

Bad faith, bias and breach of duty

Public officials are under an obligation to conduct their official duties in good faith, fairly and impartially. Failure to do so is likely to constitute misconduct involving bad faith, bias or breach of public duty.

‘Bad faith’ v. ‘good faith’

Public officials should exercise their duties in ‘good faith’, and in the absence of ‘bad faith’. ‘Bad faith’ raises issues both of fact and of law, and necessarily involves personal fault and improper motive. Acting in bad faith can include:

- dishonesty, fraud or intentional bias
- acting in the knowledge of a real or perceived conflict of interests
- inappropriate discriminating or an abuse of power
- knowingly acting beyond the scope or ambit of the power available to the agency or official, and
- corruption or other conduct with an improper motive or ulterior purpose.

‘Good faith’ requires and signifies an actual belief that all is being *‘regularly and properly done’*, 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.

Acting in good faith means that a function is performed:

- honesty
- for the proper purpose
- on relevant grounds, and
- within power.

Good faith requires *‘more than an absence of bad faith. It requires a conscientious approach to the exercise of power’*¹. 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 of omissions.

‘Bias’

There must be equality of opportunity and access in the provision of all public services. An exception to this rule is according preference to people or agencies which comply best with a government policy. Such preferences should not, if legal, give rise to an imputation of bias or its reasonable apprehension.

A reasonable apprehension of bias is also damaging to the reputation and integrity of public sector agencies and officials. Public officials are under a positive obligation to exercise their power and functions in the public interest and not for the benefit of particular persons or interests. If members of the public are not able to understand a decision-making process or its outcome, they may question both the decision and ultimately the decision-maker, including the influence of inappropriate or extraneous considerations or any attempt to ‘cover up’.

One 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’*³.

The more information that is publicly available about how decisions are made and on what considerations, the less likely it is that there will be any objective basis for a reasonable apprehension of bias.

Breach of duty

Public officials should perform all their duties to the best of their abilities. A breach of official or public duty is distinguishable from a breach of a duty of care under tort (negligence) law. It incorporates unlawful, unauthorised or partial conduct or an intentional failure to perform a mandatory duty. It also requires an active intent and improper motive on the part of the official. It may, in more serious cases, amount to corruption and will in all cases constitute maladministration.

¹ 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.

² per French J in *Applicant WAFV of 2002 v Refugee Review Tribunal* [2003] FCA 16 (17 Jan 2003) at para 52.

³ per McHugh J in *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 (14 Nov 2002) at para 68.

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Some examples of breaches of official duty include:

- a police officer who gains access to personal information about an individual for a private purpose through the police databases
- an employee of the Roads and Traffic Authority who passes on registration or licence information to a friend who is a private investigator
- a university lecturer who awards marks to a student based on considerations other than merit.

The main difference between bad faith, bias and breach of duty as against conflict of interests 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 official duty requires intent as well as misconduct.

Issues to be considered in assessing bad faith, bias or a breach of duty

An assessment will require a determination of the following:

- Who is the correct person to undertake the assessment? (eg, the supervisor; a 'probity auditor'; an independent investigator)
- Who should participate in this assessment? (eg, if and when it will be appropriate to involve the public official or any of their colleagues)
- How can an accurate assessment can be made and based on what considerations, eg:
 - › Was the decision made for the stated purpose?
 - › Is there a government policy which has been consistently applied by the decision-maker?
 - › Did the decision-maker have the necessary functions and powers?

Prevention and remedies

To prevent bad faith, bias or breach of duty, agencies and their management need to:

- demonstrate a clear and unequivocal commitment to compliance

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- clarify the legal requirements which apply to each area of activity
- ensure all staff are kept fully informed about all areas relevant to their duties and the criteria applicable to the exercise of any discretion, as well as the consequences of non-compliance, and
- have in place effective record keeping systems and practices.

To manage bad faith, bias or breach of duty, agencies may:

- take no further action because the evidence or potential is minimal and the issue can be adequately addressed by disclosure or effective supervision
- inform the complainant that in the agency's view there has been no actual misconduct or its potential is minimal
- appoint a 'probity auditor' or independent third party to review or oversight the integrity and appropriateness of the process/ decision (particularly where there is no actual misconduct or the instance is only identified near the conclusion of the process)
- restrict access to relevant, sensitive, confidential or secret information
- institute an investigation into the matter
- remove the person from duties or from responsibility to make certain decisions and reallocate these to another officer (who is not supervised by the former officer)
- transfer the person to another area or project within the agency
- transfer the person to some other agency
- refer the matter to the ICAC, NSW Police Force, Ombudsman or the Police Integrity Commission for appropriate action, and
- in serious cases, institute disciplinary proceedings and then take action appropriate to their findings (which may include, in the most serious cases, requesting or directing the person to resign, or terminating the person's employment or appointment).

For further information on this and related topics see *Good Conduct and Administrative Practice* (2nd edition), NSW Ombudsman, May 2006.