ETHICAL OBLIGATIONS ON INVESTIGATORS

Government Lawyers Seminar
1 June 2012, Sydney

Chris Wheeler
Deputy Ombudsman

Ombudsman
New South Wales

INTRODUCTION

Today I will be talking to you about ethics for investigators. I will be talking to you in your capacity as lawyers who may be responsible for conducting investigations either individually or as part of an investigation team, or be advising investigators.

My focus will be on key ethical obligations that apply to public officials, and to people performing public official functions or acting in a public official capacity. In this category I include contractors employed by agencies to undertake various functions, such as investigations.[1] For simplicity I will refer to all such people in this paper as 'public officials'.

I will start by outlining the elements of each ethical issue and the often overlapping obligations they impose on public officials. Secondly, where relevant I will talk about some exceptions to the obligation to comply with those obligations, and finally I will outline some implications that flow for investigators. I conclude the paper by looking at some of the practical benefits that can flow to investigators and agencies from compliance with ethical obligations.

ACTING ETHICALLY

Public officials are under an absolute obligation to act ethically in the performance of their official functions, including in their dealings with members of the public, each other, their employer, the government of the day and the Parliament.

In my view ethics is about moral principles and moral character, about whether decisions and actions are right or wrong, about 'morally reflective' decision-making. This interpretation is in line with the derivation of the word 'ethics' from the Greek 'ethos', meaning 'moral character'. Some commentators have argued for a very broad interpretation of ethics.[2] The problem with a broad definition is that it can encompass a range of matters that have little to do with moral principles, including standards of performance, effectiveness, efficiency, competence, avoidance of waste, and so on. Given it is such an important concept, it is unfortunate that we still do not have any general agreement as to just what 'ethics' means in practice.

Key objectives of ethical behaviour by public officials are to ensure fair and appropriate outcomes in the public interest and to foster an appropriate level of public trust in government.

In representative democracies governments are said to 'govern by consent' – by the consent of the governed. This means that a reasonable level of public trust is of fundamental importance to the proper functioning of a representative government – it is a crucial issue for both governments and the people they govern. The degree to which the public is prepared to trust government is strongly influenced by perceptions as to the general ethical standards of that government. The public's perception as to whether or not a government is 'ethical' is therefore central to whether that government is seen as acceptable.

---

[1] Any such employment should be subject to the contractor signing and agreeing to comply with the agency's code of conduct (or a version of it suitable to the role to be performed by the contractor).

[2] It is argued by some that public sector ethics can be categorised as including: *democratic ethics* – that public officials are responsible, responsive and accountable; *managerial ethics* – that public officials are efficient and effective; and *social ethics* – that public officials uphold principles of justice, fairness, equity, individual rights, etc.

The range of ethical (as in 'moral') issues that directly impact on levels of public trust in government include:

1) *public interest* issues – that public officials are perceived to act in the public interest when making decisions

2) *integrity* issues – that public officials are perceived to act honestly and legally

3) *fairness* issues – that public officials are perceived to act fairly, reasonably and consistently

4) *transparency* issues – that public officials are perceived to provide adequate information to the public, including sufficient information to enable people to better predict how the government is likely to react in any given circumstance, and

5) *accountability* issues – that public officials are perceived to be accountable.

1. Acting in the public interest

Why is the public interest important?

The WA Inc Royal Commission said in its 1992 report that one of the two fundamental principles[3] and assumptions upon which representative and responsible government is based is that:

> *"The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public."*[4]

The Royal Commission noted that this principle (the 'trust principle') "…*expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike*". Later in its report, it noted that "[g]*overnment is constitutionally obliged to act in the public interest*."[5] This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that "…*governments act, or at all events are constitutionally required to act, in the public interest*",[6] and a statement made in a 1981 judgment of the High Court of Australia that "…*executive Government…acts, or is supposed to act, … in the public interest*".[7]

What is the public interest?

The 'public interest' is a term for which there is no single precise and immutable definition. The answer to the question "*what is the public interest*?" depends almost entirely on the circumstances in which the question arises. However, as a general concept it has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It can also described as the 'common good'.

---

[3] The other fundamental principle was: "*It is for the people of the State to determine by whom they are to be represented and governed*".
[4] In Volume 1, Chapter 1, at 1.2.5.
[5] In Volume 1, Chapter 3 at 3.1.5.
[6] Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p191) – the SpyCatcher Case.
[7] Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & ors* (1981) ALJR 45 (at p49).

Although the term is a central concept to a democratic system of government, it has never been, and in my view will never be, definitively defined either in legislation[8] or by the courts. While there has been no clear interpretation, there has been general agreement in most societies that the concept is valid and embodies a fundamental principle that should guide and inform the actions of public officials.

Can we identify what is not in the public interest?

To understand the purpose or objective of the concept, in some ways it is easier to distinguish the public interest from what is not. For example, the "*public interest*" can be distinguished from:

- *private interests* of a particular individual or individuals – public interest is distinguishable from the private interest because it extends beyond the interests of an individual (or possibly even a group of individuals) to the interests of the community as whole, or at least to a particular group, sector or geographical division of the community (however, even such a statement must be qualified because there are some circumstances where an individual's private interests – in privacy and procedural fairness for example – are regarded 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* – ie, what is of interest to know, that which gratifies curiosity or merely provides information or amusement[9] (to be distinguished from something that is of interest to the public in general)[10]

- *personal opinions* - for example, the political or philosophical views of the decision-maker, or considerations of friendship or enmity

- *parochial interests* – ie, the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern; and

- *partisan political interests* - for example the avoidance of political/government or agency embarrassment (a specific factor referred to in some NSW legislation, eg, the GIPA Act, s.15, and the *Local Government Act*, s.12(8) and a matter referred to by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and ors* (1981) 55 ALJR 45 at p49).

In my view the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration away from private, personal, parochial or partisan interests towards matters of broader (ie, more 'public') concern.

---

[8] Attempts have been made in some Acts to define public interest, eg, s.24 *Surveillance Devices Act 1998* (WA) states that the public interest "*includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens*." In some Acts there are also definitions of public interest information, eg, SA Whistleblowers Protection Act 1993.
[9] *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at pp73-75), *R v Inhabitants of the County of Bedfordshire* (1855) 24 L.J.Q. B.81 at (p84) and *Lion Laboratories Limited v Evans* [1985] QB 526 (at p537)
[10] Re *Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).

So what does the term mean?

In trying to find a meaning of the term, it is important to draw a distinction between the question and its application – between what "*is*" the public interest, and what is "*in*" the public interest in any particular circumstance. The "*public* interest" is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. While the meaning of the "*public interest*" stays the same, the answer to the question what is "*in*" the public interest will depend almost entirely on the circumstances in which the question arises.

What are the dimensions of the public interest?

There are at least four dimensions of the requirement on public officials to act in the public interest. These dimensions are:

1) *outcomes* – ie, the substance – eg, the recommendations made to or decisions made by the decision-maker

2) *inputs* – ie, the matters considered in making findings, recommendations and/or decisions

3) *process* – ie, the procedures and practices followed, and

4) *approach* – ie, the conduct of the public officials involved.

What are some exceptions to the obligation to act in the public interest?

The clearest exception to the obligation to act in the public interest would be where a public official works for a government trading enterprise competing in the open market where the profit motive would be paramount.

What are some implications for investigators?

Most discussion and debate about public interest issues focuses on outcomes – about whether a decision was in the public interest or about the relative merits of conflicting public interests. However, for outcomes to be in the public interest it is crucial that the inputs – the matters considered by the investigator and eventual decision-maker – also reflect the public interest. Relevant obligations for investigators would include:

- complying with legal requirements
- exercising powers for the proper purpose
- considering relevant matters and not considering irrelevant matters
- complying with government and agency policy
- avoiding conflicts of interests.

In relation to <u>process</u> – the methodology, procedures and practices adopted for an investigation – the relevant public interest related factors that an investigator is expected to comply with would include:

- acting impartially (including the absence of discrimination) and apolitically in the performance of official functions (of course this is not necessarily applicable to elected public officials)
- acting fairly in the exercise of discretionary powers, including providing procedural fairness, the giving of reasons, and so on
- acting reasonably
- maintaining appropriate confidentiality, and
- being properly accountable and transparent, including making of appropriate records, acceptance of proper scrutiny, facilitation of appropriate public access to information, etc.

In relation to the approach – ie, the approach adopted by, or the conduct of, the investigator – what is important includes:

- acting with honesty and integrity, ie, acting in good faith, and
- avoiding or properly managing situations where private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties.

2. Acting with integrity

Acting with integrity includes the overlapping obligations to act legally, honestly, in good faith, while avoiding or managing any conflict of interests.

2.1. Acting legally

Why is legality important?

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

What are the obligations on public officials

Principles of administrative law **preclude** public officials from:

- improperly fettering their own discretion (or that of future decision-makers) by, for example, adopting a policy that prescribes decision-making in certain circumstances
- exercising a discretion in a way that is so unreasonable that no reasonable person would have exercised the power in that way (ie, the "*Wednesbury*" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* (1948) K.B. 223 principle of irrationality)
- exercising a discretionary power in such a way that the result is uncertain
- 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, or

- unreasonably delaying the making of a decision that the decision-maker is under a duty to make.

When should the obligation be applied flexibly?

The obligation to comply with legal requirements does not relieve an agency or public official of the moral or ethical obligation to mitigate the effects of rigid adherence to the letter of the law where that 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 discretion, it should be exercised in a fair and reasonable way

- if the law does not give an agency a discretion, fairness may mean adopting a broad interpretation in certain circumstances, rather than a rigid adherence to legality, or

- other options that may be available to agencies to mitigate any unreasonable or inequitable effects of compliance with the law include, for example, waiving debts, refunding fees or charges, offering an expression of regret or an apology

- deferring regulatory action to allow for an authorisation to be obtained, fast tracking assessment and determination of an application, and the like.

What are some implications for investigators?

As with all public officials, investigators are under an obligation to know and understand the law relevant to the to the performance of their official duties. Any failure to comply with the law could be a breach of the law, a breach of discipline or a criminal act.

Investigators exercising any delegated or statutory discretionary power should not:

- conduct an investigation for an improper purpose or a purpose other than that for which the investigation was authorised to be conducted

- adopt an investigative methodology or practice not authorised by or under relevant law or agency or government policy, or the approval authorising the investigation (ie, act ultra vires)

- take into account irrelevant considerations or fail to take into account relevant considerations when in conducting an investigation, assessing the information obtained, reaching conclusions or making recommendations

- conduct an investigation in accordance with an agency policy or procedure without regard to the merits of the particular case (ie, improperly fettering discretion), or

- exercise any discretionary power at the direction of another person or body (ie, act under 'dictation').

2.2. Acting honestly

Why is honesty important?

Public officials are expected by the general public, their colleagues, their agency, the government of the day and the Parliament to promote and encourage the highest standards of honesty. This is a fundamental requirement of all codes of conduct or ethics, statements of values, and the like. They should not knowingly or negligently make any false, misleading or incorrect statements or reports to any person or body.

What are some possible exceptions to the obligation?

There are certain limited circumstances where the obligation to be honest and frank may of necessity need to be selectively or flexibly applied if the public interest objectives of certain legislation are to be achieved. For example when public officials are undertaking activities relating to controlled operations (eg, purchase of drugs), assumed identities (eg, providing a false internet profile in child pornography investigations), authorised surveillance authorised by the *Surveillance Devices Act* (operatives are likely to operate with a cover story in the event they are challenged), witness protection (eg, the denial of the existence of a person, knowledge of their whereabouts, in the event of enquiry), and so on. While deceit or concealment of the truth might not be explicitly authorised in the relevant legislation, such authorisation must in practice be implied if the legislation is to achieve its intended objectives, particularly where the consequences of identification are serious.

This thinking can be applied to an extent in relation to the maintenance of confidentiality in relation to serious matters disclosed by staff or informants, including public interest disclosures. The courts and ADT have long held that there is a public interest in the protection of the identity of informants, and the need for confidentiality in investigative contexts is reflected in the GIPA Act (eg, Items 1(d) & (h) and 2(a), (b) & 3(f) of the Table to s.14). While the *Public Interest Disclosures Act*, for example, does not expressly authorise deception, some degree of misdirection or obfuscation may be required to meet the objectives of s.22.

Allowances should also be made for honest mistakes or isolated errors of judgement as opposed to intentional dishonesty, misconduct, corrupt conduct or criminal activity.

What are some implications for investigators?

Often the issue will come down to the appropriate balancing of conflicting public interests. On the one hand there is the public interest in public officials being honest and frank in their dealings with other public officials. On the other hand there is the public interest in protecting public officials from detrimental action in reprisal for the making of a serious complaint or a PID. The public interest in the honesty and frankness of public officials is extremely important. However, it may well be that circumstances may arise where the likelihood of serious detriment to an individual in reprisal for a complaint/disclosure warrants a flexibility in the honesty and frankness obligations on public officials in order to preserve confidentiality (eg, to meet obligations imposed under s.22 of the PID Act).

While such conduct should always be carefully considered and commensurate with the seriousness of the likely consequences of identification, as a general proposition it could not be argued that public officials dealing with complaints and disclosures are authorised to engage in illegal or otherwise unacceptable conduct for the purpose of preserving confidentiality, this does not mean that they must on all occasions "*tell the whole truth and nothing but the truth*". In circumstances where silence is not an option and refusal to confirm or deny would effectively confirm that a disclosure had been made, a certain degree of misdirection or obfuscation may well be acceptable for the purpose of ensuring that

the confidentiality of a person who has made a complaint or disclosure is preserved, particularly where the likely consequences of identification are serious.

Whenever public officials involved in dealing with a complaint or disclosure have found it necessary, in the public interest and with appropriate authority, to engage in activities or to make statements that might misdirect or obfuscate, it is essential they make appropriate records about what they said or did, and why. This is to ensure proper accountability to the management of the agency, and to protect those staff should the conduct in question subsequently be made to the subject of a complaint to an investigating authority.

2.3. Acting in good faith

What is good faith?

Public officials are obliged to act honestly and for the proper purpose.

Good faith requires "*more than an absence of bad faith. It requires a conscientious approach to the exercise of power*"[11]. The positive obligation of good faith on a public official is a common requirement in NSW legislation covering most aspects of public sector functions and duties as well as a pre-requisite for protection against civil liability for acts or omissions.

'Good faith' requires and signifies an actual belief that all is being "*regularly and properly done*"[12], and may be present even where the official has acted in error or irrationally. However, significant errors, repeated lapses in logical processes or an absence of reasonable caution or diligence may show a lack of good faith depending on context.

What is bias?

Public officials must be objective and unbiased when making decisions. The rule against bias (in particularly that of not judging a matter involving one's own interests) is also a key element in the notion of procedural fairness.

The *ICAC Report on Investigation into North Coast Development* in July 1990 found that no public official should ever display favour or bias toward or against any person in the course of his or her duty, even if there is no payment or return favour as a result.

A reasonable apprehension of bias can in practice also significantly damage the reputation and integrity of public sector agencies and officials. The test for apprehension of bias is "*whether a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. In deciding the issue, the court determines the issue objectively*"[13].

The main difference between bad faith, bias and breach of duty on the one hand and conflict of interests on the other relates to motive – a conflict may occur in the absence of specific intent or of any actual wrong conduct, whereas acting in bad faith, with bias or in breach of duty requires intent as well as misconduct.

---

[11] per French J in *Applicant WAFV of 2002 v Refugee Review Tribunal* [2003] FCA 16 (17 Jan 2003).
[12] per Gummow J in *Cannane v Cannane Pty Limited; Cannane v Official Trustee in Bankruptcy as trustee of the Bankrupt Estate of Cannane* [1998] HCA 26 (7 Apr 1998) at para 101.
[13] per McHugh J in *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 (14 Nov 2002) at para 68.

What are some implications for investigators?

Investigators are obliged to act in good faith, ie, to act:

- honestly
- for the proper purpose
- on relevant grounds, and
- without exceeding their powers.

2.4. Avoiding or managing conflicts of interests

Why is avoiding or managing 'conflicts of interests' important?

Public officials are expected by the general public, their agency, the government of the day and the Parliament to perform their official duties in the public interest, uninfluenced by their own personal interests, or those of family, friends or business partners.
What is meant by 'conflict of interests'?

The term 'conflict 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.

A conflict 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* – a "*reasonable perception of a conflict of interests*" is where a fair minded person, properly informed as to the nature of the interests held by the decision-maker, might reasonably perceive that the decision-maker might be influenced in the performance of official duties and responsibilities whether or not this is in fact the case. 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.
- 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.

A conflict of interests can involve pecuniary interests (ie, financial interests or other material benefits or costs) or non-pecuniary 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.

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 an investigator's conflict of interests there has 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.

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.

What is meant by 'conflict of duties'?

A distinction should be drawn between a 'conflict of interests', and a 'conflict of duties' involving a conflict between competing or incompatible public duties.

In some circumstances a conflict of duties is acceptable, or at least unavoidable, for example where the holding of one public sector position or office is the prerequisite or qualification for the holding of another position or office.

In most other circumstances, as a matter of principle a conflict of duties is 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, or
- where the activities of one agency are, or are likely to be, regulated or subject to review or oversight by the other agency.

What is the difference between 'conflict of interests' and 'bias'?

A distinction needs to be drawn between a conflict of interests and bias. While both concepts are well known in public administration, conflict of interests is far less known to the common law than bias.

"*Bias*" can be summarised as the failure to bring an impartial mind to the making of a decision. A "reasonable apprehension of bias" is where a hypothetical fair minded person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to the making of the decision. A "conflict of interests" on the other hand can be summarised as a conflict between public duty and private interests which could influence the performance of official duties and responsibilities.

Both bias and conflict of interests relate to decision-making and conduct related to decision-making. However, they approach the issue from different directions — looked at in terms of cause and effect.

- bias focuses on effects (ie, the conduct of the decision-maker)
- conflict of interests focuses on the causes (ie, 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. It is also relevant to note that a conflict of interest, by itself is not misconduct – that question depends on how it is managed and dealt with. On the other hand, bias in the performance of a public function is misconduct.

What are some implications for investigators?

Investigators advising or reporting to decision-makers or who are decision-makers themselves, should promptly, fully and appropriately disclose any actual or potential conflict of interests they may have in a matter under consideration. Where this 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.

Investigators should also bring to notice any circumstances that could result in a third party reasonably perceiving a conflict of interests to exist, ie, wherever a reasonable person could perceive 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 interest or bias.

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.

Where an investigator has an actual, potential or reasonably perceived conflict of interests (including a pecuniary interest), depending on the circumstances of the case the options available to management include:

- taking no further action because the potential for conflict is minimal or can be eliminated by disclosure or effective supervision
- informing likely affected persons 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 investigation (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 investigation or after the making of the decision)
- appointing further persons to an investigation team to minimise the actual or perceived influence or involvement of the investigator with the actual or reasonably perceived conflict
- where the persons likely to be concerned about a potential, actual or reasonably perceived conflict are identifiable, seeking their views as to whether they object to the investigator having any, or any further, involvement in the investigation
- restricting the access of the investigator to relevant information that is sensitive, confidential or secret and limiting the scope of the person's involvement in the investigation
- removing the investigator 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, or
- in serious cases, requesting or directing the person to resign, or terminating the person's employment or appointment (having complied with the rules or procedural fairness).

What are some exceptions to the obligation?

There are certain exceptions to the obligation on investigators to avoid actual or perceived conflicts of interests in the performance of official duties. These include:

- where the personal interest is so minimal in the circumstances that the mere disclosure of the interest to all interested parties would be sufficient to appropriately address the issue

- where the persons likely to be concerned about a potential, actual or reasonably perceived conflict have been informed and have agreed to the person being involved or further involved in the investigation
- where it can be adequately explained to all parties that what could be perceived to be a conflict of interests is not in fact an actual conflict of interests

- where it is 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 (eg, where a matter has a significant history that involves 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.

- where such conflicts are unavoidable (eg, where some binding agreement provides that the holder of a certain position will be responsible for investigating any allegations about the conduct of persons they supervise), provided the nature of that relationship has been disclosed to all interested parties

- where the conflict arises out of factors that are an integral part of the role (eg, where the role involves or requires an audit or investigation into the conduct of colleagues that the auditor or investigator may have worked with for some time), provided the nature of these relationships or histories has been disclosed to all interested parties at the outset

- where the conflict relates to a decision or action in relation to which the person with the conflict has no discretion (eg, where they are obliged to implement the law, government/agency policy, or a direction from a superior or Minister in a certain way).

3. Acting fairly

Fairness is an essential component of good decision-making. One of the fundamental expectations of the public is that government power will be exercised ‘fairly’, and government services and benefits will be distributed ‘fairly’ (which does not necessarily mean equally).

It is an implied condition of the granting of discretionary or statutory power to public officials that it be exercised fairly. Acting fairly includes acting reasonably and impartially, providing procedural fairness, and interviewing ethically.

3.1. Providing procedural fairness

Why is procedural fairness important?

Procedural fairness is about giving a 'fair go' to people who may be affected by a decision. It isn't enough that a decision might be 'right' – it is not 'just' if made without the decision-maker first hearing from the person affected by it. The courts argue that the policy reasons for procedural fairness are:

- to increase the chances that the decision-maker will make a fair and unbiased decision, and
- to ensure that justice is not only done but is seen to be done.

There is a presumption in statutory interpretation that legislation retains the right to procedural fairness unless it is explicitly excluded.

When does the right to procedural fairness arise?

A large amount of guesswork is often required because the courts have been less than helpful by holding that the rules are variable depending on the circumstances of each case, but not setting down clear guidance as to how to apply the principles to those cases. One area of difficulty is identifying when procedural fairness applies, eg:

- does it apply before finalising a preliminary or draft report arising out of an investigation that contains adverse comment?
- does it apply when it is proposed that adverse comment be included or an adverse finding be made in a report arising out of an investigation?
- does it apply when a decision-maker must decide whether to implement recommendations in a report that are adverse to the rights or interests of a person?

Another issue is the question as to who decides whether a comment, decision, etc is 'adverse', eg, the person the subject of the comment, the investigator, the final decision-maker, a court or tribunal? In practice each must make their own assessment as to whether an action (eg, a report) or decision (eg on a matter recommended in a report) affects the rights or interests of an individual in such a way as to attract the principles of procedural fairness.

As to when the right to procedural fairness arises, in South Australia v O'Shea [1987] HCA 39; (1987) 163CLR 378, the High Court held that "… *where a decision-making process involves different stages before a final decision is made, the requirements of natural justice are satisfied if the decision-making process, viewed in its entirety entails procedural fairness"* (at 29). However, in the later case of *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564, the High Court clarified that this only applied where the stages are part of one decision-making process. In the later case, the Court held that the question to consider is "… *whether a step leading to the final decision has the power to adversely affect the person's rights, interests, or legitimate expectations*".

The point in time at which the person the subject of the complaint is informed of the allegations will depend on the circumstances of each case. In the absence of clear statutory direction regarding the provision of procedural fairness, the following basic principles appear to be reasonable:

- If on the face of it a complaint does not disclose a case to answer, it will be appropriate to wait until a fact finding inquiry has determined that there may indeed be a case to answer before

the person the subject of that complaint is informed about the allegations (in cases where the complaint is baseless and is not pursued this will save the person suffering unnecessary stress).

- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer(s) is unknown, there will generally be no need to notify possible suspects of the allegations unless and until they are identified as clear suspects.

- Where is appears that relevant evidence could be tampered with or destroyed, and there is an unavoidable need to interview a witness before steps can be taken to secure that evidence, it may well be appropriate to delay fully informing the witnesses of the substances of the allegations until the interview. An investigator should also be circumspect about what prior information is given to witnesses where there is a real risk that there could be collusion between them.

- In rare circumstances (such as where the matter has been or is to be referred to ICAC or the police), it may not be appropriate for the agency to provide any information to the person the subject of the allegations.

Who can procedural fairness apply to?

Procedural fairness can apply to:

- the persons the subject of an investigation

- any person whose rights or interests are likely to be adversely affected by the content of a report or the recommendations arising out of an investigation

- it is likely it also applies to ‘legal persons’ whose rights or interests (including reputation) are likely to be adversely affected, ie, corporations.

What are some exceptions to the obligation?

The courts have provided some guidance as to circumstances where the principles do not apply, eg:

- where material is not credible, relevant and significant to the issue

- where compliance would be clearly impractical or unreasonable in the circumstances, eg, where a matter of significant public importance must be addressed as a matter of extreme urgency, such that there was no time available to provide procedural fairness

- where comment, decision, etc, adverse to an individual relates to policy or ‘political’ considerations that affect an individual as a member of the public or a class of the public [see for example Gibbs CJ in *Bread Manufacturers v Evans* (1981) 38 ALR 93 at 102-104]

- prior to the making of legislation or delegated legislation.

- where the comment decision has implications for a large number of people.

There are also circumstances where the principles do apply but application can be abridge or reduced, for example again in circumstances of urgency or where there are considerable costs that

will be incurred for any significant delay, ie, time limits can be imposed that are reasonable in the circumstances.

What are some implications for investigators?

Procedural fairness can be relevant to three aspects of an investigation and/or decision-making process:

1) how information is collected

2) how information is used by the investigator and eventual decision-maker, and

3) the involvement of persons affected in checking the accuracy of the information, protecting their rights, and influencing the outcome.

The aspects of procedural fairness that apply to an investigation are the:

- *notice rule* – that any person whose interests are likely to be affected by a decision is given notice (at an appropriate time) of the issues in sufficient detail for the person to be able to respond meaningfully

- *hearing rule* – that any person likely to be affected by a decision or action is given a reasonable hearing, ie, a reasonable opportunity to respond to adverse material, such as proposed adverse comment and/or recommendations. This might be face-to-face, in a hearing or in writing, as appropriate to the circumstances. In the *Kioa v West* case in 1985 the High Court said that procedural fairness had not been provided because Kioa had not been given the substance of certain credible (as in possible), relevant and significant 'material' that was known to and could have influenced the decision-maker. A similar finding was made for similar reasons by the NSW Supreme Court in *Nichols v Singleton Council* [2011] [NSWSC 1517].

- *evidence rule* – there must be logically probative evidence to support conclusions, findings and recommendations – ie, they need to be based on logical proof or material evidence rather than mere speculation or suspicion. A further aspect of this rule is that the investigator must make inquiries into all matters relevant to the subject matter of the investigation.

- *bias rule* – also known as 'the rule against bias' – the persons investigating an allegation, preparing a case or making a decision must act impartially in considering the matter. This requires, amongst other things, that the investigator and decision-maker have had no direct involvement in the matters the subject of the investigation, and preferably that neither directly supervises any of the people under investigation (particularly important where the allegations and possible consequences are serious). This rule also emphasises the need for investigators and decision-makers to choose their language carefully to ensure that the language is perceived to be neutral.

3.2 Interviewing ethically[14]

Why is ethical interviewing important?

Interviewing is central to the success of most non-paper based investigations and so the highest professional standards must be upheld to ensure the credibility, reliability and useability of the information obtained. This requires that interviews be conducted in ways that are ethical, ie, based upon respect for the human rights interviewees, procedurally fair, impartial and treating all interviewees with respect.

A well known approach for achieving this was developed in the UK known as PEACE:

> *"Following a series of miscarriages of justice in the UK where police interviewing methods were severely criticised … an ethics-based approach to interviewing was devised that aimed to minimise the risks of unreliable evidence and negative reactions from witnesses.. . The approach is known by the acronym PEACE to highlight five distance stages in the interview process. PEACE stands for, (P) Planning – stressing the importance of planning an interview prior to its commencement so that clear aims and objectives of the interview are established; (E) Engage and explain – involves explaining to the witness what the purpose of the interview is, what they should expect, and how the interview will proceed; (A) Account – refers to the manner in which an account or version of events is elicited from the witness; (C) Closure – stresses the importance of bringing the interview to a comfortable conclusion whilst maintaining rapport with a witness and avoiding negative emotional reactions such as anger or anxiety; (E) Evaluate – reminds the interviewer to evaluate the produce of their interview and their performance to identify other informational needs…"*
>
> *"Evaluation of the use of the PEACE model has illustrated improvement in the reliability of witness accounts and a reduction in miscarriages of justice where interviewing practices were cited by the appellant… However, PEACE is merely a structure for investigative interviewing, reminding practitioners of important stages that they should go through during an interview. PEACE does not in and of itself suggest what an interviewer should do within any particular stage."*[15]

What are some implications for investigators?

The implications of the obligation on investigators to interview ethically include:

- aggression, overt or implied threats and/or attempts to persuade interviewees to respond in a particular manner, are not consistent with good practice
- vulnerable people such as the young, those with mental illness or learning disabilities, and highly emotional people require particular consideration
- interviewers should be vigilant for and sensitive to signs of distress shown by interviewees and be prepared to act appropriately, which may include postponing an interview should there be indications of excessive interviewee distress, and
- the duration of an interview should be appropriate for the aims and objectives of the interview with due consideration for the capacity and emotional state of the interviewee.

---

[14] Much of this material is based on "*The Victorian Ombudsman Investigative Interview Strategy*" and the work of Dr Karl Roberts of the Australian Graduate School of Policing, Charles Sturt University.
[15] *Great Expectations: Relations of Trust and Confidence in Police Interviews with Witness of Crime*, Dr Karl Roberts, *Policing Advance Access*, June 30, 2010.

4. Being appropriately transparent

Being appropriately transparent involves being frank and candid in communications, while at the same time ensuring appropriate secrecy, confidentiality and privacy.

4.1. Being frank and candid

Why are frankness and candour important?

Public officials are obliged by the law, codes of conduct and any applicable professional ethics to be frank and candid in the advice they give in the performance of their official functions, ie, to be honest, open and sincere.

What is frankness and candour?

Frankness and candour are not only about telling the truth, but also telling the whole truth. The dictionary definitions of 'frank'/'frankness' and 'candid'/'candour' emphasise being open, unreserved, outspoken, sincere, honest, straightforward, blunt and undisguised.

In the past it was not uncommon for some public officials to claim that unless their communications were secret, they could not be expected to be frank and candid in the giving of advice as part of their official functions. Such claims demonstrated a lack of a proper understanding of official roles and duties.

The old argument that requirements of transparency inhibit frankness and candour in decision-making has been considered and dismissed in numerous judicial and tribunal decisions in a range of relevant jurisdictions, and is contrary to common law obligations and codes of conduct. For example, the argument that confidentiality or secrecy was a prerequisite for frankness and candour was authoritatively dealt with by the High Court of Australia in a case where Mason J (as he then was) said: "…*I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient*" (*Sankey v Whitlam and ors* (1978) 142 CLR 1 at p 97).

In a NSW District Court case Ainsley-Wallace DCJ noted: "*It seems to me, … to be an untenable position to say that the quality of advice given by public servants and indeed the quality of their suggestions on particular issues would be impaired if those advices and suggestions could become public*." *Helen Hamilton v Environmental Protection Authority* (District Court of NSW, No 367 of 1997, 5 August 1998, unreported).

The common law obligation of fidelity on all employees is also relevant in this context. The obligation of fidelity implies a duty in every contract of employment that the employee will act in good faith and will assist the employer by supplying information known to the employee which concerns the business and operation of the employer's business. The common law duty to obey the lawful orders of employers includes an obligation to answer questions about how an employee has done his or her work or what they have done during working hours. This implies a duty on employees to be frank and candid with their employer, and representatives of their employer.

What are some exceptions to the obligation?

The clearest exception of the obligations on public officials to be frank and candid is where there are valid secrecy, confidentiality or privacy obligations on those public officials. Another clear exception

would be where there are operational imperatives that require secrecy, confidentiality or selectivity in relation to the information that may be disclosed.

What are some implications for investigators?

During the course of an investigation investigators should provide relevant information about proposed adverse comment or recommendations to any person whose rights or interests are likely to be detrimentally affected by the investigation or any subsequent report. Other than where the provision of such information could significantly detrimentally impact on the effectiveness of an investigation, this obligation should be interpreted broadly.

Investigators should also assume that some or all of the documentation they prepare in the course of an investigation may be made public, either by their employer (for example in response to a request under the GIP Act), or by the subject of the investigation.

4.2. Ensuring appropriate secrecy, confidentiality and/or privacy

Why are the concepts of confidentiality, secrecy and privacy important for investigators?

To maintain trust in government and protect the privacy of individuals, information obtained by public officials in the course of performing their official duties should only be used and disclosed for good and proper official purposes.

Members of the public have a right to expect that information held by government concerning their personal information and health information will not be unlawfully, unreasonably or improperly disclosed, or used for purposes other than that for which the information was originally collected.

The use of official information for personal advantage, the release of official information at the whim of particular investigators, or the selective leaking of official information for an improper purpose, undermines the integrity of government and can cause unnecessary harm to individuals.

What is the difference between confidentiality, secrecy and privacy?

Confidentiality and secrecy refer to the obligation on public officials not to improperly disclose any information obtained in the course of performing their official functions. Privacy on the other hand is used here to refer to the right of individuals not to have personal information about them improperly collected, used or disclosed. In terms of obligations <u>on</u> the holders of information:

- secrecy is an obligation to comply with the law
- confidentiality is an obligation to the provider of the information
- privacy is an obligation to the subject of the information.

When might confidentiality/secrecy/privacy be important?

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 to prevent the unauthorised disclosure of personal or otherwise sensitive information.

Government agencies gather, keep and use vast quantities of information. While the majority of this information relates to relatively mundane day-to-day operational matters, some concerns the personal affairs of individuals and business affairs of companies, or is sensitive for other reasons.

While the Ombudsman has long supported a positive approach by agencies to the disclosure of information (often referred to as "*open government*"), we have also recognised that there are circumstances where effective public administration or the privacy rights of individuals requires confidentiality/secrecy/privacy.

The circumstances where it may or will be important to ensure that official information is kept confidential include those where the release of information would:

- be an unreasonable disclosure of personal information or business affairs (eg, disclosure of 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, for example in some circumstances in relation to working documents prior to a final decision being made
- give unfair commercial advantage to individuals
- cause unreasonable damage to the government's commercial interests.

What are some implications for investigators?

Investigators are obliged to protect the integrity and maintain appropriate confidentiality in relation to the official information for which they are responsible. In this regard they must only use official information in the legitimate exercise of their official functions and not for personal purposes.

An issue that arises in any investigation where there is a complainant, a witness or a person the subject of investigation, relates to whether and if so what information should be disclosed, to who, when and how. Questions that will need to be answered in such circumstances include:

- what information should or should not be disclosed?
- what information should be provided to complainants, to witnesses and/or to the subjects of the investigation?
- when should such information be provided?
- how should the information be provided?

The basic principle guiding such deliberations is that as much information as possible should be provided to all interested parties,[16] subject to reasonable limitations, for example where it can reasonably be expected that disclosure of particular information could:

[16] This is subject to the limitation that where information is obtained in the exercise of a statutory power, that information may only be used by the recipient of the information for the purposes for which the power is conferred and for purposes reasonably incidental to those powers, or for other purposes authorised by statute.

- result in unreasonable detrimental impact to any individual, for example a whistleblower who has made a report to management in confidence
- result in unreasonable detrimental impact to any current or likely future investigation
- prejudice the future supply of information
- substantially adversely affect the management of the agency
- prejudice occupational health and safety, or
- breach secrecy, confidentiality or privacy obligations.

In relation to investigations into matters raised by staff in particular, there are a number of things that might, where appropriate, need to be kept confidential, including: the fact that the complaint was made; the identity of the complainant; the substance of the complaint; the identity of any person(s) who are the subject of the complaint; and/or how the complaint is being or is to be investigated.

There is generally no legal or procedural obligation on agencies to disclose that they have received a complaint (or a disclosure under the PID Act). While the nature or substance of allegations must be put to any persons they concern at an appropriate time, this does not mean that an organisation must inform such persons before it undertakes any form of investigation or evidence gathering.

Other than where a formal disciplinary or statutory process is commenced that requires immediate notification of any person who is the subject of the investigation or action, agencies generally are not obliged to notify such persons at the outset of an investigation into allegations that may concern their conduct, at least prior to interview. In such circumstances agencies may be able to discretely undertake a range of overt or covert information gathering activities prior to notification.

Where procedural fairness obligations need to be complied with, often these can be met later in the process once information has been uncovered that warrants commencement of some formal investigative or disciplinary process that could affect the rights or interests of the individuals concerned.

There are a range of circumstances where it would or may well be appropriate to disclose information during the course of or arising out of an investigation. These circumstances would include:

- to facilitate an investigation – an integral part of any investigation is the need to disclose information for the purpose of obtaining information. This might be explicit and intentional, eg, disclosing the details of allegations to the subject of the allegations seeing his/her side of the story. Alternatively it may be implicit or even unintentional, eg, every question that is asked in the course of an interview discloses something to the interviewee, be it information the interviewer is aware of or information the interviewer is seeking.
- to keep interested parties aware of the progress and results of an investigation – the most common source of criticism or complaint about the conduct of an investigation is that the investigator/agency did not give sufficient and on-going feedback to the complainant. Complainants should be kept up to date and regularly advised, in general terms, of progress

---

In other words, in such circumstances the statute imposes on the recipient a duty not to discuss the information obtained other than for that purpose or for some other statutory purpose.

in investigating or otherwise dealing with their complaint and the timeframes that apply. It is important to reassure complainants that their complaint is being taken seriously.

- to comply with procedural fairness requirements

- to give reasons for decisions or conclusions (however, where an investigation does not substantiate a complaint or disclosure, it may be appropriate for the fact that the investigation was carried out, the result of the investigation and the identity of the person who is the subject of the complaint/disclosure to remain confidential, where possible, unless the subject requests otherwise)

- to comply with an agency's open disclosure policy when things go wrong (for example in the health sector)

- to comply with legal obligations, eg, under the GIPA Act or obligations imposed under other legislative powers such as the ICAC Act and Ombudsman Act, under subpoena, for the purposes of criminal or disciplinary proceedings, etc.

5. Being accountable

Why is accountability important?

The 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 governments, 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 depends upon trust and confidence founded upon the administration being held accountable for its actions."*

Why is recordkeeping important?

Public officials must make and keep full and accurate records of their official activities. Good record keeping assists in improving accountability and provides for transparent decision-making. Records are maintained as evidence of business activities and transactions. This evidence, which comprises the corporate memory of the agency and its narrative history:

- enables the agency and its staff to meet legislative and regulatory requirements

- protects the interests of the agency and the rights of staff and members of the public

- supports better performance of business activities throughout the agency by documenting organisational activities, development achievements and facilitating consistency, continuity and productivity in management and administration

- provides protection and support in litigation, including the better management of risks associated with the existence or lack of evidence of agency activity
- supports research and development activities.

In many circumstances public discourse will focus on whether the appropriate public interest has been correctly identified or whether there has been an appropriate balancing of conflicting public interests. At one end of the spectrum will be circumstances where the appropriate public interest considerations are clear from the terms of the relevant legislation. At the other end of the spectrum will be circumstances where there are conflicting public interests that are either very finely balanced or where the appropriate weighting to be applied to each is unclear.

As a generalisation it can be said that decisions made at either end of the spectrum are more easily supportable or defensible than decisions made in the grey area in between — at one end because the 'right' answer is clear and at the other end because there is clearly no 'right' answer and therefore the decision-maker has far more room to move.

Where a decision is contentious or otherwise significant, it should be expected that it is likely to lead to the expression of contrary views and active debate as to the merits. Such an outcome 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. In such circumstances it is important to ensure that any such debate focuses on the merits of the decision and not the conduct or propriety of the decision-maker or the decision-making process. Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

The more significant or contentious an issue, the greater the importance of ensuring that the basis for the decision is properly documented. For example, where a decision or a course of action is being considered by some third party, be it an interest group, opposition MPs, journalists, regulators, watchdog bodies, tribunals or courts, if the basis for a 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. This generally increases the chances that any debate will focus on the merits of the decision and not the conduct of the decision-maker.

Proper documentation also helps to achieve a second important goal in this context — that there was adequate rigour in the assessment process, 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, and
- some difficulty in explaining (or rationalising) the basis on which a decision was made.

What are some implications for investigators?

Investigators need to make and retain full and adequate records to adequately support their conclusions and recommendations, and to demonstrate compliance with legal requirements as well as applicable agency procedures and practices.

BENEFITS FOR INVESTIGATORS AND AGENCIES

Acceptance of outcomes

Apart from the knowledge of a job well done, there are a number of practical benefits for both investigators and agencies that flow from compliance with ethical obligations by investigators.

Organisational scientists have put forward 'organisational justice theory' or 'justice theory' as a way to describe or explain how individuals react to decisions and the way they are made. Nearly 40 years ago, Thibault & Walker[17] put forward the proposition that disputants care as much about how their disputes are resolved as they do about the outcomes they receive. Subsequent research from around the world has supported this view.

'Justice theory' looks at what is important for outcomes to be perceived to be acceptable and/or for all the people involved in the process to be satisfied with the fairness of the process and how they were treated. Justice theory argues that where the procedures followed and the interactions with the person concerned are perceived to be fair, reasonable and appropriate, then a negative outcome for the complainant will not necessarily mean the decision or outcome, or the decision-maker, is perceived negatively.

Organisational scientists argue that there are four dimensions of any decision-making process:

1) the **decisions** or **outcomes** of the process (referred to as "*distributive justice*") – focussing on the perceived fairness of decisions or outcomes of the process

2) the **procedures** used (referred to as "*procedural justice*") – focussing on the perceived fairness of processes/procedures used to make decisions/resolve conflicts/reach outcomes – the means by which decisions are made.

3) the **treatment** of the individual involved (referred to as '*interactional justice*") – focussing on the perceived fairness of the treatment of the individual concerned. This dimension consists of two separate elements:

    3a) the **manner** in which the person was treated ("*interpersonal justice*"), and

    3b) the **information** provided to the person ("*informational justice*").

Between an original issue or problem and a very negative response, there is usually some intervening event or conduct. In justice theory terms, such an intervening event, sometimes referred to as '*double deviation'*, will usually involve a failure of '*procedural justice'* or '*interactional justice'*, ie, how the problem or issue was dealt with, how the person was treated and/or how the person's initial expression of concern was handled.

It is therefore in the interests of investigators and their employing organisations that in making a decision or reaching an outcome that may be against the interests or desires of individuals, whether initially or in response to a complaint, the procedures and practices involved in making that decision or reaching that outcome are, and are clearly seen to be, fair and reasonable.

[17] Thibault, J, & Walker, L (1975), *Procedural Justice*, Hillsdale, NJ: Lawrence Erlbaum.

In relation to the fairness or 'justice' of **decisions** and **outcomes**, people base their evaluations on such criteria as their perception of the '<u>fairness</u>' of the decision or outcome, the '<u>rightness</u>' of the decision, and/or their perception of '<u>comparability</u>' with someone, some group, or something else.

Of greater relevance to investigators are peoples' perceptions as to the fairness of the <u>procedures</u> used and the <u>treatment</u> they received.

In relation to the procedures used in an investigation process, perceptions of fairness are likely to be based on assessments people make of a range of matters that relate to ethics, including such things as:

- *ethicality* – the policies and procedures used in or guiding an investigation are perceived to be fair and ethical, and the perceived intentions of the investigators and decision-makers involved are seen to meet acceptable ethical and moral standards

- *fairness* – whether the rights and interests of all parties to an investigation are properly respected, represented and considered

- *objective criteria* – the policies and procedures that guide the assessment of the facts and circumstances and the conclusions reached are seen to be based on objective criteria

- *consistency* – the policies, procedures and criteria used in an investigation are seen as being consistently applied

- *impartiality* – decision-making in relation to the investigation and its outcome is seen to be unbiased and 'neutral', and reliable safeguards are seen as being in place to avoid bias, and

- *control* – the people affected by an investigation have a perception of some control over the process because they had an opportunity to put their views/make representations and their input was treated with consideration and respect.

In relation to the **treatment** of the individual involved, 'interactional' justice is said to comprise two elements:

a) firstly, the *treatment* of the person concerned (referred to as "*interpersonal justice*") – relating to the perceived fairness of the manner in which the person is treated. Perceptions of fairness are likely to be based on assessments people make of a range of matters that include ethical considerations, such as:

    - the level of *respect* and consideration shown by the investigator, ie, whether they and their views were considered and treated politely and respectfully, including for example whether they perceived attentive listening and/or an attempt to understand their perspective

    - the *propriety* of questions, eg, whether improper questions were asked and/or prejudicial statements made by the investigator

    - the protection of *privacy*, eg, the degree to which the privacy of the person is appropriately protected or at least considered by the investigator.

b) the second element or dimension of treatment is *information* (referred to as "*informational justice*") – relating to the assessments people make of the perceived fairness of certain matters relating to the provision of information about or explanations of decisions/outcomes, including:

- the level of *transparency* – the adequacy of explanations given for a decision/ outcome

- the degree of *honesty* and *candidness* – whether realistic and accurate information was provided about a decision/outcome and how it was reached

Each element or dimension of justice theory focuses on the perception of fairness/justice by the person concerned. As in practice a person's perception is their reality, this theory emphasises the importance of acting ethically in the implementation of processes that can impact on the rights of interests of individuals.

The key lessons we can learn from organisational justice theory are that it appears to be very much in the interests of investigators and agencies that investigators (and complaint handlers) ensure that, amongst other things:

- the procedures they use are seen to be fair and reasonable (for example the provision of procedural fairness)

- their assessments of the information obtained are based on objective criteria that are seen to be consistently applied

- their interactions with complainants and people the subject of investigation are fair and respectful, and

- the timing and quality of the information they provide to complainants and people the subject of investigation is reasonable and appropriate in the circumstances.

Who benefits from procedural fairness?

In relation to procedural fairness, an interesting practical issue to consider is who benefits most – the person given the opportunity to be heard or the investigator or decision-maker providing that opportunity?

The generally accepted view is that persons whose rights or interests are affected by an investigation benefit from having the substance of allegations and grounds for adverse comment put to them because this allows them the opportunity to: deny the allegations; call evidence to rebut the allegations; explain the allegations or present an innocent explanation; and/or provide mitigating circumstances.

It could be argued that in many respects of the primary circumstance in which a person under investigation could in practice benefit from procedural fairness is actually when it has been unreasonably denied, because then any decision is likely to be set aside by the courts.

It is not commonly recognised that in a very practical sense the subject of an investigation/proposed adverse comment is not the only, and often not even the primary, beneficiary of procedural fairness. Often those who benefit most will be the investigator and the agency/employer concerned. From the perspective of an investigator, procedural fairness is best considered to be an aspect of the investigation process, not the reporting process – it is a way to check facts, to identify weakness, to discover how a report is likely to be attacked, to improve decision-making, etc.