

DECISION-MAKING PRINCIPLES OF UNIVERSITY BODIES

Introduction: What is administrative law?

Administrative law is the branch of public law that deals with the operation of government, public and statutory authorities and organisations. It regulates the administrative processes of such bodies, their functions and procedures and their impact upon persons affected by those functions and procedures.

As the University is a body set up under statute (i.e. the *La Trobe University Act 1964*) for various purposes including the public purpose of serving the community (s 5 (a) of the Act), it is subject to administrative law. The focus of this paper is how the law of administrative review impacts upon the processes of decision-making bodies set up by the University.

In essence, administrative law provides a framework for good decision-making. It seeks to ensure that decisions that affect individuals are only made by bodies or persons with authority, and that the processes by which such decisions are made are fair.

Who has to comply with administrative law?

In the University context, there are a number of decision-making bodies which attract the operation of administrative law. These include Academic Progress Committees, Faculty Boards, Faculty Academic Misconduct Committees, the Higher Degrees Academic Misconduct Committee, the Higher Degrees Appeal Committee, the Discipline Committee and the Proctorial Board. Some decisions of individuals (eg. a decision of the Vice-Chancellor to suspend a student for general misconduct, a decision of a senior officer to impose a fine for general misconduct and decisions of the Freedom of Information Officer) also attract the operation of administrative law.

Legal standards for good decision-making:

There are a number of standards which should be applied by bodies and individuals in making decisions that affect individuals. Compliance with these standards will minimise the potential for such decisions to be overturned on appeal or review by a court or tribunal, and will result in better and fairer decision-making.

1. Is there legal authority for the decision?

The La Trobe University Act, Statutes and Regulations establish various bodies and offices, and authorises those bodies and individuals holding those offices, to make certain decisions.

For a decision to be valid and effective, the decision must be one that the decision-making body is authorised to make.

Decision-making bodies must be constituted according to the relevant University legislation, both as to membership and method of appointment of such members.

Members of University decision-making bodies should familiarise themselves with the relevant University legislation to ensure that they are making decisions authorised by the legislation, and that they follow the decision-making process set out in the legislation.

Where a decision is made to impose some kind of penalty, the penalty must be one that is authorised by the relevant University legislation.

Policies and guidelines:

The University legislation has precedence over University guidelines or policies covering the same matter – the University legislation must be followed in preference to a guideline or policy. Further, guidelines or policies must be consistent with the University legislation. If decision-makers rely upon guidelines or policies in making decisions, such policies or guidelines should be in writing, be regularly reviewed and consistently applied, and must not conflict with legislation. Policies and guidelines should not be inflexibly or automatically applied without consideration of the facts and merits of the particular case.

Delegated powers:

Sometimes, legislation gives a body or individual the power to delegate its powers.

Delegation provisions in legislation are interpreted very strictly by courts. Generally, if a person or body wishes to delegate a power, and it has the authority to do so, the delegation should be recorded in writing. The delegation should refer to the section in the legislation that permits the delegation, refer to the person or position or body that is being authorised to make decisions and the category of decisions which they are authorised to make. The delegation should be reviewed periodically to check whether the delegation is still consistent with the legislation and appropriate.

2. Has procedural fairness been observed?

Procedural fairness (also referred to as natural justice) is about the way in which decisions are made, that is, the procedure adopted in making a decision, and whether that procedure was fair and proper.

Not all decisions made by public officials or bodies are subject to the rules of procedural fairness. Procedural fairness applies to the exercise of a power to affect the rights, interests or legitimate expectations of an individual - for example, a decision to suspend a student from the University or to refuse permission to re-enrol.

The rules of procedural fairness are of variable application. In other words, the degree to which, or the level at which, procedural fairness will apply in a particular case will depend primarily on the nature of the function being performed by the decision-maker. There are no hard and fast rules about what principles apply, and how they should be applied, in every case.

If a decision-making body or power is regulated by the University legislation, it is imperative to follow the procedural process set out in the legislation.

The elements of procedural fairness:

The opportunity to be heard:

This is one of the principal requirements of procedural fairness. A person should be given the opportunity to be heard before a decision that could adversely affect him or her in an individual way is made.

A hearing does not necessarily mean an oral hearing, although an oral hearing must be conducted when it is specified or envisaged by legislation. It will also generally be appropriate where a person's honesty is in issue, it being difficult to test honesty without an oral hearing and the opportunity to question the individual.

A person may be heard in writing (i.e. by exchange of letters) if the legislation does not require an oral hearing and where it is otherwise appropriate. Where there is uncertainty as to whether the rules of procedural fairness require an oral hearing, it is better to err on the side of caution and offer an oral hearing. Where the consequences of the decision are serious, an oral hearing should be conducted.

The University legislation may provide explicit hearing requirements – for example, in relation to the period of notice of the hearing that must be given. These legislative requirements **must** be followed. Where the legislation (or other document such as a policy or guideline) does not expressly provide for these matters, the decision-maker must decide what is fair and appropriate in the circumstances.

Adequate prior notice of hearing:

The person must be given adequate prior notice of the hearing.

What is adequate will depend on the circumstances such as the complexity of the matter and whether an urgent decision is essential. If there is to be an oral hearing, the person should be notified when and where this will be held, who will be present, what the hearing will be about, and whether or not the person may be accompanied by any other person.

Absence of bias:

The decision-maker must not be biased. Bias may be actual or perceived.

The test for perceived bias is this: whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question to be decided.

Examples of bias are where a decision-maker does not have an open mind about the decision to be made, has had a prior involvement with the matter that he or she is later called upon to decide, or where the decision-maker has a friendship or familial relationship with the person about whom the decision is being made.

Disclosure of relevant material before the decision:

The person about whom a decision is to be made is entitled to know what case is to be met – in other words, the matters to be considered and any allegation or accusation made against the individual, the nature of the decision that is to be made, the criteria for making the decision, and the information on which any such decision would be based. Where the University legislation deals with the matter, it is appropriate to advise the person of the relevant Statute and/or Regulation.

The decision-maker should disclose the substance of any adverse material that is credible, relevant and significant, and must ensure that the person has a reasonable opportunity to respond to that material before a decision is made.

Reasonable opportunity to respond:

The person about whom a decision is to be made should have a reasonable opportunity to respond before a decision is made.

What is reasonable will depend upon the circumstances – eg. the complexity of the matter and whether an urgent decision is essential.

Decision-makers must take account of relevant considerations and ignore irrelevant ones:

The decision must be based on relevant considerations and not on irrelevant ones.

3. Representation

There is no general rule that representation of the individual in respect of which a decision is being made should be permitted. If the governing University legislation addresses the issue of representation, then this must be adhered to. If it does not, or it gives a discretion as to whether or not to allow representation, it is a matter for the decision-making body as to what is reasonable and appropriate. Possible alternative options to consider where representation is not mandatory include allowing a person to assist who is not a legal practitioner or legally qualified, or only allowing legal

representation if an application is made to the decision-making body before the hearing and that application is granted.

4. The standard of proof

The standard of proof means that degree of certainty that a decision-maker must have in making a decision. In civil matters, the standard of proof that applies is the balance of probabilities – that is, whether something is more probable than not.

If the University legislation provides that a particular standard of proof applies to the decision-making body, and what it should have regard to in coming to its decision, then this must be adhered to.

5. Communicating and recording of decision:

Decision-making bodies should ensure that they keep written records of the processes followed and the decisions made.

Once the decision is made, it should be communicated to the person who is affected by it. The decision that is made must be one that is within the power of the decision-maker to make (the actual decision and any penalty). If the University legislation prescribes a time within which a decision must be made and/or communicated, this time limit must be met. Further, if the University legislation states that the person must be advised of his/her right to appeal against the decision, he/she must be so advised when the decision is communicated.

A written statement of reasons for decision must be provided where the legislation so provides. A statement of reasons should also be provided where the person has a right to appeal to a court or tribunal against the decision.

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This paper is not an exhaustive statement of the law. Further, as noted in this paper, the rules of procedural fairness are of variable application and depend upon the circumstances of the particular case.