



**Australian Government**

**Department of Defence**

**DEPARTMENT OF DEFENCE**

**GOOD DECISION-MAKING IN DEFENCE: A GUIDE FOR  
DECISION-MAKERS AND THOSE WHO BRIEF THEM**

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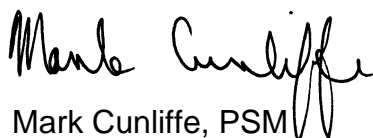
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## FOREWORD

1. In March 2014, following a review of inquiry and investigation arrangements in Defence, the Chiefs of Service Committee endorsed policy changes relating to recording and reporting complaints and incidents, fact finding and decision-making, and the ADF redress of grievance process. This Guide has been published as part of that initiative.
2. Commanders and managers today manage significant overheads, which have developed over time, regarding administrative and disciplinary matters. Supporting policies have tended to be numerous, complex, voluminous and sometimes contradictory. There is a consequent risk that commanders and managers will struggle to understand their responsibilities, and that Defence will be distracted from performing its core tasks effectively. Commanders and managers need to be empowered to act decisively without the burden of complex, difficult and, in some cases, unnecessary rules. They can then be held accountable for their decisions.
3. With that in mind, this Guide provides advice about important decision-making concepts, such as the power to make decisions, procedural fairness, and statements of reasons. The emphasis is on the considerable discretion available to commanders and managers when making decisions. The approach is risk-based, rather than rules-based. This is a significant shift from previous Defence policy about decision-making, such as ADFP 06.1.3 *Guide to Decision-Making in Defence*, which took a more prescriptive approach to decision-making processes.
4. An important development is to fill a gap in guidance on how decision-makers can collect information quickly in order to inform their decisions. A chapter on fact finding emphasises that fact finding is an incident of decision-making, rather than an end in itself. Previous guidance on fact finding, such as the chapter on routine inquiries in ADFP 06.1.4 *Administrative Inquiries Manual*, had developed into extremely rigid and legalistic processes, which in many cases were completely disproportionate to the needs of the decision-maker. The new guidance enables commanders and managers to adopt a simpler, more flexible and proportionate approach to fact finding. It can be adapted to any Defence environment, including operational contexts or workplaces where ADF, APS and contractors are working together.
5. I encourage decision-makers, and those who brief them, to consider the material in this guide, and how it can be adapted to the decisions they typically make.



Mark Cunliffe, PSM  
Head Defence Legal

10 May 2015

**AMENDMENT CERTIFICATE**

<b>Amendment number</b>	<b>Chapter(s)</b>	<b>Amendment</b>	<b>Effected date</b>

Proposals for amendment of Good Decision-Making in Defence: A guide for decision-makers and those who brief them are to be forwarded to:

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## CHAPTER 1

# INTRODUCTION

### PURPOSE AND APPLICATION OF THIS GUIDE

1.1 This Guide provides guidance for those in Defence with decision-making responsibilities, including commanders and their support staff. It outlines general decision-making principles and provides practical information and tools to help with decision-making in a wide variety of contexts. The principles outlined are not unique to a particular environment or type of decision, and can be adapted for decision-making from operational to office environments.

1.2 A decision is a choice between alternative options, and decision-making is the process by which we consider the options and make a choice. Some decisions will be between two opposite alternatives – take action X or don't take action X. Other decisions will involve many different options – take action X, take action Y or take action Z. As Defence personnel, we make decisions at work every day – how to assign work / tasks within a team, when to order new stationery, what action to take in response to enemy action, how to structure a decision brief or advice. Much of our day-to-day experience involves a largely intuitive approach to decision-making. We make decisions quickly, and often automatically, based on our previous experience. Other decisions are more analytical, consciously identifying options and considering evidence in order to arrive at the decision.

1.3 This Guide contains guidance only. It is not binding on decision-makers and does not replace the requirements of legislation, Defence Instructions, determinations under section 58B of the [Defence Act 1903](#), Defence policy or other documents that address a particular type of decision. A decision would not be invalid because procedures outlined in this Guide have not been followed, and a person should not expect that a decision-maker will follow a particular process merely because it is described in this Guide.

1.4 Decision-makers in Defence should exercise judgement in applying this Guide, using those aspects that are appropriate to the particular decision they are making. What is appropriate will depend on an assessment of the decision to be made and its associated risks.

1.5 This guide covers a range of topics associated with decision-making. Figure 1.1 illustrates some of the key questions decision-makers may need to consider, and where they are addressed in this Guide. Other topics covered in the Guide are briefing decision-makers (Chapter 6), reviewing decisions (Chapter 10), re-making decisions (Chapter 11) and dealing with difficult people (Chapter 12). When referring to the topics relevant to any given decision, decision-makers should keep in mind the general principles outlined in this chapter, and use their professional judgement when applying them to a particular decision.

Figure 1.1: Key questions for decision-makers



## IMPORTANT DECISION-MAKING PRINCIPLES

### **Decision-making requires flexibility and creativity**

1.6 There is no one size fits all approach to decision-making. A decision-maker may follow very different processes to make different types of decisions. Even similar decisions will sometimes require different processes, depending on the circumstances. While some Defence policy about particular decisions has a quite prescriptive approach, this is not always necessary or suitable for the many and varied decisions Defence personnel make. This guide aims to give decision-makers flexible guidance, which will allow them to adapt it to any circumstance. A good decision-maker will have regard to relevant legislative and policy requirements for any given decision, and to the particular environment and circumstances in which the decision is being made. They will determine the most appropriate process to follow when making the decision.

### **Decision-makers should manage risk, rather than simply avoid it**

1.7 All decision-making involves risks. These will vary depending on the type of decision. An obvious risk in this context is getting the decision wrong (or at least, with the benefit of hindsight, discovering that a different decision would have been preferable). Other risks can include legal, personnel, resources, or reputational risks such as damage to the public perception of Defence.

1.8 There has been a growing trend within Defence for decision-makers to be overly cautious in decision-making, applying formal processes that are disproportionate to the associated risks of a decision.

1.9 It is impossible to avoid risk completely. This guide encourages decision-makers to sensibly consider and manage risks by assessing the risks associated with a particular decision, and considering how best to balance competing risks.

### **Decision-makers should apply time and resources proportionate to the possible consequences of a decision**

1.10 There are limits on the time and resources available to decision-makers. As a general rule, the more serious the possible consequences of a decision, the more time and resources should be invested in the decision-making process.

1.11 Decision-makers need to apply their judgement and commonsense when determining this, which will include making an assessment of the level of risk associated with a decision.

1.12 If, for example, a decision involves serious career or financial consequences, the decision-maker might invest considerable time and resources in ensuring they have all the relevant information, have considered the evidence, and have defensible reasons for their decision.

1.13 If a decision does not involve serious consequences or involves consequences that are easily remedied, the decision-maker may decide not to invest the same amount of time and resources in the decision-making process.

**Decision-makers should balance certainty that a decision is correct against the need to make a decision in a reasonable time frame**

1.14 Decision-makers naturally want to get their decisions right. Notwithstanding this ideal, decision-makers should not postpone making a decision just because there are unknown facts or further possibilities that could be explored. Even in cases where the circumstances do not require urgency, delays can be detrimental and stressful to those waiting for a decision, and lengthy delays may cause a change in circumstances which affects the matters under decision. Accuracy in decision-making is important, but must always be balanced against the need to make decisions within a reasonable time frame.

1.15 Decision-makers should exercise judgement in determining the balance between delaying a decision to obtain further information and assessing that sufficient relevant information is available to make and support the decision. It will depend on the particular circumstances of the decision in question and relates to assessment of risk addressed above. Decision-makers should remember the law of diminishing returns – there is a point where additional information that may be obtained will not warrant the delay that results from obtaining it. Perfection can be the enemy of good decision-making.

**Decision-makers should balance individual and organisational requirements**

1.16 Because Defence is made up of individuals, decisions which affect individuals also affect Defence as an organisation. In some cases, however, the interests of an individual and the interests of Defence as an organisation will differ. For example, an individual may wish to delay a decision in order to seek advice, while Defence as an organisation wants to resolve the issue quickly to allow a unit to function optimally.

1.17 In cases where Defence's interests differ from an individual's interests, decision-makers should assess and balance the competing interests in their decision-making process.

**DECISION-MAKING AND ACCOUNTABILITY**

1.18 Defence personnel have considerable training and experience relevant to the decisions they need to make. Decision-makers should, therefore, be trusted to exercise professional judgement and commonsense to make sound decisions.

1.19 Decision-makers want to make the right decision every time. Errors will inevitably occur because not all decision-making takes place in ideal circumstances. Sometimes, even when decision-makers do everything correctly, affected individuals can dislike and challenge the decision. There is no way to prevent this and nor should there be. In mitigating and balancing risks, risk is not excluded and decision-makers should not attempt to exclude it completely. There are review processes in place (as outlined in Chapter 10), which can be used to correct bad decisions. However, review processes should not be used to unpick a decision with the benefit of hindsight, or to criticise a decision-maker simply because the reviewer has a different opinion of what the decision should be. Defence supports and trusts decision-makers, allowing the review processes to either confirm decisions or act as a safeguard against error, mitigating some of the risks associated with decision-making. Audit and assurance processes also mitigate some of these risks.

1.20 As a decision-maker, you have to be accountable for your decisions. We do this by justifying decisions – and it helps if we retain records of the decision-making process, information collected and considered, and reasons for a decision.

1.21 If you are able to provide all relevant documentation associated with making your decision/s, demonstrate that your approach was reasonable in all the circumstances, that the decision/s were reasonable and based on relevant evidence, and that you balanced the various risks associated with the decision/s reasonably, then you should not be criticised. This is true even if, in hindsight, it turns out that another choice might have been preferable. This is why it is so important to ensure documentation is retained.

1.22 Defence leadership, managers and the chain of command have an important role to play in holding decision-makers accountable. Decision-makers who make egregious errors or repeat the same mistakes again and again should be held to account through administrative or disciplinary action. However, for most mistakes, the appropriate response will be less severe – the purpose should be to help decision-makers improve their decision-making.

1.23 It should also be remembered that in balancing risks, and taking risks, sometimes the anticipated risks will eventuate. Decision-makers should be held to account on the basis of what they knew or should have known at the time, recognising that some risks cannot be completely excluded, rather than on the basis of what ultimately occurred.

1.24 Defence decision-makers are trained and experienced, and exercise their professional judgement on a daily basis. Bad decisions and decision-making should not be accepted, but decision-makers need to be supported, including when a decision is challenged.

## CHAPTER 2

# ASSESSING REQUIREMENTS

### SOME USEFUL QUESTIONS

2.1 It is important to be clear about the decision/s that may be required, the source of power to make each decision, and who is likely to make those decisions.

2.2 When an issue, incident, complaint or other event arises, assessing the situation may include assessing what decisions are likely to be required in response, and what steps should be taken so that those decisions can be made. It will not always be possible to know this at the outset, and the assessment process will usually be ongoing, with the situation being continually re-assessed as new information becomes available.

2.3 The following questions may be useful in assessing decision-making requirements in a variety of situations.

- a. What outcomes are sought (including in relation to resolving a matter, maintaining productivity, welfare of personnel, preventing recurrence, reputation etc)?
- b. What legislation, policy or other requirements are relevant in this situation?
- c. Are there any mandatory responses to the situation (including mandatory reporting requirements)?
- d. What options are available?
- e. What decisions are likely to be required?
- f. Who has power to make these decisions?
- g. Is there likely to be more than one decision-maker involved? How can these decisions be coordinated (for example in terms of timing of decisions, sharing information, sharing resources to collect information etc)?
- h. Are there any limits on the decision-making power?
- i. Who are the most appropriate decision-makers in the circumstances?
- j. What information is required to make these decisions?
- k. Is additional information required to make these decisions?
- l. What actions are required before these decisions can be made?

## COMMON DECISION CATEGORIES IN DEFENCE

2.4 It is impossible to compile a complete list of all the decisions Defence personnel make. The following offers a range of some of the more common decision-making categories that may apply in relation to an issue, incident, complaint or other event. Most of these categories are the subject of specific legislation or policy:

- a. personnel decisions (such as postings, promotions, leave);
- b. workflow management;
- c. allowances and benefits;
- d. procurement decisions;
- e. personnel disputes and conflict;
- f. misconduct issues (including unacceptable behaviour, fraud, disciplinary or criminal misconduct, sexual misconduct);
- g. operational matters (including during or following combat);
- h. welfare of personnel (including protection of personnel who have claimed misconduct by others);
- i. work performance;
- j. safety matters (including aviation safety);
- k. security matters;
- l. equipment malfunction or failure; and
- m. property damage.

2.5 It is important to remember that a single issue, incident, complaint or other event may require multiple decisions to be made, in multiple categories, by multiple decision-makers.

## POWER TO MAKE DECISIONS – LEGISLATION

2.6 A common source of decision-making power is legislation – an Act of Parliament or subordinate legislation such as regulations or determinations made under legislation (including determinations under sections 58B and 58H of the [Defence Act 1903](#)). The [Defence Enterprise Collective Agreement](#) (DECA) has the effect of legislation with respect to APS employees.



## Who has power to make legislative decisions?

2.7 Legislation will typically state who has the authority to exercise the powers conferred in the legislation. For example, the designated person may be the Minister, the Secretary, CDF or Service Chief. The legislation may assign power to an ‘authorised officer’, usually a person appointed by a particular person such as the Minister. Legislation may permit the designated person to delegate some or all of their power to another person – a ‘delegate’ (see below at subparagraph 2.13.f. for a summary on the effect of delegation).

## Mandatory or discretionary? Must or may?

2.8 Legislation may mandate that a particular decision is required if certain facts exist. This will be clear in the language used in the legislation, such as use of the word ‘must’. In such a case, the decision-maker will need to exercise judgement in determining whether the facts exist, but once satisfied that is the case, the decision-maker has no further discretion as to the outcome. For example, section 100 of the [Defence Act 1903](#) states:

*(1) If a prohibited substance test in respect of a person returns a positive test result, the relevant authority in relation to the person **must**:*

*(a) give the person written notice of the positive test result; and*

*(b) invite the person to give to the relevant authority a written statement of reasons as to:*

*(i) if the person is an officer—why the officer’s appointment should not be terminated; or*

*(ii) if the person is a defence member other than an officer—why the defence member should not be discharged; or*

*(iii) if the person is a defence civilian—why the arrangement under which the person is a defence civilian should not be terminated.*

2.9 That is, once the decision-maker is satisfied that the person has returned a positive test result, they have no discretion whether or not to issue a written notice – it **must** be issued.

2.10 In some cases, the underlying facts will be more subjective. For example, section 101 of the [Defence Act 1903](#) states that a member’s service **must** be terminated if the decision-maker is of the opinion that their service should be terminated. This formulation gives the decision-maker significant discretion because it relies on them forming an opinion, notwithstanding use of the word ‘must’.

2.11 Legislation may also give a decision-maker discretion about the outcome directly, requiring the decision-maker to consider the circumstances and exercise their judgement about what to do. This will often be indicated by use of the word ‘may’. For example, most of the decisions in the [Defence \(Personnel\) Regulations 2002](#) are of this nature: the Governor-General **may** appoint a person as an officer

(regulation 15), a Chief **may** promote an enlisted member (regulation 38), a Chief **may** post a member of the Chief's service (regulation 42). Certain APS Code of Conduct matters are also discretionary: An Agency Head **may** impose the following sanctions (section 15 of the [Public Service Act 1999](#)).

2.12 Most legislative decision-making powers of this nature are limited. For example, the legislation may specify that the discretion only arises if certain facts exist, or if certain processes have been followed. There may also be implied limitations, such as an implied obligation to provide procedural fairness, or to make decisions consistent with the objects of the legislation.

### **Making legislative decisions**

2.13 The following list outlines some general principles for making legislative decisions.

- a. **Decisions must be made by the decision-maker.** In exercising legislative decision-making power, only the decision-maker identified in the legislation (or their delegate) can make the decision. Advice and recommendations of others can be considered but the decision-maker must exercise their own discretion.
- b. **A superior officer cannot dictate the outcome.** A legislative decision should not be made simply to meet the wishes of the decision-maker's superior, chain of command or a Minister. The decision should be based on the particular circumstances of the matter, including relevant facts, evidence, legislative requirements and professional judgement of the decision-maker.
- c. **The role of policy.** A decision-maker should have regard to any Defence or government policy documents relating to the legislative decision. Policy might contain guidelines about how a decision should be made, procedures that should be followed or matters that should be taken into account when making the decision. However, policy should not be applied inflexibly. Decision-makers should have regard to the particular circumstances, and consider whether there is any reason to depart from the policy.
- d. **Decisions to provide a benefit should be interpreted beneficially.** As a general principle, legislation that provides a benefit to an individual, such as a Defence Determination, should be interpreted in a manner that is most beneficial to that individual. This does not mean that a decision-maker should ignore the wording of the Determination, but if there is some doubt, the decision-maker should favour the interpretation that benefits the affected person.
- e. **Procedural steps outlined in legislation must be followed.** Some legislation prescribes particular procedural steps to be taken before a decision can be made (see, for example, regulation 87 of the [Defence \(Personnel\) Regulations 2002](#)). A decision-maker should confirm that any procedural requirements have been met before making their decision. Failure to meet procedural steps may invalidate a decision.

- f. **The effect of delegating a decision-making power to another person.** Legislative power is normally delegated in writing, in an ‘Instrument of Delegation’ signed by the designated person. A delegation can be to a specific individual, a person in a specified position, or a particular group of people such as those with a particular security clearance or at a particular rank or classification. It is good practice for a delegate to check whether there is a current Instrument of Delegation before making a decision, as Defence will not be able to rely on or enforce a decision if it made by someone without power. A delegate exercises the power for themselves, meaning they must make their own decisions and sign the decisions in their own name. They are accountable for their decisions. A delegate cannot authorise someone else to make decisions on their behalf. They can, however, be assisted by staff members who provide decision briefs or undertake fact finding on their behalf. As with all decision-makers, a delegate should personally evaluate the facts and evidence relating to the decision.

## POWER TO MAKE DECISIONS – OTHER SOURCES OF POWER

2.14 Many decisions in Defence are made without specific legislative authority. Ordinary executive powers that allow a Department such as Defence to undertake its normal administrative functions, for example, include the common legal powers of ordinary people or organisations. Many of these ordinary powers are subject to additional regulation when exercised in a Defence context, such as the provisions of the [Public Governance, Performance and Accountability Act 2013](#). In Defence, decisions can also be made in exercise of command and employment powers.

### Command power

2.15 The power of ADF members to command other ADF members is derived from the authority to command given to the CDF and Service Chiefs in section 9 of the [Defence Act 1903](#), and is supported by the service offences of disobeying a lawful command and failing to comply with a general order. The command power provides significant authority in relation to directing the activities of subordinates. Its content is informed by the common law and historical considerations, and is subject to limits imposed in legislation. Directives issued by the CDF, Service Chiefs, or other commanders in the ADF are an exercise of the command power. Performance management of ADF members by ADF members is generally a command responsibility.

### Employment power

2.16 The power of APS supervisors (and ADF supervisors of APS employees) to direct APS employees is derived from the Secretary’s employment powers in section 20 of the [Public Service Act 1999](#), and is supported by the APS Code of Conduct requirement to comply with any lawful and reasonable direction. Employment powers provide significant authority in relation to directing the activities of APS employees. Their content is informed by common law and historical considerations, as well as more recent legislative developments (such as the [Fair Work Act 2009](#) and the [Public Service Act 1999](#)). Directives issued by the Secretary are an exercise of the Secretary’s power as an employer.

### **Command and employment based decision-making vs legislative decision-making**

2.17 Command and employment based decision-making differs from legislative decision-making in a number of important ways.

- a. Command and employment powers give decision-makers a significant amount of discretion. Legislative decision-making powers tend to be far more limited.
- b. More senior commanders or managers can direct subordinates in what decisions they should make under the command and employment powers, including through the use of directives or other policy documents. This is in direct contrast to legislative decisions, which should not be subject to binding direction.
- c. Decisions made under command or employment powers are far more likely than legislative decisions to be made intuitively, based on the decision-maker's experience, and often without even noticing that they are making a decision. Legislative decisions are more likely to involve a more formal analytic approach to decision-making.

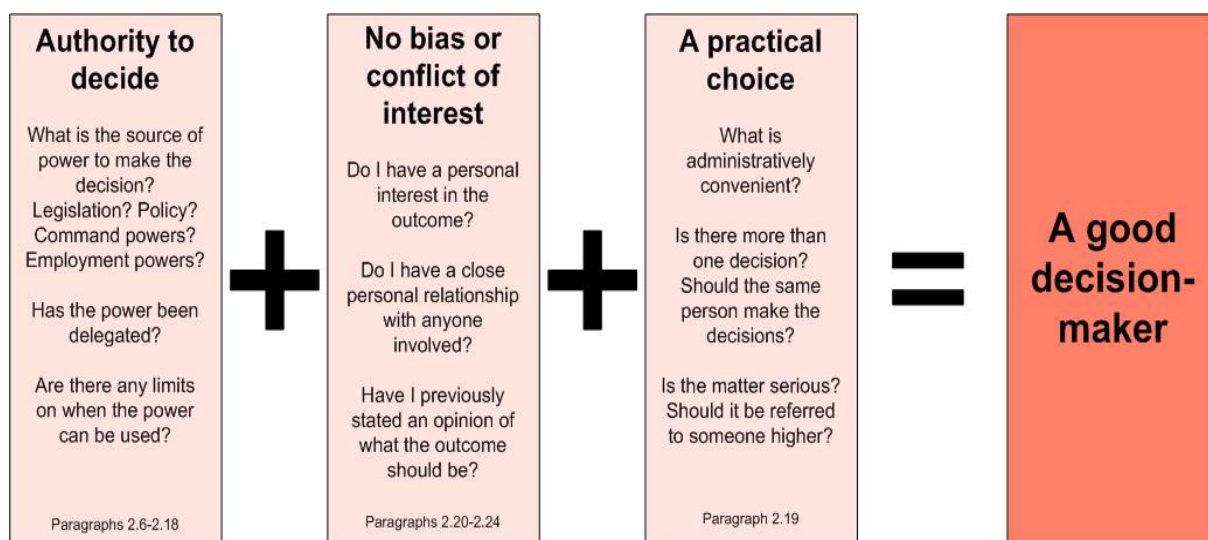
2.18 Legal officers can provide advice to decision-makers who have questions about the power to make particular decisions.

### **IDENTIFYING THE BEST DECISION-MAKER**

2.19 A decision-maker must have legal authority to make a decision. Defence policy also requires that certain matters be referred to specialist agencies within Defence for investigation and decision. There are a number of other factors which may also affect who the appropriate decision-maker is, illustrated in [Figure 2.1](#). These include:

- a. actual or potential bias or conflicts of interest;
- b. administrative issues including whether people, things or issues involved are within decision-maker's control, whether the matter involves other workplaces, and, for matters involving multiple decisions, greater efficiency in identifying a single decision-maker; and/or
- c. whether the risks or consequences of a decision warrant referring it to a person with higher rank/classification.

Figure 2.1: Choosing a decision-maker



## BIAS AND CONFLICT OF INTEREST

2.20 A decision-maker should not be biased. Bias is a tendency or inclination in relation to a person or subject matter that means the decision-maker does not bring an open mind to the question involved. For example, if a decision-maker has a very strong view about a particular person's integrity, it may be difficult to have an open mind in any decision involving assertions by that person. If a decision-maker could receive a personal benefit from a decision, they may have a tendency to prefer the outcome that benefits them personally. Prejudice against particular groups (for example due to sex, race, sexual preference etc) can lead to bias. We all have opinions about various subjects, and we all make assumptions about people. This only amounts to bias if the opinion or assumption is so strong that we are not open to evidence that suggests that the opinion or assumption is wrong.

2.21 It is usually very difficult to show that a decision-maker is actually biased. However, there should also be no 'apprehension of bias'. This is where a reasonable person could, in all the circumstances, think that the decision-maker has not brought an open mind to the decision. This might be because of the decision-maker's comments or actions before, during or after the decision-making process, or because of the decision-maker's personal interest in the decision outcome.

2.22 A person would not be considered biased in this sense simply because they are in an affected person's chain of command, or are responsible for supervising an affected person. Prior knowledge of or involvement in managing a matter does not indicate bias, unless the person has expressed a pre-conceived opinion about a decision that suggests that they would not be able to bring an open mind to the decision. Making a decision or taking a course of action that someone disagrees with does not mean that a person is biased, and a decision-maker is not required to withdraw from a decision-making process simply because someone has made an allegation of bias against them. More is required.

2.23 Scenarios that may give rise to concerns about bias include:

- a. The decision-maker has, or will have, a personal interest in the decision (that is, there is a conflict of interest). For example, if it is alleged that the decision-maker was personally involved in inappropriate behaviour, they should not be making decisions about whether the behaviour occurred and what should be done about it. Another example is a person with a personal stake in a company involved in a procurement tender process – that person should not decide who should be awarded the contract.
- b. The decision-maker is related to or has a close friendship with someone who is strongly involved in the matter (as opposed to a command or professional interest). Given the nature of Defence, decision-makers may have attended social functions with the subject of a decision – it is only if the decision-maker has an ongoing and close relationship that this would give cause for concern.
- c. A person senior to the decision-maker has exercised undue influence over the subordinate decision-maker with respect to a prospective decision. This can also be referred to as the principle that decision-makers should exercise their own discretion, and not be dictated to (see above at subparagraph 2.13.b.). Some care must be taken with this scenario. Decisions made as an exercise of command or employment powers are always subject to the directions of superior commanders or managers. Bias should not be assumed in every case. If this issue is of concern in a matter, it is recommended to consult a legal officer.
- d. The decision-maker has expressed a pre-conceived opinion about the decision. This does not mean that a person is precluded from making decisions about subjects about which they have expressed opinions. For example, a stated intention to ‘crack down’ on alcohol-related behaviour does not mean that a commander or manager cannot make decisions about alcohol-related incidents. It is only if the statement relates to the particular matter in question, or individuals involved in the matter, that this would be a cause for concern.
- e. The decision-maker is swayed by their own personal beliefs. A decision-maker’s personal views on particular religious, moral or similar considerations should not be allowed to affect a professional decision.

2.24 It is not always obvious whether an interest or relationship will amount to a conflict of interest. It is always best to be as transparent as possible. In cases where it is ambiguous whether there is a conflict of interest or a relevant personal relationship, declaring the possibility early in the decision-making process gives anyone who is concerned an opportunity to object, allowing for an informed decision on whether it is necessary to refer the matter to someone else.

## INTEGRATED WORKPLACES

2.25 Defence is an increasingly integrated environment, with ADF personnel working with APS employees and contractors. The situation is even more difficult in the ADF Cadet organisations. For managers and supervisors it can be difficult to be certain of the decision-making powers they have in relation to different people. The following may assist:

- a. [Defence \(Force\) Regulations 1952](#) (DFR), Part II addresses command of forces acting together. Regulation 4 provides CDF the power to make orders that members or parts of the Services are acting together (DFR4 Orders) and are entitled to exercise command in accordance with Part II of the DFR. Copies of DFR4 orders can be found at:  
<http://intranet.defence.gov.au/dsg/sites/LegalResources/comweb.asp?page=9408&Title=DFR4%20Orders;>
- b. [Defence Instruction \(General\) ADMIN 58-1](#) – *Authority in an Integrated Defence Organisation* has been jointly issued by the Secretary and CDF. It provides guidance on the obligations to follow directions and instructions that apply to different groups within Defence;
- c. [Australian Fleet General Orders](#) – Part 1, Command;
- d. [Defence Instruction \(Army\) ADMIN 3-2](#) – *Command, leadership and management of Army personnel within the non-Army Groups* outlines the command and management arrangements for Army personnel in non-Army Groups, including the powers of Army Area Representatives and Administrative Commanding Officers;
- e. [Australian Air Publication \(AAP\) 1001.1](#) – *Command and Control in the Royal Australian Air Force* and [AAP 1002.0.1](#) – *Command and Control of Air Operation*;
- f. For contractors, the powers available to a supervisor or manager will depend upon the exact terms and nature of the contract.

## CHAPTER 3

# FACT FINDING TO SUPPORT DECISIONS

### WHAT IS FACT FINDING?

3.1 Fact finding is the process of collecting information to support decision-making. It is incidental to decision-making. This chapter provides guidance for commanders and other decision-makers to help them meet their fact finding needs. One of the key principles to keep in mind is that the resources expended in fact finding should be proportionate to the seriousness and possible consequences of anticipated decisions.

3.2 Subject to any legislative or policy direction to the contrary, the fact finding principles in this chapter can be applied from unit-level issues through to serious or complex matters involving multiple Groups and Services. However, this chapter is not directed at fact finding undertaken by specialist areas in Defence, investigations under the [Defence Force Discipline Act 1982](#) (DFDA) or inquiries under the [Defence \(Inquiry\) Regulations 1985](#).

### WHEN IS FACT FINDING REQUIRED?

#### Fact finding is an ongoing process

3.3 Fact finding is ongoing throughout the whole decision-making process. Fact finding does not simply happen once, and a decision-maker should not assume that a single fact finding activity has provided enough information to make the decision. Fact finding is often an iterative process, where information gathered raises new questions, which are then answered through further fact finding.

#### Uncertainty and fact finding

3.4 Decisions must often be made with incomplete information. It will rarely be possible to be certain at the time a decision is made that the decision is 'right', or the best decision. Fact finding can reduce uncertainty in decision-making. However, fact finding also takes time and resources. The question of whether to engage in fact finding, and how much fact finding is enough, will always be about balancing the advantage of certainty with the disadvantage of spending time and resources.

3.5 A decision-maker should not be concerned that they do not have all possible information, but only that they have sufficient information to make a reasonable decision. An important point to remember is that there will always come a point when the value of additional information obtained through fact finding will not justify the time and resources spent obtaining it.

#### Considerations when deciding whether to undertake fact finding

3.6 With this in mind, a decision to undertake fact finding may involve answering any or all of the following questions:

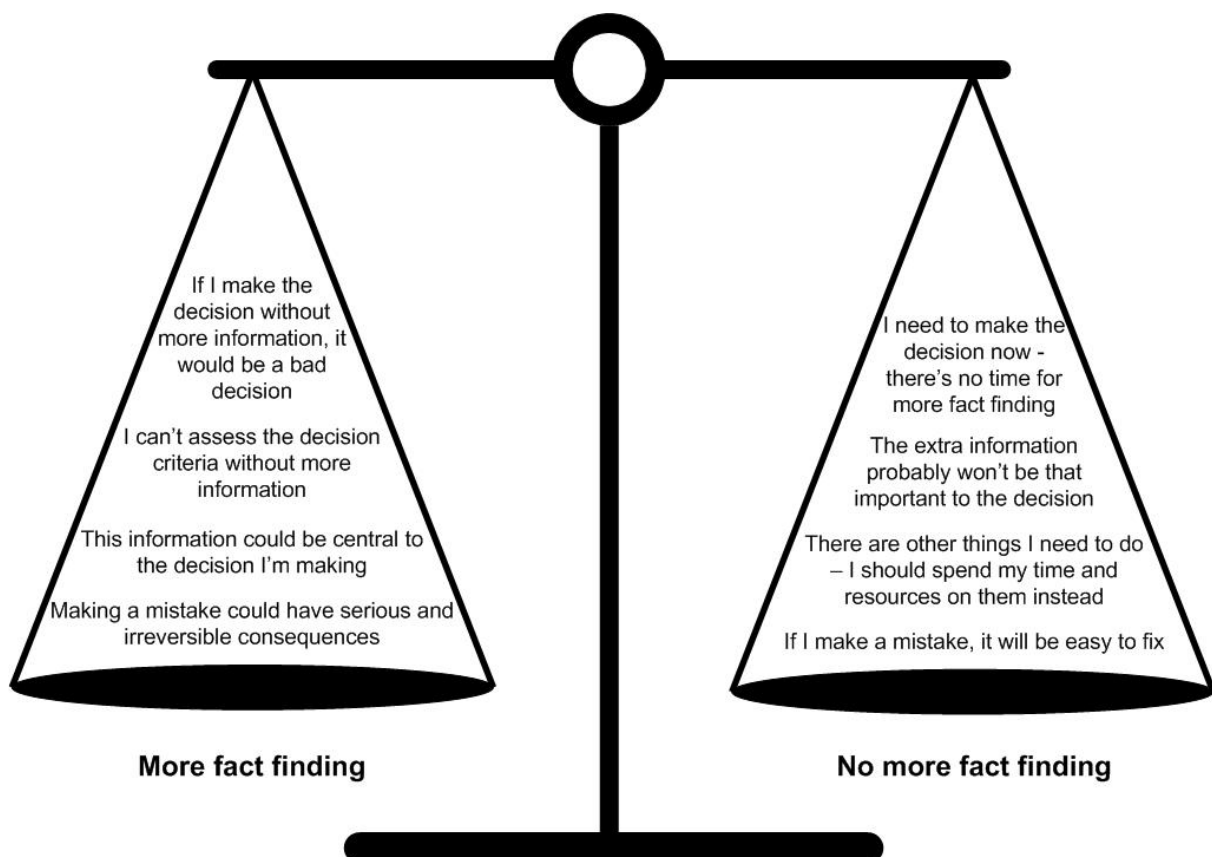
- a. What outcome am I pursuing?
- b. Is there any specific law or policy that requires me to undertake fact finding?



- c. What information do I already have?
- d. What are the criteria for making this decision?
- e. What additional information do I want in order to assess these criteria?
- f. How long will it take to get the information? How difficult will it be to obtain?
- g. How much time do I have?
- h. What resources do I have?
- i. How important is the information likely to be to the decision?
- j. What are the possible and likely consequences if I get this decision wrong?

3.7 If these questions are considered in a reasonable fashion, and records made to justify why fact finding is or is not undertaken, then there will be a sound basis to argue that the decision-maker has fulfilled any legal duty to inquire, and has made a reasonable decision. [Figure 3.1](#) illustrates the competing considerations when deciding whether to undertake more fact finding.

**Figure 3.1: Whether to do more fact finding – a balancing act**



### Decision-makers are responsible for fact finding

3.8 While fact finding is not always undertaken by a decision-maker personally, fact finding is the responsibility of the decision-maker. Decision-makers should drive the fact finding process by determining whether they have sufficient information or require more information before making a decision, determine who will collect any

additional information, and should decide when fact finding stops. Directing another person to undertake fact finding does not absolve a decision-maker of responsibility for the decision, and decision-makers should actively consider whether there is sufficient information to make a decision.

### **RELATIONSHIP WITH THE *DEFENCE FORCE DISCIPLINE ACT 1982***

3.9 Matters that involve misconduct by ADF members may be dealt with as service offences under the [DFDA](#). Decision-makers should be aware that there are particular legal requirements for investigating service offences, including providing cautions and giving witnesses a right to silence. Information gathered outside the DFDA investigation process will be of limited use when charging or trying a service offence. Further, involvement by a commanding officer or other DFDA summary authority in fact finding may have an effect on whether they are disqualified from trying a service offence under [section 108A](#) of the DFDA or for reasons of bias.

3.10 Accordingly, if the intent is to treat ADF misconduct as a service offence, care should be taken in fact finding outside of the DFDA investigation process.

3.11 Fact finding, as described in this chapter, may be useful when deciding whether a matter should be reported or referred to the ADF Investigative Service or Service Police (for example to meet the requirements of [Defence Instruction \(General\) ADMIN 45-2 – The reporting and management of notifiable incidents](#)). It may also be useful if dealing with a matter that involves both ADF and non-ADF personnel, or where there are issues to be addressed beyond an individual's misconduct.

3.12 Legal officers can provide advice to decision-makers who have questions about the relationship with the DFDA.

### **FACT FINDING OPTIONS**

3.13 Fact finding activities can vary enormously, from simply asking a question or looking something up, through to more formal inquiry processes. Fact finding activities might include:

- a. interviewing a witness;
- b. requesting documents from a witness;
- c. obtaining various Defence records, including PMKeyS records, corporate files, security gate records, internet usage records;
- d. considering Defence policy, legislative requirements, and other widely available documents;
- e. obtaining expert opinions;
- f. site visits; and/or
- g. examination of physical evidence.

3.14 Fact finding can be conducted with a great degree of flexibility, adapting the process to the particular circumstances, and the various risks that might be associated with the decisions in question.

3.15 Some examples of fact finding include:

- a. Following an incident, a commanding officer directs an officer in the unit to find out as much as possible about the incident, and to summarise the information in a brief of no more than two pages before the end of the day, with recommendations for any further action (including any further fact finding).
- b. On receiving an application for an allowance or benefit, a decision-maker checks the information provided in the application against information in the applicant's PMKeyS records.
- c. On receiving a complaint from a member of the public about an ADF member's behaviour in a public setting, a Service Chief directs an officer to find out the circumstances of the incident, identify if any action is warranted against the member, and to draft a response to the member of the public.
- d. After reporting a security incident, a security officer receives a request for additional information from the Defence Security Authority. In order to meet the request for information, the security officer interviews two people involved in the incident.
- e. An APS manager receives a complaint from a staff member, alleging that two other staff members (an ADF member and an APS employee) have engaged in unacceptable behaviour. The APS manager asks another APS employee from outside the team to interview the complainant, respondents, and any witnesses, and to make recommendations about whether the matter should be referred for APS Code of Conduct and ADF disciplinary or administrative action (as relevant), and about whether any other action should be taken within the team to prevent recurrence.

## WHO UNDERTAKES FACT FINDING?

### Decision-maker or fact finder?

3.16 Fact finding can be undertaken by a decision-maker personally. Fact finding may also be part of a person's ordinary duties, for example to inform the content of briefs or correspondence prepared for someone else's decision.

3.17 A decision-maker may also direct another person (a fact finder) to conduct fact finding for them. A decision-maker can give a fact finder considerable discretion about how they undertake the fact finding, or be quite specific about what the fact finder is to do, for example by directing them to ask a particular individual certain questions. Usually, the decision-maker will take an approach that is somewhere between these two extremes. The decision-maker can decide on both the appropriate fact finder and method of fact finding based on their understanding of the issues, their information requirements, their experience as a supervisor or commander, and their professional experience. Taking close control over fact finding does not mean that a decision-maker has already formed a view on what the

decision will be, or is not open to new information. Knowledge of a matter obtained through fact finding activities does not mean that a decision-maker cannot bring an open mind to subsequent decisions.

3.18 The role of the fact finder is to support decision-makers. This is true whether or not the decision-maker has directed the fact finding, or it is conducted in the ordinary course of duties. A fact finder is responsible to the decision-maker, and should follow directions given by the decision-maker. The material provided to the decision-maker should be relevant, balanced, factual, and free of personal bias or unsupported observations. A fact finder should also take care to refer to all information related to a recommendation, including information that might contradict the recommendation.

3.19 The decision-maker should decide what they want the fact finder to produce and in what time frame. Directing someone to undertake fact finding activities is similar to directing any staff member to undertake staff work. Responsibility for decisions made on the basis of information collected during fact finding remains with the decision-maker, not the fact finder. Accountability for decision-making does not shift to the fact finder.

3.20 A decision-maker can decide to cease fact finding at any time, for example because they consider they have sufficient information to make the decision.

### **Identifying an appropriate fact finder**

3.21 A number of considerations may be relevant in identifying an appropriate fact finder, including the nature of the matter, the experience or knowledge of the fact finder, the fact finder's availability, and the resources available.

3.22 As with the decision-maker, a fact finder should not have been personally involved in the matter being looked into. There should be no potential for allegations of actual or perceived bias against the fact finder, as this may affect the validity of any subsequent decisions that rely on the information collected. Prior knowledge of the issue or personnel involved does not disqualify someone from being a fact finder. The threshold for actual or apprehended bias is high and must have some rational basis. See above at paragraphs 2.20 to 2.24 for more information about bias.

## **FACT FINDING IN COMPLEX SITUATIONS**

3.23 Fact finding can be very complicated when there are multiple decisions to be made by a range of decision-makers, especially when the decision-makers are in different Groups and Services. It may be necessary to meet the information requirements of multiple decision-makers, but it may be possible to achieve this in an efficient and coordinated manner by assessing the issues strategically and planning for the needs of different decision-makers.

3.24 Some common examples of this type of scenario include:

- a. where an incident occurs in an integrated work environment, involving APS, ADF (often from more than one Service), and contractors;
- b. where affected ADF members have posted out of the unit where an incident occurred; and/or

- c. where the response to an incident could involve policy responses from multiple stakeholders, such as a safety incident that involves maintenance practices, contract management, procurement issues, local safety procedures, and the effect of a high operational tempo.

3.25 As far as possible, the various decision-makers and fact finders should coordinate their decision-making and fact finding processes, and share information. Different decision-makers will have different responsibilities, policy priorities, and information requirements. However, there are several very good reasons for decision-makers to share information and coordinate fact finding activities. For example, this type of coordination can reduce duplication of effort. As well as saving time and resources, another benefit is to reduce the emotional burden on witnesses (who might otherwise have been interviewed several times).

3.26 Privacy and security considerations may limit the extent to which information can be shared. In some cases, different time imperatives or different decision-making criteria will make coordination of fact finding impractical. However, where possible, the needs of other decision-makers should be considered and catered for when planning fact finding. Possible solutions are for someone senior to all (or most) of the relevant decision-makers to direct the fact finding, or for fact finding to be phased so that immediate information requirements are satisfied before systemic or deeper structural issues are considered.

3.27 Another issue that may increase the complexity of a situation, and the need to take a coordinated approach to fact finding, is where one or more person involved in the matter requires some form of specialist support. For example, where a witness has been the victim of sexual misconduct, it may be desirable to coordinate with the [Sexual Misconduct Prevention and Response Office](#) (SeMPRO) to arrange support for the witness in the course of the fact finding.

### **POWER TO OBTAIN INFORMATION**

3.28 Defence personnel engaged in fact finding are able to request any person to attend an interview, to ask any person any question, or to request any person to supply documents or other evidence, provided the question or evidence relates to or involves the work of Defence.

3.29 If the questions relate to a person's ordinary work for Defence, it would be expected that most people will be cooperative and help to resolve issues. In most cases, people will cooperate with fact finders even when there is no legal obligation to do so. People are far more likely to provide information to a fact finder if the fact finder:

- a. informs them of the importance of the request;
- b. explains the purpose of the fact finding for the unit or workplace;
- c. advises them of the support of the supervisor, manager or commander; and
- d. does not threaten or demand.

3.30 If a fact finder requires some way to compel people to cooperate with fact finding activities, the following may assist:

- a. An **ADF member** can be ordered by a superior officer (who may or may not be the relevant decision-maker or fact finder) to attend an interview, to answer questions, or to produce documents or other evidence (this might be phrased in terms of cooperating with a fact finder). ADF members who are supervised by an APS employee are also required to follow their reasonable directions. Discipline and/or administrative action may be taken against an ADF member who disobeys an order or direction of this nature. As a matter of policy, ADF members should not be ordered to answer a question if this could lead to the member being charged with an offence under civilian criminal law or the [DFDA](#) (the rule against self incrimination), or to answer a question where there is some other reasonable excuse for not doing so.
- b. An **APS employee** may be directed by someone who has authority to direct the employee (who may or may not be the relevant decision-maker or fact finder) to attend an interview, to answer questions or to produce documents or other evidence (this might be phrased in terms of cooperating with a fact finder). APS supervisors and line management, ADF supervisors of APS employees, and other people given authority by the Secretary have authority to direct APS employees. APS Code of Conduct action may be taken against an APS employee who does not comply. A direction to an APS employee must be lawful and reasonable, and does not include the power to direct an APS employee to answer a question that could lead to them being charged with an offence (the rule against self-incrimination), or where there is some other reasonable excuse for them not to do so.
- c. The terms of a contract with a **contractor** may require them to cooperate with fact finders, including attending interviews, answering questions or producing documents. The relevant contract manager will be able to advise on the terms of a particular contract.
- d. There is no general legal authority to compel other people to cooperate, including members of the public, family of ADF members, and ADF Cadets.

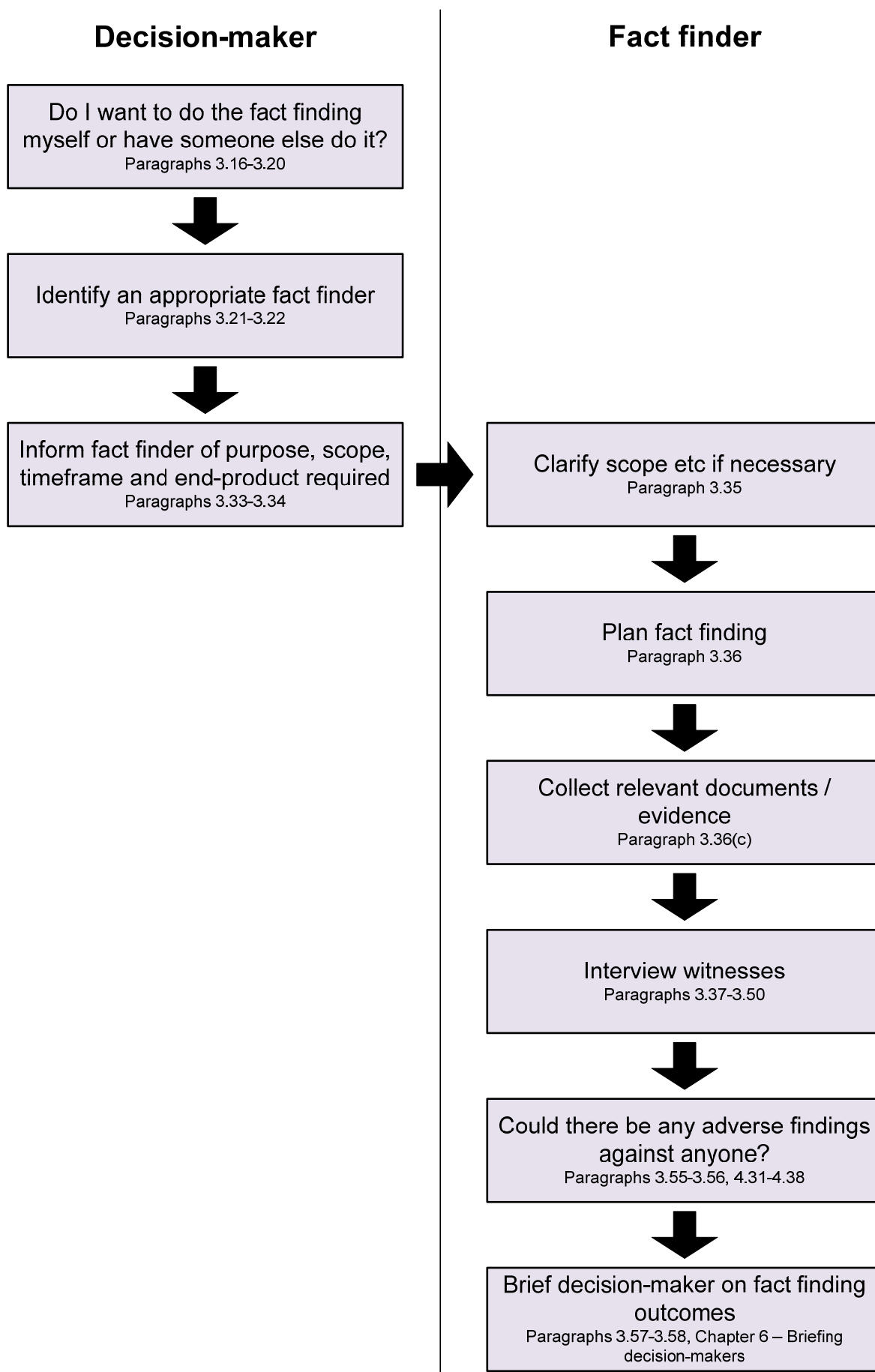
### LEGAL PROTECTIONS FOR FACT FINDERS

3.31 There is no general legislative protection for the activities of decision-makers and fact finders (although protection is available in some specific situations, such as when conducting an inquiry under the [Defence \(Inquiry\) Regulations 1985](#)). However, provided a decision-maker or fact finder acts reasonably and responsibly in all the circumstances, they are unlikely to incur civil or criminal liability. As a general rule, it will be sufficient if the fact finder's actions did not involve serious or wilful misconduct or culpable negligence. If a fact finder or decision-maker is undertaking work responsibilities and acting professionally, there is no need for legislated protections.

### MECHANICS OF FACT FINDING

3.32 This section provides guidance on how to conduct fact finding. While much of it is directed at the 'fact finder', it is equally applicable to fact finding conducted personally by a decision-maker. [Figure 3.2](#) illustrates a process for fact finding that involves a separate decision-maker and fact finder.

Figure 3.2: A process for fact finding



### Scope and purpose

3.33 When tasking a fact finder, or when undertaking fact finding personally, it is important to be clear about the scope and purpose of the fact finding. This can be done through a brief written statement (sometimes called Terms of Reference), which sets out the purpose of the fact finding and the bounds of the process. This degree of formality is not required, although it is good practice to record something of this nature in writing (such as in an email).

3.34 When tasking a fact finder, a decision-maker should be clear about:

- a. the reason for the fact finding;
- b. the scope of the fact finder's role;
- c. length of time available for fact finding;
- d. the end-product required (including the level of detail required);
- e. the decision-maker's tolerance for risk versus the need for certainty;
- f. whether findings and/or recommendations are to be made by the fact finder; and
- g. what to do if the unexpected occurs (such as witnesses refusing to cooperate or criminal or disciplinary offences coming to light).

3.35 If a fact finder is unclear about the scope and purpose of their task, they should seek guidance from the decision-maker (whether or not they were directly tasked or are undertaking fact finding as part of their ordinary duties).

### Planning fact finding tasks

3.36 The more complex a fact finding exercise becomes, the more important it is to develop a plan. The following matters should be considered when planning fact finding:

- a. **Identifying the issues.** Fact finders need to understand what they are required to look into. This allows the fact finder to obtain evidence relevant to the decision-maker. It also allows the fact finder and decision-maker to understand when to stop the fact finding process.
- b. **Identifying witnesses.** The fact finder should think about the witnesses they want to interview in relation to this matter. This will initially be through the information the fact finder has available to them. More witnesses may be identified during the process. Consideration should be given to the number, location and availability of witnesses as well as the manner in which any interviews will be conducted and recorded. Interviews may be face to face, over the phone, or by email. If the matter involves vulnerable witnesses, such as minors or victims of sexual misconduct, fact finders should consider whether any additional steps should be taken to support them throughout the fact finding process.



- c. **Identifying relevant documents and evidence.** The fact finder should consider the documents or things they need to obtain in relation to the matter and how this will be done. This will initially be through the information the fact finder has available to them as well as the general Service or Defence knowledge of the fact finder. Fact finders should consider where the documentation or evidence is kept, who can provide copies or access, and how long this will take. More documentation or evidence may be identified during the process. Any documentation or evidence collected should be retained.
- d. **Time.** Fact finders should also be aware of the time and resources available to them and plan their fact finding to meet these constraints. Matters which have serious consequences may need more time invested than matters with less serious consequences. The fact finder should exercise their judgement to decide priorities and resources, and assess the risks and returns. Fact finders should also factor in time for any procedural requirements if they are likely to make adverse findings against individuals (see chapter 4 below on procedural fairness). Time estimates should be reasonable and should anticipate delays. Most people would agree that fact finding often takes longer than we expect.
- e. **Assessing risks to complainants.** In rare cases, fact finding will be into a complaint where the complainant is at risk of reprisals against them because they have complained. In this situation, a fact finder will need to take care that they do not exacerbate this risk. One option would be to avoid identifying the complainant to the subject of the complaint, although this approach may limit the extent to which the complaint can be addressed, as it may make it difficult to obtain both sides of the story. Other options include ordering or directing the subject of the complaint not to approach or attempt to influence the complainant, or to remove one person from the immediate work environment while the matter is dealt with. This issue may also apply to other witnesses throughout the fact finding process.
- f. **Considering legal requirements.** The planning phase is a good opportunity to consider whether there are any legal requirements that may have an effect on how the fact finding progresses. These might include, for example, obligations under the [Privacy Act 1988](#), or obligations to provide procedural fairness. These are ongoing issues throughout the whole decision-making process, including fact finding. It is good practice to identify these issues at an early stage so that they can be dealt with effectively as the matter progresses.

## INTERVIEWING WITNESSES

3.37 A primary source of information and evidence relevant to fact finding is the recollection of people who have seen, heard or otherwise perceived events relevant to the incident (witnesses). As well as being able to provide information, they may have relevant expertise or may be able to authenticate a relevant document or thing. It is not necessary to conduct a formal interview for all witnesses. Depending on the nature of the fact finding task, simply holding informal conversations or sending out some email queries might be appropriate. For serious matters, especially where evidence is likely to be controversial, a more formal approach may be preferable.

3.38 A formal interview will typically involve: preparing for the interview, conducting the interview, recording the evidence, and assessing the witness's statement.

### **Preparing for the interview**

3.39 Preparing for an interview is essential to ensure that the interview is comprehensive, that all matters that should be commented on by this witness are addressed, and that the interview is as focused and concise as it can be. It may be useful to prepare a list of issues that need to be addressed with the witness, including reviewing the existing evidence and anticipating all issues that the witness can relevantly comment on. This list can be reviewed before, during, and at the end of the interview to ensure that relevant matters are appropriately dealt with. Pay attention to the witness's answers and be prepared to address new areas which come up during interview. In some cases, it may be necessary to interview a single witness more than once, although good preparation will reduce this possibility.

### **Conducting the interview**

3.40 At the outset of a formal interview, a witness should be advised of the purpose of the interview, and provided information about their obligations in terms of when they must answer questions, the consequences of not answering questions, and how the information collected in the interview might be used. Witnesses should not be ambushed – if the intent is to conduct a formal interview about a witness' own conduct, the witness should be advised beforehand, unless this could lead to tampering with evidence or other witnesses.

3.41 In some cases, a witness will request that a support person attend with them. This should usually be permitted, provided the support person is not a key witness in the matter, is not responsible for any part of the fact finding process, and provided the witness answers the questions themselves. The role of the support person is to provide a physical presence in support of the witness, and to observe the interview on behalf of the witness. Occasionally, the fact finder should proactively arrange a support person for the witness, especially where the interview or fact finding process more generally could traumatise or 're-victimise' a witness. In particular:

- a. If the witness is a minor and the interview will be about the minor's conduct, an incident where the minor might have been a victim, or any other incident that could cause emotional trauma to the minor, a parent or other adult who is acceptable to the minor should attend as a support person.
- b. If the witness is a possible victim of sexual misconduct, the fact finder should consider contacting the [SeMPRO](#) for advice on interacting with the witness, and to arrange appropriate support for the witness. This is especially important if the subject of the interview is related to the sexual misconduct. A witness's details should only be provided to SeMPRO if the witness consents.

3.42 The fact finder's aim is to obtain the witness's own account of relevant events, unaffected by other issues and influences (including from the fact finder or support person). For this reason, it is good to ask non-leading questions (eg What happened? Who was it?). Leading questions can inappropriately influence the witness's response (eg Was it CPL X?). Leading questions may, however, be useful

for efficiently recording information on matters that are not in issue or for clarifying points raised by the witness (eg Do you agree the time is now eleven am? Are you saying that this happened in the morning?). Evidence may be less reliable if it is given in response to leading questions only, rather than allowing the witness to give their own account.

3.43 Regardless of the questions asked, a fact finder should always be courteous and respectful, and not harass the witness.

3.44 At the end of the interview, ask the witness the following questions to ensure they have provided all the information they are aware of and that they accept the way in which the interview was conducted:

- a. Is there anything further you wish to say about the matter?
- b. Do you have any complaints about the way the interview has been conducted?

### **Recording a witness's evidence**

3.45 When recording a witness's statement, fact finders should capture as closely as possible that person's own account.

3.46 The nature of the record will depend on the circumstances of the person, the interview, and the evidence the witness provides. In many situations, simply taking notes throughout the interview will provide a sufficient record. However, the more controversial a witness's evidence is likely to be, the more important it is to have a more reliable record that records a witness's evidence in their own words rather than summarising or paraphrasing it.

3.47 Taped interviews provide the greatest accuracy and allow the fact finder to concentrate on the interview rather than trying to write down pertinent points. The taped record also provides protection for both the fact finder and witness after the interview, for example if there are allegations that that fact finder's conduct in the interview amounted to bullying, or if the witness disputes the fact finder's account of what was said. If an interview is to be taped, the fact finder should inform the witness and explain why at the outset of the interview. If the witness objects, the fact finder can obtain legal advice about whether they can tape the interview without consent (the rules on this differ between States and Territories). In most cases, if a witness objects to taping an interview, it would be simpler to use an alternative method to record the interview.

3.48 In situations where it is not possible or practical to tape an interview (for example because of the costs and delays associated with transcribing the tape), another option is to prepare a written statement or record of interview. A witness should review the written record after the interview and confirm that it reflects their statement by signing the document.

3.49 An interview record should include:

- a. time, date and location of the interview;
- b. brief details of the matter being looked into;

- c. details of everyone present (including the fact finder and any support person);
- d. details of the witness's name, PMKeys or employee number, other relevant identifying information; and
- e. the witness's consent to taping of the interview (if it is being taped).

3.50 Witness statements or other interview records should be handled with sensitivity, awareness of privacy concerns, and appropriately classified.

### **Assessing witness's evidence**

3.51 Most witnesses will tell the truth as they see it. However, fact finders should take into account the fallibility of human observation and memory. Even a truthful witness can provide an inaccurate statement in some matters. Matters which affect the reliability of the account include:

- a. how far away the witness was from the relevant incidents;
- b. physical conditions such as whether it was night time, what was the lighting like;
- c. the period of time over which the observation was made;
- d. how long ago the incidents occurred; and
- e. observation skills of the witness – different people will notice different things.

3.52 Occasionally, a witness will give an intentionally false account. Some witnesses will give accurate evidence about some things and false evidence about others. Even if the fact finder feels the witness is not being accurate or truthful the statement should be recorded for a comprehensive report, evidence of inconsistency, and to allow the decision-maker to assess the evidence themselves.

## **SUBJECT MATTER EXPERTS**

3.53 Subject matter experts can provide essential information, especially in matters that involve a technical issue or area. In some cases, a subject matter expert may be directed to undertake fact finding themselves, or to assist a fact finder. In other cases, they may be a witness in the fact finding.

3.54 Any subject matter expert should be selected after consideration of the person's standing, qualifications, capabilities and relevant experience. Information relating to these should be retained. If you ask a subject matter expert to provide an opinion, a copy of the information supplied to the subject matter expert should be retained. You will also need to consider if there is any possibility of an allegation of bias because of the use of that particular subject matter expert.

## PROCEDURAL FAIRNESS IN FACT FINDING

3.55 In most cases, it will not be necessary to provide procedural fairness during fact finding. However, if a fact finder intends to make adverse findings against an individual (including that a witness was not credible), procedural fairness may be required.

3.56 Chapter 4 below addresses procedural fairness requirements in decision-making (including during fact finding).

## REPORTING ON FACT FINDING OUTCOMES

3.57 Reporting fact finding outcomes to a decision-maker is no different from any other situation when briefing a decision-maker.

3.58 Chapter 6 below provides information about briefing decision-makers.

## FACT FINDING AND PRIVACY

3.59 Fact finding will often involve the collection, storage, use and disclosure of personal information about individuals. These matters are governed by the [Privacy Act 1988](#), and in particular the Australian Privacy Principles in Schedule 1 of that legislation. Decision-makers and fact finders should take particular care when dealing with sensitive personal information, such as health information.

3.60 Information about Defence's privacy obligations is available at the Defence [Privacy Knowledge site](#), and through the [Office of the Australian Information Commissioner](#).

3.61 An obligation that will arise frequently in the fact finding context is to notify individuals of certain matters when Defence collects their personal information (Australian Privacy Principle 5). One option is to provide witnesses with a privacy notice during interviews.

3.62 Decision-makers and fact finders who would like advice about their privacy obligations should contact [Complaint Resolution](#) or a legal officer.

## CHAPTER 4

# PROCEDURAL FAIRNESS

## WHAT IS PROCEDURAL FAIRNESS?

4.1 Procedural fairness is a legal principle that applies to some types of decision-making. It is frequently described in terms of two requirements:

- a. The bias rule, which is discussed above at paragraphs 2.20 to 2.24.
- b. The hearing rule, which is the subject of this chapter.

4.2 In essence, the hearing rule is that a person who is adversely affected by a decision is not surprised by the decision, or by the information that the decision-maker has relied on, and that they have an opportunity to be heard in relation to the matter before the decision is made.

4.3 While we talk about a hearing 'rule', as with most other aspects of decision-making, the application of this principle is extremely flexible. For most decisions, a decision-maker has considerable leeway in how they meet any procedural fairness obligation.

## WHAT IS THE PURPOSE OF PROCEDURAL FAIRNESS?

4.4 Procedural fairness exists to ensure a fair decision-making process, giving individuals an opportunity to know the case against them and answer it. It also serves an important purpose for decision-makers. Giving an individual an opportunity to present their case can be seen as a type of fact finding – ensuring that competing versions of events can be considered by the decision-maker. Decision-makers should look at procedural fairness as an opportunity to improve the reliability of their decisions, rather than as an onerous obligation.

## WHEN DO YOU NEED TO PROVIDE PROCEDURAL FAIRNESS?

### Legal requirements to provide procedural fairness

4.5 Procedural fairness is not legally required for all decisions. Unfortunately, there are no hard and fast rules for when it is legally required. The following may assist:

- a. Procedural fairness requirements only apply to decisions that could adversely affect an individual, as opposed to decisions that apply to a general class of people or decisions about policy content. Decisions about individuals that do not have an adverse effect do not require procedural fairness as a matter of law.
- b. Most legislative decisions that could adversely affect an individual are subject to procedural fairness requirements. This category includes, for example, ADF termination decisions under the [Defence Act 1903](#) and [Defence \(Personnel\) Regulations 2002](#), decisions on whether a member should receive a particular benefit under a section 58B determination, a decision to suspend an ADF member from duty under the [Defence Force Discipline Act 1982](#) (DFDA), and APS Code of Conduct decisions. However, some

legislative decisions do not require procedural fairness in order to be lawful, for example enlistment/appointment decisions, posting decisions and promotion decisions under the [Defence \(Personnel\) Regulations 2002](#).

- c. Many other decisions, including decisions made under command or employment powers, are unlikely to require procedural fairness as a matter of law. In particular, this includes urgent decisions with a genuine operational imperative, where a decision needs to be made quickly to ensure security, safety, efficiency or welfare of personnel. Decisions to remove an ADF member from an area of operations, for example, do not require procedural fairness in order to be lawful.
- d. It may be necessary to provide procedural fairness before making a statement or finding about an individual that reflects poorly on their reputation or credibility. This is most likely to occur in the context of fact finding, when a fact finder presents adverse findings to a decision-maker (see below at paragraphs 4.31 to 4.38 for more details about procedural fairness in fact finding).

### **Policy requirements to provide procedural fairness**

4.6 Many Defence documents include procedural fairness processes in relation to particular types of decision. Defence decision-makers should comply with these requirements.

### **Procedural fairness as good management practice**

4.7 Even if there is no legal or policy requirement to provide procedural fairness, decision-makers may choose to do so as a matter of good management practice. For example, a decision-maker may want to ensure that they have heard more than one side of a story before making decisions, or because the procedural fairness process can be a good way to manage expectations. Decision-makers may also want to ensure that they treat affected individuals fairly, which may be particularly relevant in the context of some command decisions that have a significantly adverse effect on an individual. The following are some questions that may be relevant when deciding whether to provide procedural fairness, even though there may be no legal or policy requirement to do so:

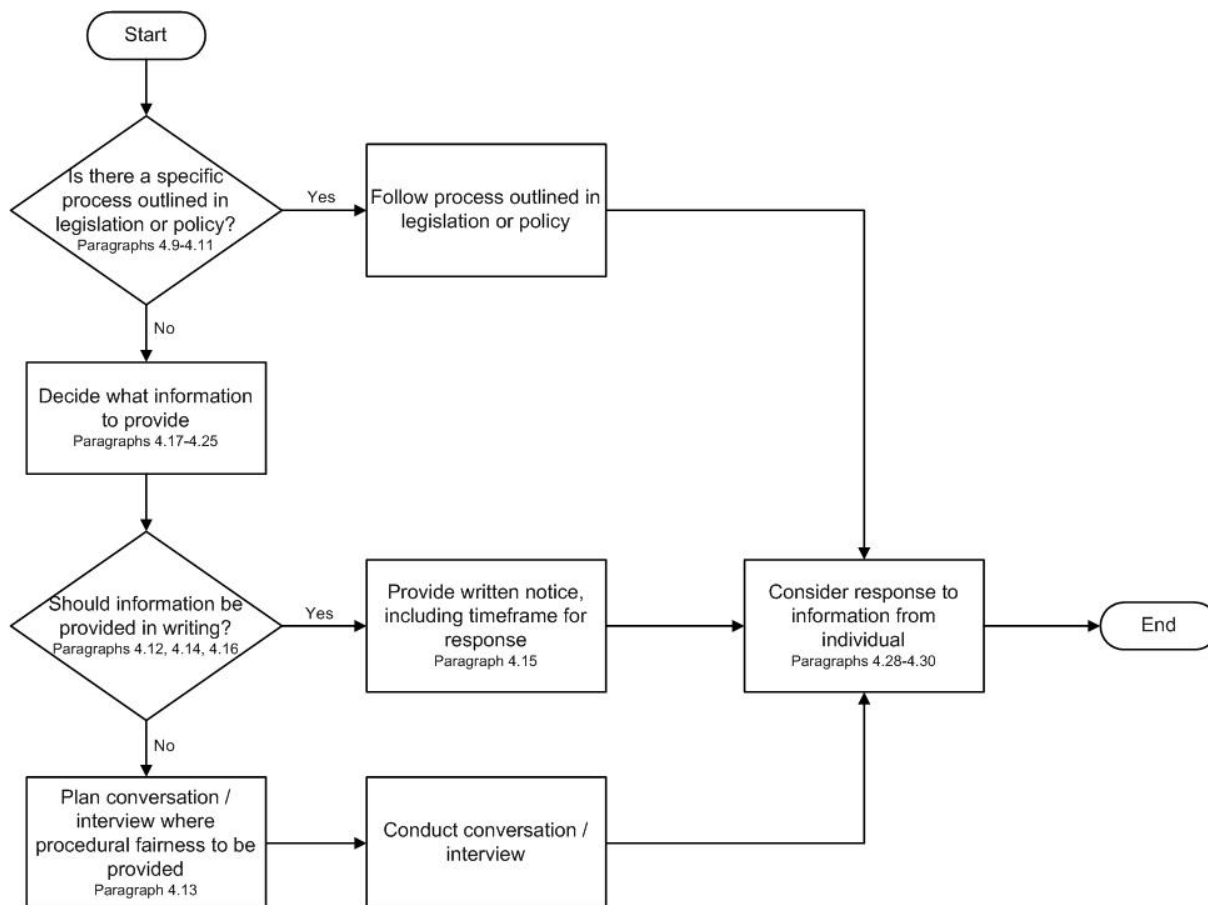
- a. Will this decision adversely affect an individual?
- b. How serious are any adverse consequences likely to be, for both the individual and the organisation?
- c. How urgent is the decision?
- d. How surprised is the individual likely to be by the decision?
- e. What process is reasonable for me to follow in the circumstances?
- f. Will there be a record of any adverse finding, including on a personnel record or similar?

- g. How long will any adverse effect last?
- h. Can the decision be easily reversed if I make a mistake?

## HOW TO PROVIDE PROCEDURAL FAIRNESS

4.8 Procedural fairness involves providing an individual with information, giving them an opportunity to comment on it, and considering any response before making a decision. [Figure 4.1](#) illustrates a process that can be followed to provide procedural fairness.

**Figure 4.1: A process for providing procedural fairness**



### Specific process identified in legislation or policy

4.9 Some legislation or policy dealing with a decision will outline a specific procedural fairness process that must be followed before making that decision. In these cases, the decision-maker should ensure that the process has been followed. Examples include the termination processes in regulations 85 and 87 of the [Defence \(Personnel\) Regulations 2002](#). Typically, a legislative or policy process will require that the individual be provided with a written notice outlining the proposed decision and any adverse information, and be given a specified period in which to comment.

4.10 In most cases, following the prescribed process will be sufficient to meet procedural obligations. Occasionally, however, additional information will become available after a person has responded to the written notice, or a decision-maker may want to take a different approach to what was outlined in the written notice (or even



make a different decision). If this occurs, it may be necessary to provide a further opportunity to comment before making a decision.

**Where there is no specific process in legislation or policy, the process should be adapted to the circumstances**

4.11 If there is no specific process outlined in legislation or policy, decision-makers may design a process adapted to the circumstance. The process followed should be reasonable in all the circumstances. Relevant factors may include how much information is being provided to the individual, how serious any possible adverse consequences are, whether the decision is urgent, and how much time it is reasonable to spend on the decision.

4.12 Procedural fairness can be provided orally, in the course of a conversation or interview. This approach can be much quicker than providing a written notice and waiting for a written response. Some situations where it might be preferable are:

- a. When engaging in performance management involving minor misconduct, procedural fairness for findings of misconduct can be provided in a counselling discussion;
- b. When considering adverse findings against an individual during fact finding, procedural fairness for those findings can be provided during an interview; or
- c. When making command decisions that need to be made quickly.

4.13 If providing procedural fairness in the course of a conversation or interview, it is important to ensure that an accurate record is kept of the information that was provided to the individual, and their response. A significant rank differential between the people involved in the interview may affect an individual's ability to reasonably respond to the information provided.

4.14 Alternatively, procedural fairness can be provided in writing. This approach may be preferable when dealing with a significant amount of information that may take the individual some time to consider and respond to. Sometimes, a written notice is simply more convenient to administer.

4.15 A written notice should identify a reasonable timeframe for the individual to respond. Factors to consider include: the complexity and seriousness of the matter and its consequences, the amount of material the member will need to consider and respond to, the demands of the work environment, the urgency of the proposed decision, and the time since any incident occurred. A request for additional time should be considered on its merits, balancing the various considerations.

4.16 The process followed may involve some combination of oral and written methods. For example, the issues may be raised orally during an interview, but an opportunity provided to make a written response within a specified period. Another example is to provide written notice ahead of an interview, foreshadowing the matters that will be raised during the interview for the individual to respond to.

## **WHAT INFORMATION SHOULD BE PROVIDED TO AN INDIVIDUAL?**

4.17 The information that should be provided to an individual will vary significantly, but the underlying principle is that the individual should not be surprised when the decision is made.

### **Decisions in response to an application**

4.18 If a decision is to be made in response to an application, such as when a person applies for a benefit, the applicant is usually responsible for providing all relevant information as part of the application. It can be assumed that the individual is familiar with the criteria for the decision, and with the information they have provided, so it will rarely be necessary to provide any information to the individual before making a decision, even if it is adverse. However, if the decision-maker considers any information that was not provided as part of the application, and which is adverse to the application, that information should be provided to the individual before making a decision and comment sought.

### **Decisions initiated by Defence**

4.19 Most adverse decisions are likely to be initiated by Defence, rather than by a person submitting an application. A common example is administrative sanctions against ADF members. In this situation, it should be assumed that the individual is not familiar with anything to do with the decision. The information that should be provided is:

- a. that a particular decision is, or decisions are, being considered;
- b. possible effects of the decision(s) under consideration;
- c. the identity of the proposed decision-maker;
- d. the authority to make the decision and any relevant Defence policy documents that are available on the DRN or otherwise (it will usually be sufficient to provide a reference to policy documents, unless the person does not have access to the DRN or other relevant service);
- e. the reason the decision/s are being considered; and
- f. any information that has been or will be considered when making the decision/s, and how that information is relevant to the decision under consideration.

### **Findings or statements adverse to credibility / reputation**

4.20 If a fact finder is considering making a finding or statement about an individual that is adverse to their reputation or credibility, it should be assumed that the individual is not familiar with anything to do with the proposed finding or statement. The information that should be provided to the individual is:

- a. that a particular finding is being considered;
- b. the context in which a finding will be made, including who is likely to have access to the finding;

- c. the reason the finding is being considered; and
- d. any information that has been or will be considered when making the finding, and how that information is relevant to the finding under consideration.

### **Form of information provided to individual**

4.21 The level of detail provided to an individual will vary. Individuals should have a genuine opportunity to engage with the issues and information, and provide a response.

4.22 One option is to provide copies of specific information under consideration, such as a copy of the member's conduct record or an extract of an interview transcript. If there is a significant volume of information, the individual should also be provided with a summary of the information and its relevance to the decision, in order to have a fair opportunity to respond.

4.23 It may not always be reasonable to provide copies directly (for example, if the materials contain a considerable amount of national security information). The information should be summarised to provide the individual with a fair opportunity to understand and respond to it, regardless of whether copies are provided directly.

### **Privacy/security/confidentiality considerations**

4.24 While individuals need to have a fair opportunity to comment on adverse information, this requirement should be balanced against the need to protect the privacy of other individuals, the confidentiality of some information, and the security of some information. If adverse information relevant to a decision is confidential for any reason, the individual should be provided with as much information as reasonably possible. Decision-makers should also be aware that they should generally not give as much weight to adverse information if the affected individual has not been given an opportunity to comment on it for this reason.

4.25 In general, the identity of a complainant or witness who has made an allegation against an individual or has provided evidence against an individual should be made known to that individual. However, if there is a risk that the individual might take reprisals against the complainant or witness, or otherwise take action to discourage the complainant or witness to provide evidence, then it may at times be appropriate to protect their identity.

### **WHO SHOULD PROVIDE PROCEDURAL FAIRNESS?**

4.26 Procedural fairness does not need to be provided personally by a decision-maker. A very common approach in legislation and policy is to outline a process where an 'initiating authority' provides a written notice, while a separate 'imposing authority' makes the decision. If there is no specific requirement in legislation or policy to separate these two roles, then the process can be adapted to the circumstances. The roles can be separated, or not, based on what is administratively convenient.

4.27 Even if the decision-maker does not provide procedural fairness personally, they should satisfy themselves that it has been provided before making the decision. A failure to provide procedural fairness will affect the validity of the final decision, so it is the decision-maker's responsibility to ensure that it has occurred if necessary.

## CONSIDERING THE INDIVIDUAL'S RESPONSE

4.28 Any response by the individual must be considered, whether provided in writing or in the course of a conversation or interview. The decision-maker should engage with the individual's response in a meaningful way – if any submission or information provided by the individual is to be rejected, there should be reasons. If a statement of reasons is prepared, it should include the reasons why any submission or information provided by the individual was rejected.

4.29 In some cases, an individual's response will raise further issues, which may warrant additional fact finding before making a decision.

4.30 If new facts or information come to light after an individual has provided a response, or if the decision-maker decides to take a different approach to the decision (or even make a completely different decision), it may be necessary to provide additional procedural fairness before making the decision. The key question is whether the individual will be surprised by the new information or approach taken in the decision.

## FACT FINDING AND PROCEDURAL FAIRNESS

4.31 As outlined above, an adverse finding against an individual's credibility or reputation may attract procedural fairness obligations, including in a fact finding process. However, if a fact finder does not make any adverse findings then there is no requirement to provide procedural fairness.

4.32 At the outset of any fact finding activity, the fact finder should consider whether they will be providing advice of findings, or simply providing advice as to options.

### Findings about conduct

4.33 Findings that an individual has engaged in particular conduct may affect their reputation. This type of finding is usually directly relevant to the matter under consideration. Examples include finding that an individual has engaged in unacceptable behaviour, or finding that an individual was responsible for causing an accident. A finding of this nature may attract procedural fairness obligations.

4.34 However, if the fact finder is simply providing advice as to options, rather than making firm findings that an individual has engaged in particular conduct, then it may not be necessary to provide procedural fairness in the course of the fact finding.

4.35 For example, advice that 'there is evidence that the individual engaged in particular conduct, and I recommend that you consider imposing a sanction against the individual' is not a finding, and does not attract procedural fairness obligations. Of course, if the decision-maker wishes to rely on the evidence obtained by the fact finder to make a decision adverse to the individual, they would have to provide procedural fairness in relation to that decision.

4.36 In this type of scenario, it is a matter for the decision-maker and fact finder whether the fact finder should make findings, and whether the fact finder should provide procedural fairness as part of the fact finding activity. If procedural fairness is provided during a fact finding activity, it does not mean that procedural fairness does

not need to be provided in relation to any subsequent decision. However, despite the possibility of duplication, providing procedural fairness during fact finding can result in more reliable fact finding outcomes.

### **Findings about credibility**

4.37 In some cases, a fact finder may consider that a witness has lied during the course of fact finding, and make a finding to that effect. A finding of adverse credibility of this nature relates to the individual's conduct during the fact finding. This type of finding is almost certain to attract procedural fairness obligations.

4.38 Fact finders should consider other reasons why a witness's evidence may be inconsistent with other evidence. In general, a finding that a person is mistaken does not require procedural fairness.

## **CONSEQUENCES OF NOT PROVIDING PROCEDURAL FAIRNESS**

4.39 Where there is a legal or policy obligation to provide procedural fairness, a failure to do so may mean that the decision is invalid.

4.40 If procedural fairness is only considered necessary as good management practice, a decision is unlikely to be invalid. However, the decision may be subject to criticism on review.

4.41 A failure to provide procedural fairness when making a decision can usually be corrected by revoking the decision, providing procedural fairness, and re-making the decision. If an individual seeks review of the decision, for example through the ADF redress of grievance process, procedural fairness can sometimes be provided through the review process, and the decision re-made in that context. We suggest consulting a legal officer if a decision appears to have been made without meeting any procedural fairness requirements.

4.42 A failure to provide procedural fairness during fact finding means that the affected finding should not be directly relied upon by a decision-maker. However, the decision-maker can rely on any information collected by a fact finder to make their own finding based on the evidence.

## CHAPTER 5

### ANALYSING INFORMATION

5.1 When making a decision, decision-makers analyse relevant information and material, deciding how much weight to give it, what information is most reliable, and whether there is any information that should not be relied on.

5.2 We do this quite intuitively all the time, but a more analytic approach is often required. This chapter provides some tools to assist in analysing information in this way. It is neither prescriptive nor comprehensive – personnel with specialist skills or training should feel free to use analytic tools from their own field of expertise.

#### STANDARD OF PROOF – HOW CERTAIN DO I NEED TO BE?

5.3 Decision-makers are rarely completely certain of all the facts before they make a decision. This is normal. When we analyse information relevant to a decision, we will rarely be certain of what information is reliable. A standard of proof is a legal concept that describes how certain a decision-maker needs to be.

5.4 In the context of decision-making in Defence, lawyers will often talk about the standard of proof being the ‘balance of probabilities’. This legal test essentially asks decision-makers to determine what probably happened, or what is probably true (as opposed to being certain of what happened). Lawyers will also talk about the ‘Briginshaw test’. This is essentially the principle that the more serious the consequences, the more certain of the facts the decision-maker should be.

5.5 The key question when applying these principles is whether, in all the circumstances, it would be **reasonable** to make the decision on the basis of the information available. Factors that may be relevant to this question include the possible consequences of the decision, the possible consequences of not making the decision, and how urgent the decision is.

#### COMMON TYPES OF INFORMATION

##### Witness statements

5.6 Witness statements from people who have witnessed an event, or are otherwise involved, can be persuasive, particularly if taken reasonably soon after any relevant events to be considered by the decision-maker. However, individuals giving statements may not be aware of all of the facts or may not have been asked all relevant questions.

##### Documentary evidence

5.7 Documentary evidence may include:

- a. written documents;
- b. data stored on computers;
- c. email and other electronic communications;
- d. recordings (audio & video);

- e. photographs; and/or
- f. text messages.

5.8 While documentary evidence can appear more reliable than witness statements, a decision-maker should be aware that documents are prepared by individuals and subject to human error. The reliability of documentary evidence can be affected by a number of factors including:

- a. the date of composition;
- b. the purpose or context of the document;
- c. the author of the document;
- d. the contents of the document;
- e. how the document was obtained;
- f. whether, when, and by whom the document has been amended or edited; and
- g. whether the author or any people referred to in a document are available to clarify the purpose or circumstances of the documentary evidence.

### **Physical evidence**

5.9 Objects or things that exist in the world (as opposed to being written down or in someone's memory) are physical evidence. Tyre tracks and a spent cartridge are examples of physical evidence. Physical evidence can be a very reliable source of information, although some care should be taken in drawing inferences from it. It is also important that an item of physical evidence can be reliably tracked to its source – for example, that a blown tyre is able to be reliably tracked to the vehicle involved in an accident.

### **Expert evidence**

5.10 Expert evidence is an opinion provided by a person who is an expert in a particular subject matter, usually due to particular qualifications or experience. Expert evidence is generally provided to assist in determining a particular issue. Typically, an expert would consider documents, physical evidence and other information provided to them, and provide an opinion about a particular issue on the basis of that information. Factors that may affect the reliability of expert evidence include the nature of an expert's specialist knowledge and whether the opinion goes beyond that area of expertise, and whether the expert has received all relevant information about a matter before providing their opinion. Weighing competing expert opinions against each other can be challenging. Expert evidence is simply one person's opinion, albeit from a position of particular expertise, so expert evidence can be accepted or not accepted, either in whole or in part.

## FACTORS TO CONSIDER WHEN MAKING A DECISION

### Relevance

5.11 If a particular fact or piece of information is relevant, then it should be considered. A decision-maker should always seek to obtain evidence that is relevant to the facts in issue and disregard information that is irrelevant. The first task in analysing the evidence will often be to determine whether evidence is relevant or irrelevant to the decision.

### Best evidence

5.12 The best evidence of any particular fact is an original source – that is, an eye witness rather than hearsay evidence, or an original document rather than a copy. Decision-makers need not wait until the best evidence is available, as it may never be, but should be aware of whether their decision is being made on the best evidence or not and, if not, whether this affects the reliability of the information.

### Hearsay

5.13 Hearsay evidence is a report by one person of what another person has said about the facts alleged. Hearsay evidence is generally regarded as less reliable than evidence given by someone who has first-hand knowledge of the facts alleged.

### Corroboration

5.14 Information is more able to be treated as reliable if it is corroborated by other evidence. So, if other evidence demonstrates substantial agreement among people or otherwise supports certain facts and circumstances, the decision-maker is likely to be justified in giving greater weight to those facts in making a decision.

## INFERENCE REASONING

5.15 Some facts can be logically inferred or deduced from other facts. In some cases, an inference will be fairly indisputable. For example, if a person was working overseas in 2011 and was working in Canberra in 2013, it could be inferred that they had travelled back to Australia some time between those dates. Other inferences are rebuttable. For example, racist material on an ADF member's Facebook page could lead to an inference that the ADF member has racist views. However, information about the author of the information and how much control the ADF member has over what goes on the Facebook page could be used to rebut this inference. If inferring facts in this way, decision-makers should be clear about what facts they have inferred from what information, and should be aware of how strong the inference is.

## ASSESSING CREDIBILITY

5.16 Decision-makers should use commonsense and experience to determine the credibility and reliability of witness statements and other evidence. When there are conflicting versions of a factual matter it does not necessarily follow that someone is lying: it is possible for people to perceive and remember events differently. The evidence may be unreliable for a number of reasons, including that the events might have occurred quickly, the person may have been unable to see clearly, or a long time may have passed since the incident.



5.17 Factors that may be relevant in determining whether a person's account is credible include:

- a. the person's opportunity for observation;
- b. supporting evidence such as statements of other individuals;
- c. any personal interest, involvement or motives;
- d. prior consistent or inconsistent statements;
- e. internal inconsistencies and ambiguities in their statements;
- f. circumstances affecting competency, such as illness or poor eyesight;
- g. the person's memory of the matter;
- h. the time since the event occurred; and
- i. the person's possible exposure to later discussion, information, or collusion.

5.18 A finding that a person is untruthful or not credible is potentially damaging to them and must be justified on the facts. This type of finding is also likely to attract procedural fairness obligations even in the absence of any decision to sanction the person (see above at paragraphs 4.37 to 4.38).

5.19 If a person has lied or been mistaken about one thing it does not necessarily follow that everything they say should be disbelieved. A decision-maker should consider why the person lied or was mistaken and whether the same reason might cause them to lie or be mistaken about something else. For example, a person might lie about certain things in order to avoid a loss of face but be truthful about other things that do not arouse the same motivations.

## CHAPTER 6

# BRIEFING DECISION-MAKERS

### THE IMPORTANCE OF HIGH QUALITY DECISION BRIEFS

6.1 When making a decision, it is common for decision-makers to rely on briefs prepared by their staff. Typically, a decision brief would contain a summary of the relevant facts, evidence, options, recommendations, and reasons for recommending a particular decision. We commonly think of written briefs to decision-makers, but briefs can also be given orally.

6.2 The purpose of a decision brief is to allow another person to make a decision. A person may prepare a brief at the direction of the decision-maker, or on their own initiative.

6.3 Decision-makers are likely to prefer different formats (including in some cases an oral brief). People preparing decision briefs should take guidance from the relevant decision-maker about the format they prefer. For example, a decision-maker may prefer a brief outlining the information collected during fact finding only, without recommendations.

6.4 As discussed at paragraphs 1.10–1.13, the amount of time spent on preparing a brief, which often relates to how much detail is in the brief, should be proportionate to the risks associated with the matter.

6.5 The contents of a decision brief are important for a number of reasons. Most importantly, a decision-maker will often rely solely on the information contained in a decision brief. Decision-makers need to be confident that the brief contains sufficient information for them to genuinely consider all the options and choose one. In addition, if a decision is challenged, the associated decision brief will typically be considered to help establish what the decision-maker considered when making the decision.

6.6 Decision-makers may adopt, without qualification, a recommendation in a decision brief. This means that any errors in the brief will potentially affect the final decision.

### MATTERS TO CONSIDER WHEN PREPARING A BRIEF

#### **Raise all relevant matters fairly**

6.7 Ensure that all relevant matters are raised and addressed in the decision brief, so that the decision-maker has a genuine opportunity to understand the various options available, and choose one. The decision-maker may not agree with the recommendation in the brief, but it is your job to provide an accurate and honest brief to the decision-maker, including information that may go against a recommendation. A comprehensive decision brief:

- a. outlines the nature of the decision to be made;
- b. references the source of power to make the decision;

- c. summarises the process followed to date, including any procedural fairness provided to individuals;
- d. summarises all relevant facts and evidence, including facts and evidence that go against a recommendation;
- e. highlights any significant gaps in evidence;
- f. summarises any policy or legislation which must be considered;
- g. makes recommendations as to what the decision/s should be; and
- h. gives reasons for the recommendations.

### **Procedural fairness**

6.8 While the decision-maker is responsible for ensuring that any procedural fairness obligations have been met (see above Chapter 4), procedural fairness will, in practice, often be provided before a brief is finalised. If the intent is that the decision-maker will not need to take any further steps to provide procedural fairness, then the brief should not include any new allegations or adverse information that the affected person has not had a chance to comment on. Be careful not to phrase something in a way which makes it appear to be a new allegation. If there is new information available, this should be brought to the decision-maker's attention, highlighting that the decision-maker may need to provide procedural fairness in relation to this prior to making a decision.

### **Accuracy**

6.9 The information given to a decision-maker should be accurate. This includes names, dates, details of the power the decision-maker is exercising, the issues raised, and the relevant evidence. Ensure references to policy are to the policy which is or was relevant to the decision and if relevant, whether it is the version of the policy that was in existence at the time of the matter. Many policies are updated regularly so ensure you check you have the right version. Inaccurate advice may result in a decision which is overturned and/or remade.

### **Advice on exercising discretion**

6.10 If the decision-maker is to exercise discretion, it is common for the brief to contain a recommendation on what the decision-maker should do, based on all the available information. A brief should also be clear that the decision-maker is required to exercise their own discretion in considering relevant matters, assessing evidence and making a decision – there should be no suggestion that the decision-maker does not have a choice.

### **Referring to evidence**

6.11 When referring to evidence ensure it is clearly and accurately identified. It must be clear exactly what the decision-maker is considering. The relevance of the evidence should be discussed in relation to the decision to be made. If it appears that there is not sufficient evidence to justify a decision, the brief should say this.

## **Recommendations**

6.12 A briefing paper should analyse the facts and evidence available. Any recommendations should flow logically from this analysis and the decision-maker should be able to understand why the recommendations were made.

## **Language used in brief**

6.13 Be objective in the language you use. Simply state the facts, evidence and other relevant matters. A brief should always refer to people in a respectful way, even if recommending that the decision-maker find that a person has lied. This includes statements such as “X’s statement is unbelievable and his actions show him to be untrustworthy” – this is overstated. Instead, a statement such as “there is evidence that X has not told the truth about ...”. Don’t try to be funny. Decisions affect people and they want a decision to be taken seriously. If a brief contains remarks or comments which are prejudicial to an individual, they will have a right to respond to these and they may be able to argue that the decision-maker is biased if a decision is made on material containing prejudicial comments.

## **Use of templates**

6.14 There is no issue with using templates for briefs, including standardised paragraphs associated with particular types of decision. However, there is always a danger that information in the template is inaccurate, or that you forget to change relevant details. Always check the accuracy and appropriateness of a template. Read through a completed brief and double check that the information accurately reflects the decision you are briefing about. Courts have found that if the decision-maker is given incorrect information because a template is used, this may invalidate their decision.

## CHAPTER 7

# STATEMENT OF REASONS

### WHAT IS A STATEMENT OF REASONS?

7.1 A decision is a choice between two or more alternative options. A statement of reasons is a written document informing people of the reasons why a particular option was chosen. A statement of reasons would typically explain what the decision is, provide information about the facts and evidence the decision-maker took into account, and explain why the particular decision was reached.

### ADVANTAGES OF WRITING A STATEMENT OF REASONS

- 7.2 A well written statement of reasons fulfils a number of functions, including:
- a. It can give an adversely affected person an opportunity to come to terms with a decision. If they are given a clear explanation of why the decision was reached, they can then decide if they are satisfied with it or if they want to seek review of the decision.
  - b. It can give other individuals involved in the matter an understanding of how it has been resolved.
  - c. It can help the decision-maker to think about the evidence and how they are justifying their decision. If there is no logical or rational reason for the decision, little or no evidence to support the decision, or policy and legal requirements have not been complied with, this will often become clear when writing a statement of reasons.
  - d. It can help the decision-maker justify their actions to their chain of command or manager, or to a person reviewing the decision.
  - e. It can improve the transparency and accountability of decision-making.
  - f. It can provide background and context to people implementing decisions, which makes it more likely that the actions taken accurately reflect the decision-maker's intent.

### WHEN IS A STATEMENT OF REASONS REQUIRED?

7.3 There is no general legal requirement to provide a statement of reasons for most Defence decisions. However, legislation or policy about a particular type of decision may require that a statement of reasons be provided.

7.4 It is good practice to provide reasons for a decision, if practicable, even when not strictly required. Written reasons would typically be provided to affected individuals at the time of decision for most administrative sanctions against both ADF members and APS employees.

7.5 If an individual affected by a decision (whether adverse or not) requests reasons, they should usually be provided.

7.6 As a general rule, a statement of reasons prepared at the time of the decision is a more reliable record of the reasons than a statement of reasons prepared after the fact. However, it is simply not practical to spend the time required to prepare written reasons for all decisions made in Defence. For example, there is no general requirement to provide written reasons for every posting decision made in Defence. However, if a person is unhappy with a posting decision they may request reasons, and reasons should usually be drafted and provided to the person if that occurs.

7.7 Occasionally, a person will ask for additional reasons for a decision, because they do not think that the statement of reasons provided adequately explains it. A decision-maker may provide additional detail about their reasons. However, in many cases, a person's dissatisfaction with reasons is actually because they disagree with them, rather than that they need more information to understand them. In this sort of situation, it is reasonable to indicate that no additional reasons will be provided.

### **LENGTH AND FORMAT OF A STATEMENT OF REASONS**

7.8 The length and format of a written statement of reasons will depend on the importance and complexity of the decision. As always, the time spent on drafting a statement of reasons should be proportionate to the significance of the decision. Generally speaking, the more serious the impact or the more complex the circumstances of the decision, the more detailed the statement of reasons will need to be to adequately explain it.

7.9 A statement of reasons should not be so long that it becomes impossible for a member to understand what has been decided and why. The language should be clear, unambiguous, and easily understood.

7.10 There is no set format for a statement of reasons. Often a Minute format will be appropriate, although email communication will be sufficient in many cases.

### **WHAT SHOULD BE INCLUDED IN A STATEMENT OF REASONS?**

7.11 A statement of reasons should deal with the key issues, facts, evidence, and reason for the decision. The language used should be simple and clear. A comprehensive statement of reasons could include:

#### **An accurate description of the decision**

7.12 State what the decision actually is. The individual should understand exactly what has been decided.

#### **The name and position of the decision-maker and the power under which they made the decision**

7.13 State the power used to make the decision. For example, a legislative decision should refer to the relevant legislation and pinpoint the relevant part of the legislation (for example a section number). Details of the various powers which support decision-making in Defence are addressed above in chapter 2.

## **A summary of the decision-making process**

7.14 This should give a summary of the relevant history of the matter. The summary should refer to any procedural fairness provided to an affected individual. Any fact finding should also be referred to. For example, a decision-maker might include details about who was consulted, and the purpose of doing so.

### **Identify key facts**

7.15 The key facts are the facts relevant to the decision. They are facts which are fundamental to why a decision was made a certain way. This is different from the evidence, which is the material which justifies the decision. The key facts will come from the evidence.

7.16 The key facts will depend on the type of decision. If it is a decision on the termination of an ADF member, the decision-maker may have to decide the suitability of the member to continue to serve. If the decision relates to an application for a benefit, the decision-maker may have to consider whether the member meets the criteria for that benefit.

### **Key issues for decision**

7.17 The key issues are the matters which are in dispute or need to be decided. These issues are the core of the statement of reasons, and it is in deciding these issues that a decision-maker will need to provide the most justification.

7.18 The decision-maker should clearly and accurately set out the issues raised.

### **The facts and evidence considered when deciding the key issues**

7.19 The evidence is the material on which the decision is based and can be justified.

7.20 Explain the evidence, the logical conclusions drawn from it, and whether the evidence was accepted or rejected and why. If one piece of evidence or one option was preferred over another conflicting item of evidence or option, explain why. The evidence does not have to be quoted at length but enough detail must be provided to allow the individual to identify what is referred to by the decision-maker.

7.21 Any policy or legislation considered should also be referred to.

### **An explanation of why the decision was made**

7.22 This explanation should flow logically from the facts and evidence, and explain why the decision-maker came to a particular conclusion. The reasons should show that the decision-maker has considered the key facts, the evidence provided, and the arguments raised.

7.23 If there are multiple options (as opposed to a yes or no decision), explain why the decision was to choose this option, rather than the others. For example, if a decision-maker has the option to terminate an ADF member or to reprimand them and the decision-maker chose to terminate, explain why (for example, due to the severity of the member's misconduct, repeated behaviour, etc).

### **Details of any review rights and timeframes which may apply**

7.24 Providing details of review rights, where relevant, is good practice, although it is not appropriate to refer to an individual's right to seek judicial review of a decision. In most cases, it is sufficient to refer to the relevant legislation or policy that explains the review right. For example:

*"If you have a complaint about the imposition of this censure, you have the right to seek review of my decision as a redress of grievance under Part 15 of the Defence Force Regulations 1952. The Complaints and Alternative Dispute Resolution Manual, chapter 6 – Redress of Grievance, outlines the process for applying for review, including timeframes."*

### **The date of the decision**

7.25 A decision should always be dated, and reflect when the decision is made. This is particularly important if there are time limits for appealing a decision, such as with Redress of Grievances.

## **DEALING WITH CLAIMS AND SUBMISSIONS BY AFFECTED INDIVIDUALS**

7.26 If a decision is about an individual, a statement of reasons should clearly and accurately set out any claims made by the individual, the relevant evidence, and the findings or reasons for accepting or rejecting those claims.

7.27 The claims do not need to be quoted at length but enough detail should be provided to demonstrate that the decision-maker has engaged with the claims, rather than simply dismissing them without giving them genuine consideration.

## **CONFIDENTIAL OR SENSITIVE INFORMATION**

7.28 If the decision-maker has considered confidential or sensitive information they should consider whether and how this should be referred to in a statement of reasons. In some cases, it will not be possible to provide complete reasons, as this would reveal confidential or sensitive information. Instead, as much information as possible should be provided, for example by way of summary or redacted documents. A common example of this type of situation is when providing reasons for a posting decision. A person may not have been given a desirable posting because someone else is better qualified. It would be inappropriate to provide information about the other person's qualifications, as this is personal information.



## CHAPTER 8

### COMMUNICATING DECISIONS

8.1 The decision-making process does not end with the decision. The decision has to be communicated to the relevant individuals or areas within Defence. For example, a decision to refuse an application for leave needs to be communicated to the person who applied for leave.

8.2 Communicating decisions to an individual, or debriefing, may involve a formal written notice, a personal interview, counselling or take some other form. The communication, whatever its form, should usually state clearly the decision made, the reasons for the decision, and provide advice about any avenues of review. One method of communicating a decision is to provide a copy of a statement of reasons.

8.3 Communicating decisions is particularly important if a decision has serious consequences for individuals. If a decision-maker fails to inform a person of their decision, that person may become aggrieved by the way in which the decision-making process has been handled rather than the actual decision. Waiting for decisions can be stressful and uncertain for people. Outcomes should be communicated to affected people quickly.

#### WHO SHOULD BE INFORMED OF A DECISION?

8.4 In some cases, it will be clear who should be debriefed about the outcome. If a decision relates to a complaint about a person's conduct, both the complainant and the respondent should be briefed.

8.5 Other individuals may also have an interest. For example, an incident and its aftermath, including any fact finding associated with it, may have had a significant emotional impact on a unit or team – in this sort of situation, it would be appropriate to debrief the unit or team as a whole about the outcome. If the matter relates to misconduct, this might take place as part of a broader discussion around expected behaviours or complaint avenues.

8.6 Occasionally, a matter will have generated considerable public interest. In this situation, a public communication of decision outcomes may be appropriate.

8.7 Decision outcomes should also be briefed to people who will be responsible for implementing them.

#### WHAT INFORMATION SHOULD NOT BE PROVIDED?

8.8 Decisions often involve sensitive and personal information of individuals. Some decisions also involve national security information, or other information that is confidential. Decision-makers will sometimes be legally constrained in what they can say by legislation, including the [Privacy Act 1988](#), or constrained through policy, such as the [Defence Security Manual](#) (DSM). For this reason, it may be appropriate to provide different people with different information, having regard to the purpose of a particular communication and legislative and policy restrictions. Decision-makers should exercise professional judgement in assessing what is appropriate to include in a debriefing. It can be helpful to think about how they would want their own personal information handled in that situation. Legal advice can also be sought.

8.9 A common question is how much information can be provided to a complainant, noting that any action taken against the respondent to the complaint could be considered 'personal information' under the [Privacy Act 1988](#) and that a decision will often involve consideration of the respondent's personal circumstances. Restricting the information provided to a complainant may sometimes be the reason they think that they have been treated unfairly, or that their complaint has not been taken seriously. For this reason, as a matter of policy, complainants should be provided with as much information as possible about the outcome. This will usually include providing information about any action taken against the respondent, and the reasons why action was or was not taken. However, any sensitive information about the respondent, such as health information or information about their family life, should not be provided to a complainant unless the respondent has consented.

8.10 Decision-makers should plan what they will include in any debriefing and keep notes of what information was provided.

### **INFORMING SUPERIORS AND CHAIN OF COMMAND**

8.11 In many cases, a decision-maker will need to inform their superiors or chain of command about a decision, the reasons for the decision, and any other related information. Sensitive and personal information should be handled appropriately, including through the use of appropriate security classifications and dissemination markings. Providing this information to a superior or the chain of command for legitimate personnel, security or other reasons is appropriate and provided for in Defence's privacy policy:

<http://www.defence.gov.au/DPG/ComplaintResolution/privacy.asp>

## CHAPTER 9

### DOCUMENTING DECISIONS

9.1 It is important to make complete and accurate records of a decision-making process. This includes making records of any fact finding, and all information collected during fact finding. It also includes any notes by the decision-maker, relating to, for example, the reasons why a particular process was followed. Comprehensive records assist if a decision is challenged, and they also improve the transparency and accountability of decision-making generally.

9.2 All documentation associated with decision-making should be classified, stored and handled in accordance with the [Defence Security Manual](#) (DSM) and the [Records Management Policy Manual](#) (RECMAN).

## CHAPTER 10

### REVIEWING DECISIONS

10.1 Most decisions in Defence can be reviewed. Reviewing a decision may occur because an individual has sought review, either informally or through a legislative review / complaint scheme. Decisions may also be reviewed on the reviewer's own motion.

10.2 Review may occur internally to Defence, or externally – where agencies or courts outside of Defence review Defence decisions.

10.3 There are multiple review options for people dissatisfied with a decision. The options outlined below are some of the most common.

#### INTERNAL REVIEW OPTIONS ESTABLISHED IN LEGISLATION

##### ADF redress of grievance

10.4 Adverse decisions affecting individual ADF members are subject to review under the ADF redress of grievance (ROG) system, established under Part 15 of the [Defence Force Regulations 1952](#).

10.5 The ROG process is the formal process through which Defence members can raise grievances that relate to their service, such as career related decisions (including termination of service), and entitlements decisions. Generally, the ROG system is a system of last resort – we would ordinarily expect members to raise issues informally through their chain of command, and seek informal review, before submitting an application for a ROG.

10.6 Decisions are frequently re-made, revoked or varied in the ROG process.

10.7 Chapter 6 of the [Complaints and Alternative Resolution Manual](#) provides policy details on the ROG process.

##### APS review of actions (ROA)

10.8 Adverse decisions affecting APS employees are subject to review under the APS review of actions (ROA) system, established under section 33 of the [Public Service Act 1999](#) and Part 5 of the [Public Service Regulations 1999](#).

10.9 The ROA process enables APS employees who are not members of the Senior Executive Service, to seek redress when they believe that an action taken in relation to their employment by the Agency Head of an APS Agency, another APS employee or the Australian Public Service Commissioner under section 41B of the [Public Service Act 1999](#), was unfair or unreasonable. This includes pay and condition decisions.

10.10 The ROA process applies to APS employees in all government agencies, not just Defence. It also includes an external review option through the Merit Protection Commissioner – some decisions, such as Code of Conduct decisions, are not subject to internal review under this process.

10.11 Decisions are frequently re-made, revoked or varied in the ROA process.

10.12 Chapter 5 of the [Complaints and Alternative Resolution Manual](#) provides policy detail about the ROA process.

### EXTERNAL REVIEW OPTIONS ESTABLISHED IN LEGISLATION

10.13 External review options include:

- a. [Defence Force Ombudsman](#) (for ADF members);
- b. [Merit Protection Commissioner](#) (for APS employees);
- c. [Inspector General ADF](#) (for military justice matters);
- d. [Australian Human Rights Commission](#) (for discrimination matters); and
- e. [Privacy Commissioner](#) (for privacy matters).

10.14 In most cases, the external review does not change the decision. Instead, it provides a recommendation to Defence. A recommendation might include remaking the decision, changing a policy, paying compensation, or giving an apology.

### JUDICIAL REVIEW

10.15 Many decisions are subject to judicial review for legal errors. Judicial review of Defence decisions can be undertaken by the Federal Circuit Court, the Federal Court, and the High Court.

10.16 Judicial review does not look at the merits of the decision but whether the decision or decision-making process was affected by legal error.

### WHAT DOES IT MEAN IF MY DECISION IS OVERTURNED?

10.17 If your decision was overturned it may be for a number of reasons, including:

- a. new information has come to light which has resulted in a new decision;
- b. the decision-making process you followed was incorrect in some way, such as a failure to provide procedural fairness or taking into account an irrelevant consideration; or
- c. the reviewer simply disagrees with the decision you reached.

10.18 All decision-makers are likely, at some point, to have a decision overturned. If this occurs it is important to find out the reason. If it was a fault in your decision-making process, you should find out and fix the problem in future decisions.

10.19 If your decisions are regularly being overturned, you may need to seek additional training.

## CHAPTER 11

### REVOKING, RE-MAKING AND VARYING DECISIONS

11.1 Occasionally, it may be necessary or desirable to revoke, re-make or vary a decision. Examples where this might occur include:

- a. the required process (including procedural fairness requirements) has not been followed;
- b. the decision-maker did not have the authority to make the decision;
- c. a person reviewing the decision (whether on application or otherwise) thinks that the decision should have a different outcome;
- d. the decision-maker changes their mind;
- e. additional information relevant to the decision becomes available; or
- f. the effect of the decision needs to be suspended while it is reviewed.

#### WHAT IS MEANT BY REVOKING, RE-MAKING AND VARYING DECISIONS?

11.2 Revoking a decision means that the decision has no effect – it is as if no decision has been made. A decision can be revoked retrospectively, which means that it is as if no decision had ever been made (see below at paragraphs 11.10 to 11.12). A decision can also be revoked prospectively only, which means that the decision would have effect between the date of the original decision and the date it is revoked.

11.3 Re-making a decision means looking at the options again and making a new decision. The original decision is effectively revoked from the date of the new decision. An example is where a person has been granted a benefit (the original decision), but on the basis of new information, the decision is re-made so that they stop receiving the benefit.

11.4 Varying a decision means changing some aspect of the original decision, but otherwise leaving the decision to stand. A common example might be to vary the date when the decision has effect.

11.5 While most decisions can be revoked, re-made or varied, there are limits on doing this in relation to some legislative decisions. While this chapter provides some guidance, if in doubt, consult a legal officer.

#### WHO SHOULD REVOKE, RE-MAKE OR VARY A DECISION?

11.6 Legislative decisions can only be changed by a person who has power under the legislation to make the decision, as outlined above at 2.7. In many cases, this means that a person reviewing a legislative decision can only change the decision if they are also a delegate for that particular decision. As a matter of policy, decisions should usually only be changed by the original decision-maker, a person who has taken over the original decision-maker's functions, or a person with a higher rank or classification than the original decision-maker.

11.7 For minor variations, such as changing the date a decision will take effect, it may be appropriate for the person responsible for implementing the decision to make the variation, for administrative convenience.

### **JURISDICTIONAL ERROR**

11.8 A jurisdictional error is a particular type of legal error, which means that the particular decision is 'no decision at all' as a matter of law. That is, the decision is effectively revoked, with retrospective effect. The types of legal errors that might be a jurisdictional error include failure to provide procedural fairness, the decision being made by a person without power, and failure to apply legislative criteria correctly. A decision should not be revoked or re-made on the basis of jurisdictional error unless a legal officer has been consulted.

### **DECISIONS THAT CANNOT BE CHANGED**

11.9 Some legislative decisions cannot be changed once they have been made. This is because the power to make the decision only exists once – and once the power has been exercised it no longer exists. This is most common for legislative decisions made in response to an application, as the power only exists once the application has been made. There are very few decisions in Defence that are limited in this way. Most decisions can be made 'from time to time' (section 33 of the [Acts Interpretation Act 1901](#)), which means that they can be revoked, re-made or varied as necessary.

### **RETROSPECTIVE DECISION-MAKING**

11.10 A retrospective decision is one that has effect before the decision is made, for example by backdating the decision. A common example is to make a decision to grant a benefit or allowance retrospective, so that the person is paid additional money. As a general rule, decisions should not be made retrospectively. The exception is if legislation or policy about the decision specifically allows it. For example, some legislation about benefits and allowances allows for the decision to have effect from the date the person applied for the benefit, rather than from the date of decision. This type of scenario alleviates the disadvantage that can be suffered if there is a delay in decision-making.

11.11 Similarly, when revoking, re-making or varying a decision, the change should not be retrospective. This is particularly important if the change will adversely affect an individual. The exceptions to this general principles are in cases of jurisdictional error (see above at paragraph 11.8) or if the decision relates to a benefit and the person who will be adversely affected either obtained the benefit through fraud or similar, or failed to update Defence about a change in their personal circumstances as required.

11.12 The rule against retrospectivity should not be applied too strictly if this would create an unfair result for an individual.

## **CHANGING DECISIONS AND PROCEDURAL FAIRNESS**

11.13 If the effect of revoking, re-making or varying a decision will be adverse to an individual, they should be provided with procedural fairness. People should be allowed to rely on decisions as they are made, and changing a decision in this way can cause surprise. Accordingly, they should be able to comment on the proposed change before it occurs.

## **PRACTICAL REASONS NOT TO CHANGE A DECISION**

11.14 Even though it is usually permissible to change a decision, there are sound policy reasons why decisions should not be changed too frequently, without good reason. Affected individuals and others should be able to rely on a decision, rather than be subject to the changing views of a decision-maker, or the changing approaches of different decision-makers to the same question. For decisions relating to individuals, re-making the decision over and over could, in some cases, be seen as an abuse of power. If an individual has applied for review of a decision, the purpose of the review is to decide whether the decision should be changed.

11.15 As well as creating certainty for individuals, a reluctance to change decisions also improves stability for Defence as an organisation, as changing decisions can undermine command authority. Changing decisions arbitrarily also reduces transparency of decision-making, and could be harmful to Defence's reputation.

11.16 When deciding whether a decision should be changed, it is important to weigh up the competing advantages and disadvantages of changing the decision.



## CHAPTER 12

# DIFFICULT SITUATIONS FOR DECISION-MAKERS

## THE EFFECT OF EXTERNAL PRESSURE

12.1 A central theme of this guide has been for decision-makers to take control of the decision-making process. Instead of following a prescriptive and legalistic process, decision-makers can adapt processes to the circumstances, balancing the various risks associated with the decision. However, in some cases, decision-makers will be subject to pressure from other people. Decision-makers can feel like they are obliged to follow a process dictated by someone else, and lose control of their own decision. The goal of this chapter is to describe some of the more common examples of this type of pressure, and how decision-makers might respond.

## PRESSURE FROM AFFECTED INDIVIDUALS

12.2 People who may be affected by a decision (or their lawyer) are likely to be concerned, and may put pressure on a decision-maker to follow a particular process (or, indeed, to decide a particular way). Occasionally, there will be a deliberate attempt to delay or otherwise de-rail a decision-making process. By and large, however, this effect is inadvertent.

12.3 Decision-makers should respond reasonably to requests from affected people, but they still control the decision-making process. Decision-makers can refuse requests, and can proceed to make decisions even when an affected person has objected to the process.

12.4 Some common examples of this type of pressure are:

- a. Requests from an affected person for more time to respond to a procedural fairness notice.
- b. Requests for more information or detail before responding to a procedural fairness notice.
- c. Non-attendance at interviews for health reasons.
- d. Refusal to attend an interview until their lawyer is available.
- e. Responses to procedural fairness notices or in an interview entirely unrelated to the issues, including making new complaints.
- f. Repeating the same requests over and over.
- g. Making the same requests through different complaint processes, which can be seen as a type of 'forum shopping'.
- h. Alleging that the decision-maker is biased, or that some part of the process followed to date is tainted.

12.5 These may all be legitimate actions by an affected person. They may have good reasons to require more time, or why they cannot attend an interview, or why they have made the same complaint through several avenues. The way a decision-maker addresses these types of matters is an example of balancing individual and organisational requirements (see above at paragraphs 1.16–1.17).

### **Requests for more time**

12.6 If a decision-maker receives a request for additional time to provide information (including in response to a procedural fairness notice), they have two options. They can either agree to the additional time requested (or some alternative period) and delay making the decision, or refuse the additional time and risk that they may need to make the decision without the relevant information. Relevant factors when making this choice include:

- a. Whether sufficient time was provided in the first place.
- b. Whether the person has made reasonable attempts to meet the required time frame.
- c. Whether there are unusual circumstances that warrant additional time being provided.
- d. The effect that the decision might have on the person.
- e. How much time has already been spent on the matter.
- f. The urgency of the decision.
- g. The importance of the requested information to the decision.

12.7 In a situation where an affected person requests additional time to provide information, the test is one of reasonableness – in all the circumstances, is it reasonable to make a decision without giving the person more time?

### **Requests for more information**

12.8 It is quite common for an affected person to say that they need more information before they can reasonably respond to a procedural fairness notice. Complying with this type of request will usually cause delays. In some cases, a request for additional information will be because the person does not agree with what has been given to them – not because they need more detail to understand it (similar to requests for additional reasons for a decision, see above at paragraph 7.7).

12.9 When faced with this type of request, a decision-maker should consider whether the person has been provided with sufficient information to respond and, if so, may refuse the request for additional information.

### **Non-attendance at interviews**

12.10 ADF members and APS employees can be ordered or directed to attend interviews (see above at paragraph 3.26). This does not extend, however, to situations where the person is incapable of attending, including due to health reasons. A decision-maker has a number of options in this situation. They can proceed to a decision without interviewing the person, they can wait until the person becomes available for an interview, or they can take steps to conduct the interview anyway. Relevant factors include:

- a. How essential is the interview likely to be to the decision?
- b. How long is the person likely to need to recover?
- c. How urgent is the decision?
- d. Is there any way to conduct the interview consistent with the person's health requirements, such as changing the location of the interview or conducting it in a less adversarial style?
- e. Can the person be ordered / directed to attend a medical appointment for assessment?

12.11 Affected people may also be reluctant to attend interviews without a particular support person, including sometimes a lawyer. This can also cause delays. While reasonable attempts should be made to accommodate this sort of request, it is not necessary to postpone an interview for weeks or months because a person's lawyer is unavailable.

### **Raising unrelated or irrelevant issues**

12.12 A typical example of this is where an affected person is responding to an allegation of misconduct against them, and they make a complaint against the person who made the allegation (or against another person). Sometimes, this complaint will be the entirety of their response to the allegation.

12.13 This type of situation can be extremely difficult for a decision-maker – the new complaint is not necessarily relevant to the decision to be made about the person's misconduct but all complaints in Defence should be dealt with.

12.14 One option is to separate out the new complaint from the decision in question – that is, proceed to make the decision on the person's misconduct, dealing with the new complaints separately. Alternatively, the decision-maker can delay the decision until the new complaints are considered. This might be appropriate if the complaints provide some explanation or mitigation for the misconduct.

12.15 Decision-makers should be careful with new complaints raised in this way, because they will have often have been dealt with through other processes. People may raise these issues because they are not satisfied with the outcome they obtained through those processes.

### **Repeat requests and use of multiple complaint avenues**

12.16 People who are unhappy with the way a request or a complaint has been dealt with will often start making the same requests over and over again, including through different complaint avenues. It is not necessary to keep responding to the same requests.

12.17 People are entitled to raise matters through different complaint avenues. Ideally, however, Defence will be providing them with a consistent response. To that end, there needs to be a degree of coordination between different parts of the organisation. There also needs to be clear records of what responses have been provided in the past, so that there is consistency in the event of staff turnover.

### **Allegations of bias or flawed process**

12.18 It is not necessary to withdraw from a decision-making process simply because someone has claimed bias or a conflict of interest. Bias is discussed extensively above at paragraphs 2.20–2.24.

12.19 Similarly, it is not necessary to change the decision-making process just because someone has complained about it. As with all complaints or requests from affected people, decision-makers should consider what is a reasonable response in all the circumstances.

## **PRESSURE FROM CHAIN OF COMMAND OR MANAGERS**

12.20 Another common form of pressure that can cause difficulties for decision-makers is pressure from commanders or managers to make a particular decision, or to follow a certain process. If a decision is a legislative decision, it is important that the decision-maker is not subject to undue influence from command, and makes the decision for themselves (see above at subparagraphs 2.13.b and 2.17.b).

12.21 It can be very difficult to deal with this type of pressure. Decision-makers should provide their commanders or managers with frank advice about what might happen. One option is to refer the decision upwards to be made by the relevant commander or manager.