



A GOVERNMENT LAWYER'S GUIDE TO RULES ON ETHICAL ISSUES

June 2022

“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 or state government department or agency or a local council. 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 throughout 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 April 2022.

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) 2014 [LPUL]</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.	www.legislation.nsw.gov.au/view/html/inforce/current/act-2014-16a	NSW Office of the Legal Services Commissioner
<i>Legal Profession Uniform Regulations 2015</i>	These Regulations and Rules are made under the LPUL.	www.legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0354	NSW Office of the Legal Services Commissioner
<i>Legal Profession Uniform General Rules 2015</i>		www.legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0246	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).	legislation.nsw.gov.au	Legal Services Council is responsible for making the Rules
Statement of Ethics (proclaimed by the Law Society Council in October 2020)	The Statement explains in succinct form the role of lawyers in the community, the duties they owe and how those duties interact.	www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/ethics/statement-of-ethics	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.	www.lawsociety.com.au/sites/default/files/2018-03/Ethical%20issues%20for%20Gov%20lawyers.pdf	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.	mddb.apec.org	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.	www.unodc.org/unodc/en/treaties/CAC/	Conference of the States Parties to the United Nations Convention Against Corruption
International Bar Association anti-corruption strategy for the legal profession 2010	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.	https://www.oecd.org/corruption/anti-bribery/46137847.pdf	International Bar Association (IBA) Organisation for Economic Cooperation Development (OECD) UN Office on Drugs and Crime (UNODC)

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.	https://www.legislation.gov.au/Details/C2022C00081	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.	www.legislation.gov.au/Details/C2019C00057 (see also www.apsc.gov.au)	Australian Public Service Commission
Attorney-General's <i>Legal Services Directions 2017</i> (including the Model Litigant Obligation)	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).	www.legislation.gov.au and www.ag.gov.au	Office of Legal Services Coordination, Attorney-General's Department

RULES AND GUIDELINES APPLYING TO NSW STATE GOVERNMENT LAWYERS

Rules	What is their purpose?	Where can I find them?	Who administers them?
<i>Government Sector Employment Act 2013</i> (NSW)	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	www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-040	Public Service Commission
Public Service Commissioner Direction No.1 of 2015 + associated information	Directive provides guidance on the standards of behaviour expected of public sector employees, including lawyers.	www.psc.nsw.gov.au/sites/default/files/2020-10/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf	Public Service Commission
Guidelines issued by the Independent Commission Against Corruption (ICAC)	The ICAC issues guidelines aimed at assisting those working in the NSW public sector, to understand the role and functions of the ICAC and fulfil their obligations and responsibilities under the <i>Independent Commission Against Corruption Act 1988</i> (NSW).	www.icac.nsw.gov.au/reporting/publications-about-reporting-corruption	ICAC
<i>Public Interest Disclosures Act 1994</i> (NSW)	The PID Act encourages and facilitates the disclosure of corrupt conduct, maladministration, serious and substantial waste, and government information contravention in the public sector. The NSW Ombudsman is responsible for promoting public awareness and understanding of the PID Act and monitoring its operation.	www.legislation.nsw.gov.au/view/html/inforce/current/act-1994-092 and www.ombo.nsw.gov.au/Find-a-publication/publications/guidelines/public-interest-disclosures	NSW Ombudsman
Prosecution Guidelines issued by the Office of the Director of Public Prosecutions (ODPP)	The ODPP advises in, institutes, and conducts proceedings in the public interest in accordance with the Prosecution Guidelines. The guideline explains the approach that the NSW Department of Industry will take in response to breaches of legislative obligations under the regulatory frameworks that it administers.	https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-2	ODPP
Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse issued by the NSW Government	<p>The Model Litigant Policy provides principles for maintaining proper standards in litigation and the provision of legal services in NSW.</p> <p>The Model Litigant Policy is complemented by the Guiding Principles which apply to all Government agencies dealing with civil claims involving child abuse. The Guiding Principles seek to make litigation a less traumatic experience for victims and ensure a compassionate and consistent approach across NSW Government when dealing with civil claims for child abuse.</p>	https://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/guiding-principles-civil-claims-child-sexual-abuse.aspx	Department of Communities and Justice

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.	www.legislation.nsw.gov.au/view/html/inforce/current/act-1993-030	Office of Local Government
<i>Local Government (General) Regulation 2021</i> (NSW)	This Regulation is made under the <i>Local Government Act 1993</i> .	legislation.nsw.gov.au/view/html/inforce/current/sl-2021-0460	Office of Local Government
The Model Code of Conduct for Local Councils in NSW and the Procedures for the Administration of the Moral Code of Conduct for Local Councils in NSW 2020	The Model Code sets out the minimum requirements of conduct for council officials, including in-house lawyers, in carrying out their functions. They are prescribed under the <i>Local Government Act 1993</i> and the Local Government (General) Regulation 2005.	www.olg.nsw.gov.au/councils/governance/model-code-of-conduct/model-code-of-conduct-and-procedures-2020/	Office of Local Government
Guidelines issued by the Independent Commission Against Corruption (ICAC)	The ICAC issues guidelines aimed at assisting those working in the NSW public sector, to understand the role and functions of the ICAC and fulfil their obligations and responsibilities under the <i>Independent Commission Against Corruption Act 1988</i> (NSW).	www.icac.nsw.gov.au	ICAC
<i>Public Interest Disclosures Act 1994</i> (NSW)	The PID Act encourages and facilitates the disclosure of corrupt conduct, maladministration, serious and substantial waste, and government information contravention in the public sector. The NSW Ombudsman is responsible for promoting public awareness and understanding of the PID Act and monitoring its operation.	www.legislation.nsw.gov.au/view/html/inforce/current/act-1994-092 and www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures	NSW Ombudsman

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, government lawyers face a discrete set of challenges in performing their role in the public interest, subject to greater public accountability.

The Rules and Guidelines 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 is designed to 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;
- Maintaining 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
- Government lawyers should be aware that legislation can set a specific person as their client

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:

The Law Society of New South Wales
170 Phillip Street, Sydney NSW 2000
DX 362 Sydney

Phone: +61 2 9926 0333
Fax: +61 2 9231 5809
Email: lawsociety@lawsociety.com.au

For general ethics enquiries contact the Law Society's Ethics Solicitors

Phone: +61 2 9926 0114
Fax: +61 2 9221 5804
Email: ethics@lawsociety.com.au

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney

ACN 000 000 699 ABN 98 696 304 966

lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809

E lawsociety@lawsociety.com.au

