

**GUIDELINES ON THE EXERCISE  
OF DISCRETIONARY POWER**

**October 2020**

## FOREWORD

*Discretion is an important mechanism for exercising power within the public sector on account of fundamental changes in society.*

*The demands that are being made on the state means that discretion, rather than rules may be better mechanism for exercising power. It is a fact that the state is being called upon to intervene in many areas of social life and to solve problems in such diverse areas as employment, education, health care, environment transport etc. through a flexible and non-rule approach to handling these inherently complex issues. These complexities require expert knowledge and a flexible approach. This is achievable by endowing public officials with appropriate discretionary powers.*

*But this trend may become disturbing because, according to a well-known adage, “absolute power corrupts absolutely”, and therefore, broad powers present possibilities of being misused or exercised in an arbitrary manner. The broader the discretion, the greater are the opportunities for abuse.*

*One of the frequent risks of corruption in the public sector is the abuse of discretionary powers; those powers which, when conferred upon an official, allow for the taking of decisions based on a certain level of reasoning, judgement and acumen.*

*Exercising discretionary powers remains something complex and relative in the sense that it is often case or context-bound. Abuse of discretionary powers impacts negatively on the perception of corruption and on the image of the public sector. It is important to be judicious in the exercise of discretionary powers. Provision of such powers aims to promote public interests. Thus, it is crucial to give due consideration to the merit and relevance of implementing and sustaining a system within an organisation that rests on fairness, transparency, accountability and integrity in the decision-making process.*

*Thus, today the question is not whether discretionary powers to administrative authorities is desirable or not but what controls and safeguards can be introduced to minimise any abuse in the exercise of such powers. It thus, becomes necessary to devise ways and means to minimise the danger of absolute discretion.*

*This guide is meant for senior public officials who are often called upon to exercise discretionary powers. It aims at providing a better understanding of the exercise of discretionary powers, its risks, as well as to convey useful information on the management of such endowed powers to help organisations prevent any potential abuse of discretionary powers. It is especially relevant to you, as a senior public official vested with such powers.*

*It is expected that this document will guide decision-makers to act more diligently in the exercise and management of discretionary powers.*

### **Disclaimer**

This guide is meant to help senior public officials in the exercise of their discretionary powers. It is for general guidance only and cannot substitute the law or take the place of legal advice. You are advised to consult the Prevention of Corruption Act 2002 as amended or other relevant legislations and to seek legal advice in case of doubt.

## Part I

### INTRODUCTION

*Discretion – The Art of suiting action to particular circumstances*  
Lord Scarman 1981

Discretion is the legal power or right to take official decisions using reasoning and judgment in particular situations. As senior public officials, we may have discretion in certain decision-making processes. We may also be granted certain flexibility and choices in the processes whilst under the moral responsibility of operating within a legal and ethical framework.

If discretionary powers are exercised within a structured mechanism of adequate checks and balances, the risk of malpractice in the fulfilment of our public duties is mitigated or reduced. Such a framework will protect public officials having discretionary powers from any abuse leading to unsound, and arbitrary decision not supported by the facts at hand, or because it is explicitly prohibited by a statute or Rule of Law. Thus, it is essential, for us, to pay particular attention to the principles of transparency, accountability and integrity, bearing in mind all relevant and material facts, criteria and circumstances prior to making decisions, particularly when these affect the rights or interest of any citizen. Citizens expect us as public officials to perform our duties impartially, act in “good faith” and avoid intentional or unintentional “*faux pas*” in exercising discretionary power to avoid any allegation of favouritism or perception thereof.

### UNDERSTANDING DISCRETIONARY POWER

According to Black’s Law dictionary, ‘*discretionary power*’ is “*a power that a person may choose to exercise or not, based on the person’s judgment*’.

In the words of Lord Halsbury (*Rooke’s Case: according to law and not humour*) ‘*Discretion means when it is said that something is to be within discretion of authorities that something is to be done according to the rules of justice, not according to private opinion and according to law and not humour. It is to be, not arbitrary, vague and beneficial, but legal and regular and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.*’

Discretionary power is the power conferred by law upon an individual or body, the exercise of which depends on judgement in a particular situation. If we are endowed with discretionary powers, we are expected to exercise such powers judiciously bearing in mind the legal and moral parameters. Inappropriate use of discretionary powers may lead to integrity violations, risks of corruption or malpractices.

Let us go through the following examples of discretionary powers under our legislations to get a better understanding of the subject matter.

**Insurance Act 2005, Section 130(4)**

The Commission (FSC) may exempt any person from the application of any FSC Rule made under this Act.

**Non-Citizens (Employment Restriction) Act 1973**

**Section 4**

An application for a permit shall be made in accordance with the guidelines issued by the Ministry and shall be addressed to the Minister who may, in his absolute discretion, grant or refuse it.

**Section 9**

Section 9 provides for approval of the Minister as regards to the appointment of the Secretary to the Board and for other employees.

**Section 9(1)**

*The Board shall, with the approval of the Minister, and on such terms and conditions as it may determine, appoint a Secretary to the Board and such other employees as are required for the discharge of its functions under this act.*

**Tourism Authority Act, Section 7(b) Powers of Authority**

*(1) The Authority shall have such powers as are necessary to enable it to effectively achieve its objects and discharge its functions and, may, in particular—*

*(a) issue, renew, suspend, vary or revoke licences and canvasser permits;*

*(b) upon approval of the Minister, in relation to any case or class of cases, for good cause, grant exemption or partial exemption from compliance with any standard or guideline made by the Authority, subject to such conditions as the Authority may impose;*

**14(1) Staff of Authority**

(1) The Tourism Authority may, with the approval of the Minister, employ, on such terms and conditions as it thinks fit, such persons as may be necessary for the proper discharge of its functions under this Act.

Within certain constraints, as decision-makers, we are able to choose whether and/or how to exercise such powers. For effective governance, discretionary powers are essential, but it has to be structured to the extent possible and the exercise of which must always be guided by a legal and ethical framework.

*You will appreciate that whether discretionary powers are granted by statute or under delegated authority, we should exercise such powers:*

- ❖ *Promptly*
- ❖ *Reasonably*
- ❖ *Appropriately*
- ❖ *In good faith*
- ❖ *Impartially*
- ❖ *Without prejudice, and*
- ❖ *In accordance with the provisions of the law and, where relevant, authorised by the instrument of delegation.*

## RISK OF CORRUPTION IN EXERCISING DISCRETIONARY POWERS

You may be already aware that one of the frequent sources of alleged corruption and malpractices or a perception thereof in public administration is the abuse of discretionary power. Can we do away with discretionary powers? In fact, discretionary power is a necessary evil and corruption may occur when it is misused for private purposes or gains. You may wish to refer to Sections 4 – 17 of the Prevention of Corruption Act 2002 as amended which describe the corruption offences.

Very often laws provide for discretionary powers. Arguably, removing discretionary powers from public officials would certainly reduce corruption. However, public administration without appropriate discretionary power may stifle public service. Therefore, the exercise of discretionary powers need to be managed effectively within legal and ethical parameters with an inbuilt accountability mechanism to avoid any abuse. Higher the discretion, higher should be the level of transparency and accountability.

## THE EXERCISE OF DISCRETIONARY POWERS

In modern times, the Legislatures are conferring discretionary powers on the administration/public officials because it is not always possible to lay down standards or norms for the exercise of administrative powers in decision-making. The conferment of power assumes that the power will be exercised independently by the authority (or person concerned) according to its own assessment and within the ambit of the power. The

administrative authorities or persons vested with such powers must not be guided by the direction or influence from third parties in the discharge of the power.

In exercising discretionary powers, as public officials, we have to comply with the relevant legal framework and the administrative principles which call us to:

- *use such powers in good faith and for the right purpose;*
- *base our decision on logically probative materials;*
- *observe the basic rules of procedural fairness;*
- *be objective in considering any particular case or issue;*
- *exercise our discretion independently and not act under the direction or influence or the directive of a third party (person or body); and*
- *give proper, genuine and realistic consideration to the merits of the particular case.*

## REVIEW OF DISCRETIONARY POWERS

There are situations where controls may be imposed on the way in which a discretionary power can be exercised with a view to minimise failure or abuse in this exercise. Main controls of this type include limiting the delegation and the extent to which an authority can proceed through rules and policies. Principles can also be developed to make sure that administrative authority does not abuse its power by acting irrationally and thereby placing substantive limits on its discretionary powers. But where the risks of abuse are too high, the review of such powers may be considered.

The National Survey on Corruption 2014, commissioned by the ICAC and conducted by StraConsult recommended the review of discretionary powers. The consultant was of the opinion that such powers may provide a breeding ground for corruption and stated the following:

*“The first and most important recommendation ... (b) elimination of as many discretionary powers as possible that are given to Ministers at the highest level of the civil service, such as delegated powers for recruitment of low grades in the service, and allocation of a number of licences. Discretionary powers of the sort provide a teeming breeding ground for acts of corruption.”*

There is a strong and persistent public perception that one of the sources of corruption and malpractices in the public administration may be the abuse of discretionary powers, due to lack

of accountability, transparency and fairness in their exercise. In fact, abuse of a discretionary power may lead to an act of corruption.

In the course of its prevention works, the ICAC has recommended the review of discretionary powers in some situations as follows:

#### *Cases of reviewed discretionary powers*

##### *a) The discretionary power of the Minister of Finance under Section 4 of Customs Tariff Act (CTA) (Exemption of Duties)*

Certain items, which were not specifically provided for exemption in the exemption list, were being exempted of excise duties under sections 4 and 9 of Customs Tariff Act (CTA) 1969 as amended at the discretion of the Minister of Finance. Religious bodies, enterprises and individuals which were not normally in the exempted list were applying for exemption under sections 4 and 9 of CTA.

Exemptions under these sections of CTA, amounted to a huge sum in 2001-02 and almost doubled the year after. In 2002-03 exemptions under the discretionary power of the Minister was estimated at 32 percent of the total exemption granted.

The Arusha Declaration to which Mauritius is a signatory – (SADC Statement on Integrity in Customs) clearly declares that one of the factors, which a national Customs integrity programme must take account of, is that there should be as few exemptions to the standard rules as possible.

#### *Recommendation of the ICAC*

One of the basic principles of corruption prevention is to minimise discretion and where possible to structure same. Accordingly, the ICAC recommended that the Government reviews its policy on exemption under the discretionary power of the Minister. This would then be in line with commitment taken at national, regional and international levels in the fight against corruption.

In the budget speech 2006-07, the Minister of Finance relinquished his discretionary power to grant exemptions under sections 4 and 9 of the CTA as follows:

#### *“TAX POLICY*

*165. Mr Speaker, Sir, I am relinquishing my discretionary power as Minister of Finance to remit duties and taxes and grant exemptions. There is now no justification for anyone not to pay his share of taxes to finance needed public services. We are, therefore, increasing penalties for non-compliance and reinforcing enforcement through the Mauritius Revenue Authority, being launched on July 1st. This will allow us to focus on obtaining payments from those who underpay and evade instead.*

*9 June 2006”*

Consequently, The Finance Act 2006 (Act No. 15 of 2006) repealed Sections 4 (a), (b), (g) and 9 of the Customs Tariff Act.

Based on the total exemption for the year 2002-03, a saving of approximately Rs 489.6 million (32% of 1.53 billion) was expected.

*b) Warning in lieu of prosecution is no longer served.*

Previously as per Standing Orders of the Mauritius Police Force, Police Officers in the grade of Superintendent or above had the discretion to issue a Warning in Lieu of Prosecution Notice (WLPN). In 2013 an amendment was brought through Slip no 01/2013 where the above discretion was removed.

## DELEGATION OF DISCRETIONARY POWERS

In general a discretionary power has to be exercised by the authority or person to whom it has been assigned. It is a well-known principle of law that when a discretionary power has been entrusted to a person, he/she must exercise the power personally unless he/she has been expressly empowered to delegate it to another person. Thus, if you are vested by a provision of the law to personally exercise a discretionary power and you delegate that power to another person, it may tantamount to a failure in exercising your discretionary power.

Before you take any action or make a decision, you need to ensure that you have the power to take the action or make the decision and the limits of that discretion. Those who delegate such powers to others may wish to consider the following factors:

- Does the legislation in particular provides for delegation?
- Which action(s) and decision(s) should be delegated and which ones should not;
- Ensure that accountability and transparency are not compromised in decision-making;
- Ensure that the decision to delegate is properly recorded;
- Ensure that the exercise of such powers and the decisions taken are duly reported; and
- Ensure that efficiency and quality in decision-making are given utmost consideration.
- Who assumes the responsibility for any abuse?



## MANAGING DISCRETIONARY POWERS

As indicated earlier, the exercise of discretionary power may provide opportunities for corrupt practices to occur. As such, you need to ensure that an effective accountability mechanism in the form of appropriate checks and balances is present within the system to avoid corrupt practices going undetected.

The table below provides broad guidelines that may assist you or your institution in managing discretionary powers.

<p><b>The Role of Top Management</b></p>	<p>Management has a prime responsibility to ensure that the discretionary powers conferred by legislation are exercised as per the law and in a just and fair manner. You will realise that a discretionary power in itself is not a major factor in creating conditions for corruption, but its abuse is a major source of corruption or malpractice. It may also be a source of negative perception. Thus,</p> <ul style="list-style-type: none"> <li>• Management should ensure that appropriate control mechanisms, policies and procedures are in place to minimize the risk of corruption which may result from the abuse of a discretionary power.</li> <li>• Top management should request for reports where specific discretionary powers have been delegated to ensure that there is no misuse or abuse in the exercise of such powers. The exercise of such powers should always be documented.</li> </ul>
<p><b>Identifying Discretionary Powers</b></p>	<p>As public officials, it is important that first and foremost you identify and understand the discretionary powers you have been endowed with and what is expected from you. Moreover, you need to</p> <ul style="list-style-type: none"> <li>• Know where, when and in what circumstances these powers must be exercised.</li> <li>• Relevant legislations/updates or regulations, an organisational chart and a manual of procedures can be used as guidelines when determining the major functional areas and positions where discretionary powers are exercised.</li> </ul>
<p><b>Structuring Discretionary Powers</b></p>	<ul style="list-style-type: none"> <li>• Administrative power can be structured as well as confined. Confining keeps it within designated boundaries, while structuring controls the manner of its exercise within boundaries.</li> </ul> <p><i>"The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure.... Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice."</i></p> <p><i>Discretionary Justice: A Preliminary Inquiry. By Kenneth Culp Davis. Baton Rouge: Louisiana State University Press.</i></p>

<p style="text-align: center;"><b>Proposing Amendments to Legislations</b></p>	<ul style="list-style-type: none"> <li>• Management needs to have a good knowledge of the discretionary powers provided by their respective legislations and regulations, their importance and the potential risks of abuse in the exercise of such powers. Any abuse or negative public perception may have a detrimental impact on the image and credibility of the organisation.</li> <li>• An Act or a regulation may provide you with discretionary powers but it does not always provide all the clues about how to exercise such powers. As a preventive measure, management must identify any risk and propose relevant policy and procedural framework to guide relevant public officials and also propose appropriate amendments, if necessary, to the relevant provisions in order to structure and minimise such discretionary powers.</li> </ul>
<p style="text-align: center;"><b>Dealing with Conflict of Interests</b></p>	<ul style="list-style-type: none"> <li>• The reason for granting discretionary power to you as a public official is because you possess the experience and knowledge in a particular area that can assist you in making decisions. However, you should abstain from exercising such powers if there is a conflict of interests as it may constitute a corruption offence under Section 13 of the Prevention of Corruption Act (PoCA) 2002 as amended. It is good to note that as public officials you are expected to perform your duties impartially, particularly when exercising statutory discretionary powers.</li> <li>• As per Section 13 of the PoCA as amended, a public official has to declare his interests in writing whenever a situation of conflict of interests (actual or reasonably perceived) arises. In such a situation the public official should abstain from exercising his discretionary powers. The public body/Senior Chief Executive/Accounting Officer must put a system in place to ensure that in situations of Conflict of Interests, when the designated public official abstains from exercising his discretionary powers, there is an alternate public official with the appropriate profile to exercise the discretionary power. The following may also be considered:             <ul style="list-style-type: none"> <li>➤ If provided by law, delegate the powers to the next officer in rank; or</li> <li>➤ Step down for this particular decision and allows a public official with relevant experience and knowledge to act in this position.</li> </ul> </li> <li>• Ensure that records are properly kept.</li> </ul>
<p style="text-align: center;"><b>Expectations from Public Officials</b></p>	<p>As public officials we need to respond to public needs, interests and expectations. We are expected to refrain from:</p> <ul style="list-style-type: none"> <li>• exercising a discretion on unjustifiable grounds and/or in an unreasonable manner;</li> <li>• exercising a discretionary power in such a way that the result is uncertain;</li> <li>• acting in a way that is biased or conveys a reasonable perception of bias;</li> <li>• making decisions that are arbitrary, unsound, vague or irrational;</li> </ul>

	<ul style="list-style-type: none"> <li>• abstaining or refusing to exercise discretionary power whilst under the duty to do so; or</li> <li>• unjustly delaying the making of a decision that the decision-maker is under a duty to make.</li> </ul>
<p style="text-align: center;"><b>Adhering to Fundamental Rights</b></p>	<p>Fundamental rights are guaranteed under Chapter II of the Constitution of Mauritius. Thus, while exercising discretionary powers,</p> <ul style="list-style-type: none"> <li>• you need to pay due attention to fundamental rights of citizens; and</li> <li>• the Executive, in its dealing with the public should ensure that the fundamental rights of individuals are not violated.</li> </ul> <p>In addition, the Constitution of Mauritius also provides for a system of check and balances whereby the legality of the administrative acts of the Executives can be reviewed by the relevant authorities. Hence, if a discretion has been exercised in breach of a fundamental right, it may be reviewed by the relevant authorities.</p>

## Part II



### GUIDING THE EXERCISE OF DISCRETIONARY POWER

#### ADOPTING POLICIES AND PROCEDURES

Policies are important means of guiding decision-makers in exercising discretionary powers **appropriately**, and **fairly**. Policies and procedures, which can be in the form of a manual (paper based or electronic format), can enhance the decision-making systems by providing valuable guidance to staff on how to exercise such powers.

#### Case Law

*In Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos., 498 U.S. 211 (U.S. 1991), the US Supreme Court stated that an administrative agency enjoys wide discretion in ascertaining best way to handle related, yet discrete issues in terms of procedures and priorities. Administrative agencies exercise wide discretion in selecting the methods to attain the legislature's goals. Administrative agencies can adopt rules and policies to carry out duties delegated by legislature. The rules and policies should be consistent with statutory provisions. This discretion is allowed to administrative agencies to adapt their rules and policies to the demands of changing circumstances. Administrative agencies' discretionary power extends to deciding remedies for infringement of agency policies. Administrative agencies have specialized knowledge and power to achieve legislature's objectives. Hence, the agencies have discretion to develop appropriate enforcement policy to attain statutory obligations. Administrative agencies can also decide on appropriation of funds available, efficiently and economically to accomplish its policies.*

The above case law is a concrete example of what is expected of an organisation in the management of discretionary powers.

The selection of criteria for decision-making may include total cost, time to implement, risk, and the organization's ability to successfully implement the decision.

- ❖ Such policies could include the criteria to be used in decision-making to help ensure that:

- *All relevant legal requirements are complied with;*
  - *All relevant factors including the context are considered by the decision-maker;*
  - *The decision-making process is characterised by openness and an appropriate accountability mechanism.*
- ❖ Policies should be applied with due consideration to particular circumstances and merits of each individual case.
- ❖ Policies adopted by agencies should be communicated to relevant stakeholders. Where an organisation, on reasonable ground, departs from a consistent application of a policy, this should not create a precedent which is binding on the organisation. Moreover this should be documented.

*Main components of a policy statement on the exercise of discretionary powers is provided at Appendix I*

## ADMINISTRATIVE PRACTICES

Policies and procedures guide administrative practices<sup>1</sup>. If adopted and implemented by organisations they will help to ensure that staff members exercise their functions in accordance with the principles set out in this guideline. Administrative considerations to enhance the exercise of discretionary powers could include amongst others, the following :

- *general procedures to be followed;*
- *duties and responsibilities in relation to particular matters or circumstances;*
- *arrangements in the event of absences of officials holding such powers;*
- *checklists to avoid unnecessary risks;*
- *criteria for decision-making and prioritizing actions; and*
- *timeframe, relevant deadlines and target dates.*

### Consistency and Compliance with Policies

Consistency of compliance in decision-making ensures, to some extent, predictability and certainty. But as far as the exercise of discretionary power is concerned, we need to consider the particular circumstances and merits of each individual case while paying attention to the following:

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<sup>1</sup> Refer to courses of conduct or policies which an organisation has determined to follow.

**a) Transparency**

Policies, guidelines and criteria under which decisions are taken should be made available to relevant staff and members of the public for transparency purposes. This will enable the person or entity affected by the decision to ascertain whether the principle of equity has been observed.

**b) The Decision-Making Process**

The premise of decision-making is that all decisions are based on the principles of fairness, transparency and accountability. Decisions are reached after thorough consideration of facts, not mere conjecture or supposition. Decisions should thus be guided by

- *Established policies and procedures;*
- *Legal requirements;*
- *Acknowledged facts;*

Decisions taken should be clear and not ambiguous. Justifications need to be provided for all decisions as such decisions may be challenged afterwards.

**c) Justifications for Decisions Taken and for Variance**

Providing written justifications for decisions taken is one of the basic principles of accountable administration and is often a requirement of procedural fairness.

- As public officials we need to provide reasons for a decision taken that are at least sufficient to enable the recipient to understand why that particular decision was made. Reasons are necessary to ensure transparency, accountability and quality in the decision-making process.
- Where a decision is taken which is not in accordance with a relevant established policy, any particular circumstance and the reasons for not following the policy should be recorded.

**d) Record Keeping**

Records, as far as the exercise of discretionary power is concerned, represent evidence of the decision-making process and protect the interests of the organisation as well as the decision-maker and the rights of all stakeholders concerned.

- Management should ensure that accurate, timely, comprehensive and full records of the whole exercise are properly kept and documented. Good record keeping assists in improving accountability and provides for transparent decision-making.

*e) Ethical Responsibility*

Flexibility and discretionary power in business and management decisions are at times necessary for efficient management.

- Parameters to detect any abuse of and arbitrary use of discretionary powers need to be set. Such parameters can also generate a system of mutual expectations, so that each individual can reasonably be confident that discretionary power will be exercised within the defined limits.
- A code of ethics helps to address any issue regarding potential abuse of formal authority and sets the parameters for social and ethical responsibility.

*f) Notifying Rights of Objection*

Whenever we exercise our discretionary power to take a decision which directly affect the rights or interests of members of the public, the following should be considered:

- ❖ Members of the public should be adequately informed of any available rights of objection, appeal or review where they are adversely affected by a decision, or a decision they potentially might wish to challenge.

*g) Existing Control Systems*

Effective management controls such as documentation, transparency, decisions based on policies and set criteria, compliance to legal frameworks, etc, are essential to the success and proper functioning of government organisations. They also act as safeguards against waste, abuse, fraud, corruption and malpractices whilst ensuring that the policies laid down by top management are properly implemented by the organisation.

However, even the most carefully designed control systems have their limitations, partly because, while they allow top managers to control the organisation, they may not control the top managers themselves. Ongoing vigilance is thus required to ensure that the systems are not undermined by corruption or malpractices or by failure to respond to changes in circumstances and operating procedures. A single case of abuse of such powers may jeopardise the integrity of the decision-making process and create a negative perception.

If the existing control systems in public organisations are functional and dynamic, the exercise of discretionary powers may become more effective, discourage any malpractice and reinforce public trust.

## CONCLUDING REMARKS

The exercise of structured discretionary powers within a mechanism with adequate checks and balances can go a long way in the fulfilment of public duties. It will also prevent any abuse leading to unsound, and arbitrary decision.

The guiding principles below can contribute towards enhancing the exercise of discretionary powers within an organisation and ensuring a system that rests on fairness, transparency, accountability and integrity in the decision-making process.

The 10 key steps below adapted from the Exercise of discretion in administrative decision-making, Ombudsman Western Australia, summarises the practices that can help you in the exercise of discretionary powers.

## ADMINISTRATIVE PRACTICES: Ten Key Steps

As a decision maker we need to:	
<b>Ensure that we have the discretionary power</b>	Check the relevant legislation and agency policies and guidelines to ensure that you have the power to act or to make the decision.
<b>Follow statutory and administrative procedures</b>	It is important that as the public official who is responsible for exercising discretion we follow statutory and administrative procedures and policies. For example, there may be pre-conditions to the exercise of discretion such as requiring consultation with a range of people or to advertise a proposal and to receive and consider submissions before a decision is made.
<b>Gather information and establish the facts</b>	Before exercising discretion, it is necessary that we gather all relevant information and establish the facts. Complementary information may be obtained through inquiries or investigation. This may require that we undertake the following: <ul style="list-style-type: none"> <li>• Review documents;</li> <li>• Undertake a site inspection; or</li> <li>• Seek specialist advice.</li> </ul>
<b>Evaluate the evidence</b>	Evaluate and weigh 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 us, and accurate so that any material facts can be established.
<b>Standard of proof to be applied<sup>2</sup></b>	In administrative matters, the standard of proof to be applied is generally ' <i>on the balance of probabilities</i> '. Proof beyond a reasonable doubt is the most demanding standard and the one that must be met for a criminal conviction. In general, the more serious the matter and the consequences arising, the higher should be the standard of proof.
<b>Act reasonably, fairly and without bias</b>	When taking action or making a decision we need to act reasonably and impartially. We must not handle matters in which we have an actual or reasonably perceived conflict of interests.
<b>Observe the rules of procedural fairness</b>	Before taking any decision, we may be required to guarantee procedural fairness to everyone who is likely to be adversely affected by the outcome.
<b>Consider the merits of the case and make a judgment</b>	Although policies, previous decisions, court and tribunal decisions may exist to guide us, it is still important that we consider the matter or application on its merits and to make a judgment about the matter under consideration. Here we must resist any form of influence.
<b>Keep parties informed, advise of the outcome and provide reasons for the decision</b>	The parties concerned need to be kept informed in a timely manner of the decision reached and the justifications provided.
<b>Create and maintain records</b>	Proper accountability demands that the reasons for any decision, any particular circumstance and the reasons for not following any established policy be recorded, either in the minutes of proceedings where the decision was taken, in a report on the proposal in which such non-compliance was recommended, or in a file note or memorandum attached to the relevant file.

*Adapted from Exercise of discretion in administrative decision-making, Ombudsman Western Australia, Oct 2009*

<sup>2</sup> the level of certainty and the degree of evidence necessary

***Main Components of a Policy Statement  
on the  
Exercise of Discretionary Powers***

*Any person using a discretionary power conferred to him/her by law will act within the boundaries of the statutory powers and will perform his/her duties as required by the relevant legislation and regulations.*

*He/She will:*

- (i) Act with honesty, integrity and with reasonable care and diligence;*
- (ii) Maintain confidentiality where reasonable and appropriate;*
- (iii) Use powers conferred to him/her only for the proper purpose, and not for any other purpose;*
- (iv) Exercise the powers reasonably;*
- (v) Not discriminate in dealings with members of the public;*
- (vi) Carry out functions effectively within set time frame;*
- (vii) Exercise discretionary powers only after proper consideration of relevant issues/circumstance;*
- (viii) Not allow another person to dictate or influence how the powers should be exercised;*
- (ix) Ensure that the exercise of such powers does not constitute a corruption offence under the Prevention of Corruption Act (PoCA) 2002 as amended.*
- (x) Maintain records for proper accountability; and*
- (xi) Abide by the rules of natural justice insofar as they relate to administrative law and the decision under consideration.*