

Tasmanian Government Response

Independent Review of the Integrity
Commission Act 2009

November 2016

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I Scope of this review

The *Integrity Commission Act 2009* (the Act) provides for an independent review of the Act after five years of operation. Specifically section 106 requires that:

“Independent review of Act

- (1) *The Minister must commission an independent review of this Act as soon as possible after 31 December 2015 to enable consideration of –*
 - (a) *the operation of the Act in achieving its object and the objectives of the Integrity Commission; and*
 - (b) *the operation of the Integrity Commission, including the exercise of its powers, the investigation of complaints and the conduct of inquiries; 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 furthering 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.*
- (2) *The independent review is to be undertaken by a person appointed by the Governor.*
- (3) *Before a person is appointed to undertake the independent review, the Minister is to consult the Joint Committee or, if the Joint Committee has not been appointed or Parliament has been prorogued, the Minister is to consult –*
 - (a) *the President of the Legislative Council; and*
 - (b) *the Parliamentary leader of each political party represented in the House of Assembly.*
- (4) *The person who undertakes the independent review must invite submissions relevant to the review from the public and give due consideration to the content of any such submissions.*
- (5) *The person who undertakes the independent review must give the Minister a written report of the review.*
- (6) *The Minister is to –*
 - (a) *transmit a copy of the report of the independent review to the President of the Legislative Council and the Speaker of the House of Assembly; and*
 - (b) *cause a copy of that report to be laid before each House of Parliament within 14 sitting-days of receiving it.*
- (7) *In this section –*

independent review means a review undertaken by a person who –

 - (a) *holds or has held office as a judge of a court of the Commonwealth or of an Australian State or Territory; and*
 - (b) *is not otherwise employed by this State, a State Service Agency or a statutory authority.”*

2. Appointment of the Independent Reviewer

On 27 November 2015, Her Excellency the Governor appointed the Honourable William Cox AC, RFD, ED, QC as the Independent Reviewer to undertake the review in accordance with section 106 of the Act. The appointment commenced on 1 February 2016 and expired on 31 May 2016. Mr Cox previously held office as Chief Justice of the Supreme Court of Tasmania and was not employed by the State of Tasmania, or a State Service Agency or a statutory authority of the State of Tasmania at the time of his appointment. The Minister for Justice consulted the JSC about Mr Cox's appointment.

Mr Cox provided his report to the Minister for Justice by 31 May 2016 and a copy was tabled in both Houses of Parliament on 23 August 2016.

In responding to the review the Government appreciates that the report makes a number of recommendations for amendments of the Act and provides a sound basis for the future operation of the Integrity Commission. The Government again records its thanks to Mr Cox for his important work in undertaking this review.

3. Background

The Act commenced on 17 December 2009, with the stated object to promote and enhance standards of ethical conduct by public officers by the establishment of the Integrity Commission with powers to investigate misconduct.

The Act at section 23 establishes a Parliamentary Committee, known as the Joint Standing Committee on Integrity. One of the functions of the Joint Standing Committee (JSC) set out at section 24(1)(e) is to review the functions, powers and operations of the Integrity Commission at the expiration of three years of the commencement of the section.

The Three Year Review was finalised and laid upon the tables of both Houses of Parliament in June 2015. A report of the review may be accessed on the Tasmanian Parliament website. In responding to the Three Year Review the Government noted the requirement for this review of the Act to be commenced as soon as possible after 31 December 2015.

The Government deferred consideration of a number of the major policy and legal issues highlighted by the work of the JSC in the Three Year Review because of a lack of

clear consensus on the part of the JSC on many of these issues and the close proximity between its report and the requirement for this independent review.

The Government indicated in its interim response to the Three Year Review that it remains committed to the following principles in dealing with misconduct in public life:

- prevention is as important as dealing with allegations of unethical behaviour;
- the need to build on existing structures and mechanisms;
- the need for proportionality;
- clarity and consistency about which public bodies are to be covered; and
- independence from the Government of the day.

In addition, the Government indicated it remained committed to ensuring that:

- accountability and responsibility for unethical conduct remains vested within agencies and other entities responsible for the investigation of misconduct;
- the Integrity Commission retains a triage function to ensure that investigations are not duplicated and entities are clear about who is responsible for conduct of investigations;
- the Integrity Commission retains the capacity to conduct investigations, but that the concerns which have been raised by various stakeholders around process, timeliness and interaction with existing investigative processes should be addressed as part of the Five Year Independent Review;
- there remain a focus on educating public officials about misconduct prevention and changing their behaviour, where appropriate;
- the Integrity Commission achieves its legislative objectives efficiently and effectively;
- integrity systems operate with openness, transparency and fairness;
- modern public sector employment practices are promoted; and

- the Integrity Commission assists public authorities to carry out their duties with respect to dealing with misconduct and maladministration.

The Government considered that the Integrity Commission must maintain a strong focus on education and prevention in relation to public sector misconduct and work collaboratively with public entities to:

- strengthen standards of integrity and ethics;
- improve the understanding of misconduct and how to prevent it;
- build capacity to prevent misconduct through risk management and timely intervention; and
- deal effectively with complaints of misconduct through internal complaint handling processes and system changes to address gaps revealed by complaints.

4. The Report of the Independent Reviewer

In responding to the recommendations made in this Five Year Independent Review of the Act, the Government remains committed to the principles set out in its interim response to the Three Year Review, as set out above.

The Report of the Five Year Independent Review makes 55 substantive recommendations, with Recommendation 50 containing a subset of 28 recommendations in response to the Integrity Commission's submission 'Identified Technical Issues, Integrity Commission Act 2009'. This submission contained 46 proposed amendments to various sections of the Act and was submitted to the JSC in the Three Year Review. The Government's position has been that it would consider the matters at the conclusion of this Review, because if there were to be other amendments to the Act it would be practical and sensible to progress these as a package of reforms.

It is noted that some of the Integrity Commission suggestions are technical or administrative, but there were others that pertained to higher policy issues such as major reforms to the *Personal Information Protection Act 2004*. These have not all been dealt with in the Independent Review Report. The Independent Review Report does not comment or accept all of the recommendations of the Integrity Commission; only

28 out of 46 originally proposed. However, some of the other technical issues are addressed in the substantive recommendations of the Independent Reviewer.

The Government has not accepted eight recommendations, seven substantive and one sub-recommendation made as part of Recommendation 50. All remaining recommendations have either been accepted in full or in principle, with the latter requiring further elaboration or consultation.

5. The recommendations not accepted by Government

The following recommendations have not been accepted by the Tasmanian Government for the reasons provided.

Recommendation 15

The Commission retaining jurisdiction over complaints referred to the agency or public authority for action. (This recommendation is related to Recommendation 18).

Response

The Government believes that accountability for the ethical health of an agency or public authority should primarily rest with the head of that agency or public authority.

The Integrity Commission should not retain jurisdiction over a complaint that has been referred to a relevant public authority, another integrity agency or other appropriate person. Once a matter is referred for action to another body, that body should have responsibility to handle the matter, without having the Integrity Commissioner being able to influence or direct any other investigation or handling of a matter.

The Government is concerned that acceptance of this recommendation would not give the relevant authority or subject officer sufficient clarity as to how the matter should proceed and what powers may be exercised by or against them. This recommendation tends to blur lines of accountability and create tension and possibly inconsistency around the exercise of powers and performance of functions.

In some cases, it may also create a conflict with the legal duties of that entity, e.g. the office of constable which is independent in relation to the investigation of alleged crime – even from certain directions from police command.

The Integrity Commission currently has powers to monitor referred investigations and to call for reports and if necessary, it can bring matters of concern to the attention of the relevant head of a public authority.

However, it is agreed that investigating agencies should have the option to refer a complaint back to the Integrity Commission. The Government will also consider the option that the Integrity Commission may, in limited and specified circumstances, recall a referred investigation – see Recommendation 18 below.

Recommendation 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).

Response

The Government notes that the DPP is not an investigatory body and that Tasmania Police is the appropriate authority to investigate criminal conduct.

There may still be a limited number of criminal allegations investigated by the Integrity Commission and it should be able to refer such matters directly to the DPP, for advice or consideration as to criminal charges. The rejection of this recommendation is supported by the DPP.

Recommendation 18

The Commission retains jurisdiction over matters it refers to other agencies and it is apparent further action by the Commission is required.

Response

As indicated in responding to Recommendation 15, the Government does not support the recommendation for the Integrity Commission to retain jurisdiction over matters referred to other agencies, for the reasons outlined above. The Government will examine amendments to allow a power to recall a referred matter in certain limited and specified circumstances for example, a failure to take any action with a referred complaint.

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.

Response

The Treasurer's Instruction recognises that there are some circumstances where external legal services may need to be procured such as where there may be a conflict, specialist expertise is needed or there may be urgent time constraints that would mean outsourcing advice and legal support would be appropriate. As the Integrity Commission is an instrumentality of the Crown and for financial management purposes a government agency the Government does not support a departure from the rules that apply to other agencies.

Conflicts of interest are managed under the current Treasurer's Instruction and the case to exempt the Integrity Commission has not been made.

Recommendation 35

That the Commonwealth be asked to amend the *Telecommunications (Interception and Access) Act 1979* so as to grant the Commission the status of a criminal law enforcement agency.

Response

It is not considered appropriate that the Commission have access to intercepted materials and data. Access to such data is currently strictly limited to national security and the investigation of serious criminal matters and the Government does not favour supporting access outside of these reasons.

Recommendation 37

That the definition of public officer be amended to specifically reference volunteers and officers exercising statutory functions or powers.

Response

The relationship between volunteers and public authorities is different from an employment relationship and it is not considered appropriate for volunteers to be brought under the remit of the Integrity Commission. This would create burdens for both public authorities and the volunteers in terms of performance management and the provision of legal assistance (noting that indemnities are already available in certain circumstances).

The Government notes that “statutory officers” appointed under statutes are already in the remit of the Act – refer to definition of statutory office in section 4 ‘Interpretation’ and section 5 ‘Public authorities’.

Recommendation 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.

Response

Accepting this recommendation would allow referrals directly from the Integrity Commission to the Code of Conduct Panel Executive Officer, without going through the normal process of a complainant making a complaint, with the prescribed fee, to the general manager of the relevant council.

While the concept of allowing direct referrals to the Panel from the Commission may have some merit, there is concern that the proposed amendments may lead to complainants circumventing the framework established in the *Local Government Act* and allow abuse of the provisions that were brought in following significant consultation with local government and the Integrity Commission. The Government will consult with Local Government and the Local Government Association of Tasmania, but is not currently minded to agree to this recommendation.

Recommendation 50(6)

Require public authorities to report each year on education and training in relation to ethical conduct.

Response

The Government does not accept that such a reporting requirement is analogous to the requirements in other Acts to annually report statistical data about numbers of training sessions provided. Responsibility for ensuring an ethically healthy organisation rests with the agency head and other senior executives. Training is only one component and requiring agencies to report on this one element may distort an agency’s approach to ethical health.

6. Recommendations accepted by Government but requiring further comment

The following recommendations are accepted by Government but with comment to clarify the Government's position.

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.

Comment

The Government is agreeing to the second alternative of this recommendation, to include a person on the Board with public sector experience – in particular human resource and industrial relations experience, and to reduce the size of the Board to four members - three members plus the Chief Commissioner.

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".

Comment

It is proposed that appointment, suspension and removal provisions in relation to the Chief Commissioner be updated to be consistent with those that apply to the DPP and Solicitor-General, as recently amended by the *Law Officers (Miscellaneous Amendments) Act 2015*.

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."

Comment

In amending this section the Government will seek to retain the current requirement for the Board to ensure that the Integrity Commission operates in a manner that affords procedural fairness to witnesses and those subject to investigation.

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.

Comment

The Government recognises the importance of ensuring that matters are dealt with efficiently, so that persons and organisations (i.e. public authorities) involved can arrange their affairs and not be the subject of lengthy processes. The Government will consult on the best means to ensure the timely completion of assessments so as to avoid undue delay.

Recommendation 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).

Comment

The Government will explore a definition of an offence of a serious nature. Currently the definition would appear to be too broad. The Government reserves the right to consider alternatives to drafting and possibly a list (through regulation or reference to Appendix D of the Criminal Code) or other description of serious offences.

Recommendation 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 (DPO), and serious misconduct by police officers under the rank of inspector.

Comment

Part (a) is a matter for the Integrity Commission and cannot be set out in legislation. Regarding Part (b), the Government agrees in principle but will consult with the Integrity Commission as to the best means to implement this recommendation. Any legislative amendment will require careful drafting to ensure an appropriate delineation of the Integrity Commission's jurisdiction.

Recommendation 11

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

Comment

This recommendation will require further consultation with a wide range of stakeholders and careful consideration. The Government does not want to fetter unduly the responsibilities of the Head of the State Service, Head of an Agency, Tasmanian Police or other appropriate investigatory authority. For example, if the allegation amounts to criminal misconduct then Tasmania Police is the appropriate investigating authority. Equally, if the allegation is such that the continued exercise of official duties by the Designated Public Official is not appropriate, the relevant Head of Agency needs to be able to take timely action. See also the response to recommendation 13 below.

Recommendation 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.

Comment

The Government agrees with the thrust of the recommendation, which is to avoid duplication of investigations into the same matters. This recommendation will require further consultation to ensure that any amendments to Employment Direction 5 are workable and allow allegations to be investigated in a timely manner, while Heads of Agency are also able to meet their delegated responsibilities as 'employers'.

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.

Comment

The Government position is that any criminal conduct, regardless of the status of the alleged perpetrator, should in the first instance be referred to Tasmania Police, or other competent authority, unless there are compelling reasons not to e.g. there is evidence to indicate that the complaint involves very senior police officers and there is reason to believe that it would be inappropriate, in those limited circumstances, to refer the matter to Tasmania Police.

It may be noted that the Integrity Commission has the ability to oversight and audit the conduct of Tasmania Police in such investigations and Tasmania Police has the option of referring a matter back to the Integrity Commission. This may be utilised if there is a particular difficulty in it investigating a criminal allegation, or where Tasmania Police determines that a criminal investigation is not warranted.

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".

Comment

The Government notes the concerns raised by many, including the legal community, about the operation of privilege against self-incrimination particularly where people make admissions without understanding their rights. The Government agrees to amend the Act to exclude the privilege of self-incrimination and to provide the protections in Recommendation 20 below.

Recommendation 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.

Comment

Specifically providing that evidence gained under coercive means cannot be used in subsequent criminal proceedings is an important safeguard. It also supports the Government's view that if there is the possibility of criminal conduct that the matter should first be referred to Tasmania Police.

As a general principle, the power to call for documents and require answers to questions in a disciplinary process should mean that evidence obtained this way is not also then available to use against the person in criminal prosecutions, other than the very limited circumstances referred to in the recommendation.

The Government notes recent High Court authorities about the use and derivative use of evidence that is coerced in an investigative process. Any amendments will need to be drafted in light of these precedents and to ensure that the rights of accused persons are not unfairly compromised within our system of law.

Given the Government's position that the Commission should only investigate or deal with criminal conduct in very exceptional circumstances, the inclusion of such an amendment will protect subject officers and clarify the Commission's role. The Government is also concerned about public reporting by the Integrity Commission of evidence that is obtained where the right against self-incrimination has been abrogated. It will further examine and consider this issue in implementing this recommendation and recommendation 19.

Recommendation 26

That all 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.

Comment

Consideration and implementation of this recommendation will require further consultation with a range of stakeholders, particularly about its intersection with recommendations 10, 11, 13 and 16.

Recommendation 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.

Comment

The Government notes that two separate Codes of Conduct already exist in the House of Assembly Standing Orders, and in principle one Code of Conduct for all Parliamentarians is the preferred option.

If the Joint Standing Committee on Integrity does determine to adopt a single, uniform Code of Conduct for both Houses of Parliament, the Government would be pleased to make a further submission to the Committee on the details of the proposed Model Code as advocated by the Integrity Commission.

The Government further notes that the Integrity Commission is satisfied that the publishing online of the "Behavioural Clause" of Ministerial Staff contracts addresses the issue of a Staff Code of Conduct.

Recommendation 36

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

Comment

The Government agrees with this recommendation.

Recommendation 49

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

Comment

The proposed amendment would bring independent members of Audit Panels within the remit of the Integrity Commission Act. There will need to be further consultation with Local Government in accordance with the Consultation Partnership Agreement administered by DPAC.

Recommendation 50

That the recommendations of the Commission in Attachment 2 to the Report of the independent Reviewer 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.

Comment

Note **6** is dealt with elsewhere in this response.

Note that in relation to **2** it was the intention of the Government at that time and the Parliament in 2009 to restrict the application of the *Acts Interpretation Act 1931* section 23AA(6) so that any power delegated by the Board could not also be used concurrently by the Board. The making of the technical amendment will provide that where a function or power that has been delegated may, notwithstanding the delegation, also be exercised by the delegator i.e. the Board.

Further by including section 23AA (7) of the Acts Interpretation Act the following will also apply to delegations of the Board. This section applies to a sub-delegation of a function or power in the same way as it applies to a delegation of a function or power, but only so far as the Act that authorises the delegation of the function or power also authorizes the sub-delegation of the function or power.

Note in relation to **23** regarding search warrants and the powers to search, drafting is a matter for Parliamentary Counsel. The policy position of the Government is that the warrant should authorise an investigator and assistants to search and the use of reasonable force to exercise any of the powers under section 52, including the seizure of things, making copies of documents, recording and downloading information etc.

Note in relation to **28** the Government supports amendment that ensures that only the relevant parts of the investigator's report are shown to the parties specified in sub-section 56 (1), accepting that such reports may cover a range of matters and issues that are not relevant to one or more of those parties.

The Government supports amendments that enable the CEO to report to the Board on the outcomes of the investigation and to make observations and recommendations on the investigation and future action, noting that the Board can require the CEO to provide the full investigation report should any member of the Board wish to see it in its entirety.

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.

Comment

The Government does not believe that this recommendation dilutes or weakens current protections and will consult during implementation to ensure that appropriate regard is had to ensuring procedural fairness.

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 Joint Standing Committee on Integrity.

Comment

The Government agrees with this recommendation but notes that this is matter for the Joint Standing Committee on Integrity.

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 Joint Standing Committee on Integrity.

Comment

The Government agrees with this recommendation but notes that this is matter for the Joint Standing Committee on Integrity.

7. Recommendations accepted by Government without comment

The Government also accepts the remaining recommendations. However, a number of recommendations recommend precise words for inclusion in the Act. The Government notes that final prerogative over drafting of amendments rests with the Office of Parliamentary Counsel.



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