

## **Feedback and Complaints Procedural Fairness Considerations**

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- 1. A Complaint Manager, Incident Manager or external investigator that is intending to investigate or act upon a complaint it has received that expressly or implicitly alleges inappropriate conduct by a Worker should have regard to the following procedural fairness steps**
- (a) Identify whether any information that may be taken into account in resolving the complaint was provided on a confidential basis or may be confidential in nature, and if so:
    - (1) consider how confidentiality can be maintained consistently with affording procedural fairness to the worker, and
    - (2) if it may be difficult practically to maintain confidentiality in resolving the complaint, consult with the person who provided the information to inform them of this difficulty and ascertain if they wish the complaint to proceed.
  - (b) Identify if the allegation relates to the behaviour of more than one worker and whether the same (or different) procedural fairness steps should apply to each worker.
  - (c) Consider who is an appropriate person within the organisation to manage the complaint and whether more than one person should discharge the role of examining the complaint, consulting with interested parties, ensuring that procedural fairness is provided to the worker, and making a decision on the complaint. More than one person may manage the complaint for organisational reasons or to avoid conflicts of interest or the appearance of bias.
  - (d) Identify the training, policies, procedures and any other relevant systems of work provided to the worker in the context of the supports or services in which the allegation arose.
  - (e) Determine an appropriate process for managing the complaint, having regard to the matters considered in paragraphs (a), (b) and (c), and aspects of this instrument.
  - (f) Inform the worker of the issue to be investigated, and the allegation(s) made against the worker. There is no formal requirement as to how the notice is to be given or the issues are to be framed – though the prudent course is to give notice in writing if the matters or potential sanctions under consideration are serious in nature.
  - (g) Inform the worker how the matter will be investigated, including who is conducting the investigation, how long it is expected to take, and how the investigation will be reported.
  - (h) Adequate details of any allegation should be given to enable the worker to respond in a constructive manner – for example, tell the worker what they are alleged to have done or omitted to do, when the incident occurred, and of any evidence that tends to confirm the allegation. Draw the worker's attention to any issue that may be critical to the outcome but which may not be apparent to them. It is not generally necessary to identify who made the allegation, though this may be unavoidable in providing other details.
  - (i) It is not generally necessary to give the worker access to records relating to the complaint – providing them with a summary of the information that may be relied on in reaching a decision is usually sufficient. Depending on the nature of an allegation it may be necessary to allow a person to inspect a document or to listen to or view an audio-visual recording that may be taken into account.
  - (j) The decision maker or person conducting the inquiry or investigation is not required to notify their provisional views or tentative findings. However, it can enhance the fairness of a process to alert a person to a perceived deficiency or inconsistency in their submission.
- 2. Inform the worker of any potential sanction that may be imposed**

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- (a) A sanction may be formal in nature (such as dismissal or an investigation into an alleged contravention of the Code of Conduct) or be an adverse consequence of a different kind (for example, work restrictions, or publication of an investigation report that reflects adversely on the worker's performance).
- (b) The notice to the worker should identify considerations that may be relevant to deciding on a sanction to be imposed. This is particularly important if a harsh sanction such as dismissal or reduction in salary is a possibility.
- (c) It may be desirable to conduct a separate hearing or procedure to decide on a sanction, to ensure fairness to the worker and to remove any appearance of bias.

**3. Give the worker a reasonable opportunity to respond to the issue to be investigated, the allegation(s) against the worker and possible sanctions**

- (a) What will be a 'reasonable opportunity' will depend on the circumstances. Many issues can be dealt with quickly – by discussion or allowing the worker a few days to prepare a response. Other issues may require a longer period for the worker to consult others, obtain information or prepare a more extended response. The central requirement is that the worker should have a reasonable opportunity to comment upon or rebut adverse or prejudicial material and to put forward information and submissions in support of a favourable outcome.
- (b) It is good practice to allow the worker to choose how they will respond – for example, a face-to-face interview or meeting to discuss the issue, a written submission, or a meeting at which the worker is accompanied by a support person that could be a colleague, a family member, or a representative (see paragraph (c) below).
- (c) A worker may choose to consult a lawyer or union official in preparing a statement, and obtain advice about what they intend to say in making a verbal submission. The person may have the union official or lawyer attend a meeting as their support person or representative respectively.
- (d) It may be necessary to allow a person to make more than one statement or submission before a final decision is made. For example, it may transpire at a meeting that some disputed matters cannot fairly be resolved without a further statement or evidence. Equally, if a harsh sanction is to be imposed it may be desirable to split the hearing into two stages – an initial finding on the complaint allegation, followed by a decision on the sanction to be imposed.
- (e) Special measures may be required to ensure that a person has a reasonable opportunity to respond – such as use of an interpreter, conducting an interview/hearing at a separate location, or agreeing to a worker's request (supported by reasons) for an extension of time or adjournment.

**4. Inform the worker in writing of the decision that has been made following the investigation**

- (a) A written record of the decision is important to ensure clarity and certainty, and to enable the worker to decide whether to follow up.
- (b) The written form can vary according to the circumstances. For example, a formal letter of advice should be used to notify an adverse decision that could be distressing to a worker or impair their career. In other circumstances – including if a decision is favourable to a worker – it may be sufficient to notify the decision by email, or to invite the worker to sign/initial a written record of the decision.
- (c) If a sanction is imposed on a worker (including an adverse finding recorded on their personnel record) the nature of the sanction should be clearly stated. If the worker has a right to challenge or review the sanction, the procedure for doing so should be outlined.

**5. Ensure that the investigation of the complaint or allegation is conducted in a fair and unbiased manner**

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- (a) A transparent process should be followed that gives a worker a reasonable opportunity to present their views on all relevant issues.
- (b) The person conducting the investigation should do so with an open mind and avoid forming a view on whether to sustain a complaint allegation against a worker before the investigation is complete.
- (c) Consider whether any decision to impose a sanction should be made separately by someone other than the person who conducted the investigation, to avoid any appearance of prejudice or prejudgement at this stage.

## 6. Other practical considerations

- (a) Fair process: Procedural fairness requirements aim to ensure that a fair process is followed in decision making that could adversely or detrimentally affect the rights or interests of a person. The underlying assumption is that a fair process will lead to better decision-making – and, in this context, better and fairer complaint handling. However, procedural fairness requirements stop short of assessing whether a particular decision or outcome is fair: they address the process to be followed in reaching a decision, but not the substantive merits of that decision.
- (b) Fair process overall: The obligation to afford procedural fairness applies to the overall process of making a decision or resolving a complaint, and not separately to each stage in that process. A person should be given a reasonable and informed opportunity to comment on any adverse finding or sanction before it is finally determined. The precise point in the process at which that opportunity is given can be of secondary importance.
- (c) An illustration of that principle is that there is generally no procedural fairness obligation to notify a person of an adverse allegation or potential finding when a complaint is first recorded or referred to another body. A reasonable opportunity to comment on the allegation or potential finding can be given at a later stage. This enables appropriate analysis of a complaint to determine if it should be managed as a complaint about the level or quality of services or supports that a person with disability is receiving, rather than an allegation of inappropriate conduct by a worker.
- (d) A person who is facing a potential adverse finding or sanction should be reassured as necessary that the overall process will be fair. Equally, a deficiency at an early stage of the process can be corrected at a later stage, provided this is done by a good faith process in which the decision maker approaches the issue with an open mind and gives genuine consideration to any submission made by the person to whom procedural fairness is owed.
- (e) The dual purpose of procedural fairness: Procedural fairness is a legal obligation that applies to decisions made under statute that adversely affect the interests of others in a direct and specific manner. A failure to comply with this legal obligation may lead to an adverse decision being set aside by a court or questioned by a review tribunal or body.
- (f) As importantly, procedural fairness aims to strengthen the fairness and integrity of administrative processes, regardless of whether legal proceedings for a breach are a possibility. Decision-makers should, accordingly, ensure procedural fairness in the pursuit of good administration as an overriding objective.

## 7. Dealing with confidential information

- (a) Information to be considered in a complaint management and resolution process may have been received on a confidential basis. For example, a complainant, informant, witness or whistleblower may request that their identity remain confidential, or private personal information about a third party may be revealed during an investigation.
- (b) The Complaint Rules (paragraph 8(5)(b)) require that a complaints management and resolution system ensures that information provided in a complaint is kept confidential, and only disclosed if the disclosure is:

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- (1) required by law; or
  - (2) is otherwise appropriate in the circumstances.
- (c) Procedural fairness principles recognise that protection of identity and confidentiality can be important elements of effective complaint handling and dispute resolution. This must nevertheless be balanced against the obligation to provide procedural fairness to a person whose interests may be adversely affected by an administrative action, particularly if a sanction may be imposed on a person as part of the resolution of a complaint or allegation.
- (d) This means that the obligation to provide procedural fairness may override – in whole or in part - the obligation to maintain confidentiality, depending on the circumstances.
- (e) Confidentiality can more easily be safeguarded if a complaint is classified as one about the quality or level of supports provided to a person with disability, rather than a complaint that alleges inappropriate conduct by a worker. Accordingly, the organisation should consider at the outset whether any worker who is identified in a complaint is identified only in a manner incidental to describing a complaint issue about the quality or level of supports.
- (f) Where a complaint involves allegations about the conduct of a worker, it may be practicable to provide the worker with the allegation and the details given in support of it, without disclosing the identity of the source of any prejudicial information. This may not be possible if, for example, the identity of the source of information will be readily apparent from the nature of the allegation. Sometimes, too, fairness may require that a source of information is revealed, so that the worker can better understand how to comment upon or rebut that information. Generally, disclosure is required to a level necessary to avoid any practical injustice to a person to whom procedural fairness is owed.
- (g) The decision maker or person conducting the inquiry or investigation should look for ways of balancing fairness and confidentiality and effectively safeguarding the interests of all parties. It may be desirable to conduct a separate preliminary discussion with each of the interested parties, so they may offer suggestions or make undertakings that ensure an appropriate balance can be struck.

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