

Issue paper (Workshop D)

Managing Conflict of Interest in the Public Sector

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Introduction

We all manage conflict of interest in our routine daily life, e.g. we enjoy eating but want to remain slim. Usually we are able to manage our personal interest on our own, and people don't care how we do it.

It is however a completely different matter when it comes to our public life. People expect and demand that public officials manage their interests and discharge their duty in an open and impartial manner. They expect the official's private interest must not compromise the way he discharges his public duty. In other words, the public interest comes first. In fact, there are increasing public expectations that Governments should ensure that public officials do not allow their private interests and affiliations to compromise official decision-making.

It is therefore important that from Government's point of view, and indeed from everyone's point of view, conflict of interest should be managed properly. We have seen so many cases that conflict of interest scandals undermined the credibility of individuals, institutions and governments. So many promising public service careers were destroyed because the conflict was overlooked, sometimes out of sheer ignorance or stupidity.

The Public Sector

In Hong Kong the public sector comprises the civil service and other principal officials appointed under the Basic Law. There are also the Legislative Council (which is the law making body), and the District Councils (which represent the local communities). In addition, we have a string of advisory boards and committees which advise the Government on many areas of public administration.

Other public bodies in Hong Kong include statutory regulatory bodies (e.g. the Securities and Futures Commission) and other public funded institutions (e.g. the universities).

Together I refer to them as the public sector in Hong Kong. I believe many countries have similar public sector institutions.

Managing Conflict of Interest

So, how do we deal with this important, topical, controversial and sometimes difficult issue?

It is important that we define what is conflict of interest. In Hong Kong, we have a simple definition. As spelt out in civil service regulations, conflict of interest arises "when the private interests of a public official **compete** or **conflict** with the interests of the government or the official's public duties". But what exactly constitutes "conflict" can sometimes be a matter of contention.

From the outset, we should recognise that conflict of interest is largely a “**perception**” issue. That is, it is not a matter of whether you think you have done the right thing. What matters is whether the public **thinks** you have done the right thing. When determining whether a conflict of interest has arisen, one test we can practically apply is whether you are prepared to discuss the situation openly – the so-called “sunshine test”. In the last analysis, the onus is on you to prove that you have acted properly.

And perception is a living issue. That is, public perceptions change over time. A certain act acceptable ten years ago may no longer be acceptable now. It therefore follows that the public official must always stay vigilant about current public perception and expectations, and appropriately adjust his way of dealing with possible conflict between his public life and private life.

Conflict of interest being a perception problem, openness and accountability is the obvious answer. A robust system of declaration of interest by public officials is the key to assure the public that they have acted impartially and in the public interest. Such declarations should be documented and should cover:

- a) Declaration of financial interests – this should include investments in land and property, and shareholdings and directorships in companies. This is particularly important with public officers who have access to market sensitive information, e.g. those who make fiscal policies and decisions, or are involved in the regulation of the financial markets.
- b) Declaration of conflict of interest as and when it arises, e.g. when an officer involved in the award of contract finds his brother is one of the tenderers, or when a land lease is being granted to a social club of which the approving officer is a member.

We also need a system to appropriately handle the declarations:

- a) We should consider whether the public should have access to the declarations. Obviously one consideration would be how influential is the public official and how important is the public duty being performed. For senior civil servants, elected officials and politicians, the public generally expects their financial interests be made transparent.
- b) Managers and supervisors should carefully vet the declarations and take appropriate management actions. Where necessary, the public officer should be given appropriate advice, including instructions to divest his interest or removal from the decision making process.

Within the civil service, the following “tools” are useful in managing conflict of interest:

- a) A code of conduct setting out government’s commitment to ethical practices and the management’s expectations of ethical behaviour of its staff.
- b) Clear guidelines with examples on what constitute conflict of interest, and the procedures governing the declarations.
- c) Training and education to ensure the officers understand the issues and follow the procedures.
- d) Designating an ethics or compliance officer to ensure staff follow the rules, and also to discuss grey areas and dilemma situations with staff.
- e) Taking effective disciplinary/criminal sanctions on non-compliance.

Public Interest versus Privacy – the Proportionality Test

Some may argue, with some justifications, that the requirement to declare one’s personal interests is inconsistent with human rights, i.e. the right to privacy. However, such a right has to be balanced against the public’s right to know, since public duty is involved. Lawyers have advised that such requirements are consistent with the Bill of Rights, provided that the extent of the declaration is commensurate with the need, and that it serves a legitimate purpose. This is commonly known as the “Proportionality Test”.

Post-service Employment

So far, we have examined how we can manage conflict of interest while in public office. But it should not stop there. If a public official, upon retiring from office, immediately takes up an appointment in private business, the public is likely to perceive a potential conflict of interest. In Hong Kong, a retired civil servant who intends to take up any employment or engage in any business activity within two years of retirement is required to obtain prior approval for doing so and the Government will assess with the advice of an independent committee, whether the proposed employment or business activity will cause a conflict of interest. In the case of senior officers, as a matter of principle, there is a minimum “sanitisation” period of 6 months during which approval for post-retirement employment will not be given.

Role of Hong Kong ICAC

Criminal Sanctions

In Hong Kong, any public official who accepts an advantage, which can be in the form of money, gift or favour, in connection with his public duty is a corruption offence under the Prevention of Bribery Ordinance. Even if it cannot be proved that a bribe has been accepted, misconduct in public office (known as malfeasance) is a common law offence. Conflict of interest in its blatant form constitutes misconduct in public office. An important part of ICAC’s job is to investigate, through its **Operations Department**, all corruption allegations and, if the Department of Justice determines to prosecute, assist in the prosecution.

Ethical Awareness

We also have a **Community Relations Department**, which, apart from educating the public about the evils of corruption, actively assists Government to raise ethical awareness in the civil service.

Transparent and Accountable Procedures

Another department of the ICAC, the **Corruption Prevention Department**, systematically reviews the practices and procedures of Government departments to minimize the opportunities for corruption. An important strategy in the corruption prevention programme is to promote transparent and accountable practices, and build in safeguards to minimize the possibility of the decision-making process being compromised by self-interest.

Through all these efforts, the ICAC launches a 3-pronged attack on corruption. We have been fairly successful in containing corruption in Hong Kong. In the last Transparency International Corruption Perception Index, Hong Kong was ranked the 16th least corrupt place among the 146 regions surveyed.

Misconduct in Public Office

As stated above, conflict of interest in its blatant form constitutes “misconduct in public office” which is a criminal offence under the common law. This common law offence which has its origin dating back to the 18th century had been rarely used in Hong Kong until recent years. In a recent court case, the Court of Final Appeal of Hong Kong elaborated on the elements of the offence and according to the judgement, misconduct in public office arises when:

- a public official;

- in the course of or in relation to his public office;
- wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- without reasonable excuse or justification; and
- the misconduct is serious, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve the nature and extent of the departure from those responsibilities.

So far we have prosecuted 19 cases of misconduct in public office: 7 acquitted, 11 convicted and 1 ongoing. The following are a few cases which happened recently in Hong Kong, which illustrated how we dealt with this kind of wrongdoing.

Example 1

A directorate officer responsible for managing government buildings –

- awarded government contracts amounting to US\$20 million to a property management company owned by the brothers of his sister-in-law;
- knew that the company did not fully meet the tender requirements;
- failed to declare the relationship;
- was convicted and sentenced to 30-month imprisonment.

Example 2

A senior officer responsible for television and entertainment licensing –

- awarded printing and production contracts amounting to US\$30,000 to his wife's company;
- failed to declare the relationship and forged some quotations to favour his wife;
- was convicted and sentenced to 1-year imprisonment.

Example 3

The Chairman of a licensing board –

- persuaded licence applicants to hire a close personal friend as their representing lawyer;
- failed to declare his relationship with the lawyer and improperly provided confidential documents to her;
- was convicted and sentenced to 1-year imprisonment.

Example 4

A senior police officer –

- accepted free sexual services from prostitutes and vice operators;
- was convicted and sentenced to 2-year imprisonment.

Although the police officer at the time of the alleged offence was off duty and was not directly involved in anti-prostitution duties, he was still convicted as he was a senior police officer having an overall responsibility for law enforcement and fighting crime. In other words, had he not been the senior police officer that he was, he would not have been offered such free services.

Disciplinary Cases

There have also been other conflict of interest scandals which did not result in prosecutions. A case involved a senior tax official who failed to declare conflict of interest when he personally dealt with tax cases handled by his wife's tax consultancy firm. Although subsequently audit revealed that there was no evidence suggesting that he had given favour to his wife's firm, the public perceived that there was a clear conflict of interest and protested. The Hong Kong Government subsequently terminated his employment contract.

Conclusion

In conclusion, I would like to reiterate the importance for public officials to handle conflict of interest properly and carefully. **Public office is public trust.** Public expectations are rising, and public officials are increasingly being called to account for their decisions. The public needs to be reassured that the decisions are made impartially without self-interest.

Some recent world developments have made this need for caution more apparent. We now see more and more successful private sector businessmen or executives becoming senior government officials and vice versa. Business models have changed - the public private partnership approach is now commonly used in implementing public projects. The public sector and private sector are now much more interactive and this makes it all the more important that public policies and decisions are made impartially and in the public interest, and **perceived to be so.**