

Natural justice/procedural fairness

What is natural justice/procedural fairness?

The rules or principles of natural justice, also known as procedural fairness, have developed to ensure that decision-making is fair and reasonable. Put simply, natural justice involves decision-makers informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule).

When should the rules of natural justice be observed?

There is a presumption in law that the rules of natural justice must be observed in exercising statutory power that could affect the rights, interests or legitimate expectations of individuals. However, it is good practice to observe these rules whether or not the power being exercised is statutory.

If action being taken by a public official or by or on behalf of a public sector agency will not directly affect a person's rights or interests, there is no obligation to inform the other person of the substance of any allegations or other matters in issue. For example, if an investigator is merely collecting information to make a report to the management of an agency so that action can be taken, there is no obligation to notify the subject of the complaint. However, if an investigation will lead to findings and recommendations about the matter, the investigator should provide natural justice to the person against whom allegations have been made. Similarly, the person who ultimately makes a decision on the basis of the investigation report must also provide natural justice, by allowing the person adversely commented upon to make submissions regarding the proposed decision and sanction.

What are the rules of natural justice?

Any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice. Any person whose rights, interests or legitimate expectations will be affected by a decision or finding is entitled to an adequate opportunity of being heard. In order to properly present their case, the person is entitled to know the grounds on which that decision or finding is to be taken.

However, the courts emphasise the need for flexibility in the application of the rules of natural justice, depending on the circumstances of each individual case. Depending on the circumstances which apply, natural justice may require a decision-maker to:

- inform any person:
 - whose interests are or are likely to be adversely affected by a decision, about the decision that is to be made and any case they need to make, answer or address
 - who is the subject of an investigation (at an appropriate time) of the substance of any allegations against them or the grounds for any proposed adverse comment in respect of them
- provide such persons with a reasonable opportunity to put their case, or to show cause, whether in writing, at a hearing or otherwise, why contemplated action should not be taken or a particular decision should or should not be made
- consider those submissions
- make reasonable inquiries or investigations and ensure that a decision is based upon findings of fact that are in turn based upon sound reasoning and relevant evidence
- act fairly and without bias in making decisions, including ensuring that no person decides a case in which they have direct interest
- conduct an investigation or address an issue without undue delay.

While a person the subject of an investigation should be informed of the substance of the allegations against them and proposed adverse comment, this does not require all the information in the investigator's possession supporting those allegations to be disclosed to that person. Indeed it may damage the effectiveness of the investigation to show the investigator's hand completely by offering too much information too early to the person the subject of complaint.

In rare cases there may be an overriding public interest in short-circuiting certain natural justice requirements. This will normally be in situations that involve serious risks to personal safety or where substantial amounts of public funds may be at risk. In these cases, expert external advice should always be sought and documented.

Benefits for persons whose rights or interests may be affected

Natural justice allows persons whose rights or interests may be affected by decisions the opportunity:

- to put forward arguments in their favour
- to show cause why proposed action should not be taken
- to deny allegations
- to call evidence to rebut allegations or claims
- to explain allegations or present an innocent explanation, and/or
- to provide mitigating circumstances.

Benefits for investigators and decision-makers

While natural justice is, at law, a safeguard applying to the individual whose rights or interests are being affected, an investigator or decision-maker should not regard such obligations as a burden or impediment to an investigation or decision-making process. Natural justice can be an integral element of a professional decision-making or investigative process – one that benefits the investigator or decision-maker as well as the person whose rights or interests may be affected.

For an investigator or decision-maker, natural justice serves a number of related functions:

- it is an important means of checking facts and of identifying major issues
- the comments made by the subject of the complaint or the interested party will expose any weaknesses in an investigation, decision-making process or information on which a decision is to be based, which avoids later embarrassment, and
- it also provides advance warning of the basis on which the investigation report or administrative decision is likely to be attacked.

Further information

For further information, see also:

- *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003
- *The Complaint Handlers Tool Kit* (2nd edition), NSW Ombudsman, June 2004

Investigating complaints – A manual for investigators (2nd edition), NSW Ombudsman, June 2004

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.