Decision making- presentation to QPS Senior Command Course 5 July 2018

By His Honour Judge P E Smith[1]

Introduction

[1] I have been asked to address you on the topic of decision making.

[2] This is crucial for senior police officers.

[3] There are many administrative decisions you will make. Some are every day decisions. On the other hand some are governed by legislation (for example, under the *Police Service Administration Act* 1990 *(*Qld)[2] or in disciplinary decision making)[3].

[4] There are also operational decisions to be considered.

Background

[5] The reality of modern life is that decisions (whether they be administrative, operational or otherwise) made by commanders are often the subject of scrutiny both private and public after the event.

[6] Let me give you some examples.

[7] Let us look at some operational decisions.

[8] First, let us look at the recent inquest into the Lindt Café siege.

[9] As you may know, at about 9.41am on 15 December 2014, Man Haron Monis told the manager of the Lindt Café to call triple zero to say that all of those in the café had been taken hostage by an Islamic State operative armed with a gun and explosives. The initial police response to the triple zero call was to clear and secure the area around the café. Over the ensuing 16.5 hours the authorities were unable to resolve the situation peacefully. 12 of the 18 hostages escaped. However, at 2.13am the manager was executed at which point in time police immediately stormed the café. Monis and Katrina Dawson were killed in the ensuing firefight.

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1 Judge Administrator District Court Queensland, Colonel Australian Army Legal Corps.
2 For example transfer decisions s 5.13; review decisions s 9.4.
3 S 7.4 *Police Service Administration Act* 1990 (Qld).

[10] The Coroner found that the police made a number of mistakes during the siege. They were as follows:

- There was a failure to properly assess, assimilate and communicate information about Monis which contributed to a failure to appreciate that the risk to the hostages was increasing. Police commanders failed to place adequate weight on a number of factors known to them or which they could have discovered.[4] The threat was underestimated.

- Calls made by a number of hostages to a police negotiator went unanswered[5]. This represented a significant failure in one of the basic components of siege management.

- The snipers and police commanders did not believe that they had lawful authority to shoot Monis. It was found that this was an unduly restrictive view on police powers and did not adequately consider the risk the hostages faced. The Coroner noted that if an officer thought it was necessary to defend one of the hostages and shooting was a reasonable and proportionate response, shooting would be permitted.[6]

- There was an unjustified refusal by successive police commanders to approve a Deliberate Action Plan.[7] Senior officers were wedded to a "contain and negotiate" plan which was not the best approach when dealing with a terrorist.[8]

- Emergency action should have been initiated when Monis fired his first shot at 2.03am. The 10 minutes that elapsed thereafter was too long.[9]

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4 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 306.
5 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 310.
6 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 322.
7 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 351.
8 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 352.
9 Inquest into the deaths arising from the Lindt Café siege. State Coroner of New South Wales May 2017 at p 354.

[11] As can be seen, action ought to have been taken as it was entirely lawful to do so.

[12] Another case of relevance is the Hillsborough Football Stadium incident in the UK.

[13] As you would probably be aware, in 1989 there was a human crush in a semi-final cup game. In an attempt to ease overcrowding the police match commander had ordered Exit Gate C to be opened which led to an influx of even more people. Ultimately, 96 people died and 766 people were injured. The 1991 coronial inquiry ruled all deaths to be accidental. However, in 2009 an independent review took place leading to a second inquest in 2014-2016. The second inquest ruled that police and ambulance services were grossly negligent and failed in their duty of care. In June 2017 the police match commander was charged with 95 counts of manslaughter by gross negligence. Other officers were charged with misfeasance in a public office and attempting to pervert the course of justice. Those cases have not yet been finalised.

[14] I note in a recent ruling a UK Judge has allowed this case to go to trial.[10]

[15] You as police in Queensland could also potentially face civil suits for torts causing personal injuries because of poor decision making.

[16] An example is the recent case of *Bulsey and Anor v State of Queensland.*[11] In that case the plaintiffs were successful in an action for assault, battery, false imprisonment and malicious prosecution. On 27 November 2004, SERT officers raided the plaintiffs' house on Palm Island. The male plaintiff was arrested and handcuffed and taken into custody. Two days later, he was brought before a Townsville magistrate. There was no case for him to answer arising from the riots on Palm Island. It was held that the arresting officer did not reasonably suspect the plaintiffs had committed an indictable offence and therefore section 198 of the *Police Powers and Responsibilities Act* 2000 (Qld) ('PPRA'), arrest without warrant, could not be relied on.

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10 https://www.theguardian.com/uk-news/2018/jun/29/hillsborough-police-commander-david-duckenfield-to-face-manslaughter-trial.

11 [2015] QCA 187.

[17] Bear in mind section 10.5 of the *Police Service Administration Act* 1990 (Qld which only allows the State to recover from the individual police officer contribution for damages if lack of good faith and gross negligence are proven.

[18] Section 26 of the *Civil Liability Act* 2003 (Qld) excludes civil liability where one does an act or makes an omission in an emergency situation. Furthermore, section 45 of the Act provides that criminals cannot be awarded damages. There are also some protections from liability in the PPRA.[12]

[19] Another example is in 2015 the family of a deceased Northern Irishman killed 42 years prior brought a civil suit against the General officer Commanding in Northern Ireland at the time, General Kitson. General Kitson was in charge of military operations in the 1970s. He was named as co-defendant in the civil suit. It was alleged he was "liable personally for negligence and misfeasance in public office."

[20] Turning then to administrative decision making, let us look at some examples of where things have gone wrong. Let us look at *Atkin v Willee*[13].

[21] In that case Captain Willee RANR QC was the President of a Military Commission of Inquiry into the death of Private Smith who died on 26 June 2009 when the APC in which he was a Commander rolled over at Puckapunyal. Before the death, Private Smith had suffered some post-traumatic stress disorder and had seen Dr Atkin, a psychiatrist. Following the death, Dr Atkin was advised that adverse findings might be made against him concerning inadequate treatment/reporting/risk management. An expert medical witness was engaged by the Commission. Counsel assisting recorded an interview with this witness. So far, so good. However, after the doctor had given evidence, she prepared a further draft expert report. With no notice to the parties appearing before the Commission, a conference was held between the witness and the President. No notes were made at this conference. Her evidence was that she agreed to change her draft report as

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12 Dog handlers- section 38; depreciation of impounded vehicles- section 122; controlled activities- section 225;

13 (2011) 194 FCR 220; [2011] FCA 568.

a result of this meeting. The second report happened to contain adverse conclusions concerning Dr Atkin.

[22] Dr Atkin applied to the Federal Court for an order that Captain Willee be *restrained from making* any findings concerning him. By this stage he had obtained a copy of the draft report and the second report and had discovered the existence of this unrecorded meeting.

[23] Needless to say, Dr Atkin succeeded in his application. Justice Gray held that the test for apprehended bias (*Ebner v The Official Trustee*[14]) is:

> "A Judge is disqualified if a lay minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide… Justice should both be done and be seen to be done."

[24] This principle extends to all administrative enquiries. It was held at [75] that a reasonable observer would come to the conclusion there was a reasonable apprehension of bias on the part of the President.

[25] A case which involves a lack of procedural fairness is the case of *Martincevic v Commonwealth of Australia*[15] a decision was made terminating the member's service with the ADF. The member had brought complaints of bullying and bastardisation in respect of his treatment by 7CSSB. He was punished a number of times whilst was with 7CSSB for disciplinary infringements. An investigating officer was appointed to investigate the member's complaints. Prior to the report being completed, the CO determined to discharge the member on medical grounds as he was unsuitable for continued service. The member lodged applications for redress of grievance but these were dismissed. As it turns out the IO completed a report which upheld some of the member's complaints of bullying and bastardisation. This was not disclosed to the member. As a result of the failure to disclose this relevant evidence the termination decision was set aside.

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14 (2000) 205 CLR 337.
15 (2007) 164 FCR 42; [2007] FCAFC 164.

[26] In the civilian context let us look at the Bundaberg Hospital Commission of Inquiry.

[27] As you may recall Dr Patel was alleged to have killed a number of his patients at the Bundaberg base Hospital in 2003-2004. A Commissioner was appointed to inquire into this.

[28] In *Keating and Leck v Morris*[16] the Supreme Court restrained the Commissioner from continuing with the inquiry on the grounds of ostensible bias. Dr. Keating was the medical director at the Bundaberg Hospital and Mr. Leck, the senior administrator.

[29] Moynihan J noted at [36] that it was of fundamental importance that the parties and the general public have full confidence in the fairness of decisions and in the impartiality of decision makers. The Judge found that such confidence could not exist relating to this inquiry.

[30] His Honour found that the commissioner unfairly interrogated the witnesses and the interrogation amounted to bias as he made “aggressive assertions, contemptuous or dismissive of bureaucrats and non-treating doctors who administer” (see [91]).

[31] Further, His Honour found that the Commissioner favourably treated some witnesses in stark contrast to his treatment of Leck and Keating (see [97]).

[32] An interim report was prepared in which expressions of belief of some witnesses were made. This manifested a prejudgment concerning Leck and Keating (see [132]).

[33] Finally, the Commissioner held private meetings with at least 4 medical practitioners and had “off the record” conversations with people from the community. His Honour found that it is a fundamental principle that a judge not hear evidence or receive submissions from one side behind the back of another (see [156]). This made out a case of bias as well.

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16 [2005] QSC 243

Principles of administrative decision making

[34] Administrative decision-makers including those in the police service are required to make legally defensible administrative decisions.

[35] If this is not done, although the decision may be a good decision on the merits, it may be legally invalid.

[36] All state government departments are required to comply with the *Judicial Review Act* 1991 (Qld) ('JR Act') and the common law when making decisions.

[37] There is also a very strong requirement for procedural fairness (natural justice) to be accorded.

Compliance with the law

[38] It is useful to set out in full because this provides the legal framework for decision making.

[39] Section 20 of the JR Act provides as follows:

"**20 Applications for review of decisions**

(1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision [decision on any one or more of the following grounds]:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
(c) that the person who purported to make the decision did not have jurisdiction to make the decision;
(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
(g) that the decision was induced or affected by fraud;
(h) that there was no evidence or other material to justify the making of the decision;
(i) that the decision was otherwise contrary to law."

Procedural fairness

[40] A member is entitled to procedural fairness when adverse administrative decisions are proposed to be made which may affect the member's rights, interests or expectations[17].

[41] All members of the police service are entitled to procedural fairness in respect of adverse administrative action proposed. The decision maker must give the member a reasonable opportunity to be heard with regard to the allegations to be relied upon.

[42] Further, there must be sufficient evidence to support the allegations and the decision. The facts, information or other evidence relied upon by the decision maker must be disclosed to the member.

[43] Further, with respect to procedural fairness, it must be recognised that a decision-maker must not be biased and must be seen to be capable of making a fair, impartial and professional decision based on the rights of the member and the merits of the case.

[44] In summary, the principles of procedural fairness in the police service are reflected by the fact that prior to any adverse administrative decision, a notice is to be given to the member as to the proposed adverse decision, as well as a statement of the facts, information or other evidence to be relied on in making the decision[18], relevant documents, and an invitation to the member to respond within a specified time.

[45] The member then provides a written response and the decision-maker considers the notice issued by the initiating authority, the member's response, and the facts upon which the decision is to be based.

[46] It should be borne in mind that a member is entitled to know the substance of the case against him or her and sufficient facts giving rise to the action so the member has a reasonable opportunity to respond to the proposed action. Any

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17 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259; *Annetts and Ors v McCann and Ors* (1990) 97 ALR 177.

18 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162.

notice should precisely summarise the matters alleged or other information relied upon.

[47] There is an obligation on the part of decision-makers to take positive steps to ensure all relevant information is disclosed to the member. There is an obligation on all decision-makers to ensure all relevant information has been obtained. However, it should be borne in mind the decision-maker is under no obligation to make out a case for the member. Relevant medical reports, witness statements, police reports, conviction certificates, inquiry officer reports or training reports should be attached to any notice of adverse action. Bear in mind that any disclosure should not breach the *Privacy Act* 1988 (Cth) or any relevant State legislation e.g. the PPRA. Redactions may be needed and legal advice should be obtained regarding such redactions.

[48] An appropriate time period should be allowed for the member to respond.

[49] I have already mentioned the rule against bias. Bias occurs when the decision maker has a financial, family, personal or other interest in the issues or outcomes. Bias may also exist where the decision maker has shown a closed mind or has expressed a pre-determined view on the issues relevant to the proposed adverse administrative action[19]. If there is actual or apparent bias then any decision should not proceed and the matter should be referred to another commander or authorised decision-maker. Of itself, current or past management or other professional relationship between a member and a proposed decision maker is not sufficient to establish bias.

[50] When making a decision, the decision-maker should be satisfied that the requirements of procedural fairness have been met and there are sufficient, reasonable and reliable evidence upon which to make the decision. A failure to afford procedural fairness may lead to the rendering of an invalid decision.

Valid Decision making

[51] The legal criteria for a valid decision is whether:

(a) It is made by a person who had authority to make the decision;

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19 *Ebner v The Official Trustee* (2000) 205 CLR 337.

(b) It is not unreasonable;

(c) The decision maker took into account relevant considerations;

(d) The decision maker disregarded irrelevant factors; and,

(e) The decision maker afforded procedural fairness by an impartial person.

[52] In respect of the power to make a decision it should be borne in mind that legislation or instructions will give express authority for a specified appointment to make a decision or to delegate decision-making. Such authority to make decisions should be carefully checked before the decision is made. Further, a decision must be reasonable in all of the circumstances of the case. A decision will be set aside if it is manifestly unreasonable[20]. However, a decision will not be invalid merely because another decision-maker would have made a different decision under same circumstances[21].

[53] The decision must be supported by the evidence. Any information should be substantiated. Irrelevant factors should be disregarded when making a decision[22]. A decision may be invalid if the decision maker gave undue weight to an irrelevant factor. There is also a legal obligation to take into account all relevant factors[23]. Some police instructions, legislation or policies set out the matters or guidelines which ought to be taken into account when making such a decision.

[54] It may be that sometimes after a member's response and before a final decision is made there may be other facts and circumstances which should be considered. The decision maker has a general duty or obligation to ensure that reasonable steps have been taken to obtain all relevant information and if fresh facts are obtained then procedural fairness should be accorded[24].

[55] With respect to the exercise of the discretion to make a decision, it is not permissible for the decision-maker to act under dictation. The decision-maker is required to use his or her own judgement. Although policy gives guidelines

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20 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

21 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627.

22 *Minister for Immigration v Li* (2013) 249 CLR 332 at 366.

23 *Minister for Immigration v Li* (2013) 249 CLR 332 at 366; *Minister for Aboriginal Affairs v Peko- Wallsend Ltd* (1986) 162 CLR 24 at 41.

24 *Martincevic v Commonwealth of Australia* (2007) 164 FCR 42; [2007] FCAFC 164.

with respect to making a decision, the decision-maker is required to exercise their own judgment and must not act in blind adherence to policy without proper regard for the merits and circumstances of each case[25].

[56] As mentioned previously, a failure to afford procedural fairness or bias will result in an invalid decision.

Standard of proof and evidence

[57] It should be borne in mind that the standard proof for administrative decision-making is the civil standard that is on the balance of probabilities. This is different to criminal proceedings, where the standard of proof is proof beyond reasonable doubt.

[58] Bear in mind that the more serious the allegation is the higher degree of certainty is necessary.[26]

[59] A decision-maker is not bound by the rules of evidence but is required to disregard irrelevant evidence. A decision-maker is required to take into account all relevant facts and circumstances, is entitled to apply policy, and is required to make a logical decision.

[60] Although the rules of evidence are not binding, the following rules have been determined to assist in what evidence to accept:

(a) Evidence is more reliable if there is corroboration, for example witnesses or documents supporting the allegations.

(b) Opinions have greater weight if given by a person who has expertise in the relevant subject matter.

(c) Hearsay evidence is not always reliable. Less weight may be accorded to such evidence.

Notification of decision

[61] There should be formal notification of the decision given to the member.

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25 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164.

26 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Statement of reasons

[62] Generally a member is entitled to a statement of reasons for the decision. If sufficient reasons are given for a decision then there are likely to be fewer grounds for complaint. Reasons provide a member with an understanding of why the decision was made. The detail or content of a statement of reasons can vary in length or complexity. A statement of reasons in essence is a step-by-step explanation of the decision making process.

Conclusion

[63] In conclusion, the police service is required to comply with the law when administrative decisions are made. Compliance with the legal requirements of procedural fairness promotes morale and reinforces confidence that decisions are made in a manner that is fair, open and lawful.

[64] Proper administrative decisions promotes operational efficiency because it does not require the diversion of financial resources to fund dispute resolution. In this manner, effective decision-making avoids costly court proceedings, which often distract personnel from their operational tasks.