

Maladministration

While the word '*maladministration*' is not used in the Ombudsman Act, it is a convenient word to describe the nature and scope of the general administrative review jurisdiction of the Ombudsman in relation to the NSW public sector.

In the Ombudsman's general administrative review role, the Office is able to investigate conduct of a public authority that appears to be:

- ' (a) *contrary to law,*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory,*
- (c) *in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,*
- (d) *based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration,*
- (e) *based wholly or partly on a mistake of law or fact,*
- (f) *conduct for which reasons should be given but are not given,*
- (g) *otherwise wrong...*' (s.26(1))

The word '*maladministration*' is used and defined in the *Protected Disclosures Act 1994*, which provides that for the purposes of that Act,

'...conduct is of a kind that amounts to maladministration if it involves an action or inaction of a serious nature that is:

- (a) *contrary to law, or*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory, or*
- (c) *based wholly or partly on improper motives.'* (s.11)

The conduct covered by the above terms in the Ombudsman Act and the *Protected Disclosures Act* includes:

• **Contrary to law:**

- › decisions or actions contrary to law or to lawful and reasonable orders from people or agencies with authority to give such orders
- › decisions or actions ultra vires (eg. the decision-maker had no power to make the decision or to do the act)
- › breaches of natural justice/procedural fairness
- › unauthorised disclosures of confidential information.

• **Unreasonable:**

- › decisions or actions so unreasonable that no reasonable person would so decide or act (eg. irrational)
- › arbitrary, partial, unfair or inequitable decisions or actions
- › applying a policy inflexibly without regard to the merits of an individual case
- › decisions or actions that do not take into account all relevant considerations, or that take into account irrelevant considerations
- › serious delays in making a decision or taking action
- › provision of wrong, inaccurate or misleading advice
- › failures to rectify identified mistakes, errors, oversights or improprieties
- › failures to properly investigate.

• **Unjust:**

- › decisions or actions not justified by any evidence or that are unreasonable
- › partial, unfair, inequitable or unconscionable decisions or actions.

• **Oppressive:**

- › unconscionable decisions or actions
- › means used to achieve ends are not reasonably proportional to these ends
- › abuses of power, intimidation or harassment.

• **Improperly discriminatory:**

- › inconsistent application of a law, policy or practices when there is no reasonable, justifiable or appropriate reason to do so
- › application of distinctions not authorised by law, or failing to make distinctions which are authorised or required by law.

• **Based wholly or partly on improper motives:**

- › decisions or actions for a purpose other than that for which a power was conferred
- › conflicts of interests
- › bad faith or dishonesty
- › decisions or actions induced or affected by fraud
- › misuse of public property, official services or facilities.

• **Irrelevant grounds/considerations:**

- › relevant considerations not adequately taken into account or irrelevant considerations taken into account
- › policies applied inflexibly without regard to the merits of each case
- › exercise of discretionary powers at the direction or at the behest of another (eg. acting under '*dictation*').

- **Mistake of law:**
 - › incorrect interpretation or application of the law
 - › ignorance of the law.
- **Mistake of fact:**
 - › decisions or actions based on information that is factually in error or misinterpreted
 - › important facts omitted from reports or deliberations, or ignored.
- **Failure to give reasons:**
 - › statements of reasons are not given when required by law or it is otherwise reasonable to do so
 - › statements of reasons are inadequate because all relevant issues are not addressed or the relevant criteria on which the decision is based are not stated
 - › reasons given are not comprehensible to the likely recipient.
- **Otherwise wrong:**
 - › negligent conduct
 - › results of decisions or actions are uncertain
 - › failures to give effect to lawful government or agency policy
 - › failures to give accurate, frank, impartial, complete or timely advice
 - › failures to honour commitments
 - › failures to meet acceptable or industry standards for public administration, good judgement, integrity and the like.

Maladministration and corrupt conduct

Maladministration can include conduct considered corrupt under the ICAC Act. Dishonest or partial exercise of official functions by a public official falls into this category. This is obviously conduct at the more serious end of the maladministration spectrum, as it must also involve criminal or disciplinary offences to constitute corrupt conduct under that Act.

Further information

For further information see also:

- *The Complaint Handlers Tool Kit* (2nd edition), NSW Ombudsman, June 2004
- *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003
- *Protected Disclosures Guidelines* (6th edition), NSW Ombudsman, April 2009.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Email nswombo@omb.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524

Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.