



Key points and references

from the
NSW Government Solicitors' Induction Training
12, 15 and 16 February 2021

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1. OVERVIEW OF NSW GOVERNMENT AND THE ROLE OF A GOVERNMENT LAWYER

Chair

Felicity Shaw, Assistant Crown Solicitor

Panellists

Jodi Denehy, Director

Nick Mitrevski, Director

Sarah-jane Morris, Director

Karen Smith, Crown Solicitor

Session details

Understand the way in which the NSW Government is organised, the purpose of each branch of government, the concept of the Crown and accountability requirements.

Explore the role of a government lawyer and the NSW government policies that apply to a government lawyer's practice, including how to deal with the receipt of subpoenas and third-party claims.

Key points

- ▶ NSW Government legal services are performed by:
 - In-house lawyers employed by agencies
 - [Crown Solicitor's Office](#)
 - external firms engaged from the [NSW Government Legal Services Panel](#)
 - external firms on the iCare general lines Legal Services Panel (for third party claims).
- ▶ The [Treasury Managed Fund](#) (TMF) covers the legal liability of NSW Government agencies. icare selects law firms to deliver legal services under the TMF scheme from its panel. Agencies are required to notify the icare claims manager of third-party claims.
- ▶ Civil proceedings commenced against the State of NSW may be [served](#) on the [CSO](#).
- ▶ [Core legal work](#) must be referred to the CSO. The CSO also performs non-core legal work for agencies, including third party claims, regulatory prosecutions and general legal services.
- ▶ The Attorney General is required to approve the briefing of [senior counsel](#) and to set the rate of remuneration.
- ▶ The Solicitor General must approve the making of a claim of [public interest immunity](#)

References

The NSW Government's [Legal Induction Booklet for In-house Government Lawyers](#) is a useful guide. It is due to be updated in early 2021.

2. ETHICS AND MODEL LITIGANT POLICY

Chair

Karen Smith, Crown Solicitor

Presenters

Richard Kelly, Director

Session details

Understand the expectations of ethical behaviour by government agencies in the conduct of litigation, including maintaining client legal privilege, and managing conflicts of interest.

Key points

- ▶ Lawyers employed by the NSW Government are subject to [professional responsibilities](#) as lawyers, as well to [ethical responsibilities](#) as public servants.
- ▶ In conducting civil litigation, the NSW Government and its legal representatives are expected to act as [model litigants](#) by:
 - dealing with claims promptly and without unnecessary delay¹
 - acting consistently
 - not requiring a party to prove a matter known to be true²
 - not relying on technical defences³.
- ▶ There are longstanding [guidelines](#) on the conduct of litigation involving NSW Government agencies, including procedures for resolving issues affecting more than one agency.

Tips for maintaining client legal privilege

- ▶ Ensure the existence of a client-lawyer relationship (independence, practising certificate, separate legal and non-legal role/work).
- ▶ Maintain confidentiality when disclosing material within and between agencies⁴.
- ▶ Keep a record of the "common purpose"⁵ understood to exist between parties, where applicable.

References

1. *Cf Apokis v Transport for NSW* [2020] NSWCA 39
2. *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65.
3. *Young v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155.
4. *Mann v Carnell* (199) HCA 66, *Evidence Act 1995* s.122. For entities with separate legal existence to the Crown, see *State of NSW v Public Transport Ticketing Corporation* [2011] NSWCA 60.
5. *Evidence Act 1995* s.122(5)(c), *Hamilton v State of NSW* [2016] NSWSC 1213 at [72].

3. THE LEGISLATIVE PROCESS

Chair

Karen Smith, Crown Solicitor

Presenter

Abbie Hartley, Parliamentary Counsel's Office

Session details

Understand the process for making laws in NSW, including regulations.

Key points

- ▶ [Parliamentary Counsel's Office](#) (PCO) drafts legislation, regulations and other statutory instruments. PCO publishes [NSW Legislation](#) and the [NSW Gazette](#).
- ▶ [Cabinet approval](#) is required for Bills to be drafted for introduction into Parliament. The [statute law revision program](#) facilitates the drafting and introduction of minor amendments to Acts.
- ▶ Ministerial approval is required for the drafting of [subordinate legislation](#) (including regulations and other statutory instruments such as [COVID-19 public health orders](#)). Most regulations are subject to [staged repeal](#).
- ▶ Regulations and other statutory instruments are made by the Governor at Executive Council after Parliamentary Counsel has issued an opinion that the instrument may legally be made.
- ▶ Government lawyers are often asked to prepare or review drafting instructions to be provided to PCO, and/or review draft legislation prepared by PCO.

Tips for preparing drafting instructions

- ▶ Ensure in-depth understanding of relevant law and policy, including case law and recent reports.
- ▶ Explain the purpose to be achieved by the legislative proposal. Avoid drafting the specific words. Instead, explain the outcome the proposal is designed to achieve. Provide all relevant details.
- ▶ Be aware of the *Interpretation Act 1987* (contains provisions of general application to all legislation) and legislation of specific application to the government sector, such as the *Government Sector Employment Act 2013* and the *Government Sector Finance Act 2018*.
- ▶ Check the [Allocation of Acts](#) to confirm the Minister with responsibility for particular legislation. Check [Administrative Changes Orders](#) for up-to-date references to public sector agencies.
- ▶ Consider enrolling in PCO's [instructor training](#) sessions.

4. STATUTORY INTERPRETATION

Chair

Naomi Malhotra, Assistant Crown Solicitor

Presenters

Sarah-jane Morris, Director

Session details

Understand key principles of statutory interpretation and engage with interpretive issues frequently encountered by government lawyers.

Key points

- ▶ Overriding approach: focus on the ordinary and grammatical meaning of the words of a provision, having regard to statutory context and purpose.

Practical steps

- ▶ Preliminary: identify the correct version of the Act and confirm it is in force.
- ▶ Focus on the ordinary and grammatical meaning of the text of the provision in issue.
- ▶ Consider the text of the Act as a whole (or at least key aspects).
- ▶ Consider the broader statutory context (e.g. legislative history and extrinsic material).
- ▶ Identify the purpose/s of the Act and provision in issue.
- ▶ Consider any relevant interpretative rules and presumptions (common law and statutory).
- ▶ Assess available constructions – consider whether statutory context and purpose supports a “strained” construction.

Remember, while your starting point is the text of the statute, statutory interpretation isn't a linear process.

5. SOURCES OF POWER AND DECISION MAKING

Chair

John McDonnell, Assistant Crown Solicitor

Presenters

Dr Amanda Sapienza, Senior Solicitor

Session details

Explore the different sources of power available to government agencies.

Understand the parameters of decision-making and the framework for review of decisions.

Key points

► Requirements to keep in mind when making or reviewing administrative decisions:

1. the decision should be authorised
2. the decision-making process should be fair
3. the decision should be reasonable
4. the decision should be the correct and preferable decision in the circumstances.

1. Is the decision authorised?

- First, check what the source of the decision-making power is. Generally, decision-making power will come from a statute.
- Pre-conditions to exercise statutory powers sometimes exist e.g. provision of notice, time-limits, or satisfaction as to a state of affairs.
- Only the authorised decision-maker (including a valid delegate) can make a decision.
- Jurisdictional errors, which result in a decision not being authorised by law, include: taking into account irrelevant/prohibited considerations; not taking into account mandatory considerations; fettering discretion by policy; acting in bad faith/fraud; acting for an unauthorised purpose; issues with jurisdictional fact-finding; absence of valid delegation; and acting under dictation.

2. Is the decision-making process fair?

- What procedural fairness requires depends on the legal framework applicable for each decision being made and the context. It almost always requires notice, an opportunity to be heard, and an unbiased decision-maker. While some statutes exclude procedural fairness, exclusion is rare.

3. Is the decision reasonable?

- Can it be justified and explained? Is the decision maker's reasoning apparent and logical?

4. Is it the best decision in the circumstances?

- Merits review can be undertaken regardless of whether a legal error was made. This may be by internal review or, where the statute provides for external review, by NCAT.

6. GOVERNMENT INFORMATION SHARING

Chair

John McDonnell, Assistant Crown Solicitor

Presenters

Tram Nguyen, Senior Solicitor

Tom Chisholm, Principal Solicitor

Kiri Mattes, Principal Solicitor

Session details

Explore the key legal requirements that apply to privacy, access to government information, public interest disclosures and orders for papers by the Legislative Council.

Key points: Privacy legislation (Tram Nguyen)

- ▶ Privacy legislation applying to NSW Government agencies mainly comprises the *Privacy and Personal Information Protection Act 1998 (PPIP Act)* and the *Health Records and Information Privacy Act 2002 (HRIP Act)*.
- ▶ Personal information is defined in s.4(1) of the *PPIP Act* as “information or an opinion about an individual whose identity is apparent or reasonably ascertainable”. Be mindful – it’s not always easy to tell whether you have sufficiently de-identified information so that it’s not personal information.
- ▶ The *PPIP Act* and the *HRIP Act* impose obligations on how NSW government agencies handle personal and health information, including how agencies collect, retain, store, use and disclose that information and how individuals can access or request amendments to the information.
- ▶ There is generally no formal obligation to report a privacy breach. However, an agency may be required to conduct an internal review of an alleged breach, which may lead to the agency taking subsequent action to address the breach.
- ▶ NCAT can externally review an alleged breach and order the agency to rectify or comply with its privacy obligations. The NSW Privacy Commissioner can also investigate a privacy complaint made by an individual.
- ▶ Ask: Is the agency dealing with personal and/or health information? Do you need to provide, obtain and review information collection notices or obtain further consents? Is this correspondence actually a request to access or amend personal information or an application for internal review?

Key points: Orders for papers by Legislative Council (Tom Chisholm)

- ▶ Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions (*Egan v Willis* at 453-454 [48]).
- ▶ Many aspects of responsible government are not identified in the *Constitution Act 1902* and depend upon what has come to be fixed by convention.
- ▶ All orders to produce documents under Standing Order 52 (SO 52) are to be communicated to the Department of Premier & Cabinet (para 1). These documents must be tabled with an indexed list (paras 2-3) and will automatically be considered published, unless privilege is claimed (para 4).

- ▶ Privilege under SO 52 does not mean documents are immune from production to the House – it means they may be viewed only by Members and are not made public (para (5)(b)).
- ▶ While there are no decided cases on the meaning of privilege in SO 52, privilege claims are generally made by reference to conventional common law categories (e.g. legal professional privilege and public interest immunity).
- ▶ Standing Order 53 covers production of documents concerning the royal prerogative, dispatches or correspondence to or from the Governor, or the administration of justice.
- ▶ Documents within Standing Order 53 are to be sought by an address presented to the Governor requesting that the documents be laid before the House.

Key points: *Government Information (Public Access) Act 2009* (Kiri Mattes)

- ▶ There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure (s.5)
- ▶ Government information means information contained in a record held by an agency (s4). A record means any document or other source of information compiled, recorded or stored in written or electronic format (Schedule 4 cl.10).
- ▶ A person who makes an access application for government information has a legally enforceable right to be provided with it (s.9), unless there is an "overriding public interest against disclosure" (OPIAD).
- ▶ Some categories of information are conclusively presumed to be OPIAD, such as Cabinet information and material claimed to be subject to legal professional privilege (Schedule 1). Otherwise, s.13 provides the "public interest test", which requires a balancing of factors for and against disclosure of information.
- ▶ S.12 recognises a general public interest favouring disclosure and provides examples of other considerations that may favour disclosure, such as the need for open discussion of public affairs and transparency of the operations, oversight of expenditure or misconduct of Government.
- ▶ S.14 provides considerations against disclosure, which relate to responsible and effective government; law enforcement and security; individual rights; business interests; environment, culture and general matters; as well as secrecy provisions.
- ▶ A person aggrieved by a "reviewable decision" may seek internal review, external review by the Information Commissioner and/or external review by the NCAT.

7. GOVERNMENT SECTOR LEGISLATION

Chair

Felicity Shaw, Assistant Crown Solicitor

Presenters

Michael Granziera, Director

Marina Rizzo, Director

Karen Ferris, Principal Solicitor

Session details

Understand the NSW legislative frameworks for public finance, government procurement, employment in the public sector and government records.

Key points: Public finance legislation (Michael Granziera)

- ▶ The *Government Sector Finance Act 2018 (GSF Act)* is the primary Act that governs public finance in NSW. This is complemented by the *Constitution Act 1902 (Part 5)*, annual *Appropriation Acts*, and statutory provisions dealing with specific funding arrangements.
- ▶ Expenditure of money for the State or a GSF agency by a “government officer” must be in accordance with appropriate delegation/sub-delegation or otherwise authorised by law (*GSF Act*, section 5.5(2) and (3)).
- ▶ When applying a financial delegation, it is always important to consider:
 - the source of funds to which the delegation applies
 - the expenditure limits and other conditions that apply to the delegation.
- ▶ Key divisions of *GSF Act* for routine agency operations include:
 - Division 3.1 (Treasurer’s directions)
 - Division 5.2 (gifts and act of grace payments)
 - Division 6.3 (financial services)
 - Division 6.4 (financial arrangements).

Key points: Government sector employment legislation (Marina Rizzo)

- ▶ The ability to employ and exercise employer functions across the NSW Government is derived from statute.
- ▶ The *Government Sector Employment Act 2013 (GSE Act)* establishes the NSW Government Sector which comprises the Public Services and other services in which people are employed in the Government of NSW.
- ▶ The GSE Act regulates the employment of persons in the Public Service. Parts of the GSE Act also apply to the broader Government Sector.

- ▶ Specific legislation deals with the employment arrangements in the Government services, such as:
 - *Teaching Service Act 1980*
 - *Police Act 1990*
 - *Health Services Act 1997*
 - *Transport Administration Act 1988.*
- ▶ Most NSW Government departments and agencies fall under the jurisdiction of the Industrial Relations Commission of NSW established under the *Industrial Relations Act 1996 (IR Act)*.
- ▶ The *IR Act* regulates employment in most of the NSW Government Sector through awards, enterprise agreements and other industrial instruments.

Key points: Government procurement and government records (Karen Ferris)

- ▶ Legislation directly regulating government procurement: *Public Works and Procurement Act 1912* and *Public Works and Procurement Regulation 2019*.
- ▶ Other legislation relevant to procurement
 - *Government Sector Finance Act 2018*
 - *Government Information (Public Access) Act 2009*
 - *Privacy and Personal Information Protection Act 1998.*
- ▶ Procurement policies and directions relevant to procurement: NSW Procurement Policy Framework and Procurement Board Directions, including:
 - *PBD 2019-04 Enforceable Procurement Provisions Direction*
 - *PBD 2020-02 – Use of Procure IT Framework*
 - *PBD 2020-04-Approved procurement arrangements*
 - *PBD 2020-05- Approved procurement arrangements for ICT Services scheme.*
- ▶ *State Records Act 1998* provides the legislative framework for government records management.