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**REPORT TO OFFICE OF THE COMMISSIONER FOR PUBLIC SECTOR
EMPLOYMENT**

**Report on a workplace investigation into the conduct of the Chief
Executive, Department for Health and Wellbeing (SA)**

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EXECUTIVE SUMMARY

This is the report of an independent workplace investigation into the conduct of Dr Chris McGowan, Chief Executive, Department for Health and Wellbeing (SA). Prior to his appointment as Chief Executive in May 2018, Dr McGowan was the Chief Executive Officer of the Silver Chain Group. The Group (including the Royal District Nursing Service) is a party to several contracts with the South Australian Government to provide nursing and health services.

Questions have been raised in the public arena as to whether Dr McGowan complied with his obligations to deal with actual, potential and perceived conflict of interest concerns relating to his links to Silver Chain. The obligations Dr McGowan was required to meet are imposed by the *Public Sector Act 2009 (SA)*, the *Public Sector (Honesty and Accountability) Act 1995 (SA)* and the *Code of Ethics for the South Australian Public Sector*.

Dr McGowan referred these matters to the Commissioner for Public Sector Employment. The Commissioner commenced an own initiative investigation, that includes this independent investigation.

The main findings in this report are:

- Dr McGowan resigned his role as sole director of a Silver Chain Group company approximately two months after he commenced as Chief Executive of SA Health. This was an inadvertent error as Dr McGowan had relied on assistance from Silver Chain officials to sever his relationship with the company.
- Dr McGowan should have notified the Minister of this oversight as required by s 17(1)(c) of the *Public Sector (Honesty and Accountability) Act 1995 (SA)*.
- The form resigning as a Director wrongly recorded the date of resignation as 4 May 2018 rather than 16 July 2018. This, too, was an unintentional oversight for which Dr McGowan accepts responsibility. This is not a matter that needs to be taken further as it does not appear that anything substantive now turns on the error.
- Dr McGowan completed a 'Statement of Pecuniary Interests', as required by s 17(1) of the *Public Sector (Honesty and Accountability) Act 1995 (SA)*. The declaration was completed more than six months later than the date required by the Act.
- SA Health procurement decisions relating to Silver Chain were properly handled by the Department and Dr McGowan. Proper governance arrangements were in place to eliminate actual, potential and perceived conflict of interest concerns.
- As Chief Executive of SA Health, Dr McGowan took an appropriate interest in programs administered by the Department, including programs involving Silver Chain.
- Dr McGowan's contact with former Silver Chain colleagues after his appointment as Chief Executive was generally appropriate. The only contact that is criticised in this report is a meeting that Dr McGowan held with a Deloitte Consulting partner, contrary to the advice of senior officials in his department.
- There was a failure on Dr McGowan's part to put appropriate conflict of interest arrangements in place upon commencing as Chief Executive of SA Health. He should have done so, given his long-standing former career as Chief Executive Officer of the Silver Chain Group. Dr McGowan acknowledges this failure. Those arrangements could have included better record keeping of contacts with Silver Chain officials, and direct written and oral engagement with SA Health officials on probity risks.
- The findings in this report should be taken up in discussion between Dr McGowan and the Commissioner for Public Sector Employment.

1 THIS INVESTIGATION

Scope of investigation

This is the report of a workplace investigation into the conduct of Dr Chris McGowan, Chief Executive, Department for Health and Wellbeing (SA). The investigation relates to Dr McGowan's appointment as Chief Executive in May 2018 and his conduct as Chief Executive after that date.

The issues that have been investigated stem from a common issue – Dr McGowan was the Chief Executive Officer of a private entity, the Silver Chain Group, prior to his appointment as a South Australian public sector employee. Questions have arisen as to whether Dr McGowan acted appropriately in severing his employment relationship with the Silver Chain Group and, subsequently as Chief Executive of the Department, in handling matters involving the Silver Chain Group that required action by the Department and in his contact with officers of the Silver Chain Group.

The Terms of Reference for this investigation cover five matters:

- the circumstances and details of Dr McGowan's resignation from his role as Chief Executive Officer of the Silver Chain Group (and all of its subsidiaries or related entities) and directorships prior to starting his role as Chief Executive of the Department for Health and Wellbeing;
- Dr McGowan's disclosure of his pecuniary interests associated with his engagement as Chief Executive, in accordance with the *Public Sector (Honesty and Accountability) Act 1995 (SA) (PSHA Act)*;
- Dr McGowan's obligations under the *Corporations Act 2001 (Cth)* in relation to his (now former) directorship with Silver Chain Corporate Services Pty Ltd (including whether there were any legal issues associated with the backdating of documents);
- the actions of Silver Chain Group as a Government contractor in supporting their former Chief Executive Officer to be aware of, and resign from, all relevant Director positions given his separation as Chief Executive of the Silver Chain Group; and
- whether there is any conflict of interest arising from any dealings Dr McGowan had with Silver Chain Group or any dealings his office had with Silver Chain Group during the period of his employment as Chief Executive, Department for Health and Wellbeing.

Commencement of investigation

The Commissioner for Public Sector Employment (**Commissioner**) commenced this investigation in November 2019 under section 14(1)(g) of the *Public Sector Act 2009 (SA) (PS Act)*. This followed a notification that Dr McGowan made to the Commissioner on 14 November 2019, following a media report the same day of matters relating to Dr McGowan's appointment.

I was formally engaged on 28 November 2019 as an external investigator by the Crown Solicitor (instructed by the Commissioner) to conduct inquiries, interview witnesses, gather relevant information and provide a report. This was to be done in accordance with the terms of a 'Standard Goods and Services Agreement' that I entered into with the Office of the Commissioner on 27 November 2019. The Agreement set out the Terms of Reference for this investigation. We later varied the agreement on 31 December 2019 to extend the time for delivery of a report to 31 January 2020.

My letter of engagement from the Crown Solicitor dated 28 November requested that my report be addressed to the Commissioner care of a nominated Senior Solicitor in the Crown Solicitor (this is

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done in the letter of transmission for this report). The Crown Solicitor provided me with an extensive range of documents (comprising five folios) for this investigation.

Investigation framework and principles

The Commissioner has a function under the PS Act s 14(1)(g) to 'investigate or assist in the investigation of matters in connection with public sector employee conduct ... on the Commissioner's own initiative'. My understanding is that this investigation is being done on an own initiative basis under that provision.

The PS Act does not specify the procedure for conducting an investigation, nor stipulate how an investigation is to be concluded or reported. There is no express reference in the Act to engaging an external investigator – nor does the Act preclude that expedient.

Though it has not been necessary for me in preparing this report to make findings on any disputed issues of fact, I note for the record that I have been guided by the civil standard of proof that is ordinarily applied in administrative investigations – that is, a 'balance of probabilities' or 'more probable than not' approach. The strength of the evidence necessary to reach that degree of satisfaction can nevertheless vary according to the seriousness of an allegation. That principle, known as the *Briginshaw* test,¹ can require stronger than normal evidence to support a serious allegation of criminality or moral wrongdoing, or to ground a finding of serious and wilful misconduct that could warrant an adverse consequence such as dismissal.

Another matter that I have discussed with others in preparing this report is compliance with the requirements of procedural fairness. It is not questioned that procedural fairness must be afforded to Dr McGowan before any finding is reached in this investigation or action is taken within the South Australian public sector based on this investigation that could be professionally disadvantageous to him.

The interview that I conducted with Dr McGowan for this investigation goes some way to meeting that procedural fairness obligation. However, further steps may be required if the adverse findings in this report are either endorsed or acted on. The sensible option would be for the Commissioner to decide what steps should be taken after considering this report. I am prepared to be consulted or to participate in a subsequent procedural fairness process if requested. However, the law does not require my participation if others can satisfactorily ensure that procedural fairness requirements are met.

For the record, I also note that I have no prior involvement with any of the matters considered in this report. Nor have I had prior contact with any of the key witnesses I interviewed for this investigation, including Dr McGowan.

Conduct of investigation and evidence considered

I commenced investigation on 1 December 2019 when I received relevant documents and met with the Commissioner, Ms Erma Ranieri, in Adelaide.

The written material that was provided to me by the Crown Solicitor for this investigation included the following documents:

- Dr McGowan's SA Government contract of employment, pre-employment declaration and pecuniary interests disclosures

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.at 361.

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- Documents provided by Dr McGowan to the Commissioner on 14, 19, 21, 26 and 27 November 2019 (many of these documents were released by the Department in response to requests from third parties under the Freedom of Information Act 1991 (SA) (**FOI Act**))
- Media reports relating to Dr McGowan's appointment and disclosures up to 27 November 2019
- The PSHA Act and Regulations and the Code of Ethics for the South Australian Public Sector
- Correspondence to the Commissioner from the Shadow Minister for Health and Wellbeing, the Hon Chris Picton MP, dated 22 and 27 November 2019.

I have subsequently been provided by the Commissioner with three other categories of documents:

- Media reports after 27 November 2019
- Extracts from the Hansard of the South Australian Legislative Assembly and Legislative Council, and the Budget and Finance of the Council, for the period 26 November to 16 December 2019
- Documents relating to the selection process that led to Dr McGowan's appointment as Chief Executive.

Additional documents were provided by two other parties who I interviewed:

- Mr Chris Picton made a written submission dated 17 December 2019, with attachments
- Ms Lyn Dean provided a folio of documents relating to the adoption of the Integrum project.

I interviewed the following South Australian Government officers in Adelaide in the period 3-5 December 2019 (the interview with Dr McGowan was recorded and a transcript prepared that is Attachment A; the other interviews were not recorded):

- Dr McGowan
- The Hon Stephen Wade MLC, Minister for Health and Wellbeing
- Mr Don Frater, Deputy Chief Executive, System Leadership and Design, Department for Health and Wellbeing
- Ms Lynne Cowan, Deputy Chief Executive, Commissioning and Performance, Department for Health and Wellbeing
- Ms Lyn Dean, Executive Director, Chief Executive, Wellbeing SA, Department for Health and Wellbeing
- Ms Nicole Chapman, Principal Executive Officer (**PEO**) to the Chief Executive, Department for Health and Wellbeing
- The Hon Chris Picton MP, Shadow Minister for Health and Wellbeing
- Mr Wayne Lines, South Australian Ombudsman
- The Hon Bruce Lander QC, Independent Commissioner Against Corruption.

I mention also that I received two telephone calls from a person who chose to remain anonymous, claiming to make public interest disclosures for the purposes of this investigation. The calls did not impart any specific information that is referred to or relied upon in this report. I have discussed those calls with the Commissioner.

Limited scope of investigation

I note three limitations on the scope of this investigation that stem from the Terms of Reference.

First, the focus of the Terms of Reference is upon Dr McGowan's conduct as a public sector employee in South Australia. That focus conforms to the functions of the Commissioner under s 14 of the PS Act. Upon commencing this investigation I clarified with the Crown Solicitor that the fourth item in the Terms of Reference required investigation only to the extent that the actions of the Silver Chain Group are relevant to Dr McGowan's conduct.

I have not found it necessary to approach the Silver Chain Group to examine corporate documents relating to Dr McGowan's severance from his employment or contact with officials. I believe that the documents provided to me for this investigation and other evidence I have received (particularly from SA Government officials) has been adequate to support the findings in this report. It is customary in an administrative investigation that corroborative evidence is not required for witness claims or assertions that appear reasonable and credible.

Secondly, some matters in this investigation have been canvassed in evidence that Dr McGowan has given to the Budget and Finance Committee of the Legislative Council of the South Australian Parliament on 23 July 2018 and 16 December 2019. Questions have been asked in the Parliament (in those proceedings and in questions to Ministers) about whether Dr McGowan has given full and accurate evidence to the Parliament. That is not a matter that I have explored directly. It is for the Parliament to examine the adequacy of witness evidence. I am mindful also of Article 9 of the UK *Bill of Rights 1689*, which applies as part of the law of parliamentary privilege in South Australia.² Article 9 provides: 'The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

In Dr McGowan's recent evidence to the Budget and Finance Committee on 16 December he responded to several questions by stating that he would not provide an answer to the Committee at that stage as he anticipated that the matter under question would be addressed in the report that I prepared following this investigation. I note that I am guided by the Terms of Reference for this investigation and not an expectation that I will necessarily address other issues that have been raised in the public arena relating to Dr McGowan.

Thirdly, it has been questioned publicly whether Dr McGowan attended Liberal Party fundraising functions prior to his appointment as Chief Executive. This topic does not arise under the Terms of Reference for this investigation. I note too that Dr McGowan addressed the matter and tabled a relevant document in a recent appearance before the Budget and Finance Committee of the Legislative Council on 16 December 2019.

2 THE FRAMEWORK FOR PUBLIC SECTOR EMPLOYMENT

Public Sector Act 2009

Dr McGowan was appointed to the position of Chief Executive of the Department in accordance with the provisions of the PS Act (s 35). Provisions of the Act that are relevant to this investigation include the following:

- *Coverage*: The Act applies to 'public sector employees'; that term is defined to include 'a chief executive of an administrative unit', which in turn is defined to include 'a department' (s 3(1)).

² *Constitution Act 1934* (SA).

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- *Objects*: The objects of the Act include establishing 'a code of conduct to enforce ethical behaviour and professional integrity in the public sector' (s 4(b)).
- *Public sector principles*: The Act specifies seven public sector principles, that include the following:
 - (6) **Ethical behaviour and professional integrity**

Public sector employees are to be honest; ... avoid conflicts of interest, nepotism and patronage; ... avoid conduct that will reflect adversely on the public sector' (s 5).
- *Public sector code of conduct*: Public sector employees must observe the public sector code of conduct that is issued by the Commissioner under Part 4 of the PS Act (s 6). The Code is a legislative instrument for the purposes of the *Subordinate Legislation Act 1978* (SA) s 15(7)).
- *Responsibilities of Chief Executive*: 'The chief executive of an administrative unit is to ensure, as far as practicable, that the objects of this Act are advanced and the public sector principles and code of conduct are observed in the management and day-to-day operations of the unit' (s 32).
- *Enforcement*: The Commissioner has several functions to ensure that the requirements of the Act are observed, including functions to advance the objects of the Act, promote observance of the public sector principles, issue the public sector code of conduct, monitor and report to the Minister on the observance of the public sector principles, provide advice on public sector employment matters, and conduct investigations into public sector employee conduct (s 14).
- *Breaches*: The Act lays down a framework for disciplinary action (including termination of employment) to be taken on the ground of an employee's misconduct (ss 54, 55). 'Misconduct' is defined in the Code of Ethics issued by the Commissioner as a contravention or failure to comply with one of the nine professional conduct standards set out in the Code. Termination for misconduct can apply to a chief executive (s 38(1)(b)).

Public Sector (Honesty and Accountability) Act 1995

The PSHA Act imposes duties of honesty and accountability on public sector office holders, employees and contractors. The Act separately specifies the duties that apply to different categories of officials and contractors – including the 'Duties of senior officials' (ss 15-18). A chief executive of a department is a 'senior official' (s 2(1)). The duties include the following:

- *Duty to act honestly*: 'A senior official must at all times act honestly in the performance of his or her duties, whether within or outside the State' (s 16(1)). This duty does not apply to conduct that is 'merely of a trivial character and does not result in significant detriment to the public interest' (s 16(2)).
- *Duty with respect to conflict of interest*: A senior official has the following disclosure and other obligations:
 - disclose any pecuniary interest to the Minister in writing within one month of appointment (s 17(1)(a), (2)). The term 'pecuniary interest' and the scope of the disclosure obligation are set out in the *Public Sector (Honesty and Accountability) Regulations 2010* (SA). The term includes an office held by the person (whether as a director or otherwise) in a company for which the person has received or is entitled to receive remuneration or a fee (reg 4(1))
 - disclose to the Minister in writing any further pecuniary interest that is acquired after the person's appointment (s 17(1)(b))

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- disclose in writing to the Minister any pecuniary interest 'or other personal interest [that] conflicts or may conflict with his or her duties', and not take action in relation to the matter except as authorised in writing by the Minister (s 17(1)(c))
- comply with any written direction from the Minister to resolve a conflict between the official's duties and a pecuniary or other personal interest (s 17(3))
- these duties do not apply if an official is unaware of a conflict or potential conflict (s 17(8)).

Failure to comply with the conflict of interest duties is both a criminal offence and can be enforced by a civil penalty order (s 18). The PSHA Act also deals with whether a contract can be avoided on the basis that a senior official has not complied with a disclosure obligation (s 17(5)-(7)).

Code of Ethics for the South Australian Public Sector

This is the code of conduct issued by the Commissioner under s 6 of the PS Act. Public sector employees (including chief executives) are required to observe the Code. Five features of the Code should be noted for the purposes of this investigation.

First, the Code commences with an aspirational statement that public sector employees must act 'effectively and with the utmost professional integrity'. Similarly, the Code exhorts employees to be 'united by common values and standards of professionalism'.

Secondly, the Code stresses that all public sector employees must familiarise themselves and act consistently with the values and standards of professional conduct set out in the Code. Chief executives have an added responsibility that is set out in a separate section of the Code:

Responsibility of chief executives and other organisational leaders

Strong and visible leadership is a critical factor in achieving support for, and adherence to, the values and professional conduct embodied by this Code.

Chief executives and other organisational leaders have a special responsibility to demonstrate publicly their support for both the spirit and letter of the Code through their actions.

In addition to exemplary personal behaviour, chief executives and other organisational leaders are responsible for raising awareness of the Code, promoting debate on application of its content, and responding to any issue – including requests for guidance – raised by employees.

Thirdly, the Code briefly explains that 'Four Foundations of Public Service' underpin the values and standards outlined in the Code – democracy, impartiality, accountability and diversity. The explanation of 'Impartiality' includes a statement that 'Public sector employees must be detached from political influence and the influence of partisan interests within the community'.

Fourthly, the Code sets out eight Values that guide the development of the South Australian public sector. These Values are articulated in the *Public Sector Values and Behaviours Framework*. One of the Values is: '*Honesty and Integrity*: act truthfully, consistently, and fairly'.

Fifthly, the Code sets out nine Professional Conduct Standards that are the core of the disciplinary framework in the PS Act. Contravening or failing to comply with a professional conduct standard constitutes misconduct for the purposes of the PS Act. One of the nine standards deals with Conflicts of Interest, and provides in part:

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Public sector employees will avoid actual or potential conflicts of interest.

Public sector employees will ensure their personal or financial interests do not influence or interfere with the performance of their role. ...

Employees will disclose in writing to their chief executive or agency head any actual or potential conflicts of interest at the earliest available opportunity ...

3 BRIEF CHRONOLOGY OF KEY EVENTS

The sequence of key events that provide the backdrop for the matters discussed in this report is:

- August 2007: Dr McGowan commenced as Chief Executive Officer (**CEO**) of the Silver Chain Group (**Silver Chain**)
- 19 March 2018: New SA Government sworn in following the recent election
- March 2018: recruitment process undertaken for the position of Chief Executive, SA Health; candidates were interviewed by a three member selection panel
- 10 April 2018: Dr McGowan signed 'Pre-Employment Declaration' (describing events as at 20 February 2018)
- 19 April 2018: Premier approved the appointment of Dr McGowan as Chief Executive, SA Health; Contract of Employment signed by the Premier (counter-signed by Dr McGowan on 18 April); Dr McGowan resigned as CEO of Silver Chain, effective 4 May 2018
- 7 May 2018: Dr McGowan commenced as Chief Executive, SA Health
- 16 July 2018: Dr McGowan requested by Silver Chain to complete forms resigning as Director of Silver Chain Corporate Services Pty Ltd (**SCCS**) and appointing a new Director, dated 4 May 2018; signed and forwarded to Silver Chain on 16 July
- 23 July 2018: Dr McGowan gave evidence to the Budget and Finance Committee of the Parliament.
- 27 November 2018: Dr McGowan signed 'Statement of Pecuniary Interests'; counter-signed by Minister on 30 November
- 1 July 2019: Integrum Pilot Project commenced
- 14 November 2019: Dr McGowan notified the Commissioner of his delayed resignation as Director of SCCS
- 1 December 2019: this part of the Commissioner's investigation commenced
- 16 December 2019: Dr McGowan gave evidence to the Budget and Finance Committee of the Parliament.

4 CONSIDERATION OF ISSUES

The five Terms of Reference for this investigation are outlined in Section 1 of this report. Findings on each item are made in Section 5. This section examines the key issues and evidence under the following headings:

- Dr McGowan's conflict of interest disclosures at the time of his appointment as Chief Executive
- Dr McGowan's actions in resigning as Director of SCCS
- Dr McGowan's actions as Chief Executive in relation to matters involving Silver Chain

Dr McGowan's conflict of interest disclosures upon appointment

Dr McGowan was expressly required by s 17 of the PSHA Act to disclose in writing to the Minister at the time of appointment any pecuniary interest, such as an office in a company from which he

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had or was entitled to receive remuneration. The Contract of Employment that Dr McGowan signed on 18 April repeated the disclosure obligations imposed by the PSHA Act (clause 8). The Code of Ethics also requires public sector employees to disclose actual or potential conflicts of interest in writing at the earliest available opportunity.

Dr McGowan made two conflict of interest declarations in relation to his appointment. The first was a standard form 'Pre-Employment Declaration' of seven pages signed on 10 April 2019. The Declaration advises that completion of the declaration is an eligibility requirement to receive an offer of employment within the South Australian public sector. Dr McGowan's Declaration contained the following undertaking:

POTENTIAL OR ACTUAL CONFLICT OF INTEREST

I undertake that if I am employed in the public sector either in the role for which I have been offered or in any other role, I will not engage in any external or private activities which will result in a conflict or potential conflict with any of my duties as a public sector employee. I am aware that detailed provisions regarding conflict of interest and disclosure of conflict of interest are contained in relevant public sector legislation, and guidelines. Without detracting from such sources, in any case where there is any possible doubt regarding a potential conflict of interest, I undertake to seek advice and instruction from a supervisor or manager.

Nothing specific can be drawn from this Declaration as it is a statement and acknowledgement of future obligation. Generally, however, the Declaration underscores the importance attached within the SA public sector to employees paying scrupulous attention to whether actual or potential conflicts of interest exist and to the perception of whether a conflict exists. This is a theme taken up below.

The only other point to note about the Pre-Employment Declaration is that it includes at the bottom of page 1 the following statement: 'PRE-EMPLOYMENT DECLARATION AS AT 20 FEBRUARY 2018'. It is probable that this merely records the date or version of the document that Dr McGowan was required to sign. At interview, he was not aware of and could not explain the discrepancy between this date and the date of his signature (10 April). At any rate, nothing turns on this discrepancy as Dr McGowan signed and dated the Declaration prior to receiving a formal offer of employment in the following week.

Dr McGowan's second declaration relating to his appointment was a standard form 'Statement of Pecuniary Interests' dated 27 November 2018. This form explained that it was designed to meet the disclosure requirement outlined in s 17 of the PSHA Act and reg 4 of the PSHA Regulations. The form requires signatories to outline pecuniary interests under several different headings, including the following item and attestation clause:

2. Office held by me (whether as a director or otherwise) in a company or other body (whether or not incorporated) in respect of which I receive or am entitled to receive any remuneration, fee or other pecuniary item. ...

I confirm this is a true and accurate description of all my pecuniary interests in accordance with section 17 of the *Public Sector (Honesty and Accountability) Act 1995*.

Dr McGowan entered 'Nil' for this item; and signed the form 'C.H. McGowan; CE Dept H&W; 27/11/18'.

Dr McGowan was unable to explain at interview why this form was signed in November 2018 – over six months beyond the date required by s 17(2) of the PSHA Act. He had no recollection of relevant circumstances.

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Strictly speaking, Dr McGowan's declaration of pecuniary interests was accurate at the time of signature: he had resigned his directorship of SCCS four months earlier on 16 July 2018.

Had the document been signed as required with one month of Dr McGowan's appointment, two further questions would have arisen as to the accuracy of the declaration. I will note but have not pursued these two issues as they are overtaken by the larger issue of Dr McGowan's approach to complying with his conflict of interest obligations.

One issue (discussed in the next section) is that Dr McGowan was apparently unaware prior to 16 July 2018 that he remained the sole director of SCCS. The question arising is whether that unawareness would bring Dr McGowan within the exclusionary terms of s 17(8) of the PSHA Act, providing that the disclosure obligation does not apply 'while the senior official remains unaware of the conflict or potential conflict'. Resolution of that issue would require further analysis of whether Dr McGowan could reasonably rely on assistance and advice he received from Silver Chain at the time he resigned as CEO, or whether he had an added duty of diligence to meet the strict requirements of the PSHA Act.

The other issue is whether Dr McGowan fell within the terms of s 17 of the PSHA Act – specifically, did he receive or was he entitled to receive remuneration or a fee as the sole director of SCCS. Dr McGowan noted at interview that he had not directly received any remuneration or fee as the sole director. The only remuneration he had received was his salary as CEO of the Silver Chain Group. Complete resolution of this issue – was he 'entitled to receive' – would require analysis of the incorporation documents for SCCS regarding payment of remuneration and whether the company had passed resolutions dealing with remuneration and fees.

Dr McGowan made three points during interview that are relevant to assessing his conduct. First, on his recollection SCCS was incorporated prior to his appointment as CEO in 2007 for the purpose of a venture in running a nursing locum service in WA. That venture was terminated prior to 2007 and thereafter SCCS 'sat as essentially a shelf company'. He agreed with the description in one media report that it was 'a non-operational dormant subsidiary company'. He remained as sole director to keep the company going. SCCS had no trading or activity and Dr McGowan could not recall a single action he took as director, nor any annual report or annual general meeting of the company. He observed: 'It featured not at all ... if this company came up five times in the nearly 11 years I was there, I'd be surprised'.

Secondly, Dr McGowan observed that his resignation and appointment to a new position were quite hurried, occurring over a period of approximately two weeks:

I vaguely remember the guys in the governance area – we had internal counsel and we had the guys in finance who did a lot of the secretarial work – gave me a bunch of papers to sign. I signed those. ... It was a very intense period of time. I can vaguely remember some time in there [X person] bringing me some papers, or somebody bringing me some papers and signing a bunch of papers. ...

Unquestionably when I left I presumed I had severed every responsibility. I received no money after leaving – other than my pay might have gone into a subsequent pay period ...

Thirdly, Dr McGowan stressed that he took conflict of interest and disclosure obligations seriously, and did so in relation to his appointment as Chief Executive. He said he is 'very conscious' and 'pretty vigilant' about whether he has a conflict of interest, about correctly completing disclosure declarations and not doing anything that is not in the interests of his employer. That said, he also noted that – depending on the nature of a declaration to be made – It may take only a matter of seconds to be satisfied that there is no conflict of interest to declare.

Assessment and commentary

Dr McGowan's 'Statement of Pecuniary Interests' should have been completed far earlier than it was. The explanation for this delay is not clear from the available evidence. There would be little added gain in this investigation to explore the delay issue further in light of other matters discussed below. Similarly, as noted above, there is no pressing need to resolve definitively the mixed legal and factual issues as to whether Dr McGowan's Statement would have been inaccurate had he signed it in the same terms within a month of his appointment, as required by s 17 of the PSHA Act.

A criticism nonetheless is that Dr McGowan should have acted differently when he signed the Statement on 27 November 2018 and forwarded it to the Minister. By then it was known that Dr McGowan had inadvertently failed to resign as director of SCCS upon his appointment as Chief Executive, and that his resignation occurred on 16 July 2018. It should also have been apparent to Dr McGowan that he was signing the declaration more than seven months following his appointment. Even if he was unaware precisely of the statutory timeline requirement, it would have been prudent to enquire 'Why am I signing this now?'

It is not known on the available evidence whether any conversation occurred within Dr McGowan's office or with the Minister regarding the delay in signing the declaration. It is understandable that the chief executive of a large government agency will rely on support staff to ensure that legal requirements of this kind are met. Possibly too the issue may arise at an acutely busy time for the chief executive, receive only momentary attention and be difficult to recall many months later.

Nevertheless, conflict of interest disclosure duties are imposed by law and exist for a vital public interest purpose. There are reminders of these duties in the contract of employment and the Code of Ethics. The Code explicitly imposes an obligation on chief executives to ensure that the values and standards in the Code are upheld within the agency. Part of this responsibility is 'strong and visible leadership' and 'exemplary personal behaviour'.

Nor can conflict of interest disclosure duties necessarily be discharged fully by completing a single written declaration. The PSHA Act imposes a continuing duty – to disclose 'any pecuniary interest or other personal interest [that] conflicts or may conflict' with an official's public duties (s 17(1)(c)). The fact that Dr McGowan remained a director of SCCS for more than two months following his appointment as Chief Executive raised at least a potential conflict of interest issue – and certainly a perception of such an issue. The law imposes responsibilities upon a company director to act in the best interests of the company when matters arise for decision.³ It is unlikely that others who became aware that Dr McGowan remained a director of SCCS after his appointment as Chief Executive would have known that the directorship was an inactive role.

Viewed in that light, it is clear that Dr McGowan should have acted differently in complying with the conflict of interest disclosure duties applying to his appointment as Chief Executive. At a minimum, a record should exist to explain why the 'Statement of Pecuniary Interests' was signed many months after Dr McGowan commenced as Chief Executive; and, upon becoming aware in July 2018 that he remained a director of SCCS, he should have disclosed that matter in writing to the Minister.

³ ASIC, 'Key responsibilities of company directors' - asic.gov.au/for-business/small-business/starting-a-company/small-business-company-directors/#responsibilities

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Dr McGowan's actions in resigning as Director of Silver Chain Corporate Services Pty Ltd

Dr McGowan was the sole director of SCCS. On 16 July 2018 he received the following email from the Personal Assistant to the Chief Executive Officer of the Silver Chain Group:

Hi Chris

Quick and easy task; promise!

On your last day at Silver Chain, we completed resignations for two entities but missed SCCS. Sorry!

Can you please sign and return the attached this week? (Email is fine)

Thanks in anticipation.

Regards, [X]

Two documents were attached. The first was a resignation form:

RESIGNATION AS DIRECTOR

TO: SILVER CHAIN CORPORATE SERVICES PTY LTD CAN 600 403 601 (COMPANY)
of [address]

I, Christopher McGowan of [address] hereby resign as Director of Silver Chain Corporate Services Pty Ltd (Proprietary Company).

The resignation is to take effect from the close of the meeting of directors of Director of Silver Chain Corporate Services Pty Ltd being held on 4 May 2018.

SIGNATURE: [Signature]

NAME: Christopher McGowan, Sole Director

DATE: 4 May 2018

The second document was headed 'SOLE DIRECTOR RESOLUTION PURSUANT TO SECTION 248B OF THE *CORPORATIONS ACT 2001* (CTH)', and recorded a resolution that another named person be appointed as director of SCCS from the date of the resolution. This document contained the same attestation clause and was signed by Christopher McGowan and dated 4 May 2018.

Dr McGowan's evidence to this investigation was that he vaguely recalled this event – that his Principal Executive Officer brought the email in for signature, that he signed it, he remembered it 'just being a very short punctuation mark in a busy day', and that he may have thought that it was unusually 'slack' of Silver Chain as they 'took all that government stuff very seriously'.

Dr McGowan did not recall seeing the date on the forms. He added that he was now 'very angry with myself for not seeing it', as his normal practice is to change a date if it is wrong: 'if I saw and noticed it I'm 100% sure that I would have just crossed it and put the today's date. I'd rather deal

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with the real problem than deal with a problem I created.’ Dr McGowan elaborated by explaining that it was his firm belief and practice over a long period not to wrongly date documents.

Dr McGowan had not turned his mind to this resignation issue subsequent to 16 July 2018. He was reminded of it by a media report following the release of documents that been requested from the Department under the FOI Act. Dr McGowan added:

I figured when I finished with Silver Chain on 4th [May] that all relationships were totally severed. ... [C]oming here my loyalty is to this place, it’s a massive job and I thought Silver Chain was well and truly behind me. ... [C]oming into this job I was very clear that I wouldn’t do anything that would represent a conflict, a real or potential conflict, which is the Code, but even the perception in my mind ...

It is clear from the evidence before me that the two documents that Dr McGowan signed were prepared by Silver Chain, including the date of 4 May 2018 that was typed on both documents. It is a side issue that I have not explored as to why Silver Chain entered that date on both documents. The probable explanation was to maintain consistency with other documents that Dr McGowan signed and with the date of his resignation from Silver Chain.

The formalities for resigning as a director, appointing a new director and notifying those changes to the Australian Securities Investment Commission (**ASIC**) are laid down in the *Corporations Act 2001* (Cth):

- A director of a company may resign in accordance with the constitution of the company or – if the replaceable rules in the Corporations Act apply – by giving a written notice of resignation to the company at its registered office (s 203A). Dr McGowan appears to have completed that formality by signing and forwarding the form headed ‘Resignation of Director’.
- The appointment of a director of a proprietary company with only one director (as SCCS was) can be done by a resolution of the director that is recorded and signed (s 248B(1)). Dr McGowan completed this formality by completing the form headed ‘Sole Director Resolution pursuant to s 248B Of the Corporations Act 2001 (Cth)’, appointing another person as sole director of SCCS. (I assume that, as required by s 251A, this resolution was recorded in the minute books of SCCS within one month, and the minute book was signed by a director within a reasonable time.)
- The resignation of Dr McGowan and the appointment of a new director were notified to ASIC online by Silver Chain on the following date (17 July 2018) using Form 484.⁴ The document lodged with ASIC recorded the ‘Cessation Date’ and ‘Appointment Date’ respectively as 4 May 2018.

Analysis and commentary

I have proceeded on the basis that the Corporations Act and ASIC requirements have been met. As well, I accept Dr McGowan’s evidence that he did not date (or backdate) the documents, nor knowingly sign a document containing an incorrect date. Further, he accepts that he is responsible for the accuracy of the documents that he signed and that he should have been more careful in checking the date on both documents.

Two other issues arise:

⁴ The ASIC website advises that Form 484 was discontinued in November 2015, and was replaced by online lodgement using Form 370.

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- Does anything turn on the fact that Dr McGowan unintentionally signed a document with an incorrect date – 4 May rather than 16 July 2018?
- Apart from the date issue, should Dr McGowan have taken any other action upon learning that he had been a director of SCCS for over two months following his appointment as Chief Executive?

It is possible – if the issue was to arise for decision in a contested proceeding – that a court would rule that Dr McGowan’s resignation from SCCS was ineffective in the period 4 May to 16 July. It is possible even that his resignation would be ineffective after 16 July, for the reason that the resignation as signed is misleading and therefore defective.

The general presumption in law is that an action will have legal effect only from the date the action was taken (an apt example is the appointment of a delegate). In limited circumstances an action can be pre-dated – for example, if parties agree in a contract that it operate from an earlier date upon which they commenced discharging their contractual obligations; or if a court makes an order, *nunc pro tunc* (‘now for then’), which is expressed to operate from an earlier date, for instance, to enable calculation of interest. Those exceptions to general principle are ordinarily done explicitly and with the concurrence of relevant parties.

In many ways the law indirectly frowns on documents being backdated without acknowledgement. Many offence provisions penalise ‘uttering a false document’ or making a ‘fraudulent declaration’. This is done to uphold the integrity of public administration and to prohibit surreptitious backdating action designed, for example, to avoid penalties and taxation liabilities. I will note two offence provisions that have arisen in the consideration of this matter.

- The Corporations Act s 1308 applies to ‘False or misleading statements’. Among the offences specified are knowingly lodging a false or misleading document with ASIC; omitting a material particular that would make a document misleading; or making a statement that is false or misleading without taking reasonable steps to ensure the document was not inaccurate.
- The *Criminal Law Consolidation Act 1935* (SA) applies to ‘Dishonest dealing with documents’. Among the offences specified are dishonestly intending to deceive another either by creating a document that is false in that it gives a misleading impression of a fact on which the validity or effect of the document may depend, or by possessing or using a document knowing it to be false.

Beyond noting those provisions, it is unnecessary to pursue their relevance further in this report. It is highly improbable that prosecuting authorities would either regard all the elements of those offence provisions as being satisfied (particularly the intent element) or deem the matter worthy of prosecution.

Dr McGowan has acknowledged that the two forms he signed should not have been pre-dated. He has given evidence that he was unaware of the error but accepts personal responsibility for it.

It is hard to see that anything substantive now turns on Dr McGowan’s error. SCCS has not taken any action that is ever likely to give rise to legal proceedings that would require a ruling on the consequences of Dr McGowan’s mistake. There is no evidence that the mistake has caused disadvantage to any person or was done to obtain a benefit or avoid a detriment. According to ASIC records, the person appointed as director by Dr McGowan’s resolution ceased office on 26 July 2019 and a new director was appointed. Courts, too, are generally prepared to overlook administrative shortcomings in order to effectuate the orderly conduct of business.

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The other issue arising is whether Dr McGowan should have taken any other action upon learning that he had been a director of SCCS for over two months following his appointment as Chief Executive. Though Dr McGowan may have been oblivious to the incorrect date in the documents he was signing, he was not unaware that the legal formalities to complete his severance from Silver Chain had not been fully taken when he left two months earlier. The only action Dr McGowan took at the time of signing was to return the documents to Silver Chain.

It appears that other senior officials in the Department were unaware of this issue until it was reported in the media in November 2019. An official commented that if this was known at the relevant time Dr McGowan would have been cautioned to be careful in handling the matter.

The prudent course of action that Dr McGowan could have followed was to consult or notify the Minister's office that this oversight had occurred and had been corrected. This was probably required in accordance with s 17(1)(c) of the PSHA Act – as I explained above. The fact is that Dr McGowan, while Chief Executive, remained a director of a company that was part of a corporate group that supplied health and community services to the SA Government. A clear conflict of private interest and public duty would arise if Dr McGowan was called on to take action in his director's role. There was, accordingly, a potential conflict of interest that would give rise to an adverse perception if publicly known.

Furthermore, notification to the Minister would have provided a clear and accessible record to ensure accountability. It would have enabled the Minister to consider whether there was an actual or potential conflict of interest that should be addressed, either in discussion with Dr McGowan or by issuing a written direction under s 17(3) of the PSHA Act. It would demonstrate that Dr McGowan was discharging his personal responsibility under s 32 of the PS Act and the Code of Ethics to provide leadership within his agency in complying with the spirit and letter of the Code and public sector principles. And, as this controversy has demonstrated, notification to the Minister would have constituted a good faith effort by Dr McGowan to observe Public Sector Principle (6) requiring that a public sector employee will 'avoid conduct that will reflect adversely on the public sector'.

Dr McGowan's actions as Chief Executive in relation to matters involving Silver Chain

It was foreseeable – indeed, certain – that matters regarding Silver Chain would arise during Dr McGowan's term as Chief Executive.

Contracts were already in place for Silver Chain (and a South Australian subsidiary, Royal District Nursing Service (**RDNS**)) to provide nursing and community health services in South Australia. Discussion of new programs or the extension or modification of existing programs was underway between the Department and Silver Chain. Two examples that are discussed below are the SA Community Care Program and the Integrum Pilot Program. Others were the Demand Management Pilots with local health networks, the Homeless Nursing Service Program, the HIV Enhanced Primary Care Coordination Program, the Transition Care Program and the Long Stay Patient Project. Overall, Silver Chain (and RDNS) was a substantial contractor to the South Australian Government.

Dr McGowan was aware of the existing and foreshadowed contractual arrangements when he commenced as Chief Executive. Actual and potential conflict of interest issues would loom large. Senior Department officials were aware of this prospect and acted to put governance arrangements in place that would avoid probity concerns. An example noted below is that legal advice was sought from the Crown Solicitor in relation to one issue that arose early in Dr McGowan's term as Chief Executive.

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This section examines how Dr McGowan dealt with these conflict of interest issues. The matters are examined in several stages:

- Dr McGowan's general approach to dealing with Silver Chain matters
- the SA Community Care Program
- the Integrum Pilot Program
- Dr McGowan's contact with Silver Chain officials
- a meeting with a Deloitte consulting partner
- my analysis and commentary on the matters discussed.

Dr McGowan's general approach to dealing with Silver Chain matters

In interview for this investigation Dr McGowan made the following points:

- As a person who had been a chief executive officer of both private and public entities he was 'very, very conscious of conflicts'. He was well aware, coming in to the job of Chief Executive of SA Health, that conflict issues could arise and must be dealt with properly in accordance with statutory and Code requirements applying to public sector employees. He was equally aware that dealing with the perception of conflict was part of the challenge.
- The main conflict danger he faced concerned procurement decisions relating to Silver Chain – 'I have a fairly black and white line that I won't get involved in anything to do with procurement because that's where Silver Chain could be favoured above anybody else'.
- Though he could not recall specific discussions at the outset with senior officers about Silver Chain conflicts, he believed it was well understood in the Department that he had to keep away from Silver Chain procurement matters. He referred to a 'high sensitivity' about this topic. He readily agreed to the governance arrangements that were put in place in the Department to avoid probity concerns.
- It was nevertheless central to his role as Chief Executive to be across all activities and programs in the Department, and in particular 'to be involved in thinking and strategising around out-of-hospital care issues ... which is where Silver Chain plays'. There were pressing health policy issues facing South Australia when he was appointed, particularly regarding demand and supply of hospital services. His experience and insight from his career in Silver Chain was probably a large factor in his appointment. It was expected that he would bring his expertise and views to health administration in South Australia, and it would have been prejudicial to the interests of the government and the community if he did not do this. He commented that 'I am 100% committed to the good of South Australians through the role I play here'.
- He has a long-standing, diverse and passionate involvement in health planning issues in Australia. A strong element of his approach is to talk to and consult a range of people in the health sector.
- He strongly felt that he has not displayed any favouritism to Silver Chain or that it has benefitted in any way from his actions. In fact, he elaborated with examples of how his portfolio planning and priorities were sometimes not to the benefit of Silver Chain and that payments to RDNS had declined in the period 2016/17 to 2018/19
- The need to stay away from procurement decisions relating to Silver Chain was more acute in the early stages when existing contract negotiations with Silver Chain were still underway. That barrier would lessen over time, for example, in approving a uniform extension of an existing panel provider arrangement for Silver Chain and other providers.

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- On reflection, he could have done more when he commenced as Chief Executive to initiate discussion with the senior executive team in SA Health as to the sensitivity about Silver Chain matters. This would have helped officials navigate the distinction between him not being involved in procurement decisions relating to Silver Chain but being involved in discussions about the South Australian health system. Further, it would have helped had he signed a memorandum to senior staff to outline his thinking and the principles.
- Overall, he was completely comfortable in the way that he acted as Chief Executive and would not change his behaviour in relation to the individual program decisions that were made.

I formed the following views based on my discussion with senior officials in the Department and my analysis of the records that were provided to me:

- When Dr McGowan commenced, there was a shared awareness that probity issues would need to be addressed, given that he had been the CEO for over ten years of a large private supplier of health services. This was raised with Dr McGowan at the outset and he was advised to be cautious. He was responsive and accepted the various governance arrangements that were put in place to deal with probity concerns. However, he seemed not to have the same initial anxiety about the potential risks as did officials with a longer career in the public sector. Dr McGowan came to the job with a clear mission to be responsive to government policy directions and priorities and to be active and in control.
- Dr McGowan's Individual actions could cause discomfort – for example, the absence of adequate records to dispel probity perception worries; or off-hand enquiries – for example, 'Where is this matter up to?' – which could be misinterpreted.
- The conflict issue that was emphasised by Dr McGowan in our interview was the importance of not being involved in procurement decisions that could favour Silver Chain. The officials agreed that it was vital to avoid actual and potential conflicts in relation to procurement, but generally they approached the probity and perception concerns on a broader basis.
- There was no concern that Dr McGowan had intentionally acted wrongly on any issue. Nor was there any concern from a public policy perspective as to the soundness of the decisions that were made on health policy and administration. It was rather a concern that in the initial stages Dr McGowan may have been naïve as to the additional overt steps that may be required in a public sector role to avoid conflict of interest problems and controversy.
- There are no ongoing concerns about the way that conflict of interest issues are understood and are being handled by Dr McGowan. Officials feel more confident in raising matters directly with him.

SA Health's handling of conflict of interest issues has also been raised externally in reports of the Auditor-General and the Independent Commissioner Against Corruption (ICAC). The Auditor-General report was critical of aspects of the procurement for the Integrum Pilot Project.⁵

The ICAC report, *Troubling Ambiguity: Governance in SA Health*, was released on 3 December 2019 while this investigation was underway. The report outlined several areas of concern relating to governance arrangements in SA Health that could contribute to risks of corruption, misconduct and maladministration. These included poor records management, conflict of interest practices, and procurement.

⁵ Auditor-General, 'Part C: Agency Audit Reports', *Annual Report for the year ended 30 June 2019*, pp 138-9.

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The separate chapter in the ICAC report on conflicts of interest noted that SA Health had been slow in developing a conflict of interest policy and managing it consistently across the agency. A particular concern was inconsistent practice in declaring and recording conflicts of interest. The report observed that individual case study problems noted in the report are likely to be 'a reflection of deep seated organisational and cultural issues' (p 41).

SA Community Care Program

The SA Community Care Program (**SACC**) delivers nursing and health support to people in the home environment. RDNS had been a sole provider of community nursing services. A new and broader program proposal was under discussion with Silver Chain and other organisations during Dr McGowan's term as CEO. Dr McGowan said that within Silver Chain he withdrew from the discussions around SACC when he became a candidate for the SA Health Chief Executive role.

On 8 May 2018 a Procurement Approvals Committee in SA Health recommended a revised panel provider arrangement, with four providers including RDNS (to be allocated \$21.66M in 2018/19). Later in May Dr McGowan, as Chief Executive of SA Health proposed in discussion with the Minister and a Deputy Chief Executive that the contract terms in the Committee recommendation (3 years + 3 + 3 year extension options) be shortened. This would enable the new Government and Chief Executive to review how community health services were to be provided and allow community consultation.

A formal briefing to this effect was prepared for the Minister in May 2018 and signed by a Deputy Chief Executive. It proposed a new contract schedule of 1 year + 1 + 3. The Minister approved entering into contracts on this basis. The later steps that were taken to execute the contracts were signed by another senior official; and in one instance a formal brief to the Minister was authorised by a Deputy Chief Executive and was not seen or endorsed by Dr McGowan.

The briefing and approval steps were in accordance with a governance arrangement that had been established to strengthen the probity framework and avoid actual or perceived conflicts of interest in relation to Dr McGowan. Under the governance framework other senior executive officers in SA Health would approve financial, procurement, contract execution and engagement requests in relation to RDNS.

Dr McGowan approved a contract extension in May 2019 for all four providers, in accordance with the previous approvals. The letters advising of the contract extensions were signed by a senior official.

The governance arrangement that was followed in the SACC procurement was grounded in legal advice that the Department sought from the Crown Solicitor in May 2018 following Dr McGowan's suggestion that the SACC contract periods should be reviewed before contracts were signed. The advice and its acceptance within SA Health are uncontentious. I note only that, in several documents that I saw (such as briefing notes that do not refer specifically to this advice but seem to be relying on it) the gist of the advice is presented ambiguously. The advice was that it was desirable for conflict of interest reasons that Dr McGowan not play any role in reviewing the procurement proposal recommended by the Procurement Approvals Committee. Some documents comment that the Crown Solicitor had advised that there was no actual, potential or perceived conflict of interest in Dr McGowan 'undertaking his role'.

The Integrum Pilot Program

Discussions in relation to this program commenced in 2017 when Silver Chain submitted a tender to take over the work of a government aged care provider, Metropolitan DomCare. The Labor

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Government accepted Silver Chain's proposal in November 2017. An element of the new program was that Silver Chain would incorporate an Integrum Peri to End of Life Pilot Program (Integrum Pilot Program) along the lines of a program it was operating in Western Australia.

In his role as CEO of Silver Chain Dr McGowan wrote in February 2018 seeking agreement to delay the Integrum Pilot Program because of the work pressures involved in taking over DomCare. Formal advice that this was agreed was given in a letter signed by a Deputy Chief Executive in August 2018.

Later, as Chief Executive of SA Health Dr McGowan spoke to the CEO of Silver Chain to suggest a further delay in program commencement. The program in South Australia could benefit from experience in the program in Western Australia. In evidence to this investigation Dr McGowan expressed the view that his initiative to contact Silver Chain did not raise a conflict of interest issue, as the formal Government approval and implementation steps were already in place and delaying the commencement of the program did not favour or advantage Silver Chain.

The formal commencement date for the Integrum Pilot Program was later set at 1 July 2019.

I met with the SA Health official who had carriage of the Integrum project and was given a comprehensive brief of material covering all stages of the development, approval and implementation of the project. The briefing and documents confirm that the governance arrangements that were implemented in May 2018 to distance Dr McGowan from decisions involving Silver Chain (and RDNS) were followed at all stages. The carriage of the matter lay in the hands of other SA Health officials, who also had responsibility for approving and signing briefing papers, letters and contractual documents.

Dr McGowan accepted and did not question any of the arrangements that were put in place. A key stage in March 2019 was that he signed a SA Health Declaration – Conflict of Interest form and approved that a Deputy Chief Executive undertake all work including direct negotiation, acquisition planning and purchase recommendation. This step was taken as the State Procurement Board's Acquisition Planning Policy required that a single supplier market approach of this kind be approved by the Chief Executive.

Questions have nevertheless been raised in the public arena as to the role that Dr McGowan played and whether there was a conflict of interest, actual or apparent. One source of concern was a comment that he made in a Legislative Council Budget and Finance Committee hearing on 23 July 2018 and the following day in an ABC radio interview. He said that the brief to the Minister on the Integrum project came across his desk and that he formally approved it as the Chief Executive but did not discuss or alter the proposal. He explained that his approval was simply a bureaucratic formality. It transpires that Dr McGowan's recollection was incorrect. Departmental documents show that the brief to the Minister was approved by a Deputy Chief Executive in accordance with the governance arrangement that had been implemented in May 2018.

Another source of concern was that Dr McGowan's diary includes a meeting with the description 'Discuss Integrum ...' with the SA Health official who had carriage of the matter. In an interview for this investigation the official said that her diary entry was different, stating only 'Meeting Chief Executive'. Further, she said that Integrum was only briefly mentioned (by way of update) at the meeting and discussion then moved to other matters.

Other internal documents refer to a meeting that Dr McGowan attended in Perth in February 2019 with Silver Chain officials to discuss the operation of the Integrum program in Western Australia. Dr McGowan had an existing arrangement to be in Perth and it appears that he altered the travel plans to enable him to meet as well with Silver Chain officials. In evidence to this investigation Dr McGowan offered the view that he thought this meeting was appropriate in his role as Chief

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Executive to ensure that major commitments of SA Health would be effective. He did not see that the meeting raised any conflict of interest concerns as procurement approval had been in place for some time and was not a topic of discussion.

Dr McGowan also attended a joint steering committee meeting for the Integrum program between Silver Chain and SA Health officials. This occurred in August 2019 after the program had commenced in South Australia.

Contact between Dr McGowan and Silver Chain officials

Internal SA Health email correspondence refers to other instances of contact between Dr McGowan and Silver Chain officials following his appointment as Chief Executive:

- In May 2018 Dr McGowan corresponded by email with a Silver Chain research officer to request information on trends in hospital admissions. Dr McGowan explained in evidence to this investigation that in substance he was requesting research that he and the research officer had jointly undertaken when they were Silver Chain colleagues. He was only after data – ‘It hasn’t got a Silver Chain spin on it’. The alternative was to ask SA Health officials to undertake the same research, which seemed unnecessary.
- In August 2018 Dr McGowan corresponded by email with a public policy adviser in Silver Chain to request references to peer reviewed publications on hospital admissions. Dr McGowan explained in evidence that this was merely a literature search and that he saw nothing wrong with requesting information. He noted that he has similar exchanges with officials in other private organisations that provide health services and that they send him information all the time.
- Dr McGowan’s diary records a calendar reminder on 11 June 2019 to ‘ask Integrum for their evaluation results’.
- Internal documents also include a couple of invitations that Dr McGowan received to attend Silver Chain celebratory events.

Meeting with Deloitte Consulting partner

Email correspondence released under the FOI Act includes two emails relating to a proposed meeting between Dr McGowan and a Deloitte Consulting partner. The first of the emails (addressed to Dr McGowan’s PEO) and dated 5 July 2018 refers to an SMS text exchange between the Deloitte partner and Dr McGowan and states that they ‘have agreed to meet on Tuesday 17 July ... to discuss potential partnerships with Silver Chain and SA Health’. The reply the same day from the PEO advised that ‘Unfortunately as it could be perceived as a probity issue it would be inappropriate for Chris McGowan to meet with [X] from Deloitte to discuss a potential partnership with Silverchain’.

SA Health officials to whom I spoke confirmed that they had discussed this email invitation and advised Dr McGowan that the meeting could not go ahead and would be cancelled. In evidence Dr McGowan advised that he privately reinstated the meeting, but Silver Chain was not discussed. The meeting was a surprise to at least one of the SA Health officials to whom I spoke. Subsequent meetings are also recorded in Dr McGowan’s diary with a Deloitte partner.

Dr McGowan elaborated on the purpose of this meeting by commenting that he is frequently in contact with the CEOs of private health suppliers and the partners of the big four accounting firms and meets them for coffee: ‘These are all people I’m talking to. ... What’s going on across the word? What are you seeing? What technologies are being introduced? That’s where I get a lot of information ...’

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Analysis and commentary

I will make six observations on Dr McGowan's actions as Chief Executive of SA Health in relation to matters involving Silver Chain.

First, procurement decisions involving Silver Chain (and RDNS) were properly handled by the Department and Dr McGowan. Proper governance arrangements were put in place to eliminate actual, potential and perceived conflict of interest concerns. Those arrangements were suitably honoured by Dr McGowan. The SA Health officials who were responsible for the carriage of matters such as the SACC and Integrum Pilot programs and for briefing the Minister acted professionally throughout.

Secondly, it was to be expected that Dr McGowan would take an active interest within the Department in programs in which Silver Chain was involved. As Chief Executive he had a responsibility for whole-of-Department administration and to be in a position to give fulsome and balanced advice to the Minister. He was appointed as Chief Executive because of his experience and expertise in health policy and services. It was to be expected that he would directly draw on that background as Chief Executive.

Thirdly, it is unremarkable that Dr McGowan had occasional contact with Silver Chain officials and consulted them on research matters. It is commonplace that external appointees to the senior ranks of the public service maintain active links with former colleagues. It is often regarded as a strength that they can draw on these links and not become insular.

Fourthly, it was nevertheless vital that Dr McGowan took responsibility for putting appropriate arrangements in place to deal with actual, potential and perceived conflict of interest problems. This was his responsibility under both the PS Act s 32 and the Code of Ethics. As the former CEO of a private organisation that was a substantial contractor with his agency, he should have been more alert to the probity risks – real or imagined – that would be thrown in his direction. He could have relied more on the cautionary warnings that he received early on from senior officials in his agency.

Dr McGowan acknowledges that his approach to conflict of interest matters could have been better handled – for example, by discussing conflict of interests more directly with senior officials and authoring a guidance document early in his term. Other measures should also have been considered. For example, it would have been prudent to keep a brief explanatory record of developments or meetings that have later been questioned – such as Dr McGowan's resignation from SCCS, and his meeting in Perth with Silver Chain officials to discuss the Integrum program.

It is noteworthy that on a few occasions in this investigation and in evidence to parliamentary committees Dr McGowan has commented that he could not fully recall the detail of events. In one instance that fanned controversy he mistakenly advised the Budget and Finance Committee on 23 July 2018 that he had signed a ministerial briefing relating to Silver Chain when in fact he had not done so because of the governance arrangements that were in place. While Dr McGowan's immense workload must be acknowledged, it is possible that less confusion or controversy would surround some of these events had better records been kept and relied upon.

Fifthly, Dr McGowan was ill-advised to go ahead privately with the meeting with a Deloitte partner after senior officials had advised him not to and had declined the meeting invitation. It was inevitable that such a meeting would raise concern about conflict of interest, especially when the meeting invitation described it as an opportunity 'to discuss potential partnerships with Silver Chain and SA Health'. At the least, if Dr McGowan felt that such a meeting was unexceptional he should have made a brief record of where the meeting was held, who attended and what was discussed.

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Sixthly, the events discussed in this report have undoubtedly played on Dr McGowan's mind and brought conflict of interest principles to the fore. Others within SA Health say they have no ongoing concerns and feel that matters are better handled and discussed more directly. It would be beneficial nevertheless – as I recommend below – that the findings in this report are taken up in discussion between Dr McGowan and the Commissioner.

Dr McGowan expressed the view to me that he acted with the highest integrity in his role and that the only mistake he made was to sign a document that contained an incorrect date. As my analysis indicates, my view is that there are other serious matters that warrant further discussion and attention. That is accentuated by the recent ICAC report that is critical of conflict of interest practices in SA Health.

5 FINDINGS ON TERMS OF REFERENCE

In this section I summarise the findings that I have made in this report on the Terms of Reference.

- *The circumstances and details of Dr McGowan's resignation from his role as Chief Executive Officer of the Silver Chain Group (and all of its subsidiaries or related entities) and directorships prior to starting his role as Chief Executive of the Department for Health and Wellbeing*

It appears that Dr McGowan's resignation as Chief Executive Officer of the Silver Chain Group was undertaken in an orderly manner. No question has been raised as to the propriety or effectiveness of his resignation, other than the matter discussed under Term of Reference 3.

- *Dr McGowan's disclosure of his pecuniary interests associated with his engagement as Chief Executive, in accordance with the Public Sector (Honesty and Accountability) Act 1995 (SA)*

Dr McGowan completed a 'Statement of Pecuniary Interests' declaration as required by the PSHA Act and Regulations. The following three criticisms are made in this report of Dr McGowan's compliance with the Act.

First, the Statement was signed in November 2018 – over six months beyond the date required by s 17(2) of the PSHA Act. This delay has not been explained.

Secondly, Dr McGowan should have informed the Minister when forwarding the Statement that he (Dr McGowan) had not resigned as director of Silver Chain Corporate Services Pty Ltd until 16 July 2018. This was more than two months after he commenced as Chief Executive of SA Health.

Thirdly, Dr McGowan should also have informed the Minister in July 2018 of his delayed resignation as director. The fact that Dr McGowan remained a director while he was Chief Executive of SA Health raised a potential conflict of interest issue within the terms of s 17(1)(c) of the PSHA Act

- *Dr McGowan's obligations under the Corporations Act 2001 (Cth) in relation to his (now former) directorship with Silver Chain Corporate Services Pty Ltd (including whether there were any legal issues associated with the backdating of documents)*

It appears that the Corporations Act and Australian Security Investments Commission requirements relating to the resignation of a director were complied with.

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However, the resignation document wrongly recorded the date of resignation as 4 May 2018 rather than 16 July 2018. Dr McGowan was unaware of this error but accepts responsibility for it. This is not a matter that needs to be taken further as it does not appear that anything substantive now turns on the error.

As noted under Term of Reference 2, Dr McGowan should have informed the Minister that he had not resigned from SCCS until two months after commencing as Chief Executive.

- *the actions of Silver Chain Group as a Government contractor in supporting their former Chief Executive Officer to be aware of, and resign from, all relevant Director positions given his separation as Chief Executive of the Silver Chain Group*

Silver Chain provided support to Dr McGowan to resign from his director positions on 4 May 2018, and again on 16 July 2018. The delay in arranging the resignation from SCCS on 16 July appears to have been an oversight as the company was inactive. Silver Chain officers inserted the incorrect date of resignation as 4 May. The actions of the Silver Chain officers has not been explained or explored in this investigation.

- *whether there is any conflict of interest arising from any dealings Dr McGowan had with Silver Chain Group or any dealings his office had with Silver Chain Group during the period of his employment as Chief Executive, Department for Health and Wellbeing.*

SA Health procurement decisions relating to Silver Chain were properly handled by the Department and Dr McGowan. Proper governance arrangements were in place to eliminate actual, potential and perceived conflict of interest concerns.

Generally, Dr McGowan as Chief Executive of SA Health took an appropriate interest in programs administered by the Department, including programs involving Silver Chain.

Dr McGowan could appropriately maintain some contact with former Silver Chain colleagues after his appointment as Chief Executive.

There was nevertheless a failure on Dr McGowan's part to put appropriate conflict of interest arrangements in place, given his long-standing former career as Chief Executive Officer of the Silver Chain Group. Dr McGowan acknowledges this failure. Those arrangements could have included better record keeping of contacts with Silver Chain officials, and direct written and oral engagement with SA Health officials on probity risks.

Dr McGowan was ill-advised to go ahead with a meeting with a Deloitte Consulting partner in July 2018 after he was advised not to by senior SA Health officials for the reason that a SA Health/Silver Chain partnership had been foreshadowed as the focus of discussion. If Dr McGowan felt that such a meeting was unexceptional he should have made a brief record of where the meeting was held, who attended and what was discussed.

Although Dr McGowan acknowledges that additional measures could have been taken to deal with some of the conflict of interest issues discussed in this report, I recommend that the findings in this report are taken up in discussion between Dr McGowan and the Commissioner for Public Sector Employment.