

Consultation on the *Integrity Commission Act 2009* legislative reform discussion paper

Submission to the Tasmanian Department of Justice

26 September 2022

Contents

Who we are.....	3
Introduction	4
The Cox Review Recommendations.....	4
Additional matters – General issues	8
Conclusion.....	8

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to make this submission to the Tasmanian Department of Justice in respect of the Government's request for input on some of the recommendations made by the Hon William Cox in his 2016 review ("the Cox Review") of the Integrity Commission Act 2009 ("the Act"), together with some additional matters.

The Cox Review Recommendations

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.

2. The ALA takes the view that a robust, early assessment of complaints is desirable. This is best achieved by specifying that an assessor's report is to be completed within 20 working days, consistently with the recommendations of the earlier Joint Standing Committee's Three-Year Review, but then with a capacity to extend time without reference to a fixed limit.
3. The ALA considers that this approach has the merit of establishing a short, expected time period for completion, whilst offering flexibility where it is merited on a case-by-case basis.

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).

4. The ALA supports amending the Act to define "offence of a serious nature" by reference to the maximum penalty available for the offence. The ALA considers that a reference to Appendix D of the Criminal Code is needlessly limiting of the definition. Arriving at the appropriate maximum penalty for use in such a definition is inevitably, to a degree, arbitrary, but general principles offer some guidance.
5. It ought to be uncontroversial that indictable offences are "offences of a serious nature". Most indictable offences under the *Criminal Code* are punishable by 21 years imprisonment. Some indictable offences have a maximum penalty of 3 years' imprisonment, by virtue of s 38 (2) (c) of the *Acts Interpretation Act 1931 s 38 (2) (c)*. The ALA considers that a maximum penalty of

18 months' imprisonment appropriately qualifies an offence as having a "serious nature" for the purposes of the Act.

6. In case of offences punishable only by way of a fine, generally these ought not to be included as "offences of a serious nature", unless they relate to offences committed by bodies corporate, in which case an available fine of 100 penalty units marks an offence as "of a serious nature".

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.

7. The ALA concurs that this is an essential amendment, and considers that the importance of the making of mandatory notifications supervenes other considerations.

Recommendation 12

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 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.

8. The ALA supports this recommendation.

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.

9. The ALA supports a modified form of Recommendation 14. The issue at the heart of the recommendation and opposition to it from the Commission is the need of ensuring procedural fairness, without jeopardising investigations.
10. The ALA considers that an appropriate balance can be struck by enacting Recommendation 14, with an exception operating only in exceptional circumstances. The appropriate arbiter of whether the exceptional circumstances arise is the Board.

11. The test to be met would be whether disclosure of the complaint and adverse material to the subject of the complaint is reasonably likely to impair the investigation of a complaint and the discharge of the functions of the Commission in meeting the objects of the Act.
12. The ALA also considers that in deciding whether the exception applies, the Board would need to consider all of the circumstances of the case, including the seriousness of the alleged conduct, the degree to which the investigation might be impaired, and whether risks to the investigation can properly be mitigated through undertakings from the subject or any other measure.

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.

13. The ALA concurs with this recommendation and the rationale advanced both by the Commission and the Cox Review.

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.

14. The ALA considers that the Commission's concerns about this recommendation are valid, and that a modified form of the exception supported by the ALA in relation to Recommendation 14 is appropriate: namely that if the Board considers that referral is reasonably likely to impair the discharge of the functions of the Commission in meeting the objects of the Act, it may decline to refer the matter.

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.

15. The ALA concurs with this recommendation.

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". 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.

16. The ALA concurs with the recommendations, and observes that the legislative framework employed in the *Australian Crime Commission Act 2002* provides functional protections in line with the recommendations.

Recommendation 26, 27 & 28

That complaints of misconduct by designated public officers, once identified as such, be immediately made the subject of investigation under Part 6, and those of misconduct by non-commissioned police officers be referred in the first instance to the Commissioner of Police for action.

That complaints of serious misconduct by a police officer, not a designated public officer which are not dealt with by the Commission under section 88(1)(a), be referred to the Commissioner of Police for action. A way of achieving this would be to add a new paragraph (ab) in section 88(1) to the following effect "(ab) refer a complaint relating to serious misconduct by a police officer to the Commissioner of Police for action; or".

That the Act be amended to delete the words "assess" and "assessing" wherever they appear in sections 87 and 88.

17. The ALA concurs with these recommendations.

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.

18. The ALA accepts the rationale advanced by the Government for not permitting referrals from the Commission to circumvent the usual procedure for Code of Conduct complaints.

Additional matters – General Issues

Regulation of the publication of complaints by complainants

19. Regarding the question of whether an amendment should be made on the publication of complaints by complainants, the ALA considers that the fact that a complaint has been made is not a matter that it is appropriate to veil in secrecy. The ALA considers each of the matters in paragraphs 2-14 to be useful, practical amendments that should be made.

Additional matters — Application of the Act to Members of Parliament during election campaigns

20. The ALA considers that the need for maintaining restraint during “caretaker” conventions heightens the need for the Act to apply to members of parliament during that period, and supports an amendment to this end.

Conclusion

21. The Australian Lawyers Alliance (ALA) thanks the Department of Justice for the opportunity to contribute to this enquiry.
22. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Yours faithfully,



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