



© 2004  
by  
The McGraw-Hill Companies

Serving the public interest is the fundamental mission of a government and its public institutions. Citizens are entitled to expect that individual officials will perform their duties with integrity, and in a fair and unbiased way. Public officials who maintain private interests during their time in office can present a threat to this fundamental right. Such conflicts of interest have the potential to weaken the trust of citizens in public institutions.<sup>1</sup>

In a number of countries, public officials regularly, and in some cases openly, flout conflict of interest laws. Not only are the laws ignored, but little if any effort is made to enforce them. In those countries, the building of an ethical public service is of the highest priority.

Even while recognizing that conflicts of interest can be commonplace in certain countries, the discussion here proceeds on the basis that widespread defiance of the law is not the case, just the opposite. Rather, it provides a general overview for an ethical public administration on how to prevent such conflicts of interest from occurring. (*The challenge of building and sustaining an ethical public administration is discussed in Chapter 6.*)

A conflict of interest arises when a person, as a public sector employee or official, is influenced by personal considerations when carrying out his or her job. In such cases, decisions are made for the wrong reasons. Moreover, perceived conflicts of interests, even when the right decisions are being made, can be as damaging to the reputation of an organization and can erode public trust as easily as can an actual conflict of interest.

Most countries consider the matter so important, and so fundamental to good administration, that they enact a specific conflict of interest law. This can provide, for example, that “a State officer or employee shall not act in his official capacity in any matter wherein he has a direct or indirect personal financial interest that might be expected to impair his objectivity or independence of judgment.”<sup>2</sup>

The framers of Thailand’s 1997 Constitution<sup>3</sup> saw conflicts of interest as such a fundamental threat to democracy that such conflicts are addressed in the Constitution itself. Provisions require government officials to be politically impartial<sup>4</sup> and prohibit a member of the House of Representatives, Thailand’s lower house of parliament, from placing himself or herself in a conflict of interest situation. Section 110<sup>5</sup> clearly states that a member of the House of Representatives shall not:

- ▶ *hold any position or have any duty in any State agency or State enterprise, or hold a position of member of a local assembly, local administrator or local government official or other political official*
- ▶ *receive any concession from the State, a State agency or State enterprise, or become a party to a contract of the nature of economic monopoly with the State, a State agency or State enterprise, or become a partner or shareholder in a partnership or company receiving such concession or becoming a party to the contract of that nature*
- ▶ *receive any special money or benefit from any State agency or State enterprise apart from that given by the state agency or State enterprise to other persons in the ordinary course of business*

Section 111 provides that:

*A member of the House of Representatives shall not, through the status or position of member of the House of Representatives, interfere or intervene in the recruitment, appointment, reshuffle, transfer, promotion and elevation of the salary scale of a Government official holding a permanent position or receiving salary and not being a political official, an official or employee of a State agency, State enterprise or local government organization, or cause such persons to be removed from office.*

Section 128, also extends this provision to senators.

## HOW TO IDENTIFY CONFLICTS OF INTEREST

Most conflicts of interest are obvious: Public officials who award contracts to themselves, members of their family or to their friends or political patrons; public officials who personally hold – or whose close relations hold – shares in companies subject to their regulation, with which they are contracting or to which they are granting licences, etc. These conflicts require no explanation. They present circumstances which pose a threat to the public interest, however honest the official may claim to be.

Conflicts of interest situations cannot be avoided. It is inevitable that, from time to time, personal interests will come into conflict with work decisions or actions. For these to be identified from the outset is important if confusion and misunderstandings are to be avoided. The following checklist can help individual public servants identify situations where a conflict of interest is likely to arise:

- ▶ *What would I think if the positions were reversed? If I were one of those applying for a job or a promotion and one of the decision-makers was in the position I am in? Would I think the process was fair?*
- ▶ *Does a relative, a friend or an associate or do I stand to gain or lose financially from an organization's decision or action in this matter?*
- ▶ *Does a relative, a friend or an associate or do I stand to gain or lose my/our reputation because of the organization's decision or action?*
- ▶ *Have I contributed in a private capacity in any way to the matter being decided or acted upon?*
- ▶ *Have I received any benefit or hospitality from someone who stands to gain or lose from the organization's decision or action?*
- ▶ *Am I a member of any association, club or professional organization, or do I have particular ties and affiliations with organizations or individuals who stand to gain or lose from the organization's consideration of the matter?*
- ▶ *Could there be any personal benefits for me in the future that could cast doubt on my objectivity?*
- ▶ *If I do participate in assessment or decision-making, would I be worried if my colleagues and the public became aware of my association or connection with this organization?*
- ▶ *Would a fair and reasonable person perceive that I was influenced by personal interest in performing my public duty?*
- ▶ *Am I confident of my ability to act impartially and in the public interest?*

When someone considers that they may have a conflict of interest, what should they do? The first step should be to place the potential conflict on the record and seek the guidance of a superior or an ethics adviser, if one is available.

Clearly, some conflicts will be so minor as not to warrant anything more than the situation being recorded and made known to others who are participating in the decision-making process. For example, an official might hold such a small number of shares in a company that their value could not possibly be affected significantly by the outcome of the particular matter under review. In such a case, the others involved may feel comfortable with the official's continued participation in the decision-making process. When they do not, however, the person should excuse himself or herself from further involvement. The assumption here, of course, is that there are no pre-existing arrangements for such a recusal.

The following checklist can be used to assess whether a disclosed conflict of interest might require other public officials to ask the person in question to stand aside:

- ▶ *Has all the relevant information been made available to ensure a proper assessment?*
- ▶ *What is the nature of the relationship or association that could give rise to the conflict?*
- ▶ *Is legal advice needed?*

- ▶ *Is the matter one of great public interest? Is it controversial?*
- ▶ *Could the individual's involvement in this matter cast doubt on his or her integrity?*
- ▶ *Could the individual's involvement cast doubt on the organization's integrity?*
- ▶ *How would this individual's participation in the decision in question look to a member of the public or to one of the organization's potential contractors or suppliers?*
- ▶ *What is the best way to ensure impartiality and fairness and to protect the public interest?*

Although it is important to deal with perceptions of conflicts of interests, neither of these checklists should be seen as automatically disqualifying relationships that no fair and reasonable person would see as giving rise to a conflict of interest.

Other strategies that an organization or government can adopt to avoid compromising, or appearing to compromise, its integrity include:

- ▶ *Keeping full and accurate records of its decision-making processes*
- ▶ *Ensuring openness by making public accurate information about the organization's processes, decisions and actions*
- ▶ *Where there is a risk of a perception of conflict of interest, ensuring that the final decision of all participants can be substantiated*

## WHAT IS NEPOTISM?

Nepotism is a particular type of conflict of interest. Although the expression tends to be used more widely, it strictly applies to a situation in which a person uses his or her public power to obtain a favor – very often a job – for a member of his or her family.

The prohibition against nepotism is not a total ban on all relatives. Indeed, blanket bans on employing relatives of existing staff can be held to be in breach

of human rights guarantees against discrimination. This situation is distinct from one relative employing another relative to a position where he or she will retain supervisory powers over that family member. But it does prohibit a public servant from using (or abusing) his or her public position to obtain public jobs for family members. The objective is not to prevent families from working together, but to prevent the possibility that a public servant may show favoritism towards a fellow family member when exercising discretionary authority on behalf of the public to hire qualified public employees.

As a member of South Africa's Ombudsman's Office has said:

A typical example might be where it is alleged that someone received an improper advantage in that he received, through the intervention of a family member who works for a certain department, contracts which that department puts out. It might be found that no criminal act is involved but unethical behaviour is. Nepotism is not yet classified as criminal in our law, yet it is clearly reprehensible and sufficiently unacceptable to require action on the part of the Ombudsman. Furthermore, the act of nepotism may be a red flag alerting the Ombudsman to the possibility of the official's perceived need to surround him or herself with those considered to be more than ordinarily capable of being relied upon to act with 'discretion.'<sup>6</sup>

Nepotism frequently occurs in the private sector, particularly in the context of promoting family members within family-owned corporations, where it is seen as legitimate. The impact of any preference is ultimately on the bottom line (profit) of the corporation, and the bottom line is family "property". Nepotism may cause ill-feeling in the workplace in the private sector, but there is no reason why the state should intervene and legislate against it.

In the public sector, however, nepotism damages the public interest. It means that the most suitable candidate fails to get a post or a promotion, and the public as a whole suffers as a consequence. Or it can mean that a less competitive bid wins a government contract at the cost of taxpayers' money.

Nepotism can cause conflicts in loyalties within any organization, particularly when one relative is placed in direct supervision over another. These situations should be avoided. A typical legal prohibition would prevent a father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew in a position as either supervisor or subordinate to one of the aforementioned relatives.

Even worse, of course, would be a judge sitting in a case in which he or she had a financial interest, or where a relation or good friend was involved. In a civil case, the parties may be asked (in case of doubt) whether they are content with the judge hearing the case, after he or she has explained the potential conflict of interest to them. In a criminal case, the judge should simply declare his illegibility and decline to sit.

A less frequent question, perhaps, is that which arises when sons and daughters of judges appear as counsel in court before their parents. In some court systems this has caused no complications. In others, it has aroused fierce controversy and given rise to serious allegations of collusion and corruption.

Nepotism primarily involves one or more of the following:

- ▶ *advocating or participating in or causing the employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or disciplining of a close family member or domestic partner in a public position, or in an agency over which he or she exercises jurisdiction or control*
- ▶ *participating in the determination of a close family member's or domestic partner's compensation*
- ▶ *delegating any tasks related to employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner to a subordinate*
- ▶ *lobbying in favor of a close relative, who subsequently is appointed either in the public sector*

*or as CEO in the private sector (in such case, the former has no jurisdiction or control over the latter)*

- ▶ *supervising, either directly or indirectly, a close family member or domestic partner, or delegating such supervision to a subordinate.*<sup>7</sup>

However, the public interest requires that only the best candidate for a job serve the state. There will be occasions when a relative is unquestionably the best qualified person for a particular post, and there must be a balancing of interests. For this reason, nepotism rules should not be an insuperable barrier and mean that well-qualified candidates are invariably disqualified. This has been drafted in terms that leave no room whatsoever for deviation or individual discretion.<sup>8</sup>

One US county government has adopted the following approach to prevent nepotism in hiring practices:

The county is interested in hiring able, qualified applicants and will consider any person for employment when they meet qualifications.

The goal of the county is to hire the most qualified applicant who is best suited for the position. Members of your family, members of your immediate household or your relatives will be considered for employment, except when:

- ▶ *their position or your position would exercise supervisory, appointment, grievance adjustment, dismissal or disciplinary authority or influence*
- ▶ *you or the employee would audit, verify, receive or be entrusted with public money or public property*
- ▶ *circumstances would exist making it foreseeable that the interest of the county and you or the employee would be in conflict or question*
- ▶ *where the county must limit hiring to avoid a conflict of interest with customers, regulatory agencies, or others with whom the City conducts business*

- ▶ *where the county must limit hiring to avoid employment discrimination, personnel policy conflicts or related problems*

The county will not knowingly place you in a situation where you are supervised by a member of your family, your immediate household or your relative, or where favoritism, interpersonal conflict, lack of productivity, lack of efficiency, or other unsound employment conditions including those mentioned in this policy may develop. This policy shall not be retroactive, unless any of the above adverse conditions are being practiced. In such a case, the county reserves the right to assign the affected employees to different operating levels, pay scales or locations.<sup>9</sup>

Further policies and procedures should address the need for and the means of disclosing and recording conflicts of interest and determining the appropriate action for minimizing their impact on the integrity of an organization's operations.

## WHAT IS CRONYISM?

Cronyism is a broader term than nepotism, and covers situations where preferences are given to friends, regardless of their suitability. It is most likely to occur in the context of the making of appointments, but it can arise in any instance when discretionary powers are to be exercised.

In Britain, cronyism is captured in such expressions as the "old school tie" or the "old boys club." In a number of countries around the world, fortunes have been made through cronyism and the abuse of connections. Indonesia under the regime of General Suharto provides many examples of cronyism. But even here, the preferences given were all within the law and many do not appear to have been tainted by criminal conduct. However, few of the decisions would have survived judicial examination of the process and criteria invoked when the privileges were conferred.

It is essential that organizations have clearly stated and well understood policies and procedures as well as written codes of conduct to deal with actual, potential and perceived conflicts of interests, including nepotism and cronyism.

However, whereas it is possible to define nepotism in terms of blood relatives or relations by marriage or partners, an effective legal definition of cronyism is impossible. This has to be dealt with more informally, on the basis of posing the question: Would well-informed, reasonable people think that this appointment or this decision was appropriate?

At times, the matter can be dealt with quite simply. If someone is applying for a position and a member of the interviewing panel knows him or her very well, they can – and should – excuse themselves from sitting on the panel. In essence, at what point does a person become a "crony" – "a friend or a companion" – so that a decision in their favor could be categorized as cronyism? To determine where the line should be drawn, the panel member can pose the question: What would the other candidates think if they knew about the relationship? Would they think it rendered the process unfair? If in doubt, the matter can be discussed and determined by the other panel members. What is necessary, of course, is for there to be complete transparency about the nature of the relationship, and that it be placed on the record.

On the other hand, if a candidate is known as a person with discretion and sound judgement, there can be greater confidence in his or her appointment. It can come down to the question of trust. The primary concern is that decisions are made that are defensible, both in the eyes of the other applicants and in the eyes of the wider public.

Some appointments are required by law to be made by a particular officeholder. Should that official feel compromised by his or her relationship with a prospective candidate, it should be possible for the officeholder to, in effect, stand aside in the selection process. He or she can also ask for formal independent advice from another official of equal or senior rank as to whom should be appointed, and act on that.<sup>10</sup>

However, ultimately, the emphasis is on being able to answer the charge of a decision being made regardless of suitability. A candidate's familiarity with decision-makers will quite rightly trigger this debate.

### AVOIDING NEPOTISM AND CRONYISM IN THE MAKING OF APPOINTMENTS

Basic principles for avoiding nepotism and cronyism with both the public and private sector are<sup>11</sup>:

- ▶ *Impartiality in all recruitment and selection processes. This is essential for public sector employees to meet their public duty by acting ethically and in the public interest. Therefore, to avoid perceptions of bias or corruption, a potential applicant should have no direct involvement in any part of the recruitment process for a job for which he or she may be a candidate. This includes acting as the contact person for potential candidates, framing advertisements or preparing the standard practice for preferred applicants' referees to be contacted. Each referee should be asked the same questions relating to the selection criteria and all the questions and responses should be documented.*

It should be clear to all concerned which person is accountable for key decisions throughout the process, and what the values are that will be applied. This should be formally recorded, and all decisions and the reasons for those decisions during a selection process should be documented.

As in all other aspects of sound administration, good recordkeeping increases accountability. In societies where there are particular pressures from clans or a person's extended family, it is advisable for those involved in the decision-making processes to formally certify that none of the applicants is a relative or is known to them, or else to excuse themselves from the process entirely.

- ▶ *Competition should be fostered. Advertisements should be framed to both adequately reflect the requirements of the job and to maximize the potential field of candidates. Generally, advertisements should be placed to attract the widest potential field possible. Selection criteria should also be reviewed before recruitment action is taken to ensure they adequately reflect the requirements of the position and attract the widest field of applicants. Only in exceptional circumstances should truly competitive measures be bypassed. When these*

*circumstances occur, the decision-maker must be able to demonstrate clear and unambiguous reasons for making direct appointments.*

- ▶ *Openness should be maximized. The risk of corruption is minimized when there are policies and procedures that promote openness in dealing with conflicts of interests. An administration that adopts a policy of openness for all its recruitment and selection decisions will avoid sending the wrong message to staff about preferred practices in recruitment and selection. This will also remove the justification for others to act contrary to stated recruitment practices and policies without valid reasons. Openness, however, does not mean breaching confidentiality.*
- ▶ *Integrity is always paramount. Taking shortcuts can compromise the integrity of the recruitment process. To ensure integrity in recruitment and selection practices, an administration must have clearly stated sanctions for non-compliance with established policies and practices. Decision-makers must be seen to use them when necessary. A number of countries have found that having independent persons involved in the selection process can markedly enhance the integrity of the process. These independent members of a hiring panel should not be known to the other committee members. If this is not possible, the extent of the independent member's affiliation with other committee members should be recorded in writing before interviews are held and form part of the recruitment file.*
- ▶ *Appeals should be available. Unsuccessful, but qualified applicants, who consider that proper procedures have not been followed, should be able to appeal to an appropriate authority for an independent review of the process and its outcome.*

### CONFLICT OF INTEREST ISSUES WHEN STAFF LEAVES THE PUBLIC SECTOR<sup>12</sup>

What happens when a public servant leaves the public service and enters the private sector? This question has become increasingly important when addressing conflict of interest issues.

This is a consequence of several factors. Efficiency reforms have led to the “downsizing” and contracting out of certain public sector functions to the private sector. Consequently, in many countries, the differences that traditionally separated public sector careers from those in the private sector are less distinct. As a consequence, there has been a growing tendency in many countries for public officials not to regard public sector employment as a long-term career, but to consider moving between the public and private sectors in the course of their working lives.

To ensure that public administrators are not tempted to exploit their government connections after leaving the public service, a sound approach to post-public sector employment is required. This both reduces the risk of corruption, and renders much less sensitive any confidential information which the departing public servant may have and which competing private sector interests may be keen to obtain for themselves.

The type of employment which may be cause for concern is one which has a close or sensitive link with the person’s former position as a public official. If a public official misuses his or her official position to obtain a personal career advantage, whether intentionally or innocently, it adversely affects public confidence in government administration.

There are, perhaps, four main areas in post-public sector employment that give rise to situations of conflict of interest and that merit consideration:

- ▶ *Public officials who modify their conduct while in office to improve prospects for future employment. Such conduct can involve favoring private interests over public duty; individual public officials “going soft” on their official responsibilities to further personal career interests; an individual only taking partial action on a certain issue out of concern for the interests of prospective private sector employers; or outright bribery, where a public official solicits employment in return for rendering certain favors.*
  - ▶ *Former public officials who improperly use confidential government information acquired during the course of official functions for personal benefit, or to benefit another person or organization. This situation does not involve information that has become part of an individual’s skill set or knowledge that can be legitimately used to gain other employment.*
  - ▶ *Former public officials who seek to influence public officials. This involves former public officials pressuring ex-colleagues or subordinates to act partially by seeking to influence their work or by securing favors.*
  - ▶ *Re-employment or re-engagement of retired or redundant public officials. This may involve:*
    - (a) senior public servants receiving generous severance compensation and re-entering the public service in non-executive positions while keeping their severance payments;*
    - (b) public officials leaving public employment only to be re-engaged as consultants or contractors at higher rates of pay to perform essentially the same work*
    - (c) public officials who decide to go into business and to bid for work from their former employer after arranging their own severance packages.*
- Codes of conduct do not provide an effective solution to preventing conflicts of interest in this area. The codes cease to have effect when people leave office – the very moment when these provisions would become relevant. This leaves three generally accepted approaches to consider:
- ▶ *Each government agency can develop specific policies for employment after an official has left the public sector. These policies should take into consideration the degree of risk to the government involved in a public official gaining employment in the private sector and the likely impact of these policies on public employees’ future careers; for example, highly qualified professionals with limited fields in which to work.*
  - ▶ *Employment contracts can have specific restrictions written into them. (However, some countries limit the legal right to restrict future employment, and this can give rise to difficulties.)*



- ▶ *Enacting legislation; this is a route that some countries have taken, but any legislation should be careful to minimize restrictions and not to impose them on people unnecessarily.*<sup>13</sup>

There is, of course, a need to ensure that restrictions on post-separation employment are in proportion to the risks posed. For this reason, public sector managers in the Australian state of New South Wales decided that the best approach is to deal with the matter on a case-by-case basis. They did not consider that the level of risk to public sector integrity warranted the degree of hardship and inefficiency that broadly targeted restrictions on employment opportunities might impose.

### GOVERNMENT MINISTERS: CONFLICT OF INTEREST AND POST-PUBLIC SECTOR EMPLOYMENT

Ministers hold positions of power and influence. Some of the knowledge they acquire can be of a confidential nature, or could confer on them advantages if subsequently, as private citizens, they were to work in an area related to their former responsibilities. Restricting the conduct of ministers after they leave office is becoming increasingly common.

In the US, the heads of executive agencies are not members of Congress, but presidential appointees. These appointees are governed by Title 18 Section 207 of the US Code, in which they are referred to as “very senior personnel.” The US system is multi-tiered: there are limited restrictions to which every government employee is subject, which become progressively more onerous as staff become more senior.

Very senior personnel must comply with several restrictions:

- ▶ *a lifetime ban (which covers all executive employees) on representing any organization on a matter on which they directly worked as an executive employee*
- ▶ *a two-year ban in cases on which they may not have directly worked, but for which they had direct responsibility*
- ▶ *a one-year ban on representing any organization to any current representative of the executive branch of government,*
- ▶ *a one-year ban on representing a foreign entity “before any department or agency of the United States” and on aiding or advising a foreign entity.*<sup>14</sup>

A statutory agency, the Office of Government Ethics, advises executive employees to ensure compliance with this law.

In Canada, the Conflict of Interest and Post-employment Code for Public Office Holders<sup>15</sup> was established in June 1994. It is an executive instrument rather than a statute, but it is administered by a statutory office, the Office of the Ethics Counsellor. The Code governs ministers. Its stated aims for what it terms “post-employment compliance measures” are to:

minimise the possibilities of:

- (a)** *allowing prospects of outside employment to create a real, potential or apparent conflict of interest for public office holders while in public office*
- (b)** *obtaining preferential treatment or privileged access to government after leaving public office*
- (c)** *taking personal advantage of information obtained in the course of official duties and responsibilities until it has become generally available to the public*
- (d)** *using public office to unfair advantage in obtaining opportunities for outside employment. (s. 27)*

*The Canadian arrangement is similar to that in the American system of tiered restrictions. It contains a permanent ban on a public office holder “changing sides” in any “ongoing specific proceeding, transaction, negotiation or case where the former public office holder acted for or advised the Government.” (s. 29(1)). The key provision, however, is a two-year ban preventing ministers from:*

- (a)** *[accepting] appointment to a board of directors of, or employment with, an entity with which they*

*had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office, or*

*(b) [making] representations for or on behalf of any other person or entity to any department with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office.’ (s. 30)<sup>16</sup>*

Unlike in the US, the Canadian prime minister has discretionary power to reduce the two-year waiting period, subject to consideration of a range of factors.

As in Canada, employment of former government ministers in the UK is governed by executive instrument, not statute. Chapter Nine of the Ministerial Code (Ministers’ Private Interests) guides post-separation employment:

On leaving office, Ministers should seek advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office, other than unpaid appointments... If, therefore, the Advisory Committee considers that an appointment could lead to public concern that the statements and decisions of the Minister, when in Government, have been influenced by the hope or expectation of future employment with the firm or organisation concerned, or that an employer could make improper use of official information to which a former Minister has had access, it may recommend a delay of up to two years before the appointment is taken up ...<sup>17</sup>

Whereas in Canada, there is a two-year ban unless the prime minister makes an exception, in the UK former ministers are merely restricted if, after seeking advice from the Advisory Committee, it is recommended that they delay their employment in the private sector.

Best practice suggests that:

- ▶ *post-public sector employment be addressed in any ministerial code*
- ▶ *a standing advisory body should assist ministers in complying with any guidelines that might*

*address their later employment. This feature is common to legislative and executive ethics instruments internationally and not just for dealing with post-public sector employment issues.<sup>18</sup>*

## SOME LEGAL APPROACHES

A number of countries have explicit conflict of interest laws. Croatia’s legislation provides not only for declarations of assets and income and for the prohibition of conflicts of interest, but also for a commission to receive declarations and to provide advice and guidance. The commission is elected by the parliament, but politicians are excluded from being members.

*The Croatian example also gives directions as to how offers of bribes are to be handled:*

### Article 14

*(1) Officials shall have the obligation without delay to reveal and inform the body which elected or appointed them, and the Commission about any pressure or improper influence to which they have been exposed in the exercise of public office.*

*(2) Officials who, contrary to the provisions of this Act, have been offered a gift or any other advantage related to the exercise of their public office, shall:*

- 1. reject such an offer,*
- 2. try to determine the identity of the person making the offer,*
- 3. in case of a gift which, due to specific circumstances, cannot be returned, the official shall keep it and report it immediately,*
- 4. list witnesses of this event, if possible,*
- 5. within reasonable time, submit the written report on the event to the competent person or body,*
- 6. if a punishable offence is involved, report it to the bodies in charge of conducting proceedings.*

The Croatian approach strikes a balance between the need for a firm legal framework for addressing such conflicts of interest and the need for flexibility. However, given the complexities of the situations which can arise, the enactment of more ambitious laws in the area of conflict of interest can be some-

thing of a blunt instrument. Thus, many countries have chosen various approaches to address the more detailed aspects of this problem. Often, no sanctions are imposed on those who refuse to give the needed information.

In this approach, laws are enacted which deal with the upper levels of government (for example, as in the 1997 Constitution of Thailand quoted above), and with basic principles. But the design of appropriate policies is effectively delegated to agencies and departments, each of which is expected to develop policies appropriate to their own situations.

Even in the implementation of these policies, a large measure of common sense is called for. The services of an ethics office can be particularly valuable. (These are discussed in Chapter 6). Equally clearly, conflict of interest, cronyism and nepotism should be covered in appropriate codes of conduct.

### ANTI-NEPOTISM LAWS

Nepotism poses particular problems. It is perhaps not surprising that by no means all countries have anti-nepotism laws – desirable though these may be. When these are lacking, favoritism shown to a relative tends to be dealt with by legal prohibitions. These include prohibitions against unwarranted privilege, direct or indirect personal financial interest that might reasonably be expected to impair objectivity and independence of judgement, or the appearance of impropriety.

A typical example of such a law reads:

**IC 4-15-7-1, on Nepotism,** *No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relative be entitled to received any compensation for his or her services out of any appropriation provided by law. However, this section shall not apply if such person has been employed in the same position in such office or department or insti-*

*tution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department or institution. No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.*<sup>19</sup>

The United States has an Office of Government Ethics to handle conflict of interests at the federal level, and Canada has chosen to deal with the issue of conflict of interest by establishing a series of Ethics Counsellors. (The framework is described in Chapter 6).

### MONITORING PUBLIC OFFICIALS' INCOME

In many parts of the world, the argument is advanced that one of the key instruments for maintaining integrity in the public service are income statements that indicate the assets and liabilities of all those in positions of influence as well as those of their immediate family members. It is a thesis that is winning support from international agencies. At the very least, such statements give the illusion of being a corruption “quick fix.” Some countries require senior officeholders to divest themselves of major investments, while others permit the establishment of “blind trusts.”<sup>20</sup>

Although the disclosure of assets and income will, of course, not be accurately completed by those who are taking bribes, it is thought that the requirement that they formally record their financial positions lays an important building block for any subsequent prosecution. It would, for example, preclude them from suggesting that any later wealth that had not been disclosed was, in fact, acquired legitimately.

The Act on Preventing Conflict of Interest in the Exercise of Public Office a Croatian law, includes the following provisions:

**(1)** *Within 30 days from the day they begin to exercise their office, officials shall provide a report with data on their property, permanent or expected income, and the property of their spouse and children, with the balance as of that day, and shall*

*provide a report upon the end of exercise of their office, and upon the expiration of the year in which in the course of the exercise of the office a major change occurred.*

**(2)** *Officials shall in the report from the paragraph 1 of this Article submit the data on monetary savings if it exceeds the net one year amount of official's income.*

**(3)** *An official shall not receive his salary prior to the fulfilment of the obligations under paragraph 1 of this Article...*

**(6)** *An official's tax card shall be a public document.*

Disclosure, the argument runs, should also extend to a certain post-service period, as a deterrent to the receipt of corrupt payments after retirement. Studies have suggested that it is unlikely that corrupt payments are made more than three years after a person has retired.

But does it work? In a vibrant democracy such as the United States, assets disclosures work because of third party enforcement. In elections, opposing candidates, for example, will scrutinize each other's asset declaration forms and make it an issue if an opponent seems to be living beyond his or her means. The same scrutiny occurs with forms requiring disclosures of campaign contributions and expenditures. If a candidate claims to receive only modest contributions and yet is travelling in a leased jet and staying at top-class hotels, his or her opponent will make it an issue. There are civil society groups, too, which check forms and report on those which seem problematic, and on donors who appear to have benefited handsomely from their financial support of candidates.<sup>21</sup>

With government bureaucrats, the process is less pronounced, but can still be effective. In U.S. public procurement, the declarations of officials making procurement decisions are examined by prospective bidders to detect possible conflicts of interest or inexplicable wealth.

Overall, countries' experiences with declarations of assets have been patchy. Initially, in countries with major corruption problems, politicians have legis-

lated for disclosure and then ignored the requirements completely. Alternatively, politicians have established an agency that merely receives declarations, none of which are made available to the media or the public. Moreover, this agency generally has neither the power nor the resources to check the accuracy of the declarations. In this way, they have been able to ensure that that third party enforcement of the kind described above has not been able to take place.

It is true that recently, in several countries, the process of disclosure has claimed some victims – though whether through carelessness rather than corrupt intent is debatable. What the declaration process can achieve is formally to record at least a measure of a person's interests, information which can later prove invaluable should it come to dealing with questions of conflict of interest.

Having accepted the argument in favor of disclosure, several questions follow: To whom should disclosure be made? What matters should be included? How broadly should disclosure requirements apply to members of an official's family? What access should the media and members of the public have to these declarations? And, in the case of career public servants, what levels of seniority must be required to submit to this process? There are no simple answers to any of these questions.

The tricky part of this process is not so much deciding on the categories of assets to be disclosed, and the categories of the officials who should be making disclosure, but rather on deciding the extent to which there should be public access to the declarations. The litmus test must be whatever is needed to achieve public peace of mind – not whatever is conceded by the noisiest of the opponents of disclosure. Nor are matters always as simple as they may seem. A minister of finance from Colombia has been quoted as saying that a public declaration of a politician's wealth would be an open invitation to kid-nappers to claim the sums disclosed as a ransom.

However, if the public do not have access to disclosure information and if there is no aggressive monitoring of the declarations, the process has little impact.

In Australia, a system whereby officials make annual written disclosures to the head of their department has been seen as effective. These are not made public. Similar disclosures are managed by the ethics counsellors in Canada, and by contrast there are rights of public access. It should be noted that Croatia has opted in favor of public access, thus enabling its citizens to police the system.

In Nigeria, the Code of Conduct Commission was empowered, from 1979 onwards to require the filing of returns by all public officials. However, they had neither the resources nor the legal powers to actually check the contents of any of these statements. As a consequence, throughout a prolonged period of looting by public officials, the only prosecutions ever mounted were against public officials who failed to file an annual return – not for filing a false one.

In today's world, however, governments are increasingly examining more meaningful public disclosure

arrangements. South Africa has designed an interesting model. It has introduced a scheme for the monitoring of the financial status of all parliamentarians and government ministers. A compromise has been reached in an effort to meet legitimate claims to privacy. The disclosure of certain interests is made openly and publicly; other interests are disclosed publicly but only as to the nature of the interest, with the actual value being disclosed privately. The interests of family members are disclosed, but in confidence. The argument for the last is that members of a parliamentarian's family have a right to privacy, and it should be sufficient for the disclosure to be made on the record, but not on the public record.

The development of effective and fair regimes for the monitoring of the incomes, assets and liabilities of senior public officials will be followed closely by anti-corruption activists. If they can be made to work – and there are obvious difficulties – then they will serve as a valuable tool in restraining abuses of office.

## ENDNOTES

- 1 See OECD Guidelines for Managing Conflict of Interest in the Public Service: <http://www.anticorruptionnet.org>. The same website contains excellent training materials developed for the OECD by Howard Whitton (howard.whitton@oecd.org). OECD – Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service (June 2003), <http://www.oecd.org/pdf/M00041000/M00041994.pdf>; The Canadian website, Values and Ethics Codes for the Public Service is a further excellent resource, [http://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/TB\\_851/vec-cve1\\_e.asp#\\_Toc46202807](http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202807)
- 2 See Code of Ethics, State of New Jersey USA: [http://www.iit.edu/departments/csep/PublicWWW/codes/coe/State\\_of\\_New\\_Jersey\\_Community\\_Affairs.html](http://www.iit.edu/departments/csep/PublicWWW/codes/coe/State_of_New_Jersey_Community_Affairs.html); For a detailed discussion of the issue at senior levels of government, see Conflict of Interest: Legislators, Ministers and Public Officials by Gerard Carney (Transparency International, Berlin) at [http://www.transparency.org/working\\_papers/carney/index.html](http://www.transparency.org/working_papers/carney/index.html).
- 3 Constitution of the Kingdom of Thailand: [http://www.kpi.ac.th/en/con\\_th.asp](http://www.kpi.ac.th/en/con_th.asp)
- 4 Constitution of Thailand, Section 70, Chapter IV
- 5 Constitution of Thailand, Section 70, Chapter VI, Part 2
- 6 Quoted in Report on the Investigation of Allegations of Nepotism in Government: Report No 11 (Special Report) to the Parliament of South Africa by the Public Protector of the Republic of South Africa, 15 April, 1999
- 7 Board of Ethics, King County, State of Washington, USA. For additional information, please contact Jeremy Pope: [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
- 8 Adapted from the City of Bristol, Tennessee, Nepotism Policy (US), September 1996
- 9 Board of Ethics, King County, State of Washington, USA. For additional information, please contact Jeremy Pope: [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
- 10 In New Zealand, the minister of justice would ask the attorney general or the solicitor general to act in his or her stead. If the minister's friends were among the candidates for the job. A decision would be recommended to the minister, which he or she would then take formally in their own name.
- 11 This section draws on materials developed by the New South Wales Independent Commission Against Corruption (NSW ICAC), Sydney, Australia. Its assistance in the preparation of these and other materials is gratefully acknowledged. For some case studies, see the NSW ICAC publication Best Practice, Best Person: Integrity in Public Sector Recruitment and Selection on the Commission's website, where there is a wealth of valuable information and approaches in preventing corruption: <http://www.icac.nsw.gov.au>
- 12 The discussion in this section is based on a dialogue between the NSW ICAC and public sector employers in that state. The full report is entitled Corruption Prevention Publications: Strategies for Managing Post Separation Employment Issues and may be accessed on the ICAC website. <http://www.icac.nsw.gov.au>
- 13 For the Canadian legislation, see <http://strategis.ic.gc.ca/SSG/oe00002e.html>
- 14 US Office of Government Ethics, Memorandum Regarding Revised Post-Employment Restrictions, 26 October 1990.
- 15 Canadian Office of the Ethics Counsellor: <http://strategis.ic.gc.ca/SSG/oe01188e.html>
- 16 Canadian Office of the Ethics Counsellor website: <http://strategis.ic.gc.ca/epic/internet/inoec-bce.nsf/vwGeneratedInterE/Home7>
- 17 S.140 Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers, Cabinet Office, July 2001. <http://www.cabinet-office.gov.uk/central/1997/mcode/>
- 18 This section draws from Post-Separation Employment of Ministers, Research Note prepared by the Australian Department of the Parliamentary Library (Research Note 40, 28 May 2002) <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn40.pdf>
- 19 State of Nebraska, USA.
- 20 See Bernard Pulle Conflicts of Interest Avoidance: Is There a Role for Blind Trusts? In Current Issues Brief 14, 1996-97. <http://www.aph.gov.au/library/pubs/CIB/1996-97/97cib14.htm>
- 21 For example, the Center for Public Integrity (<http://www.publicintegrity.org>) and Common Cause (<http://commoncause.org>)