

Report by the Inspector pursuant to Section 140(3) of the Independent Commissioner against Corruption Act 2017 Concerning an Allegation of Conflict of Interest

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Executive Summary

This Report pursuant to section 140(3) of the *Independent Commissioner against Corruption Act 2017* (Northern Territory) ("ICAC Act") deals with a complaint of corrupt conduct against the OICAC and specifically, an allegation that the Director of Investigations have a conflict of interest in allocating investigative work to be carried out externally to the OICAC to her domestic partner, who conducted a private investigation business.

Having investigated the matter, I am satisfied that the conflict of interest, if any, was recognised and appropriately managed. I am satisfied that the OICAC recognised it would be inappropriate for the Director of Investigations to be involved either in selecting an external contractor to carry out investigations and in allocating specific items of work to him. As a result, the Commissioner and Deputy CEO both ensured that that did not occur.

Accordingly, I have decided the complaint should be dismissed.

Background

In March and April 2021, I received a series of complaints from employees of the Office of the Independent Commissioner against Corruption ("OICAC").

The first such complaint was made to me on 11 March 2021 anonymously, but, in fact, by a Senior Investigator of the OICAC. In addition, I received similar complaints from three other employees in the Investigation Section of the OICAC.

The Complainant made an allegation of corrupt conduct (which I explain in more detail below) which I decided to accept for investigation and determination. In addition, the Complainant raised several workplace issues. The other complaining employees made similar allegations.

To the extent that the complaints involved allegations of inappropriate management of staff, I determined that I should refer them to the Commissioner for Public Employment, Ms Vicki Telfer, after discussions with Ms Telfer. My principal reason for taking that course is expressed in the last paragraph of my email to Ms Telfer dated 18 April 2021, as follows.

I greatly appreciate your consideration of these matters. As I said, I regard the legislation as requiring me, as Inspector, to deal with issues involving alleged impropriety, corruption or misconduct on the part of the Commissioner and officers of his Office or in the administration of the ICAC Act or error of law in relation thereto. I do not possess the resources nor the ability or expertise necessary to deal with those aspects of the complaints which raise employment issues. Needless to say if, in the course of considering these materials, you come to the conclusion that there are aspects which involved potential misconduct appropriate for me to consider please feel free to raise them with me and refer them back to me.

The complaint which I accepted for investigation was expressed in the following terms by the Complainant in her email to me dated 9 March 2021:

this is a disclosure of corrupt conduct by Kate Kelly director investigations at office of the independent commissioner against corruption NT

kate kelly is director investigations

also known as katherine kelly

also known as kate curyer

domestic partner of kelly is david mcginlay

gat risk management

both previous lived in SA

* * * *

mcginlay reported have left SA police due to allegations made against him for mistreatment of female officers under his command . . .

now in nt mcginlay is contracted by icac as an external investigator

allocation of work to mcginlay very disproportionate

an estimated 180K invoiced by mcginlay since late 2020 to date

conflict of interest in kelly allocating work to mcginlay as the director of investigations while also sitting on operations committee and with access to information on and influence over possible investigations

concerns raised to management with no responsive action

other

allegations of bullying and intimidation of staff across icac by kelly

staff willing to talk but concerned about retribution

reporter is employee of icac

reply will be received

please report back to discuss whistleblower protections and next steps

[I have omitted references to the workplace issues mentioned above]

Put shortly, the allegation was that, because there was a domestic relationship between Kate Kelly, the OICAC Director of Investigations and David McGinlay, an external investigator who had been retained by the OICAC to carry out investigations on its behalf, there was a conflict of interest which amounted to corrupt conduct within the meaning of the ICAC Act.

The Facts

As at mid-2020, Ms Kate Kelly was, as she remains, the ICAC's Director of Investigations. At that time, the Commissioner informs me, and I accept, that responsible senior officers of the ICAC became concerned that the Investigation Section of the ICAC would not be able to service its existing investigations from its internal resources. Specifically, the Commissioner says:

In 2019/20/21 the ICAC remains under considerable pressure to deliver outcomes in line with government and community expectations.

During this period the Office underwent significant growth from 9 to 30 FTE. The investigations section was carrying in excess of 50 investigations and was staffed predominately by investigators with little or no exposure to serious and sensitive investigations or integrity agency methodology.

Acknowledging this, we received funding from Treasury to engage external contractors to assist with the investigation backlog in the 2020/21 financial year.

** * * **

During the 2019/20/21 period, the investigations unit had an active case-load of over 50 investigations. To put that in context the WA CCC has been established for 14 years, they have an Operations Directorate with over 50 staff, supported by a Legal Directorate with over 10 staff and they conclude approximately 50 investigation per year.

The ICAC Investigation Unit's approved human resource quota is 11 FTE (one director, two managers and eight senior investigators). During the 2020/21 financial year to date the investigations section comprised of one director, two acting managers, six senior investigators and an investigative assistant. The majority of the senior investigators had less than six months service.

Standard investigations typically take between 6-12 months to complete. Complex investigations generally take over 12 months to complete. Two ICAC major investigations have been active and serviced by multiple staff for over 12 months. At its lowest the backlog would have taken four years to clear (50 matters x 0.5yrs / 6 investigators = 4.1yrs).

In late 2019 it became apparent that the investigation section would not be able to service the backlog of 50 investigations by relying on internal resources. In early 2020 the OICAC (Corporate Services) applied to Treasury and was approved by the Treasurer to roll-over \$500,000 surplus from the 2019/20 financial year into the 2020/21 financial year, specifically to address the backlog of investigations.

The approved OICAC budget for the 2020/21 financial year was at \$8.196M which includes a carryover of \$500,000 from the prior year, which was dedicated to outsource external investigations. The carryover request approved by the Treasurer indicated that at the end of 30 June 2020, the OICAC had 25 matters it intended to outsource valued at approximately \$500,000. These 25 matters on hand were included in the 56 matters on hand within the Investigations area as reported in the Annual Report 2019-20.

To address these issues, the OICAC began a process to identify suitable external contractors to provide the necessary investigative services. Ministerial approval of the necessary funding was obtained. This was done by a budget carryover request from 2019-20 to 2020-21 dated 21 September 2020 which explained the basis for the carryover request as follows:

The OICAC had 56 investigations on hand as at 30 June 2020, and 25 of these investigations are expected to be outsourced to support the operations of the office and alleviate the pressure on staffing capacity. The estimated amount to outsource these investigations were calculated at \$500,000 and is therefore required in order for the office to continue to attend these matters. The OICAC is committed to maximise the outcomes from its existing resources to achieve our aims and priorities in accordance with our Strategic Plan 2020-2023.

Ministerial approval to the request was given on 25 September 2020.

Prior to that time, the responsible officers of the OICAC had taken the necessary steps to identify appropriate persons who might provide the services in question. Thus, on 10 July 2020, the Acting Director Investigations emailed the Deputy CEO Mr Grant, in the following terms:

In response to the overflow case load currently being held by ICAC Investigation, it has become apparent there is a need to address this risk and seek to identify external providers who can undertake investigative duties as contractors of the OICAC. At this time we currently have such an agreement in place, with [an existing contractor], and the association is progressing well. However, additional capability in this area will provide increased agility and prioritisation within the investigations area.

The Acting Director Investigations' email continues by identifying nine Darwin-based entities which claimed to provide investigative service in the Northern Territory. Amongst them was Mr McGinlay. As a result of processes that appear to me to be perfectly appropriate, the field was narrowed down to three of whom Mr McGinlay was one. As the Acting Director Investigations put it in his email:

Following the telephone meetings the list was further narrowed down to prospective providers.

Please see narrowed list below;

- [ABC]
- [DEF]
- David McGINLAY

During the course of the telephone meetings referees details were obtained for each one. Following is the general feedback provided

- [ABC]- Feedback was very positive stating they were a professional business who provided the highest quality work in a timely manner. They are responsive to requests, maintain effective communication with clients and maintain the highest level of confidentiality.
- [DEF]- Professional, provided quality analysis and reporting, timely, good lines of communication. Maintained highest levels of confidentiality.
- David McGINLAY - Professional, highest quality work in a timely and effective manner, very experienced in stakeholder engagement on all levels, effective in identifying root causes and targeting work priorities. Highest levels of confidentiality.

Further separate meetings, being face to face, was held between [OICAC Acting Director Investigations] and the three above providers. At this time it was evident that [ABC] and David McGINLAY were able to provide a constant capacity to service ICAC's needs. [DEF] stated during

this meeting he was awaiting the results of a job interview he had participated in and may be securing fulltime employment with an NT Government agency.

It is important to note that the potential for conflict of interest arising from the domestic relationship between Mr McGinlay and Ms Kelly was recognised immediately. Thus, the Acting Director continued:

It is important to note that from the outset David McGINLAY was identified as being in a domestic relationship with the ICAC Director of Investigations, Kate KELLY. During the course of the project Director KELLY has not been afforded the opportunity to provide any input into the process, nor has any form of influence been engaged in. McGINLAY underwent the exact same process as all other contacted parties.

In conclusion, it is my recommendation that consideration be given to engaging David McGINLAY and ABC to provide external investigative services to the ICAC on an ongoing basis. This recommendation is based on the capability and capacity of both parties to undertake the work which would be referred by ICAC Investigations. Furthermore, both parties are local Darwin providers.

In relation to the ongoing risk associated with engaging a person who is in a relationship with a current ICAC staff member, the following mitigation strategies can be utilised to negate such;

- A conflict of interest declaration to be completed by both KELLY and McGINLAY.*
- Full management of external contractors is undertaken by the Team Leader of ICAC Investigations.*
- All records pertaining to this process to be maintained on record.*

It is also noted that both McGINLAY and ABC's staff will require extensive background checks prior to any engagement with ICAC.

Information forwarded for consideration and decision making.

Therefore, Mr Grant determined to seek independent advice by email dated 7 August 2020 in the following terms:

Thanks for the recent work you did to identify external providers that might be able to assist the ICAC in conducting investigations. As you rightly pointed out, we have an internal conflict of interest that needs to be managed. I have asked Peter Gallagher to conduct an independent desktop review of your assessment and recommendations. Can you please provide Peter with:

- Relevant material you collected as part of your assessment process (CV's, Business Profiles, Skills, Qualifications, Experience, Existing provision of service to Govt, referee checks, notes of interviews you conducted etc)*
- You [sic] recommendation rankings*

Please attempt where possible to anonymise the business that the conflict applies to.

The conflicted officer is Dir Inv Kate Kelly, who will not be consulted throughout this process. [My emphasis]

Mr Gallagher, a former senior New South Wales police officer and a person of complete integrity carried out the requested assessment reporting as follows on 11 August 2020:

Please see attached. I agree with the rankings previously provided. My recommendations therefore are:

1. David Harold McGinlay - the most outstanding applicant by far. Great experience and qualifications.

2.[ABC] - A reputable company with good references. I note that the investigators recommended by that company would still need to be 'vetted' by ICAC.

3. [DEF] - a good applicant but perhaps not with the breadth of experience ABC can provide.

4. [GHI] A reputable company with wide experience. I note not yet interviewed but once interviewed and, if considered acceptable, they may provide experienced investigators. Noted that any investigators recommended by Precise will need to be vetted by ICAC before actual engagement.

In my view, the steps taken by the OICAC to this point were entirely appropriate. Thus, a list of potential external providers was compiled, the Acting Director Investigations conducted an assessment of those potential external providers and an independent third-party, Mr Gallagher, conducted a review of the selection process confirming the propriety of retaining Mr McGinlay. Ms Kelly was excluded entirely from these processes. Subsequently, on 24 August 2020, Mr McGinlay executed a Consultancy Agreement for investigations, as did the Commissioner. Mr McGinlay has rendered services pursuant to that agreement since that time.

On 1 September 2020, Mr McGinlay executed a Conflict of Interest Declaration. The following are the significant parts of that Declaration:

I have an actual conflict of interest with Katherine Elizabeth KELLY, Director of Investigations, as I have a personal relationship with Ms KELLY. This relationship has been disclosed to the management of the ICAC who have implemented processes to manage the conflict.

In the section of the declaration which sets out the method by which the conflict will be managed, Mr McGinlay said this:

The provision of service by me to the ICAC will not be undertaken through Ms KELLY and there has been full disclosure of the relationship. Reporting protocols to manage the conflict of interest have been identified and enacted.

The Declaration was annotated by the Acting Director Investigations "Conflicts identified and being managed on an ongoing basis". The Deputy CEO and the Commissioner signed off on the Declaration on 1 September 2020.

In her turn, Ms Kelly provided two Conflict-Of-Interest Declaration Forms on 2 September 2020 and 8 December 2020. In each of those forms Ms Kelly disclosed that she was the de facto partner of David McGinlay who had been engaged as an external contractor with the OICAC to provide investigative services. In the second of those declarations Ms Kelly set out the following description of how the conflict would be managed:

As the Director Investigations I will be responsible for the oversight of the operational decision-making for all investigations.

The Contract Manager of the External Contractors is the designated ICAC contact for matters related to the management of external contractors conducting investigative services, and is responsible for the allocation of all work and the performance management of the contract.

The Deputy CEO is the designated ICAC contact for matters related to financial delegation and approval of payment to external contractors.

By this time, the previous Acting Director Investigations had resigned from the OICAC and been replaced by the contract manager who took responsibility for management of the external contractors. Subsequently the contract manager developed a Policy and Procedure for managing external contract investigators and a quoting system to manage and cost (in advance) the tasks being conducted by contracted investigators. I have examined these documents and they are available for inspection although I do not believe it is necessary to attach them to this Report. In addition, the contract manager designed and managed (in conjunction with OICAC Corporate Services) a detailed spreadsheet recording all costs associated with external investigators and began to consult with and escalated matters directly to the Deputy CEO. Finally, the Director of Corporate Services approved the appointment of the contract manager from 7 January 2021 for four months

as Manager Investigation which provided him with the financial delegation and authority necessary to manage the external investigators.

I should also note the Operations Committee comprises the Commissioner, the DCEO and all directors. It sits fortnightly and receives assessment recommendations and decides what matters go to the Investigation Unit. This committee confirms the scope of the investigation and tracks the progress of each investigation. There is also an Investigations Management Team which monitors investigations on an ongoing basis.

As to Ms Kelly's role, the OICAC informs me as follows:

Director Kate Kelly is responsible for operational outcomes of the investigations section. She is present at meetings with the Commissioner and various Deputy Commissioners that discuss the detail and direction of investigations. Sometimes those investigations are being conducted by external investigators and augmented by internal investigators. On those occasions where McGinlay is involved and when those discussions turn to the division of labour, Kelly excuses herself from the meetings and her Investigation Managers, in consultation with the DCEO and relevant Deputy or Commissioner, direct which tasks will be taken on by internal investigators and which will be done by McGinlay.

Finally, I should note the existence of the OICAC's Conflict of Interest Policy dated March 2019. I have reviewed that Policy which appears to me to be entirely appropriate. It is lengthy and consequently I will not attach it to this Report. It is available if desired.

Conclusion

It appears to me that the retention of Mr McGinlay as an external contractor was managed appropriately to avoid any conflict of interest. On the evidence I have examined, Ms Kelly had neither any role nor any influence in the selection of Mr McGinlay as an external contractor to the OICAC. Further, it is obvious that the potential for conflict was recognised at the appropriate time and managed appropriately.

I should add that it is obvious that Mr Gallagher, who was relevantly independent of the OICAC, determined that Mr McGinlay was the best of all the candidates. It will be very unfortunate if the OICAC was deprived of the services of the best person because of the existence of a personal relationship with an OICAC employee when that conflict could be appropriately dealt with as it was here.

In my opinion, based on the materials I have reviewed, the conflict of interest, if any, was appropriately managed and dealt with. Accordingly, I propose to dismiss the complaint.

B. R. McClintock

Bruce R McClintock

Inspector, Independent Commissioner against Corruption

24 June 2021