

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.

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