



2011

PARLIAMENT OF TASMANIA

**AUDITOR-GENERAL  
SPECIAL REPORT No.96**

**Appointment of the Commissioner for  
Children**

**April 2011**

*Presented to both Houses of Parliament in accordance with the provisions of Audit Act 2008*

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12 April 2011

President  
Legislative Council  
HOBART

Speaker  
House of Assembly  
HOBART

Dear Madam President

Dear Mr Speaker

**SPECIAL REPORT NO. 96**

**Appointment of the Commissioner for Children**

This report has been prepared consequent to examinations conducted under section 23 of the *Audit Act 2008*. The objective of the audit was to determine whether the selection process underlying the appointment of the Commissioner was thorough, objective and free from bias.

Yours sincerely

H M Blake

**AUDITOR-GENERAL**



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## Foreword

In the Legislative Council's Select Committee interim report on Public Sector Executive Appointments, the Committee's chair concluded that:

There is reason to believe that the system of appointments and promotions within the senior public sector can, and indeed does, play a central role in ensuring (or retarding), the development of a robust, independent and responsive culture within Government. This Committee's inquiries to date suggest that the development of perfect policies and protocols is not a guarantee that the business of government will be discharged in an orderly and accountable manner. However, experience suggests that the combination of an appropriate framework together with diligent independent scrutiny is needed in any system of public sector executive appointments.

The Select Committee did not inquire into the appointment of independent officers such as the Commissioner for Children but the conclusion is also valid to this circumstance. The situation I faced with the appointment to the statutory position of Commissioner for Children was one where an incumbent sought re-appointment and, in accordance with the relevant legislation, had to re-apply but was not successful resulting in criticism and allegations of bias. I am informed that similar situations arose when this position was filled in 2003. I was also faced with situations where:

- The position of Commissioner for Children reports to, or advises, the relevant Minister who also, effectively, makes the appointment because the Governor is bound to act on the advice of his Ministers.
- The incumbent Commissioner, shortly prior to completing his term, provided the Minister with a report most critical of various aspects of child protection in Tasmania.

As a result, my investigation included a strong focus on assessing evidence of bias in a process that resulted in the incumbent not being re-appointed. I concluded there had been no bias. In my view, however, neither the government nor the incumbent should have been faced with this circumstance in the first place. Greater involvement of other Parliamentary processes to support the Minister in making the appointment, more independent reporting arrangements and a more appropriate term of appointment could go a long way toward ensuring similar circumstances do not arise in future.

H M Blake

Auditor-General

12 April 2011

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## **Executive summary**

## Executive summary

### *Background*

The Commissioner for Children (Commissioner) is an independent office created in 1997, with the intention of providing oversight and advocacy of Government child protection practices. In July/August 2010, after 3½ years with Mr Paul Mason in the role, the position was advertised, as required by legislation. The selection process and appointment occurred in the midst of a storm of media and public outrage over the Government's failure to protect a particular 12-year-old child, which led to a report being issued by Mr Mason with a number of adverse findings. Following a selection process, Mr Mason was not reappointed. Instead, the appointment went to Ms Aileen Ashford who previously had worked within the Department of Health and Human Services.

The selection process involved a panel with executive representatives from three government departments that had been criticised by the Commissioner. The Liberal Party raised concerns in Parliament about political interference.

Subsequently, the Premier asked the Auditor-General to look into the selection process and I agreed. Expanding on the Premier's request, my work included a comparison of the Commissioner's conditions of appointment with other similarly independent Tasmanian statutory offices.

### *Audit conclusion*

#### *The appointment process*

The selection process underlying the appointment of the Commissioner was thorough, objective and free from bias. With respect to individual criteria:

- candidates had adequate opportunity to apply and present their claims
- the criteria were clear, relevant, comprehensive and not tailored to a particular candidate
- the five panellists brought extensive experience and a wide range of expertise and perspectives to the process
- despite limitations of the selection report, there is persuasive evidence of a thorough, logical and objective selection process

- the panel had sufficient freedom from bias to make a reliable recommendation
- the Minister’s role was consistent with freedom from bias.

On the other hand, the selection report did not provide persuasive evidence of a thorough, logical and objective selection process. Given the Minister’s effective responsibility for making the appointment, she should have asked the panel to more fully explain its reasoning<sup>1</sup>.

### *Conditions of appointment of the Commissioner*

Analysis of the recruitment and other employment and reporting practices for similarly independent functions of six selected statutory office holders highlighted a number of differences. These different arrangements may not be in the best interests of effective public administration in that, for example, a three-year term may be insufficient time for the Commissioner for Children to implement longer-term strategies needed to properly fulfil the functions required.

### *List of recommendations*

The following table reproduces the recommendations contained in the body of this Report.

<b>Rec</b>	<b>Section</b>	<b>I recommend that ...</b>
1	1.6	... the <i>Children, Young Persons and Their Families Act 1997</i> be amended to provide for a longer term of appointment of the Commissioner for Children.
2	1.7	... those responsible for the appointment of statutory office holders should ensure that there is persuasive documentation of the underlying facts and arguments for the selection.

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<sup>1</sup> Executive government consists of the Governor, Ministers of the Crown and includes the public service. The Governor is part of the Parliament (see *Constitution Act 1934* section 10), although essentially a formal part, and there are many statutory actions, such as making certain appointments, for which the Governor is responsible. However, in taking these actions the Governor is bound to act on the advice of his or her Ministers. The *Interpretation Act 1931* (section 43) defines that in any Act ‘the Governor’ means the Governor of Tasmania, or a person for the time being administering the government of the State, acting with the advice of the Executive Council (i.e. the Ministers). Therefore, while the Governor may statutorily make an appointment, in effect the appointment has to be as recommended by the responsible Minister.

<b>Rec</b>	<b>Section</b>	<b>I recommend that ...</b>
3	2.8	<p>... the Government initiate an independent analysis of the roles and functions of the State's independent officers with a view to minimising differences in their appointment, reporting and removal processes.</p> <p>Consideration should also be given to implementing a mechanism to set their levels of remuneration that is independent of executive government.</p>

**Audit Act 2008 section 30 — Submissions and comments received**

## Audit Act 2008 section 30 — Submissions and comments received

### *Introduction*

In accordance with section 30(2) of the *Audit Act 2008*, a copy of this Report was provided to Mr Mason, Ms Ashford, members of the selection panel, the Secretary of the Department of Health and Human Services and the Minister for Children with a request for comment. A summary of findings was also provided to the Treasurer and Minister for Children with a request for comment or submissions.

The comments and submissions provided are not subject to the audit nor the evidentiary standards required in reaching an audit conclusion. Responsibility for the accuracy, fairness and balance of those comments rests solely with those who provided a response or comment.

### *Submissions and comments received*

#### Minister for Children

Thanks for the opportunity to respond to the summary findings and draft report on the appointment of the Commissioner for Children.

I wish to comment on the finding, initially expressed in the Executive Summary that, as the Minister effectively responsible for making the appointment, I should have asked the panel to more fully explain its reasoning.

The context for this comment is later expressed in the Draft Report where the Auditor-General States that he is critical that I accepted what he regards as an inadequate selection report. He found that a better approach would have been to ask the panel to more fully explain its reasoning rather than for me to accept the original selection report.

In relation to these matters I would like to make the following comments:

1. As the Auditor-General has found in his Report, the selection process underlying the appointment of the Commissioner was thorough, objective and free from bias; the five panellists brought extensive experience and a wide range of expertise and perspectives to the process, there was also a recruitment consultant involved and there is persuasive evidence of a thorough, logical and objective selection process, and the panel had sufficient freedom from bias to make a reliable recommendation. As the Minister effectively

responsible for making the appointment, I share the Auditor-General's view of the selection process and the capacity of the Panel to appoint the candidate demonstrating superior merit. I had every confidence in the Panel and trusted members to do their job well.

2. In regard to the written Selection Report, the comparative assessment of candidates made it very clear that the recommended candidate demonstrated superior merit to others interviewed. There was nothing evident in the Report that caused me to have concern over the selection process or the judgement of the Panel. The decision seemed clear cut. The rigor of the Selection Panel Report was consistent with those I had seen through my professional life - including my role as Minister for Education. There were no 'alarm bells ringing'. The comparative written comments and ratings all reassured me that the Panel had acted with due diligence and a merit based decision had been made.

3. Furthermore, I was satisfied with the reasons for the Panel's decision. I was briefed by the chair of the selection panel on the process and the panel's recommendation and had the opportunity to seek clarification if I had wanted to. The decision and the reasons for it were consistent with the Selection Report. I had no concerns with the recommendation, the Selection Report or the process that led to it. I felt no need to ask the panel to more fully explain its reasoning.

4. Hence, I contest the view that I was in some way negligent in my duty for not asking the panel to more fully explain the reasoning for their decision. In fact, I never considered taking such action given the expertise of Panel members, the rigor of the selection process that I was aware had been followed, my satisfaction with the verbal briefing on the process and recommendation provided to me by the Panel Chair.

**Mr Mason**

Thank you for the opportunity to comment on the draft report you showed me Friday 11 March.

Minister's decision not free of political influence

In Section 1.7 you write (to the effect) "The Minister was keen to avoid any perception of political bias by acting contrary to the panel's recommendation [or words to that effect]."

The media storm that followed her decision demonstrates that she failed absolutely to avoid "any perception of political bias". Your finding that she did is inexplicable.

I do not resile from my assertion that the decision was one for the Minister, not for the panel, and that her decision to follow their

recommendation was as politically motivated as would have been a decision by her to have rejected it, in fact more so. If she had rejected their recommendation and renewed my appointment she could not then have been said to have made a politically biased decision.

#### Panel appointment not free of political influence

The possibility of political bias will remain as long as the Commissioner is appointed by the Minister on the recommendation of a panel appointed by him or her for that purpose. It means nothing that for instance the non-Government members Ms Calvert and Prof Carmichael reported that they acted independently. It is inconceivable that if asked they would say anything else. On the there [sic] hand, they both reported the process to be “thorough” as well as objective. That assessment conflicts with your own conclusion that the transparency and documentation of the reasoning process was substandard, which in turn casts doubt on the value of their own self-assessment.

Your report does not examine nor secluded [sic] the possibility that Government members were selected who would favour my replacement after only one term. For instance one of the Panel members had refused me information I required of him in the Inquiry in to the 12 year old child, and knew that I had effectively threatened his office (and through him the Minister) with court proceedings to comply with that requirement.

That would have been not merely inconvenient but also politically unpalatable for the Minister and the Government she serves. I should have had an opportunity to raise reasoned objections to the membership of the panel.

You refer to endorsement of the membership of the panel by DPAC as if that were a further indicator of political independence. That analysis is with respect politically naïve in itself and obscures the political perception that DPAC has regard in all it does to political consequences for the Premier and through him the political survival of the Government.

#### Panel process not free of political influence

If as you report at 1.5.3 there was “robust discussion” the question arises whether any panel member supported my own candidature over that of Ms Ashford, or whether I was completely out of the picture and the debate was between Ms Ashford and someone else. If I did have support on the panel your report suggests that the manner by which that support was swayed was opaque and unsatisfactorily documented.



Your finding to the effect that “no documentation or summaries of candidates’ responses were available nor was there documentation of how responses had been used to form judgments” is entirely consistent with the process having been politically motivated by an executive which wanted a critic gone, and the recruitment process being window-dressing for a pre-determined outcome. I can report that the recruiter from EWK took vigorous notes during the whole of my presentation at interview. Perhaps those were not made available to you.

At 1.6 you conclude (to the effect) that “the panel was selected despite advice from DHHS that recent selections for similar position in Queensland, NSW and WA had avoided including panellists from entitles [sic] in a direct relationship with the Commissioner”. Your failure to recommend that this standard be adopted formally is an omission I invite you to correct.

The failure to adopt that advice in this context where I had just delivered a report directly critical of departments represented on the panel is not inconsistent with the resulting process having been adopted in order to secure a predetermined result, namely my replacement.

#### Recommendation re term of Commissioner’s appointment

Your recommendation that a longer term for the Commissioner's appointment be considered is laudable but falls well short of the analysis of independence to which I referred you in my submission, namely the analysis of the Victorian Ombudsman and the Paris principles which underlie international membership of bodies like ENOC [European Network of Ombudspersons for Children]. In a polity of 500,000 the process by which you yourself are appointed is clearly and objectively superior, involving consultation with a committee of the Parliament and a term longer than the electoral cycle. If you balked at the independence recommended by the Victorian Ombudsman I cannot understand why you did not recommend at least your own degree of independence for Tasmania’s Commissioner for Children.

Instead the process you have now endorsed has produced a Commissioner whose appointment and independence will be mired in doubt in the public mind, especially if she says nothing critical of the Government for 3 years and gets re-appointed in October 2013 before the next election in March 2014.

#### *Auditor-General's comment*

*Public sector appointment and promotion in Tasmania hinge on application of the merit principle: namely, that the best candidate is*

*selected. Where an incumbent is not re-appointed to a position that they currently occupy there are various interpretations that could be placed on the situation. One view may be that they were unfairly treated while another explanation could be that they were unsuccessful because a candidate with stronger claims emerged.*

*The Audit Act 2008, which prescribes the powers and responsibilities of my Office, confers wide information gathering powers. In seeking access to documents and relevant stakeholders in the course of my investigation, there was no effort by any party to limit the scope of my work.*

*To produce my report, I assessed a number of factors that tended to support the case that the panel was objective. Regarding the independent panellists, they were chosen for their independence and knowledge of the position and there is no reason to suppose that they were biased in exercising their judgement. They were fully aware that they had accepted a responsibility that, whatever the outcome, would be open to scrutiny.*

*I stand by my comment that ‘the Minister’s actions were more consistent with a lack of political bias than with a desire to influence the outcome’.*

*Further, I emphasize my conclusion that the selection process underlying the appointment of the Commissioner was thorough, objective and free from bias.*

## Ms Ashford

Ms Ashford has read the report and had no comment to make for inclusion in the report.

## Members of the selection panel

### Ms Gillian Calvert

Ms Calvert has read the report and had no comment to make for inclusion in the report.

### Professor Allan Carmichael

Thank you for forwarding the draft report and providing the opportunity for me to comment. I wish to advise I have no specific comment to make.

### Commissioner of Police Darren Hine

Thank you for the opportunity to comment on the audit report. I note the recommendations and have nothing further to add.

### Ms Alison Jacob

Ms Jacob advised that she had no issues with the report and did not wish to provide a formal comment.

Ms Jenny Gale

I appreciate the opportunity to respond to the Auditor-General's report into the appointment of the Commissioner for Children. I welcome the Auditor-General's finding that the process was thorough, objective and free from bias.

### State Service Commissioner

Thank you for the opportunity to comment on the draft Report to Parliament regarding the selection process undertaken in relation to the appointment of the Commissioner for Children. I support the recommendations contained therein and for the reasons provided. I agree that wherever possible the terms of appointment, reporting and removal should be consistent across all like roles and that appropriate standards of documentation should exist to support such appointments. If we are to expect the State Service generally to produce appropriate standards of documentation in relation to selections then it is important that the right example be set from the top. Interested parties need to be assured that not only has merit been applied but it can be seen to have been applied.

### Department of Health and Human Services

I note the recommendations of the report and wish to make no comment.



## **Introduction**

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## Introduction

### *Background*

The independent statutory role of Commissioner for Children (Commissioner) was created in 1997, with the intention of providing oversight and independent advocacy of Government child protection practices. In July/August 2010, after 3½ years with Mr Paul Mason in the role, the position was advertised, as required by legislation. The selection process and appointment occurred in the midst of a storm of media and public outrage over the Government's failure to protect a particular 12-year-old child, which led to a report being issued by Mr Mason with a number of adverse findings. Following a selection process, Mr Mason was not reappointed, with the position going instead to Ms Aileen Ashford who previously had worked within the Department of Health and Human Services (DHHS).

Subsequently, the Liberal Party raised concerns in Parliament that the selection may have been for political reasons. They pointed out that Mr Mason's report had been critical of the performance of DHHS, Department of Police and Emergency Management and Department of Education, and questioned whether it was appropriate for senior officers from those three departments to be on the selection panel. Concern was also expressed that a public servant 'at the heart of the child protection system so deeply criticised in Mr Mason's report had been appointed as his replacement.

In response, the Premier stated that in order to provide clarity and certainty he had 'asked the Auditor-General to look into the selection process so the Tasmanian community can have full confidence in its outcome'. I subsequently agreed to do so. I also decided to compare the Commissioner's conditions of appointment with other similarly independent positions in the Tasmanian public sector.

### *Audit objective*

The objectives of the audit were to form an opinion whether:

- the selection process underlying the appointment of the Commissioner was thorough, objective and free from bias
- the conditions of appointment of the Commissioner facilitate the effective performance of his or her duties.

### *Audit scope*

The scope of the audit was the selection process underlying the October 2010 appointment of the new Commissioner. The audit also included some wider issues that might have a bearing on the selection process, including the term of the appointment.

The audit did not include reconsideration of decisions made by the selection panel, beyond ensuring that a reasonable basis for the decision had been documented. The audit also did not include post-appointment processes, such as post-selection counselling of unsuccessful applicants, or the timing and manner of communicating selection decisions.

### *Audit criteria*

The audit criteria were:

- Did candidates have an adequate opportunity to apply and present their claims?
- Were suitable selection criteria applied in the selection process?
- Collectively, did the selection panel have the skills, knowledge and experience to make a reliable recommendation to the Minister?
- Was there evidence of a thorough and objective selection process?
- Collectively, did the selection panel have sufficient freedom from bias to make a reliable recommendation to the Minister?
- Was the Minister's role consistent with freedom from political bias?
- Do the conditions of appointment of the Commissioner facilitate the effective performance of the duties of the position?

### *Audit approach*

The audit process for review of the selection process consisted of:

- discussion about proposed audit criteria with the Acting State Service Commissioner
- review of the selection file, Cabinet papers and other relevant materials
- discussions with some members of the selection panel

- interview with the Minister for Children (the Minister) who made the recommendation for the appointment of the new Commissioner.

The audit process for review of the conditions of the Commissioner's appointment consisted of comparison of appointment conditions and applicable legislation of the following positions:

- Commissioner for Children (*Children, Young Persons and their Families Act 1997*)
- Anti-Discrimination Commissioner (*Anti-Discrimination Act 1998*)
- Auditor-General (*Audit Act 2008*)
- Chief Commissioner of the Integrity Commission (*Integrity Commission Act 2009*)
- Ombudsman (*Ombudsman Act 1978*)
- State Service Commissioner (*State Service Act 2000*).

### *Timing*

Planning for this audit began in December 2010. Fieldwork was completed in February 2011 and the report was finalised in March 2011.

### *Resources*

The total cost of the audit excluding production costs was \$26 000.



## **1 The selection process**

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# 1 The selection process

## 1.1 *Background*

The essential question of the audit was whether or not the Minister or selection panel were unreasonably biased in their recommendation of Ms Ashford or in their decision not to recommend the reappointment of Mr Mason.

In theory, selection panels form their judgments based purely on evidence provided to the panel during the selection process. However, in practice, it is virtually impossible to assemble a selection committee that does not include members with prior opinions about some of the candidates.

I faced a similar difficulty in undertaking this audit. I have audited the departments of Health, Police and Education on many occasions and have regularly had dealings with the officers from those agencies (Deputy Secretary of DHHS, Ms Alison Jacob, Police Commissioner Darren Hine or Acting Secretary of Education, Ms Jenny Gale) who were included on the selection panel for the Commissioner for Children position. I have never had occasion to question the honesty or integrity of those officers, and the level of cooperation extended to me and my staff has always been exemplary. Similarly, I have met the former Commissioner on a number of occasions and have found him to be able, passionate and articulate. It is not possible to completely discard those opinions in taking on an audit such as this one.

Similarly, I accept that it is inevitable that individual panellists will have brought to the panel opinions formed over time. Even were it possible to prevent that, I am not convinced that better or fairer decisions would result. So, the question for me was not whether or not members of this panel had formed previous opinions about candidates. Instead, my focus was on whether or not the panel had been able to put aside any preconceptions sufficiently to adopt a thorough, logical and objective process and to support its recommendation with well-evidenced facts and analysis.

To assist in forming that view, I have reviewed the selection process and documentation against the audit criteria outlined in the Introduction. In the following discussion, I respect the confidentiality of the selection process and do not disclose details of arguments put by candidates nor comments and evaluations made about them.

1.2 *Did candidates have adequate opportunity to apply and present their claims?*

The position was locally and nationally advertised in the print media on 31 July 2010 with a standard two-week period for candidates to prepare and submit applications.

The advertisement identified six selection criteria, which all candidates selected for interview addressed in their applications, without apparent difficulty in interpreting the requirements. Candidates selected for interview were subsequently provided with ample opportunity at interview to elaborate on their claims, achievements and vision.

I was satisfied that candidates had adequate opportunity to apply and present their claims.

1.3 *Were suitable selection criteria applied in the selection process?*

There were six selection criteria (as per the DHHS Statement of Duties for the position) which I have abbreviated as:

- professional involvement, understanding and sensitivity
- communication and interpersonal skills
- commitment to and knowledge of rights of children
- discretion and credibility, prioritisation, research and analysis
- knowledge of legislation
- knowledge and experience of government processes.

Essentially, the criteria are attributes that a Commissioner for Children requires to effectively perform his or her legislative responsibilities. I considered the criteria to be clear, relevant and comprehensive and was satisfied that the criteria were not tailored to a particular candidate. I also thought that the criteria, although fairly broad, would be suitable for comparative evaluation of candidates by the panel.

1.4 *Collectively, did the selection panel have the necessary skills, knowledge and experience?*

Under the *Children, Young Persons and Their Families Act 1997* (the Act) the Governor appointed the Commissioner on the advice of the Minister for Children. The Minister's advice was in accordance with the recommendation of a selection panel which

included three highly experienced senior Tasmanian public servants and two independent panellists. The composition of the panel was suggested by the Secretary, DHHS, concurred by the Secretary, Department of Premier and Cabinet and endorsed by the Minister. The Minister advised that her endorsement of the panel's composition was based on her wish to include:

- representatives of the agencies that would deal most frequently with the Commissioner
- some independent (non-Government) members including somebody with paediatric expertise.

I was satisfied that the five panellists brought extensive experience and a wide range of expertise and perspectives to the process. In Section 1.6, I separately discuss the issue of whether the selection panel was free from bias.

## 1.5 *Evidence of a thorough and objective selection process?*

Selection was based on evidence from the following processes:

- Preliminary evaluations were performed by an external recruiting firm ('the consultant') which resulted in shortlist recommendations and summary evaluations of candidates.
- Evaluations were made by the selection panel following interviews with shortlisted candidates. The selection report noted that candidate assessments were based on their written applications, their previous interview with the consultant and their performance at panel interview. I also noted that referee assessments were sought for the successful candidate and one other candidate.

### 1.5.1 *Preliminary evaluations*

The evidence of the preliminary evaluation by the consultant was a brief report on each candidate which included a graphical assessment and written summary against a range of capabilities. The capabilities measured included the position's selection criteria as sub-criteria, but also included other criteria such as management and leadership capabilities.

I was advised that the evaluations were performed on the basis of candidates' written applications plus interviews with the consultant. The information provided to the panel did not include any information about interview questions or responses, nor did it

outline conclusions or insights from review of candidate applications.

The preliminary evaluations appeared a reasonable process for short-listing of candidates although the assessments against capabilities of marginal relevance to the selection criteria, was not ideal. However, in my view, the short-listing reports were of limited value in persuading us that the selection panel had been thorough, logical and objective, since:

- Only the conclusions were outlined; not the facts and evaluation processes that led to them.
- The formal selection criteria were somewhat peripheral to the capabilities assessed by the consultant.

Those observations are not intended as a criticism of the short-listing process. They merely serve to explain why I was looking to the selection panel's processes for evidence of a thorough, logical and objective process rather than placing significant weight on the preliminary evaluation.

### *1.5.2 The Panel's evaluations: documentation*

The Panel's evaluation processes resulted in a selection report, which provided overall rankings and criteria-level rankings for each interviewed candidate. The selection report noted that candidate assessments were based on their written applications, their interview with the consultant and their performance at panel interview.

Approximately 45 minutes were allocated for each panel interview. All panel members were present as well as a senior partner from the consulting firm. Applicants were required to answer seven questions after 30 minutes of pre-reading time. I was provided with a copy of the questions asked at interview, which although not explicitly linked to selection criteria, were generally relevant and would have been capable of assisting the panel in forming a view about candidates at selection criteria level. However, no documentation or summaries of candidate responses were available, nor was there documentation of how responses had been used to form judgements.

The selection report contained brief comments (eight to ten lines for each candidate) in the selection report about the interview process. I found the comments generally unpersuasive for various reasons:

- vagueness
- not supported by reference to candidate responses or application claims
- represented a particular view of what the candidates' vision for the future should or should not be

- reference only to interviews and not to application letters, evidence of work performance, publications or other submitted materials
- lack of documentary evidence to outline the process for reaching the individual criteria ratings for each candidate
- lack of explanation for how the overall ratings were derived from the individual criteria assessments.

Overall, the selection report did not provide persuasive evidence of a thorough, logical and objective selection process.

### *1.5.3 The Panel's evaluations: my interviews with non-Government panellists*

In consequence of failing to obtain sufficient confidence that the process had been thorough, logical and objective from the selection report, I arranged for separate interviews with the two non-Government members of the selection panel. They were:

- Ms Gillian Calvert, former NSW Commissioner for Children
- Professor Allan Carmichael, Dean of the Faculty of Health Science - School of Medicine at the University of Tasmania.

Both were adamant that the process followed had been objective and thorough. They were confident that:

- All panellists had gone into the selection process with an open mind as to which candidate might be successful.
- Application letters and other relevant materials received due consideration from the panel and were followed up with targeted questioning at interview.
- The panel had balanced interview performance against other sources of information about candidates' abilities.
- There had been robust discussion about the ranking of candidates, but ultimately the decision was unanimous.

Both Ms Calvert and Professor Carmichael impressed me as being objective, experienced and highly credible. They were able to give clear reasons for the panel's overall rankings and for evaluations against individual selection criteria.

## *1.6 Was the selection panel unbiased?*

The main reason that I was asked to review this selection was that there were suggestions, or at least inferences, of bias based on three of the panellists being from entities that were criticised in a recent investigation by Mr Mason. I gave consideration to a number of factors that tended to support the case that the panel was objective:

- The three Tasmanian public service panellists are widely-respected. In their dealings with the Tasmanian Audit Office I have consistently found them to be cooperative and forthright and I am not aware of any rumours or suggestions otherwise.
- Independence was intentionally introduced into the panel by inclusion of two non-government panellists. As discussed in Section 1.5, I have no doubts as to their objectivity.
- Endorsement of the panel and Chair was obtained from the Secretary of DPAC; an agency not directly impacted by adverse findings in Mr Mason's report.
- Independence was intentionally introduced into the panel by use of a consultant to perform initial assessments, short-listing and recommendation of questions for the panel.
- I was provided with a set of what appeared to be all communications (usually email) in any way relevant to the selection process including communications to and from the Minister and the consultant. There was nothing in any of the correspondence to suggest bias towards or against any candidate. Rather, the point was consistently made about how the process could be made as thorough and transparent as possible.
- Both independent panellists advised me that they were satisfied that the processes and deliberations of the panel were thorough and objective.

On the other hand, the following factors were less consistent with lack of bias:

- The panel was selected despite advice from DHHS that recent selections for similar positions in Queensland, New South Wales and Western Australia had avoided including panellists from entities with a direct relationship with the Commissioner.

That said, my research indicated that the composition of the panel with its inclusion of departmental representatives and knowledgeable independents was

similar to the most recent selection panels for similar statutory appointments in Tasmania.

- I had expected that the strongest argument against bias would be a well-documented selection process with decisions transparently based on the body of evidence and the advertised selection criteria. As documented in Section 1.5, I was disappointed with the quality of documentation and did not find some of the conclusions and comments about Mr Mason to be persuasive. By contrast, I found the 2006 selection report, when he was first appointed, to be considerably more convincing.

It is also worth noting that much of the public concern stemmed from the timing of Mr Mason's report to the subsequent selection process. In my view, that concern partially arose because of the short-term nature of the appointment, which virtually guaranteed that any report tabled by the Commissioner would be reasonably close to the end of the term of appointment. There is a real risk that the short term, and other appointment aspects discussed in Chapter 2, could impact on a Commissioner's perception of freedom to report without fear or favour.

In summary, despite my concerns about the selection report, I am confident that the panel had sufficient freedom from bias to make a reliable recommendation.

#### **Recommendation 1**

**I recommend that the Act be amended to provide for a longer term of appointment of the Commissioner for Children [this recommendation is further discussed in Chapter 2].**

### **1.7** *Was the Minister's role consistent with freedom from bias?*

Under the Act, the Governor appoints the Commissioner on the advice of the Minister for Children. In the context of this audit, a recommendation by a Minister to the Governor for the appointment of a statutory office holder, such as the Commissioner for Children, in effect means the appointment is made by the Minister.

In this case, the Minister advised us that she had resolved not to 'double-guess' the panel's recommendation. She was confident in the composition of the panel and was keen to avoid any perception of political bias by acting contrary to the panel's recommendation.

I accept that the Minister's actions were more consistent with a lack of political bias than with a desire to influence the outcome. I also



accept that she made reasonable attempts to ensure that the panel was knowledgeable, experienced and included ‘independent’ members.

On the other hand, given the Minister’s effective responsibility for making the appointment, I am critical that she accepted what I regard as an inadequate selection report. A better approach would have been to ask the panel to more fully explain its reasoning rather than to accept the original selection report.

**Recommendation 2**

**Those responsible for the appointment of statutory office holders should ensure that there is persuasive documentation of the underlying facts and arguments for the selection.**

**1.8**      *Conclusion*

The selection process underlying the appointment of the Commissioner was thorough, objective and free from bias.

On the other hand, the selection report did not provide persuasive evidence of a thorough, logical and objective selection process. Given the Minister’s effective responsibility for making the appointment, she should have asked the panel to more fully explain its reasoning.



## **2 Conditions of appointment of the Commissioner**

## 2 Conditions of appointment of the Commissioner

### 2.1 *Background*

The Commissioner for Children is appointed under the Act for a three-year term. At the expiration of a term of appointment, the position is then re-advertised with the incumbent able to re-apply.

In Section 1.6, I recommended that the Act be amended to provide for a longer period of appointment, on the basis that the shortness of the current term could impact on a Commissioner's perception of freedom to report without fear or favour. I also believe that three years is too short a period for a Commissioner to fully do justice to the position, and for a government to derive the greatest benefit from the appointment.

In this Chapter, I have compared various aspects of the Commissioner's appointment to those of other similarly independent positions in the Tasmanian public sector. The word 'similarly' is deliberate. My comparative assessment should not be taken as a recommendation for identical arrangements.

The aspects that I considered were:

- Who makes the appointment and whether Parliament is involved in the process?
- What is the term of appointment?
- To whom does the office holder report?
- Is the position subject to direction and is there specific reference to this in the enabling legislation?
- Who or what determines the position's remuneration?
- Can the appointed person be removed from Office and if so how?

### 2.2 *Who makes the appointment and is Parliament involved?*

A loss of independence is an inevitable consequence where the appointment has to be recommended by a responsible Minister and

the Governor is bound to act on that advice<sup>2</sup>. With three exceptions, appointments to the reviewed positions are made by the Governor based on a recommendation by the Executive, or directly by a Minister. The exceptions are:

- Auditor-General: appointed by the Governor based upon the recommendation of the Treasurer who must consult with the Public Accounts Committee, the President of the Legislative Council and the Speaker of the House of Assembly.
- Chief Commissioner of the Integrity Commission: the Minister must consult the Joint Standing Committee (in absence of that Committee, the Minister must consult with the President of the Legislative Council and Leaders of the Opposition Parties).
- Anti-Discrimination Commissioner: appointment is made by the Minister with no involvement of the Governor.

Therefore, the only appointments where Parliament has a role are those of the Auditor-General and Chief Commissioner of the Integrity Commission.

### 2.3 *What is the term of appointment?*

The appointment term and re-appointment arrangements can add to or undermine independence. For the positions that I considered, the situations are:

- Auditor-General — 10-year fixed term and cannot be re-appointed<sup>3</sup>
- State Service Commissioner — not exceeding five years but may be re-appointed
- Ombudsman — maximum five-year term, incumbent can re-apply

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<sup>2</sup> There are references in this comparative assessment in this Chapter to ‘the Executive’, which consists of the Governor, Ministers of the Crown and includes the public service. The Governor is part of the Parliament (see *Constitution Act 1934* section 10), although essentially a formal part, and there are many statutory actions, such as making certain appointments, for which the Governor is responsible. However, in taking these actions the Governor is bound to act on the advice of his or her Ministers. The *Interpretation Act 1931* (section 43) defines that in any Act ‘the Governor’ means the Governor of Tasmania, or a person for the time being administering the government of the State, acting with the advice of the Executive Council (i.e. the Ministers). Therefore, while the Governor may statutorily make an appointment, in effect the appointment has to be as recommended by the responsible Minister.

<sup>3</sup> Under the previous audit legislation, the *Financial Management and Audit Act 1990* (FMAA), the Auditor-General was appointed for a five year term which could be extended at the discretion of the Executive. The incumbent’s appointment remains under the terms of the FMAA.

- Chief Commissioner of the Integrity Commission — maximum five-year term, but can be re-appointed
- Anti-Discrimination Commissioner — maximum five year term, the legislation is silent on re-appointment
- Commissioner for Children — three-year term, the incumbent can re-apply.

In my opinion, the length and re-appointment arrangements for the Commissioner for Children are the least compatible with independence from the Executive.

#### 2.4 *To whom does the office holder report?*

An indicator of effective independence is to whom a position reports. For these six independent officers the situation is:

- Auditor-General — outcomes of financial audits are reported to the Parliament and from other examinations and investigations to Parliament, or the Public Accounts Committee or the Joint Committee established under the *Integrity Commission Act 2009*. The *Audit Act 2008* also allows for reporting to the Public Accounts Committee and the Treasurer, where the Auditor-General considers it to be against the public interest to disclose certain information in a report to Parliament. The Auditor-General also prepares an annual report for tabling in the Parliament.
- Chief Commissioner of the Integrity Commission — the Commissioner reports to Parliament on any matter arising in connection with the performance of the Commission's functions or exercise of its powers and to the Joint Standing Committee on Integrity on the performance of its functions or exercise of the Commission's powers relating to an investigation or inquiry. The Commission also prepares an annual report for tabling in the Parliament.
- Ombudsman — reports to the Parliament through an annual report and will also in future do so through the Joint Standing Committee on Integrity. The Ombudsman also has the power to report directly to the Parliament on any investigation.
- Anti-Discrimination Commissioner — reports to the Attorney-General and must prepare an annual report for tabling in the Parliament.

- State Service Commissioner — reports to, or advises, the Premier on investigations and reports annually to Parliament on the performance or exercise of the Commissioner's functions or powers during the past 12 months.
- Commissioner for Children — the Commissioner reports to, or advises, the Minister for Children on investigations. The Commissioner also prepares an annual report for tabling in the Parliament.

In my view, independence is in part compromised where reporting or advice is only to the Minister or the Government, rather than to Parliament. That basic principle is complicated by the need to keep some sensitive information out of the public arena. However, there are solutions, as for example with my Act where I can exclude sensitive data from reports to Parliament, but can report that information to a separate Parliamentary Committee.

I also note that the three positions that report to a Minister also prepare an annual report for tabling in Parliament. I am not persuaded that that mechanism fully substitutes for the loss of independence from other reporting being direct to a Minister.

## 2.5 *Is the position subject to direction and is there specific reference to this in the enabling legislation?*

Existence of an ability to be directed reduces independence. For these six independent officers the situation is:

- Auditor-General, Ombudsman and Chief Commissioner of the Integrity Commission: legislation is explicit — the office holders cannot be directed.
- Commissioner for Children: the Minister can request but not direct.
- Anti-Discrimination Commissioner: subject to direction by the Minister as it relates to some matters in the legislation<sup>4</sup>.
- State Service Commissioner: the Minister's power to direct is not made explicit in the legislation. The acting Commissioner advised that his interpretation is that his Office cannot be directed.

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<sup>4</sup> Refer to sections 10 and 11 of the *Anti-Discrimination Act 1998*.

In summary, it is clear for most situations, including the Commissioner for Children that the Minister may request but not direct.

## 2.6 *Who or what decides the positions' remuneration?*

Arrangements whereby remuneration is set by the Executive indicate a lower level of independence. The situation for the selected office holders is that, except for the Auditor-General whose remuneration is detailed in the *Audit Act 2008*, all remuneration packages are set by the Executive. In my opinion, the capacity of the Executive to determine the remuneration of statutory officers undermines the independence of those positions.

## 2.7 *Can the appointed person be removed from Office and if so how?*

Removal provisions under the control of the Executive are evidence of low independence. The situation for these office holders is:

- Auditor-General, Ombudsman, Chief Commissioner and State Service Commissioner: can only be removed by the passing of a resolution of both Houses of Parliament.
- Anti-Discrimination Commissioner: for reasons specified in clause 2 of Schedule 1 of the *Anti-Discrimination Act 1998*, the Executive can remove the Commissioner from office.
- Commissioner for Children: can be removed from Office by the Executive.

## 2.8 *Conclusion*

This analysis highlighted differences in recruitment and other employment and reporting practices for similarly independent functions of the selected statutory office holders. These different arrangements may not be in the best interests of effective public administration in that, for example, a three-year term may be insufficient time for an office holder to implement longer-term strategies needed to properly fulfil the functions required.

### **Recommendation 3**

**I recommend that, in support of Recommendation 1, Government initiate an independent analysis of the roles and functions of the State's independent officers with a view to minimising differences in their appointment, reporting and removal processes.**



**Recommendation 3 (continued)**

**Consideration should also be given to implementing a mechanism to set their levels of remuneration that is independent of executive government.**



## **Recent reports**

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## Recent reports

	<b>Tabled</b>	<b>Special Report No.</b>	<b>Title</b>
Apr	2008	72	Public sector performance information
Jun	2008	73	Timeliness in the Magistrates Court
Jun	2008	74	Follow up of performance audits April–October 2005
Sep	2008	75	Executive termination payments
Nov	2008	76	Complaint handling in local government
Nov	2008	77	Food safety: safe as eggs?
Mar	2009	78	Management of threatened species
May	2009	79	Follow up of performance audits April–August 2006
May	2009	80	Hydro hedges
Jun	2009	81	Contract management
Aug	2009	82	Head of Agency contract renewal
Oct	2009	83	Communications by Government and The Tasmanian Brand project
Oct	2009	84	Funding the Tasmanian Education Foundation
Nov	2009	85	Speed-detection devices
Nov	2009	86	Major works procurement: Nation Building projects, Treasurer's Instructions 1299 and 1214
Jun	2010	87	Employment of staff to support MPs
Jun	2010	88	Public Trustee — management of deceased estates
Jun	2010	89	Post-Year 10 enrolments
Jul	2010	90	Science education in public high schools
Sep	2010	91	Follow of special reports: 62–65 and 70
Oct	2010	92	Public sector productivity: a ten-year comparison
Nov	2010	93	Investigations 2004–2010
Nov	2010	94	Election promise: five per cent price cap on electricity prices
Feb	2011	95	Fraud control

## **Current projects**

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## Current projects

Performance and compliance audits that the Auditor-General is currently conducting:

<b>Title</b>	<b>Subject</b>
<b>Profitability, and economic benefits to Tasmania, of Forestry Tasmania</b>	Evaluates Forestry Tasmania's long-term financial and economic performance.
<b>Follow up of special reports</b>	Ascertains the extent to which recommendations from Special Reports 69–73 (tabled from October 2007 to June 2008) have been implemented.
<b>Fire management</b>	Examines whether respective government entities have implemented the recommendations from the COAG 2004 report titled <i>National inquiry on bushfire mitigation and management</i> .
<b>Tourism Tasmania</b>	Examines the effectiveness of Tourism Tasmania with respect to: promotions and advertisements; websites and implementation of planned strategies and initiatives.
<b>Out-of-home care</b>	Assesses the effectiveness of some aspects of the efficiency of out-of-home care as an element of child protection.
<b>Urban Renewal and Heritage Fund and Premier's Sundry Grants Fund</b>	Assesses the expenditure incurred on the Urban Renewal and Heritage Fund and the Premier's Sundry Grants Fund in recent years and compliance with the approved protocols and budgets.