

REDACTED FINAL REPORT

Full investigation pursuant to referral under
section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	Department for Health and Wellbeing (the department)
Public Officer	██████████ [Person B] and ██████████ [Person C]
Ombudsman reference	2017/11205 and 2017/11209
ICAC reference	2016/000170-S01
Date of referral	5 October 2017
Issues	<p>Whether by recording the telephone conversations of a colleague without their consent Person B committed misconduct in public administration</p> <p>Whether by engaging with Person B for her to record private telephone conversations of a colleague without their consent Person C committed misconduct in public administration</p>

Jurisdiction

These matters were referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act), as raising potential issues of misconduct within the meaning of that Act (the referral).

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
- (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the Complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.
- (2) In this section—
Commissioner means the person holding or acting in the office of the Independent

Commissioner Against Corruption under the ICAC Act;

ICAC Act means Independent Commissioner Against Corruption Act 2012;

Office means the Office for Public Integrity under the ICAC Act.

At the time of the referral I considered there was evidence that Person B may have breached section 4 of the *Listening and Surveillance Devices Act 1972* (**LSD Act**)¹ which was in place at the relevant time. I also considered there was evidence that Person C may have breached section 267 of the *Criminal Law Consolidation Act 1935* (**CLC Act**).

The solicitors for Person C have commented that the provisional report of my investigation does not contain an analysis of the evidence relating to a possible breach of the criminal law. As I do not have the jurisdiction to investigate statutory breaches of a criminal nature in the context of an ICAC investigation to do so would, in my opinion, be inappropriate and have the potential to compromise the integrity of any findings from my investigation.

Investigation

My investigation has involved:

- assessing the information provided by a concurrent investigation
- considering the LSD Act, CLC Act, the *Public Sector Act 2009* (**PS Act**) and the *Code of Ethics for the South Australian Public Sector* (**the Code**)²
- writing to Person B requesting that she respond in writing to a number of questions
- issuing a summons under the *Royal Commissions Act 1917* to the solicitors acting for Person B
- considering the response to the questions provided by Person B's solicitors
- writing to Person C requesting that he respond in writing to a number of questions
- issuing a summons under the Royal Commissions Act to Person C
- considering the response to questions provided by Person C
- listening to five audio recordings made by Person B
- providing Person B, Person C and the department with my provisional report for comment, and considering their responses
- considering SA Health Respectful Behaviour Policy (**the Behaviour Policy**)³
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.⁴ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁵

¹ The LSD Act was repealed by Schedule 1 cl 4(1) of *Surveillance Devices Act 2016* on 18 December 2017.

² The Code dated 1 February 2010 which was applicable in December 2014.

³ This policy was approved by the department on 30 July 2010 and was updated on 16 December 2016.

⁴ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁵ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Response to my provisional report

In response to my provisional report the solicitors for Person B and Person C respectively made detailed submissions to the effect that neither of their clients committed misconduct. I summarise and address those submissions as necessary in the body of my report.

The Chief Executive of the department submitted that:

- the provisional findings in relation to Person B and Person C were noted
- the actions of Person C could not be condoned but it was considered that '[Person C's] intent was not to deliberately act inappropriately, but to obtain information to inform a response to a workforce related matter'
- the department will obtain advice from the State Records Office in relation to the future management of the recordings.

Background

1. In December 2014, Person C was (and remains) employed by [REDACTED] the department now known as the Department for Health and Wellbeing.
2. In December 2014, Person B was employed by [REDACTED] the department.
3. As a result of an investigation conducted by my Office in relation to another matter, Person B was interviewed on 1 September 2017. As part of the investigation Person B was asked if she was aware that a work colleague (who I will refer to as 'Person A') had some of her telephone conversations recorded. Person B said that she did not know of any recordings.
4. On 4 September 2017 Person B sent an email to my Office in which she corrected this answer stating:

I just want to be sure it's clear that I didn't intentionally withhold this information, I genuinely didn't recall it at the time of talking to you.

You asked if I was aware of any phone calls being recorded between [Person A] and panel providers. I was the person responsible for those recordings. The recordings were done on my Dictaphone, from my desk, and could only capture what [Person A] was saying.

My vague memory of it is summarized below:

1. [Person C] wanted me to record it so he had a clear understanding of things [Person A] said to vendors. Initially he had asked me to grab him from his office (I sat directly outside of his office) if [Person A] was behaving inappropriately with panel members over the phone, so he could hear it for himself. That method was proving impossible due to [Person C's] heavy schedule, so he asked me to record it if possible on my Dictaphone.
2. The recordings were never intended to be shared or used as evidence in way (sic), [Person C] just wanted to be well prepared when challenging her on her behaviour - removing the Chinese whispers element.
3. I did make 2 or 3 recordings from memory, but from memory nothing really substantial was captured. I think all I was able to get was [Person A] swearing a couple of times at a vendor - but I can't remember if I was able to name the company/vendor or not.
4. I think I saved the recordings in a restricted location on the network and sent [Person C] an email with a summary. I have tried to find the email but was unsuccessful so I may have just told his assistant, [REDACTED].

Sorry the memory is so vague.
Regards,
[Person B].

5. Initially it was thought that the recordings were made in or about August 2015. Evidence received subsequently, shows that the recordings were made in December 2014. *Prima facie*, it appeared that the conduct of Person B may have breached the provisions of the LSD Act. Similarly, it appeared that the alleged conduct of Person C may have breached the provisions of the CLC Act.
6. On that basis, in accordance with my obligations under section 20(3) of the ICAC Act and the *Directions and Guidelines* issued by the Commissioner, I reported this alleged conduct of Person B and Person C to the Office for Public Integrity.
7. I subsequently received a referral from the Commissioner in relation to the alleged conduct of Person B and Person C on the basis that it raises potential issues of misconduct in public administration within the meaning of section 5 of the ICAC Act. I commenced an investigation on the basis of the referral.
8. In her written response Person B has told my investigation:
 10. [Person C] told me that he had received a number of complaints from individuals about [Person A's] behaviour and that he intended to table the complaints raised with [Person A]. [Person C] also told me that he had attempted to personally witness the behaviour by leaving his door open so that he could address that behaviour as it arose, but that because of the position of his office he could not hear from his location in it. [Person A's] behaviour was commonly discussed amongst colleagues located in the office area surrounding [Person A]. I myself had complained to [Person C] about [Person A's] conduct.
 11. It was in that context that [Person C] gave me a specific verbal direction to record [Person A's] speaking to other persons in an inappropriate or unprofessional manner in the event I witnessed that behaviour. I was required to use a Dictaphone to make audio recordings. To be clear, this direction was not specifically in respect to telephone conversations. [Person C] was quite specific that I was only to capture misconduct. I was not directed to make recordings of [Person A] generally and I did not do so. I understood [Person C's] direction to relate very specifically to examples of the types of conduct I set out above.
 12. [Person C] stated he would be in a better position to challenge [Person A] about her behaviour if he was able to hear examples for himself. [Person C] also advised me that the recordings were for his use only and that after listening to any recordings he would delete them. I understood there was no intention for any other or further use of the recordings.
 - ...
 14. Consistent with what I was directed to do, I did not record entire conversations. I recorded fragments of conversations that were examples of inappropriate language, racial discrimination, and other abusive, threatening or derogatory behaviour and code of conduct breaches towards external parties, including vendors.
 15. As it has been a number of years since this occurred I am unable to give you clear answers as to whom [Person A] was speaking or how many recordings I made because I simply cannot recall this in detail. However, I have vague (sic) memory of a (sic) making small number of brief recordings. ... Again, from memory, I only attempted to make recordings a small number of times and do not believe I recorded much of the behaviour of which demonstration was sought.
 16. I made the recordings only because I was directed to do so by [Person C].

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17. I did not make [Person A] aware that I was recording her as [Person C] made it clear that the recordings were to be without her knowledge.
18. Due to the amount of time that has passed since the event I am unable to describe in detail my thought process at the time. However, I can with clarity state that I did not intentionally or knowingly engage in any unlawful conduct. I was unaware that my conduct in recording [Person A] could amount to unlawful conduct or misconduct until I was advised that it could by the office of the SA Ombudsman. It also never occurred to me that [Person C] would direct me to do anything that was unlawful or amounted to misconduct; particularly given his stated reason for directing me to record [Person A] was to actually deal with misconduct itself.
19. I have only a vague recollection of events in respect of when and in what form I provided the recordings to [Person C]. I recall that I attempted to capture the recordings over a few days and that I provided the recordings to [Person C] essentially immediately after the exercise...
20. I think, but I cannot be absolutely certain, that I provided the recordings to [Person C's] personal assistant, [REDACTED], on a USB memory stick. I have a recollection that [she] told me that she uploaded the files onto a secure network location that could only be accessed by [Person C]. I also believe that [she] returned the memory stick to me and that I recall subsequently deleted the files from the memory stick. I can say candidly about what I just said that I find myself questioning whether I provided the recordings via email, but I think this is probably highly unlikely. However, I do think I may have sent [Person C] an email outlining what I had recorded and that I apologised for not being able to capture what he was hoping to hear.
21. I believe that the only discussion I had with [Person C] about the recording after the fact was in passing. I seem to recall apologising for not being able to capture what he had hoped and I recall [Person C] stating words to the effect that it was okay and he had not had an opportunity to listen to them at that time. I do not remember when this occurred.
22. I can say that had I been aware that recording of [Person A] may have itself potentially amounted to unlawful conduct or misconduct then I would have confronted [Person C] about that. However, in the circumstances - particularly the combination of [Person A's] highly offensive and inappropriate behaviour and receiving a verbal direction from [Person C] - nothing about the circumstances gave me any cause to believe that I may have been directed to do something inappropriate myself.
9. Person B is no longer a public sector employee.
10. Person C has told my investigation that he maintains a diary. Person C has stated that over a six month period prior to December 2014, the department had received a number of informal complaints from staff about Person A. At the time, no staff member was prepared to formalise a complaint. Person C made a range of enquiries with a number of persons in response to the complaints. Notwithstanding, no one was prepared to formalise a complaint against Person A.
11. I have received copies of diary entries dated 9 and 12 December 2014 in which Person C noted critical comments about Person A.
12. Person C has told my investigation that in December 2014 he received a verbal approach from Person B in relation to comments made by Person A while on the telephone. Person B was not prepared to formalise a complaint against Person A. There is an undated diary entry which refers to telephone conversations involving Person A on 12 and 15 December 2014, during which she was overheard using expletives. The source of the information is not noted.

13. While the allegations made against Person A would not have ordinarily resulted in Person C becoming personally involved, given that concerns were expressed by persons outside of the department, he considered that he needed to verify the accuracy of the allegations being made.
14. Person B provided Person C with five audio recordings. Two recordings were made on 15 December 2014 and three on 16 December 2014. After listening to the recordings Person C determined that the content did not constitute bullying behaviour and took no action against Person A.

Relevant law/policies

15. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

16. Section 3 of the PS Act provides:

misconduct means—

- (a) a breach of a disciplinary provision of the public sector code of conduct while in employment as a public sector employee; or
- (b) other misconduct while in employment as a public sector employee,

the term includes making a false statement in connection with an application for engagement as a public sector employee and being convicted, while in employment as a public sector employee, of an offence punishable by imprisonment

17. Section 6 of the PS Act provides:

Public sector code of conduct

Public sector employees must observe the public sector code of conduct.

18. Section 55 of the PS Act provides:

Disciplinary action

- (1) A public sector agency may—
 - (a) reprimand an employee of the agency; or
 - (b) suspend an employee of the agency from duty without remuneration or accrual of leave rights for a specified period,

on the ground of the employee's misconduct.

19. The Code provides for:

Professional Conduct Standards - exhibiting the highest standards of professional conduct

- in order to maintain public confidence in the integrity of the South Australian Public Sector, employees exhibit the highest standards of professional conduct in undertaking their duties

- professional standards include the observance at all times of lawful and reasonable direction, policies and procedures and other instruments which define what is expected or required of public sector employees
- these conduct standards are issued by the Commissioner for Public Sector Employment under Part 4, Section 15(1)(b) of the Public Sector Act 2009, and apply to all public sector employees. They apply, regardless of the:
 - nature or level of employment
 - employment status (eg. ongoing, term, casual, traineeship, apprenticeship)
 - nature of the public sector organisation (eg. administrative unit, attached office, public corporation, statutory authority, public hospitals, schools etc)
- contravention or failure to comply with these professional conduct standards will constitute misconduct as defined by the Public Sector Act 2009. Any employee who contravenes or fails to comply with these conduct standards may be liable to disciplinary action and/or termination. These professional conduct standards are the disciplinary provisions of the Code of Conduct for the purposes of the Public Sector Act 2009

...

Professional and Courteous Behaviour

- public sector employees will not at any time act in a manner that a reasonable person would view as bringing them, the agency in which they work, the public sector or Government into disrepute; or that is otherwise improper or disgraceful
 - public sector employees will comply with a lawful and reasonable direction given to them as an employee by a person with authority to give such direction
 - public sector employees will at all times treat other persons with respect and courtesy
- ...
- public sector employees will be diligent in the discharge of their role and duties and not act in a way that is negligent

20. The Behaviour Policy provides *inter alia*:

1. Commitments

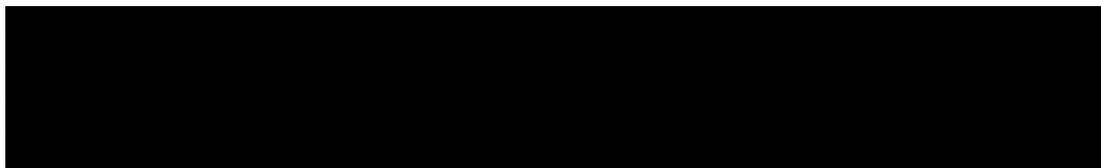
The purpose of this policy is to foster positive, professional working environments, and a culture of respect to ensure staff and consumers are valued and supported.

...

1.4 The Respectful Behaviour policy empowers staff and line managers to define and reinforce acceptable behaviours in the workplace and provides support for addressing behaviours which are not respectful in a prompt and constructive manner.

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21.



22. Person B has told my investigation that she did not have direct contact with Person A for the purpose of her role, however, there was regular interaction between them and

Person A would occasionally seek advice from Person B. The configuration of the work area had Person B's work station located adjacent to that of Person A.

23. It is not in dispute that Person A did not give consent to the recordings. I do not consider it appropriate that Person A should be informed, so I have not sought her views in relation to the allegations. Person A left the employ of the department in 2017 after having been on an extended period of leave without pay. I am also mindful that the recordings are now four years old.
24. The recordings were made using a Dictaphone machine [REDACTED].
25. I have listened to the recordings of the five telephone conversations made by Person B. The recordings were made on 15 December 2014 (two recordings) and 16 December 2014 (three recordings). They vary in duration from 4.28 minutes to 23.40 minutes. In my view, the significant features of the recordings are:
- Person A's voice is the most audible and frequent voice captured
 - some of the recorded conversations involved Person A using a softer voice presumably because she did not wish her voice to carry through to and be heard by others in the vicinity
 - at times Person A used expletives some of which would have been audible to any person in her immediate vicinity
 - although predominantly about work related issues the conversations were at times, of a friendly nature implying that Person A had a level of friendship or trust in the person she was engaging with
 - on two separate occasions Person A discussed issues of a personal and private nature
 - they record the conversations of other staff in the vicinity, some of the conversations were of a friendly and possibly non-work related nature, albeit that they were very brief
 - on occasions there was noise similar to a key pad being used adjacent to the recording device which had the effect of distorting the recorded sound.

I note that no further recordings were made after 16 December 2014.

26. The Code provides that contravention or failure to comply with the professional conduct standards of the Code constitutes misconduct under the PS Act. The Code provides that any employee who contravenes or fails to comply with the conduct standards in the Code may be liable to disciplinary action and/or termination. At the relevant time Person B was a public sector employee for the purposes of the Code, although she is no longer employed in the public sector.
27. To prove misconduct does not require Person B to be convicted of an offence. The relevant standard under the Code is whether Person B acted in a manner that would be viewed by a reasonable person as bringing Person B, the department or, more broadly, the public sector or government into disrepute; or that her actions were otherwise improper or disgraceful.
28. Person B has stated that she was aware of the complaints made by staff in relation to Person A. In fact, she had complained to Person C about Person A herself. I am advised that Person B did not wish to formalise her complaint against Person A. I would have expected that during any discussion between Person C and Person B the matter of the Behaviour Policy would be raised in terms of employee expectations and conduct. I note, however, that the Behaviour Policy is silent on making a complaint alleging employee misconduct.

29. Person B has told my investigation that she was 'directed' to make the recordings by Person C. If there had been a direction given to Person B, she would only have to comply if it was lawful. The claim that Person B was directed by Person C is refuted by him and I will deal with that later in this report.
30. Person B's solicitors submitted that:
- the Code which was in force between 1 February 2010 and 12 July 2015 is the relevant Code to be applied
 - a reasonable person is taken to know all of the essential facts (including the mitigating factors identified in the Deputy Ombudsman's provisional report) and referred to the following statement by O'Bryan J in *Robbins v Harness Racing Board (1984) VR 641*:
The word 'improper' is more difficult to define and must depend upon the context in which the expression is used. For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.
 - Person B accepts that making the recordings was inappropriate
 - Person B took the request to record Person A as a direction from a more senior officer
 - Person B made an honest and reasonable mistake of fact that she was under a lawful direction and her conduct should be considered in light of what she believed
 - Person B's conduct was in accordance with the spirit of the Code (i.e. she acting in accordance with the 'cardinal principle' of following directions by senior persons)
 - it is 'tolerably clear' that Person C used Person B to investigate the alleged conduct of Person A
 - the conduct that Person C asked Person B to record was conduct by Person A that in itself gave rise to a suspicion of misconduct which Person B was obliged to report, and Person B complied with her obligation
 - Person B was entitled to rely on the judgement of Person C in the circumstances
 - Person B has had an exemplary employment history and received a number of commendations from senior executives which 'go to the heart' of a reasonable person's assessment about whether Person B's conduct would:
bring [Person B], the Department and the public sector more broadly into disrepute or whether [Person B's] conduct was so wrong that it calls for imposition of a sanction.
 - in light of all of the facts a reasonable person would not view Person B's conduct as bringing her or the department or the public sector or government into disrepute
 - a reasonable person would consider that Person B was placed in an intolerable position and did her best in the circumstances
 - the act of recording an employee's conduct in this manner is not appropriate and should not be condoned, but in the circumstances, it does not constitute a breach of the Code and is, therefore, not misconduct.
31. While Person B acknowledges in her response to my provisional report that making the recordings was inappropriate, she submits that she was under an honest and reasonable mistake of fact that Person C gave her a lawful direction. Person B also submits that she was entitled to rely on Person C's judgment in the circumstances.
32. Person B has stated that she was 'directed' to capture evidence of misconduct and she was not limited to recording telephone conversations. Person B would have been the arbiter of what she deemed necessary to record. This presumably, gave Person B a discretion as to what behaviour she would be vigilant for and when and how she would capture it. Person B has described to my investigation examples of the type of conduct displayed by Person A such as a disrespect of authority, using profane language and

abusive interactions with internal and external parties. I have not been provided with evidence that Person B was to report back to Person C on how she was to capture the behaviours suggesting that the direction to her was sufficiently broad.

33. Person C has told my investigation that he maintains a diary. I have received copies of diary entries dated 9 and 12 December 2014 in which he notes critical comments about Person A. He has stated that while the allegations made against Person A would not have ordinarily resulted in him becoming personally involved, given that concerns were expressed by persons outside of the department, he considered that he needed to verify the accuracy of the allegations being made.
34. It is submitted that Person B was following a 'cardinal principle' provided by the Code to follow directions given by persons in seniority. Presumably this relates to the requirement for:

public sector employees [to] comply with a lawful and reasonable direction given to them as an employee by a person with authority to give such direction.

I do not think it can be said that Person B's conduct was related to her role [REDACTED] such that the 'direction' given by Person C would be binding on her in terms of her specific duties. Nor do I accept the submission that Person B's action was an extension of her obligation under the Code to report the conduct of Person A. Person B had already complied with that obligation by raising the matter with Person C.

35. Person C has told my investigation that

I requested that if [Person B] was able to record a sample of the alleged behaviour then she should provide it to me to listen to so that I could verify her claims.

There is an undated diary entry which refers to telephone conversations involving Person A on 12 and 15 December 2014, during which she was overheard using expletives. The source of the information is not noted. He went on to state:

I do remember specifically asking if she was comfortable to do this so that her claims could be verified.

36. I have considered the conflicting statements from Person B and Person C regarding whether a 'direction' was given to the former to record a colleague's conversations. I have also had regard to the initial claim by Person B, when questioned by my officer, that she was not aware of any recordings of Person A. Even allowing for the effluxion of time, I find her statement to be incongruous with the fact that she recorded the conversations and subsequently provided the recordings to Person C, a senior executive in the department.
37. On the available evidence, Person C asked Person B to make the recordings as a way of proving the allegations made against Person A. Person B's evidence is that this comprised a 'direction' for her to record Person A. I have commented that any 'direction' did not relate to Person B's specific role but I accept that, as the request came from an officer in a far more senior position to Person B, [REDACTED], she took it to be in the nature of a direction.

38. Person B has told my investigation that:

... had I been aware that recording [Person A] may have itself potentially amounted to unlawful conduct or misconduct then I would have confronted [Person C] about that. However, in the circumstances - particularly the combination of [Person A's] highly offensive and inappropriate behaviour and receiving a verbal direction from my [REDACTED] - nothing about the circumstances gave me any cause to believe that I may have been directed to do something inappropriate myself.

39. In my view, Person B would have, in all probability, questioned Person C about the suggested course of action if she had considered it to have been inappropriate or unethical. Notwithstanding, Person B did not appear to turn her mind as to whether the recording of the conversations would in any way, be unethical or improper. I address Person C's conduct later in this report.

40. I nevertheless regard the recording of conversations in the manner and circumstances of this matter, to be highly inappropriate conduct in a work place. I would have expected an officer at ASO-5 level to have an understanding of work place protocol to understand the implications of the covert recording of a work colleague. Recording of conversations in the workplace does not happen as a matter of course and at the very least, I consider that Person B should have at least turned her mind to the appropriateness or otherwise of such conduct. I note also the attendant risk of breaching the LSD Act should private conversations be recorded without the consent of the other party. I accept that Person B may not have appreciated that risk.

41. In my view, the nature of the allegations being made against Person A should have been addressed in a more transparent and fair manner. This duty did not fall on to Person B, but to more senior officers within the department.

42. In determining whether Person B's actions amount to misconduct, I have taken into account the following factors which weigh against such a finding:

- Person B was asked to make the recordings by Person C, an officer far senior to her, whose judgment and instruction she appeared to accept. I consider that the fact that Person C was in a position of authority over Person B in some way mitigates her behaviour.
- I accept that on the available evidence Person B was motivated by a genuine desire to assist Person C to understand the claims made against Person A
- there is no evidence that Person B improperly accessed departmental information
- the recordings were provided to Person C only.

43. Person B has submitted that a reasonable person, privy to all of the relevant facts would not form the view that making the recordings without Person A's consent would bring her, the department and the public sector or government more broadly, into disrepute or be otherwise regarded as improper or disgraceful. I do not agree.

44. In my view, I consider that a reasonable person would understand that:

- Person B was an employee with an exemplary work history who had genuine concerns about Person A's conduct that she considered she was required to report
- neither Person B nor Person C were acting from any improper motive in seeking further examples of Person A's conduct
- Person B perceived herself to have been 'directed' by a senior officer to covertly record Person A's conversations for the purpose of supporting her complaint
- any allegations against an officer should be investigated fairly and transparently and in accordance with the department's policies for investigating misconduct

- as Person B was a colleague of Person A and she had also complained about Person A, she should not have been asked to covertly record Person A's conduct
 - as a complainant, Person B, by undertaking to make of the recordings could have benefitted by having her allegations about Person A vindicated
 - Person B's level of seniority should have enabled her to form a view that to record the actions of Person A in the circumstances was not in accordance with usual procedure and inappropriate and potentially infringe on the rights of a fellow employee.
45. My view remains that a reasonable person, apprised of all of those matters, would form the view that such conduct was not befitting of a public officer, a public office or the government in general. I consider that most members of the public would be dismayed to learn that public officers were recording other public officers' telephone conversations without consent, regardless of the reasons.
46. My view remains that, regardless of whether or not the conduct would constitute a criminal breach, and regardless of Person B's motivation, it was improper.
47. Person B has acknowledged that the act of recording an employee's performance in this manner is not appropriate and should not be condoned but, in the circumstances, it does not constitute a breach of the Code and is therefore, not misconduct.
48. I am mindful of the implications of a finding of misconduct in relation to a person's future employment, especially when they have had up to that point, an exemplary work history. In my view, however, Person B breached the professional conduct standards of the Code which would constitute a ground for disciplinary action. In doing so Person B committed misconduct in public administration.

Opinion

In light of the above, I consider that Person B committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

Although Person B is not a current public sector employee, I will report the matter of her misconduct to the principal officer of the department pursuant to section 18(5) of the Ombudsman Act.

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49. I make the observation that of the two officers, Person C [REDACTED] is the more senior officer. There was a power imbalance.
50. In response to my provisional report, Person C's solicitors submitted that:
- the conclusions adverse to Person C at paragraph 50 and 51 of the provisional report should be withdrawn
 - the opinion that Person C committed misconduct in public administration stated in the provisional report should be withdrawn
 - the fact that conduct 'may' have been in breach or risked breaching the LSD Act or is 'potentially criminal' is not a sufficient basis to conclude that the conduct was improper; there is nothing inherently improper about making a recording for a proper purpose

- even if Person B's conduct were in contravention of the LSD Act, it would not follow that Person C's conduct was improper; Person C did not request that Person B engage in any criminal conduct
- there was no evidence and certainly no analysis of the evidence in the provisional report that the actions of Person B breached the LSD Act, noting in particular that the conversations recorded by Person B were not 'private' and that the exception in section 7(1) of the LSD Act applied
- the conduct of Person B and Person C should be seen to have been protecting the lawful interests of the State of South Australia
- by referring to the offence of aiding and abetting under the CLC Act it was wrongly concluded that this supported a finding of a breach of the Code by Person C
- Person C requested that Person B, if she was comfortable doing so, record Person A. Further, on the available evidence Person C was not present when the recordings were made or knew how or in what circumstances they would be made.
- it should not be expected that Person C would have an awareness of the LSD Act noting that:
 - Person C believes that he may well have mentioned the recordings and/or provided them to an investigator from ICAC
 - the issue of criminal liability is by no means straightforward
- it is not self-evident that the making of the subject recordings was 'highly inappropriate conduct in a work place' and 'plainly improper'
- it is not sufficient to establish a breach of the Code that Person C's conduct 'could be seen as being improper', noting that the Code will be contravened by conduct that "is improper"
- Person C's conduct was done for a proper purpose in pursuance of the department's interests and, therefore, in the public interest
- the provisional report included no justification or analysis as to why a reasonable person would consider that the relevant conduct would bring Person C, the department or the public sector into disrepute in the absence of an offence being committed
- there were mitigating factors in favour of Person C which were not considered in the provisional report.

The response on behalf of Person C also raised factual issues and made submissions on the issue of publishing my report.

51. Person C has submitted that the recordings were of Person A. Person A was known to conduct loud conversations in an open office environment, the implication being that the conversations would be audible to the various people in the immediate area at the time. The nature of Person C's job meant that he was frequently out of his office and the building. Consequently, he was often unable to witness the telephone conversations made by Person A. Person C has submitted that the content of the recordings would not satisfy the requirements of the LSD Act and I express no view on that.
52. Person B has told my investigation that she was directed to make the recordings by Person C. Person C denies having given Person B a specific direction to record the conversations.
53. I have commented earlier in this report that Person B had a discretion as to what behaviour she would be vigilant for and when and how she would capture it. I have not been provided with evidence that Person B was to report back to Person C on how she was to capture the behaviours. Nevertheless, Person B understood that she had to report to Person C on the information ascertained.

54. Person C has told my investigation that:

I requested that if [Person B] was able to record a sample of the alleged behaviour then she should provide it to me to listen to so that I could verify her claims.

He went on to state:

I do remember specifically asking if she was comfortable to do this so that her claims could be verified.

55. Irrespective of whether there was a direction given there was a discussion between Person C and Person B during which the former canvassed the recording of Person A. [REDACTED], Person C should have been aware of the existence of the Behaviour Policy and further, turn his mind as to whether the recording of Person A would be in breach of the policy having regard to his responsibility to enforce acceptable behaviours in the workplace.
56. I regard the recording of conversations in the manner and circumstances of this matter, to be highly inappropriate conduct in a work place. I have commented earlier about the attendant risk of Person B breaching the LSD Act. In that regard the conduct of Person C also created the potential for him to have aided and abetted the commission of an offence under the CLC Act. I accept that neither party would necessarily have had knowledge of the relevant statutes to be aware of that risk. Again, I express no view on that issue.
57. I infer from Person C's discussion with Person B that he must have had some concerns about his request as he enquired as to whether Person B would be comfortable making the recordings and that it would be helpful in verifying Person B's concerns about Person A. Person C has submitted that this was not improper but it reflected a genuine attempt to investigate and gather evidence. The department has expressed a similar view. I respectfully do not agree. In my view, a more structured, transparent and fairer level of enquiry would have achieved a better outcome. In having regard to the information obtained from staff and vendors it was likely that there was sufficient information alleging misuse of a position and bullying to commence a more formal process against Person A.
58. Person C has submitted that it was necessary and proper to verify the allegations made against Person A. I accept that in the absence of a formal complaint from staff or a vendor this could be problematic and I do not consider that there is any evidence that either Person B or Person C had any improper motive. I would have expected the department to have had a process in place to provide guidance in a situation involving serious allegations against a member of staff. I have not been provided with any evidence that Person C sought advice from another person or business unit within the department on the best way to manage the situation. In my view, a practice of covertly recording a colleague's activity in response to unverified allegations, taken to an extreme, could impact on working relationships, create a dysfunctional work environment and undermine confidence in the transparency of the department's complaint handling processes. In short, given the nature of the allegations and despite there not being a formal complaint, there had to be a better way to respond to the situation.
59. I find it difficult to accept that a person in such a senior position as that held by Person C would not be aware that such behaviour is improper or indeed, potentially criminal. As a senior executive I would have expected Person C to have had an appreciation of the significance of his request that Person B 'record a sample of the alleged behaviour'.

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60. I have previously concluded that Person B took the request from Person C to be in the form of a direction. Plainly, it was inappropriate for Person C to ask Person B to record Person A's actions, whether or not he intended this to be a direction.
61. Contravention of the professional conduct standards of the Code constitutes grounds for disciplinary action under the PS Act. Person C was a public sector employee for the purposes of the Code.
62. I make it clear that I am not investigating whether there is evidence of criminal conduct on the part of Person C or that the elements of an offence have been made out. To prove misconduct does not require the employee to be convicted of, or be suspected of having committed an offence. The relevant standard under the Code is whether the actions would be viewed, by a reasonable person, as bringing Person C, the department or more broadly, the public sector or government into disrepute or was otherwise improper or disgraceful.
63. In my view, the nature of the allegations being made against Person A should have been addressed in a more transparent and fair manner. As Person C appeared to have been reluctant to raise the informal allegations with Person A, given the absence of a formal complaint it is not clear how he would have confronted Person A if the secret recordings had in fact, produced evidence in support of the informal allegations.
64. In my view, Person C, as a senior Executive in an agency, suggested that Person B make the recordings. Such conduct would, if considered by a reasonable person, bring Person C, the department and the public sector or government more broadly, into disrepute and could be seen as being improper or disgraceful. This constituted a breach of the professional conduct standards of the Code.
65. In my view, I consider that a reasonable person would understand that:
- neither Person B nor Person C were acting from any improper motive in seeking further examples of Person A's conduct
 - when serious allegations are made about an officer the department would have a policy which would describe how the allegations would be assessed and investigated
 - the policy would afford the parties concerned procedural fairness
 - all staff should be aware of the policy
 - the lack of a formal complaint would not necessarily prevent allegations being assessed and investigated and if appropriate, referred to the Office for Public Integrity
 - if it was problematic to conduct an investigation and assuming Person A was subject to performance reviews, the matters of concern could be canvassed during that review process
 - Person B, as a colleague who worked with Person A and who has also complained about Person A, should not have been asked to covertly record that person's conduct
 - a person at [REDACTED] level should have an awareness and understanding of the implications of suggesting that recordings be made in the given circumstances
 - Person C should have been aware of the likely difficulty in putting information adverse to Person A and recorded in a covert manner without disclosing the manner in which the information was obtained
 - the practice would have implications for the rights of employees.
66. My view remains that a reasonable person, apprised of all of those matters, would form the view that Person C's conduct in asking a more junior employee to covertly record

Person A's conversations was not befitting of a public officer, a public office or the government in general, regardless of the reasons.

67. My view remains that, regardless of whether the conduct would constitute a criminal breach, and regardless of Person C's motivation, it was improper.
68. On the evidence before me I consider that Person C failed to comply with the Code which would *prima facie*, constitute a ground for disciplinary action.

Opinion

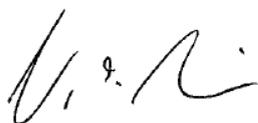
In light of the above, I consider that Person C committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

I will report the matter of his misconduct to the principal officer of the department pursuant to section 18(5) of the Ombudsman Act.

Final comment

I now report Person B and Person C for their respective misconduct to the principal officer of the department, as required by section 18(5) of the Ombudsman Act.

I will ask that the principal officer note the mitigating factors in relation to Person B.



Wayne Lines
SA OMBUDSMAN

7 March 2019