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New Zealand's experience with conflicts of interest

Intergovernmental Working Group on the Prevention of Corruption

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Introduction

Rau rangatira mā. Mihi mai, whakatau mai. Tēnei taku mihi atu ki a koutou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

(Translation: To all the leaders gathered here today, please welcome me. I acknowledge and greet you all)

Distinguished delegates. Thank you very much for this opportunity to present on this extremely important topic, and I want to start by acknowledging all the work you do, individually and as a collective, in addressing conflicts of interest.

The topic I have been asked to speak to is New Zealand's experience in addressing conflicts of interest.

To do so, I will naturally look to cover our mechanisms to prevent and manage conflicts of interest, in terms of Article 7(4) of the Convention.

However, I do not think it would be possible for me to adequately explain our implementation Article 7(4) without first providing some broader context that informs the design of our mechanisms.

Culture as context

Perhaps first and foremost, in a relatively small country like New Zealand, conflicts of interest in our working lives are natural and unavoidable.

This is exacerbated in small communities in New Zealand, particularly in local government where elected officials are also part of the community,

connected to business and have close family connections within that community.

The inevitability of possible conflicts of interest means that most people are, at least on one level or another, intuitively familiar with the concept and the need to manage conflicts effectively.

Our history and culture also play a significant role in our approach to managing conflicts of interest.

In 1948, Political Science Professor Leslie Lipson made a observed of New Zealand's political culture: "abstractions, theories, ideals—these are of little account or interest unless they can be immediately applied. Utility is the national yardstick."

The result of this culture, as has regularly been remarked on, is that legal reform has tended towards the piecemeal, rather than the comprehensive. Issues tend to be identified and fixed in turn, rather than as part of wholesale systematic changes.

Criminologist Professor John Pratt, drawing on the work of other eminent academics, has also remarked on New Zealand's strong, perhaps over, emphasis on trust, social cohesion and conformity through the Twentieth Century.

The Pulitzer Prize-winning American historian, David Hackett Fischer, made some similar observations in describing New Zealand's cultural emphasis on "fairness".

The natural corollary of this is that there is little tolerance for violating that strong social cohesion. Professor Pratt uses this corollary to draw

conclusions about New Zealand's high rates of imprisonment. Equally, however, it plays a role in New Zealand's longstanding reputation and reality as a country that rejects corruption.

Mechanisms to address conflicts of interest

In my view, the combination of these factors Generally speaking, New Zealand's system for addressing conflicts of interest could be variously be described as devolved, flexible, pragmatic, and largely reliant on voluntary compliance.

This is true in respect of the rules for disclosing and managing of conflicts of interest, and also for asset disclosure and lobbying regulations.

The rules and expectations about conflicts of interest have a variety of sources. Some of the sources are general standards or expectations about what constitutes ethical behaviour, and some of the sources are legal rules.

Indeed, in practice, a person may have multiple conflict of interest obligations under different sets of standards or statutes.

General standards and expectations

For example, the Cabinet Manual sets out the expectations on Ministers regarding conflicts of interest.

The following requirements, policies and guidance are also applicable to public servants more generally:

- the Standards of Integrity and Conduct which requires all State servants to act honestly and impartially in the public interest;
- the Auditor-General's guidance, which sets out expectations on all State servants to disclose conflicts of interest and agencies to appropriately manage them
- the Government Rules of Sourcing and Principles of Government Procurement provide comprehensive guidance on managing conflicts of interest; and
- the recently issued model standard in relation to conflicts of interest from the State Services Commissioner.

There is not a general statutory requirement for officials at any levels to declare assets or interests.

Members of Parliament declare their interests to the Registrar of Pecuniary and Other Specified Interests, who advises them about what information is required, and compiles their returns into the Register.

Public service chief executives have contractual obligations in relation to a declaration of interest on taking their position and as requested by the State Services Commissioner. These will disclosures of chief executive expenses are published regularly.

Other sectors of government and officials, meanwhile, do not have such mandatory requirements and such disclosures, where they are made, are generally not automatically publicly available. Of course, in keeping with New Zealand's relatively high levels of transparency and open

information, there are mechanisms through which relevant information can be sought.

Legal rules

There are, however, some rules for particular types of public entity, applying predominantly to members of a governing body, that are set out in statute.

Statutory rules commonly do one or more of the following:

- prohibit members from discussing and voting at meetings on matters in which they have an interest;
- require members to disclose interests before appointment, and/or in a register of interests, and/or at relevant meetings;
- prohibit members from having an interest in certain contracts with their entity;
- prohibit members from signing documents relating to matters in which they have an interest; and
- provide mechanisms for seeking exemptions from the general rules.

Examples of these statutory rules can be found in our legislation governing the education and health sectors, local government, independent state sector organisations, and companies.

New Zealand being a common law jurisdiction, it is also vital to look at the body of legal rules derived from the courts' decisions. Conflicts of interest are usually dealt with under the common law rule about bias.

The rule about bias applies to an entity (or member or official) exercising powers that can affect the rights and interests of others. Members and officials in such a position must carry out their official role fairly and free from prejudice.

Consequences for a breach

The consequences for a breach of the relevant standards or rules are also varied.

Breaching a statutory rule may constitute grounds for removing a member from office. In some cases, it might constitute an offence.

If an entity's decision is tainted by a conflict of interests, the breadth of judicial review powers mean the courts may declare the decision invalid or may prevent a person from exercising a power.

More often, if a conflict of interest is not handled well, that the person or entity concerned will become the subject of public criticism by politicians, the media, or members of the public. A regulatory agency may conduct a formal inquiry into the public entity, and the entity may take disciplinary action against an employee.

Experience in practical terms

The reasonable question to be drawn from my points above, I suppose, is “Fine, those systems have strong cultural, historical and institutional roots; but do they work?”

The short answer is “Yes”.

The slightly longer answer is “Yes. Well, most of the time.”

The mechanisms I have outlined to you have a great number of advantages. For example, they are, as I have said, tailored to specific circumstances and do not, therefore, tend to suffer from overbreadth or unhelpful generalisations.

Surveys by Deloitte and PricewaterhouseCoopers suggest that undisclosed conflicts of interest are one of the most common types of domestic corruption in New Zealand. Though drawn from a small amount of corruption overall, this is still concerning.

Indeed, serious allegations and perceptions of conflicts of interest have affected almost every level of government in recent years.

Perhaps most famously, in 2010, a then Supreme Court justice resigned because of ongoing concern around an alleged failure to adequately disclose and manage a conflict of interest, despite having successfully challenged the findings of the Judicial Conduct Commissioner in a judicial review shortly before stepping down.

More recently, in 2017, an investigation by the State Services Commission found that two staff at the Canterbury Earthquake Recovery Authority had

committed serious and sustained breaches of conflict of interests, and another had made errors of judgement.

One of the key issues in this case was that the individuals concerned were intentionally brought into their roles *because* of their business connections.

Their roles were also temporary ones, given the nature of the Recovery work, and induction into the public sector, what it means to be a public servant and what expectations that come with that were missing.

These 'sentinel events' could, in one light, be seen as examples of the system to respond to potential conflicts effectively. In that sense, our experience is that we are quite capable in this area.

However, they - along with the fact that we know very little statistically about the extent to which potential conflicts of interest are declared and managed – also demonstrate there is room for improvement in our preventive mechanisms.

In this regard, perhaps our single biggest risk is complacency. Complacency impacts particularly heavily on our willingness and capacity to proactively detect and prevent corruption.

This complacency could also be a product of the same historical and cultural forces that enable effective response mechanisms.

Conformity can make calling out of bad behaviour more intimidating; ad hoc fixes mean there may be a fractured understanding of applicable rules; the small size and inevitability of conflicts may breed overfamiliarity and desensitisation to the risks.

To respond, the State Services Commission is leading a renewed emphasis on “spirit of service” and the principles of no “double-dipping”.

There is also a greater emphasis being placed on “Speaking Up”, the SSC Standard and the reform of our whistleblower protection legislation to make it easier for people with integrity concerns, including undisclosed conflicts of interests, to speak up.

Conclusion

I would like to conclude with two points, which I doubt are particularly revolutionary, but are certainly drawn from our experience.

First, that our systems for addressing conflicts of interest are, as with most things, the product of our culture and experiences.

This is, of course, not a bad thing; indeed, we should embrace our individual history and (legislative) culture and use it to inform how we approach difficult issues.

But, secondly, things change; systems that worked perfectly, or at least mostly, well in yesteryear can break down, perhaps surprisingly quickly, in response to changes in culture. If potential conflicts are not being declared, we must ask “why not”? Where they are, that should be encouraged, but we must then ensure they are adequately managed.

In short, complacency is not a viable option. We must always seek to reappraise, learn, adapt and improve. That may not need major change, but it does need focussed, informed reform.

In other words, in te reo Māori:

Whāia te iti kahurangi ki te tūohu koe me he maunga teitei

(Translation: Seek the treasure you value most dearly: if you bow your head, let it be to a lofty mountain)

Thank you very much.

Tēnā koutou, tēnā koutou, tēnā koutou katoa.