STUDENT GOVERNANCE INITIATIVE

THE HANDY GUIDE TO GOOD DECISION MAKING ON DISCIPLINE COMMITTEES

UMSU Advocacy Service
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HOW TO USE THIS GUIDE

The ‘mechanics’ of student misconduct processes are currently set out in Statute 13.1; and will soon be replaced by the new University Regulation 8 and its attendant misconduct procedures and guidelines. The new procedures are due to commence in March 2016.

A thorough understanding of the regulatory and procedural context for the University’s misconduct processes is critical; however this guide is designed to act as a compliment to the Regulations and procedures, and should be read in conjunction with them. The University may vary its misconduct procedures from time to time; however there are a range of long standing foundational principles underpinning good decision making which remain constant. It is these approaches that are the focus of this guide.

SOME THOUGHTS ABOUT YOUR ROLE

Sometimes the pressure to focus on issues of academic honesty can obscure the requirements of sound decision making. However without a fair, consistent and transparent process, there can be no integrity to the University’s position on academic honesty. The rules of procedural fairness and the other good decision making principles set out in this guide are fundamental to due process.

Ensuring procedural fairness is considered so important that it is one area where the courts, which are otherwise extremely reluctant to deal with internal university matters, have leverage to intercede. Under the Administrative Law Act 1978 (Vic), decisions by University committees are reviewable by the Supreme Court with respect to the application of natural justice.1

The right to procedural fairness exists independently of whether the student has committed misconduct. The Advocacy Service routinely provides advice and advocacy to students who have clearly done the wrong thing. Our role is not to try to exculpate them, or to make them feel better about what they may have done. On the contrary, the approach which serves the student’s own interests best is to assist them to critically reflect on their actions and present their case honestly and candidly to the Discipline Committee.

Moreover, the role of the Advocacy Service in supporting students facing University misconduct procedures is to ensure that the University observes the rules of procedural fairness, consistency, proportionality and transparency so that students’ right to sound decisions is protected.

For student members on these committees, your role as a decision maker also requires a solid understanding and application of these principles. This means you need to understand the basic tenets of good administrative decision making. You may have a significant part to play in influencing and guiding the committee on the implementation of many of the principles set out in this guide.

1. See e.g. Simjanoski v La Trobe University [2004] VSC 180 (27 May 2004).
GUIDING PRINCIPLES

Apart from the ‘mechanics’ set out in the University’s Regulations, procedures and guidelines which provide the authority to undertake your role on the committee, you need to have a good working knowledge of the issues to consider when making decisions. Considering the principles set out below will help you make decisions which have proper regard to students’ rights and interests and which are less likely to be challenged. Everyone benefits from sound decisions made the right way the first time.

THE RIGHT TO PROCEDURAL FAIRNESS

You may have heard the terms ‘procedural fairness’ and/or ‘natural justice’. The two terms are not identical (although they tend to be used interchangeably) but for most purposes refer to the same concepts. The main difference is that natural justice tends to be used more in procedures used by courts. For this reason we refer to procedural fairness when talking about misconduct procedures because it relates to administrative decision-making. Essentially procedural fairness applies to administrative decisions made by individuals and committees and where the decision might affect a person’s rights or interests.

The High Court has said:

*The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.*

A student’s ‘right’ or ‘interest’ covers a broad category, including personal freedom, status, preservation of livelihood and reputation. In this context it is clear that misconduct procedures attract the right to procedural fairness.

Procedural fairness has a close association with natural law which has history dating back to Greeks in 6th century BC. It is predicated on the following notions:

- people are basically good;
- a person of good intent should not be harmed; and
- one should treat others as one would like to be treated.

There are three main principles:

1. The hearing rule - the right to a fair hearing before a decision is made;
2. The bias rule - a decision must be made by decision-makers with no vested interest, prior involvement in the case or preconceived ideas/bias;
3. The ‘no evidence’ rule – the right to have the decision based on logically probative evidence.

The right to be heard

The person affected by the decision should be given:

- All the information and documentation which was provided to the decision makers;
- Adequate time to prepare a response; and
- The opportunity to present his or her case either in person or in written documentation or both.

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2. Kioa v West (1985) 159 CLR 550 per Mason J at 582.
NOTICE AND ADVERSE INFORMATION

Although the process of formulating and providing notice of misconduct to a student is a separate administrative function to your role on the Discipline Committee, it is important to be aware of these requirements as they may have a bearing on the student's capacity to present their case in the hearing.

A student facing a misconduct allegation should be provided with notice of the allegation along with particulars of any credible, relevant and significant information (such as Turnitin or invigilator reports) which the decision-maker has, and which may affect the decision to be made. The student should also be given an opportunity to respond to the allegations and any other information that the decision-maker has. This applies to both oral submissions and occasions when decisions are made solely on the basis of written submissions. Adequate time should be given to the person to prepare for an oral presentation (if there is one) or prepare written submissions before a decision is made (where reasonably practicable).

If a student has already responded to some material, but further information comes to the attention of the Discipline Committee before a decision is made, then the student should also be given an opportunity to respond to that extra information.

The right to an objective decision

The right to an objective decision concerns whether the decision maker has, is likely to have, or whether a reasonable person in the circumstances would believe that a decision maker has prejudged the situation. In the context of faculty Discipline Committees it can be very difficult to avoid an apprehension of bias. For this reason, the rule is applied strictly only at the appeal stage, where the entire committee must be, and be seen to be, totally impartial.

However, even at the faculty Discipline Committee level, issues of actual bias must be taken very seriously. If actual bias is alleged, the test is whether the decision-maker is actually incapable of considering the matter fairly. The most common scenario where this is an issue is where the staff member who has raised the allegation is also a decision maker on the committee.

When you receive the Committee papers prior to the hearing, it is worth paying close attention to the constitution of the committee and cross referencing it with any staff member who is raising the allegation or providing evidence in support of it. If you think there is a problem, you can flag it ahead of the hearing with the committee chair. If it becomes apparent only in the course of the hearing, you may wish to ask the minute taker to note your concern about apprehended bias. Similarly, if you know the student who is facing the allegation well, you should excuse yourself from membership of the Committee and seek an alternative member to replace you. However, if you attend the hearing and simply recognise the student as someone you vaguely know, then this is generally not an issue.
The right to an evidence-based decision

The decision should be based on a clear and defensible reasoning. This means it must be possible to put a clear and logical rationale for the decision, as opposed to a ‘gut feeling’ for example.

To come to an evidence based decision, you need to consider each allegation, the supporting evidence presented to the committee, and the student’s response; and decide whether each fact alleged has been proven using the appropriate standards of evidence and proof (discussed further below).

You should also bear in mind that there is a material difference between an unsubstantiated allegation and exoneration or ‘innocence’ of all wrongdoing. Evidence is the issue here - you do not have to think the person is completely innocent to find an allegation unsubstantiated – it is a matter of whether there is sufficient and credible evidence to find that the misconduct occurred on the balance of probabilities (more on that later).

You might also ask yourself whether, in the absence of credible evidence to prove wrong doing, the committee is making a decision based on the student’s failure to produce evidence that they did not commit misconduct. In other words, be alert to situations where there is an absence of evidence generally about the misconduct and the committee’s decision is being made on the basis that the student failed to prove they didn’t commit misconduct. As a general rule, if there is no credible evidence on either side of an allegation – regardless of ‘suspicions’ - the allegation is unsubstantiated.

To ensure that your decision is appropriately evidence based, it is good practice to make note of the following:

- the decision itself (i.e. whether the allegation is sustained or unsubstantiated);
- the findings on material facts (i.e. what evidence supported the decision that particular facts were true and others were not);
- the evidence or other material on which those findings are based (i.e. turn it in reports, witnesses – such as invigilator reports or people who actually saw the misconduct occur, CCTV); and
- the reasons for any penalty chosen (i.e. addressing issues of consistency and proportionality discussed further below).

Whatever the Discipline Committee decides in a case, it must explain its reasons in a concise statement. The student should be able to see why the Committee has taken a particular course. Moreover, the student may have the right to appeal the committee’s decision and this rationale will be critical to determining the grounds and arguments of such an appeal.

Breach of Procedural Fairness

The consequence of a breach of the above rules is that it may give grounds for the student to appeal from the original determination. If the breach occurs at the appeal stage, then it would fall within the ambit of an Ombudsman Victoria review.

If the breach goes to the heart of the decision, that is – if the decision would potentially be different but for the breach – the appeal committee may uphold the appeal and substitute its own decision. If the Ombudsman makes a finding, then the matter is referred back to the University with appropriate recommendations.

If the breach does not directly affect the outcome, the appeal committee may uphold the appeal, but remit the decision to a new faculty discipline committee acting in accordance with procedural fairness.
OTHER PRINCIPLES FUNDAMENTAL TO SOUND DECISIONS

The overall process and procedures involved in the running of the Discipline Committee will be governed by the University’s Regulations and attendant policy and procedures. The University generally also produces guidelines to add even more detailed information to the way committees should conduct themselves. However, there are a few best practice steps you might bear in mind alongside the formal guidelines to maximise the implementation of the principles described above in the decision making process.

DECIDING THE FACTS – STANDARD OF PROOF AND STANDARD OF EVIDENCE

There are two important concepts which inform the process of determining whether the facts in the allegation are made out or not.

1. the ‘balance of probabilities’ – is the standard of proof required to determine whether there is sufficient evidence to substantiate allegation; and

2. the rule in Briginshaw – is the standard of the evidence required for extremely serious allegations such as those involving a crime, fraud or other type of moral wrong doing, which if proven, would have serious consequences for the alleged wrong doer.

Generally, proof of a fact on the balance of probabilities requires the decision maker to determine whether it is ‘more probable than not’ that the facts occurred. This may require the decision maker to compare competing versions of events to determine which version is more probable. However this is not simply a higher mathematical probability of odds at least a 51% to 49% that the events occurred. Rather in Briginshaw v Briginshaw the High Court stated that the balance of probabilities test required the tribunal in this case to:

*feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality … [A]t common law … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.*

Where the allegation concerns especially serious misconduct which might have a very onerous outcome for the student, including where suspension or termination of enrolment is a potential penalty, the Briginshaw rule requires more substantial verification than merely circumstantial or uncorroborated evidence to substantiate the allegations. For example, it would be unsound to make a finding based solely on uncorroborated hearsay evidence that a person forged a document.

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3. *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374 per Denning J.
4. (1938) 60 CLR 336 at 361–2.
PROPORTIONALITY

The Discipline Committee exercises a degree of discretion in deciding on the appropriate outcome or penalty. In doing this, it must be satisfied that its action is proportionate in all the circumstances of the case.

The simplest definition of the doctrine of proportionality is that you should apply the minimum penalty to achieve the required outcome (‘bottom up’ approach). The European Court of Human Rights has put it that the application of the doctrine of proportionality is to ensure that a measure imposes no greater restriction upon a respondent than absolutely necessary to achieve its objectives. This will involve the Committee giving consideration to such matters as:

- Consistency and fairness of sanctions; and
- The existence of any aggravating or mitigating factors of the offence or conduct

Consistency and fairness – fair in form AND fair in effect?

Consistency of approach is not always easy and is made more difficult both because the composition of the Disciplinary Committee varies, and because the volume of misconduct cases does not provide for an especially sound sample size. Further, while general consistency is important, it is also necessary to bear in mind that each case is different and must be decided on its own particular facts and merits. Moreover, while penalties which are typically issued for similar types of misconduct may provide a good reference point — regard should be had not just to the penalty itself, but also to the particular effect of that penalty on the student.

For example: the usual penalty for serious plagiarism is to deny credit for the whole subject. For a domestic student in the middle of their degree, this is an inconvenience. For an international student completing their final subject – this equates to termination of enrolment. Financial penalties in general misconduct matters are also likely to have disproportionate effects on different students.

The best guide is to consider not just the penalty itself, but the impact of the penalty in all of the student’s specific circumstances. Overall, consistency is best promoted by adopting a structured and principled approach to decision making – which is the purpose of this guide.

Aggravating and mitigating factors

Aggravating and mitigating factors have no bearing on whether the facts proving an allegation are made out, however the Discipline Committee should have regard to any relevant aggravating or mitigating factors present when determining a proportionate penalty for proven misconduct.

Aggravating factors in either general or academic misconduct matters may include:

a. Wilful dishonesty or premeditated misconduct;
b. Degree of harm or adverse impact on others;
c. Recklessness;
d. Misconduct sustained or repeated over a period of time;
e. No insight into or contrition for the misconduct;
f. Previous adverse findings of a University Discipline Committee.
Mitigating factors may include:

a. Single and isolated minor incident;
b. An error of judgement made under extraordinary circumstances;
c. Inexperience;
d. Open and frank admissions at an early stage;
e. Ill health at the time of the misconduct;
f. Significant lapse of time since the incident;
g. Demonstration of insight into and contrition for the misconduct committed.
h. Mitigation can be presented by personal evidence as well as references and testimonials.

In some cases, mitigating circumstances may go to negate factors which would otherwise be aggravating. For example where someone has committed misconduct and then had a very hostile response to the allegation, showing no contrition or insight (aggravating factors); however, they adduce evidence of a severe mental health problem which affects their capacity for an appropriate response.

Generally, the Discipline Committee should explain its reliance on mitigating or aggravating factors when giving reasons for decisions.

Intention

In the courts there is an experienced judiciary to make or guide determinations having regard to a person's intention to commit an offence. However processes outside of a court context usually do not attempt to make decisions with respect to intention. For this reason, student misconduct is frequently regarded as a strict liability matter – that is, intention is not required to establish a finding.

However, intention should play a role in considering penalty. For example where the conduct was inadvertent or ignorant, a committee might opt for a reprimand rather than a more onerous penalty. In academic misconduct matters, the student might be offered an opportunity to resubmit academic work on a pass/fail basis as an educative exercise.

Onerous penalties should be reserved for wilful or aggravated conduct because they act as a deterrent as well as a penalty, whereas inadvertent or ignorant misconduct is better served by an educative response – that is, the minimum penalty to achieve the required outcome.
CONFIDENTIALITY AND DIFFICULT OR UPSETTING CASES

Finally, a few words about your broader responsibilities as a discipline committee member. You will be privy to highly confidential information, it is absolutely critical that you do not disclose this to anyone in a way which might identify the respondent to the allegation. This means keeping and disposing of the committee papers securely and not discussing the case with anyone in terms which make the matter identifiable.

However in some cases, there may be issues which you find disturbing or upsetting. It may be a matter of the respondent’s personal circumstances raised in mitigation or it may be details of the alleged misconduct itself which affect you. In such situations it is important that you are able to debrief. There are several appropriate ways to do this; you could talk to the other members of the committee after the hearing, you can discuss the matter with the advocate who attended in support of the student or another staff member in the Advocacy Service, we can arrange a debrief with someone from the University Counselling and Psychological Services, or you can debrief with someone outside of the university, taking care to discuss the matter in ways that would not identify the people involved. If in doubt, come and speak to someone in Advocacy. Whatever you do, don’t carry around bad feelings or distress.

We trust you have found this guide useful. It is a prototype of sorts and as such we welcome your feedback on any errors or omissions or issues you feel we should cover in future editions.

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