Information Sheet - Administrative Decision Making

This information sheet contains the following:

1. Exercise of discretion in administrative decision making
2. Giving reasons for decisions
3. Procedural fairness (natural justice)
4. Remedies and Redress
5. Good record keeping
6. **Exercise of discretion in administrative decision making**

Not every administrative decisions needs a decision making guideline and existing Driver Licensing Decision Making guidelines may not cover all circumstances. However, they are an important means of providing guidance to Case Managers, who are required to exercise discretion when delivering driver licensing decisions and to those with an interest in the decisions. Decision Making Guidelines assist to ensure decisions are made consistently and fairly.

Our Guidelines:

* Contain a clear purpose of what the policy or guideline is intended to achieve;
* Are flexible to cover a range of circumstances under which discretion is to be exercised;
* Set out the relevant considerations to be taken into account by the decision-maker;
* Are expressed clearly to allow easy application and interpretation;
* Are transparent;
* State how they relate to relevant legislation;
* Are available communicated to relevant staff; and
* Are available to members of the public.

# **How should decision-makers exercise discretionary powers?**

Decision-makers must use discretionary powers in good faith and for a proper, intended and authorised purpose. Decision-makers must not act outside of their powers. No decision-maker has an unfettered discretionary decision-making power.

It is not sufficient to exercise discretion simply because it seems the right thing to do. When exercising discretion, decision-makers need to act reasonably and impartially. They must not handle matters in which they have an actual or reasonably perceived conflict of interest.

It is important to apply the values that the legislation promotes, professional values and the values of the agency, ***not*** personal values.

In exercising discretionary powers, decision-makers should have regard to any specific requirements as well as satisfy general administrative law requirements. Some of the general principles relevant to the exercise of discretion are:

* Acting in good faith and for a proper purpose;
* Complying with legislative procedures;
* Considering only relevant considerations and ignoring irrelevant ones;
* Acting reasonably and on reasonable grounds;
* Making decisions based on supporting evidence;
* Giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance;
* Giving proper consideration to the merits of the case;
* Providing the person affected by the decision with procedural fairness; and
* Exercising the discretion independently and not under the dictation of a third person or body.

A failure to act within the power provided or to comply with general administrative law principles can result in a review and overturning of a decision.

**Factors to consider when exercising discretion**

The act of exercising discretion can add a level of complexity into the decision-making process as the decision to be made may not be clear cut. It may be necessary for the decision-maker to consider and weigh up a number of factors and evidence.

The legislation may state that certain matters must be taken into account in the decision-making process. When stated, these matters must be considered. The use of the word ‘includes’ or a list which ends with a catch-all expression such as ‘any other matters that in the opinion of the decision-maker are relevant’ indicates that guidance from other sources will be necessary to determine what other factors might be relevant.

If the legislation does not specify the matters to be taken into account, it is important to consider the underlying purpose of the decision-making power and what factors might be relevant to achieving that purpose.

Guidance can also be obtained from:

* Agency policies;
* Previous decisions;
* Court or tribunal decisions; and
* The overall objectives of the legislation under which the decision is made.

Although the decision-maker may take guidance from these sources, it is important to consider each case on its merits.

It is important that adequate weight is given to a matter of great importance and that excessive weight is not given to a relevant factor of no great importance. When exercising discretion, there may be one critical or turning key factor in the decision. That is, if one factor was different, the decision would be different. It is vital that this factor is identified in the decision-making process.

# **Keeping people informed and advising on the outcome**

It is important to keep people informed in the decision-making process. Decision-makers also have a responsibility to inform the relevant parties of the outcome. There may also be a requirement to provide reasons for the decision reached.

# **Ten key steps to be considered when exercising discretion**

A ten step guide has been developed to assist decision-makers in exercising discretion. The aim of the ten steps is to simplify the process of exercising discretion. As the decision-maker will ultimately need to make a judgement about the matter under consideration, the ten steps provide guidance to reach that point to ensure accountability and transparency in the decision-making process, and to provide quality outcomes.

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| **Key Step** | **Description** |
| **1. Determine that the decision-maker has the power** | Check the relevant legislation and agency policies and guidelines to ensure that the person has the power to act or to make the decision. |
| **2. Follow statutory and administrative procedures** | It is important that the person who is responsible for exercising discretion follows statutory and administrative procedures. For example, there may be pre-conditions to the exercise of discretion such as requiring consultation with a range of people or to advertise a proposal and to receive and consider submissions before a decision is made |
| **3. Gather information and establish the facts** | Before exercising discretion, it is necessary to gather information and establish the facts. Some facts might be submitted with an application made to the decision-maker. Others might be obtained through inquiries or investigation. This may require the decision-maker to:   * Review documents; * Undertake a review of the persons history; or * seek specialist advice |
| **4. Evaluate the evidence** | It is important to evaluate and weigh up the evidence, to determine the relevant considerations and key facts. A key fact is something whereby the existence or non-existence of the fact can affect the decision. The evidence must be relevant to the questions before the decision-maker and accurate so that any material facts can be established. When evaluating the evidence, the decision-maker must ignore irrelevant considerations. |
| **5. Consider the standard of proof to be applied** | In administrative matters, the standard of proof to be applied is generally ‘on the balance of probabilities’. It must be more probable than not that the matter or allegations are proven. In general, the more serious the matter and the consequences arising, the higher the standard of proof that is necessary. |
| **6. Act reasonably, fairly and without bias** | The person taking action or making a decision must act reasonably. The decision-maker needs to act impartially. They must not handle matters in which they have an actual or reasonably perceived conflict of interest. |
| **7. Observe the rules of procedural fairness** | Before taking certain action or making some decisions, the decision-maker may be required to provide procedural fairness to anyone who is likely to be adversely affected by the outcome. |
| **8. Consider the merits of the case and make a judgement** | Although policies, previous review decisions, and court decisions may exist to guide the decision-maker, it is still important to consider the matter or application on its merits and to make a judgement about the matter under consideration. |
| **9. Keep parties informed, advise of the outcome and provide reasons for the decision** | The decision-maker should keep relevant parties informed during the decision-making process; they should inform the relevant parties of the outcome; and provide reasons for the decision reached. |
| **10. Create and maintain records** | It is vital that records are created and maintained about the issues that were taken into account in the process and why, the weight given to the evidence and the reasons for the decisions made. |

1. **Giving reasons for decisions:**

**Benefits of giving reasons for decisions**

Giving reasons for administrative decisions provides the following benefits:

* More public confidence in the decision;
* More consistency in decision-making; and
* Fairness and transparency in decision-making.

**Why should reasons for decisions be given?**

When a decision is made, there is at least one alternative decision that could have been made. Giving reasons should enable the people affected by the decision to understand why a particular decision was made.

Giving reasons is important:

* To inform a person why a decision was made and to explain the decision;
* To meet any requirements under the legislation under which the decision was made;
* To help the person affected by the decision make a choice about exercising their right of review or appeal; and

Giving reasons also demonstrates transparency, accountability and quality of decision-making as follows:

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| **Transparency** | A person affected by a decision is better able to see:   * The facts and reasoning that were the basis for the decision; * That the decision was not made arbitrarily or based on speculation, suspicion or on irrelevant information; * To what extent any arguments put forward have been understood, accepted or formed a basis for the decision; * Whether they have been dealt with fairly; and * The issues they will need to address if they decide to request a review of the decision or to lodge an appeal on the decision. |
| **Accountability** | * When required to give reasons, there is a greater incentive for decision-makers to base their decisions on acknowledged facts; * Supervisors and managers are better able to see if legal requirements, agency/government policies and standard practices have been complied with; and * People or bodies with an external review role are in a better position to assess the decision, for example, whether it was reached lawfully, based on relevant considerations, and based on the merits of the case. |
| **Quality** | * When required to give reasons, there is a greater incentive for decision-makers to rigorously and carefully identify and assess relevant issues and to justify recommendations and decisions; * Other decision-makers are able to apply decisions to future cases by using the reasons as guidance for the assessment or determination of similar issues. |

**Should reasons be given in all cases?**

There is no general duty at common law, or general rule of procedural fairness, that requires decision-makers to give reasons for their decisions, although such a duty may arise in special or exceptional circumstances. Special circumstances might include decisions relating to unfair dismissal or where giving reasons would assist someone when exercising a right of appeal. The courts hold the view that, generally, the question about whether reasons should be given is better determined by legislation.

Sometimes the requirement to give reasons is derived from the legislation which provides for the right of review of the decision, which may not be the same legislation which provided for the actual decision to be made.

**Circumstances when reasons are particularly important**

There are circumstances when giving reasons is particularly important. These include when:

* The decision is not in accordance with a relevant established policy or guideline;
* The decision is likely to detrimentally affect the rights or interests of an individual or organisations to any material extent; or
* To explain the conditions imposed on an approval, consent, permit, or licence.

Where a decision-maker makes a decision which is not in accordance with a relevant established policy or guideline, the reasons for the decision and the reasons for not following the policy should be recorded, either in a report on the proposal in which the decision was recommended, or in a file note or memorandum attached to the relevant file.

**How and when should reasons be communicated?**

The legislation under which the decision is being made may provide details about the form in which the reasons are required to be provided. For example, a prescribed form may exist in Regulations that must be used to communicate the decision. Generally, reasons are communicated in a document which is referred to as a statement of reasons. This might form part of a document in which the decision is communicated rather than forming a separate statement.

Reasons should be drafted with the potential audience in mind:

* The statement should be written in a style that can be easily understood by the person receiving it so that they understand the reasons for the decision and why the decision was made;
* Sentences should be short and plain English should be used;
* The language should be clear and unambiguous; and
* Technical terms and abbreviations should be avoided if they are not likely to be understood by the person receiving the statement of reasons.

Providing a statement of reasons is always desirable. In some cases a statement of reasons may not be required under legislation when the decision is made. For example, for some decisions that are reviewed by administrative appeal tribunals, the decision-maker is not required to provide the reasons for a decision until requested by the tribunal after an appeal or request for a review of the decision is received. However, in such cases, providing a statement of reasons at the time the decision is made is good administrative practice.

**What should a statement of reasons contain?**

**A statement of reasons should deal with the substantial and key issues upon which the decision turns.**

The information contained in the statement of reasons may to some extent be proportional to the type of decision made and what requirements might be imposed by the legislation.

Where the decision-making process has been lengthy and complex, involved seeking the views of people affected by the decision, seeking expert advice or involved weighing up a number of facts, the information set out in the statement of reasons is likely to be significantly greater than for a decision that was quick and simple to make.

A statement of reasons should deal with the substantial and key issues upon which the decision turns. It is not necessary for a statement of reasons to address each and every issue raised by the applicant or party to the proceedings.

Consideration should be given to including the following types of information in the document containing the reasons for the decision made.

**Information to be included in the document containing a statement of reasons**

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| **The decision** | **The decision should be accurately described.** |
| **Date of decision** | The date of the decision should be included. This is particularly important if there is a time limit for appeals on the decision to be made. If the date that the decision takes effect is different to the date of the decision, this should be included. |
| **The decision-maker** | The name of the decision-maker should be identified. This may be a person, committee or an organisation. |
| **Relevant legislation** | If the decision was made under legislation, this should be referred to. If the legislation specifies that certain actions be taken before a decision is made, for example, consultation with people that may be affected by the decision, reference to this may be required. |
| **Key steps taken in making the decision** | For more complex decisions, a list of the key steps taken in the decision-making process should be included together with the documents and information considered, including any legislation or policies. Details of any essential procedural steps taken or pre-conditions that may have been necessary should also be included. This may be very brief for less complex decisions. |
| **Details of the evidence considered** | The evidence considered and the key facts that arise from the evidence should be included, along with the conclusions drawn from the facts. Key facts are those on which the decision turns. Details of whether the evidence in relation to key facts was accepted or rejected should be recorded. The person affected by the decision should be able to see how the facts link to the decision made. |
| **Details of rights of appeal or review** | Information should be included about rights of appeal or review including which body is responsible for handling appeals or reviews and any timeframes which apply. |

1. **Procedural Fairness:**

**What is procedural fairness?**

*Procedural fairness* is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. It is highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.

**Is there a difference between natural justice and procedural fairness?**

The term procedural fairness is thought to be preferable when talking about administrative decision-making because the term natural justice is associated with procedures used by courts of law. However, the terms have similar meaning and are commonly used interchangeably. For consistency, the term procedural fairness is used in this fact sheet.

**Does procedural fairness apply to every government decision?**

No. The rules of procedural fairness do not need to be followed in all government decision-making.

They mainly apply to decisions that negatively affect an existing interest of a person or corporation. For instance, procedural fairness would apply to a decision to cancel a licence; to discipline an employee; to impose a penalty; or to publish a report that damages a person’s reputation.

Procedural fairness also applies where a person has a legitimate expectation (for example, continuing to receive a benefit such as a travel concession). Procedural fairness protects legitimate expectations as well as legal rights. It is less likely to apply to routine administration and policy-making, or to decisions that initially give a benefit (for example, issuing a licence in the first instance).

The rules of procedural fairness require:

* a hearing appropriate to the circumstances;
* lack of bias;
* evidence to support a decision; and
* inquiry into matters in dispute.

**What is “the hearing rule”?**

A critical part of procedural fairness is ‘the hearing rule’. Fairness demands that a person be told the case to be met and given the chance to reply before a government agency makes a decision that negatively affects a right, an existing interest or a legitimate expectation which they hold. Put simply, hearing the other side of the story is critical to good decision-making.

In line with procedural fairness, the person concerned has a right:

* to an opportunity to reply in a way that is appropriate for the circumstances;
* for their reply to be received and considered before the decision is made;
* to receive all relevant information before preparing their reply. The case to be met must include a description of the possible decision, the criteria for making that decision and information on which any such decision would be based. It is most important that any negative information the agency has about the person is disclosed to that person. A summary of the information is sufficient; original documents and the identity of confidential sources do not have to be provided;
* to a reasonable chance to consider their position and reply. However, what is reasonable can vary according to the complexity of the issue, whether an urgent decision is essential or any other relevant matter; and
* to genuine consideration of any submission. The decision-maker needs to be fully aware of everything written or said by the person, and give proper and genuine consideration to that person’s case.

**How does procedural fairness apply to the decision-maker?**

Except in rare circumstances where procedural fairness is excluded by statute, if you are making a decision which will affect the rights, interests or legitimate expectations of a person, you must comply with the rules of procedural fairness. In other words, you must ensure:

* you allow the individual a fair hearing (or verify that the individual has been granted a fair hearing) that is neither too early or too late in the decision-making process; and
* you are unbiased. This includes ensuring that from an onlooker’s perspective there is no reasonable perception of bias. For example, personal, financial or family relationships, evidence of a closed mind or participation in another role in the decision-making process (such as accuser or judge) can all give rise to a reasonable perception of bias. If this is the case, it is best to remove yourself from the process and ensure an independent person assumes the role of decision-maker.

1. **Remedies and Redress:**

**Redress circumstances**

Circumstances that warrant the provision of redress by an agency to a complainant can arise in many ways, but in broad terms may arise when any one of or a combination of the following occur:

* poor communication results in misunderstandings or misapprehensions;
* an inappropriate, unfair or unreasonable decision is made;
* an inadequate or unfair process was used to arrive at a decision; or
* a decision was made that was disproportionate or unreasonable in the circumstances.

**Redress principles**

There are six principles involved in the consideration of redress:

* All mistakes are admitted and put right.
* A sincere and meaningful apology is offered.
* Arrangements for considering redress are made public.
* Redress is fair and reasonable.
* As far as possible, redress restores the complainant to their original position.
* Redress is procedurally sound.

**Limitations**

There are limits to what steps might be reasonably expected to be taken in order to make good. The following issues should be explored in order to determine the limits in individual cases.

## **Elapsed time -** As a general principle the greater the elapsed time since the decision in question the less compelling the obligation on the agency to make good.

**Remoteness -** People not directly affected should not expect redress, unless special circumstances exist.

**Contribution -** Complainants may have themselves contributed to redress circumstances. It is reasonable for the agency to take into account the extent to which its officers and the people affected have contributed to the detriment suffered.

**Mitigation -** People affected by activities have a responsibility to take reasonable steps to minimise the impact on them.

**Unwarranted enrichment -** Redress should be aimed at making good the detriment suffered. It should not lead to a person making a profit or gaining an advantage.

**External considerations -** Providing redress is likely to be delayed or even inappropriate when other processes have not been completed. However, as a general principle, an agency should not delay providing redress while such processes are still in train once the need to provide it has been acknowledged.

**Forms of redress**

When things go wrong, many complainants want no more than to be listened to, understood, respected and, where appropriate, provided with an explanation and an apology.

There are various forms that redress can take.

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| **Explanation** | It may be possible to resolve the complaint by providing information about the decision-making process or relevant policies or legislation, or by giving reasons for decisions if this has not already been done. A complainant’s sense of grievance is likely to be lessened when they are satisfied that their position has been understood and taken into account. |
| **Apology** | A prompt apology can be extremely effective. Apologise promptly, sincerely, face to face, and confirm it in writing. Depending on the circumstances, it may be appropriate for the agency to acknowledge responsibility and express sympathy or regret. If legal liability may be a concern, an expression of sorrow, regret or sympathy, without acknowledging fault, can still be helpful. |
| **Reconsidering conduct** | Taking into account new information or information that may have been unintentionally ignored during the original assessment may lead to stopping action or taking alternative action or otherwise changing the consequences of a flawed decision. |
| **Changing policy or practice** | Some complainants are satisfied by the fact that changes will be made to prevent future similar incidents. |
| **Mitigation** | Mitigation reduces the impact of the detriment suffered and may involve correcting records, returning a licence if appropriate or refunding fees. |
| **Reimbursement** | Reimbursement for costs that were incurred as a result of the flawed decision, e.g. re-issuing a driver licence free of charge, not charging an administrative fee such as an application fee on re-application. |

1. **Good Record Keeping:**

**Why are records important?**

Records tell us what, where and when something was done and why a decision was made. They also tell us who was involved and under what authority. They provide evidence of government and individual activity and promote accountability and transparency.

**What are the benefits of good record keeping?**

Records:

* help you work more efficiently
* enable you to meet legal obligations applicable to your work
* protect the interests of the government and of your agency
* protect your rights as an employee and citizen
* demonstrate the cost and impact of your business
* enable review of processes and decisions
* retain the corporate memory of your agency and its narrative history
* help research and development activities
* enable consistency and continuity in your business

**Who is responsible?**

Creating and looking after records is central to your responsibilities as a Case Manager.

**What do we have to do?**

***Create records routinely as part of your work***

Records may naturally arise in the course of your work, such as sending an email. In other cases, where the activity does not automatically result in the creation of a record, you need to create one. Examples of this include meetings, telephone conversations and informal discussions. It is important that the record accurately reflects the discussion or activity that has taken place.

***File records into official records systems***

RM is our official system for managing our records, whether they are created and received in paper or electronically. Failure to capture records into RM makes them difficult or impossible to locate when needed. They may even end up lost or destroyed.

Do not be tempted to hoard records in your own private store, separate from our RM records system. This also applies to emails: those you send or receive in the course of your employment are official records. If an email needs to be kept to document a transaction or decision, then it should be captured into RM.

**Record keeping tips**

***Meetings***

Delegate someone to make a record of the meeting, either minutes or a simple summary of decisions. Ensure decisions and dissent are clearly recorded. Circulate the minutes of the meeting to other participants and sign or confirm the accuracy of the record.

***Conversations***

Make a record of significant business you conduct via the telephone or face-to-face, such as:

* providing advice, instructions or recommendations
* giving permissions and consent
* making decisions, commitments or agreements.

***Decisions and recommendations***

Document reasons for decisions or recommendations that you make.

***Correspondence***

File or attach emails, letters, faxes and internal memos (sent or received) that relate to your work onto files within your agency’s official records system.