

Discretionary powers

What are discretionary powers?

Discretionary powers are permissive, not mandatory. They are powers granted either under statute or delegation which do not impose a duty on the decision-maker to exercise them or to exercise them in a particular way. Within certain constraints, decision-makers are able to choose whether and/or how to exercise discretionary powers.

How must they be exercised?

No public official has an unfettered discretionary power. Public officials must exercise discretionary powers in accordance with any applicable legal requirements, reasonably, impartially and avoiding oppression or unnecessary injury.

Agencies should adopt policies and procedures which set out the general approach to be followed in at least each major area of activity for which they are responsible. This should ensure that the agency's powers are exercised consistently from case to case, unless the merits of any particular case justify a different approach.

Relevant administrative law principles

In exercising discretionary powers, various principles of administrative law require public officials to:

- use discretionary powers in good faith and for a proper purpose (eg. honestly and only within the scope of and for the purpose for which the power was given)
- base their decision on logically probative material (eg. logical reasons, information that proves the issues in question, relevant and reliable evidence)
- consider only relevant considerations and not consider irrelevant considerations
- give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance
- exercise their discretion independently and not act under the dictation or at the behest of any third person or body
- give proper, genuine and realistic consideration to the merits of the particular case, and not apply policy inflexibly, and
- observe the basic rules of procedural fairness (eg. natural justice).

Other principles of administrative law preclude public officials from:

- making decisions in matters in which they have an actual or reasonably perceived conflict of interests
- improperly fettering their own discretion (or that of future decision-makers) by, for example, adopting a policy that prescribes decision-making in certain circumstances
- exercising a discretion in a way that is so unreasonable that no reasonable person would have exercised the power in that way
- exercising a discretionary power in such a way that the result is uncertain
- acting in a way that is biased or conveys a reasonable perception of bias
- making decisions that are arbitrary, vague or fanciful
- refusing to exercise a discretionary power in circumstances where the decision-maker is under a duty to do so, or
- unreasonably delaying the making of a decision that the decision-maker is under a duty to make.

It is a serious matter for public officials to ignore valid advice or valid considerations, particularly for the purposes of avoiding discomfort or embarrassment on the part of the government, agency or decision-maker.

Policies and practices to guide the exercise of discretionary power

Not every situation demands a policy, and policies are not a panacea capable of properly addressing all circumstances. However, policies are an important means of guiding decision-makers in exercising discretionary powers appropriately, consistently and fairly.

Policies should include an objective and the criteria to be used in decision-making to help ensure that:

- all relevant legal requirements are complied with
- all relevant factors are considered
- there is consistency in decision-making, and
- the decision-making process is transparent and accountable.

As a matter of principle, it is unacceptable for an agency to adopt and implement a policy that adversely affects, or could adversely affect, the rights or interests of any member of the public where the existence or content of the policy is kept secret or the policy document is not available for inspection and purchase on request.

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Policies adopted by agencies should be communicated to relevant staff and members of the public. In this regard, s.15 of the Freedom of Information Act requires that agencies must ensure each of their policy documents are available for inspection and purchase by members of the public.

Government circulars, memoranda and codes of practice

There is usually no legally enforceable obligation to comply with government circulars, memoranda and relevant industry or generally accepted codes of practice. However in the interests of fairness, equity and consistency, decision-makers should have regard to them and comply with their terms unless there are justifiable, and preferably documented, reasons for taking another course of action.

Implementing policies and procedures consistently

Policies should not be applied rigidly without proper consideration of the particular circumstances and merits of each individual case. There will be occasions where there are justifiable grounds for not following policies, practices, codes or guidelines. Where an agency, with good and preferably documented reason, departs from a consistent application of a policy, this does not create a precedent which binds the agency. Such decisions are relevant and important considerations, but are not binding. Conversely, where an agency frequently departs from or ignores a policy, the policy would seem to have little weight or relevance and would need review.

Further information

For further information on this and related topics, see *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003.

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