

BACKGROUND BRIEFING PAPER:

New Concerns Arising from the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings Final Report

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CONTEXT

- The Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings provided its Final Report to Governor on 31 August 2023.
- The Report [*Who was looking after me? Prioritising the Safety of Tasmanian Children*](#) was tabled in Parliament on 26 September 2023.
- The Report made 75 findings and 191 recommendations; Report details one Misconduct finding (Vol. 6, Chapt 14, p.248).
- The Report stated **30 section 18 misconduct notices were issued to 22** people, but does not provide further detail in the report's main body of text (Vol. 2, Chapt 1, p14).
- Amendments were made to the *Commissions of Inquiry Act 1995* (the Act) in March 2021, one function of which was to create: "...additional requirements to provide procedural fairness where a witness to a commission of inquiry or another person may be subject to a finding of misconduct or other adverse finding" (Vol. 2, Chapt 2, p.11).
- The state's interpretation of those additional procedural fairness requirements meant the Commission was unable to make some findings it might otherwise have made:

"The way these requirements were drafted enabled various parties, including the State and lawyers acting for some individuals, to adopt interpretations which had practical consequences for the way we approached our work. We heard arguments that any adverse comment about an individual's behaviour could constitute misconduct (for example, because it was a breach of the very broad State Service Code of Conduct). This interpretation made it difficult and, in some cases, impossible for us to make some of the findings we might otherwise have made" (Vol. 1, Chapt 5, p.25).
- The Commission regarded the requirements in the Act as onerous, out of step with other states, making it too hard to hold individuals to account:

"We consider 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 tasked to do—which, in some cases, involves holding individuals to account" (Vol. 1, Chapt 5, p.26).
- The Commission noted the rights afforded under section 18 of the Act allowed a person to control the processes of the inquiry:

"The practical challenge is that the rights in relation to responding under section 18(3) could allow that person to effectively control the commission of inquiry's processes. Under section 18(3), the person may choose to make oral or written submissions, give evidence to a commission of inquiry, cross-examine the person who made the allegation or call witnesses. As a result, a person may compel a commission of inquiry to:

 - ▶ *conduct more hearings, even where the commission of inquiry's planned hearings have concluded*
 - ▶ *call or re-call witnesses for cross-examination, even in circumstances where there may be other important reasons why this is not appropriate (for example, this could be retraumatising for some witnesses and the nature of the cross-examination may be inconsistent with trauma-informed practice)"* (Vol. 8, Chapt 3, p.319).

DETAILS OF SECTION 18 NOTICES ISSUED CONTAINED IN PUBLISHED COMMISSION REPORT

- A person issued with a section 18 misconduct notice was required to provide a Procedural Fairness Response to the Commission:

“Under the current Act, a commission of inquiry must give a person notice of any allegation of misconduct (section 18(1)) and allow that person an opportunity to respond (section 18(3))” (Vo.1 8, Chapt 3, p.319).
- Close examination of the Notes sections of the tabled [Commission of Inquiry Report](#) reveals Procedural Fairness Responses provided by 22 individuals to the Commission, identifying those individuals in some cases by name and in other cases by position/role.**
- The Notes sections of the Report also reveal that, in addition to 22 individuals who provided a Procedural Fairness Response to the Commission, the **following 8 entities** also provided a Procedural Fairness Response (Table 1):

Table 1: Examples of citation in the Report’s Notes	
State of Tasmania	State of Tasmania, <i>State Procedural Fairness Response</i> , 20 June 2023, 2–4. – In Vol. 8, Chapt 18.
Office of the Solicitor-General	Office of the Solicitor-General, <i>Procedural Fairness Response</i> , 16 March 2023, 10 [20]. – In Vol. 7, Chapt 17.
Department of Health	Department of Health, <i>Procedural Fairness Response</i> , 28 April 2023, - In Vol. 6, Chapt 14.
Department for Education, Children and Young People	Department for Education, Children and Young People, <i>Procedural Fairness Response</i> , 1 August 2023, 3–4. – In Vol. 4, Chapt 9.
Integrity Commission	Integrity Commission, <i>Procedural Fairness Response</i> , 23 May 2023, 3. – In Vol. 8, Chapt 18.
Tasmania Police	Tasmania Police, <i>Procedural Fairness Response</i> , 23 March 2023, 3.
Office of the Director of Public Prosecutions	Office of the Director of Public Prosecutions, <i>Procedural Fairness Response</i> , 20 March 2023, 2 – in Vol. 7, Chapt 16
Teachers Registration Board	Teachers Registration Board, <i>Procedural Fairness Response</i> , 17 March 2023, 2. – Vol. 3, Chapt. 6.

* Note: Victoria Police also provided the Commission with a Procedural Fairness Response, however that Agency is outside Tasmania’s jurisdiction: Victoria Police, *Procedural Fairness Response*, 14 March 2023, 1, in Vol. 7, Chapt 16.

- The 22 individuals identified in the Report’s Notes section as providing Procedural Fairness Responses include the following individuals holding statutory roles (Table 2):

Table 2: Examples of citation in the Report’s Notes	
The Solicitor-General [†]	Solicitor-General of Tasmania, <i>Procedural Fairness Response</i> , 20 June 2023 – in Vol. 8, Chapt 19.
Commissioner for Children and Young People [†]	Commissioner for Children and Young People, <i>Procedural Fairness Response</i> , 11 July 2023, 2. – In Vol. 5, Chapt 11.
The Ombudsman [†]	Richard Connock, <i>Procedural Fairness Response</i> , 19 July 2023, 1. – In Vol. 5, Chapt 11.
CEO of the Integrity Commission [^]	Michael Easton, <i>Integrity Commission Procedural Fairness Response</i> , 8 March 2023, 2. – Vol. 8, Chapt 20.

[†] State Service Act 2000 does not apply to role.

[^] State Service Act 2000 does apply to role as the Head of Agency within the meaning of that Act.

RAMIFICATIONS OF THESE DETAILS COMING TO LIGHT (*Why Should We Care?*)

- There is a significant question over whether or not the Report of the Commission of Inquiry is accurately representative of the Commissioners investigations, and their true and full assessment of responsibility and accountability on the matters they were inquiring into.
- As a result of the Notes sections of the Report identifying providers of Procedural Fairness Responses, a cloud now remains over those 8 state entities and 22 individuals, as to whether or not they were intended subjects of misconduct findings or adverse findings.
- In relation to the section 18 misconduct notices issued, it is not stated clearly anywhere in the Report that the Commission resolved that any of those intended misconduct findings were unwarranted or resolved.
- It is of grave concern that the state entities referenced in the Notes sections as having provided Procedural Fairness Responses include most of Tasmania's key independent oversight watchdog offices, plus individual statutory office holders.
- It cannot be emphasised strongly enough, public confidence and trust in the 8 entities and these specific statutory office holders must be paramount.
- The individuals identified in the Report's Notes sections as having provided Procedural Fairness Responses also include people who were in key roles of responsibility within the public service, through to the most senior levels, and in some cases people who work, or have worked, in direct contact with children and young people.
- Further, these identified entities and some specific individuals who provided Procedural Fairness Responses could have key responsibilities in implementing – or providing oversight of the implementation of – the formal government response to the Commission's recommendations.
- As the Report does not include the full suite of misconduct and adverse findings considered by the Commission during the inquiry process, the Tasmanian public has been denied the transparent accountability that should have been delivered through a Commission of Inquiry process – this is a fundamentally unacceptable outcome.
- Significantly those victims/survivors, whistleblowers, and other witnesses risked further suffering and becoming retraumatised by participating in the Inquiry process in good faith, to try and keep other children safe, and maybe seek a little closure.
- Victims/survivors and their supporters, whistleblowers, witnesses, the Tasmanian community and the Parliament had a reasonable expectation that the Commission of Inquiry process would furnish findings that would deliver justice and accountability in relation to individuals and systems.
- It is of grave concern that despite the Commission's best endeavours, it appears the State's efforts to control the process has purposefully obstructed the Inquiry's mission, and cruelly sabotaged the community's hopes for justice, accountability, reform and cultural change.
- How can we trust, or have confidence in, any implementation plan for Commission recommendations' moving forward if some of those with key responsibilities in implementing it have a question mark over them from a stymied Commission process?

WHAT WE KNOW VS WHAT WE DON'T KNOW

<p>→ As a result of legislative changes, legal interpretation and argument by the state, the Commission of Inquiry found it impossible to make some of the misconduct or adverse findings it might otherwise have made.</p>	<p>? It is not clear whether the Commission, if not for state legal impediments, would have made misconduct or adverse findings against the 22 individuals who received section 18 notices.</p>
<p>→ The Report of the inquiry makes only one finding of misconduct and no findings are explicitly designated as 'adverse'.</p>	<p>? It is not clear whether the state asserted the most restrictive legal interpretation of sections 18 and 19 of the Act in order to prevent or deter the Commission from making misconduct or adverse findings.</p>
<p>→ Section 18 misconduct notices were issued to 22 individuals.</p>	<p>? It is now known whether the Commission's recommendations will be implemented or overseen by any senior public servants who received section 18 notices.</p>
<p>→ The Notes sections in the Report refers to Procedural Fairness Responses from 22 individuals and eight entities.</p>	<p>? It is not known when the Premier, the former Attorney-General*, or the Department of Justice first became aware of the Commission's concerns that sections 18 and 19 of the Act was impeding the Commission's capacity to make the adverse and/or misconduct findings they considered necessary.</p>

* The former Attorney-General, Elise Archer, held that portfolio for the duration of the Commission, resigning from the Parliament after the Commission's conclusion and the Report's tabling in September 2023.

WHAT NEEDS TO HAPPEN NOW & WHY GOVERNMENT ACTIONS ANNOUNCED ARE NOT ENOUGH

Full disclosure and transparency are required around the Commission's reported truncated section 18 notices process. Full disclosure and transparency are also required regarding the State, state entities and any individuals identified in the Commission Report in relation to Procedural Fairness Responses, before the Tasmanian community can move forward with any confidence.

Where a clean bill of health can be given – to either entities or individuals - we need independent verification of that.

- The Ministerial Statement made by the Premier on 17 October 2023 promised anyone identified in the Report as needing to be held to account would be held accountable, however, the relevant government actions announced by the Premier are largely internal processes, not suitably independent of government and not guaranteed to be transparent.
- Heads of Agency are being tasked with reviewing and considering potential breach of State Service Code by any State Servants who received section 34 and section 18 notices – this is inappropriate due to its lack of transparency. The review should instead be done externally and independently of government, with the results transparently and publicly reported.

It is unclear whether, or how, this evaluation of potential breaches of the State Service Code could be applied to entities or any Statutory Officers to whom the *State Service Act 2000* does not apply.

Independent Examination of Commission's Concerns Required:

Instead of an internal and piecemeal Heads of Agency process, an independent-of-government examination should be undertaken by a suitably qualified external independent person(s), ie a retired judge or a former Commissioner of the Australian Public Service Commission;

The independent review's terms of reference should be approved by Parliament;

The Terms or Reference for this independent review must include:

- Examination of all information and concerns raised by the Commission regarding actions of the state, departments and entities;
- Examination of any materials and correspondence between the Commissioners, the Department of Justice and any other relevant entities, relating to issues surrounding the implementation of section 18 and section 19 notices;
- Independent review to report directly to Parliament.

QUESTIONS ARISING:

1. Did the (current) **Solicitor-General, Ombudsman, CEO of the Integrity Commission, Commissioner for Children and Young People** and **Manager of Ashley Youth Detention Centre** receive section 18 notices from the Commission of Inquiry indicating they may be the subject of misconduct findings? If not, did they receive section 19 notices indicating possible adverse findings?
2. Are any of the Commission of Inquiry recommendations being implemented or overseen by senior public servants who received section 18 notices from the Commission of Inquiry?
3. If the Solicitor-General received a section 18 notice indicating that she herself may be the subject of a misconduct finding, will she be stepping aside from providing legal advice to Tasmanian departments and statutory authorities on the government response to the Commission of Inquiry and also from any civil litigation matters that involve child sexual abuse?
4. Who will provide legal advice to the government in relation to matters raised about the Solicitor-General at the Commission of Inquiry?
5. Did the Commission intend but find itself unable to make either misconduct findings or adverse findings against the 22 individuals and eight entities that appear in the Notes of the Report as having provided a Procedural Fairness Response?
6. Did the state deliberately draft the amendments made to the Act in 2021 in order to argue an interpretation that would create obstacles for the Commission to make adverse findings and findings of misconduct against the state, other entities and individuals?
7. Under whose instruction or direction did the legal representatives for the state assert an interpretation of sections 18 and 19 of the Act, that the Commission regarded as onerous and a barrier to fully undertaking its role?
8. When did the **Premier** first become aware of the Commissioners' concerns that sections 18 and 19 of the Act, including the State's interpretation of those sections, was impeding their capacity to make the adverse and/or misconduct findings they felt necessary?
9. When did the **Department of Justice** first become aware of the Commissioners' concerns that sections 18 and 19 of the Act, including the State's interpretation of those sections, was impeding their capacity to make the adverse and/or misconduct findings they felt necessary?
10. After the Department of Justice became aware of the Commissioners' concerns over sections 18 and 19 of the Act, what action was taken by the Department and/or the Attorney-General?