

Chapter 5.3: Transparency and Accountability

Background

Major party governments in Tasmania have long had a challenges with transparency and accountability, and close ties with vested interest groups.

The Global Right to Information Rating project run by the Centre for Law and Democracy rates Australia as being 67th down the list of 128 countries. As a country, we only score of 84 out of a total possible 150.¹

In 2020, the Tasmanian Ombudsman found our government has the worst record in the country for refusing to release information to the public. Tasmania was twice as bad as the next highest Australian jurisdiction, and 750% the rate of refusal of the most transparent Australian jurisdiction.²

Tasmania is the only jurisdiction in Australia without an offence of misconduct in public office,³ and the state's Integrity Commission has a poor track record of using the full extent of its powers.⁴

Information Disclosure

The Global Right to Information Rating project rates Afghanistan and Mexico as the top scoring right to information frameworks.⁵ Both frameworks are quite different to the Tasmanian *Right to Information Act 2009* and other Australian laws.

The Afghan and Mexican laws govern information transparency more broadly. Mexico, for example, sets requirements for hundreds of types of documents to be automatically disclosed.⁶ Figure 5.3.1 outlines some of the differences between these laws and the Tasmanian Act.

¹ Global Right to Information Rating, [By Country](#), Centre for Law and Democracy, 2020.

² Ombudsman Tasmania, [Annual Report 2019-20](#), 2020, p. 29

³ Parliament of Australia, [Select Committee On a National Integrity Commission Report](#), Chapter 3, 2017.

⁴ A Humphries, [Why doesn't Tasmania have a 'true' corruption commission?](#), ABC News, Mar 2019.

⁵ Global Right to Information Rating, [By Country](#), Centre for Law and Democracy, 2020.

⁶ The United Mexican States, [General Act of Transparency and Access to Public Information](#), 2015.

Figure 5.3.1: Comparison of right to information laws

	Afghanistan ⁷	Mexico ⁸	Tasmania ⁹
A Parliamentary Committee	Yes	Yes	No
Automatic disclosure of certain information	Yes	Yes	No
Officers subject to duties	Yes	Yes	No
Expedited timeframes for certain matters	Yes	No	No
Application fee	No	No	\$41.50
Institutional exemptions	No	No	Yes
Includes NGOs funded by Government	Yes	Yes	No
Government documents to be machine-readable	Yes	Yes	No
Accessibility of information provisions	Yes	Yes	No

Many of the issues with the operation of the Tasmanian Act are cultural, including matters relating to political pressure and influence. These matters are difficult to prevent in the context of an information disclosure framework.

However, laws that provide for automatic disclosure of information help set a culture of transparency and ensure the monitoring that’s needed to maintain it. This would improve the integrity of information assessments and reduce the need for having them in the first place.

New Information Accessibility and Transparency Laws

Policy 5.3.1

The *Right to Information Act 2009* will be repealed and replaced with an *Information Accessibility and Transparency Act*. This will govern general information accessibility and transparency standards as well as provide for an information disclosure framework.

Another reason for the cultural issues surrounding the right to information process in Tasmania is the Ombudsman is not empowered to issue formal findings against agencies when they underperform. The Office of the Ombudsman can overturn decisions and publish general findings in the Annual Report, but it can’t formally sanction agencies if they underperform or systemically misapply the Act.

Transparency and Information Commissioner

Policy 5.3.2

The *Information Accessibility and Transparency Act* will establish a Transparency and Information Commissioner, with the Ombudsman appointed as Commissioner. The Commission will measure and report on compliance with the Act, make general recommendations about the state of transparency and accessibility of information, and be empowered to issue formal performance improvement notices to agencies.

⁷ [Islamic Republic of Afghanistan Access to Information Law](#), unofficial translation, Centre for Law and Democracy, 2019.

⁸ The United Mexican States, [General Act of Transparency and Access to Public Information](#), 2015.

⁹ Tasmanian Government, [Right to Information Act 2009](#), 2019.

Non-Government Services

A significant distinction between the Afghan and Mexican laws, and the Tasmanian Act, is that NGOs are captured.

The Afghan Decree includes organisations that are “*substantially funded by one of the institutions defined above as well as any other body which undertakes a public function.*”¹⁰ The Mexican law is broader and captures “*any individual, legal entity or union who receives and uses public resources or performs acts of authority of the Federation, the States and the municipalities.*”¹¹

By contrast, the Tasmanian Act only captures information relevant to NGOs if the information is held by a public authority.¹² This information can be exempted on the grounds that it relates to trade secrets, would likely put the third party at a competitive disadvantage,¹³ or that it was information communicated in confidence which would likely impair the ability to obtain such information in the future.¹⁴

A strict interpretation of the Act does not allow for the presumption that the information is exempt, however, this is how it works in practice. While review mechanisms to challenge information being with-held are available, these can take years to finalise. For example, one review application relating to merely two pages of documents took five years to complete.¹⁵

Some of the most high-profile Tasmanian political controversies in recent history have related to the activities of the NGOs Safe Pathways¹⁶ and the Brahminy Foundation.¹⁷ Both NGOs, which were contracted to deliver government services in the out-of-home child care system.

NGO Transparency

Policy 5.3.3

The *Information Accessibility and Transparency Act* will require NGOs that have contracts for government service delivery to provide a minimum amount of information reporting, and be subject to the information disclosure framework.

Misuse of Commercial in Confidence

The classification of “commercial in confidence” in Tasmania law and government administration is vague and inconsistent. Departments regularly publish information in annual reports that includes the name of contract suppliers, the period of contracts, and their value.¹⁸

¹⁰ [Islamic Republic of Afghanistan Access to Information Law](#), Article 3, unofficial translation, Centre for Law and Democracy, 2019.

¹¹ The United Mexican States, [General Act of Transparency and Access to Public Information](#), Article 3, 2015.

¹² Tasmanian Government, [Right to Information Act 2009](#), S. 8, 2019.

¹³ *Ibid*, S. 37.

¹⁴ *Ibid*, S. 39.

¹⁵ Ombudsman Tasmania, [Nick McKim and Department of Primary Industries, Parks, Water, and the Environment](#), Ombudsman Tasmania decision.

¹⁶ R Whitson and E Coulter, [Safe Pathways: audit shows children not removed for months after first complaint](#), ABC News, 2018.

¹⁷ A Fromberg, [Calls for Tasmanian children in controversial NT program run by Allan Brahminy to be brought home](#), ABC News, 2020.

¹⁸ Department of State Growth, [Annual Report: 2019-20](#), 2020, p. 21.

In some cases, a description of the consultancy is also provided.¹⁹ Given tenders are publicly issued, all of this information could easily allow a competitor to discern how much a successful bidder has been paid for a contract, and what they have been paid to do.

Controversial arrangements, such as lease and licence conditions and costs for developments in National Parks, are routinely withheld on the grounds of 'commercial in confidence'. Departments have routinely been found to be misapplying 'commercial in confidence' provisions of the *Right to Information Act 2009*.^{20,21,22,23} These public revelations of government departments withholding information has not stopped them from continuing to make the same determinations.

Commercial Information

Policy 5.3.4

The *Information Accessibility and Transparency Act* will require the disclosure of details of contracts, leases and licences, including location, value, entities and minimum details of terms and conditions. The act will also provide detailed definitions relating to commercial in confidence provisions.

Misconduct in Public Office

Tasmania is the only jurisdiction in Australia without an offence of misconduct in public office. This was publicly emphasised when an outgoing Integrity Commissioner strongly recommended such an offence be established.²⁴ The State Government's position has been that suitable offences already exist.²⁵ Despite this position, there have been a range of serious findings of nepotism and misconduct that have not resulted in prosecution.²⁶

Misconduct in Public Office

Policy 5.3.5

An offence of Misconduct in Public Office will be established.

¹⁹ Department of Communities Tasmania, [Annual Report: 2019-20](#), 2020, p. 45.

²⁰ Ombudsman Tasmania, [Nick McKim and Department of Primary Industries, Parks, Water, and the Environment](#), Ombudsman Tasmania decision, 2019.

²¹ Ombudsman Tasmania, [Environment Tasmania and Department of Primary Industries, Parks, Water, and the Environment](#), Ombudsman Tasmania decision, 2019.

²² Ombudsman Tasmania, [Mandy Squires and Department of Primary Industries, Parks, Water, and the Environment](#), Ombudsman Tasmania decision, 2019.

²³ Ombudsman Tasmania, [Richard Baines and Department of Health and Human Services](#), Ombudsman Tasmania decision, 2017.

²⁴ Parliament of Australia, [Select Committee On a National Integrity Commission Report](#), Chapter 3, 2017.

²⁵ Parliament of Tasmania, Transcript of Debate, House of Assembly Hansard, Wednesday 23 September 2015.

²⁶ A Humphries, [Why doesn't Tasmania have a 'true' corruption commission?](#), ABC News, Mar 2019.