



# HOW DO PUBLIC INTEREST CONSIDERATIONS IMPACT ON THE ROLE OF PUBLIC SECTOR LAWYERS?

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## Is government obliged to act in the public interest?

The WA Inc Royal Commission said in its report that one of the two fundamental principles<sup>1</sup> 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."*<sup>2</sup>

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."<sup>3</sup> 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",<sup>4</sup> 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".<sup>5</sup>

Acting in the "*public interest*" is a concept that is fundamental to a representative democratic system of government and to good public administration. This deceptively complex concept presents two major obstacles to governments and public officials acting in the "*public interest*":

- firstly, while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice.
- secondly, identifying or determining the appropriate public interest in any particular case is often no easy task – as Lyndon B Johnson once said: "*Doing what's right isn't the problem. It's knowing what's right*".

## Are public sector lawyers obliged to act in the public interest?

Unlike their private sector colleagues, public sector lawyers are also public officials and therefore subject to the duty on all public officials to act in the public interest, ie to perform their official functions and duties, and exercise any discretionary powers, in ways that promote or preserve the public interest.

The obligation to act in the public interest is an additional burden placed upon public sector lawyers that their private sector colleagues do not have. Some things that may be acceptable in the private sector are not acceptable in the public sector. For example, public sector lawyers must act, and advise their client agency and its staff to act, within both the letter and the spirit of the law.

Public sector lawyers need to be aware that a decision can be legal, lawful, ethical and based on relevant considerations, but still not be in the public interest, for example where:

- it was not based on all relevant considerations

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<sup>1</sup> The other fundamental principle was: "*It is for the people of the State to determine by whom they are to be represented and governed*".

<sup>2</sup> In Volume 1, Chapter 1, at 1.2.5.

<sup>3</sup> In Volume 1, Chapter 3 at 3.1.5.

<sup>4</sup> Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p191) – the SpyCatcher Case.

<sup>5</sup> Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & ors* (1981) ALJR 45 (at p49).

- it was based on a mistake of fact
- the circumstances have changed before the decision is implemented, etc.

Public sector lawyers, particularly because of their involvement in interpreting legislation, often play a pivotal and sometimes unrecognised role in shaping their agencies' conception of the public interest that it serves. The obligation to act in the public interest may at times require the government lawyers to give advice that is unpalatable or disadvantageous to their client agencies.

Unfortunately, our experience at the NSW Ombudsman has been that a number of public sector lawyers do not understand this distinction. When we approach their agency seeking information and, where appropriate, resolution, they adopt a 'deny and defend' response. There are two reasons why that type of response to an Ombudsman is inappropriate:

- firstly, it's unethical – the Ombudsman is empowered by Parliament, in the public interest, to review a wide range of matters within jurisdiction. It is the clear intention of Parliament that organisations and individuals within jurisdiction will cooperate with and assist the Ombudsman. Obstruction of the legitimate activities of the Ombudsman is not in the public interest.
- secondly, it's counter productive – the office views that sort of lack of cooperation or obstruction as a clear indication of something to hide. When we are confronted by such an uncooperative or obstructive response, our automatic response is to escalate – if our inquiries were informal, they are immediately made formal and escalated to the CEO.

## When is the public interest likely to be an issue?

For public officials generally, there are four primary circumstances where the 'public interest' is an issue:

- firstly, the over-arching consideration of public service is that public officials should perform their official functions and duties and exercise any discretionary powers in ways that promote or preserve the public interest (ie, acting in the public interest)
- secondly, where it is necessary to identify the particular public interest or interests that the public official and/or the public official's employing agency are required to promote or preserve (ie, identification of public interest objectives),
- thirdly, where it is necessary to deal with conflicting public interests (ie, balancing conflicting public interests), and
- fourthly, where there are particular public interest considerations or tests specified in legislation (ie, compliance with statutory public interest tests).

## Can the public interest be defined?

As public sector lawyers I am sure most of you have used the term "*public interest*" at some time, and some of you will use it a lot of the time – but what does it actually mean?

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 be described as the 'common good'.

The public interest has been variously described as the sum of special interests, the sum of all private interests, the net result of individuals pursuing their self interest, the broad shared interests of society, and the shared/collective values of the community – the goals or values on which there is consensus.

The meaning of the term was considered in some detail by the Full Court of the Federal Court of Australia in its decision in *McKinnon v Secretary, Department of Treasury* [2005] FCAGFC 142 where Tamberlin J noted:

*“9 The expression ‘in the public interest’ directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. There will, as in the present case, often be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies and these are sometimes loosely referred to, in my view, as opposing public interests...”*

*10 The expression ‘the public interest’ is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...”*

Although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation<sup>6</sup> or by the courts. Academics have also been unable to give the term a clear and precise definition. 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.

The term was referred to in the following colourful, but pragmatic, terms by an American commentator:

*“Plainly the ‘public interest’ phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy maker (under the supervision of the courts of course).”<sup>7</sup>*

## Is it easier to 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)

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<sup>6</sup> 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*.

<sup>7</sup> Glen O Robinson, *The Federal Communications Act: A Essay on Origins and Regulatory Purpose*, in *A Legislative History of the Communications Act of 1934* 3, 15-16 (Max D Paglan ed., 1989) (at 16).

- *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<sup>8</sup> (to be distinguished from something that is of interest to the public in general)<sup>9</sup>
- *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).

These can be categorised as “*motivation*” type issues that focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties), or distinguishing between decisions made in good faith (ie, honesty, for the proper purpose and within power) from those made in bad faith. The meaning of the term, or approach, indicated by the use of the term, is to direct consideration away from such interests towards matters of broader concern.

## So what does the term mean?

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 (i.e. more ‘public’) concern.

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 as a concept, and what is “*in*” the public interest in any particular circumstance.

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. In fact it is this “*rich and variable*”<sup>10</sup> content which makes the term so useful as a guide for decision-makers.

It is actually possible to determine what is meant by the “*public interest*” if a distinction is drawn between the concept and its application. The “*public interest*” might best be seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved.

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<sup>8</sup> *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)

<sup>9</sup> *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).

<sup>10</sup> See note 11.

## What are the dimensions of the public interest?

In my view 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 – the decisions made by the decision-maker
- 2) *inputs* – ie, the matters considered by the decision-maker in making decisions
- 3) *process* – ie, the procedures and practices followed by the agency and/or decision-maker, and
- 4) *approach* – ie, the conduct of the decision-maker in relation to decisions.

Most discussion and debate about public interest issues focuses on outcomes – about whether a decision made in the public interest, or about the relative merits of conflicting public interests.

For outcomes to be in the public interest, it is crucial that the inputs – the matters considered by the decision-maker – also reflect the public interest. Relevant inputs 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 bias.

In relation to process, the relevant public interest related factors would include:

- impartiality, including the absence of discrimination, or acting apolitically in the performance of official functions (of course this is not applicable to elected public officials)
- fairness in the exercise of discretionary powers, including procedural fairness, the giving of reasons, etc
- reasonableness, including proportionality
- confidentiality
- proper accountability and transparency, including the making of appropriate records, acceptance of proper scrutiny, facilitation of public access to information, etc.

In relation to the approach of decision-makers, what is important would include:

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

# How should public interest objectives be identified?

## Identifying relevant public interests

Making an assessment as to how the “*public interest*” applies in a particular circumstance can be thought of as a three stage process:

- firstly, identification of the relevant population – the “*public*” whose interests are to be considered in making the decision
- secondly, identification of the various “*interests*” applicable to an issue or decision
- thirdly, an assessment and weighing of each applicable “*public interest*”, including the balancing of conflicting or competing “*public interests*”.

The **first step** for the decision-maker – the identification of the relevant public – is relatively simple in most cases. Most attempts to describe what is meant by the “*public interest*” refer to the “*community*”, “*common*” good or welfare, “*general*” welfare, “*society*”, “*public*” or the “*nation*”. However, the issue of what constitutes the “*public*” in “*public interest*” has largely been unexplored.

When addressing this issue, academic commentators and judicial officers have taken it as a given that the “*public interest*” relates to the interests of members of the community as a whole, or at least to a substantial segment of them - that it should be distinguished from individual, sectional or regional interests<sup>11</sup>. At the other end of the spectrum it is also widely accepted that the “*public interest*” can extend to certain private ‘rights’ of individuals - rights that in many societies are regarded as being so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness<sup>12</sup> and the right to silence.

However this conceptualisation of the public interest fails to identify and address an important implication. In my view the public interest must also be able to apply to the interests of groups, classes or sections of a population between those two ends of the spectrum. The “*public*” whose interests are to be considered can in practice validly consist of a relatively small group, class or section of a total population. Sub-groups of a total population that could be considered to be the relevant “*public*” whose best interests need to be considered by a decision-maker might be geographically based, ie, the residents of a particular area. This can be seen most clearly in a Federal system of government such as Australia, for example:

- in relation to the exercise of a discretionary power at the national level, the “*public*” could refer to all residents of Australia
- for a state public official, the “*public*” whose interests are relevant will primarily be the residents of that state, and
- for a local public official, the “*public*” would primarily be the residents of the local area.

Decision-makers at different levels of government, or in equivalent but separate levels of government (eg, separate state or local councils), will therefore have different views as to the “*public*” that is

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<sup>11</sup> *Assessing the public interest in the 21<sup>st</sup> Century: A framework*, Leslie A. Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.

<sup>12</sup> Per Mason CJ in *Attorney General (NSW) v Quin* (1990) 64 ALJR 627 and Lord Keith in *Glasgow Corporation v Central Land Board* [1956] SC(HL) 1 at p25.

relevant to their decision. One consequence of this is that they can have very different, but equally valid, views as to what constitutes the “*public interest*” in relation to the same issue.

The **second step** for (non-elected) public officials exercising discretionary powers is to determine the specific public interest objective or objectives that apply to their role and/or that of their employing agency. This is done by reference to three sources of information:

- 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 the agency or its functions, from explanatory memoranda or from relevant second reading speeches, or
  - the terms of legislation that establish the agency and/or give it functions and powers
  - any regulations that set out the functions and powers of an agency, or
  - any procedural requirements the public official is required by law to comply with in decision-making (eg, procedural fairness)
- secondary sources:
  - government policy (including council policy where relevant), or
  - plans or policies:
    - o made by or under statutory authority, or
    - o approved by the Governor and/or published in the Government Gazette, or
    - o approved by a Minister, or
    - o approved by the agency or a particular authorised public official.
- tertiary sources:
  - agency strategic/corporate/management plans, or
  - agency procedure manuals and delegations of authority, or
  - 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. Options available for making assessments as to what is in the public interest and the relative weightings to be given to competing or conflicting public interests would include:

- the revealed majority views or opinions of the public
- the views of the elected representatives of the people, or
- an objective assessment by an impartial person of the public interests likely to apply.



## Balancing conflicting or competing public interests

In practice, a decision-maker will often be confronted by a range of conflicting or competing public interest objectives or considerations. As part of the third step, decision-makers also need to balance any such conflicting or competing public interests. Such a weighing up and balancing exercise is usually based on questions of fact and degree.<sup>13</sup>

As was noted in the *McKinnon* case:

*“12 The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that ‘the public interest’ can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.”<sup>14</sup>*

Where there are conflicting or competing public interests, it may be possible to address them 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. While there may be circumstances where public interest objectives are entirely incompatible where one must be chosen at the expense of the other, in practice it is more likely that there will be degrees of incompatibility between various objectives.

## How can the various responsibilities of public sector lawyers be reconciled?

Reconciling the duties of public sector in-house counsel to their clients, the courts and the public interest is no easy task, particularly as it can be difficult to clearly identify the client or the public interest.

Both public and private sector lawyers are subject to the duties to the legal system that flow from their positions as officers of the Supreme Court, the requirements of legislation applying to lawyers, and any rules of conduct and ethics issued by the relevant law society. However, in addition to these obligations, government lawyers and their employing agencies are also subject to a system designed to ensure public accountability.

Public sector lawyers are therefore subject to their agencies’ code of conduct, any codes of conduct that apply in their public sector generally, Freedom of Information legislation, their auditor general, their Ombudsman, and in some states an anti corruption agency and/or an administrative review tribunal.

In the view of the Government Solicitors Committee of the Law Society of NSW, the hierarchy of responsibilities impacting on public sector lawyers runs as follows (from most fundamental to most superficial):

- *the Supreme Court*
- *the people of NSW*

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<sup>13</sup> Per Mason CJ, Wilson and Dawson JJ said in the *Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61ALJR 39.

<sup>14</sup> Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.

- *the Government of NSW*
- *the lawyer's public sector agency*
- *the head of that agency, and*
- *the lawyer's immediate superior(s).*

That Committee of the Law Society noted that the problem with this hierarchy is that there may well be conflict between the duties owed to different levels in the hierarchy. The most fundamental responsibilities are those that are likely to impinge least upon a government lawyer's day to day activities while the most 'superficial' (those owed to the lawyer's superior) are likely to impinge constantly. The real dilemma for the government lawyer lies in recognising where one of his/her fundamental responsibilities is being infringed on by demand arising from day to day activities.

The Committee of the Law Society also recognises that one factor that must be considered by the government lawyer in resolving the dilemma mentioned above is that there are watchdog bodies whose main role is to ensure that the more fundamental responsibilities are being met by government lawyers (and public sector employees in general).

Looking again at the hierarchy of responsibilities put forward by the Committee of the Law Society, in terms of serving the client and the public interest we can see that the situation is confusing:

- |                                      |   |
|--------------------------------------|---|
| • the Supreme Court                  | – serving the public interest   |
| • the people of NSW                  | – serving the public interest   |
| • the Government of NSW              | – serving the public interest and in a broad sense the client                             |
| • the lawyer's public sector agency  | – serving the public interest and in a practical sense the client                         |
| • the head of the agency             | – serving (hopefully) the public interest and the primary representative of the client    |
| • the lawyer's immediate superior(s) | – serving (hopefully) the public interest and the secondary representatives of the client |

To add to this confusion, the conception of what is the 'public interest' in relation to any given issue is likely to vary at each level of this hierarchy that is relevant to that issue.

## Conclusions

Public sector lawyers have duties and responsibilities over and above those of private sector lawyers. These include responsibilities to the public of their jurisdiction, and to the government of the day, not just to their particular agency.

While in any given situation it may be difficult for public sector lawyers to be clear about who is their client and what is the public interest, these are issues they must be constantly alive to and do their best to determine if they are to fulfil their duties professionally and ethically.