

REPORT OF THE INTEGRITY COMMISSION

No. 4 of 2018

Report of an investigation into
allegations of misconduct by the
(then) Minister for Human
Services and her Chief of Staff

INTEGRITY
COMMISSION



The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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President
Legislative Council
Parliament House
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Speaker
House of Assembly
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Dear Mr President

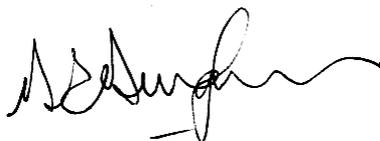
Dear Mr Speaker

Pursuant to section 11(3) of the *Integrity Commission Act 2009* (the Act), the Integrity Commission presents *Report 4 of 2018* to Parliament, arising from an investigation into allegations of misconduct by the (then) Minister for Human Services and her Chief of Staff.

Yours sincerely



Aziz Gregory Melick AO RFD SC
Chief Commissioner
On behalf of the Board



Richard Bingham
Chief Executive Officer

3 July 2018

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INVESTIGATION IREH

REPORT OF THE INVESTIGATION

**An investigation into allegations of misconduct by
the (then) Minister for Human Services the Hon Jacquie
Petrusma MP and her Chief of Staff, Suzie Jacobson**

**This is a public version of the investigation report.
Some evidence has been redacted, paraphrased or anonymised
to protect the privacy of people who assisted us in this matter
and to maintain the integrity of our investigations.**

6 June 2018

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EXECUTIVE SUMMARY

On 7 June 2017, the Integrity Commission received a complaint in a letter from the Hon Josh Willie MLC. On the same day Mr Willie announced in Parliament that he had made a 'referral' to the Commission about his concerns.¹ Mr Willie clarified aspects of his complaint by using the Commission's online complaint form on 19 June 2017.

In the complaint, Mr Willie alleged that a member of staff from the office of, at the time, the Minister for Human Services the Hon Jacqui Petrusma MP (the Minister) had directed the Commissioner for Children and Young People (the Commissioner) by email to cease putting sensitive information to the Minister in writing.²

Mr Willie suggested that, if true, this might constitute an offence under s 23 of the *Commissioner for Children and Young People Act 2016* (the CCYP Act).³ It may also have constituted a breach of the relevant employment conditions for the staff member.

This investigation was significant as it explored the nature of the relationship between a statutory officer and the relevant portfolio Minister and the Minister's staff.

In relation to the original allegation, the Commission found that the staff member – the Minister's Chief of Staff, Suzie Jacobson – did not request or direct the Commissioner to stop writing to the Minister. Further, the Commissioner was free to ignore any such request had it been made, and in fact he continued to write to the Minister. In any event, the Commission formed the view that the mere making of a request would not constitute an offence under the *CCYP Act*.

Three further allegations that emerged during the investigation related to the conduct of Ms Jacobson in meetings with the Commissioner. The Commission formed the view that the 'Ministerial Staff Conduct' conditions that form part of employment agreements for all Ministerial staff is a code of conduct for the purposes of the *Integrity Commission Act 2009* (the IC Act). However, the Commission found that Ms Jacobson's conduct, whilst robust, was not intended to be disrespectful in nature, notwithstanding that the Commissioner perceived it as such.

The Commission found that two contributing factors to the misunderstanding were communication problems between Ms Jacobson and the Commissioner and the possibility that Ms Jacobson did not fully appreciate the statutory independence of the Commissioner.

Four other allegations that emerged concerned two separate instances allegedly involving the Minister. Evidence given to the Commission during the course of the investigation raised the possibility that the Minister may have sought to enlist the Commissioner's support in a partisan way.

¹ Hansard, Legislative Council Estimates Hearings, 7 June 2017.

² Complaint from Josh Willie MLC, 7 June 2017.

³ Ibid.

The Commission found that in both instances the facts did not support a conclusion that the Minister so acted.

In one instance, it was apparent that the Minister's actions arose from her genuine concerns about the impact of public discourse on out of home care children and young people, and although she was partially influenced by the political and media pressure at that time, the actions were not improper in the circumstances. In the other instance, it was found that the Minister did not make the alleged request.

The Commission took the view that the Ministerial Code of Conduct is a code of conduct for the purposes of the *IC Act*. However, the Commission noted that the Commissioner is not a public servant for the purposes of that code and therefore there was no apolitical role held by the Commissioner that the Minister was required to respect under the code.

The Commission, in light of all of the circumstances listed above, determined to dismiss the complaint.

1.0 INTRODUCTION

1.1. Background: the complaint

- [1] On 7 June 2017, the Integrity Commission received a complaint in letter from the Hon Josh Willie MLC. On the same day Mr Willie announced in Parliament that he had made a 'referral' to the Commission⁴ about his concerns. Mr Willie clarified aspects of his complaint by using the Commission's online complaint form on 19 June 2017.
- [2] In the complaint, Mr Willie alleged that an unknown member of staff from the office of the Minister for Human Services the Hon Jacque Petrusma MP (the Minister) had directed the Commissioner for Children and Young People (the Commissioner) by email to cease advising the Minister in writing.⁵ Mr Willie suggested that, if true, this might constitute an offence under s 23 of the *Commissioner for Children and Young People Act 2016* (the CCYP Act).⁶
- [3] Mr Willie said that the alleged emailed direction followed a request by the Commissioner that the Minister correct the record after she allegedly misrepresented him in Parliament in November 2016.⁷
- [4] The complaint was accepted for assessment on 12 July 2017 as it did not, on the basis of the material available at that stage, warrant dismissal. There were a number of issues relevant to the complaint that required clarity before a determination could be made about how to deal with it.
- [5] The assessment identified a number of allegations involving the Minister and her Chief of Staff, Suzie Jacobson.
- [6] On 16 August 2017 the complaint was accepted for investigation in accordance with s 38(1)(g) of the *Integrity Commission Act 2009* (the IC Act).

1.2. Persons named in this report

Name	Details
Suzie Jacobson	At the time, Chief of Staff, Office of the Minister for Human Services and Minister for Women
Mark Morrissey	Former Commissioner for Children and Young People (CCYP)
Michael Pervan	Secretary, Department of Health and Human Services
The Hon Jacque Petrusma MP	At the time, Minister for Human Services and Minister for Women
Pene Snashall	At the time, Senior Adviser, Office of the Minister for Human Services and Minister for Women
The Hon Josh Willie MLC	Complainant

⁴ Hansard, Legislative Council Estimates Hearings, 7 June 2017.

⁵ Complaint from the Hon Josh Willie MLC, 7 June 2017.

⁶ Ibid.

⁷ Complaint form completed by the Hon Josh Willie MLC, 19 June 2017.

2.0 ADMINISTRATION

2.1. Jurisdiction

- [7] The Commission's jurisdiction was invoked on receipt of the complaint on 7 June 2017 alleging that a public officer had committed misconduct.
- [8] As a person employed in the office of the Minister, Ms Jacobson is a public officer under ss 4 and 5(1)(a) of the *IC Act*.
- [9] The Minister is a public officer by virtue of her position as a member of the House of Assembly of the Parliament of Tasmania. The Parliament of Tasmania is a public authority under s 5(1)(a) of the *IC Act*.
- [10] The Commission takes the view that the definition of misconduct under the *IC Act*, as it applies to Members of Parliament, includes conduct by Ministers of the Crown in their executive, as well as parliamentary, capacity.
- [11] In accordance with s 6(1)(a) of the *IC Act*, members of Parliament are 'designated public officers' under the *IC Act*.
- [12] If proven, the alleged conduct could amount to misconduct. Under s 4 of the *IC Act*, 'misconduct' is defined as:
- (a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –*
- (i) a breach of a code of conduct applicable to the public officer; or*
- (ii) the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or*
- (iii) a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or*
- (iv) a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or*
- (b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –*
- but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament.*
- [13] The allegation suggested conduct that, if proven, may have come within the definition of misconduct provided in s 4(1)(b) of the *IC Act*.
- [14] The allegation also suggested conduct that, if proven, may have come within the definition of misconduct provided in s 4(1)(a)(i) of the *IC Act*. Ministerial staff are required to adhere to a standard of conduct as set out in a schedule of their secondment arrangement contract. This is promoted in open sources by the Department of Premier and Cabinet (DPAC) as being applicable to all ministerial staff. 'Code of conduct' is not defined in the *IC Act*. The Commission's view is that clause 4 of schedule 3 of Ms Jacobson's secondment arrangement contract amounts to a code of conduct under the *IC Act*, and thus this allegation was within its jurisdiction.
- [15] The alleged conduct of the Minister was identified in the assessment as allegations of misconduct as set out in paragraphs (b) and (a)(i) (breach of the Ministerial Code of Conduct) of the definition of misconduct in the *IC Act*.

- [16] In accepting the matter for investigation, the Commission considered the exclusion of members of Parliament where the alleged conduct is ‘in connection with a proceeding in Parliament’.
- [17] A ‘proceeding in Parliament’ is defined broadly in the *IC Act* as:
- all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House of Parliament or of a committee, and, without limiting the generality of the foregoing, includes –*
- (a) the giving of evidence before a House or a committee, and evidence so given; and*
- (b) the presentation or submission of a document to a House or a committee; and*
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and*
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*
- [18] The definition of ‘proceeding in Parliament’ is broad, and the Commission must make a decision on whether it has jurisdiction over the alleged conduct of members of Parliament on a case-by-case basis.
- [19] In this case, the Commission determined that the conduct as alleged was not committed in connection with a proceeding in Parliament. The Commission therefore determined that it had jurisdiction over the allegations against the Minister.

3.0 MISCONDUCT ALLEGATIONS

- [20] The identifiable misconduct allegations⁸ investigated were that:
- i. Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner on 30 November 2016.
 - ii. Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner on 20 January 2017.
 - iii. Ms Jacobson failed to treat the Commissioner and his staff with respect and without harassment, victimisation or discrimination on 30 November 2016.
 - iv. Ms Jacobson failed to treat the Commissioner and his staff with respect and without harassment, victimisation or discrimination on 20 January 2017.
 - v. The Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way on 16 March 2017.
 - vi. The Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way on 27 March 2017.

⁸ Some of these allegations were revised and refined as the investigation progressed.

- vii. The Minister failed to respect the apolitical role of the Commissioner on 16 March 2017.
- viii. The Minister failed to respect the apolitical role of the Commissioner on 27 March 2017.

3.1. Assessment process

- [21] Mr Willie met with the assessor on 1 August 2017. He clarified aspects of his complaint and provided further background information.
- [22] Mr Willie forwarded the assessor other material, including documents that had been provided to him under the *Right to Information Act 2009* (the RTI Act). Mr Willie also provided a schedule listing information not provided to him under the *RTI Act* as it was deemed fully exempt. The material provided by Mr Willie was of limited assistance to the assessment.
- [23] A notice under s 47(1)(c) of the *IC Act* was served on the DPAC to obtain the incoming and outgoing emails of the then-Commissioner, Mark Morrissey. No emails sent to the Commissioner requesting that he not put his concerns in writing to the Minister were found. However, there were some relevant emails relating to matters that were the subject of the complaint and they required consideration.⁹
- [24] Other relevant material also appeared in the Commissioner's email account.¹⁰
- [25] This evidence was considered in the context of the *IC Act*, the *CCYP Act* and relevant codes of conduct.
- [26] The evidence in the Commissioner's email account was fundamental to the assessment report recommendation that the complaint be retained by the Integrity Commission for investigation. The Commission CEO agreed with this recommendation.

3.2. Investigation process

- [27] An investigator was appointed to investigate the complaint, in accordance with Part 6 of the Act, on 17 August 2017.
- [28] In accordance with s 38(2) of the *IC Act*, the Premier was notified on 21 August 2017 of the determination to conduct an investigation.
- [29] The investigation involved the use of coercive powers, under s 47(1)(c) of the *IC Act*, to obtain the DPAC emails of Ms Jacobson. Interviews under s 47(1)(a) of the *IC Act* were conducted with the Commissioner; the Secretary of the Department of Health and Human Services, Michael Pervan; Ms Jacobson; the Minister's Senior Adviser Pene Snashall; and the Minister. Information and evidence was also sourced without the need for coercive powers and from open sources.
- [30] On the day of her interview, Ms Jacobson elected to provide the investigator with a statutory declaration addressing the allegations that involved her.¹¹
- [31] As it was alleged that there may have been a breach of s 23 of the *CCYP Act*, advice was sought from the DPP seeking guidance as to whether there was evidence

⁹ File note of meeting prepared by the Commissioner 30 November 2016.

¹⁰ Email from the Commissioner 6 June 2016; email from the Commissioner 7 August 2017; email from the Minister to the Commissioner 16 March 2017.

¹¹ Statutory declaration by Suzie Jacobson, 5 October 2017.

suggestive of such a breach, and if so, how to approach this when conducting the investigation.¹² Evidence suggestive of possible breaches of s 23 of the CCYP Act – occurring on 30 November 2016 and 20 January 2017 - was provided to the DPP to facilitate this request. The DPP observed that:

I note both are outside the six-month time limit for the making of a complaint (see s 26 of the Justice Act 1959). In any event, I do not believe the alleged conduct has obstructed the Commissioner in carrying out his functions which are outlined in ss 8, 9 and 10 of the Act. The [alleged] request by Ms Jacobson to not put matters in writing, even though it may have been couched in strong terms, can only be seen as a request. Clearly, the Commissioner was free to ignore it. Similarly, criticism of a draft report, even if made in strong terms, cannot be seen to have obstructed or hindered the Commissioner in the performance of his duties. Clearly, the Commissioner was free to ignore such comments.

In my view, the type of conduct that s 23 relates to is conduct which directly obstructs or hinders the performance of the functions the Commissioner. Such conduct would include failing to provide documents to the Commissioner, directing people not to assist the Commissioner in his work or in some other way unlawfully hindering the Commissioner. It would seem to me, from the limited material you have provided, there is insufficient evidence to prove Ms Jacobson or the Minister hindered or obstructed the Commissioner. It may be different if the comments took the form of a threat, i.e. “If you don’t change your draft report we will cut off your funding” or “If you continue to send written correspondence to the Minister we will cut your staff”. However, merely stating displeasure at receiving such correspondence, in my view, does not amount to a breach of the Act.¹³

3.3. Standard of proof

- [32] The standard of proof applied in this report to factual findings is the civil standard i.e. ‘on the balance of probabilities’. This requires only ‘reasonable satisfaction’ as opposed to ‘satisfaction beyond reasonable doubt’ (as is required in criminal matters).
- [33] In considering whether the civil standard of proof has been met, an investigator will bear in mind what was said in *Briginshaw v Briginshaw*:

[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.¹⁴

3.4. Procedural fairness

- [34] In accordance with s 46(1)(c) of the IC Act, the investigator ‘must observe the rules of procedural fairness’ in undertaking the investigation.
- [35] The Minister, Ms Jacobson, Ms Snashall, Mr Morrissey and Mr Pervan were identified as parties who could be adversely impacted by the report. All of these parties were invited to make submissions and comments on the draft of this report and all of them took the opportunity to make submissions and comments.

¹² Letter to DPP, dated 18 August 2017.

¹³ Letter from DPP, dated 11 September 2017.

¹⁴ (1938) 60 CLR 336, 362 (Dixon J).

4.0 RELEVANT POLICIES, PROCEDURES, AND LEGISLATION

4.1. Commissioner for Children and Young People Act 2016

[36] Under the earlier *Children, Young Persons and Their Families Act 1997* the Commissioner reported to the Minister for Human Services and the Secretary of the Department of Health and Human Services.¹⁵ The *CCYP Act* commenced on 1 July 2016.¹⁶ It specified that the Commissioner reports to Parliament,¹⁷ not the Minister, providing the Commissioner with greater independence.

[37] The Minister's second reading speech for the *CCYP Bill* in 2015 made it clear that this change, as well as extending the Commissioner's appointment period to five years, was made with the intention of providing the Commissioner with greater independence.¹⁸ The Minister stated, in relation to the enhanced independence of the Commissioner, that:

The Commissioner is also explicitly provided with the ability to determine activities of the office within the broad scope of the role and the manner in which these activities are conducted and reported.

[38] Section 8 of the *CCYP Act* lists the functions of the CCYP:

(1) *The Commissioner has the following functions:*

- (a) *advocating for all children and young people in the State generally;*
- (b) *acting as advocate for a detainee under the [Youth Justice Act 1997](#);*
- (c) *researching, investigating and influencing policy development into matters relating to children and young people generally;*
- (d) *promoting, monitoring and reviewing the wellbeing of children and young people generally;*
- (e) *promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives;*
- (f) *assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally;*
- (g) *encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them;*
- (h) *such other functions as are prescribed.*

(2) *If the Commissioner advises the Minister under this Act or any other Act, the Commissioner must also provide the advice to any other Minister who administers the department, Agency or legislation that is the subject of the advice.*

(3) *Unless otherwise specified, the Commissioner must act independently, impartially and in the public interest when performing a function, or exercising a power, under this Act or any other Act.*

(4) *For the purpose of performing any function, or exercising any power, the Commissioner may determine when a child is considered a young person for the purpose of the function or power.*

¹⁵ *Children, Young Persons and Their Families Act 1997* ss 83(1)–(2).

¹⁶ <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2016-002/lh>.

¹⁷ *CCYP Act* s 19(2).

¹⁸ Hansard, House of Assembly, 19 November 2015.

[39] Section 11 of the CCYP Act lists the general powers of the CCYP:

- (1) *The Commissioner has the power to do all things necessary, or convenient, to be done in connection with the performance of his or her functions, and the exercise of his or her powers, under this or any other Act.*
- (2) *Without limiting [subsection \(1\)](#), the Commissioner may –*
 - (a) *require any person to provide information, answer questions, or produce documents, so far as may be relevant to the performance of the functions, or the exercise of the powers, of the Commissioner or the administration of this Act; and*
 - (b) *require information and data for the purposes of –*
 - (i) *collating, studying, interpreting and maintaining information in relation to the wellbeing of children and young people in the State; and*
 - (ii) *identifying and monitoring trends in respect of the wellbeing of children and young people in the State; and*
 - (c) *investigate, and make recommendations in respect of, the systems, policies and practices of organisations, government or non-government, that provide services that affect children and young people; and*
 - (d) *investigate, and make recommendations in respect of, the effects of any legislation, proposed legislation, documents, government policies, or practices or procedures, or other matters relating to the wellbeing of children and young people; and*
 - (e) *advise and make recommendations, in relation to the rights and wellbeing of children and young people, to Ministers, State authorities and other organisations; and*
 - (f) *provide information to other organisations in accordance with this Act or any other Act; and*
 - (g) *report publicly on the wellbeing of children and young people in the State; and*
 - (h) *exercise such other powers as are prescribed.*
- (3) *In performing a function, or exercising a power, under this Act, the Commissioner –*
 - (a) *may regulate any proceedings held under this Act in any manner he or she considers appropriate; and*
 - (b) *is not bound by the rules of evidence but may inform himself, or herself, on any matter in any manner the Commissioner thinks fit; and*
 - (c) *is not required to hold a hearing as part of an investigation or review, or as part of the performance of any other function, under this Act; and*
 - (d) *may investigate, or review, a matter in any manner he or she considers appropriate; and*
 - (e) *may hold an investigation, or review, under this Act in public or in private.*

[40] Section 23 of the CCYP Act refers to obstruction of the CCYP. A person must not obstruct, or hinder, a person who is performing a function, or exercising a power, under this Act. The penalty for breaching s 23 is a fine not exceeding 100 penalty units and, in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.

4.2. Codes of Conduct

- [41] In 2011, the Integrity Commission prepared a report¹⁹ that recommended the Government adopt codes of conduct that provide for Members of Parliament, Ministers and for Ministerial staff, and that such codes be tabled in Parliament.
- [42] To date the recommendation that the Government adopt codes of conduct that provide for Members of Parliament and for Ministerial staff has not been implemented.

4.3. Ministerial Code of Conduct

- [43] The Code of Conduct for Ministers was adopted by the Government on 1 April 2014 and has been operational from that date.²⁰ Amongst a number of conduct requirements, the Code of Conduct for Ministers requires that Ministers are to respect the apolitical role of public servants.²¹

4.4. Instruments of appointment for Ministerial staff

- [44] It is a matter for the Government of the day to decide whether it adopts a Code of Conduct for Ministerial staff. The Commission was advised in December 2015 that the Government is considering the Commission's recommendations that such a code should be adopted²² but the Commission is not aware that any action has been taken. Consequently, there is no specified Code of Conduct that applies to Ministerial Staff.
- [45] The Commission has been advised that the secondment arrangements for Ministerial staff do, however, contain the following text:

The appointee is to comply with any Ministerial and Electorate Office Staff Code of Conduct as approved by the Premier from time to time or in the absence of such Code, Clause 4.2 of this Schedule will apply.

The appointee shall maintain a standard of conduct necessary to ensure that the integrity and ethical standards expected of a servant of the Crown are maintained. The appointee is required to:

- (a) behave honestly and with integrity;*
- (b) act with care and diligence;*
- (c) treat everyone with respect and without harassment, victimisation or discrimination;*
- (d) comply with all applicable Australian law;*
- (e) comply with any lawful and reasonable direction given by a person having authority to give the direction;*
- (f) maintain appropriate confidentiality about dealings of, and information acquired;*
- (g) disclose, and take reasonable steps to avoid, any conflict of interest;*
- (h) use Tasmanian Government resources in a proper manner;*
- (i) not knowingly provide false or misleading information;*

¹⁹ Codes of Conduct for Members of Parliament, Ministers and Ministerial Staff, June 2011.

²⁰ An updated Ministerial Code of Conduct was promulgated on 22 March 2018, after the State election.

²¹ Code of Conduct for Ministers, page 5.

²² Email from DPAC, dated 9 December 2015.

- (j) *not make improper use of information gained in the course of employment or of the status, power or authority derived from the employment in order to gain, or seek to gain, a gift, benefit or advantage for themselves or for any other person;*
- (k) *declare a gift received in the course of employment or in relation to their appointment to “the Designated Manager”; and*
- (l) *comply with the Lobbying Code of Conduct.*²³

[46] The Secondment Arrangement of Ms Jacobson as a Ministerial staffer includes references to maintaining a standard of conduct necessary to ensure that the integrity and ethical standards expected of a servant of the Crown are maintained, requiring they conduct themselves in a prescribed way.²⁴

[47] Based on the above, the Commission takes the view that this Secondment Arrangement provision amounts to a code of conduct as contemplated by the *IC Act*. The term is not defined in the *IC Act* and codes of conduct can take many and various forms.

4.5. Legal advice regarding Ministerial Codes of Conduct and Ministerial Staff Secondment Arrangements

[48] Following submissions at the procedural fairness stage of the investigation, legal advice was sought as to whether the Ministerial Code of Conduct and the Secondment Arrangements for Ministerial staff are codes of conduct. The Commission concluded that the Ministerial Code of Conduct is a code of conduct and that there are respectable arguments that the substance of the Secondment Arrangements reflect a code of conduct.

5.0 BACKGROUND CIRCUMSTANCES

5.1. Political background

[49] It has been suggested by some during the investigation that Mr Willie’s complaint may have been politically motivated. There may be a number of motivations for any complaint made to the Commission, and like other complaints received by the Commission, the complaint from Mr Willie has been treated on its merits.

[50] The ongoing scrutiny and pressure placed on the Minister – regarding her performance as Minister – from the Opposition (both in and out of Parliament) and from the media is the background to the events that have been the subject of this investigation. Whether that scrutiny or pressure is in any way warranted is outside the scope of the investigation and has not been considered.

5.2. Interaction between the Commissioner and the Ministerial Office

[51] Ms Jacobson was not the primary point of contact between the Commissioner and the Ministerial Office. Ms Snashall generally dealt with the Commissioner and his staff. She described her role as maintaining connection and contact with the Commissioner and staff of that office, as key stakeholders.

[52] Ms Snashall’s role has been likened to a ‘broker’ between the two offices.²⁵

²³ Ibid.

²⁴ Secondment Arrangement, Suzie Jacobson.

²⁵ Ibid, page 5; transcript of interview with Mark Morrissey, page 22.

- [53] As Chief of Staff, Ms Jacobson's meetings with the Commissioner were less frequent than Ms Snashall.²⁶ Ms Jacobson only dealt with the Commissioner. She did not deal with or communicate with his staff.²⁷
- [54] Differing recollections of the nature of the relationship between the Commissioner and staff from the Ministerial Office have been provided to the Commission. The Commission has concluded that the relationship was not always harmonious, and that it deteriorated over time.
- [55] However, it is important and relevant to note that relationships between statutory officers and those in the political sphere can change and evolve, and can take a variety of forms. It is not unusual for the pressures of political life to create tensions.
- [56] It also may well be the case that, despite a deteriorating relationship and concerns about his treatment, the Commissioner and staff from the Ministerial Office could still work together professionally to achieve outcomes for children and young people.

6.0 INVESTIGATION

Allegation 1: Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner on 30 November 2016.

6.1. Evidence

- [57] It was alleged by Mr Willie that a member of the Minister's office may have '... directed the Children's Commissioner via email to cease advising Minister Petrusma in writing'.²⁸ Mr Willie suggested that, if true, such an action could constitute a breach of s 23 of the *CCYP Act*.²⁹ Section 23 states 'a person must not obstruct, or hinder, a person who is performing a function, or exercising a power, under this Act'.³⁰
- [58] The assessment process found no email from the Minister's Office directing or requesting the Commissioner to stop writing to the Minister. However, some relevant evidence was identified during the assessment in the Commissioner's email account.³¹ This evidence related to a meeting dated 30 November 2016 where a letter from the Commissioner to the Minister dated 11 November 2016 was discussed.

Background of letter dated 11 November 2016

- [59] The Commissioner wrote to the Minister about three separate issues affecting children and young people in November 2016. A letter about child protection redesign was sent on 7 November 2016, a letter about a process related to a change management system at the Ashley Youth Detention Centre (AYDC)³² was sent on 11 November 2016 and a letter about Safe Pathways was sent on 22 November 2016.³³
- [60] The 11 November 2016 letter to the Minister referenced issues raised with the Commissioner by detainees at the AYDC. The Commissioner made it clear in the letter

²⁶ Transcript of interview with Suzie Jacobson, page 12.

²⁷ *Ibid*, page 31.

²⁸ Complaint to Commission from Josh Willie MLC, 7 June 2017.

²⁹ *Ibid*.

³⁰ *CCYP Act* s 23.

³¹ File note of meeting prepared by the Commissioner 30 November 2016.

³² AYDC is operated by the Department of Health and Human Services.

³³ Statutory declaration by Suzie Jacobson, 5 October 2017, page 1.

that it was written on the basis of his role as an advocate for young people under the *Youth Justice Act 1997*, as well as his concerns about the AYDC resulting from his own observations.³⁴

- [61] The 11 November 2016 letter to the Minister was an example of the Commissioner acting as an advocate for detainees under the *Youth Justice Act 1997*, which is a function of the CCYP under s 8(1)(b) of the *CCYP Act*. He was performing this function by placing his concerns in writing about the wellbeing³⁵ of youth detainees and seeking information³⁶ regarding these issues. The Commissioner and Mr Pervan felt that, in writing to the Minister in relation to the AYDC and other matters, the Commissioner was performing his statutory functions.³⁷ The Commissioner saw the act of putting his concerns about AYDC in writing to the Minister as a last resort after all other attempts to advocate informally had not met with an adequate response.³⁸
- [62] Upon receipt of the 11 November 2016 letter, Ms Jacobson emailed the Minister that she was 'concerned that these issues were not talked out (I presume not) prior to them coming in a formal letter to us'.³⁹ Ms Jacobson suggested that 'I believe I need to come to next (sic) meeting with the c4c'.⁴⁰

Meeting on 30 November 2016

- [63] The next meeting with the Commissioner was on 30 November 2016. The Commissioner, the Minister, Ms Jacobson, Ms Snashall and Mr Pervan met in the Minister's Office.⁴¹
- [64] The 11 November 2016 letter was discussed.⁴²
- [65] The Commissioner later prepared a file note of the meeting on 4 December 2016.⁴³ He emailed it to a member of his staff on that date, marked 'highly confidential'.⁴⁴ The file note described the Commissioner's observations of the response to the AYDC issues he raised in the letter to the Minister:

Agenda for meeting was discussion on future of AYDC – to offer my view “off the public record”. Noting I have not put my view in regard to the future of AYDC into writing.

My standard approach to address/negotiate issues is to hold one to one discussions and informal email conversations. Always in the context of providing solutions or advice that is respectfully offered.

Drafting of a letter to the Minister is as a last resort when all other attempts to advocate informally had not received an adequate response from the Department or Government.

³⁴ Letter from the Commissioner to the Minister 11 November 2016.

³⁵ *CCYP Act* ss 11(2)(c)–(d).

³⁶ *CCYP Act* s 11(2)(b).

³⁷ Transcript of interview with Mark Morrissey, page 25; transcript of interview with Michael Pervan, page 15.

³⁸ File note of meeting prepared by the Commissioner, 30 November 2016; transcript of interview with Mark Morrissey, page 15.

³⁹ Email from the Secretary of the Department of Health and Human Services, 11 November 2016.

⁴⁰ *Ibid.*

⁴¹ File note of meeting prepared by the Commissioner, 30 November 2016.

⁴² File note of meeting prepared by the Commissioner, 30 November 2016; transcript of interview with Mark Morrissey, page 18; statutory declaration by Suzie Jacobson, 5 October 2017, page 1.

⁴³ Metadata of file note of meeting prepared by Mark Morrissey 30 November 2016.

⁴⁴ File note of meeting prepared by the Commissioner, 30 November 2016.

At start of meeting Suzie J expressed concern that I had recently written to the Minister on three particular issues. Noting that prior to writing to the Minister I had discussed and flagged these issues for considerable time with limited or no response. In my view each of these issues are of great importance to the health and wellbeing of young people.

**Suzie asked that I not put matters into written form/letter to the Minister; as such information was subject to FOI.*

...

Suzie asked that in future I write to the Secretary not the Minister. Noting that at this point the Minister requested that she be copied into all correspondence.

- [66] The Commissioner confirmed in his interview that he was concerned about issues at the AYDC, that he had discussed them with the Minister's Office, that the Government had accepted the AYDC issues were important, that he had been told that the Government was going to address the issues, and that he had consequently placed his concerns in writing to the Minister.⁴⁵ He said that he recalled that Ms Jacobson made a verbal request that he not put these issues in writing (as described in the file note).
- [67] In her statutory declaration, Ms Jacobson gave evidence that she queried the purpose of the Commissioner's letters regarding matters she saw as operational. She said this query was firmly but not confrontationally made, and was meant with the intention of ensuring a good relationship between the Department and the Commissioner. She noted that the Commissioner appeared resistant, unhappy with and took umbrage to her query, and she felt the need to diffuse any ill feeling.⁴⁶
- [68] In contrast to the Commissioner's rationale for the letter (as a strong means of advocacy and a way of recording an issue for possible future reference⁴⁷, and as a last resort for what he felt was not an adequate response of the Government or the Department)⁴⁸, Ms Jacobson saw the letter as involving operational matters. She spelt this out in her statutory declaration:

I recall that prior to this meeting, the Minister had received a number of letters from the Commissioner that were, in my view, operational in nature, seeking details of a number of projects occurring in the Department and a process related to a change management system at Ashley. ... The point was that these letters were, in my mind, largely concerning operational issues.⁴⁹

- [69] Ms Jacobson said her conversation with the Commissioner amounted to a query:

I was aware that the Head of Department had regular meetings with the Commissioner for Children and I asked whether they had been raised with him. They hadn't.

...

I therefore queried in the meeting whether there was much point them being written to the Minister as she had no power to intervene in operational matters and it just seemed to be a waste of time given what we did was refer the letters to the Department for a

⁴⁵ Transcript of interview with Mark Morrissey, page 19-20.

⁴⁶ Statutory declaration by Suzie Jacobson, 5 October 2017, pages 1-2.

⁴⁷ Transcript of interview with Mark Morrissey, page 15.

⁴⁸ File note of meeting prepared by the Commissioner, 30 November 2016.

⁴⁹ Statutory declaration by Suzie Jacobson, 5 October 2017, page 1.

response. It just seemed very circular and unproductive. I do remember the Commissioner bristling at the suggestion and my recall is that I retreated accordingly.⁵⁰

[70] Ms Jacobson said that in attempting to calm the situation she may have referenced the RTI Act.

Q: And how did you try and take the sting out of it?

A: Well, I was trying to justify it in a way that I thought it might have some meaning for him because he was very concerned about children's details at that time. We'd had a long – well, probably two years of where individual cases and individual children have had their details, in a place like Tasmania, bandied around the media and I tried to sort of justify by referring to the RTI Act, I understand. I have to tell you I don't remember saying that but I can imagine myself saying it.

Q: The reference to the RTI Act?

A: Yes, because I would've been concerned – I have no memory of saying it and I don't – and this meeting itself. As a Chief of Staff I probably go to a thousand meetings a year and a lot of them, especially when they're catch-up meetings, are not formally documented unless there's an action that comes out of them, so I don't remember it in detail because it didn't have any meaning to me until June 7th really, until it was raised in the media. But at the time I do remember him being upset and I remember trying to calm him down so as a result of that, if I'm accused of saying the RTI Act, I would've been trying to take the sting out of the conversation.⁵¹

[71] Ms Jacobson referred to her concerns which may have led her to raise the RTI Act in her statutory declaration:

I do not remember making the observation that written requests to the Minister could be the subject to requests under the Right to Information Act 2009. ... I might have. I was concerned that such requests could be the subject to RTI as this could have an impact on the privacy of the children concerned. I was aware that the Commissioner was concerned as well regarding the publicity on the children concerned.⁵²

[72] Ms Jacobson was asked her view of the notion that the Commissioner writing a letter to the Minister might have been a strong and deliberate step he elected to take, with an eye on the longer term by placing his concerns on record. It appears she may not have considered that the Commissioner's letter may have been intended to be something other than seeking a particular shorter-term operational outcome. It appears she may not have considered that the letter may have been a deliberate step by the Commissioner with a bigger picture rationale:

Q: Could it have been Mark's intention to actually have letters filed in your Office as a means to achieving an outcome he saw as beneficial for children?

A: I believe even if he filed it through our Office, it would still come to us in some way. If the Minister – if the Head of Agency – it's not like they put them in a pile in the corner, they record it, they say this is the concerns of the Commissioner at the moment. We're answering these appropriately.

Q: Okay. Is this a way of Mark escalating what he sees is an important issue, putting it firmly on the agenda by writing to the Minister?

A: I understand what you're trying to get at ... but I don't know what his motivation was.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Statutory declaration by Suzie Jacobson, 5 October 2017, page 2.

...

And I wasn't certain that he understands and, as I said, I'm always quite amazed that people don't understand that things don't come – all the information doesn't come into the Minister's Office that then gets written up and then sent back. I don't know if people understand that the letters written by the Minister are still – they've still got to come from the Department in some way.⁵³

- [73] The Minister gave similar evidence to that provided by Ms Jacobson. The Minister said that as the matters being raised in the 11 November 2016 letter were operational in nature, the letter would be better and more quickly dealt with if addressed to the Department:

If correspondence is received by me, because it was operational matters, if I need to get a response, which I did need to from the Department because it was all on operational issues which come under Mike Pervan, not under what I'm actually responsible for, I had to put it in what's called our WITS system, which is our workflow information tracking system, which – not on your version but, you know, if you sent it on the 11th November and then I think he didn't get a response until finally the 21st November, because going through WITS it adds days or it can add weeks, in some cases can add a month, and I knew that the Commissioner was always very keen to get quick turnaround. So it was always about how can we facilitate getting a quicker response, but also I was very keen for Mr Pervan to actually be aware of what the Commissioner for Children's concerns and issues were because – especially if it's operational matters. I don't mind being written to on policy matters and, you know, legislation and everything that's within my domain, but if it's coming to me and it's all to do with operational matters, which this letter was, I just thought it'd be a better process would be for him to go straight to Mr Pervan and 'cc' me in so that I was still well aware of the issue but then Mr Pervan could take carriage of the letter.⁵⁴

- [74] The Minister was asked whether she considered why the Commissioner had written the letter. Like Ms Jacobson, she was uncertain why the Commissioner wrote the letter.⁵⁵ She said:

... well, my thoughts were that as it was all operational – if it was – say, for example, that he believed the Government should build a new Ashley Youth Detention Centre and have one in the north and the south because it was going to facilitate better outcomes for children, I would've thought that was an appropriate letter to come to me because that's Government policy and something that I could enact. But when all of this is on isolation and mental health and everything else that I don't have the intimate details of, I was wondering why he was sending a letter when I'd had a – and so when I was talking to Mr Pervan and he wasn't aware of all these issues I just thought it seemed like there was a disconnect between the Commissioner for Children and the Secretary of the Department as to these issues, especially when under the Act Mr Morrissey is the advocate for the young people in Ashley, so he really should be writing to the Secretary in regards to advocacy on those issues.⁵⁶

- [75] The Minister gave strong evidence that her response to the letter was entirely based on achieving better operational outcomes and that she wished and asked to be informed of matters by way of letter. She said she had no RTI concerns about this or

⁵³ Transcript of interview with Suzie Jacobson, pages 14-15.

⁵⁴ Transcript of interview with the Hon Jacque Petrusma MP, page 7.

⁵⁵ Ibid.

⁵⁶ Ibid.

other letters whatsoever. The Minister had no recollection of Ms Jacobson's reference to the *RTI Act* in the meeting.⁵⁷ She said:

*... it would make no difference to RTI actually, that's why I was surprised by the comment that it was all to do with the RTI Act because I can't actually recall that comment even being made at that meeting. Because I wasn't worried about the RTI Act at all in regards to this letter, so it's a – as I said, I still wanted to be fully informed of what the issues were, of what was happening in Ashley, what was happening in out of home care, whatever the issues were. And that's why I welcomed my meetings with the Commissioner and receiving correspondence, whether it was email, whether it was letter, but the RTI Act never – can't be factored into my conversation.*⁵⁸

[76] The Minister recalled that Ms Jacobson queried why the Commissioner was writing to the Minister:

Q: Did Suzie question Mark of the purpose of his letters at all in this meeting?

*A: The only questions I remember was that why was he writing to me on operational matters ... when if it was – as in to me directly and cc'ing the Secretary in, wouldn't it be better for him to – if it's operational, to write to the Secretary of the Department and to get a response, and if it's not operational to then write to me and he could do the other way around, so yeah, it wasn't a question about not getting letters, it was more about what's directed to the most appropriate place.*⁵⁹

[77] Although the evidence of Ms Jacobson and the Minister focused on their view that the issues raised in the letter were operational and thus were better communicated to the Department, there may be a perception that a process of writing to the Departmental Secretary, not the Minister, might then enable a Minister to deflect public and parliamentary scrutiny and criticism of issues as they arise. The suggestion is that a Minister is less likely to be held to account for an issue that had not been brought to his or her attention. This perception was articulated in this particular instance by the Commissioner in his interview⁶⁰ and presents as an underlying assumption within the complaint and in the Commissioner's concerns that he expressed in his written recollection of the meeting.

[78] The inference within the allegation about the *RTI Act* was directly put to the Minister. She confirmed the inference was not in any way in line with her thinking at the time:

Q: And I guess to – just to clarify things for you, and that this isn't me alleging this, but one reason that somebody could ask for things not to be put in writing so that another person could say they never knew about it ... That's a scenario ...

*A: No, but also – yeah, the whole thing about it, I – I welcome correspondence, I welcome needing to know because – especially, you know, about a lot of these issues, but I really needed the Secretary to take action and to do stuff about it ...*⁶¹

[79] Ms Jacobson's evidence about her reasons for querying the purpose of the letter was similar to that of the Minister and Ms Snashall on this point. Ms Jacobson said she '... was concerned about duplication of effort. I wanted to ensure the Commissioner had a good relationship with the Department'.⁶²

⁵⁷ Ibid, pages 6, 9.

⁵⁸ Ibid, page 9.

⁵⁹ Ibid, page 14.

⁶⁰ Transcript of interview with Mark Morrissey, pages 25-26.

⁶¹ Transcript of interview with the Hon Jacque Petrusma MP, page 10.

⁶² Statutory declaration by Suzie Jacobson, 5 October 2017, page 1.

[80] Ms Jacobson denied her query of the purpose of the letters was based on the pressure the Minister was under at the time, and rather was focused on operational outcomes:

Q: It's probably fair to say that the Minister has been under some ongoing political and media pressure.

A: Yes, I think that you can safely say that.

Q: Yes, okay. Was that in any way guiding that conversation you had with Mark on 30 November?

A: Only in the terms of the overall outcome of him being a Commissioner that didn't leave. ... Throw his hand up in the air, or – or had bad outcomes, because we wanted very desperately for that Commissioner to stay.⁶³

[81] On the basis of his independent statutory role, the Commissioner knew he was not required to adhere to what he believed to be a verbal request from Ms Jacobson. He said that he continued to write to the Minister.

[82] Ms Jacobson,⁶⁴ the Minister and Ms Snashall⁶⁵ all agreed the Commissioner continued to write to the Minister.

6.2. Analysis

[83] Section 23 of the *CCYP Act* states that a person must not obstruct, or hinder, a person who is performing a function, or exercising a power, under this Act. Advice from the DPP has indicated that if Ms Jacobson – or any other person - had asked that the Commissioner not put matters in writing to the Minister; it was a request that was open for the Commissioner to ignore.⁶⁶ The evidence clearly shows that the Commissioner was certainly aware of and guided by his statutory obligations and was able to ignore the perceived request. He did ignore what he saw as a request and he continued to write to the Minister. On that basis, there is no evidence that Ms Jacobson committed a breach of s 23.⁶⁷

[84] Although Ms Jacobson's conduct did not amount to obstruction or hindering under s 23 of the *CCYP Act*, it should be considered whether the evidence shows that she did make a request to the Commissioner that he not write to the Minister, and whether any request or query about the purpose of the letter could amount to conduct by Ms Jacobson, or 'an attempt to engage in conduct, that adversely affected or could have adversely affected, directly or indirectly, the honest and proper performance of functions or exercise of powers of the Commissioner'.⁶⁸

[85] The evidence emanating from the Commissioner suggests that Ms Jacobson verbally requested that he not place his concerns in writing on 30 November 2016. The Commissioner believed he heard a request not to write to the Minister. The fact that a few days after the meeting on 30 November 2016, he chose to record this

⁶³ Transcript of interview with Suzie Jacobson, pages 19-20.

⁶⁴ Transcript of interview with Suzie Jacobson, pages 15, 18, 19.

⁶⁵ Transcript of interview with Pene Snashall, page 15.

⁶⁶ Advice from the DPP, 11 September 2017.

⁶⁷ In any event, s 26 of the *Justices Act 1959* meant that any charge would not proceed as the alleged conduct occurred outside the six-month time limit.

⁶⁸ *IC Act* s 4: definition of 'misconduct', paragraph (b).

- conversation with Ms Jacobson⁶⁹ and describe what he perceived to be a request not to write indicates that he felt the request was improper.
- [86] The passage of time and the significant workload of those attending the 30 November 2016 meeting mean that it is not possible to establish the words, or even the tone of the words, used by Ms Jacobson in her conversation with the Commissioner about this issue.
- [87] The recollections of Ms Snashall, Ms Jacobson and the Minister about the 30 November 2016 conversation about the letter differ markedly to that of the Commissioner.
- [88] Ms Jacobson's evidence was that she queried the purpose of a letter she saw as operational in nature, based on wanting to ensure better operational outcomes. This presents as a credible explanation for such a query. The evidence of the Minister and Ms Snashall supported Ms Jacobson's explanation that she queried the purpose of the letter and her rationale for making this query and emails dated 11 November 2016. Ms Jacobson's evidence does not support any inference that she was guided by an intention to limit letters from the Commissioner to avoid any later political scrutiny or criticism.
- [89] The Minister's evidence that she be asked to be copied into correspondence to the Department as she wished to be across issues⁷⁰ is supported by evidence, including the Commissioner's file note. The Minister's evidence does not support any inference that she wished to not receive letters from the Commissioner to avoid any later political scrutiny or criticism.
- [90] The 11 November 2016 letter did contain some highly sensitive information about a particular AYDC detainee. It is on the public record that personal information relating to vulnerable children has been referred to in public discourse. In these circumstances, Ms Jacobson's evidence that, if she did refer to the *RTI Act*, she was motivated by concerns of protecting a young detainee from the impact of any disclosed information, presents as credible.
- [91] Ms Snashall had no recollection of any reference by Ms Jacobson to concerns about the *RTI Act*.⁷¹ Ms Snashall said that Ms Jacobson questioned the purpose⁷² of his letter. Although this question made her uncomfortable due to the Commissioner's legislated independent status and his right to write such a letter, this recollection of the request falls short of a request not to write to the Minister.

6.3. Conclusion

- [92] By recording his concerns in writing to the Minister, the Commissioner was using his statutory powers to perform his functions under the *CCYP Act*. He viewed this as an important step available to him to perform his functions and saw this action as having potential longer-term benefits.
- [93] Whilst the Commissioner's recollection is that he was asked not to write to the Minister, other credible evidence was offered that indicates that there may have been some sort of a misunderstanding and that Ms Jacobson did not request or direct the Commissioner to stop writing to the Minister. Rather, the overwhelming evidence suggests that Ms Jacobson queried the purpose of the letter to the Minister about what she saw as an operational issues, and the Commissioner – at a time when his

⁶⁹ File note of meeting prepared by the Commissioner 30 November 2016.

⁷⁰ Transcript of interview with the Hon Jacqui Petrusma MP, page 9.

⁷¹ Transcript of interview with Pene Snashall, page 7.

⁷² Ibid.

relationship with and regard for Ms Jacobson was deteriorating – may have perceived this to be a request not to write to the Minister.

- [94] Even if there had been a request or direction not to write, it is clear that the Commissioner would not adhere to such a request as he understood his statutory independence. He continued to write to the Minister.

Allegation 2: Ms Jacobson failed to treat the Commissioner with respect on 30 November 2016.

6.4. Evidence

- [95] As well as detailing the alleged verbal request that he not write to the Minister, the file note prepared by the Commissioner about the 30 November 2016 meeting referred to an alleged comment attributed to Ms Jacobson – about the Commissioner’s letter to the Minister – that he found disrespectful and offensive. He wrote:

She also stated that I was “arse covering”. I disputed this allegation and made it very clear that under the legislation that it was my role to offer advice and to bring matters to the attention of the Minister. I found such a comment disrespectful to the role of CCYP as well as contrary to the intent of the Act. (Also personally offensive).⁷³

- [96] Ms Jacobson was unable to understand or explain how the Commissioner could perceive that she suggested he was protecting his own interests ahead of children, but speculated that it could stem from him taking a discussion of a theme regularly raised by the Commissioner (and agreed with by staff from the Ministerial Office) out of context – that the interests of children must always be the priority:

Q: All right, what about something which could be taken to mean that?

A: That’s – I was trying to think whether there was anything that could’ve been. The last three years I – three and a half years has brought home to me quite vividly the fact that out of all this politicisation of everything there are children involved, whether they’re kids up at Ashley or grandparents or foster carers or kids in care themselves, in special care. I am 100 per cent certain that Mark feels exactly the same way, and I am 100 per cent certain my Minister feels the same way.

...

A: Because every day we witness it. And I usually have to deal with it at some point.

Q: All right. And how is that relevant to this suggestion that someone might be looking after their own interests?

A: Because you – you – you asserted that it was at the – at – instead of the children, and I’m saying that the children have always been very, very – their needs and the concerns about them have always been paramount within the process.⁷⁴

6.5. Analysis

- [97] The Commissioner found the alleged accusation of ‘arse covering’ disrespectful to the role of the Commissioner and personally offensive.⁷⁵

⁷³ File note of meeting prepared by the Commissioner, 30 November 2016.

⁷⁴ Transcript of interview with Suzie Jacobson, page 21.

⁷⁵ File note of meeting prepared by the Commissioner, 30 November 2016.

- [98] Although the evidence provided by the Commissioner is that he recalls being accused of this and Mr Pervan suggested that Ms Jacobson had at times questioned the Commissioner's motives, there is no other evidence that corroborates this allegation.
- [99] The evidence of Ms Jacobson, the Minister and Ms Snashall is clear, consistent and presents as genuine.

6.6. Conclusion

- [100] It is not possible to establish what words were used in the 30 November 2016 meeting that were offensive to the Commissioner.
- [101] It seems that, in the context of a discussion about the 11 November 2016 letter, a conversation about the interests of children remaining paramount occurred and Ms Jacobson questioned the purpose of the Commissioner's letter. The Commissioner may have perceived Ms Jacobson's comments and query to be suggestive of him protecting his self-interest.

Allegation 3: Ms Jacobson failed to treat the Commissioner with respect on 20 January 2017.

6.7. Evidence

- [102] On 6 June 2017 – five months after it had taken place - the Commissioner prepared a file note of a meeting that occurred in the Minister's Office on 20 January 2017. The file note described a meeting about out of home care issues. It read:

I met with Minister Petrusma and Suzie Jacobsen (sic) (Minister's Chief of Staff) in the MO Boardroom/Level 8 on the 20th January, between 1500 and 1600 hours.

The purpose/agenda for the meeting was to brief the Minister on the contents of my draft OOHC Report, as not yet released.

The Report offered Government a positive way forward in regard to OOHC issues that were remaining unresolved in the context of my advocacy and ongoing discussions with the Department. The primary focus was the safety of children in care.

Present at the meeting were

Minister Petrusma

Suzie Jacobsen (sic)

Myself

Noting my process is to always brief and inform the Minister on all documents prior to release. This is to ensure there are no factual errors and to ensure respectful and professional process. If any factual errors exist, I will correct documentation.

I commenced discussing key aspects of the draft OOHC Report and to discuss my key recommendations. Noting each recommendation was based on factual evidence and best practice.

SJ disputed each comment I made and stated that the report was not necessary, as all issues in OOHC had already (been) addressed or well underway in being addressed. This statement by SJ was factually untrue.

SJ then stated I was wrong in producing the Report and it was unnecessary. Her tone was adversarial.

SJ then stated that in her view I had only produced the OOHC Report to "seek media attention and to self promote. It was not about children. It was my need to be in the media". I did not directly respond to SJ but directed my response to the Minister.

This response from the Chief of Staff appeared to be a clear attempt to frustrate me in my obligations as a statutory officer and Advocate for children and young people.

I assured the Minister my Report was factually correct, was positively drafted and was not in any way self promoting.

The Minister had little to say throughout this meeting. Meeting closed at 1540.

I received a text related to this meeting from the Minister the following day at 0636 AM.⁷⁶

[103] The Commissioner provided a screenshot of the text message he described in the file note. The message read:

Dear Mark, thank you for the report – I look forward to reading it tomorrow. I apologize for Suzie’s comment yesterday and I let her know after the meeting that it was inappropriate. Warm regards Jacquie.⁷⁷

[104] The Minister’s evidence suggested that the meeting might have been more strained and frustrating than other meetings with the Commissioner. She recalled:

Well, I think it was quite – yeah, like it was – I think it was a Friday afternoon, I think it was three thirty or three o’clock or something like that and Mark appeared very tired, I think because he’d been doing the report. To be honest I wasn’t sure if he – ‘cause he kept on doing this with his ear - I wasn’t sure if he had an ear infection or something, because he was like this the whole time and – but then he – because he kept on saying, you know, “I don’t want this report to not go anywhere”. And I’m saying, “we’ve already said, Mark, you know, that it’s going to – we wanted the report, that’s why everyone’s been facilitating the report and why we’ve all been working with you and trying to get the report done”, and he goes, “Well but if it doesn’t I’ll have no choice but to escalate it”, and you’re thinking, well, who are going to escalate it to, you know, it was just – it was – you felt like you were going around in circular confusing conversation until – because, as I said, I was sitting there thinking I was going to ask, “Well are you going to escalate it to, the Premier?”, or you know ...⁷⁸

[105] There had been suggestions in the investigation that Ms Jacobson could at times be quite blunt.⁷⁹ The Minister’s evidence suggests that the strained nature of this meeting may have impacted on the tone of those at the meeting:

Q: Okay. We’ve received info – information that Suzie maintained an adversarial tone in this meeting. Do you recall her tone in this meeting?

A: I know that at the time Suzie was – I think we’d all – ‘cause Suzie had to be out the door at, I don’t know, four o’clock. She was going on annual leave and the Commissioner was, you know, he was agitated and I think they were all just going, “Well what’s going on?” But it was just more like – and also trying to work out what he was meaning, it was just – I was feeling, to be quite honest, a bit frustrated myself because I had no idea what he was talking about either. Like it was – I think we were all just sitting there going – and especially when the Department and everyone had been providing all this information and – because I welcomed his report, you know. I – as it said in the text message, I said

⁷⁶ Email from the Commissioner, 6 June 2016.

⁷⁷ Text message from the Minister to the Commissioner, 21 January 2017.

⁷⁸ Transcript of interview with the Hon Jacquie Petrusma MP, page 22.

⁷⁹ Transcript of interview with Michael Pervan, page 24.

to him, “I’ll look forward to reading your report tomorrow”, and why he’s thinking we didn’t want the report and we weren’t going to action it, I couldn’t understand that, so ...⁸⁰

[106] Ms Jacobson provided a detailed and clear recollection of what was discussed about the out of home care issue in her statutory declaration. She said:

The conversation went around and he mentioned that he had been contacted constantly by the media wanting statements from him in relation to his review and a project currently under way in his department concerning the reform of out of home care. He expressed his frustration in relation to out of home care and the reform process which was going on at the time (being undertaken by the Department at an operational level) and suggested to the Minister that if he couldn’t get any greater understanding of the project he would have no choice “but to escalate the matter”.

I can clearly remember he used the words “no choice but to escalate the matter”. I remember being astonished by this remark and that he would say this to the Minister. Given that the Minister was at the highest level, I attributed his words “escalate the matter” to an intention to go to the media. I remember responding by using these words “to whom would you escalate it – the media?”

I deny that I said to the Commissioner “that his public communications in relation to out of home care report were on the basis of self-promotion and his desire to seek media attention”. I deny using any language that (would) objectively enable him to reach the conclusion that that is what I was saying to him. I remember him responding to me. It is my recollection that in fact the words I am alleged to have said or suggested were in fact said by the Commissioner to me in response to me. My recollection is that he said to me that I was accusing him of self-promotion and desire to seek media attention. That was his view of what I was saying and not what I meant. ...⁸¹

[107] Ms Jacobson’s evidence in her interview was as she detailed in her statutory declaration.⁸²

[108] Ms Jacobson said that both she and the Minister discussed who the Commissioner was considering escalating the matter to, as they were confused about what he meant. Ms Jacobson said the Minister at no time made any comments to her about the way that she had engaged with the Commissioner. Ms Jacobson then went on leave.⁸³ She did not know whether the Minister had apologised to the Commissioner about her comments.⁸⁴

[109] The Minister had the same recollection as Ms Jacobson in relation to this particular conversation:

I was very determined that the Department would provide him with access to information that would enable him to do the report, to facilitate the report, so I was a bit confused as to why he’d think that the report would go nowhere because I was actually wanting a report that I could actually use in a hope to get extra funding in the budget process coming up, but also to make out of home care much better in Tasmania. So – but he, during the report – during the meeting Mark said look if he didn’t get a satisfactory response it was words to the effect that he’d have no – he’d have to escalate it up and I was trying to find out what did he mean by escalating it up because I couldn’t understand why he was saying he was going to escalate matters, so I was thinking – and he just kept

⁸⁰ Transcript of interview with the Hon Jacque Petrusma MP, page 23.

⁸¹ Statutory declaration by Suzie Jacobson, 5 October 2017, page 2.

⁸² Transcript of interview with Suzie Jacobson, page 26-28.

⁸³ Ibid, page 28.

⁸⁴ Ibid, page 29.

on saying, "Look, I'll just have to escalate it", and I'm thinking, well what does he even mean, and I think I said, "What's he going to do, is he going to take it to the Premier, to the – you know, to the Opposition, to the media", and then Suzie, during it – I noticed that, you know, one of your things was that she – in regards to not what you've outlined, but she just said, "So are you going to escalate it to the media?", and that's what – because the only reference to the media was, "Are you going to escalate it to the media?", because we couldn't work out who is he talking about that he was going to escalate the matter to, and when she said, "Are you going to escalate it to the media?", he goes, "No, I'll escalate it to the Secretary", and I'm – then I'm sitting there thinking we've been talking about this for like twenty minutes and he's just going to escalate it to the Secretary, and I'm thinking, well we've already – going to, the Secretary's going to get a copy, we're going to be actioning it and everything else and he'd already had my commitment that we were going to welcome the report ...⁸⁵

[110] The Minister explained why she apologised for Ms Jacobson's comments the next day:

Q: Could you explain what you meant, please, on this – in this text to Mark, which is the morning after this meeting?

A: Yeah. So, Pene Snashall had told me that the Commissioner didn't like being challenged in regard to the media comment. So – as I've said, I've always tried to work with the Commissioner to try and keep him happy, and if he was unhappy I thought it best to send him a text message ... I was still concerned that he didn't think that we didn't want the report, so that's why I made it quite clear, "Thank you for the report. I look forward to reading it tomorrow", because I wanted to re-emphasise to him that I welcomed the report. I apologised for Suzie's comment about the media. So, when I said to him as inappropriate – what I said to Suzie was that he didn't like the comment about the media. I thought next time we needed to try and work out how we'd work out what his escalation method was, you know, try and ask a few more. The trouble is we'd been talking about it for twenty minutes, so it was – and it wasn't becoming clear and I thought, well, next well – now that we know that he's – his escalation is to the Secretary, if anything like this come up again in the future we'd just say, you're going to escalate it to the Secretary and then we'd start there before we jump straight to the media. So, yeah, because Pene had let me know that he didn't like the comment I thought.

Q: Can we just clarify then ... just for the sake of the record ... what Suzie's comment was?

A: Well, in regards to was he going to escalate it to the media.⁸⁶

[111] Ms Jacobson expressed amazement this allegation had been made.⁸⁷

[112] The Minister gave evidence that the Commissioner had never raised the issue again with her:

... to be quite honest when I saw him on Monday the 23rd January he never raised anything about Suzie at all then either, so – so to be quite honest, if the Commissioner for Children had an issue with Suzie, whether it's on the 20th, that day he could have sent me back a text message saying something, and on the 23rd he could have also raised with me that he did not like her comment or anything. If he'd ever raised with me that he did not like her comments or inferences or whatever, I would have been quite happy to have spoken to her about it, but the fact that he never raised anything of this with me once made it very difficult for me to actually try and work out what was going on

⁸⁵ Transcript of interview with the Hon Jacque Petrusma MP, page 21.

⁸⁶ Ibid, page 24.

⁸⁷ Statutory declaration by Suzie Jacobson, 5 October 2017, page 2.

*in his head. So – well, he was actually thinking in regards to her. So, I operate on the basis I'd rather people let me know and see – if at any time he'd said to me "I didn't like that inference" or "I found it insulting" or whatever, I would have done something about it, but not once did he actually ever raise it with me directly.*⁸⁸

[113] The evidence of both Ms Jacobson and the Minister was that, although the meeting was frustrating and difficult, the tone of this meeting was not disrespectful or adversarial.⁸⁹

6.8. Analysis

[114] If a person has, or feels they have been, accused of engaging in self-promotion it has the potential to be perceived as being offensive, rude and disrespectful. To a statutory independent officer with the function of advocating for children, and who clearly takes the role very seriously, such a suggestion would be particularly offensive.

[115] Although the Commissioner prepared a written record of this meeting that listed the comments he attributes to Ms Jacobson, the record was prepared in June 2017, five months after it occurred. This record is not contemporaneous and was prepared following a period of further deterioration in his relationship with Ms Jacobson. It is unknown if the Commissioner was referencing any particular notes, or simply drawing from his memory, in drafting this file note.

[116] By June 2017, the relationship between the Commissioner and Ms Jacobson appears to have deteriorated. This particular allegation presents as an outcome of that situation.

[117] The Commissioner's recollection of this conversation differs significantly from those of Ms Jacobson and the Minister. The passage of time and the significant workload of those attending the 20 January 2017 meeting means that it is not possible to establish the words, or the tone of the words, used by Ms Jacobson in her conversation with the Commissioner about this issue.

[118] The Commissioner clearly did take offence to a perceived suggestion by Ms Jacobson that he might take the out of home care issue to the media. The evidence of Ms Jacobson and the Minister regarding the circumstances that resulted in Ms Jacobson making reference to the Commissioner going to the media is clear, consistent and presents as credible.

[119] The Minister's explanation for her text-messaged apology to the Commissioner – that she wished him to know that the Government was taking his report seriously – presents as a credible explanation that does not suggest that Ms Jacobson's comments were deliberately offensive.

6.9. Conclusion

[120] The only common evidence of this conversation is that the Ms Jacobson did make some sort of reference to the Commissioner going to the media.

[121] The context of a deteriorating relationship between the Commissioner and Ms Jacobson, associated communications problems, a strained meeting and the media attention the Minister had been receiving, suggests that Ms Jacobson's confusion about what the Commissioner was referring to in escalating the out of home care issue

⁸⁸ Transcript of interview with the Hon Jacque Petrusma MP, page 26.

⁸⁹ Ibid, pages 20-22; transcript of interview with Suzie Jacobson, page 27.

led her to pose a question of the Commissioner that was not intended to cause offence, but did so.

[122] It seems the reference to self-promotion were words first used by the Commissioner because of these communication problems, and he may have then attributed them to Ms Jacobson.

Allegation 4: Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner on 20 January 2017.

6.10. Evidence

[123] Mr Pervan gave evidence that the Commissioner was measured in his dealings with the media⁹⁰ and that publicly advocating about issues affecting children and young people is an important part of the Commissioner's role.⁹¹

[124] In his file note, the Commissioner saw Ms Jacobson's words about self-promotion 'as a clear attempt to frustrate me in my obligations as a statutory officer and Advocate for children and young people'.⁹²

6.11. Analysis

[125] As considered in relation to allegation 3, it is not possible to establish what was said in the 20 January 2017 meeting. The evidence suggests that if Ms Jacobson made references to self-promotion by the Commissioner, they appear to have been taken out of context caused by a deteriorating relationship, prompting a communication breakdown.

[126] The evidence indicates that comments by Ms Jacobson in relation to the Commissioner escalating the out of home care issue to the media were not designed to cause offence. The evidence suggests that her words may have been prompted by confusion and perhaps some concern that the media may be used in this case. There is no evidence that suggests that Ms Jacobson's words were designed to make the Commissioner stop or reconsider his use of the media.

[127] The Commissioner's perception of what she had said appears to have caused the Commissioner to reflect on and question his future dealings with the media; especially whether such actions could be seen as something they were not.

6.12. Conclusion

[128] The Commissioner's perceptions may have promoted a lack of confidence in making public comment, but the evidence indicates he did not alter his actions in this regard.

⁹⁰ Transcript of interview with Michael Pervan, page 19.

⁹¹ Ibid, pages 20, 28-29.

⁹² Email from the Commissioner, 6 June 2016.

Allegation 5: The Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way on 16 March 2017.

Allegation 6: The Minister failed to respect the apolitical role of the Commissioner on 16 March 2017.

Allegation 7: The Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way on 27 March 2017.

Allegation 8: The Minister failed to respect the apolitical role of the Commissioner on 27 March 2017.

6.13. Evidence

Background to email of 16 March 2017

[129] Out of home care issues were being discussed publicly in Parliament and in the media in the weeks prior to 16 March 2017. The Ministerial Office had become aware of information that this discourse was having a negative impact on children in out of home care.⁹³

[130] The Commissioner said that the public discourse from all sides of politics on this issue could have been better.⁹⁴

[131] A post on the Australian Labor Party's (ALP's) Facebook page referred to out of home care children being bought and sold. The Minister explained her concerns about the impact of this post in her interview:

Well the – the Facebook post, which is that the Government is selling children is wrong, ... the inference by the Labor Party that this Government is selling children. So, it's a – the Commissioner for Children had come out and condemned other Facebook posts by other organisations, so it was to – it was similar, because at the time, if you've got children in out of home care who believe that the Government is selling them, on Facebook, it's for children in out of home care to think that they're supposed to be looked after and kept safe, that the government is supposedly looking after them, is willing to sell them on Facebook. For me, that was causing irreparable harm to kids and, as I said, I was having to get in extra counselling services. I had foster carers who were worried. I had – there was a lot of NGOs who were very concerned about their future. In fact the NGOs were too scared to – they were scared as to which one of them was going to be mentioned in parliament next, so reputations were being trashed and we were try – we were fighting hard to try and salvage those reputations because a lot of what was being alleged was false and it was shown to be false and investigations since have shown it to be false.⁹⁵

⁹³ Transcript of interview with the Hon Jacqui Petrusma MP, page 31.

⁹⁴ Transcript of interview with Mark Morrissey, page 46.

⁹⁵ Transcript of interview with the Hon Jacqui Petrusma MP, page 32.

Emailed request to condemn action of ALP on 16 March 2017

[132] The Minister sent an email to the Commissioner on 16 March 2017 referring to the ongoing public discourse – including by the ALP – and the ALP’s Facebook post. The email from the Minister said:

Dear Commissioner

I am seeking your advice on the impact the Labor Opposition’s current and ongoing politicisation of out-of-home care is having on Tasmanian children and young people in care.

These are the very children and young people who should be the centre of our concerns, and who should not be a political target.

As a Member of Parliament, I have come to accept the slings and arrows that come my way. However, drawing vulnerable children and young people into this political circus cannot continue. Like me, I am sure, that you believe they need to be protected in this process.

I would therefore ask, that as the State’s key advocate for children and young people, whether you will join me in protecting what I see is the real casualties in this process.

I know you appreciate the role our community OOHC providers play in providing quality care to our children and young people but to do that they need to attract competent, trained foster carers.

As one OOHC organisation has stated, these matters need to be resolved before they become public as “the unintended consequences of incorrect information being reported to existing and potential foster carers and indeed to children in our care, as well as to our staff are significant”.

I also want to bring to your attention, the attached Facebook post which is on the Labor Party FB page. The inference by the Labor opposition that this Government is selling children is wrong, and I believe, unethical. For the sake of all the children in the care of the state who will be traumatised by this FB post, I have asked that this post be removed. To date, there has been no response from the leader of the Opposition, nor has the Facebook Post been removed.

I intend to make my views very clear that I believe the action of the Labor Opposition is solely focussed on politics and they will do anything, even hurt children, in order to achieve their aims.

I would ask that you join with me in condemning this action.⁹⁶

[133] Evidence shows that Ms Snashall and Ms Jacobson were involved in the drafting of this email,⁹⁷ but the Minister ultimately emailed it to the Commissioner. Ms Jacobson had no recollection of her involvement in drafting the email.⁹⁸

[134] A motion of no confidence in the Minister took place later that day in relation to the out of home care issue.⁹⁹ It followed a period of Parliamentary pressure on the Minister regarding this issue.¹⁰⁰

⁹⁶ Email from the Minister to the Commissioner, 16 March 2017.

⁹⁷ Emails from Ms Snashall to the Minister and Ms Jacobson, 16 March 2017.

⁹⁸ Transcript of interview with Suzie Jacobson, pages 40.

⁹⁹ Hansard, House of Assembly, 16 March 2017.

¹⁰⁰ Hansard, House of Assembly, 7, 8, 9 and 14 March 2017.

[135] The Commissioner's response to the Minister's emailed request deflected the political nature of her request. His return email read:

Dear Minister,

Thank you for your email.

I will prepare a response to your request for advice and am also considering a strategy to more comprehensively respond to these issues, which have been causing me increasing concern over recent weeks. I also have a deep concern about the impact on these vulnerable children and their carers.

I suggest a more immediate response from me to your letter followed by a more comprehensive short report that I can table. I would hope that the Report would have an enduring value. Are you comfortable with this approach?

I will also further elaborate on my comments to The Mercury yesterday.

"It is the responsibility of the entire community to reflect on our attitudes towards these most vulnerable and important young Tasmanians."¹⁰¹

[136] The Commissioner said he pushed back in subsequent conversations and correspondence¹⁰² on the emailed request and expressed concern to Ms Snashall that the request could be perceived to be political in nature.¹⁰³

[137] The Minister had a different perspective to the suggestion that the email was political in nature. She said:

No, I didn't see the term that my email – because I asked him for ... advice. I didn't ask for anything more than his advice, you know, I didn't ask for a review or any investigation. But on the specific action of the Labor Party. I didn't ask for advice on the Labor Party itself, but on the actions of what the Labor Party was doing. So, to me, that was in his role, which is to – and if we go to, you know, the functions and powers of the Commissioner, he is to advocate for all children and young people in the state generally, especially for those who are vulnerable, you know, and vulnerable being children in at home care. So, in regards to what he is supposed to do as an advocate for children and young people this is all about children and young people under the Children, Young Persons and Their Families Act. So for me, it was going directly to what his advice was in regards to how we could best protect these children and young people in care.¹⁰⁴

[138] The Minister gave evidence that it was the initial action of the Labor Party that made her request for advice from the Commissioner appear partisan, that is prejudiced in favour of a particular cause,¹⁰⁵ in the party political sense. She was acting out of response to the Labor Party's action (in relation to the Facebook post) that was impacting on out of home care children:

But it wasn't meant to be partisan but they were – it was that they – their specific action when, at the time, when I had children and young people in care who didn't want to go to school, who I was having to get extra counselling services for where NGOs were worried that they would have to shut down that they didn't know what allegations were going to be made in Parliament where the whole out of home care system in Tasmania could actually be brought to the brink of collapse because if we kept on losing NGOs or NGOs stopped wanting to take in care, there was grave concerns. So I was appealing to him

¹⁰¹ Email from the Minister to the Commissioner, 16 March 2017.

¹⁰² Transcript of interview with Mark Morrissey, page 52.

¹⁰³ Ibid.

¹⁰⁴ Transcript of interview with the Hon Jacquie Petrusma MP, page 30.

¹⁰⁵ <https://en.oxforddictionaries.com/definition/partisan>.

*because he has a responsibility for vulnerable children, which is children under the care and protection order under the Children, Young Persons and Their Families Act – so, this is what my concern was, that if what was going on by what was being alleged in Parliament without any evidence, if this continued, I wouldn't have an NGO left in this state to provide services ...*¹⁰⁶

[139] She elaborated on this point:

*... at the time the only party that was politicising it was the Labor Party. The Greens said – Cassy O'Connor deliberately told me they were staying out of it because they could see that this is just going – that it was going to have a destructive force.*¹⁰⁷

[140] Ms Jacobson, although not able to recall much of the background discussion that led to the Minister sending the 16 March 2017 email, indicated a view that it was sent with a genuine apolitical intent:

*I think she wrote in a respectful manner, asking his advice. I think she was very concerned. I think she would've thought that given it was the Liberal Government is selling children, that it's something that actually does go at the heart, regardless of who, whether it was the Labor Government selling children or the Greens selling children, it's not a respectful way to deal with children who are at their most vulnerable, so I think she was asking for his response in relation to that and it would've been done in a genuine way.*¹⁰⁸

[141] Ms Jacobson suggested that the email could have been better phrased, but reiterated that it was sent with the interests of children in mind:

*I think, given the strength of feeling I know the Minister had, she would've wanted him - because she was very concerned about this. It had been after we'd had accusations of children living with maggots, all of which were proved to be wrong in Parliament, so I think – and those kids went to school and were ostracised as part of it. I think she felt genuinely that it would be something that he, who was – and undeniably - had children at the height of his concern, that he would want to comment on it. I can't talk for what she said and I think ... I mean everything could be better phrased, and hindsight's a wonderful thing. You think back and think, gosh, I could've said that better but it's not something – it's where your head's at at the time because emails can be quite blunt and it can mean something completely different.*¹⁰⁹

Media release 17 March 2017

[142] In response to the email, the Commissioner issued a press release in relation to the damage being caused children in out of home care by public debate. It sought care and respect for such children in this public debate.¹¹⁰

Letter from the Minister to the Commissioner dated 22 March 2017

[143] The Minister sent a signed letter dated 22 March 2017¹¹¹ to the Commissioner. This letter referred to the impact on children and young people from public reporting and discussion about those children in out of home care and sought his advice on how

¹⁰⁶ Transcript of interview with the Hon Jacqui Petrusma MP, pages 31-32.

¹⁰⁷ Ibid, page 44.

¹⁰⁸ Transcript of interview with Suzie Jacobson, pages 41-42.

¹⁰⁹ Ibid, page 42.

¹¹⁰ Email from the Commissioner, 3 April 2017.

¹¹¹ Letter from the Minister to the Commissioner, 22 March 2017.

such children should be protected. There was no reference to the politics or political parties.¹¹² The Commissioner was unconcerned by this letter.

Meeting between the Minister and the Commissioner dated 27 March 2017

[144] On 27 March 2017, there was a meeting in the Ministerial Office. Ms Jacobson was not present. The Commissioner recorded a file note of this meeting a week later on 3 April 2017. In the file note, he recalled the presence of the Minister, Ms Snashall, Mr Pervan and him.¹¹³

[145] He noted in this file note that further verbal requests from the Minister were made that he saw as inappropriate and contrary to his impartial and independent role:

I met with JP, PS and MP at 1000hrs on 27/03/17 in MO offices.

JP verbally requested I write a letter to the Labor Party condemning their recent actions in Parliament re kids in OOH. I explained this would compromise and politicise my role as CCYP. I advised I could not do this.

JP then advised I write to all members of Parliament. This request also concerned me.

Later that day 27/03/17 at approximately 1500 hrs, I met with PS and explained that I was unable/unwilling to undertake either of these requests. We discussed other options in regard to these requests. I was very clear any options must not politicise the CCYP role.

Today - 03/04/17 I sent a formal reply to JP (attached) as requested.

PS phoned CCYP office at approximately 0930 expressing concern that I had referenced "advice impacting on the political domain" in today's letter to JP.

Annie McLean has made a file note re this call.

(I remain of the view that the CCYP role must remain impartial and apolitical and I have concerns this stance is under pressure).¹¹⁴

[146] Contrary to the Commissioner's file note, the evidence shows that neither Mr Pervan nor Ms Snashall was present at this meeting.¹¹⁵ The meeting involved the Commissioner and the Minister only.¹¹⁶

[147] The Minister's recollection of the 27 March 2017 meeting was clear and differed to that of the Commissioner. She denied asking either question verbally of the Commissioner:

I had no need to ask him to do that because especially when he'd made it very clear in his – but in his press release that his role is impartial and apolitical and you know he's going to be solely focused on what's best for children, so I took it from that ...

...

... that's why my letter on that date, I didn't mention it, and so when I read that, I thought I had no reason on that meeting to actually bring it up, what we did focus on was discussing the media reporting.¹¹⁷

¹¹² Ibid.

¹¹³ Email from the Commissioner, 3 April 2017.

¹¹⁴ Ibid.

¹¹⁵ Transcript of interview with the Hon Jacquie Petrusma MP, page 35; transcript of interview with Pene Snashall, pages 37-38.

¹¹⁶ Transcript of interview with the Hon Jacquie Petrusma MP, page 35.

¹¹⁷ Transcript of interview with the Hon Jacquie Petrusma MP, page 34.

[148] The Minister denied asking the Commissioner to write to the Labor Party condemning its actions:

A: Well by this stage it was quite obvious to me that the Commissioner was not going to do anything of the sort based on his media release, so – and also that’s evidenced by the fact that I never again mentioned the ALP here, but also when he said to me in his initial, as I said, his initial email thirty-two minutes after my first email, that this is what he was going to do as strategy and I said “Oh yes, I support this approach” – I’d take it that’s what he was going to do. So I had no reason why I would ask him to write a letter to the ALP, it’s – because I knew that if he – if he was ever going to say anything it would be a public thing like he did, for example in here, where he says:

In all our actions, comments, and debates, we must first ensure that we are doing no harm even unintentionally.

But no.

Q: It didn’t happen?

...

A: Definitely not.¹¹⁸

[149] The Minister had no recollection of asking the Commissioner to write to all parliamentarians and said the Commissioner appeared unperturbed by their discussion. She gave evidence:

Q: And we’ve also received information that you then verbally asked Mark to write to all parliamentarians regarding the out of home care – out of home care issue, again, like sending the same message.

A: Mm, the only thing I – if – I’m not a hundred percent sure of that one, but again, it was just more that he was going to do a pamphlet info sheet for all service providers, politicians, the community – this is his words that he sent to us, that’s what he was going to do. So, it was more like if he was going to do that info sheet, that pamphlet, that it would be handy to get it out for everyone, so everyone had a full understanding of what

...

our responsibilities – especially under s103 of the Act that we can’t – you see, at the time allegations were being made in regards to kids and ice usage and once that’s on the public record it takes too hard to get back. ... So I didn’t want anything stated in Parliament where kids were named up or their circumstances, which were then shown to be false but which these kids would then have to live with for the rest of their life as being publicly available that you can’t it off. So, all this was all about was just making sure that we could get what he said he was going to do, this pamphlet, in motion for everyone.

Q: Okay. Did Mark seem to be concerned about your conversation?

A: Not at all.¹¹⁹

Letter from the Commissioner to the Minister dated 3 April 2017

[150] The Commissioner then prepared a letter to the Minister, attaching the media release dated 17 March 2017, providing advice in relation to having public discussions about children in out of home care.¹²⁰ He emailed the letter to Ms Snashall. She forwarded it

¹¹⁸ Ibid, page 35-36.

¹¹⁹ Ibid, page 36.

¹²⁰ Email from the Commissioner, 3 April 2017.

to the Minister and Ms Jacobson.¹²¹ The letter outlined his concerns about the requests to address issues of a political nature:

*In relation to your specific request for advice, it would in my opinion be inappropriate for me to provide advice that relates directly to the behavior of those in the political domain. This is because it is outside the scope of my legislated functions and would amount to me acting in a manner that is contrary to my obligation to perform my functions in an impartial manner.*¹²²

6.14. Analysis

Emailed request to condemn action of ALP on 16 March 2017

- [151] There is evidence that suggests that the political and media discourse in relation to the out of home care issues was having an adverse impact on children and young people.
- [152] The Commissioner has the function of advocating for Tasmanian children and young people.¹²³ It is arguable that he has a role to play in addressing concerns about the impact of the public debate about out of home care issues. The Minister identified her email as being a request for the Commissioner to perform the function of advocating for all children and young people,¹²⁴ but particularly in this case for children in out of home care.
- [153] A request for advice on how to minimise the impact of political debate presents as reasonable in these circumstances. However, the Minister's emailed request for advice about the 'Labor Opposition's current and ongoing politicisation' of the issue and, in particular, the request that he join the Minister in condemning the action of the Labor Opposition has rendered her request political and partisan in appearance.
- [154] The Commissioner is required to act independently and impartially when performing a function or exercising a power.¹²⁵ If he did as the Minister requested in her email, his independent and impartial performance of his function of advocating for all children and young people may have been undermined.
- [155] On its face, an allegation that a Minister attempted to influence the Commissioner to advocate on the basis of a political party allegiance, rather than on the sole basis of the best interests of children and young people in the State generally, is capable of falling within the referenced definition of misconduct set out in s 4(b) of the *IC Act*.
- [156] The Commissioner working for the benefit or detriment of a political party – in any way, even a small or partial way - may not be proper, as it would both be outside his functions, and would undermine his function set out in s 8(1)(a) of the *CCYP Act*. It would also undermine the way in which he is meant to go about his functions, as set out in s 8(3) of the *CCYP Act*.
- [157] The Commissioner working for the benefit or detriment of a political party, in any way or to any extent, may also not be honest, as – contrary to the public understanding of his role and any actions he might take stemming from that role – he would not be advocating solely in the public interest, or in the interest of children and young people, but rather in the interest of a political party (at least in part).

¹²¹ Email from Ms Snashall to the Minister and Ms Jacobson, 3 April 2017.

¹²² Email from the Commissioner, 3 April 2017.

¹²³ *CCYP Act* s 8(1)(a).

¹²⁴ Transcript of interview with the Hon Jacque Petrusma MP, page 30.

¹²⁵ *CCYP Act* s 8(3).

- [158] Following submissions at the procedural fairness stage of the investigation, legal advice was sought from the Solicitor General as to whether the Commissioner was a public servant for the purposes of the Ministerial Code of Conduct. The Commissioner is not appointed under the *State Service Act 2000*, and although the Commissioner might be a servant of the Crown, it is not what the term 'public servant' as used in the Ministerial Code of Conduct is intended to capture. Rather, it is intended to ensure that a Minister maintains a proper relationship with and behaves properly towards state servants. In short, the Commissioner is not a public servant for the purposes of the Ministerial Code of Conduct, and the Ministerial Code of Conduct requirement that Ministers respect the apolitical role of public servants does not apply to the Commissioner.
- [159] The ongoing political and media pressure on the Minister at the time¹²⁶ presented to the Commissioner¹²⁷ as being at least a partial motivation for the emailed request.
- [160] There are other relevant issues to consider to properly assess and contextualise the Minister's emailed request.
- [161] There is credible evidence that the Minister was genuinely concerned for the welfare of the affected children, and that this influenced her request in the 16 March 2017 email.
- [162] The Minister's evidence that the posting of potentially damaging material on Facebook was an action of the ALP is noted. Her email addressed that initial action by the ALP.
- [163] It is also worth noting that the Commissioner's understanding of, and adherence to, his independent function under the *CCYP Act* meant that he was never going to accede to the request. There was not a risk that the Commissioner was going to act in a partisan way.

Meeting between the Minister and the Commissioner dated 27 March 2017

- [164] The only two people at this meeting were the Commissioner and the Minister. It is clear that there was some sort of discussion about ways of limiting the impact on out of home care children in public and parliamentary debate.
- [165] The Minister recalled that the Commissioner in no way indicated to her that he had any concerns about this conversation on 27 March 2017.
- [166] The Minister was mindful that the Commissioner had already indicated he would not involve himself in political debate, and was adamant that she did not verbally ask him to write to the Labor Party condemning their actions in this meeting.
- [167] Evidence has been given that the Commissioner (and to some extent others) became somewhat confused in dealings with the Ministerial Office about this issue. His file note, prepared a week after the meeting, presents as an example that corroborates this observation. The file note incorrectly lists Ms Snashall and Mr Pervan as being present, when this was not the case. His recollection about this meeting was short on specific detail.
- [168] It seems quite plausible that the Commissioner has been confused about the various written and verbal interactions he has had with the Minister and her staff, and that this may have clouded his recollection of what was discussed in this meeting.

¹²⁶ Hansard, House of Assembly, 7, 8, 9, 14 and 16 March 2017.

¹²⁷ Transcript of interview with Mark Morrissey, pages 55-56.

7.0 FINDINGS

[169] In accordance with the *IC Act*, an investigator cannot make a finding that misconduct has occurred – only an Integrity Tribunal can make such a finding.

[170] The Act is not explicit about what findings an investigator can make but it is the practice of the Commission for the investigator to set out the evidence that he or she has gathered and make findings of fact, and also to make findings about what the balance of the evidence might conclude for a relevant decision maker. In some instances, an investigator will make recommendations.

Allegation 1: That Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner at a meeting held to discuss the future of the AYDC held on 30 November 2016.

[171] On the basis of evidence obtained by the Commission:

- At the meeting held on 30 November 2016, Ms Jacobson did not request or direct the Commissioner to stop writing to the Minister. She queried the purpose of the Commissioner's letter to the Minister dated 11 November 2016, which she saw as being on operational issues that were better directed to the Department. The Commissioner perceived this query to be a request not to write to the Minister.
- At the meeting, Ms Jacobson made reference to the *RTI Act* as a means of explaining to the Commissioner why she felt writing to the Minister may not be the best course of action. The Commissioner perceived this reference as Ms Jacobson attempting to protect the Minister from potential political damage caused by any future RTI requests.
- Factors which contributed to the misunderstanding were:
 - a deteriorating relationship and related communication problems between the Commissioner and Ms Jacobson
 - at times Ms Jacobson behaved in a manner that is suggestive of a lack of understanding or appreciation for the statutory independent role of the Commissioner, and
 - the Commissioner's tendency at times to perceive a slight when none was intended.
- The Commissioner continued to write to the Minister after the meeting on 30 November 2016.
- Ms Jacobson did not obstruct the Commissioner and did not breach s 23 of the *CCYP Act*.

Allegation 2: That Ms Jacobson failed to treat the Commissioner with respect at a meeting held to discuss the future of the AYDC held on 30 November 2016.

[172] On the basis of evidence obtained by the Commission:

- At the meeting on 30 November 2016, Ms Jacobson queried the motives underlying the Commissioner's actions, and queried the purpose of the 11 November 2016 letter. She did not say to the Commissioner that in writing the letter he was 'arse covering' or that he was acting out of self-interest. The Commissioner subsequently described his perception of what occurred in these terms.

- Factors which contributed to this misunderstanding were:
 - a deteriorating relationship and related communication problems between the Commissioner and Ms Jacobson
 - at times Ms Jacobson behaved in a manner that is suggestive of a lack of understanding or appreciation for the statutory independent role of the Commissioner, and
 - the Commissioner's tendency at times to perceive a slight when none was intended.

Allegation 3: That Ms Jacobson failed to treat the Commissioner with respect at a meeting about a draft report regarding out of home care issues on 20 January 2017.

[173] On the basis of evidence obtained by the Commission:

- At the meeting held on 20 January 2017, Ms Jacobson did not tell the Commissioner that his report was based on his need to seek media attention and self-promote, and was not based on the interests of children.
- At the meeting, Ms Jacobson asked a clarifying question, which the Commissioner perceived to be an offensive and disrespectful comment. The reference to 'self-promotion' in his file note were words used by the Commissioner in response to the query. They were not the words used by Ms Jacobson.
- Factors which contributed to this misunderstanding were:
 - a deteriorating relationship and related communication problems between the Commissioner and Ms Jacobson
 - at times Ms Jacobson behaved in a manner that is suggestive of a lack of understanding or appreciation for the statutory independent role of the Commissioner, and
 - the Commissioner's tendency at times to perceive a slight when none was intended.

Allegation 4: That Ms Jacobson engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner at a meeting about a draft report regarding out of home care issues on 20 January 2017.

[174] On the basis of evidence obtained by the Commission:

- Having regard to the findings made in allegation 3, Ms Jacobson did not engage in conduct that adversely affected, or could have adversely affected, the performance of the Commissioner's functions by way of making public comment.
- The Commissioner continued to make public comment on relevant matters.

Allegation 5: That the Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way by asking him by email to join her in condemning an action of the ALP on 16 March 2017.

[175] On the basis of evidence obtained by the Commission:

- The out of home care post of concern to the Minister was on the Facebook account of the ALP and involved an initial action of the ALP.
- The Minister did email the Commissioner asking him to join her in condemning an action of the ALP on 16 March 2017.
- The Minister's emailed request to the Commissioner dated 16 March 2017 arose from her genuine concerns about the impact of public discourse on out of home care children and young people.
- Although the emailed request by the Minister arose from her genuine concerns about the impact of public discourse on out of home care children and young people, her decision to send this email to the Commissioner was also partially influenced by the political and media pressure at that time.

Allegation 6: That the Minister failed to respect the apolitical role of the Commissioner by asking him by email to join her in condemning an action of the ALP on 16 March 2017.

[176] On the basis of evidence obtained by the Commission, the Minister did email the Commissioner asking him to join her in condemning an action of the ALP on 16 March 2017.

[177] The Commissioner is not a public servant for the purposes of the Ministerial Code of Conduct, and therefore there was no apolitical role held by the Commissioner that the Minister was required to respect under the Ministerial Code of Conduct.

Allegation 7: That the Minister engaged in conduct that adversely affected, or could have adversely affected, the honest and proper performance of the functions or exercise of powers of the Commissioner by asking him to perform in a partisan way by asking him to write to the ALP to condemn their recent actions in Parliament regarding out of home care issues and by asking him to write to all parliamentarians about debate regarding out of home care issues on 27 March 2017.

[178] On the basis of evidence obtained by the Commission:

- The Commissioner and the Minister met on 27 March 2017 and discussed the impact of public and parliamentary discourse on children in out of home care.
- At that meeting, the Minister did not verbally request the Commissioner to write to the ALP condemning their recent action, nor did she verbally request the Commissioner to write to all parliamentarians expressing concern about the public debate affecting vulnerable children and young people.

Allegation 8: That the Minister failed to respect the apolitical role of the Commissioner asking him to write to the ALP to condemn their recent actions in Parliament regarding out of home care issues and by asking him to write to all parliamentarians about debate regarding out of home care issues on 27 March 2017.

[179] On the basis of evidence obtained by the Commission:

- The Commissioner and the Minister met on 27 March 2017 and discussed the impact of public and parliamentary discourse on children in out of home care.
- At that meeting, the Minister did not verbally request the Commissioner to write to the ALP condemning their recent action, nor did she verbally request the Commissioner to write to all parliamentarians expressing concern about the public debate affecting vulnerable children and young people.
- The Commissioner is not a public servant for the purposes of the Ministerial Code of Conduct, and therefore there was no apolitical role held by the Commissioner that the Minister was required to respect under the Ministerial Code of Conduct.

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