

A GUIDE TO FAIR AND REASONABLE DECISIONS

Today people expect organisations to operate consistently and fairly and they expect there to be systems in place to ensure that this happens. Good administrative decision-making is integral to this process.

Good decision-making lies at the heart of good administration. Even a decision about a seemingly simple matter can have a serious impact on the community. Poor decision-making and ineffective administrative processes can lead to complaints and challenges to those decisions.

It is important for organisations to have systems in place to support fair and consistent decision-making.

When making a decision, decision-makers must act reasonably and fairly within their powers. Decision-makers should have regard to any specific legislative or procedural requirements, as well as any administrative law requirements. In general, decision-makers should do the following:

- act independently, in good faith and for a proper purpose;
- comply with relevant legislation;
- follow any relevant policies and guidelines, unless there is reason to make an exception;
- take into account all relevant matters;
- ignore matters that are not relevant to the decision;
- apply the appropriate weight to the different factors relevant to the decision;
- give proper consideration to the merits of the case; and
- make the decision on reasonable grounds and based on supporting evidence.

1. Identify the authority to make the decision

Legislation typically sets out who has the authority to make a decision, and whether that power may be delegated. Before taking action or making a decision, as a decision-maker, you should check to make sure that you have the authority to do so.

You must also respect any limits on the extent of your authority. The legislative authority to make a decision may be limited by specified factors including time. Even if legislation or policy does not specify a particular timeframe, a decision-maker must take action as soon as practicable.

Check to make sure that you have identified the source and limits of the power to make the decision by identifying the specific source of your authority (i.e. legislation, regulation, policy).

2. Ensure impartiality and independence

An authorised person or body must exercise the decision-making power personally. An exception is when there is an express power in legislation that provides for delegation of authority. The power to delegate, itself, should not be delegated. If you are delegating the authority to make a decision, the delegation should be recorded in writing.

Decision-makers must demonstrate impartiality and independence when making decisions.

“Impartial” applies to the state of mind or attitude of the decision-maker and ensures that there is no bias, either real or perceived. Impartial decisions are based on objective criteria.

To be “independent” the decision-maker must be free of outside influence.

You should declare any real or perceived conflict of interest and recuse yourself from the decision-making process without delay. The appearance of impartiality is necessary in order to maintain confidence in the decision-making process. You should not be involved in a decision where a conflict of interests exists, even if you have the proper delegation or authority.

3. Uphold procedural fairness

A fair process should be followed in making a decision that has an impact on someone. Such a process helps to ensure that a fair and correct decision is made. To ensure a fair process, the decision-maker should do the following:

- give the person an opportunity to provide all relevant information;
- where appropriate, give the person a fair chance to comment before the decision is made;
- take measures to address any actual or perceived conflict of interest;
- act independently and have an open mind; and
- act without undue delay.

A person affected by a decision should be given an opportunity to provide all relevant information before a decision is made. Where a person is making an application for something (like a license, for example), this aspect of fairness can be achieved by letting them know in advance the information they need to submit with their application.

However, at an appropriate point in the process, the person should also be told of the case against them and given a chance to comment, particularly in the following circumstances:

- adverse information has been obtained that will be taken into account and that the person has not previously been made aware of; or
- consideration is being given to cancelling an existing license or benefit.

Providing the person with an opportunity to comment in these cases can assist the decision-maker in confirming that you have the correct facts. It can also identify any issues that may be of concern to the person, and that they may seek to base a challenge on if they are not addressed at an early stage.

4. Establish the issues to be decided

Decision-makers must identify all relevant matters at the outset. Identifying the issues and related questions to be decided is crucial to making a fair and reasonable decision.

If the relevant matters aren't correctly identified and considered, the decision-maker is more likely to make a poor decision. Check that you have identified relevant matters by reviewing the legislation and policy. Advise the parties of the issues and questions that you will be deciding before the hearing commences. This will allow the parties an opportunity to express any disagreement with the issues or questions and to provide the relevant information needed for you to make a decision.

If the legislation states that certain matters must be taken into account in the decision-making process, then these matters must be considered. If the legislation allows for other matters to also be taken into account (for example, by use of the word 'includes' when setting out the relevant factors), or does not identify any specific matters to be taken into account, then it is important to consider the underlying purpose of the decision-making power and the factors that might be relevant to achieve that purpose. Guidance can also be obtained from the following:

- agency policies and guidelines;
- previous decisions;
- court and tribunal decisions; and
- the overall objectives of the legislation under which the decision is made.

Gathering all the relevant information allows the decision-maker to determine the facts. Information is relevant if it is reasonably related to a relevant matter.

Legislation may give a decision-maker the express power to gather information for specific purposes. However, even if legislation does not give an express power, the decision-maker may always request information.

5. Determine the facts

Decisions should be based on facts. It is important that sound factual findings related to the relevant matters are made.

The decision-maker should determine the facts by considering any information that is relevant, reliable and sufficient.

All relevant information should be considered and should not be dismissed without good reason. Not all information is equal in value or reliability. The decision-maker should analyse the information gathered and weigh each piece of information reasonably against the other.

Unless legislation requires otherwise, the balance of probabilities applies to administrative decision-making. The more serious the issue and outcome, the stronger the evidence required to meet this standard.

Each factual finding should be clearly recorded including the information considered and the reasons for the finding.

Check that your factual findings are based on sufficient, relevant and reliable information.

Your findings should be clearly identified and explained.

6. Evaluate the facts and then make the decision

Evaluating the facts is the final step in reaching a decision. One important consideration in evaluating the facts is whether the decision to be made is non-discretionary or discretionary.

A non-discretionary decision is one where the legislation sets out what must be considered and how it is to be decided. The decision-maker does not have any flexibility.

Decision-makers need to identify the legislative provisions that relate to their decision. Legislation should be interpreted in a way that achieves the purpose and objectives of the relevant Act. Court and tribunal decisions, legal advice and agency policy can provide guidance about the meaning and application of legislation.

The decision-maker should apply the law to the facts in order to make the decision.

In contrast, a discretionary decision allows the decision-maker some flexibility. The legislation does not impose a duty on the decision-maker to exercise their power in a particular way. It is usually indicated by the use of the word 'may'.

No one matter or combination of matters is necessarily determinative in making a discretionary decision. When making a discretionary decision, the decision-maker must ensure that all relevant matters identified in the factual findings are considered and given the appropriate weight.

The decision-maker may also consider agency policy and relevant previous decisions in reaching their decision. However, irrelevant matters must be excluded from consideration and agency policy and practice must not be applied inflexibly. The decision and reasons should be recorded.

7. Give meaningful and accurate reasons for your decision

It is important that people affected by a decision are informed of the decision, the reasons for the decision and any right of review or appeal.

Reasons contain the logical explanation for a decision and should refer to the factual findings and the information on which the findings are based. Failing to expressly refer to a factual finding may indicate that a relevant matter was not considered.

Providing reasons for a decision also helps to avoid misunderstandings, promote acceptance of adverse outcomes and reduce the likelihood of ill-informed complaints, reviews and appeals. There must be a rational connection between the evidence presented and the conclusions reached by the decision-maker.

Even where a decision-maker is not required to give reasons, it is good administrative practice to do so.

For a person who is affected by a decision, knowing the reasons for that decision can make it easier to assess whether the decision was in fact fair and reasonable, and can help them understand and accept the decision even if it is perceived to have an adverse effect. Alternatively, knowing the reasons for a decision may help a person to decide whether or not it should be challenged.

For agencies, giving reasons helps to ensure that decision-makers avoid arbitrary procedures and that they make well-founded decisions, thus enhancing the quality of the decision and of the decision-making process.

Giving reasons for decisions can assist in a number of ways, including the following:

- understanding by those affected of why the decision was made
- public confidence in the decision
- consistency and quality in decision-making
- fairness and transparency

It is good administrative practice to provide reasons unless doing so would prejudice interests that are protected by law. It is particularly important to give reasons in the following circumstances:

- the decision adversely affects the person, or
- an established approach, policy or guideline is being departed from.

Reasons can be given orally, but it is consistent with good administrative practice to give reasons in writing. This also helps to ensure that there is a written record of the decision if any concern or challenge is later raised.

Reasons for a decision should be given in plain and understandable language. Reasons should enable the person affected to understand why the decision was made. In giving reasons for a decision, the decision-

maker should deal with the substantial and key issues upon which the decision turns. Reasons should include the following:

- the decision that has been made;
- the date of the decision (if the date the decision takes effect is different from the date of the decision, this should be noted);
- who made the decision;
- a reference to any legislative authority under which the decision was made;
- a reference to any relevant legislative, policy or procedural requirements for the decision-making process, and the relevant steps taken by the decision-maker in that respect;
- a reference to the evidence considered and the key facts taken into account;
- an explanation as to why the decision was made; and
- details of any rights of review of or appeal from the decision, including any time limits.

Check your grammar and spelling, and always double-check your facts. Is the legislation titled correctly? Are the dates accurate?

Decision-makers should also offer advice about any right of appeal, including the time allowed to apply for the appeal and how to apply. If there is no statutory review or appeal process, the affected person should be made aware of the organisation's complaint management system.

Common pitfalls

The most common problem with written decisions is that they do not provide reasons or rationale. Instead, they reach a broad conclusion without supporting rationale. In situations where there is conflicting evidence, the reasons should identify the decision-maker's rationale for giving one piece of evidence more weight than another. The rejection of important items of evidence and findings of credibility should be explained.

As a decision-maker, you can encounter stressful and emotional situations. Even still it is necessary to keep those feelings and emotions out of your decision. Remember, decisions are based on the application of legal and administrative principles to the facts in a case. You should avoid relying on irrelevant considerations, emotionally-charged statements and comments. Do not use accusatory or demeaning language. Use proper names and titles, and avoid first-name references.

Checklist:

1. Do I have jurisdiction?
2. Is there an issue of bias or a conflict of interest (perceived or actual)?
 - If yes, declare the bias or conflict and recuse yourself.
3. Am I impartial and independent?
 - If no, recuse yourself.
4. Is the process procedurally fair?
 - Have all parties received notice?
 - Have all parties been advised they may be represented by counsel or other appropriate advocate?
 - Have all parties received full disclosure?
 - Will all parties have the opportunity to make their case?
 - Will all parties have the opportunity to respond?
5. What are the issues to be decided? What questions must I answer in order to make the decision?
6. What legislation applies?
 - What is the overall objective of the legislation?
 - Are there applicable policies and guidelines?
7. Are there previous decisions which would provide guidance?
 - Are there court or tribunal decisions which would provide guidance?
 - Is my decision consistent with previous decisions?
8. Do I have all of the relevant evidence to make a decision?
 - If not, ask for it.
9. What are the facts of the case?
 - How does the law apply to the facts of the case?
10. Have I given reasons for my decision?
 - summarize the decision
 - refer to the legislation under which the decision was made
 - include reference to policy and other guidance you used in making the decision
 - refer to the evidence and the key facts taken into account
 - explain the weighing of the evidence
 - explain the decision
 - advise of any appeal rights
 - check grammar and spelling