



Ms Kathleen Robinson
Conflict of Interest Review
Department of the Chief Minister & Cabinet

Dear Ms Robinson

Thank you for the opportunity to make a submission. I apologise for the delay.

The matters outlined below largely replicate, and then expand upon, those I raised with you during our meeting on 22 February 2024.

Introductory remarks

Ministers of the Crown carry a high ethical burden. They are the leaders of our community, and their conduct directly affects trust and confidence in government.

At all times ministers must act, and must be seen to act, in a manner that advances the public interest, rather than their private interests. A minister who performs their duties in a way intended, or perceived to have been intended, to advance their private interests, not only undermines confidence in that minister, but in the integrity of public institutions more broadly.

Ministers are in a unique position. Separately and collectively they make decisions that affect the entire community. They are responsible for the administration of legislation. Departmental heads are generally responsible to a minister for the performance of their agency. Ministers, collectively through Cabinet (or a sub-committee of Cabinet) determine how public money will be allocated. Ministers are primarily responsible for the introduction of legislation into the Legislative Assembly. They will often be called upon to lead, or at least contribute, to debate about significant matters of public policy. They have a significant role in the appointment of statutory office holders and other senior government officials.

With such broad and significant responsibilities, inevitably there are opportunities for a Minister to abuse their position.

Ministers and conflicts of interest – the integrity risks

The following represents just a small number of risks inherent in the discharge of ministerial functions.

Access to Information

Through their portfolio responsibilities and through Cabinet processes, Ministers have access to a broad range of sensitive and potentially advantageous information. That information could be used by a minister to advance their personal interests, including the interests of a family member or friend.

Allocation of funds - Pork Barrelling

The term Pork Barrelling is generally recognised in Australia to be the allocation of public funds and resources to targeted electors for partisan political purposes. In its August 2022 report on the topic, the New South Wales Independent Commission Against Corruption said that:

... pork barrelling breeds cynicism and erodes trust in the institutions of government. In particular, it sends a message that politicians:

- are more interested in being elected than acting in the best interests of the entire community
- will only provide funding to an electorate if it is marginal or needs to be retained
- treat voters – and the taxes they pay – as a means to achieving a partisan end
- are prepared to use entrusted public power for purposes other than that for which it is granted.

Improper influence on decisions – lobbying

*Lobbying is an accepted and integral part of our democracy. No doubt ministers are better able to make policy decisions when they hear from those who best understand the issues at play. However, '[i]n practice ... powerful groups can exert influence to further their particular interests, often at the expense of the public interest.'*¹

Lobbying regulation varies in different Australian jurisdictions. The Northern Territory is the only jurisdiction to have no such regulation.

In the absence of regulation, heavy reliance must be placed upon a Minister to identify where an association or engagement with a person or entity has become a personal interest. In other words, the Minister must be constantly alive to the conflicts of interest that might arise as a consequence of their relationship with persons who may seek to benefit from governmental decisions.

Nepotism and cronyism

In appointing persons to positions of authority within Government, Ministers (both individually and collectively) must take care to ensure that appointments are based upon an assessment of the public interest, and not a personal interest (including a political interest).

A Minister may have a personal interest in the appointment of a person who may have some political alignment to that Minister. A Minister may also have a personal interest in appointing a person who is a family member or close associate. Moreover, a Minister may have a personal interest in ensuring a particular person is not appointed to a position, based upon a dislike, or previous negative interactions, with that person, that have no bearing upon their suitability for the position.

In making, or participating in the making, of appointments to public positions, Ministers must take care to ensure they can approach the task, and be seen to approach the task, in a fair, objective and impartial manner.

Deriving Personal financial benefits from official duties

In recent times there has been much scrutiny of Minister's personal financial interests and, in particular, shareholdings.

This is not the occasion to express views about any particular matter. It is suffice to say that given the extensive powers held by Ministers (both individually and collectively) to shape and change public policy, and to make decisions which can have a significant impact upon commerce and industry, Ministers must be particularly careful to ensure that they do not involve themselves in official duties where their private financial interests may reasonably be affected.

Disclosing interests

As Members of the Legislative Assembly, Ministers are obliged to comply with the *Legislative Assembly (Disclosure of interests) Act 2008* (LADIA). The register of interests disclosed in accordance with the LADIA is maintained by the Clerk. Interests to be registered are set out in the Schedule to the LADIA.

Such disclosures are important for two reasons. First, the disclosure requirement itself ought to bring to the forefront of the member's mind their varied personal interests. In doing so, members should be more alive to the range of personal interests that may, at some point in the future, conflict with their official duties. Second, a centralised record of interests, which is publicly available, or at least available to designated persons, ensures that appropriate scrutiny can be brought to bear should it be thought that a member was acting in the face of a conflict of interest.

Of course, by its nature, such routine disclosure obligations do not, and are not intended to, provide a record of the identification, disclosure and management of a conflict of interest. That is because the requirement to make disclosures of the kind set out in the LADIA rarely coincide with the crystallisation of a conflict of interest.

Conflicts of interest can arise at any time, and in many different forums. For that reason there are other mechanisms and expectations as to how they will be dealt with.

In the Northern Territory there is no legislated Code of Conduct for Ministers. Instead, Appendix A to the Northern Territory Government Cabinet Handbook sets out the 'Northern Territory Ministerial Code of Conduct'.

While Appendix A is stylised as a Code of Conduct, it is referred to in the first line as 'guidelines'.

¹ <https://www.oecd.org/governance/ethics/influence.htm>.

In any event, clause 5 of the Code of Conduct sets out the processes to be adopted in respect of conflicts of interest. I have no difficulty with the content of clause 5. Indeed, after presenting to Cabinet about conflicts of interest in May 2023, I was invited to comment upon clause 5. I made a number of suggestions which have been incorporated into the current version.

Access to disclosures and management actions

At present, there is no central repository of information about identified conflicts of interest, and the management action taken in respect of those conflicts. I recommend that such a central repository be created.

From my perspective, that creates a number of challenges.

It is not uncommon to receive reports that a Minister has performed a public duty in the face of a conflict of interest. When such an allegation is received the obvious starting point is to identify whether the Minister themselves identified and disclosed a conflict of interest, and if so, what management action was taken in respect of that conflict.

But sourcing such documents can be problematic.

First, there is no central register of such declarations and management action. It requires me to contact different offices to establish whether there are records of any such declarations being made.

Second, in many cases it will be alleged that a Minister took part in a Cabinet deliberation, or a Cabinet decision, in the face of a conflict of interest.

The Ministerial Code of Conduct describes the process for disclosing, documenting and managing conflicts of interest raised in Cabinet. However, because the Government has taken the position that it will not provide me with access to Cabinet documents, I cannot determine whether there is any substance in an allegation that a Minister participated in a Cabinet process while conflicted.

Section 79(2) of the *Independent Commissioner Against Corruption Act 2017* makes it clear that, unless Cabinet provides relevant documents to me, I cannot require them. I do not criticise the Government for its approach. It has seen fit to rely upon provisions established by Parliament and it is perfectly entitled to do so.

But it means that many allegations will be closed without resolution, because the essential evidence necessary to address the allegations are not available.

Putting aside records relating to the disclosure of conflicts of interest, the manner in which those conflicts are being managed must be documented.

At present, there is no central register to record the action taken to manage conflicts of interest. In my view, there should be.

In short, on every occasion where a conflict of interest has been disclosed, there should be an accompanying documented management plan to address that conflict.

The record should set out, in clear and unambiguous terms, the manner in which the conflict will be addressed. In the case of a Minister, I recommend that the management action should be approved by the Chief Minister and the document should evidence that approval.

Where it is the Chief Minister who has a conflict, the current approach is for disclosure to be made to Cabinet, and for Cabinet to agree upon the management action. While that seems to be an appropriate approach, the issue to be resolved is how that information is recorded and to what extent it is made available for inspection.

When should a conflict of interest be declared?

A conflict of interest should be declared as soon as reasonably practicable after it has been identified. I do not think it is appropriate or necessary to prescribe any other time period for the making of a declaration.

In some cases, a conflict of interest might crystallise while a Minister is engaged in a public duty. It may be unreasonable to document the conflict then and there. In such circumstances, as soon as possible after the conflict is identified the Minister should record the conflict, the circumstances that gave rise to the identification of the conflict, and the steps taken upon becoming aware of the conflict.

The management action to be taken would then be documented and approved by the Chief Minister.

Proposals

For the foregoing reasons, I propose that:

1. A register be established to record all disclosed conflicts of interest of a Minister of the Crown.
2. A register be established to record all approved management action being taken in respect of all declared conflicts of interest of a Minister of the Crown.
3. A Minister of the Crown should be required to make a disclosure of a conflict of interest as soon as reasonably practicable after the conflict has been identified.
4. The disclosed conflict of interest should be recorded on the relevant register as soon as reasonably practicable after the disclosure is made. Alternatively, should an electronic register be established, that platform may act as the mechanism by which a recorded disclosure is made.
5. Every disclosure of a conflict of interest should be accompanied by a record of approved management action. That management action should be approved by the Chief Minister.
6. Where the Chief Minister has an identified conflict of interest, that conflict should be disclosed and addressed by Cabinet. Registers should be updated in the same way as any other conflict.

Separate Registers? Who should have access?

Should proposal 1 and 2 above be accepted, the question arises as to whether there should be a single register or separate registers. I have no particular view on that matter.

To my mind, the essential question is who should have access to the register(s). There is much to be said in support of making such a register open to the public. In that way everyone in the community can have confidence that a conflict of interest has been identified, disclosed and how that conflict is being appropriately managed.

However, it may be that the public disclosure of some conflicts of interest may lead to unintended, and inappropriate, consequences.

For example, if a Minister disclosed a conflict of interest in respect of a candidate for a statutory appointment, there may be speculation as to the identity of the candidate.

Should I refer a matter of potential misconduct to a Minister for action, and the Minister declares a conflict of interest in respect of that matter, the fact of a misconduct investigation, and the identity of the person being investigated, may become known. Such disclosure may unfairly damage the reputation of an individual who is ultimately found to have done nothing wrong.

It follows that serious consideration must be given to how such information would be made available on a register.

In any event, consistently with section 5(5) and (6) of the LADIA, the ICAC should have unfettered access to any register.

I trust this submission is of assistance. I am pleased to discuss with you further as required.

I intend to publish this letter on my website.

Yours sincerely



Michael Riches

Independent Commissioner Against Corruption

5 April 2024