



ETHICS AND INTEGRITY – IMPLICATIONS FOR INVESTIGATORS AND COMPLAINT HANDLERS

*Compliance with accepted standards of conduct
and decision-making can have practical benefits*

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1. Why it is important to comply with societal norms of conduct and decision-making

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. While the degree to which the public is prepared to trust government is influenced by a range of factors, a significant one is that people expect that public officials will exercise the power invested in them in accordance with generally accepted societal norms of behaviour and conduct.

Standards of conduct can be explicit (for example, statutory and common law, documented politics, codes of conduct etc or cultural (for example, politeness and showing respect, making decisions that accord with the values of the agency, etc)

The importance of compliance by the public officials with 'societal norms' (which in the context of this paper refers to the generally accepted standards of conduct and decision-making) can be looked at from a number of standpoints. For example, the following stakeholders have an interest in generally accepted societal norms being followed:

- individuals who are affected by the decisions or actions of public officials
- the community as a whole, who ultimately decide if they continue to trust the government to exercise power on their behalf (from a rational/economic perspective, such behaviour results in more positive interactions, leading to increased satisfaction)¹.
- the government (and the public sector which is its agent) whose existence and legitimacy relies on the communities continued trust
- law enforcement and integrity agencies charged with ensuring appropriate behaviour by public officials see such standards as the benchmark against which conduct is measured.

So far I have been referring to the theory that to maintain their legitimacy in a democracy, public officials should follow societal norms of behaviour and conduct. But this is not just a theoretical discussion. At the Ombudsman's office, we pride ourselves on being practical and explaining the practical benefits of following good administrative practices and having sound administrative systems. So what are the practical benefits of public officials conducting themselves in accordance with the high standards the public expects from us?

When people complain they are generally already upset, sometimes very upset, either because of the impact on them of the issue the subject of their complaint, or the way their issue was handled in the first instance.

In practice the general complaint handling 'experience' is that a significant number of complaints do not end in the complaint being substantiated, which can lead to a dissatisfied complainant. Sometimes further dissatisfaction arises out of the way the complaint was handled by the complaint handler (including the investigator), for example due to perceptions of delay or disinterest, failure to keep the complainant (and for that matter any subjects of complaint) informed as to progress, failure to ensure expectations as to outcome are managed from the outset, failure to properly explain the basis for the final decision on the complaint, and so on.

People who are dissatisfied with the outcome of their complaint, particularly those also dissatisfied with how they and/or their complaint was dealt with, often develop a negative attitude to the complaint handler. Not infrequently this can result in the complainant transferring the focus of their frustration or anger from the organisation or person they see as the cause of their original problem to the complaint

handler. Experience demonstrates that on occasion this can result in obsessive complaining behaviour, such as unreasonable persistence, or attacks on the complaint handler on the web, in social media, to the traditional media, or to MPs/Ministers, corruption bodies, Parliamentary Committees and the like.

Responding to such conduct, or trying to defend the complaint handler's reputation, can be very time consuming and resource intensive. Prevention of such conduct is of course far better than the alternative.

In this paper I argue that a key practical benefit flowing from public officials conducting themselves in accordance with the high standard the public expects of us is that unfavourable decisions are more likely to be tolerated by the persons affected if they perceive that the decision-maker has met generally accepted standards of conduct and decision making. In this regard, justice theory argues that where people affected by a decision perceive that proper procedures were followed to reach it, and they were treated fairly, they are far more likely to accept that while an outcome or decision is unfavourable for them, it is still fair and reasonable in the circumstances.

A second benefit of compliance with societal norms of conduct and decision-making is that the decision is likely to be of a higher quality. If you make a decision ethically, with the public interest in mind, and in accordance with the law, it will be more thoughtful, more thorough, more informed, and more consistent with like decisions.

So, making a decision in accordance with the standards the public expects leads to a better quality decision that is more likely to be accepted by those affected. What flows from this is that the community as a whole is more likely to support the decision because they perceive that the power they have entrusted to the public agency has been exercised responsibly on their behalf.

The key societal norms that should guide people exercising public official functions or acting in a public official capacity, including of course investigators and complaint handlers (for simplicity I will refer to all such people as 'public officials'), have developed over time from three separate directions or sources:

- 1) *ethics* – Discussion about the ethical obligations, focusing on what is morally 'right' or 'wrong', can be traced back at least 2,500 years to Socrates. There is an absolute obligation on public officials to act ethically in the performance of their official functions. Having clearly defined standards of conduct and ethical behaviour is the first step towards ensuring that public officials carry out their work professionally and that they meet the expectations of the public.
- 2) *public interest* – The recognition that governments act on behalf of the people and that there is an obligation on public officials to act in the public interest is a more recent development with discussion about the concept traceable back over 150 years, for example to the writings of John Stuart Mill in the mid 1800s. The public interest is a central and fundamental underpinning concept of a democratic system of government. It embodies a fundamental principle that should guide and inform the actions of public officials. As the WA Inc Royal Commission said in its 1992 report, "*The institutions of government and the officials and agencies of government exist for the public to serve the interests of the public*". The concept is both a guide for public officials and a criteria against which decisions and outcomes can be measured.
- 3) *administrative law* – The administrative law principles and rules applicable to public officials in the performance of their official functions focus on what is 'fair' and 'appropriate'. In their modern form they are an even more recent development, dating back only to the 1960s and 1970s in Australia. Apart from the obligation on all citizens to comply with the law and specific legal obligations on public officials performing or filling certain identified roles or positions, the

legal obligations on public sector officials and agencies include complying with the principles of administrative law. These principles and rules have been designed to protect the rights of the public and to ensure that government power is exercised appropriately.

2. Categorisation of the elements of the sources of societal norms

These key sources of societal norms guiding conduct and decision-making by public officials effectively cover largely the same ground in that they address largely the same issues. However, they do vary to some extent in the way they do it:

- *focus/objective/purpose*, eg: ethical obligations focus on guiding consideration as to what is morally right or wrong; public interest issues focus on guiding consideration as to what is in the best interests of the community; and administrative law principles and rules focus on guiding (or requiring) consideration of what is fair and appropriate
- *applicability*, eg, to individual public officials, 'legal persons', public sector agencies or the government generally
- *application*, eg, is the assessment to be made subjective or objective, and
- *enforceability*, ie, whether they are mandatory and therefore enforceable, for example rules of administrative law, or discretionary or aspirational.

[Annexure A looks at ethical obligations, public interest considerations and administrative law principles and rules in more detail under these sub-headings.]

For the purpose of comparison it is useful to categorise the various elements of each of these standards of public sector conduct and decision-making into the following four dimensions:

- 1) *outcomes/decisions* (ie, the end result of the process)
- 2) *inputs* (ie, the matters considered by the decision-maker)
- 3) *procedures/processes* (ie, the procedures/processes/practices leading up to the outcome/decision), and
- 4) *conduct/approach* (of those involved).

3. What are the elements within each dimension of the relevant standards of conduct and decision-making?

3.1. What are the dimensions of ethical obligations?

When applying ethical obligations to public administration, the requirement on public officials to act ethically comprises a number of elements that can be categorised into the four dimensions listed above:

- *outcomes/decisions* – I would argue that the relevant ethical obligations would include: acting fairly and in the public interest.
- *inputs* – relevant ethical obligations would include: acting legally, honestly, for the proper purpose, within power and impartially; avoiding bias, only considering relevant matters; and managing conflicts of interests.

- *procedures/processes* – relevant ethical obligations would include: acting fairly, including providing procedural fairness; and ensuring no improper delay, and
- *conduct/approach* – ethical obligations would include: acting honestly and in the public interest; providing procedural fairness; appropriately protecting privacy; giving reasons for decisions; and giving frank and candid advice.

3.2. What are the dimensions of ‘public interest’ considerations?

In relation to the application of the ‘public interest’ concept to public administration, the requirement on public officials to act in the public interest can be seen as comprising a number of elements that also fall into the four dimensions:

- *outcomes/decisions* – whether the objectives of and the substance of the decisions made by the decision-makers, as well as the advice given to decision-makers (as opposed to the advice considered by the decision-maker, which would be an ‘input’), are in the public interest – the meaning of the term, or the approach indicated by the use of the term, is to direct consideration away from private, personal or partisan interests towards matters of broader concern.
- *inputs* – whether the matters actually considered by the decision-maker in making decisions are in the public interest – for example considering relevant matters and not considering irrelevant matters; exercising powers for the proper purpose; giving appropriate weight to matters based on their relative importance/significance; complying with government and agency policy; acting impartially (including the absence of discrimination and acting apolitically in the performance of official functions); and avoiding bias.
- *procedures/processes* – whether the processes, procedures and practices followed by decision-makers are in the public interest – for example there is a public interest in those involved: complying with legal requirements; demonstrating fairness in the exercise of discretionary powers (including procedural fairness); acting reasonably (including with proportionality); ensuring confidentiality (where this is appropriate); and demonstrating proper accountability and transparency (including making appropriate records); accepting proper scrutiny; facilitating public access to information; and no undue delay.
- *conduct/approach* – whether the conduct or approach of the decision-maker are in the public interest – for example there is a public interest in those involved being perceived to be: acting in good faith (ie, honestly, within power and for the proper purpose); avoiding or properly managing situations where private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of official duties; and showing respect for individuals (eg, courtesy, consideration, respect for rights such as civil liberties, privacy, etc); and the giving of reasons.

3.3. What are the dimensions of administrative law principles and rules?

In relation to administrative law principles and rules, the obligations on public officials can again be seen as falling within the same four dimensions:

- *outcomes/decisions* – relevant administrative law principles would include: acting within power fairly and in the public interest

- *inputs* – relevant administrative law principles would include: acting legally, honestly, for the proper purpose, within power and impartially; avoiding bias; only considering relevant matters; and managing conflicts of interests, procedural fairness (the evidence and bias rules), etc
- *procedures/processes* – relevant administrative law principles and rules would include: acting fairly, including providing procedural fairness (the hearing rule); no unreasonable delay, etc
- *conduct/approach* – relevant administrative law principles and rules would include: acting honestly and in the public interest; providing procedural fairness (for example the notice rule); appropriately protecting privacy; giving reasons for decisions; and giving frank and candid advice.

4. How does ‘justice theory’ relate to the various identified standards of conduct and decision-making applicable to the public sector?

4.1. What is ‘justice theory’?

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 & Walkerⁱⁱ put forward the proposition that disputants care as much about how their disputes are resolved as they do about the outcomes they receive.

Researchⁱⁱⁱ into ‘justice theory’ has shown that where the people affected by a decision perceive that the procedures followed to reach it and the way they were treated were fair, they are far more likely to accept an unfavourable outcome or decision as fair and reasonable in the circumstances. In other words, people are more likely to accept decisions or outcomes that they see as unfavourable to them if they believe those decisions or outcomes arose out of a fair process in which they were treated with respect and given adequate information.

The four dimensions

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

- 1) the *outcomes/decisions* 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 (including inputs) used to make decisions/resolve conflicts/reach outcomes – the means by which decisions are made.

the *treatment* of the individual involved, referred to as “*interactional justice*” – focussing on the perceived fairness of the treatment of the individual concerned, being:

- 3) the *manner* in which the person was treated, referred to as “*interpersonal justice*”, and
- 4) the *information* given to the person, referred to as “*informational justice*”.

Distributive justice

In relation to the fairness or 'justice' of *outcomes/decisions*, justice related research has found that people base their evaluations on such criteria as:

- their perception of the *fairness* of the decision/outcome, based on one or more of:
 - needs – where the objective is to foster personal welfare
 - equity – where the objective is to preserve social harmony
 - integrity – where the objective is to ensure the decision/outcome is 'just', legal, ethical and honest
 - reasonableness – that in the particular circumstances of the case, the decision or outcome appeared to be reasonable, and/or
 - efficiency – where the objective is to maximise productivity and performance
- their perception of the *rightness* of the decision, based on an assessment of such factors as:
 - consistency
 - accuracy
 - clarity, and
 - procedural thoroughness, and/or
- their perception of *comparability* with someone, some group, or something else.

Procedural justice

In relation to the *procedures* used (including inputs), perceptions of fairness are likely to be based on assessments people make of such things as:

- processes/procedures:
 - *fairness* – whether the rights and interests of all parties are properly respected, represented and considered
 - *correctability* – there are adequate avenues and procedures for review of decisions and conduct
 - *control* – the people affected had 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
 - *clarity* – the requirements or procedural steps are clear and transparent
 - *speed* – how long it took to address their concerns was reasonable.
- inputs:
 - *ethicality/trustworthiness* – the policies and procedures that guide implementation are perceived to be fair and ethical, and the perceived intentions of the people involved are seen to meet acceptable ethical and moral standards
 - *consistency/objective criteria* – the policies and procedures that guide implementation are seen to contain objective criteria that are consistently applied
 - *impartiality/neutrality* – decision-making is seen to be unbiased and 'neutral', and there are reliable safeguards in place to avoid bias

Interactional justice

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

- firstly, 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 such things as:
 - the level of *consideration* and *respect* shown, ie, whether they and their views were treated politely and respectfully, including for example whether they perceived attentive listening and/or an attempt to understand their perspective
 - demonstrated *empathy* and *concern*, eg, they perceived that there was an attempt to understand the impact on them of the decision or conduct
 - the *propriety* of questions, eg, whether improper questions were asked and prejudicial statements made
 - *responsiveness*, eg, that staff appear to have ‘put themselves out’ to solve a service problem.
- secondly, the perceived fairness of the *information* provided to the person about or explanations of decisions/outcomes, including:
 - the level of *transparency* – the adequacy of explanations given for a decision/ outcome
 - *clarity* – whether the information provided is clear and simple
 - the degree of *honesty* and *candidness* – whether realistic and accurate information was provided about a decision/outcome and how it was reached
 - *sincerity* – whether any explanation is perceived to be sincere and without ulterior motives
 - *timeliness* – whether feedback was timely (based on the person’s perception and expectation).

4.2. Can the elements of justice theory be categorised into the same four dimensions?

The various elements of justice theory (the criteria used by people to determine fairness) can also be neatly categorised into the same four dimensions as the standards of public sector conduct and decision-making:

- in relation to the *outcomes/decisions* dimension, this would be equivalent to the *distributive justice* dimension of justice theory
- in relation to the inputs dimension, this is one aspect of *procedural justice* dimension of justice theory
- in relation to *procedures/processes* dimension, this would encompass all other aspects of *procedural justice* dimension of justice theory
- in relation to the *conduct/approach* dimension, this would be equivalent to the *interactional justice* dimension of justice theory (including both *interpersonal justice* and *informational justice*).

5. What are the common elements of the four dimensions of the various standards or formulations of appropriate conduct and decision-making?

What is interesting is that even though developed from different perspectives, the core components of each of the standards or formulations of appropriate conduct and decision-making cover very similar subject matter.^{iv} As an example to illustrate this similarity, the connection between acting ethically and

acting in the public interest was highlighted by Geoff Edwards, Adjunct Research Fellow at the Centre for Governance and Public Policy, Griffith University, in the following terms:

“Acting ethically is not the same as acting in the public interest, but the two concepts are connected. It is possible to erect a reciprocal definition: an ethical practitioner will seek to uphold the public interest; and the public interest requires a practitioner to act ethically...”^v

Looking at some of the common elements of each standard or formulation across the four dimensions:

- *outcomes/decisions* – the common elements include the importance of fairness, and in most dimensions the importance of the public interest
- *inputs* – the common elements include legality, honesty, fairness, impartiality, proper purpose, etc
- *procedures/processes* – the common elements include fairness, timeliness and giving reasons for decisions
- *conduct/approach* – the common elements include fairness/propriety, protection or privacy, and in most dimensions the importance of respect, transparency (including adequate notice), honesty and candour, timeliness and in most dimensions emphasises the importance of recordkeeping and proper accountability.

[Annexure B goes into more detail about the significant degree of overlap or congruence between the subject matter of each of the standards within these dimensions.]

6. What are the practical implications for agencies, complaint handlers and investigators

Correspondence between dimensions of societal norms and ‘justice theory’

What is particularly noteworthy is that the various standards of public sector conduct and decision-making largely correspond to the various dimensions and criteria identified by justice theory as important for unfavourable outcomes to be perceived to be acceptable and for people involved in a process to be satisfied with the fairness of the process and how they were treated. This is the practical benefit I referred to earlier.

Circumstances where ‘justice’ type issues are relevant in complaint handling

In the complaint-handling context there are two circumstances where ‘justice’ type issues are particularly relevant:

- firstly in relation to how a person responds to an initial decision or action that they perceive to be unfavourable (ie, the response to the issue the subject of their complaint), and
- secondly in relation to how a person responds to the way in which a complaint about an initial decision or action is dealt with (ie, the response to the outcome of their complaint).

The complainant’s response to the original issue

In relation to the first point (ie, the response to the issue), many complaints arise when a person’s expectations have not been met. This can be because public officials have not conducted themselves

in accordance with the high standards expected of us. This can also be because certain individuals have unrealistic or misinformed expectations.

It is easy to blame a complainant for being unreasonable in their expectations. However, a more constructive and pro-active approach is for agencies to influence and manage the expectations of people they interact with by doing things that keep those stakeholders as informed as possible. It can be as simple as information about what the agency has the power to do, and what it does not.

When a complaint is received, particularly those involving the conduct of an identified staff member, sometimes processes kick in that aim to find out the truth, or the investigator's best estimate of what is true. A stereotypical investigation triggered by a complaint would be into whether or not the public official being complained about has breached the law or breached a policy. What we have found is that this approach can be very limiting.

It seems to me that complaint handlers could benefit from broadening their focus from simply whether or not a particular allegation that a formal/written rule has been breached (eg: law, policy, code of conduct). If you understand that public officials are expected to meet other accepted standards of conduct, you may be able to better identify:

- If there are other underlying causes of the complainant's dissatisfaction?
- If the public official or agency did not meet the accepted standards, then what can the agency do to make amends?
- What can the agency learn from this complaint? For eg, does the complaint highlight problems with the organisational culture, ways the agency communicates with the public, etc.

The Ombudsman has a great provision in his Act, which allows him to identify conduct that is 'otherwise wrong'. I think all agencies could benefit from adopting an approach to complaints that is open to recognising conduct that it 'otherwise wrong'.

In our experience, stepping back and developing a broader understanding of a complaint can open your eyes to things that are not obvious to begin with.

If the evidence leads to a finding that no law or policy was breached – so no disciplinary action should be taken – some agencies become dismissive of the complainant and close that book. In reality, there may be an underlying problem with:

- the way the public official or agency communicated with the complainant in the first place (I mean, before they complained, when they were just a member of the public)
- attitude or behavioural issues with the public official
- problems with organisational systems that sowed the seed that remain.

Managerial responses are needed in these cases.

In our experience, if the agency does not recognise what has motivated the complainant to complain, and try to address that aspect, they can dig themselves a hole so deep it may take years and hundreds or thousands of dollars to get out of it.

The complainant's response to the handling of the complaint

In relation to the second circumstance I referred to earlier where 'justice' type issues are relevant (ie, the response to the handling of the complaint), complainants often escalate their behaviour when their expectations are not met as to how their complaint should be handled (the 'double deviation' in justice terms). I am talking about those cases where the complainant escalates the matter:

- by complaining to their local MP, the media or the Ombudsman
- by reframing the complaint and now seeing corruption and cover up where before there was only incompetence
- or by changing the focus of their dissatisfaction from the original problem to the way their complaint was handled
- by suspecting a conspiracy, or
- by creating their own 'cause' and fight for justice.

And so it goes on. I'm sure you all have your own experience with someone who ramps it up over time, and you wish someone had handled it properly at the beginning, and saved everyone (including the complainant) from this misery. Sadly, some of the worst cases are people who used to work for the agency and turn their dissatisfaction into a mission.

What I'm arguing today is that the vast majority of people who complain about a public official have, or believe they have, a legitimate gripe, because otherwise they wouldn't bother. And that gripe probably has something to do with a perceived failure, in one way or another, of a public agency or public official to meet the standards of conduct expected of them.

Of course, what each individual expects will vary from person to person. However, as complaint-handlers and investigators, you would be familiar with the need to both appease and empathise with a complainant, but, on the other hand, to only judge a public official against standards that are reasonable.

What I am talking about today is that it is really important to recognise that it is not unreasonable for the public to expect public officials to behave within all of the generally accepted standards, whether or not those standards can be formally enforced.

Key strategies to manage complaints

To maximise the chances that complainants will accept a decision they may not see as favourable, some of the key strategies that complaint handlers, investigators and agencies should implement include:

- implementing policies, procedures and processes for dealing with complaints that are fair and reasonable (including a right to seek a review of the original decision), properly documented, and publicly available
- making sure from the outset the complainant understands the process that will be followed to deal with their complaint, including the nature of their involvement in the process and the likely outcomes should the complaint be substantiated
- interviewing or otherwise seeking the views of the complainant during the course of any investigation to reassure them that their views have been taken into account

- giving the complainant adequate and timely information about progress and the outcome of the complaint
- explaining in sufficient detail the reasons for decisions (particularly where a complaint is not substantiated), highlighting why the decision made on the complaint is fair in the circumstances
- ensuring that all communications with the complainant are respectful and demonstrate appropriate concern/empathy, no matter the nature of the conduct of the complainant
- being alert to circumstances, practices or use of terminology that might unintentionally create an impression or perception of a lack of impartiality
- in the more sensitive or emotion charged cases, recognising the importance of face to face contact, or failing that communication by telephone, particularly where the decision on the complaint will not be welcomed by the complainant.

Practical benefits flowing from compliance

What this comparison of the various standards/formulations highlights is that compliance with accepted standards of conduct and decision-making can have important practical benefits for public officials generally, and complaint handlers and investigators in particular, in terms of:

- the level of acceptance of outcomes or decisions seen as unfavourable by the people affected, and
- the degree to which those people perceive the decision-maker and others involved in the process in a negative light.

COMPARISON OF DIFFERENT PERSPECTIVES ON ACCEPTED STANDARDS OF BEHAVIOUR AND DECISION-MAKING IN THE PUBLIC SECTOR

Ethical obligations

Focus – At the risk of massive over simplification, ethics is a concept intended to guide consideration as to what is morally **right** and **wrong**.

Objective – There is an absolute obligation on public officials to act ethically in the performance of their official functions. Having clearly defined standards of conduct and ethical behaviour is the first step towards ensuring that public officials carry out their work professionally and that they meet the expectations of the public.

Applicability – Ethical obligations apply to individual public officials.

Application – There is a strong **cognitive** element to the assessment of whether conduct and decisions are ethical or unethical. While in some matters it may be easy to conclusively determine that someone's motive was unethical, in many cases whether conduct is ethical is essentially a very personal or **subjective** matter between the individual and his or her conscience. It is each public official's responsibility to examine their personal work attitudes and be noticeably ethical through their behaviour, leading by example and promoting best practice.

Content – For the purpose of this discussion, I define 'ethics' in terms of moral principles and moral character, about whether decisions and actions are right or wrong (but not the substantive merits of those decisions or actions).

From an organisational perspective, an ethical organisation will place a significant emphasis on the importance of staff acting in accordance with the organisation's values and principles. These values and principles will be explicitly recognised as the foundation for the approach used by and within the organisation. These values are often then operationalised as rules.

Implementation of codes of conduct and associated policies assists with ensuring consistency in adhering to these ethical obligations. Ethical obligations on public officials oblige them to act legally, honestly within power, for a proper purpose and impartially; avoid or manage conflict of interests, avoid bias, provide procedural fairness, interview ethically, protect privacy, be accountable, make appropriate records and avoid inappropriate or improper delay.

Enforceability – Ethical obligations are not enforceable as such, but may be enforceable where they are also legal obligations or requirements in an enforceable code of conduct. Compliance with ethical obligations is normally influenced by such things as organisational culture, peer pressure, modelling by senior executives, and so on.

Public interest considerations

Focus – Put simply, the 'public interest' is a concept intended to guide consideration as to what is in the **best** interests of the community.^{vi}

Objective – There is an obligation on public officials to act in the public interest. The public interest is a central and fundamental underpinning concept of a democratic system of government. It embodies a fundamental principle that should guide and inform the actions of public officials. As the WA Inc Royal Commission said in its 1992 report, “*The institutions of government and the officials and agencies of government exist for the public to serve the interests of the public*”. The concept is both a guide for public officials and a criteria against which decisions and outcomes can be measured.

Applicability – Public interest considerations apply to government generally.

Application – There is a strong **subjective** element to the assessment of whether conduct and decisions are in the public interest. Other than in limited black and white type situations, whether conduct or decisions are in the ‘public interest’ will generally be open to debate as conflicting validly held views about or assessments of the public interest will generally be the norm (which is in practice very similar to the application of ethical obligations).

Content – The public interest focuses on the merits, reasonability and appropriateness of objectives, procedures and practices, all of which can be seen in this context as ends in themselves. The public interest can encompass both ethical issues and performance, effectiveness, efficiency and competence issues.

Public interest considerations to an extent mirror ethical obligations and administrative law principles, including – complying with applicable law (both the letter and spirit), acting honestly, within power, for a proper purpose, impartially, fairly, reasonably, consistently and effectively; avoiding or managing conflict of interests; avoiding bias; complying with the principles of procedural fairness; appropriately protecting privacy; ensuring appropriate accountability and transparency; making appropriate records; acting without undue delay, etc. However, public interest considerations can vary from ethical obligations and administrative law principles in that in practice they tend to focus more on outcomes than on strict standards.

Enforceability – Public interest obligations are not enforceable.

Administrative law principles and rules

Focus - For the purposes of this discussion, it can be said that the principles and rules of administrative law are there to provide a guide as to what is **fair** and **appropriate**.

Objective – Apart from the obligation on all citizens to comply with the law and specific legal obligations on public officials performing or filling certain identified roles or positions, the legal obligations on public sector officials and agencies include complying with the principles of administrative law. These principles and rules have been designed to protect the rights of the public and to ensure that government power is exercised appropriately.

Applicability – Administrative law obligations apply to individual public officials and to public sector agencies.

Application – There is a strong **objective** element to the assessment of whether conduct is legal. While the law generally, and the principles of administrative law in particular, are reasonably certain, depending on the circumstances the details of their application to particular fact situations might be open to question.

Content – The principles and rules of administrative law require decision-makers to – use discretionary powers for a proper purpose, base decisions on logically probative material, consider only relevant considerations and not irrelevant considerations, give adequate weight to matters based on their relative importance; exercise discretion independently and not act under dictation; give

proper, genuine and realistic consideration to the merits of the particular case and not apply policy inflexibly, observe the rules of procedural fairness, not exercise discretionary powers in a way that is so unreasonable that no reasonable person would exercise the power in that way ('Wednesbury' unreasonableness, ie, irrationality), not exercise discretionary power in a way that is biased or conveys a reasonable perception of bias, unreasonably delay making a decision the decision-maker is under a duty to make.

Enforcement – The principles of administrative law are reflected in legal obligations that are enforceable.

Justice theory of decision-making

Focus – Put simply, justice considerations are about what is fair.

Objective – The theory looks at what is important for outcomes to be **perceived** to be acceptable, and for the people involved 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 persons concerned are perceived to be fair, reasonable and appropriate, the degree to which the decision or outcome (and the decision-maker) is perceived negatively is reduced, even when it is unfavourable for the person concerned.

Applicability – Justice theory looks at how individuals react to decisions and the way they are made.

Application – The assessment of whether conduct or decisions are considered to be 'just' or 'fair' is very **subjective**, based on the perception of the person making the assessment.

Content – The theory argues that there are four dimensions of any decision-making process:

- 1) *outcomes/decisions* – focusing on the perceived fairness of outcomes/decisions
- 2) *procedures* – focusing on the perceived fairness of the processes/procedures used to reach outcomes or make decisions
- 3) *treatment* – focusing on the manner in which the person was treated, and
- 4) *information* – focusing the provision of information to the person.

Enforceability – The elements of justice theory are not enforceable.

A comparison of the dimensions and individual elements of public interest obligations, ethical obligations, the principles of administrative law and the justice theory of decision-making

Justice dimensions & elements	Public interest dimensions & elements	Ethical dimensions & elements	Administrative law dimensions & elements
1) Outcomes/decisions: - <ul style="list-style-type: none"> • Fairness • Rightness • Comparability 	Outcomes/decisions: <ul style="list-style-type: none"> • Public interest • Fairness - -	Outcomes/decisions: <ul style="list-style-type: none"> • Public interest • Fairness - -	Outcomes/decisions: <ul style="list-style-type: none"> • Public interest • Fairness
2) Inputs: <ul style="list-style-type: none"> • Ethicality <ul style="list-style-type: none"> • Objective criteria <ul style="list-style-type: none"> • Impartiality 	Inputs: <ul style="list-style-type: none"> • Honesty • Legality • Management of conflict of interests • Proper purpose • Within power • Procedural fairness (bias rule) <ul style="list-style-type: none"> • Appropriate criteria • Procedural fairness (evidence rule) - -	Inputs: <ul style="list-style-type: none"> • Honesty • Legality • Management of conflict of interests • Proper purpose • Within power • Procedural fairness (bias rule) <ul style="list-style-type: none"> • Relevant grounds • Procedural fairness (evidence rule) - -	Inputs: <ul style="list-style-type: none"> • Honesty • Legality • Avoidance of bias <ul style="list-style-type: none"> • Proper purpose • Within power • Procedural fairness (bias rule) • Only relevant considerations • Procedural fairness (evidence rule) • Logically probative material • Not making decisions that are arbitrary, vague or fanciful • Impartiality • Avoidance of bias • Management of conflict of interests • Procedural fairness (bias rule) • Not acting under dictation
3) Procedures/processes <ul style="list-style-type: none"> • Fairness 	Procedures/processes <ul style="list-style-type: none"> • Fairness • Procedural fairness (generally) • Reasonableness -	Procedures/processes <ul style="list-style-type: none"> • Fairness • Procedural fairness (generally) - <ul style="list-style-type: none"> • Ethical interviewing 	Procedures/processes <ul style="list-style-type: none"> • Fairness • Procedural fairness (generally) • 'Wednesbury' unreasonableness -

Justice dimensions & elements	Public interest dimensions & elements	Ethical dimensions & elements	Administrative law dimensions & elements
<ul style="list-style-type: none"> • Consistency • Clarity • Correctability • Control • Timeliness 	<ul style="list-style-type: none"> • Consistency - • Options for review of decisions • Procedural fairness (hearing rule) • No undue delay 	<ul style="list-style-type: none"> - - • Procedural fairness (hearing rule) • No inappropriate or improper delay 	<ul style="list-style-type: none"> - • Certainty(?) • Options for review of decisions • Procedural fairness (hearing rule) • No unreasonable delay
<p>4a) Conduct/approach:</p> <p>-</p> <p>-</p> <p>-</p> <ul style="list-style-type: none"> • Respect • Consideration • Empathy/concern • Propriety <p>-</p> <ul style="list-style-type: none"> • Responsiveness • Protection of privacy 	<p>Conduct/approach:</p> <ul style="list-style-type: none"> • Public interest (approach) • Management of conflict of interests <p>-</p> <ul style="list-style-type: none"> • Respect <p>-</p> <ul style="list-style-type: none"> • Procedural fairness (generally) <p>-</p> <ul style="list-style-type: none"> • Protection of privacy 	<p>Conduct/approach:</p> <ul style="list-style-type: none"> • Public interest (approach) • Management of conflict of interests • Ethical interviewing <ul style="list-style-type: none"> • Respect <p>-</p> <ul style="list-style-type: none"> • Procedural fairness (generally) • Ethical interviewing <p>-</p> <ul style="list-style-type: none"> • Protection of privacy 	<p>Conduct/approach:</p> <ul style="list-style-type: none"> • Public interest (approach) • Management of conflict of interests <p>-</p> <p>-</p> <p>-</p> <ul style="list-style-type: none"> • Procedural fairness (generally) <p>-</p> <ul style="list-style-type: none"> • Protection of privacy
<p>4b) Information:</p> <ul style="list-style-type: none"> • Transparency (incl. adequate notice, reasons for decisions etc) <ul style="list-style-type: none"> • Honesty & candour <ul style="list-style-type: none"> • Timeliness 	<p>Information:</p> <ul style="list-style-type: none"> • Transparent • Procedural fairness (notice rule) • Reasons for decisions • Recordkeeping <ul style="list-style-type: none"> • Honesty • Frankness and candour • Public interest (approach) • No undue delay 	<p>Information:</p> <ul style="list-style-type: none"> • Accountability • Procedural fairness (notice rule) • Reasons for decisions • Recordkeeping <ul style="list-style-type: none"> • Honesty • Frankness & candour • Public interest (approach) • No inappropriate delay 	<p>Information:</p> <ul style="list-style-type: none"> • Accountability • Procedural fairness (notice rule) • Reasons for decisions • Recordkeeping <ul style="list-style-type: none"> • Honesty • Frankness & candour • Public interest (approach) • No unreasonable delay

ⁱ A consistent outcome of research into public attitudes to public service employees and agencies has found that people were more dissatisfied because of rudeness/poor customer service issues than due to ethical/fairness issues (eg, the Queensland Crime and Misconduct Commission Public Attitudes Surveys: <http://www.cmc.qld.gov.au/research-and-publications/browse-by-type/public-perceptions-services>)

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

ⁱⁱⁱ See for example: Colquitt, J.A., Conlon, D.E., Wesson, M.J., Porter, C., and Ng, K.Y. (2001). Justice at the millennium: A meta-analytic review of 25 years of organizational justice research. *Journal of Applied Psychology*, 86(3), 425-445; Sparks, B.A., McColl-Kennedy, J.R. (1998), The Application of Procedural Justice Principles to Service Recovery Attempts: Outcomes for Customer Satisfaction, *Advances in Consumer Research* Vol 25, 156; Greenberg, J. (1990). Organizational Justice: Yesterday, Today, and Tomorrow. *Journal of Management*, 16(2), 399; Tyler, T.R. (1990). Why people obey the law: Procedural justice, legitimacy and compliance, Newhaven, C.T.: Yale University Press; Leventhal, G.S. (1980). What should be done with equity theory? In K.J. Gergen, M.S. Greenberg and R.H. Willis (Eds), *Social Exchange: Advances in Theory and Research* (pp. 27-55). New York: Plenum; Blader, S.L., Tyler, T.R., (2003). A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process. *Personality and Social Psychology Bulletin*, Vol 29 No 6, 747; Nabatchi, T, Bingham, LB, & Good, D (2007). Organisational Justice and Workplace Mediation: A six-factor model. *International Journal of Conflict Management*, vol 18, 148-174; Jepson, D., Rodwell, J., (2009) A New Dimension of Organisational Justice: Procedural Voice. *Psychological Reports* 2009, 105, 1-16.

^{iv} However, it can be said that each standard or formulation has a different primary focus, eg, ethics or morals, public interest on values, administrative law on rules/standards, and justice theory or perceptions of fairness.

^v Edwards G, "Where Does the 'Public Interest' Lie?", *Public Administration Today*, April – June 2011, at pp. 67-73.

^{vi} Wheeler, C – "*The Public Interest: We know it's important, but do we know what it means?*", *aijal Forum* No. 48, 2006.