

**GOOD GOVERNANCE AND CORRUPTION**

**Memorandum by the Commonwealth Secretariat**

1. The Meeting already has before it, in respect of Agenda item 1(b), paper number LMM(99)21 in the form of the Report of the Expert Group on Corruption set up by the Commonwealth Secretary-General to undertake a study of the impact of corruption on economic management.
2. The attached extract publication issued jointly by the Commonwealth Secretariat and Transparency International and entitled *Conflict of Interest: Legislators, Ministers and Public Officials* is circulated during the meeting, for information and to facilitate the discussions on agenda item 1(b). If you require the full text of the publication please contact the address below.

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# **CONFLICT OF INTEREST: LEGISLATORS, MINISTERS AND PUBLIC OFFICIALS**

A study prepared by Gerard Carney

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# PREFACE

This publication is the result of a joint collaboration between the Legal and Constitutional Affairs Division of the Commonwealth Secretariat and Transparency International (TI), a non-governmental organisation active in the field of integrity building and countering corruption. It builds on a long history of the Commonwealth Secretariat's work with like-minded and appropriate non-governmental organisations in the pursuit of common goals.

The area of Conflict of Interest is now clearly identified as one of the most crucial areas for reform in the building of democratic and accountable institutions and structures. Without clear and well-understood rules, decisions will be made by senior officials that are motivated by private gain rather than by the public interest - decisions which can have the potential to deepen poverty when they should carry with them the prospect of enhancing sustainable development for all.

In this study, prepared with financial assistance from the Ford Foundation, Gerard Carney of Bond University, Queensland, Australia returns to the ground which has made him an international authority on conflict of interest involving legislators, Minister and public officials. Of particular interest, by way of illustration, is the Ethics in Public Office Act 1995, of Ireland, an enactment rendered necessary by political scandals that demonstrate vividly (if demonstration were needed) that developed countries can suffer as badly as developing countries where their arrangements and control mechanisms are inadequate.

It is our belief that this study will be a useful tool for policy makers, researchers and to those campaigning for necessary reforms.

We join in expressing gratitude to Gerard Carney for this signal contribution to our understanding of an area which presents a number of challenges to our various systems of government

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# ABOUT THE COMMONWEALTH SECRETARIAT

The Commonwealth Secretariat (established 1965) is the main intergovernmental agency of the Commonwealth, facilitating consultation and co-operation among member governments and countries. It is responsible to member governments collectively.

The Secretariat organises Commonwealth summits, meetings of ministers, consultative meetings, and technical discussions; it assists policy development and provides policy advice, and facilitates multilateral communication among the member governments. It also provides technical assistance to help governments in their social and economic development and in support of the Commonwealth's fundamental political values.

The Secretariat is headed by a Commonwealth Secretary-General who is elected by Heads of Government.

The Legal and Constitutional Affairs Division of the Secretariat facilitates Commonwealth legal co-operation over constitutional issues, commercial crime, human rights and other aspects of law. This legal co-operation is a unique feature of the Commonwealth, made possible because members have similar legal systems, most based on, or greatly influenced by, the common Law. The division:

- facilitates dialogue among governments on legislation and other legal matters. It organises three-yearly Meetings of Law Ministers, Law Officers of Small Commonwealth Jurisdictions, and Meetings of Senior Law Officers of Ministries of Law;
- informs governments of international legal developments;
- keeps governments apprised of developments in law in other Commonwealth countries through responses to requests from officials and judges, and regular publications including the Commonwealth Law Bulletin;
- promotes co-operation between governments on legal matters including combating corruption in public life.

**Legal co-operation schemes:** The division initiated and helped to prepare, and promotes implementation of Commonwealth schemes for co-operation in law - for mutual assistance in criminal matters, the transfer of convicted offenders, extradition, and the protection of the material cultural heritage. Commonwealth legal co-operation also covers business regulatory bodies.

**Incorporating international conventions:** The division also assists governments to bring their national laws in line with international conventions such as the UN Declaration on the Elimination of Violence against Women, the Recommendations of the Financial Action Task Force on Money Laundering, and relevant World Trade Organisation (WTO) Agreements.

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# TRANSPARENCY INTERNATIONAL'S MISSION STATEMENT

## Rationale

- Corruption is one of the greatest challenges of the contemporary world.
- It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor.  
Controlling it is only possible with the co-operation of a wide range of stakeholders in the integrity system, including most importantly the state, civil society, and the private sector.
- There is also a crucial role to be played by international institutions.

## TI's Purpose

- To curb corruption by mobilising a global coalition to promote and strengthen international and national Integrity Systems.

## Guiding principles

TI is based on the following guiding principles:

- TI recognises the shared responsibility of actors in all regions for corruption, and its emphasis is on prevention and on reforming systems, not on exposing individual cases;
- TI considers that the movement against corruption is global and transcends social, political, economic and cultural systems;

Internally, TI observes the principles of participation, diversity, accountability and transparency;

- TI is politically non-partisan; and

TI recognises that there are strong practical as well as ethical reasons for containing corruption.

## How TI achieves its purpose

- TI builds national, regional and global coalitions, embracing the state, civil society and the private sector, in order to fight domestic and international corruption;
  - TI co-ordinates and supports National Chapters to implement our mission;
  - TI assists in the design and the implementation of effective integrity systems; and
- TI collects, analyses and disseminates information and raises public awareness on the damaging impact of corruption (especially in low-income countries) on human and economic development.

## What makes TI different?

- TI is the only international movement exclusively devoted to curbing corruption.
- TI is an international centre of expertise on combating corruption, pooling a large number of highly professional volunteers for an integrated approach.
- TI seeks to empower civil society to play a meaningful role in countering corruption.

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### **The Rationale:**

“Throughout the world people are increasingly angry with the ways in which public power has been manipulated for private profit. The message we get from our national chapters in every corner of the globe is that they want to see clear and clearly-understood conflict of interest rules established, and for conflicts of interest involving public officials to be contained through the open monitoring of their assets and liabilities.” Peter Eigen, Chairman, Transparency International (TI).

### **The Author:**

**Gerard Carney** is Associate Professor of Law at Bond University in Queensland, Australia. He has written extensively on the subject of controlling conflicts of interest and has served as expert consultant to several commissions of inquiry, both in Australia and abroad.

### **The Publishers:**

**Transparency International (TI)** is a not-for-profit non-governmental organisation with its headquarters in Berlin, Germany. Founded in 1993, it presently has over seventy national chapters formed or in formation, in all parts of the world. TI’s Mission Statement appears on page 2. Full details of the organisation and its finances are on the TI web site, together with the *TI Source Book on National Integrity Systems* to which this publication is an adjunct.

TI is a non-political global movement against corruption. It brings together into a coalition with civil society groups and NGOs interested in promoting just and honest government, a wide range of stakeholders, including development agencies, private sector interests, and international financial institutions.

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## **Transparency International's acknowledgements**

*Transparency International (TI) acknowledges with gratitude the financial assistance from the Ford Foundation which made this study possible.*

*An extended version of appears on TI's web site: see <http://www.transparency.de>, which also includes much of the primary material referred to in this study.*

*This study is one of a series being prepared to empower civil society to engage in meaningful and effective debates about the development of their countries' National Integrity Systems. An up-to-date list of the studies published, and the publications themselves, may also be seen on the TI web site.*

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# INTRODUCTION

This study has two main purposes. The first is to assist legislators, ministers and public officials to identify a conflict of interest when it poses an ethical dilemma in the performance of their official duties and responsibilities. The second purpose is to suggest various mechanisms either to prevent such a conflict of interest arising, or to resolve the conflict when it does arise. It does not purport to be a comprehensive manual of public sector ethics although it deals with probably the most important aspect of an ethical public life. Nor does it provide a clear blue-print of rules as if a legal text, since it has been observed :

Questions of law are ultimately able to be resolved by the courts. Matters of ethics are, almost by definition, unable to be resolved by resort to rules or laws. Ethics questions are matters for judgement about competing values, and therefore matters about which there may be continuing disagreement, ambiguity, or uncertainty.

Put in its simplest terms, a conflict of interest arises when the private interests of a politician or official clash or even coincide with the public interest. Such a conflict of interest raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the exercise of official duties. Classic examples of conflict of interest include:

- A legislator approaches a minister on behalf of a company in which the legislator is a shareholder.
- A minister accepts an offer of future employment from a company which is currently seeking a government trading licence.
- A public official must decide from a number of options on the route of a new highway - one option would reduce the value of his family's farm.

At best, guidance is given to assist in the identification and resolution of conflicts of interest. Other issues thrown up by the above simplistic definition include: what is an interest, what is a private interest, what is the public interest, what constitutes a clash of those interests, and when does a coincidence of interests raise an ethical dilemma?

The relationship between conflict of interest and corruption helps to elucidate the nature of both. Of the two phenomena, corruption is the better known. Most people are able to give an example of corrupt conduct but less readily explain the notion of a conflict of interest. As for their relationship, one can say that all cases of corruption involve a conflict of interest but the reverse cannot be maintained.

More specifically, corruption involves a clash between the official's private and public interests where usually a financial benefit is knowingly obtained at the expense of the public interest. In other words, as defined by the TI Source Book in Ch 1, corruption is the "misuse of public power for private profit". A further basis of contrast is that corruption constitutes a serious crime whereas a conflict of interest merely describes a broad spectrum of conduct. Whether particular conduct constitutes unethical behaviour or worse depends on the circumstances and the reaction to the conflict. Corruption lies at one extreme of that spectrum of conflict of interest.

This connection between corruption and conflict of interest is the subject of increasing international recognition and discussion. For instance, the Justice Ministers of the member States of the Council of Europe recommended recently the adoption of international instruments on corruption including a code of good conduct for public servants. Similarly, the Inter-American Convention Against Corruption requires the parties to consider standards of conduct to prevent conflicts of interest arising including the public declaration of income, assets and liabilities by specified public officials.

The recognition of the need to avoid conflicts of interest by legislators, ministers and public officials promotes the adoption of similar standards of ethical conduct in the community as a whole.

There remains a note of caution.

It is essential if legislators, ministers and public officials are to act ethically to provide them with the support, both technical and emotional, needed to perform their arduous public duties. In addition, they must be provided whether in a full-time or part-time position with adequate salaries to enable them to have a lifestyle appropriate to their position. This is not a lavish lifestyle but one which enables them to provide for their families and which compensates them somewhat for the stresses put on family life.

At least, the remuneration must be sufficient to ensure that financial worries do not distract them from their public duties. In such an environment of financial security, the risk of unethical conduct is reduced, the lure of monetary gain is less tempting and the avoidance and resolution of conflicts of interest more likely.

# CHAPTER 1

## RATIONALE AND BENEFITS OF PUBLIC INTEGRITY

Before considering the nature of a conflict of interest, it is important to examine the underlying basis for the ethical concern which is raised by a conflict of interest.

The fundamental premise of all government is that the power of government derives from the people for whom it serves. In other words, there is a trusteeship created between the people and those who serve in the three branches of government: the legislature, the executive and the judiciary. Members and officers of each of those branches exercise an ever increasing power over the rights and liberties of individuals, the economy and the commercial system. That trusteeship requires the exercise of power for the people's welfare, that is, in the public interest. Hence the description of "public servant" appears more apposite than "civil servant".

The duty to exercise power in the public interest has been recognised for centuries by political philosophers: Plato, Cicero, Rousseau, Wang An Shih and the Islamic scholar, Abdul Rahman Ibn Khaldun (AD 1332-1406) who regarded the luxurious living of the ruling group as one of the causes of corruption. Moreover, this fundamental premise is reflected in many constitutions throughout the world.

Nowhere is it so comprehensively stated than in the United States Senate Code of Official Conduct which contains the following declaration of Senate policy :

The ideal concept of public office, expressed by the words, 'A public office is a public trust', signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public trust. All official conduct of Members of the Senate should be guided by this paramount concept of public office.

### Public interest

The "public interest" in this context is in effect the purpose which those who exercise power conscientiously believe to be most appropriate for the general welfare of that society. Since minds differ on whether a policy will enhance society's welfare, the public interest is a flexible concept to accommodate such a range of views. Cultural differences may also explain diverging views on what is in the public interest. But there are limits to the breadth of this concept of public interest. While this study does not attempt to define the "public interest", it should be remembered that decisions made not in the public interest result in adverse consequences for the welfare of society, economically and socially, and ultimately for the political system itself. The focus of this study is on how the duty to serve that public interest is safe-guarded by the avoidance of conflict of interest.

### An absolute obligation

For legislators, ministers or officials to decide a matter even partly on the basis that it will benefit his or her private interests is to betray the trust of the people. The decision must be made solely on the basis that it is in the best interests of society. For to allow any other consideration, may result in a decision other than that most appropriate in the public interest. The primary test is subjective, that is, one which the politician or official must apply personally according to his or her own conscience.

But even if this test is satisfied, there is also an objective assessment to be made. Might the decision be viewed by the people as one made other than solely on the basis of their welfare? This must also

be considered by the legislator, minister or official but unlike the subjective test, the ultimate judgement on this issue rests with the people. Why must this be so? The reason is public confidence. The people are entitled to feel confident that their power or sovereignty is being exercised for their benefit. For, as the famous American counsel, Archibald Cox, has noted, the stability of government rests on the maintenance of public confidence:

Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern.

This confidence can be easily eroded by the appearance of a conflict of interest. For this reason, the ethical requirement for legislators, ministers and officials is to avoid both actual, potential and apparent conflicts of interest.

At times the requirement to avoid apparent conflicts of interest appears unfair and harsh, especially when abused by political opponents. Yet a politician or official who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motives. It is a self-imposed vulnerability. Unless the appearance can be dispelled by the politician or official, they risk the political consequences of assumed unethical behaviour. The appearance of a conflict of interest is, in other words, one of the hazards of the game of politics. Its avoidance becomes one of the rules of the game when the objective of the game is the pursuit solely of the public interest.

### **Accountability of government**

The trend in many political systems to adopt mechanisms to support the integrity of its public officials is part of a wider phenomenon of government accountability. The ability to challenge government decisions for breaches of human rights, for lack of constitutional power or for failure to proceed in accordance with the rules of natural justice, also derives from the fundamental premise referred to earlier that the exercise of power is to be in the public interest. The concern with the integrity of those who exercise that power is simply the torch of public accountability being shone on another level of the decision-making process. It is another example of the checks and balances so eloquently explained by Thomas Madison in *The Federalist No 51*:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

### **Guidelines to support, not undermine, public confidence**

It is essential that any discussion of safeguarding the integrity of legislators, ministers and officials occur in a positive atmosphere which recognises the privilege and honour which attaches to those vested with the public trust. No assumption is made that all who occupy public office lack integrity. Rather, the desire is to assist those in public office vested with that awesome responsibility to act always in the public interest. Accordingly, the mechanisms recommended in this study on the whole emphasise the values which underlie ethical conduct rather than the rules which implement those values.

One of the reasons often given for adopting the various mechanisms outlined in this study is to improve the low level of public confidence in the integrity of politicians and public officials. This view reflects the fact that mechanisms are generally adopted only in response to significant public scandals, such as Watergate in the United States. Public confidence depends ultimately, however, on the performance of those entrusted to govern. These mechanisms only support and assist politicians and public officials in the performance of their onerous duties and responsibilities. Their efficacy cannot be assessed simply in terms of any change in the level of public confidence. Nor is it possible to determine whether public confidence is enhanced by these measures. Their primary achievement must be the extent to which they have assisted politicians and public officials to serve the public interest better.

It should be noted, however, that increased levels of public scrutiny of government especially by an active media renders public confidence in government more vulnerable now than in the past. Yet at the same time, there is unlikely to have been any change in the nature of a conflict of interest and its prevalence. So what has rendered public confidence more vulnerable is not necessarily a further decline in ethical standards but the increased likelihood that infringements of those standards will be detected.

Along with mechanisms to help preserve integrity in government, there has been recognition of what has been called the “affirmative side” of government ethics, that is, to be “intellectually honest and politically courageous”. The issue becomes not what I can get away with, but can I justify my conduct? Essentially, it is another aspect of accountability and responsibility but one which goes beyond the scope of this study.