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Delivered by Hand

URGENT AND CONFIDENTIAL

Dear Premier

RE: Confidential investigation - Chief Executive, Department for Health and Wellbeing

I refer to your letter to me dated 14 November 2019, and subsequent correspondence.

Background

I confirm that, following the self-report of a potential conflict of interest issue by Dr Chris McGowan, Chief Executive, Department for Health and Wellbeing to me on 14 November 2019, I commenced an investigation on my own initiative, pursuant to section 14(1)(g) of the *Public Sector Act 2009 (PS Act)*.

I advise that my investigation is now complete. I write to advise you, as the relevant employer, of the outcome of the investigation and to provide you with a series of recommendations.

In order to assist with my investigation, I instructed the Crown Solicitor's Office to engage Professor John McMillan, former Commonwealth Ombudsman, to conduct inquiries, interview witnesses, gather relevant information and provide a report.

Professor McMillan provided his report on 14 January 2020. It consists of 25 pages and Attachment A which is comprised of the transcript of Professor McMillan's interview with Dr McGowan.

On 16 January 2020, Professor McMillan provided a list of editorial changes to the report together with a corrected copy of the report (**the Report**). I advise that these editorial changes were largely of a typographical nature and did not substantially impact the content or findings of the Report. The Report and transcript comprise Attachment 1 to this letter.

I forwarded a copy of the report and the transcript of his interview with Professor McMillan to Dr McGowan on 14 January 2020 for his information, expressly noting in a covering letter that I did not require a response at that stage. Notwithstanding my notation in that regard, on 16 January 2020 Dr McGowan emailed me, attaching a letter of reply to the report (**the First Reply**). The First Reply is attached, and marked Attachment 2.

By letter dated 17 January 2020, I provided Dr McGowan with a copy of the corrected Report. In addition, I provided him with my draft recommendations to you and afforded him a reasonable opportunity to provide me with any further response to the Report and my draft recommendations. My letter is attached, and marked Attachment 3.

By letter dated 20 January 2020, Dr McGowan provided a response to the corrected report and my draft recommendations (**Second Reply**). The Second Reply is marked Attachment 4 to this letter.

Documents Enclosed

I have enclosed the following documents for your consideration. I strongly recommend that you closely read each of the documents.

- Attachment 1: Report of Professor McMillan dated 14 January 2020 & Annexure A to the Report, comprising the transcript of the interview between Professor McMillan and Dr McGowan dated 3 December 2019.
- Attachment 2: Email from Dr McGowan to Commissioner dated 14 January 2020, enc letter from Dr McGowan re reply to the Report (undated).
- Attachment 3: Letter from Commissioner to Dr McGowan dated 17 January 2020 enc draft recommendations to the Premier.
- Attachment 4: Email from Dr McGowan to Commissioner dated 20 January 2020 enc letter from Dr McGowan re second reply.

Report – Matters of clarification

Further to the references in the Report to Dr McGowan's disclosure of his pecuniary interests, I advise as follows by way of further clarification:

Pecuniary Interests statement signed November 2018

As you may recall, in November 2018 I approached all public service Chief Executives and requested that they update their pecuniary interests on a template provided to them. This was a new approach, as historically pecuniary interests were managed on an individual basis between public service Chief Executives and their Ministers, with no central storage or oversight. Dr McGowan signed his completed statement of pecuniary interests on 27 November 2018, which was approved by Minister Wade on 30 November 2018, in response to my email to public service Chief Executives dated 26 November 2018. This completed statement was forwarded to my Office on 30 November 2018.

I would be pleased to provide the relevant, supporting documentation to you, should you wish to see it.

Recommendations

Having analysed the Report, together with the First and Second Replies from Dr McGowan, I now provide you with my recommendations as to the findings reasonably open to you, an appropriate response to Dr McGowan and consequential action.

As a Chief Executive of an administrative unit in the South Australian Public Service, Dr McGowan is employed pursuant to section 34 of the PS Act and a contract of employment dated 18 April 2018. The term of his employment commenced on 7 May 2018 and is due to expire on 6 May 2021 unless lawfully terminated sooner.

Termination of employment provisions are found in section 38 of the PS Act and clause 10 of the contract of employment. Chief Executive employment may be terminated by you on any one of the following grounds: redundancy, incapacity, unsatisfactory performance, misconduct, lack of an essential qualification (these grounds apply to all public service employees), or bankruptcy (this ground is specific to Chief Executives).

In addition, you may terminate the employment of a Chief Executive on notice without specifying any grounds. This option would be used, for example, where there is an insufficient basis for termination for misconduct or unsatisfactory performance but you have lost trust and confidence in the Chief Executive to perform their high level duties.

Neither the PS Act nor the contract of employment expressly provide for the imposition of a disciplinary sanction or outcome on a Chief Executive, short of termination. This is to be contrasted with rules applicable to other public service employees which provide for the issuing of a reprimand, suspension without remuneration and reduction in remuneration level.

The result is that generally you have the following disciplinary options in managing the employment of a Chief Executive:

- a. Termination for bankruptcy, redundancy, incapacity, unsatisfactory performance, misconduct or lack of an essential qualification;
- b. Termination with notice including on account of a loss of trust and confidence; and
- c. Dealing with the matter managerially by way of managerial caution, counselling and/or direction in accordance with the common law powers of an employer.

I note that the question of whether you have lost trust and confidence in Dr McGowan to perform his senior role is a matter for you.

After giving the matter careful consideration, I recommend that termination on notice is not an appropriate response in the circumstances including:

- a. Dr McGowan was new to his position in government in 2018;
- b. Dr McGowan acknowledged in hindsight that he could have done more to put appropriate arrangements in place given his long standing former career as Chief Executive Officer of Silver Chain group;
- c. The finding of the Report was that, notwithstanding this, procurement processes were managed appropriately and Dr McGowan observed the processes put in place; and
- d. Dr McGowan was not prompted by staff to take certain steps.

Specifically in relation to the induction of Senior Executives new to the Public Service, you will note that Dr McGowan states as follows in his Second Reply:

in respect to minimising the chance of other new Senior Executives (particularly those appointed from outside the Public Service) inadvertently finding themselves in similar situations in the future, I also encourage an appropriate Public Sector Senior Executive Orientation Program be available upon commencement of employment, as I feel sure I would have benefitted from such orientation had it been available at the time of my commencement with the South Australian public sector.

You will note that I have not adopted that suggestion below, on the basis that on Dr McGowan's first day as CE SA Health, I emailed him a range of public service chief executive resources to complement an agency induction. Additionally, I met with Dr McGowan on 22 May 2018 as part of the routine CE induction process that I deliver to new public service chief executives.

Accordingly, I recommend that:

1. Subject to recommendation 4 below, you accept the findings made by Professor McMillan in his report dated 14 January 2020.
2. Notwithstanding the finding that relevant procurement processes were properly managed, you counsel Dr McGowan to comply with the important ethical obligations that fall upon him as a Chief Executive and leader in the South Australian Public Service, and, in particular, that he:

- a. adopt better record keeping practices;
 - b. ensure all actual, potential and perceived conflicts of interest are reported in a timely fashion; and
 - c. exercise careful judgment regarding his management and reporting of actual, potential and perceived conflicts of interest.
3. You direct Dr McGowan to participate in a program of coaching with me on the obligations that arise for Chief Executives under the *Public Sector Act 2009* (including the Public Sector Principles), the *Public Sector (Honesty & Accountability) Act 1995* and the Code of Ethics for the South Australian Public Sector. Specifically, the ethical obligations of senior officials within the South Australian Public Service, including:
 - a. the avoidance of conflicts of interest (actual or potential), and
 - b. the avoidance of conduct that will reflect adversely on the public sector (including perceived conflicts of interest).
4. You decline to adopt the third finding in the Report with respect to Term of Reference 2 for the following reasons:
 - a. Dr McGowan has raised an objection to this finding based on a question concerning the interpretation of section 17 of the PSHA Act.
 - b. It is unnecessary for you to resolve the question of the proper interpretation because even if Dr McGowan is correct that section 17 of the PSHA Act does not extend to perceived conflicts of interest, actions that give rise to such perceptions nonetheless have the potential to reflect adversely on the public sector, contrary to the Public Sector Principles set out in the PS Act and referred to on page 8 of the Report, and/or contrary to the obligation not to bring the public sector or the Government into disrepute in the Code of Ethics.
 - c. Accordingly, irrespective of the correctness or otherwise of the legal interpretation of section 17 put by Professor McMillan, I recommend that you issue the direction and counselling in the terms set out in paragraphs 2 and 3 above.

Please feel free to contact me should you require any further information regarding this matter.

Yours sincerely



Erma Ranieri

COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

23 January 2020

Attachments:

1. Report of Professor McMillan dated 14 January 2020 and Annexure A
2. Email from Dr McGowan to Commissioner for Public Sector Employment dated 16 January 2020 enc letter from Dr McGowan re: reply to the Report
3. Letter from Commissioner for Public Sector Employment to Dr McGowan dated 17 January 2020 enc draft recommendations to the Premier
4. Email from Dr McGowan to Commissioner dated 20 January 2020 enc letter from Dr McGowan re: Second Reply