

Boyce G and Davids C (2010) "A social accountability framework for public sector conflict of interest: Private interests, public duties, and ethical cultures" – in Ball A and Osborne S P (eds) *Social Accounting and Public Management: Accountability for the Common Good*, Abingdon and New York: Routledge, pp. 275–286. (ISBN 978-0-415-80649-7; DOI 10.4324/9780203846070)

INTRODUCTION

The problem of conflict of interest arises when private or sectional interests are (or may be) pursued ahead of the public interest. Conflict of interest represents a failure of public sector accountability because it undercuts the duty of impartiality that is incumbent on all public officers¹ and counteracts the pursuit of the public interest. Acting in the public interest encompasses obligations in regard to administration, ethics, and performance, in accordance with recognised public sector principles and values that include the need for public officials and public institutions to consistently demonstrate integrity and trustworthiness. Across the world, conflict of interest is recognised to have contributed to a general decline in perceived standards of conduct in public office, undermining public trust in government and the integrity of democratic systems more broadly (Pope 2000; Stark 2000; Organisation for Economic Co-Operation and Development 2003; Cepeda Ulloa 2004; Raile 2004; Asian Development Bank and Organisation for Economic Co-Operation and Development 2006; Organisation for Economic Co-Operation and Development 2006; Young 2006; The Ombudsman 2008).

This chapter draws on two empirical studies of conflict of interest in the public sector in the Australian state of Victoria. The first project studied conflict of interest complaints against police officers over a ten-year period, and was conducted with the cooperation of Victoria Police.² The second study involved an in-depth examination of a sample of conflict of interest complaints against employees in all government departments and agencies, and was undertaken in collaboration with the Victorian Ombudsman.³ In both studies, original case files were examined in their entirety and in their original state and the primary analytical aim was to develop an empirically-driven and theoretically-informed explanation of conflict of interest and its components in a way that provided a comprehensive and operationally-relevant understanding of the problem.⁴

¹ The term "public officer" or "public official" is used here to refer to any employee who works within the public sector. This includes office- or street-level employees, managers and executives, and government officials.

² This study examined 377 complaints cases against 539 police officers for the period 1988–1998.

³ Forty-five cases were examined for the period 2003–2006, involving complaints against employees in authorities and agencies dealing with a range of government functions, local and regional councils, authorities and agencies, statutory boards, and higher education providers. This study took the form of an "Own Motion" Enquiry conducted by the authors (as sworn officers of the Ombudsman), under the independent investigation powers of the Victorian Ombudsman (an official report resulting from the Enquiry was presented to the Victorian Parliament in March 2008. See: The Ombudsman 2008).

⁴ Boyce and Davids (2009) provides a detailed overview of the two studies and their findings; individual case studies supporting the analysis are examined in Davids (2008) and The Ombudsman (2008).

The aim of this chapter is to delineate the dimensions of conflict of interest in the public sector and to outline an appropriate framework for regulation, management, and accountability, drawing mainly from the research we undertook in the government departments and agencies study, supported by the findings from the Victoria Police study. The next section defines and delineates the problem of conflict of interest in terms of three components: interests, conflicts, and perceptions. Section 3 outlines essential elements of a regulatory and management strategy to deal with the problem, namely restricting the holding of some private interests, and the appropriate structuring and administration of official work duties in the public sector. The final section outlines the social accountability framework that was developed out of both studies as a means for understanding and managing conflict of interest.

THE ELEMENTS OF CONFLICT OF INTEREST: INTERESTS, CONFLICTS, AND PERCEPTIONS

The concept of conflict of interest adds to notions of public sector integrity rather than merely providing another label for a subset of more generalised problems of misconduct and corruption. However, the evidence in our research suggests that conflict of interest in the public sector is poorly understood and inadequately managed and that the persistence of the problem damages the pursuit of the public good. Although conflict of interest is not in itself corruption, the two are conceptually and practically linked because the improper influence of private interests in the performance of public sector functions may lead to a range of ethical and accountability problems from minor misdemeanours through to major corruption. As a separate category of wrongdoing, conflict of interest is unique in two important respects: 1) it encompasses situations anterior to neglects of duty; and 2) it incorporates the importance of public perceptions of integrity, rather than limiting consideration to narrow or technical readings of propriety. Effective management of conflict of interest issues thus has the potential to both *prevent* neglects of duty, rather than merely reacting to them, and to enhance public confidence in the integrity of the public sector.

From the perspective of public accountability the ethical concept of conflict of interest ties together three interlinked components: interests, conflicts, and public perceptions (see Boyce and Davids 2009; Davids 2008). First, any public officer would be expected to have many *interests* apart from those associated with the performance of official duties, but some of these interests may pose an inherent risk of interference with the performance of official duties. *Black's Law Dictionary* offers an early but limited definition of a conflict of interest as relating to the "private pecuniary interest of the individual" (cited in Carson 1994, 390), but this narrow conception of pecuniary interests emphasises only a subset of relevant interests and ignores the importance of many non-financial interests including subjective or ideological biases, associational affiliations, partisan attachments, prejudgements, moral beliefs, and even aesthetic judgements. Interests that are held in common with most other citizens, such as one's general status as home owner/occupier, investor, or taxpayer, are unavoidable and therefore cannot be regarded as sufficiently *personal* interests to come under the aegis of conflict of interest. However, specific home localities, investments, or taxation arrangements, could be regarded as interests of concern, as could be the interests of family, friends, colleagues. As well as affiliations with others, enmity towards individuals or groups could represent an interest of concern if it causes interference with the performance of official duties, for this is the common element in any problematic interest.

Such interference may be manifested in preferential treatment for self, family or friends, or adverse treatment for enemies.

The second element of conflict of interest emphasises how private interests become problematic when they *conflict* with official duties, in particular through the impairment of competent and disinterested judgement. Conflict takes place in the mind, but because it is impossible to definitively determine subjective states of mind, concern focuses on situations that can be directly and objectively perceived as giving rise to conflicts (applying the standard legal perspective of a “reasonable person”). Thus, a conflict is present when there is a *capacity* for a known private interest to affect the performance of official duties and where a reasonable person could conclude that such a capacity existed (see Stark 2000; Davids 2008).

Dealing with *appearances and perceptions* is important because conflict of interest relates to “how things look” to a reasonable observer as much as it does to how they actually are. The notion of a “reasonable observer” means that “mere” appearances or uninformed, unreasonable, irrational, or prejudiced perceptions are insufficient to constitute a conflict of interest problem, but if a reasonable person could perceive on the basis of the known facts that a conflict of interest exists, then the conflict of interest so perceived is *ipso facto* a problem because this is in itself sufficient to undermine confidence in the integrity of the public sector.

Formal Definition

Discussion of conflict of interest in prior literature has often been confused by the use of terms such as “real”, “apparent” and “potential” conflict of interest (see Davids 2008; c.f. Parker 1987; Davis 1982; Kernaghan and Langford 1990; Preston, Sampford, and Connors 2002). The use of these terms is often associated with a failure to clearly distinguish three levels of the problem: 1) having a conflict of interest, 2) taking official actions or decisions in a conflict of interest situation, and 3) wrongly using an official position to actively pursue a private interest at the expense of proper performance of official duties. The second and third levels involve successively greater degrees of wrongdoing, but all levels are “real” and are problematic for public sector ethics.

Drawing on the preceding discussion and an extensive review of the literature (see Davids 2008; Boyce and Davids 2009), conflict of interest in the public sector context may be defined in the following way:

A conflict of interest is any conflict between the personal interests of a public officer (including financial and non-financial interests of the individual and family members, friends, associates, and organisations to which the officer belongs) and the officer’s duty to act in the public interest. A conflict exists in any situation where a public official could be influenced, or could be reasonably perceived by an outside observer to be influenced, by a private interest when performing an official function.

Some private interests may, by their very nature, be regarded as inherently incompatible with the holding of an official position in the public sector, while other interests of a more generalised nature may become problematic in the course of day-to-day work if and when they come into conflict with public duties. In the latter case, the focus is not on particular

kinds of interest but on the ways that any private interest may conflict with the performance of public duty.

Private Interests

Our research identified four broad areas of private interest that may be regarded as inherently incompatible with employment in the public sector (see Davids 2006). The first area related to secondary employment and private business interests, including the business interests of family, friends, and associates. Principal concerns related to the taint that attaches to any official action that favours or is perceived to favour interests associated with an individual's secondary employment arrangements or private business interests. We found that particular problems arise in relation to employment with outside organisations that either compete or interact in an official capacity with the public employer – such as developers, tenderers, private providers of government services, or recipients of government funding, or, in the case of policing, private security operators.

The second category of problematic private interests was post-employment arrangements, where former public officials take up employment in a private sector organisation that is in some way related to (former) official duties. In relation to government regulatory functions, such as gaming, racing, and liquor licensing, the potential problems and conflicts are obvious, but three main areas of concern are equally applicable across all government functions. First, a public employee may use an official position to enhance or cultivate future employment prospects, possibly by using an official position to favour the interests of a potential future employer. The second concern arises after new employment has commenced, to the extent that a former public official may take improper advantage of previous office by using insider knowledge or confidential information, for example. The third concern relates to the damage that may be done to the ongoing reputation of the public service when a public employee takes up private employment with a party whose private interests the official had the capacity to influence whilst in public employment (even if no such influence was used). Public perceptions in such circumstances mean that even if there was no formal wrongdoing, such post-employment arrangements appear to take private advantage of former public office and may not be trusted by reasonable members of the public.

The third category of problematic private interests relates to a public officer's capacity to affect the interests of external organisations with which the officer is associated, such as civic, social, or political bodies (including local government authorities). The principles of impartiality demand that official decisions and actions in relation to such groups be avoided in order to obviate both material impacts on the performance of public duty and public perceptions of favouritism or partiality, which taint official decisions and actions. For a conflict of interest to be of concern, it is sufficient that a third party might reasonably question the ability of that person to act independently or impartially. Our research found conflict of interest problems in relation to involvement in a range of organisations, including animal welfare groups, sporting and social clubs, school councils, and local government bodies.

The fourth category of problematic private interests involved a range of formal and less formal personal relationships, including relationships between local government council officers and commercial developers, police or prison employees and convicted criminals, and

police and proprietors of regulated businesses in areas such as hostelry, gaming and prostitution.

Public Duties

Day-to-day work in the public sector involves many situations where the application of judgement and discretion represents vulnerability to conflicts of interest because private interests (often of a more generalised nature than those discussed in section 2.2) may impact on an official's application of discretion, or may reasonably be seen to do so. Our research found that processes involving tendering and contracting, development proposals, local planning applications, child protection, employment of staff, and allocation of grants are particularly vulnerable. The findings suggested that conflict of interest problems are often manifested in allegations of unfair preferential or adverse treatment in these contexts.

As a general problem, preferential treatment involves an official acting in a way that is, or appears to be, partial to particular individuals or groups, such as family members and close associates (see Boyce and Davids 2009). We found that claims of adverse treatment often involved allegations of prejudgement on the basis of personal prejudice or ideological bias on the part of a public official, or that a member of the public had been unfairly treated as a result of their questioning of a public officer's competence or professionalism (such as a local government ratepayer questioning a valuer's judgment of property value for the purpose of levying local property taxes).

An additional area of conflict of interest uncovered by our research related to concerns that a public official may seek to pursue the interests of their organisation, sometimes in the name of "community interest", but against the broader public interest as represented by the rights of individual citizens to fair process. The public interest cannot be regarded as identical with the immediate interests of a government department or agency because over the longer term, the public interest cannot be served if individuals have a reasonable basis to perceive that members of the public are not treated fairly and impartially by government authorities (see Boyce and Davids 2009; The Ombudsman 2008).

Understanding Conflict of Interest

Conflict of interest is conceptually simple but in practice it is complex, and our research showed that there are many dimensions that are misunderstood by employees and managers, often extending to senior management and oversight levels. We found general evidence of mistaken beliefs that a conflict of interest is not of particular concern if there is no nefarious intent or a specific breach of duty. There is confusion in practical terms about the distinction between the three levels of the problem outlined earlier: 1) having a conflict of interest, 2) acting in a conflict of interest situation, and 3) using an official position to actively pursue a private interest.

Complainants do not always use the term "conflict of interest" when making allegations of preferential or adverse treatment and complaint investigators do not always recognise the conflict of interest dimensions of a complaint. As a practical matter, the existence of a conflict of interest may become evident at a management or oversight level only at or after the point where a regulatory, ethical, or other breach occurs (a neglect of duty). We found that managers and employees who do not recognise conflict of interest problems when they

are not specifically named as such often deal with the manifestations of the problem (the associated neglect of duty), rather than the underlying cause (the conflict of interest).

REGULATION AND MANAGEMENT

Compared to other overt forms of misconduct and corruption, the unique element of conflict of interest as an ethical concern is that conflict of interest focuses on the capacity of a private interest to influence the performance of duty. The key concern is the affect that this capacity has on citizen trust and confidence in the public sector, whether or not the capacity is actualised in a breach of duty. The public trust implicit in the ideals of public service and pursuit of the public good means that private or sectional gain must always be subsumed to the public interest, and the public good must always be seen to be paramount. The risks conflicts of interest pose to good governance, public trust, and accountability must be recognised and measures to identify and deal with the problem should be set in the context of a clear commitment to prioritise the public interest over private or sectional interests. In short, the preservation and building of confidence in the integrity, impartiality, and fairness of the public sector and its employees requires that the “political optics” of public sector activity be addressed in a way that maintains public trust (Stark 2000).

Contemporary public sector management activity has been heavily influenced by the practices of New Public Management (see Hood 1995; Pollitt 1993). The attendant infusion of personnel and practices from the private sector results in more complex challenges for managing and enhancing the functions of government (Polidano and Hulme 2001). In this context, processes of regulation, management and accountability must be carefully designed to ensure that the public good is prioritised. In terms of conflict of interest, effective public management rests on a clear operational understanding of the nature and dimensions of the problem and appropriate means for dealing with it. Practical complexities mean that it is not possible to simply identify and specifically prohibit all specific forms of conflict of interest. Effective regulatory regimes have tended to move from a focus on hortatory (exhortive) approaches that specify appropriate subjective states of mind (independent, disinterested) to greater emphasis on prophylactic (preventive) regulations that prohibit involvement in situations or actions that may lead to impaired judgment, or may be reasonably perceived to do so (Stark 2000).

A regulatory approach that prohibits “conflicts of interest” only in a generalised way is likely to be little more effective than an exclusively hortatory approach because it does not address the specific types of circumstances where conflicts of interest tend to arise in day-to-day work. Drawing on our analysis of the nature of conflict of interest, more specific prophylactic approaches are desirable in addition to general hortatory provisions. These involve, first, restrictions on particular sets of private interests that are inherently problematic, thereby preventing conflicts of interest. This recognises that particular kinds of private interests are problematic because of their inherent capacity to interfere with the proper performance of public duty. Prioritisation of the public interest justifies a requirement that individuals surrender the right to freely pursue this limited range of interests. In some areas, the most effective way to avoid conflicts of interest is to prohibit the holding of the particular interests concerned; for other areas, prohibition may not be appropriate but private interests may still need to be managed to prevent conflicts of interest (for example, through approval processes for engaging in secondary employment, notifications and limitations on certain civic involvements, or restrictions on particular forms

of post-employment for a defined period after leaving the public sector). Restrictions on secondary employment, post-employment, and involvement with civic and like associations represent sensitive areas of regulation because they limit an individual's present and future right to earn an income and to pursue otherwise legitimate career and personal interests, and represent restrictions on individual liberty that are not applied to ordinary citizens.

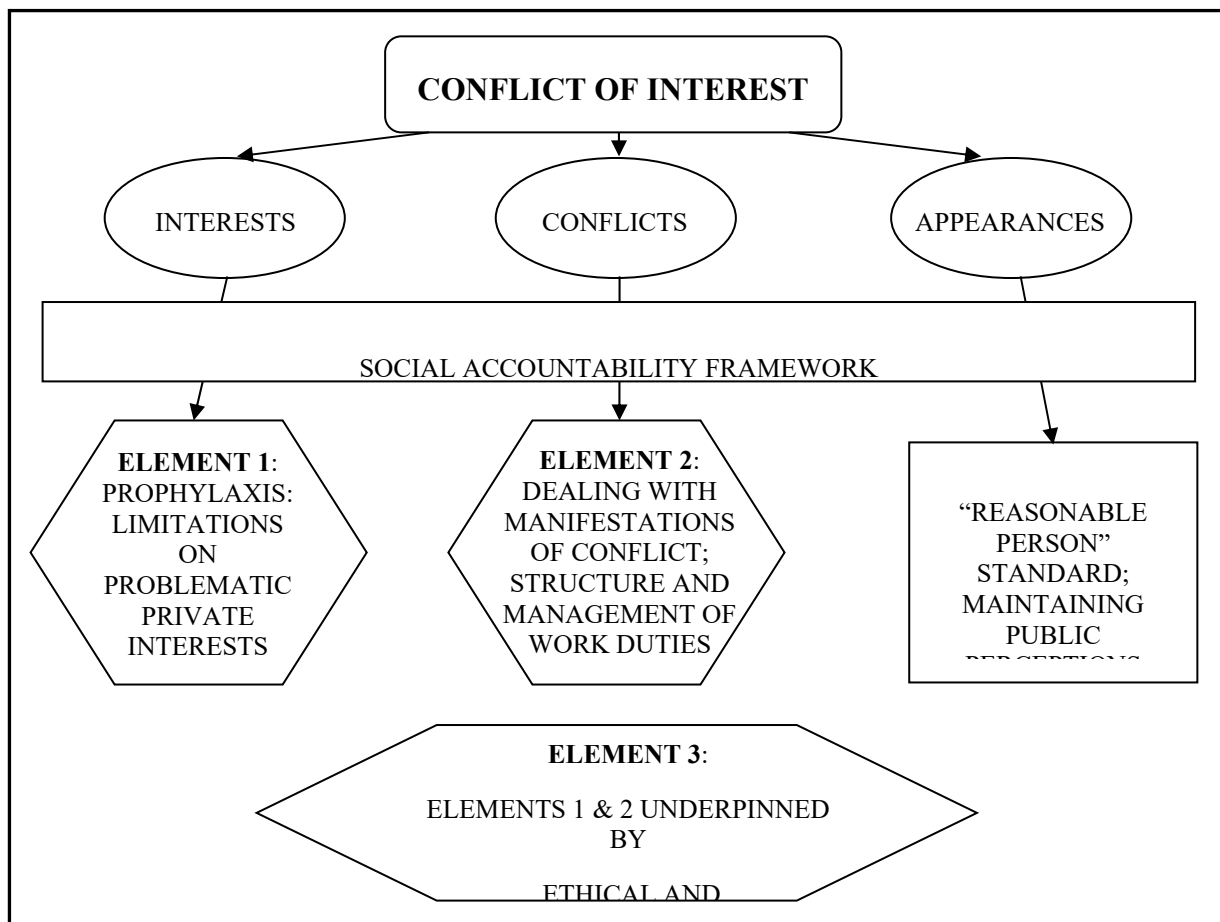
Although regulatory limitations on particular private interests, such as those associated with employment, business, and organised civic activities, can prevent some conflicts of interest (although enforcement is not necessarily straightforward), a range of other private interests of a more generalised nature, such as relationships involving family, friends, neighbours, and work colleagues, cannot easily be dealt with through regulation. Therefore, a second level of regulation and management relating to the structure and performance of work duties is required to deal with concerns about unfair preferential or adverse treatment based in conflicts of interest. Work roles and the performance of work duties must be structured and undertaken in a way that facilitates the recognition and management of conflicts of interest as they arise in day-to-day operations, and ensures that public duties are carried out in a disinterested fashion. This involves the assignment and ongoing management of public officers' duties to ensure that individuals are not involved in decisions or actions where they have a conflict of interest, or where reasonable third-party observers may conclude that such a conflict exists.

A SOCIAL ACCOUNTABILITY FRAMEWORK FOR UNDERSTANDING AND MANAGING CONFLICT OF INTEREST

Accountability, although a complex and sometimes elusive phenomenon, is at the heart of effective democratic governance and the prevention of potential abuses of power (Thomas 1998). As noted above, an effective framework for conflict of interest that attends to the three elements identified earlier in the chapter, namely interests, conflicts, and public perceptions, has become more important for social accountability in the contemporary public sector context. Figure 1 outlines the social accountability framework for public sector conflict of interest that was developed as a result of our research. The figure shows how conflict of interest may be managed through a regulatory framework including components that address each element of the problem. First, limitations on certain categories of private interest that are deemed to be inherently problematic due to incompatibility with public sector roles (addressing interests). Second, the structuring and management of work duties so that individual public officers are not involved in official actions or decisions in matters which may involve the officer in a conflict of interest (addressing conflicts). Finally, decisions in relation to the first two elements, and conflict of interest generally, are made with reference to a "reasonable person" standard, considering how things would look to a reasonable observer (addressing perceptions).

The general approach that underpins this framework transcends the limitations of rule-bound structures by taking a broad perspective on social accountability, seeking to nurture proactive accountability through the development of responsibility as a personal and subjective sense of rightness and good conscience (Sinclair 1995; Bovens 1998; Thomas 1998). In the public sector, as in any other domain, public officials who have power and authority over others must be accountable for the exercise of that power. Accountability operates through organisational structures and hierarchies, but public officers must also be accountable to the broader community. Social accountability is an expansive concept that

includes a need to account for social as well as technical and financial factors (echoing the broad domain of interests that are included within the concept of conflict of interest), *and* to consider both facts and appearances.



**Figure 21.1 A social accountability framework for conflict of interest
(adapted from Boyce and Davids 2009)**

The concept of active responsibility (Bovens 1998) within social accountability involves answerability to the self, building outwards to a sense of responsibility towards others including individuals, groups, organisations, and society at large. It is a form of responsibility that is not limited to the application of particular sets of rules and structures that enforce more passive forms of accountability, which are reactive rather than active in that they focus on accountability for past wrongdoing rather than the prevention of future wrongdoing. However, rules for passive accountability remain necessary both to provide clear and explicit indications of what is expected and to deal with wrongdoing when it occurs, since active responsibility, whilst desirable, is not always effective.

CONCLUSION

Public sector employment implies a preparedness and commitment to prioritise the public interest over private interests. To manage this issue effectively, employees and managers must recognise that public perceptions of integrity and impartiality and conflict of interest undermine the effectiveness of the public sector and can arise whether or not a conflict of interest results in an actual breach of official duty and whether or not it results in a private gain to the official. Citizen trust in public institutions cannot be assumed to exist and is not

guaranteed to persist in the face of challenges to the public's trust. This trust must be continually and actively generated and nurtured, and ideas and practices of social accountability must be at the core of a framework within which ethical, organisational, and cultural dimensions of management of conflict of interest within the public sector are effectively addressed.

ACKNOWLEDGEMENTS

The research for this chapter was supported by a Collaborative Research Grant jointly funded by Macquarie University and Ombudsman Victoria. The authors were involved in an Ombudsman's "Own Motion" investigation into conflict of interest (see The Ombudsman 2008, 2). The preparedness of the Victorian Ombudsman and Victoria Police to provide full research access to complaint files represented exceptional commitments to engage with academic research, and we are very grateful to both organisations.

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