

4.1 Members' Responsibilities regarding Disclosure of Interest and Confidentiality

Prior to their appointment, members are required to sign two forms:

- a Disclosure of Interest (Attachment A); and
- a Deed of Confidentiality (Attachment B).

Introduction

Members of the Council of the NHMRC, Principal Committees and Working Committees provide high quality, expert and independent advice that enable the NHMRC to discharge its functions. Members are drawn from a wide cross-section of the community and from different areas of expertise and experience.

Members are appointed for their expertise and experience across a diverse range of professions and fields. Members may therefore experience actual, apparent or potential conflicts between their responsibilities in activities for the NHMRC and their personal interests or other professional responsibilities. They may also be privy to information of the NHMRC that is confidential and must not be disclosed.

These guidelines are designed to guide members and the NHMRC Secretariat in the exercise of their responsibilities in order to ensure all conflicts of interest are addressed in a rigorous and transparent way that accords with the requirements of the *National Health and Medical Research Council Act 1992* (the Act).

Scope

These guidelines apply to:

- members of Council and its Principal Committees appointed by the Minister;
- members of committees appointed by the CEO; and
- all other persons appointed or engaged to assist the work of committees (be they called working groups, steering committees, expert groups, and the like).

These guidelines may not apply in the following circumstances:

- Consultants appointed under section 46 (as in these cases, consultants are engaged using the standard contract which includes specific provisions for conflict of interest and confidentiality).
- Situations where the CEO establishes a committee under subsection 39(1) and decides that different guidelines are appropriate. In these cases, it is the responsibility of the CEO to determine the procedure to be followed by the committee and would include the

disclosure of member's interests in matters being considered by the committee (see section 39(3)).

- In regard to the Embryo Research Licensing Committee, established as a Principal Committee under the *Research Involving Human Embryos Act 2002*, section 13(4) of that Act provides that the regulations may make provision for and in relation to the disclosure of a member's interests in matters being considered by the NHMRC Licensing Committee.

Note: The CEO may choose to adopt these guidelines when determining the procedures to be followed by the Licensing Committee. However if regulations are in force under the *Research Involving Human Embryos Act* that make provision for disclosure of interests of Licensing Committee members, these regulations will override any determination made under the *NHMRC Act*.

Conflict of Interest

A conflict of interest arises in any situation in which a member or related person has an interest which influences, or may appear to influence, the proper performance of the members' responsibilities to the NHMRC. The appearance of a conflict of interest is as important as any actual conflict of interest.

Who is a member? A member is any person who is or has been appointed to membership of the Council, a Principal Committee, a working party or committee or who is or has been engaged to advise or assist the Council or any working party or committee.

Who is a related person? A related person is the partner or spouse of the member, a member of the member's family or a close friend of the member.

What is an interest? The *NHMRC Act* refers to an 'interest' but does not define what this means, and therefore a fairly broad reading of that term is warranted. It is difficult if not impossible to define exhaustively all situations in which there is an interest that may conflict with the responsibilities of a member. Further, the appearance of a conflict of interest is as important to the NHMRC as any actual conflict of interest.

There are generally three types of interest (which in many cases overlap) and they provide a useful guide for consideration of members. The appearance of any of the following situations will therefore be considered to involve an interest that may conflict with a member's responsibilities.

i. Direct pecuniary interest

A direct pecuniary interest arises wherever there is a potential for a member or related person to directly gain financially from the results of NHMRC discussions or decision-making processes to which the member contributes. This may include situations such as:

- a directorship of or shareholdings in a company that may benefit from a decision of the NHMRC to which the member contributes;
- a financial investment in an organisation, such a trust, that may benefit from a decision of the NHMRC to which the member contributes;

- a consultancy or a grant involving financial gain to the member's employer (eg a hospital or higher education institution) in circumstances where the member will benefit financially from their involvement; or
- a relationship based on a common interest such as professional or institutional allegiance, sporting, social or cultural associations who may benefit from a decision of the NHMRC to which the member contributes.

ii. Indirect pecuniary interest

An indirect pecuniary interest arises from members' employment or professional interests or from their personal relationships. They include:

- situations of members holding a formal position of authority in a non-commercial organisation such as an educational institution. For example if a university Deputy Vice-Chancellor (Research) was a member of a Working Committee, he or she would have an indirect pecuniary interest in any project, grant or consultancy for which a member of that university had applied, and a head of department would have a similar interest wherever departmental members are involved; or
- an application for a consultancy or grant by a member's partner or relative, a close personal friend or a close professional colleague.

iii. Non-pecuniary interest

Actual or potential non-pecuniary interests arise where a member simultaneously has an appointment to, or employment or consultancy or other involvement with, another organisation or body that is in some way involved with the NHMRC. The interest may arise if the interests of NHMRC and the other body or organisation are in conflict, or if access to information arising from NHMRC involvement could be used to unfair advantage if divulged to the other organisation or body.

Such an interest also arises where a member has a relationship, whether professional – as with a colleague in an employment context or a professional association – or personal, with a person who may benefit from a decision of the NHMRC to which the member contributes.

Managing a conflict of interest

A conflict of interest, or the appearance of a conflict, is likely to undermine the credibility of a project, process or decision. More importantly, that may in turn undermine the status and damage the reputation of the NHMRC. Managing conflicts of interest in a vigorous, consistent and transparent fashion is essential. The two primary mechanisms used to manage situations of conflict are *disclosure* and *exclusion*.

Disclosure of interests upon appointment

Before starting to hold office, members and other persons engaged under the *NHMRC Act* are to provide written statements of any interest the member/person may have in matters to be considered or activities undertaken by the relevant as follows:

- The CEO must give to the Minister a written statement of interests the member has that may relate to the functions of the CEO.
- A member of Council or a committee must give to the CEO a written statement of interests the member has that may relate to any activity of the Council or Committee.
- Members of the NHMRC Licensing Committee. Under the *Research Involving Human Embryos Act 2002*, before appointing a member to the Licensing Committee, the Minister must be satisfied on receipt of a written declaration by the member proposed to be appointed that the member proposed does not have a direct or indirect pecuniary interest in a body that undertakes the use of excess ART embryos, being an interest of a kind that could conflict with the proper performance of the members functions (s16(3)(c) *Research Involving Human Embryos Act 2002*). The NHMRC Licensing Committee is a Principal Committee under the *NHMRC Act* (other than for purposes of a few specified *NHMRC Act* provisions dealing with Principal Committees). The provisions of the *Research Involving Human Embryos Act 2002* also set out that regulations may make provision for the disclosure of member's interest in matters being considered by the NHMRC Licensing Committee. If regulations are made in regards to conflict of interest they will override any guidelines that the Council may determine (sections 13(4) and 13(5) of the *Research Involving Human Embryos Act 2002* refers).

Disclosure of interests during tenure

The responsibility to identify and report an interest that is in potential conflict or actual conflict with their responsibilities, or has the appearance of such a conflict, is always that of the member.

Members during their tenure (or persons during their engagement) who identify an interest (most typically when they become aware that an issue is about to be considered) must as soon possible disclose the nature of the interest.

- members of Committee as soon as possible after any other facts come to their knowledge, disclose to the Chair of the committee the nature of the interest. If the member is the Chair, then the CEO is to be informed;
- if a disclosure is made, a member must not be present when the Council or Committee considers the matter or take part in any decision making;
- however if the Chair (or CEO) otherwise determines, the above does not apply.

Procedure at Meetings

Chairs of meetings must provide the opportunity for members to declare an interest in any activity of, or matters being considered by, the Council, Principal Committees or Working Committees. This should be a standing agenda item for all committee meetings and any supporting committees. At the commencement of each meeting, the Chairperson should invite members to declare or discuss any relevant matter.

In all cases, the member's disclosure must be recorded in the minutes of the meeting or if given outside the meeting, be recorded in the minutes of the next meeting after disclosure.

Exclusion

If the Chairperson of the Council has declared an interest, he or she must not be present when the Council considers the matter, or take part in any decision of the Council in relation to the matter, unless the CEO otherwise determines.

If a member of the Council has declared an interest, he or she must not be present when the Council considers the matter, or take part in any decision of the Council in relation to the matter, unless the Chairperson of the Council otherwise determines.

If a member of the Principal Committee, working party or committee has declared an interest, he or she must not be present when the Principal Committee, working party or committee considers the matter, or take part in any decision of the Principal Committee, working party or committee in relation to the matter, unless the Chairperson of the Principal Committee, working party or committee otherwise determines.

Legislative requirements and policy

These guidelines cannot cover all cases of where a conflict of interest may occur. Members may find themselves in situations that are not clear-cut where there is a genuine doubt as to whether a conflict of interest exists. Where there is doubt, that is sufficient reason for members to declare their interest.

There are legislative requirements in the *NHMRC Act* for members to disclose interests in matters being considered (see section 42A).

Section 44B(3) requires the Minister or the CEO (whoever made the appointment) to terminate the appointment of an appointed member for failure to comply, without reasonable excuse, with the disclosure of interests' requirements of the *NHMRC Act* or the requirements as set out in these guidelines.

Confidentiality

These guidelines are designed to draw members' attention to the requirements of section 80 of the *NHMRC Act*. Section 80 deals with 'confidential commercial information' – not confidential information generally – and prescribes criminal sanctions where confidential commercial information is disclosed contrary to the provisions of the Act. Members need also be aware that, apart from the operation of s80, the law may prevent them from disclosing confidential information generally.

Important note: Section 80 of the *NHMRC Act* does not apply to members of the NHMRC Licensing Committee. That Committee is instead bound by the confidentiality provisions set out in s30 of the *Research Involving Human Embryos Act 2002*. Members of the Licensing Committee should be separately informed of the confidentiality requirements that apply to them.

Members may also be privy to matters that involve confidential information, which may not necessarily be information of a commercial nature. Confidential information can be defined as information that:

- (a) is by its nature confidential, and includes information provided to the NHMRC to be used only in the exercise of its functions other than functions that will involve public disclosure of the information
- (b) the member/person assisting the NHMRC knows or ought to know is confidential
- (c) is designated by the NHMRC or Commonwealth as confidential, but does not include information that:
 - (i) is or becomes public knowledge, other than by unlawful means or by breach of confidentiality by the member or person assisting the Council or committee
 - (ii) is in the possession of the member/person assisting the committee without restriction in relation to disclosure before the date of receipt from the NHMRC or Commonwealth
 - (iii) has been independently developed or acquired by the member/person assisting the Council or committee.

Information may be designated confidential by government, by a grant applicant, or by any person or body which has made submissions or has other dealings with the NHMRC.

Situations where confidential information may be being considered can vary widely, and may include situations such as where:

- the Minister's view on a proposed policy is raised
- draft recommendations are being developed
- proposed government policy is being debated, or
- information about grant recipients that have not yet been publicly released is being considered.

It is the responsibility of all members or persons assisting the NHMRC not to disclose to any person any confidential information (including confidential commercial information), to which they become privy as a result of the exercise of their responsibilities to the NHMRC. This does not prohibit disclosure of information in the performance of their duties, or in the exercise of powers or functions under the *NHMRC Act*. Disclosure of the confidential commercial information in certain limited situations as specified in section 80 of the *NHMRC Act* is also permitted.

Responsibility of Secretariats and Chairpersons

Secretariats are to ensure that their Chairperson and members are made aware of these guidelines; that the necessary certifications are completed; and that minutes of meetings properly record disclosures of interests.

All certifications are to be kept in safe custody by the Council Secretariat.

- Secretariats are to ensure that Chairpersons are aware of their responsibilities. The Chairperson of any NHMRC meeting is obliged to ensure that members are familiar with these guidelines and to ensure that members have completed *Disclosure of Interest* and a *Deed of Confidentiality*.

- At the beginning of any meeting, members are to be given the opportunity to declare any interests that may be seen to conflict with any matter on the agenda
- At the beginning of any meeting, members are to be reminded of their responsibilities and obligations in relation to disclosure of confidential information and confidential commercial information.
- The minutes of the meeting are to record any interest declared, and conflict of interest and any decision made in relation to such a declaration.

Note: The templates attached may not be sufficient to satisfy the requirements of s16 (3) of the *Research Involving Human Embryos Act 2002*, which requires the Minister to give a written declaration by a proposed member that they do not have ‘a direct or indirect pecuniary interest in a body that undertakes uses of excess ART embryos, being an interest that could conflict with the proper performance of the member’s functions.’ The Licensing Committee Secretariat should therefore develop a more appropriate declaration/certification for their Committee members.

Disclosure of Members’ Personal Information

The Privacy Act allows disclosure of personal information in a number of circumstances, including where the individual has been made aware that information of that kind is usually disclosed, or the person has consented to the disclosure. Members of Council, Principal Committee and Working Committees are appointed under the *NHMRC Act* and as such it can be construed that such members have given implied consent to their names as members of these committees being publicly disclosed.

Therefore, members are advised – and are asked to acknowledge – that their names, official positions outside NHMRC, relevant expertise and biographical details may be included on NHMRC documentation, including the NHMRC website.

- This is provided for at Attachment A.



Australian Government

National Health and Medical Research Council

DISCLOSURE OF INTEREST

To: The Chief Executive Officer

National Health and Medical Research Council

I have read and understand the provisions of section 42A of the *National Health and Medical Research Act 1992* (the Act), and hereby declare that (tick whichever is applicable):

- I have no interests to declare which may relate to the activities of the NHMRC;
- or**
- I have attached to this form a statement listing all interests which I have that may relate to any activity of the NHMRC.

I further acknowledge that I am required by subsection 42A(4) of the Act to disclose at any meeting of the NHMRC the nature of my interests in matters being (or to be) considered. If a matter is to be decided before I am able to disclose my interest at a meeting, then I am obliged to disclose the nature of those interests as soon as possible.

I also acknowledge that my name, appointment to the NHMRC, official positions outside NHMRC, relevant expertise and biographical details may be included on NHMRC documentation, including the NHMRC website.

Dated this _____ day of _____ 2007.

Name of Signatory

Signature



Australian Government
National Health and Medical Research Council

DEED OF CONFIDENTIALITY

THIS DEED is made this day of 200

Between

THE COMMONWEALTH OF AUSTRALIA ('The Commonwealth') as represented by the

National Health and Medical Research Council ('NHMRC') and

..... ('the Member')

WHEREAS

- A. The NHMRC has been established by the *National Health and Medical Research Council Act 1992* ('*NHMRC Act*') and provision has been made under Parts 4 and 5 of that Act for the appointment of members to the Council and its Committees
- B. The Member has been duly appointed to, or is proposed to be appointed to, the Council or any of its Principal Committees (whether or not the Principal Committee or Committees is established under the *NHMRC Act* or under a different Act) or Working Committees.
- C. The Member is also, under a separate declaration, required to disclose certain interests.
- D. In addition to any legislative requirements (e.g. under section 42A of the *NHMRC Act*) it is considered desirable, having regard to good governance and transparency of process, that the Member:
 - (1) preserve and maintain the confidentiality of information to which the Member may have access by virtue of his or her membership of the Council or any of its Committees;
 - (2) undertake certain actions in relation to any conflict of interest; and
 - (3) indemnify the Commonwealth against loss or damage arising out of a breach of this Deed by the Member.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. INTERPRETATION

1.1 In this Deed unless the contrary intention appears:

‘Confidential Information’ means all information made available to the Member by the NHMRC or the Commonwealth for the purposes of the NHMRC, whether orally or in writing, or by any other means whatsoever, and includes information that:

- (a) is by its nature confidential; or
- (b) is designated by the NHMRC or the Commonwealth as confidential; or
- (c) the Member knows or ought to know is confidential;

but does not include information which:

- (d) is or becomes public knowledge other than by breach of this Deed or by any other unlawful means;
- (e) is in the possession of the Member without restriction in relation to disclosure before the date of receipt from the NHMRC or the Commonwealth; or
- (f) has been independently developed or acquired by the Member.

‘Conflict’ includes any conflict of interest, any risk of a conflict of interest and any apparent conflict of interest arising through the Member engaging in any activity or obtaining any interest that is likely to conflict with or restrict the Member in performing the work of the Committee fairly and independently.

‘Member’ includes a person exercising any function in place of, or in substitution for, any other person who is a Member of the NHMRC and also includes a person who is a member of a Principal Committee of the NHMRC and a person who is a member of a Working Committee of the NHMRC.

1.2 No variation of this Deed is binding unless it is agreed in writing between the parties.

1.3 Any reading down or severance of a particular provision does not affect the other provisions of this Deed.

1.4 The laws of the Australian Capital Territory apply to this Deed. The parties agree to submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory in respect of any dispute under this Deed.

2. PROTECTION OF CONFIDENTIAL INFORMATION

2.1 The Member must not disclose Confidential Information to any person other than current members of the NHMRC, without prior approval in writing from the CEO of the NHMRC or an official of the Commonwealth. In giving written approval the relevant person may impose such terms and conditions as he or she thinks fit.

2.2 The Member shall not use any Confidential Information except for the purpose of fulfilling his or her duties as a Member.

- 2.3 The obligations on the Member under this clause will not be breached if the Confidential Information is required by law to be disclosed and the disclosure is made pursuant to that requirement. This may involve members who have statutory obligations to their full time employer (eg a State / Territory representative).
- 2.4 Property in any document or thing containing Confidential Information (in the form of a document, article or removable medium) vests or will vest in the Commonwealth. The Member shall:
- (a) secure all copies within his or her control against loss and unauthorised use or disclosure; and
 - (b) on the expiration or termination of his or her appointment to the NHMRC, deliver all copies to the NHMRC or the Commonwealth, or otherwise deal with all copies as directed by the Chairperson or CEO of the NHMRC or the Commonwealth.
- 2.5 Neither the Commonwealth nor the NHMRC gives any undertaking to treat the Member's information, or this Deed, as confidential. The Member acknowledges that the NHMRC or the Commonwealth may disclose information relevant to this Deed, or this Deed itself, to any person:
- (a) to the extent required by law or by a lawful requirement of any government or governmental body, authority or agency;
 - (b) if required in connection with legal proceedings;
 - (c) for public accountability reasons, including a request for information by parliament or a parliamentary committee or a Commonwealth Minister;
 - (e) for any other requirements of the Commonwealth.
- 2.6 The Member warrants that he or she has read and understands the provisions of section 80 of the *NHMRC Act*.
- 2.7 The operation of this clause 2 survives the expiration or termination of the Member's appointment.

3. INDEMNITY

- 3.1 The Member shall indemnify the Commonwealth, its officers, employees and agents ('those indemnified') from and against all actions, claims, demands, costs and expenses (including the costs of defending or settling any action, claim or demand) made, sustained, brought or prosecuted against those indemnified where those actions, claims, demands, costs or expenses arise as a result of wilful or deliberate disclosure by the Member:
- (a) in breach of this Deed; or
 - (b) in breach of any of the following legislative obligations which may apply to the Member under section 80 of the *National Health and Medical Research Council Act 1992* or section 30 of the *Research Involving Human Embryos Act 2002*.
- 3.2 The Member agrees that the Commonwealth will be taken to be acting as agent or trustee for and on behalf of those indemnified from time to time.
- 3.3 The indemnity referred to in this clause 3 survives the expiration or termination of the Member's appointment.

4. PUBLIC DISCUSSION

- 4.1 The members agrees not to speak publicly on behalf of the NHMRC with the express permission of the CEO of the NHMRC.

Executed as a Deed in the Australian Capital Territory

SIGNED, SEALED AND DELIVERED

(1) BY THE COMMONWEALTH

By and on behalf of **THE COMMONWEALTH OF AUSTRALIA** acting through the National Health and Medical Research Council ABN 88 601 010 284 by:

Name of Signatory

Signature

Position of Signatory

in the presence of:

Name of Witness

Signature of Witness

(1) BY THE MEMBER

Name of Signatory

Signature

Position of Signatory

in the presence of:

Name of Witness

Signature of Witness