



THE LAW SOCIETY  
OF NEW SOUTH WALES

# A GOVERNMENT LAWYER'S GUIDE TO RULES ON ETHICAL ISSUES

AN INITIATIVE OF THE GOVERNMENT SOLICITORS COMMITTEE  
NOVEMBER 2017

*“We seek to maintain the highest standards of integrity,  
honesty and fairness in all our dealings”*

Law Society of NSW, Statement of Ethics, 2009

## INTRODUCTION

This Guide applies to you if you are a lawyer working in a federal, state or local government department or agency in New South Wales. The extent to which it applies to you will depend on your specific circumstances.

The Guide sets out:

- The Acts, rules, regulations and guidelines relating to ethical issues (referred to as the Rules) that apply to you;
- The purpose of the Rules;
- Where you can find copies of them;
- Who administers them; and
- A list of cases dealing with specific ethical issues that may arise.

The purpose of the Guide is to assist you to identify the Rules which apply to you and where you can go to seek further information on their application.

Information is current as at November 2017.

Which Rules apply to you as a government lawyer working in New South Wales?

## RULES AND GUIDELINES APPLYING TO ALL GOVERNMENT LAWYERS

Rules	What is their purpose?	Where can I find them?	Who administers them?
<i>Legal Profession Uniform Law (NSW)</i>	The LPUL provides for the regulation of legal practice in NSW in the interests of the administration of justice and for the protection of clients of law practices and the public generally. The LPUL facilitates the regulation of legal practice on a national basis.	<a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a>	NSW Office of the Legal Services Commissioner
<i>Legal Profession Uniform Regulations 2015</i>	These Regulations and Rules are made under the LPUL	<a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a>	NSW Office of the Legal Services Commissioner
<i>Legal Profession Uniform General Rules 2015</i>			The Legal Services Council is responsible for making the Rules
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015	These rules are solicitors' rules made under Pt 9.2 of the LPUL. They apply to solicitors and Australian-registered foreign lawyers, as those terms are defined in the legislation. A breach of the rules may be professional misconduct (Rule 2).	<a href="http://www.lawsociety.com.au">www.lawsociety.com.au</a>	Legal Services Council is responsible for making the Rules
Statement of Ethics (proclaimed by the Law Society Council on 28 May 2009)	The Statement explains in succinct form the role of lawyers in the community, the duties they owe and how those duties interact.	<a href="http://www.lawsociety.com.au">www.lawsociety.com.au</a>	Law Society of NSW
A Guide to Ethical Issues for Government Lawyers (2015)	Practical guide with examples of ethical issues a government lawyer may have to deal with and responses to them. This is not a rule but simply a guideline publication.	<a href="http://www.lawsociety.com.au">www.lawsociety.com.au</a>	Law Society of NSW
APEC Conduct Principles for Public Officials 2007	The Conduct Principles provide standards of conduct for the proper performance of public functions. They were recommended by the APEC Anti-Corruption and Transparency Experts Task Force. The Code has been adopted by all members, including Australia. This is not a rule but simply a guideline publication.	<a href="http://mddb.apec.org">mddb.apec.org</a>	Whoever implements the Conduct Principles within a government agency or department.
United Nations Convention Against Corruption 2004	The United Nations Convention against Corruption (UNCAC) is the sole, global, legally binding, instrument designed to promote measures to prevent and combat corruption	<a href="http://www.unodc.org/unodc/en/treaties/CAC/">www.unodc.org/unodc/en/treaties/CAC/</a>	Conference of the States Parties to the United Nations Convention Against Corruption
International Bar Association anti-corruption strategy for the legal profession	This global initiative will raise awareness among legal professionals about existing international anti-corruption instruments and equip lawyers with the necessary tools and knowledge to identify, address and resolve potential threats to the integrity of the legal profession caused by corruption	<a href="http://www.anticorruptionstrategy.org">www.anticorruptionstrategy.org</a>	International Bar Association (IBA)  Organisation for Economic Cooperation Development (OECD)  UN Office on Drugs and Crime (UNODC)

Which Rules apply to you as a government lawyer working in New South Wales?

## RULES APPLYING TO **FEDERAL GOVERNMENT LAWYERS**

(plus whatever applies at the state or territory in which you operate)

Rules	What is their purpose?	Where can I find them?	Who administers them?
<i>Judiciary Act 1903</i> (Cth)	This Act regulates the structure of the Australian judicial system and the jurisdiction of the courts that comprise it. The Attorney-General issues the Legal Services Directions under the Judiciary Act 1903.	<a href="http://www.legislation.gov.au">www.legislation.gov.au</a>	Office of Legal Services  Coordination, Attorney-General's Department
<i>Public Service Act 1999</i> (Cth) (including the APS Code of Conduct and APS Values)	The principal Act governing the establishment and operation of, and employment in, the Australian Public Service.	<a href="http://www.legislation.gov.au">www.legislation.gov.au</a> (see also <a href="http://www.apsc.gov.au">www.apsc.gov.au</a> )	Australian Public Service Commission
Attorney-General's Legal Services Directions (including the Model Litigant Obligation). The <i>Legal Services Directions 2017</i> replaced the 2005 Legal Services Directions	The Directions are a set of binding rules issued by the Attorney-General about the performance of legal work for the Commonwealth (whether performed in-house, by AGS or by other external legal service providers).	<a href="http://www.legislation.gov.au">www.legislation.gov.au</a>	Office of Legal Services  Coordination, Attorney-General's Department

Which Rules apply to you as a government lawyer working in New South Wales?

## RULES AND GUIDELINES APPLYING TO STATE GOVERNMENT LAWYERS

Rules	What is their purpose?	Where can I find them?	Who administers them?
<i>Government Sector Employment Act 2013 (NSW)</i>	This Act provides for the management of conduct and performance of officers within the public service. The objects of the Act include establishing an ethical framework for the government sector comprising core values and principles that guide their implementation	<a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a>	Public Service Commission
Premier's Memorandum 97-10 on Model Code of Conduct for NSW Public Agencies - 3 June 1997 (Updated 31 December 2014)	The Model Code forms the basis for agency-level codes of conduct developed to suit the particular operational requirements and circumstances of their agencies and provides guidance on the standards of behaviour expected of public sector employees, including lawyers.	<a href="http://www.dpc.nsw.gov.au">www.dpc.nsw.gov.au</a>	Department of Premier and Cabinet
Guidelines issued by the Independent Commission Against Corruption (ICAC), including "Protecting identity information and documents: Guidelines for public sector managers" (December 2006) and "The ICAC and public sector organisations: Guidelines for Principal Officers" (June 2007).	The ICAC issues guidelines aimed at assisting those working in the NSW public sector, including those working in a local government authority, to understand the role and functions of the ICAC and fulfil their obligations and responsibilities under the <i>Independent Commission Against Corruption Act 1988 (NSW)</i> .	<a href="http://www.icac.nsw.gov.au">www.icac.nsw.gov.au</a>	ICAC
<i>Public Interest Disclosures Act 1994 (NSW)</i>	The PID Act sets in place a system to encourage public officials to report serious wrongdoing. The NSW Ombudsman is responsible for overseeing the implementation of the public interest disclosures system by the NSW Public Sector and promoting its objectives.	<a href="http://www.ombo.nsw.gov.au">www.ombo.nsw.gov.au</a>	NSW Ombudsman

Which Rules apply to you as a government lawyer working in New South Wales?

## RULES AND GUIDELINES APPLYING TO LOCAL GOVERNMENT LAWYERS

Rules	What is their purpose?	Where can I find them?	Who Administers Them?
<i>Local Government Act 1993</i> (NSW)	The purpose of the Act is to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales, and to regulate the relationships between the people and bodies comprising the system of local government in NSW.	<a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a>	Office of Local Government
<i>Local Government (General) Regulation 2005</i> (NSW)	This Regulation is made under the <i>Local Government Act 1993</i> .	<a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a>	Office of Local Government
The Model Code of Conduct for Local Councils in NSW (November 2015) (Model Code)	The Model Code is prescribed by the <i>Local Government (General) Regulation 2005</i> (NSW). The Model Code sets out the minimum requirements of conduct for council officials, including in-house lawyers, in carrying out their functions. The <i>Local Government Act 1993</i> requires every council to adopt a code of conduct that incorporates the provisions of the Model Code.	<a href="http://www.olg.nsw.gov.au">www.olg.nsw.gov.au</a>	Office of Local Government
Circulars to Councils, including Circulars 13-06 of March 2013, 'Model Code of Conduct 2013 – Commencement and Key Resources and 16-42 of November 2016, 'Review of the Model Code of Conduct and Procedures for the Administration of the Model Code of Conduct'	Circulars are issued to councils by the Department of Local Government. They provide information of particular importance on various issues and developments, including the Model Code, misuse of council resources and conflict of interest and secondary employment.	<a href="http://www.olg.nsw.gov.au">www.olg.nsw.gov.au</a>	Office of Local Government

# EXAMPLES OF ETHICAL ISSUES FOR GOVERNMENT LAWYERS

The underlying principles of ethics and professional responsibilities are fundamentally the same for lawyers working in public and private practice. However, the principles present different challenges for government lawyers who must perform their role in the public interest and be subject to greater public accountability.

The Rules identified above, provide an ethical framework for the decisions, actions and behaviour of government lawyers working in New South Wales. When a government lawyer is confronted with an ethical issue, the Guide can provide assistance and guidance in dealing with the issue. The Guide should be read in conjunction with the specific policies and procedures that exist in your department or agency.

Examples of ethical issues that you may have to deal with as a government lawyer in your daily legal practice include:

- Determining who is the client;
- Providing independent advice;
- Duty of confidentiality, including legal professional privilege;
- Acting as a model litigant;
- Not acting where a real or apparent conflict of interest arises;
- Clearly separating legal advice and policy or management advice; and
- Recognising at all times your overriding duty to the Court.

## Cases dealing with ethical issues

### Who is the client?

- *Nye v State of New South & Ors* [2002] NSWSC 1267
- *Babcock International Ltd v Babcock Australia Ltd & Eraring Energy; Babcock Australia Ltd v Eraring Energy & Babcock International Ltd* [2003] NSWCA 6

### Providing independent advice

- *Waterford v The Commonwealth* (1987) 163 CLR 54

### Duty of confidentiality, including legal professional privilege

- *Baker v Campbell* (1983) 153 CLR 52
- *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215
- *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160

### Acting as a model litigant

- *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333
- *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537
- *DPP (Cth) v Saxon* (1992) 28 NSWLR 263
- *Greiner v Independent Commission against Corruption* (1992) 28 NSWLR 125
- *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346
- *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155
- *Scott v Handley* [1999] FCA 404
- *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548
- *ACCC v George Weston Foods Ltd* (2003) 198 ALR 592

### Not acting where a real or apparent conflict of interest arises

- *Law Society of NSW v Harvey* [1976] 2 NSWLR 154
- *Mallesons Stephen Jaques v KPMG Peat Marwick & Carter* (1991) 4 WAR 357
- *Law Society of NSW v Holt* [2003] NSWSC 629
- *Kallinicos & Anor v Hunt & Ors* [2005] NSWSC 1181

### Clearly separating legal advice and policy or management advice

- *Waterford v The Commonwealth* (1987) 163 CLR 54
- *Marcolongo v Mattiussi* [2000] NSWSC 834
- *General Manager, Workcover Authority of NSW v Law Society of NSW* [2006] NSWCA 84

### Overriding duty to the Court

- *Giannarelli v Wraith* (1988) 165 CLR 543
- *R v Witt (no 2)* [2016] VSC 142

## Further information

The Government Solicitors' Committee of the Council of the Law Society of NSW is a source of expert advice and assistance to the Council of the Law Society, the Society and the profession concerning the needs and interests of lawyers working in all three tiers of government in NSW.

The Ethics Committee of the Council of the Society provides guidance on ethical obligations of solicitors, education and policy initiatives and monitors the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. This Committee can provide guidance as to whether a solicitor may be in breach of the Conduct Rules.

For further information in relation to this Guide or the work of the Government Solicitors or Ethics Committees contact:

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