

# Good government in Tasmania

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*Strengthened donations laws and Right to Information provisions, as well as a Tasmanian Integrity Commission with teeth and new truth in political advertising laws are needed to ensure good government in Tasmania.*

Discussion paper

**Leanne Minshull**

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# Introduction

Compared to other Australian states, Tasmania has weaker political donation laws, less government transparency and limited public accountability.

Most other Australian states restructured their accountability mechanisms following a public corruption scandal. Tasmania has endured comparable scandals, but the response has been less robust.

The one good thing about being at the back of the pack is the opportunity to choose the best of the rest, leapfrogging the field. Tasmania can emerge as a national leader in good government if the political will exists.

Some areas of governance reform have never been attempted, while others were last attempted – unsuccessfully – over a decade ago.

In 2009, following increasing pressure for government transparency, the then Bartlett Labor government introduced a number of reforms including the creation of the Tasmanian Integrity Commission (TIC) and a Right to Information (RTI) framework.

In the following decade, the TIC has never held an inquiry using all of its investigative powers, meaning that it has made no misconduct findings or held any public hearings. The Australia Institute was unable to find any evidence of cases being referred to the Director of Public Prosecutions (DPP). The jurisdiction of the TIC is also more limited than the analogous integrity commissions of some other states: it cannot investigate persons who are not public servants or members of parliament.

The *Right to Information Act* came into force in 2010 in order to increase accountability of the executive to the people of Tasmania. A decade on, as at 1 July this year, the office of the Ombudsman was investigating 82 RTI cases, which had been “open” for an average of 418 days. Tasmania is an underperformer in ensuring RTIs are processed in a timely manner, and has a higher than average instance of redactions and rejections in comparison to other states.

Tasmania does not have state-level political donation laws. Only federal laws apply, meaning that there is no obligation to report donations below \$13,500 nor an obligation to report direct donations to political candidates at all. Unlike some other states, there are no bans on donations from particular industries such as property developers or the gaming industry, no ban on foreign donations and no caps on election expenditure.

Tasmania does outlaw the use of another candidate’s image and name during an election period. However, it is still perfectly legal for candidates and parties to lie in political

advertising. The Australian Capital Territory recently followed South Australia in passing truth in political advertising laws in 2020.

Rather than implement piecemeal legislation as scandals unfold, Tasmania could pre-emptively implement reforms in these four areas of governance that would collectively make Tasmania Australia's most accountable state government. This would both strengthen democracy in Tasmania and help restore trust in government and politics.

This report recommends that the Government undertake significant rather than piecemeal reform in 2021 to ensure the people of Tasmania have confidence in their democracy and their elected officials.

## RECOMMENDATIONS FROM THE AUSTRALIA INSTITUTE

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### Election donations reform

#### Expenditure caps

Tasmania already has expenditure caps for Legislative Council elections. The caps apply for the period between the beginning of the year of the election and the end of polling day. This is easier to do in Legislative Council elections where the term is set. Elections for the House of Assembly are not legislated to occur every four years, but this has been the protocol for a number of elections. Were an election to be held before the fourth year, the election period for the purposes of spending caps could be taken from the issuing of the writs.

Donations caps for candidates and political parties would not have addressed the large spending from third parties during the 2018 election. Other jurisdictions place spending caps on third parties and associated entities.

#### Expenditure Caps

- Cap election expenditure at \$30,000 per party candidate and \$30,000 per party in the State House of Assembly.
- Keep the current system of donations caps in the Legislative Council.
- Third party House of Assembly election spending cap of \$40,000.

#### Donation disclosure

- Disclosure of all donations, gifts and loans over \$1,000 within 24 hours within an election period.
- Disclosure of all donations, gifts and loans over \$1,000 within seven days outside an election period.
- Gift and loan disclosure threshold of \$1,000.

## **Donation bans**

- Ban on donations from foreign corporations or individuals.
- Ban on all donations within seven days of polling day.
- Ban on all anonymous donations.
- Ban on all donations from property developers and gaming companies.

## **Right to Information**

- Decrease the number of RTI applications by releasing more information from all government departments on a regular basis.
- Require agencies to outline elements of any provision relied upon for a refusal to an application, not just the general provision.
- Release annual and detailed information on applications that have been refused and the reasons why.

## **Tasmanian Integrity Commission**

An independent inquiry to recommend structural and cultural changes to the Integrity Commission so that design principles are improved and existing powers, including holding full inquiries with public hearings, are utilised.

That, in the interim:

- Funding be increased immediately to assist in finalising open cases.
- Jurisdiction is expanded to enable the investigation of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration.
- A well-resourced and specialised unit within the DPP be established to respond to any recommendations from the tribunal for prosecution.

## **Truth in political advertising**

- Tasmania to pursue truth in political advertising legislation based on the South Australian/Australian Capital Territory models.

# The need for open and good government

An appropriate level of transparency is a fundamental requirement for citizens to participate in shaping the way they are governed, who governs them and what government spending should be prioritised. An “appropriate” level of transparency is not necessarily total transparency, as total transparency could at times limit the safe and efficient functioning of government, whilst adding little to the goal of open participation.

Ivan Krastev from the Centre for Liberal Strategies in Bulgaria argues that an over reliance on transparency has led to the mistaken hope that transparency itself will improve our societies to such an extent there will be no requirement for people to be good.<sup>1</sup>

Finding the balance between these competing factors can be difficult. Federal governments are faced with balancing the need for transparency with genuine national security concerns. Transparency for state governments is more straightforward but still requires nuance to ensure that transparency mechanisms strengthen public institutions rather than constrain them.

Sadly, current discourse on transparency in Tasmania remains mired in the banal. Political defences to a lack of transparency overwhelmingly follow two well-trodden paths: that transparency is not a priority and that it would reveal information that is commercial in confidence.

## 1. NOT A PRIORITY

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Governments have often deprioritised implementing transparency mechanisms. The rationale that ‘now is not the right time’ has been utilised extensively during the COVID-19 pandemic by both state and federal governments. Ironically, increased public spending and unprecedented restrictions on personal freedoms in response to the pandemic should have moved transparency up the list of priorities.

Following the 2018 election, the re-elected Premier Will Hodgman announced that the Government would conduct a review into Tasmania’s Electoral Act and associated election laws. The Department of Justice website states that:

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<sup>1</sup> Krastev (n.d.) *Does more transparency mean more trust?*, <https://www.opengovpartnership.org/trust/does-more-transparency-mean-more-trust/>



The Government recognises the importance of taking this opportunity to listen to all Tasmanians and ensure that we have a robust, democratic and fair electoral system that reflects Tasmania today.<sup>2</sup>

The Review commenced on 9 June 2018 and an interim report was presented to the Attorney-General and published on the Justice Department website. A Final Report has been with the Government since December 2019, but at the time of writing had yet to be released to the public. When questioned on this, the Premier replied,

However, at the moment as the election is not until 2022 it is not a priority and we remain focused on those matters that are most important to Tasmanians right now.<sup>3</sup>

## 2. COMMERCIAL IN CONFIDENCE

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There are good reasons to protect the intellectual property of businesses in our current economic system. Absolute transparency could lead to a suppression of innovation and investment as organisations are cautious to commit capital in order to gain advantage over a competitor, if the risk of the competitor benefiting from the efforts of the organisation for free are too high. However, commercial in confidence can also be used as a shield for government just as it can a shield for businesses.

Awarding leases for public land to for-profit businesses has long been a contentious issue in Tasmania. Requiring Tasmanians to seek permission from, or pay a fee to, private corporations to access public land is an issue that ignites passion across the political divide.

A lease for exclusive use of Halls Island, a parcel of land within the World Heritage listed Walls of Jerusalem national park, has become a lightning rod for community opposition to the privatisation of public assets. An RTI application was made by an individual in 2018 seeking the terms of the lease including the annual fee payable. Two years, three reviews and an order from the Ombudsman to release the information later, the leasing arrangements were released.

Subsequent to this, calls were made to release the details of all similar private leases over public land. In response to this, the Premier referred to the 'standard protocol' of these lease arrangements being commercial in confidence, stating in the *Examiner* paper:

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<sup>2</sup> Tasmanian Department of Justice (2019) *Electoral Act Review*, <https://www.justice.tas.gov.au/community-consultation/updated-projects/electoral-act-review>

<sup>3</sup> Baker (2020) *Who are Tasmania's political lobbyists?*, <https://www.abc.net.au/news/2020-10-22/who-are-tasmanias-political-lobbyists/12795452>

In terms of leases and licences, this point is well understood, in the past, governments of both persuasions have for matters of commercial in confidence have not released that information.<sup>4</sup>

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<sup>4</sup> Holmes (2020) *'Mates rates': Halls Island lease deal prompts questions on other leases in Tasmanian public land*, <https://www.examiner.com.au/story/6604421/mates-rates-halls-island-lease-deal-prompts-questions/>

# Donations law reform

State based donations regulation has never occurred in Tasmania, let alone been revised or tightened. There is currently no obligation to report donations below \$14,300 nor an obligation to report direct donations to political candidates at all. Unlike some other states there is no ban on donations from particular industries like property developers or the gaming industry and no ban on foreign donations.

Tasmania has no requirement for disclosure of third party electoral spending. Donations received for the March 2018 election were disclosed in February 2019 under federal laws and, even then, the laws only applied to single donations over \$14,300<sup>5</sup> to parties and no requirement for disclosure of any amount to candidates.

A report from the University of Tasmania into electoral reform found that “Since 2009 the source of less than 20 per cent of more than \$25 million donated to Tasmanian political parties has been disclosed.”<sup>6</sup> After the 2018 election, criticism was levelled at the government that the monopoly owners of all poker machine licenses, the Federal Group, had undue influence on the outcome of the election via substantial campaigning and donations to the Liberal Party. The returned Hodgman government committed to undertaking political donations reform.

In response to the public concern, Premier Hodgman stated that:

We've fought this campaign on the basis of what are national laws and it's expected that all parties will abide by them.

But we should not be afraid to look at how we can do things better.

In the wash-up of any election, we should look at our democratic processes and there are a number of issues that have become apparent through this campaign that could be looked at.<sup>7</sup>

The *Electoral Act* interim report was released in December 2018 but the final report and recommendations are, at the time of writing, still sitting with the Premier. The final report was delivered to the Government in December 2019. It looks unlikely the public will see the

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<sup>5</sup> Australian Electoral Commission (2020) *Disclosure threshold*,  
[https://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/threshold.htm](https://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm)

<sup>6</sup> Eccleston and Jay (n.d.) *Campaign finance reform in Tasmania: Issues and options*,  
[https://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0010/1254718/ISC-UTAS-Insight-Ten-Campaign-Finance-Reform-in-Tasmania.pdf](https://www.utas.edu.au/__data/assets/pdf_file/0010/1254718/ISC-UTAS-Insight-Ten-Campaign-Finance-Reform-in-Tasmania.pdf)

<sup>7</sup> James (2018) *Hodgman open to Tas donation reform*,  
<https://www.examiner.com.au/story/5263252/hodgman-open-to-tas-donation-reform/>

report this year and even more unlikely that the Tasmanian parliament will deal with any of these issues this year. When Parliament resumes next year, it will be 12 months until the next state election is due. If little is done to improve government transparency, donations laws and accountability, Tasmanians will once again head to the polls with less knowledge of who has and is exercising influence over their elected representatives and government more broadly than their fellow Australians in other states.

The table below, taken from the interim report released in December 2018, shows how far behind other states Tasmania is. Note that some changes have occurred federally and in other states since the release of this chart, none of which have changed the relative position of Tasmania.

**Figure 1: Election funding and disclosure settings**

	Federal	NSW	Vic.	SA(a)	Qld	Tas.(b)	WA	ACT	NT
Gift disclosure threshold	\$13,800	\$1,000	\$1,000	\$5,191	\$1,000	×	\$2,500	\$1,000	\$1,500
Loan disclosure threshold	\$13,800	\$1,000	\$1,000	\$5,191	\$1,000	×	-	\$1,000	\$1,500
Threshold indexed	✓	×	-✓	✓	×	-	✓	×	×
Donation cap (to party)	×	\$6,300	\$4,000	×	×	×	×	×	×
Donation cap period	-	Yearly	4 years	-	-	-	-	-	-
Donor returns required	✓	✓	✓	✓	✓	×	×	×	✓
Expenditure cap (max for party)	×	~\$11m	×	~\$4m	×	×	×	\$1m	×
Expenditure cap indexed	-	✓	-	✓	-	-	-	✓	-
Per seat expenditure cap	×	\$61,500	×	\$100k	×	×	×	×	×
Expenditure caps for third parties	×	\$500k	×	×	×	×	×	\$40,000	×
Expenditure caps for associated entities	×	×(c)	×	×	×	×	×	\$40,000	×
Third party campaigner returns	✓	✓	✓	✓	✓	×	✓	✓	×
Anonymous donations threshold	\$1,000	\$1,000	\$1,000	\$200	\$1,000	×	\$2,300	\$1,000	\$1,000
Banned donor industries	×	✓(d)	×	×	✓(e)	×	×	×	×
Foreign donation restrictions	✓	✓	✓	×	✓	×	×	×	×
Expenditure reporting	×	✓	✓	✓	✓	×	✓	✓	✓
Campaign account	×	✓	✓	✓	×	×	×	×	×
Per vote public funding	\$2.74	\$3/\$4(f)	\$6.00	\$3.19	\$3.14	×	\$1.91	\$8.24	×
Public funding vote threshold	4%	4%	4%	4%	6%	-	4%	4%	-
Public funding capped to expenditure	✓	✓	✓	✓	✓	-	✓	×	-
Administrative funding (max)	×	~\$3.4m	~1.8	\$60 000	\$3m(g)	×	×	~\$533k(h)	×
Other public funding sources	×	✓	✓	×	×	×	×	×	×
Election donation reporting	×	21 days	21 days	Weekly	✓	×	✓(i)	Weekly	✓
Other reporting cycle	Annual	Half yearly	Annual	Half-yearly	Half-yearly(j)	×	Annual	Annual	Annual

Source: Tasmanian Department of Justice (2018) *Electoral Act Review: Interim report*,  
[https://www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0009/453564/Electoral-Act-Review-Interim-Report.pdf](https://www.justice.tas.gov.au/__data/assets/pdf_file/0009/453564/Electoral-Act-Review-Interim-Report.pdf)

## REFORM PROPOSALS

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The Electoral Amendment (Electoral Expenditure and Political Donations) Bill 2020 was tabled by Shadow Attorney-General Ella Haddad in the October sitting of parliament. It seeks to address some shortcomings but does not reach the current best practice, let alone exceed it. The Labor Party (ALP) Bill does not match models adopted in Queensland, Victoria or New South Wales. Specifically, the ALP Bill:

- Does not ban foreign donations.
- Does not ban anonymous donations under \$1,000.
- Does not ban donations from specific industries.
- Allows anonymous donations in total up to \$10,000.
- Allows disclosure up to 30 days after the donation is received – even within an election period.

The Bill does not follow recommendations on expenditure caps from the University of Tasmania's Insight report released after the 2018 State Election.<sup>8</sup> The Insight report recommended that for House of Assembly elections there be:

- An expenditure limit of \$30,000 per individual candidate.
- A limit of \$30,000 per candidate for parties.
- A total cap of \$750,000 per party (five candidates per electorate, for \$30,000 for each of 25 candidates in total across the State) in House of Assembly elections.

The ALP Bill proposes substantially higher caps in House of Assembly elections:

- A candidate [in a party] can spend up to \$100,000.
- A party can spend up to \$1,000,000.

For the Legislative Council the Insight report recommends that:

*In the interests of consistency, we propose that the expenditure cap for Legislative Council elections be increased to \$30,000 per candidate. Reflecting the culture and practice of the Legislative Council, the current ban on political party spending in the Upper House election should remain.<sup>9</sup>*

The ALP Bill proposes a cap in the Legislative Assembly of \$20,000 per candidate – greater than the current cap of \$17,500, but less than the Insight report recommendation of \$30,000 per candidate.

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<sup>8</sup> Eccleston and Jay (n.d.) *Campaign finance reform in Tasmania: Issues and options*

<sup>9</sup> Eccleston and Jay (n.d.) *Campaign finance reform in Tasmania: Issues and options*, page 4

## EXPENDITURE CAPS IN THE ACT

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At 457,000 people the ACT is of a similar size to Tasmania, and like Tasmania has a 25 seat lower house.

In the ACT, the expenditure cap amounts for 2020 for each category of political participant are:

- \$42,750 per party candidate to a maximum of 25 candidates (5 candidates for each of the 5 electorates) for party groupings (allowing for \$1,068,750 total expenditure for a party fielding 25 candidates);
- \$42,750 per non-party candidate or non-party Member of the ACT Legislative Assembly (MLA);
- \$42,750 per third-party campaigner; and
- \$42,750 per associated entity.<sup>10</sup>

## RECOMMENDATIONS FROM THE AUSTRALIA INSTITUTE

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### Expenditure caps

Tasmania already has expenditure caps for Legislative Council elections. The caps apply for the period between the beginning of the year of the election and the end of polling day. This is easier to do in Legislative Council elections where the term is set. Elections for the House of Assembly are not legislated to occur every four years, but this has been the protocol for a number of elections. Were an election to be held before the fourth year, the election period for the purposes of spending caps could be taken from the issuing of the writs.

Expenditure caps in the Legislative Council have allowed a high number of independents to enter the Tasmanian parliament. Keeping the expenditure caps at their current level would allow that opportunity to continue. Candidates for Legislative Council seats have around one third of constituents to reach than their House of Assembly counterparts. For these reasons, leaving the current structures in place that are serving Tasmania well would be the most appropriate.

- Cap election expenditure at \$30,000 per party candidate and \$30,000 per party in the State House of Assembly.
- Keep the current system of expenditure caps in the Legislative Council.

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<sup>10</sup> Elections ACT (2020) *Fact sheet – Electoral expenditure cap*, [https://www.elections.act.gov.au/education/act\\_electoral\\_commission\\_fact\\_sheets/fact\\_sheets\\_-\\_general\\_html/fact\\_sheet\\_-\\_electoral\\_expenditure\\_cap](https://www.elections.act.gov.au/education/act_electoral_commission_fact_sheets/fact_sheets_-_general_html/fact_sheet_-_electoral_expenditure_cap)

Donations caps for candidates and political parties would not have addressed the large spending from third parties during the 2018 election. Other jurisdictions place spending caps on third parties and associated entities.

- Third party House of Assembly election spending cap of \$40,000.

## **Donation disclosure**

Disclosure of all donations, gifts and loans over \$1,000 within 24 hours within an election period.

Disclosure of all donations, gifts and loans over \$1,000 within seven days outside an election period.

## **Donation bans**

Ban on donations from foreign corporations or individuals.

Ban on all donations within seven days of polling day.

Ban on all anonymous donations.

Ban on all donations from property developers and gaming companies.



# Right to Information

Tasmania's first *Freedom of Information Act* came into force in 1993. The objectives of the Act were:

- (1) The object of this Act is to improve democratic government in Tasmania –
  - (a) by increasing the accountability of the executive to the people of Tasmania; and
  - (b) by increasing the ability of the people of Tasmania to participate in their governance.
- (2) This object is to be pursued by giving members of the public the right to obtain information contained in the records of agencies and Ministers limited only by necessary exceptions and exemptions.
- (3) The object is also to be pursued by giving each person a right to have amended any inaccurate, incomplete, out of date or misleading information relating to that person contained in the records of an agency or of a Minister.
- (4) It is the intention of Parliament –
  - (a) that this Act be interpreted so as to further the object set out in subsection (1); and
  - (b) that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.

The Act was amended nine times between 1993 and 2009,<sup>11</sup> when it was superseded by the *Right to Information Act 2009* ("RTI Act"). The objectives of the *RTI Act*<sup>12</sup> are the same as those of the *Freedom of Information Act 1991*. The *RTI Act* has been amended eight times over the last decade.

The Tasmanian Ombudsman recently acknowledged the increased need for transparency during the current pandemic noting,

As countries around the world manage the impacts of COVID-19 and other crises facing communities, access to information becomes even more essential. Open,

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<sup>11</sup> *Freedom of Information Act 1991* (Tas), <https://www.legislation.tas.gov.au/view/html/inforce/2008-06-26/act-1991-022>

<sup>12</sup> *Right to Information Act 2009* (Tas), <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2009-070>

transparent and accountable governments that proactively release information to the community remain fundamental to a democratic society.<sup>13</sup>

In June 2018, then Premier Will Hodgman recommitted to increasing transparency by implementing a number of reporting reforms and stating that

The Tasmanian Government is committed to increasing transparency and accountability by enhancing and extending the routine disclosure of information across all government departments.<sup>14</sup>

Despite these multiple amendments and acknowledged importance of transparency during a pandemic, the objectives of the Act have not adequately been met when held against similar regimes in other states.

The latest Ombudsman Tasmania Annual Report, released on 17 November 2020, stated that:

Tasmania's public authorities refused access to any information in 30% of their 2018-19 RTI decisions. This rate of refusal was nearly twice that of the next highest jurisdiction (Queensland at 16%) and 750% that of Australia's most open jurisdictions (Victoria and the NT both at 4%). Tasmania's percentage of refusals in full has been increasing each year since 2016-17 when it was 15%.<sup>15</sup>

Tasmania is not just 'ahead' in total refusals, the table below from 2018/19 shows the state also has the lowest percentage of RTIs responded to in full and the highest number seeking external review of initial decisions (4.5%).

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<sup>13</sup> Falk, Boshier, Tydd, Rangihaeta, Lines, Bluemmel, Fletcher, Connock, Manthorpe and Shoyer (2020) *Joint statement on International Access to Information day 2020*, <https://www.ombudsman.tas.gov.au/right-to-information/joint-statement-on-international-access-to-information-day-2020>

<sup>14</sup> Hodgman (2018) *Increasing transparency and accountability*, [http://www.premier.tas.gov.au/releases/increasing\\_transparency\\_and\\_accountability](http://www.premier.tas.gov.au/releases/increasing_transparency_and_accountability)

<sup>15</sup> Ombudsman Tasmania (2020) *Annual Report 2019/20*, page 29, [https://www.ombudsman.tas.gov.au/\\_\\_data/assets/pdf\\_file/0005/592178/ANNUAL-REPORT-2019-2020-Ombudsman-Tasmania.PDF](https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0005/592178/ANNUAL-REPORT-2019-2020-Ombudsman-Tasmania.PDF)

**Figure 2: RTI response rate, 2018–19**

	Average time	Full disclosure	Part disclosure	Requests to external review
<b>Tas</b>	67.2% within 20 days	27.70%	36.70%	4.50%
<b>Vic</b>	82.62% within 30 days	64.79%	31.20%	1.75%
<b>NSW</b>	-	-	-	56 requests
<b>WA</b>	35 days	46.80%	39%	1.10%
<b>SA</b>	38.3% of requests within 30 days	37.30%	25.40%	2.10%
<b>NT</b>	77.1% within 30 days	43%	53%	2.57%
<b>Qld</b>	-	83.7% full or partial	83.7% full or partial	4%
<b>ACT</b>	-	-	-	40 requests
<b>Cth</b>	82.58% within 30 days	52%	34.87%	2.38%

Sources: Tasmanian Department of Justice (2019) *Right to Information Annual Report 2018-2019*, page 5, [https://www.justice.tas.gov.au/about/right\\_to\\_information/righttoinformation](https://www.justice.tas.gov.au/about/right_to_information/righttoinformation); Office of the Victorian Information Commissioner (2019) *OVIC Annual Report 2018-2019*, pages 50–94, <https://ovic.vic.gov.au/wp-content/uploads/2019/10/OVIC-Annual-Report-2018-19.pdf>; Information and Privacy Commission New South Wales (2019) *Annual Report 2018/19*, Appendix 3, [https://www.ipc.nsw.gov.au/sites/default/files/2019-10/IPC\\_Annual\\_Report\\_201819\\_Web\\_Accessible\\_0.PDF](https://www.ipc.nsw.gov.au/sites/default/files/2019-10/IPC_Annual_Report_201819_Web_Accessible_0.PDF); Office of the Information Commissioner Western Australia (2019) *Annual Report 2018/2019*, pages 2, 79, 98, 106, [https://www.oic.wa.gov.au/Materials/OIC\\_AR19.pdf](https://www.oic.wa.gov.au/Materials/OIC_AR19.pdf); Government of South Australia (2019) *Administration of the FOI Act 2018-19 Annual Report*, Attachment 1, <https://archives.sa.gov.au/sites/default/files/public/documents/2018-19%20Annual%20Report%20on%20the%20Administration%20of%20the%20FOI%20Act%20w%20Attachment%20%28A126206%29.pdf>; Queensland Government (2019) *RTI Annual Report 2018-19*, page 6, <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T976.pdf>; Office of the Information Commissioner Queensland (2019) *2018-19 Annual Report*, [https://www.oic.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/40786/OIC-Annual-Report-2018-19-complete.pdf](https://www.oic.qld.gov.au/__data/assets/pdf_file/0007/40786/OIC-Annual-Report-2018-19-complete.pdf).

Note: In Queensland, 83.7% of documents considered were released either in full or in part. It is not clear how many requests were overall responded to in full or in part, nor how the statistic of 83.7% is broken into in full/in part requests respectively.

## REVIEW BY THE OMBUDSMAN

Section 44 of the *RTI Act* allows for external review by the Ombudsman if:

- (1) (a) the person or external party has made an application for internal review under section 43(1), (2) or (3) in relation to the decision; and
- (b) either –
  - (i) the person or external party has been informed of the result of the review; or

(ii) 15 working days have elapsed since the application was made.

The application must be made within 20 working days of an event referred to in subsection (1)(b).

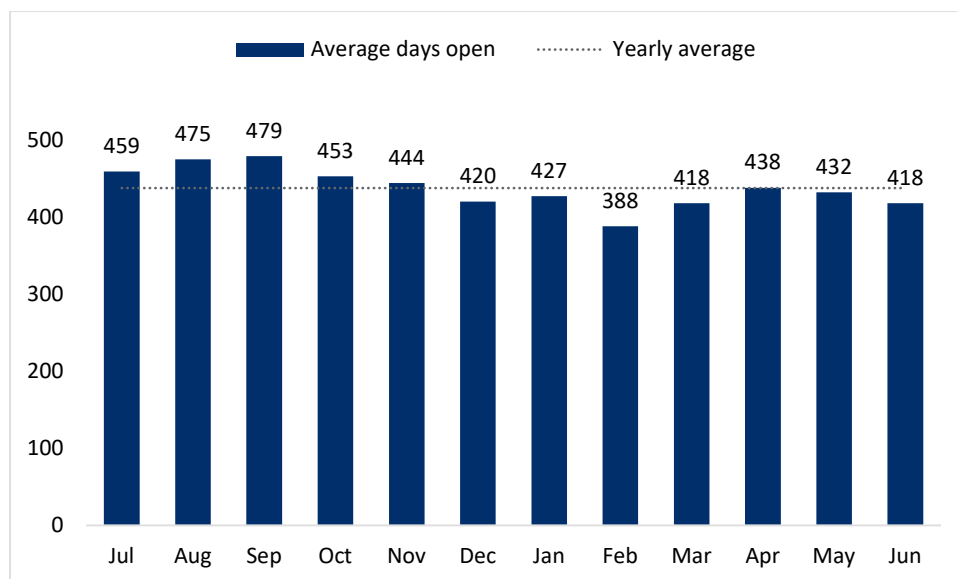
The requirement for an internal review before an external review by the Ombudsman is available is an extra hurdle, not imposed in Victoria, Northern Territory and the ACT.

The recently released 2019/20 Tasmanian Ombudsman report showed that requests for external review, already the highest in the nation for 2018/19, had further increased to 4.9%.

The number of applications for external review made to the Ombudsman in the 2019/20 reporting year was 65, compared to 59 in the 2018/19 year.

The number of open cases for the office of the Ombudsman grew in the 2018/19 and 2019/20 reporting years. The total number of active external reviews stands at 82. Increased funding in the 2019/20 state budget may assist in clearing the backlog of open cases, but the average time for a complaint to be finalised is well over a year.<sup>16</sup>

**Figure 3: External reviews – average days open (2019/20)**



Source: Ombudsman Tasmania (2020) *Annual Report 2019/20*, page 78

## RECOMMENDATIONS FROM THE AUSTRALIA INSTITUTE

Decrease the number of RTI applications by releasing more information from all government departments on a regular basis.

<sup>16</sup> Ombudsman Tasmania (2020) *Annual Report 2019/20*, page 78

Require agencies to outline elements of any provision relied upon for a refusal to an application, not just the general provision.

Release annual and detailed information on applications that have been refused and the reasons why.

# Accountability - The need for a stronger integrity commission

Transparency alone will not ensure the suppression of corruption. If all citizens are to have the ability to hold the powerful to account, an accessible, well-funded and active vehicle for that to occur is needed. In Tasmania, the vehicle relied upon to investigate misconduct by the parliament and public officers is the Tasmanian Integrity Commission.

The Commission needs structural and cultural remodelling. Its structure could be strengthened by adopting the design principles for a national integrity commission (federal ICAC) prepared by the National Integrity Committee.<sup>17</sup> Cultural issues could be addressed by undertaking an independent review of the commission, which at a minimum would examine why there have been no public hearings or full inquiries held so far.

The Tasmanian Integrity Commission was established on 1 October 2010 by the *Integrity Commission Act 2009*, in response to a cross party inquiry in 2009 into the ethical conduct of public representatives. David Bartlett, Labor premier from 2008 to 2011, called the inquiry and established the Integrity Commission in response to its findings.

The Commission has educative and investigatory functions. In the years since its inception, the Commission has spent significant time and money on providing an education service, but its publicly available record on investigations and adverse findings is less convincing.

When the state Liberal Government was elected in 2014, the Commission's funding was cut by twenty per cent and an attempt was made to cut its investigative function. In response, the Commission's Chief Executive Diane Merryfull told media that the State Government was trying to shut down the commission.<sup>18</sup>

A review of the Commission after five years of operation was completed in 2016. Led by former Chief Justice of the Supreme Court of Tasmania, William Cox AC QC, the Review

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<sup>17</sup> National Integrity Committee (2017) *Principles for designing a National Integrity Commission*, <https://www.tai.org.au/content/corruption-fighters-and-former-judges-design-national-corruption-watchdog>

<sup>18</sup> ABC News (2014) *Tasmania's anti-corruption watchdog faces funding cuts*, <http://www.abc.net.au/news/2014-05-30/anti-corruption-watchdog-fears-funding-cuts/5490182>; ABC News (2014) *Integrity Commission's Diane Merryfull says Tas Government trying to shut down watchdog*, <http://www.abc.net.au/news/2014-09-30/integrity/5778840>

made 55 recommendations, including a number that encouraged more efficiency in the operation of the commission.<sup>19</sup>

By 2017, only the first six recommendations had been implemented.

The amendment act implemented changes not recommended by the review by adding a number of provisions that allow for the Chief Commissioner to be suspended, including:

if the Governor is satisfied that the person has engaged in misbehaviour that brings the office of Chief Commissioner into disrepute.<sup>20</sup>

## NARROW JURISDICTION

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The National Integrity Commission model recommends:

That the Commission has a broad jurisdiction, including the ability to investigate any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, if the Commissioner deems the conduct to be serious or systemic.

The ability to investigate third parties already exists for the NSW Independent Commission against Corruption (ICAC). The TIC is limited to solely investigating the conduct of public officers. The Act provides a specific list of who is defined as a public officer, which includes people employed by the Parliament of Tasmania, in Ministers' or MPs' offices, government departments, the police service, a state owned company, local government or any other body funded by public money. It has limited jurisdiction to investigate parliamentarians, and anyone who is not a public officer.

The TIC cannot directly investigate anyone that is not a public officer. It cannot directly investigate an industry representative aiming to unduly influence the decisions of a public servant or parliamentarian. This is not the case in other states, including NSW, Victoria and Queensland.

The TIC may be limited in its ability to investigate parliamentarians by the definition of misconduct, and by the protections of parliamentary privilege.

The definition of misconduct provides that the TIC cannot investigate conduct that is connected with a proceeding in Parliament. This is broadly defined as 'all words spoken or

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<sup>19</sup> Cox (2016) *Independent Review of the Integrity Commission Act 2009: Report of the independent reviewer*, [https://www.integrityactreview.tas.gov.au/\\_\\_data/assets/pdf\\_file/0006/347649/Report\\_of\\_the\\_Independent\\_Review\\_of\\_the\\_Integrity\\_Commission\\_Act\\_2009\\_-\\_May\\_20162.PDF](https://www.integrityactreview.tas.gov.au/__data/assets/pdf_file/0006/347649/Report_of_the_Independent_Review_of_the_Integrity_Commission_Act_2009_-_May_20162.PDF)

<sup>20</sup> *Integrity Commission Amendment Act 2017* (Tas)

acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House of Parliament or of a committee.’<sup>21</sup>

## LACK OF PUBLIC HEARINGS

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Investigations into misconduct, be it criminal or civil, are by and large done in public in Tasmania. If you break the law, your case will be heard in public in a court of law. When lawyers appeal a finding of misconduct to either the legal profession disciplinary tribunal or the supreme court, it is done in public. When medical practitioners are reported to and investigated by the Tasmanian Health Practitioners Board, at least some of the hearings are public.

This commitment to justice not just being done but being seen to be done, has not thus far applied to our elected officials or public servants. The TIC can only hold public hearings once the investigation has reached a full inquiry under the Integrity Tribunal. Despite operating for more than a decade, the TIC has not held a full inquiry.

As the role of anti-corruption commissions is to investigate and expose corruption, and much of the content of investigations comes out in hearings, the act of hiding hearings from public view threatens the proper function of the commission. Integrity commissions assist in building public trust in government, particularly when hearings are held in public view.

Victorian Independent Broad-based Anti-corruption Commission (IBAC) Commissioner Stephen O’Bryan QC has said that openly examining cases of alleged serious corruption and misconduct in public hearings has encouraged and empowered people to come forward and report suspected wrongdoing.<sup>22</sup>

Former assistant NSW ICAC Commissioner Anthony Whealy QC has said “there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.”<sup>23</sup>

Former NSW ICAC Commissioner David Ipp QC has said of an integrity commission that “Its main function is exposing corruption; this cannot be done without public hearings.”<sup>24</sup>

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<sup>21</sup> *Integrity Commission Act 2009* (Tas)

<sup>22</sup> IBAC (2016) *IBAC sheds light on serious corruption in its third year*, <https://www.ibac.vic.gov.au/media-releases/article/ibac-shines-light-on-serious-corruption-in-its-third-year>

<sup>23</sup> Gerathy (2016) *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-publichearings/7409126>

<sup>24</sup> Gerathy (2016) *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*



As outlined by former judge and adviser to the design of Victoria's IBAC, Stephen Charles AO QC, public hearings also lead to immediate improvements in governance, and attract fresh leads to potential corrupt conduct. "Operation Ord, which exposed corrupt conduct at the Department of Education & Training, showed the community what was happening, led to immediate action by the Department to prevent any recurrence and was followed by many complaints to IBAC about other possibly corrupt conduct at the Department, and elsewhere."<sup>25</sup>

Put simply, corruption is cultural and not likely isolated to one individual instance. The apparent culture of the TIC to not hold public hearings must be changed before the TIC can fulfill its obligation to expose corrupt behaviour within the government.

## RECOMMENDATIONS FROM THE AUSTRALIA INSTITUTE

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An independent inquiry to recommend structural and cultural changes to the Integrity Commission so that design principles are improved and existing powers, including holding full inquiries with public hearings, are utilised.

That, in the interim:

- Funding be increased immediately to assist in finalising open cases.
- Jurisdiction is expanded to enable the investigation of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration.
- A well-resourced and specialised unit within the DPP be established to respond to any recommendations from the tribunal for prosecution.

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<sup>25</sup> Charles (2018) *Victoria's anti-corruption watchdog is still too weak*, <https://www.tai.org.au/sites/default/files/Briefing%20paper%20-%20IBAC%20Stephen%20Charles.pdf>

# Truth in political advertising

In Tasmania it is currently perfectly legal for political parties and candidates to lie during an election campaign. Australia has laws against misleading and deceptive conduct in trade and commerce, but not in politics. When a customer walks into a shop, they can be confident that Australian consumer law bars that business from engaging in misleading and deceptive conduct. Advertising must not “bait” customers with low prices for stock that is only in limited supply, make a prominent discount offer then hide the terms and conditions behind packaging, or lie by omission. It is reasonable for Tasmanians to expect this level of protection, if not higher, when it comes to political discourse.

National polling undertaken by the Australia Institute over the last four years consistently finds that around nine in 10 Australians support truth in political advertising laws at the national level. Only about one in 20 oppose such laws.<sup>26</sup>

Tasmania does have some restrictions on candidate behaviour during elections.

Section 196 of the *Electoral Act 2014* holds that:

(1) A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.

The Electoral Review Interim Report identified a number of issues with section 196 including:<sup>27</sup>

There is uncertainty about whether the provision applies to material published online prior to the election period but accessible during that period.

The provision does not appear to be consistent with freedom of speech – a guiding principle of this Review.

The provision is not consistent with requirements in other Australian jurisdictions.

The provision is outdated and inconsistent with the principle of holding politicians and candidates to account.

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<sup>26</sup> The Australia Institute (2020) *Polling: Truth in political advertising*, <https://www.tai.org.au/sites/default/files/Polling%20-%20June%202020%20-%20Truth%20in%20political%20advertising%20%5BWeb%5D.pdf>

<sup>27</sup> Tasmanian Department of Justice (2018) *Electoral Act Review: Interim report*, page 20

It is unclear what, if any amendments will be made to section 196, but as it stands, it provides at least some protection from opposing candidates or third parties to make unsubstantiated claims against their opponents.

In August 2020, the ACT Legislative Assembly passed truth in political advertising laws based on the existing South Australian laws, with the unanimous support of the Assembly's Labor, Liberal and Greens members. The amendment was proposed by Greens MLC Caroline Le Couteur.<sup>28</sup> From July 2021 an individual could be fined up to \$8,000, and a corporation up to \$40,500, for false political advertising.

Representatives of the three political parties represented in the Legislative Assembly spoke in favour of the legislation. Speaking to her amendment, Le Couteur said:<sup>29</sup>

Unfortunately, in Australia there is no shortage of examples of false or misleading electoral advertising. While not perfect, the South Australian system has worked well there for decades and has been upheld as constitutionally sound by the full bench of the South Australian Supreme Court ...

One of the really good features of how it is done in South Australia, and will be done here, is that the turnaround is quick enough that it is relevant to the election. It is not something that should be determined six months after the election. The idea is that the people of the ACT should be able to be sure that there are no actually misleading advertisements or falsehoods in the electoral advertisements.

ACT Attorney-General Gordon Ramsay pointed to the normative function of such laws, saying:<sup>30</sup>

I also note that, even though this provision will not be commencing prior to this election, I hope that the commitment of all three parties in support of this particular provision will at least morally and ethically bind each of the parties to support it.

Leader of the Opposition Alistair Coe similarly said:<sup>31</sup>

The Canberra Liberals will be supporting this amendment. We agree that there is a need for truth in electoral advertising. I understand the need for this legislation, from personal experience; that is, I and others have been the victims of fake social media posts and many other issues along the way. There should be a level of accountability when something demonstrably false is disseminated. It severely undermines public confidence in the Assembly and its members.

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<sup>28</sup> ACT Legislative Assembly (2020) *Hansard (27 August)*, <http://www.hansard.act.gov.au/hansard/2020/links/download.htm>

<sup>29</sup> ACT Legislative Assembly (2020) *Hansard (27 August)*

<sup>30</sup> ACT Legislative Assembly (2020) *Hansard (27 August)*

<sup>31</sup> ACT Legislative Assembly (2020) *Hansard (27 August)*

The new legislation will also allow people to complain about political material to the ACT Electoral Commission, which will have powers to investigate and ask for the removal of the advertisement.

## **RECOMMENDATION FROM THE AUSTRALIA INSTITUTE**

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Tasmania pursue truth in political advertising legislation based on the South Australian and Australian Capital Territory models.

# Conclusion

Public concern with a lack of good governance in Tasmania is increasing and is unlikely to subside until legislative and cultural reform occur. Reform to date has occurred in a haphazard manner that has seen Tasmania remain at the bottom of the good governance table.

Tasmania could implement reforms in the four areas of governance outlined in this report and become Australia's most accountable state government. This would both strengthen democracy in Tasmania and help restore trust in government and politics.

With a state election sometime in the next 15 months, it is almost certain some reform will occur. The challenge for Tasmanians and their politicians is to ensure that the reforms are substantial enough to deliver the government Tasmanians deserve.