

## Frankness and candour

### What are 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.

### When does it apply?

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, eg. to be honest, open and sincere.

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 legal position

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.

### Government policy

Government policy, which finds its most relevant expression in the codes of conduct adopted for government and by agencies, also supports frankness and candour in the giving of advice.

The *Model code of conduct for NSW public agencies* provides that '*fairness, impartiality and integrity*' are general principles applicable across the public sector. It states that:

*'The people of New South Wales have a right to expect the business of the State to be conducted with efficiency, fairness, impartiality and integrity.'*

*'Public employment carries with it a particular obligation to the public interest. It requires standards of professional behaviour from staff that promote and maintain public confidence and trust in the work of government agencies.'*

These principles are reflected in most public sector codes of conduct. Such codes emphasise fairness, honesty, integrity and impartiality, and that information provided by public officials should be clear to the intended audience, accurate, current and complete.

As an example, the Code of Conduct and Ethics for Public Sector Executives states:

*'3.2 Advice provided by executives to the Minister and Government should be **frank, independent, based on an accurate representation of the facts and as comprehensive as possible.** This includes setting up the advantages, disadvantages, costs and consequences of the available options and, where appropriate, recommending a particular course of action.'* (emphasis added)

Codes of conduct also uniformly emphasise that the public must be able to trust public officials to put the public interest above their own private interests.

### Exceptions to the obligation

The only exceptions where it can be argued that confidentiality is a valid prerequisite for frankness and candour relate to high level decision-making and policy-making, legal professional privilege, to a limited extent internal working documents (prior to a final decision being made) and possibly sensitive personal information. Even then, it is a pre-condition for justifying confidentiality that a detrimental effect can be reasonably anticipated in similar deliberative processes or where disclosure would give unfair advantage or improperly undermine the effectiveness of a decision. There may be an argument that frankness and candour would be impaired by disclosure in relation to Cabinet documents, particularly those that disclose the actual deliberations of Cabinet.

## Further information

For further information on this and related topics, see: *Good Conduct and Administrative Practice— Guidelines for state and local government*, NSW Ombudsman, August 2003 and Public Sector Fact Sheet No. 1 – *Apologies*, NSW Ombudsman.

## Contact us for more information

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