



Regulatory Bulletin

Procedural fairness

RB 2023-21

This Regulatory Bulletin explains what procedural fairness is. It also explains:

- the circumstances where the Aged Care Quality and Safety Commission (Commission) must provide procedural fairness
- our approach to providing procedural fairness when making decisions.

You can find definitions of the key terms used in this bulletin in our [glossary](#).¹

Key points

- Commission decision-makers apply fair procedures when making regulatory decisions.² These procedures are appropriate to the circumstances of each decision and meet legislative requirements.
- These fair procedures provide the people affected by a decision with a chance to respond to any negative information we use in that decision-making process. This is called the hearing rule. Those affected by a decision can include providers and individuals.

- The Commission's procedural fairness responsibilities increase in proportion to the seriousness of a decision and the impact it will have on a provider or individual.
- The Commission's primary role is to protect and improve the safety, health, wellbeing and quality of life of people receiving aged care services. Ensuring that aged care recipients are protected from harm must be the top priority.
- Where there is immediate and severe risk to consumers, the Commission may take action against a provider or an individual without giving them notice or an opportunity to respond.

¹ <https://www.agedcarequality.gov.au/about-us/corporate-documents/aged-care-quality-and-safety-commission-glossary>

² A regulatory decision by Commission decision-makers is a decision that relates to the Commissioner's functions under the *Aged Care Quality and Safety Commission Act 2018*.



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Information in this bulletin applies to: Providers and individuals (including but not limited to aged care workers and governing persons of approved providers of residential aged care, home care and flexible care under the *Aged Care Act 1997*) who may be the subject of, or involved in, the Commission's regulatory processes.

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Procedural fairness

Requirements for procedural fairness

The Commission must provide procedural fairness to a person or provider whose rights or interests may be negatively affected by one of our decisions. This is required under administrative law.

Examples of the rights or interests of a person or provider that our decision might affect include their:

- status and reputation
- independence and freedom
- privacy
- livelihood and financial interests.

There are also legislative requirements for procedural fairness for certain Commission decisions in the:

- *Aged Care Act 1997* (Aged Care Act)
- *Aged Care Quality and Safety Commission Act 2018* (Commission Act)
- *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules).

There are 3 main rules of procedural fairness:

1. Hearing rule

This rule means that a decision-maker must give a person or provider affected by their decision an opportunity to respond to any negative information. The decision-maker needs to do this before making a decision that can affect another's rights or interests.

2. Bias rule

This rule means that the decision-maker:

- is impartial and unprejudiced
- has no personal stake, interest or involvement in the case
- has no actual bias or appearance of bias in the case or against the person or provider involved.

3. Evidence rule

This rule requires the decision-maker to make decisions for logical reasons based on the available evidence.



The Commission Act and Commission Rules

The Commission Act and Rules describe the procedural fairness requirements that the Commission needs to follow. Sometimes, they also limit these requirements in certain circumstances.

Commission legislation includes specific requirements for procedural fairness for particular decisions. For example, section 23BG of the Commission Rules explains that the Commissioner must provide procedural fairness when using certain Commission powers in response to providers, or their aged care workers or governing persons, for not complying with the Code of Conduct for Aged Care (Code).

Procedural fairness expectations

Before making a final decision, Commission decision-makers use fair procedures that suit the circumstances of each decision.

Providers and individuals whose rights or interests may be affected by a decision can expect the following:

- Before a decision is made*:
 - we will notify them of any issues raised that may negatively affect their rights or interests
 - we may notify them in writing, such as through a notice of intention, which shows the evidence and reasons we are considering for the decision. We can also notify them through a conversation in person, over the phone or by email
 - they will be provided the opportunity to provide information and evidence to respond to the issues that the decision-maker raised. (You can find more information on when under [Timeframes for making submissions to the Commission](#) on page 12.)

* Unless there is an immediate and severe risk to the safety, health or wellbeing of consumers. For more information see the [immediate and severe risk](#) section below.

- Decisions will be based on sufficient and relevant evidence. The decision-maker will consider any submissions that the provider or individual makes. The decision-maker may ask the provider or individual to clarify their submissions. This might happen where the submissions have conflicting information. More information on how the Commission deals with conflicting information is covered in [Frequently asked questions](#) on page 13.



- The Commission decision-maker will be impartial and have no personal stake in the case being decided.
 - Commission decision-makers must follow the Australian Public Service Code of Conduct and Values. This includes being impartial and not biased when they make decisions.
 - The decision-maker must not have any personal, financial or other interest in the outcome of a decision they make. Under the Commission's Conflict of Interest policy, a decision-maker must let their manager know of any conflicts of interest or potential conflicts of interest. They also need to take reasonable steps to avoid the conflict.
- We will provide the decision in a way that shows the reasons and evidence that the decision-maker used to make their decision.

You can find more information about the Commission's decision-making principles in [Regulatory Bulletin RB 2019-06 Regulatory decision-making](#).³

Immediate and severe risk

The Commission's primary role is to protect and improve the safety, health, wellbeing and quality of life of people receiving aged care services. Ensuring that aged care recipients are protected from harm must be the top priority. Under aged care legislation, the Commission can act quickly to protect people receiving care and services from any immediate and severe risk to their safety, health or wellbeing. Actions taken by the Commission will be in proportion to the level of risk.

If there is immediate and severe risk to people receiving aged care services, we do not need to notify a provider or individual of our intention to make a banning order or our intention to impose sanctions.

In these circumstances, the Commission does not need to follow the hearing rule. This means that we do not need to give the provider or individual an opportunity to respond and provide information or evidence before we make a decision. However, the provider or individual may still ask for certain decisions made by the Commission to be reviewed. For more information, see the [Review of decisions](#) section on page 12.

Where there is no immediate and severe risk to people receiving aged care services, the Commission will give a provider or individual notice and an opportunity to make submissions.⁴ These submissions can provide information or evidence to respond to the issues raised in the decision-making process.

³ <https://www.agedcarequality.gov.au/resources/regulatory-bulletin-2019-6>

⁴ The Commission will notify the provider or individual of the timeframe in which any submissions may be made.



Procedural fairness in different regulatory functions

To meet the hearing rule, the Commission uses fair procedures that we adapt to the circumstances of each issue. To do this we consider:

- the nature of the issue
- the options for resolving the issue
- the timeframe for making and notifying decisions
- whether there is disagreement about the facts
- the nature and possible consequences of the decision to be made
- what actions the Commission can take to respond to the issues
- any specific legislative requirements.

The procedural fairness approach that we apply to a provider or an individual will depend on how severe the impact of the decision will be on them. Procedural fairness approaches can range from informal processes, such as conversations, to more formal processes such as:

- meetings and hearings
- notices of intention to take certain actions
- opportunities to make written submissions or provide evidence.

Based on available evidence (including information from the provider or individual), a decision-maker may decide to refer the issue to another organisation:

- to act on
- as information
- to make a final decision.

The organisation that we refer the issue to could be another regulator or government agency.

Handling complaints and information about provider responsibilities

A person can [make a complaint](#)⁵ to the Commission about the quality of aged care supports and services or the general responsibilities of a provider. Anyone can make a complaint including people receiving aged care services, their families or representatives, and staff. The Commission may also receive information from sources other than complainants who raise issues or concerns about a provider's responsibilities. We call this provider responsibility information.

A complaint or information about a provider's responsibilities can be about the conduct of the provider's aged care workers or governing persons. This may be able to be resolved through the [complaints process](#)⁶ or may involve other regulatory responses.

The Commission may go through a resolution process to respond to the issues raised in the complaint or provider responsibility information.

⁵ <https://www.agedcarequality.gov.au/making-complaint>

⁶ <https://www.agedcarequality.gov.au/making-complaint/complaints-process>



When handling complaints and information about provider responsibilities, procedural fairness means that:

- We give the person making the complaint the opportunity to present their complaint to the Commission. This includes the chance to provide extra information and evidence, if needed. We will listen to you, the complainant, to help us understand the issues raised in your complaint and your expectations.
- We involve the person making the complaint, and any relevant people, in resolving the complaint. We will keep them informed of the progress and outcome of the complaint, depending on the circumstance. This includes any action the Commission takes and the reasons why, as well as options for reconsidering the decision. There may be more than one opportunity for the person making the complaint and any relevant person to have their say. This can happen particularly when new information comes to light.
- We give the provider an opportunity to comment on any negative information raised during a complaint or finding about

them, depending on the circumstances.

When a complaint is made anonymously, or the person making the complaint asks for confidentiality, we will not disclose information about:

- the identity of the person making the complaint
- the identity of a person identified in a complaint
- any other details in the complaint that we have been asked to keep confidential.

If the Commission is considering giving directions to a provider to take action in response to a complaint, we must give the provider written notice. The notice will explain that the Commission intends to give the provider a direction. The notice will also include a set time that the provider has to respond to the notice.

When considering information from a complaint or information about provider responsibilities, the Commission must notify the relevant provider in writing.⁷ This notification will include the resolution process for the issue raised or identified. However, we will not notify the provider if the notification will or is likely to:

- get in the way of resolving the issue
- place at risk the safety, health and wellbeing of any person making the complaint, people receiving aged care services or other people
- place any person or consumer at risk of intimidation or harassment.

⁷ Under section 16 of the Commission Rules.



Performance assessments

The Commission assesses the performance of providers against the Aged Care Quality Standards (Quality Standards). This is referred to as a performance assessment and includes:

- site audits
- review audits
- quality audits, as part of quality review
- assessment contacts.

You can find more information on the different performance assessments in our Regulatory Bulletins about the [Aged Care Standards performance assessment methodology](#) and [Assessment contacts in residential and home services](#).

When doing performance assessments, procedural fairness means that the Commission's Assessment Team:

- informs the provider of the assessment process. They will do this during the entry meeting when they are conducting the performance assessment at the premises of the service
- keeps the provider informed throughout the performance assessment process. They do this by:
 - communicating in a transparent and effective way
 - being open to questions
 - holding daily meetings with the provider when they are conducting a performance assessment at the premises of the service

- lets the provider know as soon as possible about any significant concerns. This ensures that there are no surprises for the provider at the end of the performance assessment
- gives the provider opportunities to provide relevant information and evidence to respond to any issues identified during the performance assessment
- holds an exit meeting with the provider on the last day of a performance assessment to discuss the key issues they have identified during the audit. Key issues may include areas of concern, observations on areas done well, and an overview of the performance assessment. They will not give the provider a report at this time. The Assessment Team will use a similar process for assessment contacts (performance assessment); however, the meeting may be held onsite or over the telephone.

Procedural fairness also means that the Assessment Team gives its report to the provider of the service after the completion of a performance assessment, so the provider can:

- understand the reasons and evidence that the Commission will use to:
 - identify areas for improvement
 - make findings about the provider's performance against the Quality Standards



- provide to the Commission, within a particular timeframe⁸, a response to issues identified in the Assessment Team report. A Commission decision-maker will take account of this information when they prepare the performance report, which sets out their findings about the provider's performance against the Quality Standards. The decision-maker must consider the provider's response when they prepare the performance report.

You can find more information about the Commission's processes for performance assessments in [Regulatory Bulletin RB 2019-05 – Aged Care Quality Standards performance assessment methodology](#).⁹

Monitoring

The Commission undertakes a range of monitoring activities to ensure that providers, aged care workers, governing persons and key personnel comply with their responsibilities. These responsibilities are included in the aged care legislative framework. Our monitoring activities include information gathering processes.

Procedural fairness for the Commission's monitoring activities can include:

- When we receive a Serious Incident Response Scheme notification (SIRS notification), we may ask the provider for information or evidence about the incident. This also helps us to understand how the provider is complying with their responsibilities to manage and prevent incidents.

- When the Commission becomes aware of conflicting information about a provider's, aged care worker's or governing person's non-compliance¹⁰ with the Code, we will¹¹ request information or discuss the issue with those involved. This establishes the facts of the conduct we are concerned about.
- Where a provider has not submitted their prudential and financial information or not provided complete information through the Quarterly Financial Report, the Commission will ask them to submit it or for extra information. We will also let the provider know about any possible regulatory action we may take if they do not comply.

Monitoring response to regulatory action

The Commission provides procedural fairness during our monitoring activities. These activities make sure that providers, aged care workers, governing persons and key personnel comply with their responsibilities.

⁸ The Commission will notify the provider of the timeframe they can make submissions in (the timeframe will be as specified in the legislation).

⁹ <https://www.agedcarequality.gov.au/resources/regulatory-bulletin-2019-5>

¹⁰ The non-compliance may be alleged or suspected.

¹¹ Unless there is an immediate and severe risk to the safety, health, or wellbeing of consumers. For more information refer to the [Immediate and severe risk](#) section of this bulletin on page 5.



Investigation

Investigation is the planned and systematic gathering and analysis of all relevant facts. The purpose of an investigation is to:

- better determine the ongoing risk to consumers
- identify issues, which may include evidence that aged care workers, governing persons or providers have not complied with their responsibilities
- support and inform a regulatory response that addresses any identified risk and non-compliance.

The Commission may need to investigate an issue identified through:

- a complaint
- a SIRS notification received from a provider
- information about actual or suspected non-compliance with the Code
- other situations where a provider or individual is not, or may not be, meeting their legislative responsibilities.

Where the Commission decides to undertake an investigation, we will inform the provider, worker or governing person if they are the subject of an investigation and engage directly with that provider or individual as part of the investigation.

When investigating an aged care worker's or governing person's conduct, the Commission provides procedural fairness. This means that before we make any decision that affects their rights or interests, we will:

- take reasonable steps to ensure that they understand our concerns about their conduct
- give them a chance to ask any questions and provide information¹²
- give them the opportunity to be heard and respond to any negative information about them.

Where the Commission investigates an issue related to an aged care worker or governing person, we may approach other people to help with the investigation. This can include the approved provider that is or was the individual's employer, or the approved provider for which the individual is or was volunteering. The Commission may discuss with any other person an individual's or provider's compliance with the Code. This helps us to determine whether there is serious risk to consumers. Discussions can be about the aged care worker's or governing person's non-compliance with the Code or suitability to provide aged care.

¹² The Commission will notify the aged care worker or governing person of the timeframe in which submissions may be made.



Compliance and enforcement

The Commission may take compliance and enforcement action¹³ against providers and their aged care workers and governing persons, if they have not complied with legislated responsibilities. The action we take will be in proportion to the nature of the non-compliance and its risk to consumers.

The Commission may also make a:

- banning order against a person who has not been an aged care worker in the past
- banning order against a governing person of a provider
- determination that a key personnel of a provider is not suitable to be involved in providing aged care. This then means that the provider must make sure that that person stops being one of its key personnel.

You can find more information on banning orders in [Regulatory Bulletin RB 2023-17 Banning Orders](#).¹⁴

The Commission provides procedural fairness to people negatively affected by our compliance and enforcement actions. This means that:

- we will set out the reasons why we have made or are considering a specific decision
- we give the provider or individual an opportunity¹⁵ to respond in writing to the issues and evidence that may lead to a negative decision being made against them (and include us publishing that decision). However, where there is immediate and severe risk to people receiving aged care services, we do not have to give providers or individuals an opportunity to respond
- we will make sure the provider or individual knows that we may publish the compliance and enforcement action that we have taken against them on the Commission's website and on the [My Aged Care website](#).¹⁶

¹³ Under Part 8A and 7B of the *Aged Care Quality and Safety Commission Act 2018*.

¹⁴ <https://www.agedcarequality.gov.au/resources/rb-2023-17-banning-orders>

¹⁵ The Commission will notify the provider or individual of the timeframe that they can make submissions in.

¹⁶ <https://www.myagedcare.gov.au/>



Timeframes for making submissions to the Commission

How much time providers and individuals have to provide a written submission will depend on the situation and legislative requirements. The notice or communication they receive from the Commission will include the specific timeframe.

Where the Commission provides procedural fairness through a more informal process, the Commission will make sure that providers and individuals have a reasonable opportunity to provide a response. Through this type of process, we may be able to be more flexible with the timeframe for a response. Informal processes include, for example, meetings and other in-person or telephone discussions.

The Commission will consider a submission that is provided within the specified timeframe. In general, the Commission is unlikely to consider late submissions, particularly if:

- the delay is especially long
- there is no reasonable explanation for the delay
- the Commission was not advised that there would be a delay.

In exceptional circumstances, the Commission may consider requests to extend the timeframe for submissions. The Commission may also consider in exceptional circumstances a face-to-face, phone or online meeting as well as, or instead of, a written submission.

Review of decisions

An affected or interested person can ask the Commission to reconsider a decision or ask for a review of certain decisions that Commission decision-makers have made. There are also different avenues that people can use for judicial and merits reviews of some Commission decisions.

You can find more information about the reconsideration processes in [Regulatory Bulletin RB 2021-12 Reconsideration of reviewable decisions](#).¹⁷

¹⁷ <https://www.agedcarequality.gov.au/resources/rb2021-12-reconsideration-reviewable-decisions>



Frequently asked questions

1. Will the Commission notify me of any negative issues or potential decisions against me?

The Commission will give you the opportunity¹⁸ to comment on any negative information before we make a final decision. Where in the process we give you the opportunity to comment will depend on the situation and legislative requirements.

If there is an immediate and severe risk to people receiving aged care services, the Commission may not notify you of any negative issues before we make decisions about you.

Refer to the [Immediate and severe risk](#) section on page 5 for more information.

2. Can I see the documents or records that the decision-maker considered in taking action against me?

The Commission will notify you of the evidence that the decision-maker considered that is harmful to your interests. The Commission may give you copies of the evidence. This may include detailed summaries of documents if they are confidential.

For information about how to access information or documents we hold under the *Privacy Act 1988* and the Australian Privacy Principles and the *Freedom of Information Act 1982*, refer to [Access to information](#).¹⁹

3. What will the Commission do if the information I provide conflicts with other information the Commission has received?

A Commission decision-maker can receive conflicting information. This can happen in situations where, for example, the content of submissions is different from an observation an Assessment Team makes during a site audit.

To consider conflicting information, the decision-maker will:

- review all the relevant information
- weigh the information according to its credibility, relevance and significance.

Where the decision-maker gives greater weight to one piece of information over another, they will explain the reasons for this in their decision.

¹⁸ When inviting the provider or individual to make submissions, the Commission will let them know the timeframe they can make submissions in.

¹⁹ <https://www.agedcarequality.gov.au/about-us/access-information>



4. What if I have been denied appropriate procedural fairness?

If you believe you have been denied appropriate procedural fairness, you can raise this with the Commission.

For example, the Commission issues you with a Compliance Notice because we have found that you, as a provider, are not complying with the Aged Care Act. If you disagree with that decision, you can ask for a review of the decision through the Commission's reconsideration process. This includes when you disagree with the decision because you believe you have been denied appropriate procedural fairness. The Commission's decision to give a Compliance Notice is a reviewable decision under the Commission Act. There are also different avenues you can use for judicial and merit reviews of some Commission decisions.

You can find more information about the reconsideration processes in [Regulatory Bulletin RB 2021-12 Reconsideration of reviewable decisions](#).²⁰

5. Will the Commission share confidential information with other parties who may be affected by a decision that relies on that information?

The Commission may be asked by the person providing information to keep their identity confidential.

In some cases, for procedural fairness, the Commission may need to share relevant information with another party so that they understand the source of the information and can comment on, or refute, that information.

To balance the interests of all those involved, the Commission may hold separate discussions with each party. This can help us to better understand and address concerns.

When sharing information, the Commission will maintain confidentiality as much as possible.

To maintain confidentiality, the Commission may:

- share the information without sharing the identity of the person who gave us that information
- only provide a summary, or the subject, of the information.

Even if the Commission does not share the identity of the person who provided the information, that person may sometimes still be able to be identified. This can be because of the nature of the allegation they have made or prejudicial information provided. The Commission will not confirm any guesses by other parties as to the identity of the person. We will inform the person if this situation arises.

In exceptional circumstances, the Commission may decide it is necessary to share the person's identity and other personal information with another party. We do this to ensure the safety, health, wellbeing and quality of life of consumers. For example, the Commission may share information with the police if the evidence suggests that a consumer or another person is in immediate danger. The Commission will try to let the person know before we decide not to follow their request for confidentiality.

²⁰ <https://www.agedcarequality.gov.au/resources/rb2021-12-reconsideration-reviewable-decisions>



Need to know more?

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21 <https://www.agedcarequality.gov.au/subscribe>

The Aged Care Quality and Safety Commission acknowledges the Traditional Owners of Country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to Elders both past and present.



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