



# NSW Government Lawyers Handbook



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# 1. Introduction

The NSW Government Lawyers Handbook (**Handbook**) (formerly the Induction Booklet for In-house Government Lawyers) 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. The Handbook provide a comprehensive overview of relevant government policies, procedures and important legislation.

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 Department of Communities and Justice via email to: [enquiries-dcilegal@dcj.nsw.gov.au](mailto:enquiries-dcilegal@dcj.nsw.gov.au)

## 2.NSW Government Sector 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 King
- The Governor
- The Executive Council
- Ministers of the Crown and Cabinet; and
- Officers in the service of the Crown.

In addition, New South Wales legislation establishes several 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.

### 2.1. The Constitution of NSW

The constitution provides the framework of law by which the state is governed. It sets out the broad powers and rules under which the houses of parliament, Governor, executive government, judiciary, finances, government agencies and local government can operate. The NSW Constitution is an Act of Parliament introduced in 1902 after Federation and followed on from several earlier Acts. It has been amended many times since. Most of it can be changed by an ordinary amendment Act in Parliament, although some sections, including those relating to major changes to the Legislative Council, can only be amended through a referendum of NSW voters.<sup>1</sup>

### 2.2. The Executive

With reference to the *Constitution of New South Wales*, the role of these parts of the Executive can be summarised as follows:

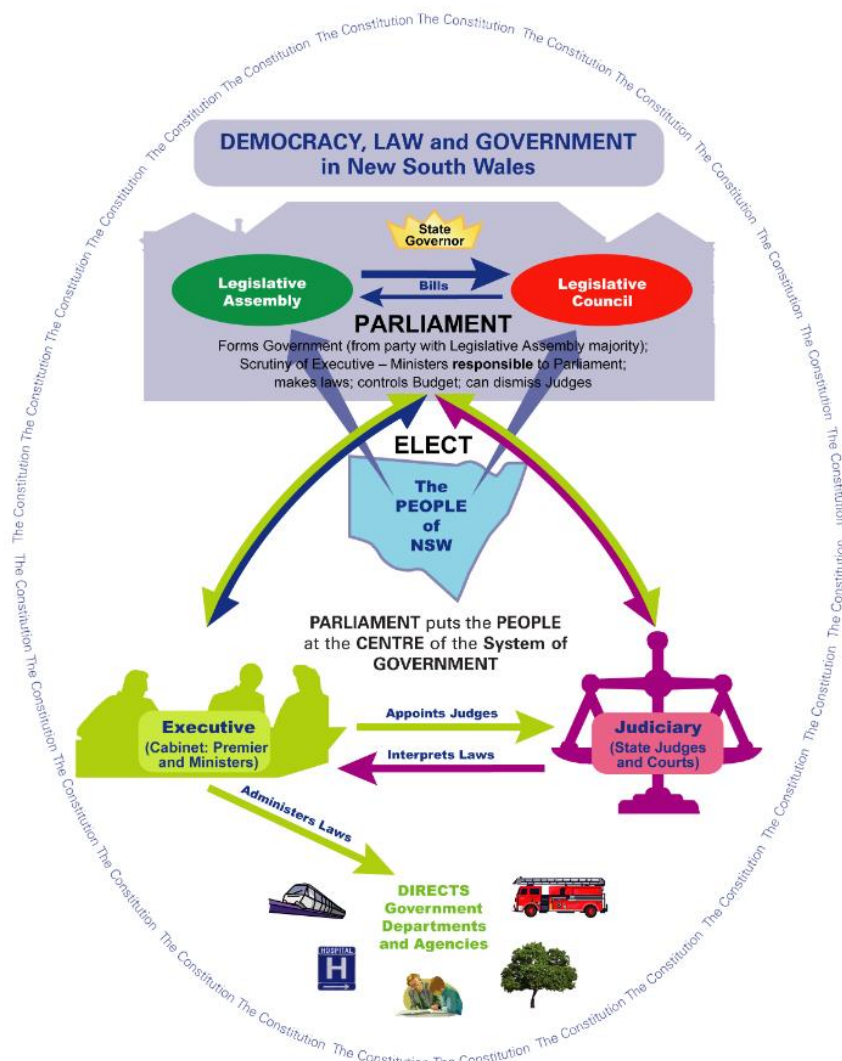
- **The King** is primarily confined to formally appointing and removing the Governor, on the advice of the Premier, but may also exercise some executive powers while present in the State.
- **The Governor** has both ceremonial and constitutional roles and functions. The Governor is the King's representative 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

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<sup>1</sup> Parliament of New South Wales website: <https://www.parliament.nsw.gov.au/about/Pages/The-Constitution-of-New-South-Wales.aspx>

their statutory functions. All Ministers are usually appointed as Executive Councilors. The Executive Council meets weekly and generally comprises two Ministers (selected via a roster) and the Governor.<sup>2</sup>

- **NSW Cabinet** comprises the Premier and all other Ministers. Cabinet is not established by legislation but 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).<sup>3</sup>
- **Ministers** have responsibility for administering their respective portfolios and are allocated Acts and are conferred with powers under specific legislation.



<sup>2</sup> For further information about the operation of the Executive Council see the Parliament of NSW website.

<sup>3</sup> For further information about the operation of Cabinet see Department of Premier and Cabinet website.

## 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 agencies and statutory officers to exercise their functions (see section 21(2)).

The Public Service is organised into the Departments and other 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, such as the Crown Solicitor and Parliamentary Counsel. Administrative Arrangements Orders specify the Ministers to whom Public Service agencies are responsible.

Departments and other agencies do not have a legal personality separate from the Crown in the State of New South Wales. Unlike incorporated bodies, these agencies cannot do 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. 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*.

## 2.4. NSW Government Departments

NSW Government departments and organisations are arranged into 11 groups, called portfolio of agencies. Within these clusters are a number of executive agencies<sup>4</sup>.



<sup>4</sup> A list of executive agencies of the NSW Government, are in Schedule 4 of the *Administrative Arrangements (Second Perrottet Ministry—Transitional) Order 2021*, containing Amendment No. 40 to the *Government Sector Employment Act 2013*.



## 2.5. NSW Government Agencies

Executive agencies may operate independently of their department but are still categorised within the relevant agency portfolio. An example of an executive agency within the Department of Communities and Justice (DCJ) portfolio is the NSW Police Force.

Many functions associated with government are also exercised by statutory agencies or independent bodies and state-owned corporations. Legislation establishing a statutory office will generally provide for the appointment, functions, and relationship to government more broadly. An example of a separate office holder or statutory agency within the DCJ portfolio is the NSW Rural Fire Service, Fire & Rescue NSW and the Crown Solicitor's Office.

## 2.6. Statutory Offices

Statutory offices 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. Many statutory offices will be expressly or impliedly conferred with the status, privileges, and immunities of the Crown. This means that for some, but not 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 office 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 offices to exercise their functions.

Legislation creating statutory offices 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 offices 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).

## 2.7. State Owned Corporations

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. The NSW Government owns several commercial businesses in energy, water, ports and forestry known as State Owned Corporations (SOCs). The Government established these businesses on behalf of the people of NSW as they provide services critical to the economy and infrastructure to the state. There are eight SOCs in NSW.<sup>5</sup>

All SOCs are set up under the SOC Act and must comply with the requirements set out in the Act. In addition, each SOC has separate enabling legislation.

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<sup>5</sup> For a list of current SOC see the NSW Treasury website: <https://www.treasury.nsw.gov.au/information-public-entities/government-businesses/state-owned-corporations>.

## 3.NSW Government Legal Services

Advice and representation for government agencies may be provided either in-house or via an external legal services provider.

Advice and representation may be provided by:

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

### 3.1. The Crown Solicitor

The Crown Solicitors Office (CSO) is a public service executive agency related to the Department of Communities and Justice. As head of the agency, the Crown Solicitor is responsible to the Attorney General for the general conduct and management of the functions and activities of the CSO. The CSO advises and represents agencies in a range of matters and is the sole provider of legal services in all matters regarded as core legal work in accordance with Premier's Memorandum 2016-04.

The Crown Solicitor also competes with the private sector to deliver non-core legal work to government agencies. As part of its non-core work, the CSO delivery services under several legal services panel arrangements. The Crown Solicitor is the solicitor on the record for the purpose of legal proceedings when representing the State, agencies, or Ministers.

Under s. 44 of the *Legal Profession Uniform Law Application Act 2014*, the Crown Solicitor may act as solicitor for:

- the State of NSW
- a person suing or being sued on behalf of the State of NSW
- a Minister of the Crown acting in his or her official capacity
- a body established by an Act or other law of NSW
- a statutory officer or employee of the Public Service or any other service of the State of NSW or of a body established by an Act or other law of NSW
- a person holding office under an Act or other law of NSW or because of the person's appointment to that office by the Governor or a Minister of the Crown
- any other person or body, or any other class of persons or bodies, approved by the Attorney General.

The CSO does not provide legal services to the general public.

### 3.2. Core legal work

All Core legal work of government **must be** referred to the Crown Solicitor to be managed in a consistent and coordinated 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").<sup>6</sup>

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.

### **3.2.1. Core legal work to private legal providers**

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/recommended.

### **3.3. Solicitor General and Crown Advocate**

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. In summary 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.

### **3.4. 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.<sup>7</sup>

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<sup>6</sup> Premier's Memorandum M2016-04-NSW Government Core Legal Work Guidelines - <https://arp.nsw.gov.au/m2016-04-nsw-government-core-legal-work-guidelines>

<sup>7</sup> Parliamentary Counsel's Office website: <http://pco.nsw.gov.au>.

## 4. External Legal Services

### 4.1. 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 first established on 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 Panel was established on a non-exclusive basis; that is, each Agency remains responsible for procuring its own legal services. 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. Information regarding the panel firms' capability statements, value adds, and rates matrix are hosted on a separate secure platform. Access to this platform is provided by Transport for NSW. Contact details are available from the Buy.nsw website.

More information including the guidelines and forms relating to the NSW Government Legal Services Panel can be found on the Buy.nsw website.<sup>8</sup>

### 4.2. Treasury Managed Fund

The Treasury Managed Fund is a self-insurance scheme created by the NSW government to insure NSW government agency risk. It delivers on the government's responsibility to keep the people and property of the state safe. The TMF is the largest fund administered by iCare Self-Insurance. As members of the TMF, agencies and government related businesses are indemnified for all insurable risks.

The TMF provides protection for the asset and liability exposures (except compulsory third party insurance) for member agencies. The government can insure against almost any liability, injury, loss or damage that may be suffered by individuals who work for and assets owned and run by its agencies. The coverage is worldwide.

There are two streams of cover:

- Workers Compensation – this covers TMF agencies in the event an employee suffers a work-related injury or illness. This is in accordance with NSW Workers Compensation and Injury Management legislation.
- General Lines – this covers legal liability, motor vehicle and property as well as other miscellaneous areas.

The TMF provides indemnity under the Statement of Cover which sets out the responsibilities of claims managers and agencies, 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.

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<sup>8</sup> <https://info.buy.nsw.gov.au/schemes/legal-services-panel>

iCare Self-Insurance operates a multi-provider model for claims management. 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 costs orders.

The TMF manage a panel of Legal Services providers who provide legal services for claims covered by iCare. Cases are distributed equally between TMF Panel Firms using a legal panel management system. More information can be obtained from the iCare website [www.icare.nsw.gov.au](http://www.icare.nsw.gov.au).

### **4.3. Department of Communities and Justice Legal Services Panel**

The Department of Communities and Justice, Legal (DCJ Legal) maintains a panel of legal practitioners. Representation may be provided by DCJ Legal lawyers, or the matter may be referred to a legal practitioner who is on the Legal Services Panel (the Panel). The Panel consists of solicitors/advocates and junior barristers.

If you have been served with a:

- Notice to provide a Statement of Information
- Notice to provide Documents or Other Things; or
- Summons to Appear and Give Evidence.

you may wish to apply for assistance with DCJ Legal.<sup>9</sup>

It is important that you contact DCJ Legal as soon as possible by telephone. This must be followed with a completed Application Form and copy of relevant Notice or Summons emailed to this Office within 48 hours (see DCJ Legal contact details).<sup>10</sup>

Links to the relevant Application Forms are found at the DCJ Legal website:

- ICAC Application Form
- LECC Application Form; and
- NSWCC Application Form.

If you receive a request for an interview by ICAC, LECC or NSWCC it is suggested that you contact DCJ Legal in the first instance to discuss the making of an Application.

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<sup>9</sup> <https://dcj.nsw.gov.au/legal-and-justice/legal-assistance-and-representation/legal-representation/contact-us.html>

<sup>10</sup> <https://dcj.nsw.gov.au/legal-and-justice/legal-assistance-and-representation/legal-representation/apply-for-assistance.html>

## 5.NSW Government Legal Services Policies

### 5.1. The Equitable Briefing Policy for Women Barristers

The NSW Government Equitable Briefing Policy for Women Barristers operates to entrench equitable briefing practices in all NSW Government agencies that brief barristers. NSW is committed to supporting the progression and retention of women barristers who are engaged with NSW agencies and across the legal profession more broadly. The NSW Policy applies to all NSW Government sector agencies that brief counsel.

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 Premier's Circular C2018-06 – Briefing Senior Counsel.<sup>11</sup>

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

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.<sup>12</sup>

### 5.2. 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. Premier's 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.

In circumstances, where a private law firm acts for a government agency a request to the Attorney General for the approval to engage Senior Counsel must be submitted. 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 or able to be estimated), the reasoning around preferences of counsel selected by an agency (e.g., 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. When a female Senior Counsel is not nominated, reasons must be provided (e.g., there are no female Senior Counsel practicing in the area or available to take the brief).

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<sup>11</sup> <https://arp.nsw.gov.au/c2018-06-briefing-senior-counsel>

<sup>12</sup> Further information can be obtained from: <https://dcj.nsw.gov.au/legal-and-justice/strategies-and-plans/information-for-government-lawyers/equitable-briefing-policy.html>

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.

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@dcj.nsw.gov.au](mailto:enquiries-dcjlegal@dcj.nsw.gov.au)

### **5.3. 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 counsel, and Senior Counsel, engaged by or on behalf of government agencies and public officials, and in respect of applications for ex gratia legal assistance. In circumstances where representation by private solicitors is approved, both the level and the rates of representation are detailed in the approval letter.

The Attorney General's rates include all overheads, secretarial, legal, and administrative assistance, but not out of pocket disbursements. The rates are GST exclusive. The Attorney General's rates do not apply to matters referred to the Legal Representation Office (LRO) as the LRO apply specific rates.

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

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.

The Attorney's rates are reviewed annually in the new financial year on or around 1 August. The current Attorney General's rates are uploaded to the DCJ website.<sup>13</sup>

### **5.4. The Model Litigant Policy**

The Model Litigant Policy for Civil Litigation (the Policy) provides principles for maintaining proper standards in litigation and the provision of legal services in NSW. The Policy is designed to provide guidelines for best practice for government agencies in civil litigation matters. It 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.

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<sup>13</sup> <https://dcj.nsw.gov.au/legal-and-justice/strategies-and-plans/information-for-government-lawyers/attorney-generals-rates-legal-representation.html>



The 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 Policy, government agencies are required to (amongst other things):

- deal with claims promptly, not causing 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 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 it has reasonable prospects of success, or 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.

## **5.5. NSW Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse**

Premier's Memorandum M2016-03-Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse in 2016 incorporates the Model Litigant Policy obligations and the obligations under the NSW Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse (the Guiding Principles).

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.

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 bound by the Model Litigant Policy when conducting civil litigation matters and the Guiding Principles when dealing with child sexual abuse claims. For more information on the Model Litigant Policy visit the DCJ website.

## 5.6. 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 that 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' (i.e., a defence not available to a normal litigant) without first consulting the Attorney General.

## 5.7. Prosecution Policy

The Prosecution Guidelines, issued under s13(1) of the *Director of Public Prosecutions Act 1986*, set out the general principles for the initiation and conduct of criminal prosecutions. 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*. These can be access from the Office of the Director of Public Prosecutions website.<sup>14</sup>

<sup>14</sup> <https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines>

## **5.8. 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 the Courts website.<sup>15</sup>

## **5.9. Ex Gratia Payments for Legal Assistance**

Premier's Memorandum 2022-10 *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. The purpose of the memorandum is to issue the guidelines for the provision of ex gratia legal assistance for Ministers, public officials, and Crown employees. The guidelines describe the circumstances in which an application for ex gratia legal assistance may be made, the procedures that must be followed and the level of fees that may be paid to the legal representatives of applicants in these matters. The guidelines are available from the Premier's website.<sup>16</sup>

The assistance which may be provided is ex gratia, or discretionary, in nature and will not be provided as of right. The Department of Communities and Justice has administrative responsibility for the provision of ex gratia legal assistance and is responsible for assessing the merits of each case and determining whether such assistance should be granted. Accordingly, any inquiries regarding the ex-gratia assistance scheme should be made to the Department of Communities and Justice.

It is important to note that private law firms are not engaged to represent employees of NSW government agency under M2022-10 unless an application has been submitted in accordance with the guidelines, forwarded for processing to the Department of Communities and Justice, and a decision to approve the request has been obtained. If this process is not followed coverage of legal fees may be denied.

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<sup>15</sup> <https://courts.nsw.gov.au/alternative-dispute-resolution/alternative-dispute-resolution-directorate.html>

<sup>16</sup> <https://arp.nsw.gov.au/m2022-10-guidelines-for-the-provision-of-ex-gratia-legal-assistance-for-ministers-public-officials-and-crown-employees/>

## 6. Principal Legislation for Government Lawyers

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.

### 6.1. Constitution Act

The *Constitution Act 1902 (NSW)* forms part of a broader body of constitutional law in NSW – including the common law, constitutional convention, and the Commonwealth Constitution governing the institutions of government in the State. The *Constitution Act* contains several 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
- 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; and
- Part 7 of the Act – which addresses administrative arrangements.

The current version of the *Constitution Act 1902* can be found on the NSW Legislation website.<sup>17</sup>

The constitution provides the framework of law by which the state is governed. It sets out the broad powers and rules under which the houses of parliament, Governor, executive government, judiciary, finances, government agencies and local government can operate. The NSW Constitution is an Act of Parliament introduced in 1902 after Federation and followed on from several earlier Acts. It has been amended many times since. Most of it can be changed by an ordinary amendment Act in Parliament, although some sections, including those relating to major changes to the Legislative Council, can only be amended through a referendum of NSW voters.

### 6.2. Administrative Arrangements

Administrative Arrangements Orders may be made by the Governor of NSW under Part 7 of the *Constitution Act* and with the advice of the Executive Council.

When government make changes to departments or Ministerial arrangements, they also produce Administrative Orders that clarify what Ministers have responsibility for what legislation, how ministers and government agencies align with departments and staff movements between Departments.

Administrative Orders also:

- allocate the administration of Acts and other portfolio responsibilities to Ministers (section 50B)

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<sup>17</sup> <https://legislation.nsw.gov.au/view/html/inforce/current/act-1902-032>

- 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 will need to be read as a reference to the Secretary of Department B if an Administrative Changes Order so provides.

In circumstances 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 under “in force” > “statutory instruments”.<sup>18</sup>

### 6.3. Public Sector Employment Legislation

The *Government Sector Employment Act 2013* (GSE Act) provides the statutory framework for NSW government sector employment and workforce management. The GSE Act commenced on 24 February 2014, replacing the *Public Sector Employment and Management Act 2002*. The GSE Act provides the foundation of a modern and effective public sector workforce, attracting and retaining talented people who want rewarding careers and who are well-equipped to deliver the best service to the people of NSW.

Two of the GSE Act's key reform areas were the structure of the sector's executive, and the employment arrangements and management practices that apply to both executive and non-executive employees.

The Act establishes two main employment structures:

1. the Public Service; and
2. 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); and
- 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 GSE Act can be found on the NSW Legislation Website.<sup>19</sup> Further information and resources

<sup>18</sup> <https://legislation.nsw.gov.au/browse/inforce#/sl/title/a>

<sup>19</sup> <https://legislation.nsw.gov.au/view/html/inforce/current/act-2013-040>

regarding the GSE Act are available from the Public Services Commission website.<sup>20</sup>

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); and
- *Police Act 1990* (NSW Police Force).

## 6.4. Public Sector Awards

The NSW Industrial Relations Commission provides information and links to common public sector awards which contain salary, wages, and conditions of employment for NSW public sector employees. All awards were made in the NSW Industrial Relations Commission and are published on the Commission's website.<sup>21</sup>

Various industry and enterprise awards exist under the *Industrial Relations Act 1996*. These are "paid rate" awards and the pay and conditions contained within cannot legally be reduced or altered. There are various awards for crown employees which apply to different areas within government and/or relate to different aspects such as salaries, conditions etc.

Some Awards which may be relevant to government lawyers include:

- Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009,<sup>22</sup>
- Crown Employees (Public Sector-Salaries) Award;<sup>23</sup> and
- Legal Officers, Various Departments Agreement No. 2375 of 1982.<sup>24</sup>

Awards are issues and updated in accordance with changes to the Award. Awards are replaced frequently to increase wages, salaries and allowances payable to employees covered by various public sector Awards, Agreements and Determinations.

## 6.5. Public finance legislation

The *Government Sector Finance Act 2018* (GSF Act) governs financial arrangements in the New South Wales government sector.<sup>25</sup> The GSF Act consolidates and replaces four financial management Acts in NSW dating from the 1980's. The GSF Act is accompanied by regulations and Treasurer's directions. The GSF Act establishes a principle-based framework for the financial administration of the NSW public sector. Regulations and Treasurer's directions provide the required operational detail to enable agency's compliance with the GSF Act. It is important to note that regulations and Treasurer's directions have legislative power and must be complied with by the entities to which they apply.

The GSF Act addresses various aspects of public finance, including:

- The circumstances in which government agencies, their officers and employees may lawfully expend public money
  - Section 5.5 of the Act makes it clear that 'government officers' – which includes all

<sup>20</sup> <https://www.psc.nsw.gov.au/legislation-and-policy/government-sector-employment-act>

<sup>21</sup> <https://www.industrialrelations.nsw.gov.au/nsw-public-sector/public-sector/public-sector-awards/>

<sup>22</sup> <http://www.lawlink.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C8041?OpenDocument>

<sup>23</sup> <https://arp.nsw.gov.au/c2022-05-crown-employees-public-sector-salaries-2022-award/#:-:text=On%20August%202022%2C%20the.or%20after%201%20July%202022.>

<sup>24</sup> [https://psa.asn.au/wp-content/uploads/2017/11/AG81\\_2375.pdf](https://psa.asn.au/wp-content/uploads/2017/11/AG81_2375.pdf)

<sup>25</sup> <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2018-055#sec.3.1>

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).
- Section 10.4 of the GSF Act enables the Governor to make regulations for, or with respect to, any matter required, or permitted to be prescribed, for carrying out or giving effect to the GSF Act. Regulations and changes to them are required to be published on the NSW Legislation website.

## **6.6. Treasurer's Directors and Treasury Circulars**

### **6.6.1. Treasurer's Directions**

Section 3.1 of the GSF Act relates to the Treasurer issuing Treasurer's Directions, which are a legislative instrument that enables the Treasurer to implement policy decisions to support Agency compliance. 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. Treasury, in accordance with the GSF Act, consults with agencies regarding development of regulations and Treasurer's directions.

Current Treasurer's Directions are located on the NSW Treasury website > Documents and resources > Documents library.<sup>26</sup>

Regulations and Treasurer's directions will be expressed to apply to:

- all GSF agencies, Accountable Authorities and government officers, or
- classes of GSF agencies, Accountable Authorities or government officers.

A Treasurer's direction cannot target an individual agency, Accountable Authority or government officer. The only circumstance in which a Treasurer's direction may apply to a particular agency is when that agency's responsible Minister consents to a specific Treasurer's direction.

### **6.6.2. Treasury Circulars**

The Treasurer also has the power to issue Treasury Circulars. Treasury Circulars are usually used to establish whole of government policies and often include an instruction or requirement to take specific action in the implementation of those policies. They may cover matters that are outside the scope of Treasurer's directions. Much like a Treasurer's direction, once implemented a circular must be followed by all government departments. Treasury Circulars also provide key information or guidance for Ministers and/or government agencies on parts of the GSF Act including how certain functions should operate and best practice guidelines.

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.

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<sup>26</sup> <https://www.treasury.nsw.gov.au/documents-resources/documents-library>

## 6.7. Interpretation Act

The *Interpretation Act 1987 (NSW)* 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 of this Act 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**

The Part sets out the principals for making of statutory rules.

- **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:

- a) regardless of whether they were enacted or made before or after the commencement of the *Interpretation Act* (section 5(1)); but
- b) 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.

## 6.8. Subordinate or Delegated Legislation

Subordinate (also known as Delegated) legislation is law made under the authority of a power conferred by an Act of Parliament. Parliament has regularly and extensively delegated to the Executive Government limited power to make certain regulations under Acts. Subordinate legislation is a category of statutory instrument that, in general, is an instrument of a legislative character made by an entity exercising a delegated law-making power under the authority of an Act. Acts often confer the authority to make subordinate legislation on the Governor. However, Acts sometimes confer the authority on other persons or bodies (for example, Ministers, courts



and tribunals and public officials). The most widely used and known form of subordinate legislation is the regulation.

The most common example of subordinate legislation is a statutory rule. Section 21 (1) of the *Interpretation Act 1987* defines a statutory rule to be:

- a regulation, by-law, rule or ordinance made by the Governor (however, the Governor no longer makes ordinances), or
- a regulation, by-law, rule or ordinance made by another person or body that must be approved or confirmed by the Governor (for example, a University by-law made under section 36 of the University of Sydney Act 1989), or
- a rule of court (which is a rule made by the person or body having power to make rules regulating the practice and procedure of a court or tribunal).
- Examples of other kinds of subordinate legislation include (but are not limited to) the following:
  - proclamations made by the Governor that commence provisions of Acts,
  - proclamations made by the Governor that alter local council areas or amalgamate them under the Local Government Act 1993,
  - rules made by the Legal Profession Admission Board concerning the admission of lawyers,
  - water sharing plans made by order under the Water Management Act 2000,
  - proclamations, orders, notices or other instruments that operate to amend an Act (see, for example, final determinations under the Biodiversity Conservation Act 2016).

The rules and guidelines for making statutory rules and subordinate legislation is outlined in the *Subordinate Legislation Act 1989* (NSW).

## 6.9. Crown Proceedings

The *Crown Proceedings Act 1988* (the Act) provides that the New South Wales government or its instrumentalities may be sued. Once a judgment is obtained, section 7 of the Act provides that the Treasurer shall pay out of any money legally available, and all of the money payable by the Crown under any judgment including any interest.

The Act 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)).



## 6.10. 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:

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
2. 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.<sup>27</sup>

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.

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<sup>27</sup> 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.

## 7. Compliance and Oversight

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 generally 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.

This section addresses a number of legal and administrative matters which are commonly encountered in the course of agency operations, as well as key accountability mechanisms and policies and directions which guide government agencies in their obligations.

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; and
- many activities at the agency level also rely on formal legal, financial, procurement or human resource delegations.

### 7.1. Premier's Memoranda and Circulars

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 primarily to the management and administration of the NSW Public Sector.

### 7.2. 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 who can make certain kinds of decisions. 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.

### **7.3. 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. Information about countering corruption in the NSW public sector is available on the [ICAC website](#).

### **7.4. NSW 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. The NSW Ombudsman's Office – led by the NSW Ombudsman – is an independent and impartial integrity agency. The Ombudsman watch over most NSW public sector agencies and some community service providers. The NSW Ombudsman undertakes a range of activities beyond the traditional ombudsman role of complaint handling and complaint investigations.

The principal legislation administered by the NSW Ombudsman is:

- *Ombudsman Act 1974* (Ombudsman Act)
- *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS CRAMA); and
- *Public Interest Disclosures Act 2022* (PID Act).

The NSW Ombudsman is responsible for:

1. Overseeing the implementation of the public interest disclosures system by the NSW Public Sector and promoting its objectives.
2. Handling complaints about most NSW government agencies, local councils, and community service providers.
3. Reviewing how community services are delivered.
4. Providing training and resources to encourage good administrative practices.
5. Monitoring the NSW Government's Aboriginal programs and engage with the community to improve the delivery of services to Aboriginal communities and peoples.
6. Reviewing the deaths of children in circumstances of abuse or neglect, and the deaths of children in care.
7. Convenes and supports the Child Death Review Team (CDRT).

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 that is 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 that is the subject of a complaint before which witnesses may be called. If the Ombudsman finds the conduct is (among other things) unlawful, based on improper motives, unjust, discriminatory, or otherwise wrong, they are required to make a report to the responsible Minister and others in relation to the conduct. This report will include 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. Further information about public interest disclosures can be found on the NSW Ombudsman website.<sup>28</sup>

## **7.5. 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 their functions by the Audit Office.

The Auditor-General conducts financial and performance audits, principally under the *Government Sector Audit Act 1983* (the GSA Act) and the *Corporations Act 2001* and examines allegations of serious and substantial waste of public money under the GSA Act, and *Public Interest Disclosures Act 1994*. Some functions under the GSA Act have "migrated" to the GSF Act upon the

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<sup>28</sup> <https://www.ombo.nsw.gov.au/>

commencement of Part 7 of that Act. 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 GSA Act, which can be found on the NSW Legislation website. 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*.

## **7.6. Royal Commissions and Special Commissions of Inquiry**

Royal Commissions and Special Commissions of Inquiry are periodically established, and Commissioners are 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 or another class of appointee. 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 on the DPC website.

## **7.7. Public Interest disclosures**

The *Public Interest Disclosures Act 2022* (PID Act) sets in place a system for public officials to report serious wrongdoing in a way that minimises the risk of reprisal. The PID Act applies to all NSW public sector agencies - including government departments and agencies, state-owned corporations, local government councils, Local Aboriginal Land Councils, and public schools, public universities and public hospitals. A full list is available in section 16 of the PID Act.

The PID Act 2022 provides for public officials to have multiple pathways to report serious wrongdoing. This includes reporting to a disclosure officer, their manager, and other agencies, such as integrity agencies. The threshold for what is considered detrimental action has been lowered, and the associated penalties for the detrimental action offence have been increased, when compared to the 1994 PID Act. Clarity is provided in the PID Act 2022 on what agencies are expected to do with a report when it is received, how they must deal with a report once it is identified that it is a PID and what they must do if serious wrongdoing is found to have occurred. The PID Act 2022 also outlines when an agency must communicate with a PID maker and with the NSW Ombudsman.

Under the Act, there are 3 types of PIDs. These are:

1. **Voluntary PID:** This is a PID where the report has been made by the public official because they decided, of their own accord, to come forward and disclose what they know.
2. **Mandatory PID:** This is a PID where the public official has made the report about serious wrongdoing because they have a legal obligation to make that report, or because making that report is an ordinary aspect of their role or function in an agency.
3. **Witness PID:** This is a PID where a person discloses information in the course of an investigation of serious wrongdoing following a request or requirement of the investigator.

The protection against detrimental action and immunity from civil and criminal liability for breaching a duty of secrecy or confidentiality when making a PID, apply to all 3 types of PID.

When a public official reports suspected or possible wrongdoing in the public sector, their report will be a public interest disclosure (PID) if it has certain features which are set out in the PID Act.

Whenever a report is made that is a PID (that is, it has all the required features of a PID), it is imperative that the recipient quickly recognises that they have received a PID. The agency must therefore have an effective assessment process in place to ensure it can identify whether a report has the features of a PID, and therefore whether it is a PID. This assessment process is not for an agency to decide to make the report a PID or to decide whether the report should be a PID. Instead, the assessment process is to identify whether the report is a PID. If an agency has received a report that is a PID (because it has all the features set out in the PID Act), then the report is a PID from the moment it is made, whether or not the agency recognises it as a PID.

In some cases, a report of wrongdoing that is not a PID may give rise to other legal obligations and protections. For example, where a person (whether or not a public official) makes a complaint to the Ombudsman, the Independent Commission Against Corruption (ICAC) or the Law Enforcement Conduct Commission, it is a criminal offence to take detrimental action against them (under the *Ombudsman Act 1974*, the *Independent Commission Against Corruption Act 1988* (ICAC Act) and the *Law Enforcement Conduct Commission Act 2016*, respectively).

### 7.7.1. Serious wrongdoing

The concept of serious wrongdoing is central to the operation of the PID Act. Serious wrongdoing is defined under section 13 of the PID Act as meaning one or more of the following:

- corrupt conduct
- serious maladministration
- a government information contravention
- a local government pecuniary interest contravention
- a privacy contravention
- a serious and substantial waste of public money.

The NSW Ombudsman provides a range of guidelines and fact sheets on the PID Act which are available at the NSW Ombudsman website.<sup>29</sup>

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<sup>29</sup> <https://www.ombo.nsw.gov.au/guidance-for-agencies/handling-public-interest-disclosures-whistleblowing>

## 7.7.2. PID Protections

Close attention should be paid to the particular circumstances in which the PID Act protects disclosure, and the exceptions that apply. Accurately identifying PIDs is important because, if a report is a PID, the public official who made the report will have special protections under the PID Act.

These protections include:

- Immunity from civil and criminal liability that might otherwise arise because they made the report
- Protections from detrimental action; and
- Protecting the identify of PID makers.

This makes sense, because a person who has made a PID might be at risk of reprisal or other detrimental action whether or not they disclosed information because they thought it was the right thing to do (voluntary), because it was their job to report (mandatory), or because they were asked to give evidence in an investigation (witness).

Under the PID Act, it is a criminal offence to take detrimental action against a person because you suspect, believe, or know that they have made a PID, or will make a PID. Other protections under the PID Act include:

- the right to seek compensation for injury, damage or loss suffered as a result of detrimental action being taken against them; and
- the ability to seek an injunction to prevent, stop or remedy a detrimental action offence.

Agencies must conduct a risk assessment to assess the risk of detrimental action against the PID maker, whilst they are handling the PID and prior to referring the PID to another agency. Agencies must also take proactive action to protect a PID maker from detrimental action.

## 7.7.3. PID Obligations

Managers have obligations under the PID Act, which includes receiving and passing on voluntary PIDs from staff they supervise. Managers also play an important role in creating a culture within their team that encourages and facilitates the making and appropriate handling of PIDs and other complaints about wrongdoing. If a manager receives a disclosure from someone they supervise, and it appears to have the features of a PID, they must communicate the disclosure to a disclosure officer for the agency where the manager or the maker works.

To be a PID, a report of serious wrongdoing must generally be made to a person's own manager, or to an agency's disclosure officer. Even when a PID is made to a manager, the manager's role is then to ensure that the PID is reported to a disclosure officer. Disclosure officers are therefore central players under the PID Act.

If a public official makes a report about serious wrongdoing, but the person they disclose the information to is not a disclosure officer (and not their own manager), then the report will generally not be a PID and they will not be protected by the PID Act.

## 7.8. 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 bans success fees for lobbying Government officials; and to places other restrictions on the lobbying of Government officials.

The objects of this Act are to promote transparency, integrity and honesty by:

- a) ensuring that lobbyists comply with ethical standards of conduct and other requirements set out in the Lobbyists Code, and
- b) conferring on the Electoral Commission the function of enforcing compliance with the Lobbyists Code and the provisions of this Act, and
- c) enabling the Electoral Commission to investigate alleged breaches of the Lobbyists Code, this Act and the regulation and impose sanctions, and
- d) banning success fees for lobbying, and
- e) restricting lobbying by former Ministers and Parliamentary Secretaries.

The LOGO Act requires third-party lobbyists to register on the Lobbyists Register. 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 certain breaches.

A copy of the *LOGO Act* can be accessed on the NSW Legislation Website.<sup>30</sup>

The Watch List and the Lobbyists Register are published on the Electoral Commission's website.<sup>31</sup>

### **7.8.1. Lobbyist Code of Conduct**

Premier's Memorandum M2019-02 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 M2019-03 can be found on the Department of Premier and Cabinet website.<sup>32</sup>

### **7.9. Ministers' Diary Disclosures**

Premier's Memorandum M2015-05 Publication of Ministerial Diaries and Release of Overseas Travel Information sets out the obligations of Ministers to publish details of scheduled meetings held with stakeholders, external organisations and individuals and release overseas travel information.<sup>33</sup> Ministers must publish summaries one month after the end of each quarter. Meeting summaries are made available on the Department of Premier and Cabinet's website.<sup>34</sup>

### **7.10. Boards and Committee appointments**

Boards and committees provide leadership, direction, and accountability across many areas of NSW Government activity. They are a vital link between community needs and government service delivery. 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

<sup>30</sup> <https://legislation.nsw.gov.au/view/html/inforce/current/act-2011-005>.

<sup>31</sup> <https://elections.nsw.gov.au/political-participants/third-party-lobbyists/lobbyists->

[watchlist#:~:text=The%20NSW%20Electoral%20Commission%20maintains,and%20any%20other%20lobbying%20laws.](#)

<sup>32</sup> <https://arp.nsw.gov.au/m2019-02-nsw-lobbyists-code-conduct>

<sup>33</sup> <https://arp.nsw.gov.au/m2015-05-publication-ministerial-diaries-and-release-overseas-travel-information/>

<sup>34</sup> <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/access-to-information/ministers-diary-disclosures>



boards, regulatory boards, professional registration boards, Area Health Service boards, trust boards and advisory councils and committees.

Premier's Memorandum M2021-07 Appointments to NSW Government Boards and committees and the guidelines outlines the requirements for boards and committees.<sup>35</sup>

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<sup>35</sup> <https://arp.nsw.gov.au/m2021-07-appointments-to-nsw-government-boards-and-committees/>

# 8. Management of Government Information

## 8.1. Record Keeping

The *State Records Act 1998* (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 State Records Act 1998 is administered by State Records Authority NSW (State Records NSW) and Museums of History NSW.

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.”*

In short, the SR defines records as any information you make or receive in the course of your official duties and can be in any format, on any media and from any source including personal devices or personal email addresses.

Examples of records include:

- digital and physical documents
- briefing notes, reports, presentations and working papers or drafts
- emails and correspondences
- messages sent via SMS, mobile apps, or collaboration platforms; and
- data in business systems.

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

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

The SR Act also sets the requirements for how government manage work-related records, information, and data in the NSW Government. Briefly these are:

- make full and accurate records of all your work-related activities as part of your daily routine
- secure and protect records; and
- dispose records legally and appropriately.

A copy of the SR Act can be accessed on the NSW Legislation website.<sup>36</sup> Further information on State records management can be accessed on the State Records NSW website.<sup>37</sup>

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<sup>36</sup> <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1998-017>

<sup>37</sup> <https://staterecords.nsw.gov.au/>

## 8.2. 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.<sup>38</sup>

### 8.2.1. 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 as soon as they become aware that a Cabinet or Executive Council claim is, or is likely to be, contested before NCAT.

### 8.2.2. Contract disclosure

Under the GIPA Act, government agencies are required to disclose certain information about the

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<sup>38</sup> <https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052>

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; and
- 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.

### **8.3. Privacy legislation**

The *Privacy and Personal Information Protection Act 1998* (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* (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.<sup>39</sup>

## 8.4. Information and Privacy Commission NSW

The Information and Privacy Commission NSW (IPC) is an independent statutory authority that administers legislation dealing with privacy and access to government held information in New South Wales.

The IPC administers the following NSW legislation:

- *Government Information (Public Access) Act 2009*
- *Government Information (Information Commissioner) Act 2009*
- *Privacy and Personal Information Protection Act 1998*
- *Health Records and Information Privacy Act 2002*

As part of its function the IPC:

- promotes and protects privacy and information access rights in NSW and provides information, advice, assistance and training for agencies and individuals on privacy and access matters
- reviews the performance and decisions of agencies and investigates and conciliates complaints relating to public sector agencies, health service providers (both public and private) and some large organisations that deal with health information
- provides feedback about the legislation and relevant developments in the law and technology.

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

- reviewing certain kinds of decisions 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 IPC. 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.<sup>40</sup>

## 8.5. 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

<sup>39</sup> PPIP Act - <https://legislation.nsw.gov.au/view/html/inforce/current/act-1998-133>; HRIP Act - <https://legislation.nsw.gov.au/view/html/inforce/current/act-2002-071>

<sup>40</sup> <https://www.ipc.nsw.gov.au/>

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
- damage relations between the Commonwealth and a State or between 2 or more States
- prejudice the prevention, investigation or prosecution of an offence
- 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
- 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.

Questions concerning PII, including advice on whether or not a PII claim should be made, are considered to be 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.<sup>41</sup>

## 8.6. Standing Order No. 52

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 to 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 on the Parliamentary website.<sup>42</sup>

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<sup>41</sup> <https://cso.nsw.gov.au/>

<sup>42</sup> <https://www.parliament.nsw.gov.au/lc/Pages/Orders-for-papers.aspx>

# 9. Commercial and Financial Arrangements

## 9.1. 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.

## 9.2. 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, 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 many Board directions and policies. The full suite of Board directions and policies can be found on the Buy NSW policy library.<sup>43</sup>

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

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<sup>43</sup> <https://buy.nsw.gov.au/policy-library>

- **PBD 2020-05 Approved procurement arrangements for the ICT Services Scheme** - This policy defines approved arrangements and thresholds for the procurement of ICT related goods and services using the mandatory ICT Services Scheme.

The *Modern Slavery Act 2018* commenced in 2022 and includes 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 on the Buy NSW website.<sup>44</sup>

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<sup>44</sup> <https://buy.nsw.gov.au/>



# 10. Intellectual Property

## 10.1. IP Framework

The 2020 Intellectual Property Management Framework (IP Framework) sets out the New South Wales Government's best practice guidelines for dealing with and managing intellectual property. The IP Framework is based on a set of guiding principles which reflect and build on practices already implemented by many NSW agencies. The purpose of the IP Framework is to facilitate the efficient, consistent, fair and transparent management of IP to optimise the benefit of these assets for the people of NSW. The IP Framework is issued under Premier's circular C2021-11 NSW Government Intellectual Property Framework.<sup>45</sup>

The 2020 IP Framework replaces the *Intellectual Property Management Framework for the NSW Public Sector published in 2005*. The 2020 IP Framework builds on the 2005 Framework and recognises the significant developments in technology, law and policy since that time.

The 2020 IP Framework is non-binding. All government sector agencies (as defined in the Government Sector Employment Act NSW (2013) (agencies)) are encouraged to refer to the IP Framework when managing their IP. Each agency will have its own IP needs, and may use the IP Principles to develop its own IP Policy to meet those needs. An IP Policy may apply to all IP assets of an agency or to a particular subset.

## 10.2. Crown copyright

Crown Copyright applies to copyright material created by or for the services of government. Where copyright material is created by a third-party contractor, the material will be Crown Copyright unless an agreement with the contractor states otherwise. Crown Copyright material is generally identified by a copyright notice and includes material such as:

- Judicial decisions and court transcripts of courts and tribunals of New South Wales
- Legislation of the New South Wales parliament
- reports, website pages and other literary works
- photographs and artworks, and artistic works used as logos
- computer code and databases; and
- video and audio recordings.

New South Wales agencies that represent the Crown in right of New South Wales will hold 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 (*Copyright Act 1968* (Cth) Part VII).

The Attorney General is the Minister responsible for Crown Copyright. The General Counsel, Department of Communities and Justice is appointed by the Attorney General as delegate to administer dealings with Crown Copyright. The Commercial team within Legal, Department of Communities and Justice assists in relation to Crown Copyright and manages the State's whole

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<sup>45</sup> <https://arp.nsw.gov.au/c2021-11-nsw-government-intellectual-property-framework/>

of government agreements with collecting societies. The Attorney General's approval is required in relation to licensing and assignment of 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:

1. **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.<sup>46</sup>
2. **NSW Intellectual Property Management Framework for the NSW Public Sector** – This policy provides guidance to assist agencies to manage their IP effectively. Please also consult the Department of Premier and Cabinet Circulars C2021-11 and C2006-53.

### **10.3. Whole of Government copyright agreement with collecting societies**

Under section 183 of the *Copyright Act 1968* (Cth), the Commonwealth and State and Territory Governments are entitled to use copyright material but must generally notify and agree terms with copyright owners (a statutory licence). In the case of copyright works and broadcasts, governments are excused from the obligation to notify individual copyright owners but are required under s 183A to make agreements with the declared collecting societies to pay equitable remuneration for the copies. The collecting societies distribute the monies to their members, who are publishers, producers and copyright owners. The Copyright Agency is the copyright collecting society representing copyright owners of copyright text and images such as books, magazines, journals, newspapers, website text, photographs and artworks. The State must pay the Copyright Agency equitable remuneration in accordance with section 183A of the Copyright Act for government copying of such material, where no licence or exception applies.

In December 2019 the State and the Copyright Agency settled the proceedings in the Copyright Tribunal and entered into a new whole of government copyright agreement.<sup>47</sup>

### **10.4. Screenrights**

Screenrights is the copyright collecting society for film, radio and television. Currently Screenrights is empowered to collect remuneration only in respect to government copies of radio and television broadcasts.

Under the procedure set out in section 153F of the Copyright Act, Screenrights has been declared by the Copyright Tribunal as the relevant collecting society governments must make agreements in respect of television and radio broadcasts.<sup>48</sup>

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. The DCJ website offers additional information.<sup>49</sup>

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<sup>46</sup> <https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/legal-assistance-and-applications/crown-copyright-information/Crown-Copyright-Guidelines-from-DCJ.pdf>

<sup>47</sup> [https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/legal-assistance-and-applications/crown-copyright-information/NSW-copyright-agency\\_agreement-2012-2023-agreement.pdf](https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/legal-assistance-and-applications/crown-copyright-information/NSW-copyright-agency_agreement-2012-2023-agreement.pdf)

<sup>48</sup> [https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/legal-assistance-and-applications/crown-copyright-information/screenrights\\_and\\_nsw\\_agreement\\_part\\_1.pdf](https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/legal-assistance-and-applications/crown-copyright-information/screenrights_and_nsw_agreement_part_1.pdf)

<sup>49</sup> <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/legal-assistance-and-applications/crown-copyright-information.html>

## 10.5. NSW Government Trademarks, Logo, and State Arms

A trademark is a type of intellectual property consisting of a recognisable sign, design, or expression that identifies products or services from a particular source and distinguishes them from others. The NSW Government has registered a trademark 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 trademark, 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, please consult the NSW Government branding website.

The NSW Government Branding team within the Department of Customer Service manages the New South Wales waratah logo. Enquiries should be directed to:

[nswgovbranding@customerservice.nsw.gov.au](mailto:nswgovbranding@customerservice.nsw.gov.au)

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

Section 6 of the *State Arms, Symbols and Emblems Act 2004* (NSW) sets out the circumstances in which permission to use State symbols is required. The section provides that it is an offence to print, issue or use a State symbol or a symbol resembling the State symbol, in connection with any trade, business, calling or profession, or the collection of debts, without the authority of the Attorney General or the Governor.

Legal manages these requests from third parties on behalf of the Attorney General. For all third party enquiries, please send through your request to Legal, Commercial and Transactional team to [enquiries-dcjlegal@dcj.nsw.gov.au](mailto:enquiries-dcjlegal@dcj.nsw.gov.au).

# 11. Cabinet and Parliamentary Resources

## 11.1. Public Sector Governance

The Cabinet Office provides a useful outline of governance of the NSW public sector with links to relevant documents including (but not limited to):

- Governance arrangements chart
- Government Directory
- Guide to the NSW Public Sector
- NSW legislation website
- NSW Parliament website
- Annual Reports,
- Minister's Office Handbook
- Cabinet practice manual

The governance framework can be located on the Cabinet Office website.<sup>50</sup>

## 11.2. Guide to the NSW Public Sector

The Cabinet's Office provides information about the structure of, and governance arrangements for, the NSW Government and NSW Government entities.<sup>51</sup>

The Guide to the NSW Public Sector (the Guide) is an information resource that describes:

- the broad structure and functions of NSW Government
- NSW public sector entity types
- the roles of these public sector entities in delivering priorities of the NSW Government
- the key governance requirements that apply to public sector entities
- the process for the creation of new public sector entities.
- The Guide provides insights that will help in developing the structure and frameworks for new government agencies. It is also relevant for NSW Government Sector employees more broadly and for those who interact with the NSW Government in some way.

The Guide does not constitute legal advice. Entities should obtain their own legal and governance advice on issues arising from the Guide.

## 11.3. Parliamentary Counsel's Office Resources

This PCO website provides guidance documents to assist in the drafting process. These include:

**PCO Standard** - The PCO Standard is a guide to legislative drafting in NSW, acting as both a style guide and a manual for drafters and editors. The objective of the document is to provide a collective base for legislative drafting resources in the office, ensure a consistent style is implemented by PCO for the NSW statute book and offer insight into PCO's approach to drafting.

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<sup>50</sup> <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/public-sector-governance>

<sup>51</sup> <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/guide-to-nsw-public-sector>

**PCO Manual for Non-Government Drafting** - contains the Premier's authorisation to the NSW Parliamentary Counsel for the drafting of legislation for non-Government members of Parliament and sets out procedures for how the drafting is to be undertaken.

**PCO Plain Language Policy** - a drafting practice document of the NSW Parliamentary Counsel's Office which sets out the Policy of the PCO concerning the use of plain language in legislative drafting. It represents the official view of the PCO on the topic.

## 11.4. Parliamentary committees

Parliamentary committees are comprised of Members of Parliament to examine issues in more detail. Committees increase public awareness and debate on issues the Houses are considering. They benefit the community by reviewing proposed laws, facilitating more informed policy making and ensuring greater government accountability.

Committees can call for written submissions, conduct hearings where witnesses give evidence and seek advice from experts. They provide an opportunity for members of the public to have their say on issues currently being considered by Government. Committees then report their findings to the relevant House and make recommendations for government action.

The list of NSW parliamentary committees includes information about matters being examined, committee membership, terms of reference, hearings and reports.<sup>52</sup>

Senior executives may be requested or summoned to attend and give oral or written evidence to a committee hearing, or to produce documents or make submissions. The Department of Premier and Cabinet has issued several guidelines detailing the requirements for appearing before committees and making submissions to them:

- C2011-27 Guidelines for Appearing Before Parliamentary Committees<sup>53</sup>
- M2017-01 Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees; and<sup>54</sup>
- M2021-08 NSW Government submissions and responses to inquiries.<sup>55</sup>

You can only give evidence of a factual nature, should refer questions that seek opinions or practical judgements to the Minister (when in attendance) or take those questions on notice to obtain a written response from the Minister.

If questions on notice have been submitted to agencies prior to the committee hearing, the Minister must approve the answers before they are sent to the committee. Answers that would affect the whole of government or other agencies must be referred to the Premier for approval.

Agencies must apply a systematic approach when determining the need for and nature of a submission requested by a committee inquiry, beginning with government-wide engagement.

## 11.5. NSW Cabinet System

Senior executives play an essential role in supporting the Cabinet system by delivering quality advice to Cabinet ministers and operating in an environment of integrity and confidentiality. As a government lawyer you may be required to lead policy development processes, communicate policy leadership in Cabinet submissions and provide advice on submissions from other agencies.

<sup>52</sup> <https://www.parliament.nsw.gov.au/committees/listofcommittees/pages/committees.aspx>

<sup>53</sup> [https://arp.nsw.gov.au/c2011-27-guidelines-appearing-parliamentary-committees/#:~:text=The%20primary%20rule%20applying%20to,attendance\)%20or%20take%20them%20on](https://arp.nsw.gov.au/c2011-27-guidelines-appearing-parliamentary-committees/#:~:text=The%20primary%20rule%20applying%20to,attendance)%20or%20take%20them%20on)

<sup>54</sup> <https://arp.nsw.gov.au/m2017-01-guidelines-government-sector-employees-dealing-legislative-councils-portfolio-committees>

<sup>55</sup> <https://arp.nsw.gov.au/m2021-08-nsw-government-submissions-and-responses-to-inquiries/>

You might be asked to update house folder notes during the year, prepare Budget Estimates briefs, and develop incoming government briefs for a new or returning government. Your agency will have established procedures and templates for preparing parliamentary briefing notes.

Premier’s Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions* also outlines cabinet processes.

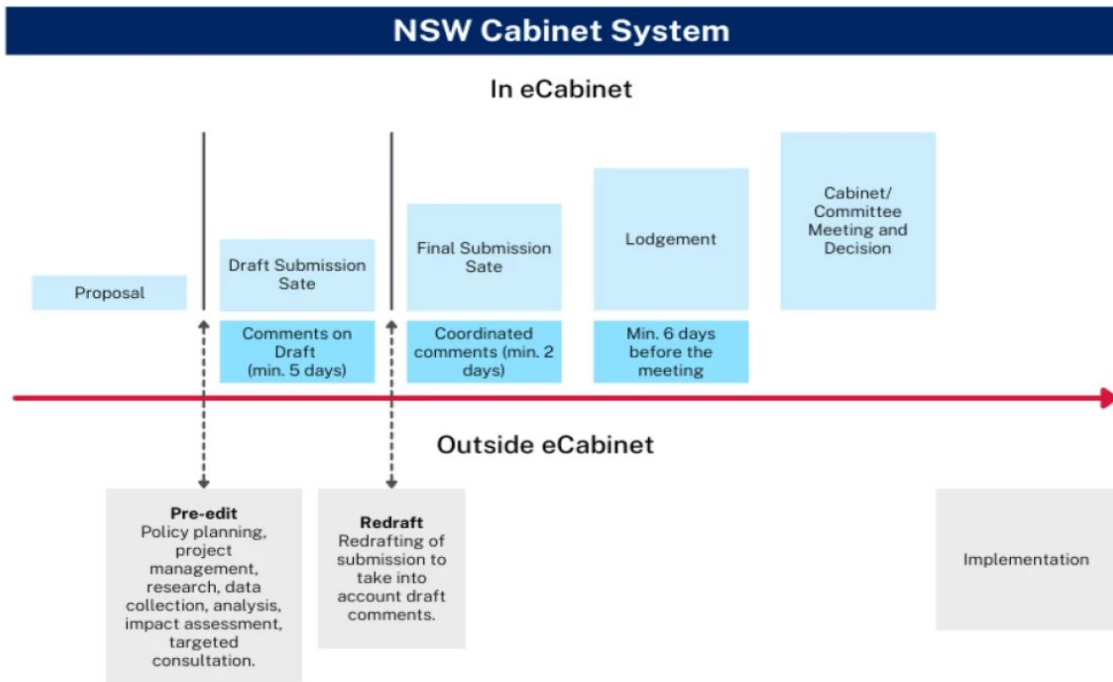
Cabinet refers to the regular meetings of the Premier and other ministers, where they discuss and agree on major issues facing the Government.

Within the NSW Cabinet system:

- all ministers are members of Cabinet
- the Premier chairs Cabinet meetings, which typically occur fortnightly
- Cabinet is based on convention. The most significant Cabinet conventions are:
  - collective responsibility
  - confidentiality
  - ministerial accountability
- Cabinet makes decisions based on recommendations put forward by ministers in a Cabinet submission
- Cabinet committees deal with specific areas of policy or have cross portfolio functions.

For Cabinet to function efficiently, Cabinet meetings must concentrate on important issues. As such, a lot of the detailed discussion between ministers and agencies - including areas of contention or disagreement - should be dealt with before bringing the matter before Cabinet.

The following diagram outlines the steps involved in developing a Cabinet submission.



### **11.5.1. eCabinet**

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. eCabinet is the secure document management system that supports the work of Cabinet. It enables government agencies and ministers' offices access to papers securely, and facilitates Cabinet, Cabinet committee and Executive Council meeting workflows. For further guidance on drafting cabinet submissions, see the Cabinet's Office website which include templates and resources.<sup>56</sup>

### **11.6. Cabinet confidentiality**

Cabinet records are strictly confidential. This is essential to protecting the collective responsibility for Cabinet decisions. You must take steps to ensure confidentiality by:

- managing Cabinet records through the secure eCabinet document management system
- adhering to eCabinet authorisation requirements
- only providing documents on a need-to-know basis
- never copying Cabinet records
- returning any Cabinet records to the Department of Premier and Cabinet to be marked off and securely destroyed.

All Cabinet documents must carry the Dissemination Limiting Marker 'Sensitive: NSW Cabinet'.

More information on Cabinet confidentiality is available in the Premier's Memorandum M2006-08 Maintaining Confidentiality of Cabinet Documents and other Cabinet Conventions.<sup>57</sup>

### **11.7. State Election and 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. During periods of Caretaker Conventions, practices apply in respect of the handling of Cabinet documents.

Legal advice on the activities that can take place during the caretaker period is provided centrally by the Department of Premier and Cabinet General Counsel or Deputy General Counsel, to ensure consistency. Generally, no significant new decisions or initiatives, appointments, or contractual undertakings should be made during the caretaker period. Routine government business, however, should proceed as usual. In addition to the formal caretaker conventions, which only apply in the caretaker period, there are other established practices that apply in the months leading up to an election.

To assist Ministers, the attached guidance on the relevant conventions and practices has been prepared. Should any difficulties arise in the application of these conventions or practices in particular circumstances, please contact the Secretary, Department of Premier and Cabinet.

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<sup>56</sup> <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/cabinet-practice-manual/templates-and-resources>

<sup>57</sup> <https://arp.nsw.gov.au/m2006-08-maintaining-confidentiality-cabinet-documents-and-other-cabinet-conventions>



## **11.8. Ministers' Office Handbook**

The Ministers' Office Handbook provides policy and practice material for Ministers and their staff about employment and office management arrangements following implementation of Ministers' powers to employ staff under the *Members of Parliament Staff Act 2013* (MOPS Act).<sup>58</sup>

The Department of Premier and Cabinet (DPC) is responsible, under the MOPS Act, for providing administrative and other support services for Ministers and their staff.

Ministers and their staff need to familiarise themselves with the contents of the Handbook and may contact P&O for clarifications and further information. The Handbook will be updated as necessary to make sure that the contents remain current and reliable, and to pick up any suggestions for improvement.

This Handbook is separate and distinct from the Ministerial Handbook. It does not duplicate material from other key sources such as the Members' Handbooks and Guides issued by the Parliament, and the Parliamentary Remuneration Tribunal's annual determination.

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 on the NSW Legislation website.

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.

## **11.9. 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 to 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.

Since 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. Ministerial 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.

## **11.10. Parliamentary Sitting Days**

Parliamentary Sitting Day Calendar for each year is found on the NSW Parliament website.

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<sup>58</sup> <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/ministers-office-handbook>



## 11.11. 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 via the APO website. APO is an open access evidence platform – making public policy research and resources accessible and useable. As a unique public good with a trusted reputation, we champion open access and evidence-informed decision-making.<sup>59</sup>

### Minister Correspondence

Minister Correspondence Directions (also referred to as 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. Ministerials are usually used 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.

## 11.12. 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 on the NSW Parliament website.<sup>60</sup>

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<sup>59</sup> <https://apo.org.au/page/about-apo>

<sup>60</sup> <https://www.parliament.nsw.gov.au/committees/Pages/budget-estimates.aspx>

# 12. Legal Research

## 12.1. NSW Government Legislation Website

Official notification of the making of statutory instruments, NSW Government Gazette and Bill Information are located at the NSW Legislation Website. 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.

## 12.2. Government Gazette

The current New South Wales (NSW) Government Gazette is managed by the NSW Parliamentary Counsel's Office. The Gazette is published weekly on a Monday except during the holidays. Notifications in the government gazette include statutory rules, commencement proclamation, local environment plan and legislative instruments.<sup>61</sup>

The Gazette historically did not have a unique marker for notifications but since 2019 each notification has a unique id that can identify it. The notification has an id based on the date of the gazette and the gazette notifications sequential number for that year.

## 12.3. NSW Caselaw

NSW Caselaw was developed in 1999 to publish decisions for New South Wales Courts and Tribunals administered by the NSW Department of Communities and Justice. This Caselaw website publishes selected decisions from the following courts and tribunals.<sup>62</sup>

- Children's Court – NSWChC
- Compensation Court – NSWCC
- Court of Appeal – NSWCA
- Court of Criminal Appeal – NSWCA
- District Court – NSWDC
- Drug Court – NSWDRGC
- Industrial Relations Commission – NSWIRComm
- Land and Environment Court – NSWLEC

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<sup>61</sup> <https://legislation.nsw.gov.au/gazette>

<sup>62</sup> <https://www.caselaw.nsw.gov.au/>

- Local Court – NSWLC
- Supreme Court – NSWSC
- Civil and Administrative Tribunal (NCAT)
  - Appeal Panel – NSWCATAP
  - Administrative and Equal Opportunity Division – NSWCATAD
  - Consumer and Commercial Division – NSWCATCD
  - Guardianship Division – NSWCATGD
  - Occupational Division – NSWCATOD
- Dust Diseases Tribunal - NSWDDT
- Transport Appeal Boards - NSWTAB

## **12.4. High Court Judgement Summaries**

The High Court of Australia website provides publications and resources for judgements. 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:

- Cases Handed Down.
- Cases Reserved.
- Original Jurisdiction.
- Special Leave Granted.
- Cases Not Proceeding or Vacated.
- Special Leave Refused.

You can subscribe to email alerts for the High Court Bulletins via the website.<sup>63</sup>

## **12.5. Legal Caselaw Database Subscriptions**

Legal caselaw database subscriptions are generally managed by the relevant agency. In the past whole of government legal subscriptions were sought for such databases as Jade. These are no longer managed on a whole of government level.

Databases that may be available through your legal team or Law Library service include:

- Jade Professional
- Lexis Advance Research or Lexis plus
- CCH IntelliConnect
- Australasian Legal Information Institute (AustLII); and
- Westlaw AU.

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<sup>63</sup> <https://www.hcourt.gov.au/>

## 12.6. NSW Coronial Findings and Recommendations

The NSW Coroner's Court findings are not included in NSW Caselaw. Select findings are published on the NSW Coroner's Court.<sup>64</sup> Premier's Memorandum *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.<sup>65</sup>

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 or any person or body to whom a recommendation is directed
- the Minister who administers the legislation or 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 (e.g., 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 the Department of Communities and Justice 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.

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<sup>64</sup> <https://www.coroners.nsw.gov.au/>

<sup>65</sup> <https://arp.nsw.gov.au/m2009-12-responding-coronial-recommendations/>