

Guidelines on Decision Making

Ombudsman Western Australia
Serving Parliament – Serving Western Australians



Guidelines on Decision Making:

- Exercise of discretion in administrative decision making
- Giving reasons for decisions
- Procedural fairness (natural justice)
- Good record keeping

A complete list of available Ombudsman Western Australia publications is available at the back of this booklet.

Exercise of discretion in administrative decision-making

What is the exercise of discretion?

Administrative decisions often include the exercise of discretion. Discretion exists when the decision-maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions. The role of the decision-maker is to make a judgement taking into account all relevant information.

Powers to act and to exercise discretion

For public sector decision-making, legislation generally provides the lawful authority for action to be taken and for decisions to be made. Public sector decision-making may be undertaken:

- As part of fulfilling responsibilities to ensure the efficient and effective management and performance of a public authority, eg, under the general public sector legislation; or
- As part of taking action or making decisions under agency or department specific legislation relating to the services delivered by the public authority.

Legislation often compels a decision-maker to act in a particular way. Where the words 'shall' or 'must' are used in legislation, there is usually no discretion available to the decision-maker. For example, if the legislation states that an application must be received by a specific date, the decision-maker must refuse the application if it is not received by that date. However, where the legislation uses the word 'may', the decision-maker is given a discretionary power to deal with a matter and has a choice to make. This choice will often involve an element of judgment about the decision.

The exercise of discretion requires the exercise of good judgement.

Can the power to exercise discretion be delegated?

The legislation sets out who is given the power to make certain decisions, for example, a Chief Executive Officer (CEO). These powers, including powers to exercise discretion, may be delegated to others under a power of delegation in the legislation. Usually, the power of delegation cannot be delegated.

Delegations are generally recorded in writing in a register, instrument or notice and may need to be set out in a Government Gazette.

Before taking action or making a decision, the decision-maker should check to ensure they have the power to take the action or make the decision and the limits of any discretion that can be exercised.

Those who delegate powers to others should consider the following factors:

- Which actions and decisions should be delegated and which should not;
- That accountability and transparency are not compromised in decision-making; and
- That efficiency and quality in decision-making is maintained.

Policies and guidelines to guide the exercise of discretion

Agencies should develop policies and guidelines to assist and provide guidance to decision-makers to exercise discretion. Unlike legislation, policies and guidelines do not have the force and effect of law and they should not be inconsistent with the legislation. If they are, the legislation takes precedence

Not every situation needs a policy or guideline and they may not cover all circumstances. However, they are an important means of providing guidance to decision-makers who are required to exercise discretion when delivering a government service and in making decisions and to those with an interest in the decisions. Policies and guidelines assist to ensure decisions are made consistently and fairly.

Before preparing a policy or guideline, it is important to weigh up the costs and benefits of what outcomes might be achieved as a result. If better service delivery and decision-making is likely to be achieved, there is likely to be an overall net benefit outcome.

Policies and guidelines assist to ensure decisions are made consistently and fairly.

To ensure policies and guidelines are most effective they should:

- Contain a clear purpose of what the policy or guideline is intended to achieve;
- Be 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;
- Be expressed clearly to allow easy application and interpretation;
- Be transparent;
- State how they relate to relevant legislation;
- Be communicated to relevant staff; and
- Be made 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 and approve an application 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.

It is important to consider each case on its merits.

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

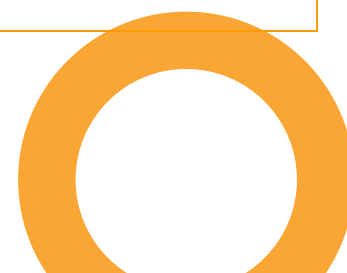
It is important to keep people informed in the decision-making process. Decision-makers also have a responsibility to inform the relevant parties of the outcome. There may also be a requirement to provide reasons for the decision reached.

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. Details are contained at page four of these guidelines.

Acknowledgement: Ombudsman Western Australia wishes to thank the NSW Ombudsman for allowing us to draw upon their publication *Public Sector Agencies Fact Sheet No. 4. Discretionary Powers* in the development of these Guidelines.

Ten key steps to be considered when exercising discretion	
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.
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.
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: <ul style="list-style-type: none"> • Review documents; • Undertake a site inspection; or • Seek specialist advice.
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.
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. This standard of proof is that found in the often-cited case of <i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336. The <i>Briginshaw</i> standard possesses a measure of flexibility, so that the more serious the allegation the higher the degree of probability required.
Act reasonably Act 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.
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.
Consider the merits of the case and make a judgement	Although policies, previous decisions, and court and tribunal 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.
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.
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.



Ombudsman Western Australia

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 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
- To comply with public authority customer service charters.

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

Transparency	<p>A person affected by a decision is better able to see:</p> <ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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 circumstances¹. 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 the minutes of the meeting where the decision was made, 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.

Reasons should be drafted with the audience in mind.

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?

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.

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

¹ *Public Service Board of NSW v Osmond* (1986) 9 ALN N85

Where the decision-making process has:

- Been lengthy and complex;
- Involved seeking the views of people likely to be affected by the decision, as well as seeking expert advice;
- Involved weighing up of a number of key facts,

the information set out in the reasons for the decision is likely to be significantly greater than for a decision that was simple and quick 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 proceedings².

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	
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.

Acknowledgement

Ombudsman Western Australia wishes to thank the NSW Ombudsman for allowing us to draw upon their publication *Public Sector Agencies Fact Sheet No. 18. Reasons for Decisions* in the development of these Guidelines.

² *Mentink v Albeitz* (1999) QSC 9; *Total Marine Services Pty Ltd v Kiley* (1985) 51 ALD 635 at 640; *KO and KP v Commissioner of Police, NSW Police* (GD) (2005) NSW ADTAP 56.

Public sector agencies deliver a vast range of services to members of the public who usually do not have the option of obtaining these services elsewhere. Under these conditions, it is important that the community has confidence that agencies will act fairly and reasonably in delivering their services.

In the Ombudsman's view it is essential that, when the service provided to an individual is unsatisfactory and the agency has in some way contributed to this, the agency should provide redress to remedy the situation.

These guidelines provide a framework to help managers make decisions about addressing a complainant's sense of grievance when they are dissatisfied with the service they have received from the agency. Ultimately, the guidelines should assist agencies to better manage their business, improve the transparency of their processes, and thus enhance public confidence in their operations.

Codes of conduct and organisational values

Public sector agencies, which include government departments, statutory authorities and local governments, have codes of conduct setting out values that include being honest and exhibiting high levels of integrity, openness and ethical behaviour.

The values in these codes should guide the way staff deal with aggrieved complainants. For example, "fairness" is demonstrated by maintaining an open mind in investigation and action; recognising the lawful rights of others to natural justice and equitable outcomes; and allowing people access to due process. The principle of "openness" requires acknowledging mistakes, explaining actions and apologising. These principles underly the redress guidelines.

In the Ombudsman's view, the ethical principles in the codes of conduct of public sector agencies are consistent with a redress framework which provides that, when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good.

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.

<p>Principle 1: Admitting mistakes</p>	<p>An organisation that values openness and accountability should be willing to admit and make good its errors. For this principle to be effective, staff must be confident that they have full support from their agency to take these actions.</p> <p>To achieve this, it is important that management provide suitable resources (including training) so that staff not only handle complaints properly but also have a good understanding of the benefits of handling a complaint well. Management should also outline the scope of employees' decision-making delegations - giving them the power to deal with complaints, and explaining the limits of redress that can be offered.</p> <p>For example, in the case of a claim made against an agency by a third party, RiskCover requires there be no admission of liability. In this instance, a 'claim' is defined as "an allegation, request, or demand for compensation". Even complaints by third parties about conduct could be regarded as a claim. For further information, see www.riskcover.wa.gov.au/liability/riskcover_claimsmanagement_liability_forms</p>
<p>Principle 2: Apologies</p>	<p>The <i>Civil Liability Act 2002</i> defines 'apology' as:</p> <p>An expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person (see Appendix A).</p> <p>The Act provides that an apology expressed in this way does not constitute an admission of liability, and therefore should not be relevant to the determination of fault or liability in connection with civil liability of any kind, nor should it be admitted into evidence in a court hearing.</p> <p>The impact of a sincere apology, offered early in the process, should not be underestimated. Even where an apology may not appear to be warranted, it is worthwhile expressing regret or sympathy in a way that does not accept blame; for example "<i>I'm sorry that this situation has left you feeling disappointed</i>". It will often avoid the escalation of a dispute and the significant cost in time and resources that can be involved.</p> <p>Apologising should not be seen as a sign of organisational weakness. To the contrary, it is a sign of organisational strength and maturity.</p>
<p>Principle 3: Visible mechanisms</p>	<p>In order to convince the public that complaints are taken seriously, agencies should publicise their mechanisms for complaint handling. This gives the public confidence that the agency will listen to complaints and act on them, and that making a complaint is worthwhile.</p>
<p>Principle 4: Fair and reasonable</p>	<p>Redress should be fair and reasonable to both the person affected and the agency. There are a number of criteria that need to be considered.</p> <p>Decisions not based entirely on legal grounds – Technical legal questions cannot and should not be ignored. However, fairness involves considering all of the ways in which the circumstances in question have affected the complainant and the wider community. This involves both legal and non-legal issues. An approach guided solely by legal principles risks being rigid, lacking the flexibility necessary for customer-focused agencies. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.</p> <p>Equal treatment - Like cases should, as a matter of principle, be treated equally. Differences in redress between similar cases should be clearly attributable to material differences in the circumstances.</p>

<p>Principle 4: Fair and reasonable</p> <p><i>continued</i></p>	<p>Resources not used to disadvantage - Agencies are typically large, with access to resources and advice not usually afforded to most citizens. Using these to the disadvantage of complainants only exacerbates the detriment suffered.</p> <p>Proportion - Redress should be proportional to the detriment suffered. This involves weighing the problem and possible solutions to find an appropriate balance.</p>
<p>Principle 5: Restoration</p>	<p>Generally, when a person suffers a detriment wholly or partly as a result of the inappropriate actions of an agency, that person should be restored to their original position. When this is not possible, fair and reasonable alternatives should be offered.</p>
<p>Principle 6: Procedurally sound</p>	<p>A proper response by an agency to a person who has suffered a detriment involves:</p> <ul style="list-style-type: none"> • covering all of the consequences of the decision in question. Failing to do so is likely to simply generate further complaints; • providing all relevant information about what happened, why it happened, what steps are being taken to rectify the position and why those steps are being taken; • accepting that agreements made in ignorance of rights and the available information are not fair and reasonable; • taking into account the views of the people affected; • taking into account protection of the public purse; • taking into account these guidelines and previous decisions about similar complaints; • dealing with the complaint in a timely manner. Agencies are much more likely to meet the ethical principles of respect, openness and accountability if redress circumstances are dealt with quickly. Delaying redress is liable to intensify the detriment already suffered.

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. Some of the more important considerations include:

Agency internal review

Where appropriate, having regard to the particular circumstances of each case, providing redress should not be delayed because the agency's internal review is incomplete.

Legal liability

In some cases the person suffering detriment will have a legal entitlement to redress, and in this situation, where possible, the agency should provide appropriate redress that obviates the need for that person to pursue their legal remedies. While concerns about legal liability are an important consideration, such concerns should not be the sole or even primary consideration in assessing whether to offer redress. Agencies have a duty to correct or rectify problems arising from maladministration for which they are responsible. Agencies should make sensible decisions to reach out of court settlements, or better still, to forestall the need for legal proceedings at all. Redress can be offered without admission of liability. The agency may wish, if offering an Act of Grace payment, to enter into a deed with the complainant by which they release the agency and the State from any liability related to the complaint.

Government expenditure

Making good a detriment suffered should be primarily based on the moral obligation of the agency to do so on a balanced assessment of the relevant circumstances. But sometimes agencies limit their responses in a bona fide attempt to limit the financial exposure of government. While it is always important to use government resources wisely, this must be accomplished in a way that does not disadvantage complainants. When considering the public interest, agencies need to take account of the improvement in public confidence in service delivery that may result from a fair and timely response to service failures. In these cases the cost of providing redress could be viewed as one of the costs of providing a reasonable standard of service.

Of course agency expenditure must have a legal foundation. The *Financial Management Act 2006* includes authorisation to request approval for Act of Grace payments (section 80(1)), which provides for the following:

If the Treasurer is satisfied that it is appropriate to do so because of special circumstances, the Treasurer may authorise an amount to be paid to a person even though the payment would not otherwise be authorised by law or required to meet a legal liability.

The procedure for making such requests is set out in [Treasurer's Instruction 319](#).

Western Australian Government policy encourages agencies to develop policies on the provision of redress (or remedies) as part of their complaints management process.³

The redress process

An agency's complaint handling system must have the capacity to identify and efficiently and effectively deal with decisions about redress. In the Ombudsman's view, a model redress mechanism incorporates the following four steps:

- Step 1.** Decide whether redress circumstances resulting in a person suffering a detriment exist.
- Step 2.** Consider the nature of the detriment.
- Step 3.** Decide what it would take to satisfy the complainant or restore the complainant to their original position.
- Step 4.** Determine what would need to be done to prevent a recurrence.

<p>Step 1: Decision resulted in a detriment</p>	<p>There are many occasions when a complainant may suffer a detriment when an agency is acting lawfully and reasonably. Depending on the circumstances, however, an apology may be appropriate.</p> <p>Similarly, redress does not need to be provided when legislation is operating as intended or to remedy major legislative deficiencies.</p>
<p>Step 2: Nature of detriment</p>	<p>Establishing the nature of the detriment that the complainant has suffered and their desired outcome should be a standard component of the complaint-handling process. In determining this, agencies should take into account:</p> <ul style="list-style-type: none"> • the amount of quantifiable financial loss (such as loss or damage to property, injury or damage to health, loss of earnings, medical and legal costs, time and trouble where the person dealt with the matter without professional assistance); and • any non-financial damage (such as gross inconvenience, embarrassment, humiliation, or stress). <p>Many complainants are eager to move on and merely seek acknowledgement of their grievance and a timely apology. Some are satisfied with the knowledge that remedial action has been taken and elect not to pursue civil claims.</p>
<p>Step 3: Restoring complainant to original position</p>	<p>Sometimes agencies offer only partial redress, resulting in the complainant remaining dissatisfied. This occasionally occurs when property has been damaged or lost as a result of an agency's action. The agency may offer a part payment on the basis that the damage or loss was accidental. However, if the complainant's actions did not contribute to the damage or loss, the principle of fairness indicates that the complainant should be fully reimbursed.</p>
<p>Step 4: Prevent recurrence</p>	<p>One of the principal functions of a good complaint handling system is to allow the agency to learn from its complaints and improve its services. It is expensive, inefficient and poor administrative practice to simply deal with complaints as they arise and fail to fix the cause.</p> <p>Each complaint should be assessed to determine whether the circumstances are likely to arise again and if there is a better way to deal with the matter. Often this will involve identifying training needs or making amendments to procedural manuals.</p>

Common excuses to avoid making good

The Ombudsman's experience is that agencies are often motivated to avoid making good to avoid expenditure or embarrassment or because they believe making good risks being seen as an admission of liability. In our view, such decisions are ill-conceived and inconsistent with the principles of accountability and openness.

The following common responses are unacceptable reasons to avoid making good:

Avoiding setting a precedent (or "the floodgates" argument)

If the flawed decision is demonstrably unfair and unreasonable in a specific set of circumstances, then this is what must be addressed.

Not legally required to offer redress

This confuses the issues of lawfulness and fairness. Fairness involves considering both legal and non-legal issues. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.

Fix the system but not resolve individual complaint

The original complainant may obtain little satisfaction from actions to prevent a recurrence of the incident that led to the complaint. When an agency identifies a deficiency that needs correction, fairness requires that the complaint which led to that identification be addressed in an appropriate manner.

Don't want to create a bigger problem

This approach is inconsistent with the ethical principle of openness. If making good alerts people to the fact that a bigger problem exists, then this is itself a useful outcome.

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.

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 replacing damaged property, correcting records, returning property or refunding fees.
Restitution	Compensation for loss or damage to property.
Reimbursement	Compensation for costs that were incurred as a result of the flawed decision, including medical costs, professional costs, or time and trouble involved.
Satisfaction	Compensation for loss of amenity or rights, or for inconvenience. When an agency is not under a legal liability to provide financial compensation (i.e. restitution, reimbursement and satisfaction), it may still decide that it has a moral obligation to offer this type of redress. This can be done by way of an Act of Grace payment under section 80 of the <i>Financial Management Act 2006</i> . Treasurer's Instruction 319 provides the procedure and guidelines for making such requests.

Develop agency-specific guidelines

The availability of redress is a crucial component of a fair and reasonable complaints system. When a complainant suffers a detriment and it can be established that an agency contributed to that detriment, an agency that wishes to be seen as accountable must take steps to rectify the perceived damage. If agencies lack a proactive approach to providing remedies, they risk complainants remaining aggrieved.

To ensure public confidence is safeguarded, the Ombudsman suggests that agencies develop a “menu” of remedies, including examples, to assist staff in considering what remedy to provide. This will ensure that staff provide consistent and appropriate responses. To ensure transparency, the agency’s commitment to appropriate redress (including limitations, where these apply) should also be made accessible to members of the public.

Resources

The following Ombudsman Western Australia publications provide further details that may be useful in the development of complaint handling systems and for staff involved in handling complaints:

- [Effective handling of complaints made to your organisation – An overview](#)
- [Making your complaint handling system accessible](#)
- [Complaint handling systems checklist](#)
- [Guidance for Complaint Handling Officers](#)
- [Investigation of complaints](#)
- [Conducting administrative investigations](#)
- [Procedural fairness](#)
- [Dealing with unreasonable complainant conduct](#)
- [Good record keeping](#)

For further information about the role of the Ombudsman and guidance for complaints management, visit our website at www.ombudsman.wa.gov.au.

Acknowledgement

Ombudsman Western Australia wishes to thank the [NSW Ombudsman](#) for allowing us to use their publication *The Complaint Handler’s Tool Kit 2004* in the development of these guidelines.

Appendix A

CIVIL LIABILITY ACT 2002

Apologies Part 1E

s. 5AF Interpretation

In this Part — “apology” means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

s. 5AG Application of this part

Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.

This Part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.

This Part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.

If in a claim for damages:

- it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
- the symptoms of the injury first appeared on or after the commencement day, the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

In this section “commencement day” means the day on which the Civil Liability Amendment Act 2003 section 8 comes into operation.

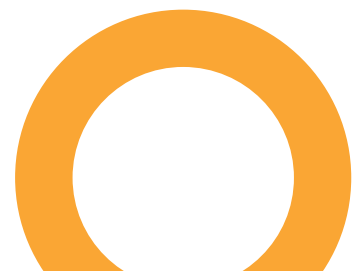
s. 5AH Effect of an apology on liability

An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages:

- does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and
- is not relevant to the determination of fault or liability in connection with that incident.

Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

You can access a full copy of the *Civil Liability Act 2002* at the [WA State Law Publisher](#) website



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?

Making and keeping your agency's records depends on the cooperation of everyone in your agency. Whilst your agency's chief executive and its corporate records section (if appropriate to your agency) are responsible for meeting the requirements of the *State Records Act 2000*, effective record keeping ultimately depends on you.

Creating and looking after records is central to your responsibilities as a public official. As an individual government employee, it is possible to be charged with an offence under the *State Records Act 2000* if you fail to keep a record in accordance with your agency's Record Keeping Plan.

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, informal discussions and the receipt of funds. It is important that the record accurately reflects the transaction or activity that has taken place.

File records into official records systems

Your agency has official systems for managing its records, whether they are created and received in paper or electronically. Failure to capture records into official records systems 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 your agency's official 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 your agency's official records system.

Handle records with care

For paper records to survive and be available for as long as they are needed, they must be properly cared for. Avoid storing records near known hazards and try not to damage them.

Records are a corporate asset of your agency and do not belong to you. Do not remove them from official records systems for extended periods of time or take them out of your agency. It is important they remain available to other staff.

Do not destroy records without authority

Your agency's records, whether paper or electronic, generally cannot be destroyed without proper authority from your agency's records staff. Some kinds of records have only temporary value and can be destroyed when no longer needed. Make sure you know which records are required long term and which are not. This information is part of your agency's Retention and Disposal Schedule, and records staff can provide information about this.

Failing to maintain records for the length of time they are needed puts you and your agency at risk of being unable to account for what has happened or been decided. This can result in problems for your agency's clients, monetary losses from penalties or litigation, embarrassment for your agency or the Government, or, in extreme cases, disciplinary action for you or your colleagues.

Protect sensitive records from unauthorised access

Records can contain personal and confidential information which must not be disclosed to unauthorised persons. Ensure that records storage areas are secure, protect passwords and do not leave sensitive records lying around.

Know your agency's policies and procedures for managing records

Every WA public sector body is required to establish policies and procedures for the management of their records in all forms. It is every public official's responsibility to create and keep records according to their agency's Record Keeping Plan. You can help support good record keeping in your agency by being familiar with these policies and procedures and applying them so you can better create and manage records in your daily work.

What happens to records once the business need ceases?

Most of your agency's records, whether paper or electronic, can be destroyed with proper authority from your records staff. However, some records have permanent value to the State and to the people of Western Australia as evidence of your agency's activities and the role of government in our society.

These records will become State archives to be retained permanently and transferred to the State Records Office once they are 25 years old. Subject to certain restrictions, they will be made available to the public on request and to future generations of researchers who might use these records many years from now.

Make sure you know which records you deal with have continuing value. Good record keeping includes taking proper care of records which have archival value and will be retained permanently.

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.

Transcribe voicemail messages or capture the message directly into your agency's official records system.

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.

Further information

[Australian Standard AS15489 Records Management](#)

[State Records Act 2000](#)

[State Records Commission Principles and Standards 2002](#)

[State Records Office of Western Australia](#)

[Record Keeping in Western Australia: Who is Responsible](#)

Your agency's Record Keeping Plan and Retention and Disposal Schedule

Acknowledgements

We acknowledge material from the [NSW State Records Office](#) and [NSW Ombudsman](#), and advice from the [State Records Office of WA](#).



Ombudsman Western Australia

Level 12, 44 St Georges Terrace Perth WA 6000 • PO Box Z5386 St Georges Terrace Perth WA 6831
Tel 08 9220 7555 • Freecall (outside metropolitan area) 1800 117 000 • Fax 08 9325 1107
Email mail@ombudsman.wa.gov.au • Website www.ombudsman.wa.gov.au

Ombudsman WA Publications

The following guidelines, information sheets and forms are available in the Publications section of our website at www.ombudsman.wa.gov.au.

General Publications
<ul style="list-style-type: none">• Ombudsman WA DL Brochure• How We Assess Complaints• Ombudsman WA Simplified A4 Poster• Ombudsman WA Simplified Information Sheet• Ombudsman WA Simplified DL
For Complainants
<ul style="list-style-type: none">• How to complain to the Ombudsman (Also available in Arabic, Amharic, Croatian, Chinese Simplified, Chinese Traditional, Cocos-Malay, Dari, Indonesian, Italian, Japanese, Persian, Serbian, Somali, Spanish and Vietnamese)• Ombudsman's complaint resolution process - Information for Complainants• Making a Complaint to a State Government Agency• Assessment of Complaints Checklist• Being Formally Interviewed by the Ombudsman• Requesting the Review of a Decision• Complaints from overseas students (Also available in Chinese Simplified, Chinese Traditional, Hindi, Indonesian and Malay)
For Agencies
<ul style="list-style-type: none">• Ombudsman's complaint resolution process - Information for public authorities• About the Ombudsman - Information for public sector agencies• About the Ombudsman - Information for local governments• About the Ombudsman - Information for universities• Effective handling of complaints made to your organisation - An Overview• Complaint Handling Systems Checklist• Making your complaint handling system accessible• Guidance for Complaint Handling Officers• The principles of effective complaints handling• Conducting administrative investigations• Investigation of Complaints• Procedural Fairness (Natural Justice)• Giving reasons for decisions• Exercise of discretion in administrative decision making• Dealing with Unreasonable Complainant Conduct• Remedies and Redress• Good Record Keeping• Information for Boards and Tribunals
For Prisons
<ul style="list-style-type: none">• Complaining to the Ombudsman - Information for Prisoners
Forms
<ul style="list-style-type: none">• Ombudsman WA Complaint Form• Ombudsman WA Authority to Act Form• Ombudsman WA Authority to Release Information• Complaint Form for overseas students

This list of publications is current as at 16 June 2011. If you require any assistance with our publications, please contact the Publications Manager on (08) 9220 7555.

Ombudsman Western Australia

Level 12, 44 St Georges Terrace Perth WA 6000 • PO Box Z5386 St Georges Terrace Perth WA 6831
Tel 08 9220 7555 • Freecall (outside metropolitan area) 1800 117 000 • Fax 08 9325 1107
Email mail@ombudsman.wa.gov.au • Website www.ombudsman.wa.gov.au

