

REPORT OF THE INTEGRITY COMMISSION

No. 1 of 2019

Summary report of an assessment of allegations of misconduct by the Hon Sarah Courtney MP (when Minister for DPIPWE and Minister for Racing) and the Secretary of DPIPWE, Dr John Whittington

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.

© Integrity Commission 2019

This report and further information about the Commission can be found on the website

www.integrity.tas.gov.au

GPO Box 822,
Hobart
Tasmania 7001

Phone: 1300 720 289

Email: contact@integrity.tas.gov.au

ISSN 2204-5910 online

President
Legislative Council
Parliament House
HOBART 7000

Speaker
House of Assembly
Parliament House
HOBART 7000

Dear Mr President

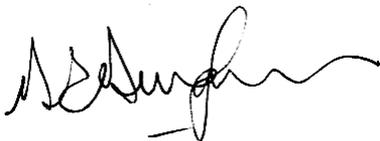
Dear Madam Speaker

Pursuant to section 11(3) of the *Integrity Commission Act 2009* (the Act), the Integrity Commission presents *Report 1 of 2019* to Parliament, a summary report of an investigation into allegations of misconduct by the Hon Sarah Courtney MP and the Secretary of the Department of Primary Industries, Water and Environment, Dr John Whittington.

Yours sincerely



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



Richard Bingham
Chief Executive Officer

19 March 2019



ASSESSMENT YARLINGTON

SUMMARY REPORT

An assessment of allegations of misconduct by the Hon Sarah Courtney MP (when Minister for Primary Industries and Water, and Minister for Racing) and the Secretary of the Department of Primary Industries, Parks, Water and Environment, Dr John Whittington

15 March 2019

TABLE OF CONTENTS

Foreword	i
1. Introduction	1
2. The evidence assessed	2
2.1. The DPaC review	2
2.2. Mr Bugg's investigation	3
2.3. Mr Sealy's investigation	4
3. Analysis of the evidence	5
3.1. Allegation 1: Ms Courtney's alleged conflict of interest	5
3.2. Allegation 4: Dr Whittington's alleged conflict of interest	6
3.3. Allegations 2 and 5: alleged misuse of funds	8
3.4. Allegations 3 and 6: improper influence	8
3.5. Allegations 7 and 9: purposefully inadequate response	9
3.6. Allegation 8: managing Ms Courtney's conflict of interest	10
4. Determination	10
5. Additional observations regarding conflicts of interest	10

Foreword

This is a summary report of an assessment undertaken by the Integrity Commission arising from a complaint received in November 2018. The complaint made allegations of misconduct relating to a personal relationship that developed between the Hon Sarah Courtney MP (as then Minister for Primary Industries and Water, and Minister for Racing) and the Secretary of the Department of Primary Industries, Parks, Water and Environment, Dr John Whittington.

An assessment is a fact finding exercise to better understand a complaint and to determine whether it ought to be investigated by the Commission or, in some instances, whether it is better dealt with by another organisation. An assessor may exercise the powers of an investigator to obtain information to help us make this decision, however will usually rely upon information that is provided by a relevant public department, or that is otherwise publicly available.

On completion of an assessment, the assessor is required to prepare and forward a report to the Commission's Chief Executive Officer in accordance with section 37(1) of the *Integrity Commission Act 2009* ('the *IC Act*'). The report is to contain a recommendation that the complaint:

- be dismissed or not accepted
- be referred (to a relevant person or agency) for investigation and action, or
- be investigated by the Commission.

In making the recommendation the assessor may consider any or all of the following:

- the principles of operation of the Commission specified in s 9 of the *IC Act*
- the nature and seriousness of the alleged misconduct if it were to be proven
- the capacity of any relevant public authority to investigate the complaint
- whether it is in the public interest, or is likely to increase public confidence, for the Commission to investigate the complaint, and
- any other matters the assessor considers relevant.

In this instance, the assessor's recommendation was that the matter be dismissed and this was ultimately the determination of the Chief Executive Officer, in accordance with s 38(1)(a) of the *IC Act*.

The Board of the Commission subsequently determined that it is in the public interest that a summary of the report be tabled in both Houses of Parliament, in accordance with s 11(3) of the *IC Act*.

1. Introduction

- [1] The complaint raised allegations of misconduct stemming from the personal relationship that developed between the Hon Sarah Courtney MP, when she was Minister for Primary Industries and Water, and Minister for Racing ('the Minister'), and the Secretary of the Department of Primary Industries, Parks, Water and Environment (DPIPWE), Dr John Whittington ('the Secretary').
- [2] The complaint focused on allegations of misconduct by the Minister and the Secretary:
1. Ms Courtney failed to declare a material conflict of interest generated by her personal relationship with the Secretary of DPIPWE to the Premier in writing as soon as possible after becoming aware of the conflict.
 2. Ms Courtney improperly spent government funds related to her personal relationship with the Secretary of DPIPWE.
 3. Ms Courtney improperly influenced Dr Whittington's decision-making as DPIPWE Secretary as a result of their personal relationship.
 4. Dr Whittington failed to take reasonable steps to avoid and disclose a conflict of interest generated by his personal relationship with Ms Courtney.
 5. Dr Whittington improperly spent government funds related to his personal relationship with Ms Courtney.
 6. Dr Whittington improperly influenced Ms Courtney's decision-making as Minister as a result of their personal relationship.
- [3] The complaint made further allegations about the Secretary of the Department of Premier and Cabinet (DPaC), Ms Jenny Gale, and the Premier, the Hon Will Hodgman MP, in relation to their respective responses to the personal relationship:
7. The Premier facilitated a purposefully inadequate response to the conflict of interest issues related to the personal relationship between Ms Courtney and Dr Whittington.
 8. The Premier failed to properly manage Ms Courtney's conflict of interest by appointing her Minister for Resources and Minister for Building and Construction.
 9. Ms Gale facilitated a purposefully inadequate response to the conflict of interest issues related to the personal relationship between Ms Courtney and Dr Whittington.

2. The evidence assessed

[4] The assessor requested from Ms Gale:

- any material prepared by and examined by Damian Bugg QC as part of his investigation/enquiry into the alleged breach of the Code of Conduct for Ministers ('the Ministerial Code') by Ms Courtney
- any material prepared by DPaC staff and a summary of material examined by DPaC staff as part of the review of the relevant decisions of Ms Courtney, and
- any material prepared by and examined by Leigh Sealy SC as part of his investigation into the alleged breach of the State Service Code of Conduct ('the State Service Code') by Dr Whittington.

[5] This material was provided and has been reviewed in the assessment.

2.1. The DPaC review

[6] After being notified by Ms Courtney on 14 October 2018 of her personal relationship with Dr Whittington, the Premier requested that DPaC review all relevant decisions made by Ms Courtney as Minister for Primary Industries and Water, and Minister for Racing.

[7] For the purposes of the review, Ms Gale sought and was provided with relevant documents from DPIPWE arising from the period 1 September to 15 October 2018, including:

- any Ministerial Briefings, Minutes or letters signed by Ms Courtney
- any statutory instruments signed by Ms Courtney
- emails from Dr Whittington
- a copy of Dr Whittington's diary, and
- confirmation of Dr Whittington's leave and travel arrangements.

[8] Further material was requested by DPaC, including:

- Dr Whittington's declared conflicts of interest
- Dr Whittington's credit card records, and
- all emails between Ms Courtney and Dr Whittington on their government email accounts.

[9] Relevant Cabinet documentation was also sought from the Cabinet Office.

[10] The DPaC staff who conducted the review developed and implemented a detailed Ministerial decision review methodology. Conflicts of interest were identified in relation to some DPaC staff, and those staff were not involved in the review.

[11] Although the actual DPIPWE documentation was not reviewed in the assessment, Ms Gale provided a schedule of this material to us. A detailed

briefing note in relation to the DPaC review was prepared for Ms Gale. Of particular note is that:

- the review found that the Ministerial decision making processes were in line with Cabinet protocols and the Cabinet Handbook
- the review included examination of meta-data, which identified the departmental approval process
- the review separated information packages approved for provision to the Minister by the Secretary, and those approved by other senior departmental staff
- where the meta-data relating to the approval process for documents suggested a change to a document by the Secretary, the detail and background to the change was reviewed, and
- there was no evidence of deviation from standard departmental clearance or approval processes.

[12] The review also examined Dr Whittington's credit card records (and those of his Executive Officer), and concluded that there were no matters of significance in relation to these records.

[13] It was concluded that the DPaC review was independent and thorough, and involved analysis of all relevant documents. The review was, when appropriate, forensic in nature and identified no material issues regarding Ms Courtney's decisions during the relevant time.

2.2. Mr Bugg's investigation

[14] On 14 October 2018, the Premier appointed Mr Bugg to investigate whether Ms Courtney had breached the Ministerial Code.

[15] Mr Bugg conducted interviews with both Ms Courtney and Dr Whittington. The interviews were not electronically recorded.

[16] Mr Bugg found that their relationship remained only work-related prior to a government trade mission undertaken in September 2018 (the China trip), and developed to be of a personal nature over the course of this trip. They returned from the China trip on 13 September 2018, and Ms Courtney then left for a personal overseas holiday on 4 October 2018, from which she returned on 13 October 2018.

[17] Ms Courtney and Dr Whittington both told Mr Bugg that they agreed to commit to a personal relationship on 13 October 2018 i.e. following the China trip and Ms Courtney's personal holiday, and after Dr Whittington had left his marital home.

[18] Mr Bugg found that the relationship took on a more personal nature once Ms Courtney and Dr Whittington started spending exclusive time together in late September – early October 2018, and that an outside observer could

have perceived that a conflict of interest had arisen. He found that at that stage, Ms Courtney should have disclosed her conflict to the Premier.

[19] On this basis, Mr Bugg found that Ms Courtney had breached the Ministerial Code. He did not however regard this to be a serious breach.

[20] Mr Bugg did not sight the DPaC review, but on the basis of his interviews stated that he was,

satisfied from the frank and responsive answers to my questions about decision making, Ministerial duties and decisions, advice and process, that during the short period in which a conflict existed, on the basis of perception, the Minister did not make any decisions or act or fail to act in any way which breached any applicable provisions of the Code.

2.3. Mr Sealy's investigation

[21] Mr Sealy was engaged to investigate whether Dr Whittington had breached the *State Service Code*, contained in s 9(8) of the *State Service Act 2000*, by failing to appropriately declare a conflict of interest arising from his position as Secretary and his relationship with Ms Courtney.

[22] Mr Sealy was instructed by the Solicitor-General to conduct the investigation on 22 October 2018. Mr Sealy was supplied the documents collated for the DPaC review of Ms Courtney's decision-making.

[23] Mr Sealy reviewed Mr Bugg's report, as he considered that some of that report's findings were relevant to how the allegation against Dr Whittington was framed. Mr Sealy also interviewed Dr Whittington.

[24] During the course of his investigation, Mr Sealy formed a view that the date when the personal relationship commenced was not the key issue, but rather that the issue at hand was,

when would a hypothetical fully-informed and fair-minded observer have first reasonably have apprehended that the relationship ... had given rise to a conflict between Dr Whittington's personal interests and the duties of his office?

[25] Mr Sealy was satisfied that there was no actual conflict of interest irrespective of the personal relationship commenced, and that there was no evidence that any decision by either Ms Courtney and Dr Whittington was in any way improperly affected or influenced by the relationship.

[26] Mr Sealy considered relevant common law and other pertinent factors in forming a view that the reference to a conflict of interest in s 9(8) of the *State Service Act* is a reference to a 'real' or 'actual' conflict of interest, but not a 'potential', 'perceived' or 'apparent' conflict. As a result, Mr Sealy concluded that there had been no breach by Dr Whittington of the *State Service Code*.

3. Analysis of the evidence

3.1. Allegation 1: Ms Courtney's alleged conflict of interest

[27] It is on the public record that Ms Courtney and Dr Whittington have formed a personal relationship. When that personal relationship started is a subjective issue, as there can be different interpretations on the status of a relationship at any time, and for the reasons outlined by Mr Sealy, it is not an especially important consideration.

[28] The Ministerial Code, dated March 2018, states:

Any material conflict between a Member's private interest and his or her official duties which arises must be resolved promptly in favour of the public interest.

So as to protect and uphold the public interest, Ministers must take reasonable steps to avoid, resolve or disclose any material conflict of interest, financial or non-financial, that arises or is likely to arise, between their personal interests and their official duties.

Ministers must declare any such conflict of interest in writing to the Premier as soon possible (sic) after becoming aware of the conflict.

[29] The Ministerial Code is accompanied by Guidance Notes, also endorsed in March 2018. The notes are 'provided as guidance to Ministers about the practical application of the Code of Conduct for Ministers'.

[30] Under the heading, Conflicts of Interest, the notes state:

A material conflict of interest exists when a Minister in carrying out his or her duties is, or reasonably appears to be, improperly influenced by private interests or when an official decision of the Minister could improperly advantage the Minister personally, or a close relative, especially, but not only, in a financial sense.

[31] The facts established by the DPaC review, and by Mr Bugg and Mr Sealy's investigations, do not suggest that Ms Courtney had a material conflict of interest as defined in the Guidance Notes. She was not improperly influenced by the private interest arising from her relationship with Dr Whittington, and her official decisions did not improperly advantage her or a close relative. Also, Ms Courtney was not Dr Whittington's employer and did not have the ability to directly benefit Dr Whittington in relation to his employment.

[32] Mr Bugg's conclusion that Ms Courtney breached the Ministerial Code is based on his view of a perceived conflict of interest. The Commission notes that the Code requires that there must be a material conflict of interest that 'arises or is likely to arise, between [a Minister's] personal interests and their official duties'.

[33] His report states:

It is trite to say that the outside observer, objectively placed, is often in a better position to understand a conflict of interest than the subject of an enquiry. It is for this reason that a standard definition of conflict of interest is broad including potential conflict, actual conflict and perceived conflict, where the third category, perceived conflict, is established if it could reasonably be perceived, or give an appearance, that a competing interest could improperly or adversely influence a person in the performance of their official duties. It is not a question of actuality or a subjective judgement, it is based on the perceptions of the outside observer.

[34] Mr Bugg goes on to say:

I have considered this matter very carefully and concluded that within a narrow span of time following her return from China and before leaving for [her personal holiday] the Minister's developing personal relationship with Dr Whittington had reached a level where a perceived conflict of interest, as explained earlier, existed and this constituted a breach of the Code.

[35] It is the Commission's view that a perceived conflict of interest must be considered objectively, and can exist only where a person acting reasonably and fully informed of all relevant information, could believe that to be so. The often-mentioned 'pub test' is not sufficient to warrant a finding of a perceived conflict of interest, because that 'pub test' is usually applied without reference to all of the known facts and circumstances of a particular situation.

[36] In this instance, it is clear that Ms Courtney did not have a material conflict of interest as defined in the Guidance Notes to the Ministerial Code. The mere existence of the personal relationship did not give rise to a conflict of interest – there was no incompatibility between Ms Courtney's personal interests and any of her specific official responsibilities.

[37] The Commission notes that Mr Bugg concluded that Ms Courtney had a perceived conflict of interest, which she should have disclosed earlier, and that this conclusion was open on the facts.

3.2. Allegation 4: Dr Whittington's alleged conflict of interest

[38] The *State Service Code* requires that,

an employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.

[39] Unlike the Ministerial Code, this provision does not require that the conflict must be 'material', nor does it specify that the provision is also enlivened if the conflict is 'likely to arise'.

[40] Mr Sealy's report states that Dr Whittington did not breach this provision because he did not have an actual conflict of interest. Mr Sealy concluded

that – as matter of law – the provision only applies to actual conflicts of interest, not perceived or potential ones.

- [41] The report canvasses, but does not decide, the question of whether Dr Whittington had a perceived conflict of interest. In considering the issue, Mr Sealy took the view that it is necessary to follow a three-step test, and apply it to individual decisions about specific matters – not to future decisions about unknown or as yet unforeseen matters.
- [42] He stated that the test is analogous to that specified by the High Court of Australia in cases of ‘apprehended bias’:

Step one is the identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits – in this case, the identified factor is the personal relationship between Ms Courtney and Dr Whittington, and ‘the merits’ is the decision-making by Dr Whittington.

Step two is articulation of how the identified factor might cause a deviation from a neutral evaluation of the merits – in this case, the political debate has not identified how this might occur.

Step three is a consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.¹

- [43] The report notes that there may be an unstated fear that Dr Whittington may now be in a position to somehow improperly influence decisions which Ms Courtney is required to take, and vice versa. It notes that in the realm of politics, perceptions – even irrational or inexplicable perceptions – matter.
- [44] It is noted that the Commission’s role is not to deal in the political realm. Our role is to consider whether there are facts which indicate that there may have been a breach of the relevant code of conduct, or some other dishonest or improper behaviour, by a public officer. For that purpose, the appropriate test for us to apply in a situation such as this, which requires a determination of whether a perceived conflict of interest exists, is that of a reasonable person who has all the relevant information.
- [45] Mr Sealy’s report goes on to consider the facts and available evidence of this case, and concludes that the earliest possible date on which a perceived conflict may have arisen was 2 October 2018, if indeed it arose at all.
- [46] The Commission agrees with Mr Sealy’s observations about what constitutes a conflict of interest in circumstances such as this.
- [47] We also accept Mr Sealy’s view that a breach of the *State Service Code* requires there to be an actual conflict of interest, rather than a perceived or potential conflict. On that basis, there was no breach of the *State Service Code* by Dr Whittington.

¹ *Isbester v Knox City Council* (2015) 255 CLR 89, 59 (Gageler J).

3.3. Allegations 2 and 5: alleged misuse of funds

- [48] It is important that the DPaC review found that there were no matters of significance in relation to Dr Whittington's credit card records, as this suggests that he did not make improper use of public funds while on the China trip.
- [49] Whilst Ms Courtney's credit card records were not examined, the material reviewed by DPaC was sufficiently detailed and was of such a nature that, had there been any improper use of public funds by either subject officer, it is likely to have been detected. No improper use was detected.
- [50] The evidence indicates that the personal nature of the relationship between Dr Whittington and Ms Courtney started to develop during the China trip in September 2018 – the relationship was purely professional in nature before that time. On that basis, there is no evidence to indicate that either person made the trip to China for anything other than legitimate work-related reasons.
- [51] Further, there appears no reason why a developing personal relationship between two public officers on a work trip would be more likely to prompt the misuse of funds than would be the case for any other officer making such a trip.
- [52] The complaint suggested that the personal relationship which developed may have led Dr Whittington to spend more time in Launceston, and that this may have involved the misuse of public resources.
- [53] Open source checks have revealed that it was Liberal Party policy before the 2018 election to divert more DPIPWE staff to the north of Tasmania. This policy pre-dates the personal relationship. When asked in Parliament about any connection between the personal relationship and Dr Whittington's alleged plans to spend more time in the north of Tasmania, the Premier responded,

the connection ... is tenuous. It would be appropriate for senior officials from departments to spend some time where a large number of our staff are based.

- [54] The Premier's response appears reasonable, and there is no evidence that any plans by Dr Whittington to spend more time in the state's north related to his personal relationship with Ms Courtney.

3.4. Allegations 3 and 6: improper influence

- [55] The DPaC review of Ms Courtney's decisions involved the analysis of relevant material by independent, experienced and informed senior officers.
- [56] As both Ms Courtney and Dr Whittington were on leave for significant periods of their recently formed personal relationship, the opportunity for any improper influence was brief.

- [57] There is no identifiable reason why the decisions of Ms Courtney would be influenced by her personal relationship with Dr Whittington.
- [58] Similarly, although there has been no specific review of any Head of Agency decisions made by Dr Whittington, there is no identifiable reason why his decisions as Secretary might have been subjected to improper influence stemming from the personal relationship. Although the DPaC review focused on Ms Courtney's decisions, the material reviewed was sufficiently thorough and was of such a nature that, if Dr Whittington's decisions as Secretary of DPIPWE had been influenced improperly, evidence of it is highly likely to have been detected. No such evidence was detected.
- [59] Mr Sealy concluded that there was no evidence to suggest any decision by either subject officer was in any way improperly influenced by their personal relationship. This conclusion presents as reasonable and based on the available evidence.

3.5. Allegations 7 and 9: purposefully inadequate response

- [60] The evidence shows that highly experienced, qualified and independent investigators were engaged to conduct the investigations.
- [61] Although concerns have been raised by the complainant and the Community and Public Sector Union about Dr Whittington's decisions being improperly influenced by the personal relationship, Mr Sealy's investigation found no evidence that any decision by Ms Courtney or Dr Whittington was in any way improperly affected or influenced.
- [62] The Commission has also concluded that the DPaC review was sufficiently thorough, detailed and independent, and that any valid concerns that might have been previously held by any DPIPWE staff about the impact of the personal relationship would have been identified in that review.
- [63] Ms Gale stated that,
- while there was a requirement for public servants to maintain confidentiality of information obtained through their employment, this would not override the ability of an employee to participate in an investigation or utilise other available avenues to raise concerns.*
- [64] It is reasonable to assert that if any DPIPWE employee had relevant information to provide the investigators then it was open for them to do so, either through internal grievance procedures, making a complaint to a relevant integrity agency or through making a disclosure under the *Public Interest Disclosures Act 2002*.
- [65] Other concerns expressed in the media about potential conflicts of interest within DPaC and their impact on the review of the matter appear unfounded, as the department was aware of the issue and took appropriate steps to manage it.

[66] The evidence shows the response by Ms Gale and the Premier to the personal relationship – in the form of the DPaC review and the investigations by Mr Bugg and Mr Sealy – was not inadequate.

3.6. Allegation 8: managing Ms Courtney’s conflict of interest

[67] Ministers are individually responsible for preventing conflicts of interest. It is up to Ms Courtney, not the Premier, to ensure there is no conflict between her personal interests and her Ministerial duties.

[68] As noted above, Ms Courtney’s personal relationship with Dr Whittington, even if she retained her original portfolios, would not have generated a material conflict of interest. It is evident that her new portfolios (Resources, and Building and Construction) may lead to some contact with Dr Whittington, but this does not necessarily translate to a material conflict of interest.

[69] Further, any possible conflict needs to be managed in relation to individual decisions about specific matters, not to future decisions about unknown or as yet unforeseen matters.

[70] It follows that the Premier has not failed to properly manage Ms Courtney’s conflict of interest by appointing her to the Resources, and Building and Construction, portfolios.

4. Determination

[71] In accordance with s 38(1)(a) of the *IC Act*, the Chief Executive Officer determined to dismiss the complaint on the basis that it is not in the public interest to further investigate the matter. This includes consideration of the likely degree of culpability of the public officers about whom the complaint has been made [ss 36(1)(f) and 36(2)(d) of the *IC Act*], and that investigating the complaint would be an unjustifiable use of the Commission’s resources [s 36(1)(e)].

[72] The Premier, Ms Courtney, Dr Whittington and Ms Gale were notified of this determination, and the notices were subject to the confidentiality provisions of s 98 of the *IC Act*. Those provisions have now been lifted with the tabling of the report.

5. Additional observations regarding conflicts of interest

[73] It is apparent from our assessment that the Commission agrees with Mr Sealy’s analysis of ‘actual’ and ‘perceived’ conflicts of interest, and their application to this matter. Notwithstanding Mr Bugg’s findings, the review undertaken by DPaC staff has shown that on the balance of probabilities, there is little likelihood of any improper conduct on behalf of either Ms Courtney or Dr Whittington.

- [74] This does not mean however that the interest that arises from the forming of a personal relationship in a workplace could not ever become an ‘actual’ conflict (in the case of the *State Service Code*) or a ‘material’ conflict (in the Ministerial Code). Personal relationships may potentially give rise to circumstances in which a conflict may develop, so it is incumbent on the parties involved to consider the interest and ensure that it is adequately managed.
- [75] Further, perceptions of conflicts of interest have capacity to do damage to public confidence in government and the broader public sector. While such perceptions may be unreasonable or, at the least, poorly informed, constant monitoring and real-time declaration of interests that have the potential or capacity to influence decisions made by public officers will go some way in ensuring better awareness and accountability. This is particularly the case for Ministers under the Ministerial Code.

INTEGRITY
COMMISSION

