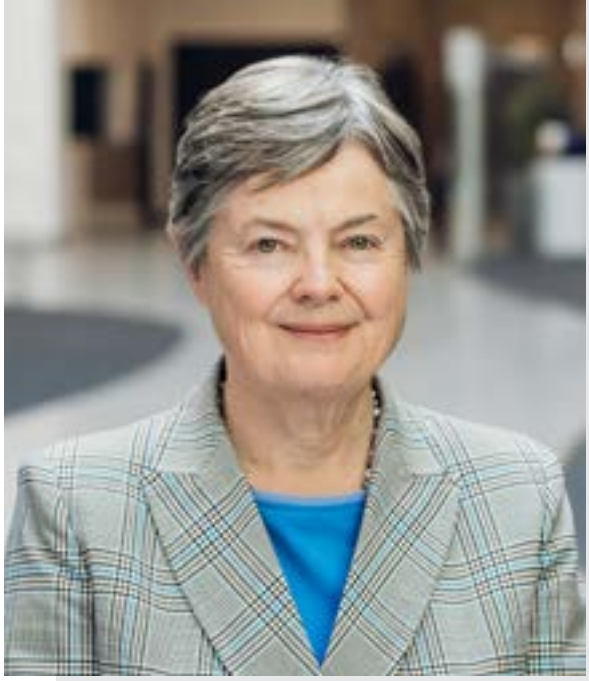
ICAC
Independent Commission
Against Corruption
SOUTH AUSTRALIA

Integrity Trade-off

An update on *Troubling Ambiguity: Governance in SA Health*

A report by the Hon. Ann Vanstone KC
Commissioner

July 2023



Commissioner's foreword

It has been more than three years since my predecessor, the Hon. Bruce Lander KC, published the *Troubling Ambiguity: Governance in SA Health* report.[1]

There, Mr Lander made observations about poor governance arrangements in SA Health which had the potential to lead to corruption, misconduct and maladministration. While it contained no recommendations the report served to highlight poor processes and governance within key areas of SA Health operations.

Two areas of focus were the rights of private practice and the attendance of clinicians, areas that in my mind are linked.

Mr Lander drew attention to the fact that the industrial agreements applying to many clinicians employed by SA Health did not clearly define their expected and ordinary hours of duty. Consequently, SA Health could not be certain that clinicians were providing the services for which they were paid. Further uncertainty arose when clinicians undertook private work at public hospitals and elsewhere as permitted under rights of private practice schemes, because there was no policy or directive in place to ensure these rights were exercised in a way which did not adversely affect their public work.

Where systems and arrangements lack clarity, they are vulnerable to corruption. It is difficult to hold individuals to account when poor practices are not only widespread but condoned, and where there is inadequate supervision.

The vulnerabilities which exist in relation to clinicians' attendance and rights of private practice have not been adequately addressed, despite a new industrial agreement commencing in February 2022. As a result, I continue to encounter issues of the kind described by Mr Lander when investigating alleged corruption in SA Health.

1 The report can be accessed at https://www.icac.sa.gov.au/publications/published-reports/troubling-ambiguity-governance-sa-health

Where systems and arrangements lack clarity, they are vulnerable to corruption. It is difficult to hold individuals to account when poor practices are not only widespread but condoned, and where there is inadequate supervision.

Clinicians play a critical role in the delivery of public health services. They must be properly remunerated so that the state can attract and retain suitably skilled and experienced staff. Many clinicians routinely exceed their required hours of duty because they are genuinely committed to their vocation and their patients. However, the present systems and arrangements are ripe for exploitation. There is a real risk that corruption and misconduct continues to occur within SA Health, but, as before, cannot be detected or addressed.

The Commission is empowered to identify and investigate corruption in public administration, and to undertake activities with a view to preventing or minimising corruption. However, we continue to be frustrated by poor systems and the apparent lack of will to change them.

SA Health operates in a complex industrial environment. But that complexity and the fear of industrial backlash does not justify intransigence.

I acknowledge that the recent COVID-19 pandemic has placed pressure on our public health system and its workforce. However, there is no reason that SA Health cannot both support its staff and take steps to promptly address systemic integrity risks. These endeavours should not be viewed as mutually exclusive.

This report has been prepared in accordance with section 42 of the *Independent Commission Against Corruption Act 2012*. A copy was provided to the Chief Executive of the Department for Health and Wellbeing for comment. I am of the view that it is in the public interest to advise Parliament and the public that the issues raised by Mr Lander in 2019 are ongoing.

I have made recommendations to assist SA Health address deficiencies in its supervision of clinicians' time and attendance, and rights of private practice.

The Hon. Ann Vanstone KC
Commissioner

Issues raised in Troubling Ambiguity

Mr Lander commenced writing *Troubling Ambiguity* because a corruption investigation being undertaken into the conduct of an employee of SA Health had become so compromised by the maladministration within the agency that there was no possibility of a criminal prosecution.

Mr Lander highlighted the fact that SA Health was unable to adequately monitor whether clinicians were completing the hours or duties for which they were being paid. Mr Lander also pointed to clinicians' rights of private practice, the manner in which those rights could be exercised, and the confusion that existed in the management of this state of affairs.

Time and attendance

At the time of writing *Troubling Ambiguity*, SA Health engaged medical specialists on a salaried basis as consultants, senior consultants and clinical academics.

There was uncertainty about these specialists' hours of duty because the industrial agreement[2] that applied to consultants and senior consultants provided that they had 'no fixed hours of duty'. The industrial agreement[3] that applied to clinical academics did not include that phrase, but did not define what the ordinary hours of duty were. These arrangements were in contrast to provisions of the industrial agreement[4] which applied to other clinicians,[5] specifically clause 55 which provided that ordinary hours of duty were an average of 38 hours per week.

The uncertainty about salaried specialists' ordinary hours of duty made it difficult for SA Health to ensure that specialists were performing their contractual duties and that SA Health was receiving the specialist expertise that it was paying for. This issue was exacerbated because many specialists worked for SA Health on a part-time basis. If an employee's full time hours were not stipulated, it was not possible to accurately define the requirements of a part-time role.

Additionally, practices had developed where salaried specialists were effectively 'double dipping' by claiming and receiving overtime and recall allowances to which they were not entitled.

The industrial agreement applying to consultants, senior consultants and other medical practitioners has been renegotiated since Mr Lander's report. The SA Health Salaried Medical Officers Enterprise Agreement 2022 commenced on 2 February 2022. The new agreement continues to provide that consultants and senior consultants have 'no fixed hours of duty'.[6] Clause 55 continues to specify that the ordinary hours of other medical practitioners are 38 hours per week.

2 At the time of writing *Troubling Ambiguity*, the relevant industrial agreement was the *SA Health Salaried Medical Officers Enterprise Agreement 2017* (SMO Agreement 2017). It is now the *SA Health Salaried Medical Officers Enterprise Agreement 2022*.
3 At the time of writing *Troubling Ambiguity*, the relevant industrial agreement was the *SA Health Clinical Academics Enterprise Agreement 2018*. This agreement continues to apply.
4 SMO Agreement 2017, clauses 52 to 74.
5 Referred to as medical group practitioners (MGP) and including interns, limited registration medical practitioners, medical practitioners, senior medical practitioners and senior registrars.
6 See clause 27.

Mr Lander also addressed job planning[7] and timesheets, which if properly implemented and governed would provide SA Health with a means of ensuring that employees were performing their duties. The report addressed the fact that there was no formal policy or directive requiring job planning or the use of timesheets. The Commission understands this remains the case.

When hours of duty are ill defined, it is difficult to hold an employee to account and ensure that they are completing the duties for which they are being paid. This increases the risk of corruption in public administration.

It is difficult for clinicians to argue that they are overworked and under-resourced without being able to accurately quantify their working hours. It is equally difficult for SA Health to respond to resourcing requests or to manage the welfare of clinicians who work additional hours when their working hours are not recorded.

Requiring clinicians to complete accurate timesheets which accurately record their working hours is a simple and cost-free measure that would benefit clinicians and SA Health alike.

Rights of Private Practice

Mr Lander focused on rights of private practice; an arrangement that allows consultants and senior consultants employed by SA Health to treat privately funded patients in a public hospital and to receive a proportion of the fee paid for that treatment.

A clinician can exercise a right of private practice during their public work duties, on public premises, and using public resources. Broadly understood, the right of private practice scheme allows a clinician to retain the earnings of their private practice billings[8] until they reach a specified proportion of their public salary ranging from 20% to 65% dependent on the type of clinician.[9] Once that threshold is reached, a distribution is made to SA Health and the clinician retains a lesser share of the earnings.

Rights of private practice agreements exist all across the country. They appear to be uniquely enjoyed only by medical consultants. If such entitlements were exercised in other areas of public administration, they would be considered exceptional and unreasonable. It is hard to imagine that the public would look kindly on an arrangement where a public sector executive was able to conduct private remunerative work worth up to 65% of their salary using public sector time, equipment and resources.

Mr Lander noted that the documents governing this arrangement, namely the SA Health Salaried Medical Officers Enterprise Agreement 2017 and the Department of Health Salaried Medical Officers Private Practice Agreement 2008, did not limit the extent to which a right of private practice could be exercised during ‘paid public time’. the absence of fixed hours of duty further complicated this. In those respects the agreements have not changed.[10]

7 Clause 18 of the *SA Health Salaried Medical Officers Enterprise Agreement 2022* and clause 33 of the *SA Health Clinical Academics Enterprise Agreement 2018* provide for the making of job plans which are intended to reflect the average expected time spent by the clinician on clinical and non-clinical duties and responsibilities.

8 Minus a 9% contribution towards indemnity and administration.

9 See clause 3 and 4 of the *Department of Health Private Practice Agreement 2008*.

10 Although the *SA Health Salaried Medical Officers Enterprise Agreement 2017* was renegotiated in 2022, the clauses dealing with rights of private practice have not changed.

The system was and remains prone to abuse because there is no way of monitoring how and to what extent rights of private practice are being exercised.

The Commission is unaware of any policies or procedures setting out the level of service salaried specialists are expected to provide to SA Health.

It is likely that most clinicians exercise their right of private practice responsibly. However, without adequate policies and procedures to govern rights of private practice, the system is susceptible to abuse. The risk of corruption in public administration remains real.

Government and SA Health response

Troubling Ambiguity was initially met with a strong appetite for change.

JANUARY 2020

The then Government published its response to the report in January 2020.[11] It accepted the observations and risks discussed by Mr Lander and welcomed the opportunity to address those matters.

The Government appointed a Cross-Agency Implementation Taskforce, chaired by the then Chief Executive of the Department of the Premier and Cabinet, to oversee a program of work comprising three streams: industrial reform, cultural reform and policy and practice reform. Each stream was assigned a list of deliverables.

While a number of initiatives were successfully made, limited progress was made to improve the arrangements governing clinicians' time and attendance and rights of private practice.

The Taskforce's initial response appears to have been to negotiate a better industrial agreement and reform the governance structures underpinning clinicians' employment arrangements. To that end, those topics were to be added to the 'management agenda' for consideration. It was intended that the Taskforce draw on the industrial relations expertise of the Department of Treasury and Finance to navigate the complex industrial environment and address the associated challenges.[12]

However, as the process continued, it seems that impetus for change weakened, probably due to the complexity of the relevant arrangements and ongoing industrial and managerial challenges. The initial objective to 'reframe and reform' rights of private practice was diluted to simply developing an agenda to discuss the issue.

11 *Initial Government Response to the ICAC report on SA Health Governance 'Troubling Ambiguity'*, January 2020: https://www.dpc.sa.gov.au/__data/assets/pdf_file/0004/136381/Initial-Gov-Response-ICAC-report-SA-Health-Governance.pdf

12 *Ibid* p 8.

JULY 2021

The then Chief Executive of the Department of the Premier and Cabinet wrote to me on 14 July 2021 to advise that the program of work assigned to the Taskforce had been completed. However, negotiations regarding the Salaried Medical Officers Enterprise Agreement continued.

Curiously, it was determined that policy changes and reforms would be progressed after the enterprise bargaining process had concluded. Given that the industrial instruments seemed to be the problem, it is unclear why proposed changes to those arrangements were not included in the negotiation process.

In relation to the above a senior officer at SA Health responded: "Proposed policy changes and reforms relating to the issues raised in *Troubling Ambiguity* were considered as part of the negotiation process. It is standard practice not to progress industrial policy changes related to agenda items during a bargaining process as Government is required to negotiate in good faith. It is considered bad faith to be actively negotiating an outcome on a particular policy matter while actively implementing a related workplace policy."

This response undermines confidence in a robust approach to the problem.

OCTOBER AND NOVEMBER 2022

I met with the new Chief Executive of SA Health in October 2022, shortly after she commenced in the role. I informed her that the Commission's investigations of certain clinicians continued to be frustrated because of the issues Mr Lander raised in *Troubling Ambiguity*.

The Chief Executive pointed to the impact of the COVID-19 pandemic on her workforce. She informed me that recent attempts to reform clinician job planning requirements had been resisted by the South Australian Salaried Medical Officers Association. The Chief Executive expected a similar response to any efforts by SA Health to reform the arrangements relating to clinicians' working hours and rights of private practice.

In November 2022, the Chief Executive provided me with a summary of the program of work undertaken by SA Health in response to *Troubling Ambiguity*, and an overview of future activities. She advised that she is considering progressing policy reform in relation to this topic as a 'package of joint priorities.'

Recent investigations

Since *Troubling Ambiguity* was tabled, the Commission has investigated or referred a number of matters about clinicians allegedly abusing their entitlements. Regrettably, those investigations could not be pursued in any meaningful way because of the very issues Mr Lander highlighted.

INVESTIGATION OF CLINICIANS A AND B

In June 2020, the former Commissioner commenced an investigation into allegations that clinician A had:

- failed to work her contracted hours;
- dedicated a significant proportion of her public working hours to providing private patient care; and
- failed to follow the appropriate billing process for private procedures, in order to receive a financial benefit.

It was alleged that clinician B had:

- failed to follow the appropriate billing process for private procedures, in order to receive a financial benefit; and
- improperly claimed payment from SA Health for 'call backs' on occasions where he was not rostered 'on-call'.

The preliminary investigation established that:

- on 66 occasions, it appeared clinician A billed SA Health inappropriately. However, this would be difficult to prove to the criminal standard because clinicians consistently failed to record their working hours.
- on eight occasions, it appeared clinician B billed SA Health inappropriately under his 'Private Practice Agreement'. However, there was no definition of his right of private practice. The allegation of dishonesty would have been difficult to prove because clinicians consistently failed to record their working hours.
- it was an accepted practice in SA Health for clinicians to claim call backs or 'recall' allowances and then claim private practice payments for that same call back. There was no documented policy which would disallow such claims.

The Commission referred both matters to SA Health for potential disciplinary action in January 2021. In June 2022, SA Health advised:

> *An internal audit found gaps in the control environment and issues with the hours of work and private practice arrangements of two (2) consultants. Specifically:*
>
> - *Not documenting hours of work*
> - *Using public time to undertake private practice; and*
> - *Not billing for private procedures which resulted in the hospital losing revenue.*

However, SA Health could not pursue disciplinary action against the clinicians because the relevant local health network *'does not have an adequate framework in place to prevent misconduct and maladministration by its consultants nor is it able to by the development and implementation of local policies and procedures without changes to the Rights of Private Practice Agreement, the Memorandum of Understanding (MOU) and applicable enterprise agreements'.*

SA Health acknowledged there were *'risks to SA Health doing nothing in that there would remain ongoing risks of corruption, misconduct and maladministration, but that there were also risks of a political, media and industrial nature in progressing the changes needed to strengthen governance arrangements in respect of consultants.'*

This response to systemic integrity issues is worrying.

SA Health advised that these issues would be considered when next reviewing the Rights of Private Practice Agreement and the Salaried Medical Officer Enterprise Agreement. The current SA Health Salaried Medical Officers Enterprise Agreement will expire on 2 February 2025. Negotiations for a new enterprise agreement cannot commence until August 2024.[13]

I have reservations about this undertaking because these issues were to be addressed during last year's enterprise bargaining process.

INVESTIGATION OF CLINICIANS C AND D

In March 2022 the Commission investigated allegations that two clinicians had been exercising their rights of private practice while they were rostered to perform non-clinical duties at a public hospital. The clinicians submitted timesheets citing 'normal duty hours', although it was suggested they may have been absent from their public duties for periods of up to six weeks.

The issues concerning time and attendance arrangements and rights of private practice meant that it would have been all but impossible to determine whether the clinicians had acted corruptly. Consequently, the corruption investigation was closed.

13 Clause 1.3 and 1.4 *SA Health Salaried Medical Officers Enterprise Agreement 2022*.

INVESTIGATION OF CLINICIAN E

In March 2022 the Commission investigated allegations that a clinician had submitted timesheets and sought payment from a local health network while performing specialist duties at another location, for which he was being paid by another network. This practice was alleged to have occurred for ten years.

In circumstances where allegations raised issues discussed in *Troubling Ambiguity* and the relevant industrial arrangements had not changed since Mr Lander published his report, the Commission determined that further investigation was futile. The ambiguity in the arrangements meant that it was impossible to determine whether corruption had occurred.

It was further alleged that the clinician had approved timesheets for a staff member which recorded hours the staff member did not work. That allegation was not pursued because the prevalence and apparent acceptance of this practice meant that those involved could not be held to account.

The investigation was closed without further action.

INVESTIGATION OF CLINICIAN F

In October 2022 the Commission investigated allegations that a clinician routinely tended to his private patients at a private hospital, causing him to neglect his public duties. It was further alleged that the clinician utilised registrars employed by the public hospital to assist with surgery on his privately funded patients.

The clinician's supervisor reported that he was often unable to account for the clinician's whereabouts. Nonetheless, the supervisor certified the clinician's timesheets recording 'contracted hours'.

The supervisor was not privy to the details of the clinician's right of private practice arrangements and spoke of a lack of clarity regarding the clinician's private and public duties. The clinician's job plan was incomplete and unsigned. Without certainty in his working hours, the investigation could not be meaningfully progressed.

I wrote to the Chief Executive in January 2023 to inform her of the outcome of my investigation. In that letter, I raised the fact that the clinician was the subject of a previous investigation involving the improper claiming of recall allowances totalling more than $130,000. The former Treasurer declined SA Health's request to waive the debt, but it is unclear whether those funds were recovered.

INVESTIGATION OF NURSING MANAGER

These matters can be contrasted with a recent Commission investigation into allegations of timesheet dishonesty by a nursing manager at a local health network.

As part of the investigation, the Commission obtained copies of the nursing manager's timesheets, leave records and building access records for a two year period.

Due to the accuracy of those records, it was quickly established that the nursing manager had worked the hours she recorded on her timesheet, and had claimed leave on the days she was absent. In fact, records indicated that the nursing manager often remained at work beyond her scheduled finishing time and without claiming any entitlements for the additional hours.

It was determined that the allegations were without substance and the investigation was finalised promptly.

Such an outcome could not be achieved where such allegations concerned a clinician.

Recommendations

The Commission recommends that SA Health:

1. implements a policy that requires all staff, including clinicians, to complete their timesheets in a manner that accurately reflects their working hours.
2. implements a policy governing clinicians' rights of private practice so that it can accurately monitor when and where those rights are exercised, the income generated and the public resources used.
3. prepares a strategy to address deficiencies in the industrial arrangements relevant to clinicians' time and attendance and rights of private practice, and ensures that those matters are specifically addressed in advance of or at the time the enterprise agreements are next reviewed.

Conclusion

Clinicians play an important role in delivering essential public health services to the South Australian community. Given they are SA Health's most highly remunerated staff, robust arrangements and systems are necessary to ensure public value and guard against corruption.

Unfortunately, the efforts to address the issues raised by Mr Lander in *Troubling Ambiguity* seem to have lost traction. While this may be partly attributable to the pressures and priorities arising from the COVID-19 pandemic, it is evident that efforts to address the deficiencies observed by Mr Lander have been met with industrial resistance. It is worrying that the same issues continue to be seen three years on.

Complaints and reports continue to be made about clinicians' time and attendance, and rights of private practice. While every effort is made to investigate them, the allegations cannot be meaningfully pursued because of the very issues raised in *Troubling Ambiguity*. Opportunities to hold individuals to account continues to be undermined by the existing scheme.

Inevitably, the reputation of the many clinicians who act with integrity will be tainted by those who do not. That is an unfortunate consequence of a system that is ripe for abuse.

Proper governance in health services will only enhance the care that clinicians provide and that the South Australian public deserve. However, this requires a significant shift in policy, practice and culture.

I am hopeful that the Government and new Chief Executive will take action to address these matters in a timely manner.

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