

GOVERNANCE

HAWKE'S BAY HEALTH CONFLICTS: LESSONS FOR THE PUBLIC SECTOR

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The much-debated report into conflicts of interest at the Hawke's Bay District Health Board has produced a number of issues for other DHBs and Crown Entities to consider.

The 183-page report contains a raft of considerations relating to conflicts as well as general governance. In this update we summarise the report and look at its implications for public sector governance.

Framework for conflicts of interest

The Director-General of Health established a Review Panel in July last year to consider issues relating to conflicts of interest that may have arisen at Hawke's Bay DHB. The panel released its report to the Director-General on 14 March 2008.

The panel spent quite some time setting out the difference between the legal, ethical and best practice framework for dealing with conflicts. The legal framework for DHBs is contained in the New Zealand Public Health and Disability Act 2000 (PHD Act). Similar provisions are contained in the Crown Entities Act 2004 (Crown Entities Act). Broadly, the statutory position is as follows:

- A Board member who is "interested in a transaction of the DHB must, as soon as practicable after the relevant events have come to the Board member's

knowledge, disclose the nature of the interest to the Board" (PHD Act).

- Following such disclosure, the member cannot, unless the Minister grants a waiver or the other Board members agree, take part in any deliberation or decision of the Board relating to the transaction, be included in the relevant quorum, or sign any document relating to the entry into of a transaction or the initiation of a transaction (PHD Act).

The panel emphasised that "transaction" is defined very widely in the PHD Act and is not limited to what is typically considered a "transaction" in the commercial world (i.e. an actual or prospective agreement). Likewise the Crown Entities Act 2004 broadly defines "matter" (in the context of a Board member being interested in a matter) so that it includes "a statutory entity's performance of its functions or exercise of its powers" which can mean a number of things in addition to actual agreements.

Boards and Board members need to be aware of interests in a variety of contexts and not focus simply on conflicts arising over specific contracts.

Report overview

The report can best be summarised in terms of three broad headings:

- Identifying conflicts of interest;
- Dealing with conflicts of interest; and
- Training and guidance for DHB Board members and governance generally.

We summarise the panel's findings on these points below.

Identifying conflicts of interest

Interest registers

Disclosure of interests is required both in the minutes of any meeting relating to a particular transaction and in the general interests register. The interests register should not be limited to initial disclosure when a Board member is elected, or periodic updates of that interest disclosure register, and should be updated to reflect disclosures made in meetings. Boards should also be aware of interests listed in general interests registers and should ask for more information where there is a potential for overlap with DHB matters. The panel emphasised that the obligation is on Boards to be vigilant.

Guidance on disclosures

Board member disclosure must include interests in transactions that would not normally be handled by the Board (e.g. where management has delegated authority to deal with a particular class of contract). Without such disclosure there is a real risk that DHB employees may treat an interested Board member or their company more favourably or, more likely, that there will be a public perception that the member is receiving more favourable treatment. The panel emphasised that ethical obligations and good practice require Board members to ensure that their Board is informed of dealings that could give rise to perceptions of preferential treatment.

Disclosure must be both forward and backward looking – the panel criticised board member Peter Hausmann's disclosure on the basis that it did not provide full details of his involvement with the development of the RFP for which his company Healthcare of New Zealand Ltd bid. The panel also criticised another Board member (who was referred to by way of an example – the panel considered that other Board members also had issues around conflicts of interest) on the basis that his disclosure did not adequately consider how his involvement with pharmacies could be affected by his role on the Board on an ongoing basis.

Board members can still be "interested" in a matter that involves a broad policy decision. Such matters require disclosure even though they may not relate to a specific transaction or explicitly to a service provider in which the member has an interest. For example, the panel saw one Board member's participation in Board deliberations relating to HBDHB's major review of community pharmacy funding and dispensing as potentially having substantial financial consequences for him through his shareholding in pharmacies. The panel considered that his participation in any discussions relating to such a matter should have been properly assessed and managed.

Disclosure should be thorough enough to allow Boards to make an informed decision when assessing an actual, potential or perceived conflict of interest. For example, if a Board member has an interest in a service provider that is engaged in discussions with the DHB with a view to entering into a contract, disclosure of the nature of the interest" should include:

- the Board member's interest in the service provider;
- the transaction of the DHB in



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- contemplation;
- the involvement or potential involvement of the service provider in that transaction; and
- the role (if any) of the Board member in the negotiations or implementation of the proposed transaction.

The Board may need to make further enquiries to obtain the information needed to manage the conflict appropriately. Board members (especially the Chair) must carefully consider each disclosure and the proper course of action moving forward.

Disclosure forms

Well-developed disclosure of interest forms are a good tool for ensuring adequate disclosure. (Bell Gully recommends disclosure forms should be tailored to ensure that the questions asked prompt members to think carefully about their roles and interests and encourage relevant and material disclosure. We have recently developed tailored forms for clients concerned that existing conflict disclosure procedures did not prompt adequately detailed disclosure in interest registers.)

Dealing with conflicts of interest

The panel emphasised that disclosure of conflicts of interest was only the starting point. The member concerned, and other members of the Board, must proactively consider what steps should be taken as a result of the disclosure. The panel’s comments in this area were as follows:

Assessment of the conflict

When assessing the conflict Board members will need to consider:

- the size and materiality of the transaction in question;
- the size and materiality of the interest the member has in the provider;
- the seriousness of the connection between the interests or the remoteness of the interest if it is indirect; and

- the perceived or actual risk that the member may influence the transaction/decision of the DHB or that the provider may derive an advantage as a result of the member’s position. For example, Peter Hausmann reviewed a draft of the RFP document to which Healthcare NZ responded two months before other potential proposers. Whether Healthcare NZ actually began preparing a response at that stage or derived any other direct benefit from seeing the RFP is not necessarily relevant, as the public perception would be that Healthcare NZ must have benefited from such a review.

Management and mitigation

There are numerous management and mitigation strategies which can be used individually or collectively to manage conflicts or potential conflicts as they arise. Flexibility and pragmatism will be needed, especially where a conflict is not clear-cut or the Board member’s expertise is particularly important.

The panel suggests five options:

- not allowing the Board member to be involved in deliberations and decisions;
- ensuring that the Board member does not receive relevant Board papers and leaves the room during relevant discussion;
- considering a waiver to allow participation in deliberations to continue;
- requiring the member to take or refrain from taking certain steps outside the boardroom; or
- recommending the member resign from the Board.

There are also a number of other mitigation or management strategies that can be employed in conflict of interest situations, alone or in combination, and public sector guidelines are particularly helpful in this regard. The panel commented that while it is desirable for Boards to use Board members' expertise, their conflicts of interest still need to be carefully handled. Often the conflict will be so great that some other solution to obtaining the expertise (for example, seeking independent advice) should be used. Boards should also consider management strategies that relate both to what happens inside and outside the boardroom – for example, restricting communications with staff members and management relating to the matter in which a member might be interested.

Default position

The default position where a Board member is interested in a transaction should be to remove them from discussion, deliberation and any decisions relating to the transaction. The panel was critical of the extent to which the statutory waiver (i.e. where all Board members agree to allow the potentially conflicted Board member to continue) allowing continued participation was used, commenting that it should be the exception rather than the norm and that most conflict situations are so problematic that waiver is inappropriate. The panel recommended erring on the side of caution. If Boards are in doubt Board members should provide fuller disclosure and Boards should undertake stricter management of conflicts.

Public perception will often be the dominant consideration in terms of handling conflicts of interest, irrespective of whether members are acting honestly and with good intentions, the panel said. Where a statutory waiver is given, additional strategies should be used to minimise risk.

Guidance for Board members and wider governance issues

The need to have appropriate training and to have written guidance for Board members in a governance manual was highlighted by the panel. Its comments in this area were:

Governance manuals

Each DHB (and by implication each Crown Entity) should have a Board governance manual which deals with management structures, the Board/management relationship, Board standing orders and handling of conflicts of interest (possibly including a separate conflicts of interest policy). Legislative requirements should be included in such a manual as should further detailed guidance and reference documents which provide additional strategies for management and mitigation of conflicts of interest. Strategies should be practical and pragmatic. The panel acknowledges that it may not always be viable to have a conflicted person step down from their role.

Induction and training

The panel placed emphasis on the need for Board members to be properly trained and inducted after election or appointment. It referred on a number of occasions to the legislative requirement in the PHD Act that Board members not already familiar with, among other things, the obligations and duties of a Board, are required to undertake and complete training approved by the Minister. The panel commented that both newly elected or appointed Board members and long-standing members must be knowledgeable on governance matters.

Wider governance issues

The panel commented on the potential for misunderstanding the separation between Board and management functions.

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It said:

- Board members should not contact management on operational matters if they are conflicted, unless the Board has first approved that contact.
- Even when there is no conflict of interest, communication between the Board and management can be problematic, especially where the issues are sensitive or confidential.

Legislative reform

Overall the panel considers that change is needed and recommends a review of the legislation that should consider issues such as whether there are grounds for DHBs to be treated as a special case separate from Crown Entities.

Are all DHBs bound by the report?

The panel's report is not legally binding in the sense that DHBs must follow its outcome. However, it is full and considered and sets out in detail what a well-qualified, independent review panel considered was the best practice approach for DHBs in managing conflicts of interest and in governance generally. As a result, a DHB (or other Crown Entity) would be very unwise to ignore the report findings. It can be expected that any further panels appointed to consider conflict of interest issues or governance issues at other DHBs or Crown Entities will use the report as a starting point.

Actions for DHBs and Crown Entities now

Some issues that we believe DHBs and Crown Entities should consider are:

Do our practices for conflict of interest disclosure meet the standard required in the report?

- Are Board members aware of the wide

definition of "transaction" or "matter"?

- Do we require forward and backward disclosure?
- Do we require disclosure of matters that would not normally be handled by the Board?
- Do we require full disclosure including precise details of the member's interest and how that may come into conflict with the DHB's or Crown Entity's objectives?
- Do we have in place appropriate disclosure forms?
- Do we have a process in place for regularly updating the interests register?

Do we ensure conflicts, once disclosed, are dealt with appropriately?

- Is there a process in place to ensure that the conflict is assessed appropriately, i.e. thought and analysis is given to the size and materiality of the transaction in question, the size and materiality of the interest the member has in the provider, the seriousness of the connection and the perceived or actual risk that the member may influence the transaction?
- Do we have a process in place to consider the options for dealing with a conflict and which of those options is best suited following the assessment?

Do we have appropriate resources in place for Board members?

- Do we have a Board governance manual?
- Do we provide induction and training for new Board members?

Advice

This update is necessarily a general summary of the panel's report along with suggestions as to what DHBs and other Crown Entities ought now to consider. It provides general guidance only. You should consider taking specific advice from your internal or external legal provider. Bell Gully is experienced in advising DHBs and other Crown Entities on conflicts of interest and governance issues.