

### 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. The Ombudsman considers it 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 or benefit; to discipline an employee; to impose a penalty; or to publish a report that may damage 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).

In some rare circumstances, the requirement to provide procedural fairness is specifically excluded by Acts of Parliament (for example, section 115 of the *Sentence Administration Act 2003*).

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 an individual who may be negatively affected by a government decision?

If you are going to be negatively affected by a government decision, you are entitled to expect that the decision maker will follow the rules of procedural fairness before reaching a conclusion. In particular, you are entitled to:

- Be told the case to be met (for example, that an agency is considering withdrawing an existing entitlement or benefit such as a rebate or an allowance), including reasons for this proposal and any negative or prejudicial information relating to you that is to be used in the decision making process.

The case to be met could be a letter or a draft report, or it could be a summary of the issues being considered by the decision maker. It is not necessary for you to receive copies of all original documents or the identity of confidential sources be revealed.

- A real chance to reply to the case to be met, whether that be in writing or orally. The type of hearing should be proportional to the nature of the decision. For instance, if the consequences of the proposed decision are highly significant, a formal hearing process may be warranted. In contrast, if the matter is relatively straightforward, a simple exchange of letters may be all that is needed. Generally, in any oral (or face-to-face) hearing, it is reasonable to bring a friend or lawyer as an observer, so you may wish to consider this.

In your reply, you may, amongst other things, wish to:

- Deny the allegations;
- Provide evidence you believe disproves the allegations;
- Explain the allegations or present an innocent explanation; and
- Provide details of any special circumstances you believe should be taken into account.

You must have the chance to give your response before the decision is made, but after all important information has been gathered. This is so you can be given all the information you are entitled to and be aware of the issues being considered by the decision maker.

The decision maker should have an open mind (be free from bias) when reading or listening to what you have to say.

## How does procedural fairness apply to an investigator?

If you are investigating a matter or preparing a report for a decision maker, it is good practice to consider the requirements of procedural fairness at every stage of your investigation.

Procedural fairness is an essential part of a professional investigation and benefits both parties. As an investigator, acting according to procedural fairness can help you by providing:

- An important means of checking facts and identifying major issues;
- Comments made by the subject of the complaint that can expose weaknesses in the investigation; and
- Advance warning of areas where the investigation report may be challenged.

Depending on the circumstances, procedural fairness requires you to:

- Inform those involved in the complaint of the main points of any allegations or grounds for negative comment against them. How and when this is done is up to you, depending on the circumstances;
- Provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise. It is important to weigh all relevant circumstances for each individual case before deciding how the person should be allowed to respond to the allegations or negative comment;

- In most cases it is enough to give the person opportunity to put their case in writing. In others, however, procedural fairness requires the person to make oral representations. Your ultimate decision will often need to balance a range of considerations, including the consequences of the decision;
- Hear all parties to a matter and consider submissions;
- Make reasonable inquiries or investigations before making a decision. A decision that will negatively affect a person should not be based merely on suspicion, gossip or rumour. There must be facts or information to support all negative findings. The best way of testing the reliability or credibility of information is to disclose it to a person in advance of a decision, as required by the hearing rule;
- Only take into account relevant factors;
- Act fairly and without bias. If, in the course of a hearing, a person raises a new issue that questions or casts doubt on an issue that is central to a proper decision, it should not be ignored. Proper examination of all credible, relevant and disputed issues is important;
- Conduct the investigation without unnecessary delay; and
- Ensure that a full record of the investigation has been made.

Of course, wherever there is a requirement to apply particular procedures in addition to those that ensure procedural fairness, the terms of that statutory obligation must also be followed.

The Ombudsman recommends that whenever it is proposed to make adverse comment about a person, procedural fairness should be provided to that person before the report is presented to the final decision maker. This should be done as a matter of best practice.

There is no requirement that all the information in your possession needs to be disclosed to the person. In rare cases, such as a serious risk to personal safety or to substantial amounts of public funds, procedural fairness requirements may need to be circumvented due to overriding public interest. If you believe this exists, make sure you seek expert advice and document it.

### 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 nor 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.

If you are relying on a briefing paper that summarises both sides of the case and makes a proposal, it is often a good idea to disclose a draft of the briefing paper to the person, even though a hearing has earlier been held.

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# 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.**

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.

## 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**

<b>Determine that the decision maker has the power</b>	Check the relevant legislation and agency policies and guidelines to ensure that the person has the power to act or to make the decision.
<b>Follow statutory and administrative procedures</b>	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.
<b>Gather information and establish the facts</b>	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"> <li>• Review documents;</li> <li>• Undertake a site inspection; or</li> <li>• Seek specialist advice.</li> </ul>
<b>Evaluate the evidence</b>	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.
<b>Consider the standard of proof to be applied</b>	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.
<b>Act reasonably Act fairly and without bias</b>	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.
<b>Observe the rules of procedural fairness</b>	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.
<b>Consider the merits of the case and make a judgement</b>	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.
<b>Keep parties informed, advise of the outcome and provide reasons for the decision</b>	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.
<b>Create and maintain records</b>	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.

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