

SUBMISSION OF THE INTEGRITY COMMISSION

October 2013

The three year review of the
functions, powers and
operations of the Integrity
Commission - Volume 1



The objectives of the Integrity Commission are to –

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

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This report and further information about the Commission can be found on the website

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Hon. Dr. Vanessa Goodwin MLC
Chair
Joint Standing Committee on Integrity
Parliament House
Hobart TAS 7000

Dear Chair

In accordance with s 24(1)(e) of the *Integrity Commission Act 2009* (the Act), the Integrity Commission presents a submission to the Joint Standing Committee on the functions, powers and operations of the Integrity Commission after three years of operation.

The Commission would welcome the opportunity to provide further information or clarification of any matters in the submission, as requested by the Committee.

Yours sincerely

A handwritten signature in black ink, reading "Murray Kellam".

The Hon Murray Kellam AO
Chief Commissioner, on behalf of the Board

A handwritten signature in black ink, reading "Diane Merryfull".

Diane Merryfull
Chief Executive Officer

15 October 2013

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ABBREVIATIONS AND ACRONYMS

ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity, Cwth
CCC	Crime and Corruption Commission, WA
CMC	Crime and Misconduct Commission, Qld
CEO	Chief Executive Officer, Integrity Commission
CMS	Case Management System, <i>Investigator</i>
DHHS	Department of Health and Human Services
DPAC	Department of Premier and Cabinet
DPEM	Department of Police and Emergency Management
DPO	Designated Public Officer, s 6 of the Act
DPP	Director of Public Prosecutions, Tasmania
ERG	Ethical Reference Groups
GBE	Government Business Enterprise
IBAC	Independent Broad-based Anti-corruption Commission, Victoria
ICAC	Independent Commission Against Corruption, NSW
JSC	Parliamentary Joint Standing Committee on Integrity, Tasmania
LGAT	Local Government Association of Tasmania
MPER	Misconduct Prevention, Education and Research
OPI	(Former) Office of Police Integrity, Victoria
PIC	Police Integrity Commission, NSW

FOREWORD FROM THE CHIEF COMMISSIONER

Under s 24(1)(e) of the *Integrity Commission Act 2009*, the Joint Standing Committee on Integrity (JSC) is required to review the functions, powers and operations of the Integrity Commission at the expiration of the period of three years, and to table in both houses of Parliament a report regarding any action that should be taken in relation to the Act or the functions, powers and operations of the Commission. This submission has been prepared by the Commission to assist the JSC in its review.

Section 106 requires the Minister to commission a further independent review as soon as possible after 31 December 2015.

The three year mark is an opportunity for timely consideration of the mandate of the Commission and how well it performs its essential work both with respect to its educative and its investigative operations. This submission provides detailed information on all aspects of the Commission's work since it was established. I have stated previously that it is sometimes not understood that similar agencies in other jurisdictions have been established for decades and that interstate experience demonstrates that it takes time to establish an organisation with a completely new jurisdiction. Both the Board and I consider that the achievements of the Commission in the short time it has been operating should be recognised as significant.

The Joint Select Committee on Ethical Conduct, Final Report *Public Office is Public Trust*, out of which the Commission emerged, was tabled on 23 July 2009. By November 2009 when the Government provided its response to the recommendations made by the Select Committee, the Integrity Commission Bill 2009 was ready to be introduced to the Parliament. Inevitably where there is novel and complex legislation developed in a short period, adjustments will be required. Some minor amendments have already been made, but now is an appropriate time for more significant amendments to be made to ensure that the Commission's work continues to be as effective as possible.

The Act which created the Commission was informed by consideration of the operation of similar integrity entities in other jurisdictions, but with adaptations so as to create a unique structure for Tasmania. The Commission is the only integrity entity in Australia which has a Board, and the only one which directly involves the Auditor-General and Ombudsman in its administration via their participation on that Board. It is one of the few commissions with no separately appointed parliamentary inspector, and the only integrity entity that is not able to access telecommunications data to assist its investigations.

However, it does share common attributes with other integrity entities including significant coercive powers, provided on the basis that it is in the public interest for public sector misconduct to be exposed, addressed and prevented. None of the entities are created as complaint resolution services and none are prosecuting agencies. Their purpose is to ascertain the facts, expose misconduct (or corruption), and report findings or recommendations, most often to Parliament.

Some of the issues around the structure of the Commission are best left until the independent five year review. However, others will benefit from closer scrutiny by the JSC as part of this review.

With the commencement of the South Australian Independent Commissioner Against Corruption in September 2013, all Australian states now have an integrity entity. While each state has its own particular issues, no public sector body is immune from misconduct – it can occur anywhere and everywhere, and is a genuine risk. In that respect Tasmania is no different to any other state. Both the JSC and the community should have confidence that the Integrity Commission is working hard and has been effective in improving accountability from the public sector. That said however, much work remains to be done in enhancing public confidence in the public sector and the confidence of the community that misconduct by public officers will be appropriately investigated and dealt with. The recommendations made below are directed to that end.

On behalf of the Board and the Commission, I commend this submission to the Joint Standing Committee and look forward to working together to achieve each of the recommendations.

A handwritten signature in black ink, reading 'Murray Kellam'. The signature is fluid and cursive, with a long horizontal stroke at the end.

The Hon Murray Kellam AO
Chief Commissioner

EXECUTIVE SUMMARY

This submission has been prepared by the Integrity Commission to assist the Joint Standing Committee on Integrity (JSC) in its review of the functions, powers and operations of the Commission, as required by s 24(1)(e) of the *Integrity Commission Act 2009* (the Act).

The work that the Commission does is essential to ensuring trust in government. Although there are other integrity entities in Tasmania, there is no other entity doing the Commission's work and it is for that reason that the Joint Select Committee on Ethical Conduct in its Final Report *Public Office is Public Trust*, 2009, stated

‘The Committee finds that the need for a new body clearly exists to address the identified deficiencies in the existing system of governance.’

It is from that report that the Joint Select Committee recommended that legislation providing for the creation of the Tasmanian Integrity Commission be drafted.¹ Although it has been three years since establishment, the Commission is still very much a new organisation, and to some extent, still in development.

While the Commission has developed a deep understanding of the jurisdiction within which it operates, it is clear that its functions and powers are still not generally well understood – either by the community or the public sector. The detail included in this submission is designed to assist all of the Commission's stakeholders, as well as the Committee, to have a greater understanding of the functions and powers of the Commission as well as provide greater transparency about how the Commission is achieving its objectives.

The submission closely follows the framework of the Act and describes publicly, for the first time, much of the operational workings of the Commission. It is in two volumes, the first is the substantive submission and volume two is a collation of various appendices.

Where possible, de-identified case studies have been used to illustrate examples of the Commission at work.

The Parliamentary Standards Commissioner, while independent of the Commission, is funded from its budget. He has provided a review of his office which has been incorporated into this submission without amendment.

There are separate chapters dealing with the Chief Commissioner, the Board and the Chief Executive Officer. Chapter Five details the work that the Commission does with respect to its objectives to adopt a strong educative, preventative and advisory role. Chapters Six and Seven provide insight into the investigative work the Commission undertakes.

Tasmania Police have a separate chapter, primarily because there are separate and significant sections of the Act which require that Tasmania Police be considered differently to other public authorities by the Commission.

¹ Recommendation 29, Joint Select Committee on Ethical Conduct, Final Report *Public Office is Public Trust*, 2009,

http://www.parliament.tas.gov.au/ctee/old_ctees/REPORTS/Ethical%20Final%20Report.pdf

As an independent statutory entity, the Commission requires a minimum level of administrative support. Details in relation to the administrative functions are set out in Chapter Ten along with an analysis of its operating budget. The Commission emphasizes that the current budget is the minimum amount required for it to be able to meet its operational requirements.

A summary of the recommendations made throughout the submission is provided.

The Committee has already extensively considered the report of the Board of the Commission under s 13(c) of the Act as forwarded in April 2013. The recommendations for amendments to correct the identified technical issues, form Recommendation 1 and 2 of this submission. Much of the information around the six essential policy issues which form Recommendation 3 is identified in Chapter Nine.

All of the recommendations made are in respect of the Commission's functions and powers – they do not deal with 'operational' issues.

Throughout the submission some issues have been raised but no recommendation has been made by the Commission. The Commission does not consider the review by the Committee as an opportunity to present a 'wish' or 'shopping' list. All of the recommendations have been carefully considered and have been made because they are essential to enabling the Commission to fulfill its statutory objectives as effectively as possible.

It is hoped that this submission will also provide the groundwork for the mandated independent review required after 31 December 2015.

RECOMMENDATIONS

The Commission makes the following recommendations, all of which relate to its functions and powers.

Recommendation 1

The Commission recommends that the identified technical issues in relation to the *Integrity Commission Act 2009* which have already been considered by the Joint Standing Committee and supported in principle, under the s 13(c) report of the Board in April 2013, be referred to the Minister for Justice for amendment to the Act as soon as possible.

Recommendation 2

The Commission recommends that the remaining identified technical issues in relation to the *Integrity Commission Act 2009* as identified in the response from the Joint Standing Committee to the s 13(c) report of the Board be considered and supported by the Committee for amendment of the Act as soon as possible.

Recommendation 3

The Commission recommends that the six essential policy issues identified in its submission at Chapter Nine, specifically:

- a. mandatory notifications of serious misconduct;
- b. the broadening of the Commission's ability to publish reports, including tabling reports in both houses of Parliament outside of sitting periods;
- c. the extension of the discretion to apply confidentiality around the Commission's investigative functions;
- d. the independence of the Commission to engage appropriate legal services;
- e. the Commission's status as a law enforcement agency; and
- f. clarifying the interaction between the Commission and public authorities' investigations of breaches of code of conduct, particularly Employment Direction 5

be supported in principle by the Committee for amendment to the Act (where necessary) as soon as possible.

CHAPTER ONE

Introduction

1.1 Background to this submission

The Integrity Commission (the Commission), established by the [Integrity Commission Act 2009](#) (the Act), commenced operations on 1 October 2010. The Act also established the Joint Standing Committee on Integrity (JSC), a function of which is to monitor and review the performance of the Commission. Pursuant to section 24(1)(e) of the Act, the JSC is required:

To review the functions, powers and operations of the Integrity Commission at the expiration of the period of 3 years commencing on the commencement of this section and to table in both Houses of Parliament a report regarding any action that should be taken in relation to this Act or the functions, powers and operations of the Integrity Commission.

The three year period expired on 30 September 2013.

This is a submission from the Commission to the JSC on the functions, powers and operations of the Commission over the three year period.

1.2 Integrity entities – the current landscape

The conceptualisation of integrity as meaning the absence of corruption appears to be axiomatic. The call to a wider concept of integrity, one that includes pathologies not just of corruption but other forms of misconduct and improper action seems similarly to be entirely unremarkable – to act with either or both improper motive or conduct is surely to act without integrity.²

The last few years has seen an increase in new and emerging jurisdictions in crime and other commissions. Some of the larger states of Australia have had crime commissions, the initial genesis of integrity entities, since the early 1980s.

Currently, integrity entities in Australia, by order of establishment, consist of –

- Australian Crime Commission (ACC) 2003 – replacing the National Crime Authority (1984);
- New South Wales Crime Commission (NSW CC), 1985;
- Independent Commission Against Corruption (ICAC), NSW, 1988;
- Crime and Misconduct Commission (CMC), Qld, 2001 – merging the Criminal Justice Commission and the Queensland Crime Commission (1989);
- Police Integrity Commission (PIC), NSW, 1996;
- Corruption and Crime Commission (CCC), WA, 2003;

² Chris Field, 'The Fourth Branch of Government: the Evolution of Integrity Agencies and Enhanced Government Accountability', *Australian Institute of Administrative Law Forum* No 72, (2013) p 25.

- Independent Broad-based Anti-corruption Commission (IBAC), Vic, 2011 – subsuming the Office of Police Integrity (OPI), Vic, 2004;
- Australian Commission for Law Enforcement Integrity (ACLEI), Cwth, 2006;
- Integrity Commission, Tasmania, 2009; and
- Independent Commissioner Against Corruption (ICAC), SA, 2012³.

Functions and roles

Some of the entities are focused solely on activities around corrupt conduct or crime. For both the ACC and the NSW CC, the principal focus is to assemble admissible evidence for the purposes of a criminal prosecution. The role of the ACC is to provide intelligence, investigation and criminal database services on nationally significant crime.

The role of the NSW ICAC is much broader than the NSW CC, as it has the function of promoting the integrity and accountability of public administration. It is empowered to investigate, expose and prevent corruption involving or affecting public authorities and public officials. It also has an educative function; educating public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community. It has special powers to inquire into allegations of corruption and such an inquiry can be far reaching.

The original Criminal Justice Commission in Queensland was established in the late 1980s after the revelations of the 1987- 89 Fitzgerald Inquiry into police corruption. It has evolved into the CMC with the merger of the Queensland Crime Commission in 2002. It operates on three 'fronts'; combating major crime: raising public sector integrity and protecting witnesses. It has a separate misconduct jurisdiction, in addition to its crime jurisdiction. The CMC was recently subject to independent review⁴ which noted that the CMC is unique among its comparable institutions in Australia in combining misconduct and major crime functions.

In WA, the CCC is focused on helping public sector agencies minimise and manage misconduct, and improving the integrity of the public sector. It does this by working collaboratively with public sector agencies to increase their ability to effectively deal with misconduct. The CCC works to:

- identify misconduct-related weaknesses in business processes;
- deal with misconduct, when it occurs; and
- provide advice about minimising misconduct.

In doing so, the CCC also retains its power to investigate cases of misconduct. While the CCC has no power to investigate organised crime, it does assist police by granting special powers to help act against organised crime.

The primary purpose of the IBAC is to strengthen the integrity of the Victorian public sector, and to enhance community confidence in public sector accountability. In summary, IBAC is required to:

³ Commencing 1 September 2013.

⁴The Honourable Ian Callinan AC and Professor Nicholas Aroney – 'Review of the *Crime and Misconduct Act 2001* and related matters', <http://www.justice.qld.gov.au/cmareview>, viewed 24 July 2013.

- provide for the identification, investigation and exposure of serious corrupt conduct, and police personnel misconduct;
- assist in the prevention of corrupt conduct, and police personnel misconduct;
- facilitate the education of the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct on public administration and the community, and the ways in which corrupt conduct and police personnel misconduct can be prevented; and
- assist in improving the capacity of the public sector to prevent corrupt conduct and police personnel misconduct.

IBAC's jurisdiction for identifying and preventing serious corrupt conduct extends across the whole of the Victorian public sector, including Members of Parliament, the judiciary, statutory authorities and state and local government. IBAC also has a broader role in relation to assessing police personnel conduct, and investigating and preventing misconduct by police personnel.

For the Commonwealth, the Integrity Commissioner, supported by the ACLEI, based in Canberra, is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Crime Commission, the Australian Customs and Border Protection Service and the Australian Federal Police. In addition, since 1 July 2013, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the CrimTrac Agency and prescribed aspects of the Department of Agriculture, Fisheries and Forestry also became subject to ACLEI's jurisdiction. ACLEI does not have an educative function in the same way that other entities do.

In SA, the ICAC commenced on 1 September 2013. The Commissioner will be supported by the Office for Public Integrity, which will receive and assess complaints and reports regarding corruption, misconduct and maladministration in public administration. The establishing Act states that it is intended that the primary object of the Commissioner will be:

- to investigate serious or systemic corruption in public administration; and
- to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.

The extent of its educative function is not yet known.

Each of the entities has different definitions of misconduct and/or corruption and different obligations with respect to responding to the allegations. In addition, although each of the integrity bodies has coercive powers of some kind, the way that witnesses are treated with respect to privilege and the manner of examination is different in them all. Further, misconduct prevention in the form of education is not a universal feature of each body, and in Queensland the most recent review of the CMC has recommended that the majority of the CMC's preventative functions be shifted to, and undertaken by, the Public Service Commission.⁵

⁵ Queensland Government response to the CMC reviews, http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/204536/queensland-government-response-to-cmc-reviews.pdf, viewed 24 July 2013.

Unlike similar mainland bodies, the Integrity Commission in Tasmania is not a 'crime commission' and while it has investigatory powers, including the power to conduct hearings, the general common law rights and privileges are retained. In addition, misconduct prevention and education is a primary focus of the Commission.

Size and funding

The size and budget of Australian integrity entities is also varied and reflects the breadth of functions that each entity is required to perform.

Table 1: Australian integrity entities - budget and staffing levels

Integrity Entity	Annual budget estimate, 2013-14 \$million	Approximate staffing level
ACC ⁶	121	504
NSW CC ⁷	23.6	100
ICAC, NSW ⁸	32.7	123
CMC ⁹	50.4	357
PIC ¹⁰	20.5	101
CCC ¹¹	35.1	153
IBAC ¹²	48.8	Undetermined, expected to be approximately 300
ACLEI ¹³	11.8	34
ICAC, SA ¹⁴	3.7 ¹⁵	unknown
IC, Tasmania	2.9	16

Governance structures

The governance structure of the Australian public sector integrity entities is also varied, and in comparison Tasmania has a unique model.

Commonwealth Australian Commission for Law Enforcement Integrity (*Law Enforcement Integrity Commission Act 2006*)

- The Integrity Commissioner is appointed by the Governor-General for a period which must not exceed five years and the sum of which must not exceed seven years. The

⁶ <http://www.crimecommission.gov.au/publications/acc-portfolio-budget-statements> accessed 24 July 2013.

⁷ Figures from financial year 2011-12,

http://www.crimecommission.nsw.gov.au/files/Annual_Report_2011-2012.pdf accessed 24 July 2013.

⁸ http://www.budget.nsw.gov.au/budget_papers/budget_paper_3 accessed 24 July 2013.

⁹ For financial year 2011-12, <http://www.cmc.qld.gov.au/about-us/our-organisation/fast-facts> accessed 24 July 2013.

¹⁰ http://www.budget.nsw.gov.au/budget_papers/budget_paper_3 accessed 24 July 2013.

¹¹ http://www.treasury.wa.gov.au/cms/uploadedFiles/State_Budget/Budget_2012_13/2012-13_budgetpaperno2_v1.pdf accessed 24 July 2013.

¹² (<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Departmental-statements>) accessed 30 July 2013.

¹³ <http://www.ag.gov.au/Publications/Budgets/Budget2013-14/Documents/PBS%202013-14%20ACLEI.PDF> accessed 24 July 2013.

¹⁴ www.parliament.sa.gov.au, Budget Statement accessed 24 July 2013.

¹⁵ During the implementation stage, with start date 1 September 2013. Ongoing revenue is estimated at \$1.6m per annum.

position is full-time and the person appointed must be a former judge of the Federal Court or of a Supreme Court or a legal practitioner enrolled for at least five years (s 75 and 76).

- All functions under the Act are allocated to the Integrity Commissioner (s 15).

NSW Independent Commission Against Corruption (*Independent Commission Against Corruption Act 1988*)

- The functions of the Commission are exercisable by the Commissioner (s 4).
- Chief Commissioner to be qualified to be or a former judge of a superior court.

NSW Police Integrity Commission (*Police Integrity Commission Act 1996*)

- Governor appoints full-time Commissioner who exercises all the functions of the Commission (s 6, 7).
- Commissioner to have been or qualified to be appointed as a judge of a superior court (s 2).
- An inspector is appointed to audit operations of the Commission and deals with complaints of misconduct by the Commission. (s 89)

Victoria Independent Broad-based Anti-corruption Commission (*Independent Broad-based Anti-corruption Commission Act 2011*)

- Commissioner to have been or is qualified to be a judge of a superior court (s 14).
- Commissioner to be an independent officer of the Parliament (s 13).
- The Commissioner constitutes IBAC (s 16).

Queensland Crime and Misconduct Commission (*Crime and Misconduct Act 2001*)

- Commission consists of five commissioners, one a full-time commissioner who is Chairperson and four part-time commissioners who are 'community representatives' (s 223).
- The Chairperson is the Chief Executive Officer of the Commission (s 251).
- The Chairperson is to be a person who has served as, or is qualified for appointment as a judge of a superior court (s 224).
- Part-time commissioners are to be Australian lawyers who have engaged in legal practice for at least five years and have a demonstrated interest in civil liberties and qualifications or expertise in one or more of areas of public sector management, criminology, sociology or research related to crime prevention or community service experience relating to public sector officials (s 225).
- All appointments to the Commission are made by the Governor-in-Council for a term no longer than five years (ss 229, 230, 231).
- In addition there are two full-time assistant commissioners one for crime, and one for misconduct, both of whom are Governor-in-Council appointments (ss 239, 244).
- The Act establishes a Parliamentary Crime and Misconduct Committee with the function (inter alia) of monitoring and reviewing the performance of the Commission's functions (s 292).
- In addition the Act provides for the appointment of a part-time Parliamentary Crime and Misconduct Commissioner (who is to have served or been qualified to serve as a superior court judge) who has the function, as required by the Parliamentary

Committee of auditing the records of the Commission and ensuring that the Commission exercises its powers appropriately (ss 304, 314).

WA Corruption and Crime Commission (*Corruption and Crime Commission Act 2003*)

- The Commissioner is to be a person who has served or is qualified to be appointed as a judge of a superior court (s 10).
- The Commissioner is appointed on the recommendation of the Premier by the Governor (s 9).
- The Commissioner performs the functions of the Commission under the Act (s 9(1)).

SA Independent Commission Against Corruption (*Independent Commissioner against Corruption Act 2012*)

- The full-time Commissioner is to be appointed by the Governor for a term not exceeding seven years (s 7 (1)).
- The Commissioner is to be a person of at least seven years standing as a legal practitioner or a former judge of a superior court (s 7 (3)).
- The Act provides for a full-time Deputy Commissioner with the same qualifications as the Commissioner (s 8).
- The Act creates an Office of Public Integrity to review and assess complaints, make recommendations as to whether and by whom complaints should be investigated. It is responsible to the Commissioner for the performance of its functions and the Commissioner is not bound by its recommendations (ss 15, 16).
- The Attorney-General must before the end of each financial year appoint a person who would be eligible for appointment as Commissioner to conduct a review to determine whether powers were exercised in an appropriate manner during that financial year (s 44).

Tasmania Integrity Commission (*Integrity Commission Act 2009*)

- Commission consists of the Board, the CEO, the staff, authorised persons, assessors, investigators and persons appointed to assist an Integrity Tribunal (s 7).
- The Chief Commissioner presides over Board meetings.
- The Chief Commissioner is to be a person of at least seven years standing as a legal practitioner (s 15(4)).
- The Chief Commissioner, members of the Board and the CEO are to be appointed by the Governor (ss 14(2), 15(1), 17(1)).
- Some functions are exercisable by the Board, others by the CEO.
- The Act also provides for the appointment of the Parliamentary Standards Commissioner, independent to the Commission.

The structure under which the Commission acts is expanded on in the remainder of this report.

CHAPTER TWO

The Integrity Commission, the Board and the Chief Commissioner

2.1 The Integrity Commission

2.1.1 Establishment

The Commission is established by s 7 of the Act and includes the Board, any member of the Board, the Chief Executive Officer (CEO), the staff of the Commission, any authorised persons, assessors,¹⁶ investigators,¹⁷ and any member of or any persons appointed to assist an Integrity Tribunal.

The Commission is a body corporate, may sue and be sued in its corporate name and is an instrumentality of the Crown. The Commission is not subject to the direction and control of the Minister in respect of the performance or exercise of its functions or powers: s 10.

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.

Objectives

The objectives of the Commission, as set out in s 3, are to:

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

The Commission is to endeavor to achieve the 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.

Principles

The functions and powers of the Commission are broadly set out in s 8, 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 s 9, to:

- raise standards of conduct, propriety and ethics in public authorities;

¹⁶ Defined by s 4(1) to be a person appointed under s 35(2).

¹⁷ As defined by s 4 (1).

- 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.¹⁸

2.1.2 Organisational overview

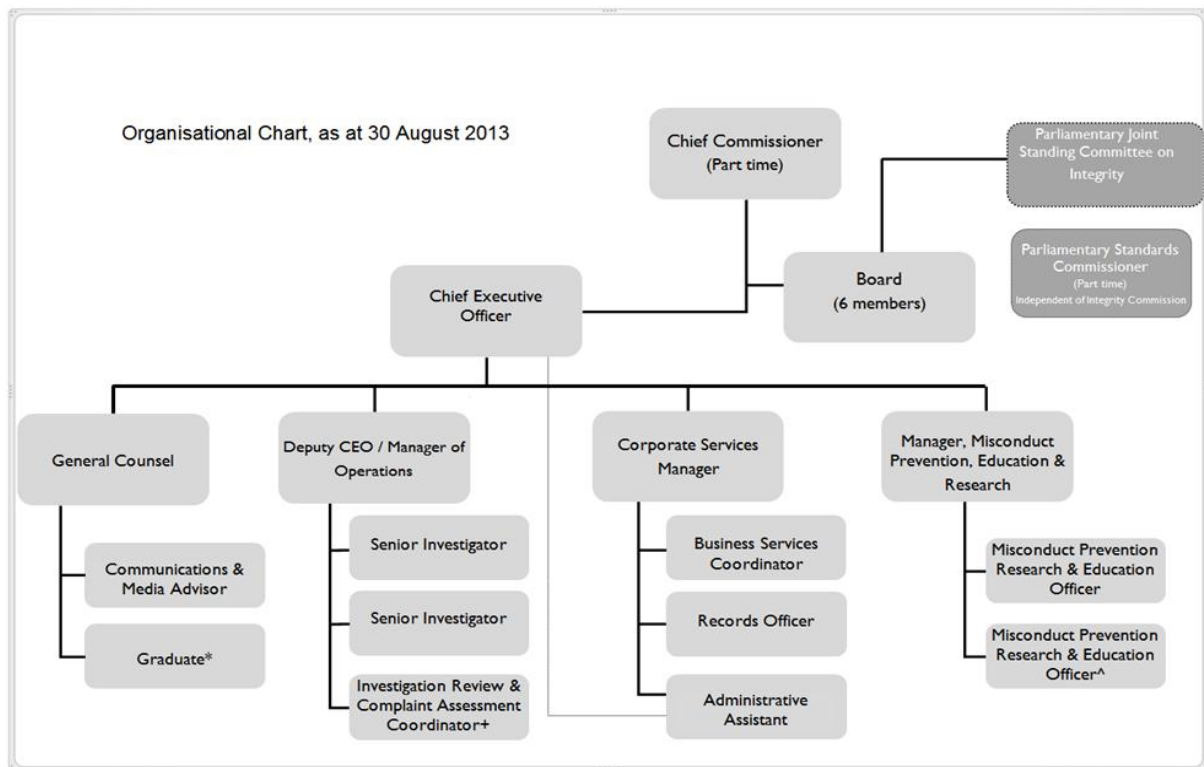
Having regard to the objectives, functions, powers and principles of operation, the work of the Commission falls into two broad areas:

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

The statutory framework establishes the Board, the CEO, and, at various stages with respect to the dealing with complaints, certain other appointments: authorised persons, assessors and investigators. To facilitate the Commission's work, and having regard to the statutory framework, the Commission decided to establish three 'business areas' – Operations; Misconduct Prevention, Education and Research (MPER); and Administration. Although there has been some adjustment of positions and staff numbers over the three years, the business areas and reporting lines have remained essentially the same.

¹⁸ Section 9(2) and (3).

Diagram 1: Organisational chart, as at 30 August 2013



*Graduate is filling the Investigation Review & Complaint Assessment Coordinator role on more responsible duties allowance.

^Position currently filled on a 6 month contract basis.

+Position under review.

2.2 The Board

2.2.1 Membership, role and functions

Membership

The Board of the Commission is established by s 12 of the Act. The Board forms part of the Commission; s 7(1).

Members of the Board are:

- the Chief Commissioner, who is the Chairperson;
- the person holding the office of Auditor-General (*ex officio*);
- the person appointed as Ombudsman (*ex officio*);
- a person with experience in local government; and
- a person with experience in law enforcement or the conduct of investigations; and
- a person who has at least one of the following:
 - experience in public administration, governance or government;
 - experience in business management and administration whether in a government organisation or non-government organisation;
 - experience in legal practice; or

- a person who has community service experience, or experience of community standards and expectations, relating to public sector officials and public sector administration.

At the time of establishment, the State Service Commissioner was the seventh member of the Board. The office of the State Service Commissioner was abolished on 4 February 2013¹⁹ and removed as a member of the Board.²⁰ The Chief Commissioner wrote to the Attorney-General, Mr Wightman, advising that the Board had reached the view that a Board consisting of seven members, including the Chief Commissioner, is the appropriate number. The Board also considered the particular skill set of the State Services Commissioner had proved to be of significant value to the Board deliberations in the past, and was likely to be required in the future. The Board suggested that a way of resolving the issue would be to amend s 14(d) of the Act so as to require the appointment of a person with experience in public administration and public sector human resources and/or industrial relations.

The Attorney-General advised that the amendment would be included in an omnibus bill, but that it was unlikely that such a bill would be finalised until late 2013. At the date of this submission (October 2013), no amendment has been introduced to the Parliament.

Table 2: Members of the Board

Chief Commissioner	The Hon Murray Kellam AO
Auditor-General	Mike Blake
Ombudsman	Leon Atkinson-MacEwen ²¹
A person with experience in local government	Elizabeth Gillam
A person with experience in law enforcement	Luppo Prins
A person with experience in public administration	David Hudson

Non-*ex officio* Board members are appointed by the Governor on the advice of the Minister for Justice. Prior to appointment, the Minister is required to consult the JSC. To ensure impartiality and independence, the Act has some restrictions on who may be appointed to the non-*ex officio* positions: specifically a person is ineligible for appointment where they have been a member of a House of Parliament, a member of a council or a member of a political party in the last five years.

Schedule 2 of the Act specifies that non-*ex officio* Board members and the Chief Commissioner are appointed for up to five years and may be reappointed. The Hon Murray Kellam AO, Mrs Gillam, Mr Prins and Mr Hudson were each appointed on the 17 August 2010 for five year terms.

Schedule 2 of the Act sets out the procedures for Board members relating to resignation, removal from office, acting members, remuneration and conditions of appointment.

¹⁹ *State Service Amendment Act 2012* (no. 42 of 2012)

²⁰ Iain Frawley was the Acting State Service Commissioner as at 1 October 2010 and retired in June 2012. Frank Ogle was the State Service Commissioner between July 2012 and January 2013.

²¹ Commenced March 2012. Previously the Ombudsman was Simon Allston who retired in January 2012.

Role and functions

In accordance with s 13, the role of the Board is to:

- ensure that the CEO and the staff of the Commission perform their functions and exercise their powers in accordance with sound public administration practice and principles of procedural fairness and the objectives of the Act;
- promote an understanding of good practice and systems in public authorities in order to develop a culture of integrity, propriety and ethical conduct in those public authorities and their capacity to deal with allegations of misconduct; and
- monitor and report to the Minister or JSC or both the Minister and JSC on the operation and effectiveness of the Act and other legislation relating to the operations of integrity entities in Tasmania.

In addition to the particular roles the Board has, it also has statutory functions under the Act which are exclusive to the Board, rather than the Board as part of the Commission.

Table 3: Statutory functions specific to the Board

Section	Function
33(1)	Approve the manner and form of a written complaint
34(2)	Approve the form of the register of complaints
45	Determine to conduct an investigation of its own motion
52(3)	Approve the form of receipt where an investigator takes things away from premises under s 52
58	Determinations and other actions of the Board following completion of an investigation
59	Give notice to certain persons of determinations of the Board under s 58
62	If the Chief Commissioner has a conflict, a member of the Board may be nominated to perform the functions and exercise the powers of the Chief Commissioner in relation to a Tribunal
89	Determine to conduct an investigation of its own motion in respect of any matter relevant to police misconduct
94	May authorise persons to disclose confidential information in certain circumstances

It is clear, having regard to the roles and functions bestowed on the Board, that it has limited involvement in day to day operations of the Commission. However, it is required to have high level oversight of the CEO and the staff of the Commission by ensuring that they are acting in accordance with sound public administration practice and the objectives of the Act.

The Board function to approve the form of receipt under s 52(3) where an investigator takes things away from premises appears to be an aberration in light of its other functions. The Commission has identified this as a technical issue which would benefit from eventual amendment. A recommendation for amendment was included in the Board's s 13(c) report to the JSC, and has been considered by the JSC and supported in principle.²²

²² Refer to Appendix 1, Volume 2 for an extract of the 'Schedule of identified technical issues'.

A primary function of the Board is to determine outcomes once an investigation into misconduct has been completed.²³

Delegation

In accordance with s 16 of the Act, the Board may delegate all or any of its functions or powers under the Act or any other Act, including to the CEO. The power of delegation can also be delegated to the CEO: s 16(2).

As at the date of this report, the Board has a current delegation to the CEO of all of its functions and powers under the Act (subject to certain limitations), including the power of delegation, except for:

- ss 45(1)(a), (b) and (c) (own motion investigations);
- s 58 (determinations of the Board at completion of an investigation);
- ss 89(1)(a) and (b) (own motion investigations regarding police officers); and
- Part 7 (ss 60 – 86 inclusive re Integrity Tribunals).

2.2.2 Meetings

Schedule 3 of the Act sets out the processes for meetings of the Board. Generally the Chief Commissioner presides at the meetings. Four members of the Board constitute a quorum, with the presiding member holding the deliberative vote. The numbers for a quorum have not changed even though the State Service Commissioner (now defunct) is no longer a member. Board members can, and have, attended by teleconference.

The Board keeps formal Minutes of meetings. It may regulate its own proceedings and may inform itself on any matter in such manner as it thinks fit.

Process

The CEO prepares the Board Agenda and ensures the relevant Register extracts in relation to misconduct complaints are available to the Board. Generally at each Board meeting the Board has reading time to consider relevant extracts from formal Registers of Open Complaints, Closed Complaints, Open Notifications and Open Police Notifications – a practice that is consistent with the Board's role under s 13(a).

The CEO is able to raise any issues concerning complaints relevant to Board members with the Chief Commissioner prior to the Board meeting, including any decision as to whether extracts from the Register should be redacted.

Board meetings have been held on a monthly basis, although more recently the Board has been meeting bi-monthly. The Board meeting usually starts with an in camera session, following private reading time and discussion, without the CEO present. The CEO then attends the remainder of the Board meeting, but has no voting rights.

²³ Refer to Chapter 7 for a detailed analysis of outcomes of investigations.

Table 4: Ordinary meetings of the Board on an annual basis

Year	Number of meetings
2010* / 2011	10
2011 / 2012	11
2012 / 2013	10

*part year

The Board developed a Governance Manual in September 2010 which sets out protocols and procedures over and above the framework established by the Act and which deals specifically with a code of conduct for Board members, including disclosure of interests in accordance with Schedule 3 of the Act. The Schedule states–

'8. Disclosure of interests

(1) If a member has a direct or indirect interest in a matter being considered, or about to be considered, by the Board at a meeting of the Board, the member must, as soon as practicable after the relevant facts come to the member's knowledge, disclose the nature of the interest to the Integrity Commission.

(2) The disclosure is to be recorded in the minutes of the Board and, unless the Board otherwise determines, a member who has made a disclosure under sub-clause (1) in relation to a matter must not –

(a) be present during any deliberation of the Board in relation to the matter; or

(b) take part in any decision of the Board in relation to the matter.

(3) For the purpose of the making of a determination under sub-clause (2), the member to whom the matter relates must not –

(a) be present during any deliberation of the Board for the purpose of making the determination; or

(b) take part in making the determination.

(4) Sub-clause (1) does not apply in respect of an interest that arises only because the member is also a State Service officer or State Service employee.

(5) Sub-clause (1) does not apply in respect of an interest that arises only because the member is also the holder of an office specified in ss 14(1)(b), (c) or (d).'

The agenda for every Board meeting has a standing item of 'Declaration of conflict of interest with agenda items' and 'Request to be excused from deliberations' (in the event of any conflict).

The Board also maintains a confidential Register of Private Interests and Associations which is renewed each year.

It has a governance sub-committee which, in accordance with best practice, is in the process of reviewing the Manual with the assistance of General Counsel of the Commission.

2.2.3 Ex officio members and their statutory offices

In establishing the Commission, the Parliament did not simply duplicate the roles of the integrity entities already in existence. The composition of the Board appears to be an acknowledgment that some matters which come to the Commission will have already been

dealt with by another integrity entity or should instead be dealt with by one of those entities and so, at times, this could be a proper subject for discussion at Board level. The Auditor-General and Ombudsman also have a part to play in upholding appropriate standards of public sector conduct and, to that extent, share an interest with the Commission in certain areas of policy and practice.

However, on establishment, there were some barriers to sharing intelligence between each entity by reason of confidentiality provisions in other acts: s 46 of the *Audit Act 2008* and s 26 of the *Ombudsman Act 1978*. Each of those sections has now been amended to enable appropriate sharing of information and intelligence.

The Commission has received legal advice in relation to the operation of clause 8 of Schedule 3 of the Act, in so far as it affects the *ex officio* members. Essentially the Schedule provides that if a member of the Board has a direct or indirect interest in a matter being considered, the member must, as soon as practicable after the relevant facts come to the member's knowledge, disclose the nature of the interest and thereafter in ordinary circumstances not take part in any decision of the Board in relation to the matter. However, the duty to disclose does not apply in respect of an interest that arises only because the member is also the holder of the office of Auditor-General or Ombudsman: clause 8(5), Schedule 3.

Integrity entities

The Commission, the Ombudsman and the Auditor-General are defined as 'integrity entities' under the Act: s 4(1). One of the roles of the Board is to monitor and report to the Minister and/or the JSC on the operation and effectiveness of legislation relating to the operations of integrity entities: s 13(c).

Conversely, Part 3 of the Act, dealing with the Commission's relationship with Parliament, and the establishment of the JSC, specifically excludes the Auditor-General as an integrity entity for that Part: s 22. The effect of the relevant sections is to create confusion around the interaction of the Auditor-General and the JSC. Obviously the Board could report to the Minister on the legislation relating to the Auditor-General as an integrity entity, and the expectation is that such a report would be prepared with the assistance and concurrence of the Auditor-General. However, any such report under s 13(c) to the JSC would only be for information, as the JSC does not have a function or role with respect to the Auditor-General as an integrity entity.

The same situation does not arise with respect to the Ombudsman.

To date, no reports about either the legislation relating to the Auditor-General or the Ombudsman have been made to either the Minister or the JSC under s 13(c).

2.2.4 Complaints about the Board

The Chief Commissioner is not bound by the State Service Act Code of Conduct and neither are any members of the Board in their capacity as Board members. The Commission is specifically excluded as a public authority under the Act by s 5(2)(h). Accordingly, members of the Board, in their capacity as Board members, are not public authorities or public

officers,²⁴ for the purposes of the Act. Board members, in their capacity as Board members, cannot be investigated for misconduct under the Act.

However, Board members can be investigated under the Act for alleged misconduct relating to their capacity as current (or previous) public officers – in particular the Auditor-General and Ombudsman can be investigated, as can other Board members in respect of actions as public officers. Indeed, the Chief Commissioner is the only Board member who has not held a position as a public officer in Tasmania.

All complaints received by the Commission, including those about Board members in their capacity as public officers, are registered in accordance with s 34 of the Act. Details with respect to complaints are recorded in the Case Management System (CMS). The CMS is a stand-alone operational database, accessible only by registered users. No Board members are registered to use or to access the CMS.

The Board has specific functions under the Act with respect to complaints, but not operationally until a complaint reaches the conclusion of an investigation.²⁵ Accordingly, the Board has no role to play with respect to the initial determination of a complaint under s 35 (including any decision to dismiss, refer, or place into assessment); nor any determination under s 38 (including any decision to dismiss, refer, or place into investigation). Those decisions reside solely with the CEO (or delegate, if any).

Complaints about Board members are treated seriously – as are all complaints received. If a complaint about a Board member is investigated, and requires consideration by the Board in accordance with s 58, that Board member will be absent from all deliberations about the complaint in accordance with the Schedule. For a Board member to exert influence over the outcome of any complaint, they would need to persuade the CEO and relevant staff members about a course of action prior to the investigation report being placed before the Board and, if it was before the Board, persuade all other members of the Board how it should be dealt with (in the absence of the member from deliberations). Given the structure of the Commission under the Act, this could not reasonably occur.

2.3 The Chief Commissioner

The Chief Commissioner is appointed by the Governor following consultation by the Minister for Justice with the JSC. The Chief Commissioner must have at least seven years standing as a legal practitioner and be under the age of 72 years.

The Hon Mr Murray Kellam AO, a previous justice of the Supreme Court of Victoria, was appointed on 17 August 2010 for a five year term.

²⁴ Section 4 defines a 'public officer' as a public authority but does not include a person specified in s 5(2).

²⁵ It can determine that an own motion investigation be commenced under s 45; it is required to approve the manner and form of a written complaint, s 33(1); it is required to approve the form of the register of complaints, s 34(2); it has a specific role under s 13(a) to ensure the CEO and staff perform functions and exercise powers in accordance with sound public administration practice and principles of procedural fairness and the objectives of the Act.

In addition to presiding over meetings of the Board, the Chief Commissioner is required to conduct inquiries where the Board determines that an inquiry be undertaken by an Integrity Tribunal.

The current Chief Commissioner has taken a particular interest in the education functions of the Commission and has presented to Tasmania Police training courses for inspectors and sergeants, made presentations including to the Institute of Public Administration, and attended meetings with the Premier and relevant ministers.

2.4 Reporting

Pursuant to its obligations under s 13(c) of the Act, the Board meets the JSC on an as-required basis each year, accompanied by the CEO and any other relevant senior managers from the Commission. The Board also contributes to each annual report of the Commission.

Section 11 of the Act requires the Commission to table an annual report in each House of Parliament on the performance of its functions and exercise of its powers under the Act for each financial year. The Annual Report can be combined with a report under s 36 of the *State Service Act 2000*, which report is an obligation of the CEO as head of agency.

At any other time, the Commission may lay a report on any matter arising in connection with the performance of its functions or exercise of its powers. Separately, the Commission may also provide a report to the JSC on the performance of its functions or exercise of its powers relating to an investigation or inquiry: s 11(4).

In April 2013, the Board reported to the Minister and the JSC on the operation and effectiveness of the Act, in particular, identifying technical issues with the Act which would benefit from eventual amendment. The Board considers a cohesive approach to rectifying all of the identified issues needs to be undertaken by the JSC, the Minister and the Commission. Accordingly, the Board resolved that all of the identified technical issues should be placed before both the JSC and the Minister in accordance with the Board's role under s 13(c) of the Act.²⁶

Outside of the obligations with respect to annual reports, the Commission tabled its first report (on finalised investigations and an assessment) in both Houses of Parliament on 25 June 2013.²⁷ A second report was tabled on 25 September 2013 with respect to an audit of Tasmania Police complaints.²⁸

There have been no separate reports to the JSC relating to an investigation or inquiry under s 11(4) to date.

²⁶ The technical issues identified in the s 13(c) report are duplicated in Appendix 1, Volume 2.

²⁷ *Report of the Integrity Commission No 1 of 2013*, http://www.integrity.tas.gov.au/_data/assets/pdf_file/0010/258481/Report_of_the_Integrity_Commission_No1_of_2013.pdf, and see Appendix 5, Volume 2.

²⁸ *Report of the Integrity Commission No 2 of 2013*, http://www.integrity.tas.gov.au/_data/assets/pdf_file/0010/268093/Report_of_the_Integrity_Commission_-_No_2_of_2013_PDF.pdf

2.5 Tabling reports in Parliament

Section 11(3) enables the Commission to lay before each House of Parliament a report on any matter arising in connection with the performance of its functions or exercise of its powers. This limits reporting by the Commission to periods when both Houses of Parliament are sitting, which could cause a delay in reporting of several months.

The Commission considers it should have the capacity to table reports as and when they are ready, rather than as determined by the sitting schedule. It notes that the Auditor-General is able to table reports if either House of Parliament is not sitting, by giving a copy of the report to the Clerk of the House of Assembly and the Clerk of the Legislative Council: *Audit Act 2008* s 30(4). A report so given is taken to have been laid before each House of Parliament and to have been ordered to be published. Further, the provisions of any enactment or rule of law relating to the publication of the proceedings of the House of Assembly and the Legislative Council apply to and in relation to a report of the Auditor-General given to the Clerks. The Clerks are required to lay the report on the next sitting-day of the House after it is received.

Such an arrangement protects the liability of the reporting entity and enables reports to be tabled and published in a timely manner.

2.6 Recommendations

The Commission recommends that its ability to table reports in both Houses of Parliament outside of sitting dates, by giving a copy to the Clerk of the House of Assembly and the Clerk of the Legislative Council, and the consequent protections with respect to publication, be supported in principle by the Committee for amendment to the Act as soon as possible.

CHAPTER THREE

The Joint Standing Committee on Integrity and the Parliamentary Standards Commissioner

3.1 The Joint Standing Committee on Integrity

3.1.1 Functions under the *Integrity Commission Act 2009*

The Joint Standing Committee on Integrity (JSC) is established under s 23 of the Act. The functions of the JSC are:

- (a) to monitor and review the performance of the functions of an integrity entity;
- (b) to report to both Houses of Parliament, as it considers appropriate, on the following matters:
 - (i) matters relevant to an integrity entity;
 - (ii) matters relevant to the performance of an integrity entity's functions or the exercise of an integrity entity's powers;
- (c) to examine the annual reports of an integrity entity and any other report of an integrity entity and report to both Houses of Parliament on any matter appearing in or arising out of such reports;
- (d) to report to the Legislative Council or House of Assembly on any matter relevant to an integrity entity's functions that is referred to it by the Legislative Council or House of Assembly;
- (e) to review the functions, powers and operations of the Integrity Commission at the expiration of the period of three years commencing on the commencement of this section²⁹ and to table in both Houses of Parliament a report regarding any action that should be taken in relation to this Act or the functions, powers and operations of the Integrity Commission;
- (f) to provide guidance and advice relating to the functions of an integrity entity under the Act;
- (g) to refer any matter to the Integrity Commission for investigation or advice; and
- (h) to comment on proposed appointments to be made under ss 14(1)(e), (f) or (g), s 15 and s 27³⁰.

²⁹ Commenced 1 October 2010.

³⁰ Sections 14(1)(e) (f) and (g) are concerned with the appointment of non-*ex officio*s to the Board of the Commission. Section 15 is the appointment of the Chief Commissioner. Section 27 is the appointment of the Parliamentary Standards Commissioner.

The ability to comment on proposed appointments under s 23(h) gives the JSC a consultative role with respect to the appointments of non-*ex officio* members to the Board of the Commission, the Chief Commissioner and the CEO, but it does not give the JSC a veto over the appointments.

The functions of the JSC are similar in some respects to those of parliamentary committees which are responsible for oversight of integrity *agencies* in other Australian states. However, it should be noted that the JSC is the Parliamentary Committee for other ‘integrity entities’ in Tasmania, which under the Act are defined to include the Ombudsman, but not the Auditor-General for the purposes of Part 3 of the Act.³¹

3.1.2 Parliamentary Oversight Committees

Each of the Australian (both Commonwealth and State) integrity agencies has a Parliamentary oversight committee. They are:

- Commonwealth – Australian Commission for Law Enforcement Integrity (ACLEI) – Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity;
- NSW – Independent Commission Against Corruption (ICAC) – Parliamentary Joint Committee on the Independent Commission Against Corruption (non police matters);
- NSW – Police Integrity Commission (PIC) – Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (police matters);
- Queensland – Crime and Misconduct Commission (CMC) – Parliamentary Crime and Misconduct Committee;³²
- South Australia – Independent Commissioner Against Corruption (ICAC,SA)– Crime and Corruption Policy Review Committee;
- Tasmania – Integrity Commission (IC) – Joint Standing Committee on Integrity;
- Victoria – Independent Broad-based Anti-corruption Commission (IBAC) – Parliamentary Joint House Committee on the Independent Broad-based Anti-corruption Commission; and
- Western Australia – Corruption and Crime Commission (CCC) – Parliamentary Joint Standing Committee on the Corruption and Crime Commission.

The Australian Capital Territory and Northern Territory do not have a stand-alone integrity entity, and misconduct issues are dealt with by the respective ombudsman.

Appendix 3, Volume 2 has a comparative analysis of Australian parliamentary oversight committees.

Other than in South Australia, each of the parliamentary committees has a specific function to monitor and review the performance of duties or functions of each respective integrity entity, as well as the annual reports and other formal reports. All committees are required to report to both Houses of Parliament, other than in Queensland, where the report is to its Legislative Assembly, being a uni-cameral parliament.

³¹ The Tasmanian State Service Commissioner was an integrity entity until 4 February 2013.

³² Queensland Parliament is unicameral.

While generally the substance of any report is about matters relevant to the functions of the integrity entity, the committees are unable to direct the integrity entity.³³

Some of the committees have a power of veto over the appointment of integrity commissioners and others do not.

While each of the committees has powers generally afforded to parliamentary committees, (i.e. to call for documents or persons and to take evidence), the committees are not authorised to investigate a specific misconduct/corruption complaint or decisions taken by an integrity entity about that complaint. Furthermore, some of the entities can withhold specific information around misconduct/corruption complaints from their committees. Where that occurs, it does appear that the various Inspectors (see below) have full access to a range of operational material.

Most committees meet with the integrity entity several times per year, and some of the meetings are held in public, while others are in camera.

The functions, powers, composition and operation of the JSC are not inconsistent with other parliamentary committees, notwithstanding the differences across jurisdictions.

3.1.3 Parliamentary Inspectors/Inspectorates

As can be seen, five of the agencies - CMC, ICAC, PIC, CCC and IBAC - also have a greater level of oversight from an additional separate independent office, variously referred to as an Inspector/Inspectorate or Commissioner (Inspectors). The functions of the parliamentary committees and the inspectors differ primarily in relation to the capacity to audit the operations of the various integrity agencies.

One important difference between the legislated roles of a parliamentary committee and that of an inspector is with respect of the ability to deal with complaints about the integrity entity. Each inspector can make recommendations, either to the integrity entity (with a reporting role to the parliamentary committee) or to Parliament itself.

Tasmania does not have a separate inspector. The role of the Parliamentary Standards Commissioner is quite different to that of an inspector and furthermore, is independent of the JSC and the Commission.

In the absence of an inspector in Tasmania, complaints of misconduct about Commission officers, where those officers are state service employees, are dealt with as per the *State Service Act 2000*.

3.1.4 Membership of the JSC

Membership of the JSC is three Members of the Legislative Council and three Members of the House of Assembly. Of the members from the House of Assembly, at least one member of any political party that has three or more members in the House of Assembly is to be a member of the JSC: s 23. In addition, Schedule 4 of the Act sets out the process where

³³ Other than in Queensland, where Guidelines must be tabled in the Legislative Assembly and voted on.

there is a vacancy, the appointment of Secretary and the election of the Chair and Vice Chair.

Meetings, voting and taking of evidence by the JSC are dealt with in Schedule 5 of the Act.

3.2 Parliamentary Standards Commissioner³⁴

3.2.1 Establishment and functions under the Act

The office of the Parliamentary Standards Commissioner (PSC) is established by s 27 of the Act. Under s 28 (1) of the Act, the function of the PSC is to provide advice to Members of Parliament and the Commission –

- about conduct, propriety and ethics and the interpretation of any relevant codes of conduct and guidelines relating to the conduct of Members of Parliament (MPs); and
- relating to the operation of the Parliamentary Disclosure of Interests Register, declarations of Conflicts of Interest Register and any other register relating to the conduct of MPs;
- relating to guidance and training for MPs and persons employed in the offices of MPs on matters of conduct, integrity and ethics; and
- relating to the operation of any codes of conduct and guidelines that apply to MPs.

Section 28 (2) of the Act provides that advice from the PSC may be provided on a confidential basis.

The PSC is bound by the confidentiality provisions of s 94 of the Act, in that a person appointed as PSC must preserve confidentiality in respect of all matters that come to that person's knowledge in the course of their duties under the Act. The PSC is also protected, under s 95 of the Act, from criminal or civil proceedings in respect of any action done, or omission made in good faith in the exercise of any powers or functions under the Act.

3.2.2 Appointment of Rev Professor Michael Tate AO

The appointment to the office of the PSC is made by the Governor for a five year term with one further term of appointment available.

The Rev Prof Michael Tate AO was appointed to the office of PSC on 18 November 2010, on a part-time basis. His term expires on 17 November 2015.

The PSC is an independent statutory officer but the Commission does provide limited administrative support. Funding for the PSC is provided from the Commission's budget.

3.2.3 Activities to date

Advice

The PSC provides advice on a confidential basis in response to requests from Members of Parliament of both chambers and from amongst all political parties and independents.

³⁴ This section on the Parliamentary Standards Commissioner has been prepared on the instructions of the Rev Prof Michael Tate AO.

Advice has been provided to clarify whether a course of action, already engaged in or being considered, raises an ethical issue whether in general or in relation to relevant Standing Orders, the *Parliamentary Disclosure of Interests Act 1996*, Guidelines concerning Members' Allocation or a relevant Code of Conduct. In some cases, a possible course of action has been suggested.

The Codes of Conduct which qualify as codes of conduct for the purposes of s 28 (1) (a) and (d) are:

- Standing Rules and Orders adopted by the House of Assembly which include a 'Code of Ethical Conduct for Members of the House of Assembly' (SO 3), and a 'Code of Race Ethics for Members of the House of Assembly' (SO 4). The responsibility for compliance with these Codes rests with the House of Assembly;
- there is no Code of Conduct applying to Members of the Legislative Council (unless they are Ministers). The Legislative Council has adopted Standing Order 103 which requires the declaration of a pecuniary interest, with consequences for the possibility or effect of a vote;
- the 'Code of Conduct: Government Members of Parliament', issued by the then premier on 12 June 2006. It has been endorsed by subsequent premiers as an appropriate Code for government members of both chambers of the Parliament. Currently it is the benchmark for conduct by members of the parliamentary Labor Party and the two members of the Tasmanian Greens who are members of the government;
- the 'Code of Conduct for Ministers' issued February 2012 by the Premier;
- the 'Code of Conduct for Ministers – Receipt and Giving of Gifts Policy' issued 2012, which is applicable to all Ministers and other members of Cabinet, and the immediate families and dependents of Ministers and other members of Cabinet.

Separately, all Members of Parliament are subject to the requirements of the *Parliamentary (Disclosure of Interests) Act 1996*, which requires Members to disclose in their ordinary return each year, all gifts received of a value of AUD\$500 or more, other than gifts from a relative.

Briefings

The PSC provided extensive assistance to the Integrity Commission in its compiling of 'Draft Model Codes of Conduct for Members of Parliament, Ministers and Ministerial Staff in Tasmania'. He joined the Chairman and officers of the Commission in presenting the drafts to Members of Parliament in June 2011.

He has helped the Commission to respond to questions posed by the Joint Standing Committee on Integrity in the interests of modifying the tenor or improving the clarity of specific provisions in the Model Code relating to Members of Parliament. He has appeared before the Joint Committee to further assist that Committee in its deliberations.

It is a matter of disappointment to the PSC that the Joint Committee is yet to present its report to the Parliament so as to enable each chamber to decide whether to adopt a code of conduct for its Members.

The PSC has provided private briefings for Members of Parliament, including Ministers, who have sought to better understand their obligations independently of any particular matter of current concern.

The PSC participated in the debriefing of organisers and the Presiding Officers following the Integrity in Office workshop attended by Members of Parliament in April 2012.

3.2.4 Confidentiality

In accordance with s 28(2), advice provided by the PSC under s 28(1) may be provided on a confidential basis. The relationship between the confidentiality under s 28(2) and s 94 of the Act³⁵ is unclear.

Greater clarity on the relation of s 28, s 29 and s 94 would be more likely to facilitate and encourage the exercise of the PSC's functions and the extent to which the PSC might be exposed to the very severe penalties under s 94.³⁶

³⁵ Which imposes an obligation to preserve confidentiality in respect of all matters that come to the PSC's knowledge in the course of duties under the Act unless disclosure is made with authorisation from the Board, the CEO, or an Integrity Tribunal except as may be required in connection with the administration or operation of the Act.

³⁶ See for example the Senate Ethics Officer in Canada, a position similar to the PSC, who is constituted so as to enjoy the privileges and immunities of the Senate and its members when carrying out his or her duties and functions: s 20.5(2) of the Parliament of Canada Act.

CHAPTER FOUR

Chief Executive Officer

4.1 Role, appointment and functions

4.1.1 Role

The Act provides for the appointment of a Chief Executive Officer.

The CEO is responsible to the Board for the general administration, management and operations of the Commission. Section 18(2) of the Act provides that the CEO:

- must perform any functions or carry out any responsibilities imposed on the CEO and may exercise any other powers conferred on the CEO by the Act or any other legislation; and
- must carry out any responsibilities, and may perform any functions or exercise any powers, delegated by the Board.

The *State Service Act 2000* (SSA) applies to the CEO in his or her capacity as the Head of Agency within the meaning of that Act.

4.1.2 Appointment

The CEO is appointed by the Governor on the recommendation of the Premier. Section 17 of the Act ensures that appointment of the CEO is subject to a consultative process involving the JSC.

The CEO holds office for the period of time specified in the instrument of appointment and is considered an employee for long service leave purposes.

The CEO is expected to be independent of any political process and accordingly, a member of a House of Parliament, (Commonwealth, state or territory) is ineligible for appointment. Furthermore, if the CEO subsequently becomes a candidate for election, he or she must vacate office.

The inaugural CEO of the Commission was Ms Barbara Etter who resigned in October 2011. Ms Diane Merryfull was appointed as CEO on 20 August 2012 for a five year term.³⁷

4.1.3 Functions

The CEO has a number of functions and powers under the Act, specific to that office.

Additionally, some functions and powers are separately held by the Commission. In accordance with s 7(2), the Commission includes the Board, any member of the Board, the

³⁷ Between 16 December 2011 and 19 August 2012, Deputy CEO Mr Russell Pearce held a direction from the Minister for Justice, Mr Brian Wightman MP, enabling him to perform and exercise the duties, obligations, rights and powers of the office of the CEO.

CEO, the staff of the Integrity Commission, any authorised persons, assessors, investigators, and any member of or any persons appointed to assist an Integrity Tribunal.

The Board itself holds other powers and functions,³⁸ as do assessors, investigators, authorised persons and persons appointed to assist an Integrity Tribunal, separate to the powers and functions of the Commission. To ensure the Commission operates effectively, the CEO holds certain delegations from the Board so that the CEO can exercise the functions and powers of not only the CEO, but also the Commission, and some functions of the Board.

The CEO may delegate any of his or her responsibilities, functions or powers, other than the power of delegation: s 19.

The Board

The CEO is not a member of the Board and does not hold any voting rights at Board meetings. The CEO prepares the agenda of each Board meeting and attends each meeting to report to the Board on the administration, management and operations of the Commission in accordance with s 18(1) of the Act.

The Board may, by resolution, delegate to the CEO any of its functions and powers including the power of delegation. On 1 November 2012, the Board delegated most of its functions and powers under the Act to the CEO subject to certain limitations. In respect of own motion investigations, the Board has delegated its powers to the CEO to commence an own motion investigation into any of the policies, practices or procedures of a public authority or of a public officer or of Tasmania Police, or the failure of those policies, practices or procedures, under s 45(1)(d) and s 89(1)(c). Also, some of the functions delegated to the CEO can only be exercised after consultation, and with the written approval of any two Board members.³⁹

Where the Board has made a determination in relation to the outcome of an investigation, it is generally the CEO who ensures the determination is given effect, at the direction of the Board.

Complaint process

Functions and powers associated with the receipt of complaints and decisions whether to dismiss or retain allegations of misconduct or serious misconduct, throughout the initial triage process, assessment and to conclusion of the investigation, are primarily vested in the CEO. It is the CEO who determines whether a complaint should be dismissed under s 36 or accepted for assessment, and, if the complaint is accepted, the CEO is responsible for appointment of the assessor.

While assessors and investigators have functions and powers that can be exercised during the assessment and investigation stage, the CEO may issue directions relating to the

³⁸ Detailed in Chapter Two.

³⁹ For example, the capacity of the Commission to assume responsibility for and complete in accordance with Parts 6 and 7 an investigation commenced by the Commissioner of Police into misconduct by a police officer, under s 88(1)(d), can only be exercised by the CEO after consultation and with written approval of two Board members.

conduct of investigations.⁴⁰ An example of an internal direction that has been issued by the CEO is with respect to the process to be followed when notices are issued under s 47 of the Act. While the Act enables an investigator (or an assessor exercising the powers of an investigator) to direct a person to do certain things by written notice, the internal directions for the Commission are that the investigator (or assessor) must first prepare a statement in writing identifying the basis on which the notice will be issued and obtain approval from the Deputy CEO or CEO for the issue of the notice. This process acknowledges the extensive nature of the powers available and that they are not to be exercised lightly.

It is the CEO who authorises persons to assist assessors and investigators,⁴¹ and who refers complaints to public authorities or appropriate persons after assessment. During the investigative stage, the CEO is also responsible for decisions around authorising the public investigation of a complaint and conducting searches (with or without search warrants). Additionally, the Act provides that an investigator can only apply for a surveillance device warrant with the authority of the CEO. At the conclusion of an investigation, it is the CEO who prepares a report and recommendations for the Board to consider under s 58.

Accordingly, the CEO has significant responsibilities around the handling of complaints and is required to be fully informed of the progress of the complaint at all times. An anomaly in the legislation with respect to the CEO's involvement is that the Act provides that the assessor or investigator prepares a report for the CEO, which the CEO then considers. This might imply that the CEO is not to have any involvement in the preparation of these reports. It is clearly not the intention of the legislation for such reports to be prepared and presented to the CEO as a 'fait accompli' and, in practice at the Commission, these reports are prepared collaboratively by the investigator, their manager, and the CEO, with the General Counsel providing legal advice and input.

4.1.4 Head of Agency functions and obligations

The CEO is a Head of Agency for the purposes of the SSA. Accordingly the CEO is required to comply with all of the state service obligations imposed on a Head of Agency. The CEO is also the Head of Agency for the purposes of the Financial Management and Audit Act 1990, (the FMA Act) the Public Account Act 1986, and the Audit Act 2008. The CEO is therefore responsible for complying with relevant Employers Directions and Treasurer's Instructions.

As a Head of Agency the CEO also has a range of other statutory responsibilities particularly around workplace relations, workplace health and safety, discrimination and record keeping. The CEO, in the capacity as Head of Agency, presents the Commission's annual report for tabling in Parliament each year, in accordance with the requirements of the SSA and the FMA Act.

⁴⁰ Section 46(4).

⁴¹ Authorisations are made pursuant to s 21.

4.1.5 Complaints against the CEO and Commission staff

Complaints about any appointed personnel or members of staff of the Commission cannot be dealt with in accordance with the Act, as the Commission is not a public authority.

All employees are state service employees and therefore required to comply with the State Service Act 2000 and in particular the state service Code of Conduct and any other legislative obligations.

The Chief Executive Officer is a Head of Agency in accordance with the State Service Act 2000 and is also required to comply with the state service Code of Conduct and any other legislative obligations.

External complaints about staff members of the Commission are registered onto a complaint database and then forwarded to the CEO for consideration. The CEO, as Head of Agency is bound to follow Employment Direction No. 5 where she has reasonable grounds to believe that a breach of the state service Code of Conduct may have occurred.

Where a complaint is internal, the Commission follows the grievance procedures established by the Department of Justice.

In addition to the above procedures, the Commission has a separate guideline establishing lines of authority for dealing with complaints. Where the complaint is about the CEO, the complaint is elevated to the Chief Commissioner for consideration and any required action. Where the complaint is about the Chief Commissioner, the complaint is referred to the Board for consideration and any required action.

4.2 Members of Parliament

Under s 30, the CEO has specific responsibility for misconduct prevention activities in relation to Members of Parliament. Those responsibilities are to monitor the operation of the Parliamentary Disclosure of Interests Register, Declarations of Conflicts of Interest Register, and any other register relating to the conduct of MP's; prepare guidance and provide training to MPs and their employees on matters of conduct, integrity and ethics; review, develop and monitor the operation of any codes of conduct and guidelines insofar as they apply to MPs; and where appropriate propose to a Parliamentary integrity entity possible modifications of any code of conduct or guidelines.⁴² Parliamentary integrity entities are defined in the Act as the President of the Legislative Council and the Speaker of the House of Assembly. The fact that the responsibility for MPs lies with the CEO indicates the importance Parliament placed on these particular issues.

The CEO and Commission's interaction with MPs is set out below.

⁴² Section 30(a)-(d) inclusive.

4.2.1 Code of Conduct

The Commission's first major research project was to review the existing Code of Conduct for Government Members and develop a draft code of conduct for Members of Parliament, Ministers and Ministerial staff in Tasmania. It was initiated in response to a direct request from the then Premier David Bartlett. Assistance was provided by Rev Prof Michael Tate AO, the Parliamentary Standards Commissioner.

The Commission tabled its recommendations in June 2011 – *Codes of Conduct for Members of Parliament, Ministers and Ministerial Staff*. The report focused on national and international best practice and represented the first complete comparative analysis in Australia of all codes of conduct for Members of Parliament and government ministers. On tabling the Premier, Hon. Lara Giddings referred the report to the Joint Standing Committee for consideration.

In May 2012, the Premier, issued a new Code of Conduct for Ministers that, with some modifications, reflected the model code outlined in the Commission's 2011 report.

Parliamentary Register of Interests

In November 2011, the CEO, through the Commission, conducted its first examination of the two Registers of interests of Members of the House of Assembly and Legislative Council required to be kept under the *Parliamentary (Disclosure of Interests) Act 1996* (the Disclosure Act). The form of the Register itself is the returns (both primary and ordinary) lodged by Members within the previous eight years, filed in alphabetical order. Effectively, the obligation under the Act, to monitor, is an obligation to monitor the primary and ordinary returns of Members and the actual declarations of interest rather than the registers themselves.

'Monitor' is not defined in the Act, and in the absence of any other legislative mandate, the Commission is merely limited to observing critically whether the returns and other declarations comply with prescribed forms. Currently there is no mandate for the Commission to make any recommendations or to effect greater transparency if that is required.

The Commission's practice is to inspect each Member's annual return and note if the information disclosed complies with the applicable requirements of the Disclosure Act. The inspection regime instituted by the Commission does not seek to verify the accuracy of the information provided nor that it constitutes a full disclosure.

2011 Returns

The Commission's inspection in 2011 noted a number of errors in the completion of the forms. Some errors were substantive (failure to provide a postal address for real property as prescribed by the Disclosure Act; failure to specify the nature of an interest in real property). Other errors were more procedural (leaving fields blank instead of writing 'nil').

After the 2011 inspection, the then Acting CEO wrote to the Clerks and Presiding Officers of both Houses of Parliament drawing the errors to their attention and suggesting that some form of additional guidance be provided through the Clerks' offices to assist members to

complete the forms accurately. These officers did not believe that it was appropriate for the Clerks to provide any additional guidance to members, although the Clerk of the House of Assembly did undertake to circulate a memorandum to Members of the House of Assembly (MHA's) informing them of the errors noted by the Commission.

2012 Returns

In January 2013, the CEO (through the Commission) conducted the second examination of the Registers, monitoring the 2012 returns. Errors similar to those in 2011 were again noted.

The Commission formed the view that many of the errors observed might have been avoided if clearer or further guidance was provided to members within each field of the form. For example – there is no guidance on the form (nor in the Disclosure Act) as to what is meant by the 'the nature of any interest' the Member has held in real property.

In March 2013, the CEO wrote to the Premier advising that it was the Commission's view that amendment of the form seemed to be the only available avenue to improve compliance by members. The Commission offered to assist officers of the Premier's Department with information on the errors noted and suggestions for amendment to the form. The CEO subsequently met with the officers to discuss appropriate changes.

The Commission considers it would be appropriate to amend s 30(a) of the Act, so that the actual returns and declarations are monitored rather than just the register itself, and to enable the CEO to make recommendations to either or both the individual Members and to the Clerk of each House of Parliament. That recommendation has been included in the s 13(c) report of the Board. The JSC has considered the recommendation and requested further information which has been provided by the Commission.⁴³

Advice

On a few occasions, the Commission has been requested to provide advice directly to Members via their ministerial and other staff. Advice has been sought on issues such as the requirement of other Members to disclose interests and gifts.

The Commission deals with queries, but subsequent to the MP workshop conducted by Dr Patmore and Professor Herr (see below), and clarification of the role of the Parliamentary Standards Commissioner (PSC), it now defers requests to him, as the more appropriate advisor, where the query falls within the PSC's jurisdiction.

'Integrity in Office'

In early 2012 the Commission developed an 'Integrity in Office' workshop and follow-up dinner, targeted at new Members of Parliament but with an invitation for other MPs to participate. Professor Richard Herr and former Attorney-General, Dr Peter Patmore were engaged by the Commission to deliver the workshop to MPs in April 2012. The Commission considered that they would be able to achieve the best outcomes as they had an understanding of, and experience with, the ethical dilemmas MPs were likely to confront.

⁴³ Refer Appendix 1, Volume 2 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 5.

In preparation for the workshop, 40 MPs were surveyed, with 21 responses received. The Commission provided the presenters with detailed survey results from which the training was prepared.

The format of the training was as an afternoon session the day before Parliament rose, followed by a dinner with a guest speaker. The Hon. Harry Jenkins, former Speaker in the House of Representatives was engaged as the guest speaker. Rev Prof Michael Tate AO was invited to participate.

The Commission had a strong response to the training, with 22 Parliamentarians attending the workshop training session on 16 April opened by the Chief Commissioner. To allow the participants complete freedom to raise and discuss sensitive issues, Commission officers did not attend the workshop. The follow-up dinner at Parliament House, was attended by 18 members.

Feedback on the workshop and dinner was positive and highlighted areas for potential improvement in the future.

Dr Patmore and Professor Herr considered that, after the next election, there may be new Members, Ministers and Ministerial staff who should be offered similar training. They have recommended similar content and information but that it be delivered with a different emphasis on practical issues, and that the participant sessions be split, depending on whether the audience is in government or in opposition.

The Commission intends to offer the training again after the next election in 2014.

4.3 Authorised Persons – s 21

Section 21 of the Act enables the CEO to make arrangements with public authorities in Tasmania, and Tasmania Police, for public officers or police officers to be made available to undertake work on behalf of the Commission. In addition there is the ability to make similar arrangements with law enforcement authorities of the Commonwealth or another state or territory for their officers to undertake investigations or assist as required.

Formal arrangements must be made in writing, and authorised persons must have a written notice of the functions and powers that they may exercise. The Commission has entered into a memorandum of understanding (MOU) with Tasmania Police for officers to be made available on an as needs basis when appropriate, subject to the Commission meeting the expenses and salary of the relevant officers. The Commission also had an MOU with the former Office of Police Integrity in Victoria, and the MOU has transferred across to the new agency (IBAC). The ability to authorise officers has assisted the Commission considerably when it has had significant investigations on foot, or where it has required specialist knowledge that has not been available in-house.

In requesting assistance, the Commission is conscious that the agencies, from which it seeks assistance from, may also have resourcing issues.

Case Study: Authorised persons

Person authorised under s 21(2)

In late 2012 the Commission received an anonymous complaint alleging impropriety with respect to the selection and employment of staff in a state service agency. The complaint was referred to the relevant department for investigation and the Commission subsequently audited the outcome of the investigation. In auditing the department's investigation, the Commission sought assistance from the then Public Sector Management Office, for a senior person with sufficient expertise in selection and appointment processes across government. That person was authorised under s 21(2) and provided detailed advice to the Commission on the appointment processes engaged in by the relevant department and the sufficiency of information provided for the investigation and audit process. The person was authorised for a six week period and only for the purposes of the particular audit (in the end the audit work only took a matter of days).

As a consequence of the issues raised by the audit, the Board determined to commence an own motion investigation under s 45(1).

Police officers authorised under s 21(5)

Operation A is detailed in the report tabled in the Parliament by the Commission in June 2013.⁴⁴ In 2012 the Commission authorised two Tasmanian Police officers under s 21(4) to assist the appointed investigators. The police officers worked full time at the Commission for a period of six months. Their salary and other expenses were met by the Commission pursuant to a MOU that had been previously agreed with the Commissioner of Police. They were authorised to work only on Operation A and had no input into other assessments or complaints undertaken by the Commission. The work undertaken by the police officers was invaluable in assisting the Commission to complete a complex operation in a timely manner.

In the same investigation, the Commission authorised⁴⁵ a forensic accountant, employed with the then Office of Police Integrity, Victoria (now IBAC) to analyse financial data obtained by the Commission by notices issued under s 47 of the Act. The authorised person worked at the Commission full time for a period of six weeks. The Commission met the salary, travel and accommodation expenses during the period of authorisation.

The Commission has used s 21 authorisations for a number of personnel undertaking work for the Commission, both within and outside of Tasmania. Initially it was thought that authorisations should be made for Department of Justice Information Technology (IT) staff and Supreme Court transcription staff, both of whom provide a service to the Commission (IT staff under a Service Level Agreement and transcription staff on a fee for service basis). Both IT and transcription staff have access to confidential material created or used by the Commission.

⁴⁴ *Report of the Integrity Commission - No 1. 2013*, www.integrity.tas.gov.au and see Appendix 5, Volume 2.

⁴⁵ Section 21(5).

The Department of Justice and the Commission have received advice that an authorisation under s 21 can only be for the exercise of the Commission's functions or powers and that transcription of recordings or proceedings or the maintenance of the Commission's computer network is not in the performance or exercise of any statutory power or function. The issue for the Commission is that it cannot ensure that administrative work undertaken by persons who are not designated officers and employees and which supports the functions or powers of the Commission is given appropriate confidentiality in respect of the sensitive nature of the work undertaken. Section 21(1) refers to 'work' but s 21(2) effectively means the work is restricted to work undertaken by a person performing or exercising powers or functions of the Commission.⁴⁶

Sections 21(4) and (5) limit the arrangements with either the Commissioner of Police or a law enforcement authority to complaints which are in investigation or before an Integrity Tribunal. This means that a s 21 authorisation cannot be made with respect to police officers (under s 21(4) or (5)) if a complaint is in the assessment phase nor if there is an own motion investigation pursuant to ss 45 or 89.

While s 21(1) might be used by 'making arrangements', it does not have the same force as s 21(4), which is directory to the Commissioner of Police and, further, is limited to public authorities within Tasmania, so it cannot be used in place of s 21(5). The limitations imposed under s 21 are contrasted with interstate integrity entities, which are not so limited, for example:

- ability to engage persons or consultants to perform services – ss 35, 36, 37 and 38, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic);
- ability to second or otherwise engage persons to assist the Commission – s 181, *Corruption and Crime Commission Act 2003* (WA);
- ability to second persons – s 255 *Crime and Misconduct Act 2001* (Qld).

The Commission recommends that ss 21(1) and (2) be amended so that persons undertaking any work for the Commission, irrespective of whether they are exercising a power or function, can be authorised, where the work requires access to confidential information.

Further, the Commission recommends amendment to ss 21(4) and (5) so that arrangements can be made with the Commissioner of Police or a law enforcement authority (within and outside of Tasmania) for officers or employees to be made available irrespective of whether the complaint is in assessment, or an own motion investigation, or an investigation, or an inquiry.

These recommendations have been included in the s 13(c) report of the Board. The JSC has considered the recommendations and supported them in principle.⁴⁷

⁴⁶ In contrast, see ss 35, 36 & 37 of the *Independent Broad-based Anti-Corruption Act 2011* (Vic).

⁴⁷ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 3.

CHAPTER FIVE

Misconduct Prevention, Education and Research

5.1 Role, functions and structure of the Misconduct Prevention, Education and Research unit

5.1.1 Role

The primary objective for the establishment of the Integrity Commission is to promote and enhance standards of ethical conduct by public officers. Section 3 of the Act states the objectives of the Commission with respect to misconduct prevention, are to:

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

One of the ways the Commission seeks to achieve these objectives is by educating public officers about ethics and integrity. On establishment, the Commission created a dedicated misconduct prevention, education and research (MPER) unit.

5.1.2 Functions under the Act

The Act prescribes the primary functions – in s 8 – which the MPER unit undertakes:

- developing standards and codes of conduct to guide public officers in the conduct and performance of their duties;
- educating public officers and the public about integrity in public administration;
- preparing guidelines and providing training to public officers on matters of conduct, propriety and ethics;
- providing advice on a confidential basis to public officers about the practical implementation of standards of conduct appropriate in specific instances; and
- establishing and maintaining codes of conduct and registration systems to regulate contact between persons conducting lobbying activities and certain public officers.

There are further specific educative, preventative and advisory functions detailed in sections 31 and 32 of the Act which build on the functions under s 8. The Commission has specific functions under s 31, while principal officers of public authorities have obligations under s 32.

Under s 31, the Commission is to:

- a) take such steps as considered necessary to uphold, promote and ensure adherence to standards of conduct, propriety and ethics in public authorities;
- b) review and make recommendations about practices, procedures and standards in relation to conduct, propriety and ethics in public authorities and to evaluate their application within those authorities;

- c) provide advice to public officers and the public about standards of conduct, propriety and ethics in public authorities;
- d) consult with, and provide assistance to, principal officers of public authorities in relation to the development and implementation of codes of conduct relevant to those authorities;
- e) evaluate the adequacy of systems and procedures in public authorities for ensuring compliance with relevant codes of conduct;
- f) develop and coordinate education and training programs for public authorities in relation to ethical conduct;
- g) enter into contracts, agreements and partnerships with other entities to support its educative, preventative and advisory functions;
- h) undertake research into matters related to ethical conduct and investigatory processes; and
- i) prepare information and material and provide educative resources to increase awareness of ethical conduct in the community.

Section 32 sets out the obligations of principal officers to educate and train their staff in relation to ethical conduct. This obligation dovetails with the work of the Commission.

The following Commission principles of operation in s 9 of the Act are particularly relevant to its MPER operations:

- working cooperatively with public authorities (including other integrity entities) to prevent misconduct;
- improving capacity of public authorities to prevent and respond to misconduct;
- ensuring that public authorities respond if they have the capacity to do so; and
- avoiding duplication or interference with appropriate work of another public authority.

5.1.3 Structure of the MPER unit

Positions and personnel

The MPER unit comprises three substantive positions, the manager and two education and research officers. Following establishment, there were some initial staff changes in the MPER unit, which has meant that at times it has been challenging to meet demand for MPER services. Staff from the operational (investigations) unit, the CEO and the Chief Commissioner also deliver targeted education, and are involved in stakeholder engagement, as required.

MPER goals and principles of operation

In performing its MPER functions under the Act, the Commission continually has regard to the following:

- while the Commission relies on its own expertise, research and partnerships with other integrity agencies to obtain information about best practice in misconduct prevention, a significant and valuable source of information is gathered through Commission engagement with public authorities and public officers;
- wherever possible, misconduct risk management must be undertaken by public authorities as they have the greatest ability to recognise and control the risk, but the Commission has a key role in providing advice and assistance to them;

- capacity building in the misconduct arena is achieved through collaborative and consultative approaches; and
- complaints and notifications under the Act are a source of intelligence which enables the Commission to recognise and address specific misconduct trends.

The Commission's training, tools and resources are the product of close collaboration among team members and with public authorities from whom information about risk and possible preventative options are obtained.

A watching brief is kept on other integrity jurisdictions so that the Commission can identify emerging issues. In addition, information from external forums, education sessions and training feedback is continually reviewed and used to inform training and product development.

Internal information from the operations unit - complaints and notifications of allegations of misconduct - also inform MPER work about misconduct areas for particular agencies that might be systemic and warrant particular preventative products. Following investigation or assessment of complaints, the MPER unit may also be involved in providing tailored misconduct prevention products or advice to public authorities.

Demand for education, training and tools on conduct, ethics and integrity is steadily increasing and, at this time, seems to be independent of the levels of complaint to the Commission.

5.2 Education and capacity building activities

The importance of the Commission's education and capacity building function was clearly articulated in the speech of the Governor of Tasmania when he opened the Commission on 1 October 2010.

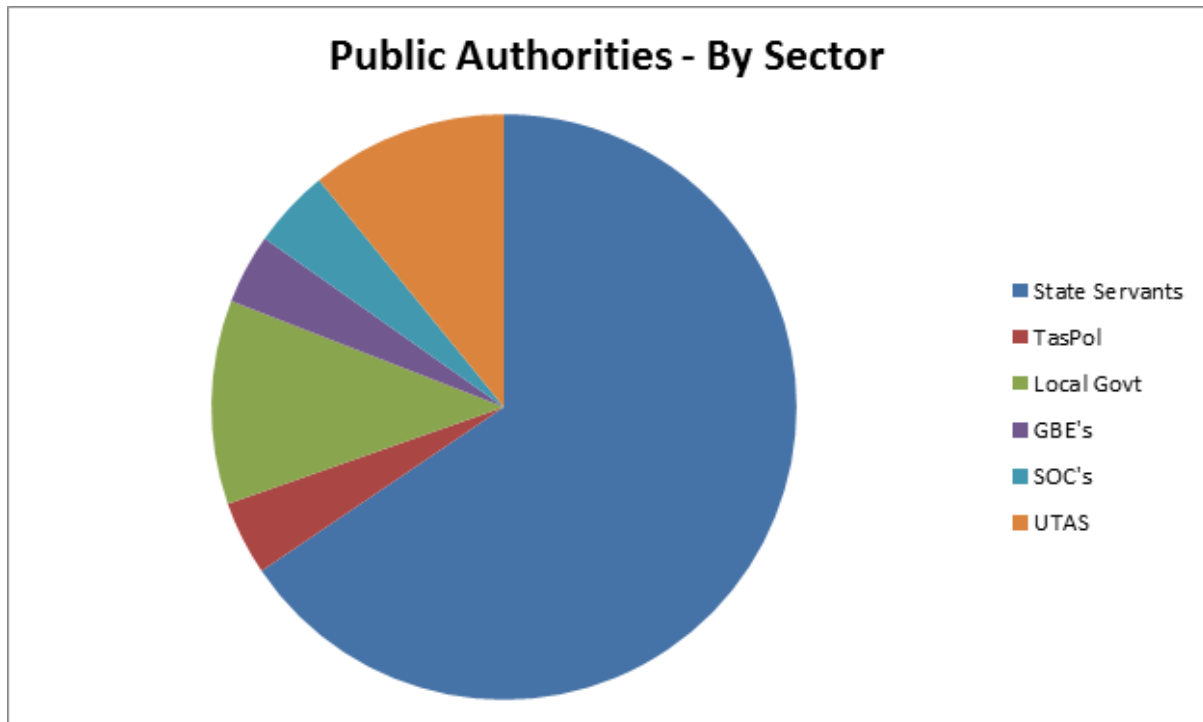
'I expect that the Commission will conduct training programmes which will be valuable in raising an awareness of what constitutes ethical behaviour, but as Jan Morre, a contributor to a 2006 World Ethics Forum, said and I quote, "to really entrench an organisational ethics strategy and create an ongoing commitment to its goals [there is a] need to go a step further and work on what is called an "ethics regime". He said that this will involve "multiple initiatives on an ongoing basis, negating the often held concept that a half day ethics seminar provides [an] ethic vaccination for life." In his paper, which looked at public sector integrity systems in two Australian States, Morre went on to describe an ethics regime in these words: "An ethics regime encourages employees to internalise ethical values and standards to such an extent that it (*sic*) becomes a way of life for the organisation. For this to occur, ethical principles and values need to become part of the everyday life for employees – something that they know so well and are so fully committed to that they no longer have to think about it – '[its] the way we do things around here'.'

5.2.1 Jurisdiction

The jurisdiction of the Commission extends to public officers and public authorities as defined by the Act. Broadly, that incorporates all state service employees; local government

employees and elected local government members; Tasmania Police and the state service personnel who support them; Members of Parliament; government business enterprises (GBEs) and state-owned companies (SOCs); independent statutory officers; and employees of the University of Tasmania. Effectively, in excess of 40,000 people fall into the Commission's misconduct prevention jurisdiction.

Diagram 2: Representation of the sectors within the Commission's jurisdiction⁴⁸



Given the high number of public officers, the Commission seeks to ensure that its activities are effective and target the most vulnerable or at risk areas. Broadly the Commission's misconduct prevention, education and capacity building activities have included:

- research – for the primary purpose of completing a specific project, or the secondary purpose of gathering intelligence to inform product development;
- engagement at regular multifaceted forums that include the state service, local government and government business sectors;
- advising on particular ethical, integrity or conduct issues as they arise, or ones which are the most topical;
- reviewing codes of conduct and key compliance policies comprising integrity frameworks;
- training delivered directly to, or in partnership with a public authority;
- presentations by the Chief Commissioner and the CEO on ethical issues;
- publication or provision of tools, articles, forms and guides (both web and paper based); and
- attendance at internal meetings of public authorities.

⁴⁸ University of Tasmania was added to the Commission's jurisdiction in 2012.

Post establishment activity

Following establishment, early MPER activity was aimed at raising the Commission's profile with public authorities and the public – for example, there were introductory meetings by the CEO and the MPER manager with all heads of agency, and attendance at a variety of public events. A generic training package was developed to assist public officers and the community understand the Commission's jurisdiction.

As the Commission matured from initial engagement, the Commission's emphasis shifted, from engagement with the community via outreach programs to a greater focus on the public sector agencies within its jurisdiction. Key activities revolved around assisting public authorities improve standards of propriety and ethics either through direct training of public officers, indirectly through provision of resources and materials, or in collaboration with professional associations or at industry forums.

The Commission intends for its MPER work to increasingly focus on improving standards in a more targeted manner and to develop products to address specific sector wide misconduct risks and trends. Increased effort will be made to assist internal capacity building within identified public authorities for example, assisting human resources managers to identify misconduct risks in their agency environment and to use generic products supplied by the Commission for internal delivery (and refer to paragraph 5.7 for further information on future approaches to education and training).

5.2.2 Public perceptions survey – March 2011 and July 2013

In July 2013, the Commission undertook a Community Perceptions Survey of 600 Tasmanians, to assess the perceptions and attitudes of the community regarding the standards of conduct and propriety in the Tasmanian public sector.

The survey also assessed the community's level of awareness of the Commission's existence and functions.

This was the second community perceptions survey undertaken by the Commission; the first was conducted in March 2011. It also assessed the community's level of awareness of the Commission's existence and function as the Commission only began operations in October 2010.

The second survey was to provide a data comparison with the initial survey. Any discernible trends over the two years are mentioned in the Community Perceptions Survey 2013 Research Report.

2013 Survey results

The 2013 Community Perceptions Survey revealed that most of the respondents believe that an Integrity Commission is important to the State, with the vast majority (89%) in agreement that a Commission is needed.

Awareness of the Commission is growing, with 43% of respondents claiming they had heard of it before undertaking the survey - this equates to about 163,957 Tasmanian adults claiming they were already aware of the Commission.

With more than two-fifths (43%) of respondents stating that they had heard of the Commission, awareness has increased by 11 percentage points since tracking began in March 2011. While this should be viewed very positively, it must be remembered that the Commission had been operating for less than six months when the baseline data was collected in 2011.

With regard to demographical differences, similar to the previous round, females aged under 55 years (27%) and those residing in the north west and west (29%) of the state were significantly less likely to have heard of the Commission.

Of those respondents who were aware of the Commission, unprompted awareness of its functions as an independent body was high, with more than two-thirds (68%) of respondents correctly identifying some aspect to do with honesty and integrity.

More specifically, almost one-quarter (23%) of respondents stated that the Commission's role is to 'deal with the honesty/ integrity of government as a whole', while almost one-fifth (19%) said its role is to 'deal with the honesty/ integrity of the public sector'.

Although knowledge of the Commission's role around mentions of honesty and integrity was high, it has dropped since the previous round (68%, when compared to 78% in 2011).

Among those respondents who were aware of the Commission, more than one-third (37%) felt that the Commission has 'too little power' – an increase of four percentage points since 2011 (33%). However, similar to the previous round, almost one-half (49%) reported that they were 'unsure' what level of power the Commission has.

When asked what type of complaints the Commission deals with, respondents were most likely to mention 'breach of law and/or codes of conduct' (22%), 'corruption' (21%), 'unprofessional conduct' (19%), 'fraud/ falsification' (17%) and 'abuse of power' (16%).

While it was accepted by the vast majority (90%) of respondents that 'there will always be some dishonesty, unethical behaviour and corruption in the public sector', more than three-quarters (76%) of respondents believe that "most Government employees are honest".

Of concern is the 68% of respondents who agreed that 'people who complain about corruption or unethical behaviour are likely to suffer as a consequence of complaining' - similar to the 2011 survey, where 69% of respondents agreed. The entrenched belief that a person could suffer for reporting corruption and unethical behaviour in government could be a key barrier to raising incidents that may occur – further education is needed to dispel this belief.

However, similar to the baseline data, the research showed that more publicity about the Integrity Commission and its role is needed, with 43% of respondents at the end of the survey making general comments about their lack of awareness and knowledge of the Commission.

As such, further education to enhance the community's knowledge of the Commission and the important role it plays in Tasmania can only serve to strengthen its reputation within the Tasmanian community.

Summary of changes between 2011 and 2013

Awareness of the Commission

- 2013 (43%) and 2011 (32%) – A higher percentage of respondents were aware of the Commission in 2013, when compared to 2011.

Awareness of its role

- 2013 (68%) and 2011 (78%) – Knowledge of the Commission's role around mentions of honesty and integrity has dropped in the current round.
- 2013 (26%) and 2011 (13%) – Respondents in the current round were more likely to be unable to give a definite response as they were 'unsure' of the Commission's role.

Level of power of the Commission

- 2013 (37%) and 2011 (33%) – A higher percentage of respondents in the current round felt that the Commission has 'too little power'.
- 2013 (49%) and 2011 (47%) – Almost one-half of respondents in both rounds reported that they were 'unsure' what level of power the Commission has.

Perceptions of the government sector

- 2013 and 2011 – Since 2011, there has been no discernible change regarding perceptions of the government sector.

5.2.3 Stakeholder engagement

Initial stakeholder engagement included interaction with peak and secondary groups that were identified as having a strong presence in the community; groups that deal with clients who are disadvantaged in society and who have significant interaction with public authorities; and included members who it was considered would carry the Commission's message to larger audiences.

Some of the early events and presentations included:

- Community and Public Sector Union Workshop - role of the Commission and importance of integrity within public authorities;
- government business forums - role of the Commission and importance of integrity within public authorities;
- co-presentation by the CEO, MPER Manager and Professor Jeff Malpas, from UTAS School of Philosophy to senior executives of the Department of Education on '*Building a Culture of Leadership*';
- organising and facilitating an *International Anti-corruption Day Forum* on 9 December 2010 attended by approximately 130 people. Panel members discussed 'It's not what you know but who you know: Government and Integrity in the Island State';
- January 2011 school presentations targeting year 11s and 12s and the role of Commission and the importance of integrity within public authorities;
- sponsoring and attending the Australian Public Sector Anti-corruption Conference in November 2011, in Western Australia;

- community education through presentations by the Chief Commissioner at Forums and a Leader's Breakfast;
- regional outreach aimed at informing the community and remote public officers of the role of the Commission and how to complain about or report acts of misconduct - Burnie in April 2011, and in Launceston in May 2011;
- presentation/workshop by the CEO at the Local Government Association of Tasmania (LGAT) annual conference in July 2011, on '*Understanding and Dealing with Misconduct*';
- ongoing training presentations to a variety of public officers, generally organised through the Tasmanian Training Consortium; and
- presentations and/or speeches by the Chief Commissioner to public sector bodies, including participation in training for Tasmania Police.

Additionally, fact sheets were provided to the community through peak bodies and 'referral agencies' such as Rotary clubs, the Migrant Resource Centre, and the Australian Local Government Women's Association. Pamphlets and guides were developed and placed in Service Tasmania centres to assist complainants.

Website

In addition the Commission uploads material as it is developed to the Commission website at www.integritycommission.tas.gov.au. The website is available to anybody, whether from the public sector or the community, and is a valuable communication tool for the Commission, with information on:

- how to make a complaint and what to expect when a complaint is made;
- the jurisdiction of the Commission, including fact sheets and brochures about the Commission;
- calendar events on direct training opportunities; and
- case studies and model forms for public officers.

Direct engagement

Stakeholder engagement activities with respect to misconduct prevention have now consolidated and extended beyond the initial awareness raising exercise. A strategic approach to engagement is now undertaken, designed to gather intelligence and tailor training and misconduct prevention products to best suit public officers in various sectors. This strategic approach also assists capacity building within public authorities.

Examples of direct engagement include:

- regular forums convened with state service agencies, local government and government businesses enterprises by convening Ethical Reference Groups;⁴⁹
- co-presentation by the MPER Manager with Mr David Morris, senior partner at Simmons Wolfhagen, '*Engaging with Integrity*' at the LGAT annual conference in 2012, focusing on the use of social media by elected members;
- community outreach through a joint stall at Agfest in 2012, with the Ombudsman, the Anti-discrimination Commissioner and the Telecommunications Ombudsman;

⁴⁹ Described in greater detail at 5.2.5 Capacity building activities.

- personal visits to Human Resource directors and compliance managers of various public authorities;
- ongoing and regular meetings with heads of agency, with the CEO explaining the Commissions' jurisdiction and methods to assist reducing misconduct risk;
- personal visits to leaders of industry forums, such as the Local Government Managers Association and the Legal Aid Commission;
- publication of articles through industry journals, in-house newsletters of agencies and intranets; and
- a regular program of training and education sessions, both generic and sector specific.

Indirect engagement is also undertaken through the Commission's web presence, which is used to provide information and resources to which agencies can refer.

It is essential that the culture of expecting and promoting integrity in all public sector agencies is evident at all levels within organisations, starting at Head of Agency and cascading through all management and staff levels.

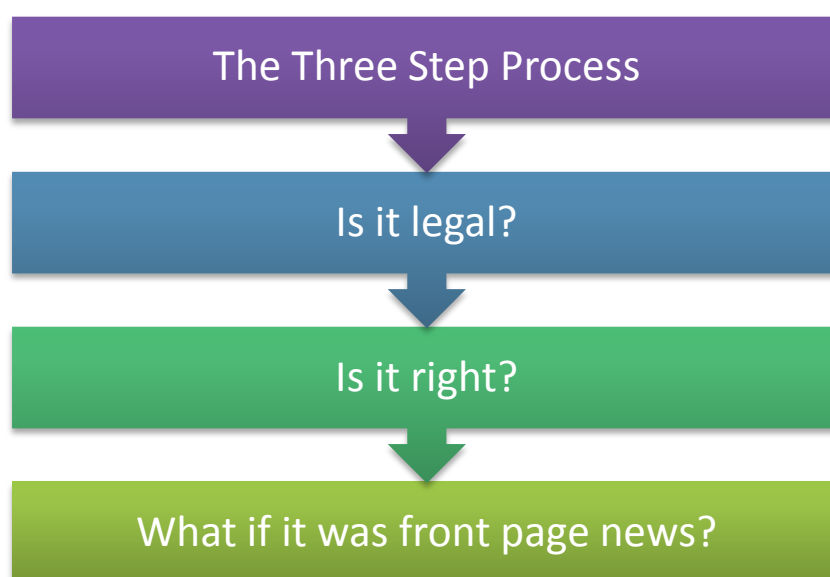
5.2.4 Education programs

Initial education and training programs focussed on the role of the Commission, how complaints could be made, Commission jurisdiction, what is meant by acting ethically, what ethical behaviour looks like, acting by the values that govern workplaces, the concept of ethical leadership and what is meant by the public interest. While some of the concepts were appropriate to senior management levels, it was ultimately considered they did not offer the best practical tools that operational staff could use to make the best ethical decisions.

The Three Step Model

As sessions have been conducted across various organisations and agencies, they have had the effect of generating their own momentum with the result that requests for MPER training have increased. However, it has become apparent that the content of the training requires a greater focus for staff at operational levels and for those making difficult ethical decisions. To meet those needs, a simple 'three step model' that can be adapted to diverse public sector roles has been designed and forms a key plank in Commission training sessions and in materials provided to public authorities.

While information about the role and functions of the Commission continues to be included in the initial parts of training sessions, the three step model is now a key focus, and a simple guide to acting ethically. Participants at sessions are asked to reflect on these questions, and the answers are discussed through group work in terms of public authorities' business and compliance environments.

Diagram 3: The Three Step Model

The model has an initial compliance focus, which is appropriate, given that the overriding ethical obligation is to follow the law and that s 9 of the *State Service Act 2009* – the state service Code of Conduct – is binding on a significant number of public servants. Codes of conduct applicable in other sectors are often mandated in whole or part by legislation (such as local government, or GBE legislation or industry requirements). Equally however, the Commission recognises that there are some public authorities that do not have a settled, applicable code of conduct.

Practical tools and guides

Particular tools to help employees and other participants of Commission training sessions meet ethical requirements and limit the risk of misconduct have been developed for basic training or have evolved as particular or topical issues arise. Some of the guides and forms include the following:

- gift guides - how to apply a gift policy, both giving and receiving;
- sound decisions guide - a structured approach to making and recording advice based decisions;
- conflict of interest in decision guide - a structured approach to identifying, disclosing and managing conflicts of interest; and
- guides on releasing information into the public arena including with respect to confidentiality.

The guides do not replace nor try to repeat internal compliance requirements – they provide simple guidance as to how to apply them, what questions to ask and where the answers may be found. They most often pose a question, or provide a series of steps to guide decisions, rather than provide an answer.

The risk and responsibility for decisions should stay with the decision maker as the person most able to control risk. The Commission's conduct prevention training avoids providing answers to difficult ethical issues, but encourages participants to identify them, adopt a

structured defensible approach to dealing with them, unpack decisions, find rational advice and record how it is used in the decision process.

The Commission also offers general training through the Tasmanian Training Consortium, (TTC) that includes the variety of tools staff can use, in their own environment, whether state sector, the University of Tasmania, local government or government business enterprise.

With the Commission's limited resources, it is not possible for it to provide training directly to all public officers in all cases. However, it has provided direct training through a variety of sources (including the TTC), to managers of public authorities and agencies, to local government councillors, train-the-trainer sessions, indirectly through its presence at forums and conferences and via its web presence. A list of direct training sessions to date is included at Table 5.

Table 5: Commission training workshops⁵⁰

Date of event	Event and number in attendance	Venue
8 April 2011	Public Officers (Information sessions) x 2; 51 participants	Burnie
11 May 2011	Public Officers (Information sessions) x 2; 70 participants	Launceston
12 May 2011	Public Officers (Working in the public sector); 8 participants	Hobart
31 May 2011	Public officer awareness session & outreach; 4 participants	Queenstown
28 June & 6 July 2011	The Integrity Commission and Misconduct; 40 participants	Hobart
14 & 19 July 2011	The Integrity Commission and Misconduct 49 participants	CCAMLR - Hobart
3 & 9 August 2011	The Integrity Commission and Misconduct; 77 participants	Hobart
19 April 2012	Integrity in Public Administration; 19 participants	CCAMLR - Hobart
26 April 2012	Integrity in Public Administration; 17 participants	Launceston
21 June 2012	Integrity in Public Administration; 27 participants	CCAMLR - Hobart
5 July 2012	Practical Application of Integrity in the Public Sector; 12 participants	CCAMLR - Hobart
26 July 2012	Integrity in Public Administration; 11 participants	Launceston

⁵⁰ To 30 August 2013.

17 & 30 August 2012	Practical Application of Integrity in the Public Sector; 38 participants	CCAMLR - Hobart
7 March 2013	Practical Application of Integrity in the Public Sector; 12 participants	CCAMLR - Hobart
18 April 2013	Practical Application of Integrity in the Public Sector; 8 participants	Launceston
4 June 2013	Practical Application of Integrity in the Public Sector; 23 participants	CCAMLR - Hobart
8 August 2013	Practical Application of Integrity in the Public Sector; 24 participants	CCAMLR - Hobart

'Practical Application of Integrity in the Public Sector' and *'Integrity in Public Administration'* are generalist sessions conducted by the Commission throughout 2011-13. At these workshops, participants are taken through practical explanations of key ethical requirements and codes of conduct. At the half day workshop, they have time to explore their own issues, through a journaling exercise. The interactive format is based on recent best practice research, which confirms that the best way to teach in this area is through open discussion, dialogue, sharing of experiences and agreement on behaviours. A total of **490** public officers participated in these sessions.

Public authorities with large numbers of employees and established training units are able to access information, assistance and resources from the Commission to design their own training programs, tailored to their needs.

Sectors with identified high risks are offered priority as are senior managers, due to their ability to influence staff, to implement practical prevention tools and to lead by example. Information about high risk sectors and activities is obtained through stakeholder engagement, complaints and notifications to the Commission, applied research and other integrity agencies.

Increasingly managers have indicated they would like to 'co-badge' their own training by concurrent delivery with the Commission, or use of Commission branded materials – so as to strengthen the message delivered and their own image, with employees and customers.

Assessment and evaluation of training

Assessment of all sessions is undertaken through hard copy feedback forms, which are reviewed and feedback is then taken into account in future training design.

A summary of the feedback (excluding individuals' names) is prepared and provided to the person who commissioned the training, so they can see issues and possibly develop guidelines or further internal training.

While feedback after each session is a good barometer of how training was conducted 'on the day', it does not measure the effect of it in a work environment – how useful it is to staff over time when ethical issues arise, and how they use the tools provided when the

opportunity arises. The Commission seeks to evaluate the effectiveness of training in various ways – by direct survey of those who attended, by feedback from agencies' senior HR managers in other engagement forums, or in feedback from managers.

5.2.5 Capacity building activities

Ethical Reference Groups

In early 2012 the Commission established Ethical Reference Groups (ERGs) to directly engage with like public authorities on ethical issues. Groups were set up within three sectors – lead agencies within the state public sector, local government and GBE/ SOCs. The heads of state sector agencies, or HR managers with whom the Commission had already dealt, nominated appropriate representatives with sufficient authority and knowledge to attend and contribute in a meaningful way. Invitations to join the ERGs have included the council owned water companies (now TasWater), the Retirement Benefits Fund and the University of Tasmania. To ensure that the ERGs are manageable not every public authority is represented.

Who is a public authority? Who is not a public authority?

Who is a public authority?

The Act defines public authorities under s 5. It includes –

- all State Service Agencies⁵¹ such as the Department of Health and Human Services (DHHS); Justice; Police and Emergency Management (DPEM); Education; Economic Development, Tourism and the Arts; Infrastructure, Energy and Resources; Premier and Cabinet; Primary Industries, Parks Water and Environment; and Treasury and Finance;
- other agencies including the Tasmanian Audit Office; Tasmanian Health Organisations – North, South and North West; TasTAFE; The Public Trustee; Macquarie Point Development Corporation; Port Arthur Historic Site Management Authority and the Tasmanian Dairy Industry Authority;
- Tasmania Police;
- any person performing functions under the *Governor of Tasmania Act 1982*;
- all GBEs including Forestry Tasmania; Hydro Tasmania; Motor Accidents Insurance Board; and Tasmanian Public Finance Corporation;
- the Board of a GBE;
- a State-owned company⁵² including Aurora Energy Pty Ltd; Tasmanian Ports Corporation Pty Ltd; Transend Networks Pty Ltd; TT-Line Company Pty Ltd; Metro Tasmania Pty Ltd; Tasmanian Railway Pty Ltd; Tasracing Pty Ltd; and Tasmanian Irrigation Pty Ltd;
- the Board of a State-owned company;
- the University of Tasmania;
- a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or Minister under an Act for example the Retirement Benefit Funds Board;

⁵¹ As listed in Schedule 1 of the *State Service Act 2000*.

⁵² Defined in s 4(1) of the Act as a company incorporated under the Corporations Act that is controlled by the Crown, a GBE, a statutory authority (as defined) or a company which is itself controlled by the Crown, a GBE or a statutory authority.

- the holder of a statutory office⁵³ – this includes a range of office holders too numerous to list in full, but includes for example, the Director of Ambulance Services; the Anti-Discrimination Commissioner; the State Archivist; the Director for Building Control; the Director of Public Prosecutions; the Auditor-General and the Ombudsman;
- a local authority, which includes every local government council; an authority established under Part 3 of the *Local Government Act 1993*; and any other body constituted under an Act having the power to levy a rate on any land;
- a council-owned company which would include for example TasWater; and
- any other prescribed body (currently no other bodies are prescribed).

Who is not a public authority?

The Governor of Tasmania; all judges of the Supreme Court, including the Associate Judge; all Magistrates; any court; members of a tribunal; members of the Tasmanian Industrial Commission, and the Commission itself are not public authorities for the purposes of the Act.

Meetings were initially held across the three sectors quarterly in Hobart. In Launceston, the three were combined and met twice yearly. The purpose of the ERGs is to enhance understanding of integrity and ethical practice in the government sector and share best practice among group members.

The groups have been effective in enabling the Commission to engage with key stakeholders, build relationships of trust, and explore avenues to deliver products in the most effective and efficient ways as well as product testing before development.

The ERGs have been helpful for the Commission and for the group members to see the degree of similarity in risk subject areas. Consequently, that information has allowed tailored prevention products to be developed, focusing on specific, defined areas of greatest need.

The Deputy Auditor-General is a member of the lead agency group, and contributes valuable expertise, as an auditor across all sectors, while the CEO of the Legal Profession Board provided valuable 'one-off' information about the issues concerning agencies investigatory capacities.

The Commission has also used training feedback from other areas to bring product ideas to ERGs.

All state government departments are represented at meetings, held in Hobart:

- Education
- Premier and Cabinet
- Primary Industries, Parks, Water & Environment
- Justice
- Police and Emergency Management
- Infrastructure, Energy and Resources
- Economic Development, Tourism and the Arts
- Health and Human Services

⁵³ An office, the holder of which is appointed by the Governor or a Minister: s 4(1).

Treasury and Finance

The northern ERG combines state sector and local councils and is attended by representatives of the following:

Tasrail	West Tamar Council
Motor Accidents Insurance Board	George Town Council
TT-Line	Tasmanian Health Organisation (THO)
Ben Lomond Water	North (includes Launceston General Hospital)
Launceston City Council	
Northern Midlands Council	Cradle Coast Authority
Break O' Day council	Dulverton Waste Management
	Northern Tasmania Development Corporation
Dorset Council	

The southern ERG is designed specifically for public authorities with a government business perspective and includes the following:

TasPorts	Retirement Benefit Fund
Aurora	Transend Networks
Forestry Tasmania	TasCorp
Southern Water	Hydro Tasmania
Metro Tasmania	Public Trustee

Examples of issues raised by members at meetings during 2012 have included:

- code of conduct issues;
- treatment and release of confidential information;
- budget cuts resulting in compliance and back-office 'checking' staff being overworked, which increase misconduct risks;
- perceived failures of agencies to obtain appropriate legal advice giving rise to a risk that government interests were not properly/adequately protected;
- inconsistent asset management, especially for exiting staff;
- administrative controls, or lack thereof, on cash payment systems;
- increased personal computer and social media use at work;
- internal management of investigations about misconduct;
- monitoring staff – for example travel, telephone, CCTV etc; and
- conflict of interest, particularly with respect to tenders.

The advantage of providing advice within the context of ERG meetings is that the ethical issues or standards of conduct raised are often applicable to all participants, as they derive from the same sector. Advice can be explained in the context of similar businesses and the message is not confused or 'lost in translation' as it would be if provided to participants separately. Those present who discuss or question advice can explore the different situations in which an ethical standard might apply, so the end result is more robust and practical in application.

ERG effectiveness was measured at different stages of development by written feedback from members. The early survey was followed up by a survey after one year of meetings. The majority of respondents thought that the groups definitely meet their expectations of an appropriate forum to discuss ethical behaviour, issues and tools and indicated they would definitely find the information and contacts made as a result of the meeting useful to their employment.

The fact that ERG meeting attendance is strong, that members are responsive when requested to review products, provide venues, consent to sharing of information and that they want to continue to come to meetings and hear more about best practice, demonstrates the value of the Commission's role in this area.

Case study: GBE agency ERG

Distribution of social media sample policies

Following ERG member requests for assistance for guidance on social media use by staff at and for work, the Commission presented facts and research findings at a meeting of the ERG in May 2012. Members requested further assistance with drafting specific social media policies. The Commission had assisted a local council settle a social media policy, and obtained permission from the Chief Information Officer to provide a copy to ERG members. The Department of Premier and Cabinet also agreed to provide a copy of its recently settled policy. Both were discussed at the next ERG meeting and used as templates by members to draft their own policies.

The Commission surveyed participants who attended ERGs in October 2012 to ascertain the effectiveness of the groups. The responses indicated that the groups worked well as discussion forums to raise ideas and methods to improve ethical behavior, but that these were not translated into concrete 'capacity building'. Participants desired greater identification of best practice and solutions. Despite requests for improvement, 94% wanted to keep coming to the meetings, showing they see the value of the groups and have confidence that the Commission will try to address the needs they have identified.

The Commission plans to address these needs, improve processes and develop further groups appropriate to specific areas within each sector.

Risk prevention products

The Commission also develops risk prevention products from information obtained through feedback at training.

In addition, complaints and misconduct prevention practices and policies from other integrity agencies have been useful to inform prevention products. As an example, before the design of a training program and related materials for public sector health, the Health Complaints Commissioner provided useful information about trends and examples of complaints. In developing scenarios and case examples to discuss at training, the Commission has, with permission, also used materials from the State Service Commission in Victoria, and the Public Sector Management Commission and CMC in Queensland. Media reports also provide evidence of risks and gaps in ethical frameworks. These are of great impact in

training, as they address the third issue of the Commission's key ethical decision making model: 'What if it was front page news?'

Following completion of an agency mapping exercise commenced in September 2013, the Commission found that the following key integrity risk areas existed in the Tasmanian public sector. It has identified the gaps in each area and will use this information to inform development of training, research and misconduct prevention activities:

- lack of or limited education on key policies comprising the ethical framework, including the code of conduct, key compliance policies, the vision/mission statement and service charter;
- lack of or limited key ethical guides;
- lack of or limited active management of misconduct;
- lack of or limited Public Interest Disclosure procedures, training or information;
- limited catering for special needs clients;
- lack of or limited misconduct investigation training or capacity;
- failure to check ongoing accreditation required of specialist staff; and
- lack of or limited misconduct risk assessment.

Articles

Separate to misconduct prevention training and specific products, the Commission contributes to newsletters, industry journals and agency intranets, on an irregular basis. Articles on the following topics have been published internally within agencies:

Don't lie, don't cheat, don't steal

This was about exercising judgment and common sense where readers don't have the time to fully read a procedure, ask for advice or check with a manager. It urged them to apply these three simple rules to resolve ethical issues where a decision or action is required quickly, where they might not have the time or ability to read a policy, or the code of conduct.

Off to a good start!

This was about new starters being supported from day one in what they understand about code of conduct requirements. It urged all staff to know and observe current standards, not just defer to the old practices or 'how we do things around here'. It suggested continuing support in ethical behaviour, after induction, by mechanisms such as a buddy or mentor, someone who can coach the new starter, bolster their confidence and help maintain their morale.

Let's talk about it: 'reasonable personal use'

It is our responsibility to self-assess, disclose and monitor how we use work tools, facilities and our time for personal activities. Is what we are doing related to our work role? Is it part of a second job, paid or voluntary? Is it 'reasonable'? Have we discussed any concerns with a colleague or our manager? If in doubt, the article provided a practical guide on what to do - talk to a manager – it's much better to disclose and discuss, than to bottle up. If limits are exceeded, and no advice has been sought, or disclosure made, it always looks worse and takes a lot more to explain.

Simple, isn't it?

This article was about how to avoid confusing ethical obligations by supplying simple tools. It explained how 'cheat sheets', or flow charts, decision making guides, cartoons or pictures can be provided to show a situation, the various thoughts needed to assess the matter and how to arrive at the right answer.

Custodians, not owners

This was a simple clip art showing thought processes around use of work resources, concluding that tools and facilities are provided to do work, not for an individual's enrichment. It was considered highly effective by a number of agencies and was published by the Department of Justice, Glenorchy City Council and DHHS.

Conflict of Interest – eliminate, avoid, or manage?

This article highlighted useful tools the Commission produces to help staff manage conflicts of interest. It defined the essential requirements of a robust conflict of interest procedure: identify, disclose, manage (or avoid) and report. Having declared an interest, managed a conflict and then made a decision, it assisted by defining how an agency and individuals must be ready to report on how their process played out. It suggested keeping a register of interests declared, and the staff recording how a conflict was managed to allow fast and clear reporting of the process that was undertaken.

Articles are also offered for publication in external professional journals of key stakeholders, such as the Local Government Association of Tasmania. Articles published in LGAT news so far include:

- *Gearing up support for councils to prevent misconduct*, Robyn Trigge, Manager MPER, (March 2012 edition);
- *Dealing with difficult social media and ethics issues*, Robyn Trigge, Manager MPER, (June 2012 edition); and
- *Dealing with misconduct: What the Integrity Commission expects*, Diane Merryfull, Chief Executive Officer (March 2013 edition).

As the articles are often topical and reach a wide audience, the Commission intends to pursue ongoing publication of relevant articles, as and when opportunities arise.

5.3 The Tasmanian ethical and integrity landscape

In developing training, research and misconduct prevention products, the Commission aims to engage with the public sector to identify agency needs and gaps in existing frameworks. In the absence of a mature complaint data base, the information required to inform products is sourced by the Commission from agencies and their staff. Notifications of misconduct are sought, in the absence of complaints being made. Questions about agency risk areas and treatments are made to the Commission by management staff. Continuing dialogues about risks and responses are held in discussion forums. Direct feedback is sought from staff after training.

5.3.1 Agency mapping report - 'Ethics and Integrity in the Tasmanian Public Sector 2013'

In September 2012 the Commission embarked on an agency mapping project to gather base line evidence of existing ethical and integrity frameworks within public authorities. The results of that project are detailed in a report published by the Commission on 13 June 2013, available on the Commission's website.

In November 2012, detailed questionnaires/surveys were sent to 188 participants of various workshops conducted by the Integrity Commission in 2012 to ascertain the effectiveness of the training provided and identify any areas of training that needs to be addressed by the Commission. Surveys were sent to state service employees (116), local government employees (43) and councillors (29). Between December 2012 and January 2013 the Commission conducted a survey of 27 state sector agencies, government business enterprises and state-owned companies to map and prioritise integrity risks in the Tasmanian public sector and inform the development of training, research and misconduct prevention activities.

Valuable data was obtained about ethical gaps, good practices and areas in which the Commission can assist public authorities strengthen their ethical frameworks. The data will be particularly useful for the Commission to develop misconduct prevention products over the next year.

Surprisingly, a majority of training participants who responded to our survey said that they had not attended any training in ethics and integrity with their current employer, other than that provided by the Commission. This confirms a prior submission of the Tasmanian Government⁵⁴ – that there is a distinct lack of structured ethics and integrity training within agencies and local councils across the state.

A significant number of respondents (46.2%) indicated that they had applied the three-step model to assist in the application of ethical principles to practical decision making in a work-related decision. This indicated that the three step model was valuable in their decision making processes. The majority who answered 'no' indicated that this was due to no ethical dilemmas arising since attending the workshop, not because the three step model was unhelpful or inapplicable to the situation.

Responses about what respondents would do if they identified misconduct or risk indicated that the ethics and integrity training had provided them with the knowledge and confidence necessary to raise it with the right persons – i.e. the person concerned, the manager or the Commission – so as to address misconduct and/or risk in the workplace.

When asked if there was any further information or assistance the Commission could provide to help participants apply ethical behaviour in their workplace, no common themes emerged but comments appeared to indicate the importance of the Commission to

⁵⁴ Para 7.4, Tasmanian Government *Submission to the Joint Select Committee of the Tasmanian Parliament into Ethical Conduct Standards and Integrity of Elected Parliamentary Representatives and Servants of the State*, August 2008, at pp. 85 to 89 see sub 25A at http://www.parliament.tas.gov.au/ctee/old_ctees/ethical.htm

respondents and a desire for a continued and greater presence, either directly, or via input into agency policies and processes in relation to ethical issues.

A number of concerns (prevalent throughout the various public authorities) were identified and indicate areas for attention, including:

- limited or lack of ongoing training or awareness-raising on ethical issues following initial induction;
- lack of appropriate complaints management processes; and
- gaps in Public Interest Disclosure procedures, access and training.

A number of good practice examples were also identified, including:

- use of online training tools;
- implementation of a Compliance Officer position;
- toolbox talks delivered on the code of conduct/hot topic sessions on ethical issues;
- contractors being required to sign off on the code of conduct; and
- liaison with special interest groups to assist disadvantaged clients.

At the conclusion of the interviews with the public authorities, they were asked what the Commission could do to assist them. Common institutional themes that emerged included:

- assistance with reviewing induction process and package information;
- development of online training modules to assist with ongoing training in ethics and integrity;
- development of information sheets and articles on hot topics and compliance requirements;
- tailored training in areas such as release of information, the code of conduct, whistleblowing, social media, and conflict of interest; and
- information on the role and processes of the Commission.

The agency mapping project has become the foundations on which the Commission plans to build its misconduct prevention program.

5.3.2 Notifications project

The Act does not impose a statutory obligation on principal officers of public authorities, nor on any public authorities or public officers,⁵⁵ to notify the Commission of misconduct or serious misconduct. Although the State Service Management Office (SSMO)⁵⁶ collates information from within the state service sector of investigations involving a breach of the code of conduct commenced under the ED5 process⁵⁷, there is no agency collating information on misconduct across the breadth of public authorities within the Commission's jurisdiction, other than the Commission. Furthermore, experience from interstate integrity

⁵⁵ Including designated public officers and Tasmania police officers.

⁵⁶ Previously the Public Sector Management Office (until 4 February 2013).

⁵⁷ Employers' Direction No. 5 – *Procedures for the Investigation and Determination of whether an employee has breached the Code of Conduct*, previously the Commissioner's Direction No. 5

entities is that good intelligence relating to misconduct⁵⁸ generally comes from notification of issues from public authorities, rather than from individual complainants.⁵⁹

Recognising the limitations in a complaint-based framework, and concerned with obtaining as much relevant raw data as possible, the Commission has established arrangements with some public authorities to notify suspected misconduct and serious misconduct to the Commission. It also collates data associated with the notifications it receives.⁶⁰

Guidelines for public authorities are published on the Commission web site. Initial meetings were arranged with heads of agencies or principal officers of other public authorities. Following initial meetings, the MPER Manager met with the compliance officers in various agencies to confirm the arrangements. Other opportunities to promote the guidelines were taken at forums such as ERG meetings and training.

Notification arrangements have been secured with 11 key agencies so far.⁶¹ The Commission also has a MOU with Tasmania Police⁶² which provides for voluntary notifications of serious misconduct by police officers and of misconduct involving commissioned police officers.

It is hoped that there will be increased uptake of voluntary notifications as public authorities come to understand the essential nature of the Commission.

See Chapter 6 for further details about notifications received by the Commission.

5.4 Impact on public authorities

5.4.1 State Service

The state service is the largest employer of public sector staff, with 27,583 employed. Of the total employed, 11,151 are within the Department of Education and 11,501 within the DHHS, they being the largest two government agencies.

The Commission's early general programs included public officer outreach training for state service personnel in locations such as Burnie, Launceston and Queenstown. Public officer training titled *The Integrity Commission and Misconduct* was also run in Hobart. From April 2012 a more comprehensive half day training workshop was delivered titled *Practical Application of Integrity in the Public Sector*, interspersed with a shorter overview session

⁵⁸ Some jurisdictions deal with corrupt and/or misconduct conduct.

⁵⁹ Complainant's may have firsthand knowledge of actions as they relate to them, but are often not best placed to provide detailed information about activities within a public authority. For example, see 38 *Crime and Misconduct Act (Qld) 2001* which requires that notifications of complaints, information or matters they suspect may involve official misconduct be made to the Crime and Misconduct Commission by heads of agencies.

⁶⁰ Discussed in greater detail in Chapter 6.

⁶¹ Local Government Division in DPAC; Metro Tasmania; Education Department; Department of Health and Human Services; Department of Parks, Primary Industries, Water and Environment; Department of Treasury and Finance; Department of Infrastructure Energy and Resources; Department of Economic Development, Tourism and the Arts; Department of Premier and Cabinet; and Department of Justice.

⁶² Discussed in greater detail in Chapter 8.

titled *Integrity in Public Administration*. The sessions have been run in both Hobart and Launceston.

These programs continue to be run by the Commission on a regular basis through TTC. The majority of participants are from the state sector, although the sessions also attract attendees from local government and GBEs/SOCs.

The Commission has provided a responsive service to the state sector through tailored training programs with relevant examples and scenarios specifically designed to give the sessions meaning and relevance. Although tailored training programs have been very successful and received well by various agencies, they are resource intensive and, ultimately, an ineffective way to reach large numbers of public officers. Accordingly the Commission has decided to focus less on tailored training and more on delivery of appropriate generic products in specific high risk areas that can be easily resourced and implemented by an agency. The products themselves are also designed to build internal capacity to resist misconduct within agencies.

Case Study: Training 1

Transport Inspectors, DIER

The Commission was contacted by the Department of Infrastructure, Energy and Resources (DIER) to deliver tailored training for their Transport Inspectors. A full day's training workshop was delivered to 18 Transport Inspectors in Campbell Town in May 2012. The training focused on the risk of conflict between their public roles and private lives in small regional towns. The training also focused on gifts and benefits owing to the risk of well-meaning gifts or preferential treatment from members of the public being perceived as influencing the Transport Inspectors' decision making.

Feedback following the workshop indicated noticeable changes including:

- recognition of the way uniforms worn off duty influences perceptions of authority;
- a new induction package was developed incorporating the messages from the day; and
- ethics and integrity were part of regular regional briefings.

Further workshops were conducted for other at-risk staff in DIER during the latter part of 2012.

5.4.2 Local government

Local government staff

Local government is a significant employer of staff, with in excess of 4,500 employed throughout the state in 29 councils. It faces particular challenges due to its widely dispersed regional base.

The Commission captures council staff within its general training offerings through TTC. Due to a relatively high proportion of complaints in the local government area⁶³, compared to others within jurisdiction, the Commission offered a more tailored program for council staff in

⁶³ Forty nine complaints for approximately 4,500 local government staff, 297 complaints for 33,115 state sector staff.

2012. This program was part of the Commission's local government focus, following state-wide council elections in October 2011.

Training was provided to staff of the Kingborough, Hobart and Sorell councils during 2012.

The Commission declined a request to train the 750 staff of Hobart City council; rather the Commission provided training to 90 managers and those in key risk areas. The sessions and materials were designed to provide tools that managers could use to operationalise ethical concepts and key compliance policies that form part of the ethical framework. By giving managers the skills to facilitate ongoing debate about ethical concepts and how they apply in a work environment, the Commission aimed to strengthen the ethical culture in the Council.

In view of the difficulty of providing information to remote or regional councils, the Commission obtained agreement from general managers attending ERG meetings that editors of their various in-house newsletters or intranets be available to publish information to all staff about discreet risk areas and general tools offered to assist them.

Elected members

There are approximately 290 elected members in local government.

The Commission has delivered general ethical training for councillors either through LGAT, directly after council meetings and at annual conferences.

Commission personnel take part in LGAT's workshops for new councillors, held biannually, after each local government election. As part of the two day program run in 2012, *Making the Most of Life in Local Government* in February 2012, the MPER Manager delivered an interactive workshop, *The Ethical Obligations of Councillors*, exploring the ethical obligations of councillors, particular misconduct risks and how these can be managed with practical tools. Forty five newly elected councillors from 29 local councils in Tasmania attended the workshop. The councillors were from many areas of the state and had varying backgrounds, ages and education levels.

The Commission has been invited to re-attend in February 2014, but it is noted that local government elections will now be held every four years, commencing in 2014.

A targeted program of education for the six larger councils was also delivered from late 2011 to 2012 to cater for the fact that incumbent councillors also need 'refresher' training, and that the Commission aimed for all councillors to have the same level of information and advice.

The six larger councils were considered to be at higher risk, in terms of number of development applications, larger stock pools and larger procurement contracts to undertake. Regional councils were included later at their request, and it was appreciated that they had unique risks from factors such as not having a large pool of suppliers to choose from, incumbent suppliers having held contracts for many years and perceived conflicts of interest due to the small size of communities.

The Commission maintains close association with LGAT, the Local Government Managers Association, and general managers, via its ERGs for local government. Regular meetings are held with LGAT policy officers to work on collaborative projects, such as the codes applying to councillors and social media policy development.

Council-owned companies

The Commission reaches council-owned companies and other authorities established under the *Local Government Act 1993* through its ERG meetings. For example, staff from the previous water and sewerage corporations owned by local council and now amalgamated into TasWater regularly attend and participate in ERG meetings.

5.4.3 Tasmania Police

The Commission's work in providing education and capacity building materials to Tasmania Police varies, according to whether the target audience are commissioned officers, non-commissioned officers or State Service employees.

In May 2011, the Commission developed materials for the sergeants' qualifying course which was delivered jointly by the Chief Commissioner and Commander Glen Frame, Professional Standards Command. Following the success of the initial course, it has been offered on further occasions by the Chief Commissioner.

In February 2012, at the request of the Tasmania Police Education and Assessment Advisor, planning commenced on design of an introductory course for its State Service employees. After consultation, a pilot program was designed and run with a select group of employees at the police academy in May 2012. Following the pilot program, it was decided that Tasmania Police would deliver a more interactive course, adopting a scenario style delivery, as utilised by the Chief Commissioner in the sergeants' qualifying course.

The Commission is also a member participant of the 'Professional Standards Advisory Group' coordinated by Tasmania Police, and chaired by the Commander, Professional Standards.

An inaugural meeting of the group was held in October 2011 and attended by the MPER research officer, the Commission's Director of Operations, Russell Pearce, a representative from UTAS (School of Philosophy), Commander Human Resources and the Commander Professional Standards, both representatives of Tasmania Police. Research on how police forces in other states establish internal ethics advisory and oversight units was presented by Commission officers at this meeting. At its most recent meeting the Commanders of both branches were very interested to hear about Commission plans to develop training modules that can be delivered by agencies, including Tasmania Police, in-house. Commission officers presented information about a number of proposed training modules that will address various ethical risk areas. It is now investigating the possibility of automating these, so that they can be accessed by Tasmania Police staff on shift work, as explained by the Commanders.

The group aims to meet half yearly, with out-of-session exchanges of information encouraged.

As set out in its terms of reference, the group is not intended to be a decision making body, but to play a key role in developing and maintaining a whole of agency focus on professional conduct and improved practices. It is to research, assess and analyse relevant available data and information, be a vehicle for the exchange of information between members and to inform strategic policy relating to ethical and professional conduct within Tasmania Police.

The Tasmania Police Professional Standards Command has also engaged with the Commission with respect to development of an Ethical Risk Assessment tool for police officers and state service staff, aimed at alerting them to misconduct risk areas and providing practical guidance on how to limit or control risk. An initial assessment was made of how staff activity within each area might be impacted by both the police and state service Codes of Conduct, what current cases and learning existed and how user-friendly guides and tools could be promoted to increase awareness and help manage risk. While the tool was partially developed, it was not 'rolled out' across the service, but is now being used to inform the development of risk management strategies relevant to particular areas, such as social media, conflict of interest and declarable associations.

The Commander of Professional Standards at Tasmania Police is also invited to the Lead Agency ERG meetings in Hobart. Of the meetings held to date, Tasmania Police has been represented at one, but will increase attendance in 2013, following clarification of the role of the Professional Standards Advisory Group.

5.4.4 Government Business Enterprises and State-owned Companies

The public business sector differs from the state or local government sectors, in that there is no mandated code of conduct or legislative requirement that certain obligations be included in a code of conduct. The *Government Business Enterprises Act 1995* (GBE Act) however does set out certain duties and obligations of officers and employees of GBEs.

Tasmania's Government Business Enterprises are:

- Forestry Tasmania;
- Hydro Tasmania;
- Motor Accidents Insurance Board;
- Port Arthur Historic Site Management Authority;
- Public Trustee; and
- Tasmanian Public Finance Corporation (TasCorp).

State-owned Companies are:

- Aurora Energy Pty Ltd (Aurora);
- Metro Tasmania Pty Ltd (Metro);
- Tasmanian Ports Corporation Pty Ltd (TasPorts);
- Tasmanian Railway Pty Ltd (TasRail);
- Tasracing Pty Ltd (Tasracing);
- Tasmanian Irrigation Pty Ltd (TasIrrigation);
- Transend Networks Pty Ltd (Transend); and
- TT-Line Company Pty Ltd (TT Line).

It should be noted that the definition of State-owned companies under the Act is more expansive than those companies identified by Treasury as State-owned. Under the Act, a State-owned company is defined in s 4(1) as a company incorporated under the Corporations Act that is controlled by the Crown, a GBE, a statutory authority (as defined) or a company which is itself controlled by the Crown, a GBE or a statutory authority. Accordingly, a State-owned company for the purposes of the Act will include more than the

six GBEs and eight companies listed above. As an example, a company controlled by the Hydro or Forestry Tasmania will fall within this definition.

It is estimated that approximately 4,300 people are employed in this sector. Supplying essential services, such as electricity, and with a close public interface, the sector is subject to significant public interest and media attention. Particular issues arise with staff access to company badged vehicles and capital equipment. Public sector businesses have sought Commission advice about how to educate staff on the reputational risks arising from unethical use of such assets, given public awareness and propensity to report what they see, and can photograph, to the media. Other issues of concern raised included:

- staff 'over buying' stock, and retaining some for personal use;
- issues around social media;
- board members' obligations and education;
- effectively managing conflicts of interest;
- managing competitive neutrality requirements that might result in a 'less than level playing field' with private sector companies in similar industries; and
- internal investigations of misconduct.

Senior representatives from most GBEs and SOCs attend regular ERG meetings. The Commission has assisted the sector by publishing a 'Guide to Developing a Code of Conduct' directed specifically to these public authorities. Direct advice has also been provided to government businesses in the following areas:

- advice and input into draft codes of conduct and summary statements for staff;
- advice and input into revised conflict of interest policies;
- social media – advice about policy design and legal precedents; and
- tendering issues, particularly around process design and panel membership in a small market environment.

5.4.5 University of Tasmania

Consequent to amendment to the Act in May 2012, the University of Tasmania (UTAS) came within the Commission jurisdiction as a public authority in May 2012.

Bringing UTAS within the Commission's jurisdiction corrected an anomaly in the Act, and is consistent with the jurisdiction that other integrity entities have over public universities interstate. Reports about misconduct within universities interstate have revealed significant instances of unethical behaviour and integrity bodies interstate have recognised that universities present high risk areas.⁶⁴ That risk is succinctly captured in the most recent report of the CMC dated 13 September 2013 *An Examination of suspected official misconduct at the University of Queensland*⁶⁵:

'The events at UQ are a reminder that, within Queensland, universities constitute an important part of the public sector. Most universities are units of public administration;

⁶⁴ See for example investigation report from ICAC, 27 March 2013, '*Investigation into allegations that a Manager at the UTS solicited and accepted money, gifts and other benefits from UTS contractors (Stark)*'

⁶⁵ <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/uq> accessed 30 September 2013.

their senior executives are public officials, and they are bound by the provisions of the *Public Sector Ethics Act 1994* and the *Right to Information Act 2009*. Universities are the beneficiaries, in part, of public funds and therefore have an obligation to act in the public interest, particularly in relation to:

- disbursement of public funds
- the obligations set out in the Code of Conduct
- obligations under the Right to Information Act.

In 2002 the Independent Commission against Corruption (ICAC) conducted a study of the New South Wales university sector.^[1] It found that many people working at universities did not identify with the broader ethos of public service or recognise that they owed a public duty to the community. It also identified a lack of awareness of conflict of interest issues and a continuing culture of keeping problems quietly “in-house”. Ten years on, the CMC found similar tensions in UQ’s handling of the forced offer and subsequent events.’

UTAS, as the recipient of significant public funds, is also appropriately:

- a public authority as defined in the *Ombudsman Act 1978*: s 4;
- a public authority as defined in the *Right to Information Act 2009*: s 5;
- a public body as defined in the *Public Interest Disclosures Act 2002*: s 4;
- subject to independent audit by the Auditor-General in accordance with the *Audit Act 2008*; and
- required to seek written approval from the Treasurer in order to exercise its power to borrow money: s 7(2) *University of Tasmania Act 1992*.

Since the amendment to the Act, UTAS has developed a Statement of Values, specifically referencing ‘integrity’, which has been distributed across the UTAS community. An information pack is being developed and will be provided to relevant UTAS staff and will also be available on the UTAS HR website.

In addition, information in relation to the Act and the responsibilities of relevant UTAS staff is being developed by UTAS, for inclusion in UTAS induction material.

UTAS estimates that 4,351 people are currently employed as permanent or contract employees, so it is a significant employer in the state. In the last financial year it had a turnover in excess of AUD\$470 million with significant capital assets. The Commission will seek to engage more fully with UTAS and assist it to identify risk areas by offering use of the agency mapping survey questions, to self-assess risk areas.

UTAS has been invited to participate in the Lead Agency ERG meetings but disappointingly has declined to participate as at the date of this submission.

[1] Independent Commission against Corruption, *Degrees of risk: a corruption risk profile of the New South Wales university sector*, Sydney, August 2002.

Table 6: Jurisdiction of public universities in Australia

	Jurisdiction	Recent publications
Qld: Crime and Misconduct Commission (CMC)	<ul style="list-style-type: none"> CMC jurisdiction encompasses units of public administration in the Queensland public sector. This means the CMC can accept information of suspected misconduct of officers in universities. The CMC Act states that it has jurisdiction over any corporate entity established or maintained under an Act which collects funds under the authority of that Act; and any non-corporate entity established or maintained under an Act which is funded to any extent, or financially assisted, by state moneys. 	<ol style="list-style-type: none"> An examination of suspected official misconduct at the University of Queensland 13 September 2013 UQ investigates events leading to retraction 3 September 2013 This is a media release from UQ stating that it has advised the CMC of a current (UQ) investigation into possible academic misconduct.
NSW: Independent Commission Against Corruption (ICAC)	<ul style="list-style-type: none"> The ICAC can investigate NSW public sector organisations ('public authority'), including public schools, colleges and universities. 	<ol style="list-style-type: none"> Investigation into Allegations that a Manager at the University of Technology, Sydney (UTS) Solicited and Accepted Money, Gifts and Other Benefits from UTS Contractors March 2013 Investigation into the Recruitment of Contractors and Other Staff by a University of Sydney IT Manager October 2012 Investigation into the Conduct of a University of New England (UNE) Procurement Officer and UNE Contractors August 2012
WA: Corruption and Crime Commission (CCC)	<ul style="list-style-type: none"> The CCC has jurisdiction over all Western Australian public officers, [including employees of] universities. For the purposes of the legislation, <i>public officer</i> is defined as, amongst other things, a 'member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law', and 'any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not'. 	<ol style="list-style-type: none"> Report on the Investigation of Alleged Public Sector Misconduct by any Public Officer in Relation to the Conduct of the International English Language Testing System by Curtin University of Technology or any Other Public Authority September 2012 Three 2013 media releases about misconduct cases in WA universities (no reports): <ul style="list-style-type: none"> Academic convicted of attempted fraud Former university lecturer pleads guilty to exam mark bribes Former ECU senior lecturer charged with corruption
Vic: Independent Broad-based Anti-corruption Commission (IBAC)	<ul style="list-style-type: none"> IBAC has jurisdiction over Victorian public sector bodies, including schools, universities, technical and further education institutes. Under the Act, <i>public bodies</i> include incorporated or unincorporated bodies established for a public purpose, including universities. This is the only body to have 'universities' specifically mentioned in its founding legislation. 	N/A – new body, no published reports/investigations as yet
SA: Independent Commission Against Corruption	<ul style="list-style-type: none"> ICAC may take action in regards to public officers and public authorities, including teachers and staff at TAFE SA and South Australian universities. For the purposes of the Act, <i>public officer</i> includes 'an officer or employee appointed by the employing authority under the <i>Education Act 1972</i>', and 'an officer or employee appointed by the employing authority under the <i>Technical and Further Education Act 1975</i>'. 	N/A – new body, no published reports/investigations as yet

5.4.6 Misconduct prevention statistics

Table 7 summarises the direct educational activities for each area within the public sector conducted in 2010, 2011, 2012 and 2013*^ with participant numbers.

Table 7: Commission misconduct prevention activities 2010^–13*

2010-2013*^	Elected members (councillors)	State sector staff	Local govt staff	GBE's & SOC's	Other	TOTAL
General program	-	511	-	-	18	482
Tailored training	192	873	141	83	25	1287
Conferences and forums	-	230	211	-	263	618
TOTAL Activities	12	90	10	6	9	121
TOTAL Participants	192	1614	352	83	306	2387

*to 30 August 2013

^The Commission commenced operating on 1 October 2010.

Table 8: Commission presentations 2010-12

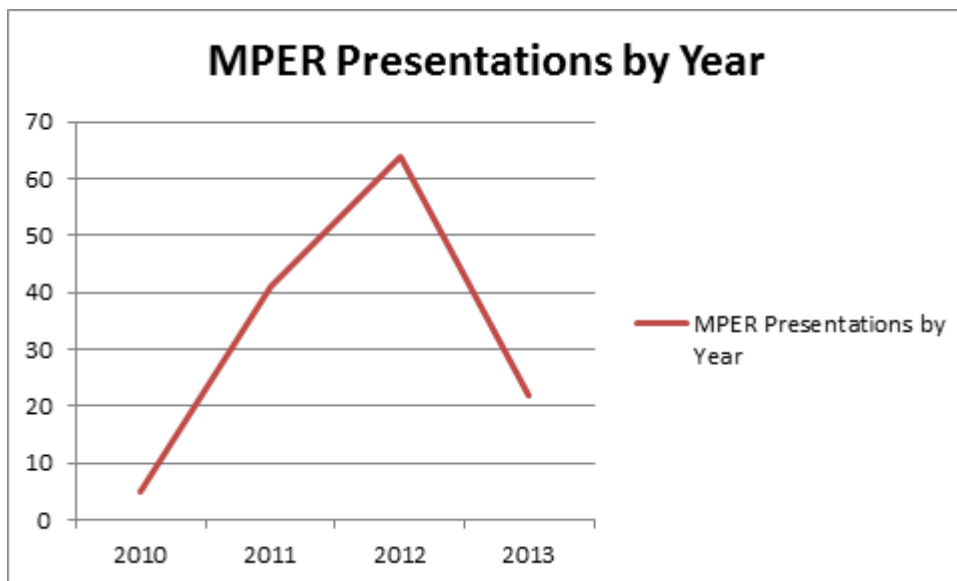


Table 8 demonstrates the increasing number of presentations given by the Commission and the change in numbers on the adoption of a more strategic approach to delivery.

5.5 Impact of the Commission

Information from other jurisdictions suggests that it is extremely difficult to measure ethical cultural change of organisations. A good indicator of the effectiveness of misconduct prevention may be to measure changes in risk management practices, inclusive of

compliance and ethical risk. This measurement method is suggested because it is impossible to measure what may not have occurred. Employees who may have committed fraud or behaved unethically are unlikely to admit that they intended to act unethically, but the preventative action changed their mind. Risk management, as a means to assess, analyse and limit industrial accidents is now accepted over a wide range of commercial enterprises as a way to prevent damage or loss through planning and applying control measures.

If agencies have started to implement systems to identify, assess, measure and treat misconduct risks, then the Commission has been successful in its statutory objective to improve the standard of conduct, propriety and ethics in public authorities in Tasmania.

Complaint levels are not a measure of success. In fact, increased internal complaints can be a sign that training is encouraging staff to identify misconduct, and giving them the confidence to report matters.

The Commission considers that increased/improved management of ethical risk appears to be occurring through uptake of the guides, forms and tools distributed by the Commission directly and indirectly. Increasingly there has been interest in development of online modules that public authorities can adapt for their own use.

To try to obtain quantitative information, at the Commission's urging the recent workforce survey of state service employees included additional questions on employees' experience of ethical behaviour and standards in the service.

5.6 Looking ahead: Commission future training

In planning the design and delivery of future misconduct prevention products, the Commission reflected on its activity in 2012, analysed the value of what was delivered and identified how changes in delivery will bring greater value, in terms of building public sector capacity and addressing misconduct risks more effectively.

5.6.1 Building agency capability

The agency mapping survey that the Commission undertook in 2012 aimed to provide information on the key areas of ethical risk in agencies so that the Commission could target the areas of highest risk.

The key to addressing those risks lies in agency heads meeting the obligations imposed on them under s 32 of the *Integrity Commission Act*, namely to train employed staff about:

- the operation of the *Integrity Commission Act* and any Act that relates to their conduct;
- the application of ethical principles and obligations to them;
- the content of any code of conduct that applies to them; and
- their rights and obligations in relation to contraventions of such codes.

To fulfill these obligations, principal officers need to ensure that:

- managers provide appropriate ethical training and awareness-raising to employees they supervise, both at induction and on an on-going basis, with practical examples

of what is expected in the way of ethical behaviour. In order to do this, they need guidance in content and delivery styles to ensure staff understand expected behaviours and changes that might be dictated by new policies, technologies or service delivery methods;

- employees receive appropriate ethical training and awareness, both at induction and on an on-going basis, with practical examples of what is expected in the way of ethical behaviour. They need refreshers on changes that might be dictated by new policies, technologies or service delivery methods; and
- agencies provide key ethical guides, appropriate policies and procedures to all employees and contractors who are engaged to deliver core business so as to inform them of their behavioural and code of conduct requirements, and the consequences of not meeting them. These materials need to be updated to take account of changes that might be dictated by new policies, technologies or service delivery methods and provide appropriate training and awareness-raising when updates are released.

The Commission's work in delivering targeted training to the public health sector in 2012 provides a case study about the work that the Commission has been doing to date, its benefits but, more importantly, its limitations.

Case study: Training 2

Public health sector training

During 2012, the Commission designed, delivered and critically assessed training for 422 senior managers within the public sector health across three regions of Tasmania.

The program was directed at senior managers with the intention that they would train their team members in the information imparted, by providing them the written materials, explaining the issues, showing them the power point slides and instituting a continuing dialogue about ethical standards, at team meetings or other appropriate events.

Program design

The program contained certain core elements, but varied in content for different work areas due to the diversity of work within a hospital. It was impossible to cater for risks generally, as the broad ethical requirements had to be 'operationalised' in order to manage risk effectively. This required a considerable level of research, consultation and analysis of risks and requirements in the following diverse areas:

- professional services to vulnerable patients;
- procurement of complex IT or medical equipment;
- procurement of food and services to deliver up to 20,000 meals per week;
- logistical contracts to manage hotel services;
- finance and human resources;
- community care of terminally ill patients;
- management of outsourced service providers;
- research and training; and
- executive management.

Modules for the program were tailored to cater for the above issues as they arose within the following work units across the three THOs.⁶⁶

Table 9: Participants – Public health sector training

Participants	Northern Area Health Service groups (Launceston General Hospital)
8	Corporate Support
13	Clinical Support
3	Finance
9	Medicine Management Team
10	Allied Health
9	HR Capital Works Team
16	Primary Health
5	NAHS
9	Surgery
10	Directors of Obstetrics & Gynaecology Management Team
10	Directors of Women's and Children's Team
8	Paediatrics
TOTAL 110	

Participants	Southern Area Health Service groups (Royal Hobart Hospital)
20	Southern Tasmania Area Health Service Executive
9	Oral Health Services
7	Clinical Support
16	Human Resources
24	Hotel Services & Logistics
9	Clinical Support
10	Medical Services
14	Quality & Safety
10	Surgical Services
11	Finance
13	Patient Information Management System
8	Women & Children's Clinical Services
21	Chronic, Complex & Community Care
9	Mixed group
10	Medical Services
35	Doctors in Training
17	Redevelopment, Engineering & Maintenance & Group Managers
TOTAL 243	

Participants	North West Area Health Service groups (Ulverstone, Burnie and Latrobe)
16	Human Resources & Quality
15	Executive
14	Heads of Departments
10	Primary Health

⁶⁶ Excludes areas of public sector health delivered within departmental responsibility, such as mental health, population health, children's health and disability services.

10	Key managers & remote units
4	Nurse Unit Managers
TOTAL 69	

Resources deployed

The Commission incurred a number of costs in preparing and delivering the program including:

- preparation costs (the resources associated with designing the sessions, researching codes of conduct and policies and operational risks in the various areas, and liaison with other integrity agencies about complaint issues and prospective training needs before the training program was settled);
- travel (five trips to Launceston, one trip to Burnie, and travel from there to Mersey to deliver six sessions and 17 local journeys to the Royal Hobart Hospital to deliver 20 sessions); and
- folders of materials (the power point slides, fact sheets, guides and various tools).

The intention was that the managers would train their staff, and the Commission understands that this has occurred to some degree; as in all cases the presentation material was provided in electronic format at each session for this purpose. After the sessions were delivered managers who were unable to attend requested that the materials be emailed to them, for delivery to their own teams.

It is apparent that considerable resources were deployed to deliver 38 training sessions to 422 staff (representing just 3.7% of the 11,501 staff employed in that portfolio).⁶⁷

While this program of training was well received by the areas concerned, it was clear to the Commission that it would be impossible for it to deliver such training to the 28,764 staff employed in state service agencies alone⁶⁸ (and the Commission's jurisdiction also covers local government, GBEs and other statutory agencies).

5.7 Integrity Commission - future strategy

While there is always a role for direct training by the Commission (particularly in the train-the-trainer context) agencies must develop their own capabilities and be responsible for building their own culture of integrity.

The role of the Commission in this is to assist agencies. This will be done by:

- continuing to develop a range of ethical and integrity training products that can be easily adapted and rolled out by the agencies themselves;
- monitoring how well agencies are tracking in meeting the obligations under s 32 of the Act;
- maintaining its strong networks built up with senior agency staff via the Ethical Reference Groups and other liaison groups; and

⁶⁷ Based on DHHS 2011/12 Annual Report, page 18.

⁶⁸ Based on Tasmanian State Service Workforce Profile 2012 and annual report of Department of Police and Emergency Management 2012.

- providing advice, support and guidance to agencies and individuals in how to meet their ethical obligations.

On 9 July 2013, the Commission launched its flagship training product, the Ethics and Integrity Training Program. With around 60 people in attendance, including the Hon. Brian Wightman, Minister for Justice and the Attorney General and representatives from across the public sector (including Agency Heads) the Commission gave the sector its first look at Module 1 of a 14 module training program on key misconduct risk areas.

The training modules are designed for public sector agencies to deliver in-house to staff in a manner that meets the specific needs of the agency.

This particular program aims to build integrity capacity and reinforce ethical decision making, while at the same time ensuring feedback loops are in place to keep the Commission abreast of trends, emerging risk areas and needs.

The Department of Justice was the first of 30 public sector agencies represented at the launch to register with the Integrity Commission to receive and implement the Program. This followed clear support for the training program from the Secretary of the Department by Simon Overland, who said:

'The Department of Justice has been the subject of some recent reports by the Integrity Commission and we are acutely aware of the need to develop internal capacity to improve our ethical culture. This training program is an excellent resource to help get us started.'

CHAPTER SIX

Complaints

6.1 Role, functions and structure of the Operations unit

6.1.1 Role

In accordance with s 3(3) of the *Integrity Commission Act 2009* (the Act), the Integrity Commission is to endeavour to achieve its objective to enhance standards of ethical conduct by public officers by:

- assisting public authorities deal with misconduct; and
- dealing with allegations of serious misconduct or misconduct by designated public officers; and
- making findings and recommendations in relation to its investigations and inquiries.

The Act is prescriptive in the way the Commission is to deal with allegations of both misconduct and serious misconduct. Part 5 (ss 33 – 43 inclusive) deals with complaints and Part 6 (ss 44 – 59) deals with investigations of complaints and outcomes after investigation.

In addition to the educative and preventative function undertaken by the Misconduct Prevention, Education and Research unit, the Commission has a dedicated Operations unit which deals with allegations of misconduct and serious misconduct made to the Commission.

6.1.2 Functions under the Act

The functions and powers of the Commission with respect to the complaint and investigation process are set out in s 8:

- receiving and assessing complaints or information relating to matters involving misconduct;
- referring complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action;
- referring complaints or any potential breaches of the law to the Commissioner of Police, the Director of Public Prosecutions (DPP) or other person that the Commission considers appropriate for action;
- investigating any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or other person that the Commission considers appropriate;
- on its own initiative, initiating an investigation into any matter related to misconduct;
- dealing with any matter referred to it by the JSC;
- assuming responsibility for, and completing, an investigation into misconduct commenced by a public authority or integrity entity if the Commission considers that action to be appropriate having regard to the principles set out in s 9;

- when conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for –
 - the prosecution of persons for offences; or
 - proceedings to investigate a breach of a code of conduct; or
 - proceedings under any other Act;
- receiving reports relating to misconduct from a relevant public authority or integrity entity and taking any action that it considers appropriate; and
- monitoring or auditing any matter relating to an investigation of complaints about misconduct in any public authority including any standards, codes of conduct, or guidelines that relate to the dealing with those complaints.

An Integrity Tribunal, when established by the Board of the Commission, is required to hold an inquiry into complaints.⁶⁹

The Commission also has separate and specific functions in Part 8 where there are allegations of misconduct about designated public officers and with respect to police misconduct.⁷⁰

In performing its functions and exercising its powers, the Commission is to have regard to the principles of operation set out in s 9, including:

- working cooperatively with public authorities, integrity entities and Parliamentary integrity entities to prevent or respond to misconduct;
- improving the capacity of public authorities to prevent and respond to cases of misconduct;
- ensuring 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;
- dealing with matters of misconduct by designated public officers;
- ensuring that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that the Commission considers appropriate; and
- not duplicating or interfering with work that the Commission considers has been undertaken or is being undertaken appropriately by a public authority.

In performing its functions and exercising its powers, 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. It is to act with as little formality and technicality as possible.

Notwithstanding the powers granted to the Commission around dealing with complaints and information relating to misconduct, public authorities and principal officers under the Act do not have a mandated obligation to report or notify misconduct to the Commission. In that sense, the Commission is dependent on complaints being made or on information being received outside of the complaint process.

⁶⁹ Inquiries into complaints are dealt with in Part 7 of the Act – see Chapter 6.

⁷⁰ Police misconduct is dealt with separately in Chapter 8. For the purposes of this Chapter it is only s 87 which is relevant.

What is misconduct?

Misconduct as defined by s 4(1) means:

- conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –
 - a breach of a code of conduct applicable to the public officer; or
 - the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or
 - a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or
 - a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or
- conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –

but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament.

Serious misconduct means misconduct by any public officer that could, if proved, be:

- a crime or an offence of a serious nature; or
- misconduct providing reasonable grounds for terminating the public officer's appointment.

Who is a public officer?

A public officer means a person who is a public authority⁷¹ or a person who holds any office, employment or position in a public authority whether the appointment to the office, employment or position is by way of selection or election or by any other manner but does not include a person specified in s 5(2). Persons specified in s 5(2) include judges, Associate Judges, magistrates, courts, tribunals, the Governor and members of the Tasmanian Industrial Commission.

6.1.3 Structure of the Operations unit

Currently the Operations unit comprises four substantive positions, the Director of Operations,⁷² two senior investigators, and the Investigation Review and Complaint Assessment Coordinator (IRCAC).⁷³ Staffing in the unit has changed over time, to take account of the evolving nature of the complaint and investigation processes.

Operations unit staff are involved in stakeholder engagement through the complaint process.

⁷¹ Refer paragraph 5.2.4 for an explanation of who is a public authority.

⁷² The Director of Operations is also the Deputy CEO of the Commission.

⁷³ The IRCAC position has been vacant since 20 May 2013. The duties of the IRCAC are being undertaken by the Senior Investigators and a second year graduate employee.

The Commission has a case management system (CMS) known as *Investigator* to manage its handling of allegations of misconduct. Although available to all staff, it is utilised primarily by the Operations unit. Further details about the CMS are in Chapter 9.

6.2 The complaints process

6.2.1 Receipt and initial processing of complaints – s 35

It is a function of the Commission to ‘receive and assess complaints or information relating to matters involving misconduct’ (s 8(1)(f) – emphasis added).

‘Complaint’ is defined (s 4(1)) as meaning ‘a complaint made under section 33 and includes any associated matters relating to the complaint’. Section 33(1) provides, that a complaint ‘is to be made in writing ... by a person about alleged misconduct in a manner and form approved by the Board.’⁷⁴ Section 33(1A) permits a complaint to be made anonymously.

The Commission receives complaints in the post as well as online through its website. The complaint form can be separately downloaded from the Commission’s website or completed online. An online complaint, when submitted, is received into the Commission’s secure inbox and an acknowledgement of receipt is automatically generated.

As the Act is currently worded, it is only on the receipt of a written complaint that the Commission’s powers in Part 5 of the Act are enlivened. This threshold requirement impacts on the capacity of the Commission to respond to allegations brought to its attention other than by way of a complaint, or by people incapable of submitting a complaint in writing.

In addition to complaints, the Commission is notified of possible or suspected misconduct by some public authorities,⁷⁵ and receives information and reports about misconduct from varied sources. So far as these notifications or reports of information are concerned, the Commission is limited in its use of powers to deal with the information. To take any action, the information must be made by way of a formal complaint, or the Board must determine to commence an ‘own motion investigation’ pursuant to s 45.⁷⁶

Fundamentally there are three stages to a complaint, if it is retained by the Commission, before it reaches the Board. Initially the complaint is triaged, and dealt with under s 35. If a complaint is retained by the Commission, the next stage is for it to be assessed under Part 5. Once an assessment has been completed, and if the complaint continues with the Commission, it is then investigated under Part 6 and a determination about the complaint is made by the Board.

All complaints received by the Commission are registered in accordance with s 34. The Register includes, at a minimum, the name and contact details of the complainant (if known),

⁷⁴ The Board has approved a form of complaint – see the online version at www.integrity.tas.gov.au and has resolved to accept ‘letters of complaint with adequate detail ... without the necessity for a completed complaint form’.

⁷⁵ Notifications from some public authorities are made on a routine basis by those agencies. Note that not all public agencies notify misconduct to the Commission, although this is part of an ongoing project of the Commission.

⁷⁶ Section 89 also enables the Commission to commence an own motion investigation where the conduct alleged relates to police misconduct.

details of the allegations made including dates, the name of identified subject officers and the relevant public authority. The Register is updated to include details of the action taken by the Commission in relation to the complaint.

Section 35

On initial receipt of a complaint of misconduct, the CEO may deal with the matter in accordance with section 35. That section gives the CEO the power to dismiss the complaint under s 36, accept the complaint for assessment, or refer the complaint to an appropriate person for action.⁷⁷

The Act provides a range of reasons to dismiss a complaint. For example, a complaint may be dismissed if the CEO considers it lacks substance or credibility, or that investigating the matter would be an unjustifiable use of resources, or not be in the public interest.⁷⁸

If the CEO determines to refer a complaint to an 'appropriate person', the CEO may also require that person to provide a report on any action intended to be taken, monitor the action taken, or audit the action taken.⁷⁹

Case Study: An audit following referral

The Commission received a complaint which alleged trespass by a State Service manager and release of confidential information about an employee's partner. The complaint was referred to the relevant department for investigation for action. The department engaged an external investigator to conduct an investigation into the various allegations. The CEO of the department 'formed the view' that there was no case to answer and that there would be no further action taken, based on the investigator's report.

The Commission audited the investigation, which included a review of the external investigator's report. The Commission, although satisfied that the course adopted by the department was appropriate, considered the external investigator fell into error in reaching conclusions. In particular the investigator repeatedly stated there was 'no evidence' of the matters alleged in the complaint. In the Commission's view, the information from the complainant was clearly evidence. Additionally, the Commission considered that there was also other evidence available to the investigator that tended to support some of the evidence of the complainant.

The Commission concluded that while there may have been no difference to the ultimate outcome, the CEO based their determination on the external investigator's conclusions, which were wrongly premised (in part) and therefore open to challenge.

Triage process

Each complaint received by the Commission undergoes a triage process, which results in a recommendation as to how the matter might appropriately be dealt with. The triage process is also applied to all non-complaint sources of allegations; notifications (from public authorities or public officers), information reports generated by Commission officers and

⁷⁷ The CEO is also able to recommend to the Board that the Board recommend to the Premier that a commission of inquiry be established - s 35(1)(d)

⁷⁸ See ss 36(1), (2), (3).

⁷⁹ Section 35(6)

referrals from other integrity entities.⁸⁰ In other words, every allegation of misconduct, however made, is considered – but only allegations contained within a ‘complaint’ under s 33 are able to be dealt with in terms of Part 5 of the Act.⁸¹

The triage process results in a recommendation as to how the complaint ought to be dealt with in accordance with section 35(1) – that is, whether the complaint should be accepted for assessment, referred elsewhere, or dismissed.

The triage process is undertaken on a regular and as required basis, and is conducted by representatives of the Operations and MPER units. The triage recommendation is reviewed by the Deputy CEO⁸² and/or the CEO, who may adopt or reject the recommendation.

The Commission’s experience to date has been that the majority of complaints are being dismissed under s 35(1)(a).

Of those matters not dismissed, the majority are referred to other agencies to be dealt with.

It is only in a small minority of matters that the CEO has accepted, or is likely to accept, a complaint for assessment – and an even smaller number of instances where the assessment outcome is likely to recommend a formal investigation by the Commission. The experience of the Commission to date is consistent with experiences of other similar bodies interstate.⁸³

⁸⁰ For example, the JSC can refer matters to the Commission under s 24(1)(g).

⁸¹ The Act was designed for the ‘triage’ process – see L Giddings MP, Second Reading Speech for the Integrity Commission Bill 2009, 4 November 2009, House of Assembly, p 11

‘The Commission will assess the complaints it receives to see if there is a more appropriate place for the matter to be handled. If there is, the complaint will be sent to that body for action although the Commission may choose to maintain a watching brief if the matter is of sufficient importance. This ‘triage’ approach supports the Commission’s charter to improve standards of ethical conduct. Public sector bodies must be assisted, encouraged, and if necessary forced, to address conduct issues as a normal part of how they do business.’

⁸² The Deputy CEO holds the requisite delegations from the CEO to make a determination under s 35.

⁸³ The CMC assessed 4578 complaints of official misconduct across the public sector and completed 87 official misconduct investigations, p 21 of the CMC 2012-13 Annual Report, <http://www.cmc.qld.gov.au/annual-report-2012-13> viewed 2 October 2013.

The CCC assessed 6148 allegations of misconduct and reviewable police action, and conducted 189 preliminary investigations and assessments, and then conducted 58 investigations, p xvii of the CCC Annual Report 2012-13,

<http://www.ccc.wa.gov.au/Publications/Reports/Annual%20Reports/Corruption%20and%20Crime%20Commission%20Annual%20Report%202012-2013.pdf> viewed 2 October 2013.

Table 10: Complaint data

	2010/11	2011/12	2012/13
Complaints	124	118	66
Allegations	165	236	357
s 35 Referrals	23	39	17
s 38 Referrals	7	7	1
Assessments	17	10	6
Investigations	2	1	4
Own motion investigations	1	0	3

Judicial review

A decision of the CEO under s 35, on receipt of a complaint is not included in the *Judicial Review Act 2000* as a decision to which that Act does not apply. Accordingly, such a decision may be subject to judicial review.

6.2.2 Designated Public Officers

Complaints alleging misconduct and/or serious misconduct about designated public officers (DPOs) are a subset of complaints about public officers. However, as a consequence of the principles of operation under s 9 and the specific functions set out in s 87,⁸⁴ the Commission has formed the view that it is unable to refer complaints about DPOs prior to the investigation stage, but must itself deal with those complaints unless they are dismissed in accordance with the provisions for dismissal in ss 35 and 38.

A DPO is defined by the Act in s 6 as a public officer who holds a certain level of seniority within the public sector. They include –

Members of Parliament
 Certain principal officers of public authorities
 Commissioned police officers

Members of a Council
 Holders of a statutory office
 Holders of a senior executive office in the state service

Where possible, the initial registration process identifies complaints involving a DPO as does the triage process. While the Commission has access to information from the Department of Premier and Cabinet (DPAC) as to which positions in the state service are designated senior executive offices, it is not always obvious in the initial stages of a complaint, whether the allegations are against a DPO.

Where a DPO is identified during the triage process, the complaint is retained for assessment by the Commission, unless there is a decision to dismiss it for the reasons set out in s 36. It is only in the last ten months that the Commission has not referred allegations

⁸⁴ Section 87 provides that the Commission **is to** assess, investigate, inquire into or otherwise deal with, in accordance with Parts 6 & 7, complaints relating to misconduct by a designated public officer (emphasis added).

of misconduct involving DPOs (following the receipt of legal advice) – prior to then, those complaints were treated in the same way as other classes of complaints.

6.3 Notifications

There is no statutory obligation on public authorities or public officers to report suspected misconduct to the Commission, nor to make a complaint about misconduct.

Logically, public officers will generally be better placed to learn of potential misconduct than members of the public. The Commission has encouraged public authorities to notify the Commission of suspected misconduct within their agencies – refer Chapter 4, 4.3.2, and Chapter 8 (with respect to police notifications).

The Commission's ability to respond to a notification of misconduct is limited because the Commission's jurisdiction is dependent on receiving a complaint. Therefore, unless the notification of the suspected misconduct is in the form of a complaint, the Commission is restricted in its ability to respond to the matter. Notifications are subjected to the triage process and any relevant information is captured in the CMS – but a notification cannot be accepted for assessment, or otherwise dealt with under Part 5.

Notifications provide important intelligence to the Commission about misconduct and about the particular agency's capacity to manage that misconduct. They enable the Commission to work with public authorities to provide best practice advice and assistance in dealing with complaints and to increase the capacity of the authority to identify, deal with and prevent misconduct. They can assist the Commission to identify emerging trends and issues that might be addressed through its education and capacity-building programs.

The Commission has published *Guidelines for Public Authorities* about the notifications process which is available online. The guiding principle for notifying the Commission is 'if in doubt, notify'. For notifications to be useful, the Commission seeks minimum information including names of relevant officers, the nature of the allegations, circumstances giving rise to the allegations, and actions taken and proposed to be taken.

The Commission has worked with the larger agencies to make the process of reporting notifications streamlined and to embed the process within the particular agency. Most of the notifying agencies send pro forma emails to the Commission inbox with the relevant information. The Commission's experience to date is that some of the notifications follow a complaint that has already been received by the Commission independently of the agency concerned. If the Commission already has a complaint, that information is not released back to the agency as a consequence of the notification, although it may be relayed through other mechanisms in the Act.

Notifications of misconduct are also considered vital to the Commission's functions because its work of collating information concerning misconduct across the public sector is not undertaken by any other agency in Tasmania.

By comparison to the voluntary nature of notifications made to the Commission, interstate integrity entities have specific legislation requiring a certain level of misconduct, or corruption

to be reported to them.⁸⁵ It is notable that the Joint Select Committee on Ethical Conduct, Final Report '*Public Office is Public Trust*', No 24, 2009 recommended, in relation to the creation of the Integrity Commission, at page 166, that

'18.14.5 The prescription that a mandatory notification system be provided to ensure that as soon as any public body identifies a serious misconduct or corruption issue, it reports immediately to the Commission'.

That recommendation was not reflected in the Act.

Up to 30 August 2013, the Commission has received 73 notifications, excluding those received from Tasmania Police.

The Commission has made a recommendation in relation to notifications at paragraph 9.7.2.

Case Study: Notification leading to investigation

Operation A, reported in the *Report of the Integrity Commission No 1 of 2013*, was a notification from the Department of Justice about the Risdon Prison Complex. The Commission was notified of the Department's decision to undertake an audit in August 2011. Because the matter had not been referred as a complaint, the Commission did not at that time have jurisdiction to take any investigative steps, but the Commission did offer guidance to the Department as the audit of the Store and Canteen areas proceeded.

The Department formally made a complaint to the Commission in November 2011. The Commission assessed the complaint and, in February 2012, determined to proceed to investigation.

In the absence of a complaint, the Commission would have required an own motion determination from the Board in order to investigate the matter.

6.4 Information reports

The Commission has adopted a procedure whereby an internal report is generated if information passed to its officers is suggestive of misconduct, and the information is not already known to the Commission through other means.

As is the case with notifications that fall short of being a complaint of misconduct, the Commission faces a similar jurisdictional dilemma with respect to information reports. No matter how strong the evidence of misconduct, the Commission cannot take such information further, without a complaint or determination by the Board to commence an own motion investigation.

Each Information Report is assessed to establish the reliability of the source and the information itself. Information reports are also subject to the triage process – but cannot be accepted for assessment, or otherwise dealt with under Part 5. The information is collated

⁸⁵ See for example:

- *Independent Commission Against Corruption Act 1988* (NSW) s 11(2); and
- *Crime and Misconduct Act 2001* (Qld) ss 37 & 38 – duty to notify of police misconduct and of official misconduct.

into the Commission's CMS and can be attached to relevant complaints or other notifications that might be received.

The Commission can and does undertake open source research into the information if required, to establish its veracity and consider whether a case to commence an own motion investigation should be put to the Board. On at least one occasion, such information has been used to recommend that the Board commence an own motion investigation.

The Commission will also disseminate information it receives to other agencies, as appropriate.

To date, the Commission has received 34 information reports.

Case Study: Information leading to an own motion

A Commission officer received information of an allegation of improper use of resources. The information source was considered reliable. The Commission made preliminary enquiries from open source data which supported the information. The CEO forwarded the information to the Board. The Board determined to conduct an own motion investigation.

6.5 Referring a complaint – s 35

The majority of complaints, if not dismissed or accepted for assessment by the Commission, are referred 'to an appropriate person for action'. Pursuant to s 35(6):

In referring the complaint to an appropriate person under sub-s (1)(c), the CEO may also –

- require the person to provide a report on what action the person intends to take in relation to the complaint; or
- monitor any action taken by the person in relation to the complaint; or
- audit an action taken by the person in relation to the complaint.

Referral of complaints at this stage (that is before an assessment by the Commission) is consistent with the objectives and functions under the Act to assist public authorities deal with misconduct.

Generally an appropriate person under s 35 will be the principal officer of the relevant public authority in respect of which the complaint is made. However, an appropriate person may also be another integrity entity, the police or the DPP.

When a complaint is referred to an appropriate person, the Commission does not retain any powers or jurisdiction with respect to the complaint, other than the CEO's discretionary powers under s 35(6) to seek a report, or to monitor the action taken or to audit the action taken. Notably, there is no 'enforcement' provision. That is, there is no mechanism by which the CEO can compel an 'appropriate person' to take action.

'Audit' is defined in s 4 to mean to examine, investigate, inspect and review. The Commission does not seek a report or monitor or audit every matter referred under s 35, but when it does require action by the appropriate person, in general terms, it requests advice of the action taken and the right to audit that action is reserved.

The only way to 're-open' a complaint, once referred, is by way of an own motion investigation under s 45. As an own motion investigation can only occur on the determination of the Board, delay in resolving matters is inevitable, especially if the public authority does not immediately respond or has limited capacity to respond.

Case Study: Own motion following complaint and audit

The Commission referred a matter to a local council for action, and sought a report on the outcome. A report of the investigation by the council was forwarded to the Commission and audited. The investigation and outcome appeared appropriate. The Commission advised the outcome to the complainant, who provided further information about the actions of the council. That information was considered by the Commission and ultimately the Board determined to conduct an own-motion investigation. The own motion investigation enabled the Commission to use its coercive powers under Part 6, particularly to conduct interviews under Notice.

When referring a complaint to a public authority, the Commission will provide either a copy of the complaint as made to the Commission, or an edited version of the complaint. The Commission may at the time of referral whether it will seek a report or to audit the outcome, although this might be done later. The complainant is advised of the referral and that further contact about the complaint should be made to the referred public authority. Similarly, the Commission expects the public authority to make timely contact with the complainant, once they receive the referral.

The Commission assists public authorities in their handling of misconduct on request. The Commission's experience to date is that public authorities frequently seek guidance as to what they should do about the complaint as referred, and what information should be remitted back to the Commission for a review or audit of their file. The Commission does provide guidance on these issues, and intends to develop its work in this area in the future.⁸⁶

Complaints made by principal officers, or public authorities themselves, are not referred at this stage of the complaint, because they are usually complaints of substance. The Commission's experience is that complaints that it refers are often low level complaints from individuals that might be better characterised as customer service issues.

The Board has recommended to the JSC and the Minister, in its report under s 13(c) of the Act in April 2013, that the Commission retain jurisdiction over complaints, even once referred, so that it can itself take action, if an audit or monitoring of the action taken indicates the public authority response has been inadequate. That report is included as Appendix 1, Volume 2.⁸⁷

⁸⁶ See for example, the article 'Dealing with misconduct: What the Integrity Commission expects', LGAT News, March 2013, p 40 -

http://www.integrity.tas.gov.au/_data/assets/pdf_file/0018/250083/IC_Merryfull_LGAT_article.pdf

⁸⁷ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 9. The JSC has considered the recommendation and as at 21 June 2013, requested further detail of what consultation, if any, was undertaken with public authorities in respect of such amendments.

CHAPTER SEVEN

Assessment, audit and investigation of complaints; own motion investigations and Integrity Tribunals

7.1 Assessment of complaints, ss 35(2) – 38

7.1.1 Assessment, s 35

After a complaint undergoes the triage process and is accepted for assessment,⁸⁸ the CEO is required, under s 35(2), to appoint an assessor ‘to assess the complaint as to whether the complaint should be accepted for investigation’.

The appointment of an assessor is a formal appointment recorded in the CMS. The Act defines an assessor as a person appointed under s 35(2). In the Commission’s operations to date, the assessor has been an employee of the Commission: there is no requirement, however, that the assessor be an employee. Where a complaint involves highly technical or specialised issues, it may be more appropriate for the appointed assessor to be an expert in that field. An assessor is part of the Commission – s 7(2) and even if employed outside of the Commission, still bound by the obligations concerning confidentiality and protected from personal liability – ss 94 and 95.

Once appointed to conduct an assessment, assessors may, if they consider it appropriate, give written notice⁸⁹ of their intention to conduct the assessment to:

- the principal officer of the relevant public authority; and
- the complainant; and
- any public officer to whom the complaint relates.

The written notice may be made confidential in accordance with s 98.

Of the complaints that have been assessed by the Commission –

- 21.6% have been notified to the principal officer;
- 48.6% have been notified to the complainant; and
- 8.1% have been notified to the subject officer.

There are varying reasons why the principal officer may not be notified of the assessment; for example, the allegation may assert the principal officer’s involvement in the alleged misconduct. The complainant may not be notified of the assessment process – for example if further inquiries or evidence gathering is required. There would need to be exceptional circumstances justifying notification to the subject officer, particularly where the alleged misconduct is current and ongoing. Assessment is usually done covertly, and control of evidence can be more difficult if multiple people are involved in, or advised of, the

⁸⁸ Refer to paragraph 6.2.1 *Triage*

⁸⁹ Section 35(3) of the Act.

assessment process. In addition, notification may cause unnecessary and unwarranted worry and anxiety to the subject officer, particularly where the allegations are unsupported.

In conducting an assessment, the assessor may exercise any of the powers of an investigator pursuant to Part 6 of the Act, if the assessor considers it is reasonable to do so. The powers of an investigator are dealt with at paragraph 7.3.2. The powers that can be exercised in assessment are wide. Consequently the Commission has developed internal procedures such that decisions to issue Notices by assessors must be backed by statements in support, and the Notice itself must be reviewed internally by the General Counsel and approved by the D/CEO or CEO.

Frequently the assessor may not need to use any powers – information can be obtained through open source searching, or by approaching relevant public authorities or officers for relevant information. Collection of information or data may also include searches of police databases. Where possible, the assessor will also endeavor to gain access to the relevant policy of the agency concerned in order to establish the policy framework in existence at the time of the alleged misconduct.

The framework of the Act means that every complaint retained by the Commission for ‘investigation’ will always go through an assessment phase first. Assessments can, and do, become lengthy and complex. Since 1 October 2010, the Integrity Commission has conducted over 37 assessments. Four (4) assessments have culminated in an investigation conducted by the Commission itself.⁹⁰

7.1.2 Report of the assessor, s 37

Section 37 of the Act provides that on completion of an assessment, or ‘review of a complaint’, the assessor is to prepare a report of the assessment, and forward the report to the CEO. In addition, the assessor’s report is to recommend that the complaint be:

- dismissed under section 36 or not accepted [emphasis added]; or
- referred to the principal officer of any relevant public authority for investigation and action; or
- referred to an appropriate integrity entity for investigation and action; or
- referred to a Parliamentary integrity entity for investigation and action; or
- referred to the Commissioner of Police for investigation if the assessor considers a crime or other offence may have been committed⁹¹; or
- referred to any other person who the assessor considers appropriate for investigation and action; or
- investigated by the Integrity Commission.

In making the above recommendation, the assessor may consider any or all of the following–

- the principles of operation of the Integrity Commission;⁹²

⁹⁰ Other investigations have commenced under the own motion powers.

⁹¹ The recommendation by the assessor for referral to the Commissioner of Police seems to have been unnecessarily limited to allegations which involve a crime or other offence, whereas misconduct will not always involve a crime or offence. The Commission has identified this as a technical issue which would benefit from eventual amendment.

- the nature and seriousness of the alleged misconduct if it were to be proven;
- the capacity of any relevant public authority to investigate the complaint;
- whether it is in the public interest, or is likely to increase public confidence, for the Integrity Commission to investigate the complaint; and
- any other matters the assessor considers relevant.

Although s 37 refers to a 'review of a complaint' this is the only reference to a review of a complaint in the Act and the wording is inconsistent with the way in which a complaint is dealt with in s 35, particularly in appointing an assessor. The Commission has identified this as a technical issue which would benefit from eventual amendment.⁹³

The report of the assessment is a factual report which sets out the assessment process, including identifying the allegations of misconduct and the information or evidence gathered. The assessor may make findings of fact if possible. The assessor will also identify knowledge or information gaps, all of which will go towards the recommendation of the assessor to the CEO.

Where the assessment involves a DPO and the recommendation of the assessor does not support dismissal, the complaint will always move into the investigation phase having regard to the Commission's obligations concerning DPOs, that is, the complaint will not be referred. For all other complaints, referral is available at this point.

The activities of the assessor under s 37 are wider than the purposes for which an assessor is appointed under s 35(2). Under s 37 the assessor is not restricted just to assessing a complaint to determine whether a complaint should be investigated. The wording of the purposes of appointment of the assessor has been identified as a technical issue which would also benefit from eventual amendment.⁹⁴

Judicial review

Pursuant to Schedule 1, s 4A of the *Judicial Review Act 2000*, a report of an assessor under s 37 of the Act recommending that a complaint be dismissed under section 36 is not a decision to which the Judicial Review Act applies. A recommendation of an assessor not to accept a complaint, or to refer or investigate, may be subject to review.

7.1.3 Actions of the Chief Executive Officer on receipt of assessment

On receipt of the report of the assessor, the CEO is to make a determination:

- to dismiss or not accept the complaint; or
- to refer the complaint to which the report relates, any relevant material *and the report* to any relevant public authority with recommendations for investigation and action; or

⁹² As specified in section 9 of the Act.

⁹³ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 10.

⁹⁴ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 8.

- to refer the complaint to which the report relates, any relevant material *and the report* to an appropriate integrity entity with recommendations for investigation and action; or
- to refer the complaint to which the report relates, any relevant material *and the report* to an appropriate Parliamentary integrity entity; or
- to refer the complaint to which the report relates, any relevant material *and the report* to the Commissioner of Police with a recommendation for investigation; or
- to refer the complaint to which the report relates, any relevant material *and the report* to any person who the CEO considers appropriate for action; or
- that the Commission investigate the complaint.

The recommendation of the assessor that a complaint should be dismissed is constrained by the matters set out in s 36. However the CEO is not so constrained and it appears that a determination to dismiss following assessment can be for any reason. Similarly, it appears that the determination that a complaint is 'not accepted' can be made for any reason.

The determination of the CEO under s 38 is recorded in the CMS.

Dismissal or referral

Most allegations of misconduct are either dismissed (or not accepted) or referred following assessment. A matter involving a DPO will not be referred at this stage. For other complaints, the Commission has regard to its statutory objectives which include assisting public authorities deal with misconduct.

Once the determination is made, s 38(2) requires the CEO to give written notice of that determination to the principal officer of any relevant public authority. This notice is often the first notification that might be made to a principal officer about a complaint.

Who or what is a 'relevant public authority'?

Who or what is a 'relevant public authority'?

The Act defines a 'relevant public authority' in relation to a complaint made or an investigation as the public authority to which a public officer who is the subject of a complaint, **is appointed**. In the case of a public authority who is a person, the relevant public authority is the person who is the subject of the complaint or investigation.

The current definition of relevant public authority does create some anomalies. As an example, where a subject public officer is employed by a different public authority at the time the complaint is made, and the allegations of misconduct relate to their previous employment, notification from the CEO will be to their current employer as principal officer, rather than the principal officer of the authority for which they previously worked. This means the principal officer who is notified of the CEO determination may have no connection to the allegations other than employing the public officer who is the subject of the complaint.

While the Act makes the giving of the notice to the principal officer mandatory, the CEO has discretion to then notify the complainant(s) and/or the subject officer(s). Each matter is considered on its own merits and there are no 'hard and fast' rules about when notification

will or will not be made to complainants or subject officers. Again, the nature of the allegations and whether the matter will proceed to an investigation, and therefore needs to remain in a covert phase may determine whether notification will be made.

Where the matter is referred to a public authority, the complainant will be advised of the referral (and the principal officer will be advised that the complainant has been notified), in order to assist the public authority deal with the allegations.

A referral made in accordance with ss 38(1)(b)-(f) inclusive, is to include any relevant material, generally obtained by the assessor, and the report. The report is the report of the assessor prepared under s 37. It is an internally generated document which frequently contains sensitive information. The Commission considers provision of that report may compromise the evidence or information referred to in the report, particularly if the misconduct is ongoing. As relevant material can already be provided, and in some cases that may include the report, there are good reasons why the information which should be included with a referral under s 38 should be at the discretion of the CEO.⁹⁵ The Commission has also identified this as a technical issue which would benefit from eventual amendment.⁹⁶

While the written notice of determination can be made confidential in accordance with s 98; the actual referral to an appropriate agency is not subject to confidentiality obligations.

Judicial review

Pursuant to Schedule 1, s 4B of the *Judicial Review Act 2000*, a decision made by the CEO in relation to a determination to dismiss a complaint under s 38 of the Act is not a decision to which the Judicial Review Act applies. As with s 37, a decision of the CEO to refer or investigate may be subject to review.

⁹⁵ Other jurisdictions deal with this aspect on the basis of 'information sharing':

- *Law Enforcement Integrity Commissioner Act 2006* (Cwth), s 44. The Commissioner has an ongoing obligation to give the head of the agency investigating the corruption issue, information or documents that relate to the issue being investigated, if they are in the control of the Commissioner and if the agency does not already have the information.
- *Independent Commission Against Corruption Act 1988* (NSW), s 53(4) when a matter is referred the Commissioner may communicate to the relevant authority any information which ICAC has obtained during the investigation of conduct connected with the matter. The information communicated can be subject to the secrecy provisions (s 111).
- *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s 77. IBAC may provide any information that it has in relation to the matter referred. [And see s 41, IBAC may at any time, provide or disclose any information acquired by reason of, or in the course of, the performance of its duties and functions or the exercise of its powers, if it considers that the information is relevant to the performance of the duties and functions of that person or body.]
- *Corruption and Crime Commission Act 2003* (WA), s 37(2). The CCC, may refer an allegation to another agency and the allegation may be accompanied by a report which may include recommendations for action, time frames for action and such information as the CCC considers would assist the agency or authority to take the action.
- *Independent Commissioner Against Corruption Act 2012* (SA), s 38(5)⁹⁵. In referring a matter to a public authority, the Commissioner may disclose information that the Commissioner has in respect of the matter.

⁹⁶ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 12.

7.2 Referred complaints - audit and review functions

7.2.1 Referral, ss 39 - 43

While s 35 enables a referral to an appropriate person for action, the determination to refer after assessment in accordance with s 38, is to:

- any relevant public authority;
- an appropriate integrity entity;⁹⁷
- an appropriate Parliamentary integrity entity;⁹⁸
- the Commissioner of Police; or
- any person who the CEO considers appropriate for action.

The referral to those identified bodies is reflected in ss 39 – 43 inclusive, which sets out what action is available to the Commission on referral.

On referral the CEO (or the Commission) is unable to direct the referred authority or entity in relation to the action that should be taken, nor can the CEO (or Commission) impose time frames for outcomes or actions. The structure of the Act does not permit a referral to be revoked.⁹⁹ The Commission has identified the loss of jurisdiction over referred complaints as a technical issue which would benefit from eventual amendment.

Integrity and Parliamentary integrity entities

Where the complaint is referred to an integrity entity or Parliamentary integrity entity in accordance with ss 40 and 41, the CEO is to notify the entity in writing that the CEO is to be informed of the outcome of the investigation including any action taken, or to be taken, by the entity. The Commission otherwise plays no part in the complaint.

⁹⁷ An integrity entity is defined as the Ombudsman or Auditor-General: s 4(1).

⁹⁸ A Parliamentary integrity entity is defined as the President of the Legislative Council or the Speaker of the House of Assembly: s 4(1).

⁹⁹ Contrast interstate integrity entities which are able to revoke or vary a referral –

- *Corruption and Crime Commission Act 2003* (WA), s 39. Despite having made a decision to refer, the CCC may at any time decide to act, ie to investigate and has a separate power to direct an agency not to take action.
- *Crime and Misconduct Act 2001* (Qld), s 48. The CMC is able to assume responsibility for and complete an investigation by a public official into official misconduct.
- *Law Enforcement Integrity Commissioner Act 2006* (Cwth), s 42. The Commissioner is able to reconsider how to deal with a particular corruption issue at any time, including directing the agency involved not to investigate the issue.
- *Independent Commission Against Corruption Act 1988* (NSW), s 57. The Commission may revoke a referral or vary a recommendation, requirement or direction.
- *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s 79. The IBAC may determine to investigate a complaint or notification that has been referred or withdraw the referral at any time. If a person or body receives a notice withdrawing a referral they must cease their investigation and cooperate with IBAC, including providing any evidence in their possession.
- *Independent Commissioner Against Corruption Act 2012* (SA), s 37(5). The Commissioner may decide to exercise the powers of an inquiry agency in respect of a matter referred to the agency and if so, the agency must refrain from taking action in respect of the matter. Further, the Commissioner may at any time revoke a referral to an agency or revoke or vary any directions or guidance given to an agency.

The Commission has made no referrals to an integrity entity or Parliamentary integrity entity to date.

Public authorities or other persons

Sections 39 and 43 deal with the actions of the CEO where the referral is to a relevant public authority, or to a person the CEO considers appropriate.

Effectively, where there is a determination to refer following assessment, the Act requires the CEO:

- to notify the principal officer of the relevant public authority in writing of the determination to refer; and
- may also notify the complainant in writing of the determination to refer; and
- may also notify the subject officer in writing of the determination to refer; and
- refer the complaint, any relevant material and the report; and
- is to notify the principal officer of the relevant public authority, or other person, in writing that the CEO is to be informed of the outcome of the investigation, including any action taken.

In practical terms, the notification of the determination, the referral and the written notification to be informed is achieved in one course of correspondence with the relevant principal officer or appropriate person.

On referral under ss 39 and 43, and in addition to being informed of the outcome of the investigation, including any action taken, or to be taken, the CEO may also:

- require the relevant public authority, or person, to provide progress reports on the investigation at such times as the CEO considers necessary; or
- monitor the conduct of the investigation; or
- audit the investigation after it has been completed.

‘Audit’ is defined in the Act to include to examine, investigate, inspect and review: s 4(1).

Since 2010, 102 complaints have been referred to various agencies for investigation. Of those referrals, 36 have been subsequently audited by the Commission.

An audit involves obtaining a complete copy of the documentation of the authority’s investigation. The Commission has an internal document which it can use as a check list for the audit. The Commission can engage with the relevant authority during the audit process – to obtain further documents, or to clarify the process undertaken. Where an investigation is inadequate or incomplete, the authority may be requested to take further action. Further action might include, but not be limited to interviewing witnesses, expanding the scope of the investigation, obtaining documentary evidence, or appointing an appropriate investigator.

On two occasions further consideration of the referred complaint following an audit of the authority’s investigation led the Board to determine to commence an own motion investigation.

The audit process enables the Commission to build a picture of deficiencies in authorities that might inhibit their ability to respond to misconduct appropriately. The experience to date is that authorities take complaints referred to them by the Commission seriously. Some authorities already have experienced in-house investigative capacity and provide very detailed investigation reports. Other agencies will outsource an investigation to an external provider. Other agencies particularly the smaller ones with limited resources (including smaller regional councils) have struggled to respond appropriately.

Commissioner of Police

In accordance with s 42, a complaint can be referred to the Commissioner of Police. The referral to the Commissioner of Police is in the same terms as to a public authority or other relevant person. The CEO is to be informed of the outcome of the investigation including any action taken.

The CEO can also require progress reports, or monitor the investigation or audit the investigation after it has been completed.

The powers available to the CEO under s 42 in referring a complaint to the Commissioner of Police are separate to the functions and powers available in Division 2 of Part 8, ss 88 – 91 inclusive, which deal exclusively with complaints about police officers.¹⁰⁰ A referral of a complaint under s 42 to the Commissioner of Police may be about any public officer, including police officers. A referral about non police officers will be appropriate where an offence or crime appears to have been committed.

7.3 Investigation of complaints

7.3.1 The investigator

Where the CEO makes a determination that the complaint should continue to be retained by the Commission and investigated, the CEO is to appoint an investigator. The appointment of the investigator is captured in the CMS.

Investigators are not necessarily employees or staff of the Commission; an investigator could for example, be an expert in a particular matter, outside of the Commission, the state service or Tasmania. Although only one person is appointed as an investigator, the CEO may authorise any person to assist an investigator and that person may also be external to the Commission. The Commission has authorised external personnel to be investigators and external personnel to assist investigators.

Generally, where outside expertise is not required, the CEO will authorise one of the senior investigators employed at the Commission as the investigator. That person will usually have also been the assessor for that complaint. It is the practice of the Commission that there will be a 'lead' investigator (the formally appointed investigator) and another investigator to ensure continuity of information.

¹⁰⁰ Dealt with in Chapter 8.

Section 46(4) permits the CEO to issue directions relating to the conduct of investigations. Subject to the Act and any directions issued by the CEO under s 46(4), an investigator:

- may conduct an investigation in any lawful manner he or she considers appropriate - s 46(1)(a);
- may obtain information from any persons in any lawful manner - s 46(1)(b);
- must observe the rules of procedural fairness - s 46(1)(c); and
- may make any investigations he or she considers appropriate - s 46(1)(d)

In some instances, the investigator must obtain the CEO's authorisation before engaging in a particular investigative activity. For example, the CEO must give authorisation in respect of the exercise of an investigator's power to enter public premises: s 50(1); and to obtain a warrant for the use of a surveillance device: s 53(1).

The CEO has issued one permanent direction regarding the conduct of investigations with respect to the procedure to be followed for the issuing of coercive notices in accordance with s 47. In other respects, CEO directions regarding the conduct of investigations relate to specific matters having regard to the circumstances at the time. In all other matters however, the powers of an investigator are largely unconstrained.

Notification of determination

Once a determination to investigate has been made by the CEO, notification is mandated in accordance with s 38(2). In addition, s 44(2) enables the CEO to give further written notice to the principal officer of the 'relevant public authority'; and the complainant; and the subject officer, that an investigator has been appointed to investigate. Such notice may include details about the complaint and if appropriate, the report of the assessor made in accordance with s 37. Confidentiality in accordance with s 98 may attach to the notice.

The notification provisions in s 44(2) appear unnecessary given the obligations, both directory and discretionary, under s 38(2). It appears to serve no additional purpose to advise that an investigator has been appointed to investigate the complaint, given the requirement to notify of the determination to investigate. The Commission has identified this as a technical issue which would benefit from eventual amendment.¹⁰¹

A 'relevant public authority' in relation to a complaint made or an investigation or inquiry, is defined by the Act at s 4(1) to mean:

'the public authority to which a public officer who is the subject of a complaint is **appointed** or, in the case of a public authority who is a person, the public authority who is the subject of a complaint, investigation or inquiry.' [emphasis added]

The Commission's interpretation of this provision is that it refers to the person's current appointment when the determination to investigate is made, even where the allegations of misconduct might relate to the person's previous employment with another public authority.

¹⁰¹ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 16.

Procedural fairness by an investigator

In conducting an investigation, an investigator¹⁰² is required to observe the rules of procedural fairness. What is required to comply with this obligation will depend on the facts of each matter. Generally, this would mean that where there is an adverse factual finding by the investigator/assessor, the subject person must have been given the opportunity to respond to the adverse material or finding. The time for doing this will generally be at the time the investigator is finalising the report of findings under s 55(1).

Where a person is given an opportunity to respond, the investigator has no means of attaching confidentiality obligations over any information provided to a person for the purposes of procedural fairness, as the confidentiality provisions in s 98 do not apply to such instances.

The obligation to observe the rules of procedural fairness by the investigator before the investigator provides their report to the CEO means that adverse factual material gathered by the Commission will be put to the relevant person. As soon as that is done, the opportunity to maintain a covert investigation is lost. This may compromise the ability of the Commission to gather further evidence, particularly if the Board makes a decision under s 58(2)(d) to require further investigation.

The CEO may provide a person with further opportunity to comment on a draft of the investigation report before it is put to the Board, by reason of s 56, but a s 98 confidentiality notice can apply to the draft report, thereby maintaining confidentiality.

The obligations for procedural fairness during the investigation/assessment stage can be contrasted with other integrity agencies, in particular –

- *Law Enforcement Integrity Commissioner Act 2006* (Cwth) s 51. Opportunity to be heard prior to publishing a report with a critical finding, but not if it will compromise the effectiveness of the investigation or action to be taken.
- *Independent Commission Against Corruption Act 1988* (NSW) ss 30 – 39. Compulsory examinations and public inquiries. The Commission may, but is not required to, advise a person required to attend a compulsory examination, of any findings it has made or opinions it has formed.
- *Corruption and Crime Commission Act 2003* (WA) ss 36, 86. Person investigated can be advised of the outcome of the investigation, if amongst other things, the Commission considers that giving the information to the person is in the public interest; s 86 where the person who is subject to an adverse report is entitled to make representations before the report is tabled.

Privacy

An investigation is to be conducted in private unless otherwise authorised by the CEO: s 48.

7.3.2 Course of the investigation

The Commission aims to use its limited investigative resources to deal with the most serious or sensitive of complaints and may investigate a matter jointly or cooperatively with the

¹⁰² Also applies to an assessor exercising the powers of an investigator pursuant to s 35(4).

public authority concerned. It may also be necessary for the Commission to draw resources from other agencies to supplement its capacity.

Including current matters, the Integrity Commission has undertaken six (6) misconduct investigations since 1 October 2010. The majority of investigations undertaken by the Commission to date have been complex and prolonged.

Once appointed an investigator will prepare an investigation plan – which is a living document, and which changes depending on events as they unfold and evidence as it becomes available. The investigation plan will incorporate information relating to identified risks, timeframes and proposed use of powers.

Powers

The investigation itself is an exercise in gathering facts and evidence. A significant proportion of the information gathered is made available to the Commission on a cooperative basis by agencies or through open source research.

Other information is obtained through the powers available to investigators under the Act. While the experience of the Commission is that generally public officers and other witnesses are prepared to divulge information to the investigator without the necessity of a formal notice, the Commission will generally serve notices as a matter of course. It is the view of the Commission that a notice issued under s 47 not only serves the purpose of requiring or directing persons to do things, it also protects the recipient of the notice precisely because of the obligation to comply. This is particularly necessary when the recipient of the notice is required to provide evidence about a supervisor or other issues related to a public authority that they would normally feel uncomfortable disclosing.

In addition, s 54 of the Act provides protection to persons served with a notice as another person is prohibited from using, causing, inflicting or procuring any violence, punishment, damage, loss or disadvantage to another person on account of that person having given evidence to an investigator, or produced or surrendered any record, information, material or thing to an investigator.

Section 47 notices

During the course of an investigation, an investigator can require or direct a person by a written notice 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; or
- 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.

A notice under s 47 is a coercive notice with significant implications for a person who is served. While the Commission has developed internal procedures around the issue of coercive notices, it is considered that legislative amendment should occur such that the

notices are issued by the CEO, rather than an investigator (who may or may not be an employee of the Commission). This seems to be a sensible safeguard around the use of significant powers, consistent with the issue of coercive notices in other integrity jurisdictions.¹⁰³

Where a notice has been issued, the investigator generally attempts to reach agreement about compliance times and receipt of evidence or other material. There has been one occasion where the recipient sought a declaration from the Supreme Court as to the validity of a notice.

Case Study: Supreme Court proceedings

***West Tamar Council v Leonard* [2012] TASSC 68**

On 19 October 2012 the Supreme Court of Tasmania delivered its decision in proceedings commenced by the West Tamar Council against the Commission and an investigator of the Commission. West Tamar Council had sought a declaration that a notice to produce, issued to the Council under s 47 of the *Integrity Commission Act 2009* was invalid.

In their statement of claim the plaintiffs contended, amongst other matters, that the subject notice was invalid as it:

- (a) failed to disclose the substance or nature of the complaint accepted for assessment;
- (b) failed to identify the matter which it is said confers jurisdiction on [Mr Leonard, the appointed assessor] to issue the notice;
- (c) failed to specify the information required to be produced with sufficient particularity to enable Mr Smith or the council to know if Mr Leonard is entitled to issue it;
- (d) did not reasonably relate to the subject matter of a complaint and purported to require the production of documents within a specified period, without confining the documents in any relevant way; and
- (e) did not limit the documents to be produced by excluding documents which refer to or contain confidential or private information of third parties or information which is properly the subject of a claim of legal professional privilege by the third parties.

His Honour Justice Evans stated at paragraphs 49 – 50, ‘Reading the notice under challenge in the context of the *Integrity Commission Act* it can be inferred:

that a complaint has been made to the Commission about alleged misconduct by a public officer, s33(1); and

that the CEO of the Commission has accepted the complaint for assessment and referred it to Gary Leonard, as an assessor, to assess whether the complaint should be accepted for investigation, s35(1) and (2); and

that Gary Leonard considers it reasonable to exercise the powers of an investigator under ss47(1), 35(4); and

that in the exercise of those powers, Gary Leonard has directed the second named plaintiff to produce the information specified in the notice, s47(1)(c).

¹⁰³ See for example: *Corruption and Crime Commission Act 2003* (WA) s 95, the Commission; *Crime and Misconduct Act 2001* (Qld) s 72 the Chairperson; *Law Enforcement Integrity Commissioner Act 2006* (Cwth), the Integrity Commissioner.

In my view this is sufficient for the notice to be enforceable.'

His Honour refused the application by the Council. Judgment was made for the Commission with an order that the Council pay the Commission's costs of the action, and a declaration that the Notice issued to the Council pursuant to s 47(1)(c) was valid. Consequent to the decision, West Tamar Council provided the relevant information sought by the Notice.

In addition to obtaining information from public officers and witnesses by way of s 47 notices, investigators have also obtained information under notice from financial institutions, Heads of Agencies, public sector businesses, local government and private companies.

The Commission has also sought and was granted leave from the Supreme Court of Tasmania, to serve a Notice on a person residing interstate, to attend and give evidence before an investigator, in accordance with s 47(1)(b) of the Act. The application to the court was made in accordance with s 76 of the *Service and Execution of Process Act 1992*.

To date an investigator has not required or directed evidence be given from:

- a prisoner or detainee under the *Corrections Act 1997* or the *Youth Justice Act 1997*;
- a patient detained in an approved hospital under the *Mental Health Act 1996*; or
- a person who is subject to a restriction under the *Criminal Justice (Mental Impairment) Act 1999*.

While an investigator may require the information or evidence be given on oath or by affirmation, this has not occurred to date. It is an offence to knowingly provide false or misleading information to the Commission.¹⁰⁴

Notices issued under s 47 can be made subject to confidentiality in accordance with s 98 and this frequently occurs.

The Commission maintains a register of notices issued in accordance with s 47 as part of its internal governance arrangements. Statistics in relation to s 47 Notices are in Appendix 2, Volume 2 'Compilation of relevant statistical information from Registers maintained by the Commission'.

Where a notice is directed to an individual, rather than an institution, wherever possible the notice is served personally. Attached to each notice is a document titled 'Important Information for Recipients of a Notice under Section 47(1)' which provides information about the notice and the process attached to it. That information includes obligations attached to the person by the notice; confidentiality provisions if they apply; the right to be represented; claims of privilege and penalty provisions. A copy of the Information is also available on the Commission website.

¹⁰⁴ Section 96.

Table 11: Registers of matters pursuant to the *Integrity Commission Act 2009*

REGISTER	2010*	2011	2012	2013**
Section 21 Authorisations	3	7	8	1
Section 47 – Notices to attend and give evidence and/or produce documents (total):	2	16	51[^]	49
(a)	0	0	1	0
(b)	0	7	9	25
(c)	2	9	42	24
Section 50 – Power to enter premises	0	0	3	0
Section 51 – Search warrants	0	0	0	0
Section 53 – Surveillance device warrants	0	0	1	0

*From 1 October 2010

**Until 30 August 2013

[^] One notice was issued under both ss 47(1)(a), (c)

Representation

A person required or directed to give evidence or answer questions as part of an investigation may be represented by a legal practitioner or other agent: s 49. The wording of s 49 fails to take into account that an agent (or a legal practitioner) representing the person under direction, may themselves be the subject of a complaint or investigation. The Commission has had direct experience where two people who were served with notices each requested representation by the same agent, who was themselves involved in the circumstances giving rise to the original complaint. Of the interviews conducted under notice since establishment, the majority of persons required or directed to give evidence have not sought to be represented. Where they are represented, such representation is usually by an agent (such as a union representative) rather than a legal practitioner.

Other integrity jurisdictions enable the agency to refuse representation by someone who is involved or otherwise compromised.¹⁰⁵

7.3.3 Entering and searching premises

In addition to the powers of an investigator under s 47 to compel a person to provide information or evidence or an explanation, an investigator may also, in accordance with s 50:

- enter any premises of a public authority without the need for consent or a search warrant; and
- enter other premises at any reasonable time with the consent of the occupier or under the authority of a search warrant.

¹⁰⁵ See for example: *Corruption and Crime Commission Act 2003* (WA) s142(4); *Police Integrity Act 2008* (NSW) s76(2)

Before exercising these powers, however, the Act requires the investigator to obtain a written notice of authorisation from the CEO.

Investigators have exercised powers under s 50 to enter the premises of public authorities on three separate occasions.

Section 51 also enables an investigator to apply to a magistrate for a warrant to enter (private) premises subject to the provisions of the *Search Warrants Act 1997*. For a search warrant to be issued, the magistrate must be satisfied that there are reasonable grounds to suspect that material relevant to the investigation is located at the premises. The Commission has not, through its investigators, applied for a search warrant to date.

There is inconsistent language used in s 51 in that s 51(3)(b) authorises an investigator to 'exercise the powers in s 52', and s 51(4)(a) requires the warrant to state that the investigator can exercise the investigator's powers under 'this Part'. The powers of an investigator under this Part¹⁰⁶ are not restricted to those in s 52. The Commission has identified this as a technical issue which would benefit from eventual amendment.¹⁰⁷

Where an investigator enters premises, s 52 applies. This section sets out the powers of an investigator while on premises. The powers include searching, using equipment and facilities, taking copies, seizing and taking away, inspecting and accessing computer equipment and securing against interference. In addition, while on the premises, the investigator can also direct a person to give reasonable assistance and answer questions.

Unlike s 47, when a person can be bound to keep confidentiality, there is no similar provision in s 52. Although a search of premises would usually be at the overt stage of an investigation, it can occur during a covert stage. Persons at the premises who are directed or required to respond to an investigator, or person assisting an investigator, should have the protections afforded by the confidentiality provisions of s 98. The Commission has identified this as a technical issue which would benefit from eventual amendment.

If an investigator takes anything away from the premises searched under s 52, they are required to issue a receipt in a form approved by the Board. The form of a receipt is an operational matter, with such matters properly vested in the CEO, in accordance with s 18 of the Act. The form of the receipt would more properly be approved by the CEO rather than the Board. The Commission has identified this as a technical issue which would benefit from eventual amendment.

7.3.4 Surveillance devices

Pursuant to s 53(1), where there is a complaint of serious misconduct, an investigator may, with the approval of the CEO, apply for a warrant under Part 2 of the *Police Powers (Surveillance Devices) Act 2006* (Police Powers (SD) Act) as if the investigator were a law

¹⁰⁶ Part 6 includes sections 44 – 59 inclusive.

¹⁰⁷ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 23.

enforcement officer within the meaning of that Act, and a reference in Part 2 to a relevant offence were read as a reference to misconduct.

As indicated in the Second Reading Speech¹⁰⁸

‘These are very weighty powers and the clear expectation is that they will only be used in cases where the gravity of the matter under investigation would justify it’.

The Commission has successfully applied for a surveillance device warrant on one occasion. The information gained from the surveillance device was instrumental in proving the actions of the relevant subject officer. At the time, the Commission had appropriate in-house expertise to manage the device itself. However, it is anticipated that assistance from a law enforcement agency would ordinarily be required when using surveillance devices; for example Tasmania Police, an interstate integrity agency, or the Australian Federal Police (AFP).

While an application for a surveillance device warrant is limited to serious misconduct, s 53 also limits such an application to when a ‘complaint’ is received, which means that should an own motion investigation into serious misconduct be commenced by the Board either under s 45 or s 89, the Commission would not be able to apply for a warrant. The Commission considers this to be an oversight and has identified it as a technical issue which would benefit from eventual amendment.¹⁰⁹

Section 53(2) of the Act makes the Commission’s records in relation to surveillance devices warrants subject to inspection by the Ombudsman as if the Commission was a law enforcement agency under the Police Powers (SD) Act, but does not impose any obligation on the Commission to maintain the same records as law enforcement agencies are required to do. The Commission, having consulted with the Ombudsman, has written to the Minister for Justice raising this issue.¹¹⁰

The Ombudsman inspected the Commission’s records in August 2013.

7.3.5 Offences relating to investigations

Section 54 sets out three offences relating to investigations:

- a person who, without reasonable excuse, fails to comply with a requirement or direction under s 47 within 14 days of receiving it commits an offence;
- a person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage to another person for or on account of that other person having given evidence to an investigator or produced or surrendered any record, information, material or thing to an investigator; and

¹⁰⁸ Second Reading Speech, *Integrity Commission Bill 2009*, House of Assembly, Deputy Premier Lara Giddings, 3 November 2009.

¹⁰⁹ Refer Appendix 1, Volume 2, ‘Schedule of identified technical issues, *Integrity Commission Act 2009*’, item 24.

¹¹⁰ The same issue is replicated in s 75, which enables an application for a surveillance device during an inquiry. In addition, s 75 is limited to a complaint, meaning that an own motion investigation into serious misconduct which reached an Integrity Tribunal would not be able to apply for a surveillance device.

- a person must not obstruct or hinder an investigator or any person assisting an investigator in the performance of a function or the exercise of a power under s 47.

The penalty which applies to each offence is significant, ranging up to 5000 penalty units (currently AUD\$650,000) or up to a year imprisonment.

Section 54 (2) does not protect a person from being threatened (by violence or other way) on account of providing information to an investigator.¹¹¹ Further, it restricts protection to matters concerning an investigator, rather than production to a person assisting an investigator, an assessor, or the Commission itself. For example, if a person is directed by a person assisting an investigator under s 52, to answer questions, and is subsequently threatened by another person (who may or may not be a public officer) for complying with that direction, there is no applicable offence in the Act.

In the current format on its face, there is no offence relating to an assessment, notwithstanding that an assessor can exercise the powers of an investigator pursuant to s 35(4). In addition the offences seem to be limited to the powers of an investigator under s 47 whereas the investigator has powers in other sections under Part 6 (ss 50 – 53 inclusive). The Commission has identified these limitations as technical issues which would benefit from eventual amendment.¹¹²

7.4 Investigations – reports and subsequent action

7.4.1 Reports

Sections 55 – 59 inclusive deal with the action once an investigation has been completed.

Standard of proof

The standard of proof used by Commission investigators when making factual findings is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters.

In considering whether or not to make a particular finding of fact, an investigator will bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

'...[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has

¹¹¹ See by way of example in other integrity Acts - *Independent Commission Against Corruption Act 1988* (NSW) s50 '...because a person is assisting the Commission, the safety of the person or any other person may be prejudiced or the person or any other person may be subject to intimidation or harassment...'; *Public Interest Disclosures Act 2002* s19 '...the person takes or threatens to take the action...'; *Corruption and Crime Commission Act 2003* (WA) s175 '...threaten to prejudice the safety...'

¹¹² Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 26.

been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.'

Report of findings

As a first step, s 55 requires the investigator to prepare a report of his or her findings for the CEO and the CEO then submits a report of the investigation to the Board.¹¹³ The Commission has adopted a considered view that the investigator should prepare a report of the investigation, which sets out the factual material obtained by the investigation, rather than findings which suggest judgments and decisions arising from factual material. An investigator is assigned to find out the facts of what has occurred so that the CEO can make a recommendation to the Board as to what should happen with that information (for example referral to the Police; the agency; the DPP). This is provided for in the Act (s 57). The Board then considers the recommendations of the CEO and makes the ultimate decision. The Board has recently confirmed that it considers it is the appropriate body to make judgments about the factual material presented by the investigator, considering the recommendations of the CEO. The Commission has identified this as a technical issue which would benefit from eventual amendment.¹¹⁴

Before the 'report of the investigation' is provided to the Board, the CEO may give a draft to:

- the principal officer of the relevant public authority;
- the public officer who is the subject of the investigation; and
- any other person who in the CEO's opinion has a special interest in the report.

The person provided with the draft is able to make written submissions or comments to the CEO in response to the draft report, within any time or manner as directed by the CEO. If a response is provided, the CEO is required to include the submissions or comments, or a fair summary of them, into the report before sending it to the Board. The opportunity to provide comment at this stage is a further step in the obligations of the Commission in respect of procedural fairness.¹¹⁵

It may take some time for this stage to be completed as reports of investigation are usually detailed and can be complex. An appropriate period for submissions or comments will vary depending on each matter, but will range from seven to 28 days. Further, if the submissions or comments significantly alter the draft report from that originally provided, it is possible that another period for submissions or comments may be required, although perhaps not to the same number of people.

In practice, the CEO will also canvass with the Head of Agency possible recommendations that the Board may consider making when referring the report of the investigation back to the agency. This is not provided for explicitly in the Act (see below at 7.4.2 regarding the limits of

¹¹³ By this stage the investigator will have afforded the subject officer, and any other person or public officers who have been subject to adverse comments, procedural fairness in accordance with s 46(1)(c).

¹¹⁴ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*', item 27.

¹¹⁵ Noting the obligations imposed by s 46(1)(c) on an investigator to observe the rules of procedural fairness.

the CEO's recommendations to the Board). However, ultimately any recommendations to an Agency Head are a matter for the Board.

The CEO is able to make the draft report subject to confidentiality provisions in accordance with s 98.

Report of investigation

Once that step has been completed, the CEO is to give the Board a 'report of the investigation' that includes:¹¹⁶

- the investigator's report; and
- submissions or comments given under s 56; and
- a recommendation referred to in s 57 (2).

The 'report of the investigation' is therefore comprised of a number of parts, and it seems to be the total 'report of the investigation', although in draft form, and which includes the investigator's report under s 55, which the CEO may provide for comment under s 56. The investigator's report is one piece of material that will be relevant to the CEO's recommendation to the Board. It is, however, most accurately described as a working or operational document and may be of considerable length and detail. As the CEO has responsibility for making the recommendation to the Board, the CEO should only be legislatively required to report to the Board on the outcome of the investigation (the Board can always require the CEO to produce the full investigation report if it wants it) and any submissions in response to the draft and a recommendation.

7.4.2 CEO recommendations

In forwarding a report to the Board, the CEO is to recommend:¹¹⁷

- that the complaint be dismissed;
- that the report of any findings and any other information obtained in the conduct of the investigation be referred to –
 - the principal officer of the relevant public authority for action;
 - an appropriate integrity entity for action;
 - an appropriate Parliamentary integrity entity;
 - the Commissioner of Police or DPP for action;
 - the responsible Minister;
 - a person who the CEO considers appropriate for action;
- that the Board recommend to the Premier that a commission of inquiry be established under the *Commissions of Inquiry Act 1995* in relation to the matter;
- that an inquiry be conducted by an Integrity Tribunal into the matter.

The report of the CEO under s 57 appears limited when compared with the investigator's report under s 55, which refers to a report of findings. The CEO is not empowered to make any findings nor observations beyond the recommendations under s 57(2). The Commission considers that the CEO should only be required to provide relevant material /information on the outcome of the investigation in draft form under s 57. Further it is appropriate that the

¹¹⁶ Section 57(1)

¹¹⁷ Section 57(2)

CEO provides a report to the Board on the outcome of the investigation, and has capacity to make observations and recommendations on the investigation and future action.

The reference to the CEO recommending the referral of the ‘report of any findings’¹¹⁸ is inconsistent with the language of s 58(2)(b) by which the Board may refer ‘report of the investigation’ (which is the CEO’s report under s 57) for referral. The Commission has identified this as a technical issue which would benefit from eventual amendment.¹¹⁹

In practice, the CEO does make recommendations to the Board about appropriate action which might be taken by principal officers or public authorities to counter the misconduct complained of (see 7.4.1 above, these recommendations will generally be put in draft to the agency for comment prior to going to the Board).

Case Study: Recommendation of the CEO from an own motion investigation

The Board commenced an own motion into an allegation of improper use of resources. The findings of the investigation report were that the use was not authorised by the relevant policy because the policy is silent on the appropriate arrangements for the use of the resource in the circumstances. No adverse findings were made by the investigation report.

Under s 57(1), the CEO is required to give the Board the investigator’s report and any submissions made in response to the provision of any draft of the report and a recommendation under s 57(2) as to how the Board should deal with the matter. The options available to the CEO under s 57(2) are to recommend to ‘dismiss the complaint’ or to refer the report of any findings of the investigation to another agency or recommend a commission of inquiry or an inquiry by an Integrity Tribunal. However, the option to dismiss is not available for own motion investigations as there is no complaint. The CEO did not consider it appropriate to recommend referral of the report to another agency.

The CEO was therefore unable to make a formal recommendation to the Board in accordance with the Act.

7.4.3 Board determination

Reports of investigations are considered by the Board at regular Board meetings. The whole of the documentation comprising the report is generally made available to each Board member at the Commission, prior to the Board meeting and Board members are individually able to discuss any aspects of the report with the CEO prior to formal consideration at the Board meeting. At the relevant Board meeting the investigator is available to respond to any queries the Board may have, as and when required.

Pursuant to s 58, following receipt of the report from the CEO, the Board **may** make a determination in relation to the subject matter of the report or recommendation to:

- dismiss the complaint;

¹¹⁸ The ‘report of any findings’ is the investigator’s report referred to at s 55(1).

¹¹⁹ Refer Appendix 1, Volume 2, ‘Schedule of identified technical issues, *Integrity Commission Act 2009*’.

- refer the report of the investigation and any information obtained in the conduct of the investigation to –
 - the principal officer of the relevant public authority for action;
 - an appropriate integrity entity for action;
 - an appropriate Parliamentary integrity entity;
 - the Commissioner of Police or DPP for action;
 - the responsible Minister;
 - a person who the Board considers appropriate;
- recommend to the Premier that a commission of inquiry be established under the *Commissions of Inquiry Act 1995* in relation to the matter;
- require that a further investigation be conducted by the investigator;
- determine that an inquiry be undertaken by an Integrity Tribunal under Part 7.

In referring a matter, the Board may make a recommendation as to appropriate action that it considers should be taken in relation to the matter. The person to whom a report is referred must notify the Board of any action taken in relation to the report within such time and in such manner as the Board may require.

Although the Board is not required to refer the 'complaint', a referral includes the report of the investigation and 'any information' obtained in the investigation. While the Board can recommend appropriate action, it has no ability to enforce sanctions or penalties for misconduct against the subject officer.

It is a matter for the person or authority to which the matter is referred whether the recommended action is taken.

It may not be appropriate for the entirety of the investigator's report to go to the relevant public authority – for example, the report may cover the actions of a number of authorities and it may not be appropriate to reveal the contents of matters concerning one agency (before it has had a chance to comment) to another agency. Similarly with respect to any public officer or officers, there could be privacy concerns.

There may also be a range of confidential material in the investigator's report that need not be seen by the public authority or public officer concerned (for example, evidence of collateral misconduct by others outside of authority/ongoing investigations).

Insofar as the Board may dismiss the complaint, the Act has not taken into account the fact that the investigation before the Board may be an own motion investigation under s 45 or s 89. This means that there is no mechanism to finalise an own motion investigation where the Board determines not to continue either by way of a referral, further investigation or proceeding to an Integrity Tribunal. The Commission has identified this as a technical issue which would benefit from eventual amendment.¹²⁰

¹²⁰ Refer Appendix 1, Volume 2, 'Schedule of identified technical issues, *Integrity Commission Act 2009*'.

Since establishment the Board has considered six completed reports of investigation from the CEO. Following determination by the Board, the report of the investigation with recommendations by the Board, are referred to principal officers of public authorities for action.

Case Study: Determination of the Board out of an own motion investigation

Under s 58(1), on receipt of a report from the CEO under s 57(1), the Board ‘may’ make a determination to take certain steps including dismissing a complaint, requiring further investigation, and referral to another body. The Act does not require the Board to take any of those steps.

The Board’s function of making recommendations arising from an investigation only arises when it refers an investigation report to another agency. If the Board decides not to make any determination to refer a report, it cannot then make a recommendation for appropriate action to any other body.

In the report of the own motion investigation which made no adverse findings, the Board did not have a complaint to dismiss nor did it wish to refer to the report to any agency – there is no discretion under the Act to refer anything less than the full report of the investigation. The Board’s only alternative then was to decline to make a determination under s 58(1). It follows that it could not make any recommendations under the Act even though the applicable government policy required amendment to deal with the matters investigated.

The Board requested the CEO approach the department responsible for the policy to suggest amendments to it to cover situations similar to those dealt with under the own motion investigation.

7.4.4 Notice of determination

Once the Board has made a determination, it is to give written notice to the principal officer of the relevant public authority: s 59(1). Alternatively, it may, if it considers it appropriate, given written notice to the subject officer, or any other person with a special interest as identified by the CEO. Such a person may be the complainant.

The notice provided under s 59 can be made subject to the s 98 confidentiality provisions.

7.5 Own motion investigations, s 45

7.5.1 Own motion investigations

The Board may commence an own motion investigation into certain matters ‘relevant to the achievement of the objectives of the Act in relation to misconduct’, including but not limited to:

- an investigation into misconduct by a public officer;
- an investigation into misconduct by a DPO;
- an investigation into misconduct or serious misconduct generally;
- an investigation into any of the policies, practices or procedures of a public authority or of a public officer, or the failure of those policies, practices or procedures.

Separately the Board can also commence an own motion investigation into Tasmania Police under s 89.¹²¹

A case for an own motion investigation is brought to the Board by the CEO, and is usually supported by relevant information justifying the commencement of an own motion investigation. To date the Board has commenced four own motion investigations.

Once a determination is made by the Board, the CEO appoints an investigator. The investigation then proceeds in the same way as an investigation of a complaint. The Board reserves own motion investigations for serious matters. It has used its power to commence an own motion for two separate matters where a complaint was originally referred to the relevant public authority and following audit by the Commission, additional concerns were identified.

Following appointment of the investigator, the CEO may, if considered appropriate, given written notice of the investigation to:

- the principal officer of any relevant public authority;
- any responsible Minister;
- any public officer suspected of misconduct;

in accordance with s 45(3). A written notice can be made confidential pursuant to s 98.

7.6 Integrity Tribunal

An Integrity Tribunal can only be established following the finalisation of an investigation and, on the determination of the Board in accordance with s 58(2)(e).

Part 7, ss 60 - 86 inclusive deals with the process and procedure around the operation of an Integrity Tribunal. Schedule 6, clauses 1 – 4 detail additional provisions in respect of hearings of an Integrity Tribunal. As a general principle, hearings of an Integrity Tribunal are to be open to the public. An Integrity Tribunal has power to control its own proceedings and can request Tasmania Police to maintain order. Specifically, an Integrity Tribunal has power to close hearings, exclude people from a hearing or prohibit reporting if there are reasonable grounds to do this (for example it may be considered necessary in the public interest or to protect the identity or privacy of a witness, or protect the reputation of a person or there may be a risk of prejudice to another investigation or court matter if the hearing is open).

The Integrity Tribunal must serve notice of the date of a hearing to any person who is the subject of the complaint and to the principal officer of the person who is the subject of the complaint. There is power for the Integrity Tribunal to apply to a Magistrate for a warrant to arrest a person who fails to appear at a hearing if they have been served with a notice to attend.

Significantly, the Act provides at s 86 that the costs of running an Integrity Tribunal inquiry, including legal and witness expenses, are funded from the Consolidated Fund, rather than

¹²¹ Dealt with in Chapter 8.

funded from the day to day budget of the Commission. As noted at the Second Reading Speech

‘These inquiries will not be cheap exercises and the Government does not anticipate that they will be needed very often. Nevertheless the Commission will be able to hold an inquiry when one is justified without having to make a case to government for extra funds. We expect the Commission will exercise this very unusual degree of financial independence responsibly and with due regard to the public interest, including the public interest in value for money.’¹²²

To date there have been no Integrity Tribunals convened by the Board.

Potential amendment – technical issues

There are some inconsistencies with the drafting of some of the sections relating to Integrity Tribunals. The inconsistencies are detailed in Appendix 1, Volume 2, ‘Schedule of identified technical issues, *Integrity Commission Act 2009*’. Essentially they are:

- s 68 – the penalty to be applied if there is non-compliance with an order or direction is inconsistent with other penalties in the Act;
- s 74(1) – the powers of an inquiry officer while on premises should be extended to persons assisting an inquiry officer;
- s 74(3) – the receipt to be issued should be approved by the CEO or Chief Commissioner, rather than the Commission itself;
- s 74(1) – extend the confidentiality provisions under s 98 to persons on premises to afford them the protection associated with confidentiality if they are required or directed to respond to an inquiry officer;
- s 78(1) and (2) – ensure consistent language around the use of the terms ‘allegations of misconduct’ and ‘complaints’; and
- s 80 and s 81 – extend the offences provision beyond just the Tribunal members or inquiry officers, and consider including the threat of violence or other detriment as an offence.

Each of the above suggested amendments were incorporated in a report of the Board under s 13(c), provided to both the Minister for Justice and the JSC in April 2013.¹²³ The JSC has advised the Commission that each of the identified technical issues and proposed amendments with the Act relating to Integrity Tribunals is supported in principle.

¹²² Second Reading Speech, *Integrity Commission Bill 2009*, House of Assembly, Deputy Premier Lara Giddings, 3 November 2009.

¹²³ Refer Appendix 1, Volume 2, ‘Schedule of identified technical issues, *Integrity Commission Act 2009*’.

CHAPTER EIGHT

Tasmania Police

8.1 Tasmania Police and the Commission

8.1.1 Jurisdiction

Tasmania Police is a public authority for the purposes of the Act: s 5(1)(d). Tasmanian police officers of commissioned rank (i.e. inspectors and above) are designated public officers (DPOs),¹²⁴ and non-commissioned police officers are a category of public officers.

Part 8 of the Act deals with misconduct by 'certain public officers', and that includes police misconduct under Division 2. The effect of Part 8 is to create additional obligations for the Commission when dealing with misconduct by police officers (and DPOs), over and above the processes set out in the previous Parts of the Act relating to complaints.

Police misconduct – Integrity Commission Act

Police misconduct is defined as 'misconduct by a police officer'. The Commission has formed the view that misconduct by a police officer is a subset of misconduct under the Act.¹²⁵ Relevantly, police misconduct is only concerned with police officers, and does not include civilian employees who are state public servants, and who fall within the general provisions in the Act concerning misconduct.

Sections 88 - 91 inclusive set out the Commission's obligations with respect to police misconduct.

In dealing with police misconduct, the Commission is to have regard to the principles of operation set out in s 9, which require it to perform its functions and exercise its powers in such a way that includes, but is not limited to, working cooperatively with public authorities; improving the capacity of public authorities; ensuring misconduct is dealt with expeditiously and to not duplicate or interfere with work that is being undertaken appropriately.

With respect to police misconduct, the Commission may, in accordance with s 88:

- assess, investigate, inquire into or otherwise deal with complaints relating to serious misconduct by a police officer in accordance with Parts 6¹²⁶ and 7¹²⁷; or
- provide advice in relation to the conduct of investigations by the Commissioner of Police (the Commissioner) into police misconduct; or
- audit the way the Commissioner has dealt with police misconduct, in relation to either a particular complaint or a class of complaint; or
- assume responsibility for and complete in accordance with Parts 6 and 7 an investigation commenced by the Commissioner into misconduct by a police officer.

¹²⁴ Although 'commissioned police officer' is not defined in the Act, under the *Police Service Act 2003* it means a police officer of or above the rank of inspector, s 3.

¹²⁵ Refer paragraph 6.1.2 for a definition of 'misconduct'.

¹²⁶ Part 6 is the framework for conducting investigations.

¹²⁷ Part 7 deals with Integrity Tribunals.

If requested by the Commission, the Commissioner is to give the Commission reasonable assistance:

- to undertake a review or audit; or
- to assume responsibility for an investigation.

If the Commission assumes responsibility for an investigation, the Commissioner must stop his or her investigation or any other action that may impede the investigation, if directed to do so by the Commission.

Consequently, the Commission's role with respect to complaints it receives about police misconduct is reserved for matters involving serious misconduct and misconduct in relation to commissioned police officers.

Police misconduct – Police Services Act 2003

The management of complaints by police, about police conduct, is governed by legislative provisions contained within the *Police Service Act 2003* (PS Act).

Tasmania Police advises that it will investigate complaints in accordance with the PS Act, which stipulates that all complaints must be in writing, or in a manner approved by the Commissioner, and made within six months after the conduct became known to the complainant.¹²⁸

Tasmania Police deals with allegations of misconduct against its officers in accordance with a set of protocols known as the 'Graduated Management Model' (GMM).¹²⁹

Upon receipt, some complaints may be dismissed; s 46(2) of the PS Act sets out the factors which may be taken into account in determining to dismiss a complaint. Section 47 of the PS Act allows for the complaint to be resolved by 'conciliation' at any stage.

Under the GMM, complaints are classified into two categories: 'Class 1 misconduct' or 'Class 2 misconduct'. If a complaint is not dismissed under s 46(2) of the PS Act or conciliated, a divisional Inspector is to decide how the complaint should be categorised. If in doubt, Professional Standards¹³⁰ is consulted.

As a general rule, Class 2 matters are the more serious, and are subject to investigation by Professional Standards or by personnel as directed by the Deputy Commissioner of Police. Class 2 complaints will generally involve allegations of the commission of an offence or a crime by a police officer.

Class 1 complaints are those which, even if proven, are likely to result in internal disciplinary measures – but not dismissal.

Upon completion of an investigation of a complaint of police misconduct, the Commissioner (or, in practice, the relevant Commander) must decide whether there has been a breach of the Tasmania Police Code of Conduct.¹³¹ If there has been a breach, disciplinary action may

¹²⁸ Source: <http://www.police.tas.gov.au/about-us/compliments-and-complaints/>
Viewed 21 August 2013.

¹²⁹ Graduated Management Model for Complaints Against Police, Tasmania Police, March 2010

¹³⁰ Refer to paragraph 8.1.3.

¹³¹ Refer s 43(2) PSA

result which might extend from counselling to dismissal.¹³² If there has not been such a breach, other corrective action might still be warranted.

8.1.2 Memorandum of understanding

Tasmania Police and the Commission entered into a Memorandum of Understanding (MOU) on 1 October 2010. The MOU was entered into in a 'spirit of co-operative endeavor' by both agencies in recognition of the need to deal effectively and efficiently with police and public officer misconduct in Tasmania.

While the MOU has no legislative force, the agencies agreed to work collaboratively towards:

- improving the culture of policing;
- enhancing leadership, supervision and management;
- implementing and applying appropriate misconduct and corruption prevention strategies; and
- providing a better policing service to the Tasmanian community.

Both Tasmania Police and the Commission have agreed to review the MOU towards the end of 2013, following the completion a joint review of the Tasmania Police Graduated Management Model (GMM).¹³³

The MOU covers:

- the exchange of information and intelligence (as permitted by law);
- access to Tasmania Police data;
- timely notification in writing of suspected misconduct involving a commissioned police officer (as a DPO);
- timely notification in writing of suspected serious misconduct by a police officer, whether commissioned or non-commissioned;
- referral of complaints to Tasmania Police;
- Tasmania Police related deaths;
- appointment of special constables;
- use of Tasmania Police audio visual recording equipment by the Commission for serious matters;
- establishment of a 'Joint Agency Steering Group';
- establishment of an 'Operational Liaison Group';
- establishment of protocols;
- appointment of liaison officers; and
- the provision of police officers to the Commission, pursuant to the Act.

The MOU also provides that dealings between the Commission and Tasmania Police are not restricted to matters or protocols contained in the MOU and a commonsense approach is to prevail in relation to interaction between the agencies.

¹³² Refer s 43(3) PSA. Where an allegation of Class 2 misconduct has been sustained, the Commander makes a recommended outcome to the Deputy Commissioner. Where that recommendation is for demotion or termination, the Deputy Commissioner consults with the Commissioner.

¹³³ See paragraph 8.1.8.

Notwithstanding the MOU, the relationship between the Commission and Tasmania Police has at times been tested. This is understandable given the newness of the relationship and the fact that Tasmania Police has not previously been subject to the level of oversight which the Commission can perform. Both agencies have sought legal advice at various times, in relation to the jurisdiction of the Commission and obligations, if any, on Tasmania Police to respond to the Commission. Where possible, the agencies have entered into working arrangements in order to accommodate requests from the Commission.

In an attempt to clarify some aspects of the Commission's jurisdiction, some amendments were made to the Integrity Commission Act, by the *Integrity Commission Amendment Act 2011*. The Hon. Brian Wightman, Minister for Justice and the Attorney-General, stated in the second reading speech:

'The oversight of the activities of Tasmania Police by the Commission is admittedly a complicated matter and requires more consideration before any legislative change is made, if in fact any is found to be necessary.'¹³⁴

8.1.3 Complaints, notifications and audits

The Commission may receive complaints about police officers under s 33.

Where a complaint of misconduct, serious or otherwise, is made (to the Commission) against a police officer who is a DPO, it is to be dealt with in accordance with s 87.

A complaint that alleges serious misconduct by a police officer who is not a DPO (i.e. a senior sergeant or below) may be dealt with in accordance with s 88(1)(a) which, with s87, is within Part 8 of the Act. Effectively this means that the complaint of serious misconduct can be processed in accordance with the framework set out under s 35 – 59: from triage to dismissal or non-acceptance, assessment or referral and when appropriate, investigation.

However, Part 8 does not stipulate a process by which the Commission might deal with a complaint of misconduct (as opposed to serious misconduct) against a police officer who is not a DPO. In other words, the general framework set out under s35 – 59 has no application, with the effect that the Commission is unable to deal with a complaint of misconduct against a police officer who is not of commissioned rank. (The only recourse for the Commission would be to investigate such a complaint via an own motion investigation.)

Professional Standards – Tasmania Police

Class 2 complaints about police officers made internally to Tasmania Police, are investigated in accordance with the provisions of Division 2 of Part 3 of the PS Act and the GMM, by Professional Standards Command.

In addition, and in accordance with the MOU, where Professional Standards receive a complaint about:

¹³⁴ Tasmania, House of Assembly (2011) *Debates*, 22 November, p. 38.

- a commissioned officer (a DPO), and it is reasonably suspected that the officer has engaged in misconduct or serious misconduct; or
- any non-commissioned officer and it is reasonably suspected that the officer has engaged in serious misconduct

the complaint is notified to the Commission, as is a report on the outcome of the internal investigation by Professional Standards. The notification from Professional Standards is not mandated by the Act, but is made consequent to the MOU, as a voluntary notification. Notification itself does not invoke the jurisdiction of the Commission – only a complaint or an own motion investigation can do so. Notification ensures the Commission is aware of trends concerning misconduct within Tasmania Police including misconduct prevention strategies and complaint handling.

As a matter of practice, Tasmania Police does not notify the Commission when it has information (however received) about misconduct involving public officers who are not police officers, and which it investigates for criminality. Accordingly, if Tasmania Police investigates alleged/potential misconduct about a public officer and conclude there is no alleged crime or criminal offence and/or no prospect of a successful conviction, the alleged misconduct is not then advised/referred to/ or otherwise notified to the Commission.

Table 12: Complaint data, Tasmania Police

	2010/11	2011/12	2012/13
Complaints	28	38	23
Allegations	40	73	65
s 35 Referrals	6	19	9
s 38 Referrals	1	4	0
Assessments	4	4	0
Investigations	1	0	0
Own Motion investigations	1	0	0

Case study: internal police investigation of police shooting

No mandate to audit under s 88(1)(c)

An internal police investigation commenced into a shooting of an alleged offender by a police officer. No formal complaint of misconduct was made to anyone with respect to the officer concerned. The internal police investigation, although still ongoing, had not revealed any evidence of misconduct, or suspected misconduct on the part of any officer involved. The offender admitted in a police interview that he intended that police shoot him and later pleaded guilty to the offence of aggravated assault with respect to the officer who shot him.

The Commission sought to obtain documentation from investigating officers relevant to the internal investigation in the purported exercise of its power under s 88(1)(c) of the Act which enables the Commission to audit the way the Commissioner has dealt with police misconduct in relation to either a particular complaint or a class of complaint. Both Tasmania Police and the Commission sought legal advice to clarify the Commission's jurisdiction under s 88.

Advice provided to both agencies is that there must be a complaint (or class of complaints) made with respect to police misconduct before the Commission may, under s 88(1)(c) audit the way the Commissioner has dealt with misconduct. Further there is no other provision in the Act that might possibly authorise the Commission to audit, monitor or oversee a police investigation (other than commencing an investigation on its own motion) in the absence of a complaint about misconduct.¹³⁵

Access was therefore refused to the Tasmania Police investigation on the basis that the Commission had no jurisdiction, there having been no complaint made about misconduct of any police officer.

The Act does not confer a power to monitor or audit a police investigation where there has been no complaint. There was no complaint made against any of the officers involved in the actual shooting¹³⁶ and investigations by police did not indicate any misconduct or suspected misconduct on their part. On that basis, there is no apparent misconduct for the Commissioner to deal with, and therefore no authority for any audit to be conducted by the Commission pursuant to the Act.

Further, the requirement that the Commission perform its functions and exercise its powers in such a way as to not duplicate or interfere with work that it considers has been undertaken or is being undertaken appropriately by a public authority suggests that even if there were a complaint about misconduct in similar matters (i.e. a police shooting), the Commission would have no business involving itself in or interfering with the investigation unless it had reason

¹³⁵ Section 8(1)(m) which provides that a function of the Commission, when monitoring an investigation into misconduct, is to gather evidence or ensure evidence is gathered for specified purposes, is not regarded as conferring a power to monitor or audit a police investigation where there has been no complaint about misconduct.

Similarly, the function of monitoring or auditing imposed under s 8(1)(q) is imposed only with respect to the dealing with or investigation of a complaint about misconduct in a public authority.

¹³⁶ There was an incidental complaint to Tasmania Police, associated with the shooting, complaining that police had prior notification of threats and took no action.

to believe that the investigation was not being conducted reasonably and properly or the manner of its conduct suggested misconduct in itself.

Tasmania Police advised that it remained committed to working cooperatively with the Commission and, despite the fact that the shooting incident did not appear to involve any misconduct on the part of police, was content for Professional Standards investigators to continue to brief Commission staff on the progress of the investigation. However, the Commission was not provided with documentation about the investigation – given the Commission had no jurisdictional mandate.

It is notable that where a person dies or is injured by a police officer discharging a firearm, Tasmania Police policy is that Internal Investigations (within Professional Standards) will conduct a full and independent investigation; *Tasmanian Police Manual*, version 11 November 2010, 10.11 'Post Police Shooting Procedures'. However, for the reasons explained above, the ability of the Integrity Commission to have a role in such matters is doubtful.

Notwithstanding the absence of a formal complaint, the Commission considers that it should have some role to play where police investigate police, particularly for those investigations where there has been a death or life threatening injury associated with police contact. This will ensure not only that proper process is followed but that it is seen to be followed.

Currently the MOU does provide that the Commissioner will notify the CEO in writing as soon as possible 'in the event of a Tasmania Police related death when there is a suspicion of misconduct or serious misconduct, including but not limited to, deaths in Tasmania Police custody or presence.'

Case Study: injury caused by collision with police vehicle

No mandate to access information

A police vehicle collided with a youth and resulted in the youth sustaining fractures to both legs. The youth had allegedly been a passenger in a stolen motor vehicle that had been pursued by the police vehicle. The incident occurred after the stolen motor vehicle had been brought to a stop and allegedly while the occupants had attempted to flee.

The Commission did not receive a complaint about the matter, but after information was brought to its attention, the Commission sought access to the Tasmania Police file in respect of the internal investigation of the incident. Tasmania Police resisted production of the file, asserting there had been no internal investigation as the incident had been treated as a traffic matter – s.88 of the Act therefore having no application.

The Tasmania Police file was subsequently obtained by the Commission, after the Acting CEO made application under the *Right to Information Act 2009* (RTI Act).

After considering the RTI file, the Commission wrote to Tasmania Police identifying a number of deficiencies and suggesting that an internal investigation be conducted. Tasmania Police subsequently implemented an internal investigation.

Operational Liaison Group

The Commission and Tasmania Police interact on a regular basis through several forums. One of those is the Operational Liaison Group (OLG) which meets approximately every quarter at either Police Headquarters or the Commission. Members of the OLG are generally:

Commission	CEO; Deputy CEO and General Counsel.
Tasmania Police	Deputy Commissioner, Commander in Charge of Professional Standards and Principal Legal Officer.

The primary focus of the OLG is on operational issues affecting both agencies and to facilitate cooperation and assistance and information exchange.

At each meeting the Agenda will include an update from Professional Standards; an update from the Commission about any matters involving Tasmania Police (subject to any confidentiality provisions which might apply); a review of liaison and contact information; any other business. In the past other business has included interim reviews of the MOU; legal issues; availability of police officers for particular investigations including authorisation under s 21 of the Act; the 2012 audit of police complaints; any joint matters; and access to police data. The Commission considers the OLG has been a useful access point for both parties.

Joint Agency Steering Group

The Joint Agency Steering Group (JASG) is a high level strategic meeting between the CEO and the Commissioner. The primary focus of JASG is to ensure the collaboration and cooperation between the two agencies, the development of strategies, the implementation of new strategies and the prompt resolution of problems that may arise.

After initial quarterly meetings, JASG meetings are now conducted on an annual basis.

8.1.4 Assessment and investigation of complaints

The process of dealing with complaints made to the Commission about Tasmania Police follows the same framework as that set out in Chapters 6 and 7.

Matters notified to the Commission by Professional Standards, and which are not complaints, are also given a 'Misconduct Matter' (MM) number and proceed through the triage process. However an assessor is not appointed and the Commission has no capacity to invoke its powers unless and until a complaint is received or an own motion investigation is commenced.

Case Study: Assessment

Assessment only available when a complaint is received

In early 2012, Tasmania Police officers conducted two strip searches of a 12 year-old girl in the course of executing a search warrant as part of a drug-related investigation. No drugs were located on the girl during either strip search.

The incident was the subject of media and public comment and the Deputy Commissioner of Police announced he would conduct a review of the incident.

Because the matter was ‘reviewed’ – as opposed to being made the subject of an internal investigation – it did not fall within the Integrity Commission’s jurisdiction, and was not able to be made the subject of audit.

Initially, no complaint about the matter was made to the Commission, and no notification was provided by Tasmania Police (because Tasmania Police did not make the issue the subject of internal investigation). Subsequently, a complaint was made to the Commission about the incident and the complaint was accepted for assessment. This matter illustrates the difficulty that arises with respect to s 88 audits – as well as the Commission’s lack of jurisdictional capacity where there is no complaint.

8.1.5 Audit of police complaints

Section 88(1)(c) enables the Commission to audit the way the Commissioner has dealt with police misconduct in relation to either a particular complaint or a class of complaint.

In 2013 the Commission conducted its first audit of how Tasmania Police managed its complaints. The Commission’s audit was wide in its scope, covering all complaints of police misconduct dealt with and finalised by Tasmania Police during calendar year 2012 (i.e. 1 January – 31 December 2012 – the audit period).¹³⁷ The audit was conducted with the full agreement and co-operation of Tasmania Police and the results have been made publicly available.¹³⁸

Being the first audit, the results provide a benchmark for future comparison and analysis. It is proposed that the Commission will conduct audits of this nature at least annually, although future audits are likely to be undertaken on a sampling basis and may focus specifically on issues such as allegation types or allegations by police district or work unit.

Similar processes are undertaken by oversight bodies in other Australian policing jurisdictions, and assist in ensuring the transparency and effectiveness of the processes by which allegations of police misconduct are internally dealt with in the respective jurisdictions.¹³⁹

8.1.6 Own motion investigations

The Board may, on its own motion, determine that the Commission should conduct an investigation (again, in accordance with Parts 6 and 7) in respect of any matter that is relevant to police misconduct. The power to commence an own motion investigation about police misconduct is consistent with the own motion powers of the Board under s 45. Matters relevant to police misconduct may include but are not limited to:

- an investigation into the conduct of a commissioned police officer; or
- an investigation into police misconduct generally; or

¹³⁷ This included complaints initiated in 2011 which were finalised in 2012.

¹³⁸ Refer Appendix 6, *Report of the Integrity Commission No 2 of 2013*.

¹³⁹ See for example s 47(1)(b) of the *Crime and Misconduct Commission Act 2001* (QLD) (CMC auditing and review of Queensland Police complaint handling) and s 40XA(2) of the *Australian Federal Police Act 1979* (Cwlth) (Ombudsman review of AFP complaint handling).

- an investigation into any of the policies, practices or procedures of Tasmania Police in relation to misconduct.

For the purposes of an own motion investigation, the Commission may conduct an investigation into:

- whether or not any particular police officer or other person may have committed misconduct; or
- whether or not any person under investigation who was a police officer at any relevant time is still a police officer at the time of the investigation; or
- any of the policies, practices or procedures of Tasmania Police in relation to misconduct.

The Board may give written notice of its determination to conduct an investigation on its own motion to the Commissioner.

Similar to the process adopted for an own motion determination under s 45, a case for an own motion investigation under s 89 is brought to the Board by the CEO, and is usually supported by relevant information justifying the commencement of an own motion investigation. To date the Board has commenced 1 own motion investigations under s 89.

Once a determination is made by the Board, the CEO then appoints an investigator in accordance with Part 6. The investigation then proceeds in the same way as an investigation of any other complaint, but subject to the additional provisions under Part 8 which include the opportunity for the Commissioner to comment on a report where it is adverse and obligations around written responses where action is requested to be taken. The Board reserves own motion investigations under s 89 for serious matters.

The own motion powers under s 89, although similar to those under s 45, do not contain specific provisions with respect to appointing an investigator.

Confidentiality

The s 98 provisions with respect to confidentiality apply to a notice of determination to the Commissioner, if the notice provides that it is a confidential document.

Notably the s 98 provisions do not extend to the Commission's role under s 88. For example, if the Commission assumes responsibility for and completes an investigation commenced by the Commissioner into misconduct by a police officer in accordance with s 88(1)(d), the Commissioner is required to stop his or her investigation or any other action that may impede the investigation, if directed to do so by the Commission: s 88(3). Given that the investigation by the Commission will invoke the Commission's powers, there may be circumstances in which the Commission would want the Commissioner to maintain confidentiality over the Commission's investigation. The failure to extend the confidentiality provisions seems to be at odds with the Commission's role.

To date the Commission has not directed the Commissioner to stop an investigation so that the Commission can assume responsibility.

8.1.7 Consultation and response

In accordance with s 90, if at any time during the course of an investigation into police misconduct, it appears to the Commission that there may be grounds for making a report adverse to Tasmania Police, the Commission may, before making the report, give the Commissioner the opportunity to comment on the report.

If the Commission requests the Commissioner to take any action, or to conduct a further investigation, the Commissioner must give a written response to the Commission stating:

- whether or not the Commissioner proposes to take the action or conduct the further investigation; and
- if the Commissioner proposes not to take the action or not to conduct the further investigation, the reasons for that decision.

Following the completion of any investigation in accordance with s 91(1), the Commissioner is to report the outcome of that investigation to the Commission.

8.1.8 Joint reviews

In 2012 Tasmania Police and the Commission agreed to a joint review of the GMM – Tasmania Police’s internal complaints handling system. The Commission is supplying a research officer to support the review, which is being managed at the Inspector level by Tasmania Police and by the CEO for the Commission.

The review will assist Tasmania Police complaint handling to be compliant with advances in best practice, and consistent with developments in other jurisdictions. The final report on the efficacy of the GMM will be presented to the Deputy Commissioner of Tasmania Police in the latter part of the 2013. It is anticipated that the report will refer to the results of the consultations, the findings of the Commission audit,¹⁴⁰ a detailed survey of best practice, and a comprehensive analysis of procedures across jurisdictions.

8.2 Access to Tasmania Police data

The MOU entered into between the Commission and Tasmania Police included a clause allowing the Commission online access to relevant Tasmania Police data, subject to all relevant legal restrictions. In 2011 the Commission sought access to Tasmania Police’s internal intranet site and the online record of investigations systems (IAPro) by way of electronic desktop access¹⁴¹ at the Commission.¹⁴²

¹⁴⁰ Refer para 8.1.5.

¹⁴¹ Electronic online access was proposed to be subject to password and other standard security protections, including being auditable. It was to only occur in circumstances connected to the statutory functions of the Commission.

¹⁴² Section 102 of the Act enables personal information within the meaning of the *Personal Information Protection Act 2004* to be disclosed to the Commission for the purpose of and in accordance with the Act.

Table 13: Tasmania Police database systems

Tasmania Police database systems
<p>INTREPID Central Enquiry (ICE) is designed to provide a search capability that runs over the top of all the Tasmania Police databases, effectively creating a 'one stop shop'.</p> <p>A police Database search enables access to information on prosecutions, traffic infringement notices (TINS or FIND), stolen motor vehicles (SMV), firearms and information data management system (IDM). Other databases include domestic violence, online charging, offence reporting system (ORS) and family violence management system (FVMS).</p> <p>IDM is Tasmania Police's intelligence database and allows for the storage, collation and allocation of information reports. A number of other reports can also be submitted via IDM including Missing Persons reports and child and family services referrals.</p> <p>The internal affairs system (IAPro) is used to record, manages and analyses complaints against police.</p> <p>In addition to the above there are other miscellaneous systems which can be searched individually including online charging system, the Forensic Register, court file tracking and offence reporting.</p>

Currently the Commission accesses data held by Tasmania Police on a request basis, where the Commission seeks specific data about an individual and specifies on each occasion that it is for a purpose and function under the Act. The difficulties with this approach are that the Commission is unable to maintain absolute confidentiality of information in relation to its own functions – Tasmania Police will always be aware of the information the Commission is seeking.

The lack of immediate access means that the Commission is restricted in responding to complaints – specific background information may be relevant about a particular complainant, or subject officer or witnesses, and therefore relevant to any determination by the Commission to assess, dismiss or investigate. For example the fact that a complainant may have a criminal history or subject to a mental health order may be relevant to meeting a complainant, or witness in person.

It is also considered that access to relevant information will confirm sources of information, and allow the Commission to independently analyse information received, and to cross reference the checks undertaken by Tasmania Police when the Commission audits or monitors a matter. It would also make the Commission's audits of Tasmania Police complaints much easier.

Electronic desktop access would significantly enhance the operational work undertaken by the Commission, and would be in line with access available to interstate integrity agencies and the respective State and Commonwealth police forces.

Legal opinion is that electronic desktop access would be the grant of unlimited access to the personal information in the control of the Commissioner, and that such disclosure would not be for a purpose of and in accordance with the Act. The opinion is that to grant *unlimited*

access there must be an ascertainable purpose for the granting of that access at every point in time when access is *available*, not simply when access actually occurs. This is because it is the conduct of the personal information custodian (the Commissioner), rather than the Commission, which attracts the operation of the personal information protection principles in the *Personal Information Protection Act 2004* (PIP Act). Accordingly, the granting of continuous access to personal information without restriction is to be treated as a continuing act of use or disclosure of the personal information by the Commissioner.

Authorisation for the Commission to have unlimited access to Police databases (electronic access, but limited to a function under the Act) would require an express statutory provision, and in the absence of that, the granting to the Commission of such unlimited access will inevitably involve a contravention of the PIP Act by the Commissioner, particularly during periods when access is not required by the Commission to fulfil its statutory functions (i.e. when the electronic password protected database is idle).

Access to Tasmania Police databases, as per current arrangements, and any future arrangements, are subject to the Commission complying with obligations imposed by any third party providers, concerning access limitations, and fees.

The issue of desktop access to data was raised in the Board's s 13(c) report to the JSC as an identified technical issue. Further information was supplied to the JSC in mid July 2013, in particular with respect to consultation with the Tasmania Police about the issue of online access to databases. The Commission has not consulted with any agencies, including Tasmania Police about what particular amendment would need to be made to achieve online access. The Commission understands that should an amendment be drafted, such amendment will be subject to comment by the relative agencies as per the normal progress of bills.

Prohibition of access to certain data

During the course of investigations conducted by Tasmania Police, whether concerning a police officer or other public officer, Tasmania Police can access certain telecommunications data, consequent to its status as a 'law enforcement agency' under the *Telecommunications (Interception and Access) Act 1979* (TIA Act). In the past the Commission has sought access to certain police files in order to either progress an assessment or investigation of a complaint, or during the audit or review process.

The Commission sought clarification as to whether disclosure of relevant telecommunications data to the Commission (and previously disclosed to Tasmania Police under Division 4 of the TIAA) can also be made to the Commission, where the disclosure was for a purpose or function under the Act.

Advice is that it doesn't matter what the purpose of the disclosure is, or what powers the Commission is using. The Commission is not and can never be (under the present terms of the Act) in the business of enforcing the criminal law, or a law imposing a pecuniary penalty. In those circumstances the Commission is unable to consider Tasmania Police files that contain any telecommunications data. Accordingly, files disclosing telecommunications data are either identified by Tasmania Police and withheld from the Commission, or, where identified by the Commission, returned without consideration of the contents.

This has meant that in some cases, the Commission has been unable to finalise an audit or otherwise progress a complaint. Similarly, in its audit of Tasmania Police misconduct matters, files containing telephone records had to be returned to Tasmania Police without audit.

8.3 Assistance with Commission misconduct work

The MOU provides that the Commissioner agrees to provide operational and investigative assistance where practicable and appropriate, to the Commission. Since 1 October 2010 the Commissioner has agreed to provide seven police officers to the Commission to assist in various investigative roles.

From a financial aspect, the Commissioner generally meets the normal salary expenses, including but not limited to the normal shift and penalty allowances and superannuation. Additional expenses, including but not limited to overtime, travel, transport, computers, telecommunication and training are met by the Commission.

The officers have been authorised to assist the Commission in accordance with s 21 and are usually assigned to a particular investigation – which may or may not involve police misconduct. All police officers authorised under s 21 are obligated by s 94(1)(d) to maintain confidentiality in respect of all matters which come to their knowledge in the course of their duties under the Act. Further, all officers also voluntarily agree to be bound by the Commission's Code of Conduct.

Usually, when the Commission identifies a need for operational or investigative assistance, the CEO requests assistance from the Commissioner in writing. If the Commissioner agrees to release personnel, Tasmania Police will advertise for interested persons within the force. The CV and relevant personnel files are then forwarded to the Commission and the CEO retains the right to approve the appropriate candidate(s) for work at the Commission.

CHAPTER NINE

Confidentiality, privilege, legal relationships and legislative amendment

9.1 Confidentiality

9.1.1 Confidential notices – s 98

Section 98 of the Act affords the Commission confidentiality over certain notices which can be given or served on a person. Specifically, a person who is served with a notice under s 98 of the Act must not disclose to another person:

- the existence of the notice; or
- the contents of the notice; or
- any matters relating to or arising from the notice

unless the person on whom the notice was served or to whom the notice was given has a reasonable excuse.

A significant penalty of up to AUD\$260,000 may apply if a person breaches the confidentiality notice without reasonable excuse. Following amendment in December 2011¹⁴³, an additional section was inserted into the Act to ensure that a person, who was made aware of the existence of a notice by way of reasonable excuse, could not themselves disclose the notice or contents of the notice, or any matters arising from the notice, without a reasonable excuse applying.

Matters relating to or arising from a notice are defined in s 98(1B) and include, but are not limited to:

- obligations or duties imposed on any person by the notice; and
- any evidence or information produced or provided to the Commission or an Integrity Tribunal; and
- the contents of any document seized under the Act; and
- any information that might enable a person who is the subject of an investigation or inquiry to be identified or located; and
- the fact that any person has been required or directed by an investigator or an Integrity Tribunal to provide information, attend an inquiry, give evidence or produce anything; and
- any other matters that may be prescribed (no matters are currently prescribed).

A reasonable excuse¹⁴⁴ may be where:

- the disclosure is made for the purpose of –
 - seeking legal advice in relation to the notice or an offence against sub-s (1); or
 - obtaining information in order to comply with the notice; or
 - the administration of the Act; and

¹⁴³ No 55 of 2011, applied 22 December 2011

¹⁴⁴ Section 98(2)(a) and (b)

- the person informs 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 Commission (or a Tribunal) may advise a person in receipt of a notice that it is no longer confidential. Once that occurs, the obligations imposed by the notice and the penalty provisions will no longer apply.

Section 98 notices are limited to the following functions set out in Table 14.

Table 14: Functions to which s 98 confidentiality notices can attach

Section	Function	Applied by
35(5) applying to s 35(3)	<p>If the assessor conducts an assessment in relation to a complaint about a public officer, the assessor may, if he or she considers it appropriate, give written notice of his or her intention to conduct the assessment to –</p> <p>(a) the principal officer of the relevant public authority; and</p> <p>(b) the complainant; and</p> <p>(c) any public officer to whom the complaint relates.</p>	Assessor
38(3) applying to s 38(2)	<p>The CEO is to give written notice of his or her determination under subsection (1) to the principal officer of any relevant public authority and may, if he or she considers it appropriate, give written notice to –</p> <p>(a) the complainant; and</p> <p>(b) any public officer to whom the complaint relates.</p>	CEO
44(4) applying to s 44(2)	<p>If a determination to investigate a complaint is made, the CEO may, if he or she considers it appropriate, give written notice to –</p> <p>(a) the principal officer of any relevant public authority; and</p> <p>(b) the complainant; and</p> <p>(c) any public officer who is the subject of the complaint –</p> <p>that an investigator has been appointed to investigate the complaint.</p>	CEO
45(4) applying to s 45(3)	<p>If the Board makes a determination under sub-s (1), the CEO may, if he or she considers it appropriate, give written notice of the investigation to –</p> <p>(a) the principal officer of any relevant public authority;</p>	CEO

	<p>and</p> <p>(b) any responsible Minister; and</p> <p>(c) any public officer suspected of misconduct.</p>	
47(7) applying to s 47(1)	<p>In conducting an investigation under s 46(1), the investigator, by written notice given to a person, may require or direct the person to do any or all of the following:</p> <p>(a) to provide the investigator or any person assisting the investigator with any information or explanation that the investigator requires;</p> <p>(b) to attend and give evidence before the investigator or any person assisting the investigator;</p> <p>(c) to 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.</p>	Investigator
56(5) applying to s 56(2)	<p>A notice may be attached to a draft of a report specifying that the draft of the report is a confidential document.</p> <p>The 'draft of a report' is the report referred to at s 56(1).</p> <p>Before finalising any report for submission to the Board, the CEO may, if he or she considers it appropriate, give a draft of the report to –</p> <p>(a) the principal officer of the relevant public authority; and</p> <p>(b) the public officer who is the subject of the investigation; and</p> <p>(c) any other person who in the CEO's opinion has a special interest in the report.]</p>	CEO
59(2) applying to s 59(1)	<p>The Board –</p> <p>(a) is to give written notice of its determination to the principal officer of the relevant public authority; or</p> <p>(b) may, if it considers it appropriate, give written notice of its determination to –</p> <p>(i) the public officer who was the subject of the investigation; or</p> <p>(ii) any other person who, in the opinion of the CEO,</p>	Board

	has a special interest in the matter.	
65(2) applying to s 65(1)	At the commencement of an inquiry by an Integrity Tribunal the Integrity Tribunal must give the public officer who is the subject of the inquiry written notice of the inquiry including – (a) the allegation of misconduct; and (b) the substance of the evidence supporting the allegation.	Integrity Tribunal
71(8) applying to s 71(1)	An Integrity Tribunal may, by notice served on a person, require or direct that person to attend an inquiry to do either or both of the following: (a) give evidence; (b) produce to the Integrity Tribunal, or a person designated by the Integrity Tribunal, any record, information, material or thing in that person's possession or control which the Integrity Tribunal considers relevant to its inquiry.	Integrity Tribunal
73(5) applying to s 73	Applies to a search warrant obtained from a magistrate in accordance with s 73.	Warrant
78(7) applying to s 78(6)	An Integrity Tribunal must serve notice of its determination under sub-s (2)(b) on the principal officer of the relevant public authority and, if the Integrity Tribunal considers it appropriate, may serve notice of its determination on – (a) the person who is the subject of the inquiry; and (b) the responsible Minister.	Integrity Tribunal
89(4) applying to s 89(3)	The Board may give written notice of its determination to conduct an investigation on its own motion to the Commissioner of Police.	Board

The use of s 98 is limited to those sections which specifically refer to the ability of the Commission to make a particular notice confidential. However it is not just the notice which is confidential, but the documents to which the notice is attached are also required to be kept confidential.

Currently the only discretion available is as to whether or not confidentiality should apply. There are some sections of the Act however where confidentiality might be thought necessary, but over which a notice cannot attach. Examples include but are not limited to:

- s 88 which sets out the Commission's role in relation to police misconduct, and which includes at s 88(3) the assumption of responsibility for a police investigation. The Commission has no ability to make those actions subject to confidentiality;
- s 90 where the Commissioner of Police may be given an opportunity to comment on a report which is adverse to Tasmania Police. During that process, the Commission is currently unable to require confidentiality in accordance with s 98;

- s 46 requires an investigator to observe the rules of procedural fairness, which might require that a subject officer be given notice of allegations made against them during an investigation. Currently the only way that can occur, and remain confidential, is by serving a notice under s 47 of the Act.

Of the total number of s 47 Notices (which require a person to give evidence or produce documents) issued to date, the majority (>87%) were subject to a s 98 confidentiality notice. From the Commission's perspective, it is appropriate to apply confidentiality when the assessment or investigation is in a covert stage, and particularly if the conduct is ongoing at the time.

The Commission considers that there should be discretion available to enable other documents under the Act, not just the notices, to be subject to confidentiality. This is particularly during the assessment and investigation stages, noting that an investigation should be conducted in private unless otherwise authorised by the CEO: s 48.

9.1.2 Application of confidentiality to the Commission, Tribunal and others

In addition to the obligations concerning confidentiality that the Commission can impose on people outside of the Commission, the Commission must itself preserve confidentiality in respect of all matters that come to a person's knowledge in the course of employment or duties under the Act. The obligation to preserve confidentiality applies to:

- a member of the Board;
- the Parliamentary Standards Commissioner;
- an officer or employee of the Commission;
- a person authorised or appointed under s 21 to undertake work on behalf of the Commission;
- an assessor or investigator;
- a member of the JSC;
- a member of an Integrity Tribunal; and
- an inquiry officer or other person appointed to assist an Integrity Tribunal.

The Board, CEO or an Integrity Tribunal may authorise the release of information without limit.

The maximum penalty for not preserving confidentiality is particularly severe: a fine not exceeding AUD\$650,000 or imprisonment for a term not exceeding two years.

9.2 Claims of privilege

An aspect which distinguishes the work of the Commission in Tasmania from other integrity entities interstate is the express preservation of the right to a claim of privilege.

During the Second Reading Speech for the *Integrity Commission Bill 2009*, the (then) Attorney-General the Hon Lara Giddings stated:

'It comes down to a balancing act between the rights of individuals and the broader public interest. In the Bill the Commission's investigators have the power to direct a person to provide information or to answer a question unless a successful claim of privilege can be made.

If the Commission establishes a Tribunal to enquire into a matter the Tribunal will have the same directive powers.

A person subject to a direction to answer a question or produce material may be excused from complying with this direction if they have a reasonable excuse. For example, they may be physically unable to attend an interview due to illness or they may wish to raise a matter of privilege.

By privilege I mean privileges such as the privilege against self-incrimination, legal professional privilege, a range of privileges recognised in the Evidence Act and also parliamentary privilege.

If the Integrity Commission does not accept a claim of privilege the person claiming it can apply to the Supreme Court to have the privilege determined.

The Joint Select Committee recommended giving witnesses a right to silence and I can see what they were trying to achieve with that. In the end though it may put a person in a worse position if they are allowed to maintain their right to silence but there is nothing to prevent an investigator or Tribunal from drawing adverse inferences as a result.

I acknowledge that this is a difficult area and I look forward to Members' contributions on it.'

Privilege is defined in the Act¹⁴⁵ as including any of the following:

- all the privileges set out in Part 10 of Chapter 3 of the Evidence Act 2001;
- the privileges of spouses and others set out in ss 18, 19 and 20 of the Evidence Act 2001; and
- the privileges of the Parliament.

It is important to note, having regard to the work of the Commission, that the privileges most expected to be claimed are those referred to in the Second Reading Speech; namely the privilege against self-incrimination, parliamentary privilege and to some extent, legal professional privilege. The privilege against self-incrimination applies where a person objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the person has committed an offence against or arising under an Australian law or a law of a foreign country; or is liable to a civil penalty.¹⁴⁶ Investigations by the Commission into misconduct or even serious misconduct will not always involve allegations concerning offences or liabilities concerning a civil penalty.

¹⁴⁵ Section 4 of the Act.

¹⁴⁶ Section 128 *Evidence Act 2001*.

Section 92 framework

Section 92 sets out the framework which must apply when a claim of privilege is made. A person can claim privilege in respect of:

- any requirement or direction of an assessor exercising the powers of an investigator under Part 6; and
- any requirement or direction given to a person by an investigator or the CEO under Part 6; and
- any requirement or direction given to a person by the Integrity Tribunal or an inquiry officer under Part 7 –

to provide information or explanation, answer any question or produce any record, information, material or thing.

A person claiming privilege can refuse to:

- answer any question or provide any information or explanation; or
- produce any record, material or thing.

Essentially, once a claim of privilege is made, the assessor, investigator, CEO, inquiry officer or Integrity Tribunal may either withdraw the requirement or direction, or issue a notice requiring the person to comply with the requirement or direction. The person to whom the notice is issued must then either comply with the notice, or within 14 days, make application to the Supreme Court for a determination of the claim for privilege.

A person who makes application to the Supreme Court must give notice of the application to the Commission and the Commission is taken to be a party to the application.

The Supreme Court may determine that the answer, information or material is:

- privileged; or
- not privileged; or
- partly privileged.

The assessor, investigator, CEO, inquiry officer or Integrity Tribunal must give effect to any determination or order or other direction made by the Supreme Court¹⁴⁷.

Relevantly, where the claim for privilege is upheld, it follows that the relevant answer, information or material remains just that, privileged, and the person under assessment, investigation or inquiry is and remains under no obligation to disclose it to the Commission (or an Integrity Tribunal). Accordingly, unless the information or material can be obtained by other means or witnesses, that part of the investigation or hearing will be unable to continue.

To date, no claims of privilege have been made.

Consequences of a failure to make a claim of privilege

A requirement or direction to a person under the Act is usually made by way of written notice under s 47. Each s 47 Notice is accompanied by 'Information for recipients of a Notice'¹⁴⁸,

¹⁴⁷ There is no suggestion that there is a power in the Court to issue a certificate of a similar nature to a s 128 *Evidence Act* certificate.

which includes information about that person's obligations arising from the notice, despite there being no obligation under the Act for an investigator to inform a person of the right to claim privilege. The information includes the following statement regarding claims of privilege:

'Claims of privilege

The powers conferred on the Integrity Commission by section 47(1) of the Act may not automatically be avoided by a claim of privilege.

If you seek to claim privilege in respect of any matter contained in this Notice, the Integrity Commission may withdraw the requirement or direction in accordance with section 92(3) of the Act. If the requirement or direction is not withdrawn, a further written Notice to comply with the requirement or direction will be issued. You will be obligated to comply with that further Notice within 14 days, or make application to the Supreme Court to determine the claim of privilege. Section 92 of the Act sets out the procedure that is to be followed to determine a claim of privilege.

As the recipient of this Notice, you should consider, where necessary, seeking appropriate legal advice as to whether a third party may be able to assert privilege over any documents you are required to produce.'

Notwithstanding the information about a person's right to claim privilege, the issue is complex. Unless a person is accompanied by a legal representative or has an understanding of the concept of privilege, an ordinary person may, inadvertently or in ignorance, waive their right to claim privilege. In fact the Solicitor-General's Office has advised the Commission that the procedure to claim privilege (in accordance with s 92) is not an easy one to follow, and for many people may be too complex, time-consuming, and/or costly to be a realistic option.

If a person provides information to the Commission under compulsion, despite having the grounds to claim of privilege in respect of self-incrimination, the question then arises as to whether evidence of that information is admissible in a prosecution against that person, arising from that information. The Act does not specifically deal with the admissibility of s 47 information and accordingly, admissibility of evidence will primarily be determined by the *Evidence Act 2001* (Tas). Evidence law is complex and it is not possible in this report to consider all of the factors that might make hypothetical evidence inadmissible; each instance will turn on its own facts. Nevertheless, in the general circumstances of information being provided under compulsion where no privilege is claimed, there is no particular rule of evidence that the information will be inadmissible.

Further, the Commission has formed the view, that an 'investigator' under the Act is not an 'investigating official' or conducting 'official questioning' as defined in s 3 of the *Evidence Act*. Accordingly, Commission investigators do not have a practice of administering a caution prior to admissions being made.

¹⁴⁸ Available on the Commission website at:
www.integrity.tas.gov.au/resources_and_publications/faqs

Comparative analysis – other jurisdictions

The legislation governing other Australian integrity agencies abrogates the privilege against self-incrimination. Some have more restrictions on how that information can then be used than others. Often other privileges are also restricted. Appendix 7, Volume 2 ‘Comparative analysis – Privilege and self-incrimination’ is a table comparing the different integrity entities treatment of privilege.

Generally, while other Australian integrity entities have the power to direct that the privileged information be provided to the entity, the incriminating information may not be used in any proceedings against the person, except in proceedings for an offence against the particular integrity entities’ Act. This is consistent with the functions and operations of the various integrity entities which are primarily concerned with investigating misconduct (or corruption) rather than prosecuting offences.

A recent research paper has examined the issue of compulsory examinations and abrogation of the privilege against self-incrimination for integrity entities. The research paper, produced for the *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012*¹⁴⁹ and published by the Parliament of Victoria has reviewed the powers of the NSW ICAC, the NSW PIC, the CMC, the CCC and the Commission. That paper observed that compulsory examinations and abrogation of the privilege against self-incrimination are necessary for the effective investigation of corruption:

‘The power of specialist agencies in the nature of Anti-corruption commissions to compel testimony and require the production of documents and other records is central to the process of revealing corruption. The power to require a person to give evidence and/or produce documents, records or other things and the abrogation of the privilege of self-incrimination are together designed to ensure the full and effective investigation of possible corruption and other forms of criminality in the public interest. The evidence of conduct of that nature often lies peculiarly within the knowledge of persons who cannot be expected to disclose their knowledge. Abrogation of the privilege against self-incrimination with balancing protective provisions is now widely accepted as essential for commissions of this nature.’¹⁵⁰

Having regard to the wording of the Act with respect to privilege, and the abrogation of privilege in other jurisdictions, with the balancing protective provisions including derivative use immunity, the Commission considers the issue of privilege is worthy of further consideration in the near future. In this regard it recommends that the issue be explored in greater detail during the independent review required by s 106 of the Act.

¹⁴⁹ <http://www.parliament.vic.gov.au/publications/research-papers/8099-independent-broad-based-anti-corruption-commission-amendment-examinations-bill-2012>, viewed 23 September 2013.

¹⁵⁰ P. Hall (2004) *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry- Powers and Procedures*, Sydney, Lawbook, pp. 596-597 as referred to in the *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012* <http://www.parliament.vic.gov.au/publications/research-papers/8099-independent-broad-based-anti-corruption-commission-amendment-examinations-bill-2012>, viewed 23 September 2013.

9.3 Legal relationships

9.3.1 Solicitor-General and Treasurer's Instructions

Although an independent statutory authority, by s 7(2)(d) the Commission is an instrumentality of the Crown and is required to comply with all relevant Treasurer's Instructions (TI)¹⁵¹. The TIs include *Treasurer's Instruction 1118 – Procurement of Legal Services: goods and services* (TI 1118), which provides instruction and guidance on the procurement of legal services.¹⁵²

In particular, TI 1118 requires all agencies¹⁵³ to refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law. It further mandates that all legal instructions must be provided by or through Crown Law unless otherwise agreed in writing by Crown Law. Agencies must not directly engage external counsel or commercial legal services without the written agreement of Crown Law. Any exemption from the requirement – to source legal services through a quotation or selective tender process – must be with the agreement of Crown Law and can only be approved by the Secretary of the Department of Treasury and Finance.

Crown Law is comprised of the Office of the Solicitor-General, the Office of the Crown Solicitor and the Office of the Director of Public Prosecutions. The Office of the Solicitor-General is responsible for the provision of legal advice to Ministers, agencies and other government instrumentalities, while also undertaking constitutional litigation on behalf of the Crown. Advice obtained from the Solicitor-General, represents the Government's view of the subject matter of the advice and is to be followed unless Cabinet directs otherwise or it is held to be incorrect by a court of competent jurisdiction.

The obligation to comply with TI 1118 and to follow the Solicitor-General's advice can create significant difficulty for the Commission when a public officer or public agency is in conflict with the Commission. This can occur very easily. 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.

¹⁵¹ TIs are issued pursuant to s 23 of the *Financial Management and Audit Act 1990* (FMA Act).

¹⁵² TI 1118 is to be read in conjunction with other TI relating to goods and services contained in the 1100 series of TIs.

¹⁵³ The CEO of the Commission is a Head of Agency for the purposes of the FMA Act – s 3 and Schedule 1. The Integrity Commission is an 'agency' under the FMA Act and for the purposes of TI. Not all public authorities as defined in s 5 of the Act are 'agencies' for the purposes of the FMA Act – in particular local government and UTAS are not required to comply with the FMA Act.

Although the Commission does not conduct ‘examinations’ in the manner of other integrity entities¹⁵⁴, 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.

The potential for conflict was recognised shortly after the Commission was established and has been the subject of discussion with the Solicitor-General. The Solicitor-General has been content to deal with the matter of exemptions from TI 1118 as and when necessary. For the avoidance of doubt, in mid-2012 the Commission sought a formal exemption from the obligation to comply with TI 1118 from the Secretary, Department of Treasury and Finance, Mr Martin Wallace. Mr Wallace’s advice was, subject to the Commission receiving written agreement from the relevant officer in Crown Law that satisfies the requirements of clauses (3) and (4) of TI 1118, and if the Commission intends to engage independent legal services without undertaking the relevant competitive procurement process prescribed in either TI 1106, TI 1107 or TI 1108, the Commission needs to satisfy the provisions of TI 1114 *Direct/limited submission sourcing: goods and services*.

There have been several occasions to date where the Commission has sought and been granted an exemption from TI 1118. The process is however cumbersome and necessarily involves the Commission advising the Solicitor-General of the basic circumstances justifying an exemption. It is healthy for there to be legal debate on aspects of the Commission’s jurisdiction, including formal legal challenges by those subject to it. Scrutiny by the courts will assist to clarify the scope of the Commission’s powers where there is doubt.

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.

9.4 Memoranda of understanding

The Commission has entered into Memoranda of Understanding (MOU) as required, but not generally as a matter of routine. MOUs do not contain any legislative force and are not intended to limit the respective agencies in carrying out their functions.

Currently the Commission has MOUs with:

¹⁵⁴ See for example the CCC, s 137 of the *Corruption and Crime Commission Act 2003* (WA).

- Tasmania Police¹⁵⁵; and
- Independent Broad-based Anti-corruption Commission in Victoria (IBAC), and previously with its predecessor the Office of Police Integrity (OPI);

It is also in the process of negotiating an Instrument of Authorisation with the Australian Transaction Reports and Analysis Centre (AUSTRAC).

IBAC MOU

The purpose of the MOU with IBAC is to set out general arrangements agreed between the respective agencies as to the conduct of investigations, information sharing and other matters which might be related to the carrying out of their respective functions. In the past the MOU governed the provision of officers from the then OPI to assist investigators at the Commission on occasions.

AUSTRAC – Instrument of Authorisation

AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit. It contributes to investigative and law enforcement work to combat financial crime and facilitate prosecution.

In April 2011 the Commission made application to become a 'designated agency' under s 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act (2006)* (Cwth) (AML/CTF Act) in order to access AUSTRAC information. The application was approved by the Commonwealth Attorney-General in 2012, and was progressed through legislation introduced into Federal Parliament in late May 2013. The *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013* received Royal Assent on 28 June 2013 and is now law. The Commission is now a designated agency for AUSTRAC.

The Commission is in the process of negotiating an Instrument of Authorisation with AUSTRAC in order to be able to access and use AUSTRAC information. Once entered into, the Commission will be able to have online desktop access to information relevant to its misconduct investigations.

9.5 Law enforcement agency

A key feature of interstate integrity entities is their status as an 'enforcement' or 'law enforcement' agencies across various pieces of both Commonwealth and State legislation. That status enables those entities to access significant powers generally reserved for traditional law enforcement agencies such as police forces. The reasoning behind the availability of those powers for integrity entities is to enable the entity to establish 'the truth' or the facts of a matter, rather than prosecute a particular case. Further, status as a 'law enforcement agency' enables an entity to share or exchange information (usually of a highly confidential nature) with other law enforcement agencies, or other agencies/entities prescribed by the relevant act.

At the commencement of the Act, there were no consequential amendments at either State or Commonwealth level to legislative frameworks prescribing 'law enforcement agency'

¹⁵⁵ Refer paragraph 8.1.2 for a discussion about the MOU.

status (or similar terms), with respect to the Commission, other than in relation to one Tasmanian Act.

9.5.1 State legislation

One Tasmanian Act – the *Australian Consumer Law (Tasmania) Act 2010*, prescribes the Commission as a ‘law enforcement agency’ under s 41. The importance of being so prescribed is the ability to share or exchange information as reasonably necessary to assist in the exercise of an agency’s functions. Under that act, the other law enforcement agencies are Tasmania Police, a police force of another State or Territory (or of an overseas jurisdiction), the Australian Federal Police, the Australian Crime Commission, and any other authority or person responsible for the investigation or prosecution of offences against the laws of Tasmania or the Commonwealth, another state or territory, or an overseas jurisdiction. As a consequence of being included as a law enforcement agency in that Act, the Commission has a legislative basis to obtain or give information that would normally be characterised as confidential, so long as the information is related to the Consumer Law Act or the functions of the Commission.

The Commission is not a law enforcement agency under any other state legislation. The problems previously detailed¹⁵⁶ with respect to issues under the PIP Act and online desktop access to Tasmania Police data may be resolved if the Commission was a law enforcement agency under the PIP Act.

The Commission considers its status as a law enforcement agency across Tasmanian legislation should be reviewed at the earliest opportunity. That it is not currently a law enforcement agency, has limited the Commission’s ability to receive and exchange information with other agencies, particularly those prescribed as law enforcement agencies.

Case Study: Inability to conduct an audit of an investigation

The Commission sought to audit an internal investigation conducted by Tasmania Police. The internal investigation file, as provided by Tasmania Police contained telecommunications interception material which had been central to the initial investigation and the subsequent internal investigation.

The Commission received legal advice that it was unable to access the interception material. Consequently it was precluded from conducting an audit and the file was remitted back to Tasmania Police.

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.

9.5.2 Commonwealth and other jurisdictions

Commonwealth legislation uses a number of different terms to describe law enforcement agencies. Invariably the terms include the following integrity entities:

- ACLEI;

¹⁵⁶ Refer paragraph 8.2, Chapter 8.

- ACC;
- ICAC;
- PIC;
- IBAC;
- CMC;
- CCC;
- AFP; and
- a Police Force of a State or Territory.

Other agencies referred to, depending on the relevant Act, include – CrimTrac, Customs and various intelligence agencies.

By reason of consequential amendments made since establishment, the Commission is now considered as an integrity body for the purposes of the IBAC legislation, (this allows the IBAC to disclose information to the Commission, for example).

The Commission is a 'law enforcement agency' for the purposes of the *Independent Commissioner Against Corruption Act 2012* in South Australia, establishing the Independent Commissioner Against Corruption and the Office for Public Integrity in September 2013.

The Commission is also a 'designated agency' under s 5 of the AML/CTF Act in order to access AUSTRAC information.

There is other legislation in which the Commission is grouped with integrity entities, the inclusion being made as and when acts are amended: see for example *Education and Care Services National Regulations* (NSW) 2011 number 653, Regulation 216.

9.5.3 Access to telephone interception material

A particular area that the Commission considers should be revisited is its access to telecommunications data under the *Telecommunications (Interception and Access) Act 1979* (Cwth) (TIA Act). Notwithstanding the wide scope of its functions and investigative powers, the Commission is presently unable to access telecommunications data under the TIA Act because it does not fall within the definition of an 'enforcement agency'. It is the Commission's contention that, as with various like-agencies operating around Australia, the capacity to request and receive telecommunications data would significantly enhance the Commission's ability to carry out its investigative functions.

Access to and analysis of historical telecommunications data in particular, will enable the Commission to properly assess complaints and to corroborate and test the veracity of allegations. In the absence of enforcement agency status under the TIA Act, the Commission is precluded from accessing telecommunications data lawfully obtained in the course of Tasmania Police investigations or by other enforcement agencies. At a minimum level, basic call charge record analysis will provide partial corroboration of allegations.

Additionally, as the matter currently stands, the Commission is also precluded from receiving information from other integrity entities if the information has been obtained from

telecommunications data under the TIA Act. While that has not occurred to date with respect to other integrity entities it has occurred with matters involving Tasmania Police. It also creates a situation where police officers who may be authorised under s 21 of the Act to assist with an investigation for the Commission, are authorised as police officers to access telecommunications data, but are unable to pass that information on to the Commission.¹⁵⁷

The Commission is the only Australian integrity entity that is not defined as an enforcement agency for the purposes of the TIA Act.

Table 15: Main investigative powers of integrity entities

Main investigative powers:	ICAC	CMC	CCC	Integrity Commission	IBAC
Entry, Search and Seizure powers (with or without a warrant)	Yes	Yes	Yes	Yes	Yes
Power to obtain documents	Yes	Yes	Yes	Yes	Yes+
Surveillance	Yes	Yes	Yes	Yes	Yes
Access to telecommunications information	Yes	Yes	Yes	No	Yes
Assume false identities	Yes	Yes	Yes	Not specified	Not specified

+ From any member of the police with respect to certain investigations.

9.6 Interaction with other relevant legislation

The Commission and its Act interacts with other state legislation in important ways, some of which are under further examination in an attempt to correct anomalies which were not envisaged on establishment.

State Service Act 2000

The State Service Act (SS Act) imposes certain obligations on state public servants, in particular with respect to the code of conduct. Heads of Agencies are also required to take certain action to resolve alleged breaches of the code of conduct under the SS Act, having regard to Employment Direction No 5 (ED5)¹⁵⁸. In particular, where a Head of Agency has reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint an investigator to investigate the alleged breach, in accordance with the procedures set out in ED5.

That obligation on a Head of Agency to investigate a breach even where the Commission is investigating the same allegation, and the ability of the Head of Agency to receive and act on

¹⁵⁷ Section 182 of the TIA Act would prevent any secondary disclosure of such material by any officer of Tasmania Police, including special constables, to the Commission, because any disclosure to that body could only be lawful if it were reasonably necessary:

(b) for the enforcement of the criminal law; or
(c) for the enforcement of a law imposing a pecuniary penalty; or
(d) for the protection of the public revenue.

¹⁵⁸ ED5 was issued by the Employer (the Minister) on 4th February, 2013 pursuant to s17(1) of the *State Service Act 2000* and has effect from that date.

information from the Commission, has been subject to considerable discussion. Some Heads of Agency have queried the appropriateness of commencing their own investigation under the auspices of an ED5 in circumstances when they are aware that the Commission, or Tasmania Police, is also conducting an investigation. Currently DPAC is managing a project to consider relevant amendments to ED5 to take account of the issues involving the Commission.

Primarily the proposed amendments are concerned with enabling a Head of Agency not to proceed with an investigation, whether commenced or not, where they are aware that an investigation of the same or substantially the same matter is also being conducted by Tasmania Police or the Commission and that investigation is not yet concluded.

A further significant consideration is the extent to which a Head of Agency can rely on the information or evidence obtained by the Commission (or Tasmania Police) without having the appointed investigator gather that information all over again, noting that the Head of Agency, through the appointed investigator, is required to afford the employee procedural fairness.

Similar issues appear to have arisen in other jurisdictions with respect to the use of findings¹⁵⁹ and evidence obtained by other integrity entities. For example, the *Independent Commission Against Corruption Act 1988* (NSW) was amended in April 2013 to enable an employer of a public official to take disciplinary proceedings against the public official on the basis of corrupt conduct findings made in a report under s 74 of the ICAC Act and to make admissible for that purpose evidence given to ICAC by the public official, even if that evidence was given subject to an objection under the ICAC Act.¹⁶⁰

Public Interest Disclosures Act 2002

Consequent to the establishment of the Integrity Commission, amendments were made to the *Public Interest Disclosure Act 2002* (PID Act). Interestingly, there are no references to public interest disclosures or to the PID Act, in the Integrity Commission Act.

The amendments established, under s 7, that disclosures can be made to the Commission or the Ombudsman, or in some circumstances, to the relevant public body or the (then) State Service Commissioner. A new Part 4A has been inserted into the PID Act in relation to disclosures made to the Commission, and the actions available to the Commission once such a disclosure is made. Notably the PID Act refers to and defines 'improper conduct' as opposed to the Act which only refers to misconduct and serious misconduct.

A number of important differences have been identified by the Ombudsman in the published *Model Procedures*¹⁶¹ and the Ombudsman recommends that a person trying to decide

¹⁵⁹ The Commission itself does not make findings – it is only an Integrity Tribunal convened under Part 7 that can make a finding that misconduct or serious misconduct has occurred: s 78(2)(b).

¹⁶⁰ *Independent Commission Against Corruption Amendment (Disciplinary Proceedings) Act 2013*, commenced 3 April 2013. The new provisions are not retrospective.

¹⁶¹

http://www.ombudsman.tas.gov.au/publications_and_media/guidelines/pid_guidelines_and_standards

under which Act to make a disclosure should consider seeking independent legal advice on the best course for them to take.

If a person makes a disclosure to the Ombudsman or a public body in accordance with the PID Act and the Ombudsman or public body considers that the disclosure relates to misconduct as defined in the Act, the Ombudsman or public body may refer the disclosure to the Commission. In that event, the Commission may deal with the disclosure under the Act.

The process adopted by the Commission is that a written PID disclosure referred to it is treated as a complaint in accordance with s 33, and an oral PID disclosure referred to the Commission is to be treated as an 'own motion' if the Commission intends to investigate.

However there remain significant points of dissonance between the PID Act and the IC Act. They are:

- the difference between the definition of 'misconduct' under the Act and the definitions of 'improper conduct' and 'corrupt conduct' under the PID Act;
- the fact that the PID Act does not permit a disclosure to be made to the Commission in respect of some public officers and public bodies against which a complaint can be made direct to the Commission under the IC Act, because the PID Act requires the disclosure to be made to another entity;¹⁶²
- related to this, the fact that the PID Act gives others a lead role in respect of disclosures against particular types of public officer and public body, where one might reasonably expect this to be given to the Commission; and
- the fact that the PID Act enables a disclosure to be made direct to the Commission about improper conduct which either would not fall within its jurisdiction under the IC Act, or would not necessarily do so.¹⁶³

Further, the Ombudsman and Commission have reached the view that while most if not all conduct that amounts to misconduct (in particular serious misconduct) within the meaning of the Act would amount to one form or another of improper conduct under the PID Act, by application of the relevant definitions, the reverse would not be the case. That might suggest that in a significant percentage of matters either disclosed directly to the Commission under the PID Act or referred to it under that Act by the Ombudsman or a public body, ultimately there would be a finding that no misconduct had occurred within the meaning of the Act.

While it is recognised that the Commission and the PID Act provide for different things and serve different purposes, there should be a smoother interaction between the two Acts. However the Commission makes no recommendations with respect to the PID Act, other than that consideration might be given to a review of that Act, subject to the Ombudsman's view.

¹⁶² Section 7, PID Act: for example MPs, the Commissioner of Police, a member of the Police Service, a councillor, the Auditor-General, the State Service Commissioner, the Ombudsman, and a person employed in an office of a Minister, Parliamentary Secretary or other MP.

¹⁶³ An example of the former is an oral disclosure, or a disclosure about proposed improper conduct. An example of the latter is a disclosure about detrimental action.

Right to Information Act 2009

The Commission is excluded from the *Right to Information Act 2009* (RTI Act) by s 6, unless the information relates to the administration of the Commission. The Commission is committed to ensuring that as far as possible its administrative information is available to the public, and generally this is done through its annual reporting process. Other information, and in particular, information relating to complaints, is exempt.

The Commission receives several requests each year for disclosure under the RTI Act and reports on those applications in its annual report.

Over the three year period, the Commission has also fielded queries from public authorities as to their concerns about the status of documentation they have received from the Commission. Documentation could include coercive notices, under the Act, served on individuals in their capacity as employees of the public authority, correspondence from the appointed assessor under s 35(3) of the intention to conduct an assessment, or correspondence from the CEO including but not limited to notification under ss 38, 44, 45 and 56. Some of these documents may have confidentiality provisions attached, but that will not always be the case.

The Commission makes no submissions on this point other than to note that the status under the RTI Act of documentation that has been forwarded by the Commission to other agencies is unclear and may merit review.

Personal Information Protection Act 2004

The Commission is excluded from the *Personal Information Protection Act 2004* (PIP Act) by s 7(ga) of that Act.

The only issue that has arisen with respect to the PIP Act is the ability to have online desktop access to police databases, as referred to in paragraph 8.2.

There has been significant consultation with the Tasmania Police about the issue of online access to databases. The Commission has not consulted with any agencies, including Tasmania Police, about what particular amendment would need to be made to achieve online access.

As previously noted, the Commissioner of Tasmania Police and the CEO entered into a MOU, on establishment of the Commission, which envisaged online access to police databases subject to all relevant legal restrictions.¹⁶⁴ Both Tasmania Police and the Commission explored the issue of access extensively between themselves and with the Office of the Solicitor-General. The Commission understands that the only impediment to obtaining online access is the legal advice that the Commissioner would be committing an offence under the PIP Act if he allowed it.

It is the Commission's recommendation that online access should be enabled, and our dialogue with Tasmania Police to date is that they agree with this proposition. However, the

¹⁶⁴ Legal restrictions will include restrictions by third party providers concerning access, confidentiality, storage etc.

legal advice is that this can only occur with legislative amendment. The Commission understands that should an amendment be drafted, such amendment will be subject to comment by the relative agencies as per the normal progress of Bills.

Accordingly the Commission seeks appropriate amendment to the PIP Act to enable that to occur.

9.7 The *Integrity Commission Act 2009*

Since 1 October 2010 there have been several amendments to the Act which have corrected urgent anomalies and issues:

- *Integrity Commission Amendment Act 2011*, Amendment No. 55 of 2011, commenced 22 December 2011 – corrected anomalies relating to the definitions associated with ‘investigators’ enabled the Commission to accept anonymous complaints and extended the non-disclosure provisions of s 98. In addition there were ancillary changes to the *Ombudsman Act 1978* and the *Audit Act 2008* to clarify the sharing of information with the Commission;
- *Justice Miscellaneous Amendment Bill*, Amendment No. 13 of 2012, commenced 30 May 2012 – included the University of Tasmania within the jurisdiction of the Commission and amended the reporting timeframes under s 11; and
- *State Service Amendment Act 2012*, Amendment No. 42 of 2012, commenced 4 February 2013 – omitted the State Service Commissioner from the Board.

9.7.1 Identified technical issues

The Commission has maintained a schedule of technical issues which have arisen with respect to the Act, some of which have only become apparent during specific operational activity by the Commission. Many of the identified issues have been the subject of legal advice, some of which was sought by the Commission and some by public authorities who interact with the Commission. The identified technical issues are distinct from and separate to any identified issues which raise questions of policy that impact on the objectives and functions of the Commission.

While previous amendments have dealt with urgent or pressing issues, the Board considers that the identified technical issues, are having an impact on the ongoing operation and effectiveness of the Commission and the Act, some to a significant extent, including:

- s 102 of the Act and the *Personal Information Protection Act 2004* with respect to online access to Tasmania Police databases;¹⁶⁵
- s 46(1)(c) with respect to the obligations imposed on investigators to observe the rules of procedural fairness prior to reporting to the CEO;¹⁶⁶
- Part 5 and Part 6 with respect to the Commission’s current inability to retain jurisdiction over a complaint, after referral to an appropriate person or entity for action, meaning the Commission is unable to use any powers if, after referral, further misconduct arises, or the person or entity fails to take appropriate action;¹⁶⁷

¹⁶⁵ Appendix 1, Volume 2, ‘Schedule of identified technical issues’, Item 46.

¹⁶⁶ Appendix 1, Volume 2, ‘Schedule of identified technical issues’, Item 17.

¹⁶⁷ Appendix 1, Volume 2, ‘Schedule of identified technical issues’, Item 9.

- s 38(1) with respect to the relevant material which should be included in a referral by the Commission;¹⁶⁸ and
- s 87 with respect to Commission being able to deal with complaints about designated public officers, consistent with other complaints.¹⁶⁹

The Board considers a cohesive approach to rectifying all of the identified issues needs to be undertaken by the JSC, the Minister and the Commission. It considered the JSC needed to be aware of the technical issues prior to the commencement of the three year review. Accordingly in a report dated April 2013, the Board placed all of the identified technical issues before both the JSC and the Minister in accordance with the Board's role under s 13(c) of the Act. The Report of the Board under s 13(c) with the identified technical issues is attached at Appendix 1, Volume 2.

The JSC has considered and supported many of those recommendations in principle. Some are the subject of further explanation or information and remain under consideration by the JSC.

The Minister has advised that the schedule will be considered in liaison with the JSC.

The Commission recommends that the identified technical issues in relation to the *Integrity Commission Act 2009* which have already been considered by the Joint Standing Committee and supported in principle, under the s 13(c) report of the Board in April 2013, be referred to the Minister for Justice for amendment to the Act as soon as possible.

The Commission recommends that the remaining identified technical issues in relation to the *Integrity Commission Act 2009* as identified in the response from the Joint Standing Committee to the s 13(c) report of the Board be considered and supported by the Committee for amendment of the Act as soon as possible.

9.7.2 Proposed policy amendments

After three years of operation, the Commission considers it timely to reconsider aspects of the Act which raise broader policy implications. Some of the issues have been touched on in other parts of this report. There are six essential policy based issues that the Commission has identified as having significant impact on the way the Commission operates and its ability to investigate misconduct. There are minimal, if any, budgetary implications to addressing these issues.

Notifications

The Act does not impose a statutory obligation on principal officers of public authorities, nor on any public authorities or public officers¹⁷⁰ to notify the Commission of misconduct or serious misconduct. Although the Commission has consistently canvassed notifications from agencies, invariably reporting to the Commission has been adhoc. In other jurisdictions,

¹⁶⁸ Appendix 1, Volume 2, 'Schedule of identified technical issues', Item 12.

¹⁶⁹ Appendix 1, Volume 2, 'Schedule of identified technical issues', Item 39.

¹⁷⁰ Including designated public officers and Tasmania police officers.

notification of misconduct or corrupt conduct is mandatory, leading to a comprehensive picture of the state of misconduct across their public sector.¹⁷¹

Mandatory notification would not mean that public agencies lose control of their own investigations but it would assist in identifying misconduct in Tasmania and contribute significantly to an understanding of underlying causes of misconduct. Notification obligations would only impose a minor administrative process on public officers or public authorities but the benefits would be significant.

The Commission recommends that minimum reporting obligations by public officers and public authorities of at least serious misconduct should be mandated by the Act.

Publication

Currently the Commission (and an Integrity Tribunal) is limited with respect to publication of reports by s 11 of the Act. In addition to the annual report, at any other time, the Commission may lay a report on any matter arising in connection with the performance of its functions or exercise of its powers before both Houses of the Tasmanian Parliament. Separately, the Commission may also provide a report to the JSC on the performance of its functions or exercise of its powers relating to an investigation or inquiry: s 11(4).

Integrity entities in other jurisdictions are also required to table reports and may also table special reports. Some, such as ICAC, also have the ability to make a recommendation that a report be made public.¹⁷² Invariably, other integrity entities have greater detail in their legislation about the material that can be published, including the making of findings and forming opinions, and making statements as to the reasoning applied to its findings. Generally prior to publication, entities are required to provide a person adversely affected by the report, the right to respond and they cannot publish opinion as to the commission of a criminal offence.¹⁷³

The Commission considers s 11 of the Act to be unnecessarily limiting on its ability to publish information about its investigations and notes there has been a level of misunderstanding in both the public sector and the community about the ability of the Commission to publish reports.¹⁷⁴

The Commission recommends that its ability to publish information about its investigations be extended in line with other interstate integrity entities.

Extension of confidentiality

The extension of the discretion to apply confidentiality to actions of the Commission which do not currently attract a s 98 notice has been discussed in paragraph 9.1.1. As noted, there

¹⁷¹ See for example *Directions and Guidelines*, published by the Independent Commissioner Against Corruption in South Australia; *Notification Guidelines for Principal Officers of Public Authorities*, published by the CCC in Western Australia.

¹⁷² Section 78(2) *Independent Commission Against Corruption Act 1988* (NSW).

¹⁷³ See for example, s 23 of the *Corruption and Crime Commission Act 2003* (WA) and s 165(6) of the *Independent Broad-based Anti-corruption Commission 2011* (Vic)

¹⁷⁴ This is in addition to the recommendation made in Chapter 2.6 with respect to tabling reports outside of sitting dates.

are sections of the Act which are not covered by the confidentiality obligations but which have been identified as being a risk to the confidentiality of an investigation or assessment. In particular, the ability of an assessor or investigator to maintain confidentiality during the procedural fairness stage has already been considered and supported in principle by the JSC in its response to the Board to the previous s 13(c) report. Functions performed under other sections of the Act may also require confidentiality, depending on the facts of the case.¹⁷⁵

The Commission recommends that the discretion of the Board and the CEO to apply confidentiality with respect to its activities around investigations be extended.

Independence of legal services

Where legal services are required on specific misconduct matters the Commission strongly advocates that it have discretion to brief and retain legal counsel outside of Crown Law, without the need for a formal exemption under TI 1118. The ability to do so is considered essential to ensuring the independence of its work.

The Commission recommends that it be excluded from complying with the obligations imposed by TI 1118 with respect to legal services.

Law enforcement agency status

The Commission recommends that there be amendments to relevant State and Commonwealth legislation to enable it to become a 'law enforcement agency' consistent with all the integrity entities across other jurisdictions, to enable it to share or exchange highly confidential information and to obtain telecommunications information.

Interaction with Employment Direction 5

The interaction between the Head of Agency obligations under ED5 and the Commission, particularly with respect to the use of information and evidence obtained by the Commission for administrative and/or disciplinary proceedings need to be reviewed. It is apparent that there is considerable confusion amongst Heads of Agencies about their obligations to commence an ED5 when they are aware that the same matter is already under investigation by the Commission. Further the 'admissibility' of evidence and information obtained by the Commission, whether under a coercive notice or by other means, should be clarified. Currently, there is confusion as to whether that information can be used in an ED5 (code of conduct) investigation. It seems pointless for the Commission to undertake an investigation and locate evidence or information about misconduct if that information cannot be used in an ED5 process.

¹⁷⁵ See for example s 88(3) and s 90.

The Commission recommends that it have the right to direct a Head of Agency not to commence an ED5 investigation where there is a risk that such an investigation may impact on a Commission investigation, and that there be a clear direction (either through the ED5 process or another avenue) that information and/or evidence obtained by the Commission can be used in administrative and/or disciplinary proceedings (subject to any affected person being afforded appropriate procedural fairness).

CHAPTER TEN

Administrative arrangements

10.1 Business support services

10.1.1 Structure of the Business Services unit

The Business Support Unit is comprised of three permanent positions, a Corporate Services Manager, a Business Services Coordinator and a Records Officer as well as a two-year fixed term position of Administrative Assistant. The Corporate Services Manager position was established in late 2011 in recognition of the requirement for a more strategic financial and budgeting focus.

The structure of Business Services has evolved since the Commission was first established with the original staffing establishment including two executive assistants and a receptionist. One of the executive assistant positions was abolished in late 2011 and the receptionist and remaining executive assistant positions were also abolished in early 2013. Aspects of each of the roles were then merged to create a redesigned Administrative Assistant position.

10.1.2 Service Level Agreement with Department of Justice

The Integrity Commission has a Service Level Agreement with the Department of Justice (the Department) for the following Corporate Services functions:

Human Resources

- position management;
- recruitment administration and selection procedure guidance;
- performance management strategy;
- workplace health and safety services including employee assistance programs;
- workers compensation and rehabilitation processes;
- industrial relations advice;
- grievance management processes; and
- payroll.

Financial Services

- end of year financial statements preparation;
- accounts payable and accounts receivable transaction processing;
- asset transaction processing and asset register maintenance;
- bank account management and provision of credit cards through the Government banker;

- Finance One system support;
- Treasury Financial Reporting System (TFRS) mandatory data reporting;
- access to the Department's Procurement Review Committee to review evaluations for procurements valued at AUD\$50,000 or more (excluding GST); and
- provision of taxation services (fringe benefits tax and business activity statement processing).

Information Technology

- management and support of the Commission's computing and network environment, including incident, problem, change and event management;
- provision of a Service Desk during the hours 8:30am to 5:00pm Mon – Fri, excluding Public Holidays; and
- a procurement service for IT equipment, mobile services and software.

Website

- support and advice to the Commission site administrator in the maintenance, training and development of websites; and
- administration of the web content management system (MySource Matrix) used to deliver Commission websites.

The Commission is responsible for all internal management reporting, management of the budget process, management of property and facility services, as well as having responsibility for administering and operating its business systems and training staff in the use of these business systems.

The Commission has formally adopted a number of internal policies from the Department which are relevant to Integrity Commission employees as State Service employees. Commission staff can access guidelines, policies and procedures via the Department's intranet. The Commission is continuing to review policies and procedures and develop those required which are specific to the Commission.

10.2 Commission structure and status of staff

10.2.1 Core staffing

On establishment, the majority of Commission staff were employed on two year fixed-term contracts to allow for a review of the structure after the Commission had been operating for a period of time.

An initial review of the structure was undertaken in early 2012 with assistance from the Department, as well as a further review following the appointment of Ms Merryfull as CEO in August 2012. As a result of these reviews, the majority of remaining contract positions were converted to permanent positions. In addition, other positions were redesigned to better suit the operational needs of the Commission.

Table 16 provides a breakdown of the staffing structure by business unit since establishment.

The Executive consists of the Chief Commissioner, the CEO and the Deputy CEO/Director of Operations (note the Deputy CEO/Director of Operations is included in the Complaints and Investigations unit in 2013 figures), as well as a research and policy officer on a fixed term contract in 2013. The Chief Commissioner can work up to a maximum of 0.8 FTE but within that cap, the actual hours vary depending on the workload.

The Business Services Unit is as described in 10.1 above.

The MPER unit consists of the Manager and two Research and Education Officers (a third position is being created to be filled in the period 2013-14).

The Operations unit is headed by the Director of Operations (included in Executive data for 2011 and 2012) and has two Senior Investigators/Complaint Assessors and an Investigation Review & Complaint Assessment Coordinator. A graduate position has also recently been assigned to this unit.

Table 16: Business Unit Full Time Equivalent (FTE)

	As at 30 June 2011	As at 30 June 2012	As at 30 June 2013
Executive	2.8	2.8	2.6
Business Support Service	5	6	4
Misconduct, Prevention and Education	3	3	3
Complaints and Investigation	5	4	4
Legal	1	1	1
Strategic Communications	1	0.6	0.6
Graduate	-	1	1
Total	17.8	18.4	16.2

The Commission is continually monitoring its staffing to ensure that the structure best meets its emerging needs within its budgetary capacity.

10.2.2 Secondment arrangements

The Commission has the authority under s 21 of the Act to second additional staff from relevant agencies in Tasmania or interstate, should a short-term increase in workload or the need for specialist expertise (such as forensic accounting) require it. The Commission has seconded staff from both the Department of Police and Emergency Management in Tasmania and the Office of Police Integrity in Victoria to assist in investigations conducted by the Commission. Costs (including salaries and reimbursement of travel expenses) of secondments paid by the Commission to the Department of Police and Emergency

Management in Tasmania totalled AUD\$94,676¹⁷⁶ and to the Office of Police Integrity in Victoria, AUD\$30,438¹⁷⁷. It should be noted that the Department of Police and Emergency Management in Tasmania contributed AUD\$37,062 to the cost of salaries during one significant investigation.

On two separate occasions the Commission has engaged external legal counsel to assist with separate investigations including representation for the Commission in *West Tamar Council v Leonard* [2012] TASSC 68. The total legal costs for both matters was just under AUD\$67,000 (ex GST).

10.3 Current and future resourcing

The Commission has been able to meet its legislative requirements within its annual appropriation. While it should be noted the Commission has not spent its entire appropriation for the three financial periods since its establishment (refer 10.5.1 Review of funding to 30 June 2013) it is expected that once fully staffed the Commission will require and spend its full appropriation. The Commission has been able to achieve significant outcomes, despite high staff turnover particularly during the first twelve months of operations. A full complement of staff is vital for the Commission to continue to build on the essential work carried out so far.

As noted, the Commission has the authority to second additional staff from relevant agencies should a short-term increase in workload require it. No specific funding has been allocated for secondment arrangements, however, and any such costs would have to be absorbed from within the current budget allocation which may have an impact on the Commission's ability to meet its costs, and, more importantly, to properly fulfill its functions under the Act, in future years. Should a major new initiative arise such as a significant investigation or an inquiry, there is provision under the Act to submit a request for additional funding to meet those costs.

In addition, the original 2010-11 budget and forward estimates did not include costs for non-*ex officio* members of the Commission's Board¹⁷⁸ or any external legal costs. These are being met from salary savings arising from staff vacancies in the current year and will continue to be absorbed, to the extent possible, through management of the staff establishment.

10.4 Information management

The sensitivity of the Commission's functions and the agency's standing within the public and state service community in Tasmania mean it must uphold a high standard of information management, with systems and procedures that have a commensurate level of rigor including security. The Commission recognises the value of its information resources as a business asset and manages that asset to ensure both legislative compliance and business efficiency and effectiveness.

¹⁷⁶ Since 1 October 2010 and 30 August 2013.

¹⁷⁷ Since 1 October 2010 and 30 August 2013.

¹⁷⁸ Such as Board fees, for example.

Information within the Commission is managed in accordance with a variety of legislative requirements and record keeping standards. These include:

- *Tasmanian Archives Act 1983*
- *Integrity Commission Act 2009*
- *Right to Information Act 2009*
- *Search Warrants Act 1997*
- *Police Powers (Surveillance Devices) Act 2006*
- *Personal Information Protection Act 2004*
- *Public Interest Disclosures Act 2002*
- *Libraries Act 1984*
- Standards Australia 2002, Australian Standard Records Management Parts 1 & 2: General AS ISO 1589.1 – 2002, Standards Australia International, Sydney
- Advices and Guidelines: Tasmanian Archives and Heritage Office
- Tasmanian Government Information Security Policy Manual

10.4.1 Electronic information systems

The Commission has adopted two electronic systems for the capture and management of business records. *Investigator* is a case management system used to store documents relating to misconduct matters brought to the attention of the Commission, and records the process of dealing with those matters in accordance with the Act. *Investigator* has been customised to reflect specific legislative requirements which determine how misconduct matters can be dealt with by the Commission. It has been in operation since January 2012. *Investigator* forms the basis of the register of complaints required to be kept by the Commission in accordance with s 34. Although accessible by all staff, *Investigator* is primarily used by operational staff according to the requirements of their role and responsibilities. It is also used to facilitate internal and Board reporting.

TRIM is the electronic document management system used to capture, retain and manage all other records and has been in use since May 2011.

10.4.2 Procedures

The Commission has implemented a range of procedures and strategies to meet its information management obligations under relevant legislation (including the *Integrity Commission Act 2009* and the *Archives Act 1984*) and recognised record keeping standards.

Policies and procedures have been implemented in the following key functional areas:

Complaint and investigation management

- the capture, reporting and secure management of complaint data as required under the Act through the customisation and introduction of a specialised case management system (*Investigator*);
- the capture, registration and management of legal notices issued under the Act;
- records to meet agency obligations in the application for and execution of warrants under the *Police Powers (Surveillance Devices) Act 2006*; and
- procedures to manage the receipt, tracking, storage and disposal of property (evidence) acquired by the Commission under legal notice or through investigative activities effectively and securely.

Integrity Commission administration

- the effective electronic capture of the Commission's business records into TRIM to ensure an authentic, secure, complete and accessible information repository;
- support and training for staff to enable them to meet their record keeping obligations through adherence to policies and procedures and use of the Commission's two electronic information repositories;
- ensuring the reporting, information management and security requirements of the *Right to Information Act 2009*, *Public Interest Disclosures Act 2002* and the *Personal Information Protection Act 2004*; and
- publication and website management to meet the requirements of the *Libraries Act 1984* including legal deposit and capture of electronic documents into Stable Tasmanian Open Repository Service (STORS) to enable public availability into the future.

Information management security

- the classification and secure storage and disposal of agency information in compliance with the Tasmanian Government Information Security Policy and associated manual;
- recording of undertakings by visitors and temporary and permanent staff to meet confidentiality requirements as determined by the Act and other legislation; and
- security clearances for all staff through the Australian Government Security Vetting Agency (Department of Defence) to Top Secret Negative Vetting 1.

10.4.3 Record management Tools

In addition to the policies and procedures listed, a range of tools has been developed, and work has commenced on others, to ensure information and records are retained, managed and disposed of in accordance with legislation and established standards.

Functional Records Disposal Authority

Significant work has been undertaken in preparation for the development (in conjunction with the Tasmanian Archives and Heritage Office (TAHO)) of a Disposal Authority to be approved

by the State Archivist which will direct the retention or destruction of records relating to the Commission's specialist functions. This has included:

- the development of a Business Classification Scheme (file plan) through consultation with Commission business units and TAHO, reference to the Act, and reference to tools in place within other agencies undertaking similar functions;
- legislative mapping to ensure record keeping requirements under the full range of legislation which directs the Commission's operations are recorded to inform the Disposal Authority;
- an appraisal of current information assets to consider information security and access requirements, business needs in the use of the information, format and risks associated with the records; and
- planning undertaken to develop the schedule in the next year.

Information registers

A series of registers to record business activities have been developed to meet legislative and operational requirements. Details are set out in Table 15.

Table 17: Registers maintained by the Commission

Register title	Legislation
Receipt book issue register	<i>Integrity Commission Act 2009</i>
Misconduct Matters Register	<i>Integrity Commission Act 2009</i>
Register of notices issued under Section 47	<i>Integrity Commission Act 2009</i>
Register of search warrants issued under Section 51	<i>Integrity Commission Act 2009</i>
Evidence / image register	<i>Integrity Commission Act 2009</i>
Register of Authorisations to enter premises, section 50	<i>Integrity Commission Act 2009</i>
Register of Right to Information requests to Integrity Commission	<i>Right to Information Act 2009</i>
Delegations and Authorisations	<i>State Service Act 2000, State Service Regulations 2011, Right to Information Act 2009, Integrity Commission Act 2009</i>
Surveillance Device Warrant Product Register	<i>Police Powers (Surveillance Devices) Act 2006</i>
Surveillance Device Warrant Register	<i>Police Powers (Surveillance Devices) Act 2006</i>
Integrity Commission Register of Records Destroyed	<i>Archives Act 1984</i>
Security Classified Record Register	<i>Archives Act 1984</i>
Contract Register	<i>Archives Act 1984</i>
Financial Delegations	<i>Financial Management and Audit Act 1990</i>
Gifts and Benefits	<i>State Service Act 2000</i>
Register of complaints against Integrity Commission staff	<i>State Service Act 2000</i>

10.4.4 Information management training and awareness

All staff members are responsible for the capture of the business records they create or receive in accordance with Commission policies and procedures. To support staff in meeting agency expectations and standards, a range of training and refresher sessions, user guides and other resources has been developed and implemented across the Commission. These cover the use of electronic systems (including TRIM and Investigator) as well as information management processes and procedures, and are tailored according to the varying roles of users.

10.4.5 Information management audit

An audit process was commenced in 2012 to measure and record the Commission's progress towards meeting Australian Standards (particularly *AS ISO 1589.1 Parts 1 & 2 Records Management*), and TAHO and other State Government information management requirements. The audit document is used to measure the Commission's progress towards record keeping maturity and is based on tools available through National Archives of Australia and Standards Australia.

The audit serves as a measure of compliance, progress and achievement, and as a tool to identify priorities and risks and to inform future developments in information management.

10.5 Budget

10.5.1 Review of funding to 30 June 2013

As noted previously, the Commission has not fully expended its appropriation for the three financial periods since commencement; however this has been largely due to staff vacancies resulting in salary savings. Since arrival, the current CEO has been reconsidering the staffing structure at the Commission in line with its strategic direction and it is anticipated the Commission will be fully staffed by mid-October 2013.

Details of budgets and expenditures are as follows:

2011 Budget \$'000	2011 Actual* \$'000	Surplus \$'000
2,989	2,608	(301)

*2011 was not for a full financial year covering the period 1 October 2010 to 30 June 2011.

Due to the timing and commencement of operations, the Commission did not require its entire appropriation in 2010-11 and returned excess funds to the Consolidated Fund.

2012 Budget \$'000	2012 Actual \$'000	Surplus \$'000
3,284	3,156	(128)

The saving in 2011-12 was primarily due to staff vacancies, including the vacant position of CEO for approximately nine months. The Commission returned excess funds to the Consolidated Fund.

2013 Budget \$'000	2013 Actual \$'000	Surplus \$'000
2,939	2,621	(301)

In 2012-13 the Commission had salary savings following a review of the organisational structure and from delays in staff recruitment. The Commission also had savings from VoIP (Voice over Internet Protocol) expenditure delayed until 2012-13 as well as savings in travel and transport costs. The Commission returned excess funds to the Consolidated Fund.

10.5.2 Future budget requirements

It is expected that the Commission will be able to continue its present level of operations with a full staffing establishment with costs able to be met out of the appropriation through the forward estimates. The Commission emphasises that the current budget is the minimum amount required for it to be able to meet its operational requirements.

As noted in section 10.3, should a major new initiative arise such as a significant investigation or an inquiry, the Commission would be unable to fund this from its normal budget, and would need to seek additional funding.

Extracts from the 2013-14 budget papers, including the forward estimates, are included at Appendix 8, Volume 2.

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