

Department of Premier and Cabinet

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The Hon Will Hodgman MP
Premier of Tasmania
Level 11, 15 Murray Street
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Dear Premier

I refer to your letter to Acting Secretary, Ms Ruth McArdle of 22 October 2018, in which you approved my recommendation that the Department of Premier and Cabinet immediately engage an independent investigator, to investigate the alleged breach of the State Service Code of Conduct by Dr John Whittington (the 'Approval Letter'). As noted in the Approval Letter, it was agreed that the independent investigator was to provide me with a report on any findings, which I would then consider with any other documentation before advising you on the outcome of the investigation.

Your approval to engage an independent investigator was based on my preliminary view that there were reasonable grounds to warrant an investigation into whether Dr Whittington breached the *State Service Act 2000* Code of Conduct (the 'SSCoC') by failing to appropriately declare a conflict of interest. In reaching this conclusion the separate findings of Mr Damien Bugg QC into a breach of the Ministerial Code of Conduct were taken into account.

Following receipt of the Approval Letter, Ms McArdle as the Acting Secretary took immediate steps to appoint Mr Leigh Sealy SC as the independent investigator. Mr Sealy was subsequently instructed on 22 October 2018 to investigate whether Dr Whittington had breached the SSSoC (and more particularly, section 9(8) of the SSSoC), by failing to appropriately declare a conflict of interest in relation to his appointment to the office of Secretary and his relationship with Minister Courtney. Relevantly, section 9(8) provides:

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

On 29 October 2018, Mr Sealy completed his investigation and provided his report to me. That report is attached to this letter. When considering Mr Sealy's report, it is important to bear in mind that section 9(8) of the SSSoC sets a statutory norm, whereas the Ministerial Code of Conduct depends on a range of considerations, including matters of policy as between you and members of the Cabinet. Therefore, the application of the Ministerial Code of Conduct to the present circumstances, may render a different answer to the application of the SSSoC.

In summary, Mr Sealy has found that there is no evidence to suggest that Dr Whittington was, by reason of his personal relationship with the Minister, subject to any *actual* conflict of interest with his duties on any date prior to him formally disclosing that relationship to me on 14 October 2018.

Mr Sealy's report considers in detail whether a 'conflict of interest' under the SSCoC means only an actual conflict of interest, or whether it also extends to a potential or perceived conflict of interest. Ultimately, it is Mr Sealy's view that the reference to a 'conflict of interest' in the SSCoC should be interpreted as being a reference to a real or actual conflict of interest, but not to a potential, perceived or apparent conflict of interest. For this reason, Mr Sealy suggested that even if it is assumed that the relationship between Dr Whittington and the Minister might have created a conflict of interest prior to the date of disclosure by Dr Whittington, a perceived conflict of interest of this nature would not, in Mr Sealy's view, equate to a breach of the SSCoC.

Mr Sealy is also of the view that there is no evidence to suggest that any decision made by either the Minister or by Dr Whittington prior to 14 October 2018, was in any way, improperly affected or influenced by the personal relationship that existed between them. I note that I separately advised you by way of letter that a review of the decisions of Minister Courtney, had been independently undertaken and completed by Department of Premier and Cabinet staff, and that the review had not identified any material issues in relation to those decisions.

For the reasons identified above, Mr Sealy has found that Dr Whittington did not breach section 9(8) of the SSCoC, and that there is no evidence to suggest that he has breached any other provision of the SSCoC.

It is now a matter for you to put your mind to all the information to determine whether Dr Whittington breached the SSCoC.

As you are Dr Whittington's employer, and in light of the fact that a conflict has been declared by each of Minister Courtney and Dr Whittington, it is also a matter for you to determine how best to manage any declared conflict. However, it is my view that the current declared conflict of interests as between Minister Courtney and Dr Whittington has created a situation which is untenable for them to continue as Minister and Secretary in the same portfolios. It is prudent for me to advise that if you determine, based on the evidence and this letter of advice, that Dr Whittington has not breached the SSCoC, there are limited options under his Instrument of Appointment from which to manage the conflict. Specifically, you can:

- 1) advise Dr Whittington that on completion of his approved leave period, he may return to his existing appointment (in which case you would manage the existing declared conflict of interest through such other means as you deem appropriate); or
- 2) direct Dr Whittington to undertake the functions and perform the duties of another office. Should you elect to reassign Dr Whittington, in accordance with his instrument he must be paid an amount which is equal to, or greater than his existing salary. Should you be minded to employ this option, I would recommend we have further discussions concerning the appropriate action.

Following your consideration of these findings, if you wish to discuss any aspect of this matter in further detail, please do not hesitate to contact me.

Yours sincerely



Jenny Gale
Secretary

30/10/18