

## ARC UPDATE

### PREPARING STATEMENTS OF REASONS

The Council has released a set of *Practical Guidelines* for primary decision makers to help them prepare sound reasons for their decisions. The requirement that decision makers give reasons is a fundamental element of our Commonwealth administrative review system and it is intended that these Guidelines will help improve the quality of statements of reasons.

The Guidelines are presented as seven questions that decision makers may ask when preparing reasons for a decision. Set out under those questions are guiding principles to assist the decision maker in preparing a statement. As a further reference, the Council has produced a *Commentary on the Practical Guidelines* to provide a fuller explanation of the law on reasons.

The *Practical Guidelines for Preparing Statements of Reasons* is reproduced in full below. These Guidelines, as well as the *Commentary on the Practical Guidelines* are also available on the Council's website at [law.gov.au/arc](http://law.gov.au/arc) or from the Council's Secretariat on (02) 6250 5800.

### PRACTICAL GUIDELINES FOR PREPARING STATEMENTS OF REASONS

#### 1. Do I have an obligation to provide a statement of reasons?

There is no general common law obligation to provide reasons for your decisions.

However, you have a *statutory obligation* to provide reasons where an Act states that a person adversely affected by your administrative decision can request a statement of reasons for that decision.

This occurs where:

- there is a right of merits review by the Administrative Appeals Tribunal (AAT); or
- there is a right of judicial review by the Federal Court; or
- the legislation under which you made your decision requires you to give reasons when notifying the person affected by the decision.

Even if a computer program is used to assist you in the making of a decision, the obligation to provide a statement of reasons remains and must be satisfied by you.

If the Ombudsman believes reasons should have been given for a decision, the Ombudsman can report to your department or agency that reasons should be given or should be improved.

In all cases, it is good administrative practice to make a note of a decision at the time it is made. Having made a note at the time of the decision, you will be able to easily provide a statement of reasons if requested to do so, even if the statement is prepared some time after your decision is taken. The contents of that note should be informed by the requirements that are set out in these Guidelines.

### **Merits review by the AAT?**

You must provide reasons if:

- your decision is AAT reviewable; and
- a request for reasons is made in writing by a person whose interests are adversely affected by your decision.

### ***Is your decision reviewable by the AAT?***

Your decision is only reviewable by the AAT if the Act authorising your decision provides for review.

### ***Whose interests are adversely affected by your decision?***

Applications for review may be made by those whose interests are adversely affected by your decision. That may be a person or a corporate body.

‘Interests affected’ may be non-material, such as an Indigenous person’s spiritual link to land, as well as property, financial or physical interests. The interests must be more than those of a member of the general public.

### ***What is a request in writing?***

The request need not be formal. A person may make a request by letter, fax or email, but not by telephone.

### **Judicial review under the AD(JR) Act?**

You must provide reasons if:

- your decision is AD(JR) Act reviewable; and
- a request for reasons is made in writing by a person who is aggrieved by your decision.

### ***Is your decision reviewable under the AD(JR) Act?***

To be reviewable, your decision must:

- be administrative, that is, apply to an individual and not everyone; and
- be directly authorised by an Act or regulations; and
- not be an exempt decision (for exempt decisions, see Schedule 1 of the AD(JR) Act); and
- be final or operative.

### ***Who is a person aggrieved?***

A person aggrieved is effectively a person whose interests are adversely affected by a decision.

Adverse effect on interests is interpreted broadly and can include the impact of your failure to make a decision, or preliminary action by you, such as refusal to accept an application, or a report or recommendation which is required by legislation.

For more, see above, ‘Whose interests are affected by your decision?’ under ‘Merits Review by the AAT?’.

### ***What is a request in writing?***

The request need not be formal. A person may make a request by letter, fax or email, but not by telephone. The request need not specify that it is being made under the AD(JR) Act.

The request may be made after AD(JR) Act proceedings have begun.

### **Other legislation requiring you to give reasons?**

If you make decisions under other legislation that requires you to give reasons, read what follows.

If your Act or regulations merely state that reasons must be given, you must state your findings, the evidence which led to your findings and why you decided as you did; see *Acts Interpretation Act 1901*, section 25D.

Alternatively, an Act or regulations may state what must be contained in your statement of reasons. Examples are:

- Social Security Act 1991, sections 1243(2), 1244 and 1261(3)—reasons must be provided for a review by the Social Security Appeals Tribunal;
- Veterans’ Entitlements Act 1986, section 137—reasons must be provided for a review by the Veterans’ Review Board;
- Migration Act 1958, sections 359A and 361—reasons must be provided for a review by the Migration Review Tribunal;

- Migration Act 1958, section 424A—reasons must be provided for a review by the Refugee Review Tribunal.

## **Time limits**

If you are required to give reasons, time limits apply.

## **Person requesting the reasons**

Under both the AAT and AD(JR) Acts, a person must request reasons within 28 days of receiving written notice of your decision.

If *not notified in writing*, the person must request reasons within a reasonable time of your decision.

If the request is outside time or the person is not entitled to them, reasons may be refused. If you refuse to give reasons, you must notify the person of your refusal within 28 days of receiving the request (AAT Act) or within 14 days of the request (AD(JR) Act).

## **Decision maker**

If a person is entitled to reasons, you must provide them as soon as practicable, but no later than 28 days after the request (AAT and AD(JR) Acts).

If there is doubt that the person can request reasons under the AD(JR) Act or AAT Act, you or the person can apply to the Federal Court or the AAT to decide the issue. If the Court or AAT decides that reasons must be given, you must provide them within 28 days of the decision.

## **2. Can I refuse to provide a statement of reasons?**

You may refuse to give reasons if:

- no interests are affected by your decision; or
- your decision is not reviewable; or
- you have already done so; or
- the request is not in writing; or
- your legislation does not require you to; or
- the request is out of time.

Specific grounds to refuse to give reasons are:

- another statute prohibits you doing so (for example, section 14ZZB of the *Taxation Administration Act 1953*); or
- for reasons requested under the AD(JR) Act—your decision is listed in Schedule 2 of the AD(JR) Act.

Even in these cases you may choose to provide reasons if there are sound grounds for doing so.

### **Attorney-General's Certificate**

If the Attorney-General has issued a public interest certificate prohibiting disclosure of the matter you must not provide a statement of reasons. Such cases are rare.

### **Failure to provide a statement**

A failure to provide reasons when you must do so has legal consequences. At the very least, as a court or tribunal will be guided by your explanation of the reasons for the decision when reviewing the decision, a failure to provide reasons may lead them to the conclusion that there were no good reasons for the decision. In such a case, a reversal of the decision is more likely.

## **3. What must be in my statement of reasons?**

You should consult your legislation for any particular requirements for your statement of reasons.

In essence, a statement must:

- set out your decision; and
- list your findings on *material facts*; and
- refer to the *evidence for your findings*; and
- give the *reasons for your decision*.

### **The decision**

You should set out the issue required to be resolved or answered by the decision, as well as the decision you have reached. Also identify yourself, your position and note whether you have legal authority to make the decision, including any delegation where appropriate.

### **Findings on material facts**

A material fact is central to the decision.

You must state your findings on all material questions of fact. The significance of the fact may be indicated by the legislation, for example 'X is to be considered'.

Alternatively, it may be inferred from the subject matter, the scope or the purpose of the legislation. As facts may become material by implication there is scope for you or for the applicant to raise factual matters which are material. You must set out those critical matters of fact that were taken into account in making your decision. If a fact is relied on, it must be set out. If a matter is considered, then your findings of fact in relation to it must be set out.

If you do not set out findings on a material fact, the inference is that you did not consider that fact. This may mean your decision is wrong.

#### *Inference of material facts*

Sometimes a fact is established directly by the evidence. Where you infer a material fact from other facts, you should set out those other facts and your process of inference to show how your decision was reached.

#### *Specifying the relevant law*

Your reasons should refer to the legislation under which you have the power to make the decision. The reasons must also refer to the legislation and to the case law principles on which your decision is based.

You should draw attention to the relevant law so the person can understand how your decision was made. This may mean summarising or paraphrasing the relevant legislation. At other times you may need to set out particular sections of statutes or delegated legislation. Explain the legal principles derived from relevant cases and only refer to those cases by name if the person requesting the reasons would expect you to do so.

#### **Refer to evidence for findings of fact**

Your statement must refer to the evidence or other material upon which the findings of fact are based.

This does not simply mean you must identify the evidence that was considered or taken into account. You should explain whether the evidence was accepted or rejected and whether any finding was made as a result of it. Where you are faced with conflicting evidence, refer to all the evidence, and state your reasons for preferring some and rejecting others.

The evidence need not be set out in detail, providing it can be readily identified. The evidence may be identified by stating its source or nature (whichever is more intelligible and informative). It is not sufficient to simply list all the documents that were before you.

## **Real reasons for the decision**

State the real reasons for your decision. Do not rewrite history when preparing a statement of reasons. Every decision should be capable of a logical explanation. Your statement must contain all steps of reasoning, linking the facts to your decision, so that the person seeking the statement can understand how your decision was reached.

Your statement must go further than state your conclusions - you must give real reasons for those conclusions. You should also indicate any relevant policy statements or guidelines or other agency practices you took into account. In essence, you need to include any detailed background to the making of your decision, so that the person who receives the reasons will understand them (and not have to guess at any gaps).

### *Appeal rights*

Remember, the purpose of any statement is to enable you to explain and defend your decision and to enable the person requesting them to decide whether to seek review or appeal of the decision and on what grounds. Accordingly, you must be clear about the reasons for your decision, setting out the evidence, facts and law relied upon. The statement should also include appeal rights. In particular, details of rights to seek internal review, review by the AAT or another administrative tribunal or judicial review should be listed. Time limits for seeking review should also be given.

## **4. How and when should my statement of reasons be prepared?**

There is no blueprint or universal pro-forma sheet for preparing every statement of reasons. The language you use and the length of your statement should be appropriate for your audience.

### **Language**

The reasons for your decision must be intelligible to the person seeking them.

Your language should be clear and unambiguous. Avoid generalities and vague terms. Do not use technical terms unless they are likely to be understood by the person receiving the reasons. Use your judgment about which approach to adopt. Try to paraphrase the legislation or use synonyms whenever possible. If the legislation you rely on is long, subtle or complex (for example, 'marriage-like relationship'— section 4 of the *Social Security Act 1991*, section 11A of the *Veterans' Entitlement Act 1986*) reproduce the section or sections.

### **Length**

The appropriate length of your statement depends on the nature and importance of your decision, its complexity and the time available.

## **When to draft your reasons**

The best practice is to prepare your statement at the time of your decision. You should at least make notes at the time of your decision, especially if a request for reasons is likely. It is difficult to reconstruct the reasoning process you used in making a decision after a period of some weeks.

Where further or better reasons than those at the time of the decision become available, a statement of those further or better reasons may be given separately. Any reasons additional to those prepared at the time of your decision may be called for in an AD(JR) Act proceeding, and by the AAT or other tribunals, and compared with the original statement that is presented. Any discrepancy between the reasons at the time your decision was made and later reasons may be used to draw an inference that you did not carefully consider your obligation to give a statement of reasons.

## **It is *your* statement of reasons**

Remember that you, as the decision maker, are the person responsible for the statement. This means that you cannot uncritically adopt a draft statement prepared by someone else. Even if you took account of a submission or recommendation from another person, you are the decision maker and the decision and the statement you provide are yours.

## **Precedents and standard form reasons**

You can use standard form sentences or paragraphs for parts of the decision, provided you consider the particular issues relevant to the case before you and provided they do not conceal the real reasons for your decision.

## **5. How should I treat recommendations, reports, or submissions in my statement of reasons?**

### **Recommendations or reports**

Your statement should include the appropriate recommendations or parts of relevant reports you should have considered in making your decision. You should indicate in your statement the weight you gave to them and the reason for your ultimate judgment.

If the report or recommendation you relied upon is prepared by someone else, that report or recommendation must contain sufficient information to enable you to satisfy the three essential requirements for a statement: the findings on material questions of fact; reference to the evidence or other material on which those findings were based; and the reasons for the decision. Where you differ from a relevant recommendation or part of a report, you should also explain how and why.



## Submissions

Where a person has made a submission or presented evidence on a material fact, your statement must deal with the submission and indicate the weight that you gave to it. Your statement should explain why you accepted or rejected the submission or argument. If you do not refer to submissions or material facts, it suggests you did not take them into account.

### 6. How should I treat confidential information in my statement of reasons?

In the course of your decision making, you may receive information on a confidential basis. How do you deal with this information in your statement?

#### Under the AD(JR) Act

You *are not* required to disclose information relating to a person or business affairs of a person, if:

- the information was supplied in confidence; or
- the publication of the information would reveal a trade secret; or
- it would breach a statutory duty or common law duty to keep the information confidential, for example section 70 of the *Crimes Act 1914* (disclosure of information by Commonwealth officers) or legal professional privilege.

An obligation of confidentiality does not apply if your statement of reasons is addressed to the person who supplied the confidential information. This may mean your statement cannot state factual findings as precisely as would otherwise be the case.

If your statement would be false or misleading without the confidential information, you are not required to provide the statement.

If the information is not included, or you decide not to provide a statement, you must notify the person requesting the statement, giving reasons.

#### Under the AAT Act

The AAT Act does not have any provisions about confidential information that are equivalent to those in the AD(JR) Act.

However, if your statement includes confidential information you should so advise the AAT when you provide the information. The AAT is able to avoid disclosing the confidential material (section 37 of the AAT Act).

## **Under the Privacy Act**

If information relevant to a request for reasons is ‘personal information’, as defined in section 6 of the Privacy Act 1988, certain information privacy principles, for example IPP 11, may apply. ‘Personal information’ means information or an opinion about an individual whose identity is apparent or can reasonably be ascertained. If personal information is involved, you can not disclose it unless the person concerned has consented. Personal information may be disclosed if, by law, an agency must disclose it, for example, because the material is required for use in court proceedings.

## **7. What happens if my statement is not adequate?**

For your statement to be adequate, it must be an accurate reflection of your decision making process and must meet the standards set out in this paper.

If your reasons for a decision are inaccurate, wrong, need other reasons or evidence or have been supplemented by inconsistent reasons, the decision may be found to be unlawful by a court or tribunal. Alternatively, you may not have met your statutory obligation to provide reasons and appeal rights that depend on adequate reasons being given will not expire until adequate reasons have been provided.

The guiding principles are that your statement must be intelligible to the person seeking the reasons and must give a clear understanding of why your decision was made. The statement of reasons must also be sufficiently precise to enable the person affected by your decision to decide whether to challenge the decision and how to do so.

### **Request for a better statement**

If your statement is not adequate, a person can apply to the AAT or to the Federal Court for a better statement.

#### ***Under the AAT Act***

If the AAT considers that your statement is inadequate or wrong, the AAT can make a declaration accordingly. You must then furnish an additional statement containing more information as soon as possible and, in any event, within 28 days of the AAT’s declaration. If the AAT does not think that the supplementary statement is adequate, it can order you to provide an additional statement.

#### ***Under the AD(JR) Act***

The Federal Court can order you to provide an additional statement, within the time specified in the order. The Court will only do so if satisfied that the order would be useful, fair and just.