Confidential

Assessment for the Premier of Tasmania

Did any or all of six selected Secretaries potentially breach the Code of Conduct?

Mike Blake AM

28 March 2024

Contents

Foreword 4

Chapter 1 Summary 5

Chapter 2 Assessment conclusions 9

Chapter 3 Recommendations 10

Chapter 4 Introduction and terms of reference 12

Chapter 5 How the assessment was carried out, other matters considered and matters not considered 16

Chapter 6 Recommendations made by the commissioners 25

Chapter 7 Submissions received, and not received, and how these were dealt with 27

Chapter 8 Other matters 31

Appendix A Terms of reference and terms of appointment 36

Appendix B Letter from the Commissioners 38

Appendix C Extracts from the *Commissions of Inquiry Act 1995* (COI Act) 43

Appendix D Extracts from the *State Service Act 2000* (SSA Act) 45

Appendix E Extracts from the *Police Service Act 2003* (PS Act) 48

Appendix F Employment Direction 5 (ED5) 51

Appendix G Recommendations made by the Integrity Commission 59

Hon Jeremy Rockliff MLC
Premier of Tasmania
Level 11, Executive Building
15 Murray Street, HOBART, TAS 7000
Premier.correspondence@dpac.tas.gov.au

Dear Premier,

I attach the Report of my independent assessment of concerns raised by the Commissioners of the Tasmanian Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (Commission of Inquiry) in respect of actions by selected past or present occupants of the following offices:

- The Secretary of the Department of Premier and Cabinet;
- The Secretary of the Department of Health;
- The Secretary of the Department for Education, Children and Young People;
- The former Secretary for the Department of Police, Fire and Emergency Management and Commissioner of Police;
- The Secretary of the Department of Justice; and
- the Secretaries of those agencies which now no longer exist by virtue of machinery of government changes, but that had responsibility for the care and protection of children and were the precursor to those departments listed above.

As requested, my assessment also considers whether such conduct may potentially amount to a breach of the Tasmanian State Service Code of Conduct or Code of Conduct under the *Police Service Act 2003* (the Codes).

Yours sincerely,

Mike Blake AM
Blakem995@gmail.com

28 March 2024

Foreword

The report of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings is titled "Who was looking after me? Prioritising the safety of Tasmanian children" (the COI Report). Having now completed the assessment the Premier appointed me to carry out, and studied the COI Report, I realise just how apt that title is.

Carrying out this assessment was confronting in a number of respects including that, despite so many reviews and reports into matters relating to abuse (however this term is defined) of children, successive administrations have failed to take, or delayed taking, action.

The COI Report provides a wonderful pathway for action, for acceptable behaviours, practices and standards to be implemented and for complainants, in particular children, to be listened to.

I found the following quote from management thinker Peter Drucker in the February 2024 edition of *Company Director*, a publication of the Australian Institute of Company Directors, to be particularly relevant –

> *"The greatest danger in time of turbulence is not the turbulence itself, it is to act with yesterday's logic."*

When it comes to matters identified by the COI, yesterday's logic is simply not acceptable. We must prioritise the safety of Tasmanian children, and of all vulnerable people.

Mike Blake AM

Chapter 1 Summary

Introduction

This report is the outcome of my independent assessment of matters of concern raised by the Commissioners of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (the Inquiry) in respect of actions of relevant Heads of Agency.

What is an independent assessment?

The Oxford language dictionary defines assessment as "the action of assessing someone or something". This is what I carried out and in so doing I had regard to findings of fact, based on the balance of probabilities. A finding of **sustained** is given when the evidence supports a finding that the alleged conduct did occur. A finding of **not sustained** is given when there is insufficient evidence to establish whether the alleged conduct did or did not occur. A finding of **false** is given when the evidence supports a finding that the alleged conduct did not occur.

I have not carried out an audit or review as these terms are defined in auditing and assurance standards.

Core focus of my assessment

The core focus of my assessment was to provide an assurance mechanism that the Secretaries identified in Chapter 5 had, or had not, acted appropriately in respect of matters of concern, and that either way, my report provides an opportunity to rebuild the community's trust in the State Service, in particular as this relates to ensuring Tasmanian children and young people are safe and well, in its care.

In carrying out my assessing of the performance of the identified Secretaries, based on the criteria I applied as outlined in Chapter 5 and the steps I took as outlined in that Chapter, I considered:

- the individual actions of Secretaries in responding to matters raised by the Inquiry;
- other matters of concern raised by the Commissioners as relevant to the Secretaries, which have resulted in the more systemic and cultural observations raised in their report; and
- other matters identified as I went about my work and in responding to submissions received.

What is misconduct?

When carrying out my work, I had regard to the definition of misconduct in the Commissions of Inquiry Act as:

> *... conduct by a person that could reasonably be considered likely to result in a criminal charge, civil liability, disciplinary proceedings, or other legal proceedings, being brought against that person in respect of the conduct.*[1]

Was I made aware of any explicit complaints against the identified Secretaries?

With the exception of Mr Pervan, I was not made aware of any complaints that could have led to a code of conduct investigation about any of the Secretaries or Acting Secretaries that are the subject of my report. In Mr Pervan's case, complaints about which I became aware were independently investigated and did not change my conclusions as outlined in Chapter 2.

The individual actions of Secretaries

In Chapter 5 I spell out how I went about identifying the Secretaries that were the subject of my assessment, contacts made with them and with others, and documentation studied.

The criteria I applied in making my assessment included application of the procedures for the investigation and determination of whether an employee, senior executive, specialist or Prescribed Officer has breached the State Service Code of Conduct outlined in ED5 and in doing so I had regard to the fact that clause 1.3 of ED5 explicitly excludes Heads of Agencies. Further detail about the criteria applied and steps followed are outlined in Chapter 5.

In applying ED5, I had regard to clause 6.5 – the onus of establishing any fact is on the party asserting it (that is, me) and proof is on the balance of probabilities[2] – and to clause 6.6 – these procedures are to be applied with procedural fairness, natural justice and in a timely manner.

When assessing the conduct of the identified Secretaries, I also had regard to requirements outlined in section 9 of the State Service Act (SSA).

Taking into account the steps followed and criteria applied, that no explicit code of conduct complaints had been made of which I am aware (or where there was such a complaint it was not sustained), that no findings were made by the Commission in relation to any Secretary and that the assessment process that I undertook for each Secretary was broadly similar, I note in respect of each Secretary:

Ms Gale

I studied Ms Gale's statements to the COI, transcripts relating to her, considered matters of concern raised by the Commissioners in their COI Report in respect of her actions (if any), her role as Chair of the Secretaries Board and its terms of reference, her contract of employment and her performance agreement with the Premier and her conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

---

[1] *Commissions of Inquiry Act 1995* section 3

[2] A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.

Ms Webster

I studied Ms Webster's statements to the COI, transcripts relating to her, considered matters of concern raised by the Commissioners in their COI Report in respect of her actions (if any), interviewed her because she decided not to take up my offer of providing me with a submission, considered her role as member of the Secretaries Board and its terms of reference, her contract of employment, her performance agreement with the Premier, her advice to me on the due diligence she carried out upon her appointment as Secretary and her conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

Ms Morgan-Wicks

I studied Ms Morgan-Wicks' submission to me, statements to the COI, transcripts relating to her, considered matters of concern raised by the Commissioners in their COI Report in respect of her actions (if any), her role as member of the Secretaries Board and its terms of reference, her contract of employment, her performance agreement with the Premier and her advice to me on the due diligence carried upon her appointment as Secretary and her conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

Mr Bullard

I studied Mr Bullard's submission to me, statements to the COI, transcripts relating to him, considered matters of concern raised by the Commissioners in their COI Report in respect of his actions (if any), his role as member of the Secretaries Board and its terms of reference, his contract of employment, his performance agreement with the Premier and his advice to me on the due diligence carried upon his appointment as Secretary and his conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

Mr Hine

I studied Mr Hine's statements to the COI, transcripts relating to him, considered matters of concern raised by the Commissioners in their COI Report in respect of his actions (if any), interviewed him because he decided not to take up my offer of providing me with a submission, considered his role (if any) as member of the Secretaries Board and its terms of reference, the contract of employment between the current Police Commissioner and her Minister and her performance agreement with the Minister[3], and Mr Hine's conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

[3] As noted later in this report, my purposes for reviewing these documents was to understand how they were expected to comply with section 9 of the State Service Act and how performance agreements dealt with child protection and collaboration.

Mr Pervan

I studied Mr Pervan's statements to the COI, transcripts relating to him, considered matters of concern raised by the Commissioners in their COI Report in respect of his actions (if any), interviewed him because he decided not to take up my offer of providing me with a submission, considered his role as member of the Secretaries Board and its terms of reference, his contract of employment, his performance agreement with the Premier and his advice to me on the due diligence he carried out upon his appointment as Secretary, studied what I refer to as the Bowen and Bartlett reports[4] and Mr Pervan's conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

Acting Secretaries

In respect of the Acting Secretaries identified in Chapter 5, in relation to their roles as Acting Secretaries, I studied transcripts relating to them, where necessary invited submissions and considered matters of concern raised by the Commissioners in their COI Report in respect of their actions (if any) and their conduct compared with requirements in section 9 of the SSA and I concluded as outlined in Chapter 2.

What were the matters of concern raised by the Commissioners and my responses?

These are discussed in Chapter 4 where I also outline the Commissioners' advice to me regarding their concerns and their application of procedural fairness and natural justice.

Other matters

In Chapters 5 and 8 I identified a number of other matters that I considered needed to be addressed. In the interests of brevity my conclusions from those chapters are not repeated here. Any recommendations arising from my work are included in Chapter 3.

[4] Refer Chapter 5.

Chapter 2 Assessment conclusions

I made three conclusions.

Firstly, and having considered matters of concern raised by the Commissioners of the Tasmanian Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (Commission of Inquiry or COI) in respect of actions by the present occupants of the following offices:

- The Secretary of the Department of Premier and Cabinet (currently Jenny Gale);
- The Secretary of the Department of Health (currently Kathrine Morgan-Wicks);
- The Secretary of the Department for Education, Children and Young People (currently Tim Bullard);
- The Secretary for the Department of Police, Fire and Emergency Management and Commissioner of Police (not currently but explicitly included in my scope, Darren Hine);
- The Secretary of the Department of Justice (currently Ginna Webster); and
- the Secretaries of those agencies which now no longer exist by virtue of machinery of government changes, but that had responsibility for the care and protection of children and were the precursor to those departments listed above (this was Michael Pervan);

and, having completed my assessment as outlined in Chapter 5 of this report, the conduct of these persons does not, potentially, breach the Tasmanian State Service Code of Conduct or, in the case of the Commissioner, neither the Tasmanian State Service Code of Conduct nor the code of conduct outlined in the *Police Service Act 2003*.

Secondly, that in relation to the persons mentioned in Chapter 5 who acted for periods as Secretary of any of the above departments (including the Department of Communities), the conduct of these persons, working in their capacity as Secretary, does not, potentially, breach the Tasmanian State Service Code of Conduct.

In addition, I note that, for reasons set out in Chapter 5, I am unwilling to conclude in respect of actions by the former occupants of the above Offices.

Thirdly, in relation to all matters in the COI's final report where findings were unable to be made (Volume 1, Chapter 5.1 Challenges we faced), I fully considered all matters and this did not change the conclusions that I arrived at as outlined above but resulted, for the reasons outlined in Chapters 4 and 6, in my Recommendations 1, 4 and 5. When considering the challenges faced, I also took into account Chapter 23 in Volume 8 Afterword.

Chapter 3 Recommendations

The following recommendations are included in this report:

Recommendations	Page
1. That Government take note of the matters raised by the Commissioners as these relate to changes needed to the COI Act and initiate changes to this Act to address these.	15
2. That Secretaries outline in their annual reports to the Premier/Minister how they have responded to performance agreement expectations about keeping children safe and developments regarding collaboration.	23
3. That the Chair of the Secretaries Board include in six-monthly reports to Cabinet a report on how effectively Secretaries are progressing collaboration, keeping children safe and recommendations made by Dr Ian Watt AC.[5]	23
4. That, to the extent they have not already done so, DECYP and DoH collaborate to ensure that, to the extent relevant, child safe policies, professional conduct policies and professional development arrangements coincide.	25
5. That, in responding to the COI's recommendations 20.1 to 20.14, Government ensure that, where applicable, it is clear the extent to which these recommendations capture Secretaries.	26
6. That, to the extent that action has not already been taken, DPAC or SSMO take ownership of the Integrity Commission's *Guide to Managing Misconduct in the Tasmanian Public Sector* and follow through on the recommendations made by the Integrity Commissioner relating to this.	29
7. That an independent review be carried out by a governance expert familiar with public sector governance of the governance arrangements established by each Secretary with the objective of ensuring these arrangements make clear responsibilities and accountabilities and a best fit for the delivery of allocated functions.	32
Alternative to 7. That, as an alternative to Recommendation 7, the proposed independent governance review be sponsored by, and report to, the Secretaries Board.	33
8. That Secretaries establish practices whereby they have access to independent views on governance via membership of audit and risk committees (or similar arrangements) with a focus, at least currently, on supporting Secretaries in identifying and mitigating risks associated with issues raised in the COI Report.	33
9. That Government, or the Head of the State Service, initiate a review of the decision to abolish the State Service Commissioner model in 2013.	34
10. That SSMO engage with Secretaries to institute a program of induction of new employees, and regular updates for existing employees, about the code of conduct and principles.	35

[5] While Recommendations 1 and 2 are similar, their source and end points differ.

In making Recommendations 2 and 3, I note that I have been advised of other accountability mechanisms that will be in place to support oversight of performance against expectations about keeping children safe. The Commissioner for Children (including a Commissioner for Aboriginal Children and Young People) will be reporting to a Parliamentary Committee, and the Independent Monitor will be reporting to Parliament every six months.

Chapter 4 Introduction and terms of reference

What was I appointed to do (my underlining for emphasis)

The terms of reference (TOR) for my work are set out in Appendix A from which I highlight that I was required to consider matters of:

1. Concern raised by the Commissioners of the Tasmanian Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (Commission of Inquiry or COI) in respect of actions by the past or present occupants of the following offices:
    - The Secretary of the Department of Premier and Cabinet;
    - The Secretary of the Department of Health;
    - The Secretary of the Department for Education, Children and Young People;
    - The Secretary of the Department of Police, Fire and Emergency Management and Commissioner of Police (*);
    - The Secretary of the Department of Justice; and
    - the Secretaries of those agencies which now no longer exist by virtue of machinery of government changes but that had responsibility for the care and protection of children and were the precursor to those departments listed above; and

2. Consider whether such conduct may potentially amount to a breach of the Tasmanian State Service Code of Conduct or Code of Conduct under the *Police Service Act 2003* (the Codes).

* Note that the present Commissioner of Police and Secretary of the Department of Police, Fire and Emergency Management was appointed after the conclusion of the hearings of the COI and so is not relevant to this assessment.

In Chapter 5 of this report, I identify the Secretaries, and acting Secretaries, that were the subject of my assessment and, in Chapter 1, I note my conclusions as to whether or not their conduct, based on my assessment, may potentially amount to a breach of the Codes[6].

What is an assessment?

The Oxford language dictionary defines assessment as "the action of assessing someone or something". This is what I carried out and in so doing I considered Employment Direction 5 and the Police Service Act – refer Chapter 5.

[6] I had to consider two codes: one which arises from Employment Direction 5 (Secretaries other than the Police Commissioner) and the code as outlined in the Police Service Act (relating to the Police Commissioner).

In carrying out my work, I had regard to findings of fact, based on the balance of probabilities. A finding of **sustained** is given when the evidence supports a finding that the alleged conduct did occur. A finding of **not sustained** is given when there is insufficient evidence to establish whether the alleged conduct did or did not occur. A finding of **false** is given when the evidence supports a finding that the alleged conduct did not occur.

I emphasise that I have not carried out an audit or review as these terms are defined in auditing and assurance standards.

Matters of process

My TOR required that I (my underlining for emphasis):

1. Provide an opportunity to persons to make submissions, or to be heard personally, as I considered it necessary, in relation to matters under assessment. In response to this requirement, I invited submissions from:

    a. Each of the Secretaries, and Acting Secretaries, that I identify in Chapter 5 of this report. Some Secretaries, and Acting Secretaries, chose not to make a submission as a result of which I extended my work as outlined in Chapters 5 and 7. I also interviewed three of the Secretaries who chose not to provide me with a submission. In one case, that is Ms Gale, I was unable to make contact with Ms Gale but, based on an extension of my work, I was able to draw a conclusion.

    b. The Chief Executive Officer of the Integrity Commission. I took into account this submission and supported the view that notifications be made mandatory – refer Chapter 7.

    c. The Ombudsman who chose not to make a submission, a decision I respected and took no further action. I did, however, note his view provided to me that he was not aware of any instances where any of the named persons (that is the six Secretaries) have potentially breached the code of conduct.

    d. Selected former Secretaries of the Department of Premier and Cabinet. This was done because I had a high regard for the views of these persons and I was interested in what they might have to tell me. One former Secretary provided me with a submission which I discussed with that person. That submission informed my thinking in Chapters 5, 7 and 8.

    e. The Office of the Solicitor-General which chose not to make a submission, a decision I respected and took no further action.

    f. The Commissioner for Children and Young People who chose not to make a submission, a decision I respected and took no further action.

    g. The current Police Commissioner who chose not to make a submission, a decision I respected and took no further action.

    h. Meg Webb MLC. Ms Webb provided me with a submission which I considered as part of my assessment. Refer, Chapters 5 and 7.

In each case I made it clear that submissions to me would, unless otherwise stated in this report, remain confidential and that, should I decide to include any commentary from those submissions in this report, doing so would be discussed with them in advance.

In one instance, for reasons I identified from reading the COI Report, I sought access to reports prepared, one by Ms Bartlett and the second by Mr Bowen. These were provided, on a confidential basis, to me and are discussed in Chapter 5.

Submissions from other persons

As explained in the previous section, for those persons mentioned, I invited submissions. I did not see it as necessary to seek submissions from other persons or to call for public submissions. In my view, the scope of my work was too narrow, and the timeframe too short, for broader consultation. I was also fearful that calling submissions more broadly might add to the very confronting circumstances already experienced, and continuing to be experienced, by the many persons addressed in the COI Report.

However, I agreed to the following link being publicly available – keepingchildrensafe.tas.gov.au/response/reviews

At the time of finalising this report, submissions sent to blakereview@tas.gov.au were:

- Ms Webb's submission referred to in paragraph (h) on the previous page.
- From an individual which referred to an ED5 investigation for consideration by the Integrity Commission and therefore outside the scope of my assessment. I asked this person to refer their submission to the Integrity Commission.
- From Emeritus Distinguished Professor Rob White and Dr Val Kitchener representing the Tasmanian OPCAT Network.

2. Engage with former Commissioners of the Commission of Inquiry so far as possible to ensure that all matters referred to in the COI's Report as matters where findings were unable to be made (Volume 1, Chapter 5.1 Challenges we faced), are fully considered. In response to this requirement, I engaged with the former Commissioners in two ways:

    a. Firstly, they made a confidential submission (refer Appendix B to me which, in the main, focussed on how they had dealt with matters relating to the challenges they faced (as outlined in Volume 1, Chapter 5.1) and their application of procedural fairness and natural justice.

    b. Secondly, in a confidential manner I posed nine questions to them to which they responded and which I have taken into account as part of my assessment. One relevant response, in particular as this relates to my assessment, is their advice to me that no findings were made by the Commissioners in relation to any Secretary.

    In addition, I give consideration to the challenges faced by the Commissioners as outlined following point 4 below.

3. Ensure that where necessary appropriate confidentiality arrangements are made for persons assisting this assessment. This was done as outlined above.

4. Provide a detailed report to the Premier about the assessment. This is that report.

Challenges faced by the Commissioners

My TOR required that I, as a matter of process, assess 'where findings were unable to be made (Volume 1, Chapter 5.1 Challenges we faced), are fully considered'. I considered these 'challenges' while carrying out my assessment and, having done so based on the approach I adopted as outlined in Chapter 5, did not alter my conclusions as outlined in Chapter 2. However, for the reasons outlined here, I believe action is needed by Government to address, at least, those aspects raised by the Commissioners as these relate to section 18 and 19 of the *Commissions of Inquiry Act 1995* (the COI Act).

How I reached this view:

- Studied the challenges outlined in Chapter 5.1 noting in particular the observation that "… the Commissions of Inquiry Act should be changed to make it less onerous to make adverse findings or a finding of misconduct against an individual. We agree that procedural fairness in these processes is fundamental but consider that the requirements in the Act are out of step with other states and territories and make it too hard to do what commissions of inquiry are asked to do – which, in some cases, involves holding individuals to account."
- Having noted their view that the COI Act should be changed, no explicit recommendation was made by them.
- Chapter 5 also discusses other challenges including the implications of section 194K of the *Evidence Act 2001*.
- Chapter 23 Afterword discusses these and other matters. However, I limited my review of these matters to observations related to sections 18 and 19 of the COI Act and I concluded support for the changes proposed based on the reasoning provided.

Recommendation 1

That Government take note of the matters raised by the Commissioners as these relate to changes needed to the COI Act and initiate changes to this Act to address these.

Chapter 5 How the assessment was carried out, other matters considered and matters not considered

Introduction

I went about this assessment by carrying out the following:

1. Identified that Messrs Williams and Healey would be my points of contact for information and resources at the Department of Premier and Cabinet (DPAC).
2. Worked from home and from an office provided to me at 21 Kirksway Place where I was provided with access to a computer and a DPAC email address.
3. On a confidential basis, engaged with a former Secretary who had had no involvement in any of the agencies encompassed by this assessment. I did this because I wanted someone with whom I could bounce ideas who was familiar with the role of Secretary in the public sector in Tasmania. This proved most helpful but the conclusions reached are my own.
4. Studied the report of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (the COI Report). My focus was:
    a. Firstly, to identify all Secretaries (use of the word Secretaries, unless explicitly stated otherwise, from now on in this report includes the Commissioner for Police) captured by my TOR. Early on in my assessment I formed the conclusion that my assessment needed to encompass those persons outlined in my TOR and any person referred to in the COI Report that had acted in the role of Secretary in any of the six departments referred to in my TOR – refer discussion below. In this respect, I confirmed with my contacts at DPAC the Secretaries identified and I also agreed with them that my scope would not include former Secretaries in any of these roles.
    b. Secondly, having identified who these Secretaries were, and confirmed these with the former Commissioners, I set about studying the text in the COI Report relating to all of these persons.
5. I was provided with access to the unredacted COI Report (that is, I was given access to the full report). Having been provided with access, I studied the redacted pages which I then took into account when forming my assessment.
6. Studied the *Commissions of Inquiry Act 1995*, focussing on sections 18 and 19 – refer Appendix C.
7. Studied the *State Service Act 2000* (SSA), focussing on sections 7 to 9 – refer Appendix D.
8. Studied the *Police Service Act 2003* focussing on sections 42 and 43 – refer Appendix E.
9. Studied Employment Direction No. 5 *Procedures for the investigation and determination of whether an employee has breached the code of conduct* (ED5) –

refer Appendix F, and formed my own view as to its application more generally and in particular to the selected Secretaries – refer further discussion below.

10. Studied the submissions received – refer this Chapter and Chapter 7.
11. In those circumstances where a Secretary decided not to provide me with a submission, I studied the statements they made to the Commissioners and I studied all of the transcripts that appear on the COI website within the DPAC domain. I also invited each of them to meet with me by phone with all but one doing so.
12. Studied employment contracts with the selected Secretaries (in the case of the former Commissioner of Police, there were two contracts – one in his capacity as Police Commissioner and the other in his capacity as Secretary of the Department of Police, Fire and Emergency Management).
13. Studied performance agreements between the selected Secretaries and the Premier. In the case of the Police Commissioner, this agreement was with the current Commissioner which is with this person's minister[7].
14. Read the terms of reference of the Secretaries Board and read the minutes of some of their meetings. This Board was established following a recommendation of the July 2021 Independent Review of the Tasmanian State Service prepared by Dr Ian Watt AC. I was particularly interested to see how this Board was responding to the need for improved collaboration between Tasmanian Government departments and the required focus on protecting children – refer later in this Chapter.
15. Studied the Bartlett and Bowen reports as these related to Mr Pervan.
16. Studied and formed a view about application of the Codes to the identified Secretaries.
17. Studied all findings and recommendations made by the Commissioners and formed a view as to how such findings or recommendations might inform my assessment.
18. Made my assessment as to whether or not any of the selected Secretaries had potentially breached the Codes – refer further discussion below.
19. Provided a draft of my report to Messrs Williams and Healey, the purpose of which was to confirm matters of fact.
20. Discussed my first draft report with the former Secretary identified in step 3 above.
21. Having regard to all of the above, formed a view about what challenges were faced by Commissioners.

[7] I also sought access to the performance reports issued against these performance agreements but at the time of writing these had still to be prepared.

Assessment criteria applied

While this assessment, as already identified, is not an audit or review, it is usual practice for an auditor or reviewer to identify the criteria applied when making comparative judgements. The criteria I applied in relation to the documents reviewed and discussions held were:

- Application of the procedures for the investigation and determination of whether an employee, senior executive, specialist or Prescribed Officer has breached the State Service Code of Conduct outlined in ED5 and in doing so I had regard to:
    - The fact that clause 1.3 of ED5 explicitly excludes Heads of Agencies. In the absence of an alternative model, I applied ED5 processes;
    - In applying ED5, I had regard to clause 6.5 – the onus of establishing any fact is on the party asserting it (that is, me) and proof is on the balance of probabilities[8];
    - In applying ED5 I also had regard to clause 6.6 – these procedures are to be applied with procedural fairness, natural justice and in a timely manner;
    - Despite that I had still to conclude as to whether a potential breach of the Code of Conduct had occurred, I had regard to clause 7 Allegations and investigation.
- Application of all of the steps outlined in the Introduction to this Chapter.
- Application of the requirements of section 9 of the SSA.

Information sought from my nominated contact persons at DPAC

I met with Messrs Williams and Healey on a number of occasions during the course of my work. All information sought was forthcoming.

Process matters raised by Meg Webb MLC

I found Ms Webb's submission helpful and I thank her for it.

In her submission, Ms Webb noted her view that "It is of paramount importance, and in the public interest, that the conduct of this independent assessment is as transparent and detailed as possible."

She went on to note that, "In this context it would be highly valuable for the assessor to 'step through' processes undertaken for the reader". She provided eight steps as examples of matters I should consider. These are detailed in Table 1 below, along with my responses. Ms Webb also suggested that I identify significant matters falling outside the scope of my assessment – refer step 8 in the Table below. Other suggestions made by Ms Webb, along with my responses, are outlined in Chapter 7.

[8] A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.

Table 1 Actions taken in response to suggestions provided by Ms Webb

Suggested step	Response/Action taken
1. Efforts made, and extent of access to the former Commissioners and the Commission's documentation, records and personnel, and whether and how that addressed specific elements of the Terms of Reference	I received a submission from the Commissioners and they responded to questions posed. I did not seek access to their documentation, records or personnel. I studied their report, transcripts and statements made to them
2. Any requests made of the former Commissioners, the government or any other entity which were partially or fully complied with or denied	Refer Chapter 4 in my report where I discuss submissions invited
3. On what basis submissions were invited	My judgement. Submissions were open to the public by reference to keepingchildrensafe.tas.gov.au/response/reviews with, at the time of preparing this report, three submissions received and discussed in Chapter 7
4. Whether any other investigations were undertaken by the Assessor, and to what end	Refer Other matters in this Chapter and in Chapters 7 and 8
5. The involvement of any victims/survivors, advocates and/or whistleblowers or any other stakeholder in the assessment	I did not engage with any such persons. My view is that the COI had thoroughly so engaged and I would add little value
6. Any interrogative processes which may have been undertaken to comply with Point 2 of the Terms of Reference	I did not engage in any interrogative processes. I was engaged to carry out an assessment, not an investigation. I fully anticipated that, should I have concluded that there is reasonable evidence of a breach of the Codes, then such interrogative processes would be carried out but not by me
7. Any correlation and interaction with the Woolcott Review	I have held discussions with Mr Woolcott, the main objectives of which were to understand respective terms of reference, approaches taken and to ensure no overlap. Mr Woolcott was provided with a copy of my report but he did not influence my work. The timing of Mr Woolcott's exercise differed from mine
8. It is also crucial that significant matters which may be determined as falling outside the scope of this independent review, are clearly identified with accompanying recommendations of additional work required	Refer Other matters in this Chapter and Chapter 8

Identified Secretaries and Acting Secretaries

My study of the COI Report led me to conclude, confirmed by my contacts at DPAC and by my contact with the Commissioners, that my scope of work included the following persons:

- Ms Jenny Gale, Secretary of the Department of Premier and Cabinet;
- Ms Kathrine Morgan-Wicks, Secretary of the Department of Health;
- Mr Tim Bullard, Secretary of the Department for Education, Children and Young People;
- Mr Darren Hine, former Secretary of the Department of Police, Fire and Emergency Management and former Commissioner of Police;
- Ms Ginna Webster, Secretary of the Department of Justice;
- Mr Michael Pervan, former Secretary of the Departments of Health and Communities
- Mr Craig Limkin, for a short period, Acting Secretary of the Department of Premier and Cabinet;
- Mr Robert Williams, for a short period, Acting Secretary of the Department of Premier and Cabinet; and
- Ms Kathy Baker, for a short period, Acting Secretary of the Department Communities.

Unless otherwise stated, any references to Secretaries applies to all of the above.

Which code of conduct applies to Secretaries?

Section 9 of the State Service Act explicitly excludes Secretaries. So, which code of conduct does apply? This was answered in contracts of employment that I studied. Each contract explicitly cross-referenced section 9 of the SSA, meaning that Secretaries are subject to this section.

What does section 9 require and what are the State Service Principles (the Principles) as these relate to Secretaries?

In Appendix D, I have provided sections 7 to 9 of the SSA from which I note:

- The Principles apply to all public servants; and
- Under section 8, a Head of Agency (Secretary) must uphold, promote and comply with the Principles; and
- Section 9 outlines what the code of conduct is, including very clear compliance requirements. For example, section 9(1) requires that an employee must behave honestly and with integrity in the course of State Service employment and, under section 9(4), requires that employees, when acting in the course of State Service employment, must comply with all applicable Australian law.

Processes to apply when there is believed to be a breach of the code of conduct

On 1 April 2023, the Premier, under authority as the Minister administering the SSA, issued ED5 *Procedures for the investigation and determination of whether an employee has breached the code of conduct* which applies where a Head of Agency has reasonable grounds to believe that a breach of the code has occurred. ED5 is included at Appendix F.

ED5 does not apply to Secretaries. However, as noted earlier, I have applied it in carrying out this assessment because it is applicable by reference to the employment contracts of these Secretaries and by reference to my TOR which requires that I make an assessment as to whether, on the balance of probabilities, having regard to procedural fairness and natural justice, the conduct of the Secretaries may potentially amount to a breach of the Codes.

How relevant today are systemic failures and cultures of the past?

Evident to me from reading the COI Report is that[9]:

- The issues dealt with, and findings made, by the COI covered the period from the mid-to-late 1980s to 2022[10];
- During that period:
    - multiple persons held the roles of Secretary covered by this assessment. In addition, multiple persons led our various institutions such as our hospitals, schools and Ashley Youth Detention Centre (Ashley);
    - multiple machinery of government changes took place;
    - governments of all persuasions (Liberal, Labor, Coalitions) governed our state; and
    - multiple reports or proposals – at least as far back as 2010 – made recommendations or proposals associated with many of the issues explored by the COI. These included, for example, reviews of children in out of home care, what to do with Ashley, and the need for greater collaboration between entities within the Crown. This means that, in my view, multiple opportunities to take action on some matters raised by the COI presented themselves. In saying this, I do not suggest that no action was taken;
- Systemic problems were identified by the Commissioners including not believing, or failing to act on, complaints of alleged abuse made by children, failed past practices, poor information systems, taking too long to initiate and carry out ED5 investigations and lack of standards;
- Perhaps failure to have systems in place to properly manage delegated functions and in this respect a lack of clarity around responsibility and accountability for delegated functions – explored further in Chapter 8;
- Perhaps evidence of inadequate collaboration between Secretaries as this related to, for example, the protection of children; and

[9] These are my conclusions from reading the COI Report and may differ from what was intended.
[10] Because I was auditor-general from 2004 to 2012, I include myself as 'part of' this period.

- Perhaps evidence of circumstances where the existence of centralised functions, for example human resources, resulted in managers of key business units perhaps abrogating responsibilities for managing people.

In raising this issue, I am not questioning the integrity of, or management by, all of those Secretaries or other managers that may have held any of these senior positions since the 1980s. However, what I am saying is that it is unreasonable, in my view, to lay all of the blame for those identified systemic practices on the current or recent Secretaries who are the subject of my assessment. But, the exception to this is those circumstances where Secretaries were aware of previously reported deficiencies or outstanding recommendations from previous reviews and did not act on these. I discuss this further under 'Due diligence carried out by Secretaries' in Chapter 8.

Having raised this matter does not mean that I, in any way whatsoever, watered down my assessment of the Secretaries who are the subject of my assessment.

Other matters considered

During the course of my assessment, a number of matters relevant to my assessment came to mind. These are dealt with here. Other matters identified not connected to my assessment are explored in Chapter 8.

The Bartlett and Bowen Reports

As noted earlier in this Chapter, I was provided with access to these two reports with both referencing Mr Pervan. I concluded that no further action is required relating to Mr Pervan.

Reviewed contracts of employment of the six Secretaries

I sought access to these contracts with the objective of establishing how they addressed expectations around compliance with the State Service Principles and the Codes. These contracts cross-referenced the need for compliance with section 9 of the SSA.

Reviewed annual performance agreements

I sought and was provided access to the annual performance agreements between the Secretaries and the Premier (in the case of the Secretary of the Department of Police, Fire and Emergency Management this was with the Premier and relevant Minister and the performance agreement I was provided with related to the current, not former, Secretary). These agreements were entered into at various dates in quarter 1 of calendar 2023.

I was looking for, and in each case, I was pleased to find, explicit priorities, along with actions/milestones and measures of success, in those performance agreements regarding keeping children safe and collaboration between Secretaries. I also sought, but my request was too early, actual reports of performance against expectations.

Recommendation 2

That Secretaries outline in their annual reports to the Premier/Minister how they have responded to performance agreement expectations about keeping children safe and developments regarding collaboration.

Establishment of the Secretaries Board

I decided to consider the role of this Board, in particular how this might relate to enhancing child safety and improved collaboration between agencies within the Crown. I sought and was given access to the Board's terms of reference and minutes of its meetings. I noted:

- Membership of this Board is restricted to Secretaries of the eight departments;
- It is chaired by the Secretary of DPAC who is also the Head of the State Service;
- While there is now some formality around the workings of this Board, its concept is not new. Heads of Departments have met under the chairmanship of the Head of the State Service for many years[11]; and
- The Board's terms of reference require it to provide twice-yearly reports to Cabinet including on the implementation of the recommendations of the Tasmanian State Service Review Report[12]. I am advised that the last such report to Cabinet occurred on 18 January 2023. Understandably, this report is strictly Cabinet-in-confidence. However, the Parliament would benefit from knowing how well the Board is progressing on:
    - collaboration;
    - child protection; and
    - recommendations from the review conducted by Dr Watt.

Recommendation 3

That the Chair of the Secretaries Board include in six-monthly reports to Cabinet a report on how effectively Secretaries are progressing collaboration, keeping children safe and recommendations made by Dr Ian Watt AC.

In making Recommendations 2 and 3, I note that:

- The Parliament can request the Premier to provide advice on the performance of the public service, including how effectively Secretaries are progressing

[11] In about 2010, the then Secretary of DPAC coined the phrase 'joined up government' and developed proposals for how this might work.
[12] The Dr Ian Watt AC review.

collaboration, keeping children safe and recommendations made by Dr Watt in his review; and

- I have been advised of other accountability mechanisms that will be in place to support oversight of performance against expectations about keeping children safe. The Commissioner for Children (including a Commissioner for Aboriginal Children and Young People) will be reporting to a Parliamentary Committee, and the Independent Monitor will also be reporting to Parliament every six months.

Chapter 6 Recommendations made by the commissioners

Introduction

Because I had things to say about how governments respond to public inquiries does not mean I do not support recommendations made by the Commissioners in their COI Report. To the contrary, the recommendations are comprehensive and implementable. As noted in Chapter 5, I studied every recommendation and finding, my main objective being to identify any observations relating to the Secretaries that are the subject of my assessment. I found none.

However, in this Chapter, I take the opportunity to provide my perspective on some recommendations that may have wider consequences generally, and for Secretaries in particular, and in doing so I note I deal with governance-related matters in Chapter 8.

Policies and procedures and professional development

Recommendations 6.3, 6.4 and 6.5 deal with the Department for Education, Children and Young People's child safe policies, professional conduct policies and professional development for education staff and volunteers. Recommendations 15.11, 15.13 and 15.15 deal with similar matters at the Department of Health. If they have not already done so, I see benefit, where this relates to child safety, in these two departments ensuring that, to the extent relevant, child safe policies, professional conduct policies and professional development coincide.

Recommendation 4

That, to the extent they have not already done so, DECYP and DoH collaborate to ensure that, to the extent relevant, child safe policies, professional conduct policies and professional development arrangements coincide.

State Service disciplinary processes

Recommendations 20.1 to 20.14 deal with many aspects relating to weaknesses identified by the Commission regarding disciplinary processes. Not clear to me is explicitly how the Commission intended these should apply to Secretaries. I anticipate all recommendations should so apply, where relevant. A reason for looking into this is an observation made in Chapter 5 that, currently, the SSA is silent on application of section 9 *The State Service Code of Conduct* to Secretaries.

Recommendation 5

That, in responding to the COI's recommendations 20.1 to 20.14, Government ensure that, where applicable, it is clear the extent to which these recommendations capture Secretaries.

Other oversight and regulatory bodies

For the reasons outlined in Chapter 7 of my report, where I deal with a submission received from the Integrity Commission, I support the Integrity Commissioner's recommendation 18.11 that:

The Tasmanian Government should implement Recommendation 11 of the Independent Reviewer's 2016 Independent Review of the Integrity Commission Act 2009 *which would oblige public authorities to notify the Integrity Commission of any allegations of serious misconduct.*

Chapter 7 Submissions received, and not received, and how these were dealt with

Introduction

Other than submissions posted to blakereview@tas.gov.au dealt with later in this Chapter, submissions were received from the Integrity Commission, Secretaries Morgan-Wicks and Bullard, Acting Secretaries Limkin and Williams, the Commissioners, a former head of DPAC and Ms Meg Webb MLC. Importantly, the Commissioners advised me that no findings were made by them in relation to any Secretary. I also note that, while the Ombudsman did not make a submission to me, he provided his view that he "was not aware of any instances where any of the named persons[13] have potentially breached the code of conduct".

Submissions received

Received from identified Secretaries and Acting Secretaries

I studied each submission and compared these with information in the COI Report, and where relevant, I asked further questions of my contacts at DPAC, which were responded to appropriately.

Ms Webb's submission[14]

Ms Webb provided a comprehensive and helpful submission. This submission did not alter my conclusions but helped clarify my thinking on what needed to be considered – refer Table 1 in Chapter 5.

Other matters raised by Ms Webb and my responses:

- In its final report *Who was looking after me? Prioritising the safety of Tasmanian children*, the Commission states as a finding that: We observed some leaders within the State Service resisted constructive criticism and lacked the curiosity and initiative required to ensure children's safety was prioritised. Response – I have found no evidence that this statement explicitly referred to the Secretaries that were the subject of my assessment.
- We also saw passivity and failures to act, particularly in response to past reviews, inquiries and internal reports highlighting problems that increased risks to children in institutions. Response – I agree and make the same point – refer Chapter 8.
- We would like to see leaders be role models for prioritising children's rights and safety. To achieve this goal, leaders need the qualities of self-reflection, an ability to acknowledge mistakes and a drive for making improvements. Response – I agree and was pleased to see child protection an explicit inclusion in performance

[13] The named persons were the six Secretaries that were the subject of my assessment.
[14] I noted from Ms Webb's submission that "… I am happy for this submission to be cited and/or released publicly by the Assessor."

agreements with Secretaries and why I recommended public reporting on actions taken.

- The Commissioners also acknowledged: We are grateful to those state servants who were cooperative, reflective and sought to assist our Inquiry. While most people engaged with us in good faith, we were disappointed that this cooperation was not universal. Response – my reading of the COI Report, transcripts, statements provided to the COI by the Secretaries and, where relevant, submissions made to me, did not indicate a lack, by these Secretaries, of cooperation or failure to assist. I did observe instances where some Secretaries may not have not agreed with observations or questions posed but that is, in my view, appropriate.
- It is of paramount importance, and in the public interest, that the conduct of this independent assessment is as transparent and detailed as possible. Response – I have endeavoured to do so.
- In this context it would be highly valuable for the assessor to 'step through' processes undertaken for the reader. Response – refer approach taken in conducting this assessment as outlined in Chapter 5 and in Table 1, Chapter 5.
- It is also crucial that significant matters which may be determined as falling outside the scope of this independent review, are clearly identified with accompanying recommendations of additional work required. Response – refer other matters reported in Chapter 8.
- Additional to the matters listed above which warrant specific addressing via this independent assessment, clear and detailed recommendations for further actions and follow-up must also be included. Response – I have made a number of recommendations based on other matters assessed. Refer Chapter 3.

Ms Webb offered me the opportunity to meet with her. We met at her Electorate Office and discussed Table 1 and my responses above.

The Integrity Commission's submission

I invited a submission from the Integrity Commission (IC). I was particularly interested in notifications and how these are dealt with by the IC. The IC advised that:

- notifications are different from complaints;
- they are not mandatory although the Independent Reviewer, the Hon William Cox AC QC, recommended in his 2016 Report[15] that (Recommendation 11):

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

[15] Independent Review of the *Integrity Commission Act 2009*: Report of the Independent Reviewer, Recommendation 11, pp 35-36, 38: https://www.integrity.tas.gov.au/__data/assets/pdf_file/0007/617074/Report_of_the_Independent_Review_of_the_Integrity_Commission_Act_2009_-_May_20162.PDF

For the reasons outlined in Hon Cox's report, I support this recommendation.

I also noted in the COI Report references to the IC's *Guide to Managing Misconduct in the Tasmanian Public Sector* (the Guide) initially released in 2017 and updated in 2023. The IC advised me that:

- The Guide was informed by the findings of an own-motion investigation into the policies, practices and procedures of selected Tasmanian public sector organisations in managing misconduct allegations.
- They sought to understand the capacity of public sector organisations to deal with misconduct so that effective resources and training could be developed to support improved standards.
- The Guide itself is a series of good practice fact sheets on managing misconduct in the Tasmanian public sector which focus on the three stages of dealing with misconduct:
    - handling the allegation and deciding whether to investigate
    - investigating misconduct, and
    - ensuring that the outcomes are adequate and appropriate.
- The investigation report on which the Guide was based made three recommendations and five good practice suggestions, all of which are relevant to the reporting and management of misconduct. These are not reported here but are included at Appendix G.

Recommendation 6

That, to the extent that action has not already been taken, DPAC or SSMO take ownership of the Integrity Commission's *Guide to Managing Misconduct in the Tasmanian Public Sector* and follow through on the recommendations made by the Integrity Commissioner relating to this.

I also note my view that, without taking anything away from the Integrity Commission's excellent work, guides of this nature should be the purview of the Head of Agency through SSMO or, even better, by an independent State Service Commissioner – refer Recommendation 9.

Submission from a former DPAC Secretary and the outcome of my discussions with them

This submission, and my subsequent discussions with this person, informed my thinking in particular around the relevance of the State Service Principles to, and my views about, the possibility of reintroducing a State Service Commissioner type role in Tasmania – refer Recommendation 9.

Other submissions to me, or contact made with me, at blakereview@tas.gov.au

From Emeritus Distinguished Professor Rob White and Dr Val Kitchener

This submission was made representing the Tasmanian OPCAT Network[16] and I met with Professor White and Dr Kitchener to discuss their submission. This conversation brought to my attention the:

- Most important roles played by civil society;
- The significance of the *OPCAT Implementation Act 2021* (OPCAT Act); and
- The critical role played by the Custodial Inspector and their appointment under the OPCAT Act as the Tasmanian National Preventive Mechanism. In the Custodial Inspector's 2022-23 annual report he noted 'An influence of OPCAT can already be seen in the work to revise my inspection standards, which I use when conducting mandatory inspections of AYDC and adult custodial centres.'

An outcome of this meeting was an observation by them that monitoring the COI's recommendations needs to be 'independent and permanent'. In this respect I draw attention to the:

- COI's recommendation 22.1, from Chapter 22 Monitoring Reforms;
- Actions already taken by the implementation group within DPAC to address this;
- Independent Monitor referred to below Recommendation 3 in Chapter 5 is aimed at addressing the COI's recommendations; and
- Revised Estimates Report includes $259.5m for the Government's initial response to the COI recommendations[17].

Submissions not received

Where no submission was provided by any of the identified Secretaries, or Acting Secretaries, I extended my work by reviewing statements made by these persons to the Commissioners, studied transcripts recording appearances before the Commissioners and interviewed all but one Secretary and one Acting Secretary.

[16] https://www.utas.edu.au/tiles/research/research-streams/law-enforcement-and-public-health/tasopcat-network
[17] https://www.treasury.tas.gov.au/Documents/2023-24%20Revised%20Estimates%20Report%20%28including%20the%20December%20Quarterly%20Report%29.pdf

Chapter 8 Other matters

Introduction

During the course of my assessment, a number of matters came to mind, or were brought to my attention, which are dealt with here. It had been my intention to assess these matters in greater detail but time did not permit this.

It was also my intention to assess the adequateness of governance arrangements in the departments being led by the Secretaries that were the subject of my TOR. There were two reasons why I wanted to do this piece of work.

Firstly, I noted that the Commissioners had also been interested in how Secretaries (not all of them) had established governance arrangements, including delegations, for the often very large and multi-service functions they had to manage.

Secondly, I noted from the COI Report, my interpretation (not necessarily an interpretation drawn by the Commissioners) that there may not always have been clarity about responsibility for delegated functions or for the establishment of whole of agency committee arrangements. My focus below is on the former – management of delegated functions.

Governance

Chapter 12 of Volume 5 of the COI Report (page 48) discusses governance with a focus on managerial and operational oversight of Ashley Youth Detention Centre (Ashley). The Report references the definition of governance from the National Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, December 2017) vol 6, 147 as "encompass[ing] the systems, structures and policies that control the way an institution operates and the mechanism by which the institution, and its people can be held to account"[18].

I concur with this definition but note my publicly held view that perfect governance frameworks can fail, and imperfect governance frameworks can succeed. In my view, success is dependent on the behaviours of persons responsible for making them work. It is in this context that I explore the remaining matters noted in this Chapter. I do not focus on governance at Ashley which was comprehensively explored by the Commission.

Roles of Secretaries in the Tasmania State Service

Secretaries fulfil the policy expectations of Government under administrative arrangements developed for this purpose. Because governments provide multiple services to the community in eight departments (Premier and Cabinet, Treasury, Natural Resources, Police, Health, Education, Justice and State Growth) reporting to nine Ministers, employing more than 28,000 public servants to deliver these services,

[18] I noted from the COI Report references to how the Tasmanian Public Service is implementing the recommendations arising from the National Royal Commission and make no further observations here.

Secretaries generally fulfil multiple functions, invariably reporting to more than one Minister. Between them, Ministers manage 37 portfolios which are managed by the eight Secretaries.

Sectaries are appointed by the Premier (the Commissioner of Police is appointed by the Police Minister) under contracts of appointment. Performance agreements are entered into annually.

Secretaries are responsible and accountable for delivery of all the functions and portfolios allocated to them. They would be expected to develop governance arrangements relevant to their responsibilities. This includes making delegations to Deputy Secretaries and other Office holders.

However, regardless of delegations, executive committee structures and other governance arrangements established, Secretaries remain solely responsible and accountable to Government for delivery of all of the functions allocated to them. They can delegate a function but they cannot delegate responsibility or accountability. As a result, where a function is delegated, or fulfilled by a statutory Office holder, it is necessary for each Secretary to have in place arrangements under which reports on how delegated functions have been implemented are provided to them. It was suggested to me that this may require Secretaries to be omniscient, i.e. all-knowing, and that this may be an unreasonable expectation. I agree. However:

- I would expect the role of Secretary to include having in place systems, practices and culture to ensure that decisions under delegations are taken appropriately; and
- While Secretaries are ultimately responsible and accountable for all actions, it would be impossible, not useful and inappropriate to require Secretaries to be fully informed in detail of every action taken under delegation in their department.

The Secretary's role is significant and broad. They cannot escape this. There are no perfect or off-the-shelf governance frameworks to guide them because administrative arrangements can, and do, change.

Recommendation 7

That an independent review be carried out by a governance expert familiar with public sector governance of the governance arrangements established by each Secretary with the objective of ensuring these arrangements make clear responsibilities and accountabilities and a best fit for the delivery of allocated functions.

Alternatively, or as well as, such an independent governance review might achieve more if sponsored by, and reporting to, the Secretaries Board given the Board's fundamental purpose is to set the overall direction for the Tasmanian State Service, drive collaboration and prioritise collective resource use to achieve cross-boundary solutions.

Alternative to Recommendation 7

That, as an alternative to Recommendation 7, the proposed independent governance review be sponsored by, and report to, the Secretaries Board.

Role of a Board of directors contrasted with the role of a Secretary

As noted in the immediately preceding matter, the role of a Secretary is significant and broad. Contrast this with a government business entity where there is a chief executive officer reporting to a skills-based board of experienced directors often bringing to the boardroom table and to the entity diversity of thought and experience. Responsibilities and accountabilities are generally clear, with multiple examples of for-profit governance frameworks for such boards and management to draw upon.

A Secretary can seek guidance, develop sound executive structures and systems and processes consistent with good governance but, ultimately, the effective application of those governance arrangements rests with them. In saying this, I understand it was an established practice to have an independent member, or members, of departmental internal audit and risk committees giving Secretaries access to independent thinking. I applied this approach when auditor-general and I pose the question – 'Is there a consistent approach currently and have these processes been useful in supporting Secretaries in identifying and mitigating risks associated with issues raised in the COI Report?' If not, could they?

Recommendation 8

That Secretaries establish practices whereby they have access to independent views on governance via membership of audit and risk committees (or similar arrangements) with a focus, at least currently, on supporting Secretaries in identifying and mitigating risks associated with issues raised in the COI Report.

Due diligence carried out by Secretaries on appointment

I invited the six Secretaries/former Secretaries that are the subject of my assessment to advise me of due diligence they carried out at the time of their appointment. I was, in part, seeking to understand how they may have been informed of, or inquired about, issues associated with the roles they were embarking on.

I received responses from four Secretaries and discussed this question with a fifth. Responses were, from my perspective, suitable and confirmed my conclusions as documented in Chapter 2.

State Service Commissioner

I wondered whether the reasons why there appeared inconsistent, poor or untimely ED5 investigations, or perhaps poor understanding of the State Service Code of Conduct and Principles, may have been related to the decision in 2013 to abolish the role of the then State Service Commissioner. In my role as auditor-general at the time I was briefed about this proposal and I noted the likelihood that it might involve more work for my Office, which proved to be the case. The process for making this decision seemed suitable to me at the time, but the decision was a policy one for the government at that time. Policy decisions of governments, or the merits of policy, must never be opined on by an auditor-general.

To an extent, the role played by this Commissioner was taken over by the State Service Management Office (SSMO) which sits inside DPAC reporting to the Head of the State Service. From my experiences, these arrangements worked okay but they lacked the 'teeth' of an independent Office, with a status equal or similar to that of a Head of Agency. It has now been more than 10 years since this change was made and I believe it timely for the success or otherwise of this to be evaluated and comparison made with practices in other jurisdictions[19]. If such a review were to be initiated, it might also explore whether any of the systemically poor practices identified by the COI may have come to light, and been resolved, much sooner.

I do, however, note that Dr Watt AO, explored this matter in his Independent Review of the Tasmanian State Service[20] concluding that:

- '… on balance, the Reviewer decided not to recommend reinstatement …' and
- 'The option (of reinstatement) should, however, be kept under consideration.'

Recommendation 9

That Government, or the Head of the State Service, initiate a review of the decision to abolish the State Service Commissioner model in about 2013.

What are the State Service Principles and how are they relevant to my assessment?

I discuss the Principles in Chapter 5. The only reason for raising them again is my view that the SSMO must ensure that every public servant (all +/- 28,000 of them) needs to understand that these principles, and the associated code of conduct referred to in section 9 of the State Service Act, apply to them. My experiences suggest otherwise.

[19] I was informally advised that the model in Western Australia would be a sound starting comparison.
[20] Refer pages 157 and 158 of Dr Watt's final report.

Essential to ensuring a strong understanding by all public servants of the code of conduct and principles are induction processes for new employees and regular updates post-employment.

Recommendation 10

That SSMO engage with Secretaries to institute a program of induction of new employees, and regular updates for existing employees, about the code of conduct and principles.

Government's response to the recommendations made by the COI

I was pleased to see a commitment by Government to implement the COI recommendations. What surprised me, however, was the commitment to do so before actually receiving the report and before evaluating the recommendations made. I would have expected a short period of analysis of the recommendations and assessment of how they fitted with government policy. A secondary question for me is whether commissions of inquiry develop policy or guide policy, my view being that they should guide, not lead.

I also repeat an earlier observation that perhaps commissions of inquiry are a last resort and may have been unnecessary had government(s) taken heed of recommendations by independent officers (the Ombudsman, Children's Commissioner(s)) and other reviews, often initiated but not always, by government(s). In this respect, I concur with the observation made by the COI that "We also saw passivity and failures to act, particularly in response to past reviews, inquiries and internal reports highlighting problems that increased risks to children in institutions." I make no recommendation.

Appendix A Terms of reference and terms of appointment

My terms of reference and terms of appointment are included here so that persons reading this report are clear on my role and my appointment.

INDEPENDENT ASSESSMENT OF CONCERNS RAISED BY THE COMMISSIONERS OF THE COMMISSION OF INQUIRY INTO THE TASMANIAN GOVERNMENT'S RESPONSE TO CHILD SEXUAL ABUSE IN INSTITUTIONAL SETTINGS REGARDING THE ACTIONS OF HEADS OF AGENCY

Background

The Tasmanian Government is committed to ensuring that strong action has been taken and will continue to be taken to ensure that Tasmanian children and young people are safe and well, in its care.

An Independent Assessment will consider matters of concern raised by the Commissioners of the Tasmanian Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (Commission of Inquiry) in respect of actions by the relevant Heads of Agency.

Terms of Reference

The independent assessment is to:

1. Consider matters of concern raised by the Commissioners of the Tasmanian Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (Commission of Inquiry) in respect of actions by the past or present occupants of the following offices:
    - The Secretary of the Department of Premier and Cabinet
    - The Secretary of the Department of Health
    - The Secretary of the Department for Children, Education and Young People
    - The Secretary for the Department of Police, Fire and Emergency Management and Commissioner of Police (*)
    - The Secretary of the Department of Justice.
    - the Secretaries of those agencies which now no longer exist by virtue of machinery of government changes, but that had responsibility for the care and protection of children and were the precursor to those departments listed above.

2. Consider whether such conduct may potentially amount to a breach of the Tasmanian State Service Code of Conduct or Code of Conduct under the *Police Services Act 2003*.

(* note that the present Commissioner of Police and Secretary of the Department of Police, Fire and Emergency Management was appointed after the conclusion of the hearings of the Commission of Inquiry and so is not relevant to this assessment)

Matters of process

The Independent Assessor will:

1. Provide an opportunity to persons to make submissions, or to be heard personally, as the Independent Reviewer considers it necessary, in relation to matters under Review;
2. Engage with former Commissioners of the Commission of Inquiry so far as possible to ensure that all matters referred to in the COI's final report as matters where findings were unable to be made (Volume 1, Chapter 5.1 Challenges we faced), are fully considered;
3. Ensure that where necessary appropriate confidentiality arrangements are made for persons assisting the review; and
4. Provide a detailed report to the Premier about the assessment.

Reporting

The assessor is to report to the Premier no later than by Friday 29 March 2024.

Appendix B Letter from the Commissioners

A letter received from the Commissioners dated 7 December 2023 is included below.

Mr Mike Blake AM
Independent review into the actions taken in response to the information and concerns raised by the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings

Dear Mr Blake AM

As the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings (**Commission**) has now concluded and our appointment as members of that Commission has ended, we collectively write to you in our private capacities.

We understand the Tasmanian Government has appointed you to undertake an Independent review into the actions taken in response to the information and concerns raised by the Commission (**Independent Review**). In accordance with the Independent Review's terms of reference, we understand that it is stated that you will engage with us as the former Commissioners to ensure that all matters referred to in the Commission's report, *Who was looking after me? Prioritising the safety of Tasmanian Children* (**Commission's report**) as matters where findings were unable to be made (Volume 1, Chapter 5.1, titled 'Challenges we faced'), are fully considered.

We consider that any engagement by the former Commissioners with you should occur collectively. Accordingly, this is the response from all of us.

We suggest that before you begin your work, it will be important for you to take account of all relevant parts of the Commission's report, not merely the content that appears in Volume 1, Executive Summary, section 5.1, pages 25-26. We also consider it may assist you for us to provide additional information regarding the Commission's approach to procedural fairness processes, including the Commission's approach to potential findings of misconduct or adverse findings.

Procedural fairness processes

In delivering the Commission's report, the Commission was required to comply with the provisions of the *Commissions of Inquiry Act 1995* (Tas) (the **Act**) which set out requirements relating to procedural fairness. Accordingly, the Commission adopted the following procedural fairness processes:

1. Where the Commission was satisfied that an allegation or proposed finding of misconduct as defined in the Act had been or should be made against a person, and that person should be required or was likely to be required to give evidence in relation to the allegation, the Commission wrote to that person giving notice of the relevant allegation or proposed finding and the evidence on which it was based, in accordance with section 18 of the Act (**section 18 notice**). As part of that section 18 notice, the Commission provided the person with an opportunity to provide any written response (which might include provision of further evidence) and otherwise advise if they wished to exercise any other rights under section 18(3) of the Act.

2. Where the Commission intended to make any adverse commentary or findings in respect of a person that did not constitute misconduct as defined in the Act, the Commission wrote to that person providing them with a copy of the relevant draft chapter (or parts of the draft chapter) containing such adverse commentary or findings and providing the person with an opportunity to provide any written response in accordance with section 19 of the Act.

3. As a matter of procedural fairness, but also for accuracy and completeness, the Commission also provided relevant draft chapters (or parts of draft chapters) to the State of Tasmania (**State**), statutory authorities, organisations and individuals where it was relevant to their interests, roles and responsibilities. Indeed, the Commission issued more than 250 draft chapters (or parts of draft

chapters) to 48 recipients. In some cases, this included revised drafts of chapters that had been previously provided. The Commission provided each recipient with an opportunity to provide any written response they might wish. The State was provided with all draft chapters (except for Volume 8, Chapter 23: Afterword) and an opportunity to provide any written response to each of them. Both the State and other recipients used the opportunity to provide responses to the Commission, which ranged from providing factual corrections, providing additional contextual information, requesting clarification of drafting, expressing policy and legal perspectives and making submissions on procedural fairness matters. This process constituted a significant part of the Commission's procedural fairness processes.

In this context, the Commission's report refers to any response received as part of these processes as a 'Procedural Fairness Response'. It follows that a reference in the Commission's report to a procedural fairness response does not imply that the person providing that response necessarily received a section 18 notice or even notice of the possibility of any adverse commentary or findings.

It should also be understood that the purpose of these procedural fairness processes was to enable people to provide responses to the Commission to enable it to determine whether it was appropriate to make a finding of misconduct, an adverse finding or include other content which might be relevant to their interests, role or responsibilities. As a result of such responses, some people were able to clarify or correct other information which had been provided to the Commission. In some cases, the Commission was able to determine that it was no longer appropriate or necessary to make any finding of misconduct or adverse commentary finding. In some circumstances, including where a person or their legal representative requested it, the Commission confirmed this position by withdrawing any relevant section 18 notice.

The Commission's process in relation to section 18 notices

The Commission considered that the obligation to issue a section 18 notice arose when the Commission reached a particular state of satisfaction (that an allegation of misconduct, as defined, had been or should be made against a person) before calling a person to give evidence at a hearing. Where that state of satisfaction existed, the Commission was required to issue a section 18 notice at least 48 hours before the person was called to give evidence.

It is important to note that the Commission's power to issue a section 18 notice and, by extension, to make findings of misconduct in respect of a person, was not extinguished once a person had given evidence for the first time before the Commission. Subsection 5(3)(a) of the Act conferred on the Commission broad powers of inquiry, including the powers to conduct its inquiry and gather information in any manner it considered appropriate, and to determine its own procedure. The Commission's investigative work could, and often did, continue after a person had given evidence for the first time, with the result that the Commission might have formed the requisite state of satisfaction at a later point in time.

Where that occurred, section 18(6) prohibited the Commission from making a finding of misconduct unless the person had been given notice of the misconduct and an opportunity to respond in accordance with section 18. In practical terms, the Commission was required to give notice to the witness and allow a reasonable period for them to respond by exercising any relevant rights under section 18(3). A section 18 notice issued in those terms was a valid notice.

Depending on the section 18(3) rights the person wished to exercise, a further hearing might have been required. This was the case if the person wished to give further evidence about the allegation and there was a need for such evidence to be given at a hearing (rather than by way of a further witness statement). If the person was called to give evidence at a further hearing then, provided the hearing was no less than 48 hours after the issue of the section 18 notice, the requirement in section 18(2) would have been satisfied.

The Commission considered this approach to be consistent with the text, context and purpose of section 18; namely, to ensure that individuals were given advance notice of allegations or potential findings of

misconduct and an opportunity to be heard on relevant matters. The approach balanced these individual interests in a manner that also recognised the inquisitorial and ambulatory nature of the Commission's work and the reality that allegations or potential findings of misconduct may not come into focus until after a person was first called to give evidence before the Commission.

The Commission's challenges with section 18

The Commission's report states that the Commission issued 30 section 18 notices to 22 people (Chapter 1, page 14). The challenges the Commission experienced in relation to making findings of misconduct are set out in detail in the Commission's report (Executive Summary, pages 25–26; Chapter 1, pages 13–17; Chapter 23; pages 319–321).

The Commission's report summarises the relationship between sections 18 and 19 of the Act and the argument advanced on behalf of the State and lawyers acting for individuals that if the Commission wished to make an adverse comment about the conduct of a state servant, this might effectively be a finding of misconduct against that person which required the specific process under section 18 to be followed (Chapter 1, page 14). As explained in the Commission's report, to avoid drawn-out legal argument and dispute, the Commission adapted its procedural fairness processes to align with this broader interpretation (Chapter 1, page 15).

In this context, the Commission sometimes issued section 18 notices in relation to a broad category of conduct, not all of which might have been of equal seriousness. These included potential findings that, in the Commission's view, might have been more reasonably characterised as adverse findings under section 19, rather than findings of misconduct, but which were arguably within the broader interpretation of misconduct put forward by the State or on behalf of individuals as we explain above. In addition, the Commission issued section 18 notices where it reached a state of satisfaction that an allegation of misconduct had been or might be made against a person (even if only on the basis of that broader interpretation of misconduct), but without the Commission necessarily being committed to making such a finding. Indeed, the Commission was required to, and did, approach any response to a section 18 notice with an open mind. As indicated, as a result of some responses to section 18 notices, the Commission determined it was no longer appropriate or necessary to make a finding of misconduct or even an adverse finding.

As the Commission was drafting its report, and actively considering the consequences of adopting the broader interpretation of misconduct on its procedural fairness processes, the Commission determined that due to the limitations of time and resources and its concern to design recommendations for the future that could be delivered and then implemented by the State in order to protect children as quickly as possible, it was not appropriate to progress or issue further section 18 notices.

In the context of the Commission's determination, there were some circumstances in which the Commission, after having received a relevant procedural fairness response, may have been open to considering an adverse finding under section 19, but given the potential for such findings to be considered findings of misconduct, the Commission determined to avoid making adverse findings against individuals where they may have been considered to be findings of misconduct.

Finally, the other consequence of the Commission's determination was that the Commission did not further consider some potential adverse findings under section 19 or findings of misconduct under section 18 and hence the relevant procedural fairness processes in relation to them were not progressed.

It was for all of these reasons that the Commission's report notes that the broader interpretation of misconduct put forward by the State or on behalf of individuals made it difficult, and in some cases impossible, for the Commission to make some of the findings it might otherwise have made (Executive Summary, page 25). At the same time, the Commission did not identify any specific findings of misconduct against any specific person that it would otherwise have intended to make but for the challenges presented by the Act.

Referrals to other authorities

The role of the Commission was to inquire into and make recommendations regarding Tasmanian Government responses to child sexual abuse in institutions. It was not the role of the Commission to investigate allegations that an individual had sexually abused a child or to respond to immediate threats to child safety. For the avoidance of doubt, as set out in the Commission's report, the Commission referred more than 100 people to appropriate authorities, including making more than 230 referrals to Tasmanian and other government authorities regarding risks or potential risks to the welfare of children (Chapter 1, page 13). We are confident that the Commission made all referrals it was legally required to make, including those necessary to ensure the safety of Tasmanian children.

Conclusion

We are very conscious that our role under the Act has ceased and believe the Commission's report speaks for our work and views. While the Commission has now concluded, we are concerned to ensure that the Commission's legacy positively contributes to ensuring that current and future generations of Tasmanian children and young people are much better protected.

For the limited purpose of assisting you to understand the Commission's approach to procedural fairness processes and to ensure that Tasmanian children and young people are protected from sexual abuse in institutional setting, the former Commissioner are prepared to meet with you if it would assist your work.

Given the complexity of the legal issues, including our capacity to provide information to you under the Act, we have engaged the Commission's former General Counsel to provide advice and legal and secretarial services to us in relation to the Independent Review and our engagement with you.

While we do not seek any personal remuneration in respect of our engagement with you, we would be grateful for your confirmation that the Independent review or the State will meet the reasonable legal costs of our engagement with you.

If you wish to contact us, we suggest you liaise with the former General Counsel, Jared Heath, who is available at [redacted] or [redacted].

Yours sincerely,

The Hon. Marcia Neave AO **Professor Leah Bromfield** **The Hon. Robert Benjamin AM SC**

7/12/2023

Copy: Mr Peter Woolcott AO
Independent assessment of conduct of heads of agency as identified in the final report of the Commission of Inquiry into Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings

Appendix C Extracts from the *Commissions of Inquiry Act 1995* (COI Act)

The COI Report makes numerous references to, and recommendations about, the COI Act all of which I support. I decided to include in my report sections 18 and 19 which are outlined here.

18. Allegations of misconduct

(1) If a Commission is satisfied that –

(a) an allegation of misconduct involving a person has been or should be made in its inquiry; and

(b) that person should be required, or is likely to be required, to give evidence in the inquiry in relation to the allegation –

the Commission must give that person notice of –

(c) the allegation; and

(d) the substance of the evidence supporting the allegation.

(2) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.

(3) A person who receives notice of an allegation of misconduct may respond to that allegation by doing all or any of the following:

(a) making oral or written submissions to the Commission;

(b) giving evidence to the Commission to contradict or explain the allegation or evidence, including the giving of oral evidence under examination by the person's counsel;

(c) cross-examining the person making the statement constituting the allegation or evidence;

(d) calling witnesses on matters relevant to the allegation or evidence.

(4) For the purposes of subsection (3) –

(a) the Commission must allow the person a reasonable period in which to prepare the response; and

(b) the person may be represented by counsel as of right.

(5) In determining what constitutes a reasonable period for the purposes of subsections (2) and (4)(a) , the Commission may have regard to such matters as it considers relevant in the circumstances.

(6) A Commission must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section.

19. Commission findings

(1) Subject to section 18 (6) , in its report a Commission may make a finding of fact on or in respect of any matter into which the Governor has directed it to inquire.

(2) In its report a Commission must not express a conclusion of law in respect of the legal liability of a person.

(3) The report of a Commission is not admissible in legal proceedings to prove a fact found by the Commission.

Appendix D Extracts from the *State Service Act 2000* (SSA Act)

The SSA Act outlines, among other matters, the roles and responsibilities of Heads of Agencies and of public servants. Sections 7 to 9 are relevant to my assessment and are included here.

7. State Service Principles

(1) The State Service Principles are as follows:

(a) the State Service is apolitical, performing its functions in an impartial, ethical and professional manner;

(b) the State Service is a public service in which employment decisions are based on merit;

(c) the State Service provides a workplace that is free from discrimination and recognises and utilises the diversity of the community it serves;

(d) the State Service is accountable for its actions and performance, within the framework of Ministerial responsibility, to the Government, the Parliament and the community;

(e) the State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;

(f) the State Service delivers services fairly and impartially to the community;

(g) the State Service develops leadership of the highest quality;

(h) the State Service establishes workplace practices that encourage communication, consultation, cooperation and input from employees on matters that affect their work and workplace;

(i) the State Service provides a fair, flexible, safe and rewarding workplace;

(j) the State Service plans for and promotes effective performance management in which Heads of Agencies, officers and employees are accountable for the performance of their functions and exercise of their powers;

(ja) there is an expectation that officers and employees –

(i) will perform to the standard and requirements identified in the performance management plan relating to the officer or employee; and

(ii) will be responsive to Government priorities; and

(iii) will deliver quality services;

(k) the State Service promotes equity in employment;

(l) the State Service provides a reasonable opportunity to members of the community to apply for State Service employment;

(m) the State Service provides a fair system of review of decisions taken in respect of employees.

(2) For the purposes of subsection (1)(b) , a decision relating to appointment or promotion is based on merit if –

(a) an assessment is made of the relative suitability of the candidates for the duties; and

(b) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and

(c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and

(d) the assessment is the primary consideration in making the decision.

8. Heads of Agencies must promote State Service Principles

A Head of Agency must uphold, promote and comply with the State Service Principles.

9. The State Service Code of Conduct

(1) An employee must behave honestly and with integrity in the course of State Service employment.

(2) An employee must act with care and diligence in the course of State Service employment.

(3) An employee, when acting in the course of State Service employment, must treat everyone with respect and without harassment, victimisation or discrimination.

(4) An employee, when acting in the course of State Service employment, must comply with all applicable Australian law.

(5) For the purpose of subsection (4),

Australian law means –

(a) any Act (including this Act) or any instrument made under an Act; or

(b) any law of the Commonwealth or a State or Territory, including any instrument made under such a law.

(6) An employee must comply with any standing orders made under section 34(2) and with any lawful and reasonable direction given by a person having authority to give the direction.

(7) An employee must maintain appropriate confidentiality about dealings of, and information acquired by, the employee in the course of that employee's State Service employment.

(8) An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.

(9) An employee must use Tasmanian Government resources in a proper manner.

(10) An employee must not knowingly provide false or misleading information in connection with the employee's State Service employment.

(11) An employee must not make improper use of –

(a) information gained in the course of his or her employment; or

(b) the employee's duties, status, power or authority –

in order to gain, or seek to gain, a gift, benefit or advantage for the employee or for any other person.

(12) An employee who receives a gift in the course of his or her employment or in relation to his or her employment must declare that gift as prescribed by the regulations.

(13) An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles.

(14) An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.

(15) An employee must comply with any other conduct requirement that is prescribed by the regulations.

(16) For the purposes of this section, a reference to an employee includes a reference to an officer and a reference to State Service employment includes a reference to an appointment as an officer and an arrangement made under section 46(1)(a).

Appendix E Extracts from the *Police Service Act 2003* (PS Act)

The Commissioner of Police is required to comply with the Code of Conduct outlined in section 42 of the PS Act which is included here. Section 43 (included on the following pages) outlines how the Commissioner is to respond to any alleged breaches of this code.

42. Code of conduct

(1) A police officer must behave honestly and with integrity in the course of his or her duties in the Police Service.

(2) A police officer must act with care and diligence in the course of his or her duties in the Police Service.

(3) A police officer must comply with –

(a) all orders in the Police Manual; and

(b) any lawful direction or lawful order given by a senior officer.

(4) A police officer must maintain appropriate confidentiality about any dealing made and information gained in the course of his or her duties in the Police Service.

(5) A police officer must disclose, and take reasonable steps to avoid, any conflict of interest in connection with his or her duties in the Police Service.

(6) A police officer must use the resources of the Police Service in a proper manner.

(7) A police officer, in connection with his or her duties in the Police Service, must not –

(a) knowingly provide false or misleading information; or

(b) omit to provide any matter knowing that without that matter the information is misleading.

(8) A police officer must not make improper use of –

(a) information gained in the course of his or her duties in the Police Service; or

(b) the duties, status, power or authority of the police officer –

in order to gain, or seek to gain, a gift, benefit or advantage for the police officer or for any other person.

(9) A police officer must not access any information to which the police officer is not entitled to have access.

(10) A police officer must not destroy, damage, alter or erase any official document, record or entry without the approval of the Commissioner.

(11) A police officer must not, at any time, conduct himself or herself or act in a manner that is likely –

(a) to be prejudicial to the Police Service; or

(b) to bring discredit on the Police Service.

(12) A police officer must not victimise or discriminate against another police officer because that other police officer has reported a breach of a provision of the code of conduct.

(13) A police officer must comply with any other prescribed conduct requirement.

43. Actions in relation to breaches of code of conduct

(1) The Commissioner must establish procedures for the investigation into any alleged breach of a provision of the code of conduct by a police officer.

(2) After considering the results of an investigation, the Commissioner must determine whether or not the police officer has breached a provision of the code of conduct.

(3) If the Commissioner determines that a police officer has breached a provision of the code of conduct, the Commissioner may take one or more of the following actions in relation to the police officer:

(a) direct that appropriate counselling be provided to the police officer;

(b) reprimand the police officer;

(c) impose a fine not exceeding 20 penalty units;

(d) direct that the remuneration of the police officer be reduced within the range of remuneration applicable to the police officer;

(e) reassign the duties of the police officer;

(f) transfer the police officer;

(g) in the case of a non-commissioned police officer, place that police officer on probation for any specified period the Commissioner considers appropriate;

(h) in the case of a non-commissioned police officer, demote the police officer;

(i) in the case of a non-commissioned police officer, terminate the appointment of the police officer;

(j) in the case of a commissioned police officer, recommend to the Minister that the appointment of the police officer be terminated or that the police officer be demoted or placed on probation for any specified period the Commissioner considers appropriate.

(k) . . . . . .

(4) If the Minister accepts a recommendation of the Commissioner made under subsection (3)(j) , the Minister is to recommend to the Governor according to that recommendation.

(5) The Governor, on receipt of the Minister's recommendation, may act according to that recommendation.

(6) The Commissioner may determine that a fine be paid –

(a) within a specified period; or

(b) in such instalments as the Commissioner specifies.

(7) If there is no determination under subsection (6) , a fine is to be paid within 14 days after service of a notice under subsection (9) .

(8) If a police officer fails to pay a fine or any instalment of a fine as required, the Commissioner may –

(a) direct that an amount equal to the fine or instalment be deducted from the remuneration payable to the police officer in full or in any specified instalments; or

(b) recover that amount as a debt due to the Police Service in a court of competent jurisdiction.

(9) The Commissioner, by notice served on the police officer, must notify the police officer of any action taken under this section.

(10) A termination of appointment or demotion under this section takes effect on service of the notice under subsection (9).

Appendix F Employment Direction 5 (ED5)

This ED outlines procedures to be followed when investigating and determining whether an employee has breached the code of conduct. The ED is included below.

EMPLOYMENT DIRECTION

State Service Act 2000

Employment Direction No. 5

PROCEDURES FOR THE INVESTIGATION AND DETERMINATION OF WHETHER AN EMPLOYEE HAS BREACHED THE CODE OF CONDUCT

Directive

Pursuant to Section 17 of the *State Service Act 2000*, I hereby direct that the arrangements and requirements set out in this Employment Direction are to apply.

Signed: .....

Date: ..1..4..23

Issued by authority of the Minister administering the *State Service Act 2000*.

Contents

1. Purpose 2
2. Application 2
3. Definitions 2
6. Direction 3
7. Allegation and Investigation 3
8. The Determination by the Head of Agency 5
9. Imposition of Sanction 5
10. Notification of Determination 6
11. Review 6
12. Requirement to keep records 6
13. Reporting and Monitoring 7
14. Review 7

Minister administering the *State Service Act 2000*

Tasmanian Government

1. Purpose

1.1 In accordance with section 10(3) of the Act, the Minister establishes in this Direction the procedures for the investigation and determination of whether an employee, senior executive, equivalent specialist or Prescribed Officer (hereinafter referred to as an employee) has breached the State Service Code of Conduct (the Code).

1.2 A finding that an employee has breached the Code may only be made in accordance with these procedures.

1.3 These procedures do not apply to alleged breaches of the Code by Heads of Agencies.

2. Application

2.1 This Direction is to apply to all State Service Agencies and officers and employees within those Agencies.

3. Definitions

'The Act' refers to the *State Service Act 2000.*

'The Minister' refers to the Minister administering the Act.

'Employee(s)' refers to the permanent or fixed-term employee appointed under section 37 of the Act.

'Employer' is as defined by Part IV of the Act.

'Employment Direction' means an Employment Direction relating to the administration of the State Service and employment matters as issued by the Employer according to Section 17 of the Act.

'Head of the State Service' means an officer responsible to perform the functions and powers of the Employer, other than the power to issue Employment Directions, as defined by section 20 of the Act.

'Officer(s)' refers to a person appointed as a Head of Agency, holder of a prescribed office or senior executive under section 31 of the Act.

4. Legislation/Award Basis and Related Documents

State Service Act 2000 Part 4 (sections 14,15,16) and sections 9, 10, 17, 20, 21, 31, 34, 37 and 50.

5. Operative Date

5.1 This Direction will take effect from the date of issue and will remain in force until varied or revoked.

5.2 An investigation which has commenced under the previous Employment Direction and has not been completed as of date of issue is to be finalised in accordance with this Direction.

6. Direction

6.1 Under section 9 of the Act, the Code establishes the conduct requirements for all employees. The Code complements the State Service Principles and may be supplemented by Agency specific standing orders made under section 34(2) of the Act.

6.2 The Minister may impose a sanction on an employee who is found to have breached the Code (section 10 of the Act). The Minister may delegate this power.

6.3 A Head of Agency, with the exception of the Head of Agency of the Department of Health and the Head of Agency of the Department for Education, Children and Young People, must not delegate the powers and functions conferred by this Direction to another person or persons.

6.4 Wherever Head of Agency appears in this Direction, with the exception of sub-Clause 1.3 and Clause 9, it should be read to include the delegates of the Head of Agency of the Department of Health and the delegates of the Head of Agency of the Department for Education, Children and Young People.

6.5 The onus of establishing any fact is on the party asserting it, and proof is to be on the balance of probabilities[1].

6.6 These procedures are to be applied with procedural fairness, natural justice and in a timely[2] manner.

7. Allegation and Investigation

7.1 Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach of the Code in accordance with these procedures. The Investigator must be impartial and must report to the Head of Agency in accordance with Clause 7.9 on the outcome of their investigation.

7.2 Where a Head of Agency becomes aware that an employee has been convicted of a crime or an offence in Tasmania which is punishable by imprisonment for a term of 6 months or more, or has been convicted elsewhere than in Tasmania of a crime or of an offence which, if committed in Tasmania, would be a crime or an offence so punishable, the Head of Agency may, after affording the employee procedural fairness and natural justice, determine whether the Code has been breached without the need for an investigation.

7.3 Where an investigation of an allegation of a breach of the Code is likely to require interviewing a child, the Head of Agency must ensure that the processes involving the child are sensitive and appropriate, bearing in mind the age, maturity and personal circumstances of the particular child. Before interviewing a child, consideration must be given to such issues as the permission of the parent or guardian, the child being accompanied by a parent, guardian or

[1] A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.
[2] "Timely" means within a reasonable time and free from unreasonable delay.
23/432127

support person and, where appropriate, keeping the child informed of the progress of the investigation.

7.4 Prior to the commencement of the investigation or in circumstances outlined in Clause 7.7, the Head of Agency must inform, in writing, the employee suspected of committing a breach of the Code:

a. of the substance[3] of the alleged breach of the Code;

b. of the intention to investigate the alleged breach;

c. who will investigate the alleged breach;

d. that the employee may seek his or her own advice and can be assisted by a person of the employee's choice throughout the process; and

e. of the possible implications for the employee if the matter proceeds to a determination by the Head of Agency that the employee has breached the Code.

7.5 During the course of the investigation, the employee suspected of committing a breach of the Code is to be given the opportunity to be interviewed and, if he or she wishes, to provide documentary evidence to the Investigator.

7.6 Before being interviewed, it should be made clear to the employee that anything said may be used as evidence if the matter proceeds to determination. The employee is to be given the option of having another person of the employee's choice present at interview to assist the employee through the process.

7.7 If, during the course of an investigation, the Head of Agency has reasonable grounds to believe that further breaches of the Code may have occurred, the Head of Agency must inform the employee of those alleged further breaches in accordance with Clause 7.4. Investigation of the additional allegations may then proceed, either as part of the current investigation or as a new investigation.

7.8 At any time during the investigation the Head of Agency may decide to take no further action on the allegation or to deal with it otherwise than as a breach of the Code. In such case the Head of Agency shall advise the employee in writing of this decision, including the reasons for the decision.

7.9 The Investigator must provide a written report(s) to the Head of Agency on the outcome of the investigation.

The report(s) must:

a. provide evidence (if any), relevant to the circumstances relating to each alleged breach of the Code of which the employee was informed in accordance with Clause 7.4;

b. include as attachments any relevant submissions, statements, records of interview or other documentary material; and

c. only include those matters relevant to each alleged breach of the Code of which the employee was informed of in accordance with Clause 7.4.

---

[3] 'Substance' means the essential elements that have given rise to the allegation of the breach of Code and the specific parts of the Code allegedly breached.

7.10 The Head of Agency shall provide the employee with a copy of the Investigator's report(s) and provide the employee with an opportunity to respond to the report(s). The employee may choose to provide this response in writing or otherwise and may provide any other relevant documentary evidence. This response must be provided to the Head of Agency within a period determined by the Head of Agency provided that this period is not less than 14 days.

7.11 If the response provided by the employee in accordance with Clause 7.10 contains information/evidence not previously known, and/ or information/evidence which is viewed by the Head of Agency as being of relevance to his/her determination pursuant to Clause 8, the Head of Agency may request the Investigator to undertake further investigations in relation to those matters, and to provide a further report concerning them within a reasonable time.

8. The Determination by the Head of Agency

8.1 If the Head of Agency determines the employee has breached the Code and:

a. the sanction imposed in accordance with section 10 of the Act is that the employee's employment is terminated, any dispute will be dealt with by the appropriate industrial tribunal; or

b. the sanction imposed in accordance with section 10 of the Act is other than termination of employment, the employee will have a right of review pursuant to section 50 (1) (b) of the Act.

8.2 In lodging a review pursuant to section 50(1)(b) of the Act, the onus is on the applicant to establish that the determination was flawed and/or the sanction imposed was not commensurate with the breach of the Code.

9. Imposition of Sanction

9.1 If the Head of Agency, determines that the employee has breached the Code, the Head of Agency (as the Minister's delegate), may impose a sanction in accordance with section 10 (1) of the Act.

9.2 Where a delegate of the Head of Agency for the Department of Health determines that the employee has breached the Code the delegate (as the Minister's delegate) may only impose a sanction in accordance with section 10(1) (a) to (f) of the Act.

9.3 Where a delegate of the Head of Agency of the Department of Health determines that the sanction of termination should be imposed, then such a sanction may only be imposed by the Head of Agency to whom the Minister has given the power of termination of a permanent employee in accordance with section 44 of the Act. In such circumstances, the Head of Agency will not be required to make any further determination in order to impose the sanction of termination.

9.4 Where a delegate of the Head of Agency for the Department for Education, Children and Young People determines that the employee has breached the Code the delegate (as the Minister's delegate) may only impose a sanction in accordance with section 10(1) (a) to (f) of the Act.

9.5 Where a delegate of the Head of Agency of the Department for Education, Children and Young People determines that the sanction of termination should be imposed, then such a sanction may only be imposed by the Head of Agency to whom the Minister has given the power of termination of a permanent employee in accordance with section 44 of the Act. In such circumstances, the Head of Agency will not be required to make any further determination in order to impose the sanction of termination.

10. Notification of Determination

10.1 If a determination is made in accordance with Clause 8.1, the Head of Agency must advise the employee in writing of:

a. the determination made and the reasons for that determination;

b. any sanction imposed, the reasons for that sanction and the operative date; and

c. the employee's rights of review.

10.2 The reasons for determination and sanction must be in sufficient detail to enable the employee to ascertain the facts found and the appropriate arguments that were accepted or rejected in arriving at the determination and sanction.

11. Review

11.1 If the Head of Agency determines the employee has breached the Code and:

a. the sanction imposed in accordance with section 10 of the Act is that the employee's employment is terminated, any dispute will be dealt with by the appropriate industrial tribunal; or

b. the sanction imposed in accordance with section 10 of the Act is other than termination of employment, the employee will have a right of review pursuant to section 50 (1) (b) of the Act.

11.2 In lodging a review pursuant to section 50(1)(b) of the Act, the onus is on the applicant to establish that the determination was flawed and/or the sanction imposed was not commensurate with the breach of the Code.

12. Requirement to keep records

12.1 The Head of Agency must keep a true and accurate record of all proceedings under this Direction, including:

a. the instrument of appointment of the person appointed to investigate the matter;

b. investigations conducted under this Direction;

c. determinations where it was found that an employee had breached the Code including the section(s) of the Act that were breached;

d. determinations where it was found that no breach of the Code had occurred;

e. discontinued investigations and the reasons for discontinuation; and

f. any sanction imposed in accordance with section 10 of the Act.

12.2 These records must be made available to the Head of the State Service as and when required.

13. Reporting and Monitoring

Not applicable.

14. Review

This Direction will be reviewed by 1 September 2023.

Appendix G Recommendations made by the Integrity Commission

The following recommendations were made in relation to the Integrity Commission's *Guide to Managing Misconduct in the Tasmanian Public Sector.*

Recommendation no. 1 It is recommended to the Premier that amendments be made to the *State Service Act 2000 (Tas)* to specifically allow Tasmanian State Service agencies to make disciplinary findings after an employee has left a particular agency or the State Service, in a manner similar to that set out in *Public Service Act 2008 (Qld)* ss 187A, 188A and 188AB.

This is reflective of the fact that all Tasmanian State Service employees are employed by the same Employer.

Recommendation no. 2 It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983 (Tas)* guidelines that public authorities keep a written record of the proceedings and action taken in respect of any allegation or suspicion of serious misconduct committed by a public officer. This is to include all serious misconduct matters, including those that do not proceed to investigation and those that are not substantiated.

These records should be kept for seven years.

Recommendation no. 3 It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983 (Tas)* guidelines that public authorities maintain an appropriately confidential register of all alleged and suspected misconduct committed by public officers. This is to include all misconduct matters, including those that do not proceed to investigation and those that are not substantiated.

These records should be kept for two years.

It is suggested that this register should include:

- references for easy location of related files
- date the matter was received
- the respondent's name
- a description of the alleged misconduct
- how the matter was dealt with (e.g. investigation, mediation, performance management)
- outcomes, and
- the date the matter was finalised.

In relation to these recommendations, the Integrity Commission advised:

- that, while it accepts the principle of Recommendation no 1, it does not consider that legislative change is required to give effect to this power;

- that heads of agency have been appropriately considering the completion of investigations where the subject person has left the organisation. Further, the Government has implemented a sector-wide register of misconduct matters where there was – or could have been, if the investigation was discontinued – a finding of serious misconduct and a sanction of dismissal; and
- that Recommendation no 2 is in progress with a view for implementation in 2024, and that the legislative change required to implement Recommendation no 3 will be reviewed in 2024.

Good practice suggestion no. 1

It is suggested that all Tasmanian public authorities make it clear that it is the responsibility of all public officers to report, address and record misconduct and other unacceptable behaviour by public officers in a fair, timely and effective way.

Good practice suggestion no. 2

It is suggested that all Tasmanian public authorities have:

- clear avenues for both internal and external persons to report allegations and suspicions of misconduct, and
- basic procedures in place for handling and recording allegations and suspicions of misconduct in the first instance (e.g. lines of reporting) – this may be in a standalone procedure or incorporated into an existing procedure.

Good practice suggestion no. 3

It is suggested that all Tasmanian public authorities make the connection between misconduct-related documents and policies simple and clear.

Good practice suggestion no. 4

It is suggested that all Tasmanian public authorities develop guidelines and endorse a standard disclosure statement for use in recruitment. This statement should require potential public officers to disclose:

- if they have been dismissed from a public authority in the last 10 years as the result of a misconduct investigation;
- if they were the subject of a misconduct or other disciplinary investigation when they left their last employer, and
- the status of any such investigation.

Good practice suggestion no. 5

It is suggested that all Tasmanian public authorities adopt a policy that allows:

- referees for former or current employees to, where the matter may be relevant to the work related qualities required for the job, share with a prospective employer misconduct-related findings, or the existence of a declaration that the employee left before findings were made, and

- misconduct findings to be taken into account during employment processes, with the weight placed on those findings to diminish over time.