Conflict of interest in the public sector

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LETTER OF TRANSMITTAL

To

The Honourable the President of the Legislative Council

To

The Honourable the Speaker of the Legislative Assembly

Pursuant to section 25 of the Ombudsman Act 1973, I present to the Parliament the report on my own motion enquiry into conflict of interest in the public sector.

G E Brouwer
OMBUDSMAN
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EXECUTIVE SUMMARY

‘Conflict of interest’ is an expression that is widely used today; however, its full significance is much less widely understood. The essence of the issue is not complex. A ‘conflict of interest’ simply describes situations, which we all encounter in the course of our everyday lives, when we are obliged to make an ethical choice between one obligation and another. Ought I to do this? Or should I do that?

The English language abounds in commonplace expressions that reflect the essential notion of conflict of interest. We hear of ‘divided loyalties’; we recall the Biblical injunction that ‘no man may serve two masters’; it may be said of a man that he ‘wants his bread buttered on both sides’; there is an ancient maxim that ‘no man shall be a judge in his own cause’. In this way folk wisdom has recorded its recognition of an enduring problem.

It has been the same throughout the ages. Despite being disgraced, dismissed and imprisoned, Francis Bacon, lawyer, scientist, philosopher and Lord Chancellor of England under King James I, stoutly maintained that conflicting private interests (bribes, actually) had not bent the decisions that he handed down from his Bench. Samuel Pepys, famous diarist in the reign of Charles II, was Secretary to the Admiralty, and by all accounts a good one; yet he shamelessly filled his own pockets through the pursuit of conflicting private interests.

So the story has continued. In our own day, we have watched a Secretary-General of the United Nations and a President of the World Bank enmeshed in issues of conflict of interest.

Conflict of interest is a critical matter for government. The legitimacy of the state relies on public confidence in public officials to act fairly and impartially and in the best interests of the community. However, despite its fundamental nature, conflict of interest is in my experience not clearly understood across the public sector. Furthermore, efforts to tackle it have generally been reactive and limited in their effectiveness. This is reflected in the volume of complaints to my office and the issues brought to my attention over recent years.
Conflict of interest is recognised as part of a broader problem of public sector ethics, which includes, at the extreme, corrupt activity. This problem is now acknowledged to be an important factor in the weakening of citizens’ trust in public institutions world-wide and in democratic systems more broadly. Such issues have certainly become more important in today’s environment where there are growing numbers of often complex interconnections and collaborations between the public sector and the business and not-for-profit sectors, including such developments as outsourcing, contracting-out, public/private partnerships, self-regulation and sponsorships. The interchange of personnel between the public and private sectors has also contributed to a degree of breakdown in traditional public sector employment cultures and attendant obligations and loyalties.

Given these developments here and overseas, I decided to conduct a broadbased review of the issue of conflict of interest in the Victorian public sector. This report is the result of that enquiry conducted in 2006–07, under my own motion enquiry powers.

My enquiry found that there are a number of misunderstandings about conflict of interest among public sector employees in Victoria and that these misunderstandings often extend to management levels. This situation contributes in turn to inadequate management of conflicts of interest and an unsatisfactory level of accountability in many areas.

On the evidence before me, I find that there is a compelling case for the issue to receive serious, fresh attention. Failure to act, I believe, will lead to a progressive undermining of public confidence in the impartiality, fairness, transparency and integrity of Victoria’s public administration.

It is a fact that conflicts of interest will continue to arise and Victorian public sector employees need to know how to identify and deal with them properly. To this end, one of my key recommendations is that the Code of Conduct for Victorian Public Sector Employees be strengthened and extended to give more detailed information and guidance on conflict of interest. I consider that a substantial education program is also required to support this initiative.
I also recommend that there be a sector-wide management approach to the issue of conflict of interest for all public sector entities. It should focus specifically on managing the risks associated with the private activity of public officers; on minimising the opportunities for public officers to pursue private interest; and on developing ethical cultures that have a commitment to serve the public interest at their core and recognise that conflicts of interest diminish public confidence in the sector.

Furthermore, I intend to table a separate report on the issue of conflict of interest in local government. Many of the most problematic cases I have considered have arisen in local government and it deserves particular scrutiny.
BACKGROUND

Scope of enquiry

This review is based on my office’s investigation of complaints from Victorians about conflicts of interest in public sector agencies within my jurisdiction. The expression ‘Victorian public sector’ includes such a wide range of activities and responsibilities that few aspects of a citizen’s life will not be touched by it from time to time. As well as government departments in the traditional sense, I have jurisdiction over more than 600 Victorian public sector agencies, including professional boards, local government councils, universities, schools, prisons and further specialist functions, like the Greyhound Racing Control Board and similar entities. Private companies contracted to provide services to public sector agencies also fall under my jurisdiction; however, elected officials (state or municipal) do not, unless the relevant complaint comes under the Whistleblowers Protection Act 2001.

Public sector ‘officials’ include chief executive officers, secretaries or chairpersons of boards and committees, as well as public servants, municipal officials, inspectors enforcing regulations and many others. All have a strict and inescapable duty to act ‘in the public interest’. When they act or make decisions ‘in office’, the only consideration that should enter their minds is ‘what their duty to the public requires’. Any extraneous factor creates a conflict of interest. If this conflict is not recognised promptly and handled wisely in each case, transparency becomes muddied and serious public mischief may follow. Conflict of interest is thus a problem that attacks the very heart of good governance.

My office is a vantage point from which to observe conflict of interest as it occurs in Victoria. I regularly receive direct complaints of conflict of interest, as well as cases where conflict of interest is established but where it is not the main basis of the complainant’s contact with my office. The substantial archive of factual material provided in this report is a matter for public record and the cases that I have selected are illustrative examples drawn from a wide and representative range of public sector agencies.
**Previous expressions of concern**

Over the last 30 years the annual reports of Ombudsman Victoria have repeatedly expressed concern about conflict of interest. Up until 1990 many of these cases related to police and prisons. However since then, as the numbers have increased, they have extended to a wider range of government departments and instrumentalities.

The annual reports of 2002 and 2003 made particular reference to the widespread lack of understanding of the concept of conflict of interest. In my annual report of 2004, I stated:

> Despite a Government Code of Conduct, and publicity on the issue, conflict of interest remains an area of concern … there is a common misconception that conflict of interest only arises if a person has done something improper. Perception is a critical aspect of the notion of conflict of interest. It is not sufficient for public officials to simply believe or assert that they will not allow themselves to be influenced in any way by their private interest. They must also be seen to avoid situations where they might be perceived as being influenced by a private interest.

**International trends and developments**

A review of international research shows that conflict of interest is an issue of concern throughout the world. Worthy of mention is the focus on improving governance associated with recent international aid efforts. This demonstrates the importance now being attached to public sector integrity in the development of economic prosperity.

I have attached a more detailed examination of these international developments in Appendix Two.
Understanding
conflict of interest
A. Understanding conflict of interest

1. What is the problem?

Definition

In the public sector context, a ‘conflict of interest’ is a situation where a conflict arises between public duty and private interest. The term refers to circumstances where a public official could be influenced, or could be reasonably perceived to be influenced, by a private interest when performing an official function. A range of private interests are relevant to the term conflict of interest.

Importance of trust

Trust in public institutions lies at the very heart of our society and government. It is a fundamental relationship that cannot be guaranteed or assumed; rather, it needs to be actively generated and maintained.

The State Services Authority (SSA) has identified the tasks of building citizens’ trust in public institutions and ensuring public sector accountability as key ongoing challenges for the next 20 years. Better understanding of the concept of conflict of interest and of the appropriate response that it requires from all public sector employees will greatly assist this effort.

Trust is also closely related to perceptions about the integrity of public sector institutions and the individuals who work there. Trust can be diminished just by the perception of wrongdoing, regardless of how well the officers concerned perform the particular function assigned to them.

As a concept, conflict of interest is important because it draws attention to a potential problem and thereby helps prevent misconduct and maintain public trust. A conflict of interest is not in itself misconduct; however, not recognising a conflict, or failing to manage a conflict appropriately is, at best, improper or, at worst, criminal.
Responsiveness, integrity, impartiality, and accountability are four of the key values laid down in section 7 of Victoria’s Public Administration Act 2004. All are threatened by conflicts of interest. Associated values of detachment, selflessness, objectivity and honesty, which lie at the core of an effective public sector, are also put at risk.

2. Understanding the nature of the problem

*Interests are a part of life*

All citizens have ‘interests’ — it is part of life — and a person’s interests very largely define them as an individual. The interest may be a house, a garden, a business, an investment, a pet. It may be membership of a church, a political party, an ethnic group or an association. It may be the interest of an employee or a taxpayer. Irrespective of whether an interested party is a public employee or not, his or her interests — provided that they are not in themselves unlawful — remain firmly in the private realm.

Nevertheless, in some areas where the danger of conflict of interest appears to be inherently high, there is a basis for prohibiting public officials with certain duties and responsibilities from having any involvement with corresponding interests that are deemed by management to be sensitive.

*Private interests versus public duties*

The concept of conflict of interest examines the *capacity* of private interests to affect the performance of public duties. Whether or not that capacity leads to a breach of duty is a separate issue.

Understanding conflicts of interest requires consideration of both the *range of interests* that may be regarded as problematic and the *ways in which those interests may conflict with official duties*. The ethical challenge starts with a requirement to recognise that private interests may at times conflict with public duties. Good administration in the public sector requires that private interests be prevented from directly or indirectly influencing public duty, and from being seen to influence the performance of public functions.
The private interest of an official assumes a public dimension only if and when it impinges on—or is perceived to impinge on—some action or decision the official must take in the course of duty. If this occurs, the official becomes ‘conflicted’ and must promptly consider the proper ethical path to take in the particular case. Perhaps it goes without saying, but the more an official’s duties are discretionary (that is, the more an official’s own personal judgement is involved), the greater their sensitivity to conflict of interest. The problem is generally less acute among officials whose duties are largely routine.

**Materiality of interests**

Impartiality is a cornerstone of the legitimacy of the public sector. For this reason, the test of whether an interest is material to an issue should be the likely perception of a ‘reasonable person’ about the impact that it may have on a public officer’s impartiality. If there is a reasonable perception that the interest will have an impact on the person’s official actions, then it is a material interest.

In coming to a conclusion about this, it could also be expected that a reasonable person would take into account the uniqueness of any interest held by the officer. For instance, many officers are parents, voters, ratepayers or holders of driver licences; however, these commonly held interests are unlikely to be judged material to official duties unless, of course, they become specifically relevant to the matter under consideration. On the other hand, membership of a sporting club reflects a very specific interest and would certainly be considered a material interest if the officer had any official dealings with their club.

**Risks arising from interests**

In addition to the potential for individual officers to seek personal benefit, conflict of interest may be demonstrated by preferential treatment for family, friends, professional colleagues or other associates. Similarly, negative attitudes towards individuals or groups can create a conflict of interest, as an officer’s discretion could be used to disadvantage those particular people or sections of the community.

Conflicts can also arise in situations where it is difficult to quantify an officer’s interests. These instances may not involve a financial gain or a benefit to an associate, but may involve opportunities for officers with strong views on an issue to pursue a personal agenda. The effective management of conflict of interest requires a focus on identifying the capacity of a private interest to influence the effective performance of an official duty, rather than detection of actual wrongdoing.
**How to identify conflicts of interest**

A conflict is present when there is a capacity for a private interest to affect the performance of official duties. In essence, the conflict takes place in the mind. It impairs, undermines or disrupts a person’s competent judgement to the point where they are unable to function as obligated by a role or public duty.

Clearly an observer cannot look into the mind of a public official in order to determine how private interests actually affect their actions. Similarly, the management of conflict of interest concerns cannot focus on subjective states of mind, but rather should concentrate on situations that can be objectively perceived as giving rise to conflicts.

The *Code of Conduct for Victorian Public Sector Employees* (the Code) prohibits public officers from being involved in decision-making processes where they may be compromised, and notes that the appearance of a conflict of interest could itself jeopardise public confidence in the integrity of the process.

**3. Dealing with conflict of interest**

*Importance of the Code of Conduct*

The ethical principles and the conduct required of all public employees in Victoria are set out in the Code. The Code is published by the Public Sector Standards Commissioner, under section 63 of the Public Administration Act. The most recent edition is dated 1 July 2007.

The Code is an important charter, designed to establish and to enjoin that essential confidence, which citizens are entitled to expect, in the integrity of their governmental administration. I have undertaken a detailed review of the Code in Appendix One.

I would also like to note the valuable contribution of the Public Sector Standards Commissioner to my enquiry.
Enhancing the Code

The Code makes distinctions between ‘actual’, ‘potential’ or ‘perceived’ conflict of interest. This is important because a recurring theme in my enquiry was the confusion caused when agencies or individuals attempted to discriminate between ‘real’ and ‘apparent’ or ‘perceived’ conflicts of interest. I consider that the existence of a conflict of interest should be based on whether a reasonable observer can conclude that a conflict may exist.

The existence of a conflict of interest should be based on the conclusion of a reasonable observer that a conflict may exist.

I note that the Public Sector Standards Commissioner structured the Code around the public sector values set out in the Public Administration Act. In my view, the Code could be enhanced by including specific examples of the problem. While not all potential areas of conflict of interest can be defined in advance, there is scope for more guidance on the range of interests that could give rise to a conflict. Likewise, further information could be provided on the nature of the conflicts of interest that can arise for public officers. I understand that the Public Sector Standards Commissioner has commenced work on such guidelines.

The public sector’s acceptance of the Code as the principal practical guide to appropriate ethical behaviour makes it a critical tool for achieving higher ethical standards in government administration. Reinforcing the Code with robust guidelines would contribute to improvements in everyday management and employee practice.

Adopting a risk minimisation approach

The performance of functions in the public sector can be damaged by conflict of interest situations. It is therefore a risk that public sector organisations should take very seriously if they want to safeguard their capacity to meet their obligations. Ethical codes and practices within the public sector need to highlight the problem of conflict of interest, making it clear that an individual should not be involved, or take any action in an official capacity, in any situation that impinges on the private interests of the individual, their family or associates.

The Organisation for Economic Co-Operation and Development (OECD) notes in its Guidelines for Managing Conflict of Interest in the Public Service that it is simply not possible to identify and prohibit all forms of conflict of interest in advance. Dealing effectively with the problem relies on sound measures for good governance generally, together with steps to identify and deal with conflicts of interest when they arise.
A common risk management approach to conflict of interest is to introduce preventative rules. This approach is designed to indirectly prevent something other than that which the rules prohibit themselves. For example, a rule banning the receipt of gifts is designed to prevent influence being obtained through gift giving. However, the perception of influence being obtained can also undermine confidence in the proper exercise of authority. No matter how thorough and scrupulous the administrative actions of an officer, public confidence may be undermined by their acceptance of a gift.

A preventative approach deals with the observable actions rather than trying to peer inside the mind of the public officer. The receipt of gifts can be observed and therefore regulated. The rule banning it not only prevents any influence from occurring, it indirectly prevents the perception of influence as well.

**Avoidable conflicts**

Risk management effort should be directed at avoidable conflicts of interest. When an officer has interests that are not held in common with other individuals as members of society, then these interests are most likely to be considered material to the official’s public duties. For example, all members of society have interests in relation to their status as homeowners, investors, taxpayers, parents or employees. These interests cannot be regarded as sufficiently material to create a conflict of interest. However, specific investments, home localities or schools, for example, may be material enough to give rise to conflicts of interest in a given context.

**Need for sector-wide management approach**

The primary goal of all management efforts connected with conflicts of interest should be the maintenance of public confidence in the integrity of the public sector. The Code is the core ethical framework for the Victorian public sector. The future development of guidelines on conflict of interest to support the Code should therefore provide a stronger basis for understanding such problems and dealing with them appropriately.
Furthermore, there should be a sector-wide approach to the management of issues associated with conflicts of interest for all public sector entities. It should focus on:

A. **Managing the risks that arise from the private activity of public officials.**
   A risk management approach seeks to reduce conflict of interest risks by limiting involvement with particularly high-risk interests that are incompatible with the responsibilities of a public official.

B. **Minimising the risks for officers conducting public and official activities to pursue private interest**

C. **Developing an ethical culture that has a commitment to serve the public interest at its core and recognises that conflicts of interest diminish public confidence in the sector.**

These three aspects of management, which I consider to be critical to the achievement of good governance in Victoria, are outlined in more detail on the following pages.
Managing the risks
B. Managing the risks that arise from the private activity of public officials

When scrutiny is justified

My enquiry examined cases involving conflicts of interest from a variety of private interests and activities. This led me to the firm conclusion that the following areas warrant specific attention and careful management:

1. Outside/secondary employment and private business interests
2. Employment and business activities after leaving public sector employment
3. Employment and private business interests of family members, friends, and associates
4. Membership of community groups and organisations
5. Inappropriate/personal relationships.

Although of an otherwise personal nature, these five aspects of the private lives of public employees can influence the performance of public duties and therefore must be addressed. While some may argue that a person’s private life is indeed private, in my view, scrutiny of some areas of private activity can be justified by the broader public interest, provided that such scrutiny is sensitive to the issues that arise whenever there are restrictions placed on individual liberty.

1. Outside/secondary employment and private business interests

Public officers who undertake secondary employment or private business activity are vulnerable to the temptation to favour these interests above official duties.

A conflict of interest is clearly evident if an outside employer is either in effective competition with, or subject to oversight by, the public employer. Indeed, a reasonable observer would view any conflict of interest arising from outside employment as completely unacceptable. The only appropriate response is for the public officer to terminate the outside interest.
There are many other matters relating to outside employment that need to be considered on a case-by-case basis. It is clearly misconduct if an official position is used to solicit or otherwise gain an advantage, benefit, or private business activity for secondary employers or private business interests. The misconduct is exacerbated if official resources, time, or confidential information is used to these ends.

Conflict of interest can also arise without the actual occurrence of any misconduct. A reasonable third-party observer needs only to perceive a potential for the public officer’s private interests to be influencing their official conduct for there to be a ‘problem’ of conflict of interest.

**Obligations in the Code**

Section 32 of the Public Administration Act requires that employees in the public service must not engage in any other paid employment or carry on any business, profession or trade without permission. The Code requires that:

Public sector employees of special bodies only engage in other employment where the activity does not conflict with their role as a public sector employee. Employment includes a second job, conducting a business, trade or profession, or active involvement with other organisations (paid employment or voluntary work). Managers or supervisors can assist public sector employees of special bodies to determine if such activities will cause an actual or perceived conflict of interest.

Victorian Public Service employees are required to seek approval to engage in any other paid employment. Other public sector employees of special bodies comply with any policies of their public sector special body head in relation to engaging in other employment.

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1  *Public Administration Act 2004*, s. 32
Three elements are necessary for this provision to be effective:

(i) Employees must seek permission to engage in outside employment or private business activity.

(ii) In deciding whether to approve such activity, public sector managers must be fully cognisant of the nature of conflict of interest and be mindful of the varied ways in which such activities may clash with official duties, or may be seen to do so by members of the public (including those with whom the official comes into contact in the course of performing public duties).

(iii) Where breaches of these provisions are found and dealt with under disciplinary provisions, concerns about the conflicts of interest involved should be central to proceedings.

Are these three important elements being met in practice? I consider that the number of conflict of interest cases coming to the attention of my office over a lengthy period of time demonstrates that there is a need for far greater understanding within the public sector about how secondary employment and private business arrangements can create conflicts of interest.

My enquiry reviewed several complaints of inappropriate outside employment or allegations that private business interests interfered with the performance of public duties. Outside employment relationships with contractors or tenderers also gave rise to complaints. In one case, a tradesman who had contracts with a department alleged the contract supervisor sought secondary employment for himself.

With regard to private business interests, my enquiry highlighted certain areas of public sector activity that are particularly vulnerable, including:

- when public officers use regulatory powers to require people to undertake training or other services supplied by the private sector
- when public officers award grants and similar forms of assistance to private companies and other organisations
- when public officers award tenders and contracts for government work.

These conflict of interest problems must be carefully managed with open and accountable procedures.
The following case studies illustrate this problem:

**Case Study 1: Dual role for inspector**

A dentist’s practice was shut down following an inspection by the Dental Practice Board of Victoria (DPBV). The dentist was required to undertake infection control training before he could re-open. The dentist complained to my office, alleging a conflict of interest because one of the DPBV inspectors also operated a business providing infection control training.

I concluded that a conflict of interest existed, as the inspector could reasonably be perceived to have been influenced by his private interest in the provision of the mandated training.

The DPBV did not initially accept my recommendation, arguing that the complainant had not been directed to attend the specific training course run by the inspector, although only one other appropriate training provider was known to the DPBV at the time. However, the DPBV ultimately accepted my recommendation to establish a conflict of interest policy, which would be applicable to any person or organisation working for or on its behalf, and to disseminate it widely.

**Case Study 2: Parking infringements - public and private employment**

I conducted two major investigations into the parking operations of the Melbourne City Council (see my annual report of 2005-06). In my findings, I highlighted the council’s poor administrative and management practices for processing infringement notices. As a result of one investigation, I concluded that the Melbourne City Council had acted unreasonably in issuing 352 Parking Infringement Notices (PINs) relating to parking at Yarra Park. The facts suggested that motorists had cause to believe that they were able to park in the reserve, and that the council had not taken sufficient action to prevent parking there.

An employee of the private car parking company that managed the paid parking spaces at Yarra Park was the informant in the matter and this led to council issuing the problematic PINs. His employment with that company was on a casual basis, but he was also a full-time employee of the Melbourne City Council Parking and Traffic Branch (although not as a parking infringement officer). I consider that he therefore had conflict of interest because a reasonable person may have concluded that he reported the matter to council due to his employment at the private parking company so as to benefit his private company employer by discouraging alternative ‘free’ parking.

The matter was resolved to my satisfaction when the council agreed to withdraw the PINs in question and refund any fines that had been paid. The council instituted new processes in relation to issuing PINs, but I remain concerned that the conflict of interest in the matter was not recognised and addressed.
I consider that the number of conflict of interest cases coming to the attention of my office over a lengthy period of time demonstrates the need for greater understanding within the public sector regarding how secondary employment and private business arrangements can create conflicts of interest.

The regulation of outside employment and private business arrangements of public sector employees is clearly justified by conflict of interest concerns. The cases examined show that there is a shortcoming in the understanding of both public sector employees and managers about conflicts of interest, especially with regard to complaints about secondary employment and business arrangements of public officials. Before granting permission for such activities, managers should ensure that they have full information about the proposed activity. If breaches occur which require disciplinary action, the conflict of interest element in the charge should be central to the proceedings. Although managers and overseeing authorities may have general confidence in the integrity of an individual officer, members of the public may not draw the same conclusions.

2. Employment and business activities after leaving public sector employment

Post-employment conflicts of interest arise when a public official leaves the public service and takes up employment in the private sector with an organisation that is in some way connected to their former role.

Conflict of interest concerns relate to two broad aspects of this situation.

A conflict of interest may arise from a reasonable perception that an official’s conduct in the public sector may have been influenced by a desire to enhance or cultivate future employment prospects. This could include, for example, favouring particular private interests, going soft on regulatory enforcement or failing to act impartially.

The potential problems associated with this are most obvious in relation to government regulatory functions, such as gaming, racing and liquor licensing. However, these concerns are equally applicable across many government functions.
The issue receives particular attention when former government ministers or senior public servants take up positions in the private sector with organisations or companies that have dealings with government. However the potential for damage to the public interest and to public trust is much broader.

A second conflict of interest problem arises when there is the potential for former public officials to try and take advantage of their previous office. This may occur through the use of confidential information or knowledge for personal benefit, or to benefit another person or organisation (such as an employer); or by seeking or gaining privileged access or preferential treatment from former colleagues, or attempting to influence them in the performance of their duty.

Again this issue often receives public attention when former politicians become lobbyists for sectional interest groups.

**Limitations of the Code**

At present, the Code’s provisions concerning future employment only restrict the use of confidential government information in future employment. However, my enquiry identified wider concerns regarding dealings between former public officers and their former employers, for example:

**Case Study 3: Preferential treatment for a future employer?**

My office received a complaint relating to an employee who was the contact within the Office of Housing for a number of construction and maintenance contracts, and was involved in tender evaluation and selection processes for these contracts.

The employee left the Office of Housing to take up employment in a company that provided support services to the building industry. It was alleged that while still employed by the Office of Housing, the person had been involved in some tender processes in which he favoured tenderers who proposed to employ the particular company as a subcontractor.

An internal audit review conducted by the department found no irregularities in the tender processes and could not verify claims that the person had favoured the company. The review specifically found that there had been no breach of the outside employment policy, because there was no evidence that the officer concerned had any formal relationship with the company prior to leaving public employment. The review also found that there was no verifiable evidence of any conflict of interest in the matter.

Although the Office of Housing subsequently reviewed its policies and procedures in relation to some aspects of its tender processes, the post-employment conflict of interest issues inherent in such situations were not addressed.
The issue of post-employment conflicts of interest was not mentioned in the internal audit review, despite the officer being engaged as a part-time consultant to the Office of Housing some months after resigning from his position. While providing these consultancy services, he had been given information about the investigation of the complaint. In finding that there had been no breach of tender processes, the original investigators failed to recognise the issue of post-employment conflict of interest in either their examination or findings.

The case illustrates how the issue of post-employment conflict of interest can give rise to perceptions of favouritism in an officer’s actions, both during the public employment and in subsequent post-employment dealings.

I also have particular concerns about former local government employees whose inside knowledge and contacts could benefit future employers or their own business interests. For example, members of the public may reasonably perceive conflicts of interest when former local government officers become development or planning consultants and deal with their former colleagues. I propose to address this issue in a separate report.

Restrictions on the post-employment of public employees may be regarded as placing an unreasonable limit on an individual’s employment opportunities, particularly where there is a small field of expertise in a commercial environment. They also raise questions about when a public officer’s obligation to serve the public interest actually ceases. Nevertheless, this area must be dealt with firmly on a case-by case-basis if public confidence in public administration is to be retained.

**Dealing with risk**

In the private sector, restrictions on future employment are used as one way to ensure that senior managers are focused on the interests of their employer. In my view, this approach may need to be adopted in the public sector, particularly for senior roles where the incumbent is likely to have valuable information, knowledge and connections.

These limitations could be made a condition of Executive Officer contracts. When negotiating such contracts, the employing agency would be required to identify organisations for which post-employment limitations could be appropriate in order to avoid conflict of interest concerns.
An alternative approach, and one that may be considered at less senior levels, would be to control the access of former employees to parts of the public sector where there could be a conflict of interest problem. However, this approach does not prevent the indirect use of information or knowledge by former employees.

Ultimately, agencies need to take a risk management approach, recognising the potential for conflicts of interest to arise in post-employment circumstances.

Guidelines too could be developed by agencies to limit official dealings between current and former public officers. In general, public officers should not deal with former colleagues; otherwise the perception of pressure and influence will readily arise. This approach helps avoid the problems that arise when attempts are made to restrict the future activity of former employees.

**NSW experience**

The NSW Independent Commission Against Corruption\(^2\) has developed a useful model for implementing these measures. Under this proposal, public officials would be required to notify their employer of their intention to take up private employment. Management can then assess the risk of conflict of interest arising and take steps to manage that issue. Strategies for risk mitigation could include invoking any future employment restrictions contained in their employment contract, or limiting continuing officers’ contact with a former colleague. This strategy is both open and transparent. It places the primary obligation relating to disclosure with the employee and the primary responsibility for risk assessment and mitigation with the employer.

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3. Employment and private business interests of family members, friends and associates

The employment and private business interests of family members, friends and associates of public officials are significant sources of conflict of interest.

The Code includes a provision prohibiting patronage and favouritism. It clearly states that family or other personal relationships must not play a part in a public employee’s exercise of power:

Public sector employees use their power in a responsible way. They do not use their power to provide a private benefit to themselves, their family, friends or associates. They exercise power in a way that is fair and reasonable, and family or other personal relationships do not improperly influence their decisions.

This provision is not specifically limited to the section of the Code that deals with conflict of interest; it has broader application as a fundamental tenet of public service.

Many of the cases that I reviewed involved private business interests of family members, friends, and associates of public employees. My enquiry found the main area of concern to be the conduct of business transactions between government agencies and particular private parties. Examples brought to my attention included the sale of property and the awarding of contracts and tenders to private parties that were related by family, friendship or association with public officials.

The following example highlights the issue and also helps to illustrate the necessity for conflict of interest situations to be managed outside the sphere of influence of the public officer concerned.

**Case Study 4: Awarding contracts to family members**

My office received a complaint that a university had granted large contracts to companies associated with a full-time member of its staff, without the inherent conflict of interest being disclosed. I recommended that guidelines be revised to ensure that members of staff could not undertake additional private work for their employer. The university initially disputed my findings, but eventually acquiesced.

Within two years I received new allegations that a provider of conference services had been paid more than $2 million by the university over a four-year period. A senior academic had previously been a director of the company concerned, but had since relinquished this position to her spouse. Some of the work had been for the faculty that was managed by the academic; however, she asserted that she had no role in awarding the contracts.
The academic maintained that conflict of interest declarations had been submitted, but my office was unable to find such documentation. It was also clear that senior managers knew of the academic’s association with the company, but had not taken adequate steps to manage the conflict of interest.

I was particularly concerned that management of the academic’s conflict of interest was left to her subordinates. A reasonable person could conclude that she was in a prime position to influence subordinates, even if she was not involved in the official decision-making process related to the contract.

Ultimately, the university acted on my further recommendations regarding its conflict of interest policies and practices.

**Case Study 5: Awarding contracted work to friends and associates**

My office received an allegation that the occupational health and safety (OH&S) unit of a large government agency had improperly utilised the services of a company belonging to the husband of an employee of the unit. It was alleged that injured employees were referred exclusively to his company due to the influence of his wife.

My investigation found no evidence that the company had benefited from the personal relationship, nor had it received a greater than expected share of the agency’s OH&S referrals to external service providers. However, the investigation did find that the agency’s processes for declaring pecuniary interest were inadequate and that a reasonable person could conclude that a conflict of interest existed. I was also concerned that the environment was vulnerable to actual corrupt conduct.

The agency accepted my recommendation to develop new processes for declaring conflicts of interest.

Other cases brought to my attention involved different contexts, but inevitably centred on the conduct of a business transaction. Specific examples include the awarding of tenders, the sale of government agency property, the handling of contracts for managing the sale of government property, and preference in the awarding of casual cleaning work. While my enquiry showed that many of these cases did not involve instances of improper private benefits, it was often the case that the departments and agencies concerned had inadequate processes for managing and disclosing conflicts of interest. These deficiencies diminished the agencies’ capacity to protect both probity and public confidence in these processes.
4. Membership of community groups and organisations

The current Code does not contain specific provisions to deal with conflicts of interest that arise from affiliations with associations, community groups and similar organisations. This is despite the fact that involvement in such organisations creates a potential source of conflict of interest in much the same way as outside employment, business, and familial relationships.

Theoretically, there is an almost infinite variety of ways in which a public employee could become conflicted through membership of a sporting association, a church, a political party or a bushwalking club—all civic entities in the private realm to which every citizen is entitled to belong. These interests only become material—giving rise to a conflict—when the interest of such a group becomes involved with a decision or an action which the public employee must take, or is likely to take, in the course of their duty.

My enquiry reviewed several cases where private involvement in community and civic organisations had a material impact on the performance of public duty or, at least, on public confidence in the activities concerned, as illustrated by the following case:

**Case Study 6: Veterinary inspection and RSPCA office-bearer**

I investigated an alleged conflict of interest involving a veterinary practitioner who examined the complainant’s dog at the request of the Royal Society for the Prevention of Cruelty to Animals (RSPCA). The RSPCA successfully prosecuted the complainant, supported by court evidence from the veterinarian.

The complainant was not aware that the veterinarian who conducted the ‘independent’ inspection was also an RSPCA office-bearer. The complainant stated that he would not have consented to the examination if he had been aware of this association. The complainant also alleged that the Veterinary Practitioners Registration Board of Victoria (VPRBV) had not dealt appropriately with his complaint about the veterinarian’s professional conduct.

After reviewing the matter, I considered that the veterinarian had a conflict of interest and should not have undertaken the examination. At the very least, the complainant should have been informed of the veterinarian’s involvement with the RSPCA and given the opportunity to object.

The VPRBV initially argued there was merely a perceived conflict of interest, before finally agreeing to bring the issue to the attention of the veterinarian and issue a guideline on conflict of interest.
Under the Veterinary Practice Act 1997, the VPRBV is empowered ‘to issue guidelines about appropriate standards of veterinary practice and veterinary facilities’. The guidelines set the minimum acceptable standard expected from a registered veterinary practitioner in Victoria. The VPRBV has now issued a guideline that recognises that issues of conflict of interest are particularly relevant to veterinary activities associated with certification, accreditation and the provision of an expert opinion. The VPRBV’s response to my concerns provides a model for other regulatory bodies to consider.

To deal with such circumstances, individuals should seek to remove themselves immediately from engagement in specific matters where they have a conflict of interest. It is not sufficient to assert that one would not or did not allow conflicting interests to intervene.

Where removal from the situation is not possible, a lesser but nevertheless still desirable option is that the conflict of interest should be disclosed to all relevant parties and should be addressed in any reports, decisions or recommendations that flow from official actions. The following case study illustrates this point:

**Case Study 7: DSE officer on RSPCA State Council**

An interest group complained to my office that a senior officer with the Department of Sustainability and Environment (DSE) was compromised when giving advice to the government on hunting and game management issues because he was a State Council member of the RSPCA.

It was not alleged that the DSE officer had acted inappropriately in his official capacity; however, I considered that there was an inherent conflict of interest in his membership of the board of an organisation that acts as a pressure group in relation to animal issues.

The DSE said that the officer was not in a conflict of interest situation for four reasons:

- His RSPCA association was private, not official.
- He did not make policy decisions on behalf of the government.
- At the time the matter was resolved, he no longer had any direct responsibility for game management issues.
- The state body of the RSPCA did not determine RSPCA hunting policy.

I remained concerned that there could be a reasonable public perception that the senior officer had a conflict of interest. The officer ultimately removed the conflict of interest by resigning from the RSPCA State Council.

In this matter the Victorian Government Solicitor’s Office (VGSO) advised DSE that the officer concerned was not in breach of the Code. While I consider the advice was not incorrect, the situation was one that I considered untenable in terms of maintaining public confidence in the impartial exercise of public duties because of the perception of bias or conflict between the officer’s private interests and his public duties.
Cases 6 and 7 illustrate that the problem of conflict of interest extends to an individual’s membership of a range of community groups and organisations when there is a clear link between their official and private roles. As any area with links to government administration is vulnerable to public concern, the problem is magnified if the individual concerned is an office holder or is known to be an actively involved member of the organisation. The following case demonstrates this:

**Case Study 8: Representations for a sporting association**

I received a complaint from a residents’ group regarding planning processes for a particular site. A senior planning officer with the relevant council wrote a submission to council on behalf of a sporting association which had particular interests in the site.

During my investigation the planning officer admitted that it had been inappropriate for him to act on behalf of the sporting association. However, I concluded that the association’s submission and the officer’s involvement had not had a material impact on the outcome.

The council officer had not been involved in considering public submissions on the matter, although he was involved in leading the council’s negotiations with various interested parties. As a result of the investigation, he stood down from this leadership role, but remained involved in the process to determine the future of the site because the council was concerned that losing his expertise would lead to unacceptable delays.

In response to my concerns, the council prepared a detailed booklet that provided guidance to council staff in relation to such matters. The booklet includes conflict of interest provisions and has become an integral part of the council’s training on ethics.

Public officers should not be involved at executive or committee membership levels in organisations where there are inherent conflicts of interest with their official duties. Membership of community groups and organisations should be disclosed to employing agencies, and officers should be prohibited from acting in any capacity for their groups and organisations in relation to their public duties. In the case of very large agencies, this provision may be specific to the officer’s portfolio area to avoid needless restrictions on unrelated private activity.

Similarly an officer should not have any involvement in their employer’s interaction with the group or organisation. If this cannot be achieved, the conflict of interest should be declared whenever any relevant matter is considered.
Managing this area is difficult, but necessary. The protection of the public interest and the maintenance of public confidence in the integrity of the public sector and its employees must be the primary concern.

5. Inappropriate/personal relationships

While the focus of concern with conflict of interest is often on the private business, employment and other organisational relationships and interests of individuals, public officers should also be aware of the manner in which a range of other associations may give rise to problems. Some areas of government give rise to obvious problems in terms of personal relationships and particular care must be taken to ensure that such relationships do not impinge on the performance of official duty. High risk areas include relationships between prison employees and convicted persons, police officers and suspects, and council officers and commercial developers or development applicants.

Problems also emerge from less formal personal relationships, for example, those with neighbours, work colleagues, parents and friends.

Case Study 9: Compromised planning assessment

My office dealt with a case in which a council officer rejected an application for a planning permit for a site next door to the home of his parents-in-law. The complainant submitted a further application, but expressed concern that the council officer had a conflict of interest and should not be involved in assessing the new application. The council which employed the officer claimed that his assessment had been made strictly on the merit of the application and in accordance with the planning scheme, and rejected the allegation of a conflict of interest.

I considered that there was a clear conflict of interest and that a reasonable observer could conclude that the officer could be influenced by his personal interests. The council agreed to my recommendation that the officer have no further involvement with the matter and an independent consultant was engaged to process the application.

It is important to note that the removal of an officer from a process does not presume any conclusion about the integrity or impartiality of the particular individual, but rather reflects a concern to ensure proper procedure. If there is official involvement of persons with conflicts of interest in such matters, it can give rise to perceptions that advice is not given impartially and that decisions are not taken impartially. These perceptions are understandable in the circumstances and do significant damage to public confidence in the overall process and in the resulting decisions.
Public officers cannot simply assert that they did not or will not allow themselves to be influenced by personal relationships. As I have referred to earlier in this report, it is not possible to ascertain the state of mind of an officer and so prevention of misconduct relies on the regulation of observable behaviour. The maintenance of public sector integrity therefore requires that officers avoid situations where it may be reasonably perceived that they could be influenced by a personal relationship.

Where such situations arise, officers should immediately declare any possible conflict of interest and withdraw from involvement, unless all parties agree that the conflict is not material to the decision being taken. Declarations of conflicts of interest, and any decisions taken in relation to them, should be recorded in a register so that there is an official record of the process available for scrutiny.

Maintenance of public sector integrity requires that officers avoid situations where it could be reasonably perceived that they could be influenced by personal relationships.
Minimising the risks
C. Minimising the risks

Managing the risks that arise from specific areas of private interest cannot eliminate all conflicts of interest because more general private interests can also conflict with the performance of public duties. Risk management strategies must therefore seek to address these too.

While not all conflicts of interest can be defined in advance, some actions present unarguable ethical breaches. In the course of my enquiry, I have identified and examined several areas of concern, in particular:

1. **Preferential treatment** – both in a general sense and in the specific areas of undue influence, abuse of office, and self-dealing.
2. **Adverse treatment** – including prejudgement and prejudice, ideological bias, a desire to enhance one’s professional reputation, and the pursuit of organisational interest in the name of community interest.
3. **Acceptance of gifts and benefits** – including gifts and benefits in general, kinds of gifts and identifying a gift’s purpose.
4. **Use of government property/information** – including the acquisition and disposal of government property.

The cases I have reviewed suggest that public sector managers often do not have a sufficient understanding of conflict of interest principles to enable them to manage them properly. There needs to be better training for staff and managers to increase their awareness of these matters, particularly common types of conflict of interest and the strategies available to deal with them.

1. Preferential treatment

Concerns about preferential treatment are at the core of many complaints about conflict of interest. Areas where perceptions and allegations of preferential treatment often arise include tendering and contracting, development applications and planning issues, child protection, investigation of public complaints, employment and appointments, and allocation of grants. Preferential treatment can include:

- undue influence
- abuse of office
- self-dealing.
Undue influence and abuse of office

Undue influence occurs when a person receives preferential treatment by exercising some form of influence over a public official. Abuse of office involves a public official using, or attempting to use, their position to coerce another official into providing preferential treatment to them or their associates. Abuse of office is often regarded as a serious form of corruption.

The following case highlights the dangers involved in developing relationships that may lead to the perception of undue influence:

**Case Study 10: Holidays with a tenderer – undue influence?**

I received a complaint relating to Parks Victoria’s selection of a developer for a major redevelopment of Queenscliff Harbour. It was reported that the Chief Executive Officer (CEO) of Parks Victoria had taken an overseas holiday with a member of the consortium that was subsequently awarded the multi-million dollar tender.

Upon making enquiries, I was provided with a copy of an independent review of both the tender process and the conflict of interest issue. It had been commissioned by the Department of Sustainability and Environment.

The review found that there was no evidence that the personal relationship between the CEO and the tenderer had prevented the tender process from being fair and equitable. The review also established that the CEO had paid for the airfares and incidentals of the holiday, and this supported the conclusion that there was no benefit to him, or his related parties, from the tenderer. In addition, key controls were examined to provide assurance that the tender process had been fair and equitable to all participants.

However, the review found that Parks Victoria could improve its process for disclosing and managing potential conflicts of interest. For example, the relationship between the CEO and the tenderer was only disclosed to the board in non-specific terms – and after the tenders had been received from a shortlist that had been itself selected from the initial expressions of interest. Further, neither the independent tender panel nor the Probity Advisor was advised of the relationship between the CEO and the tenderer.

The review recommended that the disclosure should have occurred as soon as the CEO became aware that he had a personal relationship with a bidder. In addition, the disclosure should have been included in the project files and all steps to manage the conflict of interest should have been fully documented. These latter steps would also have managed the perception of conflict of interest.
The CEO’s defence of his personal integrity and his subsequent attempt to
demonstrate this by formally distancing himself from the selection process showed
little understanding of the need to manage both the fact and the appearance of
integrity. I judged that a third-party observer could reasonably have concluded
that the CEO had a conflict of interest that could have affected the tender process.
I also judged that the processes within Parks Victoria to manage these concerns
were inadequate.

In circumstances such as described above, all of the following steps should be
taken:

- The person with the conflict of interest (in this case, the CEO) should, at the
earliest stage possible, declare both the conflict and the nature of the private
interest involved.
- The organisation should ensure that the person is not involved in any way
in the tender (or similar) process.
- The person with the conflict should play no part in the selection of members
of any assessment panel.
- The process should be managed so as to ensure that the person plays no
further role in the process. It should also ensure that he or she does not
receive any information or participate in any discussions or formation of
recommendations, in relation to the process, until after the process has been
completed.
- The manner in which the conflict of interest is managed (from the time it
becomes known) should be documented and placed on record.

The presence of a conflict of interest for a senior officer, in this case the Chief
Executive, poses particular problems. I have referred earlier in this report to my
concern when conflicts of interest are managed by subordinates – and this is
inevitably the case when the CEO has a conflict of interest. In such cases the need
for transparency is paramount if reasonable observers are to retain their faith in
the integrity of the decision-making processes.

The nature of the conflict of interest changes after a tender is awarded. However,
processes to manage the conflict must continue throughout the life of the contract.
This includes the finalisation of the contract’s details, the period of project
management and the oversight or performance under the contract.

Public officers and elected representatives must also take care in making
representations or enquiries on behalf of family and friends. If undue influence of
this kind were proven, it would constitute abuse of office. The conflict of interest
inherent in such situations means such actions could reasonably be interpreted
as an abuse of office.
Self-dealing

Self-dealing is when a public official deals in an official capacity with their private interests. Quite reasonably, members of the public will not trust processes that involve self-dealing. This also includes government agencies with potentially conflicting roles, as illustrated by the following case study:

Case Study 11: Two organisational arms - self-dealing

Film Victoria is a statutory body operating under the Film Act 2001. Two of its functions are:

i. to finance the making of films
ii. to participate in joint ventures in the actual making of the films for which it is providing finance.

I received a complaint about an apparent conflict of interest following a contract dispute between Film Victoria and a joint producer. My role was confined to the matter of conflict; disputes about contracts between parties are generally not part of my jurisdiction as the courts are a more appropriate venue.

The complainant alleged that the finance and production roles of Film Victoria were incompatible and that the finance arm influenced operations within the production joint venture. Indeed, it was alleged that the finance arm effectively ‘blacklisted’ the complainant’s organisation from future funding after the contract dispute.

My investigation established that the contract dispute related to a loan agreement. Film Victoria alleged that the complainant had defaulted on the agreement. Film Victoria’s policy is that it will not entertain new financing proposals where debts are outstanding for previous projects. I considered Film Victoria was acting reasonably and had no concerns regarding the decision-making process.

Despite my view that Film Victoria had acted appropriately, it was possible for an observer to form an impression that the organisation was exploiting its unique dual role. While the facts did not lead me to that view, this case illustrates the particular sensitivity surrounding allegations of self-dealing and their potential to diminish public confidence.

2. Adverse treatment

Adverse treatment occurs when an official acts against the interests of individuals with whom they have an acrimonious relationship. Several complaints involving adverse treatment were identified during my enquiry. These included matters related to the care of children, employment decisions and the failure to act on allegations of derogatory racist comments.
**Personal prejudices**

Where a decision could affect the rights or interests of another party, procedural fairness requires that the decision must be made in a manner that is impartial in both fact and appearance. The decision maker must not prejudge a matter or allow their personal prejudices or ideological biases to affect the decision.

Impartiality is one of the key values of public sector behaviour. The Code requires public officials to demonstrate impartiality by:

(i) making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest; and
(ii) acting fairly by objectively considering all relevant facts and fair criteria; and
(iii) implementing Government policies and programs equitably.

The following cases show that certain areas of government activity are vulnerable to complaints from aggrieved parties alleging adverse treatment due to bias or prejudice:

**Case Study 12: An officer’s previous dealings**

It was alleged that an officer in the Department of Human Services (DHS), assigned to a case involving several children, had a preconceived, negative view of the father involved, due to professional dealings when working in another organisation in the past.

DHS acknowledged that the officer should have disclosed his prior dealings with the children’s father. It subsequently counselled the officer for not disclosing his previous involvement, as well as two other managers who did not remove the officer from the case as soon as they learned of the facts.

**Case Study 13: A foster care investigator’s independence**

In my 2004 Annual Report I outlined a case where a mother complained to a foster care agency about various aspects of her son’s foster care. Dissatisfied with the agency’s investigation, the mother contacted my office. My enquiries revealed that the agency employee who investigated the mother’s complaint was herself the mother of one of the boy’s carers.

The parental relationship between the investigator and the person being investigated clearly meant that the agency employee could not independently examine the complaint under any circumstances. The agency agreed to work with DHS to review its conflict of interest policy.
These cases highlight that extra care must be taken in sensitive areas of government activity to ensure that conflicts of interest are avoided and, should they arise, are managed in an open, transparent and accountable manner. Where a reasonable person could conclude that a public officer may prejudge a matter owing to a private interest or previous association with a case, any involvement of that person in official processes relating to the specific matter should be avoided.

**Case Study 14: Panel member gets the job**

My 2004 Annual Report highlighted a matter involving a complainant who had applied unsuccessfully for a position at a regional agency. The complainant was advised by the agency that the successful applicant for the position was Ms X, who had been a member of the initial selection panel. As the agency’s CEO did not provide a satisfactory response to the unsuccessful applicant’s concerns about the appointment, she complained to my office, which sought advice from the then Commissioner of Public Employment. A formal investigation was initiated and my office interviewed the Chair and the CEO of the agency and considered available documentation on the selection process.

My investigation revealed that Ms X was not originally an applicant for the position, but had been appointed following the decision of the selection panel, of which she was a member, that none of the applicants was suitable. However, the agency did not re-commence the appointment process at that point; rather, the selection process was extended to include a new application from Ms X, who was subsequently appointed by the panel, of which, she was now no longer a member. The agency considered that due process had been followed and that the outcome was appropriate. My concern was that the judgement of the initial selection panel that none of the applicants was suitable may have been compromised by a conflict of interest.

It is difficult to think of any circumstance where an applicant for a position could be closely involved in the selection process without creating a conflict of interest. A reasonable person could conclude that the successful candidate may not have acted impartially in the initial selection procedure that eliminated other applicants. Even though in this case it was agreed on reasonable grounds by other members of the panel that none of the original applicants was suitable, the involvement of Ms X meant that a reasonable observer could question this process.

As a result of my investigation the agency agreed that, with hindsight, the appropriate course of action would have been to complete the selection process and undertake an entirely new process, for which Ms X (and others) could have been an applicant. The key problem lay in the fact that she submitted an application into an ongoing process with which she had personally been involved right up to the time of her candidature.
One conflict of interest concern addressed by the agency was that Ms X had previously been a member of the committee to which the new advertised position would report. It was rightly concluded that this would not constitute a conflict of interest, as it is not unusual for members of agencies or committees to apply for associated paid positions. Proper and impartial processes can ensure that all applicants are treated fairly in such circumstances. The problem in this specific case was that Ms X’s conflict of interest as a member of the initial selection panel was not addressed at all.

The agency accepted my concerns about the selection process and issued a written apology to the complainant. It was agreed that the ultimate appointment in this specific instance was acceptable, but that the process had been inappropriate. The agency took steps to revise staff selection and training procedures to address identified deficiencies, in particular the understanding of conflict of interest and of appointment processes, to ensure that such a situation would not happen again.

Judgements that are made about the appropriateness of an ultimate outcome may affect judgements about the processes that lead to that outcome.

The case illustrates how judgements that are made about the appropriateness of an ultimate outcome may affect judgements about the processes that lead to that outcome. In this instance, the judgement about the final outcome led to the agency failing to recognise the seriousness of the initial complaint.

**Ideological bias**

In addition to claims of prejudgment based on personal prejudices, various forms of ideological bias may result in prejudgment or prejudice.

**Case Study 15: Tainted by ideological bias?**

I received a complaint that included allegations relating to racial vilification in an agency within DHS. Although such matters would not normally be considered by my office, this specific allegation was part of a larger complaint that did fall within my jurisdiction and the issue was considered as part of that complaint.

It was alleged that a middle-level manager of the agency had been involved in racial abuse of clients and that a senior manager had taken no action when the matter had been raised with her. The substance of this allegation was that the lack of action was based on an ideological affiliation between the two managers, on the basis of open discussions with colleagues, that included support of the White Australia Policy.

At my request, the department investigated the matter and, with regard to this particular concern, found that the allegation of failure to act on a serious complaint of racial abuse was substantiated. The investigator’s report correctly noted that an individual is entitled to hold personal views and to discuss those views with others, but is not entitled to allow such personal views to interfere with the implementation of policy and procedures for dealing with complaints of racial discrimination. Failure to follow appropriate procedures in such circumstances could reasonably be interpreted as conduct that demonstrates inappropriate partiality on the basis of a commonly-held ideology. The matter was referred to the department for appropriate disciplinary action.
Dealing with any complaint of this nature is likely to be difficult because the complaint itself may be associated with a range of other concerns about policy and procedure in an organisation, such as management and leadership styles, which have little in themselves to do with conflict of interest. However, if a complaint involves allegations of conflict of interest, then these should not be dismissed merely because they are expressed in the context of an apparent, wider grievance.

Enhancement of professional reputation

My enquiry considered a number of cases where a conflict was alleged between the public duties of an officer and their desire to enhance their professional reputation or to avoid their professionalism being questioned by an aggrieved party. It is argued that such a desire may lead a person to judge a matter unfairly and in a manner that is adverse to the interests of a private party.

Case Study 16: Questioning fair values versus questioning professionalism

I received a complaint from a local government ratepayer, Ms Y, in relation to a council valuation of three properties. Ms Y was concerned about the valuations and also about the possibility that the council valuer would be prejudiced against her in future dealings. On the first concern, Ms Y had taken the matter of valuation to the relevant tribunal. I advised Ms Y that it was not within my jurisdiction to review council valuations or tribunal judgements.

The basis of the second concern was a telephone conversation with the valuer about her objection to the original property valuations. Ms Y alleged that the call was an attempt to intimidate her so that she would not question the professionalism of the valuer.

Ms Y asserted her right to ‘impartial and unemotional co-operation’ from the council valuer in resolving the disagreement over land valuations. She expressed concern that her appeal against the valuation may prejudice future dealings with the council. In relation to this matter, I advised her that if there was a specific concern about resultant unfair treatment or prejudice, she could contact my office.

This case illustrates how public officers may be seen to have a conflict of interest in terms of protecting their own reputation when their judgment is questioned.

Care must be taken by public bodies to ensure that concerns raised about official processes or decisions are treated solely on their merits.

Care must always be taken by councils and other public bodies to ensure that when members of the public question official processes or decisions, such concerns are treated solely on their merits – and not seen as a threat to the reputations of the public officers involved. Members of the public are entitled to an impartial consideration of any concerns about official decisions.
Pursuit of organisational interest at the community’s expense

Conflicts of interest can arise when a public officer favours the protection of the reputation of the public body, or of the government itself, over the fair treatment of a member of the public. For example, an officer may not acknowledge and remedy maladministration if such an admission or action has the potential to affect the reputation of the public sector entity.

Such conflicts of interest are particularly relevant where public sector organisations have both regulatory functions and commercial roles, or where there is the organisational imperative to pursue increased revenue flow or to reduce the prices paid for assets. The following case illustrates this:

Case Study 17: Parking infringement notices

In my 2006 investigation into parking infringement notices issued by Melbourne City Council, I was concerned that parking officers were required to meet daily targets of notices issued. Staff who did not meet these targets were counselled or warned, and could ultimately face dismissal. This pressure had the potential to discourage parking officers from reporting non-conforming areas and signage, and malfunctioning or broken parking meters. In other words, the organisation’s interest in increased revenue flow could take precedence over the public interest in fair process and equitable access to parking spaces. I remain concerned that the conflict of interest in the Melbourne City Council matter was not recognised and addressed, although I understand that the council is now moving to do so.

The full report of my investigation into the issuing of parking infringement notices by the Melbourne City Council may be found at www.ombudsman.vic.gov.au under ‘Media and Publications’.

Conclusions

Perceptions of adverse treatment can be as equally damaging to the public sector as those of favouritism or preferential treatment. The Code requires that public officers act impartially and, in my view, the relevant provision could usefully be extended to make it quite clear that the requirement includes any matters in which there is evidence, or reasonable perception, of prejudgement or prejudice, or ideological bias on the part of an individual decision-maker.

The Code should also make it clear that public officials should not act in a way that is (or reasonably appears to be) partial to the interests of their department or agency, at the expense of the legitimate rights and interests of private citizens. The public interest should be clearly seen to include the rights of private citizens to fair, objective and impartial treatment, and open and transparent processes.
3. Acceptance of gifts and benefits

**Gifts and benefits in general**

Some gifts and benefits offered to public officials are so expensive and extravagant that they ought to be called squarely by their proper name of ‘potential bribes’. At the opposite end of the scale, a bunch of flowers sent to a public sector secretary who has been helpful and pleasant is no more than a human gesture of personal appreciation, the refusal of which would be churlish. Between the two lies the wide and uncertain territory of ‘gifts and benefits’, where caution is essential; where sound guidance to public employees should be clear, detailed and readily available; and where managers must be ever-vigilant.

The potential problems that can arise from the receipt of gifts, benefits and other forms of gratuities are widely recognised throughout public sector jurisdictions. Indeed, some Australian jurisdictions have prepared stand-alone guides and policies to deal with the issue. The Code states:

- Public sector employees do not – for themselves or others – seek or accept gifts or benefits that could be reasonably perceived as influencing them.

- Public sector employees comply with any policies of their public sector employer in relation to accepting, declaring and/or recording receipt of gifts and benefits.

- Public sector employees who are unsure about accepting a gift or benefit seek advice from their manager.

From recent investigations, I am aware of public officers accepting invitations to lunches, dinners and entertainment, as well as similar gifts and benefits of more than token value. Such matters need to be carefully managed, with clear policies and procedures in place, to ensure transparency and accountability.

Even gifts of a nominal value, given to express gratitude, may influence the actions of public officials by creating a sense of obligation, which may unintentionally compromise them. If a third-party observer could reasonably believe that a gift was intended to influence an official in some way, then this perception damages both the reputation of the individual and their employer. The following case highlights the significance of the problem:

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*The issue of public officers accepting invitations and similar gifts and benefits of more than token value needs to be carefully managed to ensure transparency and accountability.*
Case Study 18: Accepting benefits from a former business associate

I received a complaint alleging that a senior public hospital manager was awarding contracts to a private company with which he had prior associations. I found that the manager had received invitations to lunches, dinners and entertainment, as well as attended major sporting events in corporate boxes. The manager had not disclosed most of these gifts to his chief executive, nor had he disclosed his relationship with the company. I also found multiple irregularities in the management of a range of contracts and projects over which the manager had oversight.

In defending his actions, the manager claimed:

- He did not have a special relationship with the company, as he had also received benefits from numerous other companies.
- His personal connections with the company had no impact on his decisions to award contracts to it.
- Other senior managers at the hospital also accepted hospitality from private companies that did business with the hospital.
- It was part of the ‘Australian culture’ to accept such gifts and benefits.

The hospital had a conflict of interest provision in its code of conduct that prohibited activities that ‘involve or could appear to involve a conflict between their personal interests’. Personal relationships with outside organisations that had business dealings with the hospital were one of the examples given of such conflicts. The hospital required officers to declare gifts and benefits by completing a declaration form and the examples in the policy included ‘entertainment at a restaurant and tickets to sporting events’.

The manager claimed the gifts policy was commonly flouted by management-level staff in the hospital. An inspection of the hospital’s gifts and benefits register found only one entry relating to a gift of a pen set, although I concluded that acceptance of gifts and benefits by officers was not uncommon. I also concluded that the policy had not been implemented in the day-to-day business of the hospital. Underlying these poor practices was the even poorer example set by senior managers.

The manager had been recruited from the private sector and openly stated that he had not changed his view about the appropriateness of accepting gifts and benefits since he joined the public sector. The CEO of the hospital accepted my recommendation to review the manager’s conduct, audit all financial dealings with the manager’s former employer and revise the hospital’s gifts and benefits policy.
A gifts register is an important tool in managing conflicts of interest associated with gifts and benefits; however good policy is not sufficient in itself. The hospital in the case outlined above had an appropriate policy in place, but its application, management and enforcement were poor. Senior leadership at the hospital failed to comply with or enforce the standards set out in the policy.

The toolkit on *Managing Gifts and Benefits in the Public Sector*, produced by the New South Wales Independent Commission Against Corruption (ICAC), includes guidance on how to establish a gifts and benefits register\(^3\).

A gift register is a relatively straightforward tool that can reveal offers of gifts and benefits and can remove any associated suspicion arising from these offers. A gift register also provides a way of tracking who is offering gifts or benefits to what type of positions and under what circumstances.\(^4\)

**Four kinds of gifts**

Four different kinds of gifts can be identified:

1. **Personal gifts of significant value** are clearly offered as an attempt to influence the officer concerned.
2. **Token gifts**, such as pens or other business accessories branded with the business logo of the giver, may be considered as mass-produced promotional items that do not constitute personal gifts.
3. **Ceremonial gifts**, such as a gift given on the occasion of a visit from a delegation of another agency or jurisdiction, may be regarded as a gift to the agency rather than a personal gift. The receipt of such gifts should be recorded and should be regarded as the property of the agency, rather than any individual within it.
4. **Gifts of gratitude** offered to an individual in appreciation of some specific service performed as part of their official functions (such as speaking at a seminar) are generally regarded as a courtesy, rather than an attempt to influence the individual.

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However, the potential for any offering to be perceived as an attempt to obtain influence should, in my view, lead public officers to politely decline anything other than token gifts. ICAC’s advice in this regard is that:

... if the gift is clearly not an attempt to influence the public official, is unlikely to be perceived as such, the relationship between the employee and gift giver is over and the gift is not expensive, then it would generally be acceptable for the employee to accept the gift.  

**Indentifying a gift’s purpose**

An official to whom gifts and benefits are offered must always ask himself:

- ‘Is the real intention behind this gift to win my favourable attention to the giver’s interests?’
- ‘Would I, in fact, be improperly influenced?’
- ‘Might it appear that I had been so influenced?’
- ‘Is this gift so trifling [say a marketing trinket branded with a company logo] that no serious concern could arise?’
- ‘This is a valuable present; may I accept it? Should I report it to my senior manager?’
- ‘This client has offered a valuable present to my wife; does that remove responsibility from my shoulders for conflict of interest?’

There are several indicators that a gift may be an attempt to obtain influence over the recipient. Public officers should never accept gifts offered in the following circumstances:

- gifts of significant monetary value
- a series of gifts with a significant cumulative value
- gifts given in the context of a regulatory, inspectorial, oversight or similar relationship
- gifts offered selectively to individuals within a work group
- gifts given in a secretive fashion.

The recipient of a gift is generally not in a good position to make judgements about the nature and purpose of a gift. Agency policies should require gifts to be included in a gift register, with exceptions only in very limited and well defined circumstances. An exception may reasonably be made for token gifts of low nominal value that are not targeted at specific individuals and are offered in the course of normal work interactions.

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An example of this would be key rings of nominal value given to a group of staff by a visiting foreign delegation. Clearly the active solicitation of gifts and/or benefits by public officers is completely inappropriate.

My review indicates that more attention must be given to the issue of gifts in the public sector. All agencies should develop guidelines and provide training to management and staff in relation to these requirements. Overall, greater emphasis should be placed on how the receipt of gifts affects public perceptions. I am pleased that the Public Sector Standards Commissioner proposes to issue guidelines on gift registers.

I also consider it important that induction programs for managers who are recruited from the private sector include a focus on conflict of interest in the context of public sector ethics. Agencies should identify work areas with the most frequent interchange of employees between the public and private sectors, as well as the occupational categories where public sector ethics are least understood. Areas such as engineering, procurement, information technology and property management are examples.

**Conclusions**

The four specific areas that I have identified in relation to gifts and benefits pose particular challenges for the management of conflict of interest risks in public sector organisations and agencies. In each case, strong steps must be taken to ensure both the fact and the appearance of integrity and impartiality in public sector processes.

All four areas are considered either directly or indirectly in the Code, but in each case I believe more can be done. In particular, the conflict of interest issues for each should be clearly delineated and separated from wider concerns of administration and management.

I have also identified a need for greater understanding of conflict of interest policies and procedures in relation to these gift/benefit areas. That understanding should not only include the policies and procedures themselves, but also the rationale behind them. The cases that I have reviewed suggest that there is inadequate understanding of conflict of interest issues at an operational level, and that this problem affects all levels of the public sector. My concerns would be addressed by the development of specific guidelines to complement the Code.
4. Use of government property/information

Use of government information

It is in the nature of government to receive and hold confidential information about citizens and about all manner of activities; indeed, much of the work by police and other public servants consists of little else.

Clearly any private use of government information that is not in the public domain represents a failure of honesty, impartiality and the duty of the public employee to put the public interest first.

In recent years, concerns have been publicly raised in relation to the improper use and release of police information. Studies in a number of jurisdictions have found that improper leaks of this nature are a common and damaging, contemporary form of misconduct and corruption in policing.6

Improper leaks of police information is a common and damaging contemporary form of misconduct and corruption in policing. The misuse of information has also been a problem in the broader public sector.

The misuse of information has also been a problem in the broader public sector. Indeed, a black-market commercial trade in government information was found to be operating in New South Wales. In its 1992 Report on Unauthorised Release of Government Information, ICAC found a ‘vast information network’ for the trade in government information had developed:

Information from a variety of State and Commonwealth government sources... freely and regularly exchanged for many years.

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Criminal Justice Commission, Protecting confidential information: a report on the improper access to, and release of, confidential information from the police computer systems by members of the Queensland Police Service, Criminal Justice Commission, Brisbane, 2000.
Director—Police Integrity, Investigation into Victoria Police’s management of the law enforcement assistance program (LEAP), Office of Police Integrity, Melbourne, 2005a;
Recipients included private inquiry agents, insurance companies and financial institutions.

**Case Study 19: Insider information to assist private business**

I received a complaint that an employee of the Metropolitan Fire Brigade (MFB) also operated a part-time business as an independent tester of fire fighting equipment. It was alleged that the person used his MFB position to solicit clients through his official contacts and took advantage of commercially confidential information provided to the MFB regarding rival providers.

There was no MFB requirement for the employee to seek approval to undertake outside employment; however, his Fire Services Tester accreditation by the Metropolitan Fire and Emergency Services Board (MFESB) included a condition not to operate in areas where the MFESB had any involvement.

The MFB did not consider there to be a conflict of interest due to the restrictions imposed by the MFESB. The MFB also relied on the fact that private work was not directed to the employee through the MFB, nor did the employee use MFB time to discuss or undertake private work. While it was conceded that competitors’ costing information was available to him, the MFB asserted this information was generally known in the trade and would not provide a competitive advantage.

I was not satisfied that the MFB had an adequate understanding of the implications of its employee’s access to sensitive information relating to competitors of his private business. The MFB subsequently agreed to tighten its guidelines for referrals of public enquiries about fire testing. It also agreed to establish a written agreement with the employee, thus preventing him from undertaking private jobs that conflicted with his MFB role. Furthermore, it undertook to ensure that his business would not benefit through his access to confidential MFB information.

**Case Study 20: A council censure**

A local council was dealing with a matter in relation to which a councillor had made a signed conflict of interest declaration. The complaint related to events that followed a request from the councillor to the CEO of the municipality to provide him with all council correspondence for the preceding nine months relating to the matter in which he had a declared conflict of interest. The CEO noted that the retrieval and collation of correspondence would require a substantial commitment of officer time, and, on the basis of the councillor’s declared conflict of interest in the matter, he refused to provide the information unless he was instructed to do so by the council.

When the matter was raised, the council voted to provide the councillor with the file (the resolution gave all councillors access to all correspondence relating to the matter in question). The council also voted to censure the CEO formally for not providing the file in the first place.

The mayor of the municipality sought my advice in relation to the reasonableness of the actions of the CEO. On the basis of the limited information available to me, together with advice from Local Government Victoria, I concluded that there may have been a reasonable legal basis for restricting access to material in which a councillor had a declared conflict of interest.
Use of official property

Private use of government property can represent a conflict of interest. This area is another which must be handled on a case-by-case and agency-by-agency basis. Close management attention is vital, as well as sound individual judgements made in a spirit of what is reasonable. The property concerns may vary widely and include computer time, use of telephones and use of departmental vehicles. One essential regulatory point must be that government property may not be used without express management permission, preferably in writing.

Some particular situations that may raise a conflict of interest are those where the private use of official property:

- causes the property to be unavailable for official use
- interferes with official work or the performance of duties
- impedes work productivity
- causes ill-will within the organisation
- creates a reasonable perception that private interests are being prioritised over the public interest, thereby damaging the reputation of the organisation or the public sector as a whole.

The Code requires public sector employees to:

… use work resources and equipment efficiently and only for appropriate purposes as authorised by the employer.

Most employers accept some limited private use of employer property as a way of facilitating an appropriate balance between the work and personal life of the employee. The limited use of an organisation’s property such as telephones, facsimile machines and computers may be regarded as acceptable, provided it does not interfere with work responsibilities nor incur unwarranted cost. However, where this is deemed to be acceptable, it should be done in an open and transparent way and in accordance with written guidelines.
Acquisition and disposal of government assets

The Victorian Government Purchasing Board (VGPB) has well established policies relating to the procurement and disposal of government assets. These policies are applicable to all government departments, the Victoria Police and a number of administrative offices within the government. All other public sector entities are required to take them into account.

The VGPB policies concerning the acquisition of assets require open, transparent and accountable processes that provide value for money. The policies for the disposal of government assets that are ‘considered to be redundant, unserviceable, obsolete or surplus to requirements’ have similar ethical requirements.

The following case demonstrates that the lack of proper policies and weak management supervision in at least some agencies have allowed breaches of proper procedure and, undoubtedly, losses to the public purse.

Case Study 21: Use and disposal of obsolete property

I received a complaint alleging that two senior managers within a public sector entity had appropriated mountain bikes, scuba diving equipment and a grass slasher for private use. Some assets used by the entity had been determined to be surplus to ongoing requirements and employees were given an opportunity to purchase the items. However, asset disposal requirements had not been followed and the sale of assets was not based on a fair determination of their values. It was also a concern that no records of the transactions were kept and there was no record of payment in some cases. It was also apparent that some assets had been taken for private use, although subsequently returned to the workplace.

The investigation led to the managers concerned being counselled and all staff receiving training about appropriate procedures for record-keeping in relation to the acquisition and disposal of assets. A commitment was also made to develop a charter to guide decisions about particular assets, especially whether they were required for ongoing operations.
Developing an ethical culture
D. Developing an ethical culture

An ethical culture has a commitment to serve the public interest at its core and recognises that conflicts of interest diminish public confidence in the sector.

An ethical culture is the single most important factor for ensuring continued public trust in the public sector. An ethical culture is the single most important factor that ensures that the public sector retains the degree of public trust required in a modern democracy.

A commitment to ethical conduct must therefore be ingrained at every level of the sector and in each and every task performed.

My office has pointed out previously, the concept of conflict of interest is critical to the maintenance of ethical standards in the public sector because it represents:

… a bottom line of conduct or a floor beneath which an organisation and its personnel must not descend. It is not, as some appear to believe, a ceiling on conduct which must, or should, be occasionally aspired to. Rather, it is akin to pregnancy; you cannot be a little bit pregnant and, similarly, you cannot be a little bit ethical or a little bit unethical; you are ethical or you are not.

This section looks at several of the drivers of ethical standards in the public sector, including conflict of interest principles, the Whistleblowers Protection Act 2001 (the Whistleblowers Protection Act) and robust record-keeping procedures.

1. Ethical standards in general

The importance of leadership

Leadership is crucial for the development of an ethical culture. The cases about public hospital procurement and Parks Victoria tenders, which I have highlighted in this report, are particularly illustrative of this. In both cases, neither senior officer was found to have acted inappropriately, but their actions clearly harmed external perceptions of the ethical health of their organisations. Inevitably this must have consequences for staff awareness and understanding about what constitutes acceptable conduct. In my view, senior executives of agencies must provide exemplary leadership and set the standard for ethical conduct in their organisations.
Within agencies, middle management and supervisors are also vital to the development and maintenance of appropriate ethical behaviour. Departments and agencies must challenge supervisors who attempt to absolve themselves of responsibility for lapses in the behaviour of their staff. As one of my predecessors said:

The turning of a ‘blind eye’ or a perceived tolerance of minor transgressions invariably leads to more serious transgressions. Supervisors must ensure that small breaches do not develop into major ones. Once a transgression has occurred supervisors must act swiftly and decisively. Decisive supervision is so important …

What may seem to be minor administrative detail requirements are often critical elements of accountability and because they are important elements of accountability they must never be routinely ignored.

The findings of my office in relation to the Victoria Police Inquiry into Windowshutter Kickbacks (Operation Bart) illustrate this point. It was discovered that, on average, it took just six weeks for police officers at a ‘clean’ station to become involved in misconduct, following the arrival of a police officer who had taken part in dishonest conduct at a previous station.7

2. Understanding the principles of conflict of interest

Despite generally sound principles in the Code, the cases examined during my enquiry demonstrate that the day-to-day practices of public sector employees on occasion fall short of the standards required. Indeed, I find particularly troubling the widespread, mistaken belief that a conflict of interest is not of concern if there is no actual wrongdoing.

Many public sector employees fail to understand that the ‘perception’ of a conflict of interest – even when the conduct of a public officer is nothing short of exemplary – is as damaging to public trust as any misconduct. There can be no artificial distinction between ‘actual’ and ‘potential’ conflicts of interest. Both give rise to the same corrosive outcome – loss of public confidence in government administration.

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As discussed earlier in this report, the ‘test’ for conflict of interest situations is simple: if the situation is *perceived* by a reasonable observer as one that is open to conflict of interest, then for all intents and purposes the situation is ‘conflicted’ and must be treated as such.

Public officers who recognise that a reasonable observer may perceive a conflict of interest in a given situation need to act decisively. If this approach is adopted sector-wide, then the current stigma attached to declarations of conflict of interest will undoubtedly diminish and transparency will be improved. By responding to the *perception* of conflict of interest, rather than waiting until actual misconduct occurs, public sector employees will, in effect, be preserving public confidence.

3. **Whistleblowers Protection Act**

My enquiry suggests that the protections offered under the Whistleblowers Protection Act are helpful in bringing information to the attention of oversighting agencies, such as Ombudsman Victoria. However, most concerns about conflicts of interest should be able to be dealt with fairly and openly at an agency level.

4. **Records management**

My enquiry also identified inadequate procedures in public sector records management. Formal processes for the tendering and awarding of contracts, the procurement of assets and other items, the retirement and disposal of assets, and other transactions with outside parties need to be fully documented. When conflicts of interest arise during these processes, the conflicts themselves should be documented. In each case, this should include a formal record detailing how the conflict was handled. Good record keeping reinforces the fact that conflicts of interest should be dealt with openly and transparently, rather than considered as distasteful events that ought to be kept ‘off the books’.

5. **Conclusions**

Public sector organisations should develop a set of indicators to gauge their state of ethical health. For example, conflict of interest and gift registers are opportunities to collect data about how ethical issues are dealt with at an operational level. These registers should be regularly reviewed to ensure that management decisions are consistent, fair, and accountable. Where trends or patterns of concern are found, they should be immediately addressed by senior management.
Some good work has been done in this regard by the State Services Authority in its People Matter Survey and its Agency Survey.

The increased interaction between the private and public sectors, as well as the increased mobility of management between the two sectors create challenges in respect to conflict of interest. New employees, often senior, not only bring skills and expertise honed in the private sector, but a range of private interests that need to be managed as they may have the potential to conflict with public duties.

Managers and employees need to be able to recognise conflict of interest concerns when they arise, rather than simply react to complaints and expressions of concerns. An organisation with sound ethical health will encourage staff to challenge subordinates, colleagues and superiors when a conflict of interest is apparent. Drawing these matters to attention should be seen as the ethical responsibility of a professional public servant.

It is also important that the complaint-handling staff of organisations be able to recognise conflicts of interest when public concerns are raised and that they ensure that such matters are dealt with appropriately. Complainants themselves may not frame allegations of preferential or adverse treatment in terms of conflict of interest, so the staff member must have the training to be able to identify it.
Recommendations
RECOMMENDATIONS

1. I recommend that all public sector entities review their guidelines on conflict of interest to ensure that the following key components are included in their definitions of the issue:

- A **conflict of interest** is any conflict between the personal interests of a public officer and the officer’s duty to act in the public interest.

- The **personal interests** of a public officer include those of family members, friends, associates, organisations to which the officer belongs, and other similar interests.

- Interests include financial and non-financial interests.

- Financial interests include receipt or possession of money and goods in a range of circumstances, including outside employment and private business activities.

- Non-financial interests include influences, loyalties, subjective or ideological biases, personal beliefs and predispositions, membership of civic organisations and associations, partisan affiliations and attachments, predispositions and prejudgements, moral beliefs and aesthetic judgements, and enmity towards individuals or groups.

- 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.

- Acting in the public interest encompasses obligations in regard to administration, ethics and performance, in accordance with the principles and values encompassed in the Public Administration Act.
I also recommend that:

2. The Code should be supported by guidelines consolidating all provisions in relation to conflict of interest. Other related provisions should be addressed to make the conflicts of interest issues clearer.

3. Each public sector entity review its strategies for dealing with issues of conflict of interest to ensure that they:

   a) prohibit and regulate the conduct of specified areas of **private activity**. This area of regulation seeks to deal with conflict of interest by limiting involvement with particular **interests**, such as where an outside employer is either in effective competition with, or subject to oversight by, the public employer

   b) regulate the conduct of **public** and **official activities and involvements** to deal with the possible pursuit of private interests

   c) develop an ethical culture that has a commitment to serve the public interest at their core and recognise the role of conflicts of interest in both undercutting that commitment and the public’s confidence in the sector.

4. Agency guidelines clearly distinguish the problem of conflict of interest from other concerns related to corruption and dishonesty. It should be clear that for a conflict of interest to present a problem, it does not necessarily require that there be any consequential corruption, malfeasance, or inappropriate actions or decisions.

5. Agencies develop guidelines in relation to outside activity and post-employment.

6. Agencies’ formal risk management processes include the identification of specific areas of activity where conflict of interest presents particular risks. Risk mitigation strategies should be developed to address issues identified through these processes.
7. Agency processes should require conflicts of interest issues to be considered and addressed whenever policies and procedures are reviewed.

8. The Victorian Government Purchasing Board investigate opportunities to provide additional guidance to public sector agencies regarding the management of conflicts of interest during tendering processes and in contract management, in consultation with the Public Sector Standards Commissioner.

9. The Public Sector Standards Commissioner develop and promote model policies and procedures regarding the receipt and solicitation of gifts and/or benefits.

10. Heads of agencies ensure that gift registers are established within their agency.

11. All public sector agencies review their policies and procedures relating to the disposal of assets.

12. Each public sector organisation maintain a Conflict of Interest Register that contains clear and accurate records of all declared or identified conflicts of interest and the management of them.

13. The State Services Authority provide advice on the provisions of employment contracts for agency heads to ensure ethical personal conduct and organisational performance are mandatory performance measures.

14. The Public Sector Standards Commissioner review the adequacy of ethics training across the public sector, with particular reference to the problem of conflict of interest.

G E Brouwer
OMBUDSMAN
Appendices
APPENDIX ONE

The Code of Conduct for Victorian Public Sector Employees

The Code of Conduct for Victorian Public Sector Employees (the Code) is the principal instrument for setting ethical standards within the Victorian public service.

The Public Administration Act provides a framework for good governance in the Victorian public sector and in public administration in Victoria generally. The Act enumerates seven public sector values which should underlie public sector activity and guide conduct:

- responsiveness
- integrity
- impartiality
- accountability
- respect
- leadership
- human rights.

The State Services Authority (SSA) has a key role to promote high standards of integrity and conduct in the public sector. The Public Sector Standards Commissioner, as a member of the SSA, is empowered to prepare and issue codes of conduct, the key purpose of which is to promote adherence to the public sector values.

The current Code was issued by the Public Sector Standards Commissioner in July 2007 under the auspices of the Public Administration Act 2004. The Code outlines the standard of behaviour expected of public sector employees and is designed to provide guidance for individuals faced with ethical dilemmas in their work.

The Code recognises the problem of conflict of interest and includes provisions designed to address this problem. The Code is mandatory throughout the Victorian public sector; it therefore sets sector-wide ethical standards, including standards on the issue of conflict of interest.
Research by the SSA and its predecessor bodies suggests that the majority of public sector entities have adopted or adapted the previous Code as their principal ethical framework. It has also confirmed that public sector employees were very aware of the previous Code and used it as a reference point for their conduct. Over time an increasing number of employees have reported in SSA surveys that their organisation provides procedures and systems to ensure employees avoid conflicts of interest.

My own enquiries found that, in most cases, public sector entities have directly utilised or closely adapted the provisions of the Code’s predecessor. The Code was therefore successful in providing a practical benchmark for the regulation and enforcement of ethical challenges throughout the public sector. In time I expect the new Code will be similarly effective.

Conflict of interest within the Code

Integrity is one of the key principles underpinning the Code (as was the case with its predecessor). The Code rightly relates integrity to the earning and sustaining of public trust and requires public officials to demonstrate integrity by:

- being honest, open and transparent in their dealings; and
- using powers responsibly; and
- reporting improper conduct; and
- avoiding any real or apparent conflicts of interest; and
- striving to earn and sustain public trust of a high level.

Conflict of interest is defined later in the Code as follows:

A conflict of interest can be actual, potential or perceived. This relates to circumstances where the employee is or could be directly influenced or where it is perceived the employee might be influenced.

Public sector employees ensure their personal or financial interests do not influence or interfere with the performance of their role. They seek to ensure the interests of family members, friends, or associates do not influence or could be perceived to influence their performance in the job.
A number of other provisions of the Code relate to conflict of interest issues:

- Gifts and benefits
- Remaining apolitical
- Work resources
- Public comment
- Official information
- Privacy and confidentiality
- Maintaining confidentiality
- Honesty at work
- Using powers at work
- Open to scrutiny
- Acting fairly
- Public trust
- Implementing government policies and programs
- Financial probity
- Other employment
- Reporting unethical behaviour
- Decisions and advice.

While these provisions are useful, conflict of interest issues would benefit by being given greater prominence and weight in the Code. In my view, the Code could foster greater understanding and awareness of the link between conflict of interest and public sector integrity and trust by taking a more focussed approach to the issue.

Conflict of interest is a particularly useful concept when dealing with public sector ethical issues because notions of public interest, integrity, impartiality, and public trust are at its core. I believe the conflict of interest concept provides an overarching ethical framework for many of the provisions within the Code.
International trends and developments

The Organisation for Economic Co-Operation and Development (OECD) has recognised that public policies on conflict of interest issues are an important element in building public sector integrity and the trust of citizens in democratic institutions.

Although conflict of interest is recognised to not be the same thing as corruption, the two are linked conceptually and practically, as conflicts of interest may directly lead to corrupt activity and many forms of corrupt activity are rooted in the improper influence of private interests in the performance of public or official duties.

Serving the public interest is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizens’ trust in public institutions.  

The OECD Guidelines for Managing Conflict of Interest in the Public Service lay down four core principles for dealing with conflict of interest situations in ways that promote integrity and maintain public confidence:

- serving the public interest
- supporting transparency and scrutiny
- promoting individual responsibility and personal example
- engendering an organisational culture which is intolerant of conflicts of interest.

Public sector organisations are urged to incorporate such principles in a clear policy on conflicts of interest and to establish clear and transparent processes for prevention, detection and enforcement.

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Conflict of interest and related forms of corruption may pose a threat to democratic institutions and processes, generating citizen apathy and disillusionment. Especially in emerging democracies and transition economies, this problem carries the potential to undermine the functioning of the state and its democratic systems. However this potential is not confined to these economies, similar potential has also been noted in developed environments.\textsuperscript{10} A general decline in perceived standards of conduct in public office has been noted in many countries and the prevalence of conflict of interest is recognised as an important, contributing factor to this.\textsuperscript{11}

The OECD states that a primary task for governments and the public sector is to recognise the risks that conflict of interest poses to good governance and put in place robust measures to ensure that such conflicts are rapidly identified and resolved.\textsuperscript{12} This requires attention to four broad public policy areas:


\textsuperscript{12} Organisation for Economic Co-Operation and Development (OECD), Managing conflict of interest in the public service, guidelines and country experiences, 2003a.
1. Socio-structural issues, including systems for democratic and accountable government; and societies characterised by generalised and inclusive trust, rather than particularised and exclusive trust

2. Instruments to prevent conflict of interest and corruption, including effective legal and regulatory frameworks, including codes of conduct

3. Instruments of detection and investigation, which may include independent coordinating or watchdog bodies

4. Instruments of penalisation for breaches, including appropriate legal, disciplinary and administrative sanctions.\textsuperscript{13}

A number of studies carried out or sponsored by institutions and organisations, including the OECD, the Asian Development Bank and Transparency International, have looked at governmental systems for dealing with conflicts of interest in Europe, Africa, Asia and the Americas, as well as Australia.\textsuperscript{14} A consistent theme in these studies is the recognition of the continuing potential for conflicts of interest to undermine the trust which citizens hold in governments, official institutions and public office holders.

\begin{itemize}
\item \textsuperscript{13} Organisation for Economic Co-Operation and Development (OECD), \textit{Conflict-of-interest policies and practices}, 2006.
\item \textsuperscript{14} Organisation for Economic Co-Operation and Development (OECD), \textit{Managing conflict of interest in the public service}, 2003a.
\item Organisation for Economic Co-Operation and Development (OECD), \textit{Conflict-of-interest policies and practices}, 2006.
\item E Raile, \textit{Managing conflicts of interest in the Americas}, 2004.
\end{itemize}
A variety of approaches for detection, enforcement and penalisation of conflicts of interest are evident. Legal approaches may focus on identified areas of particular concern, such as secondary employment and post-departure employment arrangements, but several countries in Central and South America and Europe have constitutional provisions relating to conflict of interest, as well as very broad systems for investigating conflict of interest cases and dealing with offenders. In the United States of America, a significant body of federal law, comprised of a large number of statutes and executive orders, establishes criminal sanctions in relation to a range of conflicts of interest relating to public officials, but the day-to-day administration of conflict of interest provisions across the governmental system is otherwise highly decentralised.\footnote{B Branon and D D Fauvre, ‘Federal criminal conflict of interest’, American Criminal Law Review, Volume 39, 2002, pp 527–569.}

In such decentralised systems, administrative systems include processes for declaring assets and income, gifts and other private interests, and lines of authority for making decisions in relation to such declarations. In Central and South America, anti-corruption measures relating to ‘illicit enrichment’ put the onus on a public official to explain any increases in wealth that are thought to be incommensurate with known legitimate sources of income.\footnote{E Raile, Managing conflicts of interest in the Americas, 2004.}

International and country-specific studies stress the importance of effective internal controls and processes within organisations for the prevention, detection and penalty regimes related to conflicts of interest. They also highlight the need for external oversight institutions, such as independent auditors or an ombudsman, to investigate specific cases in relation to those who do not comply with required standards, to report to the public on the effectiveness of integrity management processes, and to assist in the maintenance and development of conflict of interest policy and procedures.
In more developed systems, dealing with conflict of interest is part of a broader effort to prevent and combat official corruption. In the United Kingdom, the Committee on Standards in Public Life has enunciated seven ‘principles of public life’, namely:

- selflessness
- integrity
- objectivity
- accountability
- openness
- honesty and
- leadership.  

These principles have now been accepted by successive British governments as a clear set of ethical standards by which public conduct may be judged.

It is now accepted internationally that effective systems for conflict of interest management are a necessary element in supporting, or in some cases rebuilding, the trust in the public sector that is an essential element of well-functioning democracies.

17 Committee on Standards in Public Life, Standards in Public Life, 1995.