

## **ETHICS IN THE PUBLIC SECTOR – CLEARLY IMPORTANT, BUT ...**

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### **What does ‘ethics’ mean?**

This article considers the value of a focus on ethics in the public sector from an enforcement perspective. It looks at some limitations on the usefulness of a narrow focus on ethics in public administration and how effective such a focus is in helping to meet the expectations of the community and achieve the objectives of government.

Some commentators have argued for a very broad interpretation of ethics.<sup>1</sup> The problem with a broad definition is that it can encompass a range of matters that have little to do with moral principles, including standards of performance, effectiveness, efficiency, competence, and avoidance of waste. However, in my view ethics is about moral principles and moral character, about whether decisions and actions are right or wrong, about ‘morally reflective’ decision-making. This narrower interpretation is in line with the derivation of the word ‘ethics’ from the Greek ‘ethos’, which means ‘moral character’.

Given that it is such an important concept, it is remarkable that we still do not have general agreement as to just what ‘ethics’ means in practice, or a good understanding of how we can embed high ethical standards into the public sector.

### **Why are ethical standards in the public sector important?**

In representative democracies governments are said to ‘govern by consent’ – by the consent of the governed. This means that a reasonable level of public trust is of fundamental importance to the proper functioning of a representative government – it is a crucial issue for both governments and the people they govern. The degree to which the public is prepared to trust government is strongly influenced by perceptions as to the general ethical standards of that government. The public’s perception as to whether or not a government is ‘ethical’ is therefore central to whether that government is seen as acceptable.

### **Must ethical conduct be intentional?**

#### ***Is a specific intent required for conduct to be ethical?***

If ethics is about the application of moral principles, about morally reflective decision-making, presumably conduct should only be considered to be ethical where the person concerned was aware at the time that the conduct was morally good, right or proper - in other words, where the person’s conduct was intentional (ie based on specific intent – a consideration of the ethical issues that arose in a particular situation and a conscious decision to act ethically).

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***What if there is no relevant mental element?***

If we were to be successful in embedding high ethical standards in the public sector, that by itself would not be enough to ensure appropriate standards of conduct by individual public officials and the government generally.

People do what is seen to be the right thing for a range of reasons, some of which may have nothing at all to do with ethical considerations and, indeed, some of which may even be ethically 'challenged'.

Embedding high ethical standards into the public sector is important because it establishes the benchmark of conduct to be achieved by the public sector and provides guidance to those who want to meet those standards. However, embedding high ethical standards by itself will not be enough because it will not address situations where there is no relevant mental element, for example:

- If a person acts out of a proper sense of duty but is innocently mistaken in their judgment as to the morally right course of action, would they still have acted ethically (for example, where there is a conflict between one or more of the obligations on public officials to serve the Parliament, serve the government of the day, serve the public interest, serve their agency and serve the public as citizens/customers/clients)?
- Could a person's conduct be reasonably described as ethical merely because the person's conduct was not unethical or was ethically neutral? For example, in the following circumstances:
  - *automatic behaviour* – the person's actions were based on innate, automatic or routine behaviour;
  - *unthinking behaviour* – the person followed the rules or standard practice without giving ethical issues conscious thought;
  - *lack of opportunity* – the person had no opportunity to act otherwise; or
  - *likelihood of detection* – the person only acted ethically to avoid being caught (ie out of self-interest) not because of any assessment that this was the right and proper thing to do.
- Could it be argued that a person's conduct was unethical because the person innocently failed to perceive or identify an ethical issue? For example, due to:
  - *ignorance* – a failure to perceive or be aware of an ethical issue which was reasonable in the circumstances, for example, due to lack of information; or
  - *complexity* – a failure to identify an ethical issue which was reasonable in the circumstances, for example, in a complex situation involving a significant grey area.

If there was no mental element – no intention to act ethically – the conduct might be reasonable, appropriate or good practice, but this was not due to the application of moral or ethical principles-. Alternatively the conduct might be seen as being unreasonable, inappropriate, incompetent or otherwise wrong, but not due to ethical failings.

- What if there is 'constructive knowledge' – where the unethical conduct arises out of moral failings involving such things (to borrow from Professor Stephen Cohen) as:
  - *moral negligence* (a reckless failure to consider whether there was an ethical issue);
  - *moral blindness* (a failure to see an obvious ethical issue, such as a conflict of interests); or
  - *moral recklessness* (a rationalisation that there is no ethical issue to consider).<sup>2</sup>

Further confusion can be caused by the fact that in some quarters 'unethical' is equated with 'corrupt', 'illegal' or 'criminal'. Conduct could be criminal or a breach of the law but still be based on a person's firm belief that they were acting ethically (for example, civil disobedience), or conduct could be unethical without being corrupt<sup>3</sup> (for example, intentionally denying a person procedural fairness because the person was perceived to be a nuisance or clearly guilty; being influenced by irrelevant considerations, for example by letting one's strongly held personal religious beliefs inappropriately influence the exercise of discretionary powers; or misleading the public by selectively disclosing information, without lying).

Whether conduct is in fact ethical or unethical depends on cause - the motive or intention of the individual concerned. Looked at this way, while in some matters it may be easy to conclusively determine that someone's motive was unethical, in many cases the question as to whether conduct is ethical will essentially be a personal matter between the individual and their conscience.

To achieve appropriate standards of conduct in the public sector so as to maximise public trust in government, it is necessary to address the range of motivations or causes of the conduct by public officials that could impact on such outcomes and levels of trust. In my view, the range of such motivations or causes could be summarised as being:

- *intentional ethical conduct* (which could result in either appropriate or inappropriate outcomes);
- *unintentional unethical conduct* (arising out of thoughtlessness, misunderstanding, or moral failings);
- *ethically neutral conduct* (for example, routine or automatic behaviour, lack of opportunity, risk avoidance, a reasonable failure to perceive or identify an ethical issue due to ignorance or complexity); or
- *intentional unethical conduct* (either based on 'actual' or 'constructive' knowledge that the conduct was wrong, for example, 'immoral').

From an implementation and enforcement perspective, it may be more useful to focus on outcomes rather than causes, that is, whether the conduct was appropriate no matter what the cause or motivation. Alternatively, where issues about cause or motive are important, maybe the focus should be on questions of judgment rather than ethics. Judgment has a broader application as it extends beyond questions of moral or ethical principle to encompass such things as the soundness of decision-making and standards of performance/service. A third option might be to focus on the conduct and whether it was criminal, illegal, corrupt or otherwise inappropriate.

### **What factors influence the likelihood of ethical conduct**

I think it is a truism that the conduct of individuals is often more influenced by situation than character. I think we would all have seen examples where people have acted ethically/honestly in some contexts or situations but not in others. This cannot be explained by character flaws, but by how people respond to certain events, situations, opportunities and pressures. Some people may be ethical in business but understate their income for tax purposes. Some people may be generally honest in their dealings with their employer but overstate the hours they work, or slow down their pace of work to increase opportunities for overtime.

So, people may consciously act ethically in some situations and, consciously or unconsciously, act unethically in others. Their intentional unethical conduct may not always be premeditated but could be the result of spur of the moment reaction to events or opportunities.

Interestingly, social/psychological researchers have found that people often incorrectly suppose that what other people do is best explained by their character rather than their circumstances – that what somebody does reflects their character. This is referred to variously as ‘attribution theory’, ‘correspondence bias’ (ie the correspondence between conduct and character) or ‘Fundamental Attribution Error’.<sup>4</sup> While there may be some people whose moral compass always points north and whose conduct is invariably ethical, for most people ethical behaviour is not an absolute.

The various factors that can influence the likelihood of ethical conduct can be summarised as:

- *personal values* – influenced by family, education, religion;
- *personal traits* – the character of the person concerned;
- *supports* – including rules, standards, expectations;
- *deterrents* – which in this context would include the steps that have been taken to prevent and deter unethical conduct and to enforce ethical conduct; and
- *opportunities* – in this context weak or absent systems of prevention and accountability.<sup>5</sup>

### **What needs to be done to encourage and embed ethical conduct into the public sector?**

The encouragement and enforcement of good conduct and administrative practice require various mechanisms, structures and approaches that are both proactive and reactive, and comprehensively address both culture and behaviour, guidance and enforcement, and process and outcomes. They should include:

- *standard setting* – for example, offence provisions, legal obligations, legislated statements of values, jurisdiction wide codes of conduct, agency codes of conduct;
- *expectation setting* – for example, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of administrative practice and good conduct expected of staff;
- *prevention strategies* – for example, removal of opportunities through fraud prevention measures, disclosure of interests registers, gifts and benefits

registers, merit based selection, records management legislation, internal and external audit, proper supervision, ethics training;

- *enforcement mechanisms* – for example, offence provisions in law, whistleblowing legislation, internal disclosure policies, complaint policies, obligations to report corruption to the anti-corruption body, investigation capacity, FOI/GIPA, records management legislation and policies, merit reviews of administrative decisions; and
- *deterrence mechanisms* – for example, watchdog bodies, internal and external audit, disciplinary action, prosecutions.<sup>6</sup>

The not uncommon approach of government and agencies is to focus most effort and attention on setting standards and expectations. However, focussing merely on setting standards and expectations (for example, on codes of conduct, statements of values) will primarily only impact on those who wish to act ethically and those who don't wish to get into trouble, and may also serve to reduce opportunities for people to rationalise that they are not doing anything wrong. This approach is unlikely to address unintentional unethical conduct, and definitely will not address intentionally unethical conduct (whether due to moral failings or pressure brought to bear by group dynamics or the culture of the organisation).

From a practical enforcement perspective, promoting ethical conduct through such means as codes of conduct and statements of values will have limited effect unless such approaches are part of a comprehensive package of measures covering the setting of standards and expectations, as well as prevention, enforcement and deterrence. It is therefore important to employ the full range of mechanisms, strategies and approaches outlined above so as to maximise appropriate standards of conduct. For example:

- for *intentional ethical conduct*, the most effective mechanisms to encourage or enforce good conduct would be standard setting or expectation setting;
- for *unintentional ethical conduct*, the most effective mechanisms would be standard setting, expectation setting and prevention strategies;
- for *ethically neutral conduct*, the most effective mechanisms would be standard setting, expectation setting, prevention strategies and deterrent mechanisms; and
- for *intentional unethical conduct*, the most effective mechanisms would be standard setting (a pre-requisite for the following strategy and mechanisms to be effective), prevention strategies, enforcement mechanisms and deterrent mechanisms (expectation setting would have little or no impact).

<b>Category of conduct</b>	<b>Most effective mechanisms to encourage or enforce good conduct</b>
1) <i>Intentional ethical conduct</i>	Standard setting Expectation setting
2) <i>Unintentional unethical conduct</i>	Standard setting Expectation setting Prevention strategies

3) <i>Ethically neutral conduct</i>	Standard setting  Expectation setting  Prevention strategies  Deterrence mechanisms
4) <i>Intentional unethical conduct</i>	Standard setting  Prevention strategies  Enforcement mechanisms  Deterrence mechanisms

If the aim is to ensure appropriate standards of conduct in the public sector, each of these mechanisms, strategies and approaches will need to be put in place as a comprehensive package.

However, these mechanisms, strategies and approaches will be ineffective without the fifth and most important requirement – commitment. By this I am referring to commitment by government and commitment by the management of individual agencies. .

The essential elements of the necessary level of commitment include but are not limited to:

- an awareness of the importance of the issue;
- the allocation of sufficient resources and priority to addressing the issue;
- the implementation of effective governance mechanisms; and
- the establishment of an appropriate ethical culture in the public sector as a whole, as well as in each individual workplace.

**Conclusion**

While public sector ethics is a nice concept, it has limited relevance to the management of the conduct of public officials to maximise fair and appropriate outcomes in the public interest and public trust in government because:

- there is no general agreement as to the meaning of ethics and what it encompasses;
- ethics involves a mental element and is therefore a very personal and subjective issue, and in practice most people see actual standards of behaviour as more important than what may have motivated that behaviour (other than when things go wrong);
- the application of ethical principles to any complex set of circumstances may well result in a range of possible outcomes, often with no clearly right answer;
- many people can be quite selective in the application of ethical principles to various aspects of their lives and work;
- from a practical enforcement perspective it may be more appropriate or useful to focus on outcomes rather than causes, on whether conduct was criminal, illegal

or corrupt as opposed to ethical, and to talk about questions of judgment rather than ethics; and

- in practice, attempts to improve the standards of conduct and decision-making by public officials need to focus on the full range of potential conduct, not just on trying to encourage public officials to act ethically.

On this last point, while a focus on fostering ethical conduct through setting standards and outlining expectations will assist public officials who wish to act ethically (either generally or in particular circumstances), or who at least would prefer not to act unethically, it will do little to address conduct that is morally negligent, blind or reckless, and will have no impact when people are prepared to place their personal interests above the public interest.

To address the problems that can be caused by such people, a comprehensive approach is required that puts in place adequately resourced mechanisms focusing on:

- standard setting;
- expectation setting;
- prevention procedures and practices;
- enforcement mechanisms; and
- deterrence mechanisms.

## ANNEXURE A

### WHAT INFLUENCES THE LIKELIHOOD OF ETHICAL CONDUCT?

The main influences on the likelihood of people acting ethically include:

- 1) *personal values*, for example, influenced by such things as family, education, religion, ethnicity
- 2) *personal traits*, for example,:
  - strength of character, including a willingness to take responsibility for actions
  - pressure from personal circumstances (for example, a person may be more likely to engage in unethical practices if this will benefit the person personally or if engaging in ethical practices will cost the person personally).
- 3) *supports*, for example,:
  - *rules (such as codes of conduct, agency policies and procedures, and legislated standards of behaviour)*
  - *guidance as to acceptable behaviour (such as in codes of conduct, codes of ethics, legislated statements of values, guidelines, training, advice)*
  - cultural norms (for example, the culture of an organisation or of the wider society).
- 4) *deterrents*, for example,:
  - rules (for example, codes of conduct and legislated standards of behaviour)
  - prevention (for example, reduction of opportunities for inappropriate behaviour)
  - strong systems of accountability (for example, internal and external audits)
  - detection of non-compliance (for example, supervision, audits, whistleblowing, watchdog bodies)
  - penalties for non-compliance/breach.
- 5) *opportunities* (ie situation/circumstances), for example,:
  - weak or absent systems of accountability
  - organisational culture that does not judge certain conduct as being unethical (for example, nepotism or use of organisational resources for personal use).



6) *pressures*, for example,:

- organisational pressure (for example, by management or colleagues)
- political pressure (for example, by Ministers or their staff)
- personal circumstances (for example, financial pressures).

**ANNEXURE B**

**WHAT ARE THE MECHANISMS/STRATEGIES/APPROACHES THAT ENCOURAGE ETHICAL CONDUCT?**

Mechanisms, strategies and approaches that encourage ethical behaviour include:

**1. Standard setting:**

- 1.1 Offence provisions - For example, unauthorised disclosure of information; bribery/secret commissions<sup>1</sup> which apply in all Australian jurisdictions
  
- 1.2 Legal obligations - Avoidance of bias; obligations of fidelity; disclosure of interests, protection of privacy, transparency and openness in decision making, which are common law or statutory requirements common across Australian jurisdictions
  
- 1.3 Legislated statements of values and standards of behaviour - A legislative framework setting out overarching principles and standards of behaviour, covering such issues as legality, impartiality, integrity, avoidance of conflicts of interests, acting in good faith, transparency, frankness and candour, use of public resources. Legislative statements of values are the foundation for jurisdiction wide agency codes of conduct and agency statements of values in most Australian jurisdictions.
  
- 1.4 Jurisdiction wide codes of conduct - Setting out minimum standards of conduct, focusing on the public sector as a whole as apply in most Australian jurisdictions
  
- 1.5 Agency codes of conduct - Setting out minimum standards of conduct, focusing on the particular characteristics of the agency and its environment and are found all Australian jurisdictions.\*

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\*ICAC/CMC research indicates that 96% of NSW agencies and 92% of Queensland agencies have a code of conduct.

- 1.6 Ethics training - While some argue that 'ethics' cannot be taught, this does not mean that people cannot be given training as to expected standards of behaviour, and given tools to assist ethical decision-making and to create an ethical workplace culture. At present this is ad hoc in most Australian jurisdictions.
- 1.7 Responsible agency - A central agency statutorily charged with promoting and being responsible for appropriate standards of conduct by public officials, applicable in all Australian jurisdictions.
- 2. Expectation setting:**
- 2.1 Agency statements of values - An articulation of the norms and values of the organisation often set out in a code of conduct, corporate plan/business plan, statement of corporate purpose or guarantee of service. Implementation often involves little more than lip service to a set of values that are not built into an agency's culture, policies, procedures.
- 2.2 Leadership ('tone at the top') -  
Members of the government of the day demonstrating/ modelling appropriate values and ethical behaviour. Achievement of this outcome is variable across Australian jurisdictions.  
- Senior management of agencies demonstrating/ modelling a commitment to the organisation's values and to ethical behaviour generally. This is also variable across Australian jurisdictions.
- 2.3 Duty statements/contracts - These set out expected standards of conduct. Duty of employment statements and/or contracts of employment are almost universal for employment in the public sector.
- 2.4 Oaths of office - This is a requirement to hold certain positions in some Australian jurisdictions.
- 2.5 Ethics training - Discussed earlier.
- 3. Prevention strategies:**
- 3.1 Whistleblowing legislation - Legislation at some level is found in all Australian jurisdictions but is currently under review in several places.

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|-----------------------------------|---------------------------------------------|---|---------------------------------------------------------------------------------------------------------------------------------|
| 3.2                               | Disclosure of interests                     | - | Obligation to disclose pecuniary and other interests or obligations that could lead to a conflict.                              |
| 3.3                               | Gifts and benefits registers                | - | These requirements are common across all Australian jurisdictions.                                                              |
| 3.4                               | Fraud control plans                         | - | Ditto                                                                                                                           |
| 3.5                               | Use of IT and communication device policies | - | Ditto                                                                                                                           |
| 3.6                               | Accounting standards                        | - | Ditto                                                                                                                           |
| 3.7                               | Records management legislation              |   | This requires the making and retention of proper records and is found in all Australian jurisdictions.                          |
| 3.8                               | Records management policies                 |   | These apply universally in Australian jurisdictions.-                                                                           |
| 3.9                               | Merit based selection                       | - | These practices are almost universal in Australian jurisdictions.                                                               |
| 3.10                              | Criminal records checks                     | - | These are common pre-requisites across Australian jurisdictions for selection to a position in the public sector.               |
| 3.11                              | Supervision                                 | - | This is particularly important in high risk areas.                                                                              |
| 3.12                              | Ethics training                             | - | Discussed earlier.                                                                                                              |
| <br>                              |                                             |   |                                                                                                                                 |
| <b>4. Enforcement mechanisms:</b> |                                             |   |                                                                                                                                 |
| 4.1                               | Whistleblowing legislation                  | - | Discussed earlier.                                                                                                              |
| 4.2                               | Internal disclosure policies                | - | To facilitate internal public interest disclosures (whistleblowing) by staff.                                                   |
| 4.3                               | Complaint handling policies                 | - | Agency policies for the receipt, handling, investigation, of complaints and common across agencies in Australian jurisdictions. |

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| 4.4                             | Reporting of corrupt conduct -           | - | The obligation on CEOs and Ministers to report suspected corrupt conduct to the anti-corruption body applies in most Australian jurisdictions.                                                                                                                                                                                                                                                     |
| 4.5                             | Internal audit                           | - | This is common across Australian jurisdictions.                                                                                                                                                                                                                                                                                                                                                    |
| 4.6                             | External audit                           | - | This practice has universal application in Australian jurisdictions.                                                                                                                                                                                                                                                                                                                               |
| 4.7                             | Agency investigative capacity-           |   | The capacity of agencies to investigate complaints/disclosures is variable across agencies depending on their size and their exposure to and history of illegal/unethical/inappropriate behaviour.                                                                                                                                                                                                 |
| 4.8                             | FOI (or equivalent)                      | - | Legislation is found in all Australian jurisdictions.                                                                                                                                                                                                                                                                                                                                              |
| 4.9                             | Records management legislation           | - | Discussed earlier.                                                                                                                                                                                                                                                                                                                                                                                 |
| 4.10                            | Records management policies              | - | Discussed earlier.                                                                                                                                                                                                                                                                                                                                                                                 |
| 4.11                            | Merit review of administrative decisions | - | Common in Australian jurisdictions, but only for administrative decisions specifically nominated in legislation.                                                                                                                                                                                                                                                                                   |
| <b>5. Deterrence mechanisms</b> |                                          |   |                                                                                                                                                                                                                                                                                                                                                                                                    |
| 5.1                             | Watchdog/integrity bodies                | - | <ul style="list-style-type: none"> <li>Ombudsman offices are found in all Australian jurisdictions.</li> <li>- Anti-Corruption Commissions have been set up in most Australian jurisdictions.</li> <li>- Integrity/Ethics/Standards Commissioners are found in some Australian jurisdictions, such as Queensland, and WA.</li> <li>- Auditors General [in all Australian jurisdictions]</li> </ul> |
| 5.2                             | Internal audit                           | - | This possibility is common across Australian jurisdictions.                                                                                                                                                                                                                                                                                                                                        |
| 5.3                             | External audit                           | - | This mechanism applies universally in Australian jurisdictions.                                                                                                                                                                                                                                                                                                                                    |

- 5.4 Penalties - The penalties that can be imposed for non-compliance/breach of acceptable ethical standards/standards of behaviour, for example, warnings, directions, demotions, fines, dismissal, gaol, are common across Australian jurisdictions.
- 5.5 Disciplinary action - This is rare in practice.
- 5.6 Prosecution - This is very rare in practice.

**Endnotes**

- 1 It is argued by some that public sector ethics can be categorised as including: *democratic ethics* – that public officials are responsible, responsive and accountable; *managerial ethics* – that public officials are efficient and effective; and *social ethics* – that public officials uphold principles of justice, fairness, equity, individual rights.
- 2 In other words, where questions of morality are not recognised or are disregarded, as opposed to where questions of morality do arise and the conduct is intentionally unethical, improper.
- 3 In terms of the normal use of the word rather than any technical definition given in corruption legislation.
- 4 For example, Lee Ross 'The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process', in Leonard Berkowitz, ed, *Advances in Experimental Social Psychology*, vol.10 (New York: Academic Press, 1977); Daniel Gilbert and Patrick Malone, 'The Correspondence Bias', *Psychological Bulletin* 117.
- 5 Annexure A sets out is a more detailed list of various factors that can influence the likelihood of ethical conduct.
- 6 These mechanisms, strategies and approaches are set out in more detail in Annexure B.