



# CONFLICT OF INTEREST GUIDELINES FOR DISTRICT HEALTH BOARDS

## DISCLAIMER

This booklet is intended as a general guide for those people who may be considering standing for a District Health Board. The information and advice it contains are correct at the date of publication. Candidates should obtain specific professional advice on their own circumstances in relation to election matters.

## FOR MORE INFORMATION

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# Foreword



Kia ora koutou

District health board (DHB) boards have a critical leadership role in New Zealand's health and disability system and play a crucial role in the sector's work to improve the health and wellbeing of all New Zealanders.

Being a DHB board member is an opportunity to contribute to your community and make your voice heard, but with that comes responsibility.

The public has high expectations for those working in the public health and disability system and rightly so. The broader New Zealand public sector is recognised globally for its high levels of public trust and lack of corruption.

The purpose of these Guidelines is to promote good practice in managing conflicts of interest in DHB decision-making. The existence of conflicts is not itself a cause for concern – what is important is that they are managed in an appropriate manner by individuals and boards collectively.

We need committed people on DHB boards who inspire confidence and maintain integrity in the public health sector, through impartial and transparent decision making.

This guidance has been written to support current and future DHBs and board members, who are working in a complex and continually evolving health and disability system, to meet good practice governance expectations.

Ngā mihi maioha

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This document provides guidance on moving toward the goal of good practice in public sector governance. It is not legal advice, and does not create new legal obligations or extend existing ones.





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# Introduction

## Purpose of the Guidelines

These Guidelines promote good practice in managing conflicts of interest in district health board (DHB) decision-making. They reflect and build on recommendations set out in a number of relevant publications (listed as further reading in Appendix One).

The Guidelines are intended to provide a basis for assessing existing DHB conflict of interest policies and practices and for producing robust policy in the future. They are also aimed specially at assisting DHB boards to inspire confidence and maintain integrity in the public health sector, through impartial and transparent decision making. This document contains:

- ▶ a brief summary of key concepts around managing conflicts of interest in the public sector (Part One)
- ▶ a practical framework to assist in the recognition, disclosure and response to conflicts of interest (Part Two).

## Target audience

These Guidelines are aimed at the following DHB people, referred to generically as ‘members’ in these Guidelines:

- ▶ board Chairs, Deputy Chairs, and members (both elected and appointed)
- ▶ board committee members
- ▶ delegates of boards and committees (ie, those exercising authority on the board’s behalf)
- ▶ other office holders (eg, Crown monitors).

They may also assist DHB employees who assist boards with conflict of interest management, and they provide some useful information for other DHB decision-making processes.

## Limitation of Guidelines

The variety and broad nature of DHB operations mean that a single set of specific rules cannot be established. Conflicts of interest differ in nature and need to be considered on a case-by-case basis. These Guidelines are not:

- ▶ an exhaustive step by step guide
- ▶ a substitute for legal advice
- ▶ a set of legal requirements
- ▶ intended to create additional legal obligations.

# Part One – Basic concepts

This part discusses the environment in which DHBs operate, and how this impacts on managing interests. It also discusses important legal concepts. These two aspects are built on in Part Two to provide a practical framework for dealing with conflicts of interest.

## Implications of DHBs being public entities

It is common for people involved in DHB governance to have a background in the clinical, community or private sectors. To successfully transition to a DHB board, members need to understand the distinctive aspects of the public sector environment.

### The principles of impartiality and transparency

DHBs are public entities owned by the Crown. They use public funds, and act for the benefit of the public.

Members of Parliament, the media, and the public expect people who govern DHBs, whether elected or appointed members, to act impartially. They expect that decisions will be transparent and not influenced by favouritism or improper personal motives, and that public resources will not be misused for private benefit. As the Office of the Auditor-General's report *Management of conflicts of interest in the three Auckland DHBs* states:<sup>1</sup>

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.

Impartiality and transparency have a cost. Process costs and time are obvious examples. Being impartial and transparent may at times mean making a decision that is not the most directly financially advantageous to the DHB. Those in governance roles must remember that 'commercial return', though extremely important, is not the only or overriding concern.

### Good practice

These Guidelines endorse a 'good practice' approach to conflicts of interest – an approach which extends beyond strict legal compliance.

- ▶ This framework has three dimensions:
- ▶ the legal dimension (which involves compliance with statute and other law)
- ▶ the ethical dimension
- ▶ the good practice dimension.

Acting ethically requires legal compliance, and implementing good practice encompasses both legal compliance and sound ethical behaviour. Further comment on this can be found in Appendix Three.

<sup>1</sup> Office of the Auditor-General. 2007. *Management of Conflicts of Interest in the three Auckland District Health Boards*. Wellington: Office of the Auditor-General, p 13, para 1.21.



## Conflicts of interest will occur in the DHB sector

The New Zealand health and disability sector is a close community. Conflicts of interest are inevitable.

The existence of conflicts is not itself a cause for concern – provided that conflicts are disclosed and responded to (both individually and collectively) in an appropriate manner. Commonly, when a conflict of interest has become an issue, the person concerned has neither taken advantage of the situation for their personal benefit nor been influenced by improper personal motives. However, their failure to appropriately disclose and manage conflicts can cause a real or perceived unfairness.

It is critical to understand that a perception of a conflict can be just as significant as an actual conflict. Whether or not the person would actually compromise himself or herself is not the only relevant consideration.<sup>2</sup> This is the nature of conflicts of interest in the public sector environment. A reasonable test would be how the situation would be perceived if it were drawn to the public's attention.

## Disclosure is more than technical compliance

These Guidelines promote full and open disclosure as the foundation of good interest management.

It is necessary for members to regularly review their own interests, and to fully disclose them as early as possible. This allows all concerned to understand and manage the true nature, extent, and potential implications of an interest. Proper disclosure of conflicts of interest errs on the side of more disclosure, rather than less. It is also a continual process over the course of DHB business, as interests and conflicts often change.

## Disclosures need to be actively managed

Disclosure is only the first step. A board and its members must then consider how they will respond to interests that arise. The Office of the Auditor-General states:

Simply declaring a conflict of interest is not usually enough. Once a conflict of interest has been identified and disclosed, the public entity may need to take further steps to remove any possibility – or perception – of public funds or an official role being used for private benefit.<sup>3</sup>

Response to a disclosure – that is the board's action following disclosure – is just as important as the disclosure itself. A board acting lawfully must consider what (if anything) it should do in the light of a disclosure, both inside and outside the boardroom. Should a member continually have ongoing conflicts of interest that prevent the member from participating in a large number of board matters, the Chair should consider bringing this matter before the Minister as it is likely that the member cannot perform their role to the reasonable expectations of the position. Part Two addresses the practical elements of board responses.

<sup>2</sup> Office of the Auditor-General. 2004. *Christchurch Polytechnic Institute of Technology's Management of Conflicts of Interest Regarding the Computing Offered On-Line (COOL) Programme*. Wellington: Office of the Auditor-General, pp 23–4.

<sup>3</sup> Office of the Auditor-General. 2007. *Managing Conflicts of Interest: Guidance for public entities*. Wellington: Office of the Auditor-General, Part 4.



## Consequences of inappropriate management

The potential costs and consequences of a conflict of interest not being appropriately managed can be serious. These may include cost, time, damage to the reputation of individuals and DHBs, contract cancellation, litigation, public and media scrutiny, and criminal investigation.

## Relevant legislation

Most legislative provisions relating to conflicts of interest for DHBs are set out in the New Zealand Public Health and Disability Act 2000 (the NZPHD Act). A few sections in the Crown Entities Act 2004 (the CE Act) also apply, such as that dealing with the disclosure of interests before appointment, however the majority are excluded via the NZPHD Act.<sup>4</sup>

The NZPHD and CE Acts describe conflicts of interest requirements in a slightly different manner. However, the underlying intents are similar. By comparison, there are significant differences between the conflict of interest provisions in the Companies Act 1993 and the NZPHD Act.<sup>5</sup>

Members should familiarise themselves with the legislative framework applicable to DHBs. Appendix Two lists relevant provisions.

## Interpretation

This section discusses some basic terms that are central to the practical steps in Part Two of this document: ‘interest’, ‘transaction’ and ‘conflict of interest’.

### Interest

The term ‘interest’ refers to a non-DHB duty, role or pecuniary interest that has the potential to overlap with a member’s DHB role. This might be another public role, but is usually personal or private in nature.

### Transaction

Section 6(1) of the NZPHD Act gives the following definition of ‘transaction, in relation to a DHB’:

- ▶ 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
- ▶ a proposal that the DHB enter into an arrangement, agreement, or contract.

A wide interpretation of this provision is preferred, which means that ‘transaction’ is potentially applicable to nearly everything that a DHB does, including a proposed exercise of a function, duty or power. Such an interpretation advances transparency, and is consistent with a good practice approach.

<sup>4</sup> See clause 36(7), Schedule 3, NZPHD Act: ‘Sections 62 to 72 of the Crown Entities Act 2004 do not apply to a DHB’.

<sup>5</sup> For example, section 144 of the Companies Act 1993 outlines a default position which allows interested directors to vote as if they were not interested in the transaction, as opposed to the NZPHD Act which has a default position of excluding interested members.

## Conflict of Interest

The NZPHD Act uses the term ‘interested in a transaction’ for what is commonly understood to be a ‘conflict of interest’. For the purposes of these Guidelines, these two phrases are interchangeable.

The NZPHD Act further defines ‘conflict of interest’ in relation to a person and a DHB under section 6(1) to include ‘the employment or engagement of the person, or of the person’s spouse or partner, as an employee or contractor of the DHB’.

Under the NZPHD Act, a member will be ‘interested in a transaction’ (or have a conflict of interest) where a member:<sup>6</sup>

- a) ‘is a party to, or will derive a financial benefit from, the transaction; or
- b) has a financial interest in another party to the transaction; or
- c) is a director, member, official, partner, or trustee of another party to, or person who will or may derive a financial benefit from, the transaction, not being a party that is:
  - (i) the Crown; or
  - (ii) a publicly-owned health and disability organisation;<sup>7</sup> or
  - (iii) a body that is wholly owned by one or more publicly-owned health and disability organisations; or
- d) is the parent, child, spouse or partner of another party to, or person who will or may derive a financial benefit from, the transaction; or
- e) is otherwise directly or indirectly interested in the transaction.’

In the first four categories, the concern is with the member having some form of direct or indirect financial interest in what the DHB is doing. Non-financial interests (and financial interests not caught by the first four categories) are included in the fifth category, which should be interpreted broadly.

In effect, if a member stands to gain or benefit – whether financially or otherwise, and whether directly or indirectly – from what the DHB is doing, then it is likely that a conflict exists.

However, the NZPHD Act notes that a person will not have a conflict where their interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence them in carrying out their duties. What is remote or insignificant will depend on the circumstances. A person is not classed as interested in a transaction simply because they are being paid as a DHB board member.<sup>8</sup>

<sup>6</sup> Section 6(2)(a)–(e), NZPHD Act.

<sup>7</sup> The NZPHD Act currently defines publicly-owned health and disability organisations as DHBs, the Pharmaceutical Management Agency, the New Zealand Blood Service, the Health Promotion Agency, and the Health Quality and Safety Commission.

<sup>8</sup> Section 6(3), NZPHD Act.

# Part two – Practical guidance

This part sets out guidance on what is ‘good practice’ in recognising, disclosing, and responding to both interests and conflicts of interest.

The basis of the approach is that full and early disclosure of interests will make conflicts of interest easier to identify, and facilitate earlier opportunities for management, with the end goal being a more effective response.

Managing interests and conflicts of interest can be broken down into the following stages:

- ▶ recognising interests and conflicts of interest
- ▶ disclosing interests and conflicts of interest
- ▶ responding to disclosures.

Transactions and interests can change, and new interests/conflicts can arise at any time. Members and boards need to ensure they are aware of interests and how they relate to their DHB’s transactions.

## Recognising interests and conflicts of interest

The first step in managing a member’s conflict of interest is to recognise the interest at hand. The member should consider anything from which they may gain real or perceived benefit, either financial or non-financial. Some examples of interests members should consider are:

- ▶ shares they own
- ▶ having made a donation or received a gift
- ▶ being an adviser, employee or director of another business or organisation
- ▶ being a member of a professional body
- ▶ their family affiliations
- ▶ any business proposals they are developing.

Consideration of interests is not a one-off exercise. Members should regularly review their interests and ensure the board’s interests register is kept up to date. It is the member’s duty to ensure the register is kept current.

The next step is for the member to recognise that a conflict arises out of that interest. Early recognition, coupled with early and full disclosure, ensures the best chance of effective management. Some considerations in particular should be kept in mind.

- ▶ Areas for concern will be at the intersection of overlapping and potentially competing interests.
- ▶ Although the NZPHD Act and CE Act frameworks place a particular emphasis on financial interests, other interests are significant both legally and ethically.
- ▶ Conflicts of interest are not confined to a commercial transaction such as a tender process or contract. Involvement in policy and strategy can also lead to conflicts, often more difficult to manage than those arising from confined commercial transactions.
- ▶ If in doubt, members should consider whether a third party (such as a court or the public) would see an issue to exist. Consultation with the board Chair may assist individual members. Board Chairs, in turn, may wish to discuss matters with the Deputy Chair.

The practice of identifying conflicts of interest is ongoing. Conflicts of interest can evolve through changes in the dimensions of either a transaction or an interest. One appropriate time to consider them is upon receipt of a meeting agenda and board papers.

# Disclosing interests and conflicts of interest

These Guidelines promote an ongoing process of full disclosure of interests and conflicts of interests at the earliest opportunity.

Disclosing ‘interests’ (typically in positional terms, such as ‘director of XYZ Ltd’), as opposed to ‘conflicts of interest’, is not expressly required by the NZPHD Act. However, it is recommended that such ‘interests’ are in fact disclosed (with regular updates), for the purpose of alerting members to potential issues and effectively creating an ‘early warning system’.

The obligation to disclose an interest or conflict of interest is firmly on the member with the relevant interest or conflict.

In considering disclosure, it is helpful to address what should be disclosed, when, how, and to whom.

## What should be disclosed?

In the case of an interest, the details disclosed should allow an independent observer to understand what the member’s interest is, and why and how it might impact on their role on the board.

In the case of a conflict of interest, disclosure should enable an independent observer to understand the nature of the conflict, and how it could benefit the member (or other parties as per section 6(2)(d) of the NZPHD Act) and impact on the member’s role on the board.

A disclosure should also provide relevant information that enables other members to make an informed decision about how best to manage the actual or potential conflict of interest, both inside and outside the boardroom.

In order to achieve this, members should provide specific information, including (as relevant):

- ▶ the position at issue: that is, the role (eg, manager of finance or director), and its functions and duties specifically in relation to the transaction (in case of a conflict)
- ▶ in the case of a conflict, the potential value (direct and indirect) of the transaction to the member, if this can be measured

- ▶ the way in which the interest or conflict will or may impact on the performance of the member’s DHB role
- ▶ an explanation of any personal benefit – perceived, actual or potential, direct or indirect, financial or otherwise – resulting from the transaction
- ▶ historical and contextual information necessary to properly understand the disclosure
- ▶ possible future involvements and benefits.

Members should always err on the side of caution and provide more contextual information rather than less. This could include historical details indicating their levels of involvement in interests or transactions, or could mention possible future interests or conflicts. As mentioned above, public perception is an important consideration.

An inclination to withhold information, or to disclose in a confined or narrow way, may indicate a reason for concern about the adequacy of the disclosure.

A simple example of a conflict of interest statement made during a meeting could be:

Mr X declared his conflict of interest in relation to item Y, because he is a director of Z, which provides aged residential care services. The conflict arises because even though Z does not currently supply services to the DHB, it is considering putting in a tender to the DHB.

## When should disclosures be made?

Disclosures should be made at the earliest opportunity. In the case of conflicts, this is required by the NZPHD Act,<sup>9</sup> which states that:

A member of a board of a DHB who is interested in a transaction of the DHB must, as soon as practicable after the relevant facts have come to the member’s knowledge, disclose the nature of the interest to the board.

‘As soon as practicable’ should be literally interpreted: disclosure may take place in between meetings, on receipt of agendas for meetings, or at the meetings themselves.

<sup>9</sup> Clause 36(1), Schedule 3, NZPHD Act.



There are several avenues open for disclosure of both interests and conflicts of interest.

### **PRIOR TO APPOINTMENT OR ELECTION**

The first opportunity for disclosure arises before a person becomes a member of a board, as follows.

- ▶ In the case of appointment, applicants should disclose interests and conflicts of interest when providing information to allow the Minister of Health (or the board, in the case of committees) to decide whether to make an appointment.<sup>10</sup>
- ▶ In the case of election, all candidates must give a statement to the electoral officer that discloses any conflicts of interest that the candidate has with the DHB as at the date of the candidate's notice of consent, or states that the candidate has no such conflicts of interest as at that date; and discloses any such conflicts of interests that the candidate believes are likely to arise in the future, or states that the candidate does not believe that any such conflicts of interest are likely to arise in future.<sup>11</sup>

### **FIRST BOARD MEETING**

It is good practice to formally disclose those initial interests or conflicts at the member's first board meeting. Members are required to ensure the statement they provide to the Minister or electoral officer is entered into the board's interests register. This enables the board to question the nature of the interest where necessary, and provides a minuted record of the disclosure to the board.

### **ONGOING AT MEETINGS AND OUTSIDE MEETINGS**

Initial disclosures are not the end of the disclosure process. Disclosure is a continuous process as new interests and conflicts emerge over time, and existing interests and conflicts change in nature.

DHBs should ensure they have mechanisms which allow:

- ▶ disclosure at any stage between two meetings
- ▶ pre-meeting disclosure (ie, disclosure after an agenda has been set but prior to the meeting itself taking place)
- ▶ disclosure at a meeting, whether it is public or 'in committee'.

<sup>10</sup> Section 31(1)(c), CE Act.

<sup>11</sup> Clause 6, Schedule 2, NZPHD Act.

<sup>12</sup> Clauses 36(3) and (6), Schedule 3, NZPHD Act.

All meeting agendas should include standing items to accommodate disclosure and updating of both interests and conflicts of interest.

## **How and to whom should disclosures be made?**

A disclosure should be made in writing where possible and, where writing is not possible, verbally and then retrospectively in writing. Recording disclosures in writing ensures a degree of transparency; paper trails assist in managing perception, and can help to prevent difficulties of recollection if questions arise later. Disclosure must be in both the interests register<sup>12</sup> and recorded in the board minutes.

Disclosures should be made to a central contact person (see below) and to the board at the first meeting following the disclosure. Where it becomes apparent at a meeting that there is a conflict of interest, this should be raised at the appropriate points in the agenda (ie, the declarations of interest standing agenda item and the item to which the interest or conflict relates).

### **CENTRAL CONTACT PERSON**

DHBs should nominate a central contact person for administering interest matters (eg, a board secretary or legal advisor). This person should:

- ▶ be a contact point for disclosure outside of meetings
- ▶ maintain a register recording the nature of members' interests and conflicts
- ▶ be able to provide input into the development of agendas
- ▶ receive copies of all appointment disclosure statements for elected and appointed members
- ▶ assist the board in establishing and reviewing policies and procedures on conflicts of interest.

A central contact person can implement disclosure procedures such as ensuring that disclosures made outside of meetings are communicated to board members before board meetings.

## Interests register

The DHB is required by statute to maintain an interests register for the purposes of recording:

- ▶ any disclosure of interests in transactions<sup>13</sup>
- ▶ the filing of the initial statements from elected and appointed members (made to the electoral officer and the Minister respectively)<sup>14</sup>
- ▶ ‘any relevant change in the member’s circumstances affecting a matter disclosed in that statement [which must be] entered in that register as soon as practicable after the change occurs’.<sup>15</sup>

This register should be used to record both interests and conflicts of interest. Record-keeping ensures transparency and enables the proactive management of interests.

Registers need to be kept up to date and accurate to be of any use. This requires regular review, a process that the central contact person and the board should share.

DHBs should maintain electronic and hard copies of the register (the latter constituting the legally required component). Disclosures should then be entered into each, and the electronic copy sent out to members with the board papers as a regular reminder.

## Responding to disclosures

Disclosure is not the end of the process. Effective administration of conflicts of interest depends on active and appropriate responses.

Responding to a conflict of interest requires a collective effort on the part of the member concerned and the other members of the board. Response strategies may range from no action at all through to action taken outside the boardroom, such as the member removing him or herself from an employment or financial situation.

Chairs have added responsibilities, including the responsibility to ensure that processes are followed and that a high standard of care is met.

<sup>13</sup> Clause 36(1), Schedule 3, NZPHD Act.

<sup>14</sup> Clause 36(6)(a), Schedule 3, NZPHD Act.

<sup>15</sup> Clause 36(6)(b), Schedule 3, NZPHD Act.

<sup>16</sup> Office of the Auditor-General. 2007. *Managing Conflicts of Interest: Guidance for public entities*. Wellington: Office of the Auditor-General, para 4.30.

## Proactive steps

Although management of a disclosure focuses on responding or reacting to disclosures of conflicts, proactive steps can also be taken earlier in the process.

The early identification of interests can, in some circumstances, provide an opportunity to address potential impacts. For example, if an interest has the potential to attract negative public comment, a strategy could be implemented to provide assurance that the board is aware of the risk and has a clear plan if the interest does result in a conflict. Under the ‘no-surprises’ principle, boards should keep the Minister informed if public comment on a member’s situation is likely.

Updating the register and noting in the minutes any deliberate or circumstantial resolution of a potential conflict situation may also be appropriate (eg, shares being sold, or a contract ending).

## Reactive steps

The nature of the conflict of interest environment is such that reactive management will be a more common strategy.

The first part of any response by the board (to disclosures of both interests and conflicts) should include establishing that the nature and extent of the interest or conflict is understood. If not, the board should make further enquiries of the member or management in order to obtain the information needed.

In instances where the board decides that a situation does not amount to a conflict of interest (taking a good practice approach), it is still appropriate to formally record or declare the disclosure and assessment.<sup>16</sup>

At the simplest level, response to a disclosure may involve no more than recording the disclosure and requiring the ‘conflicted’ member to leave the relevant part of the meeting.

Any strategy relating to a conflict must comply with clause 36 of Schedule 3 to the NZPHD Act. Under this clause, a member of a board who has a conflict (and makes a disclosure of an interest in a

transaction) must not take part in any deliberation or decision relating to the transaction, must not be included in the quorum for any decision or deliberation on the matter, and must not sign any document relating to the entry into a transaction or the initiation of the transaction.<sup>17</sup>

However, a conflicted member of the board may continue to take part in relation to the deliberation (but not decision) of the transaction in question if the majority of the other members of the board agree.<sup>18</sup> The waiver should be used only when absolutely necessary and with great caution. The board must be aware of the potential risk that the conflicted member could be in a position to disclose information to a third party.

The exemption described above lends itself to situations where a member's participation in discussion is necessary to ensure appropriate information or expertise is made available to the board or committee. If that information or expertise can be accessed from a non-conflicted person (eg, an external expert or non-board member), the board should carefully consider doing so, instead of allowing the conflicted member to participate.

Boards should exercise caution to ensure that use of the exemption does not become common practice. They must comply with the requirement to note an exercise of the exemption in board minutes, and that the entry in the minutes must also give the majority's reasons for giving it and that what the member says in any deliberation of the board relating to the transaction concerned.<sup>19</sup> There is also a requirement to list such exemptions in the DHB's annual report.<sup>20</sup>

The management strategy adopted will depend on the nature of the disclosure and the way in which the conflict of interest impacts on the DHB and its operations. The strategy should:

- ▶ protect the integrity of the board and the DHB
- ▶ protect the integrity of the member concerned
- ▶ manage perceptions which could arise from the conflict
- ▶ preserve valuable and critical inputs into decision-making

- ▶ apply beyond the boardroom as appropriate: managing the implication of a conflict may involve the DHB in a wider sense and include a transaction that would not usually be handled by the board (eg, matters within the sphere of management's delegated authority)
- ▶ take account of information security: both parties need to recognise the variety of communication mediums that need to be monitored, and anticipate any situations in which information pertaining to a transaction involving a conflict of interest might be divulged to the member concerned.

The detail of any strategy will require careful assessment. Relevant factors include:

- ▶ the type and the extent of the person's conflicting interest
- ▶ the nature or significance of the particular decision or activity being undertaken by the DHB
- ▶ the degree to which the person's other interest could affect, or be affected by, the DHB's decision or activity
- ▶ the nature or extent of the person's current or intended involvement in the DHB's decision or activity
- ▶ the practicability of any options for avoiding or mitigating the conflict
- ▶ the depth of the connection between the interests.

The risk to be assessed is not just the risk of actual misconduct by the particular member or official involved. It is also the risk that the DHB's capacity to make decisions lawfully and fairly may be compromised, and that the reputation of the DHB and wider state services may be damaged.

In making such an assessment, the board needs to consider how the situation could reasonably appear to an outside observer<sup>21</sup> and respond accordingly.

<sup>17</sup> Clause 36(2), Schedule 3, NZPHD Act. Note that the Minister of Health has power to waive or modify this provision if the public interest supports such an action, pursuant to clause 37 of Schedule 3 to the NZPHD Act.

<sup>18</sup> Clause 36(4), Schedule 3, NZPHD Act.

<sup>19</sup> Clause 36(5), Schedule 3, NZPHD Act.

<sup>20</sup> Section 42(4), NZPHD Act.

<sup>21</sup> Office of the Auditor-General. 2007. *Managing Conflicts of Interest: Guidance for public entities*. Wellington: Office of the Auditor-General, para 4.31.

Possible strategies, so long as they comply where appropriate with clause 36 of Schedule 3 to the NZPHD Act, may include:

- ▶ excluding a member from the matter at issue
- ▶ utilising the clause 36 or 37 exemption process
- ▶ imposing additional oversight or review on the member concerned
- ▶ excluding the member concerned from a committee or working group dealing with the issue
- ▶ re-assigning certain tasks or duties to another member or person
- ▶ reaching an agreement or imposing a prohibition, ensuring that the member concerned will not undertake particular actions
- ▶ placing restrictions on access to certain confidential information
- ▶ transferring the member concerned (either temporarily or permanently) to another position or task
- ▶ composing media statements and managing media strategy.<sup>22</sup>

Communication between DHB staff and members is likely to be carefully prescribed in a board's governance rules, to ensure roles and responsibilities are clearly understood. Such regulation is particularly important when a conflict of interest situation arises. Members must ensure that they do not communicate (and are not perceived to communicate) with DHB staff on any matter related to the conflict without prior board approval.

Occasionally a conflict of interest may be so significant or pervasive that the member will need to consider divesting themselves entirely of one or the other interest or role.<sup>23</sup> In the event that such a significant conflict exists, the member should not participate in conflicted activities until the conflict is resolved to the satisfaction of the Chair. Ineffective management of the conflict at an early stage might have the consequence that the member concerned must withdraw from both roles.

In addition, if the nature of an interest or conflict of interest changes, decisions pertaining to it may need to be reviewed.<sup>24</sup>

## Recording decisions

In all cases, a written record should be retained of any decision or strategy taken on an interest or conflict. Ideally, such a record should include: the initial facts, the nature of the assessment, action taken in response, possible future action to be taken in response and any mitigation strategies undertaken. Such written records increase transparency, and ensure that the DHB is clearly seen to have recognised and responded to the conflict.

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<sup>22</sup> Ibid, paras 4.28 and 4.29 suggests other mitigation strategies.

<sup>23</sup> Ibid, para 4.34.

<sup>24</sup> Ibid, para 4.36.



# Appendix 1 – Further reading

Office of the Auditor-General. 2007. *Management of Conflicts of Interest in the three Auckland District Health Boards*.

Office of the Auditor-General. 2007. *Good Practice Guide: Managing conflicts of interest: Guidance for public entities*.

Office of the Auditor-General. 2004. *Christchurch Polytechnic’s Management of Conflicts of Interest regarding the Computing Offered On-line (COOL) Programme*.

State Services Commission. November 2009 (Updated October 2015). *Board Appointment and Induction Guidelines*.

# Appendix 2 – Relevant legal provisions

## Applicable legislation: by group

Group	Act	Reference	
Board	NZPHD Act	Section 6	
		Section 42(4) Clause 6, Schedule 2 Clauses 36–40, Schedule 3 Clause 6, Schedule 4	
Delegates	CE Act	Section 31	
	NZPHD Act	Section 6 Clauses 39–40, Schedule 3	
Statutory advisory committees:	NZPHD Act	Section 6	
		▶ community and public health advisory committees	Clause 6(3), Schedule 4
		▶ disability support advisory committees	Clauses 38–39, Schedule 4
▶ hospital advisory committees			
Other committees	NZPHD Act	Section 6 Clause 38, Schedule 3 Clauses 38–39, Schedule 4	

# Appendix 3 – Good practice

The good practice approach to conflict management has three elements. These are further explained below.



## The legal dimension

Good faith and integrity are not just aspirations of good practice, but legal requirements.<sup>25</sup>

Applicable legislation, which includes statute and other law, prescribes certain minimum standards and processes that must be met and followed. These include collective duties owed to the Minister,<sup>26</sup> and individual duties owed to the Minister and the DHB.<sup>27</sup>

Individual duties of board members include duties that each board member must, when acting as a board member:

- ▶ ‘... act with honesty and integrity’<sup>28</sup>
- ▶ ‘... act in good faith and not pursue his or her own interests at the expense of the entity’s interests’.<sup>29</sup>

In addition to these statutory obligations, members are increasingly seen as owing fiduciary duties: obligations to act in the best interest of dependant parties. Such a duty exists in relationships where one party places a special trust, confidence and reliance in the other in exercising discretion or expertise on their behalf.

<sup>25</sup> Refer to Appendix Two for relevant legal provisions as set out in the NZPHD Act and CE Act.

<sup>26</sup> Section 58, CE Act.

<sup>27</sup> Sections 26 and 59, CE Act.

<sup>28</sup> Section 54, CE Act.

<sup>29</sup> Section 55, CE Act.

## The ethical dimension

Regardless of whether any legal requirement applies, a conflict of interest will always involve ethical considerations.<sup>30</sup>

Failure to meet appropriate ethical standards in connection with conflicts of interest is open to criticism on the grounds that the conduct falls short of the ethical standards expected of those in public office. This will not necessarily involve a legal breach.

The Office of the Auditor General specifies integrity, honesty, transparency, openness, independence, good faith, and service to the public as the values and ideals within which public business ought to be conducted.<sup>31</sup> Any decision-making in regard to conflicts of interest should be conducted in line with these principles.

## The 'good practice' dimension

'Good practice' entails and extends the legal and ethical dimensions described above.

'Good practice' – sometimes referred to as best practice – is what boards and members should adhere to in order to meet appropriate standards. Good practice refers to the way in which a board meets ethical and legal requirements.

Good practice has two elements: appropriate processes and systems must be in place, and boards and board members must adopt a common sense and precautionary approach.

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<sup>30</sup>Office of Auditor-General. 2004. *Christchurch Polytechnic's Management of Conflicts of Interest regarding the Computing Offered On-Line (COOL) Programme*, p 24.

<sup>31</sup>Office of the Auditor-General. 2007. *Managing Conflicts of Interest: Guidance for public entities*. Wellington: Office of the Auditor-General, p 15.

