

## Directions For the Future

A strategic planning process will be initiated and a five year Strategic Plan, an annual Business Plan and a Risk Management Plan will be developed. Organisational values will be developed in close consultation with staff, the Board and key stakeholders and underpin key documents such as the organisation's own Code of Conduct. Notwithstanding that a Strategic Plan is yet to be approved by the Board, it is apparent that the primary focus of the Integrity Commission should be on the prevention of misconduct in the first place. To this end, research on national and international best practice in corruption and misconduct prevention will be essential, as will public sector and community engagement, and the professional design and delivery of appropriate training and education programs.

The aim will be to provide value for money and the best possible "bang for the buck". In this regard, it will be essential that the Integrity Commission has a strong organisational focus and is not seen to be just targeting high profile individuals. Subject to direction from the Board, it is hoped to conduct organisational reviews to check the ethical health of organisations, their complaint handling systems and their ability to investigate and deal appropriately with misconduct (which would be enabled by section 45(1)(d) of the Act). A suitable methodology for this approach is currently under development.

The future will be about understanding the causes of public sector misconduct in Tasmania, whether structural, behavioural or cultural, and addressing such factors in partnership with others. It will also be about building misconduct resistance within organisations, working cooperatively with them, and building the capability of such organisations to deal effectively with their own misconduct matters. It will be essential to the Integrity Commission to know what is happening within the public authorities, so the issue of notification by principal officers will certainly be pursued. The future is about values-based organisations and the development of trust and mutual respect, as opposed to organisations that are compliance driven and ruled by fear. It is also about strong and visible ethical leadership, effective leadership, supervision and management, and holding supervisors to account. It is also about dealing appropriately with staff who come to attention through mentoring, coaching, remedial training and appropriate performance management. The setting of high but pragmatic standards of conduct and the inculcation of strong values-driven and supportive cultures will be essential to future success.

It is also about the analysis of intelligence and complaints, identification of emerging issues and trends (and particularly systemic issues within organisations) and the identification of learning outcomes from complaint assessments and investigations to ensure appropriate advice, reform in policies, procedures, training etc. In this regard, it will be essential to ensure strong linkages within the Commission between the CPER and investigations/assessment streams. In a more strategic context, there will also be the challenge of ensuring a coordinated and prioritised approach amongst all integrity entities within Tasmania to the myriad of issues requiring attention. Finally, it will be about ensuring that the Integrity Commission acts in the public interest at all times, and in accordance with the highest standards, with a view to enhancing public trust and confidence in public authorities and our system of democracy.

## Future Evaluation And Review

As part of the strategic and business planning processes, it will be essential to monitor and evaluate organisational and individual performance to ensure the highest standards of performance and return on investment. There are provisions in the Act for a three year review by the Joint Standing Committee on Integrity (see section 24(1)(e)) and a five year independent review to be commissioned by the Minister (section 106). It will be interesting to see in three to five years time, the impact that an Integrity Commission has had on the ethical health of Tasmanian public authorities and levels of community confidence and support. In relation to the Tasmanian model, the features that should be considered further down the track to ensure that the Commission is able to be effective include (See Hammond 2007 referring to Heafey (1993)):

- **Independence** > has the Commission demonstrated the necessary degree of operational independence or is it beholden in any way to the Minister, Government or any Government agency? Are arrangements for the appointment and removal of key staff appropriate?
- **Powers** > has the Commission sufficient powers in order for it to be effective as well as proactive?
- **Information/Intelligence** > has the Commission ready access to all information required to properly fulfil its roles? Is it able to exchange such data with other relevant bodies? Are there mechanisms to ensure that the organisation is made aware of misconduct within public authorities?
- **Resources** > has the Commission been adequately and appropriately resourced?
- **Reporting** > do the reporting mechanisms adequately put key issues in the public domain? Conversely, are matters able to be suppressed or kept private or confidential when necessary?
- **Oversight** > how effective are the current oversight mechanisms of the Board and the Joint Standing Committee?

## Conclusion

The Integrity Commission has the potential to be a tangible and very valuable addition to the political and legal landscape of Tasmania. Finally, there will be a venue for timely investigations of high profile and sensitive matters involving public officers. This will hopefully result in enhanced public confidence in the effectiveness, fairness and impartiality of such investigations, and enhanced integrity in public administration generally.

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<sup>i</sup> A new body, called the Victorian Integrity and Anti-Corruption Commission (or VIACC) has also been recently proposed. There are other integrity agencies that specifically deal with policing, such as the Police Integrity Commission (PIC) in NSW, the Commonwealth's Australian Commission for Law Enforcement Integrity (ACLEI), the Police Complaints Authority in SA, and the Office of Police Integrity (OPI) in Victoria.

<sup>ii</sup> The educative, preventative and advisory functions of the Commission are spelt out in some detail in Part 4 of the Act.

<sup>iii</sup> Although it is noted that the WA CCC has neither statutory mandate nor authority to itself investigate organised crime (Roberts-Smith 2010).

<sup>iv</sup> This should be contrasted with the definition of "misconduct" in the CCC Act in which misconduct is essentially conduct by a public officer that is dishonest, not impartial or in breach of their public duty AND constitutes an offence against a written law or could (notionally) provide reasonable grounds for termination of the office or employment of a public service officer.

<sup>v</sup> See sections 37-40 of the Queensland *Crime and Misconduct Act 2001*, section 28 and 29 of the WA *Corruption and Crime Commission Act* and section 11 of the NSW *ICAC Act*.

<sup>vi</sup> See sections 53 to 55 of the *Crime and Misconduct Act 2001* (Qld) and section 18(2)(g) of the *Corruption and Crime Commission Act* (WA).

<sup>vii</sup> Section 36(2) of the Tasmanian Act outlines what may be considered in determining the public interest.

<sup>viii</sup> Unlike section 17 of the Queensland Act where a specific section is provided, it is unclear whether the Tasmanian model would pick up the activities of a public officer whilst interstate.

<sup>ix</sup> Standards Australia "Australian Standard: Customer Satisfaction – Guidelines for Complaints Handling in Organizations (ISO 10002:2004, MOD).

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### An Insight Into the Establishment of the Integrity Commission in Tasmania: Early Thoughts and Observations

#### Abstract

The establishment of the Integrity Commission marked a major milestone for Tasmanian legal and political history. Following several high profile incidents and the report of the Joint Select Committee on Ethical Conduct in July 2009, there was a demonstrated need for an independent body with a complaint handling and investigative role. It was recognised that there was a need for a strong, preventative, educative and advisory role. This paper discusses the challenges in setting up an integrity agency, the issues the organisation is likely to face and the key aspects of the Tasmanian model. It outlines the CEO's personal and early views on possible future directions for the Integrity Commission, an organisation which will have a critical role in ensuring ongoing trust and confidence in the Tasmanian system of democracy.

#### Introduction

The Integrity Commission opened its doors on Friday 1 October 2010. This was an historic moment in Tasmanian legal and political history. This paper outlines the early observations of the new CEO in relation to the Tasmanian model. It presents her views on the issues and challenges that the organisation is likely to face into the future, given her personal knowledge and experience, and the experiences of other Australian jurisdictions with similar bodies. This paper underpins the CEO's public lecture delivered at the University of Tasmania entitled "A Conversation with Barbara Etter" on Wednesday 13 October 2010.

#### Background

A number of high profile incidents in Tasmania led to serious consideration being given to the establishment of a public sector integrity agency, similar to agencies already established in WA (the Corruption and Crime Commission or CCC), Queensland (the Crime and Misconduct Commission or CMC) and NSW (the Independent Commission Against Corruption or ICAC).<sup>i</sup> As a result, the Joint Select Committee on Ethical Conduct was established and delivered its report in July 2009. Amongst other things, it found that there was a clear need for a new body to "address the identified deficiencies in the existing system of governance" (2009, p.9). Legislation was subsequently developed and debated in the Tasmanian Parliament in November 2009.

The start date for the Commission had been set for 1 July 2010. However, with the disruption of a fiercely fought election where the final outcome was not known for weeks, and delays in the selection and recruitment process, it was necessary to push the start date back to 1 October 2010 to allow for a proper establishment phase and appointments to critical positions such as that of Chief Commissioner and non ex officio Board members.

The CEO, Barbara Etter APM, a former Assistant Commissioner with the Western Australia Police who had headed up the then Corruption Prevention and Investigation Portfolio for three and a half years and worked closely with the CCC, took up her role on 15 June 2010, but not without some initial controversy, over whether adequate consultation had occurred on the appointment, as required by section 17 of the *Integrity Commission Act 2009* ("the Act") (Stedman, 2010). There was also media comment about the makeup of the selection panel for the appointment (Neales 2010), and both the organisation's budget and the salary of the newly appointed CEO ("Cash to match power" 2010). Accordingly, the scene was set for a somewhat controversial start to the Commission.

#### The Legislation

The *Integrity Commission Act 2009* is unique in its approach to addressing community concerns about accountability in government and enhancing community trust and confidence. The primary role of the Commission is one of prevention, education and advice (see section 3)<sup>ii</sup>, but with the very necessary role of complaint handling, assessment and referral, with the possibility of an investigation or even an "inquiry" or public hearing.

The Act, which covers Members of Parliament, ministerial staff, public sector agencies, State-owned companies, Government Business Enterprises, police and local government (and other types of organisations listed as "public authorities" at section 5 of the Act) deals with the issues of "misconduct" and "serious misconduct" by public officers and a special category of senior public officers (such as Members of Parliament and Commissioned Officers of Police) who are "designated" at section 6 of the Act; section 87 of the Act states that the Integrity Commission is to deal with complaints relating to misconduct by a designated public officer. The organisation has a clear triage role and is not given automatic oversight powers as with other integrity agencies. The aim is for the Integrity Commission to augment other oversight mechanisms already in place in Tasmania, such as the Auditor-General, the State Service Commissioner and the Ombudsman (or "integrity entities" as defined in the Act) and Parliamentary oversight mechanisms. In regards to this approach, all three positions mentioned above are included on the organisation's seven person Board chaired by the Chief

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Commissioner. The Board includes three appointed members with stipulated experience (see section 14 (1)(g)). The appointment of Honourable Murray Kellam AO, a former Court of Appeal judge from Victoria and another “mainlander”, to the position of Chief Commissioner, was announced on 16 August 2010. The three appointed Board members were also announced on the same day.

Whilst the appointment of two “mainlanders” to the positions of Chief Commissioner and CEO appeared to generate some discussion, it also indicated a genuine commitment to avoid conflict of interest situations in a small and closely knit community.

### The Tasmanian Model

The Tasmanian model, unlike some of the other models around the country, does not have an organised crime function.<sup>iii</sup> Whilst certain powers are invested in the organisation (entry, search and seizure, use of surveillance devices, directions to attend hearings, answer questions and produce information etc.), several notable investigative powers are not included in the Act such as: telecommunications interception; data access; integrity testing; and assumed identities; and controlled operations. The granting of such powers in the Tasmanian model is significantly counterbalanced by the retention of certain privileges and protections. Numerous privileges under the *Evidence Act and Parliamentary Privilege* (section 100) are retained, including a person’s right to avoid self-incrimination which is otherwise treated by other integrity agencies (for instance, see section 69 of the Victorian *Police Integrity Act 2008* and sections 26 and 37 of the NSW *Independent Commission Against Corruption Act 1988*).

Whilst some other agencies focus on crime and corruption, the Tasmanian model focuses on concepts of “integrity” (in the naming of the Commission), “conduct”, “propriety”, “ethics” and “misconduct”. In fact, the Tasmanian Act, unlike other similar legislation elsewhere, makes no mention of corruption. The Act includes a very broad definition of what constitutes “misconduct” for the purposes of the operation of the Act. It encompasses a simple breach of the Code of Conduct or an attempted breach by a public officer, as well as conduct involving dishonesty, impropriety or misuse of information or material, or public resources.<sup>iv</sup> Interestingly, the *Integrity Commission Act* fails to define what is meant by the key concept of “integrity” in the context of public administration.

Unlike its counterparts in WA, NSW and QLD<sup>v</sup>, the Tasmanian model, does not include an obligation for public sector CEO’s or principal officers to notify the Integrity Commission at an early stage of reasonably suspected misconduct (or similar) even for specially designated public officers (see above).

Whilst the drafters borrowed from the Queensland model to some extent, there are no equivalent provisions for the gathering of intelligence, or the exchange of intelligence and information with other relevant bodies.<sup>vi</sup> However, The Integrity Commission Act does draw on some of the principles at section 34 of the Queensland legislation, which states that the following principles are to be used in the performance of the misconduct function:

- Cooperation
- Capacity Building
- Devolution
- Public Interest

In relation to the above, “devolution” (which is said in the Act to be subject to the principles of cooperation and public interest and the capacity of the relevant agency) involves action to prevent and deal with misconduct occurring wherever possible within that agency. “Public interest” is also expanded upon in the Queensland legislation to provide issues that must be considered in deciding whether to take on a matter.<sup>vii</sup>

Following on from this, the “principles of operation” of the Integrity Commission are set out in section 9 of the Act and some similarities can be observed. For instance, the Tasmanian Act stipulates that the Integrity Commission should, inter alia:

- Work “cooperatively” with public authorities;
- Improve the capacity of public authorities to prevent and respond to case 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; and
- Ensure that matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that it considered is appropriate.

In relation to jurisdiction, in Tasmania, the behaviour complained about must have been committed by a “public officer” within a “public authority” (as defined in the Act) and constitute either “misconduct” or “serious misconduct” (or “serious misconduct” for a police officer given section 88(1)(a)). The Act is also retrospective so it can pick up past behaviour.<sup>viii</sup> Jurisdiction, of course, will be a key part of the initial complaint assessment process. The Tasmanian model provides detailed criteria that need to be taken into account by the CEO in determining whether to dismiss a complaint. Section 36(1) lists criteria that should be considered and then section 36(2) outlines factors which the CEO may consider in determining whether it is in the “public interest” to investigate the complaint. Section 36 is pivotal to the efficient and effective operation of the complaint handling process. For instance, there must be the ability to quickly dispense with obviously frivolous or vexatious complaints or complaints that have already been effectively investigated and dealt with by other agencies, particularly other integrity entities.

Interestingly, significant powers are actually given to the CEO, rather than the Board, under sections 35, 36, 37 and 44, in relation to dismissal and the investigation of complaints. However, “own motion” investigations need to be approved by the Board. Furthermore, pursuant to section 58, the Board determines the action to be taken in relation to an investigation report.

It should be observed that there is no independent mechanism for dealing with complaints against the Integrity Commission or its staff, such as the Special Investigations Monitor at OPI, or the Parliamentary Inspector within the WA CCC. This is an issue that the Board is considering closely to ensure appropriate mechanisms are in place.

As with other integrity agencies, the Commission is able to make findings and recommendations in relation to its investigations and inquiries (section 3 (d)) but is not able to impose actual sanctions.

In relation to independence, section 10 of the Act makes it clear that the organisation is not subject to the direction or control of the relevant Minister (the Attorney-General in this case) in relation to the performance of its powers and functions. It is notable that the Minister is not able to explicitly refer matters to the Commission. In fact, it appears the only formal power of referral to the Commission is held by the Joint Standing Committee (see section 24(1)(g)).

### The Nature Of The Organisation

One of the first tasks facing the new CEO upon her arrival in mid June, apart from identifying a range of priority actions, was determining the structure of the new organisation in light of the resources provided, the roles and priorities stated within the legislation and the needs of the Tasmanian environment. From the outset it was considered essential to ensure that a strong focus was placed and maintained on the prevention, education and advice role. Strategic communications was also considered to be particularly important in the context of stakeholder and community engagement, as was the corruption prevention, education and research role.

Given the likelihood of an influx of initial complaints and the legislative requirement for a thorough complaint assessment process, it was decided that there needed to be a strong emphasis on appropriate complaint handling and assessment processes (which met the relevant Australian Standard).<sup>ix</sup> There was also the need to have the capacity to investigate protracted and complex matters. Stakeholder management was clearly a priority,

particularly in light of the controversy surrounding the establishment of the Integrity Commission and apparent levels of scepticism and cynicism within the general community. It was therefore most important to “meet and greet” key players and attempt to develop a credible profile of competence, impartiality and independence in the early stages. In addition, given the need for strict compliance with legislation and relevant policies and procedures and given the need for absolute confidentiality on some matters, it was deemed essential to have in-house legal expertise, and avoid any conflicts of interest.

Importantly, it was essential to develop a strong and dedicated Corruption Prevention, Education and Research (CPER) stream, to include advice, education and policy functions. However, it was realised early that it would be essential to engage key external parties and develop partnerships for the effective and widespread delivery of training and education. It simply would not be possible for the Integrity Commission itself to provide all the required training and education. It would also be important to support the role of the new and independent Parliamentary Standards Commissioner (a statutory officer) who would be responsible for providing advice to Members of Parliament and the Integrity Commission on various issues.

Once the organisational structure had been determined, it was essential to develop an appropriate suite of Statements of Duties and commence the critical selection/recruitment process. Given the nature of the organisation’s business, risk management and security, including security of information and the physical safety of staff, were also considered paramount. With the assistance of another integrity agency, a security assessment was therefore undertaken and the recommendations will be considered and addressed, where necessary.

Prior to the CEO’s arrival, steps had already been put in place to establish appropriate premises, located away from public sector agencies but on the fringe of the CBD. The premises were fitted out with a hearing room, interview rooms and other identified requirements, following liaison with other integrity agencies. Finally, it was considered necessary to determine how certain administration functions such as HR, IT and financial reporting would be provided given the fledgling nature of the organisation and a finite budget. In that regard, it was decided to enter into a 12 month Service Level Agreement (SLA) with the Department of Justice for the provision of such services, subject to strict confidentiality requirements.

### The Challenges

There will be numerous challenges for the Integrity Commission in its first 12 to 18 months, including:

- The need to engage with the community and key stakeholders across Tasmania and carefully manage expectations as to what can be achieved by a new agency of a relatively small size (19 in Tasmania to the 160 FTE’s at the CCC in WA (CCC 2009, p.97), 112 at the NSW ICAC (ICAC 2009, p.84) or the 319 in the CMC (CMC 2009, p.52))
- Establishing the operational independence and impartiality of the organisation whilst to some extent still being administratively dependent on the State Government (e.g. Staff employed under the *State Service Act*, SLA with Justice, budget controls and restrictions etc)
- Ensuring very high internal standards, of necessity, at times, more demanding and stringent than general State Service standards eg. own Code of Conduct, personnel vetting to national security standards, own internal register of internal interests, proposed stricter policies on travel, secondary employment, gifts and hospitality etc
- Ensuring that the media have a clear understanding of the Commission’s jurisdiction, powers and areas of responsibility
- Raising awareness of ethics, sensitivity to ethical issues and providing decision-making frameworks or tools to assist people, both within the public sector and the broader community, in making ethical choices
- Securing appropriately qualified and suitable secondees from Police and elsewhere when required for investigations or inquiries, given significant demands within their own agencies (see section 21)
- Ensuring the proper and considered use of the powers conferred under the *Integrity Commission Act* with due regard to the requirements of procedural fairness
- Dealing with potentially complex investigative matters, with limited finite resources and within acceptable timeframes
- Determining/Identifying an appropriate case management system to handle complaints, investigations, hearings and intelligence
- Establishing cooperative working relationships with public authorities, but with the necessary amount of professional distance and healthy conflict and tension
- Establishing a professional national/international profile as well as beneficial networks and relationships with other integrity agencies
- Accessing specialised and scarce resources externally eg. forensic computing, covert operatives, and technical support for electronic evidence collection
- Adding to the professional body of knowledge on ethical leadership and integrity in public administration through conference presentations, formal papers, attendance and participation in key fora, and articles
- Identifying any appropriate matters to proceed with by way of investigation and “own motion” investigations
- Determining any matters which warrant public as opposed to private hearings. Schedule 6 of the Act provides that hearings are to be open to the public unless the Integrity Tribunal determines otherwise. It is interesting to note that under the CCC Act, the Commission can only conduct public hearings when the Commissioner reaches the conclusion, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, that it is in the public interest to do so (s140(2) of the Act - see Hammond 2007)
- Maintaining the absolute confidentiality and security of sensitive and personal information to protect not only the reputation of the Integrity Commission but the reputation of those persons subject to the investigative process
- Learning from the experiences of other integrity agencies in relation to major incidents such as the Palm Island matter and the Tyler Cassidy shooting (which deal with police-related deaths)
- Developing policies and strategies to encourage and protect complainants, informants and whistleblowers
- Dealing effectively with high levels of scrutiny by the Board, Parliamentary Joint Standing Committee on Integrity, the Parliament generally, and the media
- Protecting as much as possible, the reputations of those persons who come to the attention of the organisation and having due regard to serious issues concerning their health and welfare
- Avoiding conflicts of interest, or managing them appropriately when they arise, given the small and close nature of the Tasmanian community. It is interesting to note that Commissioner Hammond in a parting speech about his time at the WA CCC in 2007 stated that conflict of interest was “the single most important issue before the public sector today”. He stated “On the evidence before us resulting from the Commission’s investigation and hearings over the last three years, it is clear there are many quite influential public officers who wouldn’t recognise a conflict of interest if it walked up and kicked them in the backside”
- Ensuring timely and appropriate legislative reform to ensure the best possible legislative framework
- Dealing with any complaints about the Integrity Commission and its staff
- Ensuring appropriate resourcing (It is reassuring that there is provision for reserved funding provided in the Act at section 86 in relation to costs and expenses associated with inquiries)
- Demonstrating value for money for the taxpayer in due course and instituting appropriate KPI’s which cover the full functions of the Integrity Commission.