Why Give Reasons for Decisions

Christopher Enright
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Christopher Enright

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<td>2015</td>
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Citation

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<td>Australian Institute of Marine and Power Engineers</td>
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Section 1. Introduction

It is essential, however, to recall at all times that the governmental action undertaken both by trial courts and appeal courts is one that is both the exercise of power and the explanation for that exercise of power. Part of that responsibility is the clear communication of the reasons for the exercise of power.1

This article explains the rationale for giving reasons for decisions. In this context decisions refer to decisions of both administrative and judicial decisions makers. Although different authorities make these decisions they are fundamentally the same. This means that the rationale for reasons in each case is similar, subject to some variations of detail or emphasis in some aspects of the rationale. So, the function of reasons as expounded here is sometimes directed to courts but also applies to officials in the executive arm of government since they perform essentially the same task. Consequently the cases cited here refer to reasons for both judicial and administrative decisions. Generally what is said about judicial decisions applies to administrative decisions, although the standards in judicial decision making tend to be higher, reflecting the more formal nature of judicial decisions compared to administrative decisions.

Duty to Give Reasons

Judicial Decisions

In ordinary circumstances common law imposes a duty on a court to give reasons for their decision.2 So much is this the case that reasons are ‘a normal incidence of the judicial process.’3 In fact reasons constitute the bulk of most judgments.

In some exceptional circumstances, though, a judge does not have to state reasons, or may be required to give only brief reasons.4 However, many of the actual or mooted cases in this regard consists of non substantive matters, such as discretionary decisions on procedural matters, decisions on the

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1. Allsop (2009) par [78]
admissibility of evidence, a decision that it too plain for argument or a decision where an issue is uncontested.\(^5\)

**Administrative Decisions**

While there is a clear obligation for courts generally to give reasons for a substantive decision, there is, however, no general duty at common law for an administrative decision maker to give reasons,\(^6\) nor for a domestic tribunal to do so.\(^7\) However, there are now statutory changes to the common law rule. Provisions in Australia now impose a duty to give reasons on many administrative decision makers.\(^8\)

While the general duty to give reasons persists in Australia, in the United States it is qualified. Under pressure of heavy workloads some United States courts now have guidelines describing circumstances when a court can decline to give reasons.\(^9\)

**Rationale for Reasons**

*Inescapably . . . written reasons can reveal only part of the journey [of a judge] to the moment of decision.*\(^10\)

Requiring a decision maker to furnish reasons is intuitively good although ideally it should be possible to demonstrate the advantages of reasons.\(^11\)

**Inherent Value**

There is inherent value in a decision maker giving reasons. It is important for its own sake.

**Determining Content of Reasons**

The rationale for reasons is one of the chief determinants of the content of reasons. There is simple logic at work here. Reasons must do their job. Therefore knowing why reasons are important provides a basis for a decision maker working out the items that reasons must include on each occasion.

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5. See Kirby (1994) pp 126-132
7. *McInnes v Onslow-Fane* [1978] 1 WLR 1520
8. For the Commonwealth, major provisions for reasons are in s13 of the *Administrative Decisions (Judicial Review) Act 1977* and s28 of the *Administrative Appeals Tribunal Act 1975*. There are similar provisions in the legislation of some states.
11. Many of the relevant cases are set out by Sackville J in *North Coast Environment Council v Minister for Resources* (1994) 36 ALD 30.
Why Give Reasons for Decisions

Broad Array of Advantages
There are many specific justifications for requiring judges and other decision makers to give reasons because reasons serve many and varied purposes. These are intertwined, they tend to overlap and they blend into a common theme of legitimacy. With these qualifications in mind, they can usefully be described by reference to some broad categories – openness, rationality, accountability, satisfying the public’s right to know, benefiting persons affected by the decision, creating a proper precedent, assisting the review of a decision, enhancement of the decision, educating readers, guiding future conduct, exposure of wrongs and defects, and promoting law reform.

Inherent Limitations to Reasons
There are two inherent qualifications to the function of reasons. First, in most instances it is impossible for a decision maker to justify their decision in absolute and unassailable terms. At best they can show that their decision is based on good and sound reasoning. Second, we do not possess unmediated access to what goes on in the mind of a decision maker. Hence there is no assurance that any account of the decision in reasons is either true or comprehensive. This must be borne in mind when assessing the value of reasons, either in general or in specific cases.

Section 2. Openness
Reasons open up the decision-making process to view and scrutiny. Delivery of ‘reasons is [therefore] part and parcel of the open administration of justice.’ Giving reasons lifts ‘the veil of secrecy’ from decisions. Or, in the poetic words of Justice Deane (in context addressed to administrative decisions) reasons lower ‘a narrow bridge over the moat of executive silence’ that surrounds decision-making.

Openness in the form of publicly stated reasons in some ways is an end in itself since people are generally more comfortable with openness than secrecy. Yet openness also yields important symbolic and instrumental benefits. These benefits tend to interact with and feed off one another.

15. Minister for Immigration v Pochi (1980) 31 ALR 666, 686; 44 FLR 41, 63
Why Give Reasons for Decisions

Natural Desire for Openness
A natural desire for openness is one reason why courts deliver their reasons ‘publicly and in open court.’\(^\text{16}\) Publicity ‘is the very soul of justice.’\(^\text{17}\) In ‘an era of openness and transparency’\(^\text{18}\) there is a need for a ‘full exhibition’ of ‘the reasoning process.’\(^\text{19}\) Writing and publishing reasons endeavour to satisfy this requirement.

Instrumental Benefits
Openness has instrumental benefits. These overlap with some of the advantages of reasons stated below.

Symbolic Benefits
There are at least three symbolic benefits ensuing from openness. One is that justice is seen to be done.\(^\text{20}\) By this means reasons are a source of reassurance that all is well.\(^\text{21}\)

A second symbolic benefit, closely related to the first, is confidence in the system. Even if the decision is unfavourable, a person affected by the decision is likely to have much greater confidence that the decision was made fairly and properly if reasons are given,\(^\text{22}\) as will the public at large.\(^\text{23}\)

A third symbolic benefit is that giving reasons demonstrates to parties that they have been heard, as the rules of natural justice require.\(^\text{24}\) Of course for this to happen, reasons should include any substantial point raised in the decision making process. Parties ‘will not believe that they have been fairly treated if the arguments on which they relied have been simply ignored,’ except for those arguments that ‘are plainly unworthy of attention.’\(^\text{25}\)

16. *Scott v Scott* [1913] AC 417, 473 per Lord Shaw of Dunfermline who was quoting the Reports of the Commissioners on Ecclesiastical Courts, 1832. This was cited with approval in *Kitto* (1992) p 789
17. *Scott v Scott* [1913] AC 417, 477 per Lord Shaw of Dunfermline who was quoting Jeremy Bentham. This was cited with approval in *Kitto* (1992) p 790
22. *Dornan v Riordan* (1990) 95 ALR 451, 457
23. *Dornan v Riordan* (1990) 95 ALR 451, 457
Section 3. Rationality

Sir, I have found you an argument; but I am not obliged to find you an understanding.26 It is an elementary principle of fairness that a decision is ‘based on reason,’ and that can be seen only if the decision maker states their reasons.27 This is an elementary principle of fairness and part of the rules of natural justice.28

Putting this in another way, a decision must be able to stand up to reasonable scrutiny, even if the reasoning is not infallible. Reasons open up the decision-making process to this scrutiny by exposing it to ‘the public gaze.’29 This enables all persons, including of course those affected by the decision, to test its ‘validity and integrity.’30

Section 4. Accountability

Although unelected, the judiciary remains accountable to the community for its decisions. The provision of written reasons facilitates that accountability.31 A judgment ‘is the formal written record of the disposition of [a] matter.’32 Reasons both ‘do’ justice and ‘seem to do’ justice.33 This is why the ‘process of reasoning which has decided the case must itself be exposed to the light of day’.34 The system needs this to procure several major benefits that interact and overlap:
1. [A]ll concerned may understand what principles and practice of law and logic are guiding the courts’.35
2. It provides ‘a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing’.36 By exposing the decision to public view and by ‘clearly explaining the reasoning process,’ reasons make judges accountable.37 Reasons show the judge ‘to be acting judicially and not arbitrarily.’38
3. It furnishes ‘an effective stimulant to high judicial performance’.39

26. Dr Samuel Johnson
27. Mobasa v Nikic (1987) 47 NTR 48, 50
32. Doyle (1999) p 737
33. MacMillan (1948) p 491
34. Kitto (1992)
35. Kitto (1992)
36. Kitto (1992)
37. McHugh (1999) p 38
38. Sheller (1996) p 3
4. Reasons help ‘maintain confidence in the court’s ability to resolve disputes,’\textsuperscript{40} and maintain the ‘confidence of the public in the judicial system.’\textsuperscript{41} They do this by demonstrating that ‘judgments of courts are objective and fair.’\textsuperscript{42} Reasons ‘uphold the intellectual integrity of our system of law, showing adherence to the law’ as well as ‘impartiality and logical reasoning.’\textsuperscript{43} They provide ‘reassurance of the quality of the judiciary which is still the centrepiece of our administration of justice,’\textsuperscript{44} because it is ‘principally through the pages of written judgments that [the] quality [of individual judges] may be assessed.’\textsuperscript{45} People affected by the judgment, courts reviewing it, lawyers reading it and the general public are able ‘to test its validity and integrity.’\textsuperscript{46} In consequence, reasons help establish and maintain public confidence in the administration of justice.\textsuperscript{47} Specifically, ‘every piece of distinguished writing in a judgment tends to enhance the prestige of the judge’s court and to enhance the prestige [and authority] of the law.’\textsuperscript{48}

### Section 5. Public’s Right to Know

In a democracy the public has a right to know about the affairs of state. Indeed, courts now are subject to more critical and public scrutiny than ever before.\textsuperscript{49} Proceedings of courts, therefore, are public business.\textsuperscript{50} To this end, courts conduct proceedings in public so that all can see and hear the evidence given and the arguments submitted. Giving reasons for judgment furthers this notion because the public then knows why the decision was made as it was.\textsuperscript{51} As Sir Frank Kitto put it: ‘the delivery of reasons is part and parcel of the open administration of justice.’\textsuperscript{52} In turn, all this enhances public confidence in the justice system.

There is another beneficial outcome. Public knowledge enhances public debate on a decision.\textsuperscript{53} What the court says provides fodder and stimulus for

\begin{itemize}
  \item \textsuperscript{40} Sheller (1996) p 3
  \item \textsuperscript{41} Gibbs (1993) p 502
  \item \textsuperscript{42} Gibbs (1993) p 502
  \item \textsuperscript{43} Kirby (1990) p 693
  \item \textsuperscript{44} Kirby (1990) p 693
  \item \textsuperscript{45} Kirby (1990) p 693
  \item \textsuperscript{46} Sheller (1996) p 3
  \item \textsuperscript{47} Mason (2003) in Sheard (2003) p 2
  \item \textsuperscript{48} Kitto (1992) p 792
  \item \textsuperscript{49} Mason (2003) in Sheard (2003) p 2
  \item \textsuperscript{50} Scott v Scott [1913] AC 417, 473
  \item \textsuperscript{51} Gibbs (1993) pp 494-495
  \item \textsuperscript{52} Kitto (1992). Sir Frank Kitto added: ‘It is not enough that the hearing of a case has been in public’.
  \item \textsuperscript{53} Dornan v Riordan (1990) 95 ALR 451, 457
\end{itemize}
people to debate the policy and desirability of the law and the way it has been interpreted and administered. This may keep the issue in the public arena. Eventually it may provide a cue for law reform.

Section 6. Benefit to Persons Affected

Reasons confer personal benefit on the people who are affected by the decision. Reasons can overcome ‘the real grievance persons experience when they are not told why something affecting them has been done.’\(54\) When a court explains why it made the decision that it did, the reasons permit ‘the parties to see the extent to which their arguments have been understood’,\(55\) and also to know why their arguments have been ‘accepted or rejected.’\(56\) Reasons thus prove ‘attentiveness to argument’ showing that litigants have been heard as natural justice requires.\(57\) In consequence a person affected by a decision, even if the decision is unfavourable, is likely to have much greater confidence that the decision was made fairly and properly when they receive reasons.\(58\) Conversely, if reasons are not given a litigant may feel not only ‘disappointed’ but ‘disturbed.’\(59\)

In other words, a litigant should leave the court satisfied that they have had their day in court. They must feel that they have had their say, and whether it prevailed or not, that their case was heard, understood and considered.

These considerations apply to all litigants, both winners and losers. However, they are of special importance to the loser. A winner is rewarded by their victory. A loser takes nothing of substance from the hearing. What they need to take, therefore, is a reasoned explanation as to why they lost.\(60\) They can still take with them the consolation that even if they did not win, at least they received a fair hearing. Justice demands no less. Well written reasons may satisfy this demand.

Section 7. Precedent

A judgment reveals and states how a law is to be interpreted or indicates the proper formulation of a common law rule.\(61\) In this regard, judgments of

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54. *Minister for Immigration v Taveli* (1990) 94 ALR 177, 193
55. *McHugh* (1999) p 37
57. *Kirby* (1990) p 693
58. *Dornan v Riordan* (1990) 95 ALR 451, 457
61. *McHugh* (19991) p 38
higher courts are precedents or guides for future cases. While judgments of lower courts and tribunals are not strictly precedents, they may be a useful guide for those who are greatly affected by their decision. An example is a government official, especially if the jurisdiction or area of law is highly specialised. By giving the legal basis for a decision, reasons make the law predictable. They indicate how ‘like cases will probably be decided in the future.’ This function of reasons makes it even more important that reasons are clear because ‘[a]bsence of clarity is destructive of the rule of law.’

Section 8. Enhancement of Decision

Reasons enhance the making and operation of the decision. An obligation to give reasons imposes upon the decision maker an ‘intellectual discipline’ and is a ‘sound administrative safeguard.’ A decision maker who knows that she may be required to explain her decisions will make a better decision than she would if she were not required to give reasons. For example, reasons once prepared as a draft may show the judge, on reflection, that ‘a seemingly obvious conclusion is flawed.’

Reasons, therefore, by compelling a public explanation of the decision ‘necessarily constrain the exercise of judicial power within its proper limits’ and ‘represent a method of judicial accountability.’ Conversely, without reasons, a decision maker may be ‘lazy’ and ‘prone to error.’

These benefits stem from the fact that reasons are publicly issued. Publicity ‘is the keenest spur to exertion and surest of all guards against improbity. It puts the decision makers on trial.’ Publicity provides ‘on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other, an effective stimulant to judicial high performance.’

63. Merkur Island Shipping Corporation v Laughton [1983] 2 AC 570, 612, per Lord Diplock
64. Merkur Island Shipping Corporation v Laughton [1983] 2 AC 570, 612, per Lord Diplock
66. Minister for Immigration v Taveli (1990) 94 ALR 177, 193
68. Sheller (1996) p 3
69. Sheller (1996) p 3
70. Scott v Scott [1913] AC 417, 477 per Lord Shaw of Dunfermline who was quoting Jeremy Bentham. This was cited with approval in Kitto (1992) p 790.
71. Kitto (1992) p 790
There is, however, a price for reasons functioning as ways to enhance future judicial decision – ‘publishing written reasons provided more ground for others to criticise and to ensure that any censure directed at a judgment would be enduring’. This, however, is not a ground for not giving reasons because ‘considerations of despair have no place in the [judge’s] thinking’.

Section 9. Assistance for Review of a Decision

Many of the components of reasons cover steps in decision making that, if not done properly, can yield a ground for one or more avenues for review of the decision. Consequently, reasons may assist any form of review of the decision. They can do so in several ways.

They help a party to decide if they should seek review and, if so, what review they should seek and on what grounds. Reasons help their legal advisers ‘in assessing the possibility and prospects of an appeal.’

If one of the parties seeks review of the decision, reasons help the reviewing body, such as an appellate court, to perform its function. Reasons ‘expose the judge’s reasoning on matters of fact and law’ thereby enabling the court to ‘examine the soundness of the judgment.’ Reasons assist review because they ‘enable the question whether legal error has been made by the [decision maker] to be more readily perceived than otherwise might be the case.’ Conversely if a reviewing body does not know the basis on which a decision was reached, it cannot judge whether the decision was properly reasoned.

Just as reasons may facilitate review of various forms, conversely the absence of reasons for a decision ‘impedes the right of appeal.’ It ‘confuses the issues [and] makes it difficult to decide whether any error occurred.’ It also ‘tends to increase the costs of appeal’ and review.

72. Kitto (1992)
73. Kitto (1992)
74. *Soldatow v Australia Council* (1991) 103 ALR 723, 724
75. *Pettitt v Dunkley* [1971] 1 NSWLR 376, 388; but see *Housing Commission v Tatmar Pastoral Co* [1983] 3 NSWLR 378, 381 and *Australian Postal Commission v Idriss* (1992) 26 ALD 257
76. *Burns v Australian National University* (1982) 40 ALR 707, 715 per Ellicott J
77. *Minister for Immigration v Taveli* (1990) 94 ALR 177, 193
78. Kitto (1992) p 788
79. Doyle (1999) p 737
Since reasons are an aid to review of a decision, consequences flow as to the proper content of reasons. Reasons must be sufficiently complete to enable an appellate court to exercise its functions properly. Reasons must clearly identify the real and relevant issues of law and fact, and these issues must be addressed. So, for example, omission of a relevant argument or of sufficient detail in reasons may provoke an unnecessary appeal. Note in this regard, though, that even very careful reasons cannot avoid all appeals. A court may overrule a decision for either of two reasons – (i) it was wrong, for example the court made a ‘simple mistake’ and (ii) legal ‘minds simply differ.

### Section 10. Educative Function

Reasons perform an educative function. Specifically they inform a judge, whose judgment has been reversed by an appellate court, why their judgment was reversed. They also educate other lawyers by authoritatively stating legal principles and by illuminating their operation. Like other professionals, lawyers are students for all of their working life.

### Section 11. Future Guidance

Reasons give the parties and others who see the reasons an insight into the decision-making process. This may help them when decisions are made in the future under the same provision because they can ‘chart their future course of action.’

### Section 12. Exposure of Wrong

A judgment may expose an ‘error or deficiency’ or ‘an impropriety’ in the area of public administration, or some ‘individual wrongdoing.’ This,

85. Kirby (1990) p 694
86. Kirby (1990) p 695
88. Kirby (1990) p 695. See, for example, Oceanic Sun Line Special Shipping Co v Fay (1988) 165 CLR 197.
89. Kirby (1990) p 695
90. Kitto (1992) p 788
91. Kitto (1992) p 788
92. Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124, 130-131; 71 ALR 63, 79
93. Doyle (1999) p 737
95. Doyle (1999) p 738
however, should be done only if to do so is ‘strictly necessary’ for deciding the case.96

**Section 13. Law Reform**

Hearing a case and writing the ensuing judgment may reveal a ‘defect in the law or its administration,’97 or, ‘an anomaly [in a law] or a clear injustice in its operation.’98 It ‘is well within the proper scope of the judge’s functions to bring the matter forcefully to the attention of the public and of the relevant parliament or the appropriate organ of Executive Government.’99

Judges are trained in law, and experienced in its operation. They also hold a unique and enviable position by which they may view how the law functions at the ground level, that is, in particular cases. They can make recommendations for law reform based on difficulty they have seen with a law in a case before them. In practice judges commonly make such suggestions and it is regarded as a proper part of the judicial function. Indeed such has been their contribution that Brett Walker SC, a former president of the New South Wales Bar Association, has commented that, in Australia, ‘judges have long been one of the most important, fruitful and beneficial sources of law reform proposals.’100

Judges should generally be restrained and temperate in their language. Nevertheless, it can be proper to speak of defects or failings that cause injustice ‘in forceful words [and] in biting words if needs be.’101 A judge should not feel constrained in expressing appropriate feelings about the problem they have seen. ‘[J]udicial indignation in a proper case is not only permissible but required by the judge’s position in the social structure.’102

Hence, a judge ‘should not be deterred by the likely ineffectiveness of his protest or by scowls of those who are found to have used their authority wrongfully.’103 A ‘court no less than a chamber of parliament’ is a place ‘in which hidden things [can] be brought to light and shameful things exposed in their shamefulness.’104

96. Doyle (1999) p 738
97. Doyle (1999) p 737
102. Kitto (1992) p 789
103. Kitto (1992) p 789
Why Give Reasons for Decisions

Section 14. Impermissible Function

There are impermissible purposes, that is, purposes that are not a basis for giving reasons. It is emphatically not the purpose of a judgment to obtain media publicity, although in certain cases this eventuality is often unavoidable. Nor is it the function of a judgment to ‘alienate’ classes of readers rather than to ‘persuade’ them.

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