

INSTITUTE OF PUBLIC ADMINISTRATION AUSTRALIA

Code of Ethics; What Now?
Embedding the Code in the Public Sector Culture.

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Speech Notes

Acknowledgements

The program describes my task in the following terms:

provide commentary on how the Code of Ethics has or has not impacted on the way he investigates and responded to complaints.

Earlier this month, my New South Wales counterpart Bruce Barbour gave a paper to a conference on the subject of ethics in government¹. He made a couple of points which I think are well worth repeating here.

The most directly relevant is the importance of leadership, and a public service Act and code, in maintaining standards of ethics and integrity in public administration.

He quoted with approval the existence of our *Public Sector Act 2009*, and our code of ethics.

But he also explored the reasons why such standards and principles are needed, and in this context he emphasised the importance of trust. He observed that nothing erodes trust faster than unethical conduct, and made the comment that

Too many public servants think integrity is an old fashioned, optional concept. Integrity is essential to good public administration and is something the public demands - it isn't out of style and it certainly isn't optional.²

I agree with that sentiment, and it's certainly reflected in our code.

I'm pleased to say that here in South Australia I haven't seen the same level of breakdown as the examples which my NSW counterpart quoted. These included a council knowingly, and against its own legal advice, misapplying retrospective development charges; police officers misusing their positions to avoid complying with traffic laws; and agencies using various legal and other means of subverting the FOI application process.

But I have seen examples here, where the highest standards of public administration have not been met.

Bruce was making his comments in a context where it appeared to him that the level of trust between the New South Wales community and its government has diminished. He noted that the NSW government appears to have lost the confidence of many in the community, and he said:

¹ Bruce Barbour, NSW Ombudsman, *Living up to the Standards*, Paper delivered at the Corruption Prevention Network Conference, 9 September 2010

² Bruce Barbour, op. cit. (quoting a media release by him)

Once people enter into this mindset, they view everything done with mistrust, and this is very difficult to overcome and to re-establish a positive relationship, despite whatever good intentions the government might have.

In my view, the whole purpose of having an Ombudsman, is to assist in maintaining that essential trust. I deal with complaints, and conduct investigations, because I want to see standards of public administration maintained and enhanced in South Australia, not because I want to collect scalps.

An Ombudsman investigation aims at establishing whether an administrative error has occurred, and what can be done to redress the situation if it has. Section 25(1) of the *Ombudsman Act 1972* sets out the types of error that may be identified, and it provides a very useful checklist for me and my investigators in assessing an agency's conduct.

I like to summarise these possible errors as 'unlawful, unreasonable or wrong'. Others talk about maladministration. In any event, I think it is worth exploring the list a little.

Under the *Ombudsman Act 1972*, there are seven administrative sins.

The first is when an act is **contrary to the law**, under section 25(1)(a).

It's usually fairly clear if this type of administrative error has occurred. It may include instances where the decision-maker:

- failed to comply with legal obligations (e.g. contractual, statutory, common law, court order), or
- had no power to make the decision, or to do the act.

Note that my office does not continue to investigate if criminal conduct may have been revealed. If we think that an allegation may involve fraud or corruption, just like anybody else we must refer it to the Anti-Corruption Branch.

I acknowledge that it's a relatively common misconception that my office investigates **corruption**. Whilst to an extent it depends on your definition of corruption, generally we don't.

Anyway, it's worth comparing a finding of acting contrary to law with the code of ethics. Here is point 1 in the honesty and integrity section:

First and foremost, public sector employees respect the rule of law.

And dot point 3 in the democratic values section:

Public sector employees ensure they are aware of, properly administer and comply with all legislation and regulations relevant to the performance of their duties and/or their role as a public sector employee.

And dot point 2 in the accountability section

all public sector employees have an unequivocal obligation to always act both within the letter and the spirit of the law

The next question for an Ombudsman investigation is whether the act is **unreasonable, unjust, oppressive, or improperly discriminatory**, under section 25(1)(b).

In administrative law terms, 'unreasonable' means so unreasonable that no right-thinking authority could have acted in that way, or the act has no plausible justification.³ This is a very high standard to meet.

Here's a couple of legal quotes to demonstrate the point:

'So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'⁴

'... something so absurd that no sensible person could ever dream that it lay within the power of the authority.'⁵

Unjust, oppressive and improperly discriminatory have the meanings that you would expect.

Recent investigations by my office have revealed some examples of administrative acts that have failed the section 25(1)(b) test. Mostly they relate to the 'unjust' element of the subsection. They include:

- a failure to investigate a complaint properly
- demonstrable unexplained inconsistency with other decisions in similar circumstances
- a policy applied inflexibly, without regard to the merits of an individual case
- wrong advice, leading to detriment to the complainant
- failure to rectify an identified mistake

For comparative purposes, here is dot point 3 under the section of the code dealing with service, respect and courtesy - serving the people of South Australia

in dealing with citizens, public sector employees act impartially, fairly and equitably and with genuine respect for their rights as citizens of South Australia

And I could also refer to almost any point in the professional conduct standards section of the code to demonstrate the parallels.

Whilst on the subject of the directly enforceable section of our code - the professional conduct standards - I was interested to hear Stuart Littlemore, of Media Watch fame, make some derogatory comments about the journalists' code of ethics - at a Uni SA seminar earlier this month - essentially because it is not enforceable.

The presenters there also observed that an enforceable code of ethics is a trait which commonly distinguishes a profession. Mr Littlemore didn't think that journalists qualified on that score. But that's another story.

The third area of potential administrative turpitude is **whether the act was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory**, under section 25(1)(c).

This category requires us to focus on the legislation, policy or practice on which an administrative act is based. Some examples include:

- where the legislation, policy or practice contains a heavy-handed approach to decision making in which the rights of the person subject to the decision are ignored without justification

³ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

⁵ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 230.

- where the application of the law produces a result that is unreasonable, unjust or oppressive
- (one stemming from a recent complaint) where there's an apparent and unexplained inconsistency between the requirements to be satisfied for the issue of one type of licence, as compared to those for another type
- where the law apparently does not reflect the intent of Parliament.

But this type of administrative error is more to do with the legal framework than the conduct of the officer, so it's less relevant to the code of ethics.

However, the fourth type of potential administrative error is **whether the act was done in the exercise of a power or discretion, and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations** under section 25(1)(d).

This is all about an officer's actions. In considering this possible error, we focus on how the decision was made, rather than its merits. Arguably, the outcome doesn't matter. It could be a great outcome, but if it was arrived at with bad faith or for an improper purpose, it was achieved in error.

Some specific examples drawn particularly from recent local government complaints are:

- conflicts of interest
- bias or perceived bias. I've concluded that the common law test has been breached recently in a number of complaints about local government councillors.

Other types of conduct which might be relevant here are;

- where a decision has been motivated by favouritism or personal objectives
- misuse of public property, official services or facilities
- misuse of confidential information to obtain improper advantage
- bad faith⁶
- applying a policy without having regard to the merits of the particular case
- taking action as a result of irrelevant remarks or other inappropriate information recorded on files.

Now, some extracts from the code relevant to this type of administrative error. The second dot point in the honesty and integrity section is:

(public sector employees) act honestly in every aspect of their work and are open and transparent when making decisions or providing advice.

And the sixth and seventh dot points in the same section are:

public sector employees act impartially by making decisions and providing services on merit and without bias, favouritism or self-interest

they act fairly and equitably in their dealings with citizens, the government and fellow employees by basing their actions on an objective consideration of all of the relevant issues

The fifth potential administrative sin is **whether the act was done in the exercise of a power or discretion and the reasons for the act were not but should have been given** under section 25(1)(e).

⁶ Definition of bad faith – 'the lack of an honest or genuine attempt to undertake the task, and involves a personal attack on the honesty of the decision-maker': *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 397 at 19.

Fairly self-evident, this one, but let me just repeat the second dot point in the honesty and integrity section of the code:

they act honestly in every aspect of their work and are open and transparent when making decisions or providing advice.

And the fourth dot point in the democratic values section:

public sector employees are open in all of their dealings. They recognise that public information must be readily accessible and written in plain English and will lend assistance to members of the public to gain access to public information

And whilst on such matters, here's the objects of the *Freedom of Information Act 1991*:

(a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and

(b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.

And remember that they're not simply part of an administrative code, those ones. They're in the L-A-W.

The sixth potential administrative trap for young players is **whether the act was based wholly or in part on a mistake of law or fact**, under section 25(1)(f).

This section covers decisions or actions based on information that is factually in error, or that has been misinterpreted. It also covers decisions and actions where the decision-maker acted on the basis of a misinterpretation of the legal position.

A mistake of law can be distinguished from acting contrary to the law i.e. the first sin I referred to. A mistake of law is a well intentioned attempt to follow the law, which comes unglued because a decision-maker thinks, in error, that the law either permits it or requires it.

To act contrary to law the decision-maker knowingly or negligently contravenes legislation or the common law e.g. by deliberately doing something that is not legislatively authorised, or by failing to accord procedural fairness.

The seventh and last area of error is my favourite. It is simply **whether the act was wrong**, under section 25(1)(g). In relation to this one, you might well say that beauty is in the eye of the beholder.....

A 'wrong' decision or action may offend one or all of the other criteria, or it may not offend any. But nonetheless it is wrong. Some examples from our casebook:

- a decision which was contrary to the weight of the evidence (and note that it could have become 'unreasonable' if it were a little further removed from the evidence)
- one where an agency did not live up to its stated policy commitments
- one where an education institution published misleading information on its website.

Other possible instances may be cases where:

- the agency officer is rude, or does not return phone calls or correspondence
- the agency fails to respond to reasonable requests
- the decision or action causes undue hardship or loss
- the agency fails to give accurate, frank, impartial, complete and/or timely advice

- it is unclear what the decision is (although this one may well involve the 'reasons' error too)
- the agency knowingly sends members of the public on futile enquiry.

Because 'wrong' is such a broad term, it can be flexible in its application.

For example, there is a flavour throughout the code of ethics of engagement and openness with the community; of collaboration; and of respect for human dignity. In my view, a failure to respect those features could today amount to a 'wrong' administrative act.

Perhaps these features did not have the same currency in December 1972, when the *Ombudsman Act 1972* commenced operation. And perhaps, if the list of seven administrative sins was being drafted today, these types of features would figure a little more prominently.

In any event, I recently saw an example of a 'wrong' administrative act in this more modern guise - the conduct of a less than whole-hearted, and maybe even insincere or cynical, element of a public consultation process.

So in interpreting what is 'wrong' today, my office will have regard to current standards of public administration. And these are reflected very clearly in the code of ethics.

I won't further particularise those sections of the code that could be relevant to a contemporary definition of 'wrong', firstly because pretty much all of it is applicable....

.... and secondly, because I hope by now you are getting my drift that there is a significant overlap between the provisions of the code of ethics, and what constitutes administrative error under the *Ombudsman Act 1972*.

The bottom line is that if you comply with the code, the administrative acts of your agency will more than likely withstand scrutiny by my office.