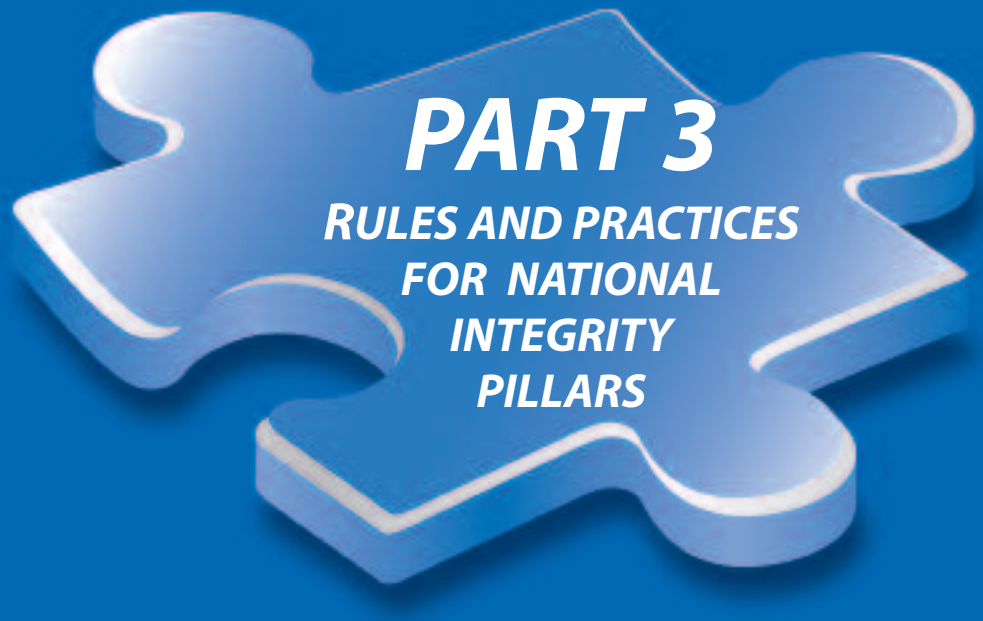

PART 3

RULES AND PRACTICES FOR NATIONAL INTEGRITY PILLARS

Chapter 11

Handling Competition Policy

Malaysia is a market economy and Malaysians are entitled to expect this economy to deliver increasing standards of living. Indeed, a key priority of the National Integrity Plan is to improve the quality of life and well-being of all Malaysian citizens.[1]

The quest for enhanced integrity and the fight against corruption do not, of course, take place only within the public sector, or only where the public sector and the private sector do business in the form of procurement. They take place, too, within private sector organizations when those organizations indulge in corrupt abuses of market power, in areas covered by a country's 'competition policy'.

Understanding competition policy

'Competition policy' is an essential tool for promoting sustainable economic activity, and for ensuring and underwriting the integrity of private sector activities. It determines the place of the state in the economic life of the nation by defining those activities that the state will be involved in, and those that will be left to the private sector. It also regulates in appropriate ways, the manner in which the private sector is to function so that the best interests of all are served. Sound competition policy forms the basis for significant elements of the National Integrity Plan.

In essence, competition policy seeks to deliver goods and services to a country's citizens at the cheapest sustainable prices; to encourage innovation and development; to increase productivity; and to foster trade and competition in international markets.

Objectives of competition policy

The prime objective of competition law is to create an open and well-regulated economy for the benefit of all the people in the country. This can be accomplished through the following measures:

- Regulating market excesses and restrictive trade practices (e.g. outlawing price-fixing, predatory pricing designed to drive a competitor out of business, fraudulent advertising, the formation of cartels, etc.);
- Providing efficient and effective regulation of banking and of stock exchanges;
- Reducing the scope for mergers and the development of 'market dominance' which are contrary to the public interest;
- Reducing the scope for monopoly profits in such fields as infrastructure, transport, and communications;
- Providing a framework for the protection of intellectual property (patent, trademarks, and copyright); and
- Providing protection of investments and savings (through regulating the activities of financial institutions and pension funds).

Competition policy does not operate simply by banning certain types of behaviour. It does much more than this. It establishes mechanisms that oversee and regulate the various activities for which they are responsible. In some instances, a Competition Authority is established to oversee and enforce the whole gamut of pro-competition policies and laws; in other instances, specific and independent regulators are appointed to regulate defined areas of activity (e.g. telecommunications, electricity, and water).

[1] National Integrity Plan, p. viii.

Targets of competition

Market rigging

Competition policy works against cartels and against those who would manipulate positions, either through being the sole provider of essential products or through combining with others in a conspiracy against competition, as well as against the public interest. Competition policy also aims to reduce barriers to entry into business activities and to expand opportunities for small and medium sized businesses. But its aims are not confined to the economic arena. They include social objectives, such as ensuring equity, promoting the welfare of consumers, and enhancing the quality of life for all (particularly the most vulnerable—the poor).

Many countries have been victims of cartels over the years—the areas of vitamins, cement, and heavy electrical engineering being among the best-known. For decades, in the field of heavy electrical equipment, collusive behaviour artificially inflated infrastructure costs around the world. Manufacturers closed down their cartels in countries where they were prosecuted, but elsewhere—largely in the developing world—they continued where regulatory agencies did not exist or were powerless to intervene. Without doubt, suspicion of cartels fuels much of the hostility within the contemporary globalization debate.

Other malpractices

Prevention of cartels aside, some of the other more black-and-white malpractices which competition policy seeks to restrain include the following:

- **Tied selling.** Forcing a buyer to purchase greater quantities of goods and services than they need, or to buy the full range of products in a particular category or other products they neither need nor want.
- **Pyramid selling.** Granting franchises to sell products on the basis that the franchisees will bring in further tiers of franchisees beneath them ad infinitum. Eventually, when the bubble bursts, those at the top disappear with the takings, while those at the bottom, who thought they were buying business opportunities, find themselves left with nothing. (This phenomenon was extremely destructive to the economy in Albania.)
- **Resale price maintenance.** Dictating the price that a seller can charge and making it a condition of supply that the price be no lower.
- **Exclusive dealing.** Creating local monopolies by agreeing to divide markets into regions whether geographically or by category of goods.
- **Refusal to deal.** Forcing a purchaser to act under instructions from the supplier under threat of the withdrawal of products or services. (This usually occurs where there are limited options for alternative supply.)
- **Differential pricing.** Charging different prices to different buyers on a basis other than those of quality or of quantity ordered.
- **Predatory pricing.** Charging of artificially low prices to undercut a competitor with the aim of driving it out of business.

Competition policy and civil society

Because competition is essentially indiscriminate in that it does not favour one interest over another, there are few political constituencies that have a vested interest in promoting and building a culture of fair competition. This renders the consumer movement an important stakeholder in the anti-corruption movement. It also means that implementation of the National Integrity Plan represents a rare opportunity for those who govern and those whom they govern to take a holistic view as to what reforms are needed.

Essentially, competition policy provides opportunities for civil society to mobilize and intervene in defence of consumer rights. Consumer groups such as the Federation of Malaysian Consumers Associations (FOMCA) can take the following actions:

- Informally monitor compliance with the standards which have been set;
- Monitor the truthfulness of advertising;
- Examine the safety of products;
- Engage with the private sector, using legal requirements as a minimum benchmark;
- Make submissions to regulators; and
- Run test cases in court, where dialogue with the private sector interests in question fails.

At the same time, civil society (and consumer groups in particular) can foster the political will to pursue a process that stimulates an understanding of how a properly conceived competition policy works in the interests of all.

Competition policy and investment

A sound competition policy can increase international confidence and help the development of a country by rendering it more attractive to investors, usually by increasing investor confidence. Nevertheless, competition policy and competition law may be ineffective unless they are developed within the wider context of regulation and legal frameworks relating to the business environment.

Issues of corporate governance, contract enforcement, the judicial system, and dispute resolution mechanisms are also important. The reform of competition policy and laws should go hand in hand with the strengthening of corporate governance and the development of appropriate codes of conduct.

Competition policy and developing countries

Competition policy is not just for the developed countries. At the national level, competition policies are found in countries at various stages of development. History seems to suggest that competition policy is a means for accelerating development by doing away with anti-competitive and anti-consumer practices.

The legislation of Canada, the United States, and the United Kingdom, for example, dates back to the end of the nineteenth century, when all three had many of the less attractive features of today's developing economies. There were small cliques of powerful private sector interests (oligarchs) that did not hesitate to manipulate markets at the expense of the public interest. Likewise, bribes and kickbacks flourished in the private sector. The responses to the challenges these interests posed can now be seen as marking an emerging recognition of the need for competition policy.

It was not that policy-makers in these countries necessarily had a very clear concept of what they were trying to achieve, or of where their reforms would ultimately lead. The measures were introduced in a piecemeal manner, not comprehensively.

In the United States, for example, the law was developed progressively and in response to differing problems. First, the Sherman Act of 1890 rendered conspiracies in restraint of trade a criminal offence, but it recognized no role for the State in actively regulating what was taking place (Canada had done so a year earlier, in 1889). Then came the Clayton Act of 1914, still the primary tool for the control of anti-competitive mergers and joint ventures in the United States. At the same time, the Federal Trade Commission Act created the Federal

Trade Commission and so introduced an element of active regulation. These countries, and other developed economies, are constantly modernizing and adapting their competition legal frameworks to new situations—the United Kingdom as recently as in 1998, with its Competition Act.

So it is that today countries as far apart as Thailand and South Africa are enacting competition laws addressing unfair and unjustifiable dominant market conduct,[2] such as mergers that may lead to monopolies or unfair competition, monopolies and the reduction of competition as a result of mergers, and unfair and restrictive trade practices. Malaysia has a plethora of laws in support of a competition policy but has not as yet completed legislation that will embody the country's policy in a Competition Act (e.g. Fair Trade Bill). Such a development will mark a significant advance in the execution of the National Integrity Plan.

Competition policy and the role of the state

There have been times in the recent past when some economists have attacked the notion of the state playing an economic role, asserting that governments should withdraw from the marketplace entirely, privatizing as they go, abandoning the old control and command economies they had been practising, and leaving the private sector more-or-less in sole charge. Most have now rejected the more extreme elements in this minimalist view. Rather, the state is seen as having a crucial role in ensuring that the principal players in the economy abide by well-defined and appropriate rules. This approach is adopted by the National Integrity Plan, which envisages the government and the private sector as partners in a distributive economic growth model.

This demonstrates the absolute necessity for a strong state, well equipped to protect the public interest and to regulate areas of the private sector susceptible to corruption and other forms of abuse. Not all players in the private sector have the public interest at heart.

It is obviously nonsensical to suggest that such critical strategic activities as banking, the management of pension funds, and insurance could ever be left free to operate entirely as they please. Indeed, the absence of effective banking regulation was one of the major factors behind the recent economic collapse of countries such as Indonesia and the Philippines. In an ideal world, self-regulation might be effective; in the real world, in the face of competition, it tends to fail.

One may be able to agree that government intervention in the economy should be restricted to setting the ground rules for fair competition, to providing a conducive environment for efficient production and provision of goods and services, and to regulating market excesses. At the same time, the state must also be strong and properly equipped to be able to perform each of these functions. This may be a lengthy process. Where the state has been deeply involved in the economy through state-owned enterprises, the government itself may well have become a monopoly, and it can take a considerable time for a competitive market to take responsibility for all of a government's commercial activities.

Distortions in a domestic market, too, can often be the result of government interventions, such as the protection of inefficient local industries producing substandard and overpriced goods. These interventions may also work against the interests of the poor in particular, by denying them access to cheaper goods of better quality. They need to be addressed in the context of competition policy.

[2] See, for example, Thailand's Competition Act, 1999 (http://www.oecd.org/dataoecd/40/45/2491524.doc) and South Africa's Competition Act, 1998 (http://www.compcom.co.za/thelaw/thelaw_act_competition_acts.asp?level=1&child=1).

Competition policy and globalization

As privatization continues to place more and more previously publicly owned assets into private hands, the way is paved for increased levels of international mergers and acquisitions. As the public barriers to competition are removed, the private barriers must, correspondingly, be addressed, and even more so with increasing globalization.

Countries with weak domestic institutions are particularly vulnerable. They are open to cross-border restrictive trade practices and international business conspiracies. Integration into the global economy may increase competition, but it does not necessarily ensure it. Cartels, vertical restraints (agreements between sellers and buyers), exclusive dealerships, and controls over domestic imports can effectively block people from receiving the development benefits which globalization should bring. Concern over these vulnerabilities lies at the heart of some of the protests against globalization presently taking place around the world.

For regulators, too, there is a growing headache. A merger in the host country of two previously competing businesses may not result in an adverse reduction in competition there. However, in a foreign country, the two firms may have subsidiaries, previously the only two rivals in a particular market. Thus the consequences of a merger going ahead in one country can have very serious consequences for another. Anti-competitive practices can also be imported through foreign direct investment (FDI), with international franchisers using local franchisees to source particular products and tie up local distribution chains.

There is also the controversial question of the role of the World Trade Organization (WTO). Should it be to enforce competition policy at the global level? Is it to be some kind of 'global competition policeman'? Is there to be an international framework, perhaps developed at the WTO, to underpin the development of a global competition policy? And would such a cooperative framework help to counter the abusive and corrupt practices that are adversely affecting international markets, particularly the economies of developing countries?

Some might be forgiven for thinking that competition policy and laws are designed only for rich and urban societies, or that competition law is designed to impose forms of capitalism at the expense of the poor and the weak. In fact, its functions are, if anything, the very reverse.

Competition law builds and sustains public confidence in institutions, and in so doing, it can help underpin the stability of democracies. It is the key to an effective market economy. If, as many now believe, the route to development for the world's poorer nations lies by way of private sector activity, a sound competition policy can provide the bedrock for a country's development. When the institutions designed to promote competition policy are weak, corruption can flourish, which is why those who would build integrity and contain corruption should see the role they are playing against this broader background.

Integrity checklist for assessing the effectiveness of a country's competition policy

- Has the government articulated a clear competition policy?
- Is such a policy being implemented effectively through law and other reforms of practices and procedures?
- Does the private sector support the development of a coherent and effective competition policy?
- Do consumer protection organizations support it?
- Are sufficient efforts being made to educate the public as to how it benefits from an effective competition policy (both in terms of lower prices and of protection against abuse)?
- Are there clear and enforceable laws criminalizing the creation of cartels and bidding rings, etc.?
- Are monopolies or near-monopolies in private hands the subject of effective regulation that protects the public interest?
- Are mergers effectively regulated so as to block the creation of monopolies and the creation of undue market dominance?
- Are local regulators independent of political interference and protected against corruption?

Chapter 12

Restoring Trust in the Public Service[1]

As we have seen, the essential building block for a nation's integrity is the family. In the same way, too, is the Civil Service the bedrock of sound administration. No matter how efficient and upright the political leadership, without a sound and professional Civil Service to support it, little can be achieved. Conversely, if members of the political leadership of a country who are Ministers are unethical in handling public affairs, it is for the Civil Service to defend the public interest by acting as a brake. Moreover, politicians and Ministers come and go, but the Civil Service remains to ensure continuity and institutional memory.

A country must therefore have a Civil Service that it can trust to provide it with the services to which it is entitled and that it can depend on for the sound, efficient, just, and honest administration of public affairs.

A Dutch Minister of the Interior once commented:

> The government either has integrity or it does not. You can't just have a little integrity. An administration stands or falls with the integrity of the government; any diminution of the integrity of the government means that the government loses the confidence of the public. And without the confidence of the public, democracy cannot work. Then there is no more democracy. That is a frightening picture.[2]

The integrity of a government can come under pressure in a variety of ways, not only stemming from straightforward corruption in the pursuit of personal gain, but also, and above all, from an improper use of power. And the improper use of power is a broad concept, one that embraces degeneration, decay, and erosion of standards of conduct, escalating into fraud and corruption.

OECD principles for managing ethics in the Public Service

A set of principles has been developed by the OECD to help countries review the institutions, systems, and mechanisms they have developed for promoting Public Service ethics. These can be adapted to national conditions, and countries can find their own ways in which to balance the various aspirational and compliance elements, so as to arrive at an effective framework that suits their own circumstances. The principles are, of course, not sufficient in themselves but provide a means for integrating ethics management into the broader public management environment. It is useful to review these principles against the background of Malaysia's own code of conduct for public servants which is generally known as the General Orders for Public Officers.

The OECD's Principles for Managing Ethics in the Public Service[3] are as follows:

1. *Ethical standards for Public Service should be clear.*

Public servants need to know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behaviour lie. The emphasis here is on broad statements of principle. The statement should not be written in detail or resemble legislation, or simply be a list of prohibitions and restrictions.

[1] The term 'Public Service' is taken to mean the civil service, armed forces, and police force of a country that implement the policies of the government.

[2] Catherine I. Dales, Minister of the Interior, in an address to the Annual Conference of the Union of Dutch Local Authorities, June 1992.

[3] PUMA Policy Brief 4, 1998, www.oecd.org/dataoecd/60/13/1899138.pdf.

2. *Ethical standards should be reflected in the legal framework.*

The legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant.

3. *Ethical guidance should be available to public servants.*

A code without a mentor or an adviser is a rudderless boat adrift on a tempestuous ocean. Public servants need to know where, and to whom to turn, when they are confronted with potential difficulties.

4. *Public servants should know their rights and obligations when exposing wrongdoing.*

Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the Public Service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility.

5. *Political commitment to ethics should reinforce the ethical conduct of public servants.*

Unless political leaders demonstrate high standards, they have no moral authority upon which to draw when they wish to reprimand others who step out of line.

6. *The decision-making process should be transparent and open to scrutiny.*

The public has a right to know how public institutions apply the power and resources entrusted to them. Public scrutiny should be facilitated by transparent and democratic processes, oversight by the Legislature, and access to public information. A corrupt and/or inefficient administration will wish to shield its shortcomings through denying access to information. The provision of channels for information and rights of access are important antidotes to this malaise. The greater the transparency, the fewer the shadows.

7. *There should be clear guidelines for interaction between the public and private sectors.*

Clear rules defining ethical standards should guide the behaviour of public servants in dealing with the private sector, for example, regarding public procurement, outsourcing, or public employment conditions. Increasing interaction between the public and private sectors demands that more attention should be placed on Public Service values and requiring external partners to respect those same values.

8. *Managers should demonstrate and promote ethical conduct.*

An organizational environment where high standards of conduct are encouraged by providing appropriate incentives for ethical behaviour, such as adequate working conditions and effective performance assessment, has a direct impact on the daily practice of Public Service values and ethical standards.

9. *Management policies, procedures, and practices should promote ethical conduct.*

Management policies and practices should demonstrate an organization's commitment to ethical standards. It is not sufficient for governments to have only rule-based or compliance-based structures. This principle stresses the importance of the aspirational aspects of ethical conduct, and the need to avoid a minimalist, rule-bound approach under which everything that is not expressly forbidden is implicitly allowed.

10. Public Service conditions and management of human resources should promote ethical conduct.

Public Service employment conditions, such as career prospects, personal development, adequate remuneration, and human resource management policies should create an environment conducive to ethical behaviour. Using basic principles, such as merit, consistently in the daily process of recruitment and promotion helps operationalize integrity in the Public Service.

Ethical conduct can be fostered, just as unethical conduct can be contagious. If nepotism, favouritism, and the selective application and waiver of rules are allowed to take place, the standards of all can be expected to come under pressure.

11. Adequate accountability mechanisms should be in place within the Public Service.

Public servants should be accountable for their actions to their superiors and, more broadly, to the public. Accountability should focus on both compliance with rules and ethical principles and achievement of results. Corruption and inefficiency flourish in an environment devoid of accountability.

12. Appropriate procedures and sanctions should exist to deal with misconduct.

Mechanisms for the detection and independent investigation of wrongdoing such as corruption are a necessary part of an ethics infrastructure. Mechanisms need to be fair and trustworthy. They should protect the innocent and the naïve, just as they should detect and punish the culpable. Penalties, where applicable, should be proportionate and should be consistently applied. A sanctions regime which is idiosyncratic and viewed as untrustworthy by staff can seriously undermine efforts to raise and to protect ethical standards.

Everyone would prefer to be, and to be seen to be, honest and respected for their personal integrity, by themselves as much as by their family, friends, and colleagues. This provides the starting point for an ethics management system that has the potential to make serious inroads into ethical misconduct, bearing in mind the fact that transgressions can be as much the result of misunderstandings and misperceptions as that of blatant illegality.

The Malaysian approach to ethics management

To reinforce integrity in the Malaysian Civil Service, the government has continuously emphasized the need for civil servants to build on the trust the public has in them, by inculcating positive values and by encouraging ethical practices. In its desire to bring about a 'clean, efficient and trustworthy' government, the National Integrity Plan stresses such values as trustworthiness, responsibility, sincerity, dedication, moderation, diligence, clean conduct, cooperativeness, honour, and gratitude.

An ethics-based approach is essentially preventative, and thus a much more profitable route than one which relies simply on the big stick of enforcement and prosecution. A well-motivated Public Service is much to be preferred to one which operates in fear and apprehension and where any exercise of personal initiative, however well-intended, invites investigation and possible censure.

Creating codes of conduct for the Malaysian Civil Service

In 1979, the Malaysian Government launched the Excellence in the Civil Service programme that established a code of ethics for the Civil Service. An accompanying 'Guide' provided a set of seven principles to guide the conduct of

personnel. Guidelines were provided to individual agencies to help implement the programme. A system of rewards was established to recognize those who had given exemplary service, and the 'Look East Policy', introduced in 1982, was intended to provide a new role model for performance and behaviour.

Under the 'Look East Policy', many Malaysian executives were sent for overseas training or attachment, particularly to South Korea and Japan, in the belief that the impressive development of resource-scarce countries like Japan and Korea, with an emphasis on work ethics and high productivity, was an excellent standard for Malaysians to emulate, particularly as it was based on shared cultural values.

The campaign for establishing a clean, efficient, and trustworthy administration (1982), the call for the inculcation of Islamic values in the administration (1982), and 'Leadership by Example' (1983) all extolled the virtues required of civil servants in their dealings with their customers and in the management of public resources. It was stressed to managers that the power of a good example has twice the value of good advice.

The main set of ethical guidelines in the Malaysian Public Service are now spelt out in the Code of Conduct formulated under the Public Officers (Conduct and Discipline) Regulations 1993, formerly known as the General Orders for Public Officers (Conduct and Discipline). These provide guidelines on specific areas of conduct applicable to a civil servant throughout the course of his career. Failure to comply with these regulations may result in disciplinary action being taken against the civil servant concerned. Among the key guidelines are the following:

- Public officials should refrain from receiving any gifts from members of the public, where the intention might be to influence them in the discharge of their official duties. Should they be in circumstances where it would be embarrassing to decline a gift, it must be reported to the appropriate authority.
- They should declare assets to their supervisors and a public official should declare his or her personal interest in any matter that is being discussed in a committee of which he or she is a member.
- They are expected to give priority to their public duties ahead of their personal interests.
- They must not behave in a manner that may damage their reputation as a civil servant of integrity and good character so as to ensure public confidence in the civil servant.
- Public accountability on the part of the civil servant, among other things, requires him or her to take personal responsibility for his actions.

The punch clock system and name tags were introduced as early as the year 1979. Apart from introducing more discipline into the Public Service, these two efforts have a significant symbolic value. The use of the punch clock is intended to instill discipline, a sense of concern for punctuality, and a greater awareness of the value of time. The use of name tags is intended to nurture a sense of pride and personal responsibility among public sector employees and to upgrade the quality of the Civil Service, especially in the area of public relations. When introducing the requirement of name tags, the then Prime Minister demonstrated leadership by making a point of complying with the requirement himself, making it plain that no one was 'above' the rules.

In support of the code of ethics, efforts have been made to upgrade productivity and efficiency through ethical practices. These include awareness programmes and policies that emphasize honesty, orderliness, politeness, public accountability, and professionalism in the discharge of one's duties.

Since intention is difficult to prove, guidelines on the giving and receiving of gifts have been drawn up to prevent unethical and corrupt

practices. Regulation 8, Public Officers (Conduct & Discipline) Regulations 1993, for instance, allows a civil servant (or anyone on his behalf) to receive or give gifts if the form, amount, or value of the present may be presumed to be reasonable, provided that the gift befits the occasion and is considered appropriate. If it gives rise to reasonable suspicion that the gift is a form of reward for fulfilling a personal favour from a certain party pertaining to an official act or is in any way an object of gratification, then the civil servant may not be permitted to keep the present and may be liable for disciplinary action. A gift received in this way must be reported.

Unless given official permission by his or her superiors, a civil servant cannot receive any salary, wages, payment, or reward for participating in the management of any commercial entity, undertaking employment in any private organization, lending his or her personal expertise, or acting as an executor, administrator, or receiver at any time, including during paid or non-paid leave of absence. However, government regulations are flexible enough to permit outside employment subject to conditions approved by the head of the relevant department.

Ensuring effectiveness of the codes of conduct

It is important that an ethics code is tailored to the conditions of the society it is designed to serve. For example, it may make sense to preclude a well-paid public official from engaging in private sector activity but if the junior staff is not adequately paid, this may be wholly unrealistic. Indeed, private sector activity of some sort can be a necessity where public sector remuneration is very low. The challenge then becomes one of how to manage effectively a situation where public officials are frequently engaged in private sector activities.

A key to bringing about behavioural changes in the Public Service is training. The National Institute of Public Administration (or Institut Tadbiran Nasional—INTAN) has responded to this need by incorporating values, ethics, and attitudinal components into its training curriculum. A training programme that assigns equal importance to aspects of motivation and attitude, besides the regular components of knowledge and skills, has been successfully implemented. Seminars and workshops on values and ethics are also held regularly at the Institute for all levels of officers.

Trust and local government

Local government is the tier of government with which the people have the most contact. With municipalities being foremost in the front line, their position needs to be covered in any assessment of Malaysia's National Integrity System, particularly as the role of local government has expanded well beyond its initial mandates of 'grass, rubbish, roads, drains, and rates'.

At the local government level, too, various safeguards should be present, including the following:

- A code of conduct for senior local government leadership, in addition to the normal criminal and Civil Service regulations that highlight corruption issues.
- Disclosure of assets by councillors and senior officials to the public, which should be effectively made known by the media.
- The existence of an independent, non-partisan complaints office that is effective and respected, and known to the public and to staff.
- Protection for whistleblowers and an ability to make anonymous complaints.
- An effective and regular system in place for undertaking regular financial and

managerial audits by independent offices of all aspects of its operations with the results of these audits both publicized and acted upon.

Promoting and monitoring ethical standards: The Standards Board for England

A possible model for promoting ethical standards is that adopted in the United Kingdom. Confidence in local democracy is a cornerstone of the UK way of life, as it is in Malaysia. But this can only be achieved when elected and co-opted members of local authorities are seen to live up to the high standards the public has a right to expect from them. So it is that in the United Kingdom, in March 2001, the Standards Board for England was established by an Act of Parliament. Notwithstanding its statutory base, the Board is completely independent of the government.[4]

The Standards Board for England is responsible for promoting high ethical standards and investigating allegations that the behaviour of members of local authorities may have fallen short of the standards required of them. The Standards Board for England helps build confidence in local democracy. It does so by promoting the ethical behaviour of members and co-opted members who serve on a range of authorities through receiving and investigating allegations that members may have breached a Code of Conduct.

The Standards Board also works with local authorities to help them provide support and guidance to their members regarding ethical behaviour. Every local authority is required to adopt a Code of Conduct that sets out rules governing the behaviour of its members. All elected, co-opted, and independent members of local authorities, including parish councils, fire, police, and National Parks authorities, are covered by the Code.

Each Code must include the provisions of a Model Code of Conduct approved by Parliament in November 2001. Authorities can choose to add their own local rules to the Model Code if they wish, although most have adopted the Model Code without additions. Authorities had until 5 May 2002 to adopt a Code of Conduct. After this date, the Model Code was automatically applied to those who had not adopted their own Code.

The Code of Conduct covers specific areas of individual behaviour such as members not abusing their position or not misusing their authority's resources. In addition, there are rules governing disclosure of interest and withdrawal from meetings where members have relevant interests. Under the Code, members are also required to record their financial and other interests on a public register.

The Board also seeks out and promotes good practice, so that local authorities may learn from their peers. In many countries, the greatest problem for local authorities lies in procurement, with Council members and their relatives often being deeply involved in work within the private sector. Procurement therefore needs careful attention at the local level. As with procurement at the Federal level, the local government procurement system must be fair and based on competitive principles, with effective conflict of interest rules and procedures. Local procurements should be advertised well in advance and made known to the public. The process for selecting a bidder should be thorough and fair, and be subject to regular internal audit by an independent office.

[4] http://www.standardsboard.co.uk/.

Integrity checklist for assessing trust in the Public Service

- How high is the level of trust in the Public Service?
- What influences the level of trust?
- Is it important that the public has a level of trust in the Civil Service?
- What are the consequences when levels of trust are low?
- What can members of the Civil Service do to increase the level of public trust in the Civil Service?

Tackling Immunities and Privileges

It is generally the position that a Head of State enjoys immunity, not for his/her personal benefit but because it would be demeaning for the country itself to have its Head of State having to defend him/herself in court unless he/she has been impeached by Parliament. Particularly is this so where the Head of State has no executive powers and so is, in a very real sense, above the temptations of corruption.[1]

By contrast, politicians are a wholly different matter. Across the world, investigations into high-level corruption allegations have been impeded by claims of political immunity. For example, it is frequently cited that high-level French, Italian, and Russian as well as Georgian, Kazakh, and Kyrgyz politicians have successfully avoided appearing or testifying in cases of corruption, even when they are the focal point. In Nigeria, corrupt state governors hide behind their immunity, and enforcement agencies are powerless to touch them. To many, it appears to showcase a network whereby politicians scratch each other's backs in a Gordian knot of mutual favours and interdependence. Indeed, there are numerous countries where the scope of political immunity has been extended beyond its intentional remit, and in such cases the politicians enjoy de facto immunity from serious crimes. In Russia, it is said that known major criminals seek election to the State Duma (Parliament) precisely because of the immunity this will bring them.

In many countries, senior public officials are shielded from the rule of law by immunities to such an extent that criminals seek public office simply to avoid charges. In such cases, there is a very high risk that a vicious cycle of corrupt practices emerges. Even if a corrupted entrepreneur is unable to attain public office, he may seek to attach himself to a political patron who—from behind his shield of immunity—is able to protect him. The exchange of favours and bribes is highly unlikely in any such situation to have been made with regard for the public good. Through excess political immunity, politicians can increase their rent-seeking capabilities, and corrupt behaviour snowballs. Their inviolability renders them virtually untouchable.

Immunity vs. integrity

All forms of political immunity are not necessarily offensive or detrimental to a country's integrity system. Indeed, appropriate forms of political immunity are as old as politics itself, in that they represent a generally accepted way of protecting the legitimate positions of senior state officers. If senior officials could be sued personally for every honest mistake they made, government could well grind to a halt. Often, too, immunity is designed to avoid politically motivated prosecutions that may impede the public official from conducting his/her daily business. Certainly, it is in the public interest to keep politicians away from endless and dubious litigation.

Substantial differences in immunity practices can be noted between countries. For example, it is far more common to request the waiving of Parliamentary immunity in countries such as Italy and Greece than in Denmark, Finland, France, and Sweden. This, of course, does not necessarily mean that there are more corrupt politicians in the former group; it simply implies that the question of immunity is more lively and active in those countries. Furthermore, in some countries, the number of rejected requests regarding waiving of political immunity is substantially higher than in other countries. This

[1] In 2000, a French court ruled that President Jacques Chirac could not be investigated while in office in connection with an employment contracts scandal during his time as Mayor of Paris. The scandal involves allegations that some members of Mr Chirac's political party benefited from salaries paid for non-existent jobs as employees of the city. The court ruled that French law barred prosecution of a president in office, but said that it was possible that Mr Chirac could be summoned once his presidential term ended (http://news.bbc.co.uk/1/hi/world/europe/598803.stm). Thus he cannot escape liability unless —as in the manner of the disgraced US President, Richard Nixon—he is pardoned by his successor.

appears to indicate that there is a more inclusive definition of political immunity, as can be seen in Portugal.

Categories of immunity

Nonetheless, certain generalizations can be observed on the question of immunity. Generally speaking, there are two separate categories of immunity:

- **Principle of non-accountability or non-liability.** This is the original, basic protection afforded to politicians, and refers mostly to the freedom of speech and expression.
- **Principle of inviolability.** This refers to a broader, more flexible protection which gives the politician freedom from arrest.

Non-liability principle

The non-liability principle, which is usually narrowly defined, is nearly always absolute; in most cases, there are no time limits or possibilities of lifting the immunity. Closely related to the principle of unconditional freedom of speech, it is generally based on the tacit understanding that accusations and defamatory statements will be kept at an absolute minimum.

If protection were not guaranteed by non-liability privileges, then Members of Parliament would feel constrained, compromised, and unable to speak freely and vote on behalf of the people they represent. Without immunity, the very independence of the Parliamentary institution would be called into question, as well as its ability to function in the light of potential politically motivated investigations into dubious defamation allegations.

The same principle applies to the Judiciary, which is also given a similar level of immunity. It would assuredly compromise the effectiveness of the Judiciary as an institution if a judge were to be held personally liable for an honest mistake of law made during a trial. It is far better for the state to be held liable in such instances, and for judges to be removed only if they are proven to be incompetent or unfit for duty.

Principle of inviolability

The question of inviolability (i.e. freedom from arrest), however, is far more controversial. In the Netherlands, politicians do not enjoy any Parliamentary inviolability, and in the United Kingdom and Ireland, Parliamentarians are given very little protection on this question. Often, if Parliamentary involvement is required, it is a matter of giving authorization to an investigation which is inevitable anyway, if for no other reason than the fact that the public demands it. Thus, in Belgium, for example, police can investigate the activities of Parliamentarians without interference, but authorization is required for the accused to be committed to trial.

Provision of immunity

The question of immunity requires that four questions be answered:

1. Who should be given the protection?
2. What acts should be included in the protection?
3. For how long should the protection extend?
4. In respect of what physical locations should there be protection?

On the issue of non-liability, the scope of the immunity generally refers to acts committed in the performance of the politician's duty, either in Parliament or on official occasions. Thus, it generally does not extend to statements made during non-official public speaking or in newspaper articles. The Parliament building is the bricks and mortar manifestation of the limits

of this form of immunity, outside of which the politician remains an ordinary citizen.

Some countries have particular provisions that allow for persons other than Parliamentarians to enjoy the immunity privilege. In the United Kingdom, for example, all those who attend Parliamentary debates and proceedings, including civil servants and expert witnesses, are included in the non-liability principle.[2]

On the issue of inviolability (i.e. freedom from arrest, etc.), it is generally accepted that when Parliamentarians are caught *in flagrante delicto*—in other words, if they are caught during or soon after committing a punishable offence—then inviolability does not offer protection. In terms of the actions covered under the inviolability principle, there is little international harmony. Some countries define particular crimes which are not covered by inviolability; others draw a line on the length of the potential term of imprisonment for the crime. The Swedish *Grundlag* states that the inviolability principle does not include criminal offences that are punishable by two years or more in jail.

Certainly, it is universally illegal for politicians to bribe or accept bribes, although the ability to prosecute such offences depends largely on how strictly the inviolability principle is enforced in any given country. Although a country may nominally forbid bribery among politicians and citizens alike, politicians are often protected not only by the vague wording of immunity provisions, but also by a circle of mutually dependent public officials, including those responsible for the prosecution of serious offences.

The duration of inviolability differs from country to country. In some countries, the principle is only relevant for the length of the Parliamentary term, whereas others limit the protection to the duration of a single Parliamentary session. In Romania, the immunity practices allow for a Member of Parliament to have his immunity automatically restored if he is re-elected into office. Politicians in some countries are granted immunity that even dates back to before their term of office commenced, a provision that can have the dangerous effect of attracting criminals seeking to avoid prosecution.

Certainly, life-long immunities are untenable; the privilege must be given up upon leaving the office. It is thus equally important to impose limits on the length of time that an Executive President and/or Prime Minister can hold office. As a deterrent, there must be a regulation that holds an office-holder accountable for his or her actions once they are out of office. In effect, immunity should be the exception rather than the rule. It is enforced not as an honour and a personal privilege, but rather as a tool that enables an individual to discharge his or her duties effectively. Once leaving office, a Parliamentarian must be able to be held to account for any transgression that occurred during his or her term in office.

Procedures for lifting immunity

The procedures for waiving Parliamentary immunity often tend to be rather vaguely defined, and to be ad hoc. Indeed, in many countries, there is no procedure at all, either because there have been no cases to set a standard procedure or because there is a distinct lack of political will to clarify such a delicate matter. In some instances, the procedures for lifting immunity are made deliberately complicated and forbidding in order to discourage any such requests.

It is nonetheless important to establish a stable set of principles to deal with such requests. As a general rule, such principles should take the following into consideration:

- It concerns a grave crime, in which the reputation of the institution of Parliament itself is at stake.

[2] In the Netherlands, there is very little scope for Parliamentary immunity; for common law offences, Members of Parliament are by law given the same status as ordinary citizens. The privilege extends only to the non-liability principle, and this covers only acts that are explicitly linked to the Parliamentary mandate. It has been more than 150 years since the authorization of Parliament to waive political immunity has been invoked; in fact, the immunity is so limited in scope that there are no defined legal procedures to waive it.

- The request does not unfairly impinge upon the politician's freedom of speech and freedom to independently carry out his or her mandate to represent the people who elected him or her.
- The purpose of the request is not to unfairly single out and discriminate against the politician.
- The facts of the case are not clouded by political machinations.

Often, a specific Parliamentary Committee is set up to deal with a particular case. Dependent on the conclusions of this Committee, Parliament will decide on the immunity status of the Member of Parliament in question. The initial request to list immunity for a given Parliamentarian is usually made by the prosecution services, a special prosecutor, or the Minister of Justice. In most cases, the relevant Committee, the Parliamentary speaker, and one or two Ministers are notified of a request. Once the Special Committee has made its decision on the matter, Parliament tends to follow its explicit recommendations. The level of majority required to authorize the waiving of political immunity is often two-thirds, though this varies from country to country.

The issue of political immunity also transcends borders—firstly, because many allegations of corruption deal with the international arms trade or the discovery of excessive assets in a foreign country, and secondly, because the privilege of political immunity extends to a large corps of foreign diplomatic representatives. Thus, it is particularly important that elected public officials are subject to extradition.

The establishment of clear, narrow, and enforceable standards of political immunity is an essential component of any national anti-corruption campaign, especially in countries where important investigations are being impeded by privileges and protection. The ending of political immunity when there has been a pattern of abuse can put faith into the democratic system; it can demonstrate a Parliament's trust in the objectivity of its institutions and it demonstrates political will to make things better.

The Declaration of the 11th International Anti-Corruption Conference in 2003 proclaimed in no uncertain terms that 'immunities are afforded to far too many people, and in a needlessly wide and general fashion.... We believe that governments must review the scope of any immunity as a matter of urgency, and then take any action necessary to restrict these to legitimate and justifiable limits.'

There is a delicate balance between protecting the work of democratic officials against disruptive and politically motivated trials on the one hand and potentially condoning corrupt behaviour in a Legislature on the other. The proposition that the very people who make laws should also be exempt from complying with them would be absurd.

Political immunity must never be allowed to become total impunity.

Monitoring Public Officials

Disclosure of assets

In many parts of the world, the argument is advanced that one of the key instruments for maintaining integrity in the Public Service should be declaration of assets. These should be made by all those in positions of influence and should cover their own and their immediate family members' incomes, assets, and liabilities. Some countries also require senior office-holders to divest themselves of their major investments, while others permit the establishment of 'blind trusts'.[1]

Those in positions of influence—be they elected or appointed officers, or career civil servants—can frequently be at risk of being made enticing but illicit offers. As suspicion of public officials has grown—fed by revelations of the ways some officials have looted their countries' treasuries or by doubt as to the origins of the funds they have used to buy expensive houses and cars—so, too, has grown the belief that the assets, incomes, and liabilities of all public officials who might be at risk ought to be monitored.

In the past, in developed countries it was considered sufficient for Cabinet Ministers simply to disclose their investments to the head of government on an informal basis. In today's somewhat more distrustful world, even the head of government, as often as not and rightly or wrongly, can be the object of suspicion. Something more rigorous seems to be called for, including an independent agency to monitor the situation if the declarations are not to be open entirely to the public.

Although disclosures of assets and income will, of course, not be accurately completed by all those who are taking bribes, it is thought that the requirement that they formally record their financial position lays an important building block for any subsequent prosecution. It would, for example, preclude them from suggesting that any later wealth that had not been disclosed was, in fact, acquired legitimately. If liabilities are monitored, the fact that a public official's financial affairs are getting out of control will serve as a red light and trigger an appropriate, and helpful, response.

Disclosure, the argument runs, should also extend to a certain post-employment period as a deterrent to the receipt of corrupt payments after retirement. Studies have suggested that it is unlikely that corrupt payments are made more than three years after an official has retired.

The Westminster tradition

There are traditionalists who argue against disclosure rules and prefer to rely on the 'Westminster' tradition of informal, largely unwritten rules. These rules were believed to guide senior government figures in observing high ethical standards—standards higher and more flexible than the demands of black-letter rules. However, all the evidence today points to the utter inadequacy of this informal system. The UK Parliament itself has abandoned it as a failure in today's world and has introduced mandatory disclosures. Corruption today can only be reduced if it is made a high-risk and a low-profit undertaking. Informal rules do not work nor do they wash with the public.

[1] See Bernard Pulle, 'Conflicts of Interest Avoidance: Is There a Role for Blind Trusts?', in *Current Issues Brief* 14, 1996–97, http://www.aph.gov.au/library/pubs/CIB/1996-97/97cib14.htm.

The US practice of assets disclosure

But does a system of disclosures actually work? In a democracy such as the United States, assets disclosures are seen by the pubic to be working from time to time. These seem to work not so much because of government enforcers (although there are those), but because of third party enforcement. In elections, opposing candidates, for example, will scrutinize each other's asset declaration forms and make it an issue if an opponent seems to be living beyond his or her means; likewise with forms requiring disclosures of campaign contributions and expenditures. If a candidate claims to receive only modest contributions and yet is travelling in a leased jet and staying at top-class hotels, his or her opponents will make it an issue. There are civil society groups, too, which check forms and report on politicians whose declarations seem problematic and on donors who appear to have benefited handsomely from their financial support of candidates.[2]

With US government bureaucrats, these processes are less pronounced but they can still be effective. In public procurement, the declarations of officials making procurement decisions will be examined by prospective bidders to detect possible conflicts of interest or inexplicable wealth.

Other country practices

Elsewhere, experience with declarations of assets has generally been patchy. Initially, in some countries with major corruption problems, politicians have legislated for disclosure and then ignored the requirements completely themselves. Alternatively, politicians have established an agency that merely receives declarations, none of which are made available to the media or the public. Moreover, such an agency generally has neither the power nor the resources to check the accuracy of the declarations. In this way, the politicians have been able to ensure that third party enforcement of the kind described above has not been able to take place.

It is true that recently, in several countries, the process of disclosure has claimed some victims, though whether through carelessness or corrupt intent is arguable. What the declaration process can achieve is record formally a measure of a person's interests, information which can be invaluable later should it come to dealing with questions of conflict of interest.

The Malaysian approach to disclosures

At present in Malaysia, Regulation 10 of the Public Officers (Conduct and Discipline) Regulations 1993 requires that a civil servant must declare all properties and assets which have been acquired or disposed by him, his spouse, or his children. A civil servant has to explain to the Disciplinary Board if he is suspected of having acquired property through improper means or through any manner inconsistent with his position as a public officer. False declaration may subject the civil servant to serious disciplinary action. Regulation 11 of the Public Officers (Conduct & Discipline) Regulations 1993 requires the civil servant to provide a reasonable explanation if he is found to carry on a standard of living beyond his legitimate means.

The National Integrity Plan envisages the extension of asset declarations to include all elected representatives, and to enable the inspection of the declarations by Parliament, the Prime Minister, and the Chief Ministers. Whether this form of inspection will satisfy the Malaysian public is an open question. It is, after all, a form of inspection conducted only by the party in power whose own members are those most at risk of being corrupted.

[2] For example, the Center for Public Integrity (http://www.publicintegrity.org) and Common Cause http://commoncause.org.

Having accepted the argument in favour of extending disclosure requirements to elected public officials (as the National Integrity Plan has done), several questions follow:

- To whom should disclosure be made?
- What matters should be included?
- How wide should coverage of members of the household be?
- How often should disclosures be made?
- What access should the media and members of the public have to these declarations?

There are no simple answers to any of these questions. The Achilles Heel of asset declaration schemes has generally been the secrecy in which most of the declarations are shrouded. In many countries, the argument is made that these declarations should be open to inspection by the press and by the public, to facilitate the exposure of those who make false declarations. This is countered by arguments in favour of personal privacy on the part of those required to make them. Yet if a scheme is to be effective, some independent monitoring will be required. Otherwise, there will no sanctions for those who fail to comply.

The tricky part of the process is not so much deciding on the categories of assets to be disclosed, and the categories of the officials who should be making disclosure, but rather on deciding the extent to which there should be public access to the declarations. The litmus test would seem to be whatever is needed to achieve public peace of mind, not whatever the opponents of disclosure are willing to concede. In Malaysia, as in Australia, a system whereby officials make written disclosures to the head of their department annually has been seen as being effective. These are not made public. In Canada, similar disclosures are managed by Ethics offices. However, in most countries, it has been the practice to introduce wholly sham arrangements for these sorts of disclosures.

The South African model

Increasingly, however, governments are examining more credible public disclosure arrangements. South Africa has designed an interesting model. It has introduced a scheme for the monitoring of all Parliamentarians (including Ministers). There, a compromise has been reached in an effort to meet legitimate claims to privacy. The disclosure of certain interests is made openly and publicly; other interests are disclosed publicly, but only as to the nature of the interest, with the actual value being disclosed privately. The interests of family members are disclosed, but in confidence. The argument for the last is that members of a Parliamentarian's family have a right to privacy, and it should be sufficient for the disclosure to be made on the record, but not on the public record.

The development of effective and fair regimes for the monitoring of the incomes, assets, and liabilities of senior public officials will be followed closely by anti-corruption reformers. If they can be made to work—and there are obvious difficulties—they can serve as a valuable tool in restraining abuses of office.

Chapter 15

Managing Conflict of Interests Issues

Serving the public interest is the fundamental mission of a government and its public institutions. Most basically, it is the sole reason why the people cede power to them.

Citizens are thus entitled to expect that individual officials will perform their duties with integrity, and in a fair and unbiased way. Private interests and affiliations constitute a threat to these processes, and inadequately managed conflicts of interests on the part of public officials have the potential to weaken the trust of citizens in their public institutions.[1]

Understanding conflict of interest

A conflict of interest arises when a person, as a public sector employee or official, is influenced by personal considerations when carrying out his or her job. In such cases, decisions are made for the wrong reasons. Moreover, perceived conflicts of interests, even when the right decisions are being made, can be as damaging to the reputation of an organization and can erode public trust, as can an actual conflict of interest.

A number of countries consider the matter so important, and so fundamental to good administration, that they enact a specific conflict of interest law. This can provide, for example, that 'a State officer or employee shall not act in his official capacity in any matter wherein he has a direct or indirect personal financial interest that might be expected to impair his objectivity or independence of judgment'.[2] Given the interplay between the three concepts—conflict of interest, nepotism, and cronyism—the three are often rolled together in a single pithy phrase.

The drafters of Thailand's 1997 Constitution[3] saw conflicts of interest as being so important as to require provisions in the Constitution itself, and not just be left to the ordinary law. Specific provisions are included requiring government officials to be politically impartial[4] and prohibiting a member of the House of Representatives from placing himself or herself in a conflict of interest situation. Section 110[5] clearly states that a member of the House of Representatives shall not:

- hold any position or have any duty in any State agency or State enterprise, or hold a position of member of a local assembly, local administrator or local government official or other political official;
- receive any concession from the State, a State agency or State enterprise, or become a party to a contract of the nature of economic monopoly with the State, a State agency or State enterprise, or become a partner or shareholder in a partnership or company receiving such concession or becoming a party to the contract of that nature; or
- receive any special money or benefit from any State agency or State enterprise apart from that given by the State agency or State enterprise to other persons in the ordinary course of business.

Section 111 provides that:

a member of the House of Representatives shall not, through the status or position of member of the House of Representatives, interfere or intervene in the recruitment, appointment, reshuffle, transfer, promotion and elevation of the salary scale of a Government official holding a permanent position or

[1] See OECD, *Guidelines for Managing Conflict of Interest in the Public Service*, http://www.anticorrutpionnet.org. The same website contains excellent training materials developed for the OECD by Howard Whitton (howard.whitton@tiri.org). Also see OECD, 'Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service' (June 2003), http://www.oecd.org/pdf/M00041000/M00041994.pdf. The Canadian website 'Values and Ethics Codes for the Public Service' is a further excellent resource, http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202807

[2] For a detailed discussion of the issue at senior levels of government, see *Conflict of Interest: Legislators, Ministers and Public Officials* by Gerard Carney (TI, Berlin) at http://www.transparency.org/documents/workd-papers/carney/3c-codes.html.

[3] http://www.kpi.ac.th/en/con_th.asp.

[4] Section 70, Chapter IV.

[5] Chapter VI, Part 2.

receiving salary and not being a political official, an official or employee of a State agency, State enterprise or local government organisation, or cause such persons to be removed from office.

By virtue of Section 128, the provision also applies to senators.

Identifying conflicts of interests

Most conflicts of interest are readily identifiable. Examples include situations when public officials award contracts to themselves, members of their family, their friends, or political patrons, or when public officials who personally or whose close relations hold shares in companies the officials are supposed to be regulating, or to which they are granting licences, etc. These conflicts are obvious and require no explanation. They present circumstances in which an official is confronted with temptation and however honest the officials may in fact be, these circumstances pose a threat to the public interest. In most countries, any single such action would constitute a breach of the country's conflict of interest law and so render a public official liable to penalties that could include imprisonment.

Conflicts of interest situations cannot be avoided, as it is inevitable that, from time to time, everyone's personal interests will come into conflict with their work decisions or actions. It is important for these to be identified from the outset if confusion and misunderstandings are to be minimized. A public official who conducts him or herself ethically will be anxious to avoid suggestions that he or she may have been guilty of an involvement that constitutes a conflict of interest.

Checklist for identifying conflict of interest situations

The following checklist can help individual public servants identify potential conflict of interest situations:

- What would I think if the positions were reversed? For example, if I was one of those applying for a job or a promotion and one of the decision-makers was in the position I am in, would I think the process was fair?
- Do I, a relative, a friend, or an associate stand to gain or lose financially from the organization's decision or action in this matter?
- Do I, a relative, a friend, or an associate stand to gain or lose my/our reputation because of the organization's decision or action?
- Have I contributed in a private capacity in any way to the matter being decided or acted upon?
- Have I received any benefit or hospitality from someone who stands to gain or lose from the organization's decision or action?
- Am I a member of any association, club, or professional organization, or do I have particular ties and affiliations with organizations or individuals who stand to gain or lose from the organization's consideration of the matter?
- Could there be any personal benefits for me in the future that could cast doubt on my objectivity?
- If I do participate in assessment or decision-making, would I be worried if my colleagues and the public became aware of my association or connection?
- Would a fair and reasonable person perceive that I was influenced by personal interest in performing my public duty?
- Am I confident of my ability to act impartially and in the public interest?

Handling conflict of interests issues

When someone considers that they may have a conflict of interest, what should they do? The first step should be to place the potential conflict on record and seek the guidance of a superior or an Ethics adviser, if there is one.

Clearly, some 'conflicts' will be so minor as not to warrant anything more than the conflict being recorded and made known to others who are participating in the decision-making process. For example, an official might hold a small number of shares in a company that are so few that their value could not possibly be affected significantly by the outcome of the particular matter under review. In such a case, the others involved in the process may feel comfortable with that person continuing to participate. Where they do not, however, the person should excuse himself or herself from further involvement.

Checklist for resolving conflict of interest situations

The following checklist can be used to assist in assessing whether a disclosed conflict of interest might require other members involved in making a decision to ask the person with the conflict to stand aside:

- Is all the relevant information available to ensure proper assessment?
- What is the nature of the relationship or association that could give rise to the conflict?
- Is legal advice needed?
- Is the matter one of great public interest? Is it controversial?
- Could the individual's involvement in this matter cast doubt on his or her integrity?
- Could the individual's involvement cast doubt on the organization's integrity?
- How would it look to a member of the public or to a potential contractor or supplier to the organization?
- What is the best option to ensure impartiality and fairness and to protect the public interest?

Although it is important to deal with perceptions of conflicts of interests, neither of these checklists should be seen as automatically disqualifying relationships that no fair and reasonable person would see as giving rise to a conflict of interest.

Other strategies for dealing with conflict of interest situations

Other strategies that an organization can adopt to avoid compromising, or appearing to compromise, its integrity include the following:

- Keeping full and accurate records of its decision-making processes;
- Ensuring openness by making accurate information about the organization's processes, decisions, and actions publicly available;
- Where there is a risk of perceptions of conflict of interests, ensuring that the technical/expert judgement of participants in the decision-making can be substantiated.

Understanding nepotism

Nepotism is a particular type of conflict of interest. Although the expression tends to be used more widely, it strictly applies to a situation in which a person uses his or her public power to obtain a favour—very often a job—for a member of his or her family.

The prohibition against nepotism is not a total ban on all relatives. Indeed, blanket bans on employing relatives of existing staff (as opposed

to the hiring of relations of staff to positions where one relative will be exercising supervision over another) can be held to be in breach of human rights guarantees against discrimination. But it does prohibit a public servant from using (or abusing) his or her public position to obtain public jobs for family members.

The objective is not to prevent families from working together, but to prevent the possibility that a public servant may show favouritism towards a fellow family member when exercising discretionary authority on behalf of the public to hire qualified public employees.

As a member of South Africa's Ombudsman's Office observed:

> A typical example might be where it is alleged that someone received an improper advantage in that he received, through the intervention of a family member who works for a certain department, contracts which that department puts out. It might be found that no criminal act is involved but unethical behaviour is. Nepotism is not yet classified as criminal in our law, yet it is clearly reprehensible and sufficiently unacceptable to require action on the part of the Ombudsman. Furthermore, the act of nepotism may be a red flag alerting the Ombudsman to the possibility of the official's perceived need to surround him or herself with those considered to be more than ordinarily capable of being relied upon to act with 'discretion'.[6]

Nepotism frequently occurs in the private sector, particularly in the context of promoting family members within family-owned companies, where it is seen as legitimate. The impact of any preference is ultimately on the bottom line (profit) of the corporation, and the bottom line is family 'property'. Nepotism may cause ill-feeling in the workplace in the private sector, but there is no reason why the state should intervene and legislate against it.

In the public sector, however, nepotism is damaging to the public interest. It means that the most suitable candidate may fail to get a post or a promotion, and the public as a whole suffer as a consequence, not to mention the person who (had there been no nepotism) would have won the position. Or it could mean that a less competitive bid wins a government contract at the greater cost of the tax payers' money.

Nepotism can cause conflicts in loyalties within any organization, particularly where one relative is placed in a direct supervisory position over another. Fellow employees are unlikely to feel comfortable with such a situation, and it is one that should be avoided. An example of a legal prohibition from the State of Indiana, USA (applicable law IC 4-15-7-1) reads:

> No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.

Even worse, of course, would be a judge sitting in a case in which he or she had a financial interest, or where a relation or good friend was involved. In a civil case, the parties may be asked (in case of doubt) whether they are content with the judge hearing the case, after he or she has explained the potential conflict to them. In a criminal case, the judge should simply declare his illegibility and decline to sit.

More marginal, perhaps, is the question that arises when the sons and daughters of judges appear as lawyers in court before their parents. In some court systems, this has caused no complications, but in others it has aroused fierce controversy and given rise to serious allegations of collusion and corruption.

Addressing the issue of nepotism

Nepotism primarily involves one or more of the following:

- Advocating or participating in, or causing the employment, appointment, reappointment, classification, reclassification, evaluation,

[6] Adv. Gary Pienaar, Office of the Public Prosecutor, Republic of South Africa, 'The Role of the Ombudsman in Fighting Corruption', Paper presented to the 9th International Anti-Corruption Conference, Durban, South Africa, 10–15 October 1999.

promotion, transfer, or discipline of a close family member or domestic partner in a county position, or in an agency over which he or she exercises jurisdiction or control;
- Participating in the determination of a close family member's or domestic partner's compensation;
- Delegating any tasks relating to employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner to a subordinate; and,
- Supervising, directly or indirectly, a close family member or domestic partner, or delegating such supervision to a subordinate.[7]

However, the public interest requires that 'only the best shall serve the state'. Of course, there will be occasions where a relative is unquestionably the best-qualified person for a particular post. This calls for a balancing of interests. For this reason, nepotism rules should not be an insuperable barrier to the employment of relatives by requiring that well-qualified candidates are invariably disqualified.

The following provision has been drafted in terms of the utmost clarity:[8]

The [Ministry] is interested in hiring able qualified applicants and will consider any person for employment when they meet qualifications.

The goal of the [Ministry] is to hire the most qualified applicant who is best suited for the position. Members of your family, members of your immediate household or your relatives will be considered for employment, except when:

- their position or your position would exercise supervisory, appointment, grievance adjustment, dismissal or disciplinary authority or influence, you or the employee would audit, verify, receive or be entrusted with public money or public property,
- circumstances would exist making it foreseeable that the interest of the [Ministry] and you or the employee would be in conflict or question,
- where the [Ministry] must limit hiring to avoid a conflict of interest with customers, regulatory agencies, or others with whom the [Ministry] conducts business, or
- where the [Ministry] must limit hiring to avoid employment discrimination, personnel policy conflicts or related problems.

The [Ministry] will not knowingly place you in a situation where you are supervised by a member of your family, your immediate household or your relative, or where favouritism, interpersonal conflict, lack of productivity, lack of efficiency, or other unsound employment conditions including those mentioned in this policy may develop. This policy shall not be retroactive, unless any of the above adverse conditions are being practised. In such a case, the [Ministry] reserves the right to assign the affected employees to different operating levels, pay scales or locations.

Here there are no 'ifs' or 'buts', no room for discretion or for waiver. The rules are plain and speak for themselves.

Understanding cronyism

Cronyism is a broader term than nepotism, and covers situations where preferences are given to friends, 'regardless of their suitability'. It is most likely to occur in the context of the making of appointments (sometimes called 'jobs for the boys'), but it can arise in any instance where discretionary powers are to be exercised.

In Britain, cronyism is captured in such expressions as the 'old school tie' or the 'old boys club'. In a number of countries around the world fortunes have been made through cronyism and the abuse of connections, of which Indonesia under Suharto was a classic example. But even there, the preferences given were all within the law and many do not appear to have been tainted by criminal conduct. However, few of the decisions would have survived judicial examination of the process and criteria invoked when the privileges were conferred.

[7] Board of Ethics, King County, USA.
[8] Adapted from the City of Bristol, Tennessee, USA, Nepotism Policy, September 1996.

Managing conflicts of interests

It is essential that organizations have clearly stated and well-understood policies and procedures as well as written codes of conduct to deal with actual, potential, and perceived conflicts of interests, including nepotism and cronyism.

However, whereas it is possible to define 'nepotism' in terms of blood relatives or relations by marriage or partners, an effective legal definition of 'cronyism' is impossible. This has to be dealt with more informally by posing the following question: 'Would well-informed reasonable people think that this appointment or this decision was appropriate?'

At times, the matter can be dealt with quite simply. If someone is applying for a position and one of the interviewing panel knows the applicant very well, he or she can—and should—excuse himself or herself from the panel.

In essence, at what point does a person whom one knows become a 'crony'—a friend or a companion'—so that a decision in their favour could be categorized as 'cronyism'? Just where the line is to be drawn is up to the personal ethics of a panel member, but again, he or she can pose the question: 'What would the other candidates think if they knew about the relationship? Would they think it rendered the process unfair?' If in doubt, the matter can be discussed and determined by the other panel members. What is necessary, of course, is the need for complete transparency about the nature of the relationship, and for this to be placed on record.

On the other hand, if a candidate is known to the appointing authority to be one who has discretion and sound judgement, there can be greater confidence in the appointment of that person. It can come down to a question of trust. The primary concern is that decisions are made that are defensible, both in the eyes of the other applicants and in the eyes of the wider public.

Some appointments are required by law to be made by a particular office-holder. Should the office-holder feel compromised by his or her relationship with a prospective candidate, it should be possible for the office-holder to be able, in effect, to stand aside in the selection process. He or she can ask for formal independent advice from another official of equal or senior rank as to who should be appointed, and act on that.[9]

However, at the end of the day, the emphasis should be on being able to refute the charge of a decision having been made 'regardless of suitability'. It is familiarity between applicants and decision-makers that quite rightly triggers this debate.

Avoiding nepotism and cronyism in the making of appointments[10]

To avoid charges of nepotism and cronyism in appointments, the New South Wales Independent Commission Against Corruption (NSW ICAC) recommends the following basic principles for the Public Service, which also hold good for much of the private sector:

1. *Impartiality should be maintained in all recruitment and selection processes.*

This is essential for public sector employees to meet their public duty by acting ethically and in the public interest. Therefore, to avoid perceptions of bias or corruption, a potential applicant should have no direct involvement in any part of the recruitment process for a job for which he or she may be a candidate. This includes acting as the contact person for

[9] For example, in New Zealand, where an appointment is the responsibility of the Minister of Justice and his friends were among the possible candidates, he would ask the Attorney-General or the Solicitor-General to act in his stead. A decision would be recommended to the Minister which he or she would then take formally in their own name.

[10] This section draws on materials developed by the New South Wales Independent Commission Against Corruption (NSW ICAC), Sydney, Australia. Its assistance in the preparation of these and other materials is gratefully acknowledged. For some case studies, see the NSW ICAC publication, *Best Practice, Best Person: Integrity in Public Sector Recruitment and Selection* on the Commission's website, where there is a wealth of valuable information and approaches in preventing corruption: http://www.icac.nsw.gov.au.

potential candidates, framing advertisements, or preparing the standard practice for preferred applicants' referees to be contacted. Each referee should be asked the same questions relating to the selection criteria and all the questions and responses should be documented.

It should be clear to all concerned precisely who is accountable for key decisions throughout the process and what the values are that will be applied. This should be formally recorded, and all decisions and the reasons for those decisions during a selection process should be documented.

As in all other aspects of sound administration, good record keeping increases accountability. In societies where there are particular pressures from clans or a person's extended family, it is advisable for those involved in the decision-making processes to formally certify that none of the applicants is a relative or is known to them, or else to excuse themselves from the process entirely.

2. Competition should be fostered.

Advertisements should be framed to both adequately reflect the requirements of the job and to maximize the potential field of candidates. Generally, advertisements should be placed to attract the widest potential field possible. Selection criteria should also be reviewed before recruitment action is taken to ensure they adequately reflect the requirements of the position and attract the widest field of applicants. Only in exceptional circumstances should truly competitive measures be bypassed. Where this is done, the decision-maker must be able to demonstrate clear and unambiguous reasons for appointing the candidate directly.

3. Openness should be maximized.

The risk of corruption is minimized where there are policies and procedures that promote openness in dealing with conflicts of interests. An administration that adopts a policy of openness for all its recruitment and selection decisions will avoid sending the wrong message to staff about preferred practices in recruitment and selection. This will also remove the justification for others to act contrary to stated recruitment practices and policies without valid reasons. Openness, however, does not mean breaching confidentiality.

4. Integrity should be upheld at all times.

Taking short cuts can compromise the integrity of the recruitment process. To ensure integrity in recruitment and selection practices, an administration must have clearly stated sanctions for non-compliance with established policies and practices and be seen to use them when necessary. A number of countries have found that having independent persons involved in the selection process can markedly enhance the integrity of the process. These independent members should not be known to the other committee members. If this is not possible, the extent of the independent member's affiliation with other committee members should be recorded in writing before interviews are held and form part of the recruitment file.

5. Appeals should be allowed.

Unsuccessful, but qualified applicants, who consider that proper procedures have not been followed, should be able to appeal to an appropriate authority for an independent review of the process and its outcome.

Avoiding conflict of interest issues in post-separation employment situations[11]

Managing the separation process when a senior public servant leaves the Public Service and enters the private sector has become increasingly important when addressing conflict of interest issues.

[11] The discussion in this section is based on a dialogue between the NSW ICAC and public sector employers in that state. The full report is entitled *Corruption Prevention Publications: Strategies for Managing Post-Separation Employment Issues* and may be accessed on the ICAC website, http://www.icac.nsw.gov.au.

This is a consequence of several factors. Efficiency reforms have led to the 'downsizing' and contracting out of certain public sector functions to the private sector. At the same time, there has been a convergence of management practices between the public and the private sectors; the essential qualifications required to work in both are now similar. As a consequence, there has been a growing tendency in many countries for public officials not to regard public sector employment as a long-term career, but to consider moving between the public and private sectors in the course of their working lives.

To ensure that public administrators are not tempted by the prospect of jobs after leaving the Public Service, a sound approach to post public sector employment is required. This both reduces the risk of corruption, and renders much less sensitive any confidential information which the public servant who is leaving may have and which competing private sector interests may be keen to obtain for themselves.

The type of employment which may be cause for concern is one that has a close or sensitive link with the person's former position as a public official. If a public official misuses his or her official position to obtain a personal career advantage, whether intentionally or innocently, it adversely affects public confidence in government administration.

There are, perhaps, four main areas in post-separation employment that give rise to situations of conflict of interest and that merit consideration:

- **Public officials who modify their conduct to improve their post-separation employment prospects.** Such conduct can involve favouring private interests over public duty; individual public officials 'going soft' on their official responsibilities to further personal career interests; an individual acting partially by over-identifying with prospective employers' interests; or outright bribery, where a public official solicits post-separation employment in return for a corrupt performance of duties.
- **Former public officials who improperly use confidential government information acquired during the course of official functions for personal benefit, or for the benefit of another person or organization.** The information here does not involve the information that has become part of an individual's personal skills and knowledge that can be legitimately used to gain other employment.
- **Former public officials who seek to influence public officials.** This involves former public officials pressuring ex-colleagues or subordinates to act partially by seeking to influence their work or securing favours. This can happen in many ways, such as through informal contact, 'jumping the counter' to obtain government information, or lobbying.
- **Re-employment or re-engagement of retired or redundant public officials.** This may involve the following situations:

  (a) senior public servants receiving generous redundancy compensation payouts and re-entering the Public Service in non-executive positions while keeping their full redundancy payments;
  (b) public officials leaving public employment only to be re-engaged as consultants or contractors at higher rates of pay to perform essentially the same work; and
  (c) public officials who decide to go into business and to bid for work from their former employer after arranging their own redundancies.[12]

[12] NSW ICAC, *Strategies for Managing Post-Separation Employment Issues*, www.icac.nsw.gov.au/pub/public/pub2_25cp.pdf.

In the area of post-separation employment, the use of codes of conduct does not provide an effective solution. The codes cease to have effect when people leave office—the very moment when these provisions would become relevant. This leaves three generally accepted approaches to consider:

- Each government agency can develop specific post-separation policies, relevant to the degree of risk and the likely impact of those policies on future careers, such as those of highly qualified professionals with limited fields in which to work.
- Employment contracts can have specific restrictions written into them. (However, some countries limit the legal right to restrict future employment, and this can give rise to difficulties.)
- Enacting legislation; this is a route that some countries have taken, but any legislation should be careful to minimize restrictions and not to impose them on people unnecessarily.[13]

There is, of course, a need to ensure that restrictions on post-separation employment are in proportion to the risks posed. For this reason, it was the view of public sector managers in the Australian State of New South Wales that the best approach is not to impose blanket prohibitions, but rather to deal with the matter on a case by case basis. They did not consider that the level of risk to public sector integrity warranted the degree of hardship and inefficiency that broadly targeted public sector restrictions might impose. Views, of course, may differ elsewhere, but these are considerations to keep in mind.

Avoiding conflict of interest issues in post-separation employment of ministers

Ministers hold positions of power and influence. Some of the knowledge they acquire can be of a confidential nature, or could confer on them advantages if subsequently, as private citizens, they were to work in an area related to their former responsibilities. Restricting the conduct of Ministers after they leave office is becoming increasingly common.

Other country approaches to managing conflicts of interest

The US system

The US system is multi-tiered: there are limited restrictions to which every former government employee is subject, which become progressively more onerous as staff become more senior.

Very senior personnel must comply with the following restrictions:

- a lifetime ban (which covers all executive employees) on 'switching sides' to represent any organization on a matter on which they directly worked as an executive employee;
- a two-year ban in cases on which they may not have directly worked but for which they had 'direct responsibility';
- a one-year ban on representing any organization to any current representative of the executive, regardless of what portfolio they are with; and

[13] For the Canadian legislation, see http://strategis.ic.gc.ca/SSG/oe00002e.html.

- a one-year ban on representing a foreign entity 'before any department or agency of the United States' and on aiding or advising a foreign entity.[14]

A statutory agency, the Office of Government Ethics, advises executive employees and ensures compliance with this law.

The Canadian approach

In Canada, the Conflict of Interest and Post-employment Code for Public Office-holders[15] was established in June 1994. This is an executive instrument rather than a statute, but it is administered by a statutory office, the Office of the Ethics Counsellor. The Code governs Ministers. One of its stated aims for what it terms post-employment compliance measures is to 'minimise the possibilities of

(a) allowing prospects of outside employment to create a real, potential or apparent conflict of interest for public office-holders while in public office
(b) obtaining preferential treatment or privileged access to government after leaving public office
(c) taking personal advantage of information obtained in the course of official duties and responsibilities until it has become generally available to the public, and
(d) using public office to unfair advantage in obtaining opportunities for outside employment' (s. 27).

The Canadian arrangement is similar to that in the United States in the creation of tiers of restrictions. It contains a permanent ban on a public office-holder 'changing sides' in any 'ongoing specific proceeding, transaction, negotiation or case ... where the former public office holder acted for or advised the Government' (s. 29[1]).

The key provision, however, is a two-year ban preventing Ministers from

- [Accepting] appointment to a board of directors of, or employment with, an entity with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office, or
- [Making] representations for or on behalf of any other person or entity to any department with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office' (s. 30).[16]

Unlike in the United States, in Canada the Prime Minister has discretionary power to reduce the two-year waiting period, subject to consideration of a range of factors.

As in Canada, post-separation ministerial employment in the United Kingdom is governed by executive instrument, not a statute. Chapter 9 ('Ministers' Private Interests') of the Ministerial Code guides post-separation employment:

On leaving office, Ministers should seek advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office, other than unpaid appointments.... If therefore the Advisory Committee considers that an appointment could lead to public concern that the statements and decisions of the Minister, when in Government, have been influenced by the hope or expectation of future employment with the firm or organisation concerned, or that an employer could make improper use of official information to which a former Minister has had access, it may recommend a delay of up to two years before the appointment is taken up.[17]

Whereas in Canada there is a two-year bar unless the Prime Minister makes an exception, in the United Kingdom, former Ministers are

[14] Office of Government Ethics, Memorandum Regarding Revised Post-Employment Restrictions, 26 October 1990.
[15] http://strategis.ic.gc.ca/SSG/oe01188e.html.
[16] Office of the Ethics Counsellor website, http://strategis.ic.gc.ca/SSG/oe00001e.html.
[17] Cabinet Office, *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*, s. 140, July 2001, http://www.Cabinet-office.gov.uk/central/1997/mcode/.

merely restricted if, after seeking advice from the Advisory Committee, it is recommended that they delay their activities.

Best practice suggests that

- post-separation employment be addressed in any Ministerial code, and
- there be a standing advisory body to assist Ministers in complying with any guidelines that might address post-separation employment. (This feature is common to legislative and executive ethics instruments internationally and not just for dealing with post-separation employment issues.)[18]

The Croatian example

A number of countries have explicit conflict of interest laws. By way of example, Croatia's legislation provides not only for declarations of assets and income and for the prohibition of conflicts of interest, but also for a Commission to receive declarations and to provide advice and guidance. The Commission is elected by Parliament, but politicians are excluded from being members.

The Croatian example also gives directions as to how offers of bribes are to be handled:

> Article 14
> (1) Officials shall have the obligation without delay to reveal and inform the body that elected or appointed them, and the Commission about any pressure or improper influence to which they have been exposed in the exercise of public office.
> (2) Officials who, contrary to the provisions of this Act, have been offered a gift or any other advantage related to the exercise of their public office, shall:
>
> 1. Reject such an offer,
> 2. Try to determine the identity of the person making the offer,
> 3. In case of a gift, which, due to specific circumstances, cannot be returned, the official shall keep it and report it immediately,
> 4. List witnesses of this event, if possible,
> 5. Within reasonable time, submit the written report on the event to the competent person or body,
> 6. If a punishable offence is involved, report it to the bodies in charge of conducting proceedings.

The Croatian approach strikes a balance between the need for a firm legal basis and a requirement for flexibility. However, given the complexities of the situations that can arise, the enactment of more ambitious, all-embracing laws in the area of conflict of interest can be something of a blunt instrument. Thus many countries have chosen to address the more detailed aspects of the problem in a diffused, management-led fashion.

In this approach, laws are enacted which deal with the upper levels of government (for example, as in the 1997 Constitution of Thailand quoted above) and with basic principles, but the design of appropriate policies is effectively delegated to agencies and departments, each of which is expected to develop policies appropriate to their own situations and needs.

Even in the implementation of these policies, a large measure of common sense is called for and, as we have discussed elsewhere, the services of an Ethics Office can be particularly valuable. Equally clearly, conflict of interest, cronyism, and nepotism should be covered in appropriate codes of conduct.

Anti-nepotism laws

The drafting of nepotism prohibitions poses particular problems, and it is perhaps not surprising that not all countries have anti-nepotism laws, desirable though these may be. Where these are lacking, favouritism shown to a relative on the basis of relationship and other family member issues tends to be dealt with by legal prohibitions such as those against unwarranted privilege, direct or indirect

[18] This section draws from Post-Separation Employment of Ministers, Research Note prepared by the (Australian) Department of the Parliamentary Library (Research Note 40, 28 May 2002), http://www.aph.gov.au/library/pubs/rn/2001-02/02rn40.pdf.

personal financial interest that might reasonably be expected to impair objectivity and independence of judgement, or the appearance of impropriety.

A typical example of a jurisdiction that has such a law reads:

[(IC 4-15-7-1), on Nepotism] No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation provided by law. However, this section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department or institution. No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.[19]

The United States has an Office of Government Ethics to handle conflict of interests at the Federal level, and Canada has chosen to deal with the issue of conflict of interest by establishing a series of Ethics Counsellors, whose role in post-separation processes has been discussed above.

Checklist for assessing and managing conflict of interests issues

- Is the concept of conflict of interest clearly understood by politicians and by members of the Civil Service?
- Is there regular training for relevant officials and the management of conflict of interest situations?
- Are there adequate arrangements to ensure that appointments to the Civil Service are made solely on merit, without elements of nepotism and cronyism being involved?
- Is there any need for special arrangements to deal with public officials entering the private sector immediately on termination of their employment in the Civil Service with a view to checking corrupt practices?
- Is there a need for advice to be available to public officials to enable them to handle apparent conflict of interest situations?

[19] State of Nebraska, USA.

Chapter 16

Promoting Transparent Public Procurement[1]

Corruption in public procurement

The Bribe Payers Index (BPI) prepared by Transparency International in 2002 revealed that public works and construction is the sector in which the biggest bribes are likely to be paid in countries around the world. This suggests that reform efforts in the field of public procurement in Malaysia should have a special focus on the situation in the construction sector.

Industry players have asked the government to check the whole procurement chain and also requested industry players themselves to correct any weaknesses. By way of response, the government has proposed a code of ethics and best practices guidelines for some industries.

But will a code of conduct be sufficient? Provided the code has teeth and it is enforced in ways that constitute a serious deterrent, it would likely make a difference. However, the prospective gains from corrupt processes are considerable, and so the prospective penalties have to more than match these. This is especially so when a survey of public perceptions of corruption among students in public institutions of higher learning (which are generally regarded as the country's future decision-makers) revealed an alarming finding: some 30 per cent of the students said that they would take bribes if they were in a position of power and able to do so.[2]

The complaints from the industry suggest that more than just a code of conduct is needed: rather, the whole system of public tendering needs careful review, with the industry itself as a major partner in the process. The opening up of public procurement, and the move away from the negotiated contracts of the past, as announced by the Prime Minister, should set reforms along an effective path.[3]

Few activities create greater temptations or offer more opportunities for corruption than does public sector procurement. Every level of government and every kind of government organization purchases goods and services, often in quantities and monetary amounts that defy comprehension.

Procurement of goods and services by public bodies amounts, on average, to between 15 and 25 per cent of gross domestic product (GDP), and in some countries even more. In absolute terms this means the expenditure of trillions of money each year. If one adds in procurement by private corporations and other buyers, it is no surprise that there is a great temptation for many players to try to manipulate the processes for their own private benefit, to extort money and other favours from bidders, to bribe purchasing agents and to give contracts to friends and relations.

A recent court case in Lesotho involving one of the world's largest construction projects has laid bare the practices of firms from industrialised countries joining together to bribe a senior procurement official in a developing country, resulting in a series of convictions, large fines and the prospect of multinational corporations being debarred from World Bank-financed projects for some time to come.[4]

Corruption in public contracting is alarmingly widespread and is almost certainly the most publicised and the most damaging to the public welfare. It has been the cause of countless dismissals of senior officials around the world, and even the collapse of entire governments. It is also the source of astronomical waste in public expenditure, estimated in some countries

[1] The National Integrity Plan undertakes to enhance the effectiveness of the public delivery system, and to ensure transparency, rationality, openness, and fairness in the procedures for procurements, supplies, services and contracts. See National Integrity Plan, p. 147.
[2] 'Shun corruption, students told', *New Straits Times*, 6 September 2006.
[3] 'No Let-up in Fight Against Corruption, Says Abdullah', *New Straits Times*, 30 April 2005.
[4] http://www.sadocc.at/news2002/2002-323.shtml.

to run as high as 30 per cent or more of total procurement costs. In many countries it is the engine for much political party financing corruption. Regrettably, however, it is more talked about than acted upon.[5]

Such is the importance of public procurement that South Africa accorded it special attention in its 1994 Constitution. Section 187 provides that

1. The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
2. The tendering system referred to in sunsection (1) subsection shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
3. No organ of state and no member of any organ of organ state or any other person shall improperly interfere with the decisions and operations of the tender boards.
4. All decisions of any tender board shall be recorded.

Corrupting the procurement process

Clearly, bribery and corruption need not be a necessary part of doing business. Experience shows that much can be done to curb corrupt procurement practices if there is a desire and a will to do so. In order to understand how best to deal with corruption in procurement, it helps to know first how it is practised.

Contracts involve a purchaser and a seller. Each has many ways of corrupting the procurement process, and at any stage.

Before contracts are awarded, the purchaser can

- tailor specifications to favour particular suppliers;
- restrict information about contracting opportunities;
- claim 'urgency' as an excuse to award a contract to a single contractor without competition;
- breach the confidentiality of suppliers' offers;
- disqualify potential suppliers through improper pre-qualification procedures; and
- take bribes.

At the same time, suppliers can

- collude to fix bid prices;
- promote discriminatory technical standards;
- interfere improperly in the work of evaluators; and
- offer bribes.

The most direct approach is to contrive to have the contract awarded to the desired party through direct negotiations without any competition. Even in procurement systems that are based on competitive procedures, there are usually exceptions where direct negotiations are permitted, such as the following:

- cases of extreme urgency because of disasters;
- cases where national security is at risk;
- cases where additional needs arise and there is already an existing contract; or
- cases where there is only a single supplier in a position to meet a particular need.

Of course, not all single-sourced contracts are corrupt. In some instances, direct contract negotiations may well be the most appropriate course of action. However, if justifying circumstances are claimed that do not really exist, the reason is often to cover up and permit corruption.

Even if there is competition, it is still possible to tilt the outcome in the direction of a favoured supplier. If only a few know of the bidding

[5] Many, but by no means all, of the decision-making points addressed in this chapter are covered in part by various 'procurement rules' such as the 'General Procurement Agreement (GPA)' of the World Trade Organization with presently 26 signatories, the 'UNCITRAL Model Law on Procurement of Goods, Construction and Services' issued 1995 by the UN Commission on International Trade Law (UNCITRAL), the World Bank 'Guidelines for the Selection of Consultants and the Procurement of Goods and Services', and the 'Manual of Procedural Rules (SCR)' of the European Commission. All of these rules of late make an effort to address the issue of corruption prevention. But none of them offer or require a sufficiently broad structure of transparency and accountability. The existing rules are unexceptional, but the fact that a high degree of corruption exists worldwide in public procurement suggests that, good as they may seem to be, the rules are simply not adequate. What is needed is full transparency and reliable assurance of implementation of the rules through efficient inspection, and intensive internal and public monitoring and auditing.

opportunity, competition is reduced and the odds improve for the favoured party to win. One ploy is to publish the notification of bidding opportunities in the smallest, most obscure circulation source that satisfies the advertising requirements, and hope that no one sees it. Cooperative bidders, of course, get information at first hand.

Competition between bidders can be further restricted by establishing improper or unnecessary pre-qualification requirements and then allowing only selected firms to bid. Again, pre-qualification, if carried out correctly, is a perfectly appropriate procedure for ensuring that bidders have the right experience and capabilities to carry out a contract's requirements. However, if the standards and criteria for qualification are arbitrary or incorrect, they can become a mechanism for excluding competent but unwanted bidders—'unwanted' because they are not prepared to offer kickbacks.

Unwanted prospective bidders, who manage to circumvent these obstacles, can still be effectively eliminated by tailoring specifications to fit a particular supplier. Using the brand name and model number of the equipment from the preferred supplier may be a little too obvious, but the same results can be achieved by including specific dimensions, capacities, and trivial design features that only a favoured supplier can meet. The inability and failure of competitors to be able to meet these features, which usually have no bearing on critical performance needs, are used as a ploy to reject their bids as being 'non-responsive'.

Competitive bidding for contracts can only work if the bids are kept confidential up until the prescribed time for determining the results. A simple way to predetermine the outcome is for the purchaser to breach the confidentiality of the bids, and give the prices to the preferred supplier to submit a lower figure that can be adjusted upwards after the contract has been let. The mechanics are not difficult, especially if the bidders are not permitted to be present when the bids are opened.

The final opportunity to distort the outcome of competitive bidding is at the bid evaluation and comparison stage. Carried out responsibly, this should be an objective analysis of how each bid responds to the requirements of the bidding documents, and a determination of which one is the best offer. If the intention is to steer the award to a favoured bidder, the evaluation process offers almost unlimited opportunities: if necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is 'best', and then apply the criteria subjectively to get the 'right' results. They are often aided in this process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.

Cross-border procurement

In international (i.e. cross-border) procurement, the greatest single cover for corruption is the 'commission' paid to a local agent. It is the agent's task to land the contract. He or she is given sufficient funds to do this without the company in the exporting developed country knowing more than it absolutely has to about the details. This creates a comfortable wall of distance between the company and the act of corruption, and enables expressions of surprise, dismay, and denial to be feigned should the unsavoury acts come to the surface.

The process also enables local agents to keep for themselves whatever is left of the handsome commissions after the bribes have been paid. Much of the commission may have been originally intended for bribing decision-makers but none of it, of course, is accounted for. This gives rise to the practice of kickbacks all along the line, with even company sales staff effectively helping themselves to their employer's money. If commissions can be rendered

transparent, it would have a major impact on this source of corruption. These techniques are only a brief outline of some of the ways in which a purchaser is able to corrupt the procurement process.

Post-contract corruption

The story does not end with the award of a contract. Indeed, the most serious and costly forms of corruption may take place after the contract has been awarded, during the performance phase. It is then that the purchaser of the goods or services may

- fail to enforce quality standards, quantities or other performance standards of the contract;
- divert delivered goods for resale or for private use; and
- demand other private benefits (trips, school tuition fees for children, gifts).

For his part, the unscrupulous contractor or supplier may

- falsify qualities or standards certificates;
- over- or under-invoice; and
- pay bribes to contract supervisors.

If the sellers have paid bribes or have offered unrealistically low bid prices in order to win the contract, their opportunities to recover these costs arise during contract performance. Once again, the initiative may come from either side but, in order for it to succeed, corruption requires either active cooperation and complicity or negligence in the performance of duties by the other party.

Unscrupulous suppliers may substitute lower quality products than were originally required or offered in their bid. They may falsify the quantities of goods or services delivered when they submit claims for payment, and pay more bribes to contract supervisors to induce them to overlook discrepancies. In addition to accepting bribes and failing to enforce quality and performance standards, buyers may divert delivered goods and services for their private use or for resale.

Corruption in procurement is sometimes thought to be a phenomenon found only in countries with weak governments and poorly paid staff. The 'most developed' countries have amply demonstrated in recent years that corrupt procurement practices can become an integral part of the way in which they do business. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings: as we have seen, it can just as easily be initiated by the supplier or contractor who makes an unsolicited offer. The real issue, of course, is what can be done about it?

Principles of fair and efficient procurement

The following principles may go some way towards ensuring fair and efficient procurement:

1. *Procurement should be economical.*

It should result in the best quality of goods and services for the price paid, or the lowest price for the acceptable quality of goods and services—not necessarily the lowest priced goods available, and not necessarily the absolutely best quality available, but the best combination to meet the particular needs.

2. *Contract award decisions should be fair and impartial.*

Public funds should not be used to provide favours; standards and specifications must be non-discriminatory; suppliers and contractors should be selected on the basis of their qualifications and the merit of their offers; and there should be equal treatment of all in terms of deadlines and confidentiality, as in all other aspects.

3. *The procurement process should be transparent.*

Procurement requirements, rules, and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.

4. *The procurement process should be efficient.*

The procurement rules should reflect the value and complexity of the items to be procured. Procedures for small value purchases should be simple and fast, but as purchase values and complexity increase, more time and more complex rules will be required to ensure that principles are observed. 'Decision-making' for larger contracts may require committee and review processes; bureaucratic interventions, however, should be kept to a minimum.

4. *Accountability is essential.*

Procedures should be systematic and dependable, and records explaining and justifying all decisions and actions, should be kept and maintained.

5. *Competence and integrity should be upheld at all times.*

Competence and integrity in procurement encourages suppliers and contractors to make their best offers and this in turn leads to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor partners with which to do business.

International financial institution projects

When a project is funded by an international financial institution (IFI), additional requirements usually apply:

- A fair chance must be given to all suppliers/contractors/consultants from all or some other countries which are suppliers and contractors, usually donor member countries;
- Suppliers/bidders or contractors from the host country may sometimes be entitled to a preference expressed as a percentage of the contract value (World Bank: 15 per cent for goods contracts; 7.5 per cent for works contract); this is usually announced in the bid invitation;
- For contractors, there is often a requirement of pre-qualification;
- For consultants, there is usually a 'short list' of those invited to bid (the list to be prepared by the purchaser, not the funding institution). This avoids expensive preparatory efforts by too many consultants when only one can get the contract. The 'short list' must have geographic variety (usually no more than two from one country);
- There may be encouragement for foreign consultants to include consultants from the host country for at least part of the job; and there may also be encouragement of joint ventures involving foreign and local consultancy firms.

Acceptance of gifts

Bribes can take the form of 'gifts' and 'gifts' can take many forms—a lunch, a ticket to a sports event, a Rolex watch, shares in a company, a holiday abroad, the school fees for a child. Some are acceptable; others, which can create a sense of 'obligation', are not.

Evaluations of such practices as 'corporate entertainment' may turn on whether or not supervisors are in a position to monitor the consequences of their purchasing officers' behaviour. Also relevant is whether a particular purchasing officer disqualifies him or herself in future situations where the firm in question is involved. Likewise, it will matter whether all the companies likely to get the business are acting in similar ways, so that no 'obligation' to prefer one bidder over another is created. Furthermore, levels of hospitality which are expected and usual, and which do not give rise to a sense of obligation, can vary considerably within the community.

What is clearly unacceptable is where hospitality given is grossly excessive, such as all-expenses-paid holidays for a purchasing officer and spouse. Less obviously unacceptable are such things as lunches or festive presents; though even here, the acceptance of seemingly trivial gifts and hospitality can, over time, lead to situations where an official unwittingly becomes ensnared by the giver.

The dividing line usually rests at the point where the gift places the recipient under some obligation to the gift-giver. This point will differ from one society to another, but it is usually defined in terms of cash (or hospitality) that must be reported as being in excess of a given figure. Attempts to make distinctions between 'private' hospitality and 'hospitality in a public capacity' generally give rise to controversy, and so are best avoided.

The point is that purchasing officers are always 'at risk' and need to be monitored carefully; any sign that they may be living beyond their means is an obvious 'red flag'.

A government should have clear and well-enforced rules about official conduct:

- Officials (and their family members) may not accept anything of value from any individual or company in contractual dealings with the ministry or department for which that official works;
- 'Public disclosure rules' regarding the assets, liabilities, and income of senior officials should be introduced and enforced; unexplained wealth of officials should lead to an inquiry;
- Any suspicion of wrongdoing by another official must be reported, and officials will be protected in carrying out that duty;
- Officials in posts involved with procurement and other contracting activities should be asked to sign a pledge that they will not demand or accept anything of value that in fact or perception could influence the exercise of governmental discretion; and
- Officials will be informed and trained about the application of the rules.

Employment after holding public office

A crucial area of corruption—and one of growing concern—is the practice of corporations offering post-official employment to public servants with whom they have had official dealings. Clearly, regulations governing the post public sector employment of officials are important. It is neither practical nor sensible to insist that former public officials not engage in commercial activity after leaving office. However, whole networks of corruption can be constructed by outside suppliers, not only through cash bribes and expensive overseas holidays, but also through the promise to officials of lucrative employment when they retire.

It is tempting for a public official, blessed with rich work experience but a less than satisfactory pension, to accept employment with former suppliers. Often, there will be nothing wrong with such an arrangement. Indeed, it may be a constructive and useful way to ensure that valuable experience is not altogether lost to the community.

But it is susceptible to abuse, particularly in the field of public contracting. For example, an official who leaves the Public Service may take with him detailed knowledge of the government's impending contract bargaining strategy and the confidential discussions that may have been held with competitors of the official's new, post-retirement employer. In such an instance, neither the public interest nor the private sector is well served.

The promise of post-retirement employment can be used, too, by unscrupulous businesses as a 'sweetener' to gain contracts and is one that will not show in any monitoring of assets or income. Although it is neither fair nor desirable to place an absolute ban on reemployment past retirement, some kinds of employment after leaving office are clearly contrary to the public interest. For example, a Minister or highly placed official may leave government service while negotiations for a large public works project are pending. Obviously, it would be improper for such a person to immediately take up employment with one of the companies tendering or actively negotiating with the government.

Combating corruption in procurement

The most powerful tool is public exposure. The media can play a critical role in creating public awareness of the problem and generating support for corrective actions. If the public is provided with the unpleasant details of corruption—who was involved, how much was paid, how much it cost them—and if it continues to hear about more and more cases, it is hard to imagine that people will not come to demand reform.

Government officials around the world are discovering that taxpayers still think of public funds as their money and do not like to see it wasted. The public, of course, is particularly unhappy when it sees its money going into the pockets of others as a reward for corrupt practices. Once public support is developed for the reform of procurement practices, the problem can be attacked from all sides.

Usually, the starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions. The next is a sound and consistent legal framework establishing the basic principles and practices to be observed in public procurement.

This can take many forms, but there is increasing awareness of the advantages of having a unified procurement code, setting out clearly the basic principles, and supplementing this with more detailed rules and regulations within the implementing agencies. A number of countries are consolidating existing laws, which have often developed haphazardly over many years, into such a code.

However, one of the greatest anomalies in the context of anti-corruption laws relating to public procurement[6] is that most countries clearly prohibit bribery at home, but many are silent when their exporters bribe abroad; some even reward it through tax write-offs.

At best, this is justified by a misguided notion of what is necessary for successful international business; at worst, it reflects a cynical and paternalistic view of what is good for others. The United States has had a Foreign Corrupt Practices Act since 1977[7] that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or maintain business, even when these events take place abroad. More recently, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[8] directed at outlawing international business corruption involving public officials, in essence aims to internationalize the US approach.

[6] See for example, Financial Management and Accountability Act 1997, and the Commonwealth 'Procurement Guidelines' (2005), issued under Regulations made under the Financial Management and Accountability Act. http://www.cipsa.com.au/Page.asp?CatID=300&PageID=870.

[7] www.usdoj.gov/criminal/fraud/fcpa.html.

[8] http://www.imf.org/external/np/gov/2001/eng/091801.htm.

Transparent procedures

Beyond the legal framework, the next defence against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself. No one has yet found a better answer than supplier or contractor selection procedures based on real competition.

The complexity or simplicity of the procedures will depend on the value and nature of the goods or services being procured, but the elements are similar for all cases:

- Describe clearly and fairly what is to be purchased;
- Publicize the opportunity to make offers to supply;
- Establish fair criteria for selection decision-making;
- Receive offers (bids) from responsible suppliers;
- Compare them and determine which is best, according to the predetermined rules for selection; and,
- Award the contract to the selected bidder without requiring price reductions or other changes to the winning offer.

For small contracts, suppliers can be selected with very simple procedures that follow these guidelines.

However, major contracts should almost invariably be awarded following a formal competitive bidding process involving carefully prepared specifications, instructions to bidders and proposed contracting conditions, all incorporated in the sets of bidding documents. Such documents may take months to prepare, and many more months may be needed for suppliers to prepare their bids and for the purchaser to evaluate them and choose the winner. These steps commonly take six months or more from start to finish. With major contracts, procurement planning must be sure to take these time requirements into account, and start early enough to ensure that the goods and services will be ready when needed. Any pressures for 'emergency' decisions should be avoided.

Opening of bids

One key to transparency and fairness is for the purchaser to open the bids at a designated time and place in the presence of all bidders or their representatives who wish to attend. A practice of public bid openings, where everyone hears who has submitted bids and what their prices are, reduces the risk that confidential bids will be leaked to others, overlooked, changed, or manipulated.

Bid evaluation

Bid evaluation in the procurement process is one of the most difficult steps to carry out correctly and fairly. At the same time, it is one of the easiest steps to manipulate if someone wants to tilt an award in the direction of a favoured supplier.

Evaluators can reject unwanted bids for trivial procedural matters—an erasure or a failure to initial a page—or for minor deviations from specifications that the evaluators decide are significant. After bids are examined, if no one is able to check them, evaluators may discover entirely new considerations that should be taken into account in choosing the winner. Or the bid evaluation criteria may be so subjective and so lacking in objective qualitative measures that the evaluators' scoring can produce any result they wish.

All of this argues for requiring bid evaluation criteria to be spelled out clearly in bid documents and for an impartial review authority to check the reasonableness of the evaluators' actions. The former allows bidders to

raise objections in advance if they consider that the criteria are not appropriate, and the latter provides additional assurance that an evaluation has been conducted properly.

Independent checks and audits

The principle of independent checks and audits is widely accepted as a way in which to detect and correct errors or deliberate manipulation, and it has an important place in public procurement. Unfortunately, it has also been used by some officials to create even more opportunities for corruption. In particular, the delegation of authority for contract approvals is an area that warrants some discussion.

At face value, the rationale for delegation is convincing: low-level authorities can make decisions about very small purchases, but higher levels should review and approve these decisions for larger contracts. The larger the contract value, the higher should be the approving authority.

In some countries and organizations, this system works without any problems. In others, where contract awards are the main path to riches, it means a graduated payoff can be required at each step of the way: the higher the path leads, the larger the percentages demanded. Coincidentally, it also means that the larger the contract, the longer the delay in reaching any decision.

All this points to a further essential element for reducing corruption: a well-trained, competent, and honest body of civil servants to carry out procurement. Establishing such a group requires a long-term effort, one that is never completely finished. It requires regular training and retraining programmes; security in the knowledge that one's job will not be lost if the winning contractor is not the one favoured by the Minister; and at least a level of pay that does not make it tempting to accept bribes to meet the bare necessities of a family. It is common practice around the world for would-be suppliers to trap relevant civil servants either by tempting them to breach the rules in minor ways or by making them offers they simply cannot refuse (e.g. a scholarship for their children at a university in a developed country). These corrupt suppliers are often experts at undermining the integrity of honest civil servants, and managers need to be on the lookout in order to protect their staff.

If a competent procurement cadre is developed, and there are a number of places where this has been achieved, the chain of approving authorities, with its accompanying delays and other hazards, can be reduced to a minimum.

None of this is to suggest that all independent checks and audits should be eliminated; they have an important role. However, there are some countries where so many review and approval stages have been built into the process that the system is virtually paralysed. In some, it is impossible to award a major contract in less than two years from the time the bids are received.

Open hearings

The experience of a growing number of countries demonstrates that a series of well-publicized open hearings can be a particularly effective means of spreading information and obtaining stakeholder commitment to a large project. For the construction of a new subway line in Buenos Aires, for example, three large public hearings were held at which the Mayor of Buenos Aires himself laid out the plans and invited suggestions on such matters as the siting of the line, the location and design of the stations, and the process for selecting the construction companies. The hearings were judged a great success; they were broadcast live on local TV and were video-recorded for later reference.

Monitoring by civil society

Civil society in a number of countries has been able to play an active role in monitoring major public procurement exercises and in giving the public an assurance that all has gone well.

In such cases, the following criteria should apply:

- Monitors should be highly respected people of unquestioned integrity;
- Monitors should possess (or have easy access to) the required professional expertise;
- Where the local members of Civil Society do not possess the required expertise, they should promptly contract such expertise from outside, including where necessary from overseas; non-availability of expertise means that problems may not be discovered, convincing professional corrective proposals could not be submitted, and the monitors would not gain the respect of the officials;
- Individual Monitors should not be subject to a veto by government;
- Monitors should have free and unlimited access to all relevant government documents, to all relevant meetings, and to all relevant officials;
- Monitors should raise issues and complaints first with the authorities, and be free to go public, only when no corrective action is taken within a reasonable period of time;
- Monitors should be prepared to offer a limited Pledge of Confidentiality regarding certain business-type (proprietary) information;
- Monitors should have full access to and review the tender documents, the evaluation reports, the award selection decision, and the implementation supervision reports, technical as well as financial; they should participate in meetings and they have the right to ask questions.

However, it is often the case that civil society is not able to attract the high degree of expertise that is required, and arrangements may be needed to ensure that this can be provided from a suitably independent source.

Use of the Internet

Another powerful instrument is the Internet. Against all claims from some quarters that openness of certain procurement process information would undermine and erode the quality of the process and endanger the entire project, several countries (Mexico, Chile, Colombia, and more recently Austria) and a number of major municipalities (e.g. Seoul, Korea) have placed their entire procurement information system on the web and allowed free access to that information.

The Seoul city system, the On-line Procedures Enhancement (OPEN) for civil applications, was developed to achieve transparency in the city's administration by preventing unnecessary delays or unjust handling of civil affairs on the part of civil servants. The web-based system allows citizens to monitor applications for permits or approvals where corruption is most likely to occur and to raise questions in the event any irregularities are detected. It gets over 2,000 visitors daily.[9]

Increasingly, all interaction between the administration and companies doing business with it or wishing to obtain contracts, and citizens in general, will be handled through this medium. If everybody can check on a real-time basis which contracts are offered by the principal at a given time, under what conditions, and who the competitors are, and what prices they offered, the opportunity for manipulation—and thus the temptation to bribe—is greatly reduced.

[9] http://english.metro.seoul.kr/government/policies/anti/civilapplications/.

'Blacklisting'

Singapore has adopted a process of blacklisting those found guilty of corruption in public contracting, and of excluding companies from doing business with the public sector for an appropriate length of time.

The sanction of 'blacklisting' (or 'debarment') should be available to the government when its contracting partners breach ethical and performance standards. Those found to have bribed, committed price-fixing or bid rigging, or provided substandard or sub-specification goods or services, whether or not in collusion with any official, should be debarred from future contracts with the government, indefinitely or for an appropriate period of time, and should also be subject to the following penalties:

- Loss or denial of contractual rights;
- Forfeiture of the bid or performance security; and
- Liability for damages, both to the government principal and to competing bidders for the losses they have incurred through bidding unsuccessfully.

Companies that have been debarred could be re-admitted after complying with certain requirements, such as paying damages, terminating the employment of the staff who actually bribed, introducing an effective no-bribery policy in the firm, and systematically implementing that new policy through a compliance programme.

Debarment is widely practised in the United States, at both Federal and State levels, for such causes as

- conviction of or civil judgment for fraud violation of antitrust laws, embezzlement, theft, forgery, bribery, false statements, or other offences indicating a lack of business integrity;
- violation of the terms of a government contract, such as a wilful failure to perform in accordance with its terms or a history of failure to perform; or
- any other cause of a serious and compelling nature affecting responsibility.

Contractors are excluded from receiving contracts, and agencies are not permitted to solicit offers from, award contracts to renew or otherwise extend the duration of current contracts, or consent to subcontracts with the contractors, unless the acquiring agency's head or a designee determines that there is a compelling reason for such action. Debarments are for a specified term as determined by the debarring agency and as indicated in the listing.[10]

In addition to such countries as Singapore, similar blacklisting (or debarment) strategy is also practised by the World Bank. The process is discussed in detail in a report prepared for the Utstein Group of countries against corruption.[11]

'Integrity Pacts'

A recent innovation in procurement is the so-called 'Integrity Pact' (IP)[12] in which a 'no bribery' pact is negotiated with the interested bidders for a particular government contract. The IP process begins with a meeting to which all bidders are invited to discuss a possible pact. The contracting body is present at the meeting (unless, of course, the presence of the contracting body is likely to inhibit the bidders from talking freely).

The IP provides for the appointment of an independent arbitrator to resolve any complaints made against parties involved in the

[10] The names of those debarred are placed on the Internet. EPLS is the electronic version of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs (Lists), which identifies those parties excluded throughout the US Government (unless otherwise noted) from receiving Federal contracts or certain subcontracts and from certain types of Federal financial and non-financial assistance and benefits; http://epls.arnet.gov/.

[11] The aid donor countries; see http://www.u4.no/themes/debarment/main.cfm.

[12] In an Integrity Pact, the prospective bidders are brought together to discuss the ground rules they will all observe when bidding for a particular contract. The IP includes a declaration that none of them will promote any of their staff to bribe officials. The exercise continues until the end of the project, and it is monitored independently. If there are found to be any breaches of the IP, agreed sanctions are imposed on the successful bidder, including a forfeiture of profit in favour of the underbidder; http://www.transparency.org/global_priorities/public_contracting/integrity_pact

process. The arbitrator is given a free hand in deciding if sanctions should be imposed in instances of alleged malpractice. The precise function of the arbitrator and sanctions are set out in the Pact.

If the process receives sufficient support from the likely bidders, the text of the IP (as agreed among those participating) is signed by the highest-ranking official in the contracting body and the highest-ranking representatives of the respective bidding companies. This approach has been developed by Transparency International, and Transparency International Malaysia might be a possible partner in any such exercise in Malaysia.

Using contracts to counter corruption: a New York case history

For generations, New York City suffered from endemic corruption and racketeering in its construction industry. When State and Federal prosecutors, working with the FBI and the New York Police Department, undertook a series of very successful criminal prosecutions against the Mafia during the 1980s, virtually every indictment included allegations that the Mafia was profiteering from the City's construction industry through extortion, bribery, bid rigging, labour racketeering, fraud, and illegal cartels. Despite the success of these prosecutions and the imprisonment of dozens of Mafia bosses, corruption seemed to continue unabated.

The problem was so severe that the New York State Legislature refused to provide billions of dollars in funding to the City's Board of Education for capital improvements to the City's crumbling school infrastructure, the largest in the nation with more than 1100 schools serving more than one million schoolchildren.

State officials were convinced that a major portion of any monies allocated to the Board of Education would end up in the hands of the Mafia, or be wasted on bribes and fraud. In order to overcome this impasse, the City agreed to the creation of a new City agency, the School Construction Authority (SCA), with a very active and well-funded office of Inspector-General to ward off Mafia influence and to protect this critical investment in the school system. In 1989, the SCA was given $5 billion for new construction and major repairs; the budget of the Inspector-General was just over $2 million annually (i.e. less than 0.05 per cent of the total).

The SCA's Inspector-General set about tackling the corruption and racketeering endemic in school construction. Significantly, this was accomplished without new legislation and without spending millions of taxpayer dollars on costly preventive measures. The Inspector-General used existing state law and the concept of civil contract to accomplish its goals, together with simple monitoring and oversight measures to insure compliance. This effort succeeded beyond anyone's expectations.

For example, the Inspector-General redrafted the standard bidding and contract forms to include requirements for

- full disclosure of ownership and performance history by each bidder (subcontractors as well as contractors);
- disclosure not only of details of previous arrests and convictions, but also of the payment of any bribes, participation in any frauds or bid rigging, and association with any organized crime figures;
- commitment to a code of business ethics by each bidder; and
- certification that all this information was true and correct, as well as an acknowledgement that it was submitted for the express purpose of inducing the SCA to award a contract.

The SCA's standard contract included a rescission clause making the contract subject to termination by the SCA on severe terms if the contractor provided false information in its bidding documents. In practice, if a contractor was found to have lied in his bidding documents, or to have engaged in bribery or fraud during the execution of the contract, the contractor faced not only the termination of his contract, but also a legally enforceable requirement that he forfeit any and all monies received for work already performed as liquidated damages. In addition, he and his company would be disqualified from receiving any SCA contracts in the future.

The information supplied by each contractor was subject to careful scrutiny by the Inspector-General's Office, which also performed extensive background checks. Whenever concerns arose, a bidder or contractor was summoned to the Inspector- General's Office to answer questions under oath. Any contractor who refused to cooperate was subject to the termination of his contracts and disqualification from future work. Any who lied under oath were, of course, liable to prosecution for perjury under the existing criminal law.

Contractors were required to make and maintain records regarding the work performed for the SCA for a period of three years after the completion of any contract. Such records were subject to audit and inspection by the SCA. If an audit disclosed overpricing or overcharging of any nature and this exceeded one half of 1 per cent of the contract billings, then, in addition to repaying the overcharges, the contractor also had to pay the reasonable costs of the audit.

Within the first five years of the SCA's existence, several hundred contractors were barred from bidding on SCA contracts. Several dozen contracts were terminated, and contractors forfeited many millions of dollars as a result. All of this was achieved through the ordinary civil law process with very few court challenges. In addition, more than a dozen contractors were convicted of perjury as a result of false information supplied to the Inspector-General.

More importantly, law enforcement officials intercepted conversations among Mafia members complaining that the process was effectively denying them access to SCA contracts. Best of all, the pool of available construction firms increased substantially with the addition of law-abiding and competent contractors who had previously declined to bid on school construction work because of the prevalence of corruption and racketeering. This increased competition resulted in further reduced costs and even higher quality work overall.

Finally, in suitable cases, where a contractor was found to be unqualified to bid on SCA work or was liable to have his contracts terminated for reasons of integrity or character, the contractor was given an option. He could drop out of competition for SCA work, or he could agree to continue bidding on, and performing SCA work, subject to close monitoring and oversight by an Independent Private Sector Inspector-General (IPSIG). The IPSIG, one of a number of qualified specialist firms with expertise in forensic accounting, law, and investigation, would be selected by, and would report to, the SCA's Inspector-General. However, all of the IPSIG's fees and costs would be paid by the contractor. The advantages in this strategy are considerable, and the fact that the reforms have been shown to be effective is reason enough for the 'contract model' approach to be seriously considered.

Questions of timing

Timing is crucial. Most public servants cannot say 'yes,' but they can say 'no,' 'perhaps,' or nothing at all. Unreasonable postponement of important decisions is usually the most visible indicator that a corrupt deal is in the making.

Procedures, therefore, should have strict calendars (which although strict, still recognize that procurement is often subject to frequent but legitimate delays). If the calendar is not respected, procedures should provide for an alternative decision-making process to make 'blackmail by procrastination' unrewarding.

Since partners to a corrupt deal are not protected by law, such illegal deals can take longer to put together than regular business transactions. Dummy companies or money-laundering channels require time to be set up. The arrangements must be both invisible and deniable. Delivery of the bribe and the promised reward has to be closely linked, because mutual trust is usually absent. In some cases, officials want to build in elements of profit-sharing. Sometimes two or three layers of 'mediators' are built in to diminish the risk of exposure of the parties to the deal. Negotiations are delicate because, at any given moment, one of the parties may bail out and expose the whole scheme. All this takes time—time that an effective regulatory framework will not allow.

Involvement of 'outsiders'

The role of 'outsiders' is basically to hamper the creation of insider corrupt relationships of 'trust' during the decision-making and implementation processes. Procedures should always focus on keeping 'outsiders' as 'outsiders', and not allow them to be drawn into internal processes. Like external auditors, the 'outsiders' should provide expertise combined with integrity.

Several measures are worthy of mention here:

- Outsiders can assist in preparing bidding documentation (especially independent consultants with public reputations to defend);
- Outsiders can participate in evaluation (adding an independent 'audit' note of concurrence or otherwise);
- The contract-awarding committee should comprise persons of known integrity, not necessarily experts—with participation on the committees being a post of public honour and with the members' own wealth being subjected to public scrutiny;
- The contract-awarding committee should not have advance knowledge of the particular projects for which their services may be needed. There should be more people on the list than will be needed at any one time. During the decision-making process, the committee should be placed in a position where they cannot physically contact bidders individually (which may involve their remaining within a controlled environment, such as a hotel). If the committee cannot make a decision within a given time, a new session should be held with a committee of a different composition;
- The authority executing the works should not have a vote in the bid evaluation committee, but rather be available to the committee to answer questions; the same goes for any international consultant who prepares the bidding documentation;
- Project implementation should be supervised by a consultant other than the one responsible for preparing the bid documentation;
- Special procedures must close loopholes whereby artificially created 'cost over-runs' are met through the national budget, and not from a foreign loan;
- 'Cost over-runs' should only be accepted where supervision reports exist which identify the reasons for the higher costs at the time that these became evident. No *ex post facto* supervision reports should be accepted. This procedure makes the contractor responsible for timely reporting of the difficulties encountered.

None of this is a question of morality. It is directed towards undermining the reliability of corrupt deals, and maximizing the risk to offenders of corrupt deals falling through or being disclosed.

Assessing integrity in public procurement: a Hong Kong checklist

A Procurement Practices Checklist developed in Hong Kong outlines some areas of potential corruption risk in procurement. A 'No' answer indicates a potential control weakness requiring further investigation.

Policies

- Are there written policies and procedures governing procurement?
- Have these guidelines been promulgated and clearly explained to all staff?
- Are the procurement instructions regularly reviewed and updated?

Requisitions

- Is there an official requisition for purchases?
- Is there a defined approval process for a requisition?
- Do all staff concerned know the requisition process?
- Is a list of specimen signatures of the approving officers maintained for checking of authenticity?

Approved Suppliers

- Is there a list of approved suppliers?
- Is there a prescribed system for the inclusion and/or deletion of suppliers from the list?
- Is there a performance appraisal of the approved suppliers?

Quotations

- Are the circumstances for purchasing goods by quotation clearly specified?
- Are there safeguards against order splitting?
- Are checks carried out to confirm the authenticity of quotations or reasons for non-quotation?
- Are random checks performed to ensure the prices obtained for direct purchases are fair and reasonable?
- Are security measures in place to prevent mislaid quotations and unauthorized release of information?

Tenders

- Is complete information given in the tender documents?
- Is the tender box double-locked with the keys held separately by two staff members of appropriate level?
- Are there appropriate procedures for opening tenders and criteria for the evaluation of tenders?
- Is the tender information kept confidential before a decision is made?
- Are unsuccessful bidders notified of the tender result?
- Are conditions and procedures in place for the waiver of competitive tender procedures?

Miscellaneous

- Is the organization's policy on conflict of interest and staff acceptance of advantages made known to all suppliers?
- Is there clear segregation of duties to minimize the opportunities for corrupt collusion?
- Are staff regularly transferred, both for career development and to minimize the potential for syndicated corruption?

Information programmes

Under Malaysia's National Integrity Plan, public procurement is to be rendered rational, open, transparent, and fair. In so doing, public information programmes about procurement will be needed that address all parties—the officials who have responsibilities for procurement, the suppliers and contractors who are interested in competing for contracts, and the public at large.

The messages should highlight the following points:

- The Malaysian government and its agencies possess clearly stated rules of good procurement practice which they intend to enforce rigorously;
- Violators of the rules will be prosecuted under the law;
- Officials who indulge in corrupt practices will be dismissed; and
- Bidders who break the rules will be fined, possibly jailed, and excluded from consideration for any future contracts, by being 'blacklisted'.

It should be clear that none of the actions suggested in this chapter is sufficient by itself to curb corruption in procurement completely, let alone overnight; however, a coordinated effort on all fronts will have dramatic effects. If anti-corruption laws are strengthened and publicized, if sound and proven procedures and good-quality documents are adopted, if procurement competence is increased by training and career development, and if everyone knows that the government is serious about enforcing honest and fair practices, change will come.

It must be widely understood that corruption in public procurement will not be tolerated, and that guilty parties will be punished. Experience shows that although these various actions may not be able to stop all corruption in procurement, they will certainly curtail the problem. Corrupt procurement is not inevitable. It can be cleaned up, and when it is, the public is the great beneficiary.

Checklist for assessing integrity in public procurement

- Under the present system, is the public receiving value for money? If not, what needs to be changed to ensure that it does?
- Under the present system, is there fair and open competition between the various bidders? Does each bidder get a fair chance? Is there any evidence of collusion between bidders to manipulate the outcome of particular bidding rounds?
- Would independent monitoring of selected projects be likely to assist the government in securing value for money?