

Good conduct and administrative practice

Guidelines for state and local government

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NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Facsimile: 02 9283 2911

Toll free: (outside Sydney Metro Area) 1800 451 524
Telephone typewriter: 02 9264 8050

Email: nswombo@ombo.nsw.gov.au
Web: www.ombo.nsw.gov.au

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Foreword

In a constitutional democracy, government is held accountable for their exercise of power.

In NSW, state and local government accountability is achieved through oversight and scrutiny by Parliament, various watchdog bodies that report to Parliament (such as the Ombudsman, Auditor-General, Independent Commission Against Corruption and the Police Integrity Commission), other watchdog bodies, the courts, the media and advocacy groups.

The Parliament, the government of the day and the public are entitled to expect that state and local government officials perform their duties to the highest standard and in compliance with the law and accepted principles of good conduct and administrative practice.

Now in their third edition, the *Good conduct and administrative practice guideline* explain these principles and provide advice – informed by administrative law, the work of the Ombudsman over the past 40 years and, where relevant, the expertise of other accountability bodies – about their practical application in the public sector.

The guidelines are intended to:

- assist public officials to understand the standards of good conduct and administrative practice that are expected of them
- provide guidance to managers to assist in the supervision and training of staff
- assist agencies in the development and review of relevant policies and procedures.

This new edition of the guidelines contains updated information to reflect key recent developments. Most notably, the passage of the *Government Sector Employment Act 2013* in NSW established the role of the Public Service Commissioner and an Ethical Framework for the NSW public sector. The principal objectives of the Commissioner's role include promoting and maintaining the highest levels of integrity, impartiality, accountability and leadership across the public sector. All public officials are now required by law to uphold the four core values of integrity, trust, service and accountability (GSE values) contained within the Ethical Framework.

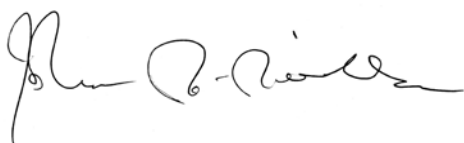
Since the last edition of the guidelines was released, there have also been significant changes to the public interest disclosure scheme as a result of amendments to the *Public Interest Disclosures Act 1994*. In addition, the *Government Information (Public Access) Act 2009* and the establishment of the Information and Privacy Commission changed the way that freedom of information is governed in NSW. There have also been some important changes to statutory reporting requirements for public sector agencies.

The updated guidelines are presented as a series of user-friendly modules. Where required, the modules contain links to appropriate references and further information. To guide users, an index to the modules has been included.

I acknowledge and thank the following NSW agencies for their resources and assistance – Independent Commission Against Corruption, Audit Office of NSW, Anti-Discrimination Board, State Records, Information and Privacy Commission, Office of Local Government and NSW Public Service Commission.

I also thank the following Australasian Ombudsman offices for reviewing a draft version of the guidelines and providing valuable input – Commonwealth Ombudsman, Victorian Ombudsman, Ombudsman Western Australia, Queensland Ombudsman, Ombudsman South Australia, Ombudsman Northern Territory, Ombudsman Tasmania, and Ombudsman New Zealand.

I commend the guidelines to you and welcome your feedback.



Professor John McMillan AO
Acting NSW Ombudsman

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Module 1

Acting ethically

This module provides guidance about:

- Acting in good faith and honestly
- Being frank and candid
- Acting reasonably, fairly and impartially
- Complying with the obligation of fidelity
- Avoiding offence and embarrassment
- Ensuring confidentiality.

Introduction

Public officials are expected to act ethically at all times in performing their official functions, including in their dealings with members of the public, each other, their employer, the government of the day and the Parliament. While there is no absolute agreement on what 'acting ethically' means, in the context of public administration it is widely understood to encompass the principles of acting in the public interest; acting honestly, in good faith and in compliance with the obligation of fidelity; and acting reasonably, fairly and impartially. In NSW, Part 2 of the *Government Sector Employment Act 2013* specifies a set of core values and principles which public officials are expected to uphold.

Responsibilities

1. Acting in good faith and honestly

Public officials are obliged to act in good faith, which requires them to act honestly, for the proper purpose, on relevant grounds, and without exceeding their powers.

Public officials should not engage in corrupt or criminal conduct, maladministration or waste of public resources (see Module 18: *Using public resources efficiently*).

Public officials exercising any delegated or statutory discretionary power should not:

- exercise such a power for an improper purpose, or for a purpose other than that for which it was conferred (for example, use a planning power for a non-planning related purpose)
- make a decision not authorised by or under the power being used to make the decision (i.e. in a manner that is 'ultra vires')
- take into account irrelevant considerations, or fail to take into account relevant considerations, when exercising the power.

Acting in good faith

Good faith requires 'a conscientious approach to the exercise of power'.¹

The common law obligation of fidelity on employees implies a duty that the employee will act in good faith and, as such, will assist the employer by supplying information known to the employee that concerns the business and operation of the employer's business. This includes taking appropriate steps to disclose any case of wrongdoing of which they become aware (see also Module 5: *Disclosing wrongdoing*). The common law duty to obey the lawful orders of employers also includes an obligation to answer questions about how an employee has done his or her work or what they have done during working hours.

Honest mistakes or isolated errors of judgement should not be dealt with in the same way as findings of corrupt conduct or criminal activity, and should not appear on the employment records of officials. Public officials need to have the confidence to make complex decisions under difficult circumstances. If a decision was wrong but there was no ill intent or breach of public trust, then the official (and the employing agency) needs to learn from that mistake rather than be punished for making it. However – depending on the context – significant errors, repeated lapses in logical processes, or an absence of reasonable caution or diligence may provide evidence of an absence of good faith.

See also Module 8: *Appropriately exercising discretionary powers* and Module 11: *Acting fairly*.

1. French J in *Applicant WAFV of 2002 v Refugee Review Tribunal* [2003] FCA 16.

Acting honestly

Public officials should promote and adhere to the highest standards of honesty and avoid any conduct which could suggest or give the perception of dishonesty. This includes not knowingly or negligently making any false, misleading or incorrect statement or report to any person or body. Where it is discovered that false, misleading or incorrect statements have been made or information provided, the problem must be promptly rectified (see also Module 11: Acting fairly and Module 14: Acting transparently).

Public officials in NSW are legislatively required to 'act professionally with honesty' as part of upholding the core value of integrity under the 'Ethical Framework for the government sector'² in Part 2 of the *Government Sector Employment Act 2013*, NSW. In addition, section 439 of the *Local Government Act 1993* requires councillors, staff and delegates to act honestly in carrying out their functions under that or any other Act.

2. Being frank and candid

Public officials are obliged by the law, codes of conduct and any applicable professional ethics to demonstrate integrity, courage and honesty by being 'frank and candid' – that is, to tell the whole truth – in performing their official functions. The obligation extends to dealings with all branches of government, including Parliament, ministers' offices and the courts, as well as the public.

See also Module 9: Providing advice to decision-makers.

3. Complying with the obligation of fidelity

There is a common law obligation of fidelity on all employees. This obligation implies a duty in every contract of employment that the employee will:

- act in good faith
- protect their employer's interests
- carry out their duties with competence and care.

The courts have held that engaging in conduct that involves opposition to, or conflict between, the employee's interest and duty to the employer, or that leads to the destruction of the necessary confidence between the employer and employee, may constitute a breach of the employee's duty of fidelity and good faith to the employer.³

The obligation of fidelity does not require public officials to compromise their integrity. 'Integrity' is one of the four core values underpinning the 'Ethical Framework for the government sector' in NSW. The framework requires public officials to consider people equally without prejudice or favour; act professionally with honesty, consistency and impartiality; take responsibility for situations, showing leadership and courage; and place the public interest over personal interest.

4. Avoiding offence and embarrassment

The personal behaviour and conduct of public officials should support and uphold the reputation and standing of their employing agency and of the government of the day. When dealing with colleagues and members of the public, public officials should be courteous and polite, helpful and sensitive to the rights of others.

In performing their duties, public officials should also refrain from any form of conduct likely to cause any person unwarranted offence or embarrassment. A public official should not make allegations which are derogatory; intended to vilify, insult or injure the reputation of any person; or which personally reflect on, or impute improper motives to, any other public official or member of the public. The only exceptions would be allegations or statements that are true, in the public interest and relevant to a matter which the official is considering or which is otherwise directly relevant to their official duties.

See also Module 6: Respecting differences, Module 10: Providing quality service and Module 11: Acting fairly.

2. <http://www.psc.nsw.gov.au/workplace-culture---diversity/workplace-culture/the-ethical-framework>.

3. Dixon and McTiernan JJ in *Blyth Chemicals Limited v Bushnell* [1933] 49 CLR 66.

5. Acting reasonably, fairly and impartially

Public officials should act reasonably, fairly and impartially in performing their duties.

Acting reasonably

The concept of 'reasonableness' is primarily an external one. Conduct is reasonable if it is lawful and:

- in accordance with accepted standards of conduct
- in good faith and for legitimate reasons
- unbiased, rational and consistent
- appropriate for a particular situation
- proportional – that is, the means used by agencies and public officials are reasonable in the context of the ends sought to be achieved.

When making decisions, public officials should respect the fair balance between the interests of the individual and the general public interest.

When a public official relies on technical advice (e.g. engineering or legal advice) in making a decision, he or she should ensure that non-technical issues, such as the reasonableness of his or her conduct and the effects of possible decisions, are also considered.

There is an ethical obligation on public officials to take lawful steps to mitigate the effects of rigid adherence to the letter of the law. This duty arises when such rigidity will result in, or is likely to result in, unintended and manifestly inequitable or unreasonable treatment of an individual or organisation. For example, if the law does not give an agency a discretion, reasonableness may mean adopting a broad interpretation in certain circumstances. See also Module 7: Complying with the law, directions and policies.

As agencies are required to uphold the law, in circumstances where statutory language necessitates rigid interpretation of the law that would result in inequitable treatment, it may be appropriate for the agency concerned to seek a legislative amendment.

Discretionary power must always be exercised reasonably, according to the circumstances of each case. The courts generally focus on whether a discretionary power was used unreasonably to determine if it is reasonable. The High Court has held that conduct is unreasonable if a response is obviously disproportionate, displays an error in reasoning (such as illogical or irrational reasoning) or lacks an evident or intelligible justification.⁴

When assessing whether conduct is reasonable, it is relevant to consider:

- the legality/regularity/integrity of conduct
- merits, based on case by case
- justification, if any, for the conduct
- logic behind the conduct
- whether the response was proportionate
- whether a decision-maker was impartial
- consistency with past decisions/conduct
- timeliness.

See also Module 7: Complying with the law, directions and policies, Module 8: Appropriately exercising discretionary powers, and Module 11: Acting fairly.

Acting fairly

While the concept of 'fair' is primarily an internal and subjective one (unlike the concept of 'reasonableness' which is primarily external and objective) conduct is generally considered to be fair if it is perceived to be:

- morally right
- ethical and honest

4. *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

- dictated by conscience
- uncorrupted and free from prejudice, favouritism or self-interest
- balanced.

Fairness is an essential component of good decision-making. It is an implied condition of the granting of discretionary or statutory power to public officials that it be exercised fairly.

Public officials should also act fairly for practical reasons. Individuals are generally far more likely to accept a decision that may not be favourable to their interests if they believe the procedures used to come to the decision, the criteria on which the decision was made, and the conduct and approach of the decision-maker were impartial and fair.

Fair treatment of individuals extends to:

- treating them with respect, courtesy and sensitivity
- informing them of the procedures to be followed and their rights
- providing them with an adequate opportunity to put their case (and preferably an opportunity to respond to any counter arguments and/or incorrect information)
- dealing with their matter in accordance with transparent and approved procedures and criteria and, where relevant, consistently with like matters
- considering their views prior to making a decision
- providing them with the reasons for the decision.

When assessing whether conduct is fair, it is relevant to consider whether or not – from the subjective point of view of the individual affected by the conduct – the conduct involved:

- decisions that are unfair/inequitable
- conduct that was unfair/inequitable
- failures to provide procedural fairness
- unfair/inequitable applications of the law.

Courts will consider whether the conduct was fair in light of principles of procedural fairness. See also Module 11: Acting fairly and Module 14: Acting transparently.

Case study

A man received a large number of traffic fines for driving offences that he had not committed. Inquiries found that he was the victim of an identity fraud in which the registration for a car that he did not own had been transferred into his name. Someone else had committed the offences in the car.

The man did not know about the outstanding penalty notices until he tried to update his driver's licence. As soon as he found out, he approached the relevant government department with evidence to show that he was not responsible for the offences – including statements, photographs and other records.

However, a departmental officer told him he had to submit an annulment application for each penalty notice, with a fee of \$50 per application, because he was out of time to request a review of the penalty notices. The total amount payable for the applications would be around \$2000, because of the number of enforcement notices. The staff member said the department couldn't 'bend the rules'.

At this point, the man lodged a formal complaint in which he argued that this approach was unfair. The department then reviewed the matter. Once the department properly considered the full circumstances, it agreed that it was unfair and unreasonable to force the man to pay for multiple annulment applications, relating to traffic offences that he had not committed and had not known about. As a result, it exercised its discretion to withdraw all the fines and related penalty notices. All demerit offences and demerit points were also removed from his driving record.

Acting impartially

Conduct is impartial when it is unbiased – that is, when it considers people equally without prejudice or favour – and when it places the public interest over actual or perceived private interests.

Public officials should perform their duties impartially, particularly when exercising statutory discretionary powers or delegated authority. Public officials must not act as decision-makers in relation to any matter in which they have an interest.

Public officials must be objective and unbiased when making decisions. It is essential that they give adequate consideration to all relevant and material facts and circumstances prior to making decisions, particularly where they affect the rights or interests of members of the public.

Public officials should abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds. Unless specifically provided by statute, all decisions by public officials should be made on the basis of merit.

See also Module 2: Acting in the public interest and Module 6: Respecting differences.

6. Ensuring confidentiality

Good public administration requires that a proper balance be drawn between the need on the one hand for government to be transparent and accessible to the public, and the need on the other hand to protect the integrity of official information and prevent the unauthorised disclosure of personal or otherwise sensitive information.

While it is good practice for agencies to take a proactive approach to the disclosure of information (often called 'open government'), there are circumstances where effective public administration or the privacy rights of individuals requires confidentiality or secrecy. In this regard, 'privacy' can be seen as the legal right of individuals not to have their personal information improperly collected, used or disclosed; 'confidentiality' can be seen as an administrative or contractual obligation; and 'secrecy' is a statutory obligation.

The circumstances in which confidentiality/secrecy may be legitimate include those where the release of information would:

- be an unreasonable disclosure of personal information or business affairs (e.g. information that could damage a person's reputation or be an invasion of their privacy without any important public interest being served)
- prejudice law enforcement or the security of premises and individuals
- prejudice the effectiveness of methods of investigation, audit or review
- be premature (e.g. involving working documents prior to a final decision being made)
- give unfair commercial advantage to individuals
- cause unreasonable damage to the government's commercial interests.

The law governing the disclosure of information in NSW is the *Government Information (Public Access) Act 2009*. This establishes that official information should be public unless there is a public interest to the contrary. It identifies the circumstances under which there is a conclusive public interest against disclosure, and the circumstances under which public officials must weigh the general public interest in open government against the specific interests in favour of confidentiality which may arise in particular cases.

The use of official information for personal advantage, the release of official information at the whim of particular public officials, or the selective leaking of official information for an improper purpose undermines the integrity of government and can cause unnecessary harm to individuals. Such conduct could be investigated pursuant to the *Ombudsman Act 1974* and may constitute corrupt conduct or criminality, for example by breaching sections 62 and 63 of the *Privacy and Personal Information Protection Act 1998*.

Disclosing confidential information

Information obtained by public officials in the course of performing their official duties must not be improperly disclosed. Public sector officials must make sure that confidential information, in any form (such as computer files), cannot be accessed by unauthorised people and that sensitive information is only

discussed with people, either within or outside the department, who are authorised to have access to it (see Module 15: Managing risk for guidance on information security). Section 21 of the *State Records Act 1998* also makes it an offence to abandon, dispose of, damage or alter a state record, or to neglect a state record in a way that causes or is likely to cause damage to it.⁵

Official information should only be released by public officials (with proper authority and in accordance with established agency policies and procedures) in the following circumstances:

- where it is necessary for the purpose of properly discharging the agency's functions
- in accordance with statutory rights of individuals to be given access to information⁶
- in accordance with government policy⁷
- in accordance with the rules or enforceable orders of a court or tribunal
- in accordance with a requirement made by a body (e.g. the Ombudsman or the Independent Commission Against Corruption (ICAC)) with the statutory power to require production of documents or statements of information
- where it is lawfully permitted for the safety, welfare or wellbeing of children or young people or other vulnerable people.⁸

Using official information

Information obtained by public officials in the course of performing their official duties must only be used for official purposes and not for personal benefit. Public officials should not seek or obtain, either directly or indirectly, any financial benefit or other improper advantage for themselves or any other person or body from any information to which they had access in the exercise of their official functions or duties or by virtue of their office or position. This includes:

- circumstances where the advantage is prospective, i.e. likely or expected in the future (even if remote or contingent on some other event occurring), or small in value
- the communication of such information to any other person with a view to providing an advantage to that or any other person or body (unless such a disclosure is lawful)
- the improper or unauthorised use or disclosure of such information after resignation or retirement.

It can be a criminal offence for public officials to use information acquired in connection with the exercise of their official functions to obtain financial or other personal benefit. Further, corrupt conduct is defined by section 8(1) of the *Independent Commission Against Corruption Act 1988* to include:

any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Case study

A police officer's domestic relationship ended and his ex-partner moved to a new address, which she did not disclose. The officer wouldn't accept this and kept trying to contact her by phone. She later saw him driving slowly past her house on several occasions and suspected he had used his position to find out her new address. After she lodged a complaint, the police department audited the officer's computer accesses. The audit confirmed that he had looked up his ex-partner's new address on the police computer system.

Police found he had not only breached internal guidelines on access to information, but had also committed a criminal offence in doing so. He was charged with illegally accessing and using confidential information.

5. Under section 3(1) of the Act a state record is any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office.

6. For example, *Government Information (Public Access) Act 2009*, *Privacy and Personal Information Protection Act 1998*, *Health Records Information Privacy Act 2002* or *Local Government Act 1993*.

7. For example, Department of Premier and Cabinet, *M2007-01 Public Disclosure of Information arising from NSW Government Tenders and Contracts*. Available online at <http://arp.nsw.gov.au/m2007-01-public-disclosure-information-arising-nsw-government-tenders-and-contracts>.

8. For example, Chapter 16A and s248 of the *Children and Young Persons (Care and Protection) Act 1998* and Part 13A of the *Crimes (Domestic and Personal Violence) Act 2007*.

Public officials should not use confidential information with the intention to improperly cause harm or detriment to their agency or the government (irrespective of whether any such harm or detriment is actually caused).

Agencies should ensure that contracts with contractors, consultants, agents or advisers specify that such people are under an obligation not to use confidential information in ways which are an abuse of their role, function or position, or which put them in a position which is inconsistent with their legal and professional obligations to the agency.

Confidentiality undertakings

On occasion agencies will need to decide whether or not to enter into a confidentiality undertaking with a third party which will require the agency to keep certain information confidential that would otherwise be publicly available.

Agencies and their staff should not enter into confidentiality undertakings which have the potential to:

- obstruct their ongoing regulatory functions or any advisory role performed by the agency
- make inaccessible to members of the public information that should be publicly available in the interests of transparency and accountability.

For example, where agencies have in their possession the best or only evidence of unauthorised or unlawful activities that may have caused damage or injury to private individuals, they should be wary of entering into confidentiality undertakings that would keep secret from those individuals both the evidence itself and the fact that the evidence exists.

Legal advisers to regulatory agencies which are contemplating entering into confidentiality agreements about unauthorised activities should advise their client as to the potential for such agreements to obstruct the body's regulatory role. They should also advise their client of the impact on the adviser's ability to give full and frank legal advice to staff of the agency unaware of the existence, or the subject matter, of the confidentiality undertaking.

Further resources

- **NSW Public Sector Commission**, *Behaving Ethically: a guide for NSW public sector employees*. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/ethics-conduct>

Behaving Ethically is a package of resources designed to help public sector employees better understand the obligation to act ethically and in the public interest. It provides practical guidance that public sector employees can use in their day-to-day dealings with colleagues, clients, customers, stakeholders and the government. It includes ethical decision-making tools and practical scenarios.

- **WA Integrity Coordinating Group**, Integrity in decision making resources, available online at <https://icg.wa.gov.au/integrity-decision-making-info-sheets-and-checklists>

The WA Integrity Coordinating Group developed an 'integrity in decision making' framework in 2011. The framework is supported by a number of factsheets and checklists.

- **NSW Deputy Ombudsman Chris Wheeler**, 'What is 'fair' and 'reasonable' depends a lot on your perspective', *Australian Journal of Administrative Law* (Volume 22 Part 1), November 2014.

This paper examines how the application of the terms 'fair' and 'reasonable' varies considerably depending on the particular interests, role or perspective of the person making the assessment. It outlines the implications of this variability for how people respond to administrative action, as well as the likelihood that they will comply with the law.

- **NSW Deputy Ombudsman Chris Wheeler**, Ethics in the public sector (presentation to Wollongong University), August 2011, available online at http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0013/6241/SP_Ethics_in_the_public_sector-Wollongong_University-18_Aug_2011.pdf

This paper critically analyses the various dimensions of ethical conduct in the public sector and discusses the mechanisms, strategies and approaches that encourage it.

Module 2

Acting in the public interest

This module provides guidance about:

- Identifying relevant public interests
- Balancing conflicting or competing public interests
- Complying with statutory public interest tests
- Demonstrating that the correct decision has been made.

Introduction

Public officials have an overarching obligation to act in the public interest. This means, broadly, that they must perform their official functions and duties, and exercise any discretionary powers, in ways that are consistent with matters of broad public concern and away from private, personal, parochial or partisan interests. In NSW, the 'Ethical Framework for the government sector' is established by Part 2 of the *Government Sector Employment Act 2013*. This explicitly recognises the role of the public sector in preserving the public interest and defending public value, with one of the public sector core values being to 'place the public interest over personal interest'.⁹

Responsibilities

The term 'public interest' is used very frequently in legislation and other formal documents which guide the work of public officials. It is, however, notoriously difficult to define succinctly in a way that captures the full range of circumstances in which it might be applied.

Very broadly, public interest is best understood as an approach to the discharge of official duties, rather than as an external interest group whose needs must be met or as a definite outcome to be achieved. As such, public interest considerations are relevant both to the objectives or outcomes of any decision-making process, and to the process and procedures followed by public officials in exercising their discretionary powers.

In some ways it is easier to distinguish the public interest from what it is not. For example, the public interest can be distinguished from:

- private interests – of a particular individual or individuals (although as discussed later there are certain private 'rights' viewed as being in the public interest)
- personal interests – of the decision-maker (including the interests of members of their direct families, relatives, business associates, etc.). Public officials must always act in the public interest ahead of their personal interests and must avoid situations where their private interests conflict, might potentially conflict, or might reasonably be seen to conflict with the impartial fulfilment of their official duties
- personal curiosity – i.e. what is of interest to know, that which gratifies curiosity or merely provides information or amusement (to be distinguished from something that is of interest to the public in general)
- personal opinions – e.g. the political or philosophical views of the decision-maker, or considerations of friendship or enmity
- parochial interests – i.e. the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern
- partisan political interests – e.g. the avoidance of political/government or agency embarrassment. This specific factor is referred to in the *Government Information (Public Access) Act 2009* at section 15, and was discussed by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and ors* (1981) 55 ALJR 45 at 49.

1. Identifying relevant public interests

In making decisions and taking actions, public officials will usually have to do more than engage this kind of process of elimination: they must identify relevant public interest considerations and take them appropriately into account. The specific public interest concerns will depend very largely on the particular circumstances in which the question arises, but it is nevertheless possible to offer general guidance.

Australian courts have identified several different kinds of public interest:¹⁰

- The interests of the community as a whole private or individual rights which are generally regarded as being so important or fundamental that their protection in each case is in the interest of the community as a whole (e.g. the rights to privacy, to procedural fairness, and to silence).

9. *Government Sector Employment Act 2013* s7.

10. See Kaye, Fullagar and Ormiston JJ in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 in Appeal Division of the Supreme Court of Victoria (at 75); Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 in Full Court of the Federal Court of Australia (at 245).

- The interests of groups, classes or sections of a population which are particularly affected by a decision, process or issue, in ways that have implications for the community as a whole (these might be residents of a particular area affected by a decision, or groups with some other particular claim to being heard, such as indigenous people, farmers, school students, first home buyers and so on).

In practice, public officials should usually be able to identify the 'public' whose interests should be considered in relation to any particular situation or outcome by considering factors such as:

- the legal context – the jurisdiction and role of the decision-maker
- the operational context – the issues to be addressed and the decision to be made
- the political context – whether the decision-maker is a representative of a group, class or section of the public that has, or is perceived by the decision-maker to have, a particular interest in and views about the decision to be made, e.g. the decision-maker's political party and/or electorate
- the personal context – whether the decision-maker has strong personal, philosophical or political views on the issue, or is subject to the direction of, or whose continued employment or career prospects are dependent on, the support of a person with such views on the issue.

Applying public interest to specific cases

In most cases, assessing how the 'public interest' applies in a particular circumstance is a three-stage process. While in many cases there will be no clear answer to the questions raised at each stage of this process, what is important is that a conscientious attempt is made to find and document appropriate answers, so that the decision-maker is able to demonstrate that the correct approach was followed and all relevant matters were considered.

The first step for the decision-maker is to be clear about which people, group, class or section of the general population is the relevant 'public' (or 'publics' if several different groups, classes or sections are involved) whose best interests must be considered in making the decision.

The second step for the decision-maker is to identify the public interest that should guide the exercise of their discretionary powers. In other words, public officials exercising discretionary powers must determine the specific public interest objective or objectives that apply to their role (and/or that of any employing agency).

This is done by reference to three sources of information:

- fundamental philosophical principles
 - any requirements that the public official is required to comply with in making good decisions, such as procedural fairness (these will usually, but not necessarily always, be explicitly specified in law)
- primary sources
 - the objects clauses in legislation, or in the absence of such provisions the spirit (intention) of legislation identified from the terms or provisions that establish either a public office or agency, or its functions, from explanatory memoranda or from relevant second reading speeches
 - the terms of legislation that establish a public sector office or agency and/or give it functions and powers
 - any regulations, rules or by-laws that set out the functions and powers of a public official, public office or agency
- secondary sources
 - government, council or board policy
 - plans or policies, whether made by or under statutory authority, or approved by the executive government, a minister, or a council or board, or approved by a relevant agency or authorised public official
 - directions given by ministers within the scope of their authority
- tertiary sources (if none of the above sources answer the question)
 - agency strategic/corporate/management plans
 - agency procedure manuals and delegations of authority
 - as perhaps a last resort, statements of duties for the decision-maker's position.

The third step for a decision-maker is to assess and apply weightings/levels of importance to the identified public interests over and above the three sources of information referred to earlier.

Case study

In response to a number of complaints, an oversight body investigated how government agencies dealt with asbestos issues. Research showed that there was a widespread knowledge of the risk of contracting asbestos-related diseases from inhaling asbestos fibres – and that the incidence of asbestos related cancers was increasing.

The investigation found that, despite the risks, there was no single government agency responsible for coordinating the management and containment of asbestos. There was no coherent, statewide government plan for dealing with asbestos. There were gaps in asbestos legislation and funding to deal with these issues was inadequate.

It also found that methods for dealing with asbestos across the whole of government were disjointed, ad hoc and confusing. There were no laws preventing home owners from demolishing asbestos buildings, asbestos was being dumped illegally on public and private land, and tens of thousands of fibro buildings constructed in the 20th century continued to deteriorate or to be inappropriately renovated or demolished.

The oversight agency recommended that the government take action to address this significant public safety issue. It found that the public interest could only be served by implementing a statewide strategy to raise awareness of the risks, the safe handling requirements and the removal of asbestos from the environment wherever possible. The government adopted the recommendations.

2. Balancing conflicting or competing public interests

In practice, public officials will often be confronted by a range of conflicting or competing public interest objectives or considerations which must be weighed up and balanced.¹¹

The kinds of conflicts or incompatibilities that often arise include:

- Where a decision would advance the interests of one group, sector or geographical division of the community at the expense of the interests of another (such a decision can be in the public interest in certain circumstances: for example, granting resident parking permits near popular destinations may be in the public interest even though it inconveniences non-residents, because it helps to ensure residents are not overly inconvenienced by people visiting nearby areas).
- Where a decision may affect people beneficially and detrimentally at the same time (e.g. a decision to improve public safety by operating CCTVs on every street corner may improve security but also may restrict the privacy of individuals).
- Where two government organisations are responsible for advancing different causes which both provide some benefit to the public (for example, it is likely that in many respects a body responsible for protecting the natural environment and a body responsible for harvesting forestry products will have equally valid but conflicting views about the public interest).
- Where a decision requires a balancing of one public interest consideration over another (for example, the *Government Information (Public Access) Act 2009* requires public officials to balance the general public interest in open government against the possible public interest in non-disclosure of certain kinds of information).

It may be possible to address conflicting or competing public interests through compromise or prioritisation. Sometimes it may be more appropriate to choose the 'least worst' option – the decision that causes the least harm rather than the most good. Even when competing public interest objectives are entirely incompatible, and where one must be chosen at the expense of the other, in practice it is more likely that

11. See Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142.

there will be degrees of incompatibility between various objectives. The decision-maker needs to consider all of those who may be affected as individuals but, more importantly, how the community at large may be affected when acting under these circumstances.

3. Complying with statutory public interest tests

It is quite common for legislation which grants a discretionary power to identify a number of specific public interest-type issues or matters to be considered by decision-makers in exercising their discretionary powers, and then to add a general 'catch-all' public interest test. For example, over 190 NSW Acts require that the public interest be considered when implementing the Act or in making particular administrative decisions under the Act.

The appeal of this approach, from Parliament's perspective, is that it makes possible legislation in fields which are often so complex that it is not possible for the Parliament to comprehensively cover all factors that should be taken into account by decision-makers.

This approach poses challenges for public officials, however, precisely because it is so open-ended. As the High Court of Australia has stated:

the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable'.¹²

In practice, the nature and scope of the 'public interest' considered relevant by a decision-maker in complying with such a statutory test will be significantly influenced by the nature and scope of the decision-maker's powers, jurisdiction, and other matters specified in law. For example, there are provisions in the *Government Information (Public Access) Act 2009* (s 12, s 13, s 14 and s 15) which are designed to assist decision-makers in determining whether certain actions would be contrary to the public interest. Given the impossibility of properly defining the public interest, the Act instead specifies factors that are considered to be irrelevant to such an assessment – for example that disclosure/inspection of documents:

- could cause embarrassment to the government/council
- could cause a loss of confidence in the government/council
- could cause a person to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

4. Demonstrating that the correct decision has been made

Public officials should expect that their decisions about what constitutes the public interest, and how to balance competing public interests, may become subject to public discussion and debate. This does not mean that the decision was wrong, only that the merits of the decision are being tested in ways that are entirely appropriate in our society.

Expression of contrary views and active debate as to the merits of particular decisions are most likely to arise where there are conflicting public interests that are either very finely balanced, where the appropriate weighting to be applied to each is unclear, or where a decision is contentious or otherwise significant.

Public officials should prepare for such circumstances by ensuring that any such debate will focus on the merits of the decision itself, and not the conduct or propriety of the decision-maker or the decision-making process. Officials should ensure that their decisions are made on reasonable grounds, that they give adequate consideration to identifying and specifying the public interest at stake, that they are clear on why particular interests are given precedence, and that they create adequate records of this process.

The more significant or contentious an issue is likely to be, the greater the importance of ensuring that the basis for the decision is properly documented. For example, if a decision or a course of action is being considered by some third party (e.g. interest groups, opposition members of Parliament, journalists, regulators, watchdog bodies, tribunals or courts), if the basis for that decision is properly documented, this supports the credibility of the decision-maker and the decision-making process in the eyes of that third party, even if there is disagreement with the merits of the decision made.

¹² Mason CJ, Brennan, Dawson & Gaudron JJ in *O'Sullivan v Farrer* (1989) 168 CLR 210 (at 217).

Proper documentation also helps officials to ensure adequate rigour by, for example:

- helping to ensure that all relevant factors are taken into consideration
- helping to highlight circumstances where decision-makers find themselves wanting to ‘skate over’ certain difficult or inconvenient issues, or where they are experiencing some difficulty in explaining (or rationalising) the basis on which a decision was made.

Further resources

- **NSW Deputy Ombudsman Chris Wheeler**, ‘*The public interest revisited – we know it’s important but do we know what it means?*’, Australian Institute of Administrative Law Forum, No 72, March 2013, pp 34 to 49.
- **NSW Deputy Ombudsman Chris Wheeler**, ‘How do public interest considerations impact on the role of public sector lawyers?’, presentation to the Public Sector In-House Counsel Conference, Canberra, 30 and 31 July 2012. Available online at http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0019/8065/Public-interest-Presentation-How-do-public-interest-considerations-impact-Public-Sector-In-House-Counsel-Conference-Canberra-30-July-2012.pdf

Module 3

Avoiding corrupt conduct

This module provides guidance about:

- Not taking improper advantage or asserting undue influence
- Rejecting bribes, gifts and benefits.

Introduction

An important part of acting in the public interest is avoiding corrupt conduct. Public officials must not engage in conduct which involves the dishonest or partial exercise of their official functions, the misuse of official information or material, or which breaches public trust. Nor should they do anything to encourage other officials to engage in this kind of conduct or to break the law. Corruption is an extremely broad topic, and there is not sufficient space to cover it in depth here. The ICAC provides extensive advice on its website (www.icac.nsw.gov.au). Instead of attempting to provide comprehensive guidance, these guidelines will focus on some of the more common forms and issues, which otherwise honest public officials are most likely to encounter.

Responsibilities

1. Not taking improper advantage or asserting undue influence

Public officials should not do favours, pressure others to do favours, or let others pressure them to do favours that might impact on the impartial performance of their duties. This includes seeking such advantages as an inducement or reward for, or otherwise on account of:

- doing or not doing something, or having done or not having done something
- showing or not showing, or having shown or not having shown, favour or disfavour to any person or body in relation to the affairs or business of the agency.

It is a fact of life that people with particular interests may attempt to influence decision-makers to make decisions in their favour. In the course of performing their official duties, public officials may sometimes legitimately make submissions to, or lobby other public officials to, influence how official decisions are made.

Problems can occur, however, if inappropriate methods are used or if such lobbying is motivated or influenced by personal interest. It is one thing for public officials to exercise their rights as members of the public to request or urge a particular course of action or decision. It is another for them to offer inducements for (or otherwise seek) preferential treatment or favours from colleagues. Likewise, while it may be completely appropriate for public officials to request or urge a particular course of action or decision in the performance of their official duties, it is another for them to do so if they are motivated by their personal interest (including the interests of family or friends).

Public officials should not:

- Take advantage of their status, position, powers or duties for the purpose of obtaining, either directly or indirectly, any unauthorised preferential treatment or other improper advantage. This applies equally to themselves or to any other person or body, for example members of their family, business associates or friends.
- Seek to gain, either directly or indirectly, any unauthorised preferential treatment or other improper advantage for themselves or anyone else, by influencing or attempting to influence the conduct of or the making of any decision by another public official.
- Be under any financial or other obligation to private individuals which could be used to influence, or reasonably be perceived by an independent observer as capable of influencing, them to make a decision that gives unauthorised preferential treatment to any person or body.

The duty to avoid taking improper advantage is not merely a moral imperative. Serious cases may amount to crimes (see sections 249B and 249H of the *Crimes Act 1900*). Even less 'serious' cases may constitute corruption or maladministration sufficient to trigger an investigation by the ICAC or the Ombudsman.

For further details see also Module 4: Avoiding conflicts of interests and Module 1: Acting ethically, especially part 6, Ensuring confidentiality.

Case study

A property developer became friendly with a senior local government officer over the course of several years and many development applications (DAs). After his last DA was approved, the developer thanked the official by sending him a bottle of wine worth \$200. The council had a policy that gifts worth more than \$100 had to be declared on an internal gifts register and that the recipient could not keep the gift.

The council officer did not declare the gift on the internal register. He instead had lunch with the developer, at which they drank the wine and discussed the developer's next DA. A colleague of the council officer became aware of this and reported the officer's conduct internally. After investigation, the council found that the officer had breached the council's Code of Conduct about gifts and benefits. It also found that his conduct could give rise to a perception that he was allowing his decision-making to be improperly influenced by the developer.

The council took disciplinary action against the officer – including issuing him with a formal written warning, and changing his duties so that he no longer had responsibility for assessing and approving DAs.

2. Rejecting bribes, gifts and benefits

A reputation for integrity and professionalism can only be achieved and maintained if the community is confident that public sector agencies and public officials are not influenced by gifts, benefits or bribes.

Public officials should never expect to get anything extra for doing what they are already paid to do. They should not seek or accept any payment, gift or benefit intended or likely to influence, or that could be reasonably perceived by an impartial observer as intended or likely to influence, them to:

- act in a particular way (including making a particular decision)
- fail to act in a particular circumstance
- otherwise deviate from the proper exercise of their official duties.

Public officials should take all reasonable steps to ensure that their immediate family members are not the recipients of gifts or benefits which could give the appearance to an impartial observer of an indirect attempt to secure their influence or favour.

Things which could influence a hypothetical impartial observer's perception of a gift or benefit include:

- the scale, lavishness or expense/cost/value
- the frequency of occurrence
- the degree of openness surrounding the occasion or gift.

Gifts or benefits would not generally include items or benefits that are essentially token or constitute moderate acts of hospitality. In some circumstances, gifts or other benefits that are not essentially token or inconsequential in kind may be acceptable. Further guidance about, and examples of, gifts and benefits is provided by the NSW Public Service Commission.¹³

If any offer or suggestion of a bribe is made directly or indirectly to a public official, it should be reported to a senior officer at the first opportunity. The senior officer should immediately inform the principal officer of the agency, who is under a duty to report to the ICAC any matter that he or she suspects, on reasonable grounds, concerns or may concern corrupt conduct.¹⁴

The Public Service Commissioner Direction 1 of 2014, issued under section 13 of the *Government Sector Employment Act 2013*, requires that heads of certain public sector agencies implement the Managing Gifts and Benefits: Minimum Standards. Those minimum standards require that each department and agency must have in place:

- a policy for the management of gifts and benefits
- a gifts and benefits register

13. NSW Public Service Commission, *Behaving Ethically*, section 2.1 *Managing gifts and benefits*. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/managing-gifts-and-benefits>.

14. *Independent Commission Against Corruption Act 1988* s11.

- training and support for employees.

The *Model Code of Conduct for Local Councils in NSW*¹⁵ states at 5.1 and 5.2 that public officials must:

- avoid situations giving rise to the appearance that a person or body, through the provision of gifts, benefits or hospitality of any kind, is attempting to secure favourable treatment from you or from the council
- take all reasonable steps to ensure that your immediate family members do not receive gifts or benefits that give rise to the appearance of being an attempt to secure favourable treatment. Immediate family members ordinarily include parents, spouses, children and siblings.

Circumstances where gifts or benefits may be acceptable

Gifts or other benefits that are not essentially token or inconsequential in kind (including moderate acts of hospitality) should only be accepted where all the following apply:

- where they are not obtained by virtue of a public official's office or position
- where a gift is given to a public official in a public forum in appreciation for the work, assistance or involvement of the public official or an agency and refusal to accept the gift would cause embarrassment or affront
- if there is no possibility that the recipient might be, or might appear to be, compromised in the process
- the gift is offered and accepted in circumstances approved by the principal officer of the agency
- the officer has obtained the formal written approval of the principal officer to receive the gift, preferably beforehand.

Principal officers should only give approval where the acceptance of the gift is unlikely to be seen by an impartial observer to create a conflict of interests, or to influence the performance of duties or functions. Relevant considerations would include such things as:

- the nature of the main functions of the agency
- the relationship between, or potentially between, the giver/donor and the agency
- the type of gift or benefit offered or given
- the frequency or regularity of gifts or offers from the same source.

Case study

A public servant in the community services sector was contacted by the CEO of a local disability service provider. The two organisations had ongoing dealings with each other and a productive working relationship. The CEO invited the public servant to deliver a work-related presentation to staff of the disability service provider. The public servant agreed and did so. Directly after making her speech, the CEO of the service thanked her on behalf of everyone and presented her with a small box of chocolates. While she would not normally accept gifts from external stakeholders, the public servant made a judgement call that it was appropriate to accept the gift in this case, because it would have embarrassed the CEO if she had declined it in front of a room full of people, and because the gift amounted to a small token of appreciation and goodwill. When she got back to work, she made an entry on the gift register and let a senior officer know. The senior officer approved the acceptance of the gift, because it was within the agency's guidelines about accepting small gifts in certain circumstances.

Gifts and benefits minimum standards

By September 2015, agencies were required to implement a set of minimum standards with respect to handling gifts and benefits, and to require their employees to comply with these standards.¹⁶

15. NSW Office of Local Government, *Model Code of Conduct for Local Councils in NSW*. Available online at <https://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>.

16. NSW Public Service Commission, *Public Service Commissioner Direction No. 1 2014*. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/copy-of-public-service-commissioner-direction-no-1-of-2014>

Agencies should consider having a gifts and benefits register to record the gifts and benefits that are given to staff, whether staff were allowed to retain non-token gifts or benefits and, if so, authorised by whom and on what basis.

Consideration could also be given to making the register publicly available.

Further resources

- **NSW Public Service Commission**, *Behaving Ethically*, section 2.1 Managing gifts and benefits. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/managing-gifts-and-benefits>
- **Independent Commission Against Corruption**, *Gifts, benefits or just plain bribes? Guidelines for public sector agencies and officials*, June 1999.
- **NSW Public Service Commission**, *Personnel Handbook*. Available online at <http://www.psc.nsw.gov.au/employmentportal/resources/personnel-handbook>

Note that some sections of this handbook are no longer current due to the introduction of the *Government Sector Employment Act 2013*. Further advice is available from the Public Service Commission website.

Module 4

Avoiding conflicts of interests

This module provides guidance about:

- Defining conflicts of interests
- Identifying conflicts of interests
- Disclosing conflicts of interests
- Addressing conflicts of interests
- Avoiding conflicts of interests.

Introduction

Public officials should not allow the pursuit of private interest to interfere with the proper discharge of their public duties. They should avoid situations in which their private interests conflict or might reasonably be perceived to conflict with fulfilling their official duties impartially and acting in the public interest.

Responsibilities

Sometimes, by virtue of their public official status, position, functions or duties, public officials have the power to make decisions or act in ways that can further their own private interest (e.g. to gain financial or other benefit for themselves, their immediate family, relatives, business associates or friends). This may cause a real or reasonably perceived conflict between the public official's private interest and the public interest.

It matters little whether a conflict of interests is actual or merely a conflict that could be reasonably perceived to exist by a third party. Both circumstances negatively impact on public confidence in the integrity of the system.

When a public official makes an administrative decision that could affect the rights or interests of any person, he or she must apply the principles of procedural fairness. A key element of procedural fairness is the so called 'rule against bias' – that is, that a person must not act as a judge in their own cause. The basis of this rule is that even if a person were able to make an impartial judgement on a matter affecting his or her own interests, the perceived bias would cast doubt on the impartiality of the decision. For example, a council employee who had assessed his or her own development application would clearly be in breach of this rule.¹⁷

A real or reasonably perceived conflict may exist even if a public official is not the ultimate decision-maker. For example, it may be that as a result of the official's conflict of interests, there had been a failure to collect all relevant facts or ask the necessary questions, or otherwise to carry out a proper investigation or assessment of the facts on which the ultimate decision was based.

1. Defining conflicts of interests

The term 'conflicts of interests' refers to situations where a conflict arises between public duty and private interest which could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

Conflicts of interests can be:

- actual conflicts of interests involving direct conflict between a public official's current duties and responsibilities and existing private interest
- reasonably perceived conflicts of interests existing where a person could reasonably perceive that a public official's private interests are or are likely to improperly influence the performance of his or her official duties, whether or not this is in fact the case
- potential conflicts of interests arising where a public official has a private interest that could conflict with his or her official duties in the future.

17. There is a considerable body of case law on the question of bias. A reasonable apprehension of bias can arise where 'it might reasonably be apprehended that a person ... would have an interest which could affect [his/her] proper decision-making' (per the majority of the High Court in *Isbester v Knox City Council* [2015] HCA 20, at [33]. This can include an 'interest which would conflict with the objectivity required of a person deciding [the issue]'. This was an interest referred to by the majority in *Isbester* (quoting *Isaacs J in Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243 at 259) as an 'incompatibility' (at [34]). The court went further noting that the application of the principle extended beyond just the decision-maker, referring to the High Court decision in *Stollery v Greyhound Racing Control Board* [1972] HCA 53, (1972) 128 CLR 509, at 520, where Menzies J referred to the '... long line of authority which establishes that a tribunal decision will be invalidated if "there is present some person who, in fairness, ought not to be there"', at [37]. The court went on to note that in *Stollery* their honours held that '... the manager's mere presence was sufficient to invalidate the decision, either because he was an influential person or because his presence might inhibit and affect the deliberations of others', at [37]. If on appeal actual or apprehended bias are established the court will set aside the decision even if satisfied that the decision below was correct on the merits: see *Concrete Pty Ltd v Paramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 581 [2] & 611 [117], and *Antoun v R* (2006) 224 ALR 51 at 52 [2]-[3]. A comprehensive review of the relevant principles relating to reasonable apprehension of bias is set out in *AJH Lawyers Pty Ltd v Careri & Ors* (2011) 34 VR 236.

The issue of conflicts of interests was considered by the Supreme Court in *Bonds and Securities (Trading) Grounds Ltd v Glomex Mines N.L. and Others* (1971) 1 NSWLR 879 in which His Honour Justice Street said:

The Courts have always looked askance upon situations in which a [person] occupying a position of trust engages in activities involving a potentiality of serving interests other than those which his [or her] position requires him [or her] to serve [situations where a conflict arises between duty and self interest are] fraught with the risk that human frailty will prove unequal to the resolution of the moral issues involved in the conflict.¹⁸

Distinguishing a conflict of interests from a conflict of duties

It is important to distinguish a conflict of interests from a conflict of duties. The former involve public duties and private interests, while the latter involve competing or incompatible public duties. Conflicts of duties commonly arise where public officials hold more than one official position, and where the positions require them to address competing objectives or interests. They can also arise when an agency has conflicting responsibilities, such as promoting development and regulating it.

In some circumstances a conflict of duties is acceptable, or at least unavoidable. These are primarily where the holding of one public sector position or office is the prerequisite or qualification for the holding of another position or office, for example ex officio appointments to boards, committees, panels or the like.

In most other circumstances, a conflict of duties is usually either unacceptable and to be avoided, or at the least a problem to be disclosed and carefully managed. These circumstances would include:

- where a public official holds positions in (or otherwise performs duties for) more than one public sector agency
- where those agencies have interests or objectives that are, or are likely to be, competing or incompatible
- where issues concerning one agency or position are, or are likely to be, considered or decided by the other agency or the holder of the other position, and such consideration or decision-making is required to be impartial
- where the activities of one agency are, or are likely to be, regulated or subject to review or oversight by the other agency.

Distinguishing a conflict of interests from bias

It is also important to distinguish between a conflict of interests and bias. While both concepts are well known in public administration, the common law has tended to focus much more on bias than conflicts of interests.

Bias essentially refers to a failure to bring an impartial mind to the making of a decision. The legal term 'reasonable apprehension of bias' refers to circumstances where a hypothetical fair-minded person, properly informed as to the nature of the proceedings or process, might reasonably decide that a decision-maker was biased.

While bias and conflicts of interests both relate to decision-making and conduct related to decision-making, they approach the issue from different directions. Bias focuses on the effect of a set of circumstances on the conduct of the decision-maker, while a conflict of interests relates to causes of a particular effect (i.e the interests of the decision-maker). Bias can be the outcome or effect of a conflict of interests, but a conflict of interests is just one possible cause of bias. A conflict of interests is not necessarily misconduct – that depends on how it is managed and dealt with. On the other hand, bias in the performance of a public function is a form of misconduct.

2. Identifying conflicts of interests

It is not always easy to identify a conflict of interests. Human nature being what it is, if a person has, or has the potential to have, a personal or otherwise private interest in a matter, it is unlikely to be in the person's interests to recognise or identify the existence of such a conflict if this would preclude them from further involvement in the matter.

18. At p. 891.

A conflict of interests can involve pecuniary interests (which can include either financial interests or other material benefits) or non-pecuniary interests (e.g. political, religious, recreational, family or other interests). They can involve the interests of the public official, members of the official's immediate family or relatives (where these interests are known), business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interests.

It is sometimes unrealistic or even undesirable to expect that the official dealing with a matter will be someone having no prior connection with the person or issues concerned. Some matters may have significant histories that involve the same members of the public and the same agency staff. Simple acquaintance with a person concerned, or the fact that an official has previously had official dealings with that person, is not sufficient in itself to indicate that the official has a real or reasonably perceived conflict. There must be something more, or something particular to the matter in question.

In assessing whether a public official has an actual, potential or reasonably perceived conflict of interests, it may be helpful to ask the following questions:

- Does the official have a current or previous personal, professional or financial relationship with an interested party?
- How significant is or was any personal, professional or financial relationship with an interested party (for example, is the relationship one of simple acquaintance, previous work experience, close friendship, business partnership)?
- Would the official or anyone associated with the official benefit from or be detrimentally affected by a decision or finding in favour of, or adverse to, any interested party?
- Does the official hold any personal or professional views or biases that may lead others to reasonably conclude that the official is not an appropriate person to deal with the matter?
- How serious is the matter and does it directly impact on the rights or interests of any person or of the general public?
- What does any relevant code of conduct require in relation to conflicts of interests?

Pecuniary interest

For councillors, senior council staff, delegates and advisers, the *Local Government Act 1993* establishes a comprehensive scheme for disclosing and dealing with pecuniary interests (ss 441-459). A pecuniary interest is defined in the Act to be:

an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated (s 442(1)).

3. Disclosing conflicts of interests

Decision-makers, and people advising or reporting to decision-makers, should promptly, fully and appropriately disclose any actual or potential conflict of interests they may have in a matter under consideration. Where the actual, potential or reasonably perceived conflict involves the interests of a public official's family or friends, those interests should be disclosed to the extent they are known to the public official.

Public officials should also bring to notice any circumstances that could result in a third party reasonably perceiving a conflict of interests to exist (that is, wherever circumstances are such that there is likely to be a reasonable apprehension that an official may not bring an impartial and unprejudiced mind to the making of a decision due to an actual or perceived conflict of interests or bias).

It is the responsibility of public officials to make such disclosures whether or not there is a statutory requirement to do so. In this regard, codes of conduct and/or conflict of interests policies adopted by agencies should require their employees to disclose relevant interests and circumstances. These policies should additionally make it clear that, depending on the circumstances, such disclosures may not of themselves be sufficient to resolve the actual, potential or reasonably perceived conflict.

Such disclosures must be made at the first available opportunity to an appropriate senior officer of the agency for a decision as to what action should be taken to avoid or deal with the conflict.

Examples of appropriate action in situations that commonly occur include a disclosure by:

- A member of an interview panel to the other members of the panel (and in particular the independent member), at the time of reviewing the applications, if an applicant is a personal friend, or past or present close work colleague. (Note: It would not be appropriate to be on an interview panel where any applicant for the position is a relative, including a parent, sibling, child, or past or present partner. It would generally be acceptable to be a referee for somebody being interviewed, provided other referee(s) are also nominated and are consulted prior to that applicant being appointed to a position).
- A person who is in an intimate relationship (or some other relationship that might lead to a reasonable perception of conflict) with a member of staff in relation to whom they have supervisory or management responsibilities, or by whom they are being supervised, or where they are in such a relationship with a party to a dispute or statutory application process over which they have to arbitrate.
- A person who is involved in the assessment or approval of a tender, contract or application, immediately they become aware that a relative, personal friend or business partner has an interest in or may benefit from or on the other hand be detrimentally affected by the contract or application.

Case study

A public servant worked in a regulatory role in the education sector. Her work involved inspecting and auditing records held by schools, as part of a larger accreditation process.

The public servant also operated a private company with its own website, through which she delivered a fee-based consultancy service to some of the same schools. She had established the consultancy company after several years of working in her regulatory role. The website made reference to her public regulatory role. She had not informed her senior officers at the regulatory body about her private consultancy work.

In her regulatory role, the public servant wrote a critical report about a particular school. This school had never used her consultancy service, but was aware that she had a private consultancy. After becoming aware of the critical report, the school complained to the regulator, and suggested that the public servant tended to favour schools that used her consultancy service.

An internal investigation found that the private consultancy work presented an actual conflict of interests in the officer's regulatory role. She was also subject to disciplinary action for not declaring her private employment.

4. Addressing conflicts of interests

Where a disclosure of an actual, potential or reasonably perceived conflict of interests (including a pecuniary interest) is made to an appropriate officer, depending on the circumstances of the case, the options available include:

- taking no further action because the potential for conflict is minimal or can be eliminated by disclosure or effective supervision
- informing likely affected people that a disclosure has been made, giving details and the agency's view that there is no actual conflict or the potential for conflict is minimal
- appointing a 'probity auditor', or independent third party to review or oversight the integrity of the process/ decision (this will be particularly appropriate where there is a reasonably perceived – but not actual – conflict of interests or the conflict is only identified at or near the conclusion of the process or after the making of the decision)
- appointing further people to a panel/committee/team to minimise the actual or perceived influence or involvement of the person with the actual or reasonably perceived conflict
- where the people likely to be concerned about a potential, actual or reasonably perceived conflict

are identifiable, seeking their views as to whether they object to the person having any, or any further, involvement in the matter

- restricting the access of the person to relevant information that is sensitive, confidential or secret
- directing the person to cease supporting a third party whose actions may conflict with the agency's interests (for example a person or organisation taking legal proceedings against the agency)
- requesting the person to relinquish or divest the personal interest which creates the conflict (where the position of such an interest is not prescribed as a qualification for the person's official position)
- requesting the person to make arrangements for the relevant private interest to be held and managed in a 'blind' trust
- removing the person from duties or from responsibility to make decisions in relation to which the conflict arises and reallocating those duties to another officer (who is not supervised by the person with the conflict)
- transferring the person to some other area of work within the agency, or some other task or project
- transferring the person to some other agency
- people with a conflict who are members of boards, committees or councils absenting themselves from or not taking part in any debate or voting on the issue
- in serious cases, requesting or directing the person to resign, or terminating the person's employment or appointment (having complied with the rules of procedural fairness).

Managers or supervisors should appropriately record all reports of conflict of interests and all decisions made or directions given about handling each case.

5. Avoiding conflicts of interests

The prerequisites for public sector agencies to be able to properly manage conflicts of interests by their staff include:

- understanding and acceptance – the senior staff of the agency must clearly understand the concept and the circumstances where such problems are likely to arise for them and the staff of the agency and accept the importance of avoiding or properly managing conflicts of interests
- appropriate policies and guidelines – the agency must develop, adopt and implement appropriate policies and guidelines to guide its staff in identifying, disclosing and adequately addressing actual, potential or reasonably perceived conflicts of interests that are likely to arise in the course of their official duties
- advice and training – the agency must take adequate steps to alert all its staff to the relevant policies and provide training in what is expected of staff under the policies, including how and when to make disclosures of actual, potential or reasonably perceived conflicts of interests
- internal disclosures and complaint-handling procedures – the agency must have in place adequate policies and procedures to encourage disclosures from staff, as well as complaints from members of the public, about conflicts of interests that have not been identified or disclosed by staff and to investigate and resolve such conflicts.

The essential prerequisites for a public official to avoid or properly address conflicts of interests issues that may arise include:

- understanding – the public official must understand the concept and practical implications of conflicts of interests
- acceptance – the public official must accept that an actual or reasonably perceived conflict of interests is unacceptable in the public sector
- trust – the public official must have strong confidence that personal information they may disclose will be treated prudently and will not be made widely or publicly known unless that is unavoidable for the purposes of properly managing an actual, potential or reasonably perceived conflict of interests
- recognition – the public official must recognise that he or she has an actual, potential or reasonably perceived conflict of interests when such circumstances arise
- action – the public official must take timely and appropriate action to avoid, or if not, to disclose any actual, potential or reasonably perceived conflict of interests.

Recognition and action are crucial, because they are often not in any official's personal interests. They may even be damaging for an official, particularly where they could result in lost opportunities, personal embarrassment, retaliation or other kinds of loss or damage. These issues should, therefore, be specifically addressed in policies and guidelines adopted by agencies to deal with conflicts of interests.

Guidance for staff

Agencies should ensure that the issue of conflicts of interests is addressed in their code of conduct. They should also consider having a specific conflict of interests policy that addresses the particular circumstances of the agency. These policies should cover such issues as:

- the definition of 'conflict of interests'
- the importance of avoiding both actual and reasonably perceived conflicts of interests
- the issues to be considered in assessing whether there is an interest that should be disclosed
- when disclosures should be made and to whom they should be made
- a person or position from whom employees can seek advice as to whether they have a conflict of interests
- how disclosures are to be recorded and dealt with
- the options available for dealing with actual, potential or reasonably perceived conflicts of interests.

Further resources

- **Bowen Committee**, *Public Duty and Private Interest: Report of the Committee of Inquiry*. Available online at http://apo.org.au/files/Resource/committeeofinquiry_publicdutyprivateinterest_july1979.pdf

Despite being published in 1979, this report sets out a number of principles for the avoidance of, and dealing with, conflicts of interests in a clear and helpful manner.

For state government public officials, the issue of conflict of interests is addressed in:

- **Public Service Commission**, *Personnel Handbook*, especially section 2-13.6. Available online at <http://www.psc.nsw.gov.au/employmentportal/resources/personnel-handbook>

Note that, as of mid 2015, the Public Service Commission is currently redeveloping the handbook to reflect changes introduced by the *Government Sector Employment Act 2013*. More information is available from the Public Service Commission's website.

- Independent Commission Against Corruption, *Identifying and managing conflicts of interest in the public sector*, December 2012.

For councillors and council staff:

- The Ombudsman endorses the 13 strategies for the management of conflicts of interests set out in Independent Commission against Corruption and Office of Local Government, *Under Careful Consideration: Key issues for Local Government*. Available online at www.icac.nsw.gov.au/documents/doc_download/1346-under-careful-consideration-key-issues-for-local-government
- Office of Local Government, *Model Code of Conduct*. Available online at <http://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>

Module 5

Disclosing wrongdoing

This module provides guidance about:

- Legal obligations to report
- Legal protections for reporters
- Managing internal reports of wrongdoing.

Introduction

Public officials have a moral obligation – and, in some cases, a legal duty – to bring to the attention of their agency or a relevant watchdog body (such as the Ombudsman or ICAC) any dishonesty or wrong conduct on the part of any other public official or public sector agency. This is part of the more general duty to observe, promote and encourage the highest standards of honesty and integrity, and to avoid conduct which could suggest any departure from them.

Responsibilities

Public officials should disclose any wrongdoing by their colleagues or agency as soon as is reasonably practicable after they become aware of it. Section 2 of *Behaving Ethically: a guide for NSW government sector employees* provides guidance for staff who see behaviour that is contrary to the Code of Ethics and Conduct for NSW public sector employees.

Agencies should encourage and support staff to make such disclosures. The staff of an agency are in the best position to know how well it is performing its functions and whether there is anything or anyone inhibiting that performance. By actively using this information and addressing the deficiencies that such disclosures highlight, agencies can become fairer, more accountable and more responsive in the way they operate.

Without such disclosures it will often be unlikely that the dishonesty or wrongdoing would have otherwise been uncovered and therefore likely that such wrongdoing would have continued.

1. Legal obligations to report

In addition to the general moral obligation to report wrongdoing, public officials are also legally obliged to report certain sorts of wrongdoing in particular circumstances. These are summarised in the table below.

Issue to be reported	People obliged to report	Reports to be made to	Relevant law
Commission of a serious indictable offence	Any person	NSW Police Force	s 316, <i>Crimes Act 1900</i>
Suspicion that a child or a class of children is at risk of significant harm, where the suspicions have arisen during the course of or from the person's work	Any person who in paid employment delivers or manages the delivery of certain services to children	Department of Family and Community Services – Child Protection Helpline	s 27, <i>Children and Young Persons (Care and Protection) Act 1998</i>
Suspicion that a matter concerns or may concern corrupt conduct	Principal officers of public authorities and certain others	Independent Commission Against Corruption	s 11, <i>Independent Commission Against Corruption Act 1988</i>
Allegations and convictions against employees concerning child protection-related issues	Heads of government agencies and certain non-government agencies	Ombudsman	s 25C, <i>Ombudsman Act 1974</i>
Belief that a police officer has engaged in conduct that constitutes a criminal offence or other misconduct	Police officers	NSW Police Force	cl.20, <i>Police Regulation 2000</i>
Belief that a correctional officer has engaged in conduct that constitutes a criminal offence or other misconduct	Correctional officers	Corrective Services NSW	cl.247, <i>Crimes (Administration of Sentences) Regulation 2001</i>

Case study

A teacher stopped a Year 4 boy in the playground and tucked his shirt into his pants. While doing so, the teacher touched the boy's genitals. Two of the boy's friends were standing nearby and saw the incident. A couple of weeks before, the same teacher had put the boy on his lap and rubbed his chest and back, for an extended period. The school's code of conduct for staff said that teachers should not touch students at all, other than in exceptional circumstances, such as to comfort a crying child.

The boy's parents contacted the school principal, who arranged for an internal investigation. However, he also said the teacher was one of the most valuable and well-liked members of the school staff and he felt sure there had been a misunderstanding. He did not make any reports to external agencies, such as police and the state child protection authority. He later declined to give the school's investigator the contact details for the two boys who had witnessed the shirt-tucking incident. He said the two boys were not trustworthy students, and there was a risk of 'reputational damage' to the teacher and the school that outweighed the value of any witness evidence they may provide.

An external oversight body later made several adverse findings about the principal's conduct. It commented that any risk of reputational damage did not outweigh the risks of failing to make the required reports to police and child protection authorities, or of failing to thoroughly investigate what had occurred. These reports and inquiries were necessary to determine as far as possible whether the teacher posed a risk to the safety and wellbeing of children.

2. Legal protections for reporters

The *Public Interest Disclosures Act 1994* (PID Act) provides certain protections against reprisal for public officials who disclose serious wrongdoing such as corrupt conduct, maladministration, serious and substantial waste of public money, breaches of the *Government Information (Public Access) Act 2009* (GIPA Act) and local government pecuniary interest contraventions. Public interest disclosures can be made to the principal officer of a public authority, another officer nominated to receive disclosures in an authority's internal reporting policy or to a number of investigating authorities including:

- the NSW Ombudsman – for serious maladministration
- the ICAC – for corrupt conduct
- the Auditor-General – for serious and substantial waste
- the Information Commissioner – for a breach of the GIPA Act
- the Office of Local Government – for disclosures about local councils.

Under section 6E of the PID Act, the head of a public authority is responsible for ensuring that:

- the public authority has an internal reporting policy
- the staff of the public authority are aware of the contents of the policy and the protections under the PID Act for public officials who make public interest disclosures
- the public authority complies with the policy and the authority's obligations under the PID Act
- the policy delegates at least one staff member as being responsible for receiving public interest disclosures.

In addition to the PID Act, other acts also provide protections for whistleblowers under certain circumstances, and sanctions for those who engage in reprisals. These include the *Police Act 1990* and the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

For further information about the PID Act see the NSW Ombudsman's series of *Public Interest Disclosure Guidelines* (available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>).

3. Managing internal reports of wrongdoing

Public officials who report wrongdoing ('internal reporters') perform an essential service. Public officials are uniquely placed to expose serious problems within the management and operations of public sector bodies. The best source of information concerning illegality, corrupt conduct and other wrongdoing within an agency is usually the people who work there.

Agencies should, therefore, provide a supportive environment that encourages their staff to report wrongdoing. Reporting concerns should be considered part of being a responsible and effective employee.

In particular, agencies and senior public officials should ensure that:

- internal reporters are protected from both direct and indirect reprisals
- internal reporters are provided with support (even if they do not ask for it)
- internal reports are properly assessed and investigated in a timely manner
- the results of investigations are appropriately dealt with
- internal reporters are advised of the outcome of investigations
- the culture of their organisation supports internal staff reports of wrongdoing.

Agencies and their officials must not, either individually or collectively:

- victimise or harass an internal reporter (for example by dismissal, demotion, forced transfer, discrimination, or the disproportionate or excessively intensive investigation of relatively minor allegations about the reporter)
- deal unfairly with a reporter or treat a reporter inconsistently with non-reporters in a similar position
- act against a reporter but not any person the subject of substantiated allegations
- fail to properly assess, investigate and deal with internal reports in a timely manner.

False, misleading and vexatious reports can also be a significant problem for agencies. In addition to encouraging staff to disclose any misconduct of which they are aware, agencies should also ensure there are strong sanctions in place for any case where it is proved the person who made the allegation had good reason to believe it was false or misleading.

Support internal reporting

Agencies should treat reports as an opportunity to identify and address organisational problems, much like complaints and suggestions from the public. An internal report should be seen as providing management with an opportunity for improvement. Consequently, agencies should treat internal reports seriously and take appropriate steps to protect internal reporters. Instructions should be issued to staff (either in general or in relation to specific staff members) to abstain from any activity that is or could be perceived to be victimisation or harassment of internal reporters.

A positive reporting environment within an agency will encourage staff to adopt an 'if in doubt, speak up' approach, knowing their concerns will be appropriately handled and they will be adequately protected. For public officials to feel comfortable about reporting wrongdoing, they must:

- believe that reporting wrongdoing will serve some good purpose – that appropriate action will be taken by the agency
- be confident that they will be protected from possible reprisals and supported for making a report – this will be affected by their understanding of whether other reporters have been appropriately protected and supported
- be aware of the nature and level of protection available to them, as well as the most appropriate way to make a disclosure.

Research and experience suggests that providing a safe alternative to silence can make the difference between environments in which problems are brought to light quickly and are dealt with professionally, and those in which problems do not surface, leading to more entrenched conflicts and greater damage to the agency.

In some cases a reporter may be a disaffected employee or former employee, motivated by breakdown in a relationship or some other kind of ill will. In such circumstances, the official receiving the report may instinctively reach the conclusion that the disaffected employee has fabricated the allegations. Experience

suggests this is a very dangerous assumption: the Ombudsman is aware of many cases in which long-standing problems have been exposed by such reports. Agencies should always respond to the factual content of a report, not the (assumed) motives of the person who made it.

Why support internal reporting?

Public agencies should support internal reporting because it is in their interest to do so:

- Early warning system – internal reporting provides managers with early warning of problems within an agency. If unchecked, these are likely to be repeated, could get worse, and may seriously damage the agency. It is far better to hear about problems from staff than to read about them in the press.
- Ability to deal with problems in-house – most agencies would prefer to have the opportunity to deal with problems in-house rather than submit to an investigation by an external body such as the Ombudsman, the ICAC, the Audit Office or the NSW Police Force.
- Reducing chances of detrimental impact on the agency – experience shows that if an internal report is not dealt with appropriately, or the reporter is subjected to reprisal or victimisation, this can result in conduct (by the reporter and other employees) that is seriously detrimental to the operations of the agency and to the morale of its staff, often for an extended period of time.
- The object of the PID Act – the object of the PID Act is 'to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector'. The legislative policy behind the PID Act is therefore clearly desirable and the Act should be interpreted broadly.

Public agencies should also support internal reporting of wrongdoing because various laws require it.

- Section 6E of the PID Act requires the head of an agency to ensure:
 - the agency has a policy for receiving, assessing and dealing with public interest disclosures
 - the staff of the agency are aware of the contents of the policy and the protections under this Act for a person who makes a public interest disclosure
 - the agency complies with the policy and the agency's obligations under the PID Act
 - the policy designates at least one officer of the public authority as being responsible for receiving public interest disclosures on behalf of the authority.
- Employers have a common law duty of care to provide a safe workplace for their staff. This means that managers and supervisors are responsible for taking all reasonable steps to prevent inappropriate behaviour at work, which includes bullying, victimisation, discrimination and harassment in the workplace. The District Court has specifically found that this duty extends to the handling of internal disclosures of wrongdoing.¹⁹
- Agencies have work health and safety obligations to ensure the health and safety of people in the workplace. This includes ensuring employees operate in a workplace free of bullying or harassment. Reporting wrongdoing can also be a difficult process and, if not properly managed, can result in stressful interactions with colleagues and managers. Stress is a legitimate and serious workplace concern and may result in a staff member sustaining a serious injury.

Codes of conduct

Agencies can clearly demonstrate their commitment to supporting staff who report wrongdoing and properly handling such matters in an internal reporting policy. Research has demonstrated the importance of agencies developing comprehensive policies, procedures and practices to ensure clarity and consistency in handling reports of wrongdoing.²⁰

19. *Wheadon v State of NSW*, No 7322 of 1998, 2nd February 2001. In this case, a police officer was awarded over \$600,000 in damages. The court found that the breaches of the NSW Police Force's duty of care to the plaintiff officer included: (a) failing to conduct a proper and adequate investigation; (b) failing to provide adequate protection from victimisation and harassment; (c) failing to give support and guidance; (d) failing to appreciate that reporters need welfare assistance but either do not realise that they need it, or they feel embarrassed about asking for it; and (d) failing to assure the plaintiff that he had done the right thing.

20. Roberts, Peter, 'Evaluating Agency Responses: the comprehensiveness and impact of whistleblowing procedures', in Brown, AJ (ed), 2008, *Whistleblowing in the Australian Public Sector*, Canberra, ANU Press.

Each agency's code of conduct should mirror the relevant information from the Premier's *Model Code of Conduct and Ethics for Public Sector Executives*²¹ which addresses the issue of public interest disclosures.

Appropriate statements should be included in the agency's code of conduct and any related policy documents concerning:

- the expectation that management are to support staff who reporting wrongdoing
- the rights and obligations of staff who receive internal reports or who make them
- the importance of the public interest disclosure legislation to the ethical framework and values of the agency
- examples of situations which may arise when a public interest disclosure is made and the principles which should be adhered to in such circumstances
- the obligation on all staff (including managers) to avoid any action that is or could be perceived to be victimisation, harassment or any other form of reprisal
- the obligation on the agency to take positive steps to protect internal reporters from actions that are or could be perceived as victimisation, harassment or any other form of reprisal.

Feedback to internal reporters

Agencies should recognise that internal reporting can result in stress, and provide ongoing support, reassurance and protection for the reporter. For example, reporters will usually not understand or accept a quick decision to take no further action, unless it is adequately explained to them. Reporters will usually want to know what decision has been made, how and by whom, and the reasons for making it. They should be reassured that the matter has been actively considered by a person with sufficient expertise, and a suitable degree of independence from staff who may reasonably be considered responsible for the alleged inappropriate conduct.

Under certain circumstances, agencies may have a legal obligation to write to reporters. The PID Act requires the agency to provide a written acknowledgement and a copy of the internal reporting policy to any person who makes a public interest disclosure within 45 days. It also requires written notification of action (or proposed action) within six months. Agencies should treat this as a minimum standard: best practice is for the agency to regularly inform the internal reporter of progress or any action being taken.

If the agency believes they can only provide limited information to the reporter, it should explain the reasons for this to the internal reporter. People may feel isolated and vulnerable if such information and contact is not provided. Nominating a particular officer with whom the person can talk further about their concerns may also be appropriate.

Disciplinary action against an internal reporter

Agencies should be cautious about taking disciplinary action against an internal reporter, especially while their report is being investigated. Doing so may create the perception that the action is being taken in reprisal for having reported wrongdoing. Just as formal disciplinary action can be perceived as reprisal, so can other employment-related actions including:

- harshly imposing human resource procedures
- rewriting job descriptions
- deciding not to award or provide a promotion, reclassification, transfer, leave of absence or other benefit
- allocating tasks, increasing or decreasing workloads and access to training, transfers or redeployments
- redundancies or dismissals.

It is recognised that this advice may not always be easy to follow, especially when internal reports are made by an employee who has complex motives for reporting (e.g. to cause trouble for the agency, or to delay disciplinary action which was already being contemplated before they made the report).

21. http://www.dpc.nsw.gov.au/public_employment/policy_directory/policy_statement?metadata=116578.

Agencies contemplating taking action against an internal reporter should be able to clearly demonstrate some or all of the following:

- the action is not causally connected to the making of the report
- there is sufficient evidence to show the reporter has been involved in improper conduct or has acted dishonestly, incompetently or negligently
- the disciplinary action is reasonable, proportionate and consistent with action taken in similar circumstances against non-reporters
- the particular circumstances of the internal reporter have been taken into account
- the action is consistent with a relevant plan which existed before the internal report was made (for example, a plan in relation to redundancies)
- the action complies with the agency's policies and procedures.

Public agencies which are unable to demonstrate that these pre-conditions have been met leave themselves open to claims that they have engaged in maladministration or corrupt conduct, and thereby to an investigation by the Ombudsman or ICAC. Agencies and officials may also lay themselves open to charges that they have committed the criminal offence of reprisal (as defined principally in the PID Act). In such circumstances, the onus of proof is reversed. If an internal reporter can demonstrate that they made a public interest disclosure and were subjected to detrimental action, the defendant is required to show that the detrimental action was not taken substantially in reprisal for them making the disclosure.

Further resources

- **NSW Ombudsman**, *Public interest disclosures*. Collection of resources available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>
- **Public Service Commission**, *Behaving Ethically: A guide for NSW government sector employees*, October 2014, <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/ethics-conduct>

Module 6

Respecting differences

This module provides guidance about:

- Valuing diversity
- Preventing discrimination and harassment
- Responding to discrimination and harassment.

Introduction

Public officials should respect the pluralism and cultural diversity of our society and avoid any conduct that is unlawful or unfairly discriminatory. It is important for public officials to appreciate differences, welcome learning from others and work to build relationships built on mutual respect.²² It is also important for public officials to provide reasonable assistance and support to those people, who because of their language, culture, age, health or abilities may have difficulty participating in employment, accessing goods and services, and making complaints.

Responsibilities

1. Valuing diversity

It is important that people with diverse skills, abilities, backgrounds, cultures and responsibilities are valued and appreciated, and offered an equal opportunity to participate in employment, receive goods and services, and make complaints.

Public officials have positive responsibilities to accommodate people's differing situations and abilities. This general moral obligation is in addition to the specific prohibitions on certain conduct in anti-discrimination laws (such as discrimination, harassment and vilification, as described below). Good conduct involves being flexible and responsive when dealing with people who face barriers to full participation in public life because of their language, cultural background, age, education levels, mental health or physical or intellectual abilities. This includes taking reasonable steps to assist and support them.

Section 3 of the *Multicultural NSW Act 2000* contains multicultural principles which provide, in part:

- e) all individuals in New South Wales should have the greatest possible opportunity to:
 - i) contribute to, and participate in, all aspects of public life in which they may legally participate, and
 - ii) make use of, and participate in, relevant activities and programs provided for or administered by the Government of New South Wales,
- f) all institutions of New South Wales should recognise the linguistic and cultural assets in the population of New South Wales as a valuable resource and promote this resource to maximise the development of the State.

Similarly, the *National Disability Strategy* establishes a framework for policy makers, service providers, community groups, business and families to engage people with disability, and provides that 'Government at all levels – Commonwealth, State, Territory and local – develop policies, deliver programs and services and fund infrastructure. They have a responsibility to ensure inclusion, accessibility and connection across levels of government in all matters affecting the interests of people with disability.'²³

Inclusive and accessible provision of goods and services

The 'Ethical Framework for the government sector' in NSW²⁴ contains minimum standards of service delivery that agencies and public officials are expected to deliver to their internal customers (those within a workplace, agency or sector) and external customers (for example, members of the public, businesses, local councils).

These standards include providing services fairly with a focus on customer needs, and being flexible, innovative and reliable in service delivery.

Agencies should have clear standards, policies and procedures that outline the expectations of staff when performing their role and dealing with customers, as well as education and training to support policies and

22. See *Government Sector Employment Act 2013*, s7.

23. Commonwealth Department of Social Services, *National Disability Strategy 2010-2020*, p. 24. Available online at <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020>.

24. <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-1/1-2-the-ethical-framework-for-the-government-sector>.

procedures. Some ways that public officials can ensure a high standard of service delivery to people with diverse backgrounds, skills, abilities and responsibilities, include (where appropriate):

- ensuring offices are physically accessible for people with limited mobility
- providing information in a range of formats and ensuring plain English is used
- providing information in a range of community languages
- using Auslan or interpreters
- accepting verbal requests for service or complaints and/or assisting people to put their requests or complaints into writing
- enabling people to have the assistance of a support person or advocate
- treating all people with courtesy and respect.

See also Module 10: *Providing quality service*.

Case study

A young person detained at a juvenile justice centre complained that the centre was not providing him with Halal meals. This meant he sometimes went without food when pork was on the menu. The young person had earlier applied to convert to Islam. The centre staff had supported him to some extent, by giving him a Koran and a prayer mat – but they were not yet providing Halal meals. After considering the complaint, the centre manager agreed to start doing so.

Diversity in the workplace

Section 63 of the *Government Sector Employment Act 2013* establishes that the heads of public sector agencies in NSW (including state-owned corporations and universities) are responsible for workplace diversity and for ensuring that workforce diversity is integrated into workforce planning. According to the Act, workforce diversity includes (but is not limited to) diversity of the workforce in respect of gender, cultural and linguistic background, Aboriginal people and people with disability. Clause 26 of the Government Sector Employment Rules 2014 contain special arrangements for the employment of Aboriginal people, people with disability and young people. Universities established under NSW legislation are defined as public sector agencies under the Government Sector Employment Regulation 2014,²⁵ only for the purpose of allowing the Public Service Commissioner to require them to provide reports and information on workforce diversity.

Part 4 of the *Local Government Act 1993* includes provisions to eliminate and ensure the absence of discrimination in employment and promote equal employment opportunity for women, racial minorities and people with disability in local government.

To foster a diverse workplace, public officials should do more than simply comply with their legislated responsibilities to not engage in discriminatory behaviour. They must work to create a culture where differences are respected and valued and reasonable adjustments are made to support the needs and circumstances of individual employees. This may include supporting employees to work on a part-time basis, or with flexible working hours, to make reasonable adjustments to physical work environments, to identify areas where additional training may be useful for staff, and to ensure suitable facilities for people with particular needs, such as an appropriate space for breastfeeding women.

Working with other agencies

Public officials are often required to consult, and work in collaboration with, organisations and individuals outside of their particular agency (including Commonwealth, state or local government agencies, non-government organisations and businesses). The NSW Ombudsman's experience suggests that problems

25. Clause 5(1)(b).

can occur when public officials do not work in a way where the roles, responsibilities, priorities and cultures of other organisations and individuals are understood and respected. We suggest officials and agencies establish business rules or arrangements with other organisations to ensure:

- clarity about who takes the lead in certain matters
- that all relevant agencies are involved
- that relevant information is shared appropriately
- that proper consideration is given to advice
- that arrangements are in place for resolving conflicts
- that decisions are made in accordance with agreed processes and timeframes
- that actions are implemented and otherwise followed up.

2. Preventing discrimination and harassment

Decisions or the provision of services or facilities which favour one or more people over others are, by their very nature, discriminatory and therefore partial (e.g. additional assistance for people with special needs). However, such decisions and actions by officials are not necessarily unacceptable unless they unfairly or unlawfully discriminate against an individual or group. Such unacceptable discrimination is:

- unfair – if arising from such things as arbitrary action, error, failure to consider relevant factors, consideration of irrelevant factors
- unlawful – if proscribed by statute.

The *Anti-Discrimination Act 1977* makes certain types of discrimination unlawful in particular areas of public life. While the Act includes a range of exceptions and exemptions, in general terms the Act prohibits discrimination in the following circumstances:

- race – includes colour, nationality, descent and ethnic, ethno-religious or national origin
- sex – includes pregnancy and sexual harassment
- age
- marital or domestic status – includes single, married, de facto, widowed
- disability – includes presumed, actual, past, present or future disability and includes physical, intellectual, and psychiatric disability, learning and emotional or behavioural disabilities, and the presence in a person's body of any organism capable of causing disease or illness, for example HIV
- homosexuality or lesbianism – including people thought to be homosexual or lesbian
- transgender – including people thought to be transgender
- carers' responsibilities for a relative or associate (only in employee/employer situations).

The areas of public life covered by the Anti-Discrimination Act include:

- provision of goods and services, including those provided by a public sector agency or a council
- education
- work
- accommodation
- the activities of registered clubs.

Vilification

The *Anti Discrimination Act 1977* (NSW) also prohibits homosexual, racial, transgender, and HIV/AIDS vilification. Vilification means any public act that could incite hatred, contempt or severe ridicule against a person on one of these grounds.

Victimisation

It is generally unlawful to subject a person to a detriment because they have made a complaint of unlawful discrimination or harassment

Types of discrimination

Direct discrimination occurs where a person is treated less favourably, on one of the grounds under the *Anti-Discrimination Act 1977* (NSW).

Indirect discrimination can occur where there is a requirement such as a rule, policy or procedure that is the same for everyone, but which has an unequal or disproportionate effect or impact on certain groups as compared to others and which is not reasonable in all the circumstances. A provision requiring employees to be of a certain height, for example, may indirectly discriminate against women and people in certain ethnic groups.

Harassment can constitute unlawful discrimination. Harassment may be described as any form of unwelcome conduct or behaviour that would offend, humiliate or intimidate a person on one of the grounds under the Anti-Discrimination Act. It is important to understand that if a person finds a particular behaviour offensive, humiliating or intimidating, and it relates to their race, sex, age, etc then it is harassment. This is the case irrespective of how the 'harasser' or anyone else perceives the behaviour. People may have different ideas about what is offensive and, within reason, it is up to them to define what they find unacceptable.²⁶

Public officials must not engage in discrimination or harassment, or support others who do so.²⁷

Commonwealth legislation

Commonwealth anti-discrimination legislation also exists concurrently with NSW legislation and covers most of the grounds under the *Anti-Discrimination Act 1977*. This legislation is the *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

3. Responding to discrimination and harassment

If an allegation is made that a public official has acted unlawfully by discriminating against a person, it is important that the agency responds promptly, and investigates the matter in a manner that is proportionate to the seriousness of issues raised. Investigations should:

- be handled expeditiously
- provide procedural fairness for both the complainant and staff member
- provide confidentiality for all parties, where practicable and appropriate, until such time as the investigation process is completed
- involve meticulous recordkeeping, including recording reasons for all significant decisions.²⁸

For employees of public sector agencies,²⁹ the *Government Sector Employment Act 2013* and Government Sector Employment Rules 2014 provide a framework for investigating allegations of misconduct.

If allegations of discrimination or harassment are raised, it will be important for senior public officials to examine the agency's culture, policies and procedures to determine whether additional guidance or training should be provided to staff about their obligations to refrain from unlawful or unfair discrimination.

26. NSW Anti-Discrimination Board, *Harassment and sexual harassment*. Available online at <http://www.antidiscrimination.justice.nsw.gov.au/Documents/harassment-and-sexual-harassment-factsheet.pdf>.

27. See, for example, Department of Planning and Environment, Office of Local Government, Model Code of Conduct, November 2015, p. 7. <http://www.olg.nsw.gov.au/sites/default/files/Model%20Code%20of%20Conduct%20-%20November%202015.pdf>.

28. See for example, Public Sector Commission, 'Code of ethics and conduct for NSW government sector employees', <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/the-code-of-ethics-and-conduct-for-nsw-government-sector-employees>.

29. As outlined in section 69 of the *Government Sector Employment Act 2013*.

Further resources

- **Public Service Commission**, *Behaving Ethically: A guide for NSW government sector employees*. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-1/1-2-the-ethical-framework-for-the-government-sector>
- **Public Service Commission**, *NSW Public Sector Aboriginal Employment Strategy 2014-2017*. Available online at <http://www.psc.nsw.gov.au/workplace-culture---diversity/equity---diversity/aboriginal-workforce/aboriginal-employment-strategy>
- **Commonwealth Department of Social Services**, *National Disability Strategy 2010-2020*. Available online at <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020> Department of Planning and Environment, Office of Local Government, Model Code of Conduct, November 2015. Available online at, <http://www.olg.nsw.gov.au/sites/default/files/Model%20Code%20of%20Conduct%20-%20November%202015.pdf>
- **NSW Anti-Discrimination Board of NSW** www.antidiscrimination.justice.nsw.gov.au
- **Australian Human Rights Commission** www.humanrights.gov.au

Module 7

Complying with the law, directions and policies

This module provides guidance about:

- Upholding the law
- Complying with lawful and reasonable directions
- Complying with policies.

Introduction

A fundamental principle of good public administration is that public officials comply with both the letter and spirit of applicable law (be it statutory or common law). No public official has an unfettered power or discretion.

Responsibilities

1. Upholding the law

All public officials are under an obligation to know and understand the law relevant to the performance of their official duties. Failure to comply with the law could be a criminal act. Breaches of the law which do not reach this threshold could still constitute disciplinary matters or have other serious consequences (see below).

To facilitate compliance with legal requirements, agencies and their senior staff should ensure that:

- management commitment to compliance is clear and unequivocal
- the legal requirements applying to each area of activity for which they are responsible are
 - identified (including timely updates reflecting changes to the law)
 - documented (preferably in detail, but as a minimum by reference to relevant provisions)
- all staff are kept fully informed, briefed and/or trained about the key legal requirements relevant to their work
- staff are made aware of the potential repercussions of non-compliance with legal requirements that apply to them
- recordkeeping systems and practices which capture evidence of compliance and non-compliance are in place (especially in relation to key, or potentially contentious, legal obligations).

Ethical obligations and rigid adherence to the letter of the law

The obligation to comply with legal requirements does not relieve an agency or public official of the moral or ethical obligation to mitigate the detrimental effects of rigid adherence to the letter of the law. This ethical obligation arises when rigid adherence results in, or would result in, unintended and manifestly inequitable or unreasonable treatment of an individual or organisation. For example:

- if the law gives an agency a decision-making discretion, it should be exercised in a reasonable way, and consistently with a procedure that can reasonably be perceived to be fair
- if the law does not give an agency a discretion, reasonableness may mean adopting a broad interpretation in certain circumstances, rather than a rigid adherence to legality
- other options that may be available to agencies to mitigate any unreasonable or inequitable effects of compliance with the law might include waiving debts, refunding fees or charges, offering an expression of regret or an apology (s 69 of the *Civil Liability Act 2002* provides that an apology does not constitute an expression or implied admission of fault or liability and is not admissible in most civil proceedings as evidence of fault or liability)
- deferring regulatory action to allow for an authorisation to be obtained, fast-tracking assessment and determination of an application, or the like.

Consequences of non-compliance

Failure to comply with legal requirements could result in such things as:

- complaints to the agency
- complaints to the Ombudsman, the ICAC, Audit Office, Information and Privacy Commission or other relevant watchdog body
- review by the NSW Civil and Administrative Tribunal (for example, about alleged breaches of privacy or unjustified refusals of access to information)
- disciplinary proceedings

- legal proceedings for orders to remedy or restrain breaches of certain Acts
- other legal challenges relating to such things as acting beyond the scope of authority or power ('ultra vires') or failing to provide natural justice/procedural fairness
- criminal proceedings
- in relation to local councils and their staff
 - a hearing by the Pecuniary Interest and Disciplinary Tribunal into complaints of alleged failures by councillors, staff, delegates and advisers to disclose pecuniary interests
 - dismissal of the mayor and councillors and the appointment of an administrator
 - removal of a council's planning powers and appointment of a planning administrator
 - the appointment of an environmental administrator
- disruption to management, staff morale problems and bad publicity that will result from any of the above.

Case study

Council officers went to a family's property on two occasions, in response to complaints that the family was keeping more chickens than was permitted on a residential property. On both occasions, the council officers were refused entry. The council then called the police to force entry. The family felt bullied by this and, in a complaint to an oversight body, they questioned whether the council had any legal right to force entry.

The oversight body made inquiries with council about their authority to enter and what kind of notice they had given the family before attending the property. Council responded that they had received a complaint from neighbours and needed to inspect the property. However, they admitted that on the two occasions they had attended the property, they had only given notice by telephone and had not given written notice.

Under the law, council could not force entry without formal written notice or a warrant. As a result of the complaint, council wrote to the family and apologised for not providing written notice. It confirmed that any future inspection of their property would comply with the relevant legislation.

2. Complying with lawful and reasonable directions

Public officials must comply with the lawful and reasonable directions and instructions of their employer which relate to matters of employment. This is a basic principle of good public administration, and a fundamental requirement of their employment relationship.

Public officials should not wilfully disobey or disregard any lawful and reasonable direction or instruction given to them by any person or body having authority to give such directions or instructions. By the same token, public officials must decline to follow any unlawful order or instruction.

The rule against dictation

Public officials in a management position should not dictate how delegations of authority or statutory discretionary powers are to be exercised, or professional judgements made, in relation to any specific cases or circumstances. They can, however, set down guidelines or criteria on the basis of which delegations of authority or statutory discretionary powers are to be exercised.

For further details see Module 9: Providing advice to decision-makers, part 3 The rule against dictation and Module 8: Appropriately exercising discretionary powers.

Dealing with doubts about legality or propriety

Any doubts as to the legality or propriety of an order or instruction should be taken up initially with the person who gave the order or instruction, or if necessary with their superior. If resolution cannot be achieved, the matter should be taken up with the principal officer of the agency. If, in practice, this is not an

acceptable option or the order or instruction was given by the principal officer, the matter may need to be raised with the minister or consideration given to:

- the making of a formal grievance under the agency's grievance policy
- the making of a public interest disclosure under the *Public Interest Disclosures Act 1994* (PID Act) for more significant matters (see our public information disclosure fact sheet 3 *Thinking about reporting serious wrongdoing?*).

3. Complying with policies

A primary function of public sector agencies is to give effect to the lawful policies of the government of the day or elected council. Public officials are employed to assist their agency to do so. Public officials should therefore give effect to a lawful policy whether or not they personally agree with or approve of it.

Application of policies

Policies, codes and the like should not be applied inflexibly, but on the basis of the merits of the particular circumstances of each individual case.

Public officials should have regard to circulars, practice notes, codes, guidelines and the like issued by government or relevant central agencies. Such guidelines should be complied with unless there are justifiable grounds for taking another course of action within the scope of the discretion available to the official.

Dealing with moral or ethical objections

There may be occasions where public officials believe they cannot give effect to a lawful policy. These circumstances will be rare. Where such objection is based on a bona fide moral belief that is honestly and strongly held (as opposed to a mere personal or political preference), the public official concerned should be relieved of responsibility for the implementation or enforcement of that policy (as long as the beliefs do not conflict with fundamental human rights). As well as recognising moral objections, such an approach helps to ensure the actual and perceived impartiality and fairness of the agency.

Further resources

- **NSW Ombudsman**, Fact Sheet 3: Thinking about reporting serious wrongdoing? Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/public-interest-disclosures/thinking-about-reporting-serious-wrong-doing-guideline-b1>

Module 8

Appropriately exercising discretionary powers

This module provides guidance about:

- Exercising discretionary powers appropriately
- Adopting policies and practices to guide the exercise of discretionary powers

Introduction

Discretionary powers are powers granted either under statute or delegation, and which do not impose a duty on the decision-maker to exercise them at all, or to exercise them in a particular way. They are, in other words, permissive rather than mandatory.

Responsibilities

1. Exercising discretionary powers appropriately

No public official has an unfettered discretionary power. Public officials must exercise discretionary powers in accordance with any applicable legal requirements and their delegated authority. They must do so reasonably, impartially and avoiding oppression or unnecessary injury.

The essential components of the appropriate exercise of a discretionary power are:

- acting with the proper and lawful authorisation, which is to say
 - within the power to make the decision
 - within the authority to make the decision
 - within the scope of the decision-making discretion
- implementing the decision properly, which is to say
 - in compliance with legal and ethical obligations
 - by asking the right questions
 - by using a fair process
 - based on evidence (including an analysis of the evidence)
 - based on the merits
 - in good faith
 - with adequate documentation.

Administrative law

In exercising discretionary powers, various principles of administrative law require decision-makers to:

- use discretionary power for a proper purpose (that is, only within the scope and for the purpose for which the power was given)
- base their decision on logically probative material
- consider only relevant considerations and not consider irrelevant considerations
- give adequate weight to matters of great importance and not give excessive weight to relevant factors of no great importance
- give proper, genuine and realistic consideration to the merits of the particular case
- apply rules and policies flexibly (that is, not improperly fettering discretion)
- exercise discretionary powers independently rather than at the direction of another person or body (that is, not acting under 'dictation')
- observe the basic rules of procedural fairness (sometimes referred to as natural justice).

Further, administrative law precludes decision-makers from:

- improperly fettering their own discretion (or that of future decision-makers) by, for example, adopting a policy that restricts decision-making in certain circumstances
- exercising a discretionary power in such a way that the result is uncertain
- acting in a way that is biased or leads to a reasonable apprehension of bias

- making decisions that are arbitrary, vague or fanciful
- refusing to consider the exercise of a discretionary power in circumstances where the decision-maker is under a duty to do so
- unreasonably delaying making a decision that the decision-maker is under a duty to make
- entering into contractual or other obligations (including the giving of undertakings) which are incompatible with the exercise of the discretionary power.

Finally, administrative law emphasises the need for decision-makers to make reasonable decisions. In a 2013 High Court decision³⁰ the majority argued that the ‘... legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision...’³¹ In this decision the High Court identified the following factors as indicative of unreasonableness:

- an obviously disproportionate response
- giving disproportionate weight to some factor
- a particular error of reasoning
- reasoning illogically or irrationally
- decisions lacking an evident and intelligible justification.

Case study

A doctor had a conditional registration to practice medicine and he worked in a medical centre. English was his second language. After three years, the doctor left the medical centre over a contractual dispute. He applied for a new registration. The authority responsible for granting medical registrations declined his application, on the basis that he did not meet new English language requirements, and even though it had granted him a continuous registration to practice medicine for the three years before.

The doctor then complained to an oversight body, which reviewed the case, including relevant legislation and policy. The oversight body noted that, under relevant legislation, the authority had some discretion when considering the English language requirement, depending on the full circumstances of the application. Despite this discretion, the authority had introduced a policy that English language requirements must be strictly applied, with no exceptions.

A principle of administrative law is that public officials should not fetter their own discretion (or that of future decision-makers) by, for example, adopting a policy that prescribes decision-making in certain circumstances.

While it is appropriate for agencies to adopt policies setting out the general approach to be followed in most cases, for reasons of consistency, the very nature of discretion is such that it should be applied to the circumstances of any particular case that may merit a different approach. Principles of administrative law also require public officials to give proper, genuine and realistic consideration to the merits of the particular case and not apply policy inflexibly.

The oversight body therefore took the view that, by having a policy that had to be indiscriminately applied in every case without the decision-maker having the freedom to consider the individual merits of a particular case, the authority was unreasonably fettering the discretion given to it by law. It suggested to the authority that it should review its decision, taking into account the full circumstances of the case and the authority did so.

30. *Minister For Immigration and Citizenship v Xijuan Li & Anor* [2013] HCA 18, at paras 72 & 76 (see also the NSW Court of Appeal decision in *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187, at 85-91).

31. At para. 68.

Ethical considerations

The exercise of discretionary powers, whether granted by statute or under delegated authority, should be exercised in accordance with general ethical principles. These principles are distinct from the requirements of administrative law, but overlap extensively with them. They hold that discretionary powers should be exercised:

- promptly
- appropriately given the circumstances of each particular case
- reasonably
- without prejudice
- in good faith (that is, honestly, for the proper purpose, on relevant grounds and without exceeding powers)
- only in ways which are lawful and, where relevant, authorised by the instrument of delegation.

It is a serious matter for a decision-maker to ignore valid advice or valid considerations, particularly for the purposes of avoiding discomfort or embarrassment to the government, agency or decision-maker. In this regard, agencies and public officials should avoid making decisions in order to fulfil some agenda not compatible with their legal responsibilities or in order to appease political protest. Agencies and public officials should always be prepared to make decisions in relation to contentious proposals rather than to abrogate their responsibility so that rights of appeal have to be exercised by people wishing for a decision to be made.

As a general rule, decisions should not have, or be interpreted to have, retrospective application or effect unless a benefit is being conferred. In such cases there should be amply documented justification.

Where a decision-maker relies on technical advice (for example, engineering or legal advice), he or she should ensure that non-technical issues, such as the reasonableness of his or her conduct and the likely effects of possible decisions, are not ignored. Where the matters at issue go to the reasonableness of an agency's or public official's conduct, technical advice is one of the factors to be taken into account, but not necessarily the sole or principal factor.

Wherever any delegated authority or discretionary power is exercised, this fact and the nature of the decision made should be recorded in writing on the relevant file or in an appropriate register or database.

2. Adopting policies and practices to guide the exercise of discretionary powers

Agencies should develop written guidelines setting out the procedures for staff to follow in each major area of activity for which each agency is responsible. Agencies should also develop written guidelines in other areas, as prudence dictates.

Policies

Not every situation demands a policy, and a policy is not a panacea which ensures that all situations are properly addressed. However, policies are an important means of guiding decision-makers in exercising discretionary powers appropriately, consistently and fairly.

Policies could cover such things as:

- general procedures to be followed
- duties and responsibilities in relation to particular matters or circumstances
- arrangements in the event of staff absences
- criteria for decision-making and prioritising action
- relevant deadlines and target dates.

Policies should include an explicit statement of the objective(s) the policy is intended to achieve and the criteria to be used in decision-making to help ensure that:

- all relevant legal requirements are complied with
- all relevant factors are considered by decision-makers
- there is consistency in decision-making
- the decision-making process is open and accountable.

The criteria to be used in decision-making should be:

- clear and simple
- unambiguous
- relevant
- capable of objective application.

This ensures that decisions are consistent and made on an objective basis.

Public availability of policies

Policies adopted by agencies should be communicated to relevant staff and members of the public.

It is unacceptable for an agency to adopt and implement a policy that adversely affects, or could adversely affect, the rights or interests of any member of the public where:

- the existence of the policy is kept secret
- the contents of the policy are kept secret
- the contents of the policy are not disclosed to interested parties on request
- the policy document is not available for inspection and purchase on request.

Secret policies are also illegal. The *Government Information (Public Access) Act 2009* (the GIPA Act) requires agencies to make their policies available to the public free of charge (s 18). The Act specifies that these policies be made available online unless doing so would impose unreasonable costs, and allows agencies to also make them available in any other way they choose (s 6).

The GIPA Act protects individuals from prejudice arising from the application of provisions in a policy document which is not publicly available (s 24):

(1) A person is not to be subjected to any prejudice because of the application of the provisions of an agency's policy document to any act or omission of the person if, at the time of the act or omission:

(a) the policy document was not publicly available as required by this Act, and

(b) the person was not aware of those provisions, and

(c) the person could lawfully have avoided the prejudice had the person been aware of those provisions.

(2) This section does not apply to any matter forming part of an agency's policy document that is not made publicly available as a result of being deleted as required by this Act from copies of the policy document that are made publicly available.

Administrative practices

Agencies should adopt administrative practices which ensure that staff exercise discretion in accordance with their policies and the principles set out in this guideline. Agencies should ensure:

- compliance with applicable procedures and practices is effectively monitored
- a reasonable degree of care and diligence is exercised in the implementation of powers and the discharge of duties
- functions are performed efficiently, effectively and without undue or avoidable delay
- activities are carried out in ways which are fair, reasonable and professional
- any administrative oversights or errors, once identified, are promptly rectified.

Agencies should ensure that their staff have the training that is necessary for them to properly perform their duties. Therefore, appropriate action should be taken to ensure that agency staff understand the policies relevant to their areas of work.

It is important that agencies regularly review their policies to ensure that they are complete, accurate, up-to-date and appropriate in the light of changing circumstances.

Government circulars, memoranda and codes of practice

While there is usually no legally enforceable obligation to comply with government circulars, memoranda and relevant industry or generally accepted codes of practice, decision-makers should usually have regard for them and comply with their terms in the interests of fairness, equity and consistency.

Decisions not to comply with circulars, memoranda and other similar codes should be justifiable, and reasons for taking another course of action should usually be documented. Where such a decision relates to an application from a member of the public for an authorisation (e.g. an approval, consent, permit or licence), the notice of the decision should adequately explain why the decision departed from any relevant circular or code.

Any cavalier or unjustified disregard of such guidance would be a matter of serious concern to the Ombudsman.

Module 9

Providing advice to decision-makers

This module provides guidance about:

- Making adequate inquiries
- Documenting advice
- The rule against dictation

Introduction

Advice given by public officials should be accurate, impartial, complete and timely.

Responsibilities

Public officials should provide advice and reports to decision-makers, when appropriate or required, that are materially accurate, cover all the issues relevant to the matter in an impartial manner, and contain relevant and appropriate recommendations.

1. Making adequate inquiries

Public officials must ensure that the decisions they make, or the advice they give to decision-makers, are based on facts and not mere conjecture or supposition. Prior to statements of opinion being given or recommendations or decisions being made, either verbally or in a report, it is important that adequate inquiries have been made to:

- obtain all relevant information
- ensure that the available information is factually correct
- establish that any applicable preconditions have been met.

The courts have historically been willing to review and overturn administrative decisions on a number of grounds which relate to a failure to look for relevant information, or a failure to find relevant information due to inadequate inquiries. These include decisions for which:

- there is no evidence that proves or helps to prove key facts³²
- there is so little sound evidence that the decision effectively has no sound basis
- the decision-maker has failed to make adequate inquiries.³³

Case study

A child protection government department took three young Aboriginal children into state care, because they were considered to be at risk of significant harm from their birth parents. Departmental staff drafted a report for their director, recommending that the children be placed with a particular carer. The report said that the foster carer and her husband were both authorised Aboriginal carers. Although there were other factors that weighed against the placement, including the number of people already in the household, the director decided to approve the placement, based on her staff's advice. On balance, she considered it important to support the children's connection with their culture.

A few months later, the department brought court proceedings to finalise the placement. During the court proceedings, the director signed an affidavit, prepared for her by staff, in which the carers were referred to as 'authorised Aboriginal carers'. On the basis of this and other information, the court made final orders placing the children with the carers. Within a year, serious allegations were raised about the carer household, including that the male carer had committed sexual offences against his step-daughter, and that he had never been authorised as a carer.

As a result, the case file was reviewed by an external oversight body, which confirmed that the male carer had never been assessed and authorised as a foster carer. Had he been properly assessed, he would not have been authorised, in light of certain relevant prior convictions. Inquiries also found there were no

32. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLRz 473; *SFGB v Minister for Immigration and Multicultural Affairs* (2003) 77 ALD 402.

33. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170; *Lee v Minister for Immigration, Local Government and Ethnic Affairs* (No 2) (1993) 45 FCR 418.

records to support the claim that the carers were Aboriginal. While the staff who recommended the placement had a 'genuine belief' that both carers were Aboriginal and that the male carer was authorised, this was only based on verbal advice they had received from a nearby district office. They had not checked these claims themselves before making the recommendation to the director, or while preparing the affidavit that was tendered in court. As a result, the department had to inform the court of these errors and find new carers for the children.

2. Documenting advice

Advice, and information obtained from preparatory inquiries, should be properly documented.

Written advice on proposals or applications should cover such things as:

- relevant law (both statutory and common law)
- relevant government and agency policies
- relevant industry codes of practice (if applicable)
- a summary of the outcome of any consultations and of all relevant submissions received
- reference to all the considerations which should reasonably be taken into account in making a particular decision, including any relevant precedents
- any facts relevant to the particular case
- sufficient information to enable any decision-maker to understand the relevant issues
- identification of options open to any decision-maker
- an assessment of these options, including (if only in summary form) the advantages, disadvantages, costs, and consequences of each option
- an analysis of any financial or other significant implications which are relevant
- one or more recommendations as to the appropriate course of action to be followed (note, any practice of preparing neutral reports should be discouraged).

3. The rule against dictation

Agencies and public officials in management positions should not direct their staff as to the content of any specific advice or recommendations that those staff may make in their own name to the agency or to any decision-maker within it. However, staff may be directed:

- to provide advice or a recommendation on a particular topic or in relation to a particular matter
- as to the content of any advice, recommendation, report, letter or other document to be made by or in the name of the public sector agency or the public official who gives the direction.

Further resources

- Module 7: Complying with law, directions and policies, section 2 Complying with lawful and reasonable directions.

Module 10

Providing quality service

This module provides guidance about:

- Ensuring quality communication
- Ensuring care and attention
- Ensuring timeliness
- Ensuring simplicity
- Respecting privacy
- Managing expectations

Introduction

The primary purpose of public officials is to serve.

Public officials should strive to provide quality service in all that they do. The importance of this principle is now firmly entrenched in NSW as a component of the NSW public sector ethics framework. Its importance as a practical priority for government is also reflected in the establishment of Service NSW, and the appointment of a Customer Service Commissioner.

The meaning of 'quality service' will vary depending on the nature of the service being provided, and the customer or client group. As a general rule, services should be easily accessible, helpful, and delivered in a manner that is timely and understandable. Communication should be accurate, and all dealings should be undertaken in a courteous manner.

The following guidelines have been written principally with the relationship between public officials and members of the public in mind, but they will generally also apply to public officials' relations with other stakeholders such as Parliament, ministers, the government of the day (if applicable), other organisations, and their colleagues.

Responsibilities

Members of the public legitimately expect that the service they receive from all public sector agencies and public officials will be to the best standard that can practicably be achieved. Public officials should provide relevant, responsive and quality service to the public. They should perform their duties in a professional and responsible manner, and treat members of the public fairly, reasonably and consistently, in a non-discriminatory manner and with proper regard for their rights and obligations.

More fundamentally, public officials should recognise the inherent dignity of individuals, and treat all parties to a matter as worthy of care and attention. Dignity is closely related to respect, but differs in fundamental ways. For example, actual respect usually needs to be earned. Dignity, however, is a birthright, as recognised by the preamble to the *Universal Declaration of Human Rights* (proclaimed in 1948):

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Respecting dignity is important in and of itself, and also for practical reasons. Psychological research has demonstrated that people place great importance on how other people view them³⁴ and may become defensive or aggressive if they feel that their dignity is being challenged. Complaints are less likely to arise, and more likely to be resolved swiftly, where individuals feel that their dignity is recognised and respected.

In her book, *Dignity: Its Essential Role in Resolving Conflict*, Dr Donna Hicks identifies what she argues are the ten essential elements of dignity:³⁵

- Acceptance of identity – people need to perceive they are not being negatively judged
- Inclusion – people need to perceive that they belong
- Safety – people need to perceive that they are safe from bodily harm and humiliation
- Acknowledgment – people need to perceive they are getting your full attention
- Recognition – people need to perceive they are appreciated
- Fairness – people need to perceive they are being treated fairly
- Benefit of the doubt – people need to perceive they are trusted
- Understanding – people should believe that what other people think matters
- Independence – people should be encouraged to act on their own behalf so they feel in control of their lives
- Accountability – people need to take responsibility for their actions and to apologise where they have violated another person's dignity.

34. Snyder CR., Higgins RL & Stucky RJ, *Excuses: Masquerades in Search of Grace*, John Wiley & Sons, New York, 1983; Plous S., *The Psychology of Judgement and Decision-Making*, McGraw Hill, New York, 1993; Baumeister RF, 'Lying to Yourself: Enigma of Self-Deception', in Lewis M & Saarni C, 'Lying and Deception in Everyday Life', The Guildford Press, New York, 1993.

35. Yale University Press, 2011, at pp. 25-26.

In certain circumstances it is legitimate for an agency to consider putting appropriate limits on what kinds of service and what types of communication will be available to particular individuals whose behaviour strays beyond acceptable limits. However, it is important for officers to always maintain a calm demeanour, show respect, and to demonstrate impartiality and professionalism, even when dealing with complainants whose conduct is unreasonable. See Module 12: Resolving conflicts and handling complaints.

1. Ensuring quality communication

When providing information to members of the public, public officials should do so promptly, in an appropriate format that is clear and easy for the recipient to understand. Information provided should be current and accurate, and include adequate details about the person's rights and entitlements as well as obligations under the law or any policy.

Courtesy and respect

In performing their official functions and duties, public officials should treat all people with courtesy and respect and should refrain from any form of conduct in the performance of their official or professional duties likely to cause any person unwarranted offence or embarrassment. This includes rudeness.

Public officials should respect the pluralism and cultural diversity of our society and avoid any conduct that is unlawful or unfairly discriminatory. Public officials should be flexible and responsive to people's needs, which may involve modifying the way work is undertaken to accommodate the personal circumstances of individuals (for example when scheduling a meeting with a person whose mobility is limited or to fit in with a person's carer responsibilities).

See also Module 6: Respecting differences, and Module 1: Acting ethically (particularly part 4: Avoiding offence and embarrassment).

Coordination

When staff from one agency are required to work with staff from another agency because of complementary or overlapping functions, steps should be taken to ensure appropriate liaison and coordination (this also applies when people work within different areas of the same agency). It is important that customers are provided with clear and consistent information from each agency and not confusing or conflicting advice. In some circumstances it will be reasonable for a single person or agency to be nominated as a contact point.

Responding to correspondence

Agencies should adopt procedures that:

- ensure correspondence is acknowledged within a reasonable period of receipt
- ensure there is a substantive response to correspondence within a reasonable period after receipt
- provide for telephone responses for routine inquiries which, unless basic or general in nature, are properly recorded on the relevant file
- ensure that if delays in responding are anticipated or occurring, an interim response is provided advising of the delay
- provide that responses include details of the name and contact telephone number of a staff member responsible for the matter
- ensure language used is clear, simple and courteous.

Responding to telephone calls

Telephone contact between agency staff and members of the public gives agencies an opportunity to respond quickly and effectively to inquiries, comments and complaints. Agencies should adopt procedures that:

- ensure telephone calls will be answered within a specified period either in person or by an automated telephone answering system
- require all staff to give their name when answering telephone calls
- require all staff to take responsibility to answer telephones

- require all staff answering telephones to either
 - respond to the call
 - promptly transfer the caller onto the officer who can best respond
 - if the call cannot be responded to, take an appropriate message
- ensure that telephone messages are responded to within a specified period (for example, one day)
- provide for staff to make realistic commitments to respond to calls that cannot be dealt with immediately
- ensure staff honour those commitments or advise callers if they cannot
- ensure that staff will speak clearly and calmly to callers at all times
- ensure that relevant details of all significant calls are recorded either in a file note placed on the relevant agency file or on a customer service database.

Accessibility

In NSW, it is estimated that about one million people have difficulties accessing information provided in written form. Some may not be able to physically hold a publication, others may have difficulty seeing the words (for example, due to vision impairment), while others again may not be able to easily understand written words (for example, due to dyslexia, illiteracy or being unable to read English).

Just like the rest of the NSW public, these people use public services and can be affected by decisions made by the government and by public sector agencies. Public sector agencies should take reasonable steps to provide information to these members of the public in forms that are accessible. For example, correspondence, forms and key publications could be translated into appropriate languages or provided in alternative formats such as large print.

For those public sector agencies that deal directly with the public, making sure that offices and customer service staff are physically accessible is also very important. This includes taking into account the possible needs of those whose mobility is restricted and those with a visual impairment. In deciding where to locate offices, agencies should also consider where their customers live and how they might be likely to travel to those offices (for example, by foot, by public transport). Publications and websites should also comply with accessibility and useability standards as dictated by the requirements of the *Disability Discrimination Act 1992* (Cth).

Case study

A woman relocated to another state with her daughter, who had a disability. They had both been victims of assault and a home invasion. The woman now needed money urgently to pay outstanding bills. She contacted a government victim support agency seeking financial help, but after a series of emails and phone calls no-one got back to her. In the meantime, because she was unable to pay her phone bill, her phone service was cut off.

After the woman made a formal complaint, the government agency reviewed her case and noted she had made two separate applications for assistance. One of these had already been determined, making her eligible for compensation as a victim of crime. To meet her immediate financial need, the agency arranged for the victims compensation funds to be deposited into the woman's bank account, while they considered her application for emergency relocation expenses. In view of the earlier failure to respond to her emails and phone calls, it also made a small ex gratia payment to allow her to pay her phone bill and have her phone service restored. Finally, it apologised to her for the earlier delays and the resulting stress and hardship.

2. Ensuring care and attention

Public officials must exercise reasonable care and attention in the performance of their duties and the exercise of their powers, and the standard of work performed should reflect favourably on the agency and the government.

The standard of care required in giving information and advice to members of the public will depend on factors such as the nature of the matter at hand, the use to which the information is to be put and the possible consequences of incorrect information or advice. A failure to exercise reasonable care, including reasonable skill and diligence, may make an agency liable if the person to whom the negligent advice is given thereby suffers economic loss.

3. Ensuring timeliness

Public officials should carry out their official functions and duties in a reasonable timeframe without undue delay, and in accordance with any statutory deadlines that may apply.

Case study

A woman applied for housing assistance after a serious domestic violence incident. The application was rejected, so she applied to the relevant government department for a review of this decision. Under the department's client service delivery and appeals policy, staff should have completed the review within 20 days. However, eleven weeks passed without a decision being made.

After leaving several phone messages during this time without a response, the woman made a complaint to an oversight body. She expressed concern that the delay in conducting the review was putting her at further risk of domestic violence.

The oversight body made inquiries with the department, which acknowledged the delay and identified a large backlog in handling review applications. It made a written apology for the delay and determined her review application. Staff from the department also met with the complainant and her legal representative to ensure the reasons for the decision were explained.

4. Ensuring simplicity

All policies, procedures, rules, authorisations, guidelines and the like that are intended to have some impact on the rights or interests of members of the public should be 'user friendly' and easy to understand.

Comprehension

Agencies and officials are constantly involved in the provision of a wide range of advice and other information to their customers or to the community generally.

Agencies should commit to providing this information in a form that helps the likely recipients to understand and act upon it. In particular, standard information such as brochures, notices and forms should be designed with careful regard to the comprehension skills of the target audience.

Correspondence with the public, and forms used by agencies and public officials, should be written in plain English using simple terms and easily understandable formats. The purpose and meaning of each letter and form should be clear. 'Legalese' and technical language should be avoided.

Straightforward procedures

Agencies should ensure that all procedural requirements that impact on members of the public are as straightforward as possible. They should, for example, contain the minimum number of steps necessary to achieve intended outcomes, and those steps should be as simple as possible.

Titles and names

The names of public sector agencies and their various component units, and the position titles of public officials who deal with the public, should be self-explanatory, reflecting clearly and simply their main function.

5. Respecting privacy

Under NSW privacy law, personal information means any information or opinion that allows an individual to be identified. The laws regulating the collection, storage, use and distribution of such information apply to NSW public sector agencies, public and private health practitioners and certain businesses in NSW. The *Privacy and Personal Information Protection Act 1998* (PIIP Act) applies to NSW public sector agencies, while the *Health Records and Information Privacy Act 2002* (HRIP Act) applies to public sector agencies, public/health practitioners and certain businesses handling health information.

Personal information and health information about members of the public that public officials have access to or have become aware of in the course of exercising their official functions should not be:

- collected, used or disclosed in contravention of the PIIP Act, the HRIP Act or any Privacy Code of Practice made under either Act
- misused (for example, used for the personal purposes of a public official, or for any other purpose which conflicts with the purpose for which the information was generated or obtained)
- unlawfully, unreasonably or improperly disclosed.

The PIIP Act sets out 12 Information Protection Principles (IPPs) which regulate the way public sector agencies must deal with personal information. Similarly, the HRIP Act sets out 15 Health Privacy Principles (HPPs) which regulate the way health information must be dealt with. The principles regulate the collection, storage, access and accuracy, use, disclosure, identifiers and anonymity, transferrals and linkage of personal information and health information.

The Acts require that public sector agencies must not do anything, or engage in any practice, that contravenes an information protection principle or health privacy principle applying to the agency.³⁶

The PIIP Act also regulates the use of information held on public registers. Information on public registers must only be disclosed if the intended use is consistent with the purpose for which the register was established. Individuals have a right to request that their information be suppressed if they have concerns about their safety.³⁷

If a person believes that a public sector agency has used their personal information or health information in a manner which breaches his or her privacy, he or she may request an internal review by that agency.³⁸ Agencies must notify the Privacy Commissioner of the progress of this internal review and of the findings and proposed actions. If the person is not satisfied with the outcome of the review he or she may seek a further review by the NSW Civil and Administrative Tribunal.³⁹ It is important to note that there are criminal penalties for public sector officials who corruptly use or disclose personal information or health information obtained in the course of their employment.⁴⁰ In addition, anyone who induces or attempts to induce a public sector official to corruptly disclose personal or health information⁴¹ or anyone who offers to supply or holds him or herself out to supply personal or health information which has been corruptly disclosed is guilty of an offence under the relevant Act.⁴²

Members of the public are able to access and request amendments to the personal or health information held by an agency about them.⁴³

A public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.

The Privacy Commissioner has the power to make a Public Interest Direction to waive or modify the requirement for a public sector agency to comply with an information protection principle and health privacy principles.⁴⁴ One such direction is the Direction on Processing of Personal Information by Public Sector

36. s21(1) PIIP Act, s11(3) HRIP Act.

37. Part 6.

38. Part 5 of the PIIP Act (s53 PIIP Act, s21 HRIP Act).

39. s55 of the PIIP Act.

40. 62(1) PIIP Act, s68(1) HRIP Act.

41. s62(2) PIIP Act, s68(2) HRIP Act.

42. s63 PIIP Act, s69 HRIP Act.

43. ss14 and 15 of the PIIP Act and Health Privacy Principles 7 and 8 in Schedule 1 to the HRIP Act.

44. s41 PIIP Act and s62 of the HRIP Act.

Agencies in relation to their Investigative Functions. This direction allows for public sector agencies to disclose personal information if it is reasonably necessary to enable the reporting on the progress and outcome of a complaint to a complainant (s 6AAA of the *Protected Information Disclosures Act 1994* (PID Act)). However this discretion does not apply to 'health records' as defined in s 6 of the HRIP Act).

6. Managing expectations

The satisfaction felt by consumers will be determined not only by the objective quality of the service but also by how well the service meets their subjective expectations.

Customers, in general, tend to judge the quality of most services along five key dimensions. Agencies need to perform well on all these dimensions to maximise customer satisfaction with their service:

- tangibles – the physical appearance of agency offices, personnel and communication materials
- reliability – the ability to perform the promised serviced dependably and accurately
- responsiveness – the willingness to help the customer and provide a prompt service
- assurance – the knowledge, credibility and courtesy of agency staff and their ability to convey trust and confidence
- empathy – the ability to provide caring, individualised attention to the consumer which involves recognising their needs, being approachable and communicating well with them.

Ways to manage customer expectations

Ways agencies can manage customer expectations include:

- clearly communicating the functions, services and processes of the agency using a variety of communication devices such as newsletters, brochures, audio recordings, website, reports, open meetings (and formats appropriate for the target audience)
- advertising the service standards that the agency can deliver and acknowledge any limitations or problems with its service
- staff checking that they have understood a customer's request before taking action
- staff being up front about what they or the agency can do and what they cannot do for a particular customer (promises that cannot be fulfilled should not be made)
- staff and the agency being open to complaints about agency service
- seeking and using customer feedback to continually review agency service provision to work out ways to meet expectations and maximise satisfaction.

Of course, public officials often deal with members of the public in situations which differ markedly from classic customer relations. The insights of the body of research known as 'organisational justice theory' or 'justice theory' are relevant here. Justice theory has shown that parties to a dispute care as much about how their dispute is resolved as they do about the outcomes they achieve. Where people believe they have been fairly treated, they are much more likely to accept a decision or outcome even if the substance of the decision is not in their favour.

In the enforcement area, it has been shown that when regulators use procedures that are seen to be fair when making decisions and implementing laws, they are much more likely to achieve positive compliance outcomes.⁴⁵ Similarly, people are more likely to adhere to agreements that are made using procedures that are perceived to be fair.⁴⁶

Justice theory holds that there are four dimensions to any decision-making process which affect whether people perceive that they have been fairly treated:

- Decisions – the perceived fairness of the outcomes of the decision-making process. The focus is on the perceived fairness of:
 - any decision to take no action
 - the findings arising out of any investigation as to whether allegations are substantiated or not

45. See Tom R Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

46. Pruitt et al, 1993, 'Long-term success in mediation', *Law and Human Behaviour* 17:313-330.

- any recommendations
- any decisions.
- Procedures – the perceived fairness of processes/procedures used to make decisions, resolve conflicts and/or reach outcomes, that is, the means by which decisions are made
- Treatment – the perceived fairness of the treatment of the individual concerned. The focus is on demonstrated:
 - respect
 - empathy
 - concern
 - responsiveness
 - honesty, etc.
- Information – the perceived fairness of the information provided to the person about the procedures used and the decisions made. The focus is on whether the information provided in relation to key decisions made is:
 - adequate
 - accurate and truthful
 - understandable
 - timely.

In performing their official functions and duties, public officials should keep the insights of justice theory in mind. More broadly, perceptions of fairness in relation to treatment are likely to be based on assessments people make of such things as whether:

- they and their views were treated politely and respectfully, including for example whether they perceived attentive listening and/or an attempt to understand their perspective
- they perceived that there was an attempt to understand the impact on them of the decision or conduct
- improper questions were asked and prejudicial statements made
- staff appear to have 'put themselves out' to solve a service problem
- adequate explanations were given for a decision/outcome
- realistic and accurate information was provided about a decision/outcome and how it was reached.

Further resources

- **Public Service Commission**, *Behaving Ethically: A guide for NSW government sector employees*. Available online at <http://www.psc.nsw.gov.au/view.aspx?ArticleID=1481>. See especially section 3.8, Customer service standards.
- **NSW Ombudsman**, *Service Provision Expectations*. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/state-and-local-government/service-provision-expectations>
- Further information about privacy can be obtained from the Information and Privacy Commission at www.ipc.nsw.gov.au. In particular, the Information Protection Principles (IPPs) explained for the public sector and the Health Privacy Principles (HPPs) guidance for agencies and organisations publications.

A number of memoranda of historical interest are:

- **Department of Premier and Cabinet**, C1996-08 Quality Customer Service-Further Implementation. Available online at <http://arp.nsw.gov.au/c1996-08-quality-customer-service-further-implementation>
- Two other relevant memoranda, Premier's Memorandum 1994-45 and Premier's Department Circular 1995-25, are no longer available online.

See also Module 12: Resolving conflicts and handling complaints.

Module 11

Acting fairly

This module provides guidance about:

- Implementing policies and procedures consistently
- Providing procedural fairness
- Correcting mistakes
- Apologies
- Providing redress for maladministration
- Explaining denials of liability

Introduction

Public officials are often called upon to make difficult decisions, for example in which different legitimate rights and interests are balanced against each other, or under circumstances where legitimate interests have been adversely affected due to mistakes or maladministration.

When public officials act reasonably and are seen to act fairly, those affected by their decisions are more likely to accept them even when they do not get the outcome they want. When a process is perceived to be fair and appropriate, then a negative outcome for the person affected by the decision will not necessarily mean a negative perception of the decision-maker.⁴⁷

Responsibilities

It is widely recognised by academics and practitioners alike that parties to a dispute care as much about how their disputes are resolved as they do about the outcomes they achieve. There is now a large body of theoretical and empirical research into this area, which is usually known as 'organisational justice theory' or 'justice theory'. This research shows that public officials should act reasonably, and ensure that they are seen to act fairly, in relation to four aspects of the decision-making process:

- decisions – the perceived fairness of the outcomes of the decision-making process 'distributive justice'
- procedures – the perceived fairness of the process used to make decisions 'procedural justice'
- treatment – the perceived fairness of the treatment of the individuals concerned 'interpersonal justice'
- information – the perceived fairness of the information provided to explain the procedures used and the outcome 'informational justice'.

These insights are relevant to all the other modules in these guidelines. This module focuses on a number of specific issues where the principles are relevant, but which are not covered elsewhere.

1. Implementing policies and procedures consistently

Public officials and agencies should ensure that policies and procedures are implemented consistently, unless the merits of the particular case justify a different approach.

It is important that decision-makers ensure that decisions are consistent with government policy, internal policies, established practice, and other relevant codes or guidelines, unless there are justifiable grounds for taking another course of action within the scope of that discretion.

However, there will be occasions where there are justifiable grounds for not following policies, practices, codes or guidelines. Policies should not be applied rigidly without proper consideration of the particular circumstances and merits of each individual case. Neither public sector agencies nor public officials should improperly fetter or restrict their discretion.

Where an agency, with good reason, departs from a consistent application of a policy, the departure should be documented. This departure does not create a precedent which is binding on the agency. Such decisions are relevant and important considerations, but are not binding.

Conversely, where an agency frequently departs from or ignores a policy, the policy would seem to have little weight or relevance and needs to be reviewed.

2. Providing procedural fairness

The rules or principles of procedural fairness (also known as natural justice) must be observed by public officials when exercising statutory powers which could affect the rights, interests or legitimate expectations of individuals.

47. While the title of this module is 'Acting fairly' it is important to note that in the context of public administration, applying the terms 'fair' and 'reasonable' is fraught with difficulties. There is no clear exposition of, or even general consensus about what constitutes 'morally right' conduct or 'accepted standards of conduct' and the concepts of fairness and reasonableness are assessed differently, for example, by members of the public, courts and Ombudsman. See Chris Wheeler, 'What is 'fair' and 'reasonable' depends a lot on your perspective', *Australian Journal of Administrative Law*, 22/1, November 2014, pp. 63-76.

The rules of procedural fairness are:

- the notice rule (often referred to as an aspect of the hearing rule) – any person likely to be affected by a decision must be given notice of the issues in sufficient detail to be able to respond meaningfully
- the hearing rule – any person likely to be affected by a decision or action must be given an opportunity to respond to adverse material, such as proposed adverse comment and/or recommendations
- the rule against bias – the people investigating an allegation, preparing a case or making a decision must act impartially in considering the matter
- the no evidence rule – there must be some logically probative evidence to support conclusions, findings and recommendations – i.e they need to be based on some logical proof or material evidence.⁴⁸

In assessing whether administrative procedures were fair and reasonable, Ombudsmen go further than the courts. They take the view that fair procedures⁴⁹ involve compliance with five basic principles:

- adequate hearing – that any person likely to be detrimentally affected by a decision or action is given an adequate opportunity to respond to proposed adverse comment (equivalent to one limb of the hearing rule of procedural fairness)
- adequate notice – to inform any person whose rights or interests are likely to be detrimentally affected by a decision or action of the issues they need to respond to (the other limb of the hearing rule of procedural fairness)
- absence of bias – the people investigating an allegation, preparing a case or making a decision must be, and be seen to be, impartial (equivalent to the rule against bias of procedural fairness)
- adequate evidence – there must be logically probative evidence to support conclusion, findings, recommendations and decisions (this is a much broader concept than the no evidence rule of procedural fairness, but closer to the broad interpretation now given to the concept of unreasonableness by the High Court⁵⁰)
- adequate reasons – that reasons should be given to explain decisions that adversely affect a person's rights or interests (there is no equivalent common law rule of procedural fairness in Australia, unlike the position in some other common law countries).

Procedural fairness can be relevant to:

- how information is collected
- how information is used
- how people affected are given notice of the allegations and the opportunity to be heard (to check the accuracy of the information, protect their rights, and influence the outcome)
- how the investigator/interviewer/presiding officer communicates with a person being questioned.

The courts have emphasised the need for flexibility in the application of the rules of procedural fairness, depending on the circumstances of each individual case. Procedural fairness may require a decision-maker to:

- inform any person
 - whose interests are or are likely to be adversely affected by a decision, about the decision that is to be made and any case they need to make, answer or address
 - who is the subject of an investigation (at an appropriate time) of the substance of any allegations against them or the grounds for any proposed adverse comment in respect of them
- provide such people with a reasonable opportunity to put their case, or to show cause, whether in writing, at a hearing or otherwise, why contemplated action should not be taken or a particular decision should or should not be made
- consider those submissions

48. The legal status of these rules, and particularly the 'no evidence' rule, is somewhat complicated. Australian courts have suggested that there are only two rules of natural justice/procedural fairness: the bias rule and the hearing rule. From this perspective, the notice rule is sometimes seen as part of the hearing rule. In the case of *TCL Air Conditioner (zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014)* the full Federal Court stated that 'there has been no authoritative recognition of the 'no evidence rule' as part of the rules for natural justice' [149]. However the court did note that 'there is no doubt that at common law it is an error of law to make a finding of fact for which there is no probative evidence'. It then stated that 'once there is some evidence that could support a finding: any error can be seen as factual, not legal' [82]. In addition, making a decision on the basis of insufficient evidence can be a basis for a court overturning a decision on the grounds of jurisdictional error. This may occur, for example, where the Act conferring the authority to make the decision requires decision-makers to satisfy themselves of certain facts, and a decision-maker gathers insufficient evidence to justify a decision on the relevant fact. Thus, while Australian courts recognise that evidence is a significant part of the decision-making process, they differ from New Zealand and UK courts on the question of whether the 'no evidence rule' counts among the rules of procedural fairness in the strict sense. Despite these legal technicalities, the principles discussed here are relevant to good administrative decision-making, and should be observed by all public officials.

49. Not to be confused with the common law concept of 'procedural fairness'.

50. See *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

- make reasonable inquiries or investigations and ensure that a decision is based upon findings of fact that are in turn based upon sound reasoning and relevant evidence
- act fairly and without bias in making decisions, including ensuring that no person decides a case in which they have direct interest, and
- conduct an investigation or address an issue without undue delay.

While a person who is the subject of an investigation should be informed of the substance of the allegations against them and proposed adverse comment, this does not require all the information in the investigator's possession supporting those allegations to be disclosed to that person. Indeed, in practice it may damage the effectiveness of the investigation to show the investigator's hand completely by providing all information to the person who is the subject of complaint prior to all lines of inquiry being explored.

When should the rules of procedural fairness be observed?

There is a presumption in law that the rules of procedural fairness must be observed in exercising statutory power that could affect the rights or interests of individuals. However, it is good practice to observe these rules whether or not the power being exercised is statutory.

In rare cases there may be an overriding public interest in short-circuiting procedural fairness requirements. This will normally be in situations that involve serious risks to personal safety or where substantial public funds may be at risk. In these cases, expert external advice should always be sought and documented.

If action being taken by a public official, or by or on behalf of a public sector agency, will not directly affect a person's rights or interests, there is no obligation to inform the other person of the substance of any allegations or other matters in issue. For example, if an investigator is merely collecting information to make a report to the management of an agency so that action can be taken, there is no obligation to notify the subject of the complaint. However, if an investigation will lead to findings and recommendations about the matter, the investigator should provide procedural fairness to the person against whom allegations have been made. Similarly, the person who ultimately makes a decision on the basis of the investigation report must also provide procedural fairness, by allowing the person adversely commented upon to make submissions regarding the proposed decision and sanction.

Benefits for people whose rights or interests may be affected

Procedural fairness allows people, whose rights or interests that may be affected by decisions, the opportunity to:

- put forward arguments in their favour
- show cause why proposed action should not be taken
- deny allegations
- call evidence to rebut allegations or claims
- explain allegations or present an innocent explanation
- provide mitigating circumstances.

Benefits for investigators and decision-makers

While procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected, an investigator or decision-maker should not regard such obligations as a burden or impediment to an investigation or decision-making process. Procedural fairness can be an integral element of a professional decision-making or investigative process – one that benefits the investigator or decision-maker as well as the person whose rights or interests may be affected.

For an investigator or decision-maker, procedural fairness serves a number of related functions:

- It is an important means of checking facts and of identifying major issues.
- The comments made by the subject of the complaint or the interested party may well expose any weaknesses in an investigation, decision-making process or information on which a decision is to be based, which avoids later embarrassment.
- It also provides advance warning of the basis on which the investigation report or administrative decision is likely to be criticised.

3. Correcting mistakes

Public officials and agencies should correct any mistakes, errors, oversights or improprieties (whether personal or organisational) of which they become aware. This should be done promptly and voluntarily.

There are also statutory obligations that apply in relation to the correction of information concerning a person's 'personal affairs' under the *Government Information (Public Access) Act 2009* (s 54 and s 55) and 'personal information' under the *Privacy and Personal Information Act 1998* (s 15).

See also Module 10: Providing quality service, especially Part 5 Respecting privacy.

Case study

A woman was pulled over by police and fined a large amount for driving an unregistered vehicle, even though she had already attended a motor registry and renewed her motor vehicle registration.

The woman phoned the agency responsible for registering her vehicle. A staff member made inquiries and found that an incorrect registration expiry date had been entered on the system, when the woman had registered her car. Although the staff member acknowledged that the agency itself had made an administrative error, he also said her only option was to elect to have the matter heard in court.

The woman then made a formal complaint. After reviewing the matter fully, the agency agreed that it was unfair to require the woman to go to court, when the agency's own error had caused the problem. As a result the agency contacted the Police Prosecutor to explain the error on their part and – after this simple step – the matter was withdrawn from court.

4. Apologies

When things go wrong, many complainants demand no more of an agency or its representatives than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology.

Where an apology is warranted it can have a great impact if given immediately and in a sincere manner. Even if an apology is not warranted, the act of apologising can be a potent way to appease an aggrieved person. Regardless of who is in the wrong, a prompt and sincere apology for any mistakes or misunderstandings is likely to work wonders. It often will avoid escalation of a dispute and the significant cost in time and resources that can be involved.

It is usually appropriate for a public official to give a prompt and genuine apology if a member of the public has been given wrong information, or provided with poor service or where the conduct of the public official falls within the domain of maladministration.

Are apologies an admission of liability?

In most cases, apologies are not admissions of liability in the legal sense. People in NSW can usually make a full apology for any harm they have caused without prejudicing their legal position in any subsequent or related legal proceedings. However, special circumstances apply in a case of alleged defamation (referred to below).

In the past, public sector agencies and public officials were reluctant to apologise as this could be taken as an admission of liability leaving them open to action through the courts from people seeking compensation. This situation changed with the commencement of amendments to the *Civil Liability Act 2002* (the Act) on 6 December 2002.

Part 10 of the Act provides that an apology (including an expression of sympathy or regret) does not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind nor can it be admitted into evidence in a court hearing as evidence of fault or liability (other than the categories of liability listed in section 3B of the Act).⁵¹

51. Per John Kleefeld, 'Thinking Like a Human: British Columbia's Apology Act' [2007] *UBC Law Review*, 40, 798-799.

Specifically, it states (s 69):

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:

- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
- (b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

In the second reading speech for this Act in the Legislative Assembly, the Premier explained the benefits of an apology and explained the rationale for this protection:

An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court. (Hansard, Legislative Assembly 23 October 2002)

While an apology can no longer be used in court in most circumstances to prove fault or liability on the part of the person making the apology, on the other hand, the giving of an apology does not absolve a person or body from any potential liability. The Act recognises, however, that an apology is a positive action that can actually go some way towards remediating the hurt suffered by an injured person and their family.

How should an apology be worded?

An apology is defined in the Act as:

an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter (s 68).

There are many different ways to make an apology. The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the detriment suffered, and what is hoped to be achieved by giving the apology (for example, restoration of reputation, acknowledgement of the wrong done, reconciliation, assurance that a problem has been addressed or will not recur).

The most effective apologies are given promptly and sincerely, and incorporate the following elements:

- scope – a description of the relevant act or omission to which the apology applies
- detriment – recognition that the affected person has suffered some detriment (which could include embarrassment, damage or loss) and acknowledgement of the types of detriment suffered (including both detriment immediately caused by the act or omission and any consequential detriments)
- cause – an explanation as to how the act or omission came about⁵²
- responsibility – an acceptance of fault, responsibility or accountability (which could include a statement as to whether the act or omission was discretionary or unintentional)
- apology – an expression of sorrow, sympathy or regret or of a general sense of benevolence or compassion
- action taken or proposed – the statement of the action taken or specific steps proposed to address the grievance or problem and to ensure it will not recur.⁵³

In the limited circumstances (discussed below) where the protections of the Act do not apply to an apology, it may still be appropriate to offer an expression of sympathy or regret.

52. Care should be exercised in relation to any statements as to how an act or omission occurred because, although the protection extends to the apology and information conveyed in the apology would not therefore be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

53. In proceedings relating to liability for negligence, the subsequent taking of action that would (if taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk or constitute an admission of liability in connection with the risk (s5C of the Act).

What apologies are not protected by the Act?

The protection under the Act does not apply to all civil proceedings. Part 10 of the Act does not apply to a number of causes of civil liability that are excluded from the operation of the Act by section 3B.

The types of civil liability that are not covered by the protection for apologies can be briefly summarised as liabilities for:

- an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- the contraction of a dust disease
- personal injury allegedly caused by smoking or the use of tobacco products
- economic loss, non-economic loss or psychological/psychiatric injury to an injured person and liability for the compensation of relatives of a deceased person that arises
 - from a motor accident (or transport accident as defined in the *Transport Administration Act 1988*) to which the *Motor Accidents Act 1988* applies
 - from a motor accident or public transport accident to which the *Motor Accidents Compensation Act 1999* applies
- damages payable by an employer for the injury of a worker or the death of a worker resulting from or caused by an injury
- compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or for a benefit payable under the *Sporting Injuries Insurance Act 1978*.

Although the range of exclusions from the operation of the apologies provisions of the Act appears at first glance to be extensive, in practice the exclusions have little relevance to the vast majority of the day-to-day interactions between public officials and members of the public.

Neither public officials nor agencies should apologise in relation to any matter that falls (or is thought to fall) into any of the categories listed in section 3B without first obtaining legal advice. This is because an apology provided in such a matter may act as an admission of liability and may therefore breach a contract of insurance held by the agency. When legal advice is sought by an agency in such circumstances, the agency should clearly ask its legal adviser to consider whether a 'without prejudice' offer of an apology could still be made, as it may facilitate an agreement between the parties that settles the matter.

Where even an expression of sympathy or regret is considered too sensitive to issue, subject to legal advice, a statement could still be offered that:

- describes or explicitly acknowledges the grievance or alleged problem (but only in general terms without referring to causation or acknowledging liability)
- states the action taken or the specific steps that are proposed to help address the grievance or alleged problem.

Apologies in relation to defamation

An apology may be made in circumstances where a member of the public alleges that they were defamed. In such cases, however, an apology should not be made until an agency has obtained legal advice as there are many technical issues that apply, and the manner and expression of the apology can affect any potential future proceedings.

5. Providing redress for maladministration

Agencies have a duty to provide appropriate redress where members of the public have been detrimentally affected by maladministration. This moral duty is owed whether or not someone has complained to the agency, to the Ombudsman, or other relevant watchdog agency, and whether or not they have a strict legal entitlement to redress.

The issue was addressed in the *Report on Parliamentary Oversight and Accountability*, prepared for the South African National Assembly by the Faculty of Law, University of Cape Town in July 1999, in the following terms:

Accountability can be said to require a person to explain and justify their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its re-occurrence in the future ...

The obligation to address grievances by taking steps to remedy defects in policy or legislation can be termed 'amendatory accountability' [as opposed to 'explanatory accountability' which requires the giving of reasons and an explanation for action taken] ...

Amendatory accountability refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered ... This means that remedial action should be authorised for exposed errors, defects of policy or mal-administration.

Agencies also have an obligation to act fairly and reasonably when dealing with members of the public who have suffered detriment arising out of maladministration. By their nature and powers, public sector agencies are in a different position to private sector agencies. It is not appropriate for agencies to take advantage of their relative position of strength (for example in relation to resources, powers, knowledge and the like) to avoid or reduce their potential liability and any obligation to provide redress. Public sector agencies should be model litigants.

Nature and scope of redress

Agencies should take appropriate steps to rectify a situation where, because of maladministration, the agency:

- has directly caused detriment to a person
- has failed to provide a benefit or entitlement to a person who is entitled to receive it, or in relation to whom the agency has a legal obligation to provide it
- has failed to perform a statutory duty and this has allowed or caused detriment to a person, or
- would likely be found liable at law to pay damages or compensation (if all information known to the agency was placed before the court or tribunal).

Options for redress can be grouped into the following categories:

- communication with the person who has suffered detriment as a result of maladministration, which may involve
 - explaining what went wrong,
 - giving reasons for decisions (a model approach to accountability would also include making available to the person who has suffered detriment, all relevant information in the possession of the agency, on request)
 - giving an apology (as discussed in Section 4 above),
- rectification (acting to correct the original action or inaction), which may involve reconsidering the conduct and taking action that should be taken, stopping action that should not have been started, ensuring compliance with the law or policy, or correcting records that are inaccurate
- mitigation of the adverse consequences of maladministration, which may include ceasing action that has caused detriment, repairing physical damage to property or the environment, replacing damaged or lost property, refunding fees or charges, or waiving fees, charges or debts
- satisfaction of the reasonable concerns of the person who has suffered detriment through non-material means, which may include actions of a symbolic nature such as an apology on behalf of the agency (discussed in Section 5 above), public acknowledgments of the wrong done, or the entering into of undertakings to take action or to ensure that the conduct will not occur again
- compensation for the detriment sustained, which may involve restitution for loss or damage to property, injury or damage to health, reimbursement for costs incurred arising out of the maladministration, or an ex gratia payment.

When considering options for redress, agencies can legitimately take into account other countervailing public interests. For example, circumstances in which it may not be appropriate to communicate all information in the agency's possession might include:

- where an agency or government-owned entity is operating commercially in a commercial environment (i.e it has no regulatory powers or public policy objectives)
- where disclosure would detrimentally affect public safety
- where disclosure would clearly be contrary to the public interest.

Ethical principles underpinning redress

Ideally, redress should put a person in the position that they would have been in had the maladministration not occurred. This will not always be practicable, however, particularly where the detriment is not amenable to financial quantification. In such cases, the person should be offered other options aimed at satisfying their legitimate concerns in ways that are reasonable and fair to all parties.

An agency is much more likely to have the confidence of its customers and the public if it listens to complaints and moves quickly to resolve or deal with them appropriately. Redress should therefore be fair and reasonable, provide a comprehensive resolution of the issue, be properly responsive and procedurally sound, and be provided in a timely manner. It should also be:

- appropriate and proportionate to the detriment caused by the maladministration
- fair to both the person detrimentally affected and the agency concerned (having regard to the circumstances).

Ethical principles that agencies should adhere to in providing redress include:

- offers of compensation to people detrimentally affected by maladministration should be calculated on the basis of what is fair and reasonable in the circumstances, and an agency should not take advantage of its relative position of strength in an effort to minimise payments (i.e the public interest in holding the state accountable for its actions, particularly where those actions have caused detriment to private individuals, should override the public interest in protecting the public resources/revenue)
- people detrimentally affected by maladministration should be provided with adequate information on the details of any offer and the reasons for the agency's decision to accept, partially accept or reject their claim
- people detrimentally affected by maladministration should not be required to waive their rights where only partial settlement is made
- agreements made in ignorance of the detrimentally affected person's rights are not fair or reasonable, and may not be valid.

Seeking legal advice concerning redress

Fairness and reason dictate that decisions concerning redress are not based solely on legal considerations.

Where agencies seek legal advice on whether to provide redress, or the nature and scope of the redress that should be offered, it is important that agencies make clear to their legal advisers (whether in-house or external) that what is being sought is an objective opinion not a 'best defence' to legal liability. Decision-makers should not base their decisions on narrow interpretations of the law, or on legalistic or overly technical grounds, with little or no consideration being given to the context and merits of each individual case, see Module 17: Obtaining legal advice and initiating legal proceedings.

6. Explaining denials of liability

People who make liability or insurance-related claims against government agencies are entitled to be given an adequate statement of reasons when their claims are rejected. Agencies with public liability claims made against them should ensure that they are properly and fairly dealt with and that claimants are quickly given meaningful answers to their claims.

Agencies' insurers will sometimes decide to reject claims. Under these circumstances, agencies should not necessarily accept without question their insurers' decision, particularly when the decision is made more on the basis of an estimation of the claimant's likelihood of pursuing the matter through litigation than on any objective evaluation of whether or not the claim is justified. Where decisions not to accept a claim stand, agencies should ensure their insurers give accurate, comprehensible explanations and reasons to claimants.

Further resources

- **NSW Ombudsman**, *Options for Redress – Guidelines for redress for detriment arising out of maladministration*, available online at www.nswombo.nsw.gov.au/publications/Publist_pdfs/guidelines/Redress.pdf
- **NSW Ombudsman**, *Apologies – A practical guide*, available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/apologies-2nd-ed>
- **NSW Ombudsman**, *Options for Redress* available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/options-for-redress>
- **NSW Ombudsman**, *The Complaint Handlers Tool Kit*, available online at http://www.ombo.nsw.gov.au/__data/Fassets/pdf_file/0017/5813/BR_Complaint-Handling-Kit-CS-CRAMA-Brochure-2013-web.pdf
- **NSW Ombudsman**, *Investigating Complaints – A manual for investigators*, available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/investigating-complaints-a-manual-for-investigators>
- **NSW Ombudsman**, *Justice Theory, Compliance with accepted standards of conduct and decision-making - 9 November 2012*, available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/speeches/speeches-by-the-deputy-ombudsman-chris-wheeler/201211-justice-theory-presentation-compliance-with-accepted-standards-of-conduct-and-decision-making>
- For further information about the development of procedural fairness in the courts, see *South Australia v O'Shea* in 1987; *Annetts v McCann* in 1990; and *Ainsworth v Criminal Justice Commission* in 1991.

Module 12

Resolving conflicts and handling complaints

This module provides guidance about:

- Resolving conflicts
- Understanding complaints
- Dealing with anonymous complaints
- Managing unreasonable conduct by complainants
- Protecting complainants.

Introduction

Public officials have a duty to ensure high quality provision of goods and services, and to ensure individuals are treated with courtesy and respect. However, errors, misunderstandings, client dissatisfaction and unexpected problems occur in all administrative systems.

When problems arise it is important that they are dealt with in a timely, efficient and transparent manner. Having clear systems in place will help to ensure that conflicts and complaints are resolved in a lawful, fair, reasonable and appropriate way.

Responsibilities

1. Resolving conflicts

It is in the interests of all concerned that public officials and agencies attempt to resolve disputes in the most timely and cost effective manner and, where possible, without recourse to the courts.

Public officials should, in the first instance, seek to resolve difficulties, disagreements or disputes by discussion, provision of information (for example, about policies, procedures and practices and decisions affecting complainants), negotiation, mediation or conciliation wherever appropriate.

Agencies should embrace policies that use or encourage alternative dispute resolution methods as an alternative to litigation involving the agency. Agencies should also be prepared to use alternative dispute resolution methods as an alternative to prosecution action in appropriate cases.

2. Understanding complaints

A complaint is any expression of dissatisfaction:

- made to or about an organisation which relates to its services or service quality, decisions, policies, procedures, charges or fees, employees, or the complaint-handling process itself
- where a response or resolution is explicitly or implicitly expected or legally required.⁵⁴

The reason for a complaint may not always be clear at first. It is important for public officials to find out precisely why a person is unhappy and what outcome they are seeking.

When people complain they want to:

- feel secure
- be listened to (patiently)
- be heard, but not judged
- have their point of view understood
- be treated with respect and courtesy, and as an individual
- be provided with an explanation
- have corrective action taken as soon as possible
- be kept up to date while action is happening
- be given an apology (if relevant and appropriate)
- be compensated (if relevant and appropriate)
- be treated fairly
- make sure the problem never happens again.

Complaints, if handled well, are integral to good organisational governance. They provide information about the effectiveness of services and help to identify aspects of service provision that need to be improved. By responding positively to complaints, an organisation can improve the quality of its services, provide better information about its services, and identify the level of client satisfaction and dissatisfaction about the services it provides.

54. Based on Australian/New Zealand Standard AS/NZS10002-2014: *Guidelines for complaint management in organizations*.

To achieve this, agencies need a complaint-handling system which is supported by clear practical policies and procedures that guide staff in their day-to-day handling of complaints and reinforce the agency's commitment to continuous service improvement and client satisfaction. An agency's policies and procedures should incorporate a three-tiered approach to complaint-handling.

- Level 1 – frontline staff must be adequately equipped to respond to complaints with a view to early resolution wherever possible. This includes being given appropriate authority and delegation, training and supervision. They should have clear guidance as to the complaints which need to be escalated to Level 2.
- Level 2 – internal review of the frontline complaint handling should occur when a complainant is dissatisfied with the process and/or outcome, and enables alternative dispute resolution or investigation of serious or complex complaints.
- Level 3 – external review will be undertaken when matters have not been able to be resolved within an agency. A matter may be referred for alternative dispute resolution, or to an external agency (e.g. the Ombudsman).

Frontline complaint handling

In order to handle complaints effectively, frontline staff need to know how to:

- value the complainant and endeavour to understand their needs
- communicate respectfully, courteously, impartially and honestly
- not take the complainant's anger or frustration personally
- listen effectively and ask the right questions
- express concern and have empathy
- ensure the complaint process is easy to access and understand
- give as much information as possible in all verbal and written communication about the complaint-handling process and outcome.

To manage complainant expectations, public officials should:

- explain the complaint-handling process to the complainant
- ask complainants if they have particular requirements for communication or other measures to ensure the process is accessible to them
- find out what the complainant wants done – if their expectation cannot be met (or is unlikely to be met) tell them at the outset
- confirm with them that you have fully understood what their complaint is about and what they want to happen
- outline the possible outcomes – let them know the limitations of your powers
- provide realistic timeframes for dealing with the matter and provide regular updates where the matter is protracted
- make sure you follow through on any promises made to redress wrongs or improve the system, process, procedure or service.

Investigation

'Investigation' is a generic term to describe a fact-finding process. Any investigation should be regarded as a process, to be approached systematically and comprehensively. Any investigation must follow a logical sequence in the pursuit of clearly identified objectives. An investigation is an inquisitorial process aimed at establishing the truth. It is not an adversarial process where the person investigating the complaint takes sides. An investigation usually involves:

- seeking to answer an identified question
- gathering sufficient reliable information to enable a decision to be made
- impartial fact finding
- reporting the outcome
- (in some circumstances) making recommendations.

The nature and scope of the investigation required in response to a complaint will depend on the circumstances of each case and any relevant statutory and policy requirements that may apply.

During an investigation, public officials must remember to:

- act reasonably, impartially and fairly, and ensure confidentiality – see Module 1: Acting ethically
- avoid and manage conflicts of interests – see Module 2: Acting in the public interest
- provide procedural fairness – see Module 11: Acting fairly.

Assessment

On receipt of a complaint it is necessary to determine what action is required. This may include options other than a formal investigation. Assessment may involve considering:

- whether the complaint primarily involves a communication problem or misunderstanding that can be resolved through explanation or discussion
- whether an alternative and satisfactory means of redress or a more appropriate mechanism for dealing with the issue is available
- whether the complaint can or must be notified to a relevant government agency
- the time that has elapsed since the alleged events occurred
- the significance of the issue for the complainant and/or the organisation.

The second step is to determine the most appropriate investigative approach. This will involve consideration of any statutory requirements, the nature of the issue and the likely outcomes. It is useful to characterise an investigation as either 'evidence-focused' or 'outcome-focused'.

- Outcome-focused investigation – an appropriate strategy for less serious issues and issues concerning organisational policies, procedures and practices. This type of inquiry aims to quickly identify and remedy problems, does not require an in-depth analysis of all available evidence, and may conclude that issues or problems alleged should be remedied through workplace training, amended policies or systems, an apology or mediation.
- Evidence-focused investigation – should be undertaken where an allegation has been made in regard to conduct that could result in criminal or disciplinary action, or a finding of wrong conduct against a person which could significantly affect their reputation or interests. All reasonable lines of inquiry should be pursued and the more serious the allegation and possible consequences, the more rigorous the investigation will need to be.

Case study

Over time, a large public sector agency built up a significant backlog of delayed complaints. Some of the complaints contained complex and serious allegations that needed to be rigorously investigated and tested. However, most related to customer service issues – such as delays, rudeness and not keeping people informed. The delays were starting to generate further complaints, so the backlog was increasing.

An oversight body worked with the agency to find out what was causing the backlog and suggest ways of addressing it. The oversight body found that the agency was applying an evidence-focused approach to all complaints – regardless of seriousness and allegation type. This meant that relatively low-level customer service complaints were receiving overly formal responses that went for several months. Even though significant resources were being spent, the level of complainant satisfaction was low.

The oversight body recommended that the agency streamline its complaint handling processes. Under this approach, the formal, evidence-based approach would be reserved only for the more serious complaints, which might result in significant management action and where a rigorous process of inquiry was warranted. In most other cases, an outcome-focused response would work better. The agency could quickly find out the reasons for any shortcomings in its service delivery and take practical action in response, without getting bogged down in exhaustive evidence-gathering. Outcomes from this less formal approach could include training or increased support for staff, changes to policies or processes, or an apology to the complainant. The agency adopted the suggested approach.

Planning the investigation

Public officials should establish the scope and sequence of investigative activities and highlight any risks that may need to be managed by preparing a written investigation plan. A written plan is also useful if the investigation needs to be handed to somebody else. The length and complexity of the plan will depend on the nature and seriousness of the complaint being investigated. However, it should not be too rigid or detailed. It is only a tool to assist the investigator and should be flexible and able to be revised or entirely replaced as new evidence or lines of inquiry emerge.

At the outset investigators need to identify:

- what questions need to be answered
- what information is required to answer those questions
- the best sources of information and methods to use to obtain that information
- any risks that need to be managed and strategies that need to be implemented to do so.

An investigation plan may be as simple as documenting these points.

Obtaining, storing and reviewing evidence

It is important, during an investigation, to gather sufficient reliable information so that findings and recommendations can be made. Sources of evidence fall into three categories:

- people – witnesses, experts, subject of investigation
- documents – legislation, policies, electronic and other records (including photos, CCTV footage, Facebook pages, tweets, emails etc)
- other physical evidence – for example site inspections, objects.

Consideration should be given to who may have relevant information about the complaint being investigated. The investigator will also need to determine what key documents – including legislation, policies and procedures – are likely to be relevant and will need to be obtained. Public officials should ensure that information obtained during an investigation is stored securely, consistent with relevant legislative and policy requirements. Records should be made about all investigative activities. This does not need to be lengthy or detailed but should allow external bodies or others within the agency to examine the actions of the investigator and to understand the approach taken and tasks completed.

After evidence has been collected and examined it is useful to review the overall evidence to identify any weaknesses or gaps, and consider whether further lines of inquiry should be followed. It is not always possible to gather evidence establishing every aspect of what happened when a complaint has been raised, but it is important to acknowledge any areas where there is insufficient evidence rather than attempt to gloss over or minimise any problems.

Reviewing the evidence also assists to determine which evidence is the most persuasive. Although the rules of evidence do not apply in administrative investigations, applying these rules will help direct you to the 'best evidence' and may help you in apportioning weight to different types of evidence. In addition, the allegations made in a complaint may in some circumstances become the subject of legal proceedings, therefore evidence of a higher quality is more likely to be admissible and valuable in any related court proceedings.

Applicable rules are:

- Relevance and cogency – the most fundamental consideration which should be given to any piece of evidence is its relevance. Evidence must also be sufficiently cogent (reliable, convincing, truthful, sound) and compelling (of sufficient weight) that it logically supports the finding that has been made.
- Hearsay evidence – evidence based on what has been reported to a witness by others, rather than what he or she has heard directly. While not inadmissible in administrative investigations, hearsay evidence carries less weight than direct evidence. Whenever the primary source is available, you should use it in preference to hearsay evidence.
- Opinion evidence – a witness's opinions about a person, or about what happened or should have happened, are usually irrelevant to an inquiry unless the witness is an expert whose opinion is of relevance to the subject matter of the investigation. However, opinion evidence may be useful for exploring investigative avenues and lines of questioning. While it is not necessary to exclude opinion evidence from consideration entirely during an administrative investigation, care should be exercised in determining what, if any, weight it should be given in proving a fact at issue.

- Direct and circumstantial evidence – evidence can be either direct (evidence of what was said or done, perceived through any of the five senses) or circumstantial (evidence from which facts may be inferred). Typically, an investigator will make use of both forms of evidence, although more weight should generally be given to direct evidence.

Reviewing the evidence is an important preliminary step to reaching initial or preliminary conclusions about the matters under investigation.

Arriving at final conclusions and drafting a report

Once an investigator has gathered and reviewed all the relevant evidence he or she will need to prepare an investigation report. It is an official record of the agency and will be used by the agency head to make a determination about the matter, and to help determine what action will be taken in response to the complaint. The investigation report may be subject to outside scrutiny, for example, by an oversight or investigative agency.

When drafting an investigation report it is important to ensure:

- that language used is clear, simple and straightforward – avoid jargon
- the report includes an analysis of relevant material/evidence, not just a summary of it
- each section of the report follows logically from the last
- recommendations are reasonable, appropriate and consistent with previous matters dealt with by the organisation that are of a similar nature unless special circumstances apply
- copies of relevant documents (or relevant parts thereof) are attached.

If the draft report contains adverse comments or recommendations in relation to an officer (or other affected person), procedural fairness requires that the person be given the opportunity to be informed about the findings and recommendations and given an opportunity to make submissions. See also Module 11: Acting fairly.

3. Dealing with anonymous complaints

Some complainants choose to remain anonymous. This may be because of a fear (sometimes justifiable, sometimes not) that reprisal action will be taken in response to the complaint. The anonymity of a complaint should not be a basis for deciding that the complaint does not raise a substantive issue. Public officials should ensure that anonymous complaints are investigated if they are assessed as having some substance, are of reasonable seriousness, and sufficient information is contained in the complaint to enable the allegations to be investigated.

4. Managing unreasonable conduct by complainants

Unreasonable complainant conduct can be defined as any behaviour by a current or former complainant which, because of its nature or frequency, raises substantial health, safety, resource or equity issues for relevant parties. The parties that might be detrimentally affected include the organisation responsible for handling the complaint, the person responsible for dealing with the complaint, the complainant (and possibly his or her family members), and other complainants and service users.⁵⁵ Unreasonable behaviour may take the form of unreasonable persistence, unreasonable demands, unreasonable lack of cooperation, unreasonable arguments and unreasonable behaviours.

The most effective way for public officials to manage unreasonable conduct by complainants is to deal with observable conduct, rather than the possible motivations or causes for that conduct. It is important for officers to always maintain a calm demeanour, show respect, and to demonstrate impartiality and professionalism.

Malicious and vexatious complaints

Occasionally an agency may, in the course of assessing a complaint, find evidence to suggest that the complaint was motivated by maliciousness – that is, for the purpose of hurting another person (for example, their career, their reputation or their livelihood). Sometimes agencies may try to use this to justify ignoring the complaint. This is the wrong approach. If the allegations nevertheless raise what would be a serious problem if true, the complaint must be dealt with accordingly.

55. NSW Ombudsman, *Managing Unreasonable Complainant Conduct Practice Manual*, p. 6. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/unreasonable-complainant-conduct-manual-2012>.

Malicious complaints often bring to light legitimate issues. Sometimes a desire to take retribution or to express anger and frustration makes a person speak out, where they otherwise would have remained silent. A good example is where a person has been disciplined by their supervisor and subsequently makes allegations that their supervisor has been corrupt. Certainly it is possible in these kinds of circumstances that the person has fabricated the complaint. However, it is equally possible that if the person had previously been aware that his or her supervisor had acted corruptly, it is only the breakdown in their relationship that would drive them to share that information.

On other occasions, an agency may find that the allegations are not supported by any evidence and there is other evidence to suggest that the complaint was made vexatiously – that is, primarily for the purpose of causing annoyance. The agency is generally justified in dismissing the complaint because it has no substance. The complainant should be advised that no evidence was found to support the allegations. However, the agency should freshly assess any further complaints from the same person to determine if they have any substance.

Limiting contact with complainants

In certain circumstances it is legitimate for an agency to consider putting appropriate limits on what kinds of service and what types of communication will be available to particular individuals whose behaviour strays beyond acceptable limits.

Agencies are entitled to expect that the behaviour of members of the public who are angry will stay within certain acceptable limits. If behaviour strays beyond these limits, an agency is entitled to place and enforce limits on contacts between the agency and the person displaying the unacceptable behaviour. Similarly, an agency may decide it is appropriate to place limits on contact with complainants who are unreasonably persistent or demanding. For example, an agency may limit the degree to which it will respond to these communications (subject to any statutory rights to information available to the public), including determining not to respond to correspondence unless it raises new and significant issues, or placing numerical limits on the number of inquiries the agency will respond to in a designated period.

There are eight critical matters that must be considered by agencies when deciding to impose any such limitations:

- In the absence of compelling reasons to the contrary, members of the public are entitled to seek advice and assistance and utilise the services and facilities provided by an agency.
- Complaints and criticism are legitimate and potentially constructive aspects of the relationship between an agency and the public. They are a valuable means of reflecting on the operations of an agency and improving both those operations and the quality of an agency's relationship with the community.
- Anger is an understandable and, to some degree, an acceptable emotion on the part of members of the public frustrated with the actual or perceived misconduct or other action or inaction of an agency or its staff. It is an emotion that needs to be properly managed so that effective service can be delivered, communication can take place and staff members and public facilities are not put at risk. It is unacceptable to unconditionally deprive any member of the community of the right to have their complaints and concerns examined or to use the services and facilities that would otherwise be provided by an agency.
- Before applying limitations, an agency should be prepared to try alternatives, for example seeing whether different (generally more senior) officers are able to deal with the person in question.
- In all but the most serious of cases, limited access and use of services and facilities should be applied only following a warning to the person that such limits will be applied, unless the specified unacceptable behaviour ceases.
- When framing reports and recommendations regarding the imposition of limits, agencies should ensure that staff avoid inflaming matters by using defamatory or otherwise derogatory language and base their recommendation on objective accounts of the person's behaviour and its impact on the agency.
- An agency should specify in writing to the person concerned, the limits that have been imposed and the reasons for their imposition.
- An agency should be prepared to have any limitations it has imposed reviewed by its CEO/Board/council on application by the person on whom the limitations are imposed (after a reasonable period, such as three months). This creates an incentive to address the problematic behaviour.

Applying limitations on contact requires tact, discretion, flexibility and common sense. Each situation needs to be considered separately, in light of the provisions of the relevant agency policy.

Supporting staff

Dealing with difficult or unreasonable complainants, or any other client, is not just the responsibility of junior, frontline staff. Management should take responsibility for developing strategies for customer service and making sure that they are implemented. Further, they should support junior staff by dealing with difficult complainants themselves, where appropriate. This approach is integral to ensuring good customer service.

It is essential to provide strong policy direction for junior and frontline staff. Good policy enables staff to confidently make appropriate decisions.

5. Protecting complainants

Agencies should welcome complaints and support people who wish to make them. Many complainants have a direct personal stake in the actions of the agency, whether they be customers or staff. These people are often in the best position to know how well the agency is performing its functions and whether there is anything or anyone inhibiting that performance. By actively using this information and addressing the deficiencies that such disclosures highlight, agencies can become fairer, more accountable and more responsive in the way they operate.

Unfortunately, however, complaints are often perceived – at least initially – as an inconvenience by the agency. Depending on the nature and circumstances of the complaint, it may even be perceived as a threat by individual employees or the agency as a whole. Under these circumstances, complainants may be subject to retribution or fear that they will be.

It is therefore essential that agencies take active steps to protect complainants. This is partly a practical and moral obligation. Under certain circumstances, agencies may have a legal duty to do so. For more information, see Module 5: Disclosing wrongdoing.

Further resources

- *Australian/New Zealand Standard AS/NZS10002-2014: Guidelines for complaint management in organizations*. Available online at <http://infostore.saiglobal.com/store/PreviewDoc.aspx?saleItemID=2764164>.
- **Commonwealth Ombudsman**, *Better Practice Guide to Complaint Handling*. Available online at <http://www.ombudsman.gov.au/pages/publications-and-media/better-practice-guides/complaint-handling.php>
- **NSW Ombudsman**, *Complaint Handling Framework and Model Policy*. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/complaint-management-framework-june-2015>
- **NSW Ombudsman**, *Complaint Handling at Universities: Australasian Best Practice Guidelines*. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/universities/complaint-handling-at-universities-best-practice-guidelines>
- **NSW Ombudsman**, *Managing Unreasonable Complaint Conduct Model Policy*. Available online at http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0006/8709/Unreasonable-complainant-conduct-a-model-policy-and-procedure_Feb2013.pdf
- **NSW Ombudsman**, *Managing Unreasonable Complainant Conduct Practice Manual*. Available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/unreasonable-complainant-conduct-manual-2012>

Module 13

Accepting scrutiny

This module provides guidance about:

- Complying with regulatory agency responsibilities
- Complying with reporting obligations.

Introduction

Parliament has entrusted power and authority to the government, public sector agencies and public officials to be exercised in the public interest. It is a condition of this public trust that public sector agencies and public officials will be held to account for the exercises of this public power.

The Administrative Review Council has described the importance of accountability in the following terms:

Accountability is fundamental to good governance in modern open societies. It is necessary to ensure that public monies are expended for the purposes which they are appropriated and that government administration is transparent, efficient and in accordance with the law. Public acceptance of government and the roles of officials depend upon trust and confidence founded upon the administration being held accountable for its actions.⁵⁶

There are a number of systems which are designed to ensure NSW state and local governments are kept accountable. These include oversight by parliamentary committees, powers of the houses of Parliament to call for documents, statutory annual reporting requirements and accountability to the Auditor General, the Ombudsman, the ICAC, as well as commissions of inquiry into specific issues.

Agencies should have policies and procedures in place outlining the conduct expected of public officials as well as mechanisms to identify and handle misconduct. Public officials should submit themselves willingly to whatever public or official scrutiny is appropriate and applicable to their position, duties or activities.

Responsibilities

1. Complying with regulatory agency responsibilities

Oversight of public administration involves an external integrity agency reviewing the conduct and decisions of government agencies and public officials. Such reviews may be by way of investigation, inspection or audit and can be based on a complaint, a legal obligation, or the oversight body's 'own motion'. As noted in the 1992 report of the Western Australian Royal Commission into Commercial Activities of Government and other Matters:

...accountability to the public is the obligating of all who hold office or employment, in whatever capacity, in our government system. Although the means by which the obligation is discharged vary, it must be regarded as a condition of public service. (at 3.1.6)

The aim of external oversight is to maintain the integrity of government agencies and public officials by holding them accountable for actions and decisions they will make while carrying out their duties. Accountability is a keystone of representative government, as it enhances public confidence in the public sector and, conversely, helps ensure that government is responsive to the interests of the public.

External oversight also provides a quality control mechanism for any internal review process existing within government agencies. While customers should be encouraged to use agencies' internal review systems, in most cases they should have the option to seek to have their complaints resolved externally if they remain dissatisfied.

Primary oversight bodies

In NSW there are several integrity agencies that have the power to investigate, review and audit government agencies and public officials.

The three primary integrity agencies in NSW with oversight roles are the Ombudsman, the ICAC and the Auditor-General. These bodies operate independently of government and are impartial in all functions. Their findings are reported to the agency concerned, and the relevant minister, and if appropriate to Parliament.

⁵⁶ Administrative Review Council, *Contracting Out of Government Services* (ARC Report No. 42, 1998) p. 5, quoting Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies* (Report No. 48, 1996) pp. 4-5.

- Amongst other roles, the **NSW Ombudsman** has been described as the 'general jurisdiction' independent review body in NSW, given the breadth of its jurisdiction which covers most aspects of administrative conduct of public sector officials and agencies. The Ombudsman has responsibility for ensuring that public sector agencies act reasonably and comply with the law and best practice in public administration. It does this by investigating, monitoring, reviewing and auditing various aspects of the conduct, policies and procedures of these agencies.
- The **ICAC** aims to protect the public interest, prevent breaches of public trust, and guide the conduct of public officials. It is specifically responsible for exposing and preventing corruption involving or affecting public authorities or officials, and educating public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community.
- The **NSW Auditor-General** is responsible for ensuring financial probity and efficiency in the public sector. The Audit Office assists the Auditor-General in fulfilling this role. The primary mechanisms used to achieve this are financial audits, compliance audits and performance audits.

Methods of oversight

There are six primary methods used by integrity agencies in NSW to carry out their oversight functions. The method employed will depend on the nature of the matters being reviewed, and on the jurisdiction and functions of the particular oversight body.

The six primary methods of oversight are:

- Investigation of complaints – Oversight agencies are able to investigate complaints made to them about the conduct of public officials, and policies, procedures and decisions of public sector agencies within their jurisdiction.
- Reviewing the quality of investigations conducted by agencies – In some circumstances, oversight bodies are able to assess the standard and outcomes of investigations conducted by government agencies. For example, the Ombudsman reviews the standard of investigations conducted by the NSW Police Force into complaints about police officers, and by public and private agencies into child protection-related allegations.
- Mandatory reporting of allegations – There are certain obligations on CEOs to report matters to an oversight body, for example reports of suspected corrupt conduct to ICAC and reports of child protection-related matters to the Ombudsman.
- Scrutinising complaint-handling systems – The Ombudsman is responsible for keeping under scrutiny the systems in place in a range of agencies to deal with complaints, including their relevant policies, practices and procedures.
- Reviewing the merits of decisions – Members of the public may seek external merit review of certain decisions of a government agency or public official, for example access to information complaints to the Information and Privacy Commission.
- Conducting audits – Oversight bodies may conduct audits of certain systems and procedures of the agencies within their jurisdiction. For example, the Auditor-General has an annual accounting audit role, and a discretionary role to conduct compliance and performance audits, and the Ombudsman audits the systems and practices of various agencies within its jurisdiction.

What compliance means in practice

Compliance with oversight by accountability agencies usually occurs in two broad phases: providing information, and responding to findings and recommendations.

Central to effective accountability is the ability to access relevant information about the operations of government. As a result, the three accountability agencies discussed above have extensive statutory powers to obtain documents, interview people and enter premises. Public officials should comply with legitimate requests for information made under these powers.

At the end of their involvement in any matter, accountability institutions will usually make findings or recommendations. Public officials and agencies are entitled to procedural fairness from the oversight body in the same way as private citizens (see Module 11: Acting fairly), including the right to notice and to a fair hearing. It is in everyone's interest that public officials and agencies participate in this process in good

faith, and treat recommendations as an opportunity to improve systems and practices, rather than in an adversarial manner.

To facilitate external accountability, agencies should ensure they have appropriate internal governance structures, systems and practices in place to ensure that:

- staff are held properly responsible and accountable for their conduct, performance and use of public resources
- compliance with applicable procedures and practices is effectively recorded and monitored
- activities are carried out in ways which are legal, fair, reasonable and professional
- public officials must make and keep full and accurate records of their official activities (see Module 14: Acting transparently, especially Part 1: Keeping records).

These all have benefits beyond compliance with scrutiny by oversight bodies, as they are features of good corporate governance more generally.

Benefits of oversight to agencies

The benefits of oversight to agencies include:

- providing technical advice and guidance about how to deal with complaints, investigations and other probity issues
- providing advice in relation to best practice across agencies with similar functions
- providing an independent and impartial perspective, and drawing attention to issues agencies may have overlooked
- supporting the agency, and in many cases providing an explanation to the complainant where the oversight body finds the agency has acted appropriately
- providing advice about how to remedy identified problems where the oversight body finds the agency has acted inappropriately
- conducting investigations beyond the resources or expertise of the agency
- aiding the agency in demonstrating integrity.

Case study

An oversight body was set up by Parliament to review investigations by public sector agencies into child abuse allegations. The aim was to provide independent oversight of the handling of serious allegations, in the public interest. In carrying out this role, the oversight body had problems obtaining information from one agency in particular, even though the agency was required by law to provide certain kinds of information upon request.

The oversight agency decided to formally investigate the agency's complaint handling systems and processes. Its inquiries found that senior managers had directed investigative staff to stop giving the oversight body their internal reports, which set out the investigator's analysis and their recommendations to the Director-General. This made it very hard for the oversight body to understand and assess the decision-making behind findings and management action. It effectively undermined one of the oversight body's key functions.

It also became clear that the agency was not reporting relevant findings to another regulatory body, which had a critical background checking role for people who work with children.

The investigation resulted in findings that the agency had failed to put in place effective systems for responding to child abuse allegations and, in particular, that its systems were inadequate for complying with its obligations to provide information to the relevant oversight and regulatory bodies. The oversight body made several recommendations for change, which the agency accepted.

2. Complying with reporting obligations

Principal officers of public sector agencies must comply with all statutory reporting obligations that apply to them.

Corporate reporting

Principal officers of public sector agencies are responsible to ensure that statutory annual and financial reporting obligations are met. This relates to both the content of such reports and reporting deadlines.

Reporting corrupt conduct to the ICAC

Principal officers of public sector agencies are obliged to report any matter to the ICAC that they suspect on reasonable grounds concerns or may concern corrupt conduct (s 11, *Independent Commission Against Corruption Act 1988*).

For more guidance in this area go to www.icac.nsw.gov.au or contact the ICAC on 02 8281 5999.

Reporting children at risk of harm to Family and Community Services

The *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) requires that certain people must report to the Department of Family and Community Services (FACS) if they have reasonable grounds to suspect that a person under the age of 16 years is at risk of harm (s 27).

A person is a mandatory reporter under the Care Act if they are:

- a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children
- a person who holds a management position in an organisation, the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children.

Staff of several public sector agencies, and some staff of councils, would fall into these two categories. Staff delivering any of the specified services to children, and managers supervising such staff, should familiarise themselves with the reporting requirements under the Act.

In addition to mandatory reporting, a general discretion to report to FACS is given by s 24 of the Care Act. That section provides that any person who has reasonable grounds to suspect that a person under the age of 18, or that a class of people under the age of 18, is at risk of harm may make a report to the Secretary of FACS.

A report under s 24 may be made anonymously and, as it is not a mandatory requirement, there is no penalty applicable under the Act if a report is not made.

A person who makes a report voluntarily under s 24 or as a mandatory reporter under s 27 is protected against civil legal proceedings or actions for breach of professional ethics, as long as the report was made in good faith.

Notifying certain alleged abuse and neglect to the Ombudsman

The *Ombudsman Act 1974* (Part 3A) requires the 'head' of all public sector agencies and 'designated non-government agencies' to notify the Ombudsman of any child abuse allegation or child abuse conviction against an employee. Part 3C of the *Ombudsman Act* requires the 'head' of a state-funded organisation providing supported disability accommodation to report certain kinds of abuse or alleged abuse or neglect of a person with disability.

Under Part 3A and Part 3C, the 'head' is usually the chief executive officer or other principal officer of the agency.

Some examples of 'designated non-government agencies' under Part 3A are:

- non-government out-of-home care providers
- pre-school centres run by councils
- non-government schools.

Most heads of public sector agencies need only notify the Ombudsman of an allegation or conviction for child abuse if it arises in the course of employment with the agency. The exception is if the agency is a 'designated government agency'. In this case, and in the case of all non-government agencies, a report must be made even if the allegation or conviction arises outside the employment context. This includes, for example, an allegation that an employee has abused his or her own child, or a conviction for abusing a child during a previous job. A number of government departments and statutory authorities have been specified as 'designated government agencies' for the purposes of Part 3A. Some examples are:

- the Department of Education
- the Ministry of Health, together with the Ambulance Service of NSW and all Local Health Districts
- the Department of Family and Community Services
- Juvenile Justice
- Sport and Recreation.

Heads of agency must notify the Ombudsman of abuse under Part 3C if it relates to an employee of the agency, or to a person with disability living in supported accommodation provided by the agency.

Under both Part 3A and Part 3C, the head of an agency should:

- notify the Ombudsman as quickly as possible but no later than 30 days after finding out about the allegation or conviction
- advise the Ombudsman whether the agency is going to take action against the employee and the reasons for that decision
- provide the Ombudsman with any written submission that the employee has given to the head of the agency about the allegation or conviction.

The head of an agency must also make sure that all employees know that if they find out about any relevant child abuse allegation or conviction against another employee, they must report this to the head of the agency.

See also Module 5: Disclosing wrongdoing.

Further resources

See the *Ombudsman Act 1974* (NSW), s 25A for the definition of a 'designated government agency' and a 'designated non-government agency'.

- The NSW Ombudsman website www.ombo.nsw.gov.au has a range of fact sheets about child protection and community and disability services.

Module 14

Acting transparently

This module provides guidance about:

- Keeping records
- Correcting records
- Giving access to information
- Giving reasons for decisions
- Notifying rights of objection, appeal or review
- Providing for internal review of decisions

Introduction

The people of NSW have a right to know what has been or is being done or contemplated by their government (both state and local), unless there are good and lawful reasons not to. The importance of transparency mechanisms such as public access to records, the giving of reasons, and of practices which support this, like good recordkeeping and rights of review, cannot be overstated. All are essential to democracy: unless the public knows what government is up to, citizens are not in a position to challenge, criticise, correct or otherwise hold their government to account. Conversely, experience has shown that a climate of secrecy is conducive to corruption, incompetence, inefficiency and maladministration.

It is critical that care is taken to ensure that full and accurate records are kept of all official duties. Despite this requirement, experience has shown that agencies often fail to ensure adequate records are made and retained. This is problematic as a failure to record even seemingly unimportant details, or a very small error in recordkeeping can have significant implications for individuals and agencies.

Responsibilities

1. Keeping records

Public officials must make and keep full and accurate records of their official activities.

Agencies and their staff create and maintain records as evidence of business activities and transactions.

Keeping clear and accurate records will help to:

- assist the agency and its staff meet legislative and regulatory requirements
- protect the interests of the agency and the rights of staff and members of the public
- support better performance of business activities throughout the agency by documenting organisational activities, development and achievements and facilitating consistency, continuity and productivity in management and administration
- provide protection and support in litigation, including the better management of risks associated with the existence or lack of evidence of agency activity
- support research and development activities.

Legislative responsibilities

Under the *State Records Act 1998*, agencies are obliged to:

- Make and keep full and accurate records of their activities (s 12(1)). Public officials should help their agency meet this obligation by creating and maintaining full and accurate records of the work in which they are involved and of the decisions they make, including the reasons for those decisions. They should ensure the routine capture of these records into recordkeeping systems, such as file systems, in the course of their duties. They should comply with requirements to keep and manage records which appear in relevant legislation, formal directives and guidelines.
- Establish and maintain a records management program (s 12(2)). Such a program helps ensure that records are made, maintained and managed systematically, through
 - accountable and consistent policies, standards and practices
 - efficient and effective records management systems and services.

Public officials should also be aware of the legal and administrative requirements which apply for the retention of public records. In this regard 'state records' include all documents of any kind made or received in the course of official duties by any person employed in a public office.

Public officials responsible for or in possession of public records must ensure that they are kept secure against unauthorised access, alteration, loss or destruction.

The State Records Authority of NSW has provided the following advice in relation to keeping records:

Good recordkeeping practices

You and your organisation need proper and reliable records. In certain situations, such as writing and sending an email, a record is made automatically and you only need to file the message. In other situations, you will need to create a record. Following are some common situations where public officials in NSW should make and file records:

Meetings

Make sure that someone has been delegated to make a record of the meeting. Ensure that decisions, actions, and advice communicated in the meeting are clearly recorded. Record any dissent by participants. Circulate the minutes or record of the meeting to other participants and sign or otherwise confirm the accuracy of the record.

Conversations

Make a record of business you conduct via the telephone or face to face. This can include:

- providing advice, instructions or recommendations
- giving permissions and consent
- making decisions, commitments or agreements.

Transcribe voicemail messages, or capture the message directly into your organisation's official records system.

Decisions and recommendations

Document the reasons for decisions or recommendations that you make.

Correspondence

File or attach email, letters, faxes and internal memos (sent or received) that relate to the work you do onto official files within your organisation's electronic (or paper) records system.

Drafting documents

File copies of drafts submitted for comment or approval by others, and drafts containing significant annotations, into your organisation's official records system.

For advice on recordkeeping, contact your records manager or the State Records Authority of NSW on 02 8257 2900 or govrec@records.nsw.gov.au

Case study

An out of home care (OOHC) agency had ongoing problems working with a foster carer couple. The foster carers did not cooperate with caseworkers in the support of the children in their care. For example, the caseworker would ask the carers to ensure that the children were present for home visits, but on three occasions in a row, the children were not at the home at the arranged time. Also, there were recurring allegations that the carers used prohibited behaviour management practices, such as locking the children outside the house if they misbehaved and hitting them with a wooden spoon.

The agency took a range of management and investigative actions in relation to the carers, over a period of about 18 months, including two verbal warnings. It did not document any of these steps. Ultimately, the agency decided to de-authorise the carers and place the children with new carers. The carers then appealed this decision to an administrative tribunal. During the proceedings, the OOHC agency was unable to demonstrate the range of prior management actions it had taken, because the actions were not documented. The tribunal overturned the agency's decision to de-authorise the carers, because the agency's claims about the carers' conduct were not supported by any records. In doing so, it commented on the agency's poor record keeping and recommended that it take steps to improve its practices in this area.

2. Correcting records

Records made and held by public officials and agencies should be complete, correct, up-to-date and not misleading. Appropriate amendments should be made to records that are found to be incomplete, incorrect, out-of-date or misleading. This is particularly important where the records:

- concern the personal affairs of any person
- could be used in ways that would affect the rights or interests of any person.

The primary legal avenues for the amendment of records can be found in the *Government Information (Public Access) Act 2009* (the GIPA Act), the *Privacy and Personal Information Protection Act 1998* (s 15) and the *Health Records and Information Privacy Act 2002* (Sch 1, cl.8).

3. Giving access to information

Members of the public should have access to government information promptly and at low cost. Most information should be available and easy to access as a matter of course.

Legal foundations

The main mechanism to enable members of the public to obtain access to information held by the NSW Government is the GIPA Act.

One of the purposes of the GIPA Act is to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective. The stated object of the GIPA Act is to open government information by authorising and encouraging the proactive public release by agencies, and giving members of the public an enforceable right of access to information that has not been proactively released. Release of information is to be restricted only when there is an overriding public interest against disclosure.

This legislative presumption in favour of disclosure is shared by the courts. Former Chief Justice of Australia, Sir Anthony Mason, noted in a High Court judgment that the disclosure of government information must be viewed 'through different spectacles' to the disclosure of personal or commercial information (*Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR at p.51), 'that the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected' (at p.52).

Effectively, the legal position on access to information reverses the onus of proof – the government must demonstrate that disclosure is likely to injure the public interest rather than the applicant needing to demonstrate why disclosure should be made.

Specific obligations under the GIPA Act

The GIPA Act requires government agencies to publish certain information unless there is an overriding public interest against disclosure. This is known as 'open access information', and can include:

- information about the agency, what the agency does and the information it holds contained in a publication guide
- policy documents
- a log of all of the information released in response to applications (a disclosure log)
- information about contracts valued over \$150,000.

Other kinds of information can be released in the following ways:

- proactive release – agencies can proactively release any information held by them as long as there is no 'overriding public interest against disclosure' or breach of a secrecy provision
- informal release – if a member of the public approaches an agency and asks it for information, the agency can decide to release it to that person without going through the motions of processing a formal GIPA application, unless there is an overriding public interest against disclosure.

- formal access – a person can make a formal access application, under the GIPA Act. To be valid an application must be in writing, accompanied by a fee of \$30, state an address within Australia to which the information must be sent and identify as much as possible the information to which the person is seeking access.

The agency must keep a record of open access information that it does not make publicly available due to an overriding public interest against disclosure.

The Information and Privacy Commission is the oversight agency for access to government information. More information and advice can be found on its website (www.ipc.nsw.gov.au).

Case study

A member of the public complained about the way an authority was notifying the public of reviews they planned to carry out on environment protection licences due for review. Under relevant legislation, the authority was required to publish notices in a newspaper, listing which licences it planned to review. The authority had been publishing only a general notice informing the public that they can visit its website to search for licences and make submissions on any licence at any time. These general notices provided no details of the licences due for review, as required in legislation.

In response to the complaint, the authority reviewed its interpretation of the relevant law. As a result, it decided to change its approach to be legally compliant. It now publishes notices that contain details of the specific licences due for review. It also provides fuller information about these licences on its website. Finally, it has improved the way it logged public concerns and feedback on licences, so that it can better monitor responses.

4. Giving reasons for decisions

Members of the public are entitled to know why public officials and agencies have made decisions and taken actions. This is particularly the case where a decision or an action affects their interests. The giving of reasons is one of the basic principles of good administration and is often a requirement of procedural fairness.

Decision-making can be broken down into four steps:

- Preparing to make a decision
 - identify and record the key issues
 - start and maintain a document trail
 - read and understand relevant legislation
 - check you have legal authority to make the decision
 - identify and understand the agency's policies and practices
 - identify and understand the procedure to be followed
 - establish a decision-making timeframe.
- Developing the decision
 - follow procedures
 - hear all parties with interests in the case
 - gather and record all relevant information
 - observe procedural fairness.
- Making the decision:
 - find and record the facts
 - apply the law to the facts
 - reasonably exercise discretion and remain impartial
 - apply appropriate weight to each factor relevant to the decision

- Communicating the decision
 - give meaningful and accurate reasons
 - communicate to all relevant people
 - communicate within the established timeframe (or provide an explanation if there is a delay)
 - provide information on appeal/reassessment mechanisms.

Circumstances where reasons are particularly important

Reasons should be given to adequately explain:

- decisions which are not in accordance with a relevant established policy
- decisions which are likely to detrimentally affect the rights or interests of individuals or organisations to any material extent
- conditions attached to any approval, consent, permit, licence or other authorisation.

Where a decision-maker makes a decision which is not in accordance with a relevant established policy, proper accountability demands that the reasons for the decision and for not following the policy should be recorded, either in the minutes of the meeting where a decision is made, in a report on the proposal in which such non-compliance was recommended, or in a file note or memorandum attached to the relevant file.

Why give reasons?

The giving of reasons serves a number of vital purposes, including transparency, accountability and quality. In particular, giving reasons:

- helps those affected by a decision to
 - understand the facts and reasoning that were the basis for the decision
 - confirm that the decision was not made arbitrarily or based on mere speculation or suspicion
 - verify whether any arguments they put forward have been understood, accepted or formed a basis for the decision
 - see whether they have been dealt with fairly
 - see whether or not they should exercise any rights of objection, review or appeal
 - understand the case they will have to answer or counter should they wish to exercise any right of objection, review or appeal that may be available
 - adjust their position to ensure that if the discretion is exercised again he or she is more likely to succeed or will not be adversely affected.
- encourages decision-makers to
 - base their decisions on acknowledged facts
 - rigorously and carefully identify and assess the relevant issues
 - properly justify recommendations and decisions.
- helps other decision-makers to act consistently in future by using the reasons as guidance for the assessment or determination of similar issues
- assists supervisors, managers and external reviewers or oversight bodies to verify compliance with legal requirements, policies, and other standards
- boosts public confidence in the decision-making processes and the public official/organisation more generally.

Content of reasons

Statements of reasons should help people to understand why the particular decision was made or action taken – and why possible alternatives were not chosen. Such statements could include:

- identification of the decision to be made
- the sources of all information relevant to the decision
- an adequate statement of the evidence relied on (if the existence or otherwise of a fact is to be relied upon, it must be set out in the reasons)

- the material questions of fact which arise from the evidence (a material fact is one on which the decision turns, for example, any essential preconditions set out in legislation or agency policy)
- findings on material questions of fact that may arise, including inferences drawn from those facts (if findings on a material fact are not set out it could be inferred that the fact was not considered)
- whether, in relation to material facts, the evidence was accepted or rejected (where the evidence on a material fact is conflicting, reference should be made to the available evidence and why certain evidence was preferred)
- the decision-maker's understanding of the applicable law and any issues of law which arise (which may necessitate summarising, paraphrasing or quoting relevant legislation)
- opinions or views on any such issues of law
- if the decision-maker is adopting the recommendation of another person or body, the decision-maker's reasons why this approach is being adopted
- conclusions derived from the facts and the law.

The courts have held that public officials do not need to explain each and every aspect of a decision to an applicant/complainant/party to proceedings. In discharging a duty to give adequate reasons: '... it is not necessary for a decision-maker, whether judicial or administrative, to address, specifically and in detail, each and every issue raised by the applicant' (*Mentink v Albietz* [1999] QSC 9); 'It is not necessary that reasons address every issue raised in proceedings, it is enough that they deal with the substantial issues upon which the decision turns' (*Total Marine Services Pty Limited v Kiely* [1998] 51 ALD 635 at 640); '... it is clear law that the reasons need not, ... descend to a point-by-point account of the evidence, and all the conflicts, nor a point-by-point recitation and then analysis of every point made in submissions' (*KO and KP v Commissioner of Police, NSW Police (GD)* [2005] NSW ADTAP 56).

Communication of decisions

The document in which a decision is communicated to an affected party (be it a notice, form, letter, facsimile, report or the like) should contain four essential elements:

- formal and procedural matters
 - the identity of the decision-maker (which need only be ascertainable from the communication)
 - when the decision was made (and, if relevant, the date from which it operates or period within which it is effective)
 - the authority under which the decision was made (be it a section of an Act, a clause of a regulation, a provision of a policy or guideline, a delegation of authority or the exercise of a certain discretionary power)
 - whether any essential procedural steps have been taken or preconditions met
- the decision itself, clearly and accurately set out
- reasons for the decision (as discussed earlier)
- rights of the person affected
 - any rights of objection, review or appeal
 - any time periods within which such rights must be exercised.

Reasons should be drafted with their potential audience in mind. Reasons should be in plain English, and intelligible to a person with no legal or other relevant technical training. The language should be clear, unambiguous and not be merely a re-statement of (or a quote from) legislation.

5. Notifying rights of objection, appeal or review

Members of the public should be adequately informed of any available rights of objection, appeal or review (both internal and external), particularly if they are adversely affected by a decision, or a decision is one which they potentially might wish to challenge for some other reason.

Members of the public should be informed of any such rights whether or not there is a statutory obligation to do so.

6. Providing for internal review of decisions

All decisions made by an agency which directly affect the rights or interests of members of the public should be subject to an appeal mechanism, wherever practicable.

The agency is responsible for establishing a mechanism which is both practical and reasonable, given the circumstances under which it operates. These policies should, however, be consistent with the general obligation to act fairly and reasonably (see Module 11: Acting fairly) and to provide sufficient information to allow people to understand what the agency has decided and why, as discussed earlier in this module.

In general, the NSW Ombudsman takes the view that a 'one review' policy is reasonable. We also consider that agencies can reasonably expect people seeking review of a decision to set out reasons why they believe the original decision was unreasonable, unfair or otherwise wrong.

Where an application or request for review of a decision is made, the decision should be reviewed afresh by a person:

- who was not involved in making the decision being reviewed
- who is not subordinate to the original decision-maker
- who has the delegation to override the original decision.

Reasons should be given for any decision to uphold or overturn the original decision.

Further resources

- State Records, *Recordkeeping and You*, an online training module designed to assist all staff in the organisation to understand their broad responsibilities for making and managing records when working for NSW Government. Available online at <http://elearning.records.nsw.gov.au>
- State Records, *Your responsibilities for managing email*, an online module designed to assist all staff in the organisation to understand their broad responsibilities for managing email, particularly email messages that need to be saved and kept as records. It is designed to be used in conjunction with an organisation's specific policies, procedures and business rules on email management. Available online at <http://elearning.records.nsw.gov.au/>
- State Records, *Recordkeeping in the NSW public sector*. Available online at <http://www.records.nsw.gov.au/recordkeeping/recordkeeping>
- NSW Ombudsman, Child protection fact sheet No 1 – Keeping records. Available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/child-protection/keeping-records-cp01>.

This document is particularly relevant to keeping records of investigations.

- NSW Ombudsman, Complaint management framework and model policy. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/complaint-management-framework-june-2015>

Module 15

Managing risk

This module provides guidance about:

- Embedding risk management in policies and procedures
- Information security
- Risk managing employees
- Procurement and contracted services

Introduction

Risk management refers to the prevention or management of events, incidents or accidents that could have adverse impacts on or implications for the efficiency of an organisation's operations or the achievement of its objectives. It involves identifying the potential for an event, incident or accident to occur, and taking steps to reduce the likelihood of its occurrence or severity of its impact.

A comprehensive, systematic and structured approach to risk also helps identify opportunities for continuous improvement and innovation. This is achieved through a regular assessment of the prevailing environment for each agency, of each agency's use and allocation of resources as well as of its fundamental responsibilities.

Responsibilities

1. Embedding risk management in policies and procedures

Agencies should ensure that the identification, assessment, prevention and management of risk are integral to their operations. Agencies and their senior managers should ensure that the agency defines and documents a risk management policy which sets out:

- the agency's/CEO's commitment to risk management
- the agency's/CEO's risk management approach to implementation of the policy
- responsibilities for implementation of the policy.

Risk management has broad relevance across the operations of agencies, for example in relation to:

- compliance with statutory requirements
- employee conduct and discipline
- employment procedures
- staff training
- work health, safety and welfare
- compliance with privacy, anti-discrimination, harassment and equal employment opportunity policies and legislation
- public liability
- fraud control
- disaster and emergency response
- business continuity planning
- security in relation to premises, assets and information
- asset management
- maintenance of equipment
- protection of the environment
- prioritisation of the use of resources.

It is generally unrealistic to assume that every possible risk can be identified. The aim should be to identify the most likely risks, or those that will have serious consequences for an agency and the options for managing such risk to prevent or minimise adverse impacts and to capitalise on opportunities. Options for treating risks include:

- eliminating the risks (for example, by not performing or discontinuing a function or activity, or performing the function or activity in another way)
- reducing the likelihood of a risk occurring (for example, by employing safer work practices, providing appropriate training, instruction or supervision, isolating hazards, changing the design of the workplace, providing protective equipment or clothing, carrying out inspections, etc)

- managing the risk by reducing the consequences of the risk should it occur (for example, by putting up signage or sending an email informing staff if a spill has occurred and an area has just been mopped)
- transferring the risk to another party (for example, seeking an external investigator to conduct an investigation where there is a risk of media exposure, or questions about bias or conflicts of interest could be raised should an internal investigator be used).

Agencies should ensure that the risk management processes they adopt are appropriate (having regard to the relevant operation or activity). Generally, a risk management process will include the following main elements:⁵⁷

- policy and procedures – establishing the context in which the process or conduct will take place
- risk framework – identifying risks and possible actions
- training and guidance – analysing and evaluating risks in terms of consequences and likelihood
- accountability – treating risks, including identifying options and implementing changes required to eliminate or reduce risks
- monitoring and reviewing – occurrences and the performance of the risk management system
- leadership and commitment – reporting to management on significant occurrences and the performance of the risk management system
- clear roles and responsibilities – communicating and consulting with staff and other relevant parties
- being transparent and inclusive
- taking human and cultural factors into account.

Case study

A worker sustained a significant physical injury at work, during a critical incident. A member of the public had seriously assaulted him, requiring him to take time off work. A government department paid for his physical treatment and rehabilitation, but did not offer any information or advice about psychological support options. While he was off work, the man became anxious and depressed, but his manager was unaware of this because he had not contacted him during his leave. The man took his own life while off work.

The man's wife complained that the department had failed to make sure that he received support not only for his physical injury, but also his related mental illness. A review of the case resulted in an overhaul of the department's policies and the introduction of a clear risk management process for workers involved in critical incidents. The new process required managers to stay in regular contact with workers while off-duty and to ensure that ongoing mental health support was made available as part of rehabilitation.

2. Information security

Information security ensures the availability, integrity and confidentiality of information systems and information. This is of increasing importance as information technology becomes more and more widespread in public sector agencies, and as information becomes an increasingly important resource in public administration.

All government agencies should adopt and regularly review policies, procedures and practices for the safe storage, preservation, distribution and disclosure of personal or otherwise sensitive information. This includes taking adequate steps to safeguard electronic information, including developing and implementing

57. See, for example, NSW Treasury, *Risk Management toolkit for NSW Public Sector Agencies Vol. 1: Guidance for Agencies*. Available online at http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0019/22564/TPP12-03B_Risk_Management_Toolkit_Vol1-Agency_Guide_dnd.pdf and International Standards Organization, *AS/NZS/ISO 3100:2009 Risk Management: Principles and Guidelines*. Available online at http://www.iso.org/iso/catalogue_detail?cs006Eumber=43170.

plans for information security management and seeking certification to the National Standard for information security management.⁵⁸ Agencies in NSW should have particular regard to the requirements set out by the Digital Information Security Policy⁵⁹ and the Information Classification and Labelling Guidelines.⁶⁰

Agencies should also ensure that employees understand their obligations in relation to the security of information held by the agency, and that these are reflected in codes of conduct.

3. Risk managing employees

Risk management is also an important aspect of the effective management of public sector employees and the environment in which they work. It is a fundamental principle of good public administration that the conduct and performance of public officials should be adequately and regularly reviewed. More generally, agencies should assess any risks presented by particular public officials, and act on those risks.

Agencies should maintain appropriate management structures, systems and practices to ensure that the performance of staff is reviewed regularly and any information gathered as a result is used to improve the operations of the agency.

Effective risk management of public officials requires a transparent and fair process, including appropriate involvement of the public official concerned and relevant supervisors. The point of such risk management is not to discipline the public official, but rather to ensure the official's ongoing suitability for employment in a particular capacity or in a particular locality, and to ensure the level and nature of supervision is appropriate.

4. Procurement and contracted services

In its *Investigations into allegations of corrupt conduct in the provision of security products and services by suppliers, installers and consultants*,⁶¹ the ICAC outlined 11 corruption prevention recommendations that can be applied to all projects.

These are:

- overall responsibility for identified tasks associated with the selection of contractors is maintained in-house
- adopt a rigorous product selection approach
- explore alternatives rather than rely on exclusive advice
- consider the feasibility of separating tasks between external consultants
- adopt a broad approach to the due diligence enquiries that are conducted before undertaking a supplier relationship
- adopt a preference for open tender methodologies
- adopt a range of audit activities to ensure compliance with purchasing and supply manuals
- improve project management systems by clarifying roles and responsibilities
- ban employees who have direct contact with procurement activities from accepting any gifts or benefits from potential or existing suppliers/contractors
- be proactive in explaining obligations on contractors to declare conflicts of interests
- ensure compliance with the Department of Premier and Cabinet's Guidelines for the Engagement and Use of Consultants (C2004-17) when engaging and using consultants (for NSW Government agencies).

58. Currently International Standards Organization, *AS/NZS/ISO 27001:2013 Information technology – Security techniques – Code of practice for information security controls*. Available online at http://www.iso.org/iso/catalogue_detail?csnumber=54533.

59. NSW Department of Premier and Cabinet, *M2012-15 Digital Information Security Policy*. Available online at <http://arp.nsw.gov.au/m2012-15-digital-information-security-policy>.

60. NSW Department of Finance and Services, *DFS-C2013-05-Information Classification and Labelling Guidelines*. Available online at <http://arp.nsw.gov.au/dfs-c2013-05-information-classification-and-labelling-guidelines>.

61. Independent Commission Against Corruption, *Investigations into allegations of corrupt conduct in the provision of security products and services by suppliers, installers and consultants*. Available online at http://www.icac.nsw.gov.au/component/docman/doc_download/4200-investigation-into-allegations-of-corrupt-conduct-in-the-provision-of-security-products-and-services-operation-tilgasept-2013.

Using contractors

Agencies are responsible for the standard and consequences of work performed, or services provided on their behalf, by contractors and subcontractors.

An agency, publicly funded to provide a service or to pursue some activity in the public interest, may decide to contract out the task of providing that service or pursuing that activity. In such cases the normal standards of public accountability should continue to apply.

This may be achieved via the terms of the contract between the agency and the contractor to enable the agency to:

- monitor the conduct of the contractor under the contract
- handle complaints about the contractor's work
- compel the contractor to rectify any problems identified.

It is not acceptable for an agency to argue that a problem is a contractor's fault and that the agency is not accountable for what the contractor has or has not done. The agency is accountable to the public for the way it has arranged for the service to be delivered.

The agency must ensure that the contract provides for the agency to have an immediate right of access to information contained in records held by the contractor, such as:

- any information that relates directly to the performance of the services by the contractor
- information that is collected by the contractor from members of the public to whom it provides, or offers to provide, the services
- information that is received by the contractor from the agency to enable it to provide the services.

Contractors are considered to be public officials under the *Public Interest Disclosure Act 1994 (NSW)*.

This includes:

- individuals who are engaged by public authorities under a contract to provide services to or on behalf of the public authority (s4a(1)(b))
- employees or officers of a corporation engaged by a public authority under a contract to provide services to or on behalf of the public authority who provides or is to provide the contracted services (s4a(1)(c)).

This means that contractors may make a public interest disclosure under that Act, and that their conduct can also be the subject of such a disclosure. Agencies must therefore ensure that contractors are aware of the Act and the internal reporting policy of the agency, and know how to make such a disclosure and to whom.

See also Module 5: Disclosing wrongdoing.

Using subcontractors

The extent to which an agency is required to monitor and control the conduct of subcontractors is a difficult issue. Ultimately a balance must be reached between the right of the agency to contract out, thereby removing itself from the day-to-day delivery of services, and the need to ensure that the subcontractor remains accountable to the agency and to the public.

The agency should retain the right to undertake inquiries into the conduct of subcontractors where required, to regulate that conduct and, if necessary, to terminate their services. The terms of the contract between the contractor and the subcontractor should be subject to the agency's approval and subject to a contract term that the subcontractor is to deliver the service contracted for to the satisfaction of the agency.

5. Work health and safety

A particular statutory obligation on agencies and public officials in management positions is to ensure that their premises adequately provide for the health, welfare and safety of the staff and members of the public who use them.

It is incumbent on management to ensure that appropriate processes and procedures are in place to ensure compliance with the *Work Health and Safety Act 2011*, as well as the regulations and any relevant industry codes of practice made pursuant to that Act.

Agencies should have a process of review to ensure obligations of workplace health and safety are constantly adhered to in order to remain effective in changing environments.

Further resources

- **NSW Treasury**, *Risk Management toolkit for NSW Public Sector Agencies Vol. 1: Guidance for Agencies*. Available online at http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0019/22564/TPP12-03B_Risk_Management_Toolkit_Vol1-Agency_Guide_dnd.pdf
- **International Standards Organization**, *ISO Guide 73: 2009 Risk Management*. Available online at http://www.iso.org/iso/catalogue_detail?csnumber=44651
- **International Standards Organization**, *AS/NZS/ISO 3100:2009 Risk Management: Principles and Guidelines*. Available online at http://www.iso.org/iso/catalogue_detail?cs006Eumber=43170
- **International Standards Organization**, *AS/NZS/ISO 27001:2013 Information technology – Security techniques – Code of practice for information security controls*. Available online at http://www.iso.org/iso/catalogue_detail?csnumber=54533
- **Australian National Audit Office**, *Public Sector Governance: Strengthening performance through good governance. Better Practice guide*. Available online at <http://www.anao.gov.au/Publications/Better-Practice-Guides>
- **Independent Commission Against Corruption**, *Investigations into allegations of corrupt conduct in the provision of security products and services by suppliers, installers and consultants*. Available online at http://www.icac.nsw.gov.au/component/docman/doc_download/4200-investigation-into-allegations-of-corrupt-conduct-in-the-provision-of-security-products-and-services-operation-tilgasept-2013
- **Commonwealth Ombudsman**, *Automated Assistance in Administrative Decision-Making Better Practice (AAADM) Guide*. Available online at http://www.ombudsman.gov.au/docs/better-practice-guides/aaadm_guide.pdf.
- **Department of Premier and Cabinet**, *M2012-15 Digital Information Security Policy*. Available online at <http://arp.nsw.gov.au/m2012-15-digital-information-security-policy>
- **Office of Finance and Services**, *DFS-C2013-05-Information Classification and Labelling Guidelines*. Available online at <http://arp.nsw.gov.au/dfs-c2013-05-information-classification-and-labelling-guidelines>

Module 16

Enforcing laws and conditions

This module provides guidance about:

- Imposing enforceable conditions
- Dealing with allegations about unlawful activities

Introduction

Regulatory agencies generally have a legal or ethical obligation to enforce the laws for which they have responsibility or jurisdiction. Agencies with a regulatory role are obliged to properly deal with allegations about unlawful activities, which include activities that are prohibited or unauthorised, or are contrary to the terms of a consent, licence, approval, or other instrument of permission issued pursuant to lawful authority. Failure to properly deal with such allegations, quite apart from being poor administrative practice, could expose an agency to liability for compensation and the expense of litigation.

Responsibilities

1. Imposing enforceable conditions

Many public sector agencies have regulatory functions or responsibilities. These usually fall into one of two related categories:

- consideration of applications and issuing of authorisations (for example, approvals, permits, licences or consents) to permit activities within their jurisdiction
- enforcing compliance with the law in a particular area (for example, by making sure the terms and conditions of any authorisation are being complied with, and that no relevant activity is being carried out without the required authorisation).

Agencies should not see themselves primarily as ‘gatekeepers’ – putting most of their time and attention towards ensuring that applications for authorisation are dealt with properly. Once applicants are past the gate, there is often a need to have ongoing dealings with the applicant/development/activity to ensure compliance with the terms and conditions of the authorisation and any applicable legal requirements. As a general rule, agencies should not base their enforcement activities solely around reacting to complaints and criticism – a broader monitoring program is usually appropriate.

When drafting conditions, it should always be assumed that at some stage a person or body will be called on to enforce those conditions (this may arise out of a program of inspections or compliance audits, or a complaint from a member of the public). Experience shows that problems often arise because conditions are not sufficiently comprehensive, the meaning of conditions is unclear – and the lack of specificity means they are unmeasurable and unenforceable, compliance with the condition is costly or otherwise difficult to determine, or compliance is impracticable or unlikely given the nature of the conditions imposed.

To ensure they are enforceable and effective, each condition should be:

Enforceable

- legal – in accordance with the provisions of the relevant Act or Regulation
- for the proper purpose – for the purpose for which the power to impose the condition was conferred
- certain – free from ambiguity or other uncertainty
- measurable – in a manner which makes it possible, and preferably easy, to find out whether the requirements of the condition have or are being met or breached.

Effective

- necessary – the condition serves a good and proper purpose to achieve a reasonable objective
- applicable – the condition has been drafted to apply to the particular circumstances of the activity or work in question
- workable – the requirements of the condition are practical and can be readily implemented
- reasonable – compliance with the condition should not impose unreasonable burdens
- clear and simple – easily understandable by members of the public.

To properly support their regulatory obligations and functions, agencies should:

- systematically audit or monitor compliance with conditions of consent (subject to resource constraints), particularly for activities or works that will or are likely to have a significant impact on the environment or upon the welfare and living conditions of members of the public, especially vulnerable people
- have a system for logging and responding to complaints about non-compliance with conditions of authorisations and unauthorised activity
- investigate complaints in a timely fashion and inform the complainant of the outcome
- in deciding whether to take further action, take into account the particular circumstances of the case, be reasonable and act consistently
- develop policies on investigation and enforcement including the factors the agency will consider when deciding if further action is required
- incorporate alternative dispute resolution principles and strategies into their procedures for responding to complaints
- avoid adopting blanket policies of not enforcing the law in particular areas or in relation to particular matters.

2. Dealing with allegations about unlawful activities

When an agency becomes aware of unlawful activity within its jurisdiction, the matter must be assessed and a decision made as to what kind of response is required. This decision, and any subsequent action, should be documented.

Determining whether unlawful activities have occurred

Agencies should take reasonable steps to determine whether unlawful conduct has, in fact, occurred and whether a response is required.

Not every allegation of unlawful conduct will need a full, formal investigation. Many matters can be resolved informally. When deciding whether a matter requires full investigation, a range of factors could be considered, including:

- is the matter within the jurisdiction of the agency?
- is the allegation premature (for example, does a complaint relate to some unfinished aspect of work still in progress)?
- does the activity or work require permission, and if so is an approval in place?
- is the complaint trivial, frivolous or vexatious?
- has too much time elapsed since the events the subject of the complaint took place?
- is another agency more appropriate to investigate or otherwise deal with the matter?
- is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
- does the complaint suggest a systemic problem (for example, if a complaint is one of a series, could there be a pattern of conduct or a more widespread problem that should be addressed instead)?

Determining whether enforcement action is required

Agencies have discretion in deciding whether to take enforcement action on the basis of evidence of unlawful or unauthorised activity. However, agencies are obliged to uphold the law (including compliance with relevant administrative law principles) and to act in the public interest.

See also Module 2: Acting in the public interest.

In determining whether to take enforcement action, some of the issues to be considered include:

- is the unlawful activity likely to affect a significant number of people?
- is it likely to have a serious negative impact on any person?
- has the activity attracted sustained public controversy and no alternative resolution has been proposed or is likely?

- will the circumstances of the activity unreasonably impact on certain population groups, particularly disadvantaged or marginalised groups?
- is the activity indicative of a systemic flaw – possibly the result of a deficiency in policy or procedures?
- has there been a blatant attempt to flout the law or inappropriately delay action?
- are the identified breaches of a technical or inconsequential nature, with no aggravating circumstances?
- could the unlawful activity be carried out lawfully if consent had been sought?
- could the non-compliance be easily remedied by some action on the part of the person responsible?
- will there be reasonable proportionality between the ends to be achieved by enforcement action and the means that will have to be used to achieve them?

A further consideration is that any obligation to comply with the law does not relieve agencies of the moral obligation to take lawful steps to mitigate the effects of rigid adherence to the letter of the law if that results in, or is likely to result in, manifestly inequitable or unreasonable treatment of an individual or organisation.

Options for action

After having established that an unlawful activity has occurred and that a response is required, agencies have a number of options, including:

- referring the matter to another agency for further action
- counselling the person concerned, to educate them on the relevant requirements
- negotiating a resolution between the parties or obtaining undertakings to address the issues of concern
- issuing a warning or caution to the offender, requiring work to be done or activity to cease in lieu of more formal action
- issuing a notice of intention to serve an order or a notice requiring work to be done under relevant legislation
- taking proceedings in a relevant court for an order to remedy or restrain a breach of the relevant Act or Regulation or for an injunction
- issuing a penalty notice or starting proceedings for an offence against a relevant Act or Regulation.

Case study

A government department had responsibility for managing freshwater resources, including water in rivers, streams and lakes. It set the overall policies for ensuring water resources were sustainable and it licensed the extraction and use of water.

The department had powers to take enforcement action in response to breaches of legislation, including the unlawful taking of water, or building illegal dams, to ensure that water was shared fairly between landowners. Its enforcement powers were extensive, ranging from issuing advisory notices, warning letters, stop work orders, and remediation directions, to pursuing licence suspensions, licence cancellations, penalty notices and prosecutions.

A land-owner complained to the department that a neighbour had constructed several new dams on the neighbouring property, without a licence. This meant the complainant's own access to water was now severely restricted. To secure her own water supply, she had to relocate her house water pump site, replace the pump, drill two new water bores and install two extra storage tanks.

Although there was compelling evidence to support the complainant's claim that the neighbour had built the dams illegally, the department did not take any of the enforcement options that were available to it. The department also conducted no inquiries into the complainant's claims. Instead, the department advised the complainant that she and the neighbour should try to resolve the matter informally, through a Community Justice Centre.

The complainant complained to an external oversight body, which reviewed the matter and obtained evidence from various sources and parties. During the inquiries, a senior manager in the relevant district gave evidence that he had never prosecuted anyone in the several decades he had been 'working with farmers', and that he considered formal enforcement action was inappropriate. Other evidence supported the complainant's claims that the dams were illegally built and had restricted her own access to water.

The oversight body found that, although not every breach of legislation requires enforcement action, in this case there appeared to be no good reason for the department's decision not to take enforcement action. In a case where there was a public interest issue, and an alleged intentional breach of an Act, it was unreasonable to expect the complainant to resolve the matter herself. The department was responsible for enforcing the water legislation and it was not appropriate to deflect that responsibility onto the affected party.

As a result of the oversight body's findings and recommendations, the department decided to take enforcement action against the neighbour. It also made an ex gratia payment to the complainant, for the various expenses she had incurred because of the failure to take action earlier.

Responding to complainants

Unlawful activity may come to the attention of the agency by way of a complaint from a member of the public. When this occurs, it is important that agencies take adequate steps to properly respond to complainants, as well as to the substance of the complaint. For example, they should:

- manage expectations to ensure the complainant is realistic about what can and cannot be achieved
- provide regular feedback to the complainant as to progress
- advise the complainant of the outcome of the investigation and what, if any, action the agency intends to take.

See also Module 12: Resolving conflicts and handling complaints.

Prevention strategies

It is important to prevent unlawful activities wherever possible. Some strategies to achieve this are imposing sensible and enforceable conditions, keeping proper records, educating the community, exercising powers reasonably, undertaking regular inspections and checks on compliance, and responding to complaints promptly.

Further resources

- **NSW Ombudsman**, Enforcement Guidelines for Local Government. Available online at <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/enforcement-guidelines-for-councils>

Module 17

Obtaining legal advice and initiating legal proceedings

This module provides guidance about:

- Seeking legal advice
- Complying with legal advice
- Disclosing legal advice
- Initiating legal proceedings
- Sharing legal services.

Introduction

Public officials and public agencies should act within the letter and spirit of the law by complying with legal obligations, only making decisions that they have the power to make, exercising those powers reasonably and in accordance with the law, and accepting liability for actions for which they are clearly responsible. In order to do this, agencies will sometimes need to seek guidance and advice from a lawyer.

Unlike their private sector colleagues, but like other public servants, lawyers who are public officials have a duty to act in the public interest. Among other things, that obligation means they should act as model litigants. Agencies retaining private sector lawyers need to ensure they are explicitly aware that the agency wishes to be a model litigant, a model citizen and to act in the public interest, as well as in accordance with any other standards set for all public sector agencies and their employees.

See also Module 2: Acting in the public interest for a discussion of the general obligations on public officials to act in the public interest.

Responsibilities

1. Seeking legal advice

Legal advice should only be sought for appropriate purposes, for example – to clarify significant uncertainty as to the agency's legal rights, obligations or liabilities. It is not appropriate for agencies or officials vested with discretionary power to seek legal advice about how that discretionary power should be exercised in relation to the merits of particular matters.

An agency will often need to ascertain its legal options or obligations. In particular, it would generally be good practice for an agency to seek legal advice in the following circumstances:

- when making important decisions that may create legal liabilities or be subject to judicial or other external review (for example, in dismissing an employee or entering into a contract)
- when exercising a power that, if not exercised properly, is likely to be subject to judicial review or criticism from a watchdog or regulator
- where there is a risk that the agency does not have the power to undertake the action proposed
- where some event has happened and it is unclear whether
 - this may have put the agency under some legal obligation or liability
 - the agency has any legal remedies available to it.

The threshold to justify seeking advice is the existence of significant uncertainty. Experience shows that too often legal advice is sought by agencies and officials where no real uncertainty exists. This can be a delaying tactic or an avoidance tactic where the agency or official wants to offset blame for a controversial decision – to be able to say 'the decision was based on legal advice'.

Seeking legal advice in these circumstances means the agency will be able to make a more informed decision, and also demonstrate that it has tried to act in a lawful way in the event its actions are called into question.

When seeking legal advice, agencies and their staff should:

- seek advice from an independent source rather than relying on advice provided by an interested party
- wherever possible, provide legal advisers with written instructions together with all necessary supporting factual material
- ensure that all telephone conversations regarding legal advice are properly recorded in file notes and that significant legal advice is provided in writing
- ensure that communications with legal advisers in relation to advice that is being prepared, focuses on clarifying instructions and providing supporting factual material.

When seeking legal advice, agencies and their staff should not:

- seek advice as a delaying or avoidance tactic where the agency or official wants to offset blame for a controversial decision
- narrowly define the strict legal obligations of the agency to the exclusion of considerations of reasonableness, ethics and accepted standards of public accountability
- opinion shop (i.e ignore unwelcome advice and seek more palatable advice)
- refuse to determine contentious questions solely because there is an appeal or other mechanism by which the matter could be determined
- commence legal proceedings with the intention to cause delay or intimidation.

Case study

A woman complained through her local member of parliament that a police officer had assaulted her during a traffic stop. During the investigation that followed, the police department formed a preliminary view that the officer's conduct did not amount to an assault. However, because the matter was the subject of a complaint, the department sought advice from the Office of the Director of Public Prosecutions (DPP) on this point, and about whether a charge should be laid.

The DPP provided advice that the evidence was likely to be sufficient to establish the offence of assault, and further that it was in the public interest to charge the officer.

Despite this advice, the police department found that the officer had not assaulted the woman. It decided on discretionary grounds not to charge the officer.

The woman then complained to an oversight body, which reviewed the case, including the legal advice obtained from the DPP. The oversight body took the view that it was unreasonable to seek the advice of the DPP and then reject it on unspecified discretionary grounds. The oversight agency suggested to the police department that it should review its decision.

2. Complying with legal advice

Agencies should act in accordance with legal advice they obtain about questions of law (for example, the interpretation of a legal provision or an explanation of the legal obligations on the agency in particular circumstances) in so far as the advice is consistent with the public interest.

According to the principles of administrative law, in the exercise of discretionary powers public officials and agencies must not simply follow legal advice. In accordance with the overriding duty to act reasonably, legal advice is generally only one factor among many to be considered when determining the appropriate course of action. The question of the reasonableness of the course of action being considered falls to the agency and its relevant staff. In other words, matters of discretion must be decided by an agency by applying its own mind to the issue, and not by unthinkingly following legal advice.

The lawyer's role is to advise on technical legal issues – that is, what can or cannot be legally done and the legal consequences that may flow from options identified or available for the exercise of discretion. Agencies should be aware that the lawyer's role is not to advise on policy or strategic issues – that is, the merits of an issue or on the reasonableness of a course of action (unless in the case at hand questions of reasonableness are legal questions). Lawyers may choose to give advice on non-legal issues as part of serving their clients' needs. However, it is important for agencies to be aware that this advice may not necessarily reflect the same standard of professional expertise as their legal advice.

See also Module 1: Acting ethically and Module 8: Appropriately exercising discretionary powers.

3. Disclosing legal advice

It is sometimes reasonable and appropriate for public officials and agencies to disclose legal advice, even under circumstances where legal professional privilege could be claimed.

Officials and agencies should fully and faithfully represent relevant legal advice when they choose to disclose it. It is generally unacceptable to only disclose the existence of legal advice. For example, an agency should not inform someone that their application for consent or approval has been rejected on the basis of legal advice that their proposal is not legally permissible, but refuse to tell the person the specific nature of that advice. If the agency is concerned about sensitive information in the document containing the legal advice, it can release only those parts of the document that explain the basis for its decision. Alternatively, it could paraphrase the legal advice received.

In deciding whether to disclose legal advice, public officials and agencies should have regard to the *Government Information (Public Access) Act 2009* (GIPA Act). This provides a public right of access to government information, subject only to limited exemptions which must be weighed against the general public interest in open government. Under the GIPA Act, agencies may claim a conclusive public interest against disclosure of documents for which they have a 'client legal privilege'. They are required, however, to consider 'whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause' (Schedule 1, clause 5).

The following factors may be relevant to deciding whether it is appropriate to disclose legal advice or waive a right to claim legal privilege:

- Agencies may be justified in refusing access to the legal advice on which it has based a decision where legal proceedings are reasonably contemplated.
- Disclosing legal advice may help avoid escalation in a dispute, by helping the other party to understand why the agency decided or acted in the way it did. Sometimes the person may be persuaded that the agency's conduct was not contrary to law or, even if the person believes the legal advice to be incorrect, that it was reasonable for the agency to rely on the advice. This may help avoid a formal complaint or possibly even legal action.
- Proper accountability demands that an agency provide reasons for its decisions, to demonstrate that it has exercised its decision-making power lawfully and reasonably.
- Reports relating to damage or injury to members of the public that are prepared by public officials or agents of an agency should generally be provided to any person who suffered damage or injury, or to their representatives
 - where an injury occurs on government property or while a person is in the custody or under the control of public officials or agencies
 - where the person injured has been required or invited to be present on the property or in the care of public officials or their agents
 - the person suffers disadvantage or is vulnerable because of, for example, their age (such as school children) or their mental capacity.

Documents relating to the accountability of government

In the absence of good reasons to the contrary, it is in the interests of responsible and accountable government to disclose documents (or relevant parts of documents) relating to the affairs of an agency where the documents:

- contain information likely to contribute to positive and informed debate about issues of serious public interest
- set out factual or technical matters relating to an event/incident/locality/structure, etc
- are reports of finalised investigations or inquiries, or inspections carried out by public officials arising out of events or circumstances that have resulted in damage or injury to the member of the public seeking access to the report
- reveal significant reasoning behind decisions made by the agency or its staff that affect or will affect a significant number of people

- show the pathway by which agency policy was created that affects the rights or interests of members of the public
- will overcome any special disadvantages facing people making claims against the agency
- show how an agency has dealt with a complaint made by the person seeking access
- contain the best or only evidence of matters that affect the rights or interests of the person seeking access
- will assist or allow proper inquiry into possible deficiencies in the conduct of the agency or its staff (for example, by exposing or removing suspicion of significant impropriety)
- will otherwise significantly contribute towards the public accountability of the agency or its staff
- consist of information that is already in the public domain or in the possession of the applicant
- consist of information that is innocuous by reason of its stale or trivial contents.

4. Initiating legal proceedings

Agencies should not resort to legal action unless it is absolutely necessary. Even successful legal proceedings are likely to result in costs, delays and long-term antagonisms. Moreover, adversarial legal proceedings are not always the best way of resolving contentious public policy questions.

Before commencing or defending legal action, agencies should obtain legal advice as to the prospects of success. If the advice is that the prospects of success are poor or evenly balanced, alternative methods for resolving the dispute should be considered.

5. Sharing legal services

Where lawyers employed by one agency perform legal services for another agency, they must be alert to the potential for conflicts of interests to arise.

Such conflicts should be avoided if possible. If a conflict arises, it should be dealt with in a way that ensures that the public official functions of both agencies continue to be fulfilled impartially and with integrity.

Where agencies enter into arrangements to share legal services (or for one agency to use lawyers employed by another agency), both agencies should ensure that those arrangements explicitly address the approach to be followed where a potential conflict of interests is identified.

Further resources

- Law Society of NSW, *A Guide to Ethical Issues for Government Lawyers*. Available online at www.lawsociety.com.au/resources/areasoflaw/Government/008727

Module 18

Using public resources efficiently

This module provides guidance about:

- Preventing waste
- Reporting serious and substantial waste

Introduction

Public resources should only be used by public officials for official purposes. In the performance of their duties, public officials and agencies should strive to obtain value for public money spent, and avoid waste and extravagance in the use of public resources.

Responsibilities

1. Preventing waste

Public officials are expected to ensure they deliver value for public money spent and avoid waste and extravagance in the use of public resources.

Public officials should be scrupulous in their use of public property, official services and facilities (such as transport, stationery, telephones or secretarial services). These should only be used for those duties or functions and for no other purpose. Nor should public officials permit their misuse by any other person or body. This duty includes caring for and maintaining equipment, vehicles or records in their care or possession, or for which they are responsible. Public officials should avoid any action or situation which could create the impression that public property, official services or public facilities are being improperly used for their own or any other person or body's private benefit or gain.

The *Public Finance and Audit Act 1983* requires that the head of an agency shall ensure that there is an effective system of internal control over the financial and related operations of the agency including sound practices for the efficient, effective and economical management of functions (s 11).

Codes of conduct

The standards expected of public officials should be reflected in the formal codes of conduct of agencies both at the state and local government level.

The Code of Ethics and Conduct for NSW Government Sector Employees states:

You must use public resources in an efficient, effective and prudent way. Never use public resources – money, property, equipment or consumables – for your personal benefit, or for an unauthorised purpose.

If you are responsible for receiving, spending or accounting for money, ensure you know, understand and comply with the requirements of the *Public Finance and Audit Act 1983*, the *Public Works and Procurement Act 1912* and the *Government Advertising Act 2011*.⁶²

The Office of Local Government's *Model Code of Conduct for Local Councils in NSW* sets out similar guidelines for the use of council resources.⁶³ In particular, these include:

- Council resources are to be used ethically, effectively, efficiently and carefully in the course of official duties, and must not be used for private purposes.
- Union delegates and consultative committee members may have reasonable access to council resources for the purposes of carrying out their industrial responsibilities.
- Council property, including intellectual property, official services and facilities must be used scrupulously, and their misuse must not be permitted by any other person or body.
- Any action or situation that could create the appearance that council property, official services or public facilities are being improperly used for personal benefit or the benefit of any other person or body should be avoided.

62. NSW Public Service Commission, *Behaving Ethically: A guide for NSW government sector employees*, section 2.2, at p. 55. Available online at <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/ethics-conduct>

63. NSW Department of Planning and Environment, Office of Local Government, *Model Code of Conduct for Local Councils in NSW*. Available online at <https://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>.

- Council resources, property or facilities must not be used for assisting election campaigns unless the resources, property or facilities are otherwise available for use or hire by the public and any publicly advertised fee is paid for use of the resources, property or facility.
- Council letterhead, council crests and other information that could give the appearance it is official council material cannot be used for elections or other non-official purposes.
- Council's computer resources must not be used to search for, access, download or communicate any material of an offensive, obscene, pornographic, threatening, abusive or defamatory nature (7.12-7.19).

Personal use of public resources

Generally speaking, public officials should not use public resources for private purposes unless:

- these resources are also available for use by members of the public
- the use is on the same terms and conditions as apply to members of the public.

Agencies may permit occasional and minor use of some equipment for private purposes – for example, occasional local telephone calls or photocopying of a few pages using the office photocopier.

Personal use of employer communication devices

Public officials should be particularly careful to avoid misuse of communication devices provided by their employing agency. Using an agency's computer resources to search for, access, download or communicate any material of an offensive, obscene, pornographic, threatening, abusive or defamatory nature is unacceptable and in most cases is likely to constitute a disciplinary offence, and possibly a criminal offence. Agencies need to develop and disseminate to all staff, policies which clearly articulate what is expected of staff in relation to the use of the agency's computer resources, including its electronic mail (email) system.

It is important to recognise, however, that the formulation of an appropriate policy is not in itself sufficient to protect an agency against misuse of its communication devices. Agencies need to ensure that their staff are aware of and understand the policy. A common feature of cases of unfair dismissal for misuse or alleged misuse of communication devices in the workplace has been the employee's claim that they were either unaware of the employer's policy or that the policy was unclear and had not been properly drawn to the attention of the employee. Misuse of communication devices is likely to be less prevalent among employees who have been required to sign a declaration attesting that they have read, understood and agreed to abide by the policy, and may provide clearer grounds for any resulting disciplinary action.

Agencies must be proactive in terms of preventing, detecting and responding to misuse of communication devices. They have a responsibility to institute measures for monitoring and controlling the use of communication devices, to encourage or require reporting by staff of breaches of the policy, and to take appropriate action in response to cases of misuse.

It is important not only to detect misuse of electronic communication devices (for example, through use of software to generate reports on access to internet sites or random reviews of sites accessed by users) but also to use technology that works to prevent it (for example, commercially available products that block access to prohibited sites on the internet or software to monitor incoming and outgoing email for certain words, file types and attachment size).

An important way for agencies to demonstrate the message that accessing, transmitting or creating sexually explicit or otherwise offensive material is unacceptable is by dealing with instances of misuse in a consistent and appropriate way. Agencies need to clearly formulate and communicate to staff about the types of management action which will be taken in response to misuse of communication devices. Furthermore, agencies need to ensure that their policies on this issue are consistently enforced.

Case study

A government department provided its staff with computers, on which they all had internet access. The department required all staff to sign an undertaking that they would not use the internet to access pornographic or obscene material. Staff also had to sign an undertaking that they would not use their work email addresses to send inappropriate, abusive or threatening emails.

A staff member sent an email to a group of colleagues. An attachment to the email contained an offensive joke and several obscene images. While the recipients of the email had all signed the undertaking about appropriate use of work email, only one of them reported it to a manager. The department took disciplinary action against the staff member who sent the email, including issuing him with a written warning and conducting targeted audits of his computer use for the next 12 months. It also issued written warnings to the other staff members who had received the email but failed to report it.

2. Reporting serious and substantial waste

Public officials should be encouraged to report any serious and substantial waste of public money. Under the *Public Interest Disclosures Act 1994* (the PID Act), certain public officials may enjoy confidentiality and be protected from reprisals if they disclose certain kinds of wrongdoing to the appropriate authorities in the correct way.

If a public official has concerns about serious and substantial waste of public resources, the disclosure would normally be made to either the Audit Office or the Office of Local Government in relation to councils, to the principal officer of the agency concerned, or in accordance with the internal reporting policy of the agency. Other agencies to which a disclosure may be made about other kinds of misconduct or maladministration include the ICAC, the Ombudsman, the Information Commissioner and the Law Enforcement Conduct Commissioner. To benefit from the protections of the PID act, the public official making the disclosure must honestly believe on reasonable grounds that a public sector agency or public official has committed a serious and substantial waste of public money.

The term 'serious and substantial waste' is not defined in any legislation. The NSW Audit Office has provided a working definition, stating that it 'refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources'.⁶⁴ In addressing any complaint of serious and substantial waste, the Audit Office will consider the nature and scale of the alleged waste (for example, the dollar value, the potential savings and the public interest).

A disclosure that principally involves questioning the merits of government policy is not protected under the PID Act.

Case study

A government department decided to use a new telecommunications provider for a two year contract. Before doing so, it did not seek quotations from any other telecommunications provider or call for tenders. An internal complainant alleged to a government auditing body that another company would have been prepared to provide the same service for a much lower cost, and that the decision not to seek tenders or quotes had effectively caused a loss of around \$350,000 to \$400,000.

The auditor conducted inquiries into the department's decision. The department advised that it did not think there was a need to enter into a competitive tendering process because the service was covered by a government period contract.

64. Audit Office of New South Wales, *External Public Interest Disclosures Policy*, section 4.3. Available online at http://www.audit.nsw.gov.au/ArticleDocuments/100/External_Public%20Interest_Disclosures_Policy_March_2014.pdf.aspx

After inquiries, the auditor found that, while there was no formal requirement to seek competitive quotations, it would have been advisable to conduct market testing before entering into a new contract. It noted there was a record of internal advice that the department should conduct market testing at the end of the existing telecommunications contract, but that the department had not done so.

The auditor also found that it would have been better practice to seek competitive quotes, because:

- the contract was in an area of new and rapidly changing technology
- it could be reasonably assumed that more than one supplier might be capable of supplying the relevant goods or services
- other parties who reasonably believe that they are capable of submitting a competitive bid, should be given the opportunity to do so
- a proposal put before the organisation by a private sector body is not unique and there could be alternative suppliers.

Further resources

- For further information about the *Public Interest Disclosures Act 1994* see the NSW Ombudsman's series of PID Guidelines, available online at <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>
- **Department of Premier and Cabinet**, C1999-09 Use of Employer Communications Devices and the attached Employer Communication Devices Policy and Guidelines. Available online at <http://arp.nsw.gov.au/c1999-09-use-employer-communication-devices>
- **Department of Premier and Cabinet**, M2002-04 Protocol for Acceptable Use of the Internet and Electronic Mail. Available online at <http://arp.nsw.gov.au/m2002-04-acceptable-use-internet-and-email>
- **Public Service Commission**, Behaving ethically: A guide for NSW government sector employees. Available online at <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct>
- **NSW Department of Planning and Environment, Office of Local Government, *Model Code of Conduct for Local Councils in NSW***. Available online at <https://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>

