



Legal Induction Booklet for In-house Government Lawyers

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Induction Booklet for Government Lawyers
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Legal Induction Information for In-house Government Lawyers

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1 Introduction

The Legal Induction Booklet is a guide to assist in-house government lawyers, who are new to working in government, to operate effectively, including those panel law firm staff who are on secondment to a government agency.

All lawyers should familiarise themselves with the topics covered by this booklet, and are encouraged to provide any suggestions on ways to improve this document to the Legal Services Coordination, Department of Communities and Justice by email to: NSWLSC@justice.nsw.gov.au.

2 Overview of the NSW Government Sector

2.1 Overview

The descriptor of the 'New South Wales Government' and the 'New South Wales government sector' do not have a universal legal meaning. The terms are generally used to refer to the executive arm of government (as opposed to the judiciary or the legislature). The following persons and institutions are commonly regarded as falling within these descriptors:

- The Queen
- The Governor
- The Executive Council
- Ministers of the Crown and Cabinet
- officers in the service of the Crown

In addition, New South Wales legislation establishes a number of statutory bodies and offices with various levels of independence, which are often considered part of the broader 'government sector'.

The role of the Executive is to administer laws, develop and implement new policy proposals, and bring forward proposals for new laws. At all times, the Executive has a responsibility to act in the public interest and according to law.

A comprehensive discussion of the scope and characteristics of the Executive arm of government can be found in Anne Twomey's *The Constitution of New South Wales* (Federation Press, 2004). The following summary draws substantially on that work.

2.2 The Queen, Governor, Executive Council, Ministers, and Cabinet

With reference to the *Constitution of New South Wales* (at 583-584), the role of these parts of the Executive can be summarised as follows:

- The Queen is now primarily confined to formally appointing and removing the Governor, on the advice of the Premier, but may also exercise some executive powers while present in the State.
- The Governor has both ceremonial and constitutional roles and functions. The Governor is the Queen's representative in the State and, as the repository of executive power, exercises certain statutory and non-statutory (prerogative) functions.

- The Governor's statutory functions must be exercised on the advice of the Executive Council, except where statute otherwise provides. The Governor's non-statutory functions must be exercised on the advice of the Executive Council, except in relation to 'reserve powers' (concerning the appointment or dismissal of the Premier or dissolution of Parliament) which may only be used in exceptional circumstances and in accordance with constitutional convention.
- The Executive Council is the formal body that advises the Governor on the exercise of his or her statutory functions. All Ministers are usually appointed as Executive Councillors. The Executive Council meets weekly and generally comprises two Ministers (selected via a roster) and the Governor. Further information about the operation of the Executive Council is available at: <https://www.dpc.nsw.gov.au/tools-and-resources/cabinet-practice-manual/executive-council/>
- Cabinet comprises the Premier and all other Ministers. Cabinet is not established by legislation. It is based on convention. Cabinet's decisions are implemented and given formal legal effect by the Executive Council, Ministers, and others in the government sector. Convention and practice require certain kinds of proposed government action to be escalated for consideration and approval by Cabinet or one of its committees (for example, the Expenditure Review Committee). Further information about the operation of Cabinet is available at: <https://www.dpc.nsw.gov.au/tools-and-resources/cabinet-practice-manual/>
- Individual Ministers have responsibility for administering their respective portfolios and are allocated Acts and are also conferred with powers under specific legislation.

2.3 The Public Service and other services of the Crown

The Public Service of New South Wales is regulated by the *Government Sector Employment Act 2013* ('the *GSE Act*') and consists of persons employed under that Act by the Government of New South Wales in the service of the Crown. The primary role of the Public Service is to enable Ministers, statutory bodies and statutory officers to exercise their functions (see section 21(2)).

The Public Service is organised into the Departments and other Public Service agencies specified in Schedule 1 to the *GSE Act*. Departments are headed by Secretaries, while other Public Service agencies are headed by the persons specified in Schedule 1. Administrative Arrangements Orders specify the Ministers to whom Public Service agencies are responsible.

Departments and other Public Service agencies do not have a legal personality separate from that the Crown in right of the State of New South Wales. Unlike incorporated bodies, these agencies cannot do particular things in their own right – for example, enter into contracts. Individual public servants may nonetheless have authority to do particular things on behalf of the Crown (such as entering into contracts having regard to delegations) or may be conferred with or delegated functions under legislation.

Persons may also be employed in the service of the Crown in other 'services' created by legislation. Examples include:

- the Teaching Service
- the NSW Police Force
- the NSW Health Service; and
- the Transport for New South Wales.

The enabling legislation for these services provides for their role and administration. In addition, these services of the Crown (along with the Public Service) form part of the broader 'government sector' for the purposes of the *GSE Act* (discussed at 4.2 below).

2.4 Statutory offices and corporations

Many functions associated with government are exercised by statutory officers or statutory corporations. Legislation establishing a statutory office will generally provide for the appointment, functions and relationship to government more broadly.

Statutory corporations have a legal personality separate from that of Crown in right of the State, and unlike Public Service agencies, may do certain things in their own right. However, it should be borne in mind that:

- Many statutory corporations will be expressly or impliedly conferred with the status, privileges and immunities of the Crown. This means that for some, but not necessarily all legal purposes, they are treated in the same way as the Crown itself. In New South Wales legislation, this will generally be done by expressly deeming the body to be a 'NSW Government agency' or a 'statutory body representing the Crown'.
- Subject to exceptions, a statutory body that is a 'NSW Government agency', or a person holding public office under the Government of New South Wales, cannot employ staff unless legislation specifically authorises them to do so (*Constitution Act 1902*, section 47A (2)). Persons will therefore frequently be employed in the Public Service or other services of the Crown to enable particular statutory corporations to exercise their functions.
- Legislation creating statutory corporations will frequently provide for Ministerial control and direction of the corporation's activities in some or all respects. However, some bodies enjoy a significant degree of independence from Ministerial control.

The structure and functions of a statutory corporation will be set out in the legislation creating it. As each statutory corporation is a 'unique' creation by Parliament, close attention will need to be paid to the terms of the corporation's enabling legislation in order to determine its role, functions, capacities and management arrangements. However, all statutory corporations are limited by the principle that they may only exercise functions with which they are expressly or impliedly conferred by statute (*Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117).

Statutory State-owned corporations established under the *State-owned Corporations Act 1989* (‘the *SOC Act*’) are a specific subclass of statutory corporations, which are generally created for the purposes of a State-managed commercial activity.

3 Legal Services in the NSW Government Sector

3.1 Overview of legal service provision

Advice and representation for the State and government agencies may be provided by:

- the Crown Solicitor
- the Solicitor General and of the Crown Advocate
- agency in-house legal teams; or
- the private sector.

All 'Core' legal work **must be** referred to the Crown Solicitor (see 3.2 below). The Crown Solicitor may also perform 'non-core' legal work referred by agencies. Further information concerning the role of the Crown Solicitor and the Crown Solicitor's Office can be found at <https://www.cso.nsw.gov.au/>.

The roles of the Solicitor General and Crown Advocate, and the circumstances in which they are briefed, are addressed in the Core Legal Work Guidelines (discussed at 3.2 below). In brief:

- The Solicitor General is the senior non-political Law Officer of the Crown, acting as Senior Counsel for the Attorney General and the State in the High Court of Australia and other courts. The Solicitor General advises the Attorney General and the State on civil and criminal matters including issues of constitutional law and exercises certain functions as delegated by the Attorney General.
- The Crown Advocate advises and appears for the Attorney General and the State, particularly on questions arising under the criminal law, and appears in criminal proceedings of special significance, including contempt of court proceedings. The Crown Advocate also exercises certain functions as delegated by the Attorney General.

Key arrangements for instructing private sector legal providers are addressed at 3.3 below.

3.1.1 *Parliamentary Counsel*

Parliamentary Counsel is responsible for drafting primary and subordinate legislation for the State on the instruction of Ministers and agencies. Questions concerning whether legislation or subordinate legislation can be made **must be** referred to the Parliamentary Counsel.

Guidance on the role of Parliamentary Counsel and the role of the office can be found on Parliamentary Counsel's Office website: <https://www.pco.nsw.gov.au/what-we-do.html>.

3.2 Core legal work

Government agencies can procure legal services from the private sector in respect of certain matters arising within their administration (see information below at 3.3.1) However, core legal work of government **must be** referred to the Crown Solicitor to be managed in a consistent and co-ordinated way. Premier's Memorandum 2016-04 provides that agencies must refer all core legal work to the Crown Solicitor in accordance with the Core Legal Work Guidelines.

The Guidelines apply to all Departments, Executive agencies related to Departments, Advisory Entities (including Boards and Committees), Separate agencies and Statutory Authorities/Bodies. They do not apply to State-owned corporations.

Under the Guidelines, a matter will constitute core legal work where:

- the best interests of Government as a whole require a single source of authoritative legal advice and central management; or
- it relates to the statutory or common law functions of the Attorney-General.

Annexure A to the Guidelines sets out particular types of matters that are generally regarded as meeting the criteria for being core legal work. The Crown Solicitor may also determine that particular matters satisfy the overarching criteria for core legal work, notwithstanding that they do not fall within the types of matters listed in the Annexure. In some limited circumstances, the Crown Solicitor may determine that it is appropriate for core legal work to be performed by a private legal provider.

Where the Crown Solicitor has provided advice in relation to a core legal matter, public sector agencies are expected to defer to the opinion of the Crown Solicitor in the event of any difference of opinion with the agency's in-house legal officers. By convention, the Crown Solicitor in turn defers to the legal opinions of the Solicitor-General and, ultimately, the Attorney-General.

Core legal work performed by the Crown Solicitor for general Government Sector agencies will generally be paid for from the Attorney General's Legal Fund (formerly known as the 'Core Fund'), unless a different source of funding is available.

A copy of M2016-04-NSW Government Core Legal Work Guidelines can be found at: <http://arp.nsw.gov.au/m2016-04-nsw-government-core-legal-work-guidelines>.

3.3 Management of External Legal Services

3.3.1 *NSW Government Legal Services Panel*

A panel of external law firms has been established to provide legal services, as required, by Government agencies. The NSW Government Legal Services Panel was established effective 1 July 2016. The Panel satisfies the external legal requirements of eligible departments, agencies, separate agencies, statutory bodies, State-owned corporations of the NSW Government and other agencies eligible to purchase from NSW Government contracts. The term of the Panel was three years, with two options to extend of 12 months duration each. The Panel was established on a non-exclusive basis, that is, each Agency remains responsible for procuring its own legal services. The current Panel is being renewed.

The Panel arrangements do not affect the obligation of agencies to refer Core Legal Work to the Crown Solicitor, as set out at 3.2.

An Agency's procurement of legal services outside the Panel arrangements will usually be on an exceptional basis. Agencies have discretion to retain legal services outside the Panel arrangement, including from the Crown Solicitor – such arrangements must be reported for capture in annual reporting documentation.

All engagement of external law firms must be made by in-house government lawyers to comply with delegations, and to ensure external legal services are relevant, effective and deliver appropriate value for money.

More information including the guidelines and forms relating to the NSW Government Legal Services Panel can be found on the ProcurePoint website located at: <https://www.procurepoint.nsw.gov.au>

Further information regarding the panel firms' capability statements, value adds and rates matrix are hosted on a separate secure platform. Ansarada is a virtual data room that can be located at: <https://dataroom.ansarada.com/NSWGOVLP>

To gain access to Ansarada, please email your request to Sarah.Newton@transport.nsw.gov.au

3.3.2 Legal Panel Value Adds

Law firms on the NSW Government Legal Services Panel provide value adds, including the forwarding of invitations to seminars and bulletins on legal developments, to the respective government agency's Contract Manager for approval and circulation across the department or agency. In-house government lawyers should decline any direct invitation that may involve contravention of the Conflicts of Interest Policy as it applies to gifts and benefits (including hospitality) and as is relevant to their agency.

3.3.3 Treasury Managed Fund

The Treasury Managed Fund (TMF) is the largest fund administered by iCare Self-Insurance. The TMF provides protection for the asset and liability exposures (except compulsory third party insurance) for most government agencies. Workers compensation, public and other liabilities, property, motor vehicle accident and other miscellaneous cover is managed for agencies as a self-insurance fund, including collecting contributions from agencies towards the cost of administering the TMF.

The TMF provides indemnity under the Statement of Cover which sets out the responsibilities of claims managers and agencies and the requirements for notification of claims to the TMF and approval for settlement of claims. Fund managers are appointed by NSW Treasury to manage claims against the Fund. TMF Claims Managers act as agents of the iCare Self-Insurance in relation to the management of claims.

iCare Self-Insurance operates a multi-provider model for claims management which features five claims management service providers, each assigned to a claims management portfolio. The TMF will, if a claim is accepted, pay all awards of damages as well as the legal costs and disbursements incurred in the proceedings, including any adverse orders for costs.

3.3.3.1 Treasury Managed Fund Legal Services Panel

The TMF Legal Services Panel handles all TMF litigation for member Agencies. The TMF Legal Services Panel has been established through a public tender process and consists of a Main Panel and a Supplementary Panel. Within these panels are lists for different areas of litigation, including:

- General Claims
- Complex Claims
- Workers Compensation
- Employment
- Protective Actions

The Main Panel is principally used with the Supplementary Panel used where:

- There is an overflow of work
- A conflict of interest arises on the Main Panel that cannot be resolved
- The Supplementary Panel contains a firm with the particular required expertise
- There is a need to develop the expertise of Supplementary Panel law firms; and
- An underperforming law firm on the Main Panel needs to be replaced.

A list of the TMF Panel Firms can be located at:

<https://riskinsite.nsw.gov.au/portal/server.pt/community/icare%20TMF/268/Contracts/1288>

<https://my.icare.nsw.gov.au/login/>

Cases are distributed equally between TMF Panel Firms using a legal panel management system called the NSW Legal Panel Gateway (LPG). The LPG is an internet-based software system for managing procurement. iCare Self-Insurance, claims managers, member agencies and panel law firms use the LPG. The LPG provides updates, reports on key performance indicators and service level agreements, allocates work and measures costs.

More information on the LPG can be located at:

https://riskinsite.nsw.gov.au/portal/server.pt/community/tmf_legal_panel/322

<https://legalpanelgateway.com.au>

3.4 Equitable briefing policy

The Equitable Briefing Policy promotes equal opportunities for women at the Bar in the provision of legal advice or Court appearance work. The NSW Government recognises the need for equity in briefing practices. Panel Law firms conducting work on behalf of a government agency are required to consider briefing female barristers and ensuring an equitable distribution of work to both male and female barristers.

The NSW Government Equitable Briefing Policy for Women Barristers (Equitable Briefing Policy) applies to all government departments and agencies and to Panel firms conducting work on behalf of a government agency. The Policy is founded on the principles of equality and is designed to promote opportunities for women at the Bar. Under this Policy, government agencies are required to make a reasonable effort to identify and genuinely consider engaging female counsel. The Policy is endorsed by the Department of Premier and Cabinet Circular C2018-06 – Briefing Senior Counsel.

Under the Policy, when government agencies engage barristers or advocates, they are to take reasonable endeavours to:

- a) Identify female counsel in the relevant practice area
- b) Genuinely consider engaging female counsel
- c) Monitor and review the engagement of female counsel; and
- d) Periodically report on the nature and rate of female counsel engaged.

The Attorney General monitors compliance with the Equitable Briefing Policy to ensure that the Government proactively plays its role in addressing the imbalance in the briefing of male and female members of the New South Wales Bar.

Transport for NSW is tasked with compiling data input from various government departments and agencies on the rates of engagement of male and female Counsel. This data is extracted from the Annual Legal Services Expenditure Data Collection.

Panel law firms and in-house Government Lawyers must have regard to the Equitable Briefing Policy when engaging barristers. Annual reports on panel law firm equitable briefing practices will be made available to the Attorney General and government agencies to ensure compliance with the Policy.

The NSW Government approved the Equitable Briefing Policy for Women Barristers which came into effect on 1 July 2018 and can be found at : <https://www.justice.nsw.gov.au/legal-services-coordination/Documents/nsw-equitable-briefing-policy.pdf>

3.5 Briefing of Senior Counsel

Agencies cannot engage Senior Counsel to provide advice or to appear on behalf of the Agency until approval to brief is obtained from the Attorney General.

C2018-06: Briefing Senior Counsel provides that Government agencies obtain the Attorney General's prior approval to engage Senior Counsel and the level of remuneration to be paid, when agencies propose to engage Senior Counsel other than via the Crown Solicitor.

A copy of the Premier's Memorandum C2018-06 Briefing Senior Counsel can be found at: <https://arp.nsw.gov.au/c2018-06-briefing-senior-counsel>

Where a private law firm acts for a government agency it is required to submit a request to the Attorney General for the approval to engage Senior Counsel. Agencies and panel law firms need to submit requests in advance of the need to brief to allow the Attorney time to consider the requests. Where a request is urgent, the reason for the urgency must be

specified. Requests must also detail the level of expertise or skill of the Senior Counsel proposed; the probable total cost of Senior Counsel's fees in the matter (where this is known and able to be estimated); the reasoning around preferences of particular counsel selected by an agency, for example experience; and the importance of the matter in respect of which the request is being made.

Agencies are expected to propose at least one female Senior Counsel in the request to the Attorney General. Where a female Senior Counsel is not nominated, reasons must be provided (eg there are no female Senior Counsel practicing in the area or available to take the brief). Agencies are expected to make reasonable endeavors to identify possible female Senior Counsel who could be engaged when nominating senior counsel for approval.

Senior Counsel may be briefed through the agency or in-house legal team directly or briefed indirectly by a panel law firm or the Crown Solicitor's Office on behalf of the Department or Agency. In all circumstances, approval from the Attorney General is required.

The Legal Services Coordination Unit at the Department of Communities and Justice has created a Factsheet and Checklist for agencies to use which can be located on the Department of Communities and Justice website at:

<https://www.justice.nsw.gov.au/legal-services-coordination/Documents/applications-approval-engage-senior-counsel-fact-sheet.pdf>

Requests from agencies for approval to engage Senior Counsel must be directed to the Department of Communities and Justice at the following email address:

Enquiries-DCJLegal@facsnsw.gov.au

3.6 Attorney General's Rates for Legal Representation

The Attorney General's rates (also referred to as AG Rates or Attorney's rates) are payable to legal representatives such as solicitors, junior and Senior Counsel, engaged by and on behalf of Government agencies and public officials and in respect of applications for ex gratia legal assistance. Where representation by private solicitors is approved, both the level and the rates of representation are detailed in the approval letter.

The Attorney's rates include all overheads, secretarial, legal and administrative assistance but not out of pocket disbursements. The rates are GST exclusive.

The Attorney's rates do not apply to matters referred to the Legal Representation Office (LRO) as the LRO apply specific rates. Where an application is approved for LRO representation by private solicitors the conditions and the rates of representation payable are those known as the LRO rates. A Fact Sheet relating to the Attorney General's rates for Legal Representation can be found at: <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/attorney-generals-rates-for-legal-representation.aspx>

The Attorney's rates are different to the Crown Rates which are set by the Crown Solicitor.

The Attorney's rates for solicitors apply to external solicitors engaged (outside any panel and LRO arrangement) to act on behalf of a government agency in such matters as outlined above, and as a guide for all other matters. The Attorney's rates for solicitors do not apply to Panel law firm solicitors engaged under the NSW Government Legal Services Panel, the Treasury Managed Fund Panel (TMF) or the Health Panel. Fees for these solicitors have been set under the relevant Panel agreements.

The current Attorney's rates (as at 1 August 2020) are as follows:

- Solicitor - \$295 per hour with a daily maximum of \$2,950 plus GST
- Junior Counsel - \$295 per hour with a daily maximum of \$2,2152.50 plus GST
- Senior Counsel - \$488 per hour with a daily maximum of \$4,880 plus GST

The daily maximum for solicitors and Senior Counsel is based on a 10-hour day. The daily maximum for junior counsel is based on a 7.5-hour day. The daily rate is a maximum rate; there is no entitlement to the maximum daily rate. Work performed over a day can be charged at the hourly rate up to but not exceeding the stated daily maximum per calendar day or 24-hour period.

Those briefing junior counsel in respect of matters to which these rates apply are expected to negotiate an appropriate fee having regard to the matter, the experience of counsel and the need to keep legal costs to government reasonable.

As provided for in Premier's Memorandum *C2018-06-Briefing Senior Counsel* where exceptional circumstances arise due to the complexity of the matter, an application can be made to the Attorney General seeking approval to brief Senior Counsel at a higher nominated rate – such approval though only occurs in exceptional circumstances.

The Attorney's rates are reviewed annually in the new financial year on or around 1 August of each year.

3.7 Model Litigant Policy and Guiding Principles

The Model Litigant Policy provides guidelines for best practice for government agencies. It applies to all Departments, Executive agencies related to Departments, Advisory Entities, Separate agencies, Statutory Authorities/Bodies, and subsidiaries of the NSW Government established under the *Corporations Act 2001* (Cth).

The Model Litigant Policy is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation. There is an expectation that government will deal honestly and fairly with its citizens and discharge its powers for the public good, noting that the courts expect the government and its agencies to act as a moral exemplar throughout the litigation process.

Government legal officers, in addition to their professional legal obligations are also held accountable through judicial criticism and the expectation of assistance in the administration of justice by the Crown. Courts can take conduct falling short of the standard of a model litigant into account when determining questions of costs.

The Model Litigant Policy seeks to provide clarity and guidance on the conduct required of a model litigant and goes beyond the requirement for lawyers to act in accordance with their ethical obligations and acting honestly or in accordance with the law and court rules.

Under the Model Litigant Policy, government agencies are required to (amongst other things):

- deal with claims promptly, and not cause unnecessary delay in the handling of claims and litigation
- pay legitimate claims without litigation
- act consistently in the handling of claims
- avoid litigation where possible
- keep costs to a minimum where it is not possible to avoid litigation
- not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- not rely on technical defences, except for in the circumstances specified in the policy
- consider the use of confidentiality clauses in relation to settlements on a case-by-case basis
- only undertake and pursue appeals where the State or agency believes (i) it has reasonable prospects of success or (ii) the appeal is otherwise justified in the public interest
- apologise where the State or an agency is aware that it has acted inappropriately; and
- provide reasonable assistance to claimants and their legal representatives in identifying the proper defendant to a claim if they are not, or are incorrectly, identified.

The Model Litigant Policy is complemented by the *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sex Abuse* ('Guiding Principles') which apply to all Government agencies dealing with civil claims involving child abuse. This includes the sexual abuse and/or serious physical abuse of a child or young person (under 18 years of age) and any other abuse that is connected to the sexual or serious physical abuse.

The aim of the Guiding Principles is to make litigation a less traumatic experience for victims and to ensure a compassionate and consistent approach across government when dealing with relevant civil claims. There are 19 Guiding Principles which include:

- considering resolving matters without a formal statement of claim
- considering any requests from victims for alternative forms of acknowledgement or redress, in addition to monetary claims
- providing early acknowledgement of claims, including information about initial steps to resolve the claim and services and supports available to claimants
- regular communication with claimants
- facilitating access to records relating to the claimant and alleged abuse (subject to privacy requirements and legal professional privilege)
- not relying on limitation periods as a defence; and
- acting consistently in the handling of claims and litigation.

A number of Guiding Principles overlap with principles stated in the Model Litigant Policy.

Neither the Model Litigant Policy nor the Guiding Principles prevent the State and agencies from acting firmly and properly to protect the interests of the State or agency, or from taking all legitimate steps in pursuing litigation.

Individual agencies are responsible for enforcing the Model Litigant Policy and Guiding Principles, and Agency heads are required to monitor and report on their agency's compliance with the Guiding Principles Policy.

Panel lawyers engaged to act on behalf of a government agency are also bound by the Model Litigant Policy when conducting civil litigation matters and are also required to comply with the Guiding Principles when dealing with child sexual abuse claims.

The NSW Government *Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse* can be found at: <http://arp.nsw.gov.au/m2016-03-model-litigant-policy-civil-litigation-and-guiding-principles-civil-claims-child-abuse>

3.8 Litigation involving Government Agencies

Premier's Memorandum M1997-26: *Litigation Involving Government Authorities* provides guidelines that apply to all Government authorities, including Government Trading Enterprises, for their conduct of both civil and criminal proceedings.

The guidelines specifically address disputes between government authorities. They are informed by the overarching principle that litigation between Government authorities is undesirable and should be avoided whenever possible. The guideline sets out principles for managing the process where disputes occur.

The guidelines acknowledge that government authorities have a responsibility to comply with the law, and that they may be subject to the same penal sanctions as the rest of the community. Where it is necessary for criminal proceedings to be undertaken by one authority against another, the guidelines set out steps which authorities should take to simplify and manage the issues in dispute.

In the case of civil disputes between authorities, the guidelines set out steps which Government authorities should take to resolve the dispute without litigation, based on discussion at the senior officer and Ministerial level (if necessary) and alternative dispute resolution. If a dispute cannot be resolved informally, litigation **may not be** commenced without the prior approval of the Premier.

The guidelines also stipulate:

- Procedures to be followed when making Public Interest Immunity ('PII') claims in response to requests for the production of documents, and when a process of discovery or subpoena relates to Cabinet documents.
- That no Government authority may claim that any New South Wales legislation (including subordinate legislation) is invalid, without first consulting the Attorney-General.
- That no Government authority should take a 'technical defence' (ie, defence not available to normal litigant) without first consulting the Attorney General.

A copy of M2021-07 Appointments to NSW Government Boards and committees and the guidelines can be found at: <https://arp.nsw.gov.au/m2021-07-appointments-to-nsw-government-boards-and-committees/>

3.9 Prosecution Policy

Should a matter involve decisions about prosecution, guidance may be sought by applying, so far as is appropriate, the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*.

A link to the Prosecution Guidelines can be found at: <http://www.odpp.nsw.gov.au/prosecution-guidelines>

3.10 Alternative Dispute Resolution Directorate

The Alternative Dispute Resolution (ADR) Directorate co-ordinates, manages and drives ADR government policy, strategy and growth in NSW. Its role is to provide advice on ADR policy and strategy to eligible agencies and oversee the implementations of the reform recommendations.

A link to the Department of Communities and Justice website outlining the role of the ADR Directorate can be located at:

http://www.courts.justice.nsw.gov.au/Pages/cats/catscorporate_adrdirectorate/catscorporat_e_adrdirectorate.aspx

3.11 Ex Gratia Payments for Legal Assistance

Premier's Memorandum M2019-01: *Guidelines for the Provision of ex Gratia Legal Assistance for Ministers, Public Officials and Crown Employees* prescribes rules for Government agencies to follow when applying for approval of ex gratia legal assistance to its employees.

A copy of M2019-01 and the guidelines can be found at:

<http://arp.nsw.gov.au/m2019-01-guidelines-provision-ex-gratia-legal-assistance-ministers-public-officials-and-crown-0>

It is important to note that private law firms are not engaged to represent employees of NSW government agency under M2019-01 unless an application has been submitted in accordance with the guidelines and forwarded for processing to the Department of Communities and Justice and a decision to approve the request has been obtained, otherwise coverage of legal fees may be denied.

4 Key Legislation and Principles for Government Lawyers and the Government Sector

This Part addresses legislation and legal principles which:

- are fundamental to the way in which government as a whole is organised and operates, and/or
- create basic rules for the operation of all primary and subordinate legislation administered by government, and the way in which litigation involving government is conducted.

4.1 Constitution Act

The *Constitution Act 1902* forms part of a broader body of constitutional law – including the common law, constitutional convention, and the Commonwealth Constitution – governing the institutions of government in the State.

The *Constitution Act* contains a number of provisions concerning the constitution and procedures of the legislative, Executive and judicial arms of government. However – and particularly in the case of the Executive and the Judiciary – much of the law concerning how these institutions operate is found outside of the *Constitution Act*, in other Acts of Parliament and in the broader body of constitutional law.

Provisions of the *Constitution Act* which may be of particular relevance to the routine work of government lawyers include:

- Division 4 of Part 4, which provides for the exercise of Ministerial powers when a Minister is absent or unavailable; and
- Part 5, which stipulates that most monies held for and on behalf of the State form part of the Consolidated Fund. Authority to expend money from the Consolidated Fund is provided under appropriations, and that authority is in turn devolved to agencies and their officers through financial delegations.

Part 7 of the Act – which addresses administrative arrangements – is discussed at 4.1.1 below.

The current version of the *Constitution Act 1902* can be found on the NSW Legislation website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1902-032>

4.1.1 **Administrative Arrangements**

Administrative Arrangements Orders may be made by the Governor under Part 7 of the *Constitution Act* to:

- allocate the administration of Acts and other portfolio responsibilities to Ministers (section 50B)
- specify the Ministers to whom Public Service agencies are responsible (section 50C); and
- establish, abolish or change the name of any Public Service agency; or transfer a part (or all parts) of a Public Service agency to another agency (section 50D).

Administrative Arrangements Orders may also require reference in Acts and other instruments to Ministers, Public Service agencies or public service employees by a specified description to be read as being references to Ministers/agencies employees by another description. For example, a reference in an Act to the Secretary of Department A in an Act will need to be read as a reference to the Secretary of Department B if an Administrative Changes Order so provides.

Where a part or parts of a Public Service agency are transferred by an order, transferred employees become employees of the agency to which the transfer is made (section 50D(2)(a)). Administrative Arrangements Orders may also provide for other matters consequential on or incidental to an administrative change.

The consolidated Administrative Changes Orders and Allocation of the Administration of Acts can be found on the NSW Legislation website at:

- <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2001-0338>
(Allocation of the Administration of Acts)
- <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-1977-0005>
(Administrative Changes Orders)

4.2 **Public Sector Employment Legislation**

The *Government Sector Employment Act 2013* ('GSE Act') creates the legislative framework for government employment in New South Wales. The *GSE Act* commenced on 24 February 2014, replacing the *Public Sector Employment and Management Act 2002*.

The *GSE Act* contains provisions applying to:

- the Public Service; and
- the broader 'government sector' (defined in section 3), which comprises the Public Service along with other services such as the Transport Service and the Health Service.

Section 5 of the Act provides that particular entities *do not* form part of the government sector for the purposes of the Act.

Matters addressed by the *GSE Act* include:

- The role of the Public Service Commissioner (Part 3)
- The structure of the Public Service, and employment arrangements for Public Service employees (Part 4; see also, the discussion of the Public Service at 2.3 above).
- Workforce diversity, cross-agency employment, disciplinary matters and appointments in the ‘government sector’ more broadly (Part 5)

The *GSE Act* is complemented by several sets of rules and regulations made under the Act, including the *Government Sector Employment (General) Rules 2014*. These rules and regulations provide additional detail on employment arrangements and related matters.

The current version of the *Government Sector Employment Act 2013* can be found on the NSW Legislation website at:

<https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-040>. Information and resources regarding the *GSE Act* are available from the Public Services Commission website: <http://www.psc.nsw.gov.au/employmentportal/resources/fact-sheets>

It is important to note that employment arrangements for parts of the ‘government sector’ other than the Public Service are also addressed in other legislation, including:

- Transport Administration Act 1988 (Transport Service)
- Health Service Act 1997 (NSW Health Service)
- Teaching Service Act 1980 (Teaching Service)
- *Police Act 1990* (NSW Police Force)

4.3 Public finance legislation

The *Government Sector Finance Act 2018* (‘the *GSF Act*’) governs financial arrangements in the New South Wales government sector. It addresses various aspects of public finance, including:

- The circumstances in which government agencies, their officers and employees may lawfully expend public money

In particular, section 5.5 of the Act makes it clear that ‘government officers’ – which includes all Public Service employees – may only expend money for the State or their agency when authorised to do so by an appropriate financial delegation or other lawful authority.

- The giving of Treasurer’s directions to agencies and individuals concerning government financial practices and procedures (Division 3.1)

Treasurer's directions confer specific obligations on agencies and individuals, and provide an additional level of detail beyond the terms of the *GSF Act* and its subordinate regulations, Treasurer's directions in effect at the date of writing include:

TD19-01 – Financial Services (addressing agency use of banking services); and

TD20-01 – Gifts of government property (addressing the circumstances in which gifts of government property may be made, and procedures to be followed)

- The making of gifts and 'act of grace' payments (Division 5.2)
- Agency banking arrangements (Division 6.3)
- 'Financial arrangements', including investment and borrowing by government agencies (Division 6.4)
- Delegations of authority to expend from different sources of money available to government – commonly referred to as 'financial delegations' (Division 9.2)

Key concepts under the Act which determine to whom it applies and the manner in which it operates include:

- 'GSF agency'; and
- 'Government officer'

These are defined in Division 2.2 of the Act, and (generally-speaking) capture the vast majority of entities and individuals who are commonly regarded as part of the 'government sector'.

The *GSF Act* commenced on 1 October 2018, but some provisions of the Act – principally, Part 7, which deals with annual and financial reporting by agencies – have not commenced as at February 2021. The following Acts continue to operate pending repeal by the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018* ('the *GSF Repeal and Amendment Act*') and the commencement of outstanding provisions of the *GSF Act*:

- Public Finance and Audit Act 1983 ('PFA Act')

The *PFA Act* provides for the office of the Auditor-General, audit of government agencies, and the preparation of agency financial reports. Treasurer's directions may also be given under section 9 of the Act.

The *PFA Act* will be renamed the *Government Sector Audit Act* and further modified when provisions of the *GSF Repeal and Amendment Act* take effect.

- Annual Reports (Departments) Act 1985 & Annual Reports (Statutory Bodies) Act 1984

These Acts set out the annual reporting obligations for defined 'Departments' and 'statutory bodies' and will be repealed once Part 7 of the *GSF Act* commences.

Some authorisations given under the former *Public Authorities (Financial Arrangements) Act 1987* concerning the entry into 'financial arrangements' by agencies have also been preserved and given effect by savings and transitional provisions of the *GSF Act*.

The current version of the *Government Sector Finance Act 2018* can be found on the NSW legislation website at <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2018-055>. Treasurer's directions can be found on the NSW legislation website, in the list of "As Made" statutory instruments beginning with "T": <https://www.legislation.nsw.gov.au/browse/asmade#/sl/title/t>.

The operation of public finance legislation is complemented by the periodic issue of Treasury Circulars and Treasury Policy Papers. Further information on this legislation is provided by NSW Treasury at : <https://www.treasury.nsw.gov.au/budget-financial-management/reform/government-sector-finance-act-2018>

4.4 Other “foundational” legislation

4.4.1 *Interpretation Act*

The *Interpretation Act 1987* sets out principles relevant to the interpretation of New South Wales legislation. It avoids the need to repeat various 'common' principles in each new enactment.

Regard should always be had to the Act when considering the meaning or operation of Acts, subordinate legislation, and instruments prepared under legislation. Important provisions include:

- Part 2 ('Words and Expressions')

This Part addresses the meaning of expressions and grammatical forms commonly used in New South Wales legislation, including: gender and number (section 8); 'may' and 'shall' (section 9); the expressions 'statutory body representing the Crown' and 'NSW government agency' (section 13A); references to Ministers (section 15); and commonly used words and expressions (section 21).

- Part 4 ('Amendments and repeals')

The Part Addresses the effect of amendment and repeal of Acts and statutory rules, including its effect on things done prior to a relevant amendment or repeal (see section 30).

- Part 5 ('Construction of Acts and Instruments')

This Part sets out specific principles relevant to the construction of Acts and instruments, including the use of extrinsic material (such as second reading speeches and explanatory memoranda – section 34). The principles set out in Part 5 complement – and in many respects overlap with – common law principles of statutory construction.

- Part 6 ('Statutory rules and certain other instruments' - discussed at 4.4.2 below)
- Part 7 ('Exercise of statutory functions')

This Part Sets out principles concerning how and by whom statutory functions may be exercised in certain situations. It includes principles relevant to acting officeholders (section 46) and delegations (section 49)

- Part 8 ('Statutory bodies')

The Part sets out specific principles concerning the operation of bodies created under statute, including functions which statutory corporations are taken to possess (section 50).

The principles set out in the *Interpretation Act* apply to all Acts and instruments:

- regardless of whether they were enacted or made before or after the commencement of the *Interpretation Act* (section 5(1)); but
- subject to any contrary intention that appears in the *Interpretation Act*, or a particular Act or instrument (section 5(2)).

The current version of the *Interpretation Act 1987* can be found on the NSW Legislation website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2018-055>.

4.4.2 Subordinate Legislation Act

Key matters addressed by the *Subordinate Legislation Act 1989* are:

- procedures to be followed when making statutory rules (eg regulations), including the preparation of regulatory impact statements and publication of proposed rules for public comment (Part 2); and
- the staged repeal of statutory rules after 5 years, subject to exceptions (Part 3).

The provisions operate in conjunction with Part 6 of the *Interpretation Act*, which provides for matters including:

- the tabling of notice of a statutory rule before each House of Parliament within 14 sitting days of the publication of the rule (section 40); and
- the ability of either House to disallow statutory rules either prior to their being tabled, or within a particular period after the rule is tabled before the House (section 41).

Part 6 of the *Interpretation Act* also provides for the consequences of a statutory rule being disallowed by Parliament.

The current version of the *Interpretation Act 1987* can be found on the NSW Legislation website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1987-015>.

4.4.3 **Crown Proceedings Act 1988**

The *Crown Proceedings Act 1988* provides for the way in which certain kinds of 'civil proceedings' may be brought by or against 'the Crown', which is defined in section 3 of the Act:

'**Crown** means the Crown in right of New South Wales, and includes:

- (a) the Government of New South Wales, and
- (b) a Minister of the Crown in right of New South Wales, and
- (c) a statutory corporation, or other body, representing the Crown in right of New South Wales.'

Relevantly:

- The Crown may bring civil proceedings under the title 'State of New South Wales' against any person in a competent court (section 4).
- Claims against the Crown (other than a statutory corporation representing the Crown) by way of civil proceedings may be brought against it under the title 'State of New South Wales' in a competent court (section 5(1)). A document required to be served on the Crown in such proceedings shall be served (subject to any other Act or law) on the Crown Solicitor (section 6(1)).

4.5 Executive Power

Many actions taken by government derive their authority from legislation conferring a power or function on a particular person or body. Those functions are frequently devolved (primarily through delegation) to other persons in the government sector.

However, some powers and functions exercised by government are sourced from the general law. In different contexts and at different times, these have been referred to as 'Executive' or 'prerogative' powers, and the term 'prerogative' is sometimes used to identify a subset of those powers.

It is sometimes helpful to divide Executive power into two categories, namely:¹

- Powers which can be exercised unilaterally, to affect the rights of others. An example is the prerogative of mercy, which involves the grant of a full or conditional pardon by the Governor to a person convicted of a criminal offence under a law of the State; or
- Legal capacities enjoyed by the Crown which are akin to those enjoyed by a natural person. An example is the capacity to enter into contracts with other parties in respect of government activities. This legal capacity is generally relied upon by Public Service agencies when entering into contracts, as such agencies are groups of Crown employees and the agency lacks a legal personality separate from the Crown.

Depending on the power or function in question, the exercise of Executive power may reside with the Governor (acting on advice) or may be devolved within government. These powers and functions may also be modified or extinguished by statute.

Questions concerning the existence and scope of the Crown's executive powers – including the extent to which they may be exercised by particular persons within government – are core legal work under the Core Legal Work Guidelines and **must be** referred to the Crown Solicitor when they arise.

¹ See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 at [132] per Gageler J; (2016) 257 CLR 42; quoting from the judgment of Brennan J in *Davis v The Commonwealth* (1988) 166 CLR 79 at 108.

5 Legal and Administrative Compliance and Oversight

This Part addresses a number of legal and administrative matters which are commonly encountered in the course of agency operations, as well as key accountability mechanisms.

5.1 Government Policies, Guidelines and Procedures

The Government regularly issues guidance and directions to regulate and support government sector activity. These include:

- policy documents, such as Premier's Memoranda and Departmental Circulars;
- rules and directions made under legislation or with a specific legal status, such as Treasurer's directions.

Many activities at the agency level also rely on formal legal, financial, procurement or human resource delegations.

5.1.1 *Premier's Memoranda*

The Department of Premier and Cabinet publishes Premier's Memoranda and Department Circulars. These instruments are expressions of government policy and may be directed to some or all agencies commonly considered to be part of the government sector. By convention, agencies are expected to apply and implement the requirements set out in a relevant Premier's Memorandum or Department Circular, unless legally prevented from doing so.

The Department of Premier and Cabinet Circulars may also contain whole-of-Government policy announcements, relating mainly to the management and administration of the NSW Public Sector.

The complete listings of memoranda published by the Department of Premier and Cabinet can be viewed at: <http://www.dpc.nsw.gov.au/announcements>

5.1.2 *Other government administrative requirements and policies*

Some legislation allows directions or rules to be made which have a 'whole of government' application. For example, the Treasurer may make directions under section 3.1 of the *Government Sector Finance Act 2018* in relation to a number of matters concerned with (in general terms) the financial administration of public sector agencies.

The legislation in question will general specify the nature and extent of the obligation imposed on agencies and officers to follow such directions.

Ministers and agencies will also issue policies, directives and guidelines from time to time addressing particular practices in a cluster or agency. Most – although not necessarily all –

such documents are an expression of policy as opposed to strict legal rules, but there is nonetheless an expectation that these will be applied in their terms by those to whom they are directed, to the extent permitted by law.

5.1.3 Delegations

The basic legal questions that should be asked by public servants and other government officers when action is to be taken or a decision is to be made are:

- Is a particular legal authority required for taking the action or making the decision?
- Who has the legal authority to take the action or make the decision?
- What legal requirements must be complied with when taking the action or making the decision?

Every Government agency has one or more instruments of delegation governing by whom certain kinds of decision can be made. For many kinds of action or decision taken by public servants, holding a formal delegation is essential. Delegations may relate to:

- 'internal' matters, concerned with the management of the agency – for example, employment in an agency, or the expenditure of money on its behalf ('financial delegations'), or
- decisions and actions which affect members of the public more broadly.

Delegations may be made to agency staff from Ministers, agency heads, other staff in the agency hierarchy, statutory bodies, or others, depending on the structure of the agency and the function being exercised.

If you need to exercise a delegated function, you must ensure your decision is made lawfully, ethically and impartially. Decisions or actions taken must be able to withstand external scrutiny.

Delegations will frequently be subject to conditions and limitations, and delegates are generally expected to exercise their functions in accordance with applicable policies and agency objectives, to the extent permitted by law. In particular, many actions require a financial delegation to enable the expenditure of public money, and these delegations will set limits concerning the amount of expenditure that a given delegate can authorise.

You must familiarise yourself with the instruments of delegation within your agency, and ensure you act within your delegation limits and the limitations of your role as well as in accordance with applicable legal principles at all times.

5.2 Transparency and Accountability

5.2.1 *Independent Commission Against Corruption*

The principal object of the *Independent Commission Against Corruption Act 1988* ('*ICAC Act*') is to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption (ICAC).

The ICAC is an independent and accountable body whose purpose is to investigate, expose and prevent corruption in the NSW public sector and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community. In conducting its investigations, ICAC has powers enabling it to obtain documents and information, and to enter premises to gather evidence. Where it is satisfied that it is in the public interest to do so, ICAC may conduct a public inquiry into allegations of corrupt conduct.

Under section 11 of the *ICAC Act*, a principal officer of a NSW public authority has a duty to report to the ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct. A principal officer is generally the person who heads the public authority, most commonly the Secretary, Chief Executive or the Minister of a NSW Government Agency.

The *ICAC Act* contains no provision permitting delay in reporting. To delay can result in the loss of investigative opportunities to the ICAC. The duty to report overrides any duty of confidentiality. As it is a statutory duty, a principal officer is protected in making such a report from any civil or criminal liability.

All reports and complaints regarding suspected corrupt conduct are carefully assessed by the ICAC.

A copy of the *ICAC Act* can be accessed on the NSW Legislation website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1988-035>.

Information about countering corruption in the NSW public sector is available on the ICAC website located at: www.icac.nsw.gov.au. If giving advice on advertising proposals, you should ensure that you consider ICAC's ten guidelines in its publication titled 'Sponsorship in the Public Sector - A guide to developing policies and procedures for both receiving and granting sponsorship', which can be found at: <https://www.icac.nsw.gov.au/CustomSearchPage.aspx?ModuleID=734&keywords=sponsorship&multiSite=False>. You should also be aware of its publication 'Direct negotiations - guidelines for managing risks in direct negotiations'. The NSW Independent Commission Against Corruption published a revised version in August 2018 which can be located at: <https://www.icac.nsw.gov.au/media-centre/media-releases/2018-media-releases/icac-releases-guidelines-to-help-public-sector-agencies-manage-corruption-risks-in-direct-negotiations>.

5.2.2 Ombudsman

The NSW Ombudsman has a general function of overseeing the integrity of public authorities, including local government authorities and staff of political office holders.

The *Ombudsman Act 1974* sets out the Ombudsman's core investigative functions. Any person, including a public authority, may make a complaint to the Ombudsman about the conduct of a public authority. Although a complaint may include alleged conduct that is unlawful, the Ombudsman may also investigate conduct that is (among other things) unreasonable, unjust, oppressive, discriminatory, based on improper motives or mistake of law or fact, or otherwise wrong.

Following receipt of a complaint, the Ombudsman may carry out an investigation into the conduct the subject of the complaint. The Ombudsman is empowered to require public authorities to provide documents or information, usually by the issuing of a formal Notice, and has the power to enter and inspect premises used by public authorities. The Ombudsman may also hold an inquiry into conduct the subject of a complaint, before which witnesses may be called.

Following an investigation, if the Ombudsman finds that conduct is (among other things) unlawful, based on improper motives, unjust, discriminatory, or otherwise wrong, he or she is required to make a report to the responsible Minister and others in relation to the conduct, including any recommendations regarding action to be taken in response to the conduct.

The Ombudsman may recommend (among other things) that a public authority mitigate or change the conduct in question, that laws or practices be changed, or that compensation be paid. While the recommendations of the Ombudsman need not be followed, if the Ombudsman is not satisfied with the response to a report, he or she may make a report to Parliament.

Information about the NSW Ombudsman can be found on the Ombudsman's Office's website located at: <http://www.ombo.nsw.gov.au/>.

5.2.3 Auditor-General

The Auditor-General of New South Wales is the independent auditor of the New South Wales public sector. The Auditor-General reports directly to Parliament on the New South Wales government's financial statements and use of public money. The Auditor-General is assisted in the exercise the functions of the role by the Audit Office.

The Auditor-General conducts financial and performance audits, principally under the *Public Finance and Audit Act 1983* ('the *PFA Act*') and the *Corporations Act 2001*, and also examines allegations of serious and substantial waste of public money under the *PFA Act*, and *Public Interest Disclosures Act 1994*. Some functions under the *PFA Act* will "migrate" to the *GSF Act* upon the commencement of Part 7 of that Act.

The Audit Office produces several publications. The Auditor-General's Report to Parliament is produced as Financial Audit Reports, Performance Audit Reports and Special Reviews. The majority of Financial Audit Reports are published between October and December each year as they report on the June year-end financial statements of government agencies. Performance Audit Reports are published regularly throughout the year and report on different performance aspects of government agencies.

The office of the Auditor-General and the Audit Office are established under the *PFA Act*, which can be found on the NSW Legislation website at <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1983-152>. As indicated at 4.3 above, the *PFA Act* is due to be amended and renamed the *Government Sector Audit Act*. These amendments will also mean that some responsibilities of agencies with respect to reporting will be located in Part 7 of the *Government Sector Finance Act 2018*.

To subscribe to Auditor-General's Reports and Better Practice Guides or Professional Updates submit your request via the link at:

<http://www.audit.nsw.gov.au/publications/subscriptions/default.aspx>

5.2.4 Royal Commissions and Special Commissions of Inquiry

Royal Commissions and Special Commissions of Inquiry are periodically established and Commissioners appointed to consider issues of public importance (including actions of government).

Royal Commissions are established under the Executive power of the State, by the Governor issuing a Royal Commission under letters patent to a person to make an inquiry. The letters patent will set out the terms of reference for the Royal Commission – that is, the matters which the Commission is to investigate and report on.

The provisions of the *Royal Commissions Act 1923* confer specified powers on the appointed Royal Commissioner or Commissioners. These include powers to require witnesses to attend and give evidence under oath or affirmation, and to require the production of documents. The precise powers enjoyed by a Commissioner depend on whether they are a judge or former judge, on the one hand, or another class of appointee, on the other. Commissioners may take evidence in public or in private.

Special Commissions of Inquiry are initiated by the Governor issuing letters patent under the *Special Commissions of Inquiry Act 1983*, commissioning a person to inquire into and report to the Governor on a particular matter or matters. As with the *Royal Commissions Act*, the *Special Commissions of Inquiry Act* confers certain powers on Commissioners with respect to the taking of evidence and the conduct of inquiries more generally.

Information concerning current and past Special Commissions of Inquiry can be found at <https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/>.

5.2.5 Public Interest disclosures

The *Public Interest Disclosures Act 1994* ('*PID Act*') sets out a framework for protecting public officials who disclose wrongdoing in accordance with the Act.

Key matters addressed by the *PID Act* include:

- who may make a protected disclosure
- the conduct in respect of which a disclosure may be made

- the entities to which particular kinds of disclosure may be made – these include (depending on the subject matter) the Independent Commission Against Corruption, the Ombudsman, and the Auditor-General (amongst others); and
- the specific protections available to public officials who make disclosures under the Act.

Close attention should be paid to the particular circumstances in which the *PID Act* protects disclosure, and the exceptions that apply. However, conduct in respect of which a disclosure may be made under the Act includes:

- corrupt conduct
- maladministration; and
- serious and substantial waste of public money.

Public authorities are required to provide six monthly reports to the Ombudsman and to prepare annual reports under the Act.

The NSW Ombudsman is responsible for overseeing the implementation of the public interest disclosures system by the NSW Public Sector and promoting its objectives. Further information about public interest disclosures can be found on the NSW Ombudsman website at: <https://www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures>.

A copy of the *PID Act* can be found on the NSW Legislation website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1994-092>

5.2.6 Lobbying

The *Lobbying of Government Officials Act 2011* ('*LOGO Act*') applies a set of ethical standards to all third-party lobbyists and other individuals and organisations that lobby government; and enables the Electoral Commission to investigate alleged breaches and impose sanctions.

The *LOGO Act* requires third-party lobbyists to register on the Lobbyists Register, and for the Lobbyists Code of Conduct (which is set out in the *Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014*). Breaches of the code and other restrictions imposed by the Act may result in lobbyists being removed from the Lobbyists Register and/or being placed on a Lobbyists Watch List. Criminal sanctions also apply for some breaches.

A copy of the *LOGO Act* can be accessed on the NSW Legislation Website at: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2011-005>. The Watch List and the Lobbyists Register are published on the Electoral Commission's website (<https://www.elections.nsw.gov.au/>).

Premier's Memorandum M2014-13: *NSW Lobbyists Code of Conduct* explains the arrangements for the regulation of lobbying in New South Wales by the Electoral Commissioner and the requirements for all NSW Government officials:

- not to have lobbying contact with unregistered third-party lobbyists; and
- to observe special precautions when meeting with any lobbyist who has been placed on the Lobbyists Watch List.

The Memorandum also outlines restrictions on appointing lobbyists to Government Boards and Committees in certain situations. A copy of M2014-13 can be found at:

<http://arp.nsw.gov.au/m2014-13-nsw-lobbyists-code-conduct>

5.2.7 Ministerial Diaries

Premier's Memorandum M2014-07 sets out the obligations of Ministers to publish quarterly summaries detailing scheduled meetings held with stakeholders, external organisations and individuals. A copy of M2014-07 can be found at: <http://arp.nsw.gov.au/m2014-07-publication-ministerial-diaries>

The quarterly summaries are published on the DPC website at

http://www.dpc.nsw.gov.au/about/publications/ministers_diary_disclosures

5.2.8 Appointments to Government Boards

NSW Government boards and committees play an important role in providing leadership, direction and accountability across many areas of NSW Government activity. Boards and committees represent a vital link between community needs and government delivery of services.

These boards and committees are diverse in terms of functions, form, size and the way in which they operate. They encompass boards of government trading enterprises, marketing boards, regulatory boards, professional registration boards, Area Health Service boards, trust boards and advisory councils and committees.

Information regarding NSW Government boards and committees can be found at: http://www.dpc.nsw.gov.au/programs_and_services/boards_and_committees

A link to Premier's Memorandum *M2015-04 Appointments to NSW Government boards and committees* can be located at: <http://arp.nsw.gov.au/m2015-04-appointments-nsw-government-boards-and-committees>

5.3 Management of Government Information

5.3.1 *Record Keeping*

The *State Records Act 1998* ('the *SR Act*') makes provision for the creation, management and protection of the records of 'public offices' of New South Wales and provides for public access to those records.

The Act applies to a broad range of 'State records' held by public offices, which are defined in section 3 of the Act as:

'any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.'

The concept of a 'public office' captures a broad range of government bodies. Specifically, the Act:

- imposes obligations on public offices, their officers and staff to protect State records
- specifies when State records can and cannot be disposed of
- allows the State Archives and Records Authority to issue standards and codes of best practice for records management
- requires the longer-term preservation of certain kinds of State record; and
- provides for public access to certain kinds of State record once 30 years have elapsed since their creation.

A copy of the *SR Act* can be accessed on the NSW Legislation website at <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1998-017>. Further information on State records management can be accessed at: <https://www.records.nsw.gov.au/archives>.

5.3.2 *Government Information (Public Access) Act 2009*

The *Government Information (Public Access) Act 2009* ('*GIPA Act*') enables individuals to apply for access to information, formally and informally, that is held by public sector agencies (referred to as 'government information').

On receipt of an access application, an agency must initially decide whether the application is valid. If it is, the agency must conduct a search for the information sought under the application. An agency is not under any obligation to release information under an access application unless the information is held by the agency. It is also not under any ongoing obligation to continue to release information that comes into the agency's possession after the time the application is made.

After locating the information sought by the application, the agency must evaluate the information and identify the public interest considerations for and against disclosure to the applicant (sections 12 and 14 of the *GIPA Act*).

While the public interest considerations in favour of disclosure are not limited by the *GIPA Act*, an agency may only have regard to those public interest considerations against disclosure that are enumerated in section 14. After identifying the public interest considerations, the agency must weigh the considerations against one another and decide, in respect of each piece of government information, whether, on balance, the information should or should not be disclosed (see section 13).

It is conclusively presumed that certain classes of information specified in Schedule 1 to the Act – for example, cabinet information – are subject to an overriding public interest against disclosure. Applications may not be made in respect of the excluded information specified in Schedule 2.

There is a right to internal review of an access application by an agency. If the applicant is dissatisfied with the internal review, access applications may also be reviewed by the Information Commissioner and/or the NSW Civil and Administrative Tribunal (Part 5). Reviewable decisions include whether access is granted, the manner in which access is granted, and whether the agency has conducted a sufficient search for the information sought.

Under the *GIPA Act*, government agencies are also committed to ensuring government information is available in the following ways:

- **Mandatory proactive release** (information which all government agencies are required to make available); and
- **Authorised proactive release** (information which the government agency chooses to make available)

A copy of the *GIPA Act* can be accessed on the NSW Legislation website here: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2009-052>.

Cabinet and Executive Council claims: The *GIPA Act* provides that the Premier is a party to any NSW Civil and Administrative Tribunal (NCAT) review of a decision by an agency that there is an overriding public interest against disclosure because information is Cabinet or Executive Council information. Agencies are required to contact the Department of Premier and Cabinet's Legal Branch (telephone: 9228 5599) as soon as they become aware that a Cabinet or Executive Council claim is, or is likely to be, contested before NCAT.

5.3.2.1 Contract disclosure

Under the *GIPA Act*, government agencies are required to disclose certain information about the agency's contracts, where the value, or anticipated value, is \$150,000 or more, including GST.

The [eTendering](#) website outlines information of contracts over \$150,000 between NSW Government agencies and private sector organisations including:

- Contract value
- Name and business address of contractor
- Commencement date of contract

- Details of the project undertaken
- Estimated amount payable to the contractor
- Description of variation or renegotiation provisions in the contract
- Method of tendering and assessment criteria
- Description of operational or maintenance services.

Additional information may be required in certain situations. There are also time sensitive requirements concerning the publication of certain contractual details. Where a contract valued over \$5 million, the agency must also publish a copy of the contract.

5.3.3 *Privacy legislation*

The *Privacy and Personal Information Protection Act 1998* ('the *PPIP Act*') applies to dealings by public sector agencies with 'personal information', which is defined as 'information or an opinion...about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.' The *Health Records and Information Protection Act 2002* ('the *HRIP Act*') applies to dealings with similar kinds of information in a health service context, referred to as 'health information' (which is a sub-category of 'personal information').

Together, the two Acts can be referred to as the 'Privacy Legislation'. If information is anonymous and it is not reasonably practicable to ascertain the identity of an individual from the information, the Privacy Legislation will not apply to it.

The Privacy Legislation establishes a number of 'Information Privacy Principles' ('IPPs') and 'Health Privacy Principles' ('HPPs'). These regulate how personal or health information may be:

- collected
- stored or retained
- accessed
- amended
- used; or
- disclosed.

For example, there is a general prohibition on the disclosure of personal or health information to persons or bodies outside the agency, and personal or health information may not be used for a purpose other than that for which it was collected. Public sector agencies are also required to take reasonable steps to confirm the accuracy of personal or health information before using it.

The IPPs and HPPs are subject to a number of exceptions and exemptions. Most notably, the consent of the individual concerned will usually be an exception to what would otherwise be a breach of an IPP or HPP. Where another Act or law (including the common law) requires or reasonably contemplates non-compliance with an IPP or HPP, this will exempt an agency from compliance. An agency cannot contract out of its obligations under the Privacy Legislation.

An individual may complain about an agency's alleged failure to comply with an IPP or HPP by making an application for internal review. This may lead to proceedings being brought in

the NSW Civil and Administrative Tribunal against the agency if the individual is not satisfied with the findings of the review or the action taken, or the internal review is not completed within 60 days from the date the application is received. The Tribunal has the power to award damages of up to \$40,000 for a breach of an IPP or HPP.

Copies of the Privacy Legislation can be accessed on the NSW Legislation website at <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1998-133> (PPIP Act) and <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2002-071> (HRIP Act).

5.3.4 Information and Privacy Commission NSW

The Information Commissioner is appointed under the *Government Information (Information Commissioner) Act 2009*. The Commissioner's role includes:

- reviewing certain kinds of decision made under the *GIPA Act* and the Privacy Legislation; and
- investigating complaints about agencies' conduct under the *GIPA Act* and reporting annually on the Act's operation.

The Commissioner is supported by the NSW Information and Privacy Commission.

Information about the role of the Commissioner and Commission – including advice, assistance and training for agencies and individuals on privacy and access matters – can be found on the NSW Information and Privacy Commission's website, located at: www.ipc.nsw.gov.au.

5.3.5 Public Interest Immunity

Public interest immunity ('PII') is a common law doctrine and the name given to the body of substantive and procedural rules whereby confidential information that is otherwise relevant to court proceedings is withheld on the ground that the public interest in its disclosure is outweighed by a competing public interest in its suppression. The immunity applies to prevent the disclosure of information in a range of situations, including pursuant to a subpoena, discovery, or a call for a document in court and in the course of a witness giving evidence.

PII applies to protect confidential information where disclosure would harm the public interest. While the categories are not closed, section 130(4) of the *Evidence Act 1995* sets out a list of matters that can be taken to relate to PII/matters of state, being information which, if disclosed, would:

- prejudice the security, defence or international relations of Australia; or
- damage relations between the Commonwealth and a State or between 2 or more States; or
- prejudice the prevention, investigation or prosecution of an offence; or
- prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

- disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
- prejudice the proper functioning of the government of the Commonwealth or a State.

Question concerning PII – including advice on whether or not a PII claim should be made – are core legal work under the Core Legal Work Guidelines and **must be** referred to the Crown Solicitor. Further information on Public Interest Immunity can be found on the NSW Crown Solicitor’s Office website at:

https://www.cso.nsw.gov.au/Pages/cso_resources/cso_fact_sheet_PII.aspx

5.3.6 Standing Order No. 52 – Order for the Production of Documents

The Legislative Council has the power to order the production of State papers by the Executive Government. The basis of this power is the common law principle that the Houses of Parliament possess such inherent powers as are reasonably necessary for their effective functioning.

The Legislative Council routinely makes orders for the production of State papers. Orders for the production of State papers are commonly referred to as ‘orders for papers’ or ‘orders for returns’. The procedures for the production of State papers are set out in Standing Order 52 of the Legislative Council.

Under Standing Order 52, any member of the House may give notice of motion for an order for papers. Usually, the notice will relate to a particular decision of Government that has become a matter of broad public interest. If the House agrees to the motion, the General Counsel of the Department of Premier and Cabinet is advised of the order and coordinates the preparation of the Government response – that is, the return to order. Strict timeframes apply for the response to the order which must be complied with. The return to order is provided to the Clerk and is tabled in the House and made public, unless privilege is claimed.

The Executive Government may make a claim for privilege in respect of documents covered by an order for production, on grounds such as legal professional privilege or public interest immunity. Procedures have been established for dealing with privilege claims, but it is ultimately for the House to determine any such claim.

Parliament has set out an overview of orders for the production of State papers, including the management of privilege claims, at

<https://www.parliament.nsw.gov.au/lc/Pages/Orders-for-papers.aspx>.

5.4 Commercial and Financial Arrangements

5.4.1 *Ex gratia payments*

Section 5.7 of the *GSF Act* enables a Minister to make an ‘act of grace’ payment to a person, where the Minister is satisfied that ‘special circumstances’ or circumstances of a kind prescribed by regulation warrant the payment. Such a payment may be made notwithstanding that there is otherwise no legal obligation to make it.

It is a matter for the Minister to determine whether ‘special circumstances’ exist in a particular case. ‘Special circumstances’ may include (but are not limited to) a perceived moral obligation to remedy the detrimental effects of government action, despite the absence of a legal obligation to do so.

The function may be delegated by Ministers, in accordance with section 5.7(4) of the *GSF Act*.

The power of Ministers under section 5.7 of the *GSF Act* is additional to Ministers’ powers to make ‘act of grace’ or ‘ex gratia’ payments at general law. The circumstances in which a Minister may make such payments are fundamentally similar.

5.4.2 *Procurement*

The NSW Procurement Board is responsible for overseeing the Government’s procurement system, setting policy and ensuring compliance. It has the statutory power to issue directions to agencies and make decisions and monitor the progress of agency compliance. It accredits agencies to undertake their own procurement of goods and services and construction.

Part 11 of the *Public Works and Procurement Act 1912 (PWP Act)* contains important provisions in relation to procurement of goods and services (including construction) by NSW government agencies. The NSW Procurement Board may issue directions and policies that apply to the procurement of goods and services by and for government agencies (section 175). A government agency is *required* to exercise its functions in relation to the procurement of goods and services in accordance with any policies and directions of the Board that apply to the agency and the terms of its accreditation (if any; section 176). An agency is also required to adhere to the principles of probity and fairness and to obtain value for money in the exercise of its functions in relation to procurement.

There are a large number of Board directions and policies. The full suite of Board directions and policies can be found at <https://buy.nsw.gov.au/policy-library>. Significant ones include

- NSW Procurement Policy Framework

Summarises Government procurement objectives, legislation and policies, and the NSW Procurement Board’s requirements at each step of the procurement process. It is a good ‘one stop shop’ for procurement information.
- PBD 2019-05 Enforceable Procurement Provisions Direction (EPP Direction)

Sets out the legal requirements arising from the government procurement chapters of free trade agreements to which Australia is a party.

- **PBD 2020-04 Approved procurement arrangements** (see: <https://arp.nsw.gov.au/pbd-2020-04-approved-procurement-arrangements>)

Sets out overarching procurement requirements and thresholds, including requirements relating to use of whole of government contracts and prequalification schemes.

- **PBD 2020-05 Approved procurement arrangements for the ICT Services Scheme** (see: Defines approved arrangements and thresholds for the procurement of ICT related goods and services using the mandatory ICT Services Scheme.

Other policies and areas of law also affect, or apply to, Government procurement, for example:

- Government Sector Finance Act 2018
- Independent Commission Against Corruption Act 1988
- Government Information (Public Access) Act 2009
- Various Treasury Circulars, Treasury Policy Papers, and Premier's Memoranda.

The *Modern Slavery Act 2018* is not in force at the time of writing. It is expected that Act will be amended (to harmonise with similar Commonwealth legislation) and enter into force in due course. It is likely to include a requirement to ensure that the procurement of goods and services by NSW government agencies are not the product of modern slavery, with the effectiveness of such due diligence procedures to be monitored by a commissioner provided for in the Act (in consultation with the NSW Procurement Board).

Government lawyers should be mindful that procurement obligations, directions and policies may be relevant at all stages of a procurement.

NSW Government procurement information and documents can be found at: <https://buy.nsw.gov.au/>.

5.4.3 Intellectual Property

5.4.3.1 Crown copyright

Questions concerning Crown copyright might arise where an agency prepares or commissions original written documents, websites, artistic works, photographs, music, videos, databases, or certain other material and then wishes to publish, disseminate or enter arrangements involving use of such material. The usual position is that the State owns copyright in original works and other subject matter made under, or published by or under, the direction or control of the Crown in right of the State of NSW; however, the ownership of such copyright may be modified by agreement (see: *Copyright Act 1968* (Cth) Part VII).

The Attorney General is the Minister responsible for Crown Copyright.

An issue which frequently arises is the licensing or assignment of Crown copyright. The two most important policy documents in relation to the licensing and assignment of Crown copyright are:

- **Crown Copyright Guidelines** – These clarify when approval must be sought from the Attorney General or Attorney General’s delegate in relation to the licensing and assignment of Crown Copyright material and, alternatively, when the agency can manage the licensing or assignment of Crown copyright internally.
- **NSW Intellectual Property Management Framework for the NSW Public Sector** – This policy provides guidance to assist agencies to manage their IP effectively. See also Department of Premier and Cabinet Circulars C2005-06 and C2006-53.

See: <https://www.justice.nsw.gov.au/lrb/Pages/crown-copyright-information/nsw-agencies-licensing-copyright.aspx>

The issue of Crown copyright or questions about copyright ownership may become apparent in a wide range of commercial arrangements. Government lawyers should be alert to the question of who owns copyright in material being used, shared, published or prepared under Government contracts.

5.4.3.1 NSW Government Trade Marks

The NSW Government has registered a trade mark and issued Brand Guidelines in relation to the use of the NSW Government ‘Waratah’ logo which is generally required to be the primary brand or logo used by NSW government agencies. The use of the Waratah logo is now managed by the Department of Customer Service.

If agencies become aware of non-government entities using (infringing) the Waratah logo trade mark, for example, to imply an affiliation with the Government, they should raise this with the Department of Customer Service. For more information and to access the Brand Guidelines, see: <https://www.nsw.gov.au/nsw-government-communications/branding>.

Some agencies have obtained permission to use a different logo or trade mark and some of these have been registered as trade marks with IP Australia. Trade marks come up for renewal periodically and may otherwise lapse. In general terms a trade mark needs to be *used*, by or under the control of the owner, to distinguish particular goods or services in Australia in order to remain capable of registration.

5.4.3.2 State arms and symbols

Section 6 of the *State Arms, Symbols and Emblems Act 2004* sets out the circumstances in which permission to use State arms or symbols is required. The Department of Communities and Justice manages such written requests on behalf of the Attorney General.

5.4.3.3 Copyright collecting societies and use of copyright material for the services of the State

Government lawyers should also be aware of the State's agreements with copyright collecting societies in relation to the use of (non-Crown) copyright material for the services of the State.

Under section 183 of the *Copyright Act 1968* (Cth), the Government may use copyright material for the services of the State but must generally notify and agree terms with individual copyright owners. However, in the case of works and radio and television broadcasts, the State must, under section 183A of the *Copyright Act 1968* (Cth), enter agreements with the declared collecting societies and pay equitable remuneration not to individual copyright owners but to the relevant copyright collecting society. The collecting societies then distribute the money to their members who include copyright owners.

For more information see: <https://www.justice.nsw.gov.au/lrb/Pages/crown-copyright-information/copyright-agreements-collecting-societies.aspx>.

6 Useful Reference Tools

6.1 Public Sector Governance

The Department of Premier & Cabinet provides a useful outline of governance of the NSW public sector with links to relevant documents. The governance framework can be located at: http://www.dpc.nsw.gov.au/programs_and_services/governance

[DPC keeps up to date on its website a high level summary of NSW Government agencies established under Schedule 1 of the Government Sector Employment Act 2013 and SOCs established under the State Owned Corporations Act 1989.](#)

<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/371fe4cd56/Governance-Arrangements-Blue-Chart.pdf>

6.2 Parliament and the Executive

6.2.1 *NSW Parliament website*

This website contains PCO corporate information such as annual reports, and information on preparing and publishing legislation. Publications of particular interest include:

- NSW Government Ministerial Handbook
- Information Sheet on the Staged Repeal of Statutory Rules
- Policy relating to Plain Language

The PCO website can be located at: www.pco.nsw.gov.au

6.2.2 *The Cabinet System*

The Department of Premier and Cabinet provides online resources to help agencies preparing Cabinet submissions to better understand Cabinet and each stage of the Cabinet system. These resources can be located at: http://www.dpc.nsw.gov.au/programs_and_services/cabinet_in_nsw

A copy of the Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions* can be located at: <http://arp.nsw.gov.au/m2006-08-maintaining-confidentiality-cabinet-documents-and-other-cabinet-conventions>

Cabinet submissions are stored and distributed through eCabinet. Each cluster has a Cabinet Liaison Officer who co-ordinates comments for their cluster on draft and final submissions. Timing requirements need to be taken into account when preparing Cabinet submissions.

Further information about timeframes for preparing and lodging Cabinet submissions can be found at: <https://www.dpc.nsw.gov.au/tools-and-resources/cabinet-practice-manual/types-of-submissions/>

<http://help.ecab.nsw.gov.au/>

6.2.3 State Election – Caretaker Conventions

Conventions in relation to periods of ‘caretaker’ government should be adhered to in New South Wales. These conventions cover the period immediately leading up to a general election and continue until either the Government is returned, or a new Government is commissioned.

A copy of *Premier’s Memorandum M2018-01* relating to the 2019 State Election Caretaker Conventions can be located at: <http://arp.nsw.gov.au/m2018-01-2019-state-election-caretaker-conventions>

During periods of Caretaker Conventions, practices apply in respect of the handling of Cabinet documents: <https://arp.nsw.gov.au/assets/ars/bca1ebcbb2/M2018-01-Guidance-Note-re-Caretaker-Conventions-2019-State-Election.pdf>

Legal advice on the activities that can take place during the caretaker period is provided centrally by the General Counsel or Deputy General Counsel, to ensure consistency.

6.2.4 Ministerial Handbook

The ‘Ministerial Handbook’, has been prepared by the Department of Premier and Cabinet to assist Ministers in the effective, efficient and ethical discharge of their duties.

The Ministerial Handbook (prepared by the General Counsel) provides information on:

- the appointment and operation of the Ministry
- the standards of conduct required of Ministers [superseded]
- the operation of Cabinet [superseded]
- the operation of the Executive Council; and
- the processes for drafting and enacting legislation and making regulations.

The Ministerial Handbook can be found at:

<http://publications.dpc.nsw.gov.au/assets/composed-pdfs/2/Ministers-Office-Handbook-updated-23-03-2017.pdf>

The ‘Ministers’ Office Handbook’ (prepared by Ministerial and Parliamentary Services) provides policy and practice material for Ministers and their staff about employment and office management arrangements. The Ministers’ Office Handbook can be found at: <https://publications.dpc.nsw.gov.au/ministers-office-handbook/introduction/>

The Ministerial Code of Conduct prescribes the ethical standards of behaviour applicable to Ministers. The Code is set out in the Appendix to the ICAC Regulations and can be found at: <http://www.legislation.nsw.gov.au/#/view/regulation/2010/211/app1>

Ministers and their staff should also have regard to any changes to policies conveyed by the various Memoranda, Circulars and Directions issued by the Premier, the Department of Premier and Cabinet (DPC) and Treasury.

Further information or advice on the matters raised in the Ministerial Handbook may be obtained from the Department of Premier and Cabinet.

6.2.5 House Folder Notes

Lawyers may be asked to advise on the content of a House Folder Note ('HFN') or to draft a HFN, such as when it relates to legal proceedings.

HFNs are prepared to assist Ministers respond to questions in Parliament. Each House of Parliament has approximately an hour set aside each sitting day for 'Question Time'. Typically, questions asked of Ministers by the Opposition during Question Time are intended to scrutinise the Government, while questions asked by Government backbenchers usually give Government Ministers the opportunity to highlight the Government's program and performance.

For the 57th Parliament elected in 2019 new processes have been introduced in the Legislative Council for Question Time which include a 'take note of answers to questions' debate and limited supplementary questions for which written answers must be provided by 10.00am the next working day. Urgent legal assistance may be required for the preparation of answers to supplementary questions.

The set out and style of HFNs will reflect the expectations of the relevant Minister. HFNs must be absolutely factually correct as Ministers will rely on them in Parliament and are under a duty to not mislead the House.

Cabinet and Parliamentary Services manage the preparation and updating of HFNs and can provide information on HFN format and other requirements.

HFNs are not released under GIPA access applications.

6.2.6 Parliamentary Sitting Days

Parliamentary Sitting Day Calendar may be found at: <https://www.parliament.nsw.gov.au/Pages/sitting-day-calendar.aspx?y=2017>

6.2.7 Parliamentary Research Service

Parliamentary Research Service may be accessed through Australian Policy Online. This is a research database and alert service providing free access to full text research reports and papers, statistics and other resources essential for public policy development and implementation in Australia and New Zealand. The research database can be accessed using the following link: <http://apo.org.au/about>

6.2.8 Ministerial Correspondence

Ministerial Correspondence Directions ('Ministerials') are a Direction to an Agency, from the Minister's Office, to provide to the Minister's Office by way of a Briefing Note, background information for the Minister's benefit, in respect of particular issues. Usually they are to facilitate a formal response by the Minister's Office to an enquiry made by a member of the public, to the Minister, or by another Member of Parliament, on behalf of that Member's constituent.

The Minister's Office will usually indicate in the Ministerial, whether or not a draft of a proposed letter to be sent from the Minister's Office to the enquiring constituent or Member, is to be attached to the responding Briefing Note. The Briefing Note should be succinct and will generally identify the issue, set out the factual background, the current position and make a recommendation.

The Direction will set a deadline for the responding Briefing Note, which must be complied with. When preparing the responding Briefing Note, allowance needs to be made for the time it will take to obtain any intra-Agency endorsements, such as the Agency Chief Executive, as well as any other endorsers, such as the General Counsel or the Agency Secretary.

6.2.9 Legislative Council Budget Estimates

Ministers and Senior Public Servants attend an annual Budget Estimates Inquiry to answer questions about the expenditure, performance and effectiveness of their agencies. Budget Estimates is a key process for government accountability and transparency. The Budget Estimates Inquiry involves detailed questioning on the decisions, actions and advice of ministers and public servants.

More information on Budget Estimates can be found at:

<https://www.parliament.nsw.gov.au/committees/Pages/budget-estimates.aspx>

6.3 Legal Research

6.3.1 NSW Government Legislation Website

Official notification of the making of statutory instruments, NSW Government Gazette and Bill Information are located at: www.legislation.nsw.gov.au

To join the Parliamentary Counsel's notification web feed please follow the below link: <http://www.legislation.nsw.gov.au/maintop/epub>

NSW Legislation also offers subscription to feeds as follows, which can be accessed from their website:

- New or Updated Bills in Parliament
- New or updated in force legislation
- New As-Made legislation; and
- New Government Gazettes

The Parliamentary Counsel may publish on the NSW legislation website: legislation, the Gazette and other matter under the authority of the Government in accordance with Part 6A of the *Interpretation Act 1987*. Instructions on how to correctly cite particular Acts and instruments can be found in sections 66-67 of the Act.

6.3.2 Government Gazette

Tel 9321 3333 Email nswgazette@pco.nsw.gov.au

The Government Gazette is published electronically by Parliamentary Counsel's Office.

The requirements for gazette notices is set out Parliamentary Counsel's Gazette portal, under the section headed 'FAQ': <https://www.legislation.nsw.gov.au/gazette>

6.3.3 NSW Caselaw

This website publishes recent decisions of almost all NSW Courts and Tribunals, which can be located at: www.caselaw.nsw.gov.au

6.3.4 JADE Professional Subscription

JADE (Judgments and Decisions Enhanced) is a current awareness service that collects recent decisions of selected Australian Courts and Tribunals into an enhanced database. Almost as soon as the court releases its decision online, Jade collects the judgment, notifies you about important cases by email or RSS feed and provides you with a facility to log in and make your own annotations. The easy to use and highly effective search engine allows you to quickly and easily retrieve the cases that you need.

You can access JADE Professional at: <https://jade.io/t/home>

6.3.5 Australia Legal Information Institute ("Austlii")

This website provides a wide range of legislative and court information as well as links to similar international law websites. Austlii can be accessed at: www.austlii.edu.au

6.3.6 High Court Quarterly Summary of Judgments

The High Court Bulletin is compiled approximately once a month, from February to December after each Court sitting and contains, as at the date of each issue:

1. Cases Handed Down
2. Cases Reserved
3. Original Jurisdiction
4. Special Leave Granted
5. Cases Not Proceeding or Vacated
6. Special Leave Refused

To subscribe to email alerts for the High Court Bulletins, complete the online form located at: <http://www.hcourt.gov.au/library/high-court-bulletin>

For enquiries concerning the High Court Bulletin, contact the Court Librarian on (02) 6270 6921 or Legal Research Officer on (02) 6270 6307.

For a record of High Court Bulletins prior to 2011, refer to the following websites:

Austlii - <https://www.austlii.edu.au/au/other/hca/bulletin/>

Jade - <https://jade.io/j/#!/j/?clh=HCAB>

6.3.7 NSW Coronial findings and recommendations

The NSW Coroner's Court findings are not included in NSW Caselaw. Select findings are published at: www.coroners.justice.nsw.gov.au/Pages/findings.aspx

M2009-12 Responding to Coronial Recommendations sets out the process for responding to coronial recommendations directed at Ministers and NSW government agencies. The purpose of the Memorandum is to ensure that there is a consistent process across government for responding to coronial recommendations, and that there is increased accountability and transparency in responding to such recommendations.

Coroners conducting inquests or inquiries into deaths, fires or explosions may make recommendations relating to public health and safety or other matters that arise during the course of an inquest or inquiry.

When a coroner makes a recommendation at an inquest or inquiry, the coroner will forward a copy of the recommendation to:

- the State Coroner any person to whom, or body to which, a recommendation is directed
- the Minister who administers the legislation, or who is responsible for the person or body to which a recommendation relates; and
- the Attorney General.

Within six months of receiving a coronial recommendation, a Minister or NSW government agency should write to the Attorney General outlining any action being taken to implement the recommendation. If it is not proposed to implement a recommendation, reasons should be given (eg the recommendation will not achieve the intended outcome; the outcome can be achieved in another way; the recommendation is impractical to implement having regard to the cost and potential benefits; there are other considerations that make implementation of the recommendation not feasible).

Ministers and agencies are encouraged to provide updates to the Attorney General on any further action taken to implement the Coroner's recommendations following their initial advice. In accordance with the usual process, if the proposed Government response to a coronial recommendation involves significant change to Government policy, impacts on more than one portfolio, or has budgetary implications, a Minister should bring forward a Cabinet Minute.

The Department of Communities and Justice maintains a record of all coronial recommendations notified, together with the responses received from Ministers and NSW government agencies. The Attorney General will arrange for a report to be posted on his Department's website, in June and December of each year, summarising coronial

recommendations made and the responses received from Ministers and NSW government agencies. The Attorney General will also send a copy of the report to the State Coroner for information. State Owned Corporations are encouraged to adopt the provisions of this Memorandum.

Access to coronial recommendations reports are available from the Department of Communities and Justice website: <http://www.justice.nsw.gov.au/lrb/Pages/coronial-recommendations.aspx>

7 Useful Contacts

7.1 PCO (incl. Government Gazette)

Tel 9321 3333 Email parliamentary.counsel@pco.nsw.gov.au

Guidance on the preparation of drafting instructions and other relevant information is available on the Parliamentary Counsel's Office (PCO) website: www.pco.nsw.gov.au. See the NSW Government Handbook (section 4 and Annexure J) as well as the policies on Plain language and Gender-neutral expression.

It is a requirement under s.7(c) of the *Subordinate Legislation Act 1989* that a proposed regulation submitted for making by the Governor must be accompanied by a copy of the opinion of the Attorney General or the Parliamentary Counsel as to whether the proposed regulation may legally be made. In practice the 'opinion' is routinely given by Parliamentary Counsel, rather than the Attorney General. The requirement is an effective control on the use of the regulation making power by Government.

As to the advice given by the PCO, this constitutes legal advice and is otherwise privileged (see *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160 (12.11.2009)).

Tel 9321 3333 Email nswgazette@pco.nsw.gov.au

The Government Gazette is published electronically by Parliamentary Counsel's Office.

PCO publishes an Information Sheet "NSW Government Gazette Information" and technical requirements for statutory instruments not drafted by Parliamentary Counsel's Office. A copy of the Information Sheet can be located at: <http://www.legislation.nsw.gov.au/Gazetta/IS.pdf>

7.2 Crown Solicitor's Office (CSO)

The CSO hosts regular seminars and events for NSW government lawyers, for both professional development and/or to keep up to date with key areas affecting government agencies. Practising solicitors can claim one point for each hour attended of either the seminar or the webinar.

To find out more information about legal seminars, please click this link: http://www.cso.nsw.gov.au/Pages/cso_seminars/cso_seminars.aspx

The CSO regularly distributes legal alerts concerning important developments, including significant cases and new legislation. These can be found at https://www.cso.nsw.gov.au/Pages/cso_resources/Resources.aspx.

The CSO Client Centre provides NSW government lawyers with access to a range of current and previous CSO newsletters, alerts and seminar papers and webinar recordings on subjects of interest to government practice. Email csomarketing@csso.nsw.gov.au to register for access.

7.3 NSW Government Lawyers Network

The NSW Government Lawyers Network (Lawyers Network) is a secure website which provides a platform for NSW Government lawyers to share legal advices, precedents and other relevant material with other agencies within the NSW public sector.

The resource is intended to provide greater coordination between legal teams across government and promote greater internal collaboration so as to maximise consistency in service across government as well as to drive down costs of external expenditure.

The Government Lawyers Network is designed wholly and exclusively for NSW Government legal officers from agencies and departments across the sector. To become a member and have access to the Government Lawyers Network, lawyers who meet the criteria are required to complete and return the [Membership Form](#) to the Department of Communities and Justice Legal Services Coordination at nswlsc@justice.nsw.gov.au

The NSW Government Lawyers Network can be located at: www.lawyersnetwork.nsw.gov.au

7.4 Department of Communities and Justice – In-house Government Lawyers Forum

The In-house Government Lawyers Forum is a whole of government legal and professional development seminar catered to the needs of in-house government lawyers across the sector. The Forum, held a number of times during a calendar year provides a valuable networking opportunity for government lawyers. Each Forum is hosted by a different government agency with relevant and informative topics selected for each Forum to enhance in-house government lawyers practice needs.

To be added to the In-House Government Lawyers Forum mailing list, please email your request to: nswlsc@justice.nsw.gov.au