

# CONFLICTS OF INTEREST AND ETHICS IN GOVERNMENT

## BRIEFING NOTE: COMPARATIVE ANALYSIS OF COUNTRY STUDIES

### **I. Overview:**

This memo compares and analyzes the approaches taken by the conflicts of interest and ethics regimes in the countries that were the subjects of six individual country studies: Canada, the United States (federal executive), Trinidad & Tobago, Ghana, Singapore, and Malaysia.

It also analyzes the different ways in which various conflicts of interest regimes attempt to deal with various issues.

### **II. Short Conclusion:**

The six country studies reveal a shared conception of the damage to the integrity of government and the public good caused by conflicts of interest. They recognize that bribery and corruption are the most serious forms of conflicts of interest and priority is accorded to addressing these major problems. Some countries such as Singapore and Malaysia focus great energies on these issues. Other regimes, such as Ghana, Canada and the United States (federal), have turned significant attention to less extreme but still important forms of conflicts of interest dealing with the avoidance of conflicts between one's existing private interests and public duties.

### **III. Conflicts of Interest: Shared Understanding and a Spectrum of Challenges:**

The fundamental starting point for each regime is a shared ethical conception that public officials should not be influenced by private considerations when making decisions in their public capacity. The legislation and Codes of Conduct of the countries are attempts to translate this general principle to apply to specific circumstances. We can conceive of the different ways in which private interests can affect public decisions as a spectrum. On the far end of the spectrum lies the most extreme and obvious form of corruption: bribery. Bribery can be best understood as the payment of money or other value in exchange for a public official's agreement to make a decision on a matter in a particular way. At the other end of the spectrum lie more subtle forms of influence, some of which may even operate on the subconscious level. These may include donations to one's political campaign, contact with lobbyists, etc.

There is no significant difference between the countries examined regarding the definition of a conflict of interest. The differences lie in what types of conflicts of interest they address and the scope of the coverage of these conflict of interest provisions, *i.e.* in what public officials they target, as is discussed below.

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### III. Scope of Coverage:

Some countries such as Malaysia, Singapore and Trinidad & Tobago, have legislation with very broad coverage, applying to a wide range of public officials. Trinidad & Tobago's *Integrity in Public Life Act* applies to every person in public life and to people exercising public functions. Similarly, Malaysia's *Anti-Corruption Commission Act* applies to all civil servants and public officials, as does Singapore's *Prevention of Corruption Act*. Moreover, Singapore also has a Code of Conduct for Ministers. Ghana's Code of Conduct has a more limited reach, applying to what we would consider senior government officials such as all Members of Parliament, Ministers, Deputy Ministers, judges, ambassadors, heads of ministries or government departments and heads of public corporations or companies. The American conflict of interest provisions that apply only for the federal executive branch would apply to the estimated 4 million employees of that branch. The Canadian federal legislation applies to both elected and unelected public officials. The Canadian provincial legislation examined only applies to elected public officials, approximately 107 members of the Ontario legislature and 85 members of the British Columbia legislature. The Canadian legislation (both federal and provincial) takes a further targeted approach by delineating different responsibilities for different types of office holders (e.g. public servants, elected members of parliament and Cabinet Ministers).

The broader the reach of the legislation, the more challenging it is to apply to the specific types of conflicts of interest that different type of public officials may face. By necessity, some of the legislation that applies on a broad basis (e.g. Malaysia, Singapore, Trinidad & Tobago) generally covers the most egregious and obvious types of conflicts of interest, such as bribery. In other jurisdictions such as Canada, these offences would be covered under the *Criminal Code*.

More stringent requirements may be placed on elected officials and even more stringent requirements placed on those that exercise greater power such as Ministers. These requirements are generally coupled with some form of oversight. Serious practical obstacles exist to extending a significant level of oversight to lower levels of government or public authorities. However, under the American federal executive regime, every employee of the executive branch is required to provide a detailed confidential report of their financial status. This system is supported by a significant government bureaucracy: each executive department has a supervising ethics office and there is also a separate Office of Government Ethics which exists to provide overall direction of executive branch policies related to preventing conflicts of interest on the part of executive branch employees. This office is headed by a Director who is appointed by the President and must be confirmed by the Senate. It would be both politically and operationally challenging, not to say expensive, for other jurisdictions to duplicate this level of support and oversight.

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### III. Prohibited Activities

#### A. General

All codes contain a general prohibition against conflicts of interest, defined generally as exercising public power or authority in a manner that benefits one's private interest (see e.g. Singapore's Code of Conduct, Trinidad & Tobago's *Integrity in public Life Act* and the Canadian federal and provincial legislation). Specific prohibitions should be seen as examples of the types of activities that would fall under the general rule against conflicts of interest. The lack of a rule prohibiting a specific type of activity should not necessarily be seen as endorsing that activity. Often, specific rules are enacted in order to address activities that have been problematic in the past. The specific elaborations of prohibited conflicts of interest may assist in alerting public officials and members of the public as to what types of conduct are not permissible. Moreover, as discussed in detail below, the prohibitions are likely to only be as strong as the efficacy of enforcement mechanisms established under the particular regime.

#### B. Gifts

All of the countries, with the exception of Trinidad & Tobago, place restrictions on the receipt of gifts by public officials. In Ghana, there is a criminal prohibition on accepting and being influenced by gifts. In Singapore and Malaysia there are strong and extensive prohibitions which also apply to entertainment. The restrictions in Canada and the United States are more regulatory than quasi-criminal. They are focused more on the disclosure of gifts over a certain amount rather than on their prohibition. Disclosure is discussed below.

#### C. Travel

Payments by private actors to public officials for travel would likely fall under the provision for gifts as noted in the memo on Trinidad & Tobago. However, some of the countries contain explicit prohibitions or regulations on this issue. Singapore explicitly prohibits public officials from accepting overseas trips from contractors. Canadian and American federal legislation contain specific restrictions on receiving free travel from external sources. The issue has arisen frequently in the past in both countries given their vast geographic expanse. In Ontario, legislation prohibits public officials from accumulating frequent flyer miles while engaged in government travel. This is a less dangerous example of a conflict of interest but one that demonstrates how a public official can improperly derive a private benefit from their public duties.

#### D. Contracts with Government

Canada and the United States have strong prohibitions on public officials contracting with government directly or indirectly. Singapore has very detailed prohibitions both on contracting and on relations with contractors. While countries such as Ghana have no

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explicit prohibitions, this subject would likely be subsumed within the general conflict of interest provisions

### **E. Anti-Nepotism Provisions**

Nepotism is generally understood as the preferential treatment of a relative of a public official. It is an age old problem in governments and politics. Nepotism risks advancing a public official's private interests (in getting a job for a relative) at the expense of the public interest (in having the most qualified person in that position). Only Canada and the United States contain explicit anti-nepotism provisions in their legislation. Singapore explicitly prohibits public officials from attempting to influence civil service hiring. This would address the issue of nepotism in this area.

### **F. Outside Interests**

Canada and the United States have explicit prohibitions on certain public officials engaging in outside employment. Elected Canadian provincial legislators ("members"), but not Ministers, may engage in outside employment or the practice of a profession. In Singapore and Malaysia, prior approval is required from the relevant authority. In Ghana, public office holders are not prohibited from engaging in other employment or practicing certain professions. Singapore restricts public officials' journalistic activities.

Allowing public officials to pursue outside interests is an invitation for conflicts of interest. However, some public officials may need to pursue outside employment if their public salary is insufficient. Others may simply wish to supplement their public salary. There also may be a public benefit in public elected officials pursuing outside interests, as it brings them into contact with certain members of the public in the course of ordinary interaction.

### **G. Holding of Certain Assets**

Most jurisdictions do not restrict the type of assets that may be held by public officials. There are restrictions on the holding of certain types of assets in Canada and in the U.S. there are agency-specific restrictions. Where such restrictions exist, the public official must divest the assets either through their sale or by way of transfer to a blind trust, as is discussed below. Most jurisdictions favour disclosure of assets over outright prohibition.

### **H. Other Types of Prohibitions or Restrictions**

It is now standard to see explicit prohibitions on the disclosure or use of confidential information to further one's personal interests (see e.g. Ghana, Trinidad & Tobago, Canada).

Singapore explicitly prohibits public officials from attempting to influence civil service hiring and from attempting to improperly influence civil servants.

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The Canadian and American jurisdictions examined contain extensive post-employment restrictions and prohibitions for former public officials. The trend in both countries is towards greater regulation in this area (see in particular President Obama's Executive Order of January 21, 2009).

### **IV. Affirmative Requirements**

#### **A. Duty of Recusal**

Some of the jurisdictions couple the general prohibition on conflicts of interest with a positive duty of disclosure and recusal (see Trinidad & Tobago, Canada, United States) by any public employee who finds himself or herself in a situation where they feel a conflict of interest may arise. In the other jurisdictions, recusal may be implied by the general duty to avoid conflicts of interest.

#### **B. Duty of Disclosure**

All of the jurisdictions contain detailed provisions regarding the disclosure of assets and liabilities. In most cases, full confidential disclosure is required to some official followed by a more limited public disclosure. The disclosure requirements vary, both in their frequency and their depth.

Trinidad & Tobago, Singapore, Canada and the United States require annual disclosure. In Ghana, disclosure is required of public officials upon entering public office, every four years and at the end of their term of office. In Malaysia, disclosure is only required upon entering office. As set out in the country memos, the substance of the disclosure of property and assets is quite detailed.

The Canadian jurisdictions, Trinidad & Tobago and the United States also require the disclosure of gifts. The threshold for each is different with the U.S. the lowest at \$100 and Trinidad & Tobago the highest at \$2000. The Canadian jurisdictions are closer to the low end of the scale at \$200-\$250. The high threshold for Trinidad & Tobago means that most gifts to public officials will not need to be disclosed and this has the potential to create apparent or real conflicts of interest. There are no disclosure requirements in Ghana, Singapore and Malaysia, likely because of the strong prohibitions on accepting gifts in the first place.

The new Canadian federal legislation also requires the disclosure of offers of employment and public declarations of recusal. American legislation requires the disclosure of government waste (including both the physical waste of government property, and the waste of official time by public servants).

Trinidad & Tobago, Canada and the United States maintain some form of public registry or public disclosure of assets / gifts / etc.

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### **C. Duty of Divestment / Blind Trusts**

Divestment, either through sale or transfer to blind trusts, is discussed extensively in the country memos and in the memo on separating public and private interests. It is noted here that divestment may be required under certain circumstances and that many of the jurisdictions permit but do not require the use of blind trusts to deal with possible conflicts (e.g. Singapore, Trinidad & Tobago, Canada). The advantages and challenges of blind trusts are analyzed in detail in the memo on separating private and public interests.

### **D. Other Disclosure Regimes**

An issue which is beyond the scope of this project is the transparency of private contributions to political campaigns. Extensive regimes exist in both Canada and the United States for disclosure of campaign contributions and expenses.

### **V. Enforcement**

Enforcement is critical to the efficacy of any conflict of interest regime.

In Canada, the federal and provincial conflict of interest legislation is overseen by an independent official styled as a Commissioner who has the power to initiate inquiries, compel testimony and produce documents and punish for contempt. In Ghana, the Constitution empowers committees of Parliament to supervise the work of public officers. The committees have the ability to launch investigations of public officers who may be involved in conflicts of interest. Under the Constitution, the Commission on Human Rights and Administrative Justice is composed of three entities including a human rights institution, an Ombudsman and an Anti-Corruption Agency. The Anti-Corruption Agency works to investigate complaints of corruption, abuses of power and the misappropriation of public moneys by a public officer. The Agency also works to investigate a public officer who has violated the Code. The Commission submits reports of the investigations to the Attorney General and the Auditor General.

In Malaysia, the enforcement of the anti-gratification and anti-corruption provisions is done by the Malaysian Anti-Corruption Commission. The Anti-Corruption Advisory Board advises the Commission. It advises the Commission on the corruption problems in Malaysia and proposes policies and strategies to the Commission to aid in the eradication of corruption. The Board evaluates and endorses proposals from the Commission in regard to its day-to-day activities and endorses resource needs of the Commission.

In Singapore, the Corrupt Practices Investigation Bureau is responsible for the enforcement of the relevant legislation. The Bureau investigates and arrests corrupt offenders.

In Trinidad and Tobago, an independent Integrity Commission composed of five persons is empowered to make use of any law enforcement agency, or part of the Public Service.

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It has the power to authorize investigations, compel witnesses, order production of reports, documents or other information. Most importantly, it is vested with an enormous discretionary power to “do all such things as it considers necessary or expedient for the purpose of carrying out its functions.”

The American federal Office of Government Ethics is described above.

### VI. Sanctions

The range of sanctions for violating the relevant provision varies immensely. Significant prison sentences may be imposed for bribery offences at the high end of the conflict of interest scale. At the other end of the scale, some conflict of interest provisions have no sanctions for their violations.

In the Canadian case, criminal offences aside, sanctions only accompany the most egregious violations. The federal legislation permits the Commissioner to impose “administrative monetary penalties” that do not exceed \$500. The strongest sanctions are political embarrassment and possible punishment. Canadian commissioners can recommend legislative reprimand or suspension and the ultimate political penalty that can be exacted is to declare a member’s seat vacant, *i.e.* to effectively strip an elected member of the legislature of his or her seat. This has never been done to date in the relatively short history of these provisions in Canada.

More severe sanctions exist in Trinidad and Tobago. Its Commission can apply to court for an order compelling compliance with the Act, and the failure to comply with this order is an offence subject to a fine of \$150,000. The Commission can refer matters to the Director of Public Prosecutions for prosecution. Where a person in public life fails to provide a declaration, or particulars, and there are no reasonable grounds for not complying with the Commission, that person is guilty of an offence and is liable on summary conviction to a fine of \$250 000, and to imprisonment for a term of up to ten years. Similarly, if a person in public life knowingly makes a false declaration, or fails to attend an inquiry being conducted by a tribunal, that person is guilty of an offence and is liable on summary conviction to a fine of \$250 000, and to imprisonment for a term of up to ten years. If a person in public life is deemed to be in possession of any undisclosed assets or income, and they fail to disclose their existence, or if an inquiry determines that their existence was deliberately omitted from the required declaration, they are liable upon summary conviction to a fine of \$250 000, and imprisonment for a term of up to ten years. Furthermore, if the failure to disclose is determined to be deliberate, a Court may also order the forfeiture of property or the payment of its equivalent value. Additional sanctions are reviewed in the memo on Trinidad and Tobago.

In Ghana, the Commissioner of Human Rights and Administrative Justice or the Chief Justice, as the case may be, may take such action as he considers appropriate in respect of the results of the investigation or the admission. The Commission does not directly have any power to sanction a public official for misconduct however, it can make

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recommendations which can lead to prosecutions or resignations, as discussed in the Ghana memo.

In Malaysia, anyone found guilty of committing a corruption offence will, on conviction, be liable to imprisonment for a term of no more than 20 years and to a fine of not less than five times the sum of the gratification (if it is capable of being valued) or 10 000 ringgit, whichever is higher. There are similar penalties for failing to inform an officer of the Commission of an offer of gratification promised to them. Making a false statement or intending to mislead is an offence liable to a significant fine and/or a term of imprisonment of up to 10 years.

In Singapore, anyone found guilty of a corruption offence will be subjected to a fine not exceeding \$100 000 and/or to imprisonment for a term of no more than 5 years. Additional severe sanctions for public officials and for Members of Parliament are discussed in the Singapore memo.

American conflict of interest legislation establishes procedures for both the criminal and civil prosecution of public employees found to have breached their ethical duties. Any employee who is found to have committed an offence in relation to a conflict of interest is liable to imprisonment for up to 1 year, or a fine (depending on the offence in question), or both. Anyone who willfully engages in the conduct constituting the offence is liable to imprisonment for up to 5 years, or a fine of up to \$100 000 for a misdemeanor or \$250 000 for a felony, or both. The Attorney General of the United States may bring a civil action in the appropriate United States district court against any person who offends the conflict of interest legislation. Upon proof of such conduct, such person is liable to pay not more than \$50 000 per violation, or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is found to be greater.

### **VII. Current and Future Trends:**

Over the past two decades there has been a growing recognition of the need to treat a public official's family as a single unit for purposes of scrutinizing conflicts of interest. Experience has shown that prohibitions can be easily avoided by placing assets in the name of a spouse or relative. The definition of private interests now usually encompasses the public official's immediate relatives.

To date, most conflict of interest codes have focused on the public official's property and investments as the key site for using public power to advance one's private interests. Increasingly, other sites of opportunities and possible conflicts are being recognized, including political contributions, contacts with lobbyists and post-employment opportunities. In Canada and the United States, the trend is towards greater transparency and regulation in these areas.

There are important connections to other types of legislation and enforcement mechanisms such as the Criminal Code (e.g. Canada and Ghana) and Access to Government Information legislation (e.g. United States, Canada). As noted in the memo

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on Ghana, the lack of access legislation is a serious impediment to combating corruption because it enables a veil of secrecy to be maintained over government decisions.

### **VIII. Resources:**

In addition to the resources listed in each country memo see also:

The United States, Executive Branch, online:

[http://www.whitehouse.gov/our\\_government/executive\\_branch/](http://www.whitehouse.gov/our_government/executive_branch/)

Ontario Legislature, online:

[http://www.ontla.on.ca/web/members/members\\_current.do?locale=en](http://www.ontla.on.ca/web/members/members_current.do?locale=en)

Legislative Assembly of British Columbia, online:

[http://www.leg.bc.ca/\\_media/flash/People.pdf](http://www.leg.bc.ca/_media/flash/People.pdf)