



Performance audit report

## Management of conflicts of interest in the three Auckland District Health Boards





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# Management of conflicts of interest in the three Auckland District Health Boards

This is the report of a performance  
audit we carried out under section  
16 of the Public Audit Act 2001.

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## Foreword

I carried out a performance audit at the request of the Minister of Health, in which I looked in detail at the conflict of interest policies and practices of the Auckland District Health Board, the Counties Manukau District Health Board, and the Waitemata District Health Board.

There are several especially difficult types of conflict of interest that are specific to district health boards (DHBs) and that are sometimes unavoidable. They are inherent in the nature of the DHB sector, and affect both members and staff. It is often not easy to decide whether a person's other interests or connections mean that they should be excluded from a decision or project of their DHB.

The three Auckland DHBs I looked at have a range of useful policies and procedures in place, but in some areas there is room for improvement. In particular, board and committee members need to conscientiously follow the statutory requirements about conflicts of interest that apply to them.

This is not an area that is conducive to prescriptive rules and easy answers, and I do not attempt to offer them. Earlier this year, I published general guidance for the public sector called *Managing conflicts of interest: Guidance for public entities*. Policies need to allow for the exercise of judgement, because many situations are not clear cut and can be properly assessed only when they arise.

Managing conflicts of interest need not mean that a DHB cannot have members or officials who have experience, knowledge, connections, or contacts with other organisations, or who have other commercial relationships with their DHB. But people need to recognise that sometimes there may be particular matters in which it is unwise for them to participate, or where their involvement needs to be limited.

My findings are focused on the three Auckland DHBs, but I hope that this report may also be of value to the wider DHB sector.



K B Brady  
Controller and Auditor-General

29 October 2007

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## Glossary

**The Act** means the New Zealand Public Health and Disability Act 2000.

**Board** means the governing body of a DHB.

**Clinicians** or **clinical staff** refers to those DHB employees who are primarily involved in providing health services and disability support services to patients, such as physicians, surgeons, or nurses.

**Committee** means a committee of the board of a DHB.

**Conflict of interest** has no formal and exhaustive definition. We consider that, in the public sector, there is a conflict of interest where a member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have. For a DHB, the Act provides that a conflict of interest includes where a person is "interested in a transaction" (or would be if they were to become a member or delegate of the board or committee), and that a person can also have a conflict of interest through their (or their spouse's or partner's) employment or engagement as an employee or contractor of the DHB.

**DHB** means a district health board.

**Interested in a transaction** is defined in the Act. A person is interested in a transaction if they (or their spouse, civil union partner, de facto partner, child, or parent) may derive a financial benefit from it, if they have a financial interest in (or are a partner, director, official, board member, or trustee of) an entity to whom the transaction relates, or if they are otherwise directly or indirectly interested in the transaction. Certain exceptions apply, including an interest in a party that is – or is owned by – a publicly owned health and disability organisation, or where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence them in carrying out their responsibilities.

**Member** means a member of a board or committee of a DHB. It does not include a DHB's employees (except where a particular employee has also been appointed or elected as a member).

**The three Auckland DHBs** or the **DHBs** means the Auckland DHB, the Counties Manukau DHB, and the Waitemata DHB.

**Transaction** is defined in the Act. A transaction, in relation to a DHB, means the exercise or performance of a function, duty, or power of the DHB; an arrangement, agreement, or contract to which the DHB is a party; or a proposal for such an arrangement, agreement, or contract.

## Summary

We carried out a performance audit that looked at how conflicts of interest are dealt with in each of the three Auckland District Health Boards (the Auckland DHB, the Counties Manukau DHB, and the Waitemata DHB).

### The nature of conflicts of interest

Our approach to assessing the management of conflicts of interest is derived from a wide range of New Zealand and overseas sources of guidance, and is set out in our recent guidance publication *Managing conflicts of interest: Guidance for public entities*.

Impartiality and transparency in administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations. They expect people who work in the public sector to act impartially, without any possibility that they could be influenced by favouritism or improper personal motives, or that public resources could be misused for private benefit.

However, in a small country like ours, conflicts of interest in our working lives are natural and unavoidable. The existence of a conflict of interest does not necessarily mean that someone has done something wrong, and it need not cause problems. It just needs to be identified and managed carefully.

### Conflicts of interest in DHBs

For DHBs, there are some statutory rules that apply to board and committee members, especially for meetings. In particular, a member who has a conflict of interest in a matter must make a disclosure that is recorded in the minutes and in a register. The member must not take part in the relevant deliberation or decision (unless the statutory partial waiver power is used).

Managing conflicts of interest can be especially difficult in DHBs. Several types of conflict of interest are quite specific to – and widespread within – the DHB sector, and are not always easy to manage. In part, this is because of three structural characteristics of the sector:

- Many board and committee members (especially elected members) may have those roles because they have a strong personal or professional interest in the health system, perhaps through operating or working for an organisation that receives funding from a DHB.
- Commercial product suppliers, especially pharmaceutical companies, are widely regarded as having a strong influence on the health system.

- Many senior clinicians, particularly specialist doctors, work part-time in the public sector (that is, as an employee of a DHB) and part-time in private practice.

These characteristics give rise to a number of situations or risks where interests may come into conflict. We encountered these frequently during our audit. In such situations, it is often not easy to decide where to draw the line between acceptable and unacceptable behaviour.

## Policies and procedures

The three Auckland DHBs all have policies and procedures for staff that were specifically about managing conflicts of interest, and have had them for several years. The overall approach of the three Auckland DHBs is fairly similar, and in some areas their policy content is identical. The policies contain detailed examples and guidance about particular scenarios that could arise for DHB personnel. The policies and procedures could be enhanced by including further information or criteria for managers on how to assess the seriousness of a conflict of interest when it arises. In general, we were pleased with the content of the DHBs' policies for staff, and satisfied that the policies do not require significant change.

Different conflict of interest issues can arise for members. In our view, it would be helpful for the Auckland DHB and the Counties Manukau DHB to develop a policy or other written guidance material about conflicts of interest that is aimed specifically at members.

All of the DHBs operate interests registers for board members and for senior staff. Most of the disclosures we saw recorded in the DHBs' interests registers were of interests, rather than conflicts of interest. Using an interests register to record general ongoing interests is legitimate and helpful. However, DHBs are required to use the register to record members' *conflicts* of interest.

## Dealing with conflicts of interest in practice

Administrative and other staff in the DHBs who were most often likely to consider conflict of interest issues demonstrated a good understanding of conflicts of interest. The understanding of members, and of other managers and staff in operational departments, was variable.

Administrative staff took conflict of interest issues seriously when such matters came to their attention. They were sensitive to risks to the organisation, and we saw examples of cautious and sensible judgements about conflicts of interest. We saw very few examples of serious breaches of rules or expectations.

Other than routine written declarations of interests, we found that conflicts of interest were often dealt with orally. There was usually very little documentation.



We expected to see more documented examples of how particular conflicts of interest were managed, because good record-keeping assists risk management.

The distinction between interests and conflicts of interest is not always understood. Sometimes, after an interest or conflict of interest had been disclosed, DHBs did not always consider whether and how the situation should be assessed and managed. Many of the conflict of interest issues that are inherent in, or common throughout, the sector were well known but were often considered to be “too hard” to deal with. For example, although members were good at declaring their interests, it was not always clear that in meetings they considered whether those interests came into conflict in particular matters. This was particularly the case at the Auckland DHB and, to a lesser extent, at the Counties Manukau DHB. DHBs must ensure that they identify specific conflicts of interest at meetings, and that the affected members do not then participate in that particular matter unless the formal waiver procedures are used.

Because of the size of the DHBs, it was difficult for administrative staff to be confident that they were aware of all issues that might arise throughout the organisation, or that all people within the organisation complied with the relevant policies or expectations when a conflict of interest issue arose. Therefore, people we spoke to did not think it was possible to have complete assurance that all conflicts of interest were being identified and managed properly.

All of the DHBs’ conflicts of interest policies relied, at least to some extent, on the manager of the affected individual to make decisions about how to deal with conflicts of interest, rather than having all matters referred to a single or central decision-maker. Such managers may not have a great familiarity with the relevant policies. We consider that the DHBs could do more to raise awareness of how to manage conflicts of interest under their policies, especially among managers in operational departments.

## **Leadership, governance, management, and overall culture**

The three Auckland DHBs all consider themselves to be highly ethical and conscientious organisations. They pride themselves on their organisational values. People at the DHBs have a strong professional understanding and acceptance of general values around ethics and integrity.

At both the Counties Manukau DHB and the Waitemata DHB, we formed the overall view that the chairpersons and chief executives were attentive to conflict of interest matters. Also, both the Counties Manukau DHB and the Waitemata DHB had administrative staff who took a proactive role in such matters.

By contrast, at the Auckland DHB it was not apparent to us that the board made any significant attempt to engage with conflict of interest issues. Such matters did not appear to have a high profile at meetings, and the board often did not consider whether particular members needed to be excluded.

Overall, people we spoke to at the Auckland DHB were not always clear who they should go to for advice about conflicts of interest. In our view, the Auckland DHB should assign a key administrative staff member or team the responsibility of leading, fostering, and co-ordinating the management of conflict of interest issues.

### Some general lessons for dealing with conflicts of interest

Many public entities have interests registers to record various types of common and ongoing interests that might give rise to a conflict of interest in the future, and sometimes to record actual conflicts of interest that have been identified. This is reasonable, but DHBs need to be clear whether it is an interest or a conflict of interest that is being recorded.

Disclosing interests generally can be a useful precursor to disclosing and managing conflicts of interest in particular cases. However, it is not a substitute for doing so. In particular, the statutory requirements for members require them to declare and record *conflicts* of interest.

Interests cannot usefully be assessed in the abstract. It is necessary to consider whether the personal interest could affect or be affected by the matter that is before the DHB. Conflicts of interest are best assessed case by case. People may be connected to a matter in different ways, but sometimes it will be necessary to consider whether a possible connection is too remote or insignificant to realistically amount to a conflict of interest at all. Even if it is recognised as a conflict of interest, it may or may not be particularly serious.

The three DHBs have largely not taken advantage of the statutory waiver power that would enable them to make limited use of the knowledge and expertise of conflicted members. In our view, they might find it useful to do so. This power gives DHBs a flexibility that many other public entities do not have.

Risks of conflicts of interest in major contracts are not limited simply to the people who are on the evaluation panel or who are controlling the contracting process. Nor are they limited to the stages of formally assessing, recommending, and awarding a particular contract to a tenderer. They may arise at much earlier stages.

To say that there is a conflict of interest, and that it needs to be managed, is not an indication of a lack of trust or faith in the member or official concerned.

Conflicts of interest are sometimes natural, unavoidable, and inevitable (and to a considerable extent they are inherent in the DHB sector). Identifying and managing a conflict of interest is usually not about questioning the sincerity of an individual's motives or intentions. Rather, what is important is being able to show that public decision-making is fair and sound.

None of our comments should be taken to mean that DHBs cannot involve people who have experience, knowledge, connections, or contacts with other organisations. Nor does it mean that members and staff cannot have other commercial relationships with their DHB. However, DHBs need to recognise that, because of this, there may sometimes be particular matters in which people should not be involved or should be involved in a limited way.

## Our recommendations

We recommend that:

1. the three Auckland District Health Boards include in their conflicts of interest policies further information or criteria for managers about how to assess the seriousness of a conflict of interest to help managers decide what, if anything, needs to be done about particular conflicts of interest;
2. the Auckland District Health Board adopt a policy on conflicts of interest specifically to assist members;
3. the Counties Manukau District Health Board adopt a policy on conflicts of interest specifically to assist members;
4. the three Auckland District Health Boards take further steps to enable managers in operational departments to understand and apply the organisation's conflicts of interest policies;
5. the Auckland District Health Board identify and record conflicts of interest of members for particular matters that arise at meetings, so that it is clear when a member should not participate in a specific matter (or when the formal waiver procedures may need to be considered);
6. the Counties Manukau District Health Board identify and record conflicts of interest of members for particular matters that arise at meetings, so that it is clear when a member should not participate in a specific matter (or when the formal waiver procedures may need to be considered); and
7. the Auckland District Health Board assign an administrative staff member or team the responsibility of leading, fostering, and co-ordinating the organisation's management of conflict of interest issues.



# Part 1

## Introduction

- 1.1 In this Part, we explain:
- why we did the audit;
  - the scope of our audit;
  - how we carried out our audit; and
  - the nature of conflicts of interest.

### Why we did the audit

- 1.2 On 20 March 2007, the High Court set aside a contract for laboratory services in the Auckland region between the three Auckland District Health Boards (the Auckland DHB, the Counties Manukau DHB, and the Waitemata DHB) and Lab Tests Auckland Limited: *Diagnostic Medlab v Auckland District Health Board* (the *Diagnostic Medlab* case).<sup>1</sup>
- 1.3 The Court found that one of the members of the Auckland DHB had a conflict of interest and that the DHBs did not do enough to protect the process of awarding the contract from that conflict of interest.
- 1.4 As a result, the Minister of Health asked the Auditor-General to carry out a performance audit under section 16 of the Public Audit Act 2001 to examine how conflicts of interest are dealt with in each of the three Auckland DHBs.
- 1.5 The Auditor-General agreed to this request.

### Scope of our audit

- 1.6 Our audit examined whether:
- each of the three Auckland DHBs has and is operating adequate systems and processes for identifying and disclosing conflicts of interest, having regard to legal and other public sector standards;
  - each of the DHBs has and is operating adequate systems and processes for managing conflicts of interest, having regard to legal and other public sector standards; and
  - the governance and management structures and arrangements of each of the DHBs adequately support the prudent management of conflicts of interest.
- 1.7 In other words, the audit considered how well the three Auckland DHBs were equipped to deal with conflicts of interest overall. It did not focus on inquiring into specific incidents. In particular, the audit did not consider:
- the factual situation that was the subject of the decision in the *Diagnostic Medlab* case; or

<sup>1</sup> High Court, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J. (The judgment is partially reported at [2007] 2 NZLR 832, but most of the discussion of the conflict of interest issue is omitted.) At the time of writing our report, the Court's decision was the subject of an appeal to the Court of Appeal.

- whether the contract the DHBs entered into with Lab Tests Auckland Limited should have been set aside.

1.8 As our audit focused on only the three Auckland DHBs, our findings are necessarily limited to them. Nevertheless, we consider that some of the issues and lessons that we discuss may be relevant to other DHBs and other public entities (see in particular Parts 2 and 6).

### How we carried out our audit

1.9 We examined a significant amount of documentation from the DHBs, including policies, procedures, other guidance material, minutes, registers, and file excerpts. We also considered other relevant guidance material aimed at the health system or parts of it.

1.10 We interviewed a wide range of people at each of the DHBs, including board members, the chief executive, other senior staff, other administrative staff, and clinicians.

### The nature of conflicts of interest

1.11 Managing conflicts of interest requires careful judgment, and involves a balance. An approach that is too relaxed will lead to legal and reputational risks, and undermine public confidence in the entity. Equally, an approach that is too cautious and restrictive could frustrate the entity and its members and staff from operating effectively.

1.12 In 2007, we published general guidance for the public sector called *Managing conflicts of interest: Guidance for public entities*.<sup>2</sup>

1.13 Our approach to assessing the management of conflicts of interest is derived from a wide range of New Zealand and overseas sources of guidance (listed in that publication), and from our own inquiry reports in recent years.<sup>3</sup>

1.14 Our 2007 general guidance publication explains how to understand conflicts of interest in a public sector context, and how to identify, disclose, and manage them. It presents our view on what constitutes good practice in the public sector. It does not set rules, but aims to provide a coherent source of advice to help public entities develop their own policies and to understand how to make sensible and prudent decisions when trying to manage conflicts of interest.

1.15 We consider that, in the public sector, there is a conflict of interest when a member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

<sup>2</sup> This is available on our website at [www.oag.govt.nz](http://www.oag.govt.nz).

<sup>3</sup> See, for example, our 2004 report *Christchurch Polytechnic Institute of Technology's management of conflicts of interest regarding the Computing Offered On-Line (COOL) programme*.

- 1.16 The other interest or duty might exist because of:
- the member's or official's own financial affairs;
  - a relationship or other role that the member or official has; or
  - something the member or official has said or done.
- 1.17 Interested readers should refer to our general guidance publication for more detail. However, some main points from that publication are worth restating.
- 1.18 Impartiality and transparency in administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations. They expect people who work in the public sector to act impartially, without any possibility that they could be influenced by favouritism or improper personal motives, or that public resources could be misused for private benefit.
- 1.19 However, in a small country like ours, conflicts of interest in our working lives are natural and unavoidable. The existence of a conflict of interest does not necessarily mean that someone has done something wrong, and it need not cause problems. It just needs to be identified and managed carefully.
- 1.20 Just because a member or official has an interest outside their work, it does not necessarily follow that they have a conflict of interest. A conflict of interest occurs only if something arises at work that overlaps with the other interest. A conflict of interest is about the overlap, intersection, or coincidence of two different interests or duties, where one could affect the other.
- 1.21 The public entity needs to consider whether there is a reasonable risk that the situation could undermine public trust and confidence in the member, official, or public entity. Public perceptions are important. It is not enough that public sector members or officials are honest and fair; they should also be clearly seen to be so.
- 1.22 Managing conflicts of interest well is not only good practice but also protects the public entity and the member or official involved. A conflict of interest that is hidden, or that is poorly managed, creates a risk of allegations or perceptions of misconduct, or of other adverse consequences such as litigation.
- 1.23 Rules and expectations about conflicts of interest have a variety of sources. People managing conflicts of interest need to consider both the ethical and legal dimensions of conflicts of interest. (In Part 2, we discuss some particular rules that apply to DHBs.)

- 1.24 Policies and procedures can provide clear rules for simple and predictable situations, and set out a process for dealing with the more difficult ones. It is for each public entity to decide what policies and procedures it should have in place to help it manage conflicts of interest. The policies and procedures will depend on the entity's structure, functions, and activities, and any applicable statutory requirements. The entity should consider what its operations are, what fields it operates in, and what sorts of problems or risks might typically arise. Our published guidance discusses the sorts of matters that policies and procedures could cover.
- 1.25 However, policies and procedures are not enough. They cannot anticipate every situation, since a conflict of interest can arise in a wide range of circumstances. Moreover, the seriousness of some situations will be a question of degree, and not easily managed by a rule. Accordingly, judgement will be required in some situations.
- 1.26 There are two aspects to dealing with particular situations:
- identifying and disclosing the conflict of interest (primarily the responsibility of the member or official concerned); and
  - deciding what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public entity).
- 1.27 In these cases, the public entity needs to assess carefully:
- the seriousness of the conflict of interest; and
  - the range of possible mitigation options.
- 1.28 The focus of the assessment is not primarily the risk that misconduct will occur. It is about the seriousness of the connection between the interests, the risk that the public entity's capacity to make decisions lawfully and fairly may be compromised, and the risk that the entity's reputation may be damaged. In making this assessment, the entity needs to consider how the situation may reasonably appear to an outside observer.
- 1.29 Usually, mitigation means that the member or official withdraws from, or is excluded from being involved in, the public entity's work on the particular matter.



## Part 2

# Conflicts of interest in district health boards

- 2.1 In this Part, we discuss:
- what DHBs are;
  - particular conflict of interest rules that apply to DHBs; and
  - types of conflicts of interest that commonly arise at DHBs.

### District health boards

- 2.2 A DHB is a Crown entity constituted under the Act. There are 21 DHBs in New Zealand.
- 2.3 A DHB is governed by a board, which is made up of publicly elected members and government-appointed members. A board must have a community and public health advisory committee, a disability support advisory committee, and a hospital advisory committee (the statutory committees), and it may have other committees.
- 2.4 Using mostly government funding, a DHB provides, or funds the provision of, health services and disability support services within a particular geographical area. This means that, for a certain locality, some services are provided to patients directly by a DHB through its clinical and other staff (such as at a public hospital). Some other services are provided by private or community-based organisations (such as by a privately owned clinic or a primary health organisation), under a contractual arrangement with a DHB, with funding that has been provided by that DHB. These two roles are often respectively called the “provider” and “funder” roles of DHBs.
- 2.5 The three Auckland DHBs are large organisations. They each employ more than 5000 staff, and each year they each receive in the vicinity of \$1 billion in revenue. They each serve communities of more than 400,000 people.
- 2.6 The DHBs also have some subsidiaries. Most relevant to this audit, the three Auckland DHBs own Northern DHB Support Agency Limited, which helps co-ordinate or carries out some projects or activities where the three Auckland DHBs wish to work together. The Counties Manukau DHB and the Waitemata DHB own HealthAlliance NZ Limited (HealthAlliance), which among other things handles much of their purchasing of equipment and consumables.

## Particular conflict of interest rules that apply to district health boards

### Statutory rules

- 2.7 For DHBs, there are some specific statutory rules that apply to board and committee members, especially for meetings.<sup>1</sup>
- 2.8 Before appointment or election, a prospective member must disclose to the Minister of Health or electoral officer (or to the board, in the case of a committee member) all conflicts of interest that they have, or are likely to have, in matters relating to the DHB. The statement must be incorporated into the interests register, along with subsequent changes to matters in that statement. A person who fails to disclose a material conflict of interest before accepting nomination as a candidate for election is disqualified from membership of the board. A board member of a publicly owned health and disability organisation may not be appointed to a statutory committee that is likely to regularly advise on matters relating to transactions in which the person is interested.
- 2.9 A member who is interested in a transaction of the DHB must disclose the nature of the interest to the board or committee.<sup>2</sup> The disclosure must be recorded in the minutes and in the interests register. The member must not take part in any deliberation or decision of the board or committee relating to the transaction; nor sign related documents.
- 2.10 However, there are partial waiver powers. The other members of the board or committee may decide to permit the member to participate in the board's or committee's deliberations (but not its decision) about the transaction. Certain matters about the permission must be recorded in the minutes.
- 2.11 Also, the Minister of Health may waive or modify the prohibition on participation for particular board members, transactions, or classes of transactions. A copy of any such waiver or modification must be presented to the House of Representatives.<sup>3</sup>
- 2.12 A member who fails to comply with these provisions may be removed from office.

1 See sections 6, 21, and 29, clauses 6 and 17 of Schedule 2, clauses 36-39 of Schedule 3, and clauses 6 and 38-39 of Schedule 4 of the Act. Section 31 of the Crown Entities Act 2004 also applies to appointed board members, and sections 53 and 59 of that Act apply to all board members. Sections 62-72 of the Crown Entities Act do not apply to DHBs, but may apply to their subsidiary companies.

2 See the Glossary for the definitions of the terms "transaction" and "interested in a transaction". The definitions come from the Act, and are broad.

3 For committees, this power can be exercised by the board, rather than the Minister of Health. The board must provide a copy of the notice to the Minister.

- 2.13 A person who performs or exercises functions, duties, or powers of the board that have been formally delegated to them must consider whether they have any conflicts of interest, and if so must disclose them to the board.
- 2.14 The Act does not require DHBs to maintain a register of ongoing personal interests of members or staff (although a DHB may do so as a matter of policy). Rather, the matters that the Act requires to be recorded in the “interests register” are members’ declared *conflicts* of interest in particular matters.<sup>4</sup>

### Other relevant rules

- 2.15 Like all public entities, DHBs are also subject to the general common law rules that require procedural fairness in public decision-making.<sup>5</sup>
- 2.16 Many clinical staff of a DHB will be bound by codes of conduct and ethical standards set and enforced by their own professional regulatory bodies.<sup>6</sup> In general, we consider that the expectations in such publications are consistent with other relevant rules and expectations (including our expectations) about conflicts of interest.
- 2.17 The State Services Commissioner’s new code of conduct of the State Services (*Standards of Integrity and Conduct*) will apply to DHBs from 30 November 2007. The Ministry of Health also provides some other guidance for DHBs.
- 2.18 DHBs may have internal policies and procedures for dealing with conflicts of interest (see Part 3). One common procedure is to require senior staff and members to regularly record various types of ongoing personal interests in an interests register. This can be an effective tool to make it easier to identify and manage particular conflicts of interests when they arise, but it is not the same as disclosing conflicts of interest. (We discuss the use of interests registers, and the difference between disclosing interests and disclosing conflicts of interest, in Part 6.)

### Types of conflicts of interest that commonly arise at district health boards

- 2.19 Managing conflicts of interest can be especially difficult in DHBs.

4 The Act does not always use the exact phrase “conflict of interest” in this context, but that is the effect of the relevant provisions. The Act says that when a member is “interested in a transaction” of a DHB, they must disclose “the nature of the interest” to the board, and the disclosure must be recorded in the minutes and “entered in a separate interests register maintained for the purpose”. (See the Glossary, paragraph 2.18, and Part 6.)

5 These rules were applied in the *Diagnostic Medlab* case. The effect is that the statutory rules are not exhaustive. It may be possible to comply with the statutory provisions yet still be found to have acted unfairly in an administrative law sense.

6 See, for example, the New Zealand Medical Association’s *Code of Ethics* (2002); St George, Ian (ed) (2007), *Cole’s Medical Practice in New Zealand*, New Zealand Medical Council, Wellington, Foreword and Chapter 20; and guidance published by organisations such as the Royal Australasian College of Physicians and the Royal Australasian College of Surgeons.

- 2.20 Straightforward examples of a conflict of interest often include a person being in a position where they can influence or make a decision to employ a relative, award a contract to a company in which they have a financial interest, or offer a grant to an organisation to which they belong. These situations can occur anywhere in the public sector, including within DHBs, but are generally fairly easy to identify and manage.
- 2.21 However, several types of conflict of interest are quite specific to – and widespread within – the DHB sector, and are not always easy to manage. In part, this is because of three structural characteristics of the sector:
- Many board and committee members (especially elected members) may have those roles because they have a strong personal or professional interest in the health system, perhaps through operating or working for an organisation that receives funding from a DHB.
  - Commercial product suppliers, especially pharmaceutical companies, are widely regarded as having a strong influence on the health system.
  - Many senior clinicians, particularly specialist doctors, work part-time in the public sector (that is, as an employee of a DHB) and part-time in private practice.
- 2.22 These characteristics give rise to a number of situations or risks where interests may come into conflict. We encountered these frequently during our audit.
- 2.23 In the following paragraphs we discuss the types of situations or risks that these characteristics can create.

### **Board and committee members**

- 2.24 It is fairly common for a board or committee member to work for (or own or operate) an external organisation that is funded by a DHB to provide health services. Examples include primary health organisations, pharmacies, laboratories, aged care organisations, mental health care organisations, and oral health organisations. The DHB board or committee may need to make decisions or recommendations that affect those services. The decisions might be quite specific to a contractual relationship with that particular provider, or might be at a high strategic level about, say, the relative priorities of different types of services that are competing for a limited pool of funding. Decisions at quite a high level can have flow-on effects that will ultimately affect the amount of funding a particular service provider will receive.

- 2.25 Also, a member may be at risk of being accused of bias if they act as a forceful advocate for, or representative of, a particular profession, health issue, or section of the community. Sometimes, holding or expressing strong views can reach the point where it is regarded as prejudice or predetermination for or against a person or issue.
- 2.26 These situations are difficult because it is generally desirable to have people involved in governance who have some knowledge or expertise that is of use to the DHB, and to include people who can contribute the perspectives of the various different stakeholders in the health system. Part of the rationale for having private and community health providers funded locally by DHBs is to promote local consultation, collaboration, and co-ordination. DHB boards are partly democratically elected, and it is common for the public to elect health professionals to DHB boards.
- 2.27 However, this makes it more likely that people involved in DHB decision-making will be placed in a difficult position through having a strong personal or professional stake in some matters that the DHB has to decide. A member's personal or professional expertise in the health system may make them a highly valued and effective member, but that same expertise may also mean they have conflicts of interest from time to time.

### **Involvement with commercial product suppliers**

- 2.28 Many of the major commercial suppliers of medical equipment, consumables, and pharmaceuticals are large multinational companies. Traditionally, to help market their products, such companies fund such activities as sponsorship, research, grants, hospitality, and gifts aimed at individuals working in healthcare (or indeed at an organisation as a whole). These activities can include sponsoring conferences or training events, funding travel for people to attend conferences or to study new products, funding or sponsoring particular clinical programmes or staff, corporate-box entertainment, dinners, and inexpensive giveaways such as pens.
- 2.29 Often, individual clinicians are the targets of these activities. They may receive some form of funding, hospitality, or gifts in the course of their work for a DHB. If they also work in private practice, they may receive such items in that capacity.
- 2.30 Some of this marketing is aimed at influencing the prescribing practices of clinicians for individual patients. That is a matter that professional ethics publications warn doctors to be careful about.

- 2.31 DHBs also make major purchasing decisions about equipment, consumables, and pharmaceuticals. Clinicians (or other DHB staff) who are involved in helping to make (or advise on) these decisions may be perceived as biased if they have received funding, hospitality, or gifts from a potential supplier.
- 2.32 These situations are difficult because at least some of these activities are legitimate and useful. Commercial funding is often a significant and valued source of funding for some DHB activities. Without it, some services may not be able to be provided and some medical research may not occur. In addition, ongoing professional education is necessary and important for clinicians. These issues are also difficult because marketing often aims to influence people subconsciously, so an individual will often genuinely believe that their professional judgement and objectivity has not been improperly affected. But clinicians and other DHB staff risk being accused of receiving inducements or rewards in the implicit expectation that they will favour a particular supplier when making decisions or offering advice in the course of their work.

### Senior clinicians and private practice

- 2.33 Having clinicians who work concurrently in both the public and private sectors is an inherent and long-standing feature of the health system. We do not suggest that this is wrong. DHBs enjoy the benefit of expert professionals who they might otherwise struggle to attract and retain. But it means that clinicians are sometimes placed in a difficult position.
- 2.34 Specialist doctors may be involved in helping to make (or advise on) DHB decisions about whether or how to contract out to private providers some or all of a DHB's services in a particular area, or about the ongoing management of the relationship with a private provider. A doctor may have a conflict of interest if they also work for an existing or potential private provider of such services (especially if they are an owner or operator of that provider).
- 2.35 Similar issues may arise where a doctor is involved in DHB decision-making about the purchase of equipment, consumables, or pharmaceuticals if the doctor also has an established and close business relationship with a particular supplier through their private practice (or if through their private practice they have already developed a strong preference for a particular brand of product).
- 2.36 These situations are difficult. Even where the doctors are not the main decision-makers, or not closely involved in controlling the decision-making process, it may still be necessary or highly desirable in the interests of sound and informed decision-making for the DHB to seek the input of its expert clinical staff who are most closely involved in the area. The clinicians may have valuable advice to offer,

or they may reasonably expect to be consulted. Yet, in highly specialised areas, it may be unavoidable that most or all of those DHB staff are also connected, in their personal capacity, to a potential alternative provider of the service or product.

- 2.37 In addition, specialist doctors who work part-time for a DHB and part-time in private practice may face conflicts of interest when working with patients. They may be faced with situations where they have the opportunity to:
- encourage a patient to seek surgery or other treatment at the doctor's private practice (or discourage them from attempting to use the DHB), in cases where the treatment could or should reasonably be undertaken at the DHB;
  - encourage a patient to use the doctor's own private practice, in cases where the patient needs to be referred to private practice but where there are other possible private providers whom the patient should also be informed about; or
  - conduct their work at the DHB in such a way that there is always too much work for the DHB to handle at any given time, so that there are continually cases that need to be transferred to the private sector.
- 2.38 Conversely, a doctor could attempt to fast-track a private patient *into* a DHB facility for treatment, ahead of other patients. Although this situation does not directly involve personal benefit for the doctor's private practice, it could be seen as allowing favouritism to influence a DHB's operations.
- 2.39 These issues are difficult, in part because the doctor-patient relationship is largely conducted in a personal and confidential way. This is quite proper, but it also means that these risks are difficult to assess or manage.
- 2.40 Doctors have strong ethical obligations, which they generally take very seriously. Doctors also generally strongly believe that their advice and decisions are always in their patient's best interests, because of their ethical obligation to do their best for their patient and to provide their patient with access to the necessary care and the ability to make informed decisions. Their good faith in this respect is usually not questionable, but it can sometimes mean that the doctor may not appreciate how the situation could appear to an outside observer. They may be unable to see that certain advice can also appear as if it is intended to benefit the doctor personally.
- 2.41 Also, because doctors rely to a large extent on their own individual judgement, exercised professionally and independently, they are sometimes less receptive to guidance or instructions from non-clinical managers and are sometimes less concerned about their organisation's administrative requirements.

### Other issues

- 2.42 A DHB employee (whether a clinician, administrator, or other staff member) may be elected as a board member of the DHB. This is permitted by the Act. However, it can create risks if the board considers matters that may directly affect the employee. This should not normally be a significant problem, because employment matters are usually left to the chief executive to manage and matters relating to employment agreements are often delegated to others to negotiate on a national basis. Also, it might create an uncomfortable situation if the performance of the chief executive is being assessed by a body that includes one of their subordinates.
- 2.43 Sometimes, when a DHB is deciding which provider to fund for delivery of a particular service, one of the potential providers belongs to, or is part of, the DHB. This risks creating an organisational conflict of interest, where other potential providers might question the ability of the DHB to make a fair decision. It may be unavoidable, because of the DHBs' combined funder and provider roles, although the roles of particular individuals might have to be segregated as much as is practicable.
- 2.44 Some people who work in the health system are also involved in external expert advisory organisations, professional regulatory or training organisations, community or advocacy organisations, or other public sector organisations. Sometimes, the activities or interests of that other organisation may overlap with the person's work at a DHB in a way that could divide their loyalties and so create a conflict of interest.
- 2.45 Clinicians generally have a strong sense of their professional and ethical duty to act in the best interests of their patients. Occasionally, this may lead to their feeling obliged to resist, perhaps even publicly, something that their DHB is doing, which could create a conflict between their professional obligations and their obligations to their employer.
- 2.46 In the situations described in this Part, it is often not easy to decide where to draw the line between acceptable and unacceptable behaviour.



## Part 3

# Policies and procedures

- 3.1 In this Part, we discuss the policies and procedures for identifying, disclosing, and managing conflicts of interest that we reviewed at each of the three Auckland DHBs.
- 3.2 We make some general findings that apply to all three DHBs, and then discuss matters that relate to each of the DHBs in turn.

### General findings for the three Auckland District Health Boards

#### Policies for staff

- 3.3 The three Auckland DHBs all have policies and procedures for staff that are specifically about managing conflicts of interest (and some related policies also address conflicts of interest). The policies and procedures have mostly been in place for several years.
- 3.4 The policies and procedures at each of the three Auckland DHBs differ in detail and form, but their overall approach is fairly similar and in some areas their policy content is identical.
- 3.5 In general, we were pleased with the content of the DHBs' policies for staff.
- 3.6 The conflict of interest policies for staff all exhibit the following positive features:
- They explain the concept of conflicts of interest, and acknowledge the importance of managing risks and how situations might be perceived by others.
  - They are largely consistent with the relevant legal requirements that apply to DHBs, but are not limited to compliance with legal rules. They also treat conflicts of interest as having an ethical dimension.
  - They describe a broad range of types of conflict of interest that can arise, and are not limited to business or financial interests.
  - They discuss identifying, disclosing, and managing conflicts of interest.
  - They closely focus on particular issues and examples that are especially relevant to the DHB sector (but do not imply that the examples discussed are exhaustive).
  - They do not rely solely on periodic declarations of interests, but impose an ongoing obligation on people to disclose conflicts of interest when they arise.
  - They are not overly rigid, but allow for judgement to be applied in particular cases.

- They are generally easy to understand, and contain enough detail to provide helpful guidance without being too long.
- They (or related policies) often impose additional requirements on people closely involved in high-risk areas such as major contracting and funding decisions.

3.7 The policies contain detailed examples and guidance about particular scenarios that can arise for DHB personnel, where a person's other activities or connections can sometimes give rise to a conflict of interest. They typically cover:

- doing business with close relatives;
- interests in organisations with activities similar to the DHB;
- disclosing confidential information;
- receiving fees, rewards, hospitality, and gifts;
- sponsorship, travel, or other funding to attend conferences or meetings;
- activities on public bodies, or professional or employee organisations;
- participating in political activities;
- making public statements;
- workplace relationships;
- referring patients to private practice;
- relationships with pharmaceutical companies, and medical and surgical equipment suppliers;
- evaluating or endorsing new products;
- making presentations to decision-making bodies; and
- acting as a paid adviser to suppliers.

3.8 The policies include examples of what is and is not acceptable behaviour for some of these particular types of conflict of interest. Sometimes, they suggest that the situation is acceptable only if it has been notified to, or approved by, the person's manager. This is reasonable, because many situations will need to be judged case by case. However, the policies do not always contain much general guidance for managers about how to exercise their judgement in those cases. The policies could be enhanced by including further information or criteria for managers about how to assess the seriousness of a conflict of interest (which in turn will inform what mitigation action, if any, should be taken). Such information need not seek to prescribe particular responses, but could give managers more guidance about the relevant factors to bear in mind when weighing up particular

situations.<sup>1</sup> This would also help reduce the risk of significant inconsistency between decisions made by different managers, particularly since decisions could be made by a range of different people within each DHB.

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### **Recommendation 1**

We recommend that the three Auckland District Health Boards include in their conflicts of interest policies further information or criteria for managers about how to assess the seriousness of a conflict of interest to help managers decide what, if anything, needs to be done about particular conflicts of interest.

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- 3.9 Until recently, there were no comprehensive or widely followed policies or procedures focused specifically on contracting for services (that is, tendering or similar processes for awarding funding contracts to external providers for the delivery of health services).
- 3.10 Regional contracting guidelines were prepared in 2007, and seem likely to be adopted by all three Auckland DHBs. These guidelines are likely to be based in the Northern DHB Support Agency. They provide detailed guidance for managing all aspects of service contracts. In several places, they discuss conflicts of interest.
- 3.11 Under the guidelines, any person involved in selecting a service provider will be required to disclose any conflicts of interest and managers will need to ensure that the conflicts of interest are addressed. People on an evaluation panel will need to sign an “evaluation panel code of conduct” (which contains additional guidance). Tenderers will also be required to declare any matters that might cause a conflict of interest. In our view, these guidelines will be very helpful.
- 3.12 We discuss each DHB’s other policies for staff below.
- 3.13 Overall, in our view, the policies for staff do not require significant change.

### **Policies for members**

- 3.14 All the DHBs have provisions in their Standing Orders that quoted or paraphrased the statutory rules about members’ participation in board or committee meetings.
- 3.15 We discuss each DHB’s policies for members separately.

### **Procedures for recording interests and conflicts of interest**

- 3.16 DHBs are required by law to record disclosures of conflicts of interest by members in an interests register.
- 3.17 All of the DHBs operate interests registers for board members. The DHBs collect information about the interests of members of statutory committees, and mostly

<sup>1</sup> See our guidance in paragraphs 4.14-4.40 in our publication *Managing conflicts of interest: Guidance for public entities*, and in particular paragraph 4.23.

maintain these in the interests registers.<sup>2</sup> However, they do not keep interests registers for non-statutory committees of the board. They ought to do so, because the legal requirement to keep interests registers applies to these committees too.<sup>3</sup>

- 3.18 They also operate interests registers for senior staff.
- 3.19 They use their interests registers to record ongoing interests, not just conflicts of interest, and update them from time to time. Most of the disclosures we saw recorded in the DHBs' interests registers were of interests, rather than conflicts of interest. (We discuss this distinction further in Parts 4 and 6.)

## Auckland District Health Board

### Policies for staff

- 3.20 The Auckland DHB has a conflicts of interest policy that applies to staff, which was adopted in 2005. The content of that policy is virtually identical to the equivalent policy at the Counties Manukau DHB.
- 3.21 The general definition of a conflict of interest is:
- ... when it is likely that an employee could be influenced or could be perceived to be influenced by a personal or private interest **in any transaction** whilst carrying out their responsibilities for the DHB.*
- 3.22 The policy defines “transaction” as in the Act. The policy defines “interest in a transaction” in a way that may give the impression that it is limited to financial matters. In our view, such a focus is too narrow. However, in other places the policy seems to take a broader approach to the concept.
- 3.23 There is also a more general policy called *Standards of conduct*, adopted in 2002, which also contains material about conflicts of interest. It can be useful for an entity to have a broad code of conduct in addition to specific policies on particular topics. However, the discussion on conflicts of interest in this policy is different from that in the conflicts of interest policy, and there is no explicit cross-reference to the conflicts of interest policy. This overlap could cause confusion or mislead people into believing that the *Standards of conduct* policy is the DHB's sole or main source of guidance about conflicts of interest. Overall, we consider that the guidance in the conflicts of interest policy is the more useful of the two.
- 3.24 The DHB has four policies dealing with various (and sometimes overlapping) aspects of the area of sponsorship, donations, hospitality, and gifts. Two of them were introduced in early 2007. The policies provide that all such matters are to be recorded and approved by a more senior person.

<sup>2</sup> See paragraph 3.37 for our comments about the Auckland DHB.

<sup>3</sup> See clause 38(8) of Schedule 3 of the Act.

- 3.25 The level of approval required depends on the type and value of the matter. Low-value gifts and hospitality (under \$100) need to be approved by the person's manager and recorded in a register held in the person's department. Larger items require higher-level approvals and need to be reported to a central administrator.
- 3.26 In 2007, administrative staff started to monitor some sponsorship, especially travel, to ensure that it did not create risks for upcoming major contracts, and had started to ask sponsors to confirm in writing that they did not expect anything in return for their offers.
- 3.27 The amount of guidance in this area is commendable. However, the amount of detail and potential overlap, particularly spread among four different policy documents, could be too confusing for users. In our view, the policy content might be more effectively consolidated into one or two documents.
- 3.28 There is a separate policy on procurement. We expected it to mention conflicts of interest at relevant points, or at least contain a cross-reference to the conflicts of interest policy. We were disappointed that it did not.
- 3.29 We were told that it was common for people involved in a major contract to complete a conflicts of interest declaration form. However, we were not provided with this and it is not a requirement of the procurement policy.
- 3.30 Overall, there are few cross-references to the conflict of interest policy in related policies.

### **Policies for members**

- 3.31 As noted in paragraph 3.14, the DHB's Standing Orders have provisions about conflicts of interest in meetings. However, those provisions could be fuller. For example, they do not explain the statutory definitions given to the terms "transaction" and "interested in a transaction". It would be helpful to do so, given the broad definitions of those terms.
- 3.32 The statutory rules about participation in meetings are covered in training sessions for new members.
- 3.33 However, there are no relevant policies or written guidance dealing with conflicts of interest aimed specifically at members. The *Standards of conduct* policy and one of the gift policies state that their coverage included members, but the content focuses exclusively on staff. It was also not clear to us how members were made aware of those policies. In our view, it would be helpful to have a policy or other written guidance material about conflicts of interest that is aimed specifically at members, because the issues for members may be different (see also paragraphs 3.46-3.47).

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### Recommendation 2

We recommend that the Auckland District Health Board adopt a policy on conflicts of interest specifically to assist members.

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- 3.34 There is a policy providing specific guidance for DHB employees who are also board members. This is a useful policy to have.

### Procedures for recording interests and conflicts of interest

- 3.35 There is an interests register for senior staff that applies to the senior management team. It records interests of those staff. It was not clear to us how often it was updated. In our view, it would be better if relevant staff were reminded at least once a year to update their details. We also saw some examples of disclosures of conflicts of interest by staff.
- 3.36 The interests register for board members was updated from time to time. It contained interests, rather than conflicts of interest. The register did not have the same high profile at board meetings of the Auckland DHB as at the other two DHBs. For example, it did not appear to be routinely circulated to members for checking and amending. We saw little evidence of disclosures of interests or conflicts of interest being recorded in the minutes.
- 3.37 Information about the interests of members of statutory committees was collected, but it was not generally collated or maintained in an easily accessible form, so in our view does not constitute a register. A register is a readily available list, catalogue, or other formal record.
- 3.38 Board members' interests were also disclosed in the DHB's annual report. Although this is not strictly required, it helps to promote transparency.

## Counties Manukau District Health Board

### Policies for staff

- 3.39 The Counties Manukau DHB has a conflicts of interest policy that applies to staff, which was adopted in 2005. The contents of that policy are virtually identical to the equivalent policy at the Auckland DHB (see paragraphs 3.21-3.22).
- 3.40 The DHB told us it was likely to conduct a full review of its policy once we had completed our audit.
- 3.41 There is a separate policy on donations, gifts, and sponsorship. In general, most such matters need to be referred to a more senior person who determines whether they can be accepted. More valuable gifts must be recorded in writing, in a gifts register.

- 3.42 Most purchasing of equipment and consumables for the Counties Manukau DHB and the Waitemata DHB is managed by their subsidiary, HealthAlliance. HealthAlliance has a procurement policy, which covers conflicts of interest and gifts, and general probity expectations. HealthAlliance also has a policy on gifts, sponsorship, and entertainment. Staff (including DHB staff) and contractors involved in a review of such matters were routinely required to complete a form declaring any relevant interests or gifts or hospitality.
- 3.43 At the time of our audit, HealthAlliance was revising its procurement policy and form. In addition, it was preparing similar procurement policies for the Counties Manukau DHB and the Waitemata DHB. This will be an improvement, because it was not previously clear whether HealthAlliance's requirements formally applied to contracts managed directly by the DHBs.

#### **Policies for members**

- 3.44 As noted in paragraph 3.14, the DHB's Standing Orders have provisions about conflicts of interest in meetings. However, those provisions could be fuller. For example, they do not explain the statutory definitions given to the terms "transaction" and "interested in a transaction". It would be helpful to do so, given the particularly broad definitions of those terms.
- 3.45 In recent years, the board has been provided with various general guidance papers about a range of governance matters, including conflicts of interest (such as, most recently, a one-page quick reference guide to the statutory requirements).
- 3.46 However, there are no general policies for members that deal with all aspects of conflicts of interest. We consider that such a policy would be helpful. It need not be as detailed as the policy for staff, because the governance nature of members' roles is such that their involvement is largely limited to participating in formal meetings. Members are not generally involved in day-to-day operations in the range of different ways that staff can be.
- 3.47 However, simply referring to the statutory provisions may not be enough. In our view, members could also benefit from guidance about such matters as bias and predetermination, the need to consider perceptions of conflicts of interest, behaviour outside meetings (such as attempting to lobby staff for personal benefit), managing their other work when it might overlap with DHB matters, confidential information, and gifts and hospitality.

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### Recommendation 3

We recommend that the Counties Manukau District Health Board adopt a policy on conflicts of interest specifically to assist members.

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### Procedures for recording interests and conflicts of interest

- 3.48 An interests register for senior staff was set up in early 2007, and the DHB told us it intended to update it quarterly. It applies to the senior management team, but the DHB was considering whether to apply it to some other senior personnel.
- 3.49 The interests register for board members is distributed to members with the agenda papers for each meeting. Also, “disclosure of interests” is a standard agenda item at the beginning of each meeting. In our view, these are useful steps, because they enable the register to have a high profile among members. The register was regularly updated by members, as their personal circumstances changed. Disclosures were generally offered orally. The disclosures were also recorded in the minutes. Disclosures were of interests, rather than conflicts of interest.
- 3.50 There are similar registers for the statutory committees. They were regularly updated, but we noted that in some cases they were incomplete.
- 3.51 Board members’ interests were not disclosed in the DHB’s annual report. Although this is not strictly required, it would help to promote transparency. In our view the DHB should consider doing so.

## Waitemata District Health Board

### Policies for staff

- 3.52 The Waitemata DHB has a conflicts of interest policy that applies to staff, which was adopted in 2003. The general definition is that employees:
- ... must avoid:*
- *activity*
  - *interests*
  - *relationships*
- with any person or entity outside Waitemata DHB which would create, or might appear to others to create, a conflict with the interests of Waitemata DHB.*
- 3.53 The conflicts of interest policy includes matters relating to gifts and hospitality, so there is no separate policy on that subject. Gifts (except those of “minimal value”) must not be accepted without the prior approval of the chief executive.



- 3.54 At the time of our audit, the policy was being revised, and the DHB was consulting internally on a draft new policy. The draft new policy is a significant rewrite of the current policy, and will provide fuller and more detailed guidance in some areas (although, in our view, the current policy is satisfactory for the time being). In part, it appears to draw on material from the other DHBs. The draft new policy formalises the interests register for senior staff, which existed previously but was not acknowledged in the policy. Gifts or benefits worth more than \$50 must be discussed with the person's manager before they are accepted. Overall, we consider that this policy is likely to be a very useful document, once finalised.
- 3.55 Several related policies discuss conflicts of interest (or contain cross-references to the conflicts of interest policy). These are policies on delegations, additional employment, fraud, discipline and dismissal, and recruitment. This indicated to us that the concept of conflicts of interest is well integrated throughout the DHB's policies.
- 3.56 The discussion in paragraphs 3.42-3.43 on policies about purchasing equipment and other supplies at the Counties Manukau DHB also applies to the Waitemata DHB.

### Policies for members

- 3.57 For members, a policy called *Guidelines and protocols for board and committee members* (which incorporates a code of conduct) was adopted in 2005. This policy contains material on conflicts of interest. The guidance is a helpful summary of the statutory provisions for members, and also discusses the need to be alert for a "perception" of conflict of interest. The policy advises that "normal practice" with conflicts of interest is to leave the room. The policy contains warnings about using one's position for personal gain, and covers gifts. It also contains guidance about confidential information, about members doing other paid work for the DHB, and about consultation processes (including the need for members to keep an open mind).
- 3.58 We consider that this general guidance policy for members is useful.

### Procedures for recording interests and conflicts of interest

- 3.59 There is an interests register for senior staff. As well as covering the senior management team, it includes information about a wide range of other senior staff who have a key role in major contracts or appointments. At the time of our audit, it was up to date. However, it had been updated irregularly during the last few years. In our view, it would be better if relevant staff were reminded at least once a year to update their details.

- 3.60 The most recent version of the interests register for board members is published in the board's agenda papers for each monthly meeting. Also, "disclosure of interests" is a standard agenda item at the beginning of each meeting. In our view, these are useful steps, because they enable the register to have a high profile among members. The register was regularly updated by members, as their personal circumstances changed.
- 3.61 Disclosures were generally made in writing. The document routinely circulated among members contained a summary of their interests, but full records were kept of each individual disclosure. Disclosures were also recorded in the minutes. When a disclosure was of a conflict of interest in a particular situation, the action taken to manage the situation (that is, that the member abstained from participating or left the meeting) was usually also recorded.
- 3.62 There are similar registers for the statutory committees.
- 3.63 Board members' interests were also disclosed in the DHB's annual report. Although this is not strictly required, it helps to promote transparency.

## Part 4

# Dealing with conflicts of interest in practice

- 4.1 In this Part, we describe how well the policies and procedures of the three Auckland DHBs are implemented and complied with in practice.
- 4.2 We discuss some general findings that apply to the three DHBs, and then discuss matters that relate to each of the DHBs.

### General findings for all the Auckland District Health Boards

#### General approach to dealing with conflicts of interest

- 4.3 In our view, administrative staff and staff in high-risk areas in the DHBs who were likely to consider conflict of interest issues most often had a good understanding of conflicts of interest.
- 4.4 The understanding of members, and of other managers and staff in operational departments we spoke to, was more variable. We consider that the understanding of others throughout the organisation (who may think about conflicts of interests infrequently) is likely to vary even more widely.
- 4.5 Administrative staff took conflict of interest issues seriously when such matters came to their attention. However, because of the size of the DHBs, it was difficult for staff to be confident that they were aware of all issues that might arise throughout the organisation, or that all people within the organisation actually complied with the relevant policies or expectations when a conflict of interest issue arose. Therefore, people we spoke to did not think it was possible to have complete assurance that all conflicts of interest were being identified and managed properly.
- 4.6 However, two mitigating factors were often mentioned in our interviews. One was that, although the organisations are large, in another sense the health system is an intimate one. People in each particular part often tend to know each other and have a range of dealings with each other. This may mean that unusual or improper behaviour is not likely to remain hidden for very long, if at all, and also that people are likely to value their own reputations highly (which may deter improper behaviour).
- 4.7 The second was that, because large organisations tend to be somewhat bureaucratic, most major decisions are likely to involve a lot of different people, at a range of levels. This is likely to increase the level of internal scrutiny of decisions and reduce the likelihood of a single individual being able to exert improper influence (or being improperly influenced by someone else).

- 4.8 We learned of a large number of anecdotal examples of the sorts of conflicts of interest that can arise (or that are at risk of arising). Administrative staff, in particular, were sensitive to risks to the organisation, and we saw examples of cautious and sensible judgements about conflicts of interest.
- 4.9 We found very few examples of serious breaches of rules or expectations, or other matters that had involved formal complaints or suspected misconduct requiring investigatory or disciplinary action, or that had caused major legal, financial, or reputational risks.
- 4.10 Where the DHBs required interest or conflict of interest forms to be completed at certain times (such as for registers of members or senior staff, or for people closely involved in an evaluation for a major contract), we gained the impression that these requirements were generally complied with. However, we did not review files to verify the extent to which all people involved in a major contract completed such forms when they were expected to do so.
- 4.11 Particular conflicts of interest can arise at any time. Other than routine written declarations of interests, we found that conflicts of interest were often dealt with orally. There was usually very little documentation<sup>1</sup> (of either disclosures or decisions about how to manage them), unless the relevant discussions had occurred by email. To some extent, this is perhaps natural, especially if it is quickly and easily decided, without any dissent, that the conflicted person is simply not going to be involved in the matter (for example, by not being considered for appointment to an evaluation panel or working group). Nevertheless, we expected to see more documented examples of how particular conflicts of interest were managed. Good record-keeping, as well as being prudent business practice, is an important element in risk management of issues that have the potential to cause problems if not well handled. Also, the DHBs' policies expect conflicts of interest to be documented.
- 4.12 Sometimes, after an interest or conflict of interest was disclosed, people did not always consider whether and how the situation should be assessed and managed (see paragraphs 4.21-4.26 and 4.28 for the individual DHBs, and Part 6). Many of the conflict of interest issues that are inherent in, or common across, the DHB sector (as outlined in Part 2) were well known but were often considered to be "too hard" to deal with.

### Availability and awareness of policies

- 4.13 People we spoke to during our audit were all generally aware of the need to be alert for conflicts of interest. They expected their DHB to have a policy on the topic.

<sup>1</sup> Except for matters that arise in board or committee meetings, which are usually recorded in the minutes.

- 4.14 Many of the people we spoke to were not familiar with the details of their relevant policies. That was not, in itself, of great concern to us. Large organisations commonly have extensive sets of policies. It is more important that people have an understanding of the broad expectations of them, know generally what sorts of matters the relevant policies are likely to cover, and know how to find the policies when they need them.
- 4.15 The DHBs' policies were all available to staff. Almost all clinical and administrative staff used computers as part of their day-to-day work, and the policies were usually accessed electronically, through an intranet.
- 4.16 All of the policies relied, at least to some extent, on the manager of the affected individual to decide how to deal with conflicts of interest, rather than having all matters referred to a single or central decision-maker. This is necessary, given the large size of the organisations, but it also means that the people who may need to make many of the day-to-day decisions about staff will be managers who work in operational departments (for example, Service Managers and Clinical Heads, and some managers who report to them), rather than in a DHB's administrative centre.
- 4.17 Such managers may not be familiar with the relevant policies, and may not even necessarily be aware of them unless the policies are drawn to their attention. For this reason, we consider that the DHBs could do more to raise awareness of how to manage conflicts of interest under their policies, especially among managers in operational departments. Training and support for these people is especially important. The DHBs may find it useful to promote awareness of the contents of their policies, and how to use them, through such methods as occasional articles in staff newsletters and targeted training sessions for managers in operational departments.

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**Recommendation 4**

We recommend that the three Auckland District Health Boards take further steps to enable managers in operational departments to understand and apply the organisation's conflicts of interest policies.

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**Use of the statutory waiver procedures**

- 4.18 The DHBs did not generally use the statutory power to formally grant permission to a conflicted member to participate in discussions (but not vote).<sup>2</sup> We were told that the DHBs considered that procedure too difficult, cumbersome, or risky to use. (We discuss this further in Part 6.)

<sup>2</sup> We are aware of one example of this power being used, at the Waitemata DHB.

### Monitoring and review

- 4.19 The DHBs did not generally do much ongoing or periodic monitoring of how well their conflict of interest policies were understood and used, and how effective they were.
- 4.20 At the time of our audit all the DHBs had started, or were intending to start, a review of the contents of their policies and procedures.<sup>3</sup> They are likely to await our report before finalising their reviews.

### Auckland District Health Board

- 4.21 At the Auckland DHB, it was common to encounter an attitude that mere disclosure of interests was enough to deal with any potential issues. This applied to both staff and members.
- 4.22 Once a person's interest had been identified and disclosed, there was sometimes little consideration of:
- whether the interest gave rise to a conflict of interest in connection with a particular matter (that is, the question, decision, project, or activity that the person is or may be involved in); and
  - if so, how serious it was and what to do about it.
- 4.23 This may indicate some uncertainty over how or where to draw the line in some areas. However, it is not appropriate to simply ignore the question of whether a conflict of interest exists. A general disclosure of a personal interest is not the same as a disclosure of a *conflict* of interest (that is, making a disclosure when a personal interest overlaps with a particular matter that is before the DHB). Moreover, disclosure is an important starting point, but it cannot be assumed that mere disclosure is enough to manage a conflict of interest.
- 4.24 It is not enough to simply declare a general interest, but never consider whether it creates a conflict of interest in particular matters (nor to acknowledge a conflict of interest but proceed without considering what further action may be necessary). It is important to consider the next steps:
- The statutory rules for members are clear, and need to be applied deliberately, rigorously, and conscientiously. If a member has a conflict of interest in a particular matter, they must declare it and then abstain from participating in that matter (or, alternatively, the board or committee could formally grant them permission to participate in discussions but not vote).
  - For staff, the relevant manager should assess the seriousness of the conflict of interest, and then decide what steps to take to manage it.

<sup>3</sup> Some of this work was in response to the *Diagnostic Medlab* case, but some of the work predated it.

- 4.25 In particular, it was extremely rare to see examples of a member declaring a conflict of interest in a particular matter at a meeting and withdrawing from participation in the matter. This was surprising, given the range of interests that members have. We formed the view that some people considered that, because most members have a range of interests, everyone was conflicted to one degree or another and that, so as long as members' interests were well known, nothing more could or should be done about it. In other words, that any conflicts of interest would be too widespread or too difficult to deal with.
- 4.26 We do not agree. Members are not all conflicted. Conflicts of interest need to be considered case by case. For any given matter before the board or a committee, it may be that the decision could affect one or two members particularly, because of their other interests and roles. The normal expectation ought to be that their conflicts would be identified, and those members would not participate in those particular matters (unless the formal waiver procedures are used).<sup>4</sup> We discuss this issue in Part 6.

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**Recommendation 5**

We recommend that the Auckland District Health Board identify and record conflicts of interest of members for particular matters that arise at meetings, so that it is clear when a member should not participate in a specific matter (or when the formal waiver procedures may need to be considered).

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## Counties Manukau District Health Board

- 4.27 At the Counties Manukau DHB, it was common for members to orally declare interests (and changes to them) at meetings. These were frequently noted in the minutes. We formed the view that members were generally careful about this.
- 4.28 It is important to always be alert for when an interest may give rise to a conflict of interest in particular cases, and to document those instances (see paragraphs 4.23-4.26 and Part 6). However, it was not always clear that members considered whether their declared interests gave rise to conflicts of interest for particular matters (either at that meeting or subsequently) that warranted their withdrawal. It was not common for a member to withdraw from participation in a particular matter.

<sup>4</sup> The Auckland DHB largely operates by consensus, and so it very rarely votes on any matter. But the prohibition on participation is not limited to voting; it also applies to deliberations. And it is not relevant that the outcome may have still been the same regardless of the person's participation.

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**Recommendation 6**

We recommend that the Counties Manukau District Health Board identify and record conflicts of interest of members for particular matters that arise at meetings, so that it is clear when a member should not participate in a specific matter (or when the formal waiver procedures may need to be considered).

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**Waitemata District Health Board**

- 4.29 The Waitemata DHB generally took a cautious approach to conflicts of interest, especially at board level. The board was careful to record actual conflicts of interest for particular matters before the board. We found that it was common for a member to declare a conflict of interest in a matter and to withdraw from participation. The DHB had sought legal advice on a number of occasions about particular matters.
- 4.30 Occasionally, this cautiousness may even have meant that a person had withdrawn from participation in consideration of a matter when it may not have been necessary to do so. Although it is often wise to err on the side of caution, it is also possible to be too cautious. This can create frustration if people are being excluded who legitimately feel that their input is warranted and that the effectiveness of the organisation's work is being unnecessarily hindered.



## Part 5

# Leadership, governance, management, and overall culture

- 5.1 In this Part, we assess the role of the DHBs' leadership, governance, and management, and their overall culture, in identifying, disclosing, and managing conflicts of interest.

### Leadership, governance, and management

- 5.2 At both the Counties Manukau DHB and the Waitemata DHB, we formed the overall view that the chairpersons and chief executives were attentive to conflict of interest matters, and accepted personal responsibility for the sound management of such matters. They led by personal example, by taking a very cautious approach to declaring conflicts of interest of their own and by declining most offers of gifts and hospitality.
- 5.3 Both the Counties Manukau DHB and the Waitemata DHB had administrative staff who took a proactive role in advising on conflicts of interest, reviewing policies and procedures, and helping deal with particular situations that arise. Those staff members were well known in their organisations as the main contact points for other staff or members who needed assistance.
- 5.4 By contrast, at the Auckland DHB it was not apparent to us that the board made any significant attempt to engage with conflict of interest issues. Such matters did not appear to have a high profile at meetings, and the board did not often consider whether particular members needed to be excluded. Practices or procedures had not changed significantly since the Court decision in the *Diagnostic Medlab* case. We had expected that, if anything, the Auckland DHB might have a higher sensitivity to conflicts of interest, because of previous conflict of interest concerns.
- 5.5 The Auckland DHB considered that it had carried out a lot of work to improve its practices and organisational values in recent years. In particular, many people expressed the view that the current chief executive had tightened the rules on gifts and hospitality.
- 5.6 Overall, people we spoke to at the Auckland DHB were not always clear about who they should go to for advice about conflicts of interest. It seemed to us that the Auckland DHB lacked a visible "owner" of conflict of interest issues in its administrative centre, to provide general oversight and assistance with the policies and their implementation. Such a person could be, for example, someone in a legal, corporate service, board support, finance, human resources, or internal audit role. Individuals in most of these areas currently have some involvement with aspects of conflicts of interest, but it was difficult to see that any particular individual or department was willing to take responsibility for leading, fostering,

and co-ordinating the DHB's management of conflict of interest issues. The purpose of such a role would not be to centralise decision-making or remove responsibility from the relevant managers (or decision-making groups), but to provide a clearer avenue of support and guidance for those people who need assistance with difficult cases.

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**Recommendation 7**

We recommend that the Auckland District Health Board assign an administrative staff member or team the responsibility of leading, fostering, and co-ordinating the organisation's management of conflict of interest issues.

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- 5.7 At all three Auckland DHBs, matters about managing conflicts of interest were, in general, also integrated into other policies, and disclosing interests was a routine part of meeting and contracting processes.
- 5.8 There were no apparent extra difficulties about work carried out on a regional basis or through subsidiaries.
- 5.9 The three Auckland DHBs were all concerned about whether they were doing enough to manage conflicts of interest, in the light of the approach taken by the High Court in the *Diagnostic Medlab* case. However, they were also often unsure about what more they could or should be doing.

**Overall culture**

- 5.10 The three Auckland DHBs all consider themselves to be highly ethical and conscientious organisations. They pride themselves on their organisational values, and point out that many of their staff belong to professions that impose strict ethical obligations on their members.
- 5.11 In general, it was clear to us that people at the DHBs appreciate that they work in a public sector context, and that high expectations apply to them about impartiality, transparency, integrity, and the spirit of service to the public. They have a strong professional understanding and acceptance of general values around ethics and integrity.
- 5.12 Occasionally, we encountered a view that what was most important was that individuals act honestly and with good intentions. This can indicate a less than full appreciation of the concept of conflicts of interest. Labelling a situation a conflict of interest does not mean that some misconduct has occurred or will occur, and it does not indicate a lack of trust or faith in the person concerned. But the reasonable perception of an outside observer of the possibility for improper

conduct is often what creates the risk for the organisation. Conflicts of interest can undermine public trust and confidence in the organisation (see paragraphs 6.23-6.25).

- 5.13 We sometimes detected a view that the clinical and non-clinical staff in the DHBs were not always closely integrated or aligned in views and attitudes. This may mean that administrative staff and other managers have a reduced ability to influence the behaviour of clinical staff, including in the area of managing conflicts of interest.



## Part 6

# Some general lessons for dealing with conflicts of interest

- 6.1 In this Part, we describe some overall lessons that we consider can be applied to improve the identification, disclosure, and management of conflicts of interest at the DHBs.
- 6.2 These comments apply to the three Auckland DHBs, but may be useful for other DHBs too.

### Identifying and assessing conflicts of interest

#### Use of interests registers

- 6.3 Many public entities have interests registers to record various types of common and ongoing interests that might give rise to a conflict of interest in the future. They may require members or officials to regularly (for example, yearly) submit a declaration listing specified personal interests. Such a declaration may often focus mainly on connections with other organisations or businesses, or other matters that can create particular risks for the entity.
- 6.4 These declarations are not of *conflicts* of interest, because only the interests are recorded. This method enables relevant managers to be aware of most relevant ongoing interests. It acts as a reminder to members and officials of the need to be alert for conflicts of interest. The register, if reviewed and updated regularly, helps people to monitor situations that could give rise to a conflict of interest, and to identify conflicts of interest at an early stage. However, this sort of register is not compulsory, and is no more than a tool to help members, officials, and public entities to identify and manage conflicts of interest before they create problems. This type of register is not a substitute for disclosing and dealing with specific conflicts of interest when they arise.
- 6.5 If a DHB uses an interests register to record general ongoing interests of key people, the register needs to be kept up to date. It is good practice to formally update it at least yearly (unless the DHB can be confident that all people will update their details when changes in their circumstances occur). The interest needs to be described sufficiently to enable it to be understood, but at that fairly abstract stage it is probably not necessary to include lengthy details about the interest.<sup>1</sup>
- 6.6 The DHBs need to consider who should be subject to such a register. In our view, it is not necessary to apply it to all clinicians or all staff. As well as members and the senior management team, it may be useful to apply it to one or two levels of management further down the organisation (including, for example, Clinical Heads or Service Managers), and staff based in other important decision-making risk areas.

<sup>1</sup> The statutory obligation on members to ensure that the “nature” of their interest is disclosed, which might require a fuller explanation of relevant details, applies when they are disclosing a *conflict* of interest in a particular matter.

6.7 Sometimes an interests register may perform two functions: it may record general interests and particular *conflicts* of interest. For DHB members, the law requires conflicts of interest to be recorded in the register. It is reasonable to use an interests register for both purposes, but DHBs need to be clear whether an interest or a conflict of interest is being recorded.

### Focus on *conflicts* of interest, not just interests

6.8 Disclosing interests generally can be a useful precursor to disclosing and managing conflicts of interest in particular cases. However, it is not a substitute for doing so. In particular, the statutory requirements for members require them to declare and record *conflicts* of interest.

6.9 The wording of the Act is not as clear as it could be about this distinction, because it uses the term “interests register”. But what members are legally required to declare is when they are “interested in a transaction”. That means having a particular *conflict* of interest, not simply an interest in general. It is a declaration when there is a connection between their personal interest and a particular matter that is before the DHB.<sup>2</sup>

6.10 Interests cannot usefully be assessed in the abstract. It is necessary to focus on whether the personal interest could affect, or be affected by, the matter that is before the DHB. In other words, all relevant aspects of the nature of the matter and the nature of the person’s interest need to be considered, as well as the answers to such questions as:

- Is there a connection between them?
- Do they overlap, intersect, or coincide?
- How could they be related?
- What do they have to do with each other?
- Does the personal interest create an opportunity to act in a way that is not in the DHB’s interests?
- Does the personal interest create an opportunity to use publicly funded resources or time to advance someone’s own interests?
- Could the person be improperly influenced in their decision-making?
- Does the person have a personal stake in the outcome of the decision?

6.11 Failing to focus on these questions may not only mean that conflicts of interest are sometimes not identified when they should be. The opposite problem could also arise – that someone is wrongly excluded because of a general interest they have declared when no real difficulty actually exists for the particular matter before the DHB.

<sup>2</sup> See the definitions in the Glossary.

- 6.12 Conflicts of interest are best assessed case by case. This involves judgement.<sup>3</sup> People may be connected to a matter in different ways, but sometimes it will be necessary to consider whether a possible connection is too remote or insignificant to realistically amount to a conflict of interest at all. Even if it is recognised as a conflict of interest, it may or may not be particularly serious (and it may be more or less serious than a conflict of interest of someone else).<sup>4</sup> This assessment will affect what should be done about the situation. It is not appropriate to ignore the issue by simply assuming that everyone is conflicted, and that they are all conflicted to the same degree.
- 6.13 Assessing a person's connection to another individual or organisation can be difficult. Careful judgement is always required when weighing whether such a connection is close enough to constitute a conflict of interest. It will depend on the closeness, extent, or recency of the relationship or involvement, and also the degree to which the matter could directly or significantly affect the individual or organisation. In exercising this judgement in the DHB sector, some degree of pragmatism is necessary, because a person in a specialised field is likely to know and have previously worked with or for many of the other key players. Simply being acquainted with someone, or having worked with them in the past, will not usually create any problem.
- 6.14 For members, a judgement that there is a conflict of interest must mean that the member withdraws from participation (unless the waiver powers are used – see paragraphs 6.17-6.20). With staff, there is more scope for discretion by their manager depending on the seriousness of the conflict of interest and the other mitigation options available. But usually the answer will be that the person withdraws or is excluded from the DHB's work on the particular matter.

### Considering the position of members

- 6.15 A member does not have a conflict of interest in all or most matters merely because they are a health professional working in a particular area. Members are likely to take office with their own personal or professional views, philosophies, and issues of concern, based on their particular knowledge and experience. A board that is partly elected may have a political dimension, and so it is also natural that members may feel a need to act as advocates or representatives for

<sup>3</sup> See also our more detailed discussion about identifying and assessing conflicts of interest in Parts 2 and 4 of our publication *Managing conflicts of interest: Guidance for public entities*.

<sup>4</sup> Factors to consider in assessing seriousness include the type or size of the member's or official's other interest; the nature or significance of the particular decision or activity being carried out by the public entity; the extent to which the member's or official's other interest could specifically affect, or be affected by, the public entity's decision or activity; and the nature or extent of the member's or official's current or intended involvement in the public entity's decision or activity.

a particular community of interest. To a considerable extent, this is all entirely legitimate.<sup>5</sup>

- 6.16 What members need to be particularly careful about are situations where a DHB decision they are involved in:
- could affect (or be affected by) their own work or personal circumstances (especially, but not necessarily, financially);
  - could affect (or be affected by) a person or organisation that they are closely involved with; or
  - is a matter where they have expressed views in a manner that indicates they have a closed mind or fixed position (in other words, showing prejudice or predetermination) before the matter has been heard or deliberated upon.

### Power to grant waivers to members

- 6.17 The three Auckland DHBs have largely not taken advantage of the statutory waiver power that would enable them to make limited use of the knowledge and expertise of conflicted members. In our view, they might find it helpful to do so, to reduce the likelihood that members are conflicted so often that the relevant board or committee struggles to perform its role effectively. Under this power, once a member has disclosed a conflict of interest in a matter, the remainder of the board or committee may resolve to permit the member to take part in the meeting's deliberation (but not decision) about the matter.<sup>6</sup>
- 6.18 This statutory waiver power is unusual. Most other statutory rules in the public sector do not contain an equivalent power. We have concluded that it was inserted by Parliament as a deliberate acknowledgement of the likelihood that conflicts of interest may be especially prevalent in DHB boards and committees, and accordingly to allow them some greater lenience. This power gives DHBs a flexibility that many other public entities do not have.
- 6.19 The Act requires the minutes to record such a permission, and the reasons for giving it, as well as "what the member says in any deliberation of the board relating to the transaction concerned". Some people expressed concern that these administrative requirements are too onerous. We are not persuaded that they are. In particular, we do not consider that the Act's requirement means that the board must produce a verbatim transcript of the member's comments. In our view, a fair summary of the member's contribution would be enough, since minutes are a summarised record of the meeting's proceedings.

<sup>5</sup> This point was acknowledged by the High Court Judge in the *Diagnostic Medlab* case, at paragraph 125.

<sup>6</sup> Clause 36(4) of Schedule 3 (for boards), and clause 38(4) of Schedule 4 (for committees). In addition, a board may waive or modify the statutory rules in respect of a member of a committee or transaction or class of transactions before a committee, if satisfied that it is in the public interest or the interests of the DHB to do so (clause 39 of Schedule 4).



- 6.20 Of course, the waiver power would have to be used carefully, not indiscriminately, having regard to the seriousness of the member’s conflict of interest in the particular situation. In situations where the conflict of interest is especially direct and significant, it would be unwise to use the power.<sup>7</sup>

### Who needs to be considered and when

- 6.21 The three Auckland DHBs are beginning to acknowledge that risks in major contracts are not limited simply to the people who are on the evaluation panel or controlling the contracting process. A range of other advisers or decision-makers, at both higher and lower levels of the organisation, may have a role to play in the process and therefore the ability to exert some influence on the decision. Conflicts of interest may exist among those people. However, we accept that it may not be practicable to extend requirements about signing conflict of interest forms to every single individual who may have some connection to the project. DHBs simply have to remain alert to these risks, and deal with them when they identify them.
- 6.22 Nor are the risks associated with major contracts limited to the stages of formally assessing, recommending, and awarding a particular contract to a tenderer. They may arise at much earlier stages, including at the time of preliminary discussions about a possible project, well before its specific nature and form have been agreed upon.<sup>8</sup> Sometimes those early planning discussions can have an important effect on shaping what is ultimately decided.<sup>9</sup> There is no single “right time” or “trigger point” in a project when conflicts of interest need to be considered. It can be a risk throughout a process. Of course, in the very early stages, the discussions may be at such a general level that it is difficult to realise that someone has (or could soon have) a conflict of interest. We acknowledge that this can be tricky. Sometimes an interest that is apparently minor at the outset can assume more significance over time, as circumstances or proposals change. But the fact that a matter is a long way from any substantive decision is a factor that can legitimately bear upon any assessment about whether there can reasonably be said to be a conflict of interest yet, and if so how serious it is.

### What it means to have a conflict of interest

- 6.23 It is important to remember that labelling a situation as a “conflict of interest” does not mean that corruption or some other abuse of public office has occurred. To say that a conflict of interest exists, and that it needs to be managed, is not an

<sup>7</sup> This point was alluded to by the High Court Judge in the *Diagnostic Medlab* case, at paragraphs 134 and 158.

<sup>8</sup> Although the Act uses the term “transaction”, it defines that term in a broad way to cover a wide range of decisions or activities. See the Glossary.

<sup>9</sup> This is what the High Court Judge found in the *Diagnostic Medlab* case. For example, if a person is likely to have a conflict of interest in the final decision about *who* to contract, they may also have a conflict of interest in the preceding decisions about *whether* to contract and precisely *what* to contract for.

indication of a lack of trust or faith in the member or official concerned. Usually, there is no suggestion that the member or official has taken advantage of the situation for their personal benefit or been influenced by improper personal motives (nor that they are likely to do so).

- 6.24 The member or official, and their colleagues, will often sincerely believe that they will never behave improperly. But the reasonable perception of an outside observer of the possibility for improper conduct or a lack of impartiality can be just as significant when considering how to manage the situation. Conflicts of interest are sometimes natural, unavoidable, and inevitable (and in the DHB sector they are inherent to a considerable extent). They simply need to be recognised and actively managed. Identifying and managing a conflict of interest is usually not about questioning the sincerity of an individual's motives or intentions. Rather, what is important is being able to show that public decision-making is fair and sound.
- 6.25 When considering how to manage an identified conflict of interest, the question is not limited to whether the member or official concerned is likely to act improperly. Managing conflicts of interest also involves considering appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.
- 6.26 None of our comments should be taken to mean that DHBs cannot involve people who have experience, knowledge, connections, or contacts with other organisations. Nor does it mean that members and staff cannot have other commercial relationships with their DHB. But people need to recognise that, because of this, there may sometimes be particular matters in which they should not be involved or in which their involvement needs to be limited.

## Approaches to some particular types of conflict of interest

### Seeking advice or comments from interested parties

- 6.27 Managing a conflict of interest does not always mean removing or avoiding it altogether. Sometimes a DHB will want to consult with, or seek the advice of, particular people despite (or even because of) their close personal interest in the matter:<sup>10</sup>
- They may arguably be self-interested, but that very fact could be what gives them the special knowledge or expertise that the DHB wants to use.
  - There may be very few relevant expert advisers who are reasonably available, all of whom may be conflicted.

<sup>10</sup> The comments in this section do not apply to members of the board and board committees or other people exercising a formally delegated power. Instead, they need to comply with the provisions in the Act, as discussed in paragraphs 2.7-2.13.

- There may be a reasonable expectation that, to be fair, the DHB would consult with them before making a decision.

6.28 In our view, it is possible for DHBs to sensibly use such people where they consider this to be necessary or highly desirable, even though the people could be said to have a conflict of interest.<sup>11</sup> The best way to use such people in this position is to do so openly and inclusively, and to be clear about the limitations on their role. For example, the DHB could design a process that uses some or all of the following features:

- including a large number of people who are likely to represent the full range of different viewpoints, so as to reduce the possibility of any one person exerting too much influence (perhaps also obtaining their advice in a public or semi-public way such as through a forum, discussion group, or hearing);
- sharing all relevant information widely;
- explicitly acknowledging that the advisers have their own interests, requiring those interests to be declared, and sharing them with other participants and with the DHB's decision-makers;
- ensuring that the role of the advisers is limited to offering advice or comments, rather than making decisions (and perhaps not even making formal recommendations);
- considering whether to tightly limit the scope of the advisers' input, perhaps to relevant technical or operational issues, or alternatively to high-level strategic directions (rather than the selection of particular providers or questions affecting matters like price);
- seeking additional expert advice or reviews by other, more independent, people;
- designing decision-making criteria that are as objective as possible; and
- ensuring that the decision-makers do in fact make their own decision, rather than simply adopting the views of the advisers.

6.29 These features can help maximise the benefits of collaboration, while reducing the risk that disaffected stakeholders could claim that the process was unfair because of the involvement or connections of particular individuals.<sup>12</sup>

11 This point was accepted by the High Court Judge in the *Diagnostic Medlab* case. The Judge said, at paragraph 126: "A conflict of interest can be benign where the person who is conflicted does not participate in making the actual decision and the decision-makers know about and understand the conflict. If the conflict is declared, the decision-makers can stand the conflicted person down in respect of certain matters, or consider input from the conflicted person while making appropriate allowances for the conflict. The ability to compensate for the conflict cannot extend to voting, however, where the conflicted person could directly influence the outcome or decision."

12 We saw a useful example of these features being put into practice by the Waitemata DHB during consultation for a strategic planning and prioritisation process for funding called Programme Budgeting and Marginal Analysis.

### Referrals to private practice

- 6.30 Some policies have particular guidance for specialist doctors who are in a position where one of their DHB patients may need to be referred to the private sector. That guidance suggests that the doctor should consider inviting the patient to discuss referral to a private specialist with their GP, or at least provide the patient with a list of all suitable specialists (rather than simply referring the patient straight to their own private practice). In our view, this guidance is fair.

### Gifts, hospitality, and sponsorship

- 6.31 It is not necessary to forbid gifts, hospitality, and sponsorship. Policies simply need to provide a framework for judging what is acceptable and what is not (and what sorts of approval processes to require for certain matters). In doing so, it is relevant to consider such factors as:
- Is the person likely to be involved in advising on or making significant decisions about the supplier in the near future? (For example, is it a major tender process?)
  - How significant or valuable is the offer? (For example, free branded pens from suppliers can be regarded as trivial.)
  - Is there a legitimate purpose to the offer? (For example, is there a real and relevant educational benefit for the person? Do they appear to have been singled out and, if so, why?)
  - Is the offer non-targeted or incidental to something else? (For example, is it a social event sponsored by a supplier that forms part of a conference where the person has otherwise paid for their own travel and attendance?)





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