

Government Ethics

by the Hon. Alan Demack AO, Queensland Integrity Commissioner
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The topic of Government Ethics is one which is a fundamental interest to government lawyers. We belong to a profession which has a strong commitment to ethical behaviour. Both common law and equity had a strong identifiable ethical basis. Today, just as much of the common law has been expressed in statute law, so, with government ethics, we are now able to concentrate on one Act, the *Public Sector Ethics Act 1994* (“the Act”).

Ethics Principles

The Act identified five “ethics principles” for public officials (s.4). These principles are:

- ? Respect for the law and the system of government
- ? Respect for persons
- ? Integrity
- ? Diligence
- ? Economy and efficiency

These principles are declared to be fundamental to good public administration (s.4(1)).

Ethics Obligations

The Act identified ethics obligations which flow from these principles. These ethics obligations provide a basis for codes of conduct for public officials and are not themselves legally enforceable (s.5). However, the ethics obligations apply to all public officials (s.6).

The ethics obligation which is derived from the ethics principle “respect for the law and system of government” is in s.7:

7.(1) a public official should -

- (a) uphold the laws of the State and Commonwealth; and
- (b) carry out official public sector decisions and policies faithfully and impartially

(2) subsection (1)(b) does not detract from a public official's duty to act independently of government if the official's independence is required by legislation or government policy, or is a customary feature of the official's work.

This ethics obligation should contain no surprises for a lawyer. It recognises a duty to act independently of government at times. This may occur more often for government lawyers than for other professionals. It is fundamental to the rule of law that lawyers adhere strictly to the law, even when political exigencies may favour a more relaxed approach.

The ethics obligation which is derived from the ethics principle "respect of persons" is in s.8:

- 8.(1) A public official should treat members of the public and other public officials –
- (a) honestly and fairly; and
 - (b) with proper regard for their rights and obligations.

8.(2) A public official should act responsively in performing official duties

I have been intrigued by the word "responsively" and, initially, wondered if "responsibly" was intended. However, on reflection, the sentence is dealing with an experience some people complain of when they say "you are not listening to me." Public officials must respond to the public with whom they deal. That response should show respect for the person.

The ethics obligation which is derived from the ethics principle "integrity" is in s.9:

- 9.(1) In recognition that public office involves a public trust, a public official should seek -

- (a) to maintain and enhance public confidence in the integrity of public administration; and
 - (b) to advance the common good of the community the official serves.
- (2) Having regard to the obligation mentioned in subsection (1), a public official -
- (a) should not improperly use his or her official powers or position, or allow them to be improperly used; and
 - (b) should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the public interest; and
 - (c) should disclose fraud, corruption and maladministration of which the official becomes aware.

The obligations here are very onerous, particularly for lawyers. We are expected to know the proper way in which powers are used and to be able to recognise fraud, corruption and maladministration. It would be my expectation that the lawyers within departments will provide a significant impetus towards integrity in public administration.

The ethics obligation which is derived from the ethics principle "diligence" is in s.10:

10. In performing his or her official duties, a public official should -
- (a) exercise proper diligence, care and attention; and
 - (b) seek to achieve high standards of public administration.

Again, this is what the courts expect of lawyers, and so is part of a lawyer's duty.

The ethics obligation which is derived from the ethics principle "economy and efficiency" is in s.11:

11. In performing his or her official duties, a public official should ensure that public resources are not wasted, abused, or used improperly or extravagantly.

None of these ethics principles stands alone. They need to be balanced against one another in each instance. None is more highly rated, but in cases where there is an interaction between them, it is a matter of judgement whether one should carry more weight than another.

Public Official

“Public official” is defined in the schedule to the *Act*, and means:

- (a) an officer or employee of a public sector entity: or
- (b) a constituent member of a public sector entity, whether holding office by election or selection;

but does not include a judicial officer or local government councillor.

Clause (b) is necessary, because, as we shall see, “public sector entity” is defined very broadly and includes instrumentalities established under State authorisation for a State purpose. People carrying out the responsibilities of such entities may hold office either by election or selection.

Public Sector Entity

The schedule to the *Act* defines “public sector entity” as:

...any of the following:

- (a) the Parliamentary Service;
- (b) the administrative office of a court or tribunal;
- (c) a department;
- (d) a local government;
- (e) a university, university college, TAFE institute or agricultural college;
- (f) a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorisation for a public, State or local government purpose;
- (g) an entity, prescribed by regulation, that is assisted by public funds;

but does not include any of the following –

- (h) a GOC;

- (a) a corporatised corporation
- (i) the following entities under, or within the meaning of, the Education (General Provisions) Act 1989-
 - (i) a parents and citizens association
 - (ii) a school that is not a State school;
 - (iii) an advisory committee;
 - (iv) an international educational institution;
- (j) an entity prescribed by regulation.
- (k) commission, Authority, Office, Corporation or Instrumentality

The first five categories in that definition are clearly identified. The sixth category needs some examination. It reads-

A commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorisation for a public, State or local government purpose.

The words “commission”, “authority” and “corporation” are used often enough to identify bodies that carry out a specific purpose, for example, Criminal Justice Commission, Beach Protection Authority, Queensland Investment Corporation. The word “office” is not used in its popular sense of designating a room or suite of rooms. It is used to identify a person or group of people who carry out a specific task, for example, the Audit Office. “Instrumentality” is intended to cover the various other bodies that are established under State or local government authorisation for a public, State or local government purpose. They are instruments for carrying out that purpose whether they are called branches, councils, panels, tribunals, teams, funds, group, committees, forums or trusts.

I have not yet been able to obtain one list that identifies all these bodies. The State Affairs Branch of the Department of Premier and Cabinet maintains a list of bodies established under State authorisation. It presently lists 643 bodies. Audit Report No. 2 2000-2001 identifies additional bodies established under State authorisation.

It follows that the ethics obligations in the *Public Sector Ethics Act* apply to all people engaged in a broad band of public activities, except members of Parliament, judicial officers,

local government councillors and those within a GOC, corporatised corporation or some entities under the *Education (General Provisions) Act 1989*.

Government Owned Corporations (GOC)

A GOC is a government body corporate (company), declared by regulation to be a GOC (*Government Owned Corporations' Act 1993, s.6*).

While there are many companies established under State authorisation for a State purpose, there are twenty four GOCs listed in the Audit Report No. 2 2000-2001. Eleven are in the energy sector, two associated with the Brisbane Markets, eight are port authorities, together with Queensland Rail, Golden Casket Lottery Corporation Limited and Queensland Investment Corporation. These corporations are excluded from the definition of “public sector entity” and consequently their employees and constituent (board) members are not subject to the ethics obligations found in the *Public Sector Ethics Act*.

However, entities as diverse as The City of Brisbane Airport Corporation Pty, companies established by universities to provide professional services to the community, Queensland Events Corporation Pty Ltd and Logan Motorway Company Limited fall within the definition of public sector entity. Consequently, their employees and constituent (board) members are subject to the ethics obligations found in the *Public Sector Ethics Act*.

Codes of Conduct

The CEO of each public sector entity must ensure that a code of conduct is prepared for the entity. The schedule to the *Act* defines CEO to mean:

- (a) for the Parliamentary Service – the clerk of Parliament; or
- (b) for the administrative office of a court or tribunal – the chief executive of the department in which is administered the legislation under which the court or tribunal is established; or
- (c) for a department – the chief executive of the department; or
- (d) for a local government – the local government’s chief executive officer; or

- (e) for a university or university college – the vice-chancellor of the university or university college; or
- (f) for another public sector entity – the person prescribed by regulation or, if no person is prescribed, the person responsible to the Minister for the management of the entity.

The purpose of the codes is to provide standards of conduct for public officials consistent with the ethics obligations (s.12(2)). A code must relate to a particular public sector entity and applies to all public officials in the entity (s.13(1)). However, it may make a different provision, consistent with the ethics obligations, for different types of public officials (s.13(2)). For example, when you prepare opinions, the copyright rests with the Crown and you can expect no additional payment above your salary. However, a lawyer working in your department may, by contract, also lecture at a university and may be entitled to royalties on texts published as a result of that work.

The *Act* provides that a code may provide ethics obligations public officials **must** comply with. (s.14(2)).

There must be consultation in the preparation of a code of conduct with:

- (a) the public officials to whom the code is to apply; and
- (b) industrial organisations representing the interests of any of the officials; and
- (c) other appropriate entities representing the interests of any of the officials.

(s.16(2)).

When the code is prepared, it is approved by the responsible authority (s.17), which for most government lawyers will be the Minister. However, the definition of “responsible authority” in the schedule to the *Act* should be noted:

- (a) for the Parliamentary Service – the speaker; or
- (b) for the administrative office of a court or a tribunal – the Minister responsible for administering the Act under which the court or tribunal is established; or
- (c) for a department – the Minister administering the department; or

- (d) for a university or university college – the council of the university or university college; or
- (e) for a local government – the local government; or
- (f) for another public sector entity established under an Act – the Minister administering the Act; or
- (g) for another public sector entity – the Minister administering the entity.

Compliance With Codes

The CEO of a public sector entity must ensure that each public official has reasonable access to a copy of the ethics principles and obligations for public officials, and the conduct obligations stated in the entity's code of conduct that apply to the official (s.19). In practice, most codes quote the ethics principles and obligations.

The CEO of a public sector entity must ensure that public officials of an entity are given appropriate education and training about:

- (a) the operation of the *Act*; and
- (b) the application of ethics principles and obligations to public officials; and
- (c) the contents of the entity's approved code of conduct; and
- (d) the rights and obligations of the officials in relation to contraventions of the approved code of conduct

(s.21).

The CEO of a public sector entity must ensure that administrative procedures and management practices have proper regard to the *Act* and the approved code of conduct (s.22). Each annual report of a public sector entity must include an implementation statement showing details of compliance with the CEO's obligations (s.23).

Disciplinary Action

Any disciplinary action for a contravention of an approved code of conduct by a public official of a public sector entity should be dealt with under:

- (a) if the official is a public service officer – the *Public Service Act 1996*; or
- (b) if the official is a local government employee – the local government legislation applying to the local government; or
- (c) if the official is not a public service officer or a local government employee but there are disciplinary processes applying to the official – the disciplinary processes; or
- (d) if there are no disciplinary processes applying to the official – the regulation.

(s.24).

Many public officials are not employed under the *Public Service Act 1996* or employed in local government. I am not aware of the disciplinary processes they face, other than to say that there are no regulations.

Queensland Integrity Commissioner

The office which I hold was introduced by the 1999 amendment to the *Public Sector Ethics Act*. The purpose was to help Ministers and others to avoid conflicts of interest, and in so doing to encourage confidence in public institutions (s.25).

The functions of the Integrity Commissioner are:

- ? to give advice to “designated persons” about conflicts of interest issues.
- ? to give advice to the Premier, if the Premier asks, on issues concerning ethics and integrity, including standard setting for issues concerning ethics and integrity.
- ? to contribute to public understanding of public integrity standards by contributing to public discussion of policy and practice relevant to the integrity commissioner’s functions.

(s.28).

The *Act* defines “designated persons” as:

- (a) the Premier
- (b) a Minister

- (c) a Parliamentary Secretary
- (d) a government member
- (e) a statutory office holder
- (f) a chief executive officer of a department of government or a public service office
- (g) a senior executive officer or senior officer employed in a department of government or public service office
- (h) a chief executive officer of a government entity or a senior executive equivalent employed in a government entity who is nominated by the Minister responsible for administering the entity.
- (i) a person employed in the office of a Minister, or engaged, to give advice to the Minister.
- (j) a person employed in the office of the Parliamentary Secretary, or engaged, to give advice to the Parliamentary Secretary.
- (l) without limiting paragraph (i) or (j), a person, or a person within a class of person, nominated by a Minister or Parliamentary Secretary.

(s.27(1)).

I will not spend time discussing this list except to point to the words in (g) “public service office” and in (h) “government entity”. The definitions in the schedule to the *Act* refer respectively to s.17 and s.21 of the *Public Service Act 1996*. S.17 in turn refers to schedule 1 of the *Public Service Act* which includes the Queensland Audit Office, Office of Queensland Parliamentary Counsel and the Public Trust Office. It does not include the Criminal Justice Commission which is included in the definition of “government entity”. The use of two definitions, “public sector entity” and “government entity” means that some entities may be required to have codes of conduct, but the CEO of that entity is not a designated person. Universities and their vice chancellors are an example.

Advice

A designated person may seek advice about a conflict of interest issue involving a designated person in accordance with government structures. The provisions are found in ss.29, 30 and 31 which are appended.

Briefly, a person may seek advice about that person's own conflict of interest issue. The Premier may seek advice about any designated person. A Minister or Parliamentary Secretary may seek advice about persons under their authority. A CEO may seek advice about staff.

If the person seeking advice is a senior executive officer, senior officer or senior executive equivalent, this request must be authorised by the CEO.

Standards For Advice

The Integrity Commissioner has regard to:

- ? approved Codes of Conduct
- ? ethical standards and codes adopted by Legislative Assembly by resolution
- ? ethical standards and Codes of Conduct approved by the Premier for Ministers
- ? other appropriate ethical standards

(s.32).

Confidentiality

The request for advice, any additional information supplied, the advice given and the record of any refusal to give advice, are protected from disclosure under the *Freedom of Information Act 1992*, (s.33(1), and schedule 1 to the *Freedom of Information Act 1992*).

Disclosure of Documents

This is dealt with in s.34 which is appended. Briefly, designated persons may disclose documents relating to their conflict of interest. The Integrity Commissioner may disclose documents to:

- ? the person about whom the advice has been given,
- ? the Premier, if the Premier asks,
- ? a Minister or Parliamentary Secretary, if asked,
- ? a CEO, if asked.

If the Premier has not asked for a document, the Integrity Commissioner must disclose the document to the Premier if the Integrity Commissioner reasonably believes that the person has an actual and significant conflict of interest, has been so advised, and has failed to resolve the conflict within 7 days.

Documents relating to senior executive officers, union officers or senior executive equivalent can only be disclosed to their CEO, not to the Premier or Minister.

Conflicts of Interest

The codes of conduct have attempted to identify the circumstances in which a conflict of interest may arise. It is very difficult to arrive at an inclusive definition. My work in progress on this issue is that a conflict of interest may arise where there is a conflict between a person's personal interest and a person's official duty because:

- ? a person has an interest in any kind of property, the value of which may be altered by a decision the person may be involved in making
- ? a person accepts gifts and/or entertainment which may influence decision making
- ? a person has or seeks employment outside the public sector which could compromise decision making
- ? a person uses an official position to gain unmeritorious advantages for relatives or friends
- ? a person has a strongly held personal conviction
- ? a person has an interest in any kind of property, the value of which may be altered by the use of confidential information obtained in the discharge of official duties.

This still does not provide an adequate definition for some situations of conflict that may arise on the boards of government corporations which are not GOCs.

Conclusion

The *Public Sector Ethics Act 1994* provides an excellent basis for the sound administration in the public sector. However, its successful implementation will take some time because of the

wide definition of public sector entities. I hope that government lawyers will be able to take a leading role in this.

Appendix

Public Sector Ethics Act 1994

Division 5 – Advice

Request for advice by designated persons

29.(1) The integrity commissioner may give advice about a conflict of interest issue only if-

- (a) the person seeking the advice is a designated person; and
- (b) the person makes a written request for the advice and, if the person is a senior officer, the request is accompanied by a signed authority to seek the advice from the chief executive officer of the department, public service office or government entity in which the person is employed.

(2) In this section —

“**senior officer**” includes a senior executive officer and senior executive equivalent.

Designated persons about whom advice may be sought

30.(1) A designated person may seek advice about a conflict of interest issue involving the person.

- (2)** The Premier may seek advice about a conflict of interest issue involving any designated person.
- (3)** A Minister may seek advice about a conflict of interest issue involving a designated person who is-
 - (a) a statutory office holder whose office is established under an Act administered by the Minister; or
 - (b) the chief executive of a department administered by the Minister or a senior executive officer or senior officer employed in the department; or

- (c) a chief executive officer of a government entity or a senior executive equivalent employed in the entity nominated by the Minister under section 27(1)(h); or
 - (d) mentioned in section 27(1)(i); or
 - (e) nominated by the Minister under section 27(1)(k).
- (4) A Parliamentary Secretary may seek advice about a conflict of interest issue involving a designated person who is—
- (a) mentioned in section 27(1)(j); or
 - (b) nominated by the Parliamentary Secretary under section 27(1)(k).
- (5) The chief executive officer of a department or public service office may seek advice about a conflict of interest issue involving a designated person employed in the department or office.
- (6) The chief executive officer of a government entity who is nominated by the Minister under section 27(1)(h) may seek advice about a conflict of interest issue involving a senior executive equivalent who is—
- (a) nominated by the Minister under section 27(1)(h); and
 - (b) employed in the entity managed by the chief executive officer.
- (7) To remove any doubt, it is declared that advice must not be sought by or about a person who has been, but is not presently, a designated person.

Process for seeking advice

- 31.(1) A request for advice under section 30 must disclose all relevant information about the conflict of interest issue for which the advice is sought.
- (2) The integrity commissioner may ask the designated person for further information for the purpose of giving the advice.
 - (3) The integrity commissioner may refuse to give the advice if the integrity commissioner reasonably believes that—
 - (a) he or she does not have enough information about the conflict of interest issue to give the advice; or
 - (b) the advice is asked for in circumstances where the giving of the advice would not be in keeping with the purpose of this part.
 - (4) Advice given under this division must be in writing.

- (5) If the integrity commissioner refuses to give advice under subsection (3), the integrity commissioner must record in writing the integrity commissioner's reasons for refusing to give the advice.

Authorisation of particular disclosures

- 34.(1) A relevant document about a conflict of interest issue may be disclosed under subsections (2) to (7).
- (2) A person who is or has been a designated person to whom a relevant document relates may disclose the document.
- (3) The integrity commissioner may disclose a relevant document to the person who is or has been the designated person to whom the relevant document relates.
- (4) The integrity commissioner must give a copy of a relevant document relating to a particular designated person, other than a senior executive officer, senior officer or senior executive equivalent—
- (a) to the Premier, if—
 - (i) the Premier asks for a copy of the document; or
 - (ii) the integrity commissioner reasonably believes that the person has an actual and significant conflict of interest; or
 - (b) to a Minister, if the Minister asks for a copy of the document and the person is a person about whom the Minister may seek advice under section 30(3); or
 - (c) to a Parliamentary Secretary, if the Parliamentary Secretary asks for a copy of the document and the person is a person about whom the Parliamentary Secretary may seek advice under section 30(4).
- (5) The integrity commissioner may give a copy of a relevant document to the Premier under subsection (4)(a)(ii) only if—
- (a) the integrity commissioner advises the designated person in writing that the commissioner has the belief mentioned in the provision and is therefore required under subsection (4)(a) to give a copy of the document to the Premier; and
 - (b) the designated person fails to resolve the conflict to the integrity commissioner's satisfaction within 7 days after being given the advice mentioned in paragraph (a).

- (6) The integrity commissioner must give a copy of a relevant document relating to a particular designated person to the chief executive officer of a department or public service office if—
- (a) the chief executive officer asks for a copy of the document; and
 - (b) the person is a person about whom the chief executive officer may seek advice under section 30(5).
- (7) The integrity commissioner must give a copy of a relevant document relating to a particular designated person to the chief executive officer of a government entity who is nominated by the Minister under section 27(1)(h) if—
- (a) the chief executive officer asks for a copy of the document; and
 - (b) the person is a person about whom the chief executive officer may seek advice under section 30(6).
- (8) To remove any doubt, it is declared that the integrity commissioner must not disclose a relevant document relating to a person who has been, but is not presently, a designated person, other than under subsection (3).
- (9) In this section—
- “designated person to whom the relevant documents relate”** means the designated person involved in a conflict of interest issue and to whom the relevant documents relate.
- “relevant document”**, for a conflict of interest issue, means each of the following documents—
- (a) the request for advice;
 - (b) any further information requested by the integrity commissioner under section 31(2) and given to the integrity commissioner;
 - (c) the advice given by the integrity commissioner about the issue;
 - (d) the record, under section 31(5), of the integrity commissioner’s refusal to give the advice.