



## CONFLICTS OF INTEREST: PRINCIPLES, POLICY AND RULES

### Introduction

The Council of the University of Cape Town has made the following **STATEMENT OF PRINCIPLES AND POLICY** concerning potential and real conflicts of interest in the conduct of the affairs of the University, and the following specific rules for giving effect to this statement of principles and policy.

These amplify paragraph 21 of the Statute which provides as follows:

‘Financial and other interests of council members

1. Any member of the council or a committee of the council who has a direct or indirect financial or personal interest in any matter to be discussed at a meeting must, before or during such meeting, declare such interest, and comply with such other rules and policies at the council may adopt.
2. After such declaration such member of the council or a committee of the council must excuse himself or herself from the meeting and any subsequent meeting at which the matter is to be discussed, and is not entitled to receive papers relating to the matter.’

### Basic Considerations

#### 1. **Fiduciary Responsibilities:**

Members of the Council, members of committees, and members of management are elected and appointed to serve the interests of the University and the public generally. This, upon their acceptance of office, makes such persons trustees for the benefit of the University and the public they serve. It results in an obligation on their part to fulfil their responsibilities in a manner consistent with this situation. All decisions of the Council, of other University bodies and committees and of members of management are to be made solely on the basis of a desire to promote the best interests of the University and the public. The university’s integrity is to be protected at all times.

#### 2. **Other commitments and Interest:**

People of substance inevitably are involved in the affairs of other institutions and organisations, in addition to having, in most instances, their own professional or business careers. This University benefits from having in its Council and committees people of excellence and high standing who in Council and committees freely share their expertise. Similar considerations apply in the case of some members of management.



### 3. Potential for Conflicts of Interest:

The potential for conflicts of interest is obvious. A publication by the Association of Governing Boards of Universities and Colleges ('AGB') in the United States very aptly says:

“An effective board, administration and faculty cannot consist of individuals entirely free from at least perceived conflicts of interest”<sup>1</sup>

### 4. Range of Potential Seriousness and Implications:

The significance and implications of such conflicts, potential or real, could vary over a wide range of possibilities. Worst cases, unless countered by appropriate rules and procedures, could have substantial detrimental effects for the University. These could include litigation, embarrassment and public criticism. At the other extreme the element of perceived or potential conflict may be so trivial that it can safely be ignored, in accordance with the legal maxim “de minimis non curat lex”. In between there could be cases where, although the perceived conflict cannot be said to be trivial, special circumstances may exist which render it insignificant or inconsequential, or which indicate that the risk of abuse or other detrimental effects is extremely remote, or that, on striking a balance, the implications of such conflict as may exist are wholly outweighed by the potential benefits to be derived, in the best interest of the University, from adopting the resolution or entering into the transaction in question.

### 5. Fundamental requirements

The judgement required for steering a proper course in the application of these considerations, must be that of the Council. There is no body in the University structures, which can vis-à-vis the Council play, the role of which in the case of a company is played by a general meeting of shareholders vis-à-vis the board of directors. Hard and fast rules can not be laid down for every case: but certain fundamental principles and requirements stand out as guidelines for the Council itself as well as for committees, and management, in dealing with conflict-of-interest issues:

- 5.1 The observance of both complete integrity of approach and of fairness in procedures is essential, not only as a matter of ethical standards but also because departures and violations bring for the University vulnerability to review proceedings in the High Court.
- 5.2 These fundamental principles are not only to be observed but should be seen to be observed. In regard to conflict-of-interest issues and their consequences perceptions (on the part of reasonable members of the public) play a critical role.

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<sup>1</sup> “ A Guide to Conflict of Interest and Disclosure Issues” by Richard T. Ingram



- 5.3 Transparency in the treatment of conflict-of-interest questions is a further fundamental requirement. Where such questions are involved, there is a need for meticulous disclosure, adherence to prescribed procedures, and precise recording of proceedings as well as the reason for arriving at decisions.
- 5.4 Both in the definition of what constitutes a conflict of interest and in the evaluation of its significance in particular instances a sense of balance should be sought to be attained with reference to potentially contradictory considerations. For instance, on the one hand the best interests of the University are indeed served by the presence in Council of people of high calibre and expertise and could in particular circumstances well be served by awarding a contract to such a person or his or her firm as being uniquely qualified for it, above all his or her available competition. On the other hand, what is to be strictly avoided is either the reality or reasonable public perception of nepotism, or of a practice of University contracts and business being awarded on a basis of favouritism among friends.

#### **DEFINITIONS AND OCCASIONS FOR CONSIDERATION OF CONFLICTS OF INTEREST**

6. The definition of conflict of interests makes it clear that not only the direct, personal and pecuniary interests of the individual are relevant, but also those of members of his or her immediate family circle and of partnerships, firms, companies and close corporations in which his or her pecuniary interest, fiduciary responsibility or personal participation is substantial enough to be of significance.
7. Conflict of interest questions require to be weighed in various situations, for example with reference to
  - 7.1 acceptance of election/appointment to the Council or a committee;
  - 7.2 membership of a University tribunal exercising quasi-judicial functions;
  - 7.3 participation in a particular agenda item at a meeting of Council, a committee or some other body (other than quasi-judicial);
  - 7.4 the award or conclusion of a contract between the University and the person concerned or other individual, company or firm with whom or which he or she is associated as per definition.



8. With reference to 7.1 a person is not to be discouraged from accepting an appointment as contemplated merely by reason of the fact that conflicts in situations as referred to in 6.2 to 6.4 may arise in course of time. However, there could be sound grounds for declining Council membership, and/or being advised to do so, where a long-term, repetitive or ongoing professional or business relationship is contemplated or already exists between the University and the person concerned or some other individual, company or firm with whom or which he or she is associated as per definition. In such instances advice may be given by the Chair of Council and/or the Vice Chancellor, after their obtaining such professional or other advice as they may consider necessary.
9. The situations in 7.2 to 7.4 are dealt with in the Rules

## RULES

### 10. Introduction:

- 10.1 These rules have been made by the Council in pursuance and implementation of its Principles and Policy, and are to be interpreted accordingly.
- 10.2 The rules are subject to amendment and/or amplification by the Council at its discretion.
- 10.3 In particular, the rules concern mainly such conflicts as may be experienced by Council or Committee members in situations as referred to in paragraphs 6.2 to 6.4 and may need amplification with specific reference to members of management.

### 11. Definitions:

In these Rules, save where the context clearly indicates otherwise –

- 11.1 “Conflict of Interest” means, for a member of the Council, committees, management or staff of the University, who has a fiduciary responsibility to the University as described in paragraph 1 of the Statement, a real or potential conflict with that responsibility, arising from
  - (a) a substantial, direct, beneficial and personal or financial interest on the part of
    - (i) such a member personally, or
    - (ii) someone in his or her immediate family circle, or
    - (iii) a professional practice, firm, close corporation, partnership, company, business or other organisation in which such member or his or her family has an interest as described above.

Or from



- (b) a fiduciary responsibility on the part of such a member towards any organisation as described in (a) (iii) by reason of being a director to or being employed or engaged by it in some executive capacity,

where the interest as defined in (a) above, on the part of persons or organisations mentioned in (a) or (b) above, relates to University affairs to be dealt with by the Council, a committee or other university body which includes the member concerned, or by such member himself or herself, provided that the holding of shares in a company listed on the Stock Exchange to the extent of less than 5 per cent of the issued shares of such company shall be deemed not by itself to constitute a substantial interest as contemplated in (a) above. “Conflicting interests” has a corresponding meaning.

- 11.2 “Immediate family circle” means that which includes a spouse, parents, siblings, children or any other relative if the latter resides in the same household as the member concerned.
- 11.3 “Quasi-judicial body” means the University Student Disciplinary Tribunal, or the Appeal Tribunal or any other body or single person charged under University rules or regulations with a disciplinary function or a function of deciding on the issue of permits, permissions, authorisations or similar rights or privileges.
- 11.4 “Statement” means the Council’s Conflicts-of-Interest Statement on Principles and Policy as set out in paragraphs 1 to 7 above.
- 12.** Where a member of the Council, a Committee, management or staff serving as a member or the sole member of a quasi-judicial body is aware or is made aware of a conflict of interest arising from any link, as contemplated in paragraphs (a) or (b) of the definition of “Conflict of interest”, between himself or herself and any party to proceedings due to be, or in the course of being, conducted before or by the tribunal, such member shall immediately withdraw from such proceedings and record or cause to be recorded the reason for such withdrawal.
- 13.** Each member of Council or of a committee shall, before or at the first meeting of Council attended by him or her in each year of the period of tenure of such member, submit to the Registrar, for the information of Council, a list of all interests and relationships, on the part of himself or herself or any member of his or her inner family circle, which may potentially result in a conflict of interest on his or her part in the course or as a result of proceedings of the Council or its committees.
- 14.** In addition to making the annual disclosure referred to in Rule 13, a member of Council or of a committee shall, with reference to any particular item on the agenda of a meeting of council or such committee attended by such member, at such meeting make full disclosure to Council or such committee of a real or perceived conflicting interest to which such a member is a party.



15. Having made a disclosure as referred to in Rule 14 such member of Council or of a committee shall withdraw from the meeting and not be present at nor participate in the consideration of the matter in respect of which he or she has made such disclosure, unless
  - 15.1 the Chair immediately rules that he or she need to do so, or
  - 15.2 he or she is invited by the Council or committee to stay or, having withdrawn, to return, either for the sole purpose of supplying relevant information or for full participation in the proceedings;

provided that such member shall not be invited to full participation in the proceedings, either by ruling of the Chair or by decision of the Council or the committee, except on the basis that the Chair, Council or committee, as the case may be, is satisfied, and decides, that there is in fact no conflict or one of such triviality that it should be disregarded on a de minimis basis.
16. Conflicts of interest situations reported to, taken into account or otherwise considered by Council or a committee shall be recorded, with adequate particulars, in the minutes of Council or of the committee concerned.
17. Where a committee (or other body) holds Council-delegated power to act, and the committee is of the opinion that a transaction should be entered into notwithstanding a conflict of interest on the part of a Council member (or other member of the committee) in respect of such transaction, no final decision shall be taken by the committee. Instead, the decision concerned shall take the form of a recommendation to Council (via more senior committee/s where applicable), and the recommendation shall be supported by a report fully explaining the conflict concerned, and furnishing reasons for its recommendation despite the conflict, indicating also what attention had been given to the factor of competition, real or potential, and all other relevant considerations.
18. Where, in the case of a matter dealt with directly by Council, Council reaches a decision to the same effect as an opinion of a committee referred to in Rule 17, the items prescribed in Rule 17 for forming part of a committee's report shall mutatis mutandis be recorded in the Minutes of Council.
19. In all cases where there is or may be competition for a contract with the University, and a member of Council, or of a committee dealing with the matter, may directly or indirectly have an interest in one of the competing tenders, bids, or propositions, as the case may be, the Chair and staff members responsible for arrangements in connection with meetings and accompanying procedures shall in their discretion take all such precautions as may be necessary in order to ensure that in the procedures adopted such member of Council or of the committee concerned is not accorded any advantages vis-à-vis other competing parties.



## Explanatory note and commentary

### Introduction

The above Principles, Policy and Rules on Conflicts of Interest which deal with situations:

- (1) where such members serve as members of University tribunals exercising quasi-judicial functions (i.e. involving decisions affecting people's rights);
- (2) where such members participate (or consider participating) in particular agenda items at meetings of council or a University committee or some other body which does not exercise quasi-judicial functions; and
- (3) where contracts are concluded or awarded between the University and a member or his or her immediate family or a business associate or a professional practice, firm, partnership, or other business entity in which he or she (or his or her family member) has an interest (defined as a "substantial, direct, beneficial and personal or financial interest")

In the case of situations (1) and (2) above the rules are clear. The member concerned must withdraw from the proceedings of the tribunal or Council or committee meeting and record or cause to be recorded his or her reasons for doing so (Rules 12 and 15).

In relation to situation (3) -

- (a) where such a problem arises in relation to a company, i.e., where a contract is proposed between a company and one of its directors, the law requires the director's interest to be disclosed to a general meeting of the company's members, which may then approve the conclusion of the contract;
- (b) as is pointed out in paragraph 4, there is in the University context no body akin to a general meeting of a company;
- (c) this does not mean that such a contract can **never** be concluded: such self-denying ordinance could operate against the best interests of the University because it could lead to the University's losing the services of the person or business entity best qualified to do the work required, merely because he or she is a member; alternatively it could lead to such persons declining to serve on Council with a consequent loss of expertise and experience; and
- (d) the Statement (paragraph 5.4) stresses that a "sense of balance should be sought to be attained with reference to potentially contradictory considerations". These contradictory considerations are, one the one hand, the fact that it may be in the best interests of the University to contract with the Council member (or his or her associate) and the need, on the other hand, to avoid reality (or reasonable public perception) of nepotism or of a practice of awarding University contracts "on the basis of favouritism among friends" of Council (or associated with a member);



Rules 17 and 18 make it clear that such a contract can only be concluded by Council itself. Other University bodies with Council delegated power to act must refer such proposed contracts (which they think are in the interests of the University) to Council with a full report setting forth the conflict and motivating the conclusion of the contract despite the existence of the conflict (Rule 17). Where Council is itself dealing directly with such a matter it must cause to be recorded in its minute the matters which would have to be dealt with in a report made under Rule 17.

## Interpreting the Rule

In a key case, the University Building and Development Committee interpreted paragraph 3.4 as meaning that an appointment or contract award can be “in the best interest of the University” even though the member or firm was not **“uniquely”** qualified for it, above all his or her available competition”. This phrase is in a sentence beginning “For instance” The Statement of Principles and Policy does not make this the test and that the Rules (particularly Rule 17) do not do so either. Council recorded that it agreed with this interpretation. **The sole test is “the best interest of the University”. Each case has to be considered on its merit. The avoidance of nepotism and a practice of awarding University contracts and business on a basis of favouritism among friends (and the reasonable public perception of nepotism or such a practice) should lead, in Council’s view, to very few such contracts being concluded. There will be very few cases where it can truly be said that such a contract can be awarded to a member (or his or her associate) without at least the reasonable public perception of nepotism or a practice of favouritism where the person concerned (or his or her firm) is not “uniquely qualified” for it, above all his or her available competition”. But each case has to be considered, on its merits, by Council itself with a full recordal of all the matters considered and the reasons for arriving at the decision in question.**

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