

Conflicts of Interest in Relation to Tertiary Education Institution Councils

The following material has been put together by the Tertiary Advisory Monitoring Unit to assist tertiary education institution councils to deal appropriately with conflicts of interest. The information has been sourced from legislation, State Services Commission guidelines and the Audit Office's guidelines (references noted in text).

What is a Conflict of Interest?

Context

The State Services Commission note that conflicts of interest should be viewed within an ethical context of **good faith, honesty and impartiality**:

- **good faith:** members of governing councils or boards of Crown bodies have an obligation to act at all times in good faith and in the best interests of the body to which they have been appointed;
- **honesty:** members of governing councils or boards of Crown bodies have an obligation to act honestly at all times in relation to all matters concerning the body to which they have been appointed;
- **impartiality:** members of governing councils or boards of Crown bodies must observe the principles of fairness and impartiality in all official dealings. No individual or organisation with which council members or officers are involved may be given improper preferential treatment – whether by access to goods and services, or access to information, or anything similar.

Definition

A conflict of interest arises where a prospective or existing council member has an interest which conflicts (or might conflict, or might be perceived to conflict) with the interests of the Crown body itself. The key question to ask when considering whether an interest might create a conflict is:

does the interest create an incentive for the Council member to act in a way which may not be in the best interests of the body?

If the answer is 'yes', a conflict of interest exists. The existence of the incentive is sufficient to create a conflict. Whether or not the appointee would actually act on the incentive is irrelevant.

Types of conflicts of interest

A conflict of interest may take a number of forms. It may be financial or non-financial. It may be direct or indirect. It may be professional or family related. A conflict of interest may arise from:

- directorships or other employment;
- interests in business enterprises or professional practices;
- share ownership;

- beneficial interests in trusts;
- existing professional or personal associations with the Crown body concerned or with other tertiary education providers;
- professional associations or relationships with other organisations;
- personal associations with other groups or organisations; or
- family relationships.

A conflict of interest may be more perceived than actual. Perception is a very important factor in the public sector; the processes of government (including agencies in the wider State sector) must be fair and ethical, and must be very clearly seen to be so.

Examples

Some hypothetical examples of conflicts of interest follow.

Example 1: An appointee to the Council of a TEI holds shares in a private training enterprise that is in direct competition with the TEI.

Comment: The appointee has a direct financial interest in the competing company. A poor performance on the part of the Crown body may translate into greater profits for the competing company and its investors (including the appointee). The appointee therefore has an incentive to put her own financial interest ahead of the interests of the council.

Example 2: An appointee to the council of a TEI is a partner in an accountancy firm which regularly undertakes consultancy work for the body.

Comment: The appointee has a direct conflict of interest. Persuading the Council to give more consultancy work to her firm is likely to result in financial gain for the appointee. She therefore has an incentive to place the interests of her firm ahead of the council's interest in finding the best value consultants. Other council members may find it difficult to criticise the performance of the accountancy firm in light of the appointee's presence on the council. Additionally, the appointee may be tempted to pass confidential information relating to the council's activities to her employers, providing them with inside information which will give them an advantage over their competitors.

Example 3: An appointee to a Council of a TEI is the wife of the TEI's Chief Financial Officer.

Comment: The council must be able to appraise critically the performance of the institution which includes the performance of the chief executive and other employees of the TEI. A close family relationship between a council member and a senior manager is very likely to inhibit or prevent that critical appraisal.

These are just some examples of the types of conflicts of interest that may arise. There will be many variations on these themes. Legal advice should be sought where there is any doubt.

Processes for Recognition of Management of Conflicts of Interest for Tertiary Education Institution Councils

There are a number of legislative provisions contained in the Education Act 1989 and the Local Authorities (Members' Interests) Act 1968 which TEI Councils are bound by and these will be discussed later in this document.

These legislative provisions do not cover all the potential conflicts of interest that may arise and councils should establish appropriate systems for recording declarations of interest.

Key elements of systems for recording and managing conflicts of interest are:

- Discussion with Council Chair should a member be uncertain whether the potential for conflict of interest exists
- A conflicts of interest policy including procedures to deal with conflict of interest matters (or potential conflicts)
- A Conflicts of Interest Register updated regularly (every 6-12 months)
- Regular agenda item to ascertain at Council meetings whether any member has a potential conflict related to any specific agenda items
- Recording of any potential conflict of interest in the council minutes and the process by which it will managed (if management possible – see below)

Note: There is also the possibility that a protected disclosure could be made through the Protected Disclosures Act 2000 in relation to a member's conflict of interest. However, matters of interpretation as to "member" may arise as to the full applicability of that Act.

As a general rule of best practice, particularly as a tool for managing risk, councils should in the exercise of all decisions (including those addressing conflicts of interest) undertake the process in a reasonable and fully informed way. Consultation or at least discussion is advisable to reduce the possibility of challenge or practices that are undesirable. Good practices with transparency promote good governance and management, thereby reducing the risk of invalidity of decisions based on bias, compromise, or conflict. Naturally best practice would involve consideration of all the facts in any given situation as these will be variable and consequentially increase or reduce risk.

Conflicts of Interest Register

The register should include information that will help the Council, when considering matters, to determine if any Council members have a conflict of interest that needs to be managed in that matter.

For example, if the Council is considering entering into a contract with the local architecture firm, the register should record whether any of the Council members have an interest in that firm.

We suggest that you include the following information in relation to each member.

- The member's name and the name of the member's partner.
- A description of any companies or partnerships in which the member or his or her spouse/de facto partner have an interest

- A description of the business that the member and his or her spouse/de facto partner engage in (if applicable). For example, the member may be a builder, working as a sole trader. Or, a member might own the local supermarket, from which the Council buys all its supplies.
- Any business or personal involvement with this or other tertiary education providers

The Council should update its register as often as it considers it needs to keep the register accurate - perhaps every 6-12 months.

Specific Legislative Provisions for TEIs and Conflicts of Interest

Education Act 1989: Section 175 Disclosure of Interest

A member of Council who has an interest in a matter being or about to be considered by the Council, shall, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Council or committee.

For the purposes of this section, a person has an interest in a matter if, and only if, the matter relates to the **conditions of service** of the person as the chief executive or a member of the staff of the institution concerned or the person has **any other direct or indirect pecuniary interest** in the matter.

A disclosure under this section shall be recorded in the minutes of the meeting of the Council or committee and the member shall not, unless the Council decides otherwise:-

- (a) Be present during any deliberation of the Council or committee with respect to that matter; or
- (b) Take part in any decision of the Council or committee with respect to that matter.

The Audit Office define a pecuniary interest through application of a test to assess whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned. An indirect pecuniary interest is harder to define but may include indirect interests through a spouse or company where an expectation of a financial gain or loss is a possible outcome.

Local Authorities (Members' Interests) Act 1968 –Audit Office guidelines

Reference: The Audit Office publication “Financial Conflicts of Interest of Members of Governing Bodies” it can be found at www.oag.govt.nz

Prospective Council Members - Procedure to determine whether a candidate is eligible for election or appointment to a Council

A person is ineligible to be elected or appointed to a Council if they have a disqualifying contract (or contracts) with the Council in the financial year in which the appointment or election takes place.

A disqualifying contract or contracts exists if the candidate is concerned or interested in a contract with the Council and the total value of that contract or contracts exceeds \$25,000 (incl GST) in the financial year.

A candidate will be directly concerned or interested if he or she is personally a party to the contract. A candidate may be indirectly concerned or interested if the contract is between the Council and another person, and the candidate:

- has a personal connection with that person; or
- could benefit from the contract.

Information should be sought from candidates to determine whether a disqualifying contract or contracts exist.

Exceptions

Certain types of contracts will not disqualify a candidate from election or appointment. A candidate will not be disqualified who has a contract with the Council that falls within either of the following two categories.

1. Before the election or appointment, all of the candidate's obligations in respect of the contract have been performed and the amount to be paid by the Council has been fixed.
2. Although the candidate's obligations under the contract may not have been performed before the election or appointment, the amount to be paid by the Council (or the method of determining the amount to be paid) has been fixed in the contract, and:
 - the contract is for a period of not more than one year, or
 - with the Council's consent, the candidate relinquishes the contract within one month of election or appointment and before starting to act as a member

The Audit Office cannot grant prior or retrospective approval for contracts in which a candidate is concerned or interested

OAG sought advice from Crown Law that confirmed that they cannot grant either prior or retrospective approval for contracts between candidates and Councils.

Accordingly, unless the disqualifying contract or contracts falls within one of the two categories set out above (explained in further detail at page 19 of the OAG's booklet), the candidate is not eligible to be elected or appointed.

Current TEI Council Members -:Gaining Approval to Exceed the Limit

Prior Approval

The Audit Office can grant prior approval for contracts that would otherwise take Council members above the \$25,000 limit in any financial year. The Act requires the existence of a "special case" before prior approval can be granted.

Prior approval is not automatic and cannot be assumed. The Audit Office must be satisfied that the criteria set out below are satisfied and that the risk of preferential treatment has been addressed.

In the case of a single contract (usually for a larger amount), the following criteria are applied:

- (i) Has the Council taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender for the contract?

- (ii) Has the Council considered and evaluated each of the tenders or quotes, and can it justify the preferred choice on the basis of cost, performance or quality of service?
- (iii) Has the Council resolved to accept the contract subject to Audit Office approval?
- (iv) Do the minutes record that the member having the interest declared that interest and did not vote or speak on the matter when under consideration at a meeting of the Council?

In the case of multiple contracts for smaller amounts, such as arise from day-to-day purchases of supplies, the Audit Office will give prior approval if the Council confirms that:

- after due enquiry it has found no alternative satisfactory source of supply or product; or
- the desired source of supply is the most efficient and/or the most competitive on the basis of cost, performance or quality of service.

Retrospective Approval

The Audit Office has a limited power to grant retrospective approval for disqualifying contracts that have already been entered into. The same criteria are applied as for an application for prior approval, however, in addition the Audit Office must be satisfied that:

- (i) there is a “sufficient special reason” why prior approval was not obtained; and
- (ii) prior approval would have been obtained if it had been sought.

Assessing Conflicts of Interest – State Services Commission Guidelines

Reference: The State Services Commission publication “Board Appointments and Induction Guidelines” it can be found at www.ssc.govt.nz

Having established the existence of a conflict of interest, the next consideration is the seriousness of the conflict. Conflicts can be divided into two categories:

a **Unmanageable conflicts of interest:** where a conflict of interest is:

- unavoidable (i.e. the appointee cannot or will not divest him or herself of the conflicting interest); and
- serious (in terms of the significance and/or value of the interest, and the appointee's circumstances); and
- pervasive (i.e. would affect so many of the council's decisions that management mechanisms are not practical);
- the conflict is likely to render the appointee ineligible for the position.

b **Manageable conflicts of interest:** where a conflict of interest has been identified, but:

- the appointee is prepared to divest him or herself of the interest or sever the connection that is causing the conflict; or
- the conflict of interest is so minor (taking into account the circumstances of the appointee) or so remote that:
 - it provides no real incentive to the appointee to act against the best interests of the Crown body; and

- there is little risk of a negative public perception; or
- the conflict of interest affects a confined area of the council's operations;
- the conflict of interest can probably be avoided, or alternatively managed through some appropriate mechanism.

Mechanisms for Avoiding or Managing the Risk of Conflicts of Interest

Many conflicts of interest fall into the "manageable" category. If a candidate is otherwise suitable, there will often be mechanisms available to avoid or minimise any risk to the decision making integrity of the council. The main methods of dealing with a conflict of interest are:

- **Divestment:** the appointee agrees to divest him or herself of the interest that is creating the conflict (e.g. to sell shares).
- **Abstaining from voting:** the appointee agrees that, in addition to declaring the interest, he or she will not participate in any vote on related issues. The abstention should be noted on each occasion in the minutes.
- **Withdrawing from discussion:** the appointee agrees that, in addition to declaring the interest and abstaining from voting when related issues arise for discussion and/or decision at council meetings, he or she will withdraw from the meeting for the duration of the item. The withdrawal should be noted on each occasion in the minutes.
- **Non-receipt of relevant information:** the appointee agrees that, in addition to declaring an interest and withdrawing from the discussion and the vote, that he or she should not be given any information (i.e. council papers, written or oral briefings etc.) relating to the interest by the council or the body.
- **Agreement not to act:** the appointee agrees not to participate in any other council action concerning the interest (e.g. signing documents that relate to the interest on behalf of the council).
- **Severing connections:** the appointee agrees to leave an employment position or an organisation which gives rise to the conflict.
- **Confidentiality agreements:** the appointee agrees not to pass confidential information relating to the Crown body or the council to professional or personal associates outside the ambit of council business. Confidentiality agreements should be entered into with new appointees as a matter of standard practice. Confidentiality agreements will often help to minimise the risk of conflicts of interest.
- **Declarations of interest:** the appointee retains the interest, but agrees to declare it when related issues arise for discussion and/or decision at council meetings (see later section on processes for identifying and managing conflicts of interest) .

These methods of managing a conflict of interest may be used singly or in combination, depending on the nature and extent of the conflict of interest that is being considered. If the council is governed by statute, there may be relevant statutory provisions that provide appropriate rules and procedures

Not all conflicts of interest will be clear-cut in terms of how serious they are and how (or if) they can be managed. In considering these issues, those involved should take into account the nature and extent of the conflict and any relevant legislative provisions.

It is sensible to err on the side of caution. In many cases it will be desirable to obtain legal advice.

Examples

The various mechanisms for avoiding or managing conflicts of interest can be considered in relation to the factual examples above, as follows:

Example 1: an appointee to the council of a trading Crown body holds shares in a company which is in direct competition with the Crown body.

Comment: the appropriate action will depend on the value of the shares held, and, possibly, on the appointee's own circumstances (i.e. the relative importance of the shares to the appointee's financial situation). If the value of shares is very small and there is no risk of a negative public perception, the conflict may be immaterial. If the value of the shares to the appointee is more significant, it would probably be necessary to require that they be sold or placed in a blind trust. Declarations of interest would not be suitable, because the conflict of interest concerns the performance and success of the Crown body as a whole, rather than one specific area of its operation.

Example 2: an appointee to the council of a Crown body is a partner in an accountancy firm which regularly undertakes consultancy work for the body.

Comment: This conflict of interest is unlikely to be manageable, because it is ongoing and serious. Even if the appointee were to sign a confidentiality agreement, and to agree to remove herself from discussions on specific items relating to her firm, her relationship with the other council members might affect their decision making on those items. In addition, the public perception of the arrangement would be likely to be very negative.

Example 3: an appointee is considered for appointment to the council of a Crown body that has a regulatory function in respect of a particular industry. The candidate is the director and major shareholder in a company that operates in that industry.

Comment: declaring an interest (and possible absencing himself from council discussions and votes) will be suitable only if regulating the industry in which the appointee's company operates is just one of the council's activities. If regulation of that industry is the council's main activity, the conflict of interest may be too serious to allow the appointee to be confirmed, unless he severs his relationship with the company and divests himself of his shareholding in the company. Decisions on whether this type of conflict can be managed may depend on statutory provisions. A number of body-specific statutes provide for some type of industry representation, but explicitly rule out candidates who are intimately or financially connected to the industry concerned. Where there is any doubt, legal advice should be sought to determine whether the conflict means that the appointment is untenable.

Example 4: the appointee to a council of a Crown body is the wife of the agency's chief executive.

Comment: the closeness of the family relationship, combined with the ongoing and pervasive nature of the conflict, means that the appointee is probably unsuitable for appointment, or if the situation arises mid-term, should resign.

Example 5: an appointee to a council of a Crown body was in the past employed by a lobby group in the same industry as the Crown body, although the association has now ceased.

Comment: whether the perception of a conflict is manageable or not will depend on a number of factors: the significance of the Crown body, the political sensitivity of the appointment, the passage of time between the appointee's involvement with the lobby group and the date of the appointment, the public profile of the appointee and/or the body, the likelihood of the appointee resuming contact with the lobby group after the expiration of his term on the council, etc. Even though the conflict of interest may be more perceived than real, the appointment may not be tenable if it would seriously compromise the integrity and standing of the council in public opinion.