



APSAC Conference 2011 Paper
Fremantle, Western Australia
15 – 17 November 2011

Establishment of the Integrity Commission in Tasmania: Challenges and lessons to be learned.

The Hon Murray Kellam AO, Chief Commissioner, Integrity Commission Tasmania

1. BACKGROUND

The Integrity Commission, established by the *Integrity Commission Act 2009* (the Act), began operating on 1 October 2010. It was a key recommendation arising from an inquiry by the Parliamentary Joint Select Committee on Ethical Conduct. The Committee, in its final report, *Public Office is Public Trust* and released on 24 July 2009, said that many Tasmanians had lost faith in open government in Tasmania. It noted the following areas of concern “in the mechanisms currently available to support ethical and open Government in Tasmania and the capacity to conduct independent investigations”:

- The development of standards and codes of conduct was currently ad hoc and organisationally based – there was clearly a need for uniformity of approach across the entire public sector.
- Training and professional development in relation to ethical conduct was similarly of an ad hoc nature. The lack of ongoing training for new public officers was of particular concern to the Committee.
- There was a need for the co-ordination of training for all public officers including a community outreach program.
- There was a need for a dedicated research function to support the continual development of standards and codes of conduct.
- There was a need for an authority to provide confidential advice to public officers in relation to the conduct of their duties.
- There was clearly a need for the ability to investigate and expose conduct by public officers contrary to the public interest and constitutes a breach of public trust.
- There was clearly a need for the formalisation of a ‘networking arrangement’ between the Statutory Officers examined by the Committee: Director of Public Prosecutions; Ombudsman; Auditor-General and State Service Commissioner^[1].

^[1] *Public Office is Public Trust*, 2009

The Committee determined that a new body be established to address the identified deficiencies in the Tasmanian system of governance. As a result, specific recommendations were:

Recommendation 29

The Committee recommends that legislation providing for the creation of the Tasmanian Integrity Commission be drafted.

The objectives of the Commission are to:-

- 1. improve the standard of governance in Tasmania;*
- 2. enhance public trust that misconduct, including corrupt conduct, will be investigated and brought to account; and*
- 3. elevate the quality of, and commitment to, good governance by adopting a strong, symbolic and educative role.*

The Commission will achieve these objectives by:-

- 1. educating public officials in Tasmania on integrity;*
- 2. investigating allegations of corrupt or inappropriate behaviour made against public officials in Tasmania; and*
- 3. making findings in relation to those investigations and taking the appropriate action.*

It was recommended (no. 16) that a principal function of the new Integrity Commission be to:-

- a. 'Develop standards and codes of conduct to guide public officials in the conduct and performance of their duties;*
- b. Prepare guidance and provide training to public officials on matters of conduct, propriety and ethics;*
- c. Provide advice on a confidential basis to individual public officials about the practical implementation of the rules in specific instances'.*

The object of the Act and objectives of the Commission are set out in section 3 of the Act:

1. The object of this Act is to promote and enhance standards of ethical conduct by public officers by the establishment of an Integrity Commission.
2. The objectives of the Integrity Commission are to –
 - a. improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and
 - b. enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
 - c. enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.
3. The Integrity Commission will endeavour to achieve these objectives by –
 - a. educating public officers and the public about integrity; and
 - b. assisting public authorities deal with misconduct; and
 - c. dealing with allegations of serious misconduct or misconduct by designated public officers; and
 - d. making findings and recommendations in relation to its investigations and inquiries.

So as you can see, the Tasmanian model has education and misconduct prevention at the forefront of its objectives.

2. THE TASMANIAN MODEL

2.1. Structure

The Integrity Commission consists of a Chief Commissioner and six Board Members, a statutorily appointed Chief Executive Officer and staff who undertake the various functions of the Commission. The board provides oversight and guidance to the Chief Executive Officer and staff of the Commission, promotes good practice and systems, and monitors and reports on the operation and effectiveness of the *Integrity Commission Act 2009*.

The triage function of the Commission is made clear by the fact that three of the Board members are ex officio members of the Board. The Ombudsman, the Auditor-General and the State Service Commissioner are all members of the Board.

This requirement does of course present the problem that each of these three positions and their organisations, are subject to the jurisdiction of the Commission. In the eyes of some, that raises a question of conflict of interest. On the other hand, the knowledge that each of these persons has in relation to the public sector in Tasmania, has proved to be a most valuable asset. The other three members of the Board are required to have experience and knowledge of policing in one case, the public sector in another case and local government in the third case.

The Chief Executive Officer is responsible to the Board for the general administration, management and operations of the Commission. Staff roles include:

- Misconduct prevention, education and research
- Investigation;
- Complaint assessment and investigation review;
- Strategic communications; and
- Business services.

2.2. Parliamentary Standards Commissioner

The Act also established the office of the Parliamentary Standards Commissioner, which is independent of the Commission. The Parliamentary Standards Commissioner provides confidential advice to Members of Parliament and the Integrity 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.

The Parliamentary Standards Commissioner recently assisted the Commission in drafting model codes of conduct for Members of Parliament, Ministers and ministerial staff tabled before the Tasmanian Parliament in June this year.

2.3. Joint Standing Committee on Integrity

The main function of the Joint Standing Committee on Integrity is to monitor and review the performance of the Integrity Commission and report to Parliament on the Commission's performance is appropriate¹. Section 23 of the Act requires the Committee to consist of six members, three from each House. The Committee has the responsibility of reviewing the Integrity

¹ S. 24 (1)(a) and (b) *Integrity Commission Act 2009*

Commission's functions, powers and operations after a three year period under section 24(1)(e) of the Act.

2.4. Not a Crime or Corruption Commission

The Integrity Commission is not a crime or corruption commission, it does not investigate and deal with organised crime. Under the Act it has no powers to impose sanctions. Nor are there any organisation crime provisions as found in the *Crime and Misconduct Act 2001*² and the *Crime and Corruption Commission Act 2003*³. In this regard the Integrity Commission is similar to the Independent Commission Against Corruption (ICAC) in New South Wales, and what is forecast to be the new Victorian model, as both only have jurisdiction in the public sector⁴. One distinction between the Commission and ICAC is that the Commission has jurisdiction over police whereas New South Wales has a separate police oversight body, the Police Integrity Commission.

2.5. Integrity Commission's Functions

The functions and powers of the Integrity Commission are set out in section 8 of the Act. The Commission's main functions are to educate the public and increase awareness on integrity and ethical issues in the public sector; provide training to public officers on matters of conduct, propriety and ethics; develop standards and codes of conduct to guide public officers in their conduct and in the performance of their duties; provide advice on a confidential basis to public officers about standards of conduct; receive and assess complaints on public misconduct, refer such complaints back to public authorities where appropriate; and monitor or audit investigations of complaints referred back to public authorities by the Commission.

Section 9 of the Act outlines the principles of operation. The Commission is to perform its functions in a way that raises standards of conduct, propriety and ethics in public authorities and improves the capacity of public authorities to prevent and respond to misconduct. Further, the Commission is to work cooperatively with public authorities to prevent and respond to misconduct.

2.6. Emphasis on Education and Prevention

As stated above the Integrity Commission has a strong educative and training role and develops standards and guidelines to assist public officers in performing their duties in an ethical manner⁵. The Commission also provides confidential advice to public officers about the practical implementation of standards of conduct in specific circumstances.

Raising awareness of misconduct, serious misconduct and unethical behaviour will help public authorities address training needs for staff, ensure correct systems and procedures are in place, understand public perceptions of their organisations, and deal effectively with any misconduct. This is important as the onus under our act in section 32 for the training and education of staff is on the relevant public authority. Under the Act, principal officers have an obligation to provide training on the Act and their Codes of Conduct. Public authorities are responsible for identifying, managing and dealing with acts of misconduct.

2.7. Complaints and Investigations

The Commission accepts complaints about possible misconduct by public officers. Complaints are also accepted about 'designated public officers' which can include Members of Parliament, Parliamentary staff, local government councillors, statutory officers, high ranking police officers and

² QLD, Chap Two, Part Two

³ WA, Part Four.

⁴ The New South Wales Crime Commission handles organised crime in New South Wales.

⁵ Section 31, *Integrity Commission Act 2009*

senior executive officers. Misconduct is defined widely by the Act and includes behaviour that involves a breach of a relevant code of conduct; the exercise of functions or powers in a dishonest or improper way; misuse of information in connection with the performance of official functions; and other inappropriate behaviour.

Serious misconduct includes behaviour that would lead to a person losing their employment or being charged with a criminal offence. A complaint can be made about a person who was a public officer at the time of the alleged misconduct, even if they are no longer a public officer at the time of making the complaint. Complaints may be made retrospectively.

The Commission may request the relevant public sector agency or another integrity body (such as the Ombudsman, State Service Commissioner or Auditor-General) to investigate the matter and report back to the Commission, or the Commission may determine to investigate the complaint itself.

If a determination is made to proceed to investigation, the rules of procedural fairness must be observed⁶. Under the Act investigators can require or direct a person to: provide information or an explanation⁷; attend to give evidence⁸; and produce records, information, material or a thing relevant to the investigation⁹. Investigators also have the power to enter¹⁰ and search premises¹¹ and take possession¹² or seize¹³ records, information, material or things. In cases of alleged serious misconduct, investigators can make an application to use surveillance devices¹⁴.

It was noted in the *Public Office is Public Trust* report 2009 that the protection of the reputation of those who allegation are made against is paramount and accordingly all investigations carried out by the Commission should be conducted in private¹⁵.

2.8. Own motion investigation

The Act empowers the Commission to conduct investigations in the absence of a complaint. Under section 45 of the Act, the Commission's board can make a determination to commence an own motion investigation 'into any matter that is relevant to the achievement of the objectives of the Act in relation to misconduct'¹⁶ within the public sector.

2.9. Inquiry by Integrity Tribunal

Upon a determination by the board that an inquiry is to be conducted, 'the Chief Commissioner is to convene an Integrity Tribunal for the purpose of conducting that inquiry'¹⁷. An Integrity Tribunal has the power to require or direct persons to appear before it; take evidence on oath; require or direct persons to produce any records, information, material or things in their possession or control; require or direct a person to answer questions¹⁸. The Act also gives an inquiry officer the power to enter¹⁹ and search premises²⁰, take possession²¹ of or seize²² any record, information, material or

⁶ Section 46 (1)(c), *Integrity Commission Act 2009*

⁷ Section 47(1)(a), *Integrity Commission Act 2009*

⁸ Section 47(1)(b), *Integrity Commission Act 2009*

⁹ Section 47(1)(c), *Integrity Commission Act 2009*

¹⁰ Section 50, *Integrity Commission Act 2009*

¹¹ Section 52 (1)(a), *Integrity Commission Act 2009*

¹² Section 52(1)(d), *Integrity Commission Act 2009*

¹³ Section 52(1)(f), *Integrity Commission Act 2009*

¹⁴ Section 53, *Integrity Commission Act 2009*

¹⁵ Joint Select Committee on Ethical Conduct, *Public Office is Public Trust*, final report, 2009

¹⁶ Section 45, *Integrity Commission Act 2009*

¹⁷ S.60, *Integrity Commission Act 2009*

¹⁸ Section 64, *Integrity Commission Act 2009*

¹⁹ Section 72, *Integrity Commission Act 2009*

thing as evidence. Section 64(3) of the Act states that in respect of any inquiry, 'an Integrity Tribunal is not bound to observe the rules of law governing the admission of evidence but may inform itself of any matter in such manner as it thinks fit'. However, section 69(1) (b) qualifies this by stating that the Tribunal must observe the rules of procedural fairness. A public officer who is subject to a complaint before the Tribunal is entitled to representation²³.

Privilege may be claimed by a person in relation to any requirement or direction of an assessor or investigator or the Integrity Tribunal to provide information answer any question or produce any record. The privileges are those set out in Part 10 of Chapter 3 of the *Evidence Act 2001*. They include client legal privilege, religious confession, medical communications, privilege against self-incrimination in other proceedings and evidence relating to settlement transactions. If a claim of privilege exists the person claiming privilege may refuse to answer any questions or provide any information or material²⁴ to the Commission. If a claim for privilege is made the requirement in question can be withdrawn by the Commission, but if it is not withdrawn a notice must be issued requiring compliance. The person so required to comply must apply to the Supreme Court within 14 days seeking that the Court determine the claim for privilege. There is nothing in the Act that prevents a person entitled to claim privilege from waiving its application²⁵. Once privilege has been waived it cannot be revoked²⁶.

3. CHALLENGES FACED BY THE COMMISSION IN ITS FIRST YEAR

The challenges facing the Commission throughout the first year have been substantial. First it needs to be understood that there has been no similar scrutiny of the public sector, including police, in Tasmania prior to the commencement of the Commission and there were many who did not support the establishment of the Commission. Furthermore the legislation was drafted and passed in a very short space of time after the handing down of the Joint Committee report. There was no wide consultative process, such as that which has taken place in Victoria over the past year, although submissions on the Integrity Commission Bill 2009 were invited from a number of bodies, such as the Law Society. There was a relatively brief time from in which to make such submissions and indeed, the Law Society of Tasmania declined to make any submission on the Bill on the basis that there was insufficient time to do so prior to it being debated in Parliament.

Thus the first challenge is that in Tasmania there does not appear to be the widespread level of public and institutional support for such an institution that exists in a state such as Victoria. The Commission needs to do much work in educating the public as to its role.

A further challenge arises from the circumstances in which the Commission came into existence. As is perhaps always the case with new legislation which is quickly introduced, there are ambiguities, and in some cases outright problems created by the drafting of the legislation. For example, under section 47 of the Act, an investigator may by written notice require a person to attend and give evidence, or to produce records. If the notice given is stated to be confidential, then under section 98, a person must not disclose the existence of the notice to anyone else without reasonable excuse.

²⁰ Section 74 (1)(a) and (b), *Integrity Commission Act 2009*

²¹ Section 74 (1)(d), *Integrity Commission Act 2009*

²² Section 74 (1)(f), *Integrity Commission Act 2009*

²³ Section 66, *Integrity Commission Act 2009*

²⁴ Section 92, *Integrity Commission Act 2009*

²⁵ Section 92(112), *Integrity Commission Act 2009*

²⁶ Section 92(12), *Integrity Commission Act 2009*

Regrettably the drafting of section 98 is such that confidentiality applies to the notice itself, but not to the statements or documents which might be produced in response to such a notice. There are a number of other similar lacunas in the Act.

Under section 89 the Commission may conduct an investigation on its own motion in respect of any matter that is relevant to police misconduct. However the Act does not provide for any investigative powers upon such an own motion.

Another challenge is that the Act is very “complaint” driven. It sets out a clear process for the assessment and investigation of complaints. However, no such process is clearly established for the Commission to act upon notifications or information which may be made. Whilst it is true that the Board may upon its own motion direct any investigation into any matter which is “relevant to the achievement of the objectives of (the) Act in relation to misconduct”²⁷, this is a relatively heavy handed response to every notification or piece of information which may come to the Commission. However, in the absence of such an “own motion” the Commission has no power to investigate without the making (by someone) of a formal complaint.

A further challenge is that the Act is far from clear as to the jurisdiction of the Commission in relation to police. Whilst, consistent with the complaint driven nature of the legislation, the Commission has ample power to investigate a complaint of serious misconduct by a police officer, there is a question about as to whether it has jurisdiction to investigate, or for that matter even audit, police activity which does not necessarily raise a prima facie case of “police misconduct”. For example there is doubt as to whether the Commission has jurisdiction to audit a police investigation into a police shooting, a death in custody, a death or serious injury arising out of a police pursuit. This uncertainty does not assist in the development of a cooperative approach between the Commission and police.

A particular challenge in the Tasmanian context has been the design of the structure of the Commission to fit the Tasmanian context. The Commission, by mainland standards, has a relatively limited budget which permits a staff level of approximately 18 persons, including the Chief Commissioner. In this context the allocation of sufficient resources to the investigation arm, as against the misconduct prevention and education arm of the Commission, raises different issues which do not exist in the larger mainland equivalent bodies.

A further challenge in the establishment of the Commission was the fact that Parliament chose not to place any limitation on the length of time which might have expired since the conduct, the subject of a complaint might be made. This meant that within a short period of commencing operation, a significant number of complaints were made to the Commission, some of which related to matters which had allegedly occurred decades ago.

Whilst the Act gives ample power to dismiss complaints on the basis of frivolity, lack of substance, unjustifiable use of resources, and lack of public interest so as to justify the Commission proceeding to investigate, the entitlement to make such complaints did perhaps engender false expectations on the part of such complainants, with the result that many of them are disappointed with the determination of the Commission not to proceed to investigation. It may have been better to place some limitation on how old complaints might be. The Act however, does provide that in the case of a complaint about misconduct occurring after the commencement of the Act, the complaint may be dismissed if the complainant had knowledge of the subject matter of the complaint for more than a year and fails to give a satisfactory explanation for delay in making the complaint.

²⁷ Section 45, *Integrity Commission Act 2009*

As observed above, the Act provides that the Joint Committee is to review the functions, powers and operation of the Commission at the expiration of 3 years from the commencement of the Act, which is in October 2013. I consider that to be an appropriate provision. It is still early days in the life of the Tasmanian Integrity Commission. As appears to be traditionally the case in the establishment of such bodies there are many challenges and difficulties to overcome, not the least of which is the challenge of convincing those who are unused to seeing the benefits that independent scrutiny has in increasing public confidence in their activities. I expect that the review in 2013 will result at the minimum, in some substantial legislative amendments, but may indeed involve more significant structural change. For my part I see that as a challenge to meet the requirements of the Tasmanian community and not a threat.

1. REFERENCES