Administrative Review Council

Decision Making: REASONS

Best-practice guide 4

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Contacting the Council

For information about this guide, or more generally about the Council's work, contact:

The Executive Director
Administrative Review Council
Robert Garran Offices
National Circuit
Barton ACT 2600

Telephone: 02 6250 5800
Facsimile: 02 6250 5980
Email: arc.can@ag.gov.au
Internet: http://www.law.gov.au/arc

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Preface

Most administrative decisions that affect individuals and organisations are made by primary decision makers—front-line administrators in government agencies. Only a minority of these decisions are reviewed by internal review officers, ombudsmen, courts or tribunals. The quality of administrative justice experienced by the public depends largely on primary decision makers 'getting it right'.

Central to good decision making is decision makers' understanding of the legal and administrative framework in which decisions should be made. In turn, this depends on whether primary decision makers receive adequate training in relation to that framework. To help agencies develop suitable training programs, in 2004 the Administrative Review Council published *Legal Training for Primary Decision Makers: a curriculum guideline*.

Using the curriculum guideline as the foundation, the Council has now produced this series of best-practice guides. They are designed for use as a training resource and as a reference for primary decision makers in Commonwealth agencies. The legal framework in which state and territory and local government agencies operate is broadly similar, but the guides do draw attention to areas where there are important differences.

Guide 4—*Decision Making: reasons*—looks at the requirements of two important Commonwealth Acts that impose on many decision makers a duty to provide reasons for their decisions. The other guides in the series cover the following areas:

- Guide 1—*Decision Making: lawfulness*—provides an overview of the legal requirements for lawful decision making, including requirements that have developed through the grounds for judicial review.

- Guide 2—*Decision Making: natural justice*—discusses the implications of natural justice (or procedural fairness) for decision makers and its connection with public service values and standards of conduct relating to conflict of interest.

- Guide 3—*Decision Making: evidence, facts and findings*—deals with the role of primary decision makers when receiving evidence, determining questions of fact and accounting for their findings.

- Guide 5—*Decision Making: accountability*—outlines a range of administrative law accountability mechanisms that can be used to review primary decisions; this includes judicial review, merits review, and investigations by the

Ombudsman and other investigative bodies such as the Human Rights and Equal Opportunity Commission and the Privacy Commissioner.

The general principles discussed in the guides might be modified by the legislation that establishes particular agencies or gives agencies their decision-making powers. Agencies wishing to modify or customise the guides for the purpose of training their staff should apply to the Administrative Review Council for permission.

The information provided in the guides is of a general nature: it is not a substitute for legal advice.

Contents

Introduction

Providing a statement of the reasons, evidence and facts for a decision is a fundamental part of administrative review.

A statement of reasons affords a person affected by a decision the opportunity to have the decision explained. The person can then decide whether to exercise their rights of review and appeal, and, if they decide to do so, they are then able to act in an informed manner.

Describing the reasoning process can also help decision makers think more carefully about their task and be more careful in their decision making. Further, the preparation of statements of reasons can help agencies identify relevant principles and create standards to guide future decision making.

Bodies that review government decisions—courts, tribunals, ombudsmen and other oversight bodies—pay close attention to reasons for decisions when deciding whether a decision should be set aside, a new decision made, or other remedial action taken. A decision maker is likely to face criticism when the reasons for a decision are deficient or do not provide a full or accurate account of why the decision was made.

Providing reasons for a decision should not be treated as an obligation that is separate from other principles of good decision making. It is good administrative practice to make a note of every decision at the time the decision is made. This makes it easier to provide a statement of reasons if asked to do so. A documentary record of the decision-making process also helps others understand when, why and by whom a decision was made.

This guide is adapted from two earlier Administrative Review Council publications—*Practical Guidelines for Preparing Statements of Reasons* and *Commentary on the Practical Guidelines*. The commentary contains more detail about the legislation and case law relating to the obligation to provide reasons. Both publications are available on the Council's website <www.law.gov.au/arc>.

The obligation to provide reasons

There is no general common law obligation to provide the reasons for a decision. There are, however, many statutes that impose a duty to give reasons:

- Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that a statement of reasons must be given on request to a person who has a right to apply for merits review of a decision by the Administrative Appeals Tribunal.

- Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that a statement of reasons must be given on request to a person who has a right to apply for judicial review of a decision by the Federal Court or the Federal Magistrates Court.

- Comparable state and territory statutes that confer rights of appeal and review contain a similar requirement to provide a statement of reasons.

- The legislation that confers power to make a decision might require that reasons be provided for a decision either when notifying a person of a decision or if the person asks that reasons be provided.

There are two other circumstances in which an agency can also be expected to provide reasons or an explanation for a decision, even though it may have no legal obligation to do so:

- Section 15 of the *Ombudsman Act 1976* (Cth) provides that, if the Ombudsman considers reasons (or better reasons) should have been given by an agency in relation to action it has taken, the Ombudsman can make a report recommending that the omission be remedied by the agency.

- Government service charters commonly state a commitment by agencies to explain or provide reasons for decisions. It is important that agencies honour that commitment.

Those legal obligations and other expectations generally oblige agencies to provide reasons or an explanation for administrative action that directly affects the rights and interests of individuals and organisations. This aligns with other important principles of administrative law that require accountability and transparency in decision making.

Although the obligation to provide reasons or an explanation should be viewed as a general aspect of administrative law and public administration, this guide focuses on the legal duty imposed by the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act. The principles described here are nevertheless more widely relevant to the general obligation of government agencies – Commonwealth, state and territory – to provide reasons for decisions.

An agency cannot impose a charge for providing a statement of reasons.

Scope of the obligation to provide reasons under the AAT Act and ADJR Act

The obligation to provide reasons is imposed in similar terms by the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act, both of which also apply to many of the same decisions. There are, however, some differences in the coverage and terms of the Acts.

The AAT Act requires that a written statement of reasons be provided on request to a person whose interests are affected by a decision that is reviewable by the Administrative Appeals Tribunal. A decision is reviewable by the tribunal only if the Act authorising the decision provides for the tribunal's review. More than 400 Acts provide for the tribunal's review of some, but not necessarily all, decisions made under those Acts. Examples are Acts relating to taxation, social security, veterans' benefits, freedom of information and privacy. Decisions reviewable by the Security Appeals Division of the tribunal are exempted from the requirement to provide reasons.

Section 37(1) of the AAT Act requires that a statement of reasons be lodged with the tribunal within 28 days of a person making an application to the tribunal for review of a decision. In short, a statement must be prepared even if the person has not previously asked for one.

The ADJR Act requires that a written statement of reasons be provided on request to a person aggrieved by an administrative decision that is reviewable by the Federal Court or the Federal Magistrates Court under the Act. The Act applies to most, but not all, administrative decisions made under Commonwealth legislation. The right to seek review—and hence the right to request a statement of reasons—applies only to decisions that are final or operative, not merely to administrative steps taken towards reaching a decision.

Two schedules to the ADJR Act exclude some categories of decisions from the Act's coverage (Schedule 1) and from the requirement to provide a statement of reasons on request (Schedule 2). Examples of decisions that are excluded by Schedule 2 are decisions relating to the administration of criminal justice, to the settlement of industrial disputes, to the redress of grievances for members of the Defence Force, and to personnel management and appointment and promotion decisions in the Australian Public Service. Some decisions made under the *Migration Act 1958* (Cth) are also excluded. In many of these cases there are statutory requirements or procedures in existence to ensure that reasons are provided.

In numerous areas of government, decisions are now made either by or with the assistance of a computer program. A decision of this type is nevertheless subject to the obligation to provide a statement of reasons if the AAT Act or the ADJR Act applies to the decision.

People entitled to reasons

Under the ADJR Act a person 'aggrieved' by a decision or conduct can request a statement of reasons; under the AAT Act a person whose 'interests are affected' by a decision can request a statement of reasons. Both expressions are similar in coverage. In essence, the right to seek reasons belongs to any person directly and individually affected by a decision—for example, a person refused a benefit or visa, a company refused a licence, or an organisation refused a grant. The right to seek reasons can also extend more broadly. It can be claimed by any individual or organisation that has interests that are specially affected by a decision—that is, has interests greater than an ordinary member of the public. The interest affected can be either a material interest, such as property or finance, or a non-material interest, such as an Indigenous Australian's spiritual link to country.

The procedure for requesting and providing reasons

Both the AAT Act and the ADJR Act require that a request for reasons be made in writing. The request need not be formal, however, and a person may make it by letter, fax or email—but not by telephone. The request need not specify that it is being made under the AAT Act or the ADJR Act, but it must be more than a request for information about the decision.

Time limits apply. Both Acts require that a request for reasons be made within 28 days of the person receiving written notice of a decision. If they are not notified in writing the person must request reasons within a reasonable time of the decision.

The decision maker is required to provide the statement of reasons as soon as practicable but no later than 28 days after receiving the request.

Those time limits mean it is important that a decision maker knows or calculates the date on which a person was notified of a decision or received a statement of reasons. There are rules governing this in ss 28A, 29 and 36 of the *Acts Interpretation Act 1901* (Cth), which supplement the provisions of the AAT Act and the ADJR Act. The position can be summarised as follows.

A written notice of a decision can be handed to someone personally or by leaving it at or posting it to their place of residence or business, as last known to the agency.

A notice to a corporation can be given by leaving the notice at or posting it to the head office, the registered office or a principal office of the corporation.

If a notice is posted the Acts Interpretation Act and AAT Act consider it to have been received at the time in which a letter would be delivered in the ordinary course of post. This can depend on the local postal delivery times, and it is always open to a person to prove that there was a delay in postal delivery.

There is a different rule in the ADJR Act, which provides that a letter is deemed to have been received at the time it was posted. This can mean that the 28-day period for requesting a statement of reasons commences running before a person physically receives the notice of a decision.

Both under the AAT and the ADJR Acts, the 28-day period is calculated from the day following the presumed date of notifying a person of a decision. For example, for the purpose of the AAT Act, if a notice of a decision is sent on 1 March and delivered in the ordinary course of post on 3 March, the first day of the 28-day period is 4 March and the last day for delivering the request for a statement of reasons to the decision-maker is 31 March. Under the ADJR Act, if a notice of a decision is posted on 1 March, it is deemed to be received on that day. Consequently, the first day of the 28-day period is 2 March and the last day for delivering the request for a statement of reasons is 29 March.

If the last day of the calculation is a Saturday, Sunday or public or bank holiday the 28-day period ends on the next working day.

Subject to complying with those time limits, a request for reasons can be made at any time, either before or after proceedings have begun under the AAT Act or the ADJR Act.

Refusing to provide a statement of reasons

There are a number of grounds on which a decision maker can refuse to provide a statement of reasons:

- The request for reasons does not relate to a decision to which the ADJR Act or the AAT Act applies.

- The person requesting reasons is not a person aggrieved (the ADJR Act) or whose interests are affected (the AAT Act) by the decision.

- The request is not in writing.

- The request is out of time.

- Another statute provides that the right to reasons is not applicable—for example, s 14ZZB of the *Taxation Administration Act 1953* (Cth).

Under the AAT Act the person requesting reasons must be notified of the refusal on one or more of these grounds within 28 days of the request for reasons being received. Under the ADJR Act the time for notification depends on whether:

- the request is made out of time, in which case it is 14 days, or

- the decision maker is of the opinion that the person who made the request is not entitled to make the request, in which case it is 28 days.

A decision maker can choose to provide a statement of reasons even if there is no legal obligation to do so. Generally, however, it is good administrative practice not to refuse reasons on the ground that the request was received out of time—especially if the delay is minor.

Enforcing the obligation to provide a statement of reasons

Both the AAT Act and the ADJR Act provide that a person may begin proceedings to challenge either a refusal to provide reasons or the adequacy of a statement. A ruling can be made by the Administrative Appeals Tribunal (under the AAT Act) or the Federal Magistrates Court or the Federal Court (under the ADJR Act) requiring that a statement be given to the person or that further and better particulars be provided. A ruling of the tribunal must be complied with as soon as possible and not later than 28 days from the date the tribunal makes the ruling. A ruling of a court must be complied with in the time specified in the court's order.

Other legislation requiring that reasons be given

Many other Acts, including some state and territory Acts, require—in terms similar to those of the AAT Act and the ADJR Act—that a person be given the reasons for a decision made under the Act. An Act might contain special rules that differ from those in the AAT Act and the ADJR Act. An example is s 26 of the *Freedom of Information Act 1982* (Cth), which requires that every decision to refuse access to a document be accompanied by a statement of reasons given to the applicant. It is not necessary for the applicant to ask for the reasons.

If an Act requiring that reasons be given does not set out what the statement must include, s 25D of the Acts Interpretation Act provides that the statement must

include the findings on material questions of fact, the evidence to support those findings, and the reasons for the decision.

The content of a statement of reasons

Both the ADJR Act and the AAT Act provide that a statement of reasons must contain the following:

- the decision
- the findings on material facts
- the evidence or other material on which those findings are based
- the reasons for the decision.

It is advisable to use those four elements as headings when developing the statement of reasons.

The decision

A statement of reasons should refer to the legislation that authorised the decision. It is better to quote, rather than summarise, the relevant statutory provisions and then note which aspects need to be resolved or answered, as well as the decision reached on those matters.

Paraphrasing the legislation is unwise because the meaning might be inadvertently changed. For example, if the decision to be made is whether an applicant for a pension or benefit is living in a ‘marriage-like relationship’ it would be erroneous to say that the question is whether the person is in a ‘de facto relationship’.

The name and position of the decision maker should be made clear, as well as that person’s legal authority to make the decision. If the person is a delegate this too should be noted.

The findings on material facts

A statement of reasons must contain the findings on all material facts. If a finding is not set out a court might conclude that it was not taken into account and that the decision is invalid as a consequence.

A material fact is a fact that can affect the outcome of a decision. Consequently, the findings on material facts are those that support the decision, based on the consideration of all relevant evidence.

The legislation might expressly provide that a fact is material—for example, by making the exercise of power depend on its existence or non-existence. Material facts can also be implied by the subject matter or the scope or purpose of the legislation.

A finding of fact will sometimes be established directly by the evidence—for example, a person's age or nationality. At other times a material fact might be inferred from other facts; for example, a finding that a person was in a 'marriage-like relationship' could be inferred from things such as living arrangements and personal relationships. When a finding of fact is inferred, the statement should set out the primary facts and the process of inference.

The evidence on which the findings were based

A statement of reasons must refer to the evidence on which each material finding of fact is based. It is not sufficient simply to list all the documents that were considered in reaching the decision. The statement should identify the evidence that was considered relevant, credible and significant in relation to each material finding of fact.

When referring to evidence it is not necessary to quote it or to provide a copy, so long as the evidence can be readily identified. The evidence might be identified by stating its source or nature, whichever is more intelligible and informative—for example, 'the medical report from Dr *X* dated 20 June'.

The statement should demonstrate that each finding of fact is rationally based on evidence. If the evidence was conflicting, the statement should say which evidence was preferred and why. For further information on how to account for findings, see Guide 3 in this series, *Decision Making: evidence, facts and findings*.

The reasons for the decision

The actual reasons relied upon by the decision maker at the time of making the decision must be stated. Every decision should be amenable to logical explanation. The statement must detail all steps in the reasoning process that led to the decision, linking the facts to the decision. The statement should enable a reader to understand exactly how the decision was reached; they should not have to guess at any gaps.

The statement must go further than merely expressing conclusions: it must give reasons for those conclusions. This might necessitate mention of the legislation, relevant principles of case law, and policy statements or guidelines or other agency practices that were taken into account. The criteria and other factors considered in making the decision and why material facts were accepted should be noted.

Appeal rights

A statement should also include appeal rights. In particular, details of any right to seek internal review or review by an administrative tribunal (such as the Administrative Appeals Tribunal) should be provided. Time limits for seeking review should also be given.

The format and style of a statement of reasons

There is no blueprint for preparing a statement of reasons. Its format, style and length will vary according to the nature of the decision and the intended recipient.

Style and language

A statement of reasons is meant to inform: it should be written in a style that makes it intelligible to the person requesting it. Use plain English, keep sentences short and to the point, avoid generalities and vague terms, and avoid technical terms and abbreviations if they are not likely to be readily understood by the person concerned. Develop a logical structure, and use headings to guide the way.

It is not necessary to have a statement translated if it is for a person whose native language is not English. Extra care might nevertheless be needed to ensure that the reasons, and any appeal rights, are clearly explained.

Length

The length of a statement will depend on the nature, importance and complexity of the decision. The statement should be no longer than is necessary to comply with the legal obligation to prepare it. For a simple decision a page or two might suffice; a decision with complex facts or multiple considerations might need to be longer.

The reasons

It is important to be mindful that both the AAT Act and the ADJR Act oblige the decision maker to provide the statement of reasons. The decision maker is legally responsible for the statement. A draft statement can be prepared by someone else, but the draft should not be adopted uncritically by the decision maker.

An agency can provide standard wording to incorporate in a statement of reasons—for example, setting out the legislative provisions, the relevant policy or guidelines, and general questions to be determined for a decision of the kind in question. A template like this can help the decision maker express and respond to all relevant legal and policy criteria and explain how a discretionary power was exercised. The use of standard wording nevertheless runs the risk of concealing either the real reasons for the decision or the consideration given to factors and evidence relevant to the case at hand.

Where a decision is made or assisted by a computer program the statement of reasons might equally be made or assisted by an automated process. The decision maker should check the statement carefully to ensure that it complies with the requirements for statements of reasons.

Record keeping

At the time of making a decision it is good administrative practice to prepare a record that can form the basis for a statement of reasons if one is requested. In particular, it is prudent to make a contemporaneous note of the assessment of evidence, findings of fact and reasons.

Special considerations

Recommendations and reports

A statement of reasons should refer to any recommendations that were before the decision maker and relevant parts of reports that were considered in making the decision. If the decision was made by adopting the recommendation or report, this should be explained and the reasons for doing so given. In order to provide an accurate record of the reasoning process, it might also be necessary to note any recommendation or part of a report that was rejected and the reasons for this. If information additional to that given in the report was considered, that information should also be referred to.

If adopting a report, the decision maker should be careful to ensure that the report contains sufficient information to satisfy the requirements for a statement of reasons—namely, the findings on material questions of fact, a reference to the evidence or other material to support those findings, and the reasons for the decision.

Submissions

A statement of reasons should also refer to any submission or evidence presented by a person and considered in making the decision. If a submission from a person is not referred to in the statement there is a risk that a court will conclude it was a relevant matter that was not considered.

Confidential information

The ADJR Act contains special rules in relation to references to confidential information in a statement of reasons. A statement is not required to disclose information about the personal or business affairs of someone other than the person making the request in the following circumstances:

- The information was supplied in confidence.
- Publication of the information would reveal a trade secret.
- The information was provided in compliance with a duty imposed by legislation.
- Publication of the information would breach a statutory duty to keep the information confidential.

There is no obligation to provide a statement of reasons if the statement would be false or misleading without the confidential information. If confidential information is excluded from a statement or a statement is not provided, the person requesting the statement must be notified and given reasons.

In the AAT Act there are no similar rules relating to confidential information. Once proceedings have begun before the Administrative Appeals Tribunal, however, the tribunal has power under ss 35(2) and 37 of the Act to prohibit or restrict the disclosure of confidential material. It is therefore open to a decision maker at that stage to ask the tribunal to restrict the disclosure of confidential information included in a statement of reasons.

Private personal information

The Information Privacy Principles contained in the *Privacy Act 1988* (Cth) can be relevant in preparing a statement of reasons. Principle 2 provides that an agency is not to disclose personal information without the consent of the person concerned. 'Personal information' is defined in s 6 of the Act as information or an opinion about an individual whose identity is apparent or can reasonably be ascertained.

As a general rule, personal information collected for one purpose cannot be used or disclosed for another purpose without the consent of the person it relates to. Personal information may, however, be disclosed if disclosure is required or authorised by another law or for the purpose of the preparation or conduct of proceedings before a court or tribunal.

The Attorney-General's public interest certificate

Any matter in relation to which the Attorney-General has signed a public interest certificate under s 14(1) of the ADJR Act or s 28(2) of the AAT Act should be excluded from a statement of reasons. Such cases are, however, rare.

A statement of reasons does not have to be provided if it would be false or misleading without the information covered by a public interest certificate. The person requesting the reasons must be told why a statement cannot be provided or why it omits relevant information.