

Conflict of Interest

A Guide for Councillors

October 2012

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Introduction

This Guide is for Councillors in Victorian local governments. It describes the conflict of interest requirements in the *Local Government Act 1989* (the Act).

What is conflict of interest?

Councils are entrusted with a range of decision making powers so that they can govern in the best interests of their local communities. These powers should only be used in a way that is consistent with the purpose and objectives of councils, as described in the Act.

It is a primary principle of Councillor conduct that a Councillor:

- act with integrity
- impartially exercise his or her responsibilities in the interests of the local community
- not improperly seek to confer an advantage or disadvantage on any person.

Conflict of interest is about transparency. As a member of a Council, it must be clear that your private interests are not affecting your public duties as a Councillor and that you are not using your position for personal benefit. This is why the law says you cannot participate in a decision when you have a conflict of interest.

The Act defines the specific circumstances that give rise to a conflict of interest and describes the actions that you must take when you have such a conflict.

Your responsibility

It is your responsibility, as an elected Councillor, to identify and disclose your conflicts of interest when required to do so.

No matter how precise the rules are, a situation may arise when it is hard to ascertain whether you have a conflict of interest. If this happens, you should seek assistance (see page 4). If you still can't be sure, it is recommended that you disclose a conflict of interest rather than risk committing an offence.

Concerns about the result of a Council decision should not influence your decision about whether to disclose a conflict of interest. Your personal responsibility to disclose a conflict of interest overrides any other obligation you have as a decision maker.



Penalties

A failure to disclose a conflict of interest is a breach of the Act.

A person who fails to disclose a conflict of interest may be prosecuted in court and fined. If this results in the person being convicted, he or she will be disqualified from being a Councillor for seven years.

Getting help

In addition to this short guide, Local Government Victoria provides more comprehensive material on conflict of interest for Councils on its web site at www.localgovernment.vic.gov.au.

Assistance with conflict of interest matters may also be sought from:

- a lawyer or other suitably qualified/experienced person
- your Chief Executive Officer (CEO) or an experienced officer authorised by the CEO to give such assistance
- Local Government Victoria
- the Municipal Association of Victoria (MAV) or the Victorian Local Governance Association (VLGA).

The type of assistance you get from these sources will vary, depending on who provides it. Your personal lawyer can generally give you legal advice about whether you have a conflict of interest in a specific matter. Assistance from other people may be limited to helping you to understand the requirements of the Act, rather than advising you about a specific conflict of interest. This is particularly true for assistance provided by Council officers.

It is important to note that another person can assist you to decide whether you have a conflict of interest but he or she cannot make the decision for you. No matter what assistance you receive from someone else, legally you remain responsible for your own actions.

While this Guide summarises your obligations as a Councillor, the definitive statement of your legal obligations is the law itself – particularly sections 76AA to 81 of the *Local Government Act 1989*.

1. Making Disclosures

Council meetings

As a Councillor you must disclose any conflicts of interest you have in matters being considered at Council meetings. This applies even if the meeting is closed to the public.

If you have a conflict of interest at a Council meeting, you must:

- disclose the conflict of interest immediately before the matter is considered
- notify the Mayor/chair you are leaving the meeting
- leave the room and any area where you can see or hear the meeting until the matter has been concluded.

When making your disclosure, you must state the class of interest (see part 3, “Direct and Indirect Interests”) as well as describing the nature of the interest. However if this would mean disclosing information that is confidential or private, particularly if it is about another person, you can make a full disclosure to the CEO in writing before the meeting and then just disclose the class of interest in the meeting.

For example, a Councillor might make the following disclosure in a meeting. *“I wish to disclose that I have a conflict of interest because of a close association. My partner is an employee of one of the companies that tendered for this contract”*. However, if full disclosure had been made in writing to the CEO before the meeting, the second sentence referring to the partner’s employment could be omitted at the meeting.

While disclosures must normally be made immediately before each matter is considered, special arrangements apply if a Councillor has conflicts of interest in two or more matters being considered consecutively. In such cases, all disclosures may be made before the first matter is considered and the Councillor must leave the meeting and remain outside until all the matters are concluded. It is important, when doing this, to clearly state which matters you have conflicts of interest in, as well as the detailed nature of each conflict.

Conflict of interest disclosures are recorded in the minutes. When the minutes are tabled for adoption at the next meeting you should check that the record is accurate. The minutes should only include the details of your interest if they are disclosed in the meeting. While a written disclosure to the CEO is not available to the public, it is recommended that the minutes record the fact that a written disclosure was also provided.



Special committee meetings

If you have a conflict of interest in a matter being considered at a special committee meeting, you must follow the same procedure as for a Council meeting.

Audit committees

If you are a member of the Council's audit committee you must disclose conflicts of interest in the same way as in a Council or special committee meeting.

Section 223 Committees

If you are a member of a committee established to hear public submissions under section 223 of the Act you must disclose conflicts of interest in the same way as in a Council or special committee meeting.

Assemblies of Councillors

An assembly of Councillors (however titled) is either:

- an advisory committee of the Council where at least one Councillor is present
- a planned or scheduled meeting where at least half the councillors and at least one officer are in attendance.

However, these meetings are only assemblies of Councillors if they consider matters that are likely to be the subject of a decision by the Council, by a special committee or by a member of Council staff under delegation.

A meeting of another organisation is not an assembly of Councillors.

If you have a conflict of interest at an assembly of Councillors, you must:

- disclose the fact that you have a conflict of interest, but do not have to give details of the interest
- leave the meeting while the matter is discussed.

A record will be made of each assembly, reported to a Council meeting and incorporated in the Council minutes. If you have disclosed a conflict of interest at an assembly, you should check that it has been correctly recorded.

2. Conflict of Interest Checklist

A useful way to identify a possible conflict of interest is to use the following checklist.

Y/N	Am I, a relative of mine or a member of my household likely to be directly affected by this matter?
Y/N	Is my property, or that of a relative or household member, likely to be directly affected?
Y/N	Am I or a member of my family likely to gain or lose in any way that can be measured in money?
Y/N	Do I or a member of my family own shares in a company or body that is likely to be directly affected?
Y/N	Am I or a member of my family owed money by a person who is likely to be directly affected?
Y/N	Do I or any member of my family hold a position in a company or body that is likely to be directly affected?
Y/N	Am I or a member of my family employed by a person, company or body that is likely to be directly affected?
Y/N	Do I or a member of my family act in any way for a person, company or body that is likely to be directly affected?
Y/N	Have I or a member of my family previously dealt with this particular matter in any other capacity?
Y/N	Have I or a member of my family received any gifts in money or otherwise from a person, company or body that is likely to be directly affected?
Y/N	Have I or any member of my family been involved in any court or tribunal process in relation to the matter?
Y/N	Could the amenity of my or my family's home be altered by this decision?

If you answer “yes” to any of these questions, you should check the specific requirements on the following pages to see if you have a conflict of interest. For example, page 12 describes the values of gifts that give rise to conflicts of interest.

(“Family” and “relative” are defined in parts 3 and 6)

3. Direct and Indirect Interests

This part of the guide describes, in detail, the different classes of interests that give rise to conflicts of interest.

Types of interests

The Local Government Act describes seven classes of interests. This includes **direct interests** and the following six **indirect interests**.

- close association
- indirect financial interest
- conflicting duty
- applicable gift
- party to the matter
- residential amenity.

These are discussed in detail below.

If you have any of these direct or indirect interests you must disclose a conflict of interest in the way described in part 1, “Making disclosures”.

Some important matters

For a conflict of interest to exist you have to be involved in the process of making a **decision on a matter**.

For example: holding shares in a company is an indirect financial interest. It only becomes a conflict of interest if you are involved in considering a decision about a matter that affects that company.

Importantly, it is not just the final decision that counts. If there is a reasonable chance that an **alternative decision** will affect your interests, you still have a conflict of interest.

For example, a proposal to relocate a refuse station may involve a conflict of interest for you if you live close to one of the sites that have been considered, even if is not the recommended site.

Direct interest

A direct interest is an interest that directly applies to a person. That is, it is an interest that is not just the result of a connection with another person, company or body.

“Direct interest” is not limited to financial interests.

A direct interest exists if there is a reasonable likelihood that a person’s benefits, obligations, opportunities or circumstances will be directly altered if the matter is decided in a particular way.

Examples of direct interest include proposals that will:

- > give you money or property or take it from you
- > change the value of your property
- > grant you a permit
- > rezone your land
- > allow you to tender for a contract
- > give you an award
- > appoint you to a paid position.

You have a **conflict of interest** if you have a direct interest in the matter.

You also have a **conflict of interest** if a relative or a member of your household has a direct interest in the matter (see “close association” below).

Indirect interest – close association

When your interest in a matter is only because of the interests of a family member, relative or household member, it is referred to as an indirect interest because of a “close association”.

Family members include your spouse or domestic partner and any of the following who live with you:

- your son or daughter
- your brother or sister
- your father or mother.

If a member of your family has any direct or indirect interest in a matter then you have a conflict of interest in that matter.



Relatives include all people who are related to you who are only once or twice removed, no matter where they live. This includes:

- your spouse or domestic partner,
- your son or daughter, brother or sister, father or mother
- your grandparent, grandchild, uncle, aunt, niece or nephew
- your step father, step mother or step child
- your in-laws (son, daughter, brother, sister, mother or father in-law).

(Also see part 6 “Family & Relatives – Definitions”)

If your relative has a direct interest in a matter then you have a conflict of interest in that matter. However, you don’t have a conflict of interest if your relative only has an indirect interest.

For example, you have a conflict of interest if your uncle is tendering for a Council contract but you don’t have a conflict of interest only because your uncle has an indirect financial interest in a company that is tendering for a Council contract.

Household member includes any person who lives with you or shares all or part of your residence. If a member of your household has a direct interest in a matter then you have a conflict of interest in that matter.

(For information about “friends” see page 17)

Indirect financial interest

You have a **conflict of interest** if you or a member of your family has an indirect financial interest in the matter.

A person has an indirect financial interest if they are likely to gain or lose in a way that can be measured in money, resulting from a benefit or loss to another person, company or body.

For example, you may have an indirect financial interest if:

- > you hold shares in a company that has tendered for a Council contract
- > you are a regular subcontractor of a business that is likely to tender for a Council contract
- > you own land that adjoins a property which is proposed to be rezoned to allow a change of use.

You automatically have an indirect financial interest if you or a member of your family holds **shares** in a company that has a direct interest, unless the following exemption applies.

Shares are exempt if both of the following apply:

- the total value of shares held in the company by you and members of your family does not exceed \$10,000
- the company has issued shares with a total value of more than \$10 million.

There is no exemption for shares in a small company or body if the total value of all issued shares is less than \$10 million, no matter how few shares you have.

(The relevant value for shares is at the date of your last ordinary return or on 30 June or 31 December – whichever is latest.)

You automatically have an indirect financial interest if you are owed money by a person, company or body that has a direct interest, but not if it is a bank or credit union.

Indirect interest – conflicting duty

You have a **conflict of interest** in a matter if you or a member of your family has a conflicting duty in relation to the matter.

A conflicting duty arises when a person holds any of the following types of positions with a person, company or body that has a direct interest:

- a manager or a member of the governing board of the company or body
- a partner, consultant, contractor, agent or employee of the person, company or body
- a trustee for the person.

For example, you have a conflicting duty if:

- > you are on the committee of a community organisation that has applied to the Council for a grant (unless you are a Council representative as described below)
- > you are a board member or employee of a company that has tendered for a Council contract
- > you act as agent for a person who has applied for a planning scheme amendment (even if you are not acting as their agent for that particular application) (also see page 18).



Also, if you or a member of your family previously held one of those positions and in that position dealt with the relevant matter, a conflicting duty is considered to exist.

For example, you have a conflicting duty in relation to a development proposal if you previously worked for the developer and helped prepare the proposal.

However, you do not have a conflicting duty as a result of your position with another organisation if you are the Council's representative on that organisation with the Council's approval (by resolution) and you receive no remuneration for that position. This will usually apply to regional library boards and other Council-related bodies.

The following positions are also exempt from "conflicting duty":

- a position with MAV or VLGA
- a member of a development assessment committee
- a member of a waste management board
- a member of the Country Fire Authority board who was nominated by the MAV
- a member of the board of a referral authority (but only in regard to planning referrals)
- an employee of the Crown (if the matter doesn't relate to your current or expected work).

Note that being a member of a Council special committee or advisory committee that considers a matter does not create a conflicting duty when the matter is considered in Council. This is because the committee is not a separate body.

Indirect interest – applicable gift

An applicable gift includes any gift with a value of at least \$500 received in the past five years from someone who has a direct interest. This includes:

- gifts of money or in-kind
- multiple gifts from a single source with a total value of \$500 or more.

When estimating the cost of a gift that is not in the form of money you should consider how much any other person would have to pay to purchase the gifted item.

It is illegal for a Councillor to accept an anonymous gift valued at \$500 or more.

You have a **conflict of interest** in a matter if you or a member of your family has received an applicable gift from a person company or body that has a direct interest in the matter.

For example, you have a conflict of interest because of an applicable gift if:

- > you received a \$500 election campaign donation within the past five years from an organisation that has applied for a Council grant
- > you have been given free memberships from a club that has applied for a planning permit and the total value of the memberships is over \$500
- > a friend, who has allowed you to use his holiday house on a regular basis, has applied for a subdivision permit and the value of the free accommodation exceeds \$500.

The following gifts, received in the preceding five years, are not counted as applicable gifts for defining conflicts of interest:

- Gifts, other than election campaign donations, received more than 12 months before you became a Councillor. (If you have been elected for successive terms of office, this means 12 months before you were first elected.)
- Reasonable hospitality provided at a function or event you attended in an official capacity as Mayor or Councillor.

Note: for the hospitality exemption to apply, the hospitality should be reasonable in the circumstances and not excessive. In addition, you must be attending for an official purpose that is related to your duties as a Councillor.

For example:

- > If you are sent tickets to a sporting event, but your attendance at the event is not related to your role as Mayor or Councillor, the tickets are not exempt hospitality.
- > If you are attending a conference as a Council representative, any reasonable hospitality received at the conference would be exempt.



Indirect interest – party to the matter

If you or a member of your family has been a party to civil proceedings relating to a matter, you have a **conflict of interest** in that particular matter.

This includes having been an applicant or respondent in a related matter in a court or in a tribunal (such as VCAT). There is no time limit on this type of interest.

For example, if you were one of several people who previously appealed to VCAT against a proposed retail development and a revised proposal has now been submitted to Council for a decision, you have a conflict of interest.

Indirect interest – residential amenity

You have an indirect interest in a matter if your residential amenity is reasonably likely to be altered if the decision is made one way or another. This is a **conflict of interest**.

An indirect interest arising from residential amenity may, for example, arise from:

- > a planning application in relation to a neighbouring property
- > a proposed change in use of a nearby property that will impact on your enjoyment of your home
- > a change to parking arrangements in your street.

There is no simple distance rule to decide whether your residential amenity will be altered by a proposal, as each situation needs to be considered on its merits. However, even though you may have a residential amenity issue in relation to a matter, you might not have a conflict of interest if either the “remoteness” or “in-common” exemptions apply (see page 15).

For example, you would probably not have a conflict of interest because of your residential amenity due to a development that would increase the amount of traffic in your town or suburb unless you would be affected more than most other people in the town or suburb.

4. Exemptions

General exemptions

The Local Government Act provides three general exemptions to a conflict of interest. These relate to remoteness, interests held in common and lack of knowledge.

It is best to seek advice before relying on any of these exemptions.

Remoteness

If your interests in a matter are so remote or insignificant that a reasonable person would not consider the interests capable of influencing your decision then you are not considered to have a conflict of interest.

In common

If your interests are generally held in common with other residents, ratepayers, voters or with any other large class of persons and your interests do not exceed the interest generally held by those other people then you are not considered to have a conflict of interest.

No knowledge

If you do not know the circumstances that create the conflict of interest, and a reasonable person would not expect you to know those circumstances, you are not considered to have a conflict of interest.

Specific Councillor exemptions

The Act also includes a number of specific exemptions for Councillors. These relate to matters where Councillors would normally be expected to vote as a matter of Council business.

These exemptions apply to the following decisions:

- electing the Mayor
- appointing members and chairs to special committees
- appointing Councillors to non-remunerated positions
- setting Mayor and Councillor allowances
- adopting a policy on Councillor expenses
- adopting a Councillor code of conduct
- an application to the Minister for conflict of interest exemptions (see below)
- eligibility for superannuation guarantee under taxation legislation
- a submission to an electoral representation review or subdivision review



Councillor conduct exemptions

You are not considered to have a conflict of interest in some councillor conduct matters. This is to ensure that you are not deprived of the right to defend yourself. This applies to:

- internal disputes involving one or more Councillors
- allegations of misconduct or serious misconduct by a Councillor
- an application for a Councillor Conduct Panel
- an application to VCAT on a councillor conduct matter.

Budget and Council Plan exemptions

It is possible that you may have a conflict of interest in an item that is proposed to be included in the Council Plan or the budget. As it is desirable for all Councillors to participate in these decisions, specific exemptions have been provided in the Act.

- For the **Council Plan**, if the Council previously approves your conflicting item for inclusion in the Council Plan and you disclose a conflict of interest at that time, you do not need to disclose a conflict of interest in the overall Council Plan.
- For the **budget**, if the Council previously approves your conflicting item, as well as the proposed funding for the item, for inclusion in the budget and you disclose a conflict of interest at that time, you do not need to disclose a conflict of interest in the overall budget.

If you become aware that you have a conflict of interest in an item proposed for inclusion in the Council Plan or the budget you are entitled to notify the Mayor or Chair in advance that you have a conflict of interest in that item. If you give such a notice, the Mayor or Chair must allow a prior motion to be put that the item be included in the proposed Council Plan or budget, so that you can disclose your conflict of interest at that time.

Ministerial exemption

In certain circumstances, and subject to certain processes, the Minister for Local Government may grant exemptions to conflict of interest.

Ministerial exemptions are only possible where the Council is unable to maintain a quorum. In addition, the Minister must consider the extent of the relevant conflict of interest before granting an exemption.

5. Additional issues

This part of the guide discusses some additional conflict of interest issues.

Clubs and community organisations

Being a member of a club or other community organisation is not regarded, by itself, as being a ground for a conflict of interest.

However, you will have a conflict of interest if:

- you have a conflicting duty as an office bearer, employee, consultant or agent of the club or organisation
- you have received an election campaign donation or other applicable gift from the club or organisation
- you have an indirect financial interest (for example, the decision is likely to alter your membership fees).

Public boards

If you are on the governing committee or board of a public organisation, even if the organisation is established by an Act of Parliament, you may still have a conflict of interest because of a conflicting duty. (Part 3, “Direct and Indirect Interests” lists some exemptions.)

The reason for this is that your obligations as a Councillor are different from your duties to the other organisation and need to be kept completely separate. The people that you and your fellow Councillors represent need to know that the Council is making decisions in the interest of the community and not just to serve the interest of the other organisation.

Friends

The Act does not define “friends” as a category for identifying conflicts of interest. The reason for this is the difficulty in determining the level of closeness that should be regarded as an indirect interest.

However, you may face situations where the interests of someone you are particularly close to will be affected. If you believe that a friendship is too close for you to vote impartially or if there is a reasonable likelihood that it will be perceived as a conflict with your public duties you should consider seeking Council’s consent to abstain from the matter on the grounds of having a “conflicting personal interest”. (Consult your council administration about this process if the need arises.)

If you are unsure whether a friendship is close enough to warrant seeking Council’s consent to abstain, you should consider how your voting on the matter would be perceived in the community if the connection were known.



Business connections

Councillors are often people who run businesses in the municipality. If this applies to you, there may be times when you need to consider whether you have a conflict of interest when one of your customers is involved.

As a general rule, you will not have a conflict of interest just because a person or company is a customer unless you have an indirect financial interest or a conflicting duty.

- You will have an indirect financial interest if, as a result of the Council decision, you are reasonably likely to gain or lose financially – such as when it would result in an increase or decrease in your business.
- You will have a conflicting duty if you are an agent, consultant or contractor for the person or company directly affected by the Council decision.

Similarly, you will not generally have a conflict of interest just because someone who provides goods or services for your business has a direct interest in the matter. However, you will have an indirect financial interest if the effect on the other person or company is likely to result in an indirect financial gain or loss for your business.

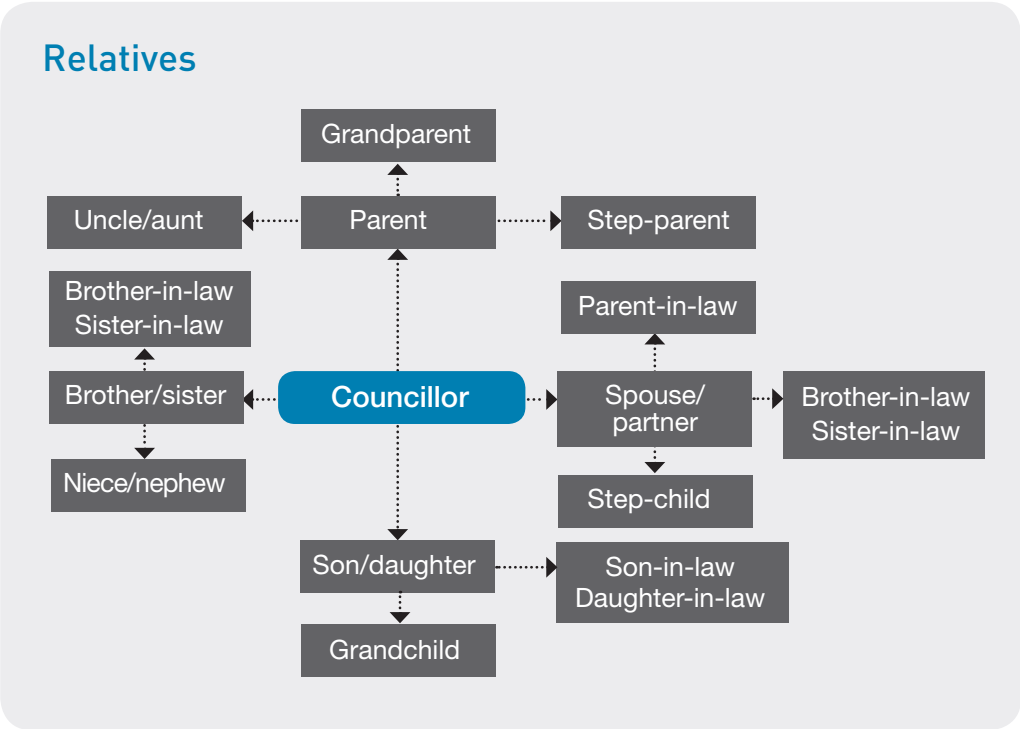
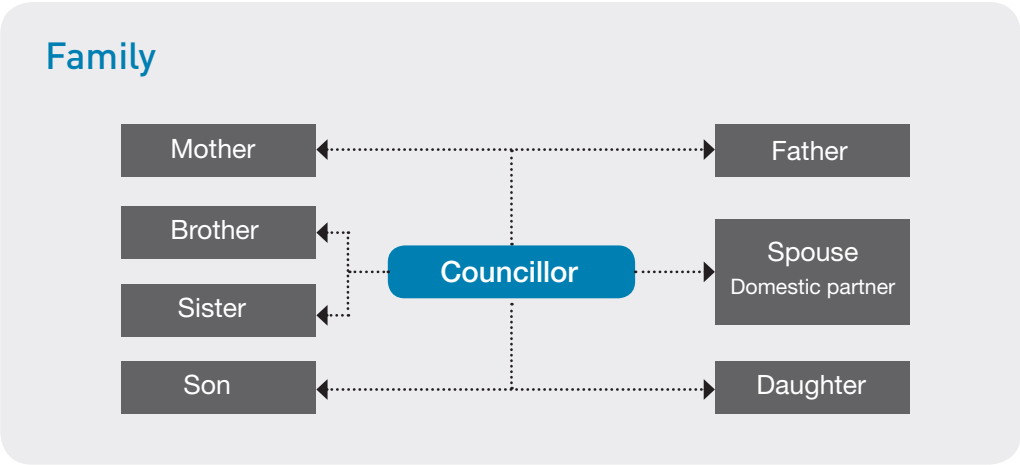
Note: the above comments relate to businesses that you personally own, as a sole proprietor or in partnership. If you are only an office holder of a company or an employee of a business, you will have a conflict of interest if the company or business has a direct interest, but not if its interests are indirect (see page 11).

Agency

The Act states that you have a conflicting duty if you are an agent for a person who has a direct interest in a matter. For Councillors in some professions, such as lawyers or accountants, this may mean having to consider possible conflicts of interest more frequently.

In some cases, a conflicting duty may be exempt because it is too remote to be capable of influencing your decision on the particular matter (see page 15). However, the remoteness exemption will not apply if the Council decision on the matter may affect your business or your dealings with the relevant person. Neither will it apply if you have an indirect financial interest as a result of your agency role.

6. Family & Relatives - Definitions



Notes:

- For "Family" - your father, mother, brother, sister, son or daughter is defined as a family member only if they live with you.
- These diagrams should be read in conjunction with pages 9 and 10.

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