Good decisions

RESOURCE

Contents

Administrative decision-making 1

Recordkeeping 4

Stage 1: Preparing for the decision 8

What is the decision-making power? 8

Do you have the authority? 8

Should you be the decision-maker? 9

What is the timeframe to make the decision? 10

What are the key issues? 10

Identify the applicable procedures 11

Stage 2: Developing the decision 12

Follow procedures 12

Gather all necessary information 12

Observe natural justice 13

Stage 3: Making the decision 16

Find the facts 16

Apply the law 17

Reasonably exercise discretion 18

Stage 4: Communicating the decision 22

Give meaningful and accurate reasons 22

Our role

Our role is established under these three acts:

- *Ombudsman Act 2001*
  - Under the Ombudsman Act, the Office of the Queensland Ombudsman investigates complaints about the actions and decisions of state government departments and agencies (including state schools and TAFE), local governments and public universities. Our complaints assessment and investigation service is free and independent.
  - We give people a timely, effective and independent way to have administrative actions of agencies investigated.
  - We improve the quality of decision-making and administrative practice in government agencies.
- *Public Interest Disclosure Act 2010*
  - We review the management of public interest disclosures, provide education and advice to agencies as the oversight agency.
- *Inspector of Detention Services Act 2022*
  - We promote the humane treatment of detainees and the prevention of harm through reviews, inspections and independent reporting.

Terminology

In this resource, we use the word 'agency' to describe all of the Queensland state government departments, local councils, public universities and government authorities that we can investigate.

Referenced legislation

Queensland

Acquisition of Land Act 1967

Acts Interpretation Act 1954 (AIA)

Building Act 1975

Child Protection Act 1999

Human Rights Act 2019 (HRA)

Information Privacy Act 2009

Judicial Review Act 1991

Local Government Act 2009 (LGA)

Public Records Act 2002 (PRA)

Public Sector Ethics Act 1994

Public Sector Act 2022 (PSA)

Right to Information Act 2009 (RTIA)

Administrative decision-making

Administrative decision-making can be multifaceted and complex. Even a decision about a seemingly simple matter can have a significant impact on people in the community.

The community expects public agencies to have policies and procedures to support and inform fair and consistent decision-making at all levels within government.

Good administrative decision-making lies at the heart of this process.

Administrative decision-making is improved if three basic components are considered:

1	**Facts** – gathering all necessary and relevant information.
2	**Law** – correctly identifying, interpreting and applying the relevant law to the facts.
3	**Discretion** – correctly identifying and considering relevant policy and reasonably exercising discretion.

What principles apply when making a good decision?

All agencies should have a Code of Conduct based on the four key ethics principles and values set out in the *Public Sector Ethics Act 1994*.

The principles and responsibilities of public officers are:

1. Integrity and impartiality

Public office involves trust. Public service agencies, entities and officials seek to promote public confidence in the integrity of the public sector and:

(a) are committed to the highest ethical standards

(b) accept and value their duty to provide advice which is objective, independent, apolitical and impartial

(c) show respect towards all people, including employees, clients and the general public

(d) acknowledge the primacy of the public interest and undertake that any conflict of interest will be resolved or appropriately managed in favour of the public interest

(e) are committed to honest, fair and respectful engagement with the community.

2. Promoting the public good

The public sector is the mechanism through which elected representatives deliver programs and services for the benefit of the people of Queensland. Public service agencies, public sector entities and public officials:

(a) accept and value their duty to be responsive to the requirements of government and the public interest

(b) accept and value their duty to engage the community when developing and implementing public sector priorities, policies and decisions

(c) accept and value their duty to manage public resources effectively, efficiently and economically

(d) value and seek excellence in service delivery

(e) value and seek enhanced integration of services to better serve clients.

3. Commitment to the system of government

The public sector has a duty to uphold the system of government and the laws of the State, Commonwealth and local government. Public service agencies, public sector entities and public officials:

(a) accept and value their duty to uphold the system of government and the laws of the State, the Commonwealth and local government

(b) are committed to implementing public sector priorities, policies and decisions professionally and impartially

(c) accept and value their duty to operate within the framework of ministerial responsibility to government, the parliament and the community.

This does not limit the responsibility of a public service agency, entity or official to act independently of government if the independence of the agency, entity or official is required by legislation or government policy, or is a customary feature of the work of the agency, entity or official.

4. Accountability and transparency

Public trust in public office requires high standards of administration. Public service agencies, entities and officials:

(a) are committed to exercising proper diligence, care and attention

(b) are committed to using public resources in an effective and accountable way

(c) are committed to managing information as openly as practicable within the legal framework

(d) value and seek to achieve high standards of public administration

(e) value and seek to innovate and continuously improve performance

(f) value and seek to operate within a framework of mutual obligation and shared responsibility between public service agencies, entities and officials.

Considering human rights in good-decisions

The introduction of the *Human Rights Act 2019* (HRA) means that human rights considerations now form part of decision-making and complaints management approaches by public agencies.

In relation to decision-making, this means that all decision-makers are required to identify and consider all relevant human rights when applying discretion.

This should be appropriately reflected in public agencies policies and procedures relevant to the decision-making.

The HRA requires all public agencies in Queensland to act compatibly with human rights and to give proper consideration to human rights before making a decision.

Section 8 of the HRA defines 'compatible with human rights' as an act or decision that:

- does not limit a human right, or
- limits a human right only to the extent that is reasonable and demonstrably justifiable, in accordance with section 13 of the HRA.

This means that every act, policy or decision by a public agency must be assessed for compatibility with these rights.

To carry out these responsibilities, when acting or making decisions public agencies should follow these steps.

Step 1: Identify relevant rights

Review the 23 rights protected under the HRA and see what rights are relevant to your situation.

Step 2: Consider the impact

Will your decision limit or restrict any of the relevant rights you've identified?

No: if rights are not being limited, you are acting compatibly with human rights.

Yes: if human rights are being limited, or if you are unsure, you should move to step 3.

Step 3: Determine whether the limit is reasonable and justified

Ask yourself the following questions about the decision or action you are proposing:

- Is it lawful?
- What law or regulation allows you to limit a person's rights? If you can't identify a law or regulation then you may not be able to limit rights.
- Is there a purpose?
- What is the aim of the limitation? does it achieve a legitimate purpose?
- Is it reasonable?
- Will what you are doing effectively achieve your purpose?
- Is it necessary?
- Is this the least restrictive way to achieve your purpose?
- Is it fair and balanced?
- Do the benefits outweigh the harm caused by the limitation?

If you answer no to any of these questions, your proposed action or decision is unlikely to be compatible with human rights.

If it is possible to modify your proposed action or decision, do so then reassess for compatibility.

If it is not possible to modify the proposed action or decision, you will need to document the nature and extent of the incompatibility and the process used to consider human rights.

This is a general guide only. You may wish to seek legal advice if you need more detailed guidance on a specific issue, or consult the Queensland Human Rights Commission website for more information: **www.qhrc.qld.gov.au**

Source – Queensland Human Rights Commission, A3_Poster_Actingcompatiblywithhumanrights

Stages of decision-making

Good decision-making involves four stages:

Stage 1	Stage 2	Stage 3	Stage 4
PREPARE FOR THE DECISION	DEVELOP THE DECISION	MAKE THE DECISION	COMMUNICATE THE DECISION

It is important that throughout these four stages, **comprehensive and timely recordkeeping** is maintained.

Casebooks (available on our website) contain examples from our investigations. They identify at which stage/s of the decision-making process problems occurred.

www.ombudsman.qld.gov.au/improve-public-administration/investigative-reports-and-casebooks/casebooks

Recordkeeping

Why?

1. Public agencies have a legal obligation to undertake comprehensive recordkeeping

The *Public Records Act 2002* (PRA) governs recordkeeping for all Queensland public authorities.

The PRA defines both a public authority and a public record. It also includes specific recordkeeping requirements that all agencies must comply with, specifically:

- what records need to be kept, by who, and why
- who is responsible for records
- how records should be created and managed
- when records can be disposed of
- who authorises disposal of records.

Under section 7 of the PRA, public authorities are required to make and keep full and accurate records of their activities.

Public records

A public record includes any form of recorded information, created or received by, or created on behalf of a Queensland public authority in the transaction of government business.

Responsibility for records

Public authorities are responsible for making, managing, keeping and preserving complete and reliable public records.

You must have regard to any relevant policy, standards and guidelines made by the State Archivist about the making and keeping of public records when managing your obligations under the PRA.

This includes the Records Governance Policy.

Records need to:

- be stored appropriately
- have preservation measures applied so that they stay accessible and usable
- remain accessible and useable
- be kept safe and secure until you're legally able to destroy or transfer them to Queensland State Archives (QSA).

Public records must be kept for the appropriate retention periods listed in the current authorised retention and disposal schedule.

Records Governance Policy

The Records Governance Policy is a fit-for-purpose records and information governance policy.

It has replaced Information Standard 31: Retention and disposal of public records, and Information Standard 40: Recordkeeping. These information standards have been repealed.

Disposal of records

Section 13 of the PRA states that public records cannot be disposed of without authorisation.

Disposal includes destroying, transferring, selling, donating, abandoning, damaging or amending a record.

Authorisation for the destruction or transfer of records is given through retention and disposal schedules approved by the State Archivist.

Records cannot be destroyed if they are required as evidence for legal proceedings, under a disposal freeze or subject to a right-to-information request.

Any disposal of public records must be endorsed by your CEO or authorised delegate.

2. Improved decision-making

Current and future decision-making of an agency is improved when decision-makers base their decisions on comprehensive relevant information.

3. Explain your decisions

Creating and maintaining a comprehensive document trail of your decision-making process will help you to explain your decision.

4. Protect you and your agency

Good recordkeeping will protect you and your agency from criticism by providing the best opportunity to explain why a certain decision was made.

5. Other benefits

- helps decision-makers prepare a comprehensive statement of reasons if required or requested
- enables an agency to establish how particular decisions were made, in the event that the agency needs to revisit a matter in the future
- helps review bodies to understand why and how a decision was made
- enhances accountability in government
- enhances transparency in government by enabling agencies to respond meaningfully and efficiently to applications under the *Right to Information Act 2009* (RTIA)
- helps an agency demonstrate relevant human rights were properly identified, considered and any limitation on a human right is reasonably justified.

Right to information

Anyone can make an application under the RTIA. The motive of the applicant is irrelevant. There is no time limit on lodging an RTI application, although there are time limits applicable to decision stages.

The RTIA is designed to 'push' information out to the public. The main consideration is the public interest test, which requires information to be released unless it is in the public interest to withhold it.

Information privacy

Government agencies must comply with the Information Privacy Principles (IPPs) in Schedule 3 of the *Information Privacy Act 2009* (IPA).

Information Privacy Principles – Schedule 3

- Collection of personal information (IPPs 1–3)
- Storage and security of personal information (IPPs 4–5)
- Access to and correction of personal information (IPPs 6–7)
- Accuracy of personal information (IPP 8)
- Using and disclosing personal information (IPPs 9–11).

Access to, and amendment of, personal information will be regulated under the IPA rather than the RTIA.

If there is a breach of privacy, people should make a complaint to the relevant agency. Privacy complaints can be reviewed by the Information Commissioner. The Queensland Civil and Administrative Tribunal (QCAT) will hear and determine complaints.

Confidentiality

Legislation may impose a duty of confidentiality not to disclose information/records except in particular circumstances. For example:

- the performance of your functions with the consent of the person to whom the information relates
- in compliance with lawful process requiring production of documents or giving of evidence
- as permitted or required under legislation.

Human Rights

The HRA provides that it is unlawful for a public agency to act or make a decision in a way that is not compatible with human rights, or to fail to give proper consideration to a human right.

It also provides that a human right may only be subject under law to reasonable limits that can be 'demonstrably' justified.

An agency will require sufficient records to demonstrate all relevant human rights were identified and any limitations are reasonable and justified in order to support the lawfulness of discretionary decisions.

Section 25 of the HRA also provides that a person has the right not to have the person's privacy unlawfully or arbitrarily interfered with, or reputation unlawfully attacked. The scope of this right is very broad and includes protections in relation to personal information and data collection.

If a person believes a human right has been breached they may also make a human rights complaint to the agency responsible for the breach.

Human rights complaints can be reviewed by the Human Rights Commissioner.

What?

All information relevant to the decision-making process should be the subject of written records.

Every form of contact should be recorded and maintained – verbal or written conversations, attendances, inspections and meetings. These include emails, telephone memorandums, faxes, letters, notes of inspections and minutes of meetings.

Other information that should be recorded in the decision-making process includes:

- preparation for the decision
- procedures followed
- evidence gathered
- natural justice observed
- evaluation of evidence and factual findings
- law applied
- exercise of discretion – matters considered (including human rights) and weighting decision and reasons.

There is little point making good records if they are inaccessible and unable to be used for future decision-making. Records should be readily available from the agency's recordkeeping system. If records are not able to be entered or scanned into the recordkeeping system, a record should be made in the system as to the existence, nature and location of the records.

When?

Records should be made simultaneously or as soon as practicable following the event or contact. If this is not done, the reliability (credibility) of the record may be called into question.

How?

Tips for good recordkeeping:

- keep it simple, brief and to the point
- use clear, objective and respectful language
- record evidence, facts and opinions together
- if recording opinions, include explanatory reasoning
- include your name, position and date the record was made.

Do not:

- include personal opinions or value judgements – they add nothing to the record
- record irrelevant personal attributes
- use discriminatory or derogatory language
- record your impression of what the person was thinking or feeling
- record opinions or views prematurely before a final view is formed
- record decisions that you are not delegated to make.

Good records = Good defence
Poor records = Poor defence
No records = No defence!

When recordkeeping really matters[1]

1. The decision is discretionary – the decision requires more than the verification of facts and involves the exercise of significant judgement.
2. The subject matter is unusual – the matter is not a common one and there is limited policy guidance for decision-makers.
3. The subject matter is complex, requiring significant finding of facts, analysis and judgement.
4. A number of officers are working on the decision concurrently.
5. There are significant verbal contacts between the applicant and the agency.
6. The applicant will be given the opportunity of a hearing or input before a decision is made and needs to be provided with all relevant information.
7. The applicant is likely to be disappointed with the final decision and may seek a review of the decision.
8. There are third parties with an interest in the decision.
9. The decision is of significant public interest.

1 *Based on a recordkeeping checklist originally developed in Commonwealth of Australia, Department of Defence Decision-Makers Handbook – Making personnel-related decisions for APS and ADF, 2006, at p.25.*

A decision-making checklist

KEEP GOOD RECORDS

PREPARE FOR THE DECISION

- [ ] What is the decision-making power?
- [ ] Do you have the authority?
- [ ] Should you be the decision-maker?
- [ ] What is the timeframe to make the decision?
- [ ] What are the key issues?
- [ ] Identify the applicable procedures

KEEP GOOD RECORDS

DEVELOP THE DECISION

- [ ] Follow procedures
- [ ] Gather all necessary information
- [ ] Observe natural justice

KEEP GOOD RECORDS

MAKE THE DECISION

- [ ] Find the facts
- [ ] Apply the law
- [ ] Reasonably exercise discretion

KEEP GOOD RECORDS

COMMUNICATE THE DECISION

- [ ] Give meaningful and accurate reasons

STAGE 1:

Prepare for the decision

Decision-makers need to prepare properly for a decision. You should refer to relevant legislation, policies, procedures, past practice, agency records and employees in your decision. This stage is critical as it is the foundation of the decision-making process. If this stage is not handled well, it is unlikely the ultimate decision will be sound.

What is the decision-making power?

Legal authority necessary

Clear legal authority must exist for an administrative decision that adversely affects a person. Most decisions are made directly or indirectly in accordance with power granted by legislation.

Identify legislative basis

Decision-makers need to know the source and limit of their power, including whether the power is non-discretionary or discretionary. As a decision-maker, you need to correctly identify the legislative provision/s that underpin/s the decision you will be making.

Identify any other legislation that could compliment or impact on the primary decision-making power, such as the *Acts Interpretation Act 1954* (AIA), or the HRA. The existence of discretionary powers will likely require the decision-maker to consider the human rights of individuals who may be affected.

Do you have the authority?

Powers of delegation

Legislation usually sets out who is authorised to make a decision.

The general legal principle is that the authorised person or body must exercise powers and functions personally.

An exception to this general principle is the express power of delegation. This is why legislation usually provides that the authorised person or body may delegate their authority to another person/officer/body.

For example, section 282 of the *Public Sector Act 2022* (PSA) provides that:

(1) The chief executive of a public service entity may delegate the chief executive's functions under this Act or another Act to an appropriately qualified person.

(2) The chief executive of a public sector entity other than a public service entity may delegate the chief executive's functions under this Act to an appropriately qualified person.

(3) A delegation of a function may permit the subdelegation of the function.

(4) If a function is performed under another Act, the power to delegate or subdelegate the function is subject to the other Act.

Another example is section 257 of the *Local Government Act 2009* (LGA), which provides that a council may, by resolution, delegate its statutory powers to the mayor or standing committee or chairperson of a standing committee or Chief Executive Officer (CEO). Each resolution must specify the particular powers being delegated.

Under section 259 of the LGA, the CEO may delegate their powers to an appropriately qualified employee or contractor of the local government unless the council has directed the CEO not to further delegate the power.

The principles of delegation under the AIA remain unchanged.

Form of delegation

Under section 27A (3) of the AIA, delegations must be in writing and signed by the person delegating the power.

If you are a delegated officer, ensure you have a copy of the document signed by the person with the statutory power giving you the power. Keep it in your possession.

Also, ensure that your delegation covers the specific decision-making power.

Delegated officers exercise power on their own behalf and should sign decisions in their own name as delegate and not sign 'for' or 'on behalf of' the authorised person.

Delegations should be reviewed regularly to ensure consistency with legislation, roles and position descriptions.

Rules of delegation

Section 27A of the AIA sets out the rules relating to delegations. The rules include, but are not limited to:

- delegations may be made to a person or body by name or to a specified officer, or the holder of a specified office, by reference to the title of the office concerned
- delegations may be general or limited, made from time to time, and may be revoked by the delegator
- laws apply to the delegate in the same way as they apply to the delegator
- delegated powers must be exercised in accordance with any conditions to which the delegation is subject
- delegates may, in the exercise of an administrative power, do anything that is incidental to the delegated power
- the delegator can still exercise a power that has been delegated
- the delegator has a duty to ensure that delegated powers are properly exercised
- powers cannot be subdelegated unless the relevant Act expressly authorises the subdelegation of the power.

Should you be the decision-maker?

It is important to consider whether you may have a conflict of interest regarding the decision before you. If you do, this may mean that you should not be involved in the decision (even though you have the necessary delegated power).

What is a conflict of interest?

A conflict of interest is where a decision-maker's private interests interfere or appear to interfere with their duty to put the public interest first. It may arise from financial interests (monetary gain or avoiding loss) or personal interests (family or personal relationships, involvement in sporting, social or cultural activities). A conflict of interest can be actual, perceived or potential.

Actual conflicts of interest involve a direct conflict between a public officer's current duty and their existing private interests.

Perceived (apparent) conflicts of interest are where it could be perceived by others that a public officer's private interest may improperly influence the performance of their public duty.

Potential conflicts of interest are where a public officer has private interests that could interfere with their public duty in the future.

Recognise, report and record

As a decision-maker, you should ensure that you recognise, report and record any actual, perceived or potential conflict of interest so it can be managed appropriately. Your agency's code of conduct should provide guidance.

What is the timeframe to make the decision?

Legislation

If your legislation provides that a decision must be made within a particular time, then you must comply with that time limit.

If a decision is not made within the statutory time period, you may be able to continue with the process and make the decision if the legislation is silent on the effect/consequence of non-compliance. However, if the legislation states the effect/consequence of non-compliance with the timeframe (e.g. **the decision is a deemed refusal or the original decision on review is confirmed**), then you will be prevented from continuing with the decision-making process.

If your legislation does not set a specific timeframe, you are still required to take the action/make the decision within a reasonable time.

Section 38(4) of the AIA provides that if no time is provided or allowed for doing anything, it is to be done as soon as possible and as often as the relevant occasion happens.

Policy/procedure

Your agency's written policy or procedure may set a specific timeframe within which to make your decision. Where practicable, you should comply.

Ultimately, the decision should be made within a reasonable time. If this is not possible, consider advising those affected of the delay, otherwise it could give the impression that matters are being ignored or covered up.

What are the key issues?

Identifying the key issues is critical to the success of any decision to be made. Taking care to correctly identify key issues at the outset avoids difficulties later in the decision-making process.

The first step to identify key issues is to carefully read and correctly understand the matter (e.g. an application or complaint).

You should refer to and consider relevant legislation, policy, procedures and agency records and consult with relevant agency staff, if necessary.

The key issues in any decision include the relevant matters to be considered. As a decision-maker, you must consider only relevant matters in making a decision. Irrelevant matters should be ignored.

So how do you determine the matters that must be considered? Refer to the legislation.

What must be considered is determined by the legislation under which you are making your decision. Your agency's policy may give guidance.

Consider the scope of the 23 human rights (HRA) that may be relevant to the decision. This will assist decision-makers in identifying information that might need to be collected (such as details about an affected individual's circumstances) to ensure human rights are being limited in a way that is reasonably justified.

All relevant matters specified – exhaustive

The legislation may state all the matters to be considered. You must only consider those matters.

Some relevant matters specified – inclusive

The legislation may state some, but not all, of the matters to be considered. You must consider the matters stated. You must also identify and consider any other relevant matters (not specified) by implication from the subject matter, scope and purpose of the legislation.

No relevant matters specified – silent

The legislation may not state any matters to be considered. In this situation, the relevant matters are determined by implication from the subject matter, scope and purpose of the legislation.

By correctly identifying and recording the key issues/relevant matters at this early stage, information gathering should be properly directed so that only relevant factual findings are made and considered later in the decision-making process.

Identify the applicable procedures

What are procedures?

Procedures are the steps involved in achieving the specific legislative or policy purpose.

Statutory procedures

Statutory procedures are set out in legislation.

Common law procedures

Common law procedures are developed by the courts as part of common (general) law to ensure that there are fair procedures in administrative decision-making. These procedures are known as natural justice or procedural fairness. The law attaches great importance to this concept.

Administrative procedures

Administrative procedures are developed by agencies when legislation may not set out the particular procedures to be followed, for example, in conducting investigations, making decisions or exercising other powers.

STAGE 2:
Develop the decision

In developing the decision, the decision-maker should follow lawful and fair procedures, gather information relevant to the decision and provide natural justice to people affected by an adverse decision.

Follow procedures

Statutory procedures

Legislation may require that particular procedures be followed before a decision can be made. You must comply with mandatory procedures.

Strict compliance is usually required unless the legislation states or indicates otherwise.

If the legislation gives you a choice of procedures, consider the legislation's underlying purpose and principles in deciding which procedures to follow.

Administrative procedures

If no procedures are set out in the legislation, you have discretion as to the procedures to follow.

However, the procedures followed must be reasonable in the particular circumstances.
You should consider:

- the underlying purpose of the legislation/power and what you should do to ensure that purpose is achieved
- any written agency procedures.

Written agency procedures can provide valuable guidance on the decision-making process in order to ensure consistency and fairness.

It is important that administrative procedures are not based solely on cost or convenience.

Gather all necessary information

Responsibility for providing information

An applicant is not required to provide information unless required by legislation. However, clearly it is in an applicant's interests to do so to improve the prospect of a favourable decision.

Power to gather information

Legislation may give express powers to gather information for different purposes such as decision-making and investigation. These powers may require:

- the Queensland Police Service to provide criminal history information
- applicants to provide further information and/or statutory declarations
- other relevant organisations or people to provide information
- people to answer questions or produce a stated document or thing
- a decision-maker to inspect, search, measure, test, photograph, film a place or thing or seize a thing
- a decision-maker to take an extract from or copy of a document.

Even if the legislation does not give an express power to gather information, you may request relevant information from the affected person/s or other relevant person/s to help make the decision.

When gathering information, consider whether under section 25 of the HRA, any practices may limit an individual's human right to privacy and reputation, such as:

- conducting surveillance
- collection and storage of personal information
- sharing of personal information across or within agencies
- exercising powers of entry/search/seizure.

Extent of information gathering

Information gathering should focus on relevant factual matters to be proved and considered.

If the legislation requires that a decision can be made only if certain facts/preconditions exist, then you must ensure that you have gathered and recorded specific evidence that establishes these facts/preconditions.

You should ensure that you have gathered all reasonably/practicably available relevant evidence as this should be the basis for your findings of fact.

Evidence is information that can be used to demonstrate the existence or non-existence of a fact. Types of evidence include verbal, documentary, visual, physical and expert.

Verbal evidence is the recollections of persons gathered by telephone, meeting and/or interview.

It is one of the most difficult forms of evidence to gather as communication is open to differing understandings and interpretations. Witness recollections are not always perfect.

Documentary evidence is documents/records.

Documents are generally an important source of information. Documents are not just paper. They include any disc, tape or other article from which sounds, images, writings or messages are capable of being produced or reproduced. Refer to sections 11, 12 and 13 of the RTIA and section 36 (Schedule 1) of the AIA for definitions of 'document'.

Visual evidence is gathered by site inspection/s. Site inspections assist decision-makers by providing visual information and context to better understand the issues.

Physical evidence is any evidence gathered in the form of a physical object, thing or sample, intended to prove a fact in issue, based on its demonstrable physical characteristics.

Expert evidence is opinion evidence given by an expert in a field of specialised knowledge. The expert's specialist knowledge must be based on the person's training, study or experience and the opinion expressed must be wholly or substantially based on their specialised knowledge.

All relevant information gathered should be fully and accurately recorded.

Observe natural justice

What is natural justice?

Natural justice, or procedural fairness, is a legal principle that is part of the common (general) law of Australia.

Natural justice is an important legal concept in decision-making as it is fundamental to fairness in the process of making decisions which may affect the rights and interests of people.

The High Court of Australia has stated:

> The law attaches great importance to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he/she may have a fair opportunity to deal with it.

In the context of decision-making, natural justice means providing a person who might be adversely affected by an administrative decision with a 'fair hearing' before the decision is made. Essentially, this means giving the person an opportunity to put their side of the story and to comment on relevant issues and information before you make a decision.

What is a fair hearing?

The requirements of a fair hearing are flexible. They may vary from case to case depending on the legislation, subject matter, the particular circumstances, seriousness, potential consequences and other relevant matters. However, there are three minimum requirements of a fair hearing:

1. Disclosure

The notice to the affected person must identify the critical issues and contain sufficient information to allow that person to respond in a meaningful way:

- You need to identify what you see are the 'critical issues' on which your decision will turn.
- You must disclose any adverse information/material that is 'credible, relevant and significant' to the decision.
- You may not have to provide the actual documents or details of other people involved. However, you have to at least disclose the substance of the adverse information.
- The notice should also include the nature of the decision to be made, possible consequences, when, where and how a submission can be made.
- There is no problem with you indicating that you have reached a preliminary (provisional) view on a matter, provided you advise the affected person what that view is and provided also that you make it clear that your mind is still open at this stage to a contrary or different view.

2. Reasonable opportunity to be heard

A reasonable opportunity to be heard means that the affected person gets a fair opportunity to speak or respond and that the decision-maker gives genuine consideration to their submission:

- The affected person must be given a reasonable opportunity to present their case, arguments and submissions before a decision is made.
- A hearing can be formal or informal and may involve verbal submissions, written submissions, legal or other representation, assistance from a support person or interpreter.
- The affected person must be given reasonable time to respond. Reasonable time depends on the extent and complexity of the issues, urgency of the decision and other relevant matters.
- The decision-maker must properly consider the affected person's submissions.

3. Impartiality

A decision-maker must be and be seen to be impartial (i.e. free from bias). Bias is a lack of impartiality for any reason. It may arise from the decision-maker having some financial or personal interest in the outcome of the decision (conflict of interest) or giving the impression that they have prejudged the issue/s to be decided:

- The governing consideration is that 'justice is done and is seen to be done' with the decision-maker reasonably open to persuasion.
- Actual bias is where the decision-maker has a predisposition to decide the matter other than with an impartial and open mind.
- Apprehended bias or the appearance of bias is where a fair minded person properly informed might apprehend that the decision-maker might not bring an impartial mind to the matter.

There is nothing wrong with indicating a provisional view provided the decision-maker makes it clear their mind remains open on the issue.

A conflict of interest by officers involved in the decision-making process may or may not give rise to a reasonable apprehension of bias in the decision.

When is natural justice required?

1. When legislation expressly provides that a decision-maker must observe natural justice

For example, section 33 (1) of the *Fire and Emergency Services Act 1990* provides that the dismissal or suspension must be effected in accordance with the Act and the principles of natural justice.

In this situation, it is really a matter of complying with the common law requirements of natural justice.

Legislation frequently specifies particular aspects of natural justice such as notice requirements, and the way in which affected persons are to be heard, for example, by making written submissions. Examples of such legislation are:

- 'Show cause notices' under section 175 of the *Building Act 1975*
- 'Notice of intention to resume land' under section 7 of the *Acquisition of Land Act 1967*.

However, legislation rarely states exhaustively what you have to do to provide natural justice. For example, legislation does not usually state that the decision-maker must be free from bias or act impartially. That requirement originates from the common law rules of natural justice.

You need to comply with any natural justice provisions in your legislation and the common law rules of natural justice. As a general rule, you should always proceed on the basis that natural justice is required in your decision-making.

2. When the common law supplements any statutory procedures

At common law, natural justice is required when a proposed decision may affect a person's rights, interests or legitimate (reasonable) expectations.

Rights and interests can be:

- existing legal rights and proprietary interests
- licence to conduct an activity
- livelihood and existing financial interests or benefits
- interest in being granted a new licence or benefit
- reputation
- status
- personal liberty.

Legitimate expectations can arise from representations and regular policies/practices.

For example, when a person:

- is already entitled to natural justice, and has been promised that the decision-making process will happen in a particular way
- has been granted a licence/benefit over a number of years and they consider nothing has changed to indicate the licence/benefit would be discontinued.

STAGE 3:
Make the decision

In making the decision, the decision-maker should find the material facts, correctly apply the relevant law to the facts of the case and reasonably exercise their discretion.

Find the facts

Material facts

The power to make a decision usually depends on the existence or non-existence of certain material facts. A decision-maker must establish all material facts necessary for the decision:

- All findings of fact must be supported by relevant evidence. Facts must not be based on suspicion, assumptions, generalisations or speculation.
- If legislation requires that particular facts must exist before you can make a decision, then make sure that you have established those facts and you have sound relevant evidence to support those findings.
- Facts may be either 'known facts' (facts already established or accepted by the parties or the decision-maker that are undisputed/agreed) or 'facts in issue' (disputed facts which will be necessary to make findings on the basis of evidence).

Evaluating evidence

As a decision-maker, you should evaluate the evidence considering relevance, reliability and sufficiency. Evidence is not necessarily proof. It can be tested and evaluated and may be accepted or rejected.

1. Relevance

Relevant evidence is information that is logically or reasonably related to the issue in question.

All relevant evidence must be considered, not just the evidence which supports the finding you may want to make.

Keep an open mind. Do not discount relevant evidence without good reason.

2. Reliability

The reliability of evidence concerns the credibility or weighting to be given to the evidence. Not all evidence is equally weighted.

The rules of evidence which apply in court concerning evidence which is inherently unreliable, do not apply to decision-makers (unless the legislation requires otherwise), but are a useful guide.

Verbal evidence may conflict. Conflicting accounts do not necessarily mean someone is lying. It is possible for a witness to be mistaken or to perceive or remember events differently.

Documents/records are generally an important and reliable source of evidence. However, the reliability of a record can be affected, for example, where there was a significant delay in the making of the record.

Expert evidence can be evaluated by considering:

- the expert's research, whether identified facts can be proven and reasonableness of any conclusions
- the expert's field of specialised knowledge
- the expert's training, study and qualifications
- whether the expert appears to be impartial.

3. Sufficiency

The question of whether evidence is sufficient to prove a fact must be assessed in accordance with a legal standard.

Unless legislation requires that a particular matter must be proved to the more onerous criminal standard (beyond reasonable doubt), it is the civil standard (on the balance of probabilities) that applies to administrative decisions.

You can use your experience and expertise to help you assess the evidence, particularly conflicting evidence and what is more likely than not to be the case. The strength of evidence necessary to establish a fact on the balance of probabilities may vary according to the seriousness of the issues involved.

The High Court has stated that:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved.

You should make further inquiries if you do not have enough evidence or your evidence is not up-to-date about the key facts you need to make your decision.

Make, explain and record findings

Unless legislation provides otherwise, there is no onus of proof on an applicant, claimant or complainant.

As a decision-maker, you have the responsibility of ensuring you are reasonably satisfied on each relevant factual matter.

Ensure you record all findings of fact and the explanation/reasoning for them. In particular, you should clearly identify and explain the findings of fact that 'turn the decision', by recording the evidence you considered, the evidence you accepted or preferred and your reasoning.

Apply the law

Before a decision-maker can apply the law to the particular facts of a case, it is important the decision-maker has correctly interpreted and understood the legislation.

So what does the law mean and how should it be applied?

The text of the legislation

The starting point is to identify the particular legislative provision/s to be applied. The provision/s express the legislature's intention or purpose.

Interpretation in context

Interpretation is a process where meaning is given to words in legislation. The words used may be capable of more than one meaning.

A provision should be read in the context of the entire section, surrounding parts and other relevant provisions. Legislation should be read as a whole.

The AIA sets out the rules of interpretation that apply to all other legislation. Those rules apply unless a contrary intention clearly appears from the other legislation.

Legislative purpose

As a decision-maker, you need to understand the purpose or objective of the legislation, the way in which the legislation seeks to achieve the purpose and how the provision fits into the overall scheme of the legislation. You should give effect to the purpose of the legislation.

The purpose or objective is usually stated in the legislation. If not, they should be identified by implication from the topic, provisions and related materials. Understanding the purpose helps you to read and interpret the legislation in the correct way.

Section 14A of the AIA provides that in interpreting an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

Also, section 48 of the HRA provides that in interpreting legislation, provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

If a provision is unable to be interpreted in a compatible way, then it should be interpreted in the way that is most compatible (unless an override declaration applies).

International law, and judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered.

Court or tribunal decisions

The functions of courts and tribunals include interpreting the law and applying the law to the facts.

While considering a matter, courts or tribunals may decide the meaning of a particular section of legislation. Such a decision then becomes part of the law and must be followed by decision-makers when deciding matters with the same or similar facts.

Courts or tribunals decide the application or operation of legislation to particular factual situations.

However, if the facts are different, then the decision-maker is not bound to follow the court's or tribunal's decision. In these circumstances, it may be advisable to obtain specific legal advice.

Legal advice

If you are unclear about the correct meaning and/or application of legislation, consult your manager and consider obtaining legal advice.

Be aware that legal advice is only an opinion. It's not law and therefore is not binding in the way that legislation or a court/tribunal decision is binding.

Clearly, available relevant legal advice should be considered in a decision-making process.

Legal advice should not be blindly followed and does not absolve a decision-maker of the ultimate responsibility to make the correct decision.

Legal advice may be reasonably relied on if:

- the instructions given to the legal adviser are clear, accurate and complete (all relevant information is included)
- the advice contains no obvious errors
- the advice shows that the adviser has clearly understood and answered the questions/issues raised and appears to be reasonable.

If specific legal advice has been obtained in relation to a particular case, care should be taken in relying on the advice for another case where the facts are different.

If general legal advice has been obtained, care should be taken to ensure that the advice is relevant to the issue or case under consideration. If a decision-maker decides not to follow legal advice, sound reason/s should be apparent and documented.

Policy

You should consider any relevant agency policies on how a particular power should be exercised. However, the particular circumstances of a case also need to be considered, as policies must not be applied inflexibly.

Reasonably exercise discretion

What is discretion?

Generally, discretion is deciding as you think fit after proper consideration.

The nature and scope of a decision-maker's discretion depends on the particular provisions and legislation.

Section 32CA of the AIA provides that:

> In an act, the word 'may' or a similar word or expression used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

If the legislation states that a power 'may' be exercised, after proper consideration of all relevant issues and the particular circumstances of the case, it is up to the decision-maker whether or not to exercise discretion to the decision to be made. However, the decision to exercise or not exercise the discretion must be lawful and reasonable in the circumstances.

Exercising discretion

1. Exercising discretion – policy

What is policy?

Policy is created within public agencies to provide guidance on interpreting legislation and making consistent decisions. Policy is not law. It is a set of written guidelines to assist decision-makers responsible for exercising specific statutory powers in order to make consistent, legally correct and fair decisions.

Policies should include:

- the objectives that the legislation and particular statutory power aim to achieve
- the requirements for a valid exercise of the decision-making power (expressly or implied from the legislation and those imposed by general administrative law principles)
- procedures that should be followed to obtain and assess all information relevant to the decision-making process, if no specific procedures are set out in the legislation
- the circumstances in which natural justice may require a person to be given a hearing before a decision is made adverse to the person's interests
- the considerations relevant to the exercise of the decision-making power and examples of irrelevant considerations
- the facts needed to be established to support a favourable decision
- the type of evidence that should be sought to establish those facts.

Lawfulness of policy

Policy must be consistent with the law and be reasonable. Policy cannot expand or limit a statutory power. Policy should not obstruct the facts of a case being considered.

The courts have clearly stated that there is a distinction between:

- 'unlawful policy' that removes or limits the range of discretion given by the legislation; and
- 'lawful policy' that leaves the range of discretion and provides guidance for the exercise of the discretionary power.

Interpretation of policy

It is important that you correctly understand why the policy was written and its purpose.

Policy should be interpreted so that its intent, purpose or objective is achieved. Literal interpretations may lead to unintended results or wrong/unreasonable outcomes.

Well-drafted policy should clarify the meaning and intended practical application of the relevant legislation.

Policies can and should be reviewed and changed if they are not clear or are not doing the job they were created for.

Application of policy

An important principle in decision-making is consistency. Consistency does not mean that all cases should be decided the same way. People can be treated differently if their cases are genuinely different and there is a rational reason for doing so.

Policy must not be inflexibly applied in decision-making. A policy is a relevant consideration in making a decision but not the only consideration. A decision-maker must have regard to, and evaluate the merits of, the particular case. In other words, policy should not prevent proper consideration of a matter that may require a different outcome to the policy.

The following examples/statements are indicative of inflexible policy application and the individual merits of the case being ignored:

- refusing to make an exception to the policy or practice
- relying on the policy in the reasons or decision documents without referring to the particular facts and circumstances
- striving for consistency for its own sake – the decision would be inconsistent with past practice or precedents in the agency
- the decision would create a precedent or open the floodgates.

It is important that records relevant to a decision should refer to any policy that was considered and how it was balanced against the particular facts and circumstances of the case.

Under section 20 of the RTIA, public agencies are required to make copies of their policy documents available for inspection and purchase by members of the public. The term 'policy document' is widely defined to cover documents about how an agency proposes to administer statutory powers or administer schemes that may affect the rights or interests of members of the community.

Importantly, section 20(3) of the RTIA, provides that the policy cannot be relied on to the disadvantage of any person if:

- the policy was not available
- the person was unaware of its existence
- the person could have lawfully avoided the prejudice had they been aware of the policy.

2. Exercising discretion – briefing notes and recommendations

Unless legislation provides otherwise, a decision-maker may consider briefing notes and recommendations prepared by other officer/s involved in the decision-making process.

Briefing notes/recommendations should:

- summarise legal advice, financial and technical reports
- analyse evidence and record factual findings
- attach reports for contentious issues
- cover all elements required in a statement of reasons
- include options and recommendations.

3. Exercising discretion – other officers

You may consult and consider the views of other relevant experienced/qualified officers.

4. Exercising discretion – relevant matters

You must only consider relevant matters. Irrelevant matters must be ignored.

Relevant matters may be either mandatory or discretionary considerations. The legislation should indicate whether the relevant matters must or may be considered.

All matters specified in the legislation

Legislation may say that certain matters must be taken into account in making a decision.

If it states that only certain matters must be considered, then you do not need to take into account any other matters. If it does not specify 'only', then you may be able to take into account other relevant matters.

Human rights

Where a decision is to be made under a discretionary law, you must also consider the existence of any relevant matters set out in the HRA. You must assess any human rights which may be relevant to the decision or action. Existence of relevant human rights will require you to assess:

- if any proposed decision or action is compatible with, or may limit a human right
- whether a less restrictive way is available to achieve the purpose of any limitation; and
- whether any limitation is reasonable and justified.

Section 13(2) of the HRA provides guidance on factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

These include considering and balancing the:

- nature of the right
- purpose of any limitation
- relationship between limitation and its purpose
- existence of less restrictive and reasonably available ways to achieve the purpose
- importance of the purpose of the limitation
- importance of preserving the human right.

All relevant matters not specified

Legislation may not specify what relevant matters are to be taken into account.

In this situation, the relevant matters should be determined from the subject matter, scope and purpose of the legislation.

Your agency's policies and previous decisions may provide guidance. There may also be relevant court decisions and legal advice available.

5. Exercising discretion – weighting of relevant matters

Legislation may indicate the weight or importance to be given to certain relevant matters.

For example, s 5A of the *Child Protection Act 1999*, provides that ‘the safety, wellbeing and best interests of the child are paramount’.

More often legislation states that certain matters should be considered, but does not indicate the weight or importance that should be placed on each matter. It is not necessarily the case that less weight is to be given to discretionary matters compared to mandatory matters.

In practice, relevant matters may compete. Be clear about which matters you put more weight on in reaching your decision and why.

6. Exercising discretion – particular circumstances

You must consider the particular circumstances and merits of a case.

This includes considering the impact of your decisions on affected individuals. If you believe a particular impact on a person is necessary, be clear about why a less drastic course of action is not available or appropriate.

7. Exercising discretion – powers

Only use powers for the purpose for which they were given. You cannot use a power for a different purpose, even when you believe that it is justified or necessary in the public interest.

8. Exercising discretion – make up your own mind

You must act independently in exercising your discretion, according to your own assessment of the particular case before you. Your decision must be made without any direction or attempted influence from another person.

Make and record decision and reasons

Ensure you record the matters you have taken into account, the weight you have given to each and why. If you considered policy, explain how it was relevant and balanced against the facts of the case.

If the affected person has raised irrelevant matters, ensure these matters are also recorded together with the reasons you considered them irrelevant.

You should be able to clearly identify the critical or turning factor in your decision. You can do this by considering what issue in the decision would need to change in order for you to make the reverse decision. It is important that this issue can be justified with sound evidence, with natural justice having been observed.

Finally, record your decision and reasons.

Record

your decision and reasons

STAGE 4:

Communicate the decision

It is important that people affected by government decisions understand the reasoning for making a decision. They must also be advised of any available right of internal or external review or appeal.

Giving reasons for decisions is essential to fairness, ensures transparency and promotes accountability in decision-making. If a correct decision is badly communicated, it is likely a complaint will be made. Effective communication of decisions and reasons can assist in preventing or reducing complaints.

Give meaningful and accurate reasons

The purpose of giving reasons for a decision is to enable:

- the decision-maker to explain/defend their decision
- the person requesting them to decide whether to seek review or appeal of the decision and on what grounds.

Clear reasons for decisions also:

- assist in avoiding misunderstandings
- promote goodwill and acceptance of adverse decisions
- reduce the likelihood of ill-informed complaints, appeals and reviews.

What is your decision and reasons?

To meaningfully and accurately communicate your decision, it is critical that:

- you have good records of the decision-making process
- you are clear on your decision, reasons and the consequences of the decision.

Unclear decisions and reasons may indicate an incorrect decision and/or a lack of confidence by the decision-maker in the decision made.

Reasons are the logical explanation for the decision. The steps of reasoning should link the facts to the decision to understand how it was made.

Reasons are defined in section 27B of the AIA and s 3 of the *Judicial Review Act 1991* (JRA).

Conclusions or outcomes are not reasons.

Requirement to give written reasons with decision

Legislation increasingly requires that reasons must be given in writing for particular decisions.

Section 27B of the AIA, provides that:

> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision, (whether the expression ‘reasons’, ‘grounds’ or another expression is used), the instrument giving the reasons must also:
>
> - set out the findings on material questions of fact; and
> - refer to the evidence or other material on which those findings were based.

Be aware that failure to provide written reasons as required may indicate that:

- the decision is defective
- any review or appeal rights do not end until compliant written reasons are provided to the affected person.

Request for statement of reasons

Even if your legislation does not require you to give written reasons with your decision, the affected person may be able to request a statement of reasons under section 32 of the JRA.

In the JRA, 'reasons' in relation to an administrative decision is defined as:

- findings on material questions of fact
- a reference to the evidence or other material on which the findings were based as well as the reasons for the decision.

Statement of reasons – suggested content

1. The decision

Set out the issues to be resolved or answered by the decision as well as the decision you have reached.

2. The decision-maker

Identify yourself and your position and the legislation that gives you the power to make the decision, including any delegation if appropriate.

3. The process

Set out the main steps taken in the decision and the steps taken to comply with statutory procedures.

Outline the broad categories of information or documents before you, including any agency policy.

4. Findings on material facts

A material fact is one which is central to the decision. State your findings on all material questions of fact.

The significance of the fact may be indicated by the legislation or it may be inferred from the subject matter, as well as the scope or the purpose of the legislation.

If a fact is relied on, it must be acknowledged. If a matter is considered, then your findings of fact in relation to it must be stated. If you do not state your findings on a material fact, it may be inferred that you did not consider the fact.

5. Inference of material facts

A fact can be established directly by evidence. Where you infer a material fact from other facts, you should acknowledge those other facts and your process of inference to demonstrate how your decision was reached.

6. Specify the relevant law

You should refer to any legislation and to case law principles on which your decision is based.

7. Refer to evidence for findings of fact

You must refer to the evidence or other material upon which the findings of fact are based.

You should explain whether the evidence was accepted or rejected and whether any finding was made as a result of it.

Where you are faced with conflicting evidence, you should refer to all the evidence and state why you preferred some and rejected other evidence.

Evidence may be identified by stating its source or nature, whichever is more intelligible and informative. It is not sufficient to merely list all the documents that were before you.

8. Real reasons for the decision

Your statement must go further than merely stating your conclusions. Conclusions or outcomes are not reasons. You must state the real reasons for the decision.

Every decision should be capable of a logical explanation. Your statement must contain all steps of reasoning, linking the facts to your decision, so that the person seeking the statement can understand how your decision was reached.

You should indicate any relevant policy or guidelines or agency practices you considered.

9. Review or appeal rights

The statement should include internal and/or external rights of review or appeal and the time allowed for exercising those rights.

Give reasons even if not required or requested

Even if a statement of reasons for a decision is not requested or required by law, giving clear written reasons to people affected is considered good administrative practice. Maladministration includes an action for which reasons should have been given, but were not.

In giving meaningful and accurate reasons for a decision to an affected person, your communication should be clear to an impartial, reasonably intelligent reader about:

- the types of issues considered
- the reason relevant material was accepted or rejected so as to fully explain the basis for the decision.

Your statement should clearly track the reasoning process adopted in arriving at the decision. You should take care to specifically and genuinely address the affected person's major arguments.

Communicate your decision and reasons

Inform people of rights of review or appeal

Decisions subject to statutory review or appeal process

If a decision is subject to a statutory review or appeal process, a person adversely affected by the decision should be notified of the following along with the decision and reasons:

- the right of review or appeal
- the time allowed to apply for the review or appeal
- how to apply for the review or appeal.

Decisions subject to an internal administrative complaint management process

All agencies should have a complaint management system.

Information about an agency's complaint management process should be available on the agency's website and in customer service centres and offices.

Section 264 of the PSA requires each department to have a complaint management system in place for customer complaints.

Section 268 of the LGA and sections 187 and 306 of the Local Government Regulation 2012 provide that local government must have a complaint management system in place.

Information about complaint management processes can be found at: **www.ombudsman.qld.gov.au.**

Public

This document is released to the public space. It is approved for public distribution and readership.

We acknowledge the Traditional Owners of the land throughout Queensland and their continuing connection to land, culture and community. We pay our respects to Elders past and present.

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