



13 November 2018

Dear [REDACTED]

### Official Information Request

**Our Ref: 2018/0177**

I refer to your official information request received on 16 October 2018 where you have asked:

- *Are senior public servants required to declare potential conflicts of interest? Under what circumstances (if any) can senior public servants avoid declaring potential conflicts of interest?*
- *In what year did it become a requirement for senior public servants to declare potential conflicts of interest?*
- *Please supply me with copies of guidelines or other publications about conflicts of interest that were created between 1995-2000 for use in the public sector.*

The State Services Commissioner is responsible for setting standards of integrity and conduct across most of the State Services. Standards of integrity and conduct for the State Services are established in a code of conduct which in its current form, came into force on 20 November 2007.

The core values in the code of conduct relevant to conflicts of interest are the requirements to act with fairness and with impartiality. In addition, the guidance that supports the current code of conduct notes that organisations may prohibit the continued holding of certain types of interest as a condition of appointment to a position, or promote transparency by requiring this type of interest to be registered.

The principles of acting with fairness and impartiality have been in place since the first Public Service Act came into force in 1912 and have been reflected in subsequent revisions of the Act, the code of conduct and supporting guidance.

The State Services is a decentralised system with individual chief executives responsible for their agency's operation, including its policies and processes. State servants are subject to the requirements of their agency's conflicts of interest policies.

In June 2018, the State Services Commissioner issued model standards that outline his expectations for staff and organisations in the State Services to support effective reporting and management of conflicts of interest. All State Services organisations are expected to integrate these model standards into policies and processes for managing conflicts of interest.

While it is not held by State Services Commission (SSC), the OAG's good practice guidance, *'Managing conflicts of interest: Guidance for public entities'* applies to all public entities and sets out some specific expectations on all public servants in relation to declaring any conflicts of interest. Conduct expectations on public servants are also set out in the Cabinet Manual.

In addition to the above, there may also be statutory and professional requirements that apply to particular public servants in relation to requirements to declare any conflicts of interest.

- SSC's model standards can be found: <http://www.ssc.govt.nz/integrityandconduct>
- The Office of the Auditor General's guidance can be found: <https://www.oag.govt.nz/2007/conflicts-public-entities/docs/oag-conflicts-public-entities.pdf>.
- The Cabinet Manual can be found: <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>

### **Copies of guidance created between 1995-2000 for use in the public sector**

Please find enclosed the following documents listed in the table below, which was guidance published by SSC between 1995-2000. In both instances, the publications were identified as reprints of earlier versions.

Item	Date	Document Description	Decision
1	Published 1995	Public Service Principles, Conventions and Practice: The Senior Public Servant	Released in full
2	Reprinted in May 2000	Public Service Code of Conduct	Released in full

It is important to note that State Services is the term for the organisations that serve as instruments of the Crown in respect of the Government of New Zealand. It consists of all Public Service departments, some departments that are not part of the Public Service, all Crown entities (except tertiary education institutions), a variety of organisations listed on Schedule 4 or Schedule 4A to the Public Finance Act 1989, the Reserve Bank of New Zealand and registered teachers employed by a free kindergarten association.

If you wish to discuss this decision with us, please feel free to contact [Ministerial.Services@ssc.govt.nz](mailto:Ministerial.Services@ssc.govt.nz).

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or freephone 0800 802 602.

Please note that we intend to publish this letter (with your personal details removed) and enclosed documents on the State Services Commission's website.

Yours sincerely



Catherine Williams  
Deputy Commissioner  
**State Services Commission**

*The*  
*Senior*  
*Public*  
*Servant*



STATE SERVICES  
COMMISSION  
Te Komihana  
O Ngā Tari Kāwanatanga

*A paper in the*  
*guidance series*  
*'Public Service*  
*Principles,*  
*Conventions*  
*and Practice'*

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

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# **CONTENTS**

	Page
<b>Introduction</b>	3
<b>Section One</b>	
<b>THE PROFESSIONAL PUBLIC SERVANT</b>	5
<b>Section Two</b>	
<b>THE EMPLOYMENT ENVIRONMENT</b>	7
Distinctive Features	7
Summary	9
Ministerial Responsibility and the Public Official	10
Dual Accountability	13
Good Government: 'Striving for Excellence'	14
<b>Section Three</b>	
<b>PUBLIC SERVANTS AND EMPLOYMENT LAW</b>	15
Contract of Employment	15
The State Sector Act 1988	15
The Public Finance Act 1977	17
The Employment Contracts Act 1991	18
General Legal Provisions	18
Other Statutory Provisions	19
Code of Conduct	20
<b>Section Four</b>	
<b>SITUATIONS AND ISSUES</b>	22
Public Servants and Ministers	23
Serving the Minister	23
Possible Problem Areas	26
Ministerial Involvement in Detailed Management and Administration	28
Personal and Organisational Conduct	31
Independent Statutory Functions	37
Limits on Political and External Activity	38
Matters of Conscience and Matters of Duty	40
Post Employment Obligations	42
Industrial Disputes	45
Information and the News Media	45
Summary	46
Conclusion	47
<b>Appendix 1</b>	49
Vision Statement	
<b>Appendix 2</b>	50
Reference Material	

In November 1558 Elizabeth I appointed William Cecil as her principal adviser saying:

*'This judgment I have of you, that you will not be corrupted by any manner of gift, and that you will be faithful to the State, and that without respect of my private wish you will give me that counsel you think best, and that, if you shall know anything necessary to be declared unto me of secrecy, you shall show it to myself only, and assure yourself I will not fail to keep taciturnity therein.'*

As a simple guide to the obligations of a senior official and the relationship that might exist this charge remains pertinent.

And as Mark Twain once said. . .

*'Always do right. This will gratify some people and astonish the rest.'*

*This paper is a guide to good practice and a reference for senior public servants in their daily work. It should be read with discernment. The reader should also refer to the Cabinet Office Manual and Cabinet Office circulars, for specific direction where applicable.*

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## **INTRODUCTION**

The purpose of this paper is to discuss some of the issues that arise for senior public servants as employees. Reference is made to features of general employment law and to aspects of the employment relationship that apply to public servants generally. However, the main emphasis is on difficult issues that arise from time to time and on issues of principle with which senior public servants should be familiar.

The paper is in four main sections.

- *Section One* discusses the desirable qualities and attributes of a “professional” public servant.
- *Section Two* discusses the distinctive features of the employment environment of the senior public servant.
- *Section Three* discusses relevant aspects of general employment law and summarises the law as it applies to public servants in particular.
- *Section Four* identifies and discusses a number of specific issues of particular relevance to senior public servants.

*Appendix 1* contains the statement of the New Zealand Public Service on *Striving for Excellence in Serving New Zealand*.

*Appendix 2* identifies some basic reference material.



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## **Section One**

# **THE PROFESSIONAL PUBLIC SERVANT**

There has been some debate about whether there is a distinct profession or professional grouping to which public servants, particularly senior public servants belong. Whatever the case it is important that senior public servants act professionally. That is, they act to support and maintain generally accepted standards and values of conduct, and share a sense of common purpose and duty.

Senior public servants are conscious of the special institutional and constitutional framework within which they operate. They are concerned with promoting the public welfare. They have well-developed and informed notions of personal integrity, and the need to be above reproach, as this applies to their positions in the Public Service and their personal conduct.

### ***Desirable Attributes***

To be professional in the Public Service means:

- obeying and upholding the law
- discharging obligations to the elected government of the day in a politically impartial way
- displaying a high level of knowledge and competence
- delivering services and achieving results through organisational efficiency, and fiscal responsibility
- demonstrating a strong sense of personal responsibility, personal integrity and commitment to the public good
- preparing advice, delivering services, and making decisions reached by using analytically sound, well-rounded, informed and inclusive approaches
- respecting people and their views both inside and outside the Public Service
- tendering advice with courage, tenacity and independence
- promoting and advocating the core values of the organisation, evaluating the performance of staff in the light of those values, assessing the extent to which core values are actually reflected in the organisation, and providing opportunities for general training and counselling as appropriate.

It would not be professional for a public servant to:

- act out of spite or bias or favouritism
- allow official action to be influenced by personal relationships, self-interest, or personal obligations
- promote a particular political viewpoint or personal agenda.

### *Ambiguity and Tension*

What emerges from this attempt to distil some of the essential elements of Public Service professionalism is a strong sense of ambiguity from which tension or conflict may arise. This is inevitable in an environment where senior public servants must:

- be committed, informed, and prepared to pursue tenaciously what they believe to be right and important
- be dispassionate, impartial and willing to accept political direction without public demur
- be committed to serving their Ministers and the government of the day wholeheartedly and be prepared to identify with its policies and priorities while remaining non-partisan and preserving their ability to provide the same level of service and commitment to any future government
- acknowledge, respect and support political control of the service in the processes of government while also accepting public, personal and organisational responsibility for actions and performance.

## **Section Two**

# **THE EMPLOYMENT ENVIRONMENT**

### ***Distinctive Features***

Senior public servants operate in an unusual and distinctive employment environment. The senior public servant is employed in a public context and has a variety of formal duties and obligations. Chief executives are employed by the State Services Commissioner. Chief executives are the employers of public servants within departments. All public servants, including chief executives, have an important relationship with the Minister or Ministers with responsibility for their departments. Those Ministers are not the employers of senior public servants, but the duties which senior public servants owe to them are very similar to the duties which employees are deemed to owe to employers.

### ***Obligations***

Senior public servants also have obligations to Parliament and to the government as a whole and they must act according to law – a wide concept that includes the notion that any person vested with statutory authority must exercise that authority properly in terms of both substance and process. This applies whether a public servant is acting under delegated authority from a Minister or an administrative superior, or is acting as an independent decision maker in the exercise of some statutory functions, such as those of the Public Trustee, the Comptroller of Customs, or the Registrar of Electors.

The various grounds on which an Ombudsman may find that an official “decision, recommendation, act or omission” warrants further consideration or review provide a useful reminder of the way in which such matters need to be dealt with and the kinds of things that need to be taken into account:

- Was it contrary to law?
- Was it unreasonable or unjust?
- Was it oppressive or improperly discriminatory?
- Was it based on a mistake of law or fact, or incomplete information?
- Was it wrong?

### ***Natural Justice***

In addition to these considerations, administrative law requires that decisions are arrived at fairly, impartially and in accordance with due process. As a minimum standard in this area, section 27 (1) of the New Zealand Bill of Rights Act 1990 provides that “every person has the right

to the observance of the principles of natural justice by any tribunal or public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

### *A Question of Ethics*

Finally, there is the matter of the duty of senior public servants to the "public interest" however defined. The question is whether or how far that duty extends beyond the obligations they owe to their employers, and to Ministers of the Crown, both individually and collectively. The answer cannot be expressed in simple terms, or by the promulgation of some code or set of normative statements. The resolution requires judgment, and the exercise of a discretion tempered on a case-by-case basis. In short, the question is a matter of ethics.

The employment relationship in which senior public servants participate is both complex and distinctive. There are a number of reasons why this should be so:

- Public Service departments are public agencies set up by government or Parliament to promote public purposes.
- Public officials and public agencies are an important part of the overall scheme of government.
- Public Service agencies should operate – and should be seen to operate – in an efficient, responsive, principled and professional way, to enhance public confidence in government and, by extension, in the legitimacy of the State and its institutions.

In this context, it is important but not sufficient just to comply with instrumental requirements. Issues of efficiency, effectiveness, responsiveness and accountability also acquire or assume an ethical dimension. That is, their achievement ought to be a higher or moral duty occasioned by the very nature of being a Public Service official. The subject of ethics implies more than adherence to codes of conduct, for instance. While such rules may prescribe ways of keeping out of trouble, ethics is concerned with determining what ought to be done in a given situation, both at an individual and an organisational level.

### *Public Expectations*

Public Service departments rely on and regularly exercise the coercive power and sovereign authority of the State to obtain the revenue they need to operate, to obtain sensitive information and to carry out their functions. Individual members of the public may be obliged by law to

deal with government agencies and be dependent on them to protect their interests and their privacy or even to provide them with the necessities of life.

On the basis of the foregoing, it is inevitable that politicians and the public wish to be reassured that: government departments behave ethically, they are well managed, public money is being spent efficiently and for the purpose intended, departmental functions are carried out well, and statutory power and authority is exercised properly. The public and public organisations have a legitimate stake in the activities and performance of the government and its agencies.

### ***Acting Responsibly***

For their part, public servants should be aware of the considerable powers, responsibilities and discretion they have been given – not as of right but as trustees of public resources and public office. They should aim to act in ways that reassure the public and politicians that the Public Service is carrying out its functions responsibly and effectively, and that it is worthy of continuing trust and confidence.

Public Service departments work in a climate where their senior managers are expected to demonstrate publicly a high standard of efficiency in the management of resources and a commitment to achieving specific output production targets, notwithstanding that these requirements may seem onerous or even inappropriate.

Public Service managers only have as much freedom to manage as elected politicians and, ultimately, the public are prepared to give them. At the same time, more and more will be expected of managers in terms of efficient and productive administration and performance. In the words of a former senior British civil servant “If you cannot work like that . . . you are in the wrong business.”

### ***Summary***

- The activities of Public Service departments take place in a specific institutional and constitutional context and must be carried out in a particular and characteristic way.
- Senior public servants have to deal with a high level of ambiguity, and potentially conflicting demands.
- The actions of senior public servants and their agencies are subject to regular scrutiny, constraints and imperatives of a public nature.
- Government departments must continue to be subject to effective political direction and control by people who are given the mandate to do that through the electoral process.

## **Ministerial Responsibility and the Public Official**

The notion of *ministerial responsibility* linked closely with the idea of *responsible government*. Both concepts derive from the function of Parliament in providing a control or influence upon the powers of the State as exercised by the government of the day and its Ministers.

“In general terms, it is the responsibility of Ministers to determine policy and defend policy decisions; it is the responsibility of officials to advise Ministers and to implement Government policy.”<sup>1</sup> Ministers collectively are responsible for formulating and promoting government and ministerial policy, and individually accountable for the achievements or shortcomings of their departments.<sup>2</sup> Ministers have the constitutional right to determine within the limits of the law what is in the public interest, and the constitutional duty of public servants is to give effect to those determinations.

Ministers are not the only people who influence or develop policy, however. The public, community groups, and sectoral interests are increasingly involved in the public policy development processes through a variety of means. In addition, it has long been recognised that public servants exercise considerable influence, through the knowledge they hold, the advice they give and the discretion they exercise when giving effect to government policy or dealing with issues that may not warrant direct ministerial attention. That power is not, and should not be, exercised in a moral vacuum.

### ***Impartiality and Political Neutrality***

Senior public servants appointed independently and on merit have a duty to tender informed, impartial and politically-disinterested advice on policy initiatives, and they should be “at one” with the Minister at all times in public. Once firm decisions have been made senior officials should not promote alternative or counter policy proposals. All efforts must be devoted to implementing policy decisions. It is not appropriate for public servants to be involved or seem to be involved in any subsequent public debates or discussions that might in any way undermine those decisions, or appear to criticise the Responsible Minister, or the government.<sup>3</sup>

While Ministers accept the merits of a professional, apolitical Public Service they are free to seek advice elsewhere. Ministers will often seek input from their own political staff and from a variety of sources outside the Public Service.

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1 *Cabinet Office Manual* Ch. 2/6 G5.

2 *Cabinet Office Manual* Ch. 2/5 G4.

3 *Cabinet Office Manual* Ch. 2/8 G17.

The doctrine of ministerial responsibility is complemented by the principle of *political neutrality*. This holds that if public servants are to maintain the confidence and trust of, and be fit to serve, successive governments, those officials must conduct themselves and tender advice impartially, without fear or favour to any party political interest or particular administration. To step over the often indistinct line between promoting or defending policy and explaining, advising on or implementing policy is to provide the opportunity for the loyalty of the Public Service to be called into question. Knowing where the boundaries are requires the senior public servant to exercise a judgment based on the circumstances of the situation and the issues involved.

### ***Demonstrating Commitment***

A willingness and ability to serve legitimate governments of whatever persuasion should not be confused with a lack of commitment to formulating and implementing the policies of a government. In this context the otherwise useful distinction between explaining government policy and advocating it (in terms of its merits as seen by Ministers) may not always be sustainable. Any apparent lack of enthusiasm by officials about particular government policies or initiatives may be just as telling as direct criticism of its substance, and is inappropriate. Obvious personal enthusiasm for (and public commitment to) particular government policies or initiatives can be just as inappropriate.

### ***Independence***

Independence, in the context of the Public Service, has a particular meaning. It evolves from the need for the Public Service to be seen to be non-partisan, and to act in ways that reflect integrity and professionalism. For the public servant independence is also concerned with having a duty to provide high quality, disinterested advisory services, and applying one's knowledge and experience in all aspects of the job without fear or favour.

Senior officials are appointed and promoted because they have certain desired qualities which include intellectual abilities and an absence of strong partisan allegiance. They are appointed for their capacity to make judgments in the context of a particular political environment.

Ministers must be able to rely on their departments for more than an unthinking obedience, if only for the reason that their departments must be presumed to know their public well, and to be able to measure for the Minister's information the effect of existing or proposed activities and the reaction to them.



Independence, in the context of the Public Service, means having a capacity and willingness to provide advice that will be both “free and frank”, and be tendered from a disinterested, informed, and non-partisan standpoint.

In circumstances when senior officials feel that criticism of particular policy proposals ought to be tendered to a Responsible Minister the manner in which such criticism is conveyed is important. Any criticism should be constructive, and in the context of “free and frank” advice,<sup>5</sup> and made with the approval of and by the chief executive, personally. In some particularly contentious cases, or where matters of important principle are at issue, it may be appropriate to also provide the comment or criticism in written form.

### ***Collective Responsibility and the Public Official***

Policy decisions of substance are taken by Ministers collectively rather than individually. Officials must frequently contribute to the preparation of advice to groups of Ministers by groups of officials from different agencies. This process can easily blur the established relationship between particular Ministers and senior officials. Yet, situations can arise where senior officials are directed to do things by Ministers which seem contrary to the wishes of Cabinet, or even to refrain from consulting with other officials and Ministers. Under such circumstances a chief executive should raise the matter with the Responsible Minister, in writing if necessary, and seek counsel from the State Services Commissioner as appropriate.

### ***Attendance at Select Committees***

If a chief executive or senior official from a department is asked, for example at a Select Committee, to comment on the soundness of a Responsible Minister’s policy proposal by the Minister’s colleagues, and the chief executive or official feels that the response will seem critical of the Responsible Minister the *Guidelines for the Chairmen of Select Committees* (1987) offers useful guidance. “. . . *Departmental officials being examined by select committees are in a special position. They attend select committees on behalf of ministers, and are subject to that minister’s direction as to what answers they should give, and which officials shall represent the department. . . The following guidelines may assist committees:*

- *committees are entitled to question departmental officials on opinion or advice given to a minister or to the Government in confidence;*
- *a departmental official is entitled to refuse to disclose such opinion or advice without the agreement of the minister;*
- *a minister can claim that such information is confidential state information;*

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5 See also *Cabinet Office Manual* Ch.2 G12.

6 In practice the chief executive will determine departmental representation.

- *the House can order production of such information; protecting it if necessary by having it produced before a select committee;*
- *a departmental official or minister who refused to obey such an order of the House could be proceeded against by the House for contempt.*

*A refusal to answer a question cannot be treated as a contempt unless the answer is insisted on by the committee (by majority if necessary). A simple refusal to answer an individual member's question is not contempt. . . " section 5.8. p.19.*

### ***Attendance at Cabinet Committees***

The situation with respect to Cabinet Committees is substantially the same. The difference is that the forum is private rather than public, only government members are present, and the opportunity for frank exchanges is thereby enhanced. While it is hoped that committee members would not put a chief executive in a position to give an opinion or reveal information or advice that would compromise their relationship with their Minister, such cases will arise from time to time. The key is to be aware of the possibility, be ready to make a judgment to accede to or refuse a request for information based on the circumstances of the situation while preserving the integrity of the advice, the office holder, and retaining loyalty to the Minister.

### ***Dual Accountability***

Dual accountability may arise when a public servant experiences a conflict of duty, usually between a duty to his or her employer, and a duty to, for instance, a professional body or a sectoral interest.

Dual accountability is a real issue for many officials. If and when conflicts arise they need to be confronted early, and worked through conscientiously. However, it will mean that where the conflict of loyalty cannot be managed satisfactorily, accountability to the Minister and to the government of the day should normally prevail. Public servants enter the Public Service not to satisfy self, group or sectoral interests, but to work in the wider public interest.

### ***Policy Ministries***

Not all public servants are closely involved in tendering advice to Ministers. Most public servants are concerned with delivering departmental outputs and services to the public. There are now several ministries and departments such as Women's Affairs, Consumer Affairs, Conservation, and Pacific Island Affairs that have a special advocacy role. That is, they are seen to advocate for particular interests. In these agencies it is desirable that clear understandings and ground rules are established to avoid serious conflicts of duty, and for officials to know to whom they

are accountable. There is, and should be, a distinction between advocacy and representation. Matters of dual accountability and duty are determined ultimately on the basis of a priority to the employer. In other words, the acceptance of “the Queen’s shilling” denotes an allegiance to the Crown, which, for all practical purposes, means the government of the day and the Responsible Minister.

### ***Conflict Resolution***

In the final analysis, such conflicts may need to be approached by emphasising the political legitimacy conferred on elected politicians by their electoral accountability, asking whether a breach of the law or some basic constitutional convention (such as the obligation to provide correct information to Parliament) was involved, and by discussing the circumstances in which a public servant, having explored alternatives, should feel compelled to resign or take action short of resignation rather than conspire in implementing what is to that person morally unacceptable, corrupt policy.

The option of resignation is not always realistic or necessary except in extreme cases. Even then it is most often a matter of individual conscience for which no specific guidance can be provided.

### **Good Government: ‘Striving for Excellence’**

The objective of trying to achieve an appropriate balance is reflected in the Public Service statement *Striving for Excellence in Serving New Zealand*.

In this statement, the vision of the Public Service is discussed in terms of helping New Zealand governments – but helping them to achieve specified goals in the form of a higher quality of life, higher living standards, high employment, social equity and justice, a high quality natural environment, and international respect as a member of the community of nations.

As well as existing to advise the government and to implement its policies and decisions to the highest possible standards of quality and integrity, the Public Service is described as being imbued with the spirit of service to the community and operating in accordance with the principles of law *and* democracy. The Public Service is seen as giving free and frank advice to the government of the day and informing and implementing its decisions, having a role in the “custodianship of the nation’s resources for future generations of New Zealanders” and maintaining “the stability and continuity required in a system of democratically elected governments”.

As in many other areas affecting senior public servants, an important aim is finding a balance, however elusive that will prove.

### **Section Three**

## ***PUBLIC SERVANTS AND EMPLOYMENT LAW***

Most senior public servants are employed under individual contracts of employment – as a chief executive, or otherwise. As such, they should be aware of relevant provisions of their individual contracts, the State Sector Act 1988, the Employment Contracts Act 1991 and those of the general law of employment as it has developed in New Zealand.

### ***Contract of Employment***

Employment contracts for chief executives are entered into with the State Services Commissioner. Employment contracts for other senior public servants (including Senior Executive Service members) are entered into with the chief executive of the department concerned or someone acting under the delegated authority of the chief executive.

Such contracts will include provisions dealing with matters such as:

- the duties the employee is expected to perform and other obligations they have as an employee
- the obligations of the employer
- the term of a contract
- early termination of the contract
- remuneration
- arrangements for setting out performance requirements and reviewing performance in terms of those requirements
- other matters.

Efforts should be made by both parties to ensure performance obligations are discharged fully. The performance agreement process is important not only because it provides an input into periodic reviews of remuneration, but also to specify performance expectations and appraisal criteria, provide feedback to employees on their performance, and record the achievements and experience of senior officials.

### ***The State Sector Act 1988***

The Act:

- provides for departmental staff to be employed by chief executives and for the Employment Contracts Act 1991 to apply to them with necessary modifications
- includes special conditions for chief executives and members of the Senior Executive Service in relation to matters such as criteria for appointment, tenure, conditions of employment, and opportunities for training and development

- is aimed at ensuring that employees in the State Services will be “imbued with the spirit of service to the community” and will maintain appropriate standards of integrity and conduct
- requires chief executives to operate a personnel policy that complies with the principle of being a “good employer” as defined in the Act and which ensures that all employees maintain proper standards of integrity, conduct and concern for the public interest
- authorises the State Services Commissioner to issue a code of conduct covering the minimum standards of integrity and conduct that are to apply in the Public Service
- requires chief executives to develop, publish and report on annual equal employment opportunities programmes
- requires chief executives in making appointments to give preference to “the person who is best suited to the position”, notify vacancies wherever practicable, notify appointments (other than those of acting, temporary or casual employees) and establish a procedure for reviewing appointments that are the subject of any complaint by departmental employees (which must be approved by the State Services Commissioner and comply with guidelines prescribed by the Commissioner)
- provides for the transfer of employees within a department and between departments in restructuring situations
- requires appointments to be made in writing by the chief executive or a person acting under formal delegated authority from the chief executive
- authorises chief executives to require any applicant for appointment to their department and any existing employee to undergo a medical examination and to issue instructions that must be observed by all employees of the department
- limits the personal liability of chief executives and departmental employees for acts done in good faith while carrying out the functions and powers of the department or chief executive concerned.

### ***Personal Liability***

Section 86 of the State Sector Act 1988 states that:

*“No chief executive, or member of the Senior Executive Service or other employee, shall be personally liable for any liability of the department, or for any act done or omitted by the department or by the chief executive or any member of the Senior Executive Service or any other employee of the department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the department or of the chief executive.”*

This provision does not, of course, provide a blanket immunity from criminal prosecution. The *Cabinet Directions for the Conduct of Crown Legal Business* (which were revised in April 1993) provide that if an employee of a department is charged with a criminal offence arising out of the course of their employment, any claim for the reimbursement of the employee's legal costs shall be decided by the chief executive of the department concerned.

The *Directions* also provide that if an employee of a department is named as defendant in a civil action arising out of the course of their employment, the Crown shall bear the expenses of that defence and the Attorney-General may take over the conduct of the case.

### **The Public Finance Act 1977**

The Public Finance Act 1977 contains some important, although little used, provisions which have important implications for the personal liability of public servants for proper custody and use of public money and stores.<sup>8</sup> Section 30 of the Act provides for the Controller and Auditor-General to surcharge those persons responsible for a "deficiency or loss" for the full amount involved or some lesser amount where intent is proven .

Deficiency or loss is defined widely for this purpose and includes:

- "(a) Any deficiency or loss of, or failure to fully and properly account for, money or stores by reason of –*
- (i) The wilful or negligent omission of any person or persons to collect, receive, or account for any money or stores; or*
  - (ii) The application and charging of any money to any service or purpose from which it was not legally available or applicable; or*
  - (iii) The payment of any money without proper authority or without being properly vouched; or*
  - (iv) The failure to comply with any enactment; or*
- (b) Any deficiency or loss of money or stores, or expenditure of money, or damage to stores, or expenditure for the replacement or repair of stores, caused through –*
- (i) The fraud, mistake, default, negligence, or error of, or improper or unauthorised use by, any person or persons; or*
  - (ii) The failure to comply with any enactment."*

People who may be the subject of a surcharge have the right to make representations to the Controller and Auditor-General and to appeal against a surcharge decision to the Minister of Finance. The matter of intent on the part of the public official is an important element in establishing liability.

<sup>8</sup> See also Medicines Act 1981, section 102 for provisions for the protection of persons acting under the authority of that statute.

(Note: There is provision in Section 35 of the Act for disputes between a government department and the Audit Office over the following matters to be referred, if necessary, to the Governor-General for decision:

- the charging of any expenditure to any vote, appropriation, account, fund, or other authority
- the crediting of any receipt to the proper allocation of revenue, account, or fund
- the legality of any expenditure or proposed expenditure.)

### ***The Employment Contracts Act 1991***

The Employment Contracts Act 1991 provides a framework for the negotiation of individual and collective employment contracts. This framework will apply to all officials, including senior public servants other than chief executives, and members of the Senior Executive Service for whom special conditions are set out in the State Sector Act 1988. The Employment Contracts Act 1991 also contains specific rights and procedures which, depending on the terms of individual contracts of employment, may apply to senior public servants. These relate to disputes over the interpretation, application or operation of contracts and to cases of alleged:

- unjustifiable dismissal
- disadvantage in employment or in one or more of the conditions thereof because of some unjustifiable action of the employer
- discrimination in employment based on colour, race, ethnic or national origins, sex, marital status or religion or ethical belief or because of any involvement in the activities of an employee organisation
- sexual harassment in employment
- duress arising from an employee's membership or non-membership of an employee organisation.

Separate discrimination provisions exist in the Human Rights Act 1993 (see page 20 Other Statutory Provisions).

### ***General Legal Provisions***

In addition to the terms and conditions of particular employment contracts and applicable statute law, the courts have developed some general terms of contract which are deemed, as a matter of law, to be incorporated into employment contracts. This area of the law will continue to be affected on a case-by-case basis but some general comments can be made.

### ***Duty to Employer***

Employees have a duty to do work allowed for in their employment contract which is provided by their employer and to do so diligently and competently. Employees are also required to carry out the lawful and reasonable instructions of the employer. Employers do not have an unfettered discretion to allocate “new” work which is outside the scope of an existing employment contract but the courts have protected the ability of employers to change the “mode of performance at work to adapt to technological change, so long as the nature of the work remains the same”. In the case of senior executive staff, in particular, the courts have recognised a substantial (but not unfettered) discretion to assign different duties to employees from time to time so long as the terms and conditions of employment of the employee concerned are preserved.

### ***Duty of Fidelity***

Employees also have a duty of fidelity. There is no fixed or simple statement of what this duty involves but it has been described as involving an undefined duty to act reasonably, in good faith, co-operatively, in a non-disruptive manner and generally in such a way as to maintain an employment relationship of mutual trust and confidence. It includes obligations not to do anything which would impinge adversely on an employer’s business, or anything which could have that effect, and not to reveal valuable information about an employer’s business which has been obtained in the course of employment. The test is how an honest and reasonable person would view the action concerned.

### ***Duty of Fairness***

The courts have been developing the notion that employers have an obligation in law to deal with their employees fairly and reasonably. In the case of Public Service employers, such an obligation exists by virtue of the “good employer” provisions of the State Sector Act 1988.

### ***Other Statutory Provisions***

Other statutory provisions that may apply to senior public servants as employees include:

- the Human Rights Act 1993<sup>9</sup> which lists provisions generally prohibiting discrimination in employment on the grounds of sex, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation, as defined in the legislation, and which make sexual harassment and racial harassment unlawful. Provisions are also included for dealing with complaints arising from these provisions.

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<sup>9</sup> The Human Rights Act 1993 consolidates and amends the provisions of the Human Rights Commission Act 1977, and the Race Relations Act 1971, and consequently repeals those Acts.



- the Health and Safety in Employment Act 1992
- the Parental Leave and Employment Protection Act 1987
- the Wages Protection Act 1983
- the Holidays Act 1981
- the Volunteers Employment Protection Act 1973
- the Equal Pay Act 1972.

This list is not exhaustive.

## **Code of Conduct**

The State Services Commissioner has issued a Public Service *Code of Conduct* under the authority of the State Sector Act 1988 and a number of departmental chief executives have issued one or more of their own codes of conduct applicable to departmental employees generally or employees in particular types of positions.

The Public Service *Code of Conduct* sets out minimum standards of conduct and behaviour for all public servants – including those holding senior positions. Senior public servants should make themselves thoroughly familiar with the provisions of the Public Service *Code of Conduct* and all relevant departmental codes. They should also recognise that the provisions in these codes are of special relevance to them for at least two reasons:

- some of the provisions will be of particular pertinence to more senior staff because of the positions they hold
- senior public servants have an important leadership and modelling role to play as exemplars of good conduct and behaviour both within and outside their organisations.

Matters where any suggestion of impropriety or inappropriateness may arise should be the subject of early and prior disclosure to an appropriate superior so that counsel may be given and received and necessary decisions made. The key concept is *disclosure*

The Public Service *Code of Conduct* sets out the legislative obligations placed on employers and employees and establishes three principles of conduct which all public servants are expected to observe. These are as follows:

1. **Employees should fulfil their lawful obligations to government with professionalism and integrity.**

Specific issues discussed under this heading include:

- employees' primary obligations of service to their Minister/ government and the need for political impartiality, whichever party is in power

- guidelines on making public comment on government policy, and on individual comment in the public arena
- guidelines on private access to and communications with Ministers and members of Parliament
- the possibilities for conflict arising from individual participation in public bodies or voluntary associations, and requirements if a public servant wishes to stand for Parliament
- guidelines on the release of official information.

2. **Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.**

Specific issues discussed include guidelines on the following :

- expectations and responsibilities involved in satisfactorily carrying out duties at work
- need for courtesy toward and respect for the rights of colleagues and the public
- need for honesty and impartiality and avoidance of situations which could compromise integrity or lead to conflicts of interest
- handling of offers of gifts or gratuities.

3. **Employees should not bring their employer into disrepute through their private activities.**

Specific issues discussed include:

- guidelines on personal behaviour and activities in both official and private capacities which might bring an employee's department into disrepute or jeopardise its relationships with government or the public.

## ***Section Four***

# ***SITUATIONS AND ISSUES***

When difficult situations arise, there are number of approaches the individual should consider – personal reflection, reference to written sources such as this guide, discussions with superiors, mentors and colleagues, reference to departmental legal services, consultation with the Solicitor-General, and reference to the State Services Commissioner. In some circumstances it may be appropriate to speak directly with the Minister. Whatever the preferred approach, issues will almost certainly be easier to deal with, and less likely to affect working relationships adversely, if the senior public servant develops a firm personal reputation for professionalism and principled and ethical decision making.

Ministers, for example, may not appreciate being advised that a senior public servant is unable to comply with their wishes or requirements. In the end, however, Ministers want to be served by officials on whose consistency and common sense they may rely.

Senior officials should aim to establish good working relationships with their Minister or Ministers based on mutual respect and recognition of the distinctive role, responsibilities and obligations of the other. Senior officials should not become involved in party politics but they do need to have a sensitive appreciation of the political pressures which apply to Ministers. Ministers also need to feel that their senior officials understand such things and that they are genuinely committed to serving government and Ministers efficiently and professionally.

The need for a positive working relationship does not mean it is necessary or even desirable that there should be strong personal or social relationship between Ministers and their public servants. The relationship needs to be professional rather than personal and senior public servants should be careful to retain a measure of detachment in their dealings with Ministers.

### ***Preserving Integrity***

While maintaining their integrity at all times on matters of law and principle, officials should aim to avoid becoming too “precious” about their independence or place in the scheme of things. Above all, the office of the Minister, and the person holding such office for the time being, is entitled to respect and to the highest possible quality of service.

In the Public Service, *perceptions* are very important. Just as justice must be seen to be done, a high standard of ethical and appropriate behaviour must be seen to be maintained. Steps should be taken to avoid apparent or potentially inappropriate behaviour. Senior public servants, by virtue of their position, also need to be aware of the impact their actions or perceived actions may have on others.

A good test is to consider how you would feel if a particular action or practice became the subject of news media scrutiny, reviewed by some competent authority, and/or partisan political debate. Would you still feel that the action or conduct concerned was proper and appropriate under all the circumstances – even though it might not be universally popular? How would you feel about discussing the issue with friends and mentors? What would be the likely impact on the reputation of your department and the standards of conduct of departmental staff and their attitudes to ethical issues?

This test is *not* the same as asking whether it would be possible to justify the action or conduct concerned or to defend yourself or the department against some formal charge or complaint. It may well be possible to do that without satisfying the suggested tests. What can be justified and what ought to be done may not be the same. What ought to be done is the ethical position.

### **Public Servants and Ministers**

In constitutional and administrative terms the relationship between a chief executive and portfolio Minister is pivotal. When the relationship is professionally based and founded on a good understanding of each other's role, effective governance is enhanced.

Relationships between Ministers and senior public servants, including chief executives, are never static. They are affected by personality factors, and the political environment of the times. Relationships may be at a variety of different levels – with the Minister as a person; as a member of Cabinet; as a member of Parliament; as a member of a party caucus; as a member of a political party; as a representative of an electoral constituency. The relationships are never simple, or always well-defined.

For the senior public servant there are a number of potentially challenging issues that can be identified. These are in two main areas:

- dealings with the Minister as the Minister
- dealings with the Minister as a member and proponent of a particular political party.

### **Serving the Minister**

The authority for senior officials to act for their agency derives from the chief executive. In contacts with Ministers senior public servants do not operate independently from their chief executive, but act for and with the confidence of the chief executive.

In their dealings with Ministers chief executives need to maintain regular contact, personally, and to ensure that such contact is not impaired by third parties, be they senior officials, or Ministerial staff.

### ***Contacts with Ministers***

In each department, protocols should be developed about the extent to which the Minister deals with senior departmental staff directly. A suitable approach may be to confirm the principle that staff of appropriate seniority and competence may deal directly with the Minister but should keep the chief executive informed and be cautious about committing the department in areas where prior consultation with other departmental staff and/or the chief executive would be wise. Devolution of authority to senior officials carries with it an explicit reporting requirement to chief executives.

Problems may arise if a Minister appears to be preferring a particular official as a source of advice. There is no simple formula for such situations but the chief executive should be aware of the signs, and should certainly initiate discussions at an early stage with the Minister if favouritism or bias seems to be developing. The onus on the senior public servant to recognise the situation and to report his or her concerns to the chief executive is equally important. A consequence of not acting in these circumstances may be to dilute the authority and standing of the chief executive which could affect the integrity of departmental advice.

If officials are contacted directly by a Minister and given oral instructions on a matter of substance, the official should make sure that the instructions are recorded fully and accurately and that the chief executive is advised as soon as possible.

It is competent for a Minister to refuse to deal with a particular official. In those circumstances steps should be taken to avoid conflicts, and to ensure that the official is not penalised in any unwarranted way.

### ***Free and Frank Advice***

The imperative to provide free and frank advice is related directly to the need to maintain the confidence of the current as well as a future portfolio Minister, and to the principle of political neutrality. In addition, the onus is to provide advice free of personal interest or the interests of the agency. The advice should reflect an understanding or appreciation of the policies and priorities of the government of the day and be transparent. That is, the advice should not contain unclear or hidden agendas.

Free and frank advice is not always the same as advice the Minister may wish to hear. Advice to a Minister that has been watered-down may not meet the test of being free and frank. It is inappropriate, for instance, for departmental advice to be altered, or influenced unduly, by a third party (say, by ministerial staff) before it reaches a Minister.

In giving advice, officials should be sensitive and responsive to Ministers' aspirations and objectives. At the same time, officials tendering advice should aim to take the broadest possible view, to balance (often explicitly) short-term considerations against the longer term and to have regard to a concept of the broader public interest which they can (if necessary) define and articulate. Such an approach requires a wide appreciation of relevant subject areas and may also require a sound institutional memory and well-developed links with the wider policy communities and sector groups affected. It requires effective and professional relationships between advisers in different agencies and a good grasp of ethical principles.

The obligation and function of public servants to give free and frank advice to Ministers and to the government of the day is vital and it can give rise to some difficulties.

For example, it will not always be easy to determine when to stop giving advice on a matter about which the Minister and the government have already made up their minds. In such cases, being quite explicit about the issue may be helpful – even to the point of the chief executive suggesting that the Minister says when, in his or her view, the critical point has been reached. Until then, senior officials have an important role to play in making available to Ministers all relevant information and experience at their disposal and the most honest, comprehensive and rigorously developed evaluation possible of proposals and alternatives.

### ***Ministerial Prerogative***

The development of public policy may be informed by good research, analysis, and rational decision making, but it is also subject to the imperatives and influences of political judgment, and processes. Those processes are an expression of democratic and representative government. Ministerial prerogative refers to the right of a Minister, subject to the support of the Cabinet as a whole, to determine policy. That right or prerogative is in turn an expression of the democratic principle which derives from the nature of representative and responsible government. That is, that Ministers' decisions represent the will of the people, and Ministers are accountable to the people through Parliament and the democratic processes for their actions and decisions. The actions and decisions of Ministers will be concerned with preserving the confidence of the people in the way they are governed and building and maintaining political support as well as with resolving particular issues or problems.

In the end, of course, it is for Ministers to make the policy choices and officials need to recognise that such decisions will not always be the preferred ones from an official's viewpoint.

A sense of proportion and modesty are virtues to be encouraged in those who tender advice to Ministers and governments. An acceptance that you might not have all the answers, or be able to make precise predictions in all circumstances, should temper the approach of the professional adviser.

Commitment to the implementation of ministerial decisions does not require that officials change their views about the wisdom or appropriateness of a policy or decision. It does require them to keep their counsel and to develop and provide any subsequent advice discreetly and within the policy development processes of the government.

### ***Seeking Clarification***

It can be helpful to seek guidance from the Minister about the extent to which they wish to be exposed to differences of view within the department (possibly with a summary and recommendation from the chief executive) or to a single, filtered, departmental view. It is, of course, necessary to distinguish between situations where there is a genuine, known difference of opinion within the department and those where a senior official may feel that important information, options or insights are being systematically and deliberately withheld from a Minister. The latter is not acceptable in the context of providing free and frank advice.

A senior official may feel that the Minister is not being provided with full, accurate or appropriate advice from within the department or ministry. In those circumstances there is an onus on the official to first bring the concern to the notice of the chief executive. If the concern persists it may then be proper for the official to seek collegial support, and to submit an opinion to the chief executive in writing.

### **Possible Problem Areas**

#### ***General Administration***

- Situations may arise where Ministers direct their senior officials not to consult with the officials of other departments, or direct them to implement decisions which the senior officials of the department believe to be contrary to the expressed collective view or known collective opinion of the Cabinet. In such cases, the chief executive should be advised by officials and the chief executive should raise the matter with the Minister concerned. If the Minister confirms the directive, the chief executive may feel the need to:
  - proceed on the basis of a confirmed Ministerial directive knowing that the political consequences of this are matters for which the Minister accepts responsibility, or
  - discuss the issue with the State Services Commissioner. In extreme cases a matter that cannot otherwise be resolved may then be referred jointly to the Prime Minister.
- Although senior public servants are responsible directly to their Minister, they may also be called upon to deal with other Ministers as members of formal Cabinet committees or otherwise. Indeed the State Sector Act 1988 explicitly recognises that chief executives may be required to give advice to other Ministers. Officials need to be careful

in this context to fulfil both their general obligation to provide frank and complete advice and maintain their duty to support and keep faith with their Minister. Where it can be anticipated that this may be an issue, prior discussion with the Minister is desirable.<sup>10</sup> Officials should not have discussions with, or tender advice to, other Ministers without the knowledge and consent of their own Minister. The possibility of conveying advice through, or in the name of, the Minister should always be considered.

- If an acting Minister issues instructions which a senior official believes may be contrary to the approach or policy of the Minister, this should be drawn to the attention of the acting Minister. In the event of serious concern, options include trying to contact the absent Minister, discussion with the State Services Commissioner and referral to the Prime Minister.
- If a direction is received directly from the Prime Minister every effort should be made to ensure that the Minister is aware of this and is given the opportunity to express any concerns he or she may have. In the end, however, Prime Ministers must be considered to have the authority of their office and the confidence and support of the Cabinet.

### ***Issues of Law***

- In situations where issues of law or the inappropriate use of authority may be thought to be involved, the approach may need to be different.
  - Of particular concern will be any case in which a ministerial directive involves the expenditure of public money. In such cases Ministers are generally acting under explicit delegation from Cabinet. The Public Finance Act 1989 requires that public money only be spent pursuant to lawful authority. In particular cases, discussion with the Controller and Auditor-General may be necessary in order to clarify the direction.
  - Other exceptions to carrying out directions, while important, are not so clear cut. Take, for example, a situation in which a Minister requests information about particular individuals or organisations and the senior officials concerned have reason to believe that the Minister intends to use the information for personal reasons unrelated to their ministerial office, for the benefit of other parties, or to the detriment of the individuals and organisations concerned. Even if the Minister was lawfully entitled to request the information, it may be appropriate for a

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<sup>10</sup> See also Constitution Act 1986, section 7, which provides that “Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council.”



chief executive to seek an indication about the reasons for the request and, if necessary, express concern about the propriety of the department complying with it.

- The obligation of senior officials to carry out the directions of Ministers is not absolute. The chief executive should decline to act on the directives of Ministers in the following situations:
  - where it is reasonably held that instructions are unlawful because it would be unlawful for the Minister to issue them (either in administrative or criminal law)
  - where it would be unlawful for officials to accept them (again, in administrative or criminal law)
  - where officials would have to break the law in order to carry out the directive.

In these circumstances the chief executive should consult appropriately before taking the decision.

**Ministerial  
Involvement in  
Detailed  
Management  
and  
Administration**

The State Sector Act 1988 envisages that Ministers will not normally involve themselves in the day-to-day management of their departments and that chief executives will have direct, personal and explicit responsibility in this respect. Within their briefs chief executives have a wide discretion in managing their departments to achieve results. Attached to that discretion are explicit disclosure and reporting requirements on the chief executive, including being answerable for actions or omissions to the Minister. The relative autonomy of a chief executive should be balanced by the provision of appropriate information to the Minister to avoid surprises, or to anticipate issues or difficulties related to the affairs of the department.

In terms of the State Sector Act 1988 and the Public Finance Act 1989 the general relationship between Ministers and departmental chief executives should be characterised as:

- Departments being extensions of the Minister acting in the Minister's name and in accordance with the Minister's wishes and direction. The Minister is continually and directly – if not always personally – responsible for all the activities in the department.
- Chief executives under the Public Finance Act 1989 having “a delegated authority to enable the production of contracted outputs in the most efficient and effective manner” and being “accountable for the exercise of this authority”. As well as their direct, personal accountability to their Ministers (who retain political and constitutional responsibility for the activities of departments) chief executives also have duties to Cabinet as a whole, to Parliament and to the law.

Under section 32 of the State Sector Act 1988, chief executives are responsible to their Ministers for:

- “(a) The carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and*
- (b) The tendering of advice to the appropriate Minister and other Ministers of the Crown; and*
- (c) The general conduct of the Department; and*
- (d) The efficient, effective, and economical management of the activities of the Department.”*

Under section 33 of the Public Finance Act 1989, chief executives are responsible to the “Responsible” Minister for “the financial management and financial performance of the department and shall comply with any lawful financial actions required by the Minister [of Finance] or the Responsible Minister.”<sup>11</sup>

### ***Chief Executive Performance Management***

The performance of individual chief executives is subject to annual review by the State Services Commissioner as employer, and on behalf of, and in consultation with, the appropriate Minister. This review is carried out having regard to the terms of the formal performance agreement that each chief executive is required (by Cabinet directive) to enter into with the appropriate Minister. These agreements contain some common provisions designed to reflect and protect the collective interests of the government as a whole and the obligation on chief executives to provide free and frank advice of high quality to their Ministers. The agreements also contain undertakings that relate specifically to the department concerned.

While this approach is essentially based on a formal agreement between Ministers and chief executives, the importance of effective personal relations with the Minister or Ministers and being responsive to their requirements, should be maintained at a more informal level.

It is in this context that the *Cabinet Office Manual* notes (inter alia) that:

*“Ministers should not have operational responsibility for the routine performance of Departments. They must have, however, some form of ‘early warning system’ so that they are alerted to potentially controversial matters very quickly.”*

The degree of ministerial involvement in departmental activities varies from department to department depending on their nature. One way of

<sup>11</sup> For further discussion see *The Public Service and Government*, – Ministers’ Relationships with Departments.

<sup>12</sup> *Cabinet Office Manual* Ch. 2/6 G6.

recognising this has been to distinguish between Ministers “of” something and Ministers “in charge of” a particular department. The *Cabinet Office Manual* describes the different ministerial designations.<sup>13</sup> The “in charge of” designation is mostly used for Crown entities rather than departments.

In many areas of government administration a firm convention has developed that – in the interests of neutral administration – Ministers should not become involved in matters involving the personal affairs of individuals or firms with which the department is dealing unless there is specific statutory provision for this or there are some exceptional circumstances. Normally, such matters should be dealt with by departmental and statutory officers, specialist tribunals and/or the courts.

### ***Other Relationship Aspects***

Ministers are constitutionally and politically responsible for the activities of their departments and they may be required to answer in Parliament and to the public accordingly. In that capacity (as well as in their capacity as representatives of the collective owner of the department for the purposes of the Public Finance Act 1989 and the purchaser of its outputs) they are clearly entitled to timely and comprehensive information about any and all aspects of their department’s present and future activities. They are also entitled to receive frank and professional advice about matters of policy and administration. They determine policy issues, within the limits of the law, are entitled to have their departments give effect to their wishes and requirements in implementing government policies, and to be satisfied that their departments are being managed properly and efficiently.

Having noted earlier the importance of mutually supportive relationships between Ministers and chief executives, there is still scope for issues to arise where the exact allocation of responsibility between them is not clear. An example is the question of whether the Minister or the chief executive should communicate with the news media on an issue, or with those affected by a policy issue or programme, and what the content of such communications should be. The *Cabinet Office Manual* provides useful guidance in this respect but the application of such guidelines to particular cases may still require careful consideration.

The quality of departmental advice and management remain matters for which chief executives are accountable in terms of the State Sector Act 1988 and their personal performance agreements. Should a Minister lose confidence in the quality of departmental management or policy advice, the Minister may seek advice elsewhere or initiate a review or reviews of the department and its management.

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<sup>13</sup> *Cabinet Office Manual* Ch. 2/2 C1.

<sup>14</sup> *Cabinet Office Manual* Ch.2/8 G15-17.

### *Dealing with Special Concerns*

A chief executive may be concerned that a Minister is:

- intending to make purchase decisions or set priorities inconsistent with existing statutory requirements
- trying to involve the department in the promotion of party political objectives
- wishing to use his or her position improperly
- seeking to have too much influence over matters about which the chief executive is required to make independent decisions.

These matters need to be discussed by the chief executive with the Minister in the first instance. If the situation is clear and the concern of the chief executive well-founded in fact the action should be to decline to act or comply. If the situation is unclear then discussion and clarification with the Minister should be pursued. Only then should a second opinion be ventured or obtained (and then only with the Minister's knowledge), or a third party consulted.

Then, if the concern of the chief executive is not resolved, other parties may be involved including the State Services Commissioner, and in special circumstances the Solicitor-General. Only after these avenues have been exhausted should recourse to other Ministers or the Prime Minister be contemplated. In no instance should there be any suggestion of going behind the Minister's back to resolve matters.

### *Ministerial Staff*

It is desirable that good relations be established and maintained between ministerial staff and senior departmental officials. To provide a basis for this relationship the functions and roles of the various staff in ministerial offices should be clarified in writing so that these are clearly understood by all concerned. Only the Minister has the power to direct ministerial staff, and those seconded to the Minister's office, or require them to act. Any significant requirement or direction which is said to reflect the wishes of the Minister should be confirmed by the Minister in writing. This is particularly important in any case where a statutory power or the expenditure of public money is involved.

### **Personal and Organisational Conduct**

This is a general area where senior public servants need to be above reproach if they are to enjoy (and deserve to enjoy) the confidence of politicians, their own staff, and the general public. Expectations and requirements in this area may be more intrusive and demanding than is the case either for members of the public or for senior managers in the private sector.

Public confidence in the integrity and probity of the Public Service is crucial to the operation of government.

In addition to the general provisions in the Public Service *Code of Conduct* about matters such as gifts and rewards, preferential treatment, and financial interests, senior public servants need to be conscious of several other issues.

### ***External Links***

In order to carry out their jobs properly, senior public servants may need to maintain links with outside organisations and to participate in discussions and debate on policy issues outside the department and the Public Service. That need should be balanced by the imperative to preserve loyalty to the Minister at all times, and to maintain a good working relationship and understanding with the Minister or Ministers.

New Zealand has not developed as much as some overseas countries the notion of “policy communities” within which particular types of issue are debated intensively, knowledgeably, and with a substantial measure of frank but discreet disclosure of views, information and options. Frank exchanges between departmental officials and a variety of other people and organisations may still be useful and appropriate if public servants are to be well-informed and governments are to have the benefit of well-developed and comprehensive advice.

Such processes, however, inevitably carry with them risks of capture by interest groups or influential individuals and even the possibility of undue influence. Senior public servants must be aware of this and be careful to retain their political neutrality.

New Zealand is a small country in which a relatively small number of people may be closely involved in the activities of particular organisations. Many people wear a number of different hats and it is almost inevitable that public servants will need to deal with people on an official basis whom they know personally, and even socially. This places demands on the impartiality and ethical sensitivity of senior public servants who need to be alert to the issues involved.

### ***Impartiality and Discretion***

Senior public servants are in a position to influence the granting of benefits to, or the exercise of administrative discretion in favour of, individuals, organisations and firms. Examples include the letting of contracts, the administration of government programmes, and employment decisions such as appointments and promotions. Absolute impartiality, fairness and discretion is essential in such processes.<sup>15</sup>

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15 Refer to Cabinet Office *Guidelines for Contracting for Services* (1992).

Sometimes a balance may have to be struck between the genuine value of established, continuing, business-partner type relationships with particular firms or suppliers and the need, for reasons of probity, public confidence, and conspicuous even-handedness, to test existing arrangements by periodic tender and renegotiation processes.

### ***The Political Dimension***

Particular care is required when a department is required to deal with any matter where a Minister, a member of Parliament or any other person prominently associated with a political party has a direct or personal interest.

Any person is entitled to have matters affecting them dealt with by a department fairly, competently and dispassionately. In practice, it is important to appreciate that the decisions or actions of an official may become the subject of political and news media interest and that issues may be raised about:

- the extent to which officials may have applied different considerations, acted other than in a proper manner, or treated people differently
- the extent to which people may have taken advantage (or tried to take advantage) of their position or connections.

Such concerns are far from hypothetical. Since 1978 there have been at least three formal inquiries into cases where such concerns have been raised – the 1978 inquiry by the Chief Ombudsman into the granting of import licences to a former member of Parliament, the 1980 inquiry into what became known as The Marginal Loans Board Affair, and the 1989 inquiry into the dealings between a Parliamentary Under-Secretary to the Minister of Agriculture and officials of the Ministry of Agriculture and Fisheries on matters relating to his personal agricultural interests.

The findings of these inquiries confirm the value of having action on such matters supervised by senior staff with broad experience and sound judgment, and of full records being kept of all discussions and the reasons why decisions have been made.

### ***Personal Relationships and Work***

Senior public servants should be aware of the impact that personal relationships in the immediate workplace, or between people from different agencies having an interest in the same issues, can have on real or perceived objectivity.

Where conflicts of interest may arise, or are likely to be perceived to be present from personal relationships, the senior official should avoid any possible accusation of nepotism or favouritism. There is no place for any

patronage, or hint of bias in staff appointment or promotion processes, or in matters of policy formulation or development. In the latter instance it is proper for an official to declare any conflict of personal interest, and to offer to withdraw from, or not be involved in, subsequent policy discussions. Interests in this context include not only the interests of the individual public servant, but may extend to the interests of members of his or her immediate family.

With respect to staff appointments and promotions it is not sufficient for the official merely to take no part in the decision-making procedure. (Nor is it appropriate in the case of staff discipline where favouritism or bias may be seen to be exercised through inaction). Prudent practice goes to the point of saying that relatives, and persons with close personal relationships such as those in de facto marriages, should not be employed in the same area of work within a department. There are exceptions where the nature of the job is geared for partners, but in these cases the persons are usually of similar or equal status with no direct power to influence the advancement, or impede the employment prospects of the other.

The practice is valid not only as a way of avoiding actual or perceived conflicts of interest, but also may be applied in the best interests of other staff, the maintenance of general staff relationships, good personnel management, and operational efficiency.

Formal Public Service-wide rules used to exist on the employment of near family members in the same department and similar rules will have been adopted in many individual departments. In practice, other sorts of relationships may actually be of equal or more concern. The kind of intense personal relationship that may be formed from time to time between co-workers and may not even be known to immediate work colleagues may be more significant in terms of judgment and objectivity than more established and well-known family or quasi-family relationships. Similarly, close personal links based on friendship or common membership of organisations may be very influential, and should be declared and managed in ways that avoid any possibility of mis-interpretation or partisanship.

### ***Hospitality and Gifts***

As both the Public Service and general business environment have developed in recent years, there are many more opportunities available to senior public servants to participate in business hospitality and enjoy offers of various kinds.

For example, firms invite senior public servants to take advantage of preferential hospitality at major sporting or cultural events and firms may suggest all-expenses-paid trips overseas for study, seminar or promotional purposes. Travel companies offer substantial frequent-traveller inducements or attractive familiarisation trips for departmental staff – including personal assistants of senior employees.

In the absence of more formal rules practice should be guided by objectivity, sound judgment, and the need for the reputation, integrity and principles of the Public Service to be preserved.

As a general rule, the following guidelines are suggested:

- Offers of significant hospitality should be disclosed to the chief executive (or to the Minister as the case may be) before acceptance.
- Hospitality should not be accepted at any time when the company concerned is seeking or may soon be seeking to expand or confirm its business relationship with the department, or even with the government, for example, through a tender or contract.
- Senior departmental staff should be aware of the way that acceptance of hospitality could be perceived by other parties – politicians, business competitors, the news media, departmental staff and the public.
- Any offers of subsidised travel for trips overseas should be declined. It may be appropriate to attend sponsored conferences or seminar overseas but travel should be met by the department.
- Senior staff must be scrupulous in ensuring that nothing is done which could be interpreted as soliciting hospitality, travel or other such benefits.
- Conspicuously lavish, excessive or over-generous hospitality should be avoided at all times.
- Public servants should not derive personal benefit from business promotions associated with repeated use of particular goods and services provided to the department or at departmental expense (for example, free trips for frequent flyers or competitions based on petrol purchases). In most cases – and in the case of senior staff in particular – it would not be appropriate for public servants to derive personal benefit in this way, particularly if there is an element of discretion involved in which the supplier is chosen to provide particular goods and services.
- Gifts of significant value received in the course of official duties should be disclosed and then transferred to the department, as determined in each case by the chief executive.

### ***Other Personal Benefits***

Senior public servants need to be particularly careful about not deriving undue personal benefit from their employment – either by reason of their access to information or, more directly, through fees, royalties or gratuities paid to them for work done in their official capacity. For example, payments for speaking engagements or carrying out official duties should either be declined or paid to the department.



Other things being equal, however, such requirements need not prevent:

- acceptance of modest or token expressions of appreciation
- public servants accepting remuneration for approved paid activities carried out in their own time or on leave.

This is provided such acceptance has been approved in advance by the authority of the chief executive or it otherwise conforms to departmental codes.

Employment contracts for senior public servants will generally specify that the remuneration set out in the contract represents full and complete compensation for services provided to the employer by the employee.

### ***Secondary Employment***

Before accepting any outside or secondary paid employment, or unpaid activity, a senior public servant should first obtain specific approval from the chief executive. Approval should only be granted provided the outside employment does not place the official in a conflict with their official duties, and will not adversely affect the efficiency or performance of the employee, and is performed wholly in their own time. Interests that may create a conflict include:

- employment in a business which is in the process of entering into, or has a contractual relationship with any Public Service department
- employment in an organisation which receives public funding<sup>16</sup>
- businesses concerned with lobbying Ministers, or members of Parliament, or government-owned agencies
- situations where the public servant's employing department is in a regulatory relationship with the company or concern offering secondary employment
- secondary employment that might make demands on or compete for the public servant's time after normal working hours (for overtime, for instance), "on call" situations, or special duty availability
- situations giving access to privileged, private or confidential information in the course of official duties as a public employee pertinent to the business or client base of the secondary employer.

### ***Personal Affairs***

Employment contracts for senior public servants may include provisions allowing for dismissal in the event of bankruptcy, insolvency, serious financial difficulties and criminal offences involving dishonesty or other serious criminal activity.

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<sup>16</sup> For instance, acceptance of a directorship in a Crown entity would not be appropriate.

More generally, senior public servants should immediately disclose to their administrative superiors full details of any situation which has arisen in which their personal conduct is likely to be called into question in court, the media or some other public forum. Some conduct which, while undesirable, may be tolerable in a member of the public or a more junior employee may raise serious questions concerning the continued employment of more senior public servants.

### ***Setting an Example***

The authority of a senior public servant derives from a number of sources, including the nature of their position, their knowledge and experience, and their demeanour and personal reputation. Much of their authority, or legitimacy to act, will stem from their personal conduct, and the standards and values they subscribe to and communicate to others. How well they command respect, and how well they are able to obtain the best from staff, will often depend on such intangible, but conspicuous qualities.

Senior public servants should set a good example to their colleagues and display leadership qualities and attributes in the work environment, and in their public lives. There are inestimable benefits of appropriate modelling on staff morale, professionalism, and personal and administrative ethics. The obverse is also true. So, in such matters as treating people as individuals, respecting confidentiality and privacy, maintaining appropriate standards of dress, not allowing personal financial circumstances to intrude in the workplace, avoiding non-professional dependencies (in the matter of borrowing or lending money, for instance), and the use of alcohol, senior officers should set a good example.

### ***Using Authority Responsibly***

Senior public servants should not abuse their positions of seniority in their department and the discretion and authority they have. They should be scrupulous in avoiding the use of departmental assets, facilities or funds for private purposes. They should avoid taking advantage of their position to pressure or influence more junior members of staff into, for example, participating in social activities or financial transactions. They should avoid any suggestion that they are seeking to influence colleagues or more junior staff (in the same or other agencies) to exercise discretion for the benefit of individuals or organisations.

### ***Independent Statutory Functions***

In addition to their managerial and policy advice responsibilities, a number of senior officials have specific statutory powers and discretion assigned to them by law which they are required to exercise in their own right and not as the delegate or agent of their Minister.<sup>17</sup>

<sup>17</sup> See also *The Public Service and the Law* for a further discussion on the role of a statutory officer.

As a matter of general administrative law, where Parliament has specified that an official is to exercise a particular power or discretion in their own right, the official cannot be subject to ministerial direction and control in that respect. The Minister may have views on a particular issue and the decision maker may consult their Minister and take his or her views into account. Indeed, such consultation may be necessary if the decision maker is to be fully informed of all relevant and proper considerations. In the end, however, the decision must be taken by the statutory officer, having regard to all proper and relevant considerations. This is because any decision they take may be subject to judicial review and to the criteria employed in such reviews.<sup>18</sup>

In some cases the independence of senior officials from ministerial direction and control is explicit in law. For example, the State Sector Act 1988 requires that personnel decisions affecting individual employees be taken independently by chief executives and makes it clear that Ministers are not responsible for such decisions.

Even so, Ministers still have a clear and basic right to be kept informed and to be advised as they wish or need to be about the activities of departments for which they remain responsible. Part of the role of senior officials is to recognise and be sensitive to the public and to the Parliamentary responsibility that Ministers have for the activities of their departments. Decisions taken independently, by someone other than a Minister, can still have significant consequences in terms of public and political concern. For these reasons it is important that a Minister is advised of decisions and announcements before they are made public.

### **Limits on Political and External Activity**

A public employee has an obligation and duty to serve the aims and objectives of their Minister, and the government of the day. The Public Service *Code of Conduct* outlines the nature of those obligations in this area. As a general rule senior public servants should avoid:

- any activities or actions that might diminish the political neutrality of the Public Service
- any adverse public comment on government policies, either in an official or private capacity
- any open acknowledgment of, or public allegiance to, a particular political party<sup>19</sup>

<sup>18</sup> See also *The Judge Over Your Shoulder*, Crown Law Office, Wellington.

<sup>19</sup> A public employee wishing to stand as a candidate in a general election should disclose that intent to his or her chief executive so that leave may be granted for a period to "commence before nomination day, and in the event of his (sic) nomination as a candidate, shall continue until the first working day after polling day, unless he withdraws his nomination." (See section 52 of the Electoral Act 1993.)

- making representations in a private or personal capacity to members of Parliament or Ministers (except in their capacity as authorised representatives of organisations, such as an employee, or professional body, and then only when that activity has been declared to and approved by the chief executive)
- being appointed in a personal capacity to any position of significant responsibility in a public, professional or voluntary body which is likely to become involved in making representations to the government on policy issues or being openly critical or supportive of the actions of policies of government.

### ***Civil and Political Activities***

Such restrictions impose important limitations on the civil and political rights of senior public servants as citizens of New Zealand. Clearly, such moral restrictions are consistent with the importance of the Public Service being able to demonstrate genuine impartiality in a party political sense and to maintain the confidence of successive governments, and governments-in-waiting, that it will serve them faithfully, loyally and well.

It is a reality that Ministers of the Crown generally find it difficult to work with officials who in their personal capacity openly or publicly criticise or support policies of political parties, or adopt partisan positions. The statement made or position adopted by the official may not be forgotten easily and could colour the way that Ministers relate to the official, or to the department employing the official.

Expressing a strong view that might bring the official into favour with a political party may have unintended outcomes. The official may benefit from any alignment of viewpoint at some future date, or the official may find themselves side-lined on certain discussions, or blocked effectively from working on certain issues. Either way the consequences could be to reduce the credibility both of the official, and the official's department and the Public Service generally. These issues all fall into the category of risk management for the public official.

### ***Membership of a Political Party***

Whether or not a senior public servant joins a political party as an ordinary fee-paying member (as opposed to becoming involved actively in the activities of the party) is a matter of personal responsibility for the individual in most instances, although there may well be some positions where even membership would be inappropriate. It should be remembered, however, that the fact a senior public servant is a member of a political party will become known – either within the party concerned or more generally. The political impartiality of the public servant concerned may then be called into question.

## ***Membership of External Bodies***

Senior officials appointed to external bodies in their official capacity should clarify their status at the outset to determine whether they are regarded as delegates of their Minister or whether they are required to carry out their duties and responsibilities as members of the body concerned, independently of the Minister.

- In the first scenario, officials need to seek a briefing by the Minister as required and act on the basis of any lawful instructions they may receive.
- In the second scenario, officials need to familiarise themselves with the legal obligations of the body concerned and their personal legal obligations and liabilities as a member of it. They should also seek to bring to it the same values and approach to decision making that they would apply in a departmental context as a senior public servant.

## ***Matters of Conscience and Matters of Duty***

Public Service organisations attract and need persons of passion, strength of character, personal conviction and commitment. These qualities are the stuff from which matters of conscience most likely derive. All officials will face personal dilemmas. It would be a sterile Public Service if the ethic of neutrality prevailed to the extent that the public servant's only duty was to do without question what he or she was told. Sometimes officials may have to wrestle with their conscience and do what seems proper to them, morally and ethically. There should be room for this to happen.

### ***Dissent***

It is possible that senior public servants may find themselves in situations where they feel unable in good conscience to carry out a particular direction, implement a particular policy, or simply keep silent about a particular issue. For example a person with religious or moral objections may not wish to be involved in any policy advisory work on matters that may conflict with strong personal convictions. Usually, such a wish can be accommodated. In more extreme instances the individual may feel that they can no longer work in a department that administers or promotes advice supporting particular moral values.

The Public Service *Code of Conduct* recognises this, emphasises that such dilemmas must be managed so as to avoid conflict with official duties, and advises public servants in situations of this kind to discuss their circumstances and options with colleagues, and their chief executives if necessary.

Matters of conscience are personal issues and involve a personal responsibility to effect a resolution. By their very nature they are not black-and-white.

Clear-cut issues involving illegality, constitutional impropriety or matters which are likely to offend the morality of the community as a whole, are matters of both a personal and collective responsibility and need to be dealt with suitably. They usually engage a public interest and are concerned with the collective interests of government.

It is inherent in their role that senior public servants accept the discipline of complying with otherwise lawful and reasonable directions from the elected politicians and serve faithfully the government of the day – even in cases where this requires action which is contrary to their best judgment or personal views.

If, after careful reflection, senior public servants find themselves unable to accept this discipline, two issues will normally arise:

- whether the situation can be resolved by the person concerned being transferred to other duties or another department, or the task assigned to someone else
- whether the inability has to call into question whether the person can or should continue to be employed as a senior public servant.

### ***Personal Responsibility and Peer Reporting***

Matters where illegality (for example, unlawful administrative action or criminal misconduct), gross constitutional impropriety (such as deliberately misleading the Minister, Parliament or the Governor-General) or where fundamental public morality may be involved, need to be confronted vigorously. If there is a responsibility on individual officials to report in good faith and on reasonable grounds instances of maladministration or corruption, there is a concomitant responsibility on senior management to respond appropriately to such reports.

### ***Whistleblowing***

Although there is no formal recognition of “whistleblowing” there is no need to wait for legislation as a guide to doing what is right, or what ought to be done in particular circumstances. If illegality, corruption, impropriety, or waywardness is suspected then mechanisms or procedures should be in place to allow persons to bring those matters to the attention of the appropriate people and to know that such information will be acted upon without the need to blow a whistle publicly.

Overseas research studies have shown that “whistleblowers” tend to be highly principled, public-spirited persons who will place what they perceive to be the public interest in a matter ahead of their own situation if they see that as the only way to achieve a desired result.

There are protections for “whistleblowers”, or persons who disclose information in the public interest. These protections are to be found at common law, and within the Employment Contracts Act 1991.

### ***Leaking***

Whistleblowing can be distinguished from “leaking”. In the former the informant is prepared to disclose his or her identity, and is normally motivated in a public-spirited way. Those who leak information usually wish to remain anonymous, and the release is often motivated by partisan considerations. The latter activity is intolerable under any circumstances and may lead to dismissal.

## **Post Employment Obligations**

### ***The Problem for Governments***

Stated simply the problem is – should there be any restriction on the scope of permitted activities for those who have held a public office appointment when they cease to be so employed? The answer is problematic, but on balance there is a case for some restrictions.

A principal conflict or difficulty may arise where former employees use information, such as in writing or teaching, or in private business, or as a consultant, or in some other form of employment, for remuneration and/or personal gain and the information would not otherwise have been available to members of the general public.

A serious conflict could also arise where a senior public servant sets themselves up with work or business arrangements whilst in government service, or does favours in return for an expectation of work outside the Public Service. Such behaviour would be entirely inappropriate and intolerable.

Beyond the more obvious cases that might arise the matter of perception is most important. There must also be a perception that no conflict of interest exists in the post employment situation. It is not sufficient to have taken steps to avoid conflicts of interest. It must be seen that no conflict of interest exists.

Post employment applies to both those who leave the Public Service for work outside, and those who retire. More concern will attach to the former category who remain active in the employment market and who increasingly transfer between sectors.

When public employees leave their employment (and senior public employees in particular) they take with them two kinds of information:

- general understanding of the way government and public administration operates

- specific and sometimes confidential or sensitive information about aspects of government policy or about organisations associated with government, or about personalities in government.

There may be some good that derives from former employees using information about the first kind, and there is likely to be some limitation on the extent of time (it may be relatively short) that the second kind remains sensitive, or even confidential.

There will be some information and knowledge acquired in the course of their employment that will be of a privileged nature. That is, it will relate to information about individuals, be acquired on trust, be commercially sensitive, or have a special duty or loyalty attached to it. Matters of national or military security would also fall into this category. However, these exceptions aside, restraints that might be placed on former employees to earn a livelihood, and take advantage of their skills and experience acquired during their employment in public employment, should be the exception rather than the rule.

The State Services Commission has adopted the view that except in certain cases former public employees should otherwise be free or not unduly or unreasonably inhibited in their employment pursuits. The principle is not to restrain unless there are compelling reasons to do so. It is also the view of the courts.<sup>20</sup>

### ***Post Employment Conditions***

Chief executives have written into their contracts of employment some restrictions<sup>21</sup> on the paid activities they can engage in for a period after their employment as a chief executive but there are no other formal provisions in this area in New Zealand. For instance, there are no general conditions contained in contracts of employment for senior managers or those who work closely at the political and administrative interface. By contrast, a number of overseas countries do have formal provisions covering this type of situation.

The reasons why restrictive conditions are contained in chief executives' contracts of employment are mainly that:

- public employees not be placed in a position where they could benefit inappropriately, or be seen to benefit inappropriately, from information gained or contacts established in the course of their employment in the Public Service

20 See for instance *Peninsular Real Estate Ltd v Harris* (unrep, DP 293/91, 6/9/91) for an account of the principles identified.

21 A standard provision restricts a chief executive in any employment or activity for up to 12 months where the chief executive is likely, or is perceived as being likely, to "unfairly or improperly benefit from knowledge which has come into the chief executive's possession in the course of the performance of the duties" (under the Contract of Employment) except where prior consent has been obtained.



- the judgment or behaviour of public servants may be influenced by the prospect of future employment with an outside firm or organisation
- outside firms or organisations not derive inappropriate advantage or favourable treatment from the employment of former public servants.

In the absence of more formal requirements in the Public Service it remains a matter of judgment and good sense in particular circumstances. What can be said is that:

- senior public servants should be scrupulous in disclosing any possibility of employment with an organisation or firm they have official dealings with at the earliest possible stage so that any necessary steps can be taken to avoid potential areas of concern or difficulty
- former senior public servants should exercise particular restraint in subsequent dealings with former colleagues to avoid any suggestion that they may be seeking to take undue advantage of established relationships. For their part, serving officers should be conscious of the need to deal with former colleagues on a fair and impartial basis.

### ***Public Comment***

The area of comment on Government policy or departmental actions by former senior public servants is less clear cut but still important.

Former senior public servants clearly have important rights to hold and express their opinions. It could even be argued that informed commentators (free of the necessary restraint imposed by their status as serving public servants) have what amounts to a positive moral obligation to contribute to public debate on significant issues of the day. And, former senior public servants who have resigned or retired in part at least because of concern over the current direction of Government policy may feel obliged particularly to express themselves in a public and potentially influential way. Any comment should avoid reference to information obtained in a previous official capacity which was not otherwise available publicly. Former senior public servants should not use their previous status to lend particular force or authority to their statements.

A measure of continued discretion is also appropriate in the interests of preserving the ability of existing public servants and the Public Service as an institution to be accepted by Ministers as impartial, loyal, and discreet. Discretion is also important for another reason. Politicians may not be as concerned about the content of a statement reported publicly as with the fact that the comment was made by a senior public servant. This makes the need to exercise judgment all the more important to avoid bringing the Public Service into disrepute.

The best advice that can now be given is to suggest that former public servants who wish to comment should express themselves in a restrained, constructive and professional way. They should also recognise that contributions from them may become the subject of responses from Ministers, news media comment and partisan political debate. The target or focus of any comment, whether public or private, should be considered carefully.

As a matter of professional courtesy, former senior public servants who are about to express views on Government policy through means such as press statements, submissions to select committees, contributions to seminars or conferences, or published papers and the like may also wish to consider advising their former colleagues and the chief executive (and Minister in some cases) of their intention.

## **Industrial Disputes**

Issues may arise from time to time about what role senior public servants should take during the course of industrial disputes. In essence senior managers have a prior responsibility to manage the government's interests if these exist.

As a general rule, senior public servants will be expected to identify closely with the interests of the employer in industrial disputes or in matters of pay negotiations, and act accordingly. This is not to say that senior public servants are precluded from taking an employee perspective on matters affecting the renegotiation of their own employment conditions or resolving any matters arising in the course of their own employment.

Senior staff may be members of the organisation acting as the bargaining agent for employees involved in a dispute. The union or employee organisation normally recognises the distinctions that need to be made during periods when adversarial or differing positions are adopted by parties to a collective or individual employment agreement and affecting members. Senior public servants do not lose their industrial or employment rights by virtue of their management status.

## **Information and the News Media**

By the nature of their employment, senior public servants frequently become privy to sensitive and privileged information. The Official Information Act 1982 is designed to facilitate the availability of information to enable members of the public to better participate in the decision-making processes of government. But the Act also recognises that there are good grounds for some information to be withheld and that decisions about the release of information should be made by responsible and authorised people. For instance, section 9 (g) provides for "*Other reasons for withholding official information -* ". to "*Maintain the effective conduct of public affairs through -*

- (i) *The free and frank expression of opinions by or between Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty; or*

*(ii) The protection of such Ministers of the Crown [or members of organisations], officers, and employees from improper pressure or harassment . . . ”*

In special circumstances senior officials may wish to take particular news media representatives into their confidence and provide background information on an off-the-record, or not-for-attribution basis. If so, they should make sure – in consultation with their news media advisers – that they understand the rules, conventions and ethical strictures that apply to journalists in such situations and the limitations of these.

Above all, the senior public servant should accept and recognise that they are accountable in their dealings with news media representatives, and that officials have an obligation to provide balanced, factual information in even-handed ways. Journalists are entitled to have access to factual information.

Suggesting to a journalist that particular types of questions should perhaps be asked may seem to provide a safe and more ethically desirable alternative to leaking in cases where a senior public servant or other employee may be concerned about the direction of government policy or decision making. In practice, the ethical considerations are much the same. Under any normal circumstances the practices are equally undesirable.

### **Summary**

- The senior public servant ought to be alert to the need not only to do the right thing, but also appear to do the right thing. Transparency in all transactions should be observed.
- In all aspects of the work of a senior public official the respective roles and relationships between the political and administrative arms of government need to be understood and respected. Where doubts or difficulties arise clarification and counsel should be sought.
- Personal and organisational integrity are crucial elements of good government administration and management practice. It is not sufficient only to be concerned with the instrumental and technical dimensions. The ethical dimension is equally important.
- In matters of conscience the environment needs to be created within which dilemmas can be resolved satisfactorily. The conditions need to be safe for peer reporting and dissent to be expressed, and for appropriate responses to be formulated.
- Subscription to public service ethics for the senior public servant continues on leaving Public Service employment. Some aspects of duty persist beyond the normal term of a contract.

Section Four has been concerned with situations and issues that senior public servants will encounter in their personal and public life. The value of the discussion and comment will be determined not so much in direct guidance, but in providing a base for thinking about and debating predicaments and problems of an ethical nature.

## **Conclusion**

This paper is concerned with principles, conventions and practice. Principles are bases for reasoning; conventions are about accepted or shared behaviours or ways of relating based on consent or agreement; and practice is concerned with actions as distinct from theory – what actually happens! But, the paper goes further than that and ventures into the field of ethics. It is about moral principles at a personal, professional, and organisational or administrative level. Ethics are about what ought to be rather than what might be justified; about right and wrong, and the use of discretion. Ethics derive from a variety of sources – the employment relationship, professional standards and values, constitutional and political conventions, law, the role of the organisation, and from within the individual practitioner. In that respect ethics are situational – not universal.

The aspects of the Public Service which distinguish it from nearly all other employment environments are to be found in:

- the crucial role it has as a link in the democratic system of government
- the inescapable political nature of the work it is expected to perform, yet in a politically impartial manner
- the trust reposed in it and all who hold office within its ranks.

It is true that departments are accountable for the efficient and effective provision of goods and service. At a different level the way they are produced, and the conduct and behaviour of those responsible for their production, contributes in significant ways to the confidence politicians and the public will have in the Public Service. The integrity and judgment displayed by senior managers will be crucial to maintaining confidence that public resources are in good hands.

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# APPENDIX 1

## **The New Zealand Public Service STRIVING FOR EXCELLENCE IN SERVING NEW ZEALAND**

### **Vision**

*The New Zealand Public Service will help New Zealand governments to achieve a higher quality of life, higher living standards, high employment, social equity and justice, a high quality natural environment and international respect as a member of the community of nations.*

### **Purpose**

*The New Zealand Public Service, imbued with the spirit of service to the community, exists to advise the Government and implement the Government's policies and decisions to the highest possible standards of quality and with the utmost integrity in accordance with the principles of law and democracy thereby enhancing the well-being and prosperity of all New Zealanders.*

### **Principles and Values**

*In an increasingly dynamic, diverse and technological world, the New Zealand Public Service should make a vital contribution to efficient and effective government. The New Zealand Public Service will:*

*Give free and frank advice to the government of the day, and inform and implement its decisions with intelligence, enthusiasm, energy, innovation and common sense*

*Demonstrate the qualities of leadership, sound judgment, fiscal responsibility and high ethical standards that attract the confidence and respect of the Government and the people of New Zealand*

*Establish and maintain an equitable and challenging working environment, both now and for the future, that is consistently able to respond to constant change, and trains, develops and motivates every public servant to perform to the highest levels of their ability*

*Ensure that people with professional management skills and the attributes of leaders are recruited and developed across the Public Service. This is to meet current and future Public Service-wide needs for high quality management and contribute to enhancing New Zealand's management resources overall*

*Ensure that every public servant demonstrates understanding of the collective interest of government and the special nature of the relationship between Parliament, the Crown and the Public Service in the need for apolitical, objective and professional policy advice and the custodianship of the nation's resources for future generations of New Zealanders*

*Act at all times within the true spirit of the law and work to maintain the stability and continuity required in a system with democratically elected government.*

## **APPENDIX 2**

### **Reference Material**

#### **Legislation**

*Constitution Act 1986*

*Electoral Act 1993*

*Employment Contracts Act 1991*

*Human Rights Act 1993*

*New Zealand Bill of Rights Act 1990*

*Official Information Act 1982*

*Ombudsman Act 1975*

*Privacy Act 1993*

*Public Finance Act 1975*

*Public Finance Act 1989*

*State Sector Act 1988*

#### **Codes of Conduct**

State Services Commission (1990) *Public Service Code of Conduct* Wellington

Relevant departmental and divisional codes of conduct

#### **General Reference Material**

(1994) *Cabinet Office Manual* (incorporating *Cabinet Directions for the Conduct of Crown Legal Business*, CO(93)5)

Crown Law Office (1989) *The Judge Over Your Shoulder: Judicial Review of Administrative Decisions* Wellington

STATE SERVICES COMMISSION  
Te Komihana O Ngā Tari Kāwanatanga



# Public Service Code of Conduct

Published pursuant to section 57 of the State Sector Act 1988





The Māori figure incorporated in the cover is the male figure standing in the entrance foyer of the State Services Commission. It is said to represent 'Mahu' - a name derived from Mahutonga the Southern Cross constellation - and is often referred to as a traveller.

STATE SERVICES COMMISSION  
Te Komihana O Ngā Tari Kāwanatanga



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## CONTENTS

	Page
Introduction	5
Public Service Code of Conduct: The Three Principles	9
First Principle	10
Obligations to Government	11
Political Neutrality	11
Public Comment on Government Policy	13
Private Communications with Ministers and Members of Parliament	15
Political Participation	16
Release of Official Information	18
Second Principle	20
Performance of Duties	21
Respect for the Rights of Others	22
Avoiding Conflicts of Interest and Maintaining Integrity	23
Offers of Gifts or Gratuities	25
Third Principle	26
Personal Behaviour	27

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## INTRODUCTION

The Code of Conduct is issued by the State Services Commissioner in terms of the Commissioner's authority under section 57 of the State Sector Act 1988 to prescribe:

*"... minimum standards of integrity and conduct that are to apply in the Public Service."*

The purpose of the Code is:

- to provide guidance on the standards of behaviour required of public servants;\* and
- to form the basis for any codes that may be required by chief executives to suit the particular operational requirements and circumstances of their departments.

### *The Rights and Obligations of Public Servants*

Legislation and common law establish certain minimum standards or general obligations applying to the parties to any employment relationship.

For public servants, the most relevant of these are contained in the State Sector Act 1988, the Employment Contracts Act 1991, and departmental employment

\*NB: In this context the terms 'public servant' and 'employee' also refer to members of the Senior Executive Service.

contracts (individual employment contracts and collective employment contracts).

In accordance with these Acts and contracts, Public Service employers have the obligation to provide their employees with:

- impartial selection and appointment procedures;
- clear statements of employees' duties and employer expectations of them;
- appropriate feedback and communication on work performance;
- fair rates of remuneration for skill, responsibilities, and performance;
- good and safe working conditions;
- equal employment opportunities, including recognition of the aims and aspirations of Māori and ethnic or minority groups, and the employment needs of Māori, women, and people with disabilities;
- opportunity for the enhancement of individual abilities;
- freedom from harassment or discrimination in the workplace;
- appropriate disciplinary and dispute procedures, and opportunity for redress against unfair or unreasonable treatment by the employer.

In return, public servants have an obligation to their employers:

- to be present at work as required;
- to maintain expected standards of performance;

- to obey all lawful and reasonable instructions;
- to maintain proper standards of integrity, conduct, and concern for the public interest.

### *The Code*

The Code of Conduct establishes three principles of conduct which all public servants are expected to observe:

- i Employees should fulfil their lawful obligations to Government with professionalism and integrity.
- ii Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.
- iii Employees should not bring their employer into disrepute through their private activities.

The principles do not specify every potential act of behaviour but rather, establish the obligations generally expected of public servants in their relationships with Government, their chief executive, colleagues, and the public. These obligations are highlighted in the Code.

There are a number of circumstances which may affect employees' observance of these obligations, and the Code therefore provides guidelines for appropriate conduct in a variety of contexts.

Chief executives may also wish to develop additional standards of conduct for their employees. In terms of their powers as employers under the State Sector Act



they may do so, provided that such standards are not inconsistent with those of the Code. The formulation and application of departmental disciplinary procedures is also the responsibility of chief executives.

The Code provides the minimum standards of integrity and conduct for the Public Service. Observance of these standards, and those required by chief executives, is intended to increase the sensitivity of employees to such matters and encourage the pursuit of the ideal which gives the Public Service its greatest strength - a "spirit of service" to the community.

Further expansions of, or amendments to, the Code may be issued by the Commission from time to time, as circumstances require.



Michael Wintringham  
State Services Commissioner

## Public Service Code of Conduct: THE THREE PRINCIPLES

### FIRST PRINCIPLE

(pages 10-19)

*Employees should fulfil their lawful obligations to Government with professionalism and integrity.*

### SECOND PRINCIPLE

(pages 20-25)

*Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.*

### THIRD PRINCIPLE

(pages 26-28)

*Employees should not bring their employer into disrepute through their private activities.*

## 1. FIRST PRINCIPLE

*Employees should fulfil their lawful obligations to Government with professionalism and integrity.*

The first principle of the Code is concerned with public servants' obligations to Government in the performance of their official duties. In broad terms, the first priority for public servants is to carry out Government policy. In doing so, they are expected to act in a manner which will bear the closest public scrutiny.

## Obligations to Government

*Employees are obliged to serve the aims and objectives of the Minister. Employees should ensure that their personal interests or activities do not interfere with, or appear to interfere with, this obligation.*

The State Sector Act 1988 sets out the relationship of departments (through their chief executives) to Ministers, and thus to Government. The key responsibilities of departments (and their employees) are to assist in the formulation and the implementation of Government policy. The focus of these responsibilities is to the Minister. Public servants are therefore obliged to serve their Ministers within the law, with integrity, and to the best of their ability.

## Political Neutrality

As public servants are required to serve the Government of the day, they must act not only to ensure that their department maintains the confidence of its Minister, but also that it is able to establish the same relationship with future Ministers.

Public servants have a recognised role in assisting with the development as well as the implementation of policy. This may occur in different ways and at different levels within each department. It is the responsibility of public servants to provide honest, impartial, and comprehensive advice to Ministers, and

to alert Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers' views.

However, the final decision on policy is the prerogative of Ministers, and public servants may not withhold relevant information from Ministers, nor seek to obstruct or delay a decision, nor attempt to undermine or improperly influence Government policy (for example, by the unauthorised release of official information).

The dilemma for public servants who hold strong personal beliefs on certain issues is recognised, but it is one which must be managed so as to avoid conflict with their official duties. It is Ministers who bear political responsibility for Government policies, and it is the role of public servants to faithfully implement those policies to the best of their abilities. Once the Minister has made a decision, it is the duty of public servants to implement that decision within the law, whether or not they personally agree with it.

If public servants find themselves in a situation where their conscience demands that they should decline to carry out a lawful instruction, they should discuss their circumstances and options with their chief executive (via their superior).

## Public Comment on Government Policy

Departments may authorise certain employees to respond to media requests for comment about aspects of Government policy, or its implementation or administration by the department. Official comment on behalf of the department should be made only by those employees authorised to do so.

Where no specific provision is made by the department, employees responding to media enquiries should exercise an appropriate degree of discretion and common sense, or seek the advice of their superiors.

### *Individual Comment*

Generally, public servants have the same rights of free speech and independence in the conduct of their private affairs as other members of the public. However, they also have a duty not to compromise their employer by public criticism of, or comment on, policies with which they have been professionally involved or associated.

Public servants should therefore ensure that their contribution to any public debate or discussion on such matters maintains the discretion appropriate to the position they hold, and is compatible with the need to maintain a politically neutral Public Service. Employees occupying senior positions or working closely with Ministers need to exercise particular care in this regard.

In general, comment made by individuals on issues of public policy which might be associated with

their official role would normally be regarded as unacceptable if it:

- revealed advice given to the Minister;
- used or revealed any information gained in the course of official duties where this was not already known by, or readily available to, the general public;
- criticised, or offered alternatives to, a proposed or actual ministerial policy or departmental programme, or that of any other Minister or department with which the individual was professionally involved;
- purported to express or imply a departmental view, rather than clearly expressing a personal view only;
- gave openly partisan support to, or criticism of, a political party;
- constituted a personal attack on a Minister or departmental colleagues;
- amounted to a criticism sufficiently strong and/or persistent so as to call into question the employee's ability to impartially implement, administer, or advise upon a Government policy.

Actions of the kind noted above could be considered misconduct, depending on the circumstances of the case.

## Private Communications with Ministers and Members of Parliament

Generally, public servants have the same rights of access to their political representatives as other members of the public. However, given the requirement for public servants to remain politically neutral in their work, such communications should be approached with special sensitivity.

As a general guide:

- employees may communicate privately with any Minister or Member of Parliament about matters outside their employment, but employees occupying senior positions or working closely with Ministers should exercise particular care with such communications;
- employees may also communicate privately with their Minister about matters concerning their department, but such matters should first be raised with the chief executive of the employee's department;
- where a matter is raised directly with the responsible Minister, the department may be directed to provide a suitable response;
- a public servant is entitled to the same information or level of detail in a response as would be given to any member of the public under the Official Information Act 1982.



## Political Participation

Public servants need to ensure that their participation in political matters does not bring them into conflict with their primary duty as public servants to serve the Government of the day in a politically neutral manner. This is important in order to maintain ministerial and public confidence in the impartiality of the advice given, and actions taken, by public servants. Determining what is appropriate in any particular case will depend on the extent of the participation of the individual, the nature of the issue, and the position held by the individual in the Public Service.

### *Participation in Public Bodies or Voluntary Associations*

Public servants are free to stand for, or be appointed to, any office or position on any public or voluntary body. However, they should first inform their employer of their intentions, to ensure that no conflict exists between such participation and their duties and responsibilities as a public servant. Where the employer considers that there would be a conflict of interest, appropriate arrangements will need to be made to avoid or resolve the conflict. In some cases this may require that the employee be requested not to stand for office, or to resign a position already held.

### *Standing as a Member of Parliament*

Public servants may offer themselves as candidates for Parliament. To conform with the intent of section 52 of the Electoral Act 1993, a public servant wishing to stand as a candidate in a general election, or a by-election, should disclose their intent to his or her chief executive. Section 52 states that "Any State servant who desires to become a candidate for election as a member of Parliament shall be placed on leave of absence" which "shall commence on nomination day, and, in the event of his or her nomination as a constituency candidate or of the inclusion of his or her name in a list submitted under section 127 of this Act, shall continue until the first working day after polling day, unless, in any case where he or she is a constituency candidate, he or she withdraws his or her nomination."

Where the employer is satisfied that the candidacy "will materially affect" the employee's ability to perform their duties satisfactorily, or to be seen as independent in relation to particular duties, it may be necessary to place an employee on leave prior to nomination day. Early notification to the chief executive is therefore important.

An employee may resume duty on the first working day after polling day if not elected as a member of Parliament. However, under section 53 of the Electoral Act 1993, if an employee is elected to Parliament he or she will be deemed to have resigned from the Public Service. In effect, section 53 prohibits a member of Parliament also being a State servant.

During the period of leave an employee may not be required or permitted to carry out any of his or her official duties, or be entitled to any salary or other remuneration as a State servant, "except to the extent to which he or she takes during that period any leave with pay to which he or she is entitled."

### **Release of Official Information**

The disclosure of official information is subject to the requirements of the Official Information Act 1982. The general principle of the Act is that information should be made available on request, unless compelling reasons exist why it should not. These reasons are detailed in the Act.

Specific procedures for dealing with the release of information may also be laid down by departments, provided they do not conflict with those of the Act. Official information should be released only in accordance with those procedures and by employees authorised to deal with requests for information. In all other circumstances, information is to be used by employees only for official purposes and treated as confidential to the department.

Employees authorised by their department to respond to requests made under the Official Information Act should exercise proper care and discretion in the application of departmental procedures. In cases of doubt, employees should seek the guidance of their

superior. Should the release of politically sensitive material be required, such employees should ensure (through their chief executive) that the Minister is kept fully informed.

It is unacceptable for public servants to make unauthorised use or disclosure of information to which they have had official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of information may lead to disciplinary action, including dismissal.

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

## 2. SECOND PRINCIPLE

*Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.*

The second principle of the Code is concerned with the general obligations of employees to give satisfactory service, to respect the rights of the public and departmental colleagues, and to refrain from conduct that might lead to conflicts of interest or integrity.

## Performance of Duties

*Employees should carry out their duties in an efficient and competent manner, and avoid behaviour which might impair their effectiveness.*

There is an accepted common-law obligation on all employees to perform satisfactorily the duties for which they are paid. Public servants are therefore expected to give full effect to departmental policies in their work.

This obligation includes the following duties:

- to obey the law;
- to obey all lawful and reasonable employer instructions and to work as directed;
- to ensure competence and efficiency in the performance of assigned duties;
- to refrain from conduct (such as the use of intoxicants) which might impair work performance;
- to consult the employer before undertaking secondary employment, and not to undertake secondary employment which, in the opinion of the employer, might conflict with official duties;
- to show reasonable care, and neither use, nor allow the use of, departmental property, resources, or funds for anything other than authorised purposes;

- to incur no liability on the part of the employer without proper authorisation;
- to be absent from the workplace only with proper authorisation.

## Respect for the Rights of Others

*In performing their duties, employees should respect the rights of their colleagues and the public.*

As well as being expected to ensure satisfactory individual performance, employees also have a duty to contribute to the smooth functioning of the workplace by treating their colleagues and the public with courtesy and respect. In meeting this obligation, employees are expected:

- to avoid behaviour which might endanger or cause distress to other employees, or otherwise contribute to disruption of the workplace;
- to refrain from allowing workplace relationships to adversely affect the performance of official duties;
- to respect the privacy of individuals when dealing with personal information;
- not to discriminate against, or harass, departmental clients or colleagues because of their sex, marital status, ethnicity, disability or religious or ethical beliefs\*;

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\* Human Rights Act 1993  
State Sector Act 1988

- to respect the cultural background of colleagues and clients in all official dealings;
- to have due regard for the safety of others in the use of departmental property and resources.

### Avoiding Conflicts of Interest and Maintaining Integrity

*Employees should perform their duties honestly and impartially, and avoid situations which might compromise their integrity or otherwise lead to conflicts of interest.*

The impartiality and integrity of public servants is central to the maintenance of public and governmental confidence in the Public Service.

Public servants must therefore observe the principles of fairness and impartiality in all official dealings. No individual or organisation with which an employee is involved may therefore be given preferential treatment (whether by access to goods and services or access to 'inside information') over any other individual or organisation.

In addition, public servants should avoid any financial or other interest or undertaking that could directly or indirectly compromise the performance of their duties, or the standing of their department in its relationships with the public, clients, or Ministers. This would include any situation where actions taken



in an official capacity could be seen to influence or be influenced by an individual's private interests (e.g. company directorships, shareholdings, offers of outside employment).

Where any actual or potential conflict of interest arises with the full, effective, and impartial discharge of their official duties, employees should inform their chief executive (via their superior). The chief executive will then determine the nature and degree of the conflict as it relates to their official duties, and decide upon the best course of action to resolve it.

Many situations of conflict may be resolved simply by transferring a duty from the employee concerned to another employee not affected by the particular circumstances. Alternatively, the employee might be required to restrict or abandon the interest or activity giving rise to the conflict. However, where these options are not practical, or do not enable the matter to be resolved on a basis which the employee concerned is able to accept, then ultimately, the option of resignation from the department may need to be considered.

A potential area of conflict exists for public servants who may have to deal directly with Members of Parliament who have approached the department in a private capacity. It is important for both the Member of Parliament and the public servant that any such dealings be addressed, and be seen to be addressed, on the basis of strict impartiality.

If a public servant is in any doubt about the manner in which to respond to an enquiry from a Member of Parliament, that matter should be referred immediately to the chief executive. If there is any doubt about the propriety of a request, the matter should be referred, through the chief executive, to the Minister.

### Offers of Gifts or Gratuities

Public servants may not abuse the advantages of their official position for private purposes, or solicit or accept gifts, rewards, or benefits which might compromise, or be seen to compromise, their integrity.

The line between token gifts of appreciation, and those which might compromise the recipient is often not easily defined. However, as a general rule, a line may be drawn in situations where a gift (whatever its nature or value) could be seen by others as either an inducement or a reward which might place the employee under an obligation to a third party.

Where such offers are made, they should be reported by the employee to his or her superior or chief executive, who will determine the appropriate response, or final disposal of any gift already received.

### 3. THIRD PRINCIPLE

*Employees should not bring their employer into disrepute through their private activities.*

The third principle of the Code is concerned with the obligation of public servants not to compromise their employer through their personal behaviour.

## Personal Behaviour

*Employees should avoid any activities, whether connected with their official duties or otherwise, which might bring their department into disrepute, or jeopardise its relationships with Ministers, clients, or the general public.*

As a general principle, personal behaviour that does not interfere with the performance of official duties or reflect on the integrity or standing of the department, is no concern of an employer.

However, an employer has a legitimate interest in the private activities of an employee where they reflect to the discredit of the department in its relationships with Government or the public, and/or possibly call the employee's fitness for continued employment into question.

Whether such activities constitute misconduct will depend on the circumstances in each case, and may vary from department to department, or according to the position held by an employee. For example, some minor offences against the law may be of no concern to the employer where they do not involve breaches of trust, or otherwise impair the ability of employees to fulfil their duties. However, other cases may be of greater concern, particularly where some degree of publicity identifies the actions of an individual with their employment.

In making judgements of this kind, regard should be had to the following factors:

- the nature and circumstances of the activity;
- the position, duties, and responsibilities of the employee;
- the consequences of the activity on the ability of the employee to fulfil his or her duties and responsibilities;
- the effects of the activity or its consequences on departmental relationships with clients, Ministers, or the general public.

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