



GUIDELINES

# EXERCISE OF DISCRETIONARY POWERS

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### Disclaimer

These guidelines are meant to support 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.

## FOREWORD

*Discretion is an important aspect of decision-making within the public sector and exists at all levels of public policy as well as law enforcement. It basically refers to the freedom and latitude to act on one's own authority and judgment in taking decisions and making choices within certain legal bounds. It can help avoid the burden of excessive bureaucracy.*

*The demands made on the State often means that discretion can be a powerful tool in decision-making which is crucial for much-needed solutions in any area of life. It is a fact that the State is often being called upon to intervene, through a flexible approach, in many areas of social and economic life in order to solve complex problems in such diverse areas as employment, education, health care, environment and transport, amongst others. This is achievable by endowing public officials with appropriate discretionary powers, which is expected to be used in a judicious manner.*

*But, despite the multiple benefits of such a power, the exercise of discretion in decision-making also contains the risk of misuse or arbitrariness. Misuse occurs when this power which, when conferred upon an official, is used to take decisions based on unsound reasoning, judgement and acumen. Therefore, the broader the discretion, the greater are the opportunities for abuse which may lead to corrupt practices.*

*Abuse of discretionary powers, in addition to the fact that it can amount to a breach of the law, reinforces the perception of corruption and impacts negatively on the image of the public sector. It is therefore important to be judicious when exercising 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 granted 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. Therefore, it becomes necessary to devise ways and means to ensure that such powers are used effectively.*

*This guide is meant for senior public officials who are often called upon to exercise discretionary powers. It provides a better understanding of the issue, its risks, as well as conveys useful information on the management of such endowed powers to help organisations prevent any potential abuse.*

*It is expected that this document will guide senior public officials to act more diligently in the exercise and management of discretionary powers.*

## Part I



### UNDERSTANDING DISCRETIONARY POWERS

#### INTRODUCTION

*Discretion – The Art of suiting action to particular circumstances*

*Lord Scarman 1981*

Discretion is an important aspect of decision-making within the public sector and exists at all levels of public policy as well as law enforcement. It basically refers to the freedom and latitude to act on one's own authority and judgment in taking decisions and making choices within certain legal bounds. It can help avoid the burden of excessive bureaucracy. It is the power to take official decisions using reasoning and judgment in particular situations.

Senior public officials are often being vested with the power to make decisions. As such, they are granted with certain flexibility and choices in the process whilst being under the responsibility of operating within a legal and ethical framework.

Wrongful use of discretionary powers, whether intentional or unintentional, during decision making processes more than often leads to breach of rights and/or interest of citizens or even undermine national interest. Additionally, such abuse of discretionary powers is not only in breach of the principles of transparency, accountability and integrity but may also amount to a breach of the law, thus rendering the decision maker subject matter of legal proceedings, including criminal proceedings.

Hence, discretionary powers are to be exercised within a structured mechanism of adequate checks and balances in order to mitigate the risk of malpractices in the fulfilment of public duties. Such a framework will protect public officials exercising discretionary powers from any abuse leading to unsound or arbitrary decision not supported by the facts at hand. Thus, it is essential 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 public officials to perform their duties impartially, act in "good faith" and avoid intentional or unintentional "*faux pas*" in exercising discretionary powers to avoid any allegation of favouritism or perception thereof.

## DISCRETIONARY POWERS

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 1891, in the words of Lord Halsbury (*Rooke's Case: according to law and not humour*) '*when it is said that something is to be done with the discretion of the authorities...that discretion is to be done according to the rules of reason and justice, not according to private opinion: ...according to law, and not humour. It is to be not arbitrary, vague and fanciful, 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 thus the power conferred by law upon an individual or body, the exercise of which depends on judgement in a particular situation. Public officials endowed with discretionary powers are expected to exercise such powers judiciously bearing in mind the legal and moral parameters. An abuse 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 [Financial Services 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 licenses 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.

Where the words ‘shall’ or ‘must’ are used in legislation, there is usually no discretion available to decision makers while the word “may” provides decision makers with greater latitude to weigh up different factors in coming to a decision.

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 within a legal and ethical framework.

## THE EXERCISE OF DISCRETIONARY POWERS

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

- *use such powers in good faith and for the right purpose;*
- *base decisions on logically probative materials;*
- *observe the basic rules of procedural fairness;*
- *be objective in considering any particular case or issue;*
- *exercise discretion independently and not act under the 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.*

Discretionary powers whether granted by statute or under delegated authority should be exercised:

- *Promptly and reasonably;*
- *Appropriately and in good faith;*
- *Impartially and without prejudice; and*
- *In accordance with the provisions of the law and, where relevant, authorized by the instrument of delegation.*

## EXERCISE OF DISCRETIONARY POWERS AND CORRUPTION RISK

In modern times, the Legislatures are conferring discretionary powers on 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.

One of the frequent sources of alleged corruption and malpractices, or a perception thereof, in public administration is the abuse of discretionary powers. Given the freedom, latitude and lack of control, when it comes to the exercise of discretionary powers there is a number of inherent risks such as breach of citizens' rights and corruption. Hence, the exercise of discretionary powers gives rise to opportunities for corruption. Lord Acton's saying "Power corrupts and absolute power corrupts absolutely" is relevant here as unfettered power in its operation could undermine the integrity and probity of the most scrupulous person.

Corruption occurs when one's vested authority is used to give undue preferential treatment to any group or individual or to discriminate against any group or individual for personal gain. The risk of corruption is further exacerbated when the discretionary power is centred in one person only.

Abuse of discretionary powers may lead to the following corrupt practices, amongst others:

- Exercising a discretionary power to achieve another purpose against gratification
- Favouritism or Nepotism
- Receiving gratification to exercise a discretionary power
- Using such powers in situations of conflict of interests.

It is generally agreed that, 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 needs to be managed effectively within legal and ethical parameters with an inbuilt accountability mechanism to avoid any abuse. The higher the discretion, the higher should be the level of transparency and accountability.

## 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. Main controls of this type include limiting the delegation and ensuring compliance to existing rules and policies. Policies, rules, and principles developed ensure that administrative authority does not abuse its power by acting irrationally and thereby place 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 that,

*“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.”*

The consultant was of the opinion that such powers may provide a breeding ground for corruption. There is a strong and persistent public perception that one of the sources of corruption and malpractices in the public administration stems from the abuse of discretionary powers, due to lack of accountability, transparency and fairness in its exercise.

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

### *Instances where Discretionary Powers were subject to Review*

#### *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 or control discretion. This may be achieved by either structuring the discretion which controls the manner in which the power is exercised or by eliminating such powers. In this perspective, the ICAC recommended that the discretionary power conferred to the Minister regarding exemption be reviewed.

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.

*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 a public official is vested by a provision of the law to personally exercise a discretionary power and delegates that power to another person, it may tantamount to a failure in exercising discretionary power.

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?*

## Part II



### GUIDING THE EXERCISE OF DISCRETIONARY POWERS

#### ADOPTING POLICIES AND PROCEDURES

Policies and procedures are important means of guiding decision-makers in exercising discretionary powers **appropriately**, and **fairly**. They serve to control and structure discretionary powers. Policies and procedures, which can be in the form of a manual (paper based or electronic format), enhance the decision-making process 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, it should be documented.

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

## MANAGING DISCRETIONARY POWERS –ROLE OF MANAGEMENT

As stated earlier, the exercise of discretionary power may provide opportunities for corrupt practices to occur. As such, Management of public bodies 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 management of public bodies in managing discretionary powers:

<b>Responsibility of Top Management</b>	<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. 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, Management should:</p> <ul style="list-style-type: none"> <li>• Identify the discretionary powers endowed to the organisation and its officials;</li> <li>• 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. Administrative considerations to enhance the exercise of discretionary powers could include amongst others, the following: <ul style="list-style-type: none"> <li>✓ <i>general procedures to be followed;</i></li> <li>✓ <i>arrangements in the event of absences of officials holding such powers;</i></li> </ul> </li> </ul>
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	<ul style="list-style-type: none"> <li>✓ <i>checklists to avoid unnecessary risks;</i></li> <li>✓ <i>criteria for decision-making and priority actions; and</i></li> <li>✓ <i>timeframe, relevant deadlines and target dates</i></li> </ul> <ul style="list-style-type: none"> <li>• 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>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><b>Reinforcing Existing Control Systems</b></p>	<p>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 of resources, abuse, fraud, corruption and malpractices within an organisation whilst ensuring that the policies laid down by top management are properly implemented.</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> </ul>
<p><b>Proposing Amendments</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,</li> </ul>

<p style="text-align: center;"><b>to Legislations</b></p>	<p>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.</p> <ul style="list-style-type: none"> <li>• An Act or a regulation may provide public officials with discretionary powers but it does not always provide the guidelines about how to exercise such powers. As a preventive measure, management must identify any risk and propose relevant policy and procedural framework to guide concerned 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>Ensuring Ethical Responsibility</b></p>	<p>Flexibility and discretionary powers in operations and management decisions are at times necessary for efficient functioning of the organisation.</p> <ul style="list-style-type: none"> <li>• Parameters to prevent and detect any abuse or 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 powers will be exercised within the defined limits.</li> <li>• A code of ethics helps to address issues regarding potential abuse of authority and sets the parameters for social and ethical responsibility.</li> </ul>
<p style="text-align: center;"><b>Expectations from Public Officials</b></p>	<p>Public officials should be reminded of the need to respond to public needs, interests and expectations. Hence, they 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>• taking decisions that are arbitrary, unsound, vague or irrational;</li> <li>• abstaining or refusing to exercise discretionary power whilst under the duty to do so; or</li> <li>• unjustly delaying decision taking.</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>• there is a need to pay due attention to fundamental rights of citizens; and</li> </ul>

	<ul style="list-style-type: none"> <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 discretion has been exercised in breach of a fundamental right, it may be reviewed by the relevant authorities.</p>
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## MANAGING DISCRETIONARY POWERS – ROLE OF THE PUBLIC OFFICIAL

Policies and procedures guide practices. 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 these guidelines.

To ensure the effective use of discretionary powers, public officials endowed with such powers should apply the following:

### *a) Identifying Discretionary Powers*

As public officials, it is important first and foremost to identify and understand the discretionary powers that you have been endowed with and what is expected from you. Moreover, you need to know where, when and in what circumstances these powers must be exercised.

### *b) The Decision-Making Process*

Decisions should thus be guided by:

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

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, particular circumstances as well as merits of each individual case and not mere assumptions. Decisions should be clear and not ambiguous.

### *c) Ensuring Transparency*

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

*d) Justifications for Decisions*

Providing written justifications for decisions taken is one of the basic principles of accountable administration and is often a requirement of procedural fairness. Justifications need to be provided for all decisions given that such decisions may be challenged afterwards.

Thus,

- 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 taken. 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.

*e) Record Keeping*

Records, as far as the exercise of a 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.

Public Officials 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.

*f) Dealing with Conflict of Interests*

The reason for granting discretionary powers to public officials is because they usually possess the experience and knowledge in a particular area that can assist in making decisions.

- However, one 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 public officials are expected to perform their duties impartially, particularly when exercising statutory discretionary powers.
- 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 have a system in place for managing situations of Conflict of Interests, It must be ensured that there is an alternate public official with the appropriate profile to exercise the discretionary power when the designated public official abstains from exercising his discretionary powers.



The following may also be considered:

- If provided by law, delegate the powers to the next officer in rank; or
- Step down for this particular decision and allow a public official with relevant experience and knowledge to act in this position.
- Ensure that records are properly kept.

***g) Notifying Rights of Objection***

Whenever discretionary powers are exercised to take a decision which directly affects the rights or interests of members of the public, the following should be considered:

- ❖ Members of the public who are adversely affected by a decision should be adequately informed of any available right of objection, appeal or review.

## CONCLUDING REMARKS

The exercise of discretionary powers within a structured 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.

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 interests of any citizen. Citizens expect public officials to perform their 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.

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 we 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>1</sup></b>	In administrative matters, the standard of proof to be applied is generally <i>'on the balance of probabilities'</i> , that is, what appears to be probable or not probable. In general, the more serious the matter and the consequences arising from the exercise of a discretionary power, 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. Such situations of conflict of interests have to be disclosed in writing to the organization.
<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*

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<sup>1</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 and make decisions in line with established criteria;*
- (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.*