

Embedding high ethical standards

Ethical Leadership and Governance
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1. What does 'ethics' actually mean?

I want to talk today about the mechanisms/strategies/approaches that would be required to effectively embed high ethical standards in the public sector as part of a holistic approach to foster good judgement and good governance. In looking at this issue, I want to focus on the role of integrity bodies and where they fit into our system of government. More specifically, I want to talk about the practical problems associated with enforcement of ethical behaviour, and the need to change our thinking about where integrity bodies fit in our system of government.

Some commentators have argued for a very broad interpretation of ethics.¹ 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. However, 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 narrower interpretation is in line with the derivation of the word 'ethics' from the Greek 'ethos', which means 'moral character'.

Given it is such an important concept, it is remarkable that we still do not have any general agreement as to just what 'ethics' means in practice, or a good understanding of how we can imbed high ethical standards into the public sector. In this regard, while I am sure we would all agree that it is important to embed high ethical standards into the public sector, I argue that a focus on 'ethics' alone is in practice far too narrow or limited to be effective in achieving such key objectives as ensuring fair and appropriate outcomes in the public interest and fostering an appropriate level of public trust in government. Further, even where a decision or action was ethical, it does not necessarily follow that it was the best one.

2. Why are ethical standards in the public sector important?

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.

While ethical (as in 'moral') issues have a direct impact on public trust in government, such issues are just one of a range of factors that can impact on that level of trust, for example performance and service issues, as well as perceptions of general competence and judgement. The range of factors that directly impact on levels of public trust in government include:

- *integrity* issues – ensuring legality and honesty in decision-making by public officers (ie, ethical issues)
- *fairness* issues – acting fairly, reasonably and consistently
- *transparency* issues – providing more and better information to the public by improving the government's attitude to openness and transparency
- *trustworthiness* issues – improving the information available to people to enable them to better predict how the government is likely to react in any given circumstance (as part of a program to increase the public's perception that government will act/react appropriately)
- *accountability* issues – improving the government's approach/attitude towards accountability generally, including increasing the actual and perceived level of accountability of government (perceived cover-ups, the misuse of secrecy and the rigid control clearly exercised by modern governments over the disclosure of information about the operations of government, increase the public's distrust in government)

¹ 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.

- *performance* issues – ensuring competent, efficient and effective action by public officials.

The various factors listed above will not be effective if looked at or addressed in isolation, as there are significant interrelationships/interactions between them. In the achievement of good governance and trust in government, ethical conduct is just one factor in a range of interdependent factors that should be addressed on an integrated and holistic basis.

3. Must ethical conduct be intentional?

Is a specific intent required for conduct to be ethical?

If 'ethics' is about the application of moral principles, about morally reflective decision-making, presumably conduct should only be considered to be 'ethical' where the person concerned was aware at the time that the conduct was morally good, right or proper. In other words where the person's conduct was intentional (ie. based on specific intent – a consideration of the ethical issues that arose in a particular situation and a conscious decision to act ethically).

What if there is no relevant mental element?

If we were to be successful in embedding high ethical standards in the public sector, that by itself would not be enough to ensure appropriate standards of conduct by individual public officials and the government generally.

People do what is seen to be the 'right' thing for a range of reasons, some of which may have nothing at all to do with ethical considerations and indeed some of which may even be ethically 'challenged'.

Embedding high ethical standards into the public sector is very important because it sets out the benchmark of conduct to be achieved by the public sector and provides guidance to those who want to meet those standards. However, embedding high ethical standards by itself will not be enough because it would not address situations where there is no relevant mental element, for example:

- A If a person acts out of a proper sense of duty but is innocently mistaken in his or her judgement as to what is the morally right course of action, would they still have acted ethically (eg, where there is a conflict between one or more of the obligations on public officials to serve the Parliament and government, serve the public interest, serve their agency and serve the public as customers)?
- B Could a person's conduct be reasonably described as 'ethical' merely because the person's conduct was 'not unethical' or was 'ethically neutral'? For example in the following circumstances:
- *automatic behaviour* – the person's actions were based on innate, automatic or routine behaviour
 - *unthinking behaviour* – the person followed the rules or standard practice, without giving ethical issues any conscious thought
 - *lack of opportunity* – the person had no opportunity to act otherwise
 - *likelihood of detection* – the person only acted ethically to avoid being caught (ie, out of self-interest) not because of any assessment that this was the right and proper thing to do.

C Could it be argued that a person's conduct was unethical because the person innocently failed to perceive or identify an ethical issue? For example, due to:

- *ignorance* – a failure to perceive or be aware of an ethical issue which was reasonable in the circumstances, eg, due to lack of information
- *complexity* – a failure to identify an ethical issue which was reasonable in the circumstances, eg, in a complex situation involving a significant 'grey area'.

If there was no mental element – no intention to act ethically – the conduct might be reasonable, appropriate or good practice, but this was not due to the application of moral or ethical principles. Alternatively the conduct might be seen as being unreasonable, inappropriate, incompetent or otherwise wrong, but not due to 'ethical' failings.

D What if there is 'constructive knowledge' – where the unethical conduct arises out of moral failings involving such things (to borrow from Professor Stephen Cohen) as:

- *moral negligence* (a reckless failure to consider whether there was an ethical issue)
- *moral blindness* (a failure to see an obvious ethical issue, such as a conflict of interests) or
- *moral recklessness* (a rationalisation that there is no ethical issue to consider)?

In other words, where questions of morality are not recognised or are disregarded, as opposed to where questions of morality do arise and the conduct is intentionally unethical, improper, etc.

Further confusion can be caused by the fact that in some quarters 'unethical' is equated with 'corrupt', 'illegal' or 'criminal'. Conduct could be criminal or a breach of the law, but still be based on a person's firm belief that they are acting ethically (eg civil disobedience), or conduct could be unethical without being 'corrupt'² (eg, intentionally denying a person procedural fairness because the person is perceived to be a nuisance, clearly guilty, etc; being influenced by irrelevant considerations, for example by letting one's strongly held personal religious beliefs inappropriately influence the exercise of discretionary powers; misleading the public by selectively disclosing information, without lying; etc).

Whether conduct is in fact ethical or unethical in my view depends on cause - the motive or intention of the individual concerned. Looked at this way, while in some matters it may be easy to conclusively determine that someone's motive was unethical, in many cases the question as to whether conduct is ethical will essentially be a very personal matter between the individual and his or her conscience.

To achieve appropriate standards of conduct in the public sector so as to maximise public trust in government, it is necessary to address the range of motivations or causes of the conduct by public officials that could impact on such outcomes and levels of trust.

In my view, the range of such motivations or causes could be summarised as being:

- 1) *intentional ethical conduct* (which could result in either appropriate or inappropriate outcomes)
- 2) *unintentional unethical conduct* (arising out of thoughtlessness, misunderstanding, or moral failings)
- 3) *ethically neutral conduct* (eg, routine or automatic behaviour, lack of opportunity, risk avoidance, a reasonable failure to perceive or identify an ethical issue due to ignorance or complexity, etc), or
- 4) *intentional unethical conduct* (either based on 'actual' or 'constructive' knowledge that the conduct was wrong, eg, 'immoral').

² In terms of the normal use of the word rather than any technical definition given in corruption legislation.

From an implementation and enforcement perspective, it may be more useful to focus on outcomes rather than causes – whether conduct was appropriate no matter what the cause or motivation. Alternatively, where issues about cause or motive are important, maybe the focus should be on questions of ‘judgement’ rather than ‘ethics’. Judgement has a broader application as it would extend beyond questions of moral or ethical principle to encompass such things as the soundness of decision-making and standards of performance/service. A third option might be to focus on the conduct and whether it was criminal, illegal, corrupt or otherwise inappropriate.

4. What factors influence the likelihood of ethical conduct?

I think it is a truism that the conduct of individuals is often more influenced by ‘situation’ than ‘character’. I think we would all have seen examples where people have acted ethically/honestly in some contexts or situations but not in others. This cannot be explained by character flaws, but by how people respond to certain events, situations, opportunities, pressures, etc. For example, somebody may be honest and ethical at work, and cheat on their partner, or vice versa. Some people may be ethical in business, but understate their income for tax purposes. Some people may be generally honest in their dealings with their employer, but overstate the hours they work or slow down their pace of work to increase opportunities for overtime.

Many people are conscientious about being good law abiding citizens, other than when they are behind the wheel. So people may consciously act ethically in some situations, and consciously or unconsciously act unethically in others. Their intentional unethical conduct may not always be highly premeditated, but could be the result of spur of the moment reaction to events or opportunities.

Interestingly, social-psychological researchers have found that people often incorrectly suppose that what other people do is best explained by their character rather than their circumstances – that what somebody does reflects their character. This is referred to variously as “*attribution theory*”, “*correspondence bias*” (ie, the correspondence between conduct and character), or “*Fundamental Attribution Error*”.³ While there may well be some people in this world whose moral compass always points north, whose conduct is invariably ethical, for most people ethical behaviour is not an absolute.

The various factors that can influence the likelihood of ethical conduct can be summarised as:

- *personal values* – influenced by family, education, religion, etc
- *personal traits* – the character of the person concerned
- *supports* – including rules, standards, expectations and the like
- *deterrents* – which in this context would include the steps that have been taken to prevent and deter unethical conduct and to enforce ethical conduct
- *opportunities* – in this context weak or absent systems of prevention and accountability.⁴

³ Eg, Lee Ross “*The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*”, in Leonard Berkowitz, ed, *Advances in Experimental Social Psychology*, vol.10 (New York: Academic Press, 1977); Daniel Gilbert and Patrick Malone, “*The Correspondence Bias*”, *Psychological Bulletin* 117.

⁴ Set out in Annexure A is a more detailed list of various factors that can influence the likelihood of ethical conduct.

5. What needs to be done to encourage and embed ethical conduct into the public sector?

As part of a comprehensive approach to foster good judgement and good governance, governments, agencies and senior public officials need to introduce various mechanisms, structures and approaches to encourage or enforce good conduct. To be effective, these need to be both proactive and reactive, and comprehensively address both culture and behaviour, guidance and enforcement and means and ends (process and outcomes). In my view they should include:

- 1) *standard setting* – eg, offence provisions, legal obligations, legislated statements of values, jurisdiction wide codes of conduct, agency codes of conduct, ethics training, etc
- 2) *expectation setting* – eg, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of behaviour expected of staff
- 3) *prevention strategies* – eg, removal of opportunities through fraud prevention measures, disclosure of interests registers, gifts and benefits registers, merit based selection, records management legislation, internal and external audit, proper supervision, ethics training, etc. In this context it would also be useful to address incentives, such as requirements or targets in SES contracts of employment.
- 4) *enforcement mechanisms* – eg, whistleblowing legislation, internal disclosure policies, complaint policies, obligations to report corruption to the ICAC, investigation capacity, FOI, records management legislation and policies, merit reviews of administrative decisions, etc
- 5) *deterrence mechanisms* – eg, watchdog bodies, internal and external audit, disciplinary action, prosecutions, etc.⁵

The not uncommon approach of government and agencies is to focus most effort and attention on setting standards and expectations. However, given the range of motivations and causes I referred to earlier, focussing merely on setting standards and expectations (eg. on codes of conduct, statements of values, etc) will primarily only impact on those who wish to act ethically and those who don't wish to get into trouble and may also serve to reduce opportunities for people to rationalise that they are not doing anything wrong. This approach is unlikely to address unintentional unethical conduct, and definitely will not address intentionally unethical conduct (whether due to moral failings, or due to pressure brought to bear by group dynamics or the culture of the organisation).

From a practical enforcement perspective, promoting ethical conduct through such means as codes of conduct and statements of values will have limited effect unless such approaches are part of a comprehensive package of measures covering the setting of standards and expectations, as well as prevention, enforcement and deterrence.

It is therefore important to employ the full range of mechanisms, strategies and approaches outlined above so as to maximise appropriate standards of conduct. For example:

- for intentional ethical conduct, the most effective mechanisms to encourage or enforce good conduct would be standard setting or expectation setting
- for unintentional ethical conduct, the most effective mechanisms would be standard setting, expectation setting and prevention strategies
- for ethically neutral conduct, the most effective mechanisms would be standard setting, expectation setting, prevention strategies and deterrent mechanisms, and
- for intentional unethical conduct, the most effective mechanisms would be standard setting (a pre-requisite for the following strategy and mechanisms to be effective), prevention strategies, enforcement mechanisms and deterrent mechanisms (expectation setting would have little or no impact).

⁵ These mechanisms, strategies and approaches are set out in more detail in Annexure B to this paper.

| Category of conduct | Most effective mechanisms to encourage or enforce good conduct |
|------------------------------------|--|
| 1) Intentional ethical conduct | Standard setting Expectation setting |
| 2) Unintentional unethical conduct | Standard setting Expectation setting Prevention strategies |
| 3) Ethically neutral conduct | Standard setting Expectation setting Prevention strategies Deterrence mechanisms |
| 4) Intentional unethical conduct | Standard setting Prevention strategies Enforcement mechanisms Deterrence mechanisms |

If the aim is to ensure appropriate standards of conduct in the public sector, each of these mechanisms, strategies and approaches will need to be put in place as a comprehensive package.

However, these mechanisms, strategies and approaches will be ineffective without the 5th and most important requirement – commitment. By this I am referring to commitment by government and commitment by the management of individual agencies. Without proper commitment, there will be no legislated ethical requirements or jurisdiction wide codes of conduct, no comprehensive ethics training, there will be piecemeal and half hearted enforcement of agency codes of conduct, no effective whistleblowing legislation, gaps in the effective implementation of enforcement mechanisms and failures to consistently and effectively empower and resource deterrence mechanisms.

The essential elements of the required level of commitment include, but are not limited to:

- an awareness of the importance of the issue
- the allocation of sufficient resources and priority to addressing the issue
- the implementation of effective governance mechanisms, and
- the establishment of an appropriate ethical culture in the public sector as a whole, as well as in each individual workplace.

6. What mechanisms, strategies and approaches are in place in nsw to help foster good conduct in the public sector?

In NSW, various mechanisms, strategies and approaches have been put in place by successive governments to foster good conduct in the NSW public sector and to help keep government accountable.

While none has all the bases fully covered, compared to all other Australian jurisdictions NSW in particular falls down in a number of areas, particularly in relation to standard setting:

- 1) *Legislated statements of values and standards of behaviour* - The attached table at Annexure C compares the various Australian jurisdictions in terms of the legislated ethics and related obligations for their public officials. If you look down the almost completely empty NSW column you will see that from an ethics perspective NSW is somewhat of a legislative desert!
- 2) *Jurisdiction wide code of conduct* – In NSW there isn't one. Every other Australian jurisdiction has one, but not NSW. All we have is a 'model' code to provide some guidance to agencies in the development of their own codes. However, there are non-agency based codes of conduct for certain parts of or groups in the public sector, for example there is a code of conduct for local government, a code of conduct for the Senior Executive Service, a code of conduct for MPs.
- 3) *Responsible agency* - I think one of the reasons why NSW falls down in these fundamental areas is because, unlike all other Australian jurisdictions, there is no central agency statutorily charged with establishing and promoting appropriate standards of conduct by public officials. In other Australian jurisdictions there are independent, or at least largely independent, bodies or officials with such a role?⁶ Merely having an Ombudsman and a corruption body is not enough. They perform quite different enforcement and deterrence functions – not the standard setting function of the bodies listed above.

In relation to expectation setting, while I am aware that a number of agencies have statements of values, from what I have seen these are little more than a list tucked away in some policy or guarantee of service, or on a poster on the wall. The development of these statements of values were seen in most cases as a project that had been completed, not part of an ongoing process. They are not built into agency cultures and therefore serve little or no good purpose in practice.

And as for leadership creating an appropriate ethical culture in the NSW public sector as a whole and in each agency – the media reports that we all too frequently see paint a grim picture.

⁶ Such as the Public Sector Standards Commission and the Public Sector Commission in WA, the Public Service Commission and the Ethics Commissioner in Queensland, the office of the Commissioner for Public Employment in the NT, the State Services Authority in Victoria, the Commissioner for Public Employment in SA, the Office of the State Service Commissioner in Tasmania and the Australian Public Service Commission in the Commonwealth.

7. To enhance the effectiveness of deterrence mechanisms should an 'integrity branch' be recognised as the fourth branch of government?

The current approach to deterrence mechanisms

Over time in many Australian jurisdictions a fair bit of thought and work (albeit generally reluctantly and with implementation often best described as disjointed and disorganised) has been put into most of the five mechanisms, structures and approaches required to encourage and enforce good conduct. However, the area that has perhaps received the least considered thought concerns deterrence mechanisms.

Historically, the approach adopted by governments around Australia has been very reactive and ad hoc. Seldom has there been any comprehensive review of what deterrence mechanisms are in place and what are required. What normally happens is that there is a knee jerk reaction to a scandal or crisis and if anything is done at all, often the relevant government creates a new body, with little thought given to:

- measures to ensure the new body is appropriate independent of executive government (for example: the term of appointment, possibility of reappointment and dismissal provisions are quite different for the ICAC Commissioner/PIC Commissioner, Auditor General, Ombudsman/Information Commissioner, members of the Judicial Commission, Privacy Commissioner, Health Care Complaints Commissioner, etc; the staff of some integrity or deterrence type bodies can be appointed by that body under its own legislation, while the staff of others may only be appointed under the PSEM Act)
- whether the jurisdiction of the new body is wide enough and does not significantly overlap the jurisdictions of existing bodies
- how the new body will liaise with and appropriately coordinate its activities with existing bodies
- whether the resources allocated to the new body will and continue to be sufficient for it to adequately perform its role.

It is well past time that the adequacy of deterrence mechanisms in place are comprehensively reviewed in each Australian jurisdiction, with the aim of ensuring that appropriate mechanisms are in place with the necessary powers and resources to ensure that their deterrence role will be effective.

Where are integrity bodies currently seen to sit in the structure of government?

The growth in the complexity of regulation, in the discretionary powers of public officials and in the size of Executive government, particularly in the 20th century, led to a growing realisation by the Executive and Legislative Branches that new structures and powers were needed to ensure the integrity of government.

No longer could the Executive Branch remain largely self regulating and unaccountable. In many Westminster systems a series of independent bodies have been established to join Auditors General in ensuring the integrity of government. This started with the appointment of Ombudsman in most Westminster systems in the last quarter of the 1900s. In various jurisdictions Ombudsman were then joined by anti-corruption bodies, public sector standards or ethics commissioners, information commissioners and the like.

As various integrity type bodies were designed and intended to operate independently of Executive government, several did not think it appropriate that they be seen as part of the Executive Branch. For want of a better home, in many Westminster systems Ombudsman in particular, have been seen as 'officers of the Parliament' – either explicitly through statute⁷ or Constitution,⁸ or implicitly by the recognition of the close relationship between the Ombudsman and the Parliament.⁹

⁷ Eg, s.11(2), *Ombudsman Act 2001* (Queensland).

⁸ Eg, s.94E, *Constitution Act 1974* (Victoria).

⁹ Eg, the formal title of the WA Ombudsman is "*Parliamentary Commissioner for Administrative Investigations*".

This was seen as enhancing the ability of the Parliament to keep the Executive accountable. In a 2005 Briefing Paper prepared by the NW Parliamentary Research Service entitled "*Parliamentary Accountability: The Role of Parliamentary Oversight Committees*,"¹⁰ it was noted that:

'[W]ith the expansion of the modern state and the exponential growth in bureaucratic activity, the need for Parliament to exercise its accountability or scrutiny functions efficiently and effectively is more pressing than ever.

[W]ith the expansion in state activities, Parliament itself cannot hope to perform the vast array of accountability functions required in the modern era.

Parliament must consciously share the work of accountability with other agencies. As Peter Barberis comments, 'The key is to establish a proper working relationship between Parliament and the extra-parliamentary institutions of accountability.'

There has, however, been considerable confusion as to where integrity type bodies fit within the structure of government – are they part of the Executive, the Legislature or the Judiciary? For example, are the Ombudsman, Auditor General and ICAC Commissioner and PIC Commissioner officers of the Executive or of the Legislature? Is the Judicial Commission part of the Executive or the Judiciary? Some bodies with integrity/watchdog roles are almost business units of government departments, for example, Privacy NSW which is effectively a business unit of the Justice and Attorney General's Department.

The 'officers of Parliament' approach might not be such a good fit for integrity type bodies that have jurisdiction over the Parliament and/or MPs (eg, in NSW the ICAC and Auditor General). For the same reason there are problems in seeing integrity type bodies (in that capacity) as 'officers of the Court' if they have jurisdiction over the courts and/or judicial officers (eg, in NSW the ICAC, Auditor General and Judicial Commission).

This has led to concern about ways to ensure integrity bodies have sufficient guarantees of independence to ensure they are adequately able to perform their functions. This in turn has led to consideration of the place of integrity bodies in the structure of government.

Is the number of the branches of government fixed and immutable?

In Westminster systems, the powers of government are commonly described as being separated into three branches: the Legislative branch (which makes laws); the Executive branch (which puts laws into operation); and the Judicial branch (which interprets the law).

When first established, most Ombudsmen were seen as part of the Executive Branch. This has changed over time in many jurisdictions, either explicitly or implicitly, to a perception that the Ombudsman is an Officer of the Parliament. In NSW this is now a generally accepted view held by both the Executive and the Legislature, particularly since the establishment of a Parliamentary Committee to oversee the work of the Ombudsman. Given that the Parliamentary Committee has a veto over the appointment of the Ombudsman, and that the Ombudsman can only be dismissed on the address of both houses of Parliament to the Governor, this reinforces the view that the Ombudsman is more an officer of the Legislature than of the Executive. In Victoria, this has been made explicit. The State's constitution was amended to specify that the Ombudsman is an officer of the Parliament.

¹⁰ Griffith G, 2005, Briefing Paper No. 12/05, Sydney.

It has been argued by various commentators in recent years, for example Chief Justice Spiegelman of the NSW Supreme Court,¹¹ the Commonwealth¹² and Victorian¹³ Ombudsman and others,¹⁴ that consideration should be given to the concept that there is, or should be, another branch of government – the Integrity branch of government. Chief Justice Spiegelman's idea is that an Integrity branch of government would incorporate the various agencies that have been established to ensure the integrity of government, possibly including such agencies as the Auditor General, Independent Director for the Public Prosecutions, Corruption Commissions, Ombudsman, Statutory Integrity Commissioners as well as ad hoc commissions of inquiry. He went further to suggest that possibly such a branch of government could be seen as incorporating the integrity functions of the Judiciary.

What these commentators are suggesting is that there should be a fourth branch – the 'Integrity' branch – whose role is to ensure proper practice on the part of the other branches of government.

What is meant by separation of powers?

What is being described by reference to various 'branches' of government is a way of thinking about the structure of government – referred to as the 'separation of powers'. In practice probably a more accurate description might be 'sharing of powers'. For example:

- law is made by each branch¹⁵
- laws are interpreted by each branch¹⁶
- rights are determined by each branch¹⁷
- integrity issues are reviewed and/or enforced by each branch¹⁸

Other overlaps or sharing of powers include:

- the funding of each branch is through the budget, which is prepared by the Executive and approved by the Parliament
- the Executive appoints all judicial officers, who can only be dismissed on the address of both Houses of Parliament to the Governor/Governor General
- the Governor General is the head of the Executive government and also is part of the Parliament (per ss.1 and 61 of the Commonwealth Constitution)
- in NSW the Chief Justice of the Supreme Court is the Lieutenant Governor and acts in that role when the Governor is absent
- Ministers of the Executive branch are all members of the Legislative Branch.

In practice then, each Branch performs at least some functions of other Branches, and is generally reliant on at least one other Branch to exercise its powers or to achieve its objectives, or conversely has some form of veto over the actions of one or both of the other Branches. It could be argued that each branch performs a gatekeeper role in relation to one or both of the other Branches.

¹¹ *Judicial Review and the Integrity Branch of Government*, address by the Hon JJ Spiegelman AC, Chief Justice of NSW to the World Jurist Association Congress, Shanghai, 8 September 2004; JJ Spiegelman, *The Integrity Branch of Government*, *Quadrant Magazine Law*, July 2004, Vol. XLVIII Number 7-8.

¹² Commonwealth Ombudsman Annual Report, 2006-07 (at Ch 8); John McMillan, *Future Directors – The Ombudsman*, Address to AIAL National Administrative Law Forum, Canberra, July 2005.

¹³ Victorian Ombudsman Annual Report, 2005 (at p 8); Transcript of Public Accounts and Estimates Committee Inquiry into a Legislative Framework for Victorian Statutory Officers of Parliament, 8 February 2006.

¹⁴ Eg, Stuhmcke and Tran, *The Commonwealth Ombudsman – An Integrity branch of government*, *AltLJ* Vol 32:4 December 2007 (at p.233).

¹⁵ The Legislature through statutes, the Judiciary through the common law and the Executive exercising powers delegated by Parliament to make regulations, orders, directions, etc.

¹⁶ The Legislature through second reading speeches and debates on bills, the Judiciary in judgments, and the Executive through implementing, enforcing, applying, being restricted by legislation in practice.

¹⁷ The Legislature through statutes, the Judiciary in judgments, and the Executive in the exercise of executive powers.

¹⁸ The Legislature through such avenues as question time, questions on notice, debates, Parliamentary Committees, etc, the Judiciary through judicial review, proceedings for criminal acts by public officials, etc, and the Executive through the police, internal and external audits, disciplinary action, etc.

This does not mean that the idea of separation of powers is irrelevant. The purpose of the concept of separation of powers is the establishment of a system of checks and balances on the exercise of government power. The objective is to prevent the abuse or misuse of power by the Crown – probably in practice primarily by the Executive – with prevention of abuse or misuse of power by the Judiciary and the Legislature a secondary objective.

In practice it is probably more accurate to describe the system as the sharing of powers (described by one commentator as “*separate institutions sharing powers*”¹⁹). However, within this system each branch of government has an overriding or paramount power in relation to its primary role:

- the Legislature is the paramount body to make law
- the Judiciary is the paramount body to interpret the law
- the Executive is the paramount body to implement the law.

What are the central concepts of the separation of powers doctrine?

For the separation of powers doctrine to work, the key requirement is the independence of the institutions or officials within each branch – both in theory and practice.

The central concepts of the separation of powers doctrine therefore include, firstly, *independence*, which is ensured by such measures as:

- Judges can only be dismissed on the address of the Parliament to the Governor (or equivalent)
- discussions in Parliament cannot be impugned or questioned in any other forum
- what is said in court and in Parliament has absolute privilege in defamation
- a member of Parliament cannot hold any office of profit under the Crown (other than Ministers)
- during each term of Parliament (ie, between elections) members of Parliament may only be removed from office by the courts (or the Parliament), in circumstances prescribed by law (including the relevant Constitution).
- The second central concept is *interdependence*, in the sense that each branch is reliant on at least one other branch to be able to exercise its powers or to achieve its objectives. Examples of this interdependence include:
 - the Executive can only exercise powers given to it by the Legislature (statutes) or the courts (common law)
 - the Legislature can only achieve the objectives of its legislation through the Executive (and most Bills are introduced into the Parliament by the Executive)
 - the judgments of the Judiciary are enforced, in most cases, by the Executive.

In the Australian context, and in particular NSW, we have separation of powers in the sense that the powers of each ‘branch’ are supposed to be implemented independently, not in the sense that each branch is completely separate from and independent of the others or that the core powers of each branch can only be exercised by that branch. The term ‘separation of powers’ refers to a doctrine or concept, not necessarily to any particular physical or legal structures.²⁰

¹⁹ Richard E Neustadt, *Presidential Power*, Signet, New York (1964) p.42.

²⁰ Note, in contrast, the Commonwealth constitution rigidly applies the separation of powers concept, eg:

“1 The **legislative power** of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives.”

“61 The **executive power** of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.”

“The **judicial power** of the Commonwealth shall be vested in ... the High Court of Australia...” (emphasis added)

Should integrity bodies be independent?

In most cases it was seen as essential for their effectiveness that at least the head of each such agency be given statutorily guaranteed independence from Executive government similar to that of Judges (the only difference being term appointment)²¹.

The legislation in each State and Territory establishing an Ombudsman provides that either the Ombudsman may only be dismissed by the Governor on the address of the Parliament,²² or the suspension of the Ombudsman by the Governor must be ratified by the Parliament within a certain period.²³

A clear distinction between integrity bodies and bodies that are part of Executive government is that integrity bodies are not accountable to a Minister, and are not subject to direction by a Minister as to the manner or form in which they perform their integrity related functions.

In NSW the independence of statutory officers with integrity related functions is also facilitated by joint committees of the Parliament having a veto over the appointment of those officers.²⁴

Another indicator of independence of statutory officers or bodies from the Executive Branch is the power to make reports to Parliament at the complete discretion of the officer or body. In NSW the various integrity bodies or officers have the discretion to make 'special reports' to Parliament at any time, on matters relating to their functions.

Do integrity bodies have common functions?

The third central concept for inclusion in a branch of government is a common *function*, in this case an '*integrity*' related function.

The word 'integrity' refers to such things as honesty, incorruptibility, soundness, reliability, and in its broad sense observing proper practice. Chief Justice Spiegelman²⁵ has indicated that in his view integrity involves such things as legality, maintenance of fidelity to the public purpose for the pursuit of which the institution was created, and the application of public values, including procedural values, which the institution is expected to obey. In many ways, this is a broad reformulation of the core jurisdiction of Ombudsman – 'maladministration', ie, conduct that is contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; based on improper motives; irrelevant grounds or irrelevant considerations; based on a mistake of law or fact; or otherwise wrong, etc.

Corruption can be seen as a sub-set of 'maladministration'. The essential difference between them is that the focus of the maladministration related work of most Ombudsman is on public officials and agencies not performing their official duties appropriately, whereas the jurisdiction of corruption fighting bodies generally relates to conduct fundamentally opposed to official duty, eg, the abuse of power for gain.

Bodies or officers whose role could be described as having a significant integrity function would therefore include Ombudsman, Auditors General, corruption commissioners, integrity or ethics commissioners, and possibly also information/privacy commissioners, judicial commissions and electoral commissioners.

²¹ For example, in NSW the following statutory officers with integrity related functions may only be dismissed from office on the address of both Houses of Parliament to the Governor (other than for such reasons as bankruptcy, etc); Ombudsman, Deputy Ombudsman, Assistant Ombudsman (ss.6(5) and 8(2), *Ombudsman Act 1974*) [Deputy and Assistant Ombudsman can also be dismissed by the Ombudsman]; ICAC Commissioner (s.103 and cl.6, Sch 1, *Independent Commission Against Corruption Act 1988*); Inspector of the ICAC (cl.7(2), Sch 1A, *Independent Commission Against Corruption Act 1988*); PIC Commissioner, Assistant PIC Commissioners (s.7 and cl.7, Sch 1, *Police Integrity Commission Act 1976*); Inspector of the PIC (cl.7(2), Sch 2, *Police Integrity Commission Act 1996*); Auditor General (cl.6, Sch 1, *Public Finance and Audit Act 1983*); and Electoral Commissioner (s.21AB, *Parliamentary Electorates and Elections Act 1912*).

²² Eg, s.3(5)(b), *Ombudsman Act 1973* (Vic); s.6(5) *Ombudsman Act 1974* (NSW); s.68, *Ombudsman Act 2001* (Qld); s.28(1), *Ombudsman Act 1976* (Cth).

²³ Eg, s.2.6, *Ombudsman Act 1978* (Tas); s.8, *Ombudsman (Northern Territory) Act*; s.(6), *Parliamentary Commissioner Act 1971* (WAQ); s.18, *Ombudsman Act 1972* (SA); s.28(4), *Ombudsman Act 1976* (Cth).

²⁴ The Committees include Committees oversighting the Ombudsman, ICAC Commissioner, Inspector of the ICAC, PIC Commissioner, Inspector of the PIC, Auditor General, and DPP.

²⁵ "*The Integrity Branch of Government*", the first lecture in the 2004 National lecture series for the Institute of Administrative Law, Sydney, 29 April 2004.

While both the Judicial and Legislative Branches also perform some integrity related functions, these are peripheral to their core functions, and they already have the necessary degree of independence to be able to perform their core functions.

What should be the criteria for inclusion in an 'Integrity Branch' of government?

In practice, a number of integrity bodies or officers have been created in nearly all Westminster systems that have the core requirements of each of the recognised branches of government, ie, independence and interdependence. So whether or not these officers or bodies are generally recognised as a fourth branch, they already meet the key criteria to be one. Referring to them as an Integrity Branch of government would therefore merely be a recognition of this reality.

If we were to recognise an Integrity Branch of government, I would argue that the criteria to determine which public bodies or offices are part of that Branch should include:

- 1) a significant *integrity* related function, with a significant jurisdiction over at least one Branch of government, and
- 2) a need to be *independent*, particularly of Executive government, which could be demonstrated by measures such as:

the head of the body or the holder of the public office only being dismissible on the address of both Houses of Parliament to the Governor/Governor General

a Parliamentary Committee having a veto over the appointment of the head of the body or the holder of the public office

the body or public office not being subject to direction by a Minister or Executive government as to the exercise of its discretionary powers, and

the body or public office having a discretionary power to make a report to Parliament or any matter within its jurisdiction

- 3) *interdependence* with at least one other Branch (each Branch of government should be reliant on at least one other Branch of government in the achievement of its objectives), ie, the body or official does not have determinative or enforcement powers, and possibly not prosecutorial powers (which is in conformity with the current powers of NSW bodies whose primary role is to perform integrity type functions).

Other criteria may be desirable, for example a statutory Parliamentary Committee to oversight the body or public office.

What is required for the recognition of an 'Integrity Branch' of government?

In referring to an 'Integrity Branch' of government, this is not something that needs to be brought about by legislation or by the creation of some 'super' integrity body incorporating the integrity functions of existing bodies. After all, the other Branches of government were not 'established' as such by statute (although the Commonwealth and State Constitutions do embody, to one degree or another, the concept of separation of powers), and the Executive and Judicial Branches consist of numerous separate bodies.

At the minimum, all that would be required is a change in our perception of the structure of government to recognise that there are several agencies that do not sit comfortably within one of the established Branches of government, but have sufficient similarities in role to be seen as a separate Branch in their own right.

While in my view not essential, where constitutional amendment is a practical option, consideration could be given to the inclusion of a provision that integrity functions of government are to be performed by integrity agencies. Such a provision could:

- describe existing integrity agencies by name, or
- require that a body or bodies be established to perform specified integrity related functions, or
- specify certain characteristics of such bodies (eg, those designed to ensure the independence of integrity bodies).

The inclusion of such a provision would be unlikely to require any amendment to the specified powers of the executive as most constitutions do not specifically refer to the integrity type powers or functions of the executive.

In practice, the most significant impact of seeing the structure of government in terms of four branches would be to give some clarity to the requirements for a body to be considered part of the Integrity Branch. If the Executive and the Legislature were thinking about the establishment of a body with an integrity role, or changes to an existing integrity type body, then their thinking would be guided by the criteria that should apply.

8. Conclusions

While public sector ethics is a nice concept, it has limited relevance to the management of the conduct of public officials to maximise fair and appropriate outcomes in the public interest and public trust in government:

- there is no general agreement as to the meaning of 'ethics' – what it encompasses
- 'ethics' involves a mental element and is therefore a very personal and subjective issue, and in practice most people see actual standards of behaviour as more important than what may have motivated that behaviour (other than when things go wrong)
- the application of ethical principles to any complex set of circumstances may well result in a range of possible outcomes, often with no clearly 'right' answer
- many people can be quite selective in the application of ethical principles to various aspects of their lives and work
- from a practical enforcement perspective it may be more appropriate or useful to focus on outcomes rather than causes, on whether conduct was criminal, illegal or corrupt as opposed to 'ethical', and to talk about questions of 'judgement' rather than 'ethics'
- in practice, attempts to improve the standards of conduct and decision-making by public officials need to focus on the full range of potential conduct, not just on trying to encourage public officials to act ethically.

On this last point, while a focus on fostering ethical conduct through setting standards and outlining expectations will assist public officials who wish to act ethically (either generally or in particular circumstances), or at least would prefer not to act unethically, it will do little to address conduct that is morally negligent, blind or reckless, and will have no impact when people are prepared to place their personal interests above the public interest.

To address the problems that can be caused by such people, a comprehensive approach is required that puts in place adequately resourced mechanisms focusing on:

- standard setting
- expectation setting
- prevention procedures and practices
- enforcement mechanisms, and
- deterrence mechanisms.

It is well past time for the government of NSW to comprehensively review the systems and structures in place in this State to ensure appropriate conduct by public officials.

To provide a proper foundation for the promotion of appropriate conduct, in my view this would need to include:

- a legislated statement of values and the standards of behaviour expected of all public officials
- a code of conduct covering the NSW public sector as a whole
- the setting up of an independent agency with statutory responsibility, and the necessary resources, to establish and promote appropriate standards of conduct by public officials.

These are not novel or radical ideas, and their implementation would bring NSW into line with all other State, Territory and Commonwealth Governments in Australia.

In addition, to embed the independence of integrity agencies into our system of government the time is ripe for the recognition of an Integrity Branch of government, with the necessary statutory provisions being put in place to ensure its on-going roles and necessary levels of independence.

ANNEXURE A

What influences the likelihood of ethical conduct?

The main influences on the likelihood of people acting ethically would include:

- 1) *personal values*, eg influenced by such things as family , education , religion, ethnicity, etc
- 2) *personal traits*, eg:
 - strength of character, including a willingness to take responsibility for actions
 - pressure from personal circumstances (eg, a person may be more likely to engage in unethical practices if this will benefit the person personally or if engaging in ethical practices will cost the person personally)
- 3) *supports*, eg:
 - rules (such as codes of conduct, agency policies and procedures, and legislated standards of behaviour)
 - guidance as to acceptable behaviour (such as in codes of conduct, codes of ethics, legislated statements of values, guidelines, training, advice, etc)
 - cultural norms (eg, the culture of an organisation or of the wider society).
- 4) *deterrents*, eg:
 - rules (eg, codes of conduct and legislated standards of behaviour)
 - prevention (eg, reduction of opportunities for inappropriate behaviour)
 - strong systems of accountability (eg internal and external audits)
 - detection of non-compliance (eg, supervision, audits, whistleblowing, watchdog bodies etc)
 - penalties for non-compliance/breach.
- 5) *opportunities* (ie situation/circumstances), eg:
 - weak or absent systems of accountability
 - organisational culture that does not judge certain conduct as being unethical (eg, nepotism or use of organisational resources for personal use).
- 6) *pressures*, eg:
 - organisational pressure (eg, by management or colleagues)
 - political pressure (eg by Ministers or their staff)
 - personal circumstances (eg, financial pressures).

ANNEXURE B

What are the mechanisms/strategies/approaches that encourage ethical conduct?

Mechanisms, strategies and approaches that encourage ethical behaviour would include:

1. Standard setting:

- 1.1 Offence provisions - eg, unauthorised disclosure of information; bribery/secret commissions, etc [in all Australian jurisdictions]
- 1.2 Legal obligations - avoidance of bias; obligations of fidelity; disclosure of interests, protection of privacy, transparency and openness in decision making, etc [common law or statutory requirements common across Australian jurisdictions]
- 1.3 Legislated statements of values and standards of behaviour - a legislative framework setting out overarching principles and standards of behaviour, covering such issues as legality, impartiality, integrity, avoidance of conflicts of interests, acting in good faith, transparency, frankness and candour, use of public resources, etc. [legislated statements of values are the foundation for jurisdiction wide agency codes of conduct and agency statements of values in all Australian jurisdictions, other than NSW]
- 1.4 Jurisdiction wide codes of conduct - setting out minimum standards of conduct – focusing on the public sector as a whole [jurisdiction wide codes in all Australian jurisdictions, other than NSW]
- 1.5 Agency codes of conduct - setting out minimum standards of conduct – focusing on the particular characteristics of the agency and its environment [common in all Australian jurisdictions, - recent ICAC/CMC research indicates that 96% of NSW agencies and 92% of Queensland agencies have a code of conduct]
- 1.6 Ethics training - while some argue that ‘ethics’ can not be taught, this does not mean that people cannot be given training as to expected standards of behaviour, and given tools to assist ethical decision-making and to create an ethical workplace culture [ad hoc in most Australian jurisdictions]
- 1.7 Responsible agency - a central agency statutorily charged with promoting and being responsible for appropriate standards of conduct by public officials [in all Australian jurisdictions other than NSW].

2. Expectation setting:

- 2.1 Agency statements of values - an articulation of the norms and values of the organisation, often set out in a code of conduct, corporate plan/business plan, statement of corporate purpose or guarantee of service [implementation often involves little more than lip service to a set of values that are not built into an agency’s culture, policies, procedures, job descriptions, induction training, decision-making, etc]

- 2.2 Leadership ('tone at the top') - members of the government of the day demonstrating/ modelling appropriate values and ethical behaviour [variable across Australian jurisdictions!].
- senior management of agencies demonstrating/ modelling a commitment to the organisation's values and to ethical behaviour generally [variable across Australian jurisdictions]
- 2.3 Duty statements/contracts of employment - setting out expected standards of conduct [duty statements and/or contracts of employment are almost universal for employment in the public sector]
- 2.4 Oaths of office - [a requirement to hold certain positions in some Australian jurisdictions]
- 2.5 Ethics training - [see above]
- 3. Prevention strategies:**
- 3.1 Whistleblowing legislation - [in all Australian jurisdictions to one extent or another; currently under review in many]
- 3.2 Disclosure of interests obligations - obligations to disclose pecuniary and other interests that could be in or lead to obligations to disclose pecuniary and other interests that could be in or lead to a conflict [disclosure of interests is a requirement in some sections of the NSW public sector such as for MPs, Councillors and senior council staff, but not for CEOs or the SES in state government agencies]
- 3.3 Gifts and benefits registers - [reasonably common in NSW agencies]
- 3.4 Fraud control plans - [common in NSW agencies]
- 3.5 Use of IT and communication devices policies - [common in NSW agencies]
- 3.6 Accounting standards - [in all Australian jurisdictions]
- 3.7 Records management legislation - requiring the making and retention of proper records [in all Australian jurisdictions]
- 3.8 Records management policies - [common across all Australian jurisdictions]
- 3.9 Merit based selection - to avoid nepotism, favouritism, etc [almost universal application in all Australian jurisdictions]
- 3.10 Criminal records checks - [common pre-requisites across all Australian jurisdictions for selection to a position in the public sector]
- 3.11 Supervision - particularly important in high risk areas
- 3.12 Ethics training - [see above]
- 4. Enforcement mechanisms:**
- 4.1 Whistleblowing legislation - [see above]
- 4.2 Internal disclosure policies - to facilitate internal disclosures (whistleblowing) by staff [in most NSW agencies]
- 4.3 Complaint handling policies - agency policies for the receipt, handling, investigation, etc of complaints [in most NSW agencies]

- | | | | |
|-----------|--|---|--|
| 4.4 | Reporting of corrupt conduct | - | the obligation on CEOs and Ministers to report suspected corrupt conduct to the ICAC [s.11, ICAC Act in NSW] |
| 4.5 | Internal audit | - | [common across all Australian jurisdictions] |
| 4.6 | External audit | - | [universal application across all Australian jurisdictions] |
| 4.7 | Agency investigative capacity | - | the capacity of agencies to investigate complaints/disclosures [variable capacity across agencies depending on their size and their exposure to and history of illegal/unethical/inappropriate behaviour] |
| 4.8 | FOI (or equivalent) | - | [in all Australian jurisdictions] |
| 4.9 | Records management legislation | - | [see above] |
| 4.10 | Records management policies | - | [see above] |
| 4.11 | Merit review of administrative decisions | - | [common in Australian jurisdictions, but only for certain administrative decisions in NSW] |
| 5. | Deterrence mechanisms | | |
| 5.1 | Watchdog/integrity bodies | - | Ombudsman [in all Australian jurisdictions] |
| | | - | Corruption Commissions [5 so far across Australian jurisdictions] |
| | | - | Integrity/Ethics/Standards Commissioners [in some Australian jurisdictions, eg, Queensland the WA] |
| | | - | Auditors General [in all Australian jurisdictions] |
| 5.2 | Internal audit | - | [common across Australian jurisdictions] |
| 5.3 | External audit | - | [universal application across all Australian jurisdictions] |
| 5.4 | Penalties | - | the penalties that can be imposed for non-compliance/breach of acceptable ethical standards/standards of behaviour, eg warnings, directions, demotions, fines, dismissal, gaol, etc [common across Australian jurisdictions] |
| 5.5 | Disciplinary action | - | [rare in practice] |
| 5.6 | Prosecution | - | [very rare in practice] |

ANNEXURE C

Australian comparisons of ethics and related obligations for public officials

| | ACT | CTH | NSW | NT | QLD | SA | TAS | VIC | WA |
|---|------------------|----------------|-----|------------------|---|-------------------|-------------------|--|----------------|
| Statements of values/ principles: | | | | | | | | | |
| • accountability: | s.6 | s.10(1) | - | cl.2(c) ? | - | s.4(f) | s.7(1)(d) | ss.7(1) (d), 3(b)(iii) | - |
| -to government | s.6(c) | s.10(1) (e) | - | - | - | - | s.7(1)(d) | - | - |
| -to Parliament | - | s.10(1) (e) | - | - | - | - | s.7(1)(d) | - | - |
| -to public | - | s.10(1) (e) | - | - | - | - | s.7(1)(d) | - | - |
| • service to the public | ss.6(a), 7(a) | s.10(1) (g) | - | cl.2(a) | s 25(1)(b), PS Act | s.4(a),(e) | - | S7(1)(a)(i) | s.7(a) |
| • responsiveness to: | | | | | | | | | |
| -requirements of gov't | s.6(b)(i) | - | - | - | s.3(1)(a)(i), 25(1)(a), 98(1)(d), PS Act | s.5(2) | - | S7(1)(a)(i) | s.7(b) |
| -needs of public | s.6(b)(ii) | - | - | - | s.25(1) (a) | - | - | S7(1)(a)(ii) | - |
| • fairness and integrity | ss.6(d), 7(b) | s.10(1) (g) | - | cl.4(a), (e) | ss.4(2) , 9, PSE Act | ss.4(b) , 5(6) | - | ss 7(1)(b) , 3(f) ss 7(1)(c) (ii), 7(1)(e) (i) ss.3(d) | s.9(a), (b) |
| • efficiency and effectiveness | ss.6(e), 7(d) | s.10(1) (g) | - | cl.4(c) | s.3(1)(b), PS Act | s.4(a) | - | 8(1)(b) s.3(b)(i) i) | s.7(e), (f) |
| • impartiality | - | s.10(1) (a) | - | cl.2(b), 4(a) | s.25(1) (b), PS Act | - | s.7(1)(a),(f) | s.7(1)(c) | - |
| • highest ethical standards | - | s.10(1) (d) | - | - | - | s.5(6) | s.7(1)(a) | s.3(f) | - |
| • respect for law and system of government | - | - | - | - | ss.4(2) , 7, PSE Act | - | - | - | - |

| | ACT | CTH | NSW | NT | QLD | SA | TAS | VIC | WA |
|--|---------------|--------------------|-----|---------------|-------------------------------------|--------------|-----------------------|--------------|----|
| Standard of behaviour: | | | | | | | | | |
| <ul style="list-style-type: none"> integrity/probity | s.9(c) | s.13(1) | - | cl.4(a) | s.9 PSE Act, s.26(g), PS Act | - | ss.7(1)(a), 9(1),(14) | s 7(1)(b) | - |
| <ul style="list-style-type: none"> honesty | - | s.13(1) | - | - | s.(8)(1)(a), PSE Act | s.5(6) | ss.7(1)(e), 9(1) | s7(1)(b)(i) | - |
| <ul style="list-style-type: none"> respect for persons/without harassment | s.9(f) | s.13(3) | - | s.49(g) | s.8, PSE Act | s.5(6), 5(5) | s.9(3) | s7(1)(e)(ii) | - |
| Standard of decision-making: | | | | | | | | | |
| <ul style="list-style-type: none"> fairness/equity | ss.6(d), 7(b) | s.10(1)(g) | - | cl.4(e) | - | - | s.7(1)(f) | s7(1)(c)(i) | - |
| <ul style="list-style-type: none"> impartiality | s.9(b) | s.10(1)(a),(g) | - | ccl.2(b),4(a) | S 26(g), PS Act, s.7(1)(b), PSE Act | - | s.7(1)(a),(f) | s7(1)(c)(i) | - |
| Standard of advice: | | | | | | | | | |
| <ul style="list-style-type: none"> honest/with integrity | - | ss.10(1)(f),13(1) | - | cl.4(b) | Ss 25(1)(b), PS Act | S 5(6) | ss.7(1)(e), 9(1) | s7(1)(b)(i) | - |
| <ul style="list-style-type: none"> frank | - | s.10(1)(f) | - | - | - | - | s.7(1)(e) | s7(1)(a)(i) | - |
| <ul style="list-style-type: none"> objective/impartial | - | - | - | cl.2(b) | Ss 25(1)(b) 26(e) PS Act | - | s.9(10) | s7(1)(a)(i) | - |
| <ul style="list-style-type: none"> accurate/not false of misleading | - | ss.13(9), 10(1)(f) | - | s.49(m) | - | s.5(2) | ss.7(1)(e), 9(10) | - | - |
| <ul style="list-style-type: none"> comprehensive | - | s.10(1)(f) | - | - | - | s.5(2) | s.7(1)(e) | - | - |
| <ul style="list-style-type: none"> timely | - | s.10(1)(f) | - | - | - | s.5(2) | s.7(1)(e) | s7(1)(a)(i) | - |

| | ACT | CTH | NSW | NT | QLD | SA | TAS | VIC | WA |
|---|-------------------|--------------------|-----|------------|--|--------------------|----------------|---------------|-------------------|
| Standard of performance: | | | | | | | | | |
| • care/skill/diligence | s.9(a) | s.13(2) | - | cl.4(a) | s.10, PSE Act | s.4(e) | s.9(2) | - | - |
| • professionalism | - | s.10(1)(a) | - | cl.4(a) | - | - | s.7(1)(a) | s.3(g) | - |
| • effectiveness | s.6(e) | s.10(1)(g) | - | - | - | s.5(4) | - | s.3(b)(i) | s.7(e),(f) |
| • economy and efficiency | s.6(e) | - | - | cl.4(c) | s.11, PSE Act, 25(1)(a), PS Act | s.5(4) | - | s.3(b)(i) | s.7(e),(f) |
| • without excessive formality | - | - | - | cl.2(d) | - | - | - | - | s.7(c) |
| • with minimum delay | - | - | - | cl.2(d) | - | - | - | - | s.7(c) |
| Standard of service: | | | | | | | | | |
| • service quality | ss.6(a), 7(a) | - | - | cl.2(a) | ss.26(a), 25(1)(a), PS Act | s.4(e), 5(1), 5(4) | - | s.7(1)(i) | s.7(a) |
| • courtesy/sensitivity | s.9(d) | ss.10(1)(g), 13(3) | - | cl.4(e) | - | s.5(6) | - | - | s.9(c) |
| • responsiveness to needs | s.6(b) | - | - | - | s.8(2), PSE Act, s.25(1)(a), 3(1)(a)(i) PS Act | s.5(1) | - | s.7(1)(a)(ii) | - |
| • assistance to understand entitlements | s.9(e) | - | - | - | - | - | - | - | - |
| Obligation to comply/uphold: | | | | | | | | | |
| • the law | s.9(h) | s.13(4) | - | - | S 7(1)(a) PSE Act s.26(h) PS Act | s.5(7) | s.9(4) | - | s.9(a) |
| • lawful and reasonable directions | s.9(i) | s.13(5) | - | s.49(c) | - | - | s.9(6) | - | - |
| • code of conduct | ss.9(h), 25(1)(i) | s.14, cl.2.2 | - | s.16(2)(c) | ss.18, PSE Act | s.6 | ss.9(1), 5, 10 | s.63 | ss.9(a), 21(1)(b) |

| | ACT | CTH | NSW | NT | QLD | SA | TAS | VIC | WA |
|--|---|---|--|---|---|--|--|--|--|
| <ul style="list-style-type: none"> standards of conduct: <ul style="list-style-type: none"> -CEO -SES -employees recordkeeping standards | <p>s.9(h)</p> <p>s.9(h)</p> <p>s.9(h)</p> <p>-</p> | <p>ss.12, 14</p> <p>ss.14, 35 (2)(c)</p> <p>ss.13(11), 29(3)(g)</p> <p>-</p> <p>-</p> | <p>-</p> <p>-</p> <p>-</p> <p>-</p> | <p>ss.16, 23, cl.2</p> <p>s.16, cl.2</p> <p>s.16, cl.2</p> <p>-</p> | <p>ss.25, PS Act</p> <p>s.25, PS Act</p> <p>s.10(b), PSE Act, s.25, PS Act</p> <p>ss.98(h) PS Act</p> | <p>s.37, 38</p> <p>s.5</p> <p>s.5</p> <p>-</p> | <p>s.8</p> <p>s.9 (15)</p> <p>s.9(15)</p> <p>-</p> | <p>ss.8,13</p> <p>ss.8</p> <p>ss.8</p> <p>-</p> | <p>ss.9,30,32</p> <p>s.9</p> <p>ss.9, 21(1)(b)</p> <p>s.7(h)</p> |
| <p>Obligation to report:</p> <ul style="list-style-type: none"> conflict of interests corruption/fraud maladministration waste | <p>s.9(j)</p> <p>s.9(q)(i)</p> <p>s.9(q)(ii)</p> <p>-</p> | <p>s.13(7)</p> <p>-</p> <p>-</p> <p>-</p> | <p>-</p> <p>s.11, ICAC Act</p> <p>-</p> <p>-</p> | <p>cl.4(b)</p> <p>-</p> <p>-</p> <p>-</p> | <p>-</p> <p>s.9(2)(c), PSE Act</p> <p>s.9(2)(c), PSE Act</p> <p>-</p> | <p>S 15(2)</p> <p>-</p> <p>-</p> <p>-</p> | <p>s.9(8)</p> <p>-</p> <p>-</p> <p>-</p> | <p>3.6 (MCO C)</p> <p>-</p> <p>s.7(1)(b)(iii)</p> <p>-</p> | <p>-</p> <p>-</p> <p>-</p> <p>-</p> |
| <p>Use and disclosure of information:</p> <ul style="list-style-type: none"> confidentiality/ non-disclosure not to obtain improper advantage not make improper use of | <p>s.9(m)</p> <p>s.9(l)</p> <p>-</p> | <p>s.13(6), cl.2.1</p> <p>s.13(10)</p> <p>s.13(10)</p> | <p>-</p> <p>-</p> <p>-</p> | <p>-</p> <p>-</p> <p>-</p> | <p>-</p> <p>-</p> <p>-</p> | <p>S 5(6)</p> <p>-</p> <p>-</p> | <p>s.9(7)</p> <p>s.9(11)</p> <p>s.9(11)</p> | <p>3.4, 6.3, 6.2 (MCO C)</p> <p>3.3 (MCO C)</p> <p>3.4 (MCO C)</p> | <p>-</p> <p>-</p> <p>s.9(b)?</p> |

| | ACT | CTH | NSW | NT | QLD | SA | TAS | VIC | WA |
|--|--------|----------|-----|---------|-------------------------|-------|--------------|-------------|---------|
| Use of property/resources: | | | | | | | | | |
| <ul style="list-style-type: none"> use efficiently & responsibly | - | s.13(8) | - | cl.4(c) | s.25(1)(e), PS Act | s5(4) | - | 5.3(MCOC) | -s.7(f) |
| <ul style="list-style-type: none"> avoidance of extravagance or waste | s.9(p) | - | - | cl.4(c) | s.11 PSE Act | - | - | - | - |
| <ul style="list-style-type: none"> not to obtain improper advantage | - | - | - | cl.4(d) | - | - | s.9(11) | - | - |
| <ul style="list-style-type: none"> not make improper use of/ use in a proper manner | s.9(o) | s.13(8) | - | - | ss.9(2)(a), 11, PSE Act | - | s.9(9), (11) | 5.3 (MCO C) | s.9(b) |
| Use of position/powers: | | | | | | | | | |
| <ul style="list-style-type: none"> not to obtain improper advantage | s.9(k) | s.13(10) | - | cl.4(d) | s.9(2)(a), PSE Act | - | s.9(11) | 3.2 (MCO C) | - |

Relevant Acts, Regulations and Mandatory Standards/Directions

| | |
|-----|---|
| ACT | <i>Public Sector Management Act 1994 (Part 2)</i> <i>Public Sector Management Standard 1 – Ethics</i> |
| Cth | <i>Public Service Act 1999 (Part 3)</i> <i>Public Service Regulations 1999</i> <i>Public Service Commissioners Directions (Chapter 2) – APS Values</i> |
| NT | <i>Public Sector Employment and Management Act (ss.16 & 65)</i> <i>Public Sector Employment and Management Regulations (Part 2)</i> <i>Commissioner for Public Employment - Instruction Number 13 – Code of Conduct</i> |
| Qld | <i>Public Service Act 2008</i> <i>Public Sector Ethics Act 1994</i> |

Public Sector Ethics Regulation 1999

| | |
|-----|---|
| SA | <i>Public Sector Act 2009</i> <i>Public Sector Regulation 2010</i> <i>Commissioner for Public Section Employment – Code of Conduct</i> |
| Tas | <i>State Service Act 2000 (Part 2)</i> <i>State Service Regulations 2001 (ccl.11,12)</i> <i>State Service Commissioner - Direction No. 2 – State Service Principles</i> <i>State Service Commissioner – Direction No. 5 - Procedures for Investigation and Determination of Alleged Breaches of the Code of Conduct</i> <i>State Service Commissioner - Direction No. 14 – Gifts & Benefits</i> |
| Vic | <i>Public Administration Act 2004</i> <i>Public Sector Standards Commission - Code of Conduct for Victorian Public Sector Employees</i> |
| WA | <i>Public Sector Management Act 1994 (Part 2)</i> <i>Public Sector Standards Commissioner – Code of Ethics 2002</i> |

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