

# Submission to the Review of the *Integrity Commission Act 2009*

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# INTRODUCTION

*“While corruption takes vastly different forms from country to country, this year’s scores reveal that all regions of the globe are at a standstill when it comes to fighting public sector corruption.”<sup>1</sup>*

So states the Transparency International *Corruptions Perceptions Index Report* for 2021, which also scored Australia at 73/100, a four point slippage from the previous year’s ranking. Recognising the transparency index focuses upon performance of nations rather than subnational states, it is difficult to identify meaningful evidence to argue Tasmania is bucking this national trend.

In this context of apparent international stagnation in anti-corruption efforts, this review of the Tasmanian *Integrity Commission Act 2009* is welcome.

The Integrity Commission (the Commission) is an independent statutory authority established by the *Integrity Commission Act 2009* (Tas) (the Act). The Commission’s defined objectives 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.

While welcoming this opportunity to participate in the review of the *Integrity Commission Act 2009*, it is worth acknowledging its genesis is in the previous independent review undertaken by the Hon. William Cox, the report of which was tabled in the State Parliament on 24 August 2016.

Specifically, the July 2022 Justice Department Discussion Paper, *the Integrity Commission Act 2009 Legislative Report Proposal Paper*, refocuses the current review onto the remaining recommendations made in the Cox Review Report, yet to be enacted by the government.

Additionally, the current review seeks consideration of further specific potential reforms of the Act raised since the 2016 Cox Review including:

- 2018 report recommending review of Tasmania’s “Disclosure of official secrets” and “Unauthorised access to a computer” offences; and
- 2021 decision on its jurisdiction over members of parliament regarding election campaigns.

This submission will be in three Parts:

**Part 1** will provide comment on those outstanding Cox Review recommendations yet to be implemented, including those presented as Appendix A in the Justice Department Discussion Paper<sup>2</sup>;

**Part 2** will address the two matters mentioned above which were raised since the 2016 Cox Review; and

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<sup>1</sup> Transparency International *Corruptions Perceptions Index Report* for 2021

<sup>2</sup> See Appendix A – Cox Review Report recommendations to proceed in the next stage of legislative reform, *Discussion Paper July 2022*; pg 26.

**Part 3** will also argue for a broadening of the current review's scope, specifically the following matters:

- Capacity to investigate third parties corruptly influencing public sector;
- Capacity of the Integrity Commission to hold public hearings; and
- Codes of Conduct, development and ongoing monitoring and review.

At the outset, however, it is also necessary to state there are currently concerns and frustrations held across some sectors of the community surrounding the priorities and performance of the Tasmanian Integrity Commission which may be beyond legislative amendment to address. For example, the Integrity Commission has not held any public hearings in the twelve years since its establishment following the passage of the Act in 2009, despite provision in the Act for such hearings to be held.

It needs to be acknowledged that public confidence in the Integrity Commission's capacity to act with rigour and without fear nor favour, will not be reassured by solely amending the Act, no matter how worthy any proposed amendments to the Act may be. The broader problem of confidence in the Integrity Commission - which in all likelihood is beyond the scope of this current review process - stems from community frustration with, and lack of understanding of, apparent Commission decisions to not investigate matters which on the surface at least appear to present a prima facie case for examination.

In this context, having an Act which looks good on paper, with loop-holes closed and prerequisite powers provided, may not be worth the paper it is printed on if it remains under-utilised. Therefore, it is to be hoped, that should the proposed next tranche of legislative amendments, plus the incorporation of more recent matters raised, serve to remove unintended legislative impediments and provide clarifications of investigative scope, these reforms will encourage a greater understanding of, and trust in, the Integrity Commission's role and decision-making processes,

### ***Background Context of Current Review***

The Report of the *Independent Review of the Integrity Commission Act 2009*, tabled in Parliament on the 24<sup>th</sup> of August 2016, contained 55 recommendations. In the Government's formal response to the Cox Review, delivered in November 2016, it states it has accepted in principle 47 of those recommendations, while not accepting seven substantive and 1 sub-recommendation.<sup>3</sup>

In 2017 the then-Hodgman government moved on the first six recommendations of the Cox Review Report, by introducing the necessary amendments which addressed some technical and the more straightforward in nature matters identified. The legislative amendments acting on those six recommendations were passed by the Parliament and commenced in June 2017. However, since the passage of those amendments, the remaining recommendations have been subject to further consideration and hence are the subject of this current review yet again.

Further, additional matters have been identified since the 2016 Cox Report and have been incorporated into the brief Discussion paper provided by the Justice Department for inclusion in the current consultation process.

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<sup>3</sup> Tasmanian Government Response: Independent Review of the Integrity Commission Act, November 2016; pg 8.

## PART 1: OUTSTANDING 2016 COX REVIEW RECOMMENDATIONS

The provided Justice Department [Discussion Paper](#) details 24 recommendations of the 2016 Cox Review Report yet to be acted upon despite the government's in-principle support. It is beyond the scope of this submission to provide an in-depth analysis on each of these recommendations. Instead, by cross-referencing the government's position with the Integrity Commission's response to those individual recommendations, it is possible to identify where there is a difference in opinion between the government's position and that of the Commission. This submission will then focus on those recommendations which elicit a divergence in position between government and the Commission.

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

Both the government and the Integrity Commission agree with this recommendation. This submission also supports its implementation.

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

Both the government and the Integrity Commission agree with this recommendation, however noting the IC does so 'in-principle'. This submission also supports its implementation, on the proviso the Commission's proposed suitable definition of 'as one punishable by imprisonment, including suspended sentences' is reflected in the proposed amendment, and also that the Commission's warning that should the threshold for 'serious misconduct' be set too high, it could prevent the Commission from being able to focus on serious misconduct, contrary to the Cox Review's earlier emphasis.<sup>4</sup>

**Recommendation 11** – *That the Act be amended to require mandatory notification by public authorities of serious misconduct and misconduct by Designated Public Officers to the Commission in a timely manner.*

Both the government and the Integrity Commission agree with this recommendation, however noting the IC does so 'in-principle'. This submission also supports its implementation, recognising the Commission's qualifications. Further this submission endorses that any amendment should reflect the Commission's identified need that legislation should "require notification of 'reasonably suspected serious misconduct and reasonably suspected misconduct by DPOs ...'. To do otherwise would only require the public authority to notify at the end of the relevant process, and contradicts the intent of the amendment."<sup>5</sup>

Sections 28–31 of the *Corruption, Crime and Misconduct Act 2003* (WA), and sections 37–40 of the *Crime and Corruption Act 2001* (Qld) could provide useful drafting examples.

**Recommendation 12(a)** – *That where the Commission is assessing or investigating misconduct of a public officer involving a breach of the State Service code of conduct, the CEO shall, unless he or she is of the*

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<sup>4</sup> Integrity Commission's *Response to Recommendations of Independent Reviewer*, 24 June 2016; pg 3.

<sup>5</sup> *Ibid*; pg 3.

*opinion that to do so might compromise such assessment or investigation, promptly advise the Head of Agency of that officer of the nature of that misconduct on a confidential basis.*

Both the government and the Integrity Commission agree with this recommendation, however noting the IC does so 'in-principle'. This submission also supports its implementation, on the proviso the Commission's identified need for confidentiality provisions consistent with section 98 of the Act are reflected.

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

Despite government support for this Cox Review Report recommendation, the Commission disagrees with it on the following grounds:

*"While the Commission supports the application of the rules of procedural fairness to its operations, the Commission considers that providing material contained in the assessor's report (prepared under s 37 of the Act) to the subject officer of a proposed investigation to be undertaken by a public authority could jeopardise that investigation. This is particularly an issue with referrals of matters involving suspected criminal conduct to Tasmania Police where further confidential investigative action may be required."*<sup>6</sup>

This submission concurs there is merit to the Commission's concerns, and particularly in light of proposed expansion of the Commission's scope and powers to include third parties external to public officials seeking to influence them (discussed later in this submission).

Noting the government's undertaking to continue consulting with the Commission and other stakeholders on this proposed amendment, it is important it is resolved in a manner which does not impede the Commission operating in accordance with its established and defined objectives, while also balancing procedural fairness considerations. Further, to reiterate, that ongoing consultation should also be in the context of expanding the Commission's scope beyond the public sector to include third parties.

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

Both the government and the Integrity Commission agree with this recommendation. This submission also supports its implementation.

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

The Integrity Commission disagreed with this Cox Review Recommendation at the time, arguing it both undermines the Commission's jurisdiction and also contradicts that same Review's Recommendation number 10. The Commission's opposition to this particular recommendation has merit and must be taken into consideration, and until a strong case is put that any amendments

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<sup>6</sup> Integrity Commission, 24 June 2016; pg 5.

seeking to implement this particular recommendation does not undermine the Commission's jurisdiction, its implementation is **not** supported.

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

Despite the government's reluctance on this matter, the Integrity Commission supported this recommendation. This submission also supports its implementation, particularly given its consistency with Recommendation 15.

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

*and*

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

Both the government and the Integrity Commission have provided in-principle support to both Recommendations 19 and 20. This submission also supports their implementation noting it is an area of legal complexity, and on the proviso the specific qualifications cited by the Commission are reflected in the ongoing consultations surrounding how best to implement these two related recommendations.<sup>7</sup>

#### ***Handling of complaints in relation to misconduct or serious misconduct of police officers (Recommendations 26, 27 and 28)***

Noting the government has accepted these three interrelated recommendations in principle, being presented as a group for consideration is made more difficult and confusing given the Commission, while agreeing with recommendation 27 in principle, adamantly disagrees with both recommendations 26 and 28. To summarise:

“...the Commission considers that it should have discretion to retain misconduct matters relating to non-commissioned police officers, as it does for all other public officers. This is important in cases where it may not be possible for police to objectively investigate the matter or where there may be systemic issues, and the public interest not be detracted by a perception of police investigating their own officers.”<sup>8</sup>

These concerns, particularly the risk of public disquiet over the perception of police investigating themselves, has been thrown into sharp relief again recently, with public controversy surrounding recent revelations of a listening device, secured by Tasmania Police under a warrant pertaining to a specific individual, being left to record indiscriminately a Risdon Prison meeting room for approximately two months. Further, once these revelations were brought to light, public concerns were compounded by the announcement by the Police Commissioner that a police-appointed inquiry will take place to examine this incident. Although the inquiry is framed as being independent, to be conducted by a retired Solicitor-General, the fact that it has been established by Tasmania

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<sup>7</sup> See Integrity Commission discussion on these two recommendations, June 2016 response, pg 9.

<sup>8</sup> *Ibid*; pg 11.

Police to investigate Tasmania Police actions has undermined public confidence in some quarters on the grounds that it still appears to contain perceived conflict of interests.

This submission reiterates concerns that these recommendations require clarification as a priority, and should be weighted to protect public interest and eliminate the risk of perception of police investigating themselves, and will therefore, reserve the right to not support any potential amendments seeking to implement recommendations 26 and 28 as they currently stand.

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

Both the government and the Integrity Commission agree with this recommendation. This submission also supports its implementation.

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

Despite the government's stated reluctance on this matter and the fact it "was not minded to agree to this recommendation" on the grounds it would allow referrals direct to the Commission without going through the 'normal' process of a complainant making a complaint to the general manager, the Integrity Commission supported this recommendation.

It is worth noting that public debate surrounding the lack of robust accountability measures in place in local government, and recent complaints regarding behaviour of some local government representatives, may prompt the government to revisit their opposition to this recommendation. In some instances, it could be highly inappropriate for complainants to be required to submit complaints to general managers or anyone associated with that particular local council in question.

Therefore, this submission also supports this recommendation's implementation as the government's argument for not doing so remains unconvincing.

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

Both the government and the Integrity Commission agree with this recommendation. This submission also supports its implementation.

#### **Recommendation 50 – Technical Amendments**

Many of these technical items relate to the implementation of other recommendations, some of which have been dealt with above. The Discussion Paper notes that others will still be further consulted with relevant stakeholders including the Commission, so at this stage it is beyond the scope of this submissions to provide further comment.

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

Both the government (in-principle) and the Integrity Commission agree with this recommendation. This submission also supports its implementation.

**Recommendation 53** - *That an amendment to the Act to ensure the confidentiality of events arising out of the execution of a search warrant, or the exercise of any powers of an investigator under s 52 of the Act, be formulated by the Commission and implemented if approved by the Joint Standing Committee.*

The Integrity Commission agrees with this recommendation, yet at this stage any formulated amendment (by the Commission to be approved by the Joint House Standing Committee) has not been made public. Hence, despite providing in-principle support, this submission will echo the government's Discussion Paper's silence on whether the actual amendment is endorsed until it is made public.

**Recommendation 55** – *That an amendment to the Act to ensure confidentiality over the actions of the Commission of those persons subject to any lawful requirements made by it under the Act be formulated by the Commission and implemented if approved by the Joint Standing Committee.*

As with Recommendation 33 above, this submission provides in-principle support for this recommendation pending any Joint House Standing Committee approved amendment being made public for critique, noting similar in-principle support provided by the government and agreement by the Commission.

### ***Part 1 (A) – Appendix A: Cox Review Report recommendations to proceed in the next stage of legislative reform***

The Justice Department [Discussion Paper](#) details a further 24 recommendations to be prioritised in the next tranche of legislative amendments.

The Integrity Commission's 2016 response to the Cox Review Report contains feedback on the specific recommendations grouped by the department into this next legislative priority, and is supportive of the adoption of all these recommendations.

As such, this submission is also supportive of these proposed priority amendments detailed in Appendix A, while still reserving the right to critique any eventual legislative amendments.

## PART 2: POST-2016 MATTERS RAISED IN DISCUSSION PAPER

As per the Justice Department [Discussion Paper](#) provided, the government is seeking feedback upon additional identified areas for potential reform raised since the 2016 Cox Review Report, upon which the government does not yet have a decided position:

*Other general matters relating to the Act identified through consultation with the Commission, some related to the Cox Review Report;*

I note the Justice Department statement it is continuing to work closely with the Commission across a range of matters additional to, but also related to, matters arising from the Cox Review Report. So, while the effort to consult and provide the opportunity for input on those matters is acknowledged, some are beyond the scope of this submission while they remain at such a general and exploratory level of discussion.

- However, in-principle support is given to the notion of amending the Act to allow the Board to dismiss an own motion investigation and for the CEO to make a recommendation to that effect. However, it should also be stipulated that should the Board and CEO undertake to dismiss an own motion investigation: 1) reasons must be provided, and 2) the initial own motion investigation along with the dismissal reasons need to be reported publicly, pending appropriate natural justice considerations etc. It may be that such own motion disallowance processes are report to the Joint House Standing Committee for example.
- On the matter of amending the Act to permit the Commission to accept referrals from the Local Government Association Code of Conduct Panel, this submission would support such a move in-principle, pending the public release of any such amendments.

*Potential reforms arising from the Commission's 2018 own-motion report that recommended review of Tasmania's 'Disclosure of official secrets' and 'Unauthorised access to a computer' offences. The offences referred to are in sections 110 and 257D of schedule 1 of the Criminal Code Act 1924 (Tas) and section 43C of the Police Offences Act 1935 (Tas); and*

This submission provides in-principle agreement to the resolution of these matters identified in the Integrity Commission's 2018 report, which was tabled in Parliament, while reserving the right to critique any draft legislation released, noting that, as stated in the Discussion Paper, these amendments may be to the *Criminal Code Act 1924* and the *Police Offences Act 1935*, rather than the *Integrity Commission Act 2009*.

- It would appear sensible to ensure consistency across legislation regarding matters such as "disclosure of official secrets", with the proviso of complying with natural justice procedure and principles.
- Issues surrounding matters like 'unauthorised access to a computer' offences are recognised as crucially important and also reflect, in general, a need for continual review of legislation to ensure it is 'moving with the times' particularly regarding technological developments.

For example, in 2019 the ABC reported the case of a 28-year veteran of the Western Australian police force convicted on 180 charges of accessing a secure police database to access personal details of 92 women with whom he'd interacted on dating sites. The former senior constable used police computer databases to access information on a third of these

women multiple times over several years, with one victim's details accessed 13 times over six years.<sup>9</sup>

- More recently, in 2021 a former Queensland senior constable police officer was convicted for leaking the address and other details of a domestic abuse victim to her violent ex-partner, a childhood friend of the officer, five years after first admitting to hacking into two confidential police databases. Significantly, the Queensland Crime and Corruption Commission (CCC) also re-opened investigations into the officer after allegations emerged during compensation hearings that a car belonging to the former officer's childhood friend had been transferred into the officer's name at around the same time he accessed and provided the friend with his ex-partner's details. Despite police originally trying to suppress this information, submitting that it had nothing to do with the victim's compensation case, the CCC acknowledged that it raises the possibility of corruption.<sup>10</sup>

Both the above examples involve police computer databases being accessed for unauthorised purposes, and the data obtained 'misused', however it is worth noting that the proposed reforms in this area would cover all public sector employees. Reforms of these provisions should also include all identified public officers and entities as defined under the Integrity Commission Act 2009, as has been noted elsewhere, political appointee staff in Ministerial and other political officers may not be employed as state service employees. Additionally elected representatives should also be covered by these provisions.

#### ***Potential reforms arising from a 2021 decision of the Commission in respect of its jurisdiction over members of parliament in relation to election campaigns.***

This is an important area requiring reform, and its inclusion in the Discussion Paper is very welcome. The election campaign period, across all democratic parliamentary systems, is an intense period where influence and access are sought over those seeking election, and promises are made by those seeking election.

This matter highlights a serious policy disconnect when prioritising anti-corruption and pro-integrity efforts. As pointed out by Griffith University researchers when contributing to the *National Integrity Commission-Options for Australia* project paper, policy and legislative reform effort tends to focus upon executive government agencies, and general public sector entities and employees. Yet, "*while strengthening the system as it relates to these is important, the most crucial area for strengthening is arguably at the parliamentary and political levels. This is where the public perceive the major – and growing – corruption problems.*"<sup>11</sup>

To reinforce this point, a 2018 survey found that 64.4 percent of respondents considered that some State MPs are perceived 'corrupt' with a further 15 percent considering most politicians are corrupt versus 6.7 per cent who believe that none are.<sup>12</sup>

According to the Griffith University Options Paper, "*The most pressing challenges of corruption perception in the community relate to the integrity reputations of **elected officials (Members of Parliament and Ministers)**, and abuse of high office, rather than public servants. There is only limited value in*

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<sup>9</sup> ABC News report, 1 February 2019.

<sup>10</sup> Andrews Legal Factsheet, 12 June 2019.

<sup>11</sup> Brown et al, 2018 Griffith University Options Paper: pg 33.

<sup>12</sup> See citation of the Global Corruption Barometer in the Brown et al 2018 Griffith University Options Paper; pg 33.

*strengthening the public sector misconduct system with anti-corruption processes developed primarily for public servants and executive officials, when enhanced responses are needed elsewhere.”*<sup>13</sup>

An example of where those “*enhanced responses are needed*” is during the election period when those prospective Minister and Members of Parliament are campaigning to achieve those positions of “high power”.

Public confidence in our good governance infrastructure is rooted in the understanding of fair and free elections for public office. These formative pillars of our democratic institutions are based upon, and reflect, the core principles of

- Equal access to decision-makers, and
- Ensuring decision are free from undue influence.<sup>14</sup>

Which brings us back to the disconnect between current public policy emphasis and community assumption, versus the legislative reality in Tasmania.

Locally there is an assumption that we have in place legislative mechanisms to implement, monitor and enforce the delivery of that equal access and protections from undue influence during the highly charged election campaign periods; that the ‘rules’ which apply once elected, remain in place when seeking re-election.

The issue of sitting MPs not being covered by the *Integrity Commission Act 2009* during the election period, came to a head following the 2021 State election, when there was an attempt to refer the then-Premier to the Integrity Commission over actions which occurred during the May election campaign. In response the Integrity Commission CEO issued a public statement detailing that:

*“The impact of the (parliament's) dissolution is that sitting members no longer hold their seats in parliament; they cease to be MPs and are no longer public officers... We acknowledge that government ministers retain their ministerial role during the election period, and remain subject to the Ministerial Code of Conduct. However, given we only have jurisdiction over ministers due to their status as MPs, I can confirm that we do not have jurisdiction over ministers (including the Premier) during the election period.”*<sup>15</sup>

This clarification that sitting MPs seeking re-election were not considered MPs probably came as a shock to many involved in the state political arena. While not disputing that legal assessment, it appears on the surface to be counter-intuitive given those recontesting MPs still retain their taxpayer-funded staff and electoral offices etc during the election period. Resources which non-sitting candidates do not have access to.

Yet, as mentioned above, it is during election periods that there is a heightened potential for the occurrences of misconduct, serious misconduct, and corruption as policy and funding commitments are sought by individuals and interested entities as part of election campaigning.

A corruption or misconduct risk arises when some individuals or entities may have privileged access to decision-makers, and may rely on personal relationships and connections to influence decision-making processes, including promises or undertakings made during election campaigns.

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<sup>13</sup> Brown et al, 2018 Griffith University Options Paper: pg 57.

<sup>14</sup> Crime and Corruption Commission Queensland, June 2022; pg 3.

<sup>15</sup> Baker, E., ABC News, 11 June 2021.

This risk was identified by the Queensland Crime and Corruption Commission (CCC) which in the lead up to the 2020 Queensland state election wrote to all candidates warning of the potential methods of improper influence which could be used to exert influence:

*Ultimately, what the community asks of government is that it be fair and trustworthy. Queenslanders want to know that decisions are transparent and merit-based. They want to have confidence that their politicians are not for sale and are prepared to be accountable for their actions. It goes without saying that they believe decisions are meant to be made in the best interests of the Queensland community.<sup>16</sup>*

Tasmanians are still witnessing the fall-out of the election grants promises made during recent state elections, including that of 2021, which at the least risks undermining confidence in public integrity, and at the worst could be examples of the exertion of undue influence as warned by the Queensland CCC.

It is worth noting the Integrity Commission's own concerns regarding the potential misconduct risks associated with the state's parliamentary elections, reflected in the Commission's recent initiative to, "release a series of research papers about ethical conduct and potential misconduct risks in Tasmanian parliamentary elections" with the aim of stimulating public awareness and debate over appropriate solutions.<sup>17</sup>

Thus far Paper 1 of the Commission's series focused on 'pork-barrelling' and the second paper, released in April of this year, examined the implications of Tasmania's current use of grants during election campaigns.

It is interesting to note that despite identifying both these activities as being problematic within the broader context of seeking to influence electioneering and 'election bribery' considerations, neither Commission report explicitly recommends any adjustment to the Commission's own legislated scope or powers to rectify the identified problem.

Currently, it appears the discussion regarding potential remedial reforms of the matter highlighted by the Tasmanian 2021 election example is focused upon how to best ensure sitting MPs recontesting elections are still covered by the Integrity Commission Act 2009 as those elected MPs were prior to the election period. Therefore, it is important to stress that all candidates should be covered by any provisions to close this loophole, whether they are sitting members seeking re-election, or not. Similarly, these provisions should cover all sitting members seeking re-election and candidates for both the House of Assembly and Legislative Council, noting there can be Ministers in both yet the election cycles are separate and different.

There is also an argument that local government elections and candidates should also be covered.

Amending the Integrity Commission Act 2009 to ensure integrity and accountability mechanisms apply to members seeking re-election and candidates seeking election, would assist in addressing established public perception that elected MPs and election processes are the 'weak link' when it comes to public trust and good governance. It would also serve as a preventative mechanism, assist

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<sup>16</sup> Crime and Corruption Commission Queensland, June 2022; pg 3.

<sup>17</sup> See the Integrity Commission website for its '[Ethical conduct and potential misconduct risks in Tasmanian parliamentary elections](#)' series of Research Papers commencing 2021.

in improving the standard of ethical conduct during election campaigns, which in turn will enhance public confidence in the regulatory system consistent with the Commission's defined objectives 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.

## PART 3: ADDITIONAL AREAS FOR REFORM

There are additional opportunities to strengthen other aspects of the *Integrity Commission Act 2009*, and the Integrity Commission's scope and powers, beyond the matters raised specifically in the Departmental Discussion Paper. This section will highlight three key areas: the investigation of third parties seeking to influence the public sector or public officials; public hearings; and codes of conduct.

### *Capacity to investigate third parties corruptly influencing public sector*

The Centre for Public Integrity undertook a comparative analysis of State and Territory integrity commissions powers and functions. This analysis identifies that only Tasmania and Western Australia do **not** provide their respective integrity commissions powers to investigate third parties which may be attempting to corruptly influence the public sector.<sup>18</sup>

Section 4, 'Interpretation' of the Tasmanian *Integrity Commission Act 2009*, defines "misconduct" solely in relation to conduct, or attempted conduct that may be considered a breach, dishonest or improper by a public officer. The lack of capacity to investigate third parties and their potential corrupting influence upon the public sector, or public officers, is currently a glaring omission from the Tasmanian Integrity Commission powers, particularly when compared with its interstate counterparts.

Provisions for the investigation of third parties are provided in other jurisdictions in acknowledgment that governments are relying increasingly upon 'out-sourcing', partially or entirely, the design, and implementation of services. Again, the Queensland CCC identifies;

*"Private sector organisations actively compete for, and rely on, government contracts as a source of revenue. But such engagement can heighten public sector corruption risks, particularly those associated with conflicts of interest, fraud or a lack of openness relating to procurement resulting in poor value for money, or the misappropriation of public funds."*<sup>19</sup>

The Queensland CCC notes the difficulty in determining the extent to which practices seeking to influence or impact government decision-making is exacerbated by the extent to which those interactions occur in private and by non-public sector representatives. The CCC states;

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<sup>18</sup> See Centre for Public Integrity comparative analysis, *Australia's Weakest Watchdog*, October 2021.

<sup>19</sup> Crime and Corruption Commission Queensland, June 2022; pg 4.

*“Recent investigations by the CCC have demonstrated that individuals or groups of people may “groom” or develop relationships with key people over a long period of time to position themselves to exert influence over government decisions. While there may be no overt quid pro quo, a person who has ingratiated themselves to a decision-maker over a long period of time may benefit from that person’s favourable view of them.”*<sup>20</sup>

A survey undertaken by the CCC of Queensland’s public sector found there is a growing concern of the perceived improper influence and lobbying undertaken by private interests:

- disturbingly more than a half of respondents having reported corruption risks associated with lobbying efforts;
- 14 per cent reporting they have either witnessed or suspected individuals from the private sector attempting to benefit themselves or associated entities by pressuring public sector employees; and
- a further 11 per cent stating they have witnessed or suspected a private sector individual or entity pressuring an elected official to benefit themselves or another.<sup>21</sup>

This is a significant acknowledgement of the reality experienced interstate, and it would be extremely arrogant to presume that somehow Tasmania is automatically immune to similar ‘temptations’.

Further, the Queensland CCC reiterates:

*“... the means by which people access elected officials and public sector decision-makers in order to effect or encourage a particular outcome — have intensified. While in many circumstances access to government decision-makers is conducted legitimately and in accordance with existing regulations, corruption risks may still arise. A corruption risk arises when some individuals or entities may have privileged access to decision-makers, and may rely on personal relationships and connections to influence decision-making processes. That is particularly so where those modes of access sit outside the established regulatory framework which is intended to ensure transparency around matters of advocacy and lobbying.”*<sup>22</sup>

In Tasmania, those “modes of access” remain outside the Integrity Commission, which is a major component of our regulatory framework.

Hence the TIC is not permitted to investigate any conduct, or attempted conduct that could also be considered a breach, dishonest or improper by any private sector, or third party, that may seek to: *“adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of [a] public officer.”*

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<sup>20</sup> Crime and Corruption Commission Queensland, June 2022; pg 4.

<sup>21</sup> Ibid; pg 5.

<sup>22</sup> Crime and Corruption Commission Queensland, June 2022; pg 3.

For example, should concerns be raised of a private entity seeking to exert undue influence upon a state sector employee that could sway a decision or provide an advantage to the third party – the Integrity Commission could investigate the state sector employee, as a public officer, but not necessarily the behaviour of the private entity.

There are existing interstate examples that do include powers to investigate third parties apparently seeking to improperly influence public officers:

- Queensland’s [Crime and Corruption Act 2001](#), section 15.
- NSW’s [Independent Commission Against Corruption Act 1988](#), section 8.
- Northern Territory’s [Independent Commissioner Against Corruption Act 2017](#), section 10.

While noting that due to specified different scopes and range of powers across the array of interstate integrity and anti-corruption bodies means it is not always possible to compare ‘apples with oranges’, the capacity to investigate the potentially corrupting influence of third parties on the public sector, and public officers including elected representatives should be a consistent across them all, including Tasmania.

A ‘pro-integrity’ approach would strengthen the role and capacity of the Tasmanian Integrity Commission to investigate third parties seeking to corruptly influence the public sector and elected officials. As identified by the Griffith University Options Paper:

*“There is only limited value in strengthening the **public sector misconduct system** in isolation, when major weaknesses relate to the effectiveness of efforts to combat corruption-enabled border crime and abuse of the financial systems across the economy as a whole, and the inability of public or private sector whistleblowers to secure protection for the disclosure of wrongdoing which may relate to public sector misconduct, private sector misconduct or both.”<sup>23</sup>*

### **Public Hearings**

Since its establishment following the passage of the *2009 Act*, the Tasmanian Integrity Commission has not held any public hearings.

This is despite the current *Integrity Commission Act 2009* providing the Commission’s capacity to hold public hearings should an investigation warrant an Integrity Tribunal.

Additionally, section 48 of the Act stipulates an investigation is to be conducted in private, unless “*unless otherwise authorised by the chief executive officer.*” This section infers the decision whether to hold public hearings or not is at the discretion of the Commission.

Any public hearings held, whether as part of an Integrity Tribunal’s operations or another mechanisms such as section 48, the Commission is required to balance the machinery of justice with procedural fairness considerations.

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<sup>23</sup> Brown et al, 2018 Griffith University Options Paper: pg 57.

In contrast to the Tasmanian's Act's imposed limitations on public hearings, the NSW ICAC uses public hearings as a standard or default investigative mechanism, a practice which has generated considerable controversy. However, there is also "broad recognition" that although anti-corruption or integrity agencies which undertake most investigations in private, "*should be free to hold a public inquiry wherever satisfied that this is a necessary or more effective way of progressing an investigation, and is in the public interest.*"<sup>24</sup>

Given procedural fairness and justice considerations, there may be viable alternative options that strike a balance between the current failure to undertake any public hearings and accountability concerns that absence raises, with the potentially problematic NSW ICAC model.

For example, there is an argument that the default position should be to require the Commission to determine whether public hearings are in the public interest, and if so, then public hearings are to be held unless a case is made for procedural fairness and/or the confirmed existence of considerations of the wellbeing of individuals involved warranting the foregoing of public hearings for specific investigations. Under such a model, it may be that the default position is for public hearings to be held, but only once certain criteria are complied with, such as the public interest.

### **Codes of Conduct**

The Attorney-General's Second Reading speech when debating the *Integrity Commission Bill* in 2009 mentions the intended role of the Commission once established, in reviewing relevant codes of conduct:

*"The codes of conduct for members and ministers, as well as ministerial and parliamentary member staff, while already in place, will be, following its establishment, referred to the Integrity Commission for review and to allow it to make recommendations for improvement."*<sup>25</sup>

However, in contrast to that stated intent, currently the Codes of Conduct for Members of Parliament are to be reviewed by the Joint Standing Committee on Integrity, despite the Integrity Commission originally being charged in 2011 with the drafting of the current Code of Conduct in place.

Further, alleged breaches of the MPs' Code of Conduct are to be referred to either the House of Assembly or the Legislative Council, rather than be directed to an independent entity at arms-length of other MPs being expected to become judge and jury of 'one of their own'.

The public perception of nepotism and protectionism risks being exacerbated should the referred MP share a political party allegiance with the parliamentary entity or grouping assigned to hear complaint. Or it risks the public perception of being fatally politicised should the referred MP be an independent or a member of a smaller, or different, political party to those with the numbers on the forum receiving the complaint. Unfortunately, either scenario raises the unhealthy spectre of a perceived conflict of interest over the apparent situation of MPs monitoring and judging fellow MPs.

It is recommended that the responsibility for reviewing and administering Codes of Conduct for Members of Parliament, for Ministers, and for ministerial, senior political and parliamentary staff

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<sup>24</sup> See the Griffith University, *A National Integrity Commission-Options for Australia Strengthening Australia's National Integrity System: Priorities for Reform*, Options Paper, August 2018: pg 16.

<sup>25</sup> House of Assembly Hansard, Attorney-General Lara Giddings MP, second reading speech on the *Integrity Commission Bill 2009* (No. 85); 3 November 2009.

should be transferred to the Integrity Commission. This would be consistent with the recent move of the administration responsibility for the Lobbyist Register and Lobbying Code of Conduct to the Integrity Commission from the Department of Premier and Cabinet.

It is worth noting any revision of Codes of Conduct relevant to Members of Parliament and parliamentary, and ministerial staff will need to be undertaken in accordance with any relevant recommendations made in the *Motion for Respect: Report into Workplace Culture in the Tasmanian Ministerial and Parliamentary Services, August 2022*, released by Anti-Discrimination Commissioner Sarah Bolt.

I am sure there are many good ideas regarding how to improve and expand the relevant expertise, advice and counsel available to parliamentarians – and also local government elected representatives. However, the key area of concern that remains outstanding is whether those democratic tiers of government can demonstrate without a shred of doubt they can deal appropriately and transparently with breaches when they occur, and do so with the expected robustness and independence the public expects, and those involved deserve.

In this context, the current concept and role of the Parliamentary integrity entity would require reviewing and refining.

Clearly, an established arms-length independent entity, such as the Integrity Commission, would meet that criteria – both in the ongoing review of the effectiveness of current Codes of Conduct over time, as well as being the entity which examines any reports of alleged breaches. This may require amending section 8 of the Act, Functions and powers of Integrity Commission, to clarify codes of conduct provisions pertaining to the parliamentary workplace (as defined by the *Motion for Respect Report* released in August 2022) provide similar provisions as currently in place stipulating the Commission's role regarding lobbyist register.

## CONCLUSION

It must be noted that the Tasmanian Integrity Commission's role and functions are different to most other integrity bodies around Australia. An example, previously mentioned in the submission above, is the NSW Independent Commission Against Corruption (ICAC) which has a mandate to expose corrupt conduct and has been provided a full suite of statutory investigative powers to achieve this outcome. In contrast the Integrity Commission was established with a primary focus being the prevention of misconduct and serious misconduct through education, training and the development of capacity, with a recognition that the Commission would only undertake investigatory functions itself in serious matters, such as misconduct and serious misconduct.

However robust, independent and transparent integrity entities and processes, and public expectation and demand for such integrity bodies, are shared across all national jurisdictions.

In that context, this review of the *Integrity Commission Act 2009* is timely and welcome. However, it is worth noting with some concern, that many of the outstanding recommendations sourced from the 2016 Cox Review Report and identified as priority future amendments, still require ongoing consultation with both the Commission and other stakeholders before such amendments are even drafted. While stakeholder consultation and engagement are welcome and encouraged, it does

indicate there could still be a considerable delay before even the identified priority reforms are considered by Parliament, let alone implemented.

Further, this submission raises additional significant reforms – particularly the need to provide the Integrity Commission the capacity to investigate third party attempts to corruptly influence the public sector, entities and/or officials. This reform is also pertinent in light of the Justice Department’s Discussion Paper’s identified additional area for consideration, that of the issue of sitting MPs seeking re-election not being covered by the auspices of the Act.

Given the Queensland Crime and Corruption Commission’s recognition of the need for greater recognition of the perceived and actual threat posed by third parties, and risks associated with election campaigning periods discussed above, it is hoped the government will seize the opportunity presented by this current review of the Tasmanian Act to add further protections in these areas in the interests of Tasmanians, and fostering public confidence in the robustness and fairness of our democratic elections, and the accountability and transparency of our systems of good governance.

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