.[1]

The Commission considers that there should be a set timeframe for agencies to notify the Commission. Similar provisions in other jurisdictions, which may be used as a reference point in

[1] See, *Report of the Independent Reviewer*, pages 37–38, [3.6.3]–[3.6.6].

drafting this amendment, can be found in ss 28–31 of the *Corruption, Crime and Misconduct Act 2003* (WA), and ss 37–40 of the *Crime and Corruption Act 2001*(Qld). Further, the Commission is concerned that, to maximise reporting, heads of public authorities should be given guidance on the determination of what constitutes 'serious misconduct'.

To address the above issues, the Commission suggests that the recommended amendment include a provision allowing the Commission to issue guidelines about notifications.[2] The guidelines could include criteria determined by the Commission eg the form and timeframe for notifications, and guidance for assessing what might constitute serious misconduct.

[12] That:

> ***(a) Where the Commission is assessing or investigating misconduct of a public officer involving a breach of the State Service code of conduct, the CEO shall, unless he or she is of the opinion that to do so might compromise such assessment or investigation, promptly advise the Head of Agency of that officer of the nature of that misconduct on a confidential basis.***
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> ***(b) When any such assessment or investigation is concluded and a determination by the CEO under section 38, or one by the Board under section 58, or one by the Integrity Tribunal under section 78 has been made, and the complaint referred back to the Head of Agency, the latter may treat the evidence gathered by the Commission as part of any code of conduct investigation.***

The Commission agrees in principle with this recommendation.

In relation to Recommendation 12(a): the Commission considers that any advice provided to a head of agency about an assessment or investigation be provided in a formal notice, protected by the confidentiality provisions under s 98 of the Act.

In relation to Recommendation 12(b): the Commission considers that the amendment should provide for the relevant head of agency to use any material gathered by the Commission, including any evidence and any report prepared by the Commission, as part of its investigation.

The Commission notes that Recommendation 12(b) may necessitate consequential amendment of the *State Service Act* and Employment Direction No.5.

[13] That Employment Direction 5 should be amended to provide:

> ***(a) That where the Head of Agency is advised by the Commission that it is assessing or investigating misconduct of a public officer of that agency involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.***
>
> ***(b) That where, in accordance with Recommendation [11], the Head of Agency notifies the Commission of serious misconduct of a public officer involving a breach of the State Service code of conduct, the Head of Agency is not to proceed to appoint an investigator to investigate the alleged breach until advised to do so by the Commission.***

The Commission agrees in principle with this recommendation.

In relation to Recommendation 13(b): the Commission considers that the recommendation should include '*serious misconduct of a public officer and misconduct of a designated public officer …', and that the* relevant head of agency should notify the Commission of '*reasonably suspected misconduct involving an alleged breach …*', as per the Commission's comment on Recommendation 11.

[2] See, for example: *Corruption, Crime and Misconduct Act 2003* (WA) s 30; *Crime and Corruption Act 2001* (Qld) s 40; *Public Interest Disclosures Act 2002* (Tas) s 3.

[14] That the Act be amended to require that before any referral by the CEO pursuant to section 38 of a complaint to a public authority for investigation and action, any adverse material contained in the assessor's report be disclosed to the officer the subject of the complaint, that the latter be given the opportunity to comment upon it and that any submission or comment in relation thereto by the subject officer be attached to the material referred to the public authority.

The Commission disagrees with this recommendation.

While the Commission supports the application of the rules of procedural fairness to its operations, the Commission considers that providing material contained in the assessor's report (prepared under s 37 of the Act) to the subject officer of a proposed investigation to be undertaken by a public authority could jeopardise that investigation. This is particularly an issue with referrals of matters involving suspected criminal conduct to Tasmania Police where further confidential investigative action may be required.

Further, the Commission's jurisdiction includes public authorities other than the State Service, and those other public authorities are not subject to ED5. The proposed amendment could jeopardise investigations to be undertaken by those agencies.

The Commission notes that the rules of procedural fairness will require subject officers to be given the opportunity to respond to any findings of the actual investigation undertaken by any public authority.

We note that the amendment poses no issues where an assessment report is referred to a State Service Agency for an investigation given the current notification requirements under ED5 (which requires notification to the subject officer immediately). However, while the Commission does not agree with the current notification provisions for subject officers under ED5, the notification requirements should remain the responsibility of the relevant investigating agency, not the Commission.

The Commission notes that the recommended amendment poses no issues for referrals under s 58(2)(b) of the Act ie where the investigation is complete and the referral is for the purpose of action.

[15] That in accordance with item 9 of Attachment 2, Parts 5 and 6 of the Act be amended so that the Commission retains jurisdiction over a complaint even after referral to an appropriate person or entity for action, such jurisdiction to include powers within those Parts.

The Commission agrees with this recommendation.

[16] That the Act be amended to require that if criminal conduct by a public officer other than a designated public officer or a police officer is suspected by the Commission during its triage of a complaint, the matter must immediately be referred to Tasmania Police.

The Commission disagrees with this recommendation, on the basis that it would fundamentally undermine the Commission's jurisdiction and that it conflicts with Recommendation 10.

The Reviewer has recommended, in Recommendation 10(b), that the Commission '*expedite the processing of complaints by … so far as practicable* ***confining its investigative function*** *to* ***serious misconduct*** *by public officers, misconduct by designated public officers, and* ***serious misconduct*** *by police officers under the rank of inspector*' (emphasis added).

The crux of Recommendation 10 is that the Commission should, as far as possible, only investigate 'serious misconduct' and misconduct (serious or otherwise) alleged to have been committed by designated public officers (DPOs).

'Serious misconduct' is defined in s 4 of the Act as:

> *… misconduct by any public officer that could, if proved, be:*
>
> *(a)* ***a crime or an offence of a serious nature****; or*
>
> *(b) misconduct providing reasonable grounds for terminating the public officer's appointment;* (emphasis added)

In Recommendation 9, the Reviewer has recommended defining 'offence of a serious nature' with reference to a specific term of imprisonment or fine.

Despite the above two recommendations, Recommendation 16 is that '*the Act be amended to require that if criminal conduct by a public officer other than a designated public officer or a police officer is suspected by the Commission during its triage of a complaint, the matter must immediately be* ***referred*** *to Tasmania Police*' (emphasis added).

'Referred' has a particular meaning in the context of the Act. At a number of decision-points – receipt of a complaint, or on the completion of an assessment, investigation and integrity tribunal – the Commission may 'refer' a matter to other parties (including the Commissioner of Police).[3] Currently, the Commission loses jurisdiction over a matter when it is referred. The Commission does note that recommendations 15 and 18 both provide for the Act to be amended so that the Commission does not lose jurisdiction of a matter on referral.

As it stands, the implementation of Recommendation 16 would mean that any complaint that alleged potentially criminal conduct by someone other than a police officer or a DPO would be immediately referred to the police. This appears contradictory to Recommendation 10, which is essentially suggesting that a substantial proportion of complaints investigated by the Commission should be those that contain allegations of 'serious misconduct'; that is, allegations of 'a crime or an offence of a serious nature' (or which would provide reasonable grounds to terminate the public officer's appointment).

Further, in Recommendation 17 the Reviewer recommends that '*the Act be amended to delete the words "or DPP" from sections 57(2)(b)(iv), 58(2)(b)(iv) and 78(3)(d)*'. This appears to be a complete removal of the Commission's ability to prepare briefs of evidence and refer matters to the Director of Public Prosecutions for prosecution. This recommendation also appears to contradict the recommendation that the Commission should be investigating allegations of 'a crime or an offence of a serious nature' in Recommendation 10.

The Commission also notes that the Reviewer appears – to some extent – to have based recommendations 16 and 17 on the DPP's comments about the High Court cases of *Lee v The Queen*[4] and *X7 v Australian Crime Commission*.[5] As stated by the Reviewer, these cases caused the DPP to have 'misgivings' about the appropriateness of the Commission handling cases that involved

[3] Ref relevant sections of act
[4] [2014] HCA 20 ('*Lee No* 2').
[5] (2013) 248 CLR 92 ('*X7*').

potential criminal offences. The DPP's primary concern appears to relate to the Commission's ability to compulsorily acquire evidence and the impact of the 'companion principle', which is a reference to:

> *… the principle that the onus of proof of a criminal charge rests on the prosecution (the onus principle); and the companion to the onus principle, being that an accused cannot be required to testify to the commission of the offence charged (the companion principle).*[6]

However, on 10 March 2016, the High Court handed down its most recent decision in this line of case law, the decision of *R v Independent Broad-based Anti-corruption Commissioner*.[7] This case appears to further distinguish *Lee No 2*, and has more recently been applied in *Zanon v The State of Western Australia*. In *Zanon*, McLure P succinctly summarised the preceding case law, including all cases mentioned above,[8] and stated:

> *Prima facie, the effect of R v IBAC is that the companion principle has no application to information obtained under compulsion prior to the commencement of the prosecution of an offence.*[9]

These cases appear to undermine any purported requirement for the Commission's jurisdiction to be removed in all potential instances of criminal conduct. As such, the Commission contends that *Lee No 2* has now been distinguished to such an extent that it will only apply in a very limited fact situation.

The Commission reiterates and emphasises the comments made in its submission to the Five Year Review that, for a variety of reasons, police are often unable or unwilling to deal with referrals of complaints of serious misconduct that may amount to criminal offences.[10] It is simply not the core business of police to deal with such allegations. These kinds of investigations are often complex and time consuming, and may be politically delicate. The Commission has been specifically established as an independent body with coercive powers to deal with these kinds of matters, and it should be allowed to fulfil its objectives.

The Commission has been given jurisdiction over serious misconduct for a reason; it has also been given coercive powers so that it can deal with serious misconduct more adequately than an ordinary public authority. It currently has the ability to liaise with – and refer matters to – both the police and the DPP. In the opinion of the Commission, the implementation of Recommendation 16 in particular would undermine the Commission's intended objectives and jurisdiction.

As an alternative to Recommendation 16, the Commission would support a form of mandated consultation or liaison process with Tasmania Police. A process for this is currently being formalised within a protocol that sits within the existing memorandum of understanding between the Commission and Tasmania Police.

If Recommendation 16 were to be implemented, it would be imperative for recommendations 15 and 18 to be implemented simultaneously. To do otherwise would be to cause a fundamental undermining of the Commission's jurisdiction and objectives, and the production of substantial timeliness and practicality issues.

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[6] *Zanon v The State of Western Australia* [2016] WASCA 91 ('*Zanon*'), at [111].
[7] [2016] HCA 8 ('*R v IBAC*').
[8] *Zanon* [2016] WASCA 91, at [110].
[9] *Zanon* [2016] WASCA 91, at [144].
[10] Integrity Commission, Submission to Independent Five Year Review (2016), page 32 [131].

[17] That the Act be amended to delete the words "or DPP" from sections 57(2)(b)(iv), 58(2)(b)(iv) and 78(3)(d).

The Commission disagrees with this recommendation, as discussed below and in Recommendation 16 (above).

The main impetus for this recommendation appears to be the DPP's misgivings about the potential application of the 'companion principle' (see above) to matters handled by the Commission. That is, he is concerned that if the Commission has used coercive powers against a person during its investigations, he will not subsequently be able to mount a successful prosecution of that person. As stated above, the most recent case law suggests that this may be less of a barrier than first thought.

In any case, so far as the Commission is aware, the DPP's concerns are not of such an extent that he would want the Commission's ability to refer matters to him to be completely removed. Such appears to be the effect of Recommendation 17.

The Commission further notes that the Reviewer makes no recommendations about the references to the DPP in ss (8)(1)(h) and (i) of the Act. In those sections and in s 8(1)(m), Parliament appears to have specifically provided for the Commission to have a role in referring matters to the DPP for prosecution:

> *(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; and*
>
> *(i) investigate any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate; and*
>
> *…*
>
> *m) when conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for –*
>
> > *(i) the prosecution of persons for offences; or*

Further, even if Recommendation 16 were to be implemented, the Commission would still retain jurisdiction over complaints of criminal conduct by police and DPOs. If the Commission were to complete an entire investigation into police conduct that was potentially criminal, it would then – due to Recommendation 17 – not have the specific power to refer that matter to an independent body to prosecute i.e. the DPP. The Commission's only option would appear to be to refer it to the police for prosecution, which would undermine the rationale for leaving it within the Commission's jurisdiction in the first place.

If Recommendation 17 is to be implemented, there must be some consequential amendments to the Act to allow the Commission to refer matters eg briefs of evidence, to the DPP for prosecution.

[18] That the Act be amended to provide for the Commission to retain jurisdiction over matters referred to public authorities where after action by a public authority (or a failure by a public authority to take appropriate action) it is apparent that further action by the Commission is required.

The Commission agrees with this recommendation.

[19] That the privilege against self-incrimination be excluded from the Act. This might be achieved by amending section 4 to except that particular privilege from paragraph (a) of the definition of "privilege".

The Commission agrees in principle with this recommendation, but qualifies that by referring to its discussion at Recommendation 20 below.

[20] That the Act be amended to provide that any statement or document made or produced by a witness under compulsion shall be inadmissible against that person in any civil or criminal proceedings against him or her, other than proceedings for an offence against the Act or perjury in respect of that statement without his or her consent.

The Commission agrees in principle with this recommendation, but qualifies that by the discussion below. The Commission also qualifies its agreement by stating that this recommendation must not apply to the subsequent use of coerced material in disciplinary proceedings eg ED5 investigations.

Recommendations 19 and 20 raise complex legal issues to which a significant amount of attention and care will need to be given during the drafting of amendment legislation. In other jurisdictions, entities similar to the Commission are already able to abrogate privileges as provided for in recommendations 19 and 20. The High Court cases of *Lee No. 2* and *X7* (see above) have raised issues requiring legislative amendment in those other jurisdictions.[11] A thorough survey of legislation in other Australian jurisdictions will need to be undertaken to ensure that the Tasmanian legislation meets all the necessary requirements and contains all the necessary safeguards. For example, the legislation will need to deal with scenarios including both primary and derivative use of evidence, and pre- and post-charge disclosures.

The 'principle of legality' means that courts interpret legislation to preserve the privilege against self-incrimination. If Parliament wishes to override such a right, its intent must be clear, 'whether by express words or necessary implication'.[12] Recommendations 19 and 20 are mutually dependent and in order to establish a sufficient threshold of parliamentary intent, they must be implemented together.

Further, Recommendation 17 (above) suggests that it may be intended to remove the Commission's ability to refer matters to the DPP. The Commission disagrees with that recommendation, for the reasons explained above. Nevertheless, the Commission notes that any implementation of recommendations 19 and 20 will need to be cognisant of whether Recommendation 17 is implemented. If amendments are made that are intended to prevent coerced material from being shared with the DPP, those amendments will need to be drafted with great clarity, as illustrated in *Zanon*:

> *The first issue is whether the police, lawfully in possession of the compulsorily acquired information, were prohibited from publishing it to the DPP.* ***If the publication (not just the examination) was prior to the commencement of criminal proceedings against Mr Quaid, the answer would be an unequivocal no. The companion principle would have no application****. The privilege against self-incrimination (and the lesser rights under the umbrella of the right to silence) are expressly abrogated, subject to the protective provision relating to direct-use immunity. Both the police and DPP would be entitled to possession of the material.*[13]

[21] That the Act be amended so that any coercive notice issued under section 47 be signed by the Chief Commissioner, but that he or she may delegate this power to the CEO to be exercised when he or she is not available.

The Commission agrees with this recommendation.

[22] That the Act be amended to afford any witness required to attend and give evidence at an Integrity Tribunal hearing, and who may be subject to allegations of wrongdoing thereat,

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[11] See, for example, the *Law Enforcement Legislation Amendment (Powers)* Act 2015 (Cth).

[12] *Sorby v Commonwealth* (1983) 152 CLR 281, [14] (Gibbs CJ), referenced in ALRC paper: *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, at [11.35].

[13] *Zanon* [2016] WASCA 91, at [150].

protection similar to that provided by section 18 of the Commissions of Inquiry Act 1995, including the right to representation by counsel and not being made the subject of any adverse finding as provided therein.

The Commission agrees in principle with this recommendation, given the provisions that already exist within the Act.

As it stands, the Act already provides some of the protections listed in Recommendation 22 for 'the public officer who is the subject of the inquiry'.[14] This recommendation appears to be going beyond those protections for persons who are merely 'witnesses'.

There can be a fine line between a person who is the subject to an inquiry, and a person who is a witness to that inquiry. This has been well documented in media reporting on, in particular, public examinations undertaken by the New South Wales' Independent Commission Against Corruption.[15] The practicality of these additional protections is therefore questionable. Nonetheless, recognising that the Act already delineates between the two for integrity tribunals, and the protections already provided, the Commission accepts this recommendation.

However, the Commission notes that the current provisions in the Act do not give due regard to the purposes and processes of an integrity tribunal, which is termed an 'inquiry' within the Act. An integrity tribunal is part of an inquisitorial process designed to get to the truth of matter; it is not a court, and the Commission is unable – even after the completion of an integrity tribunal – to impose a sanction on any person. Further, given the inquisitorial nature of integrity tribunals, the Commission will not always know in advance the nature of an allegation that is to be made against a person and 'the substance of the evidence supporting the allegation'. This would be particularly the case for 'witnesses'.

As has recently been stated by the Victorian Independent Broad-based Anti-corruption Commission (IBAC) in relation to this very issue:

> *… examinations … are part of an inquisitorial and not adversarial process, and are* ***part of an investigation****, not the result of an investigation …* ***examinations do not constitute a trial****. In this context,* ***advance warnings about adverse evidence that might be presented is anathema to any sound investigation or examination****. It is fundamental to any competent investigation not to arm persons of interest with knowledge of what the investigator knows and, by deduction, does not know. To do so risks prejudicing an investigation … The suggestion that a witness in a public examination should be provided with adverse evidence is contrary to settled case law …* ***nothing could be more likely to prejudice an IBAC investigation, and thereby hinder IBAC's important role in exposing corrupt conduct, than to require IBAC to provide notice of adverse material when an examination is held in public****. Such a requirement would not constitute a safeguard in any sense of the word, and would wrongly conflate public examinations with adversarial contests.*[16]

[23] That section 49 of the Act be amended to enable the investigator to prohibit a person required to give evidence or answer questions, as part of an investigation, from being represented by a

[14] *Integrity Commission Act*, ss 65, 66(3), 70.
[15] See, for example, articles on the appearance of Arthur Sinodinos at an ICAC examination in 2014, such as http://www.abc.net.au/news/2014-04-03/sinodinos-to-give-evidence-at-icac-inquiry-into-awh/5363408.
[16] http://www.dpc.vic.gov.au/images/documents/Community_Consultations/IBAC_-_Submission_to_IBAC_discussion_paper.pdf page 4-5 (emphasis added).

person who is already involved in an investigation or is involved or suspected to be involved in a matter being investigated.

The Commission agrees with this recommendation. The Commission notes that there may be benefit in defining the scope of 'agent' in s 49.

[24] That the Act be amended to enable the Integrity Tribunal to refuse to allow a public officer who is the subject of an inquiry, a witness referred to in section 66(2), or a person permitted to participate in an inquiry pursuant to section 67(1) to be represented before the Tribunal by a person who is already involved or suspected to be involved in a matter being investigated.

The Commission agrees with this recommendation.

[25] That section 83(3) of the Act be amended to permit the CEO to agree the quantum of legal costs at his or her discretion in lieu of having to have them taxed in the Supreme Court.

The Commission agrees with this recommendation.

[26] That complaints of misconduct by DPOs, once identified as such, be immediately made the subject of investigation under Part 6, and those of misconduct by non-commissioned police officers be referred in the first instance to the Commissioner of Police for action.

The Commission disagrees with this recommendation.

In relation to the first part of the recommendation: the Commission's view is that the Act should be amended to provide discretion for the Commission to refer certain complaints against DPOs to public authorities for action and investigation. This would allow the Commission to refer matters involving DPOs who are not the head of the public agency and where the alleged misconduct may be relatively minor. This provides for a pragmatic approach to complaint management and reduces the use of the Commission's resources on matters better considered by other entities eg allegations of minor misconduct by local government councillors, which may be easily addressed through a Code of Conduct Panel established under the *Local Government Act 1993*.

The Act would also need to retain the ability for the Commission to dismiss such allegations.

In relation to the second part of the recommendation: again, the Commission considers that it should have discretion to retain misconduct matters relating to non-commissioned police officers, as it does for all other public officers. This is important in cases where it may not be possible for police to objectively investigate the matter or where there may be systemic issues, and the public interest not be detracted by a perception of police investigating their own officers.

[27] That complaints of serious misconduct by a police officer not a designated public officer which are not dealt with by the Commission under section 88(1)(a) be referred to the Commissioner of Police for action. A way of achieving this would be to add a new paragraph (ab) in section 88(1) to the following effect: "(ab) refer a complaint relating to serious misconduct by a police officer to the Commissioner of Police for action; or …".

The Commission agrees with this recommendation. However the Commission considers that the new s 88(1)(ab) should refer to '… *for investigation and action*' to be consistent with other similar referral provisions.

[28] That the Act be amended to delete the words "assess" and "assessing" wherever they appear in sections 87 and 88.

The Commission disagrees with this recommendation on the basis of its reasoning in relation to Recommendation 26.

[29] That consideration be given to the adoption of the Model Codes of Conduct for Members of Parliament and Ministerial staff in Tasmania presented to Parliament by the Commission in June 2011.

The Commission agrees with this recommendation.

[30] That the Act be amended to permit the Parliamentary Standards Commissioner, at any time, to provide a report to Parliament on the performance of his or her function.

The Commission agrees with this recommendation.

However the Commission maintains its submission that a report should be required annually:

> *The Commission submits that, in the interests of public awareness of the role of the Parliamentary Standards Commissioner, the Parliamentary Standards Commissioner should provide a report to Parliament on the activities of the office each year, subject to the confidentiality provision in s 28(2) of the Integrity Commission Act.*[17]

[32] That an order be made under s 104(1)(b) to insert the University of Tasmania and under s 104(2) to insert the Vice Chancellor as principal officer into Schedule 1 of the Act, with a consequential amendment to Part 2 of Schedule 1 if required.

The Commission agrees with this recommendation.

[33] That the definition of "misconduct" set out in section 4 of the Act be retained.

The Commission agrees with this recommendation.

[34] That Treasurer's Instruction 1118 be amended such that where a conflict of interest exists, the Commission should have a discretion to brief and retain legal counsel outside of Crown Law, without the need for a specific exemption, as sought by the Commission.

The Commission agrees in principle with this recommendation.

The Commission however seeks that TI 1118 be amended to provide the Commission with a broader exemption, ie beyond merely conflicts of interest. A conflict of interest may not always be immediately apparent, and may only arise at the latter stages of handling a matter. This position was raised during the Three Year Review of the Integrity Commission:

> *For instance, when the width of a coercive Notice that has been issued by the Commission is challenged, the officer or agency concerned can be presumed to have sought Crown Law advice about the matter, yet the Commission itself may also require legal advice which it also has to get from Crown Law. It is also possible that an issue may emerge in which the Commission's investigative work impacts upon Crown Law itself, or an officer of or associated with Crown Law. It is reasonable to assume that there may be many occasions when Crown Law is in a position of conflict – neither the public officer nor agency concerned, nor the Commission may be aware that the other has sought legal advice, yet both are required to obtain that advice only from Crown Law.*
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> *Although the Commission does not conduct 'examinations' in the manner of other integrity entities, its investigators are able to compel evidence be given subject to the issue of a s 47 Notice. The Commission considers that where the evidence from the witness is likely to be complex or where several witnesses are involved, there is a benefit to retaining a legal practitioner to assist the investigator obtain evidence. Such decisions may need to be made quickly and covertly. Further, the Act provides for the convening of an Integrity Tribunal. When such a Tribunal is convened, it will be expected to maintain its independence and, accordingly, counsel assisting an Integrity Tribunal should be independent of Crown Law.*
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> *…*

[17] Integrity Commission, *Submission to Independent Five Year Review* (2016), page 55 [226].

The Commission considers it is appropriate that it seek the Solicitor-General's advice on constitutional matters or statutory interpretation of the Act, in accordance with TI 1118.

However, where legal services are required on specific misconduct matters the Commission strongly advocates for it to have discretion as to the legal services it retains, without the need for a formal exemption under TI 1118. It considers the ability to brief and retain legal counsel outside of Crown Law, as and when required subject to budgetary considerations, to be essential to ensuring the independence of its work.[18]

[35] That the Commonwealth be asked to amend the Telecommunications (Interception and Access) Act 1979 (Cth) so as to grant the Commission the status of a criminal law enforcement agency for the purposes of that Act.

The Commission agrees with this recommendation.

[36] That no compelling case has been made for the inclusion within the Criminal Code of an offence of Misconduct in Public Office.

The Commission accepts this recommendation and notes that it is ultimately a matter for Government to determine.

[37] That the definition in the Act of "public officer" be amended to specifically reference volunteers and officers exercising statutory functions or powers.

The Commission agrees with this recommendation.

The Commission notes that '*volunteer*' needs to be carefully defined and linked to the volunteer's work for an agency under the Commission's jurisdiction.

The Commission also notes that any definition of '*officer*' needs to include persons exercising statutory functions or powers irrespective of whether they are directly employed by a public authority eg contractors. It is suggested that the definition relate to '*persons*' rather than '*officers*'.

[38] That section 46 of the Act be amended to provide that where a person has been appointed to assist an investigator, the CEO may also authorise that person to exercise any of the powers of an investigator set out in section 47.

The Commission agrees with this recommendation.

[39] That the Act be amended by adding the words "or own motion investigation, as the case may be" after the word "complaint" in section 58(2)(a).

The Commission agrees with this recommendation.

[40] That section 94 of the Act be subject to further consideration of the proper definition of what material needs the protection of confidentiality and the limits of appropriate disclosure.

The Commission agrees with this recommendation. The Commission maintains its position put to the Reviewer.

[41] That sections 98(1A) and 98(2) be amended so that confidentiality responsibilities are placed on persons to whom the existence of, contents of and matters relating to or arising from the notice have been disclosed, and further so that a person to whom any such information has been disclosed but who has not been informed by the person making the disclosure that it is an offence to disclose that information without a reasonable excuse to any other person, will him or herself have a reasonable excuse for the disclosure made by him or her.

The Commission agrees with this recommendation.

[18] Integrity Commission, *Submission to Three Year Review: submission 1, vol 1* (2013), page 125–6, cl 9.3.1.

[42] That the Act be amended so that "assessments" be included in section 98(1B)(d) of the Act and "assessors" be included in section 98(1B)(e).

The Commission agrees with this recommendation. The Commission notes that the implementation of Recommendation 8 will impact the proposed amendment of s 98(1B)(e).

[43] That section 98(2)(a)(i) of the Act be amended by adding after the words "offence against subsection (1)" the words "or subsection (1A)".

The Commission agrees with this recommendation.

[44] That section 98(2) of the Act be amended to clarify that the list of reasons given is not exhaustive.

The Commission agrees with this recommendation.

[45] That section 98(2) of the Act be redrafted to exonerate persons to whom disclosures have been made but who have not been informed that to disclose them further without reasonable excuse is an offence.

The Commission agrees in principle with this recommendation.

The Commission notes that this issue may already be dealt with through Recommendation 41. However the Commission considers that, while the Reviewer noted and agreed with the issue raised by the Commission's discussion,[19] no solution to the actual issue was subsequently recommended. The Commission maintains its original submission:

> *[316] Section 98(2)(b) imposes on the person making the disclosure – for one of the three listed reasonable excuses – an obligation to inform 'the person to whom the disclosure is made that it is an offence to disclose the existence of the notice to another person unless the person to whom the disclosure was made has a reasonable excuse'. The drafting of the provision suggests that this obligation under s 98(2)(b) would not be imposed on a person if they were to disclose for a reason other than the three listed in s 98(2)(a) (although they would still be subject to s 98(1A)).*[20]

The proposal of the Commission to solve the above dilemma was to:

> *Redraft s 98(2) to clarify that all persons who disclose on the basis of a reasonable excuse must meet the obligation imposed by s 98(2)(b) – regardless of whether their reasonable excuse was one of the listed examples.*[21]

[46] That section 98 of the Act be amended to provide that where the Commission or Integrity Tribunal has finally dealt with a complaint or own motion investigation, a person served with a notice that it or any document referred to therein or attached to it is a confidential document, may apply to the Commission or Integrity Tribunal for advice that such document is no longer a confidential document.

The Commission agrees with this recommendation.

[47] That section 98(1) of the Act be amended to read:

> ***"(1) A person on whom a notice that it or any document referred to therein or attached thereto is a confidential document was served or to when such a notice was given under this Act must not disclose to another person –***
>
> ***(a) the existence of that confidential document; or***
>
> ***(b) the contents of the confidential document; or***
>
> ***(c) any matters relating to or arising from the confidential document –***

[19] Report of Independent Reviewer, page 108 [8.10.7].
[20] Integrity Commission, *Submission to Independent Five Year Review* (2016), page 81.
[21] Integrity Commission, *Submission to Independent Five Year Review* (2016), page 80.

unless the person on whom the confidential document was served or to whom it was given has a reasonable excuse."

The Commission agrees in principle with this recommendation.

Subsections (a)–(c) cannot be amended to state 'confidential document', because it would not then cover notices that do not have attached documents. Moreover, the Commission considers that the recommended wording is overly complex.

A simpler approach would be the inclusion of a new subsection (d) to state that it covers any documents specified to be confidential in the notice. Further, the Commission notes that, if s 98(1) is to be changed, then s 98(1A) must be changed so that it has the same wording, as would all other provisions in s 98 (ie to refer to existence, contents, matters relating to or arising from, and anything that were added by way of a s 98(1)(d)).

The Commission notes some minor inaccuracies in the Reviewer's report and recommendation: in [8.10.11] of the report, the reference to 'section 55' should be to 'section 56'; and the reference to 'subsection (3)' should be to 'subsection (5)'. In the recommendation: '*was served or to when such a notice was given …*' should read *'was served or to whom such a notice was given …'.*

[48] That the Local Government Act 1993 be amended to provide for referrals from the Commission to be dealt with without the requirements of sections 28V(3)(b), (f) or (g) of that Act, and that amendments be made to that Act to ensure that such referrals be made directly to the Executive Officer and (as has been recommended in Recommendation [12(b)] in relation to ED5) on such referral the Code of Conduct Panel may treat the evidence gathered by the Commission as part of its investigation.

The Commission agrees in principle with this recommendation.

The Commission considers that the amendment recommended in the third part of Recommendation 48 provide for a Code of Conduct Panel to use any material gathered by the Commission, including any evidence and any report prepared by the Commission, as part of its investigation.

[49] That Audit Panels be included explicitly in the definition of a local authority in section 4(1) of the Act.

The Commission agrees with this recommendation.

[50] That the recommendations of the Commission in Attachment 2 to this report opposite the item numbers appearing in the first column thereof be implemented in respect of the following items: 1, 2, 3, 4, 5, 6, 7, 8, 11, 14, 15, 20, 22, 23, 24, 25, 26, 27, 28, 33, 34, 37, 38, 40, 41, 42, 43 and 45.

The Commission agrees with this recommendation.

In relation to **item 6** (requirement of public authorities to report each year on education and training): the Commission considers that the amendment should include a provision for the Commission to issue guidelines for principal officers to undertake the required reporting. Further, the Commission considers that the amendment should require principal officers to report on '*prevention programmes*', rather than be limited to merely '*education and training*'.

[51] That section 37(1) of the Act be amended by deleting the words "or review".

The Commission agrees with this recommendation.

[52] That section 46(1)(c) of the Act be repealed and in lieu thereof a requirement to observe the rules of procedural fairness should be included in section 55.

The Commission agrees with this recommendation.

[53] That an amendment to the Act to ensure the confidentiality of events arising out of the execution of a search warrant, or the exercise of any powers of an investigator under section 52 of the Act, be formulated by the Commission and implemented if approved by the JSC.

The Commission agrees with this recommendation.

[54] That sections 57(2)(b) and 58(2)(b) of the Act be amended to allow the CEO in any recommendation to the Board and the Board in its determination to specify such parts of the report and any other information obtained in the course of the investigation should not be included in the referral to the persons mentioned in sections 57(2)(b)(i-vi) and 57(2)(b)(i-vi), or section 58(2)(b)(i-vi).

The Commission agrees with this recommendation.

[55] That an amendment to the Act to ensure confidentiality over the actions of the Commission of those persons subject to any lawful requirements made by it under the Act be formulated by the Commission and implemented if approved by the JSC.

The Commission agrees with this recommendation.