

# **STUDENT BEHAVIOURAL MISCONDUCT RULES**

## **BEHAVIOURAL MISCONDUCT INVESTIGATION AND PENALTY GUIDELINES**

## **NATURAL JUSTICE AND PROCEDURAL FAIRNESS**

Procedural fairness and natural justice refer to the actions of a decision maker rather than the outcome of the proceedings. Procedural fairness is now the term more commonly used in the administrative law context.

There are four fundamental planks to natural justice and procedural fairness. These are:

1. a hearing appropriate to the circumstances,
2. lack of bias,
3. evidence to support a decision, and
4. clear reasoned decision making.

### **Interview**

The alleged offender should receive all the relevant information and must have an opportunity to address the adverse information relating to their case. The decision maker should identify all the relevant issues arising from the inquiry and the alleged offender must be given sufficient opportunity to address those issues and to give evidence and present arguments relating to them.

### **Lack of bias**

The decision maker should not have an interest in the matter being decided and should not appear to bring a biased or prejudiced mind to the inquiry and decision. The decision maker must show an open mind to the case. The perception of bias as well as actual bias must be avoided. The test is whether a fair-minded person might reasonably apprehend that the decision maker might not bring an impartial mind to the proceedings.

### **Evidence to support a decision**

The decision maker should make reasonable inquiries or investigations about the case and check the facts and identify the major issues. The decision maker should make clear findings on matters of fact that are material to the decision, and take into account all the relevant factors and only the relevant factors.

### **Decision making**

The decision should address the claims made by the alleged offender and reflect genuine consideration of them. The decision should identify the evidence or material on which the findings of fact are made and the reasons of the decision maker for accepting or rejecting a piece of evidence. The decision should reflect all the steps of reasoning linking the findings of fact to the decision.

## **RECORD KEEPING**

- This is essential to the integrity of the process. You may use paper records but these must be transferred to TRIM, which is the mandatory repository of all University records. Advice on use of TRIM and file creation can be obtained from the Manager, Records Management Office.

## **CONDUCT OF INVESTIGATIONS [Rule 28-42]**

- Investigators may commence an investigation when:
  - a direct complaint is made to them;

- a complaint is referred to them by another Investigator who is unable to investigate themselves;
  - they become aware of an offence, or
  - a more senior member of UNE directs them to.
- An investigation will normally be within the Investigator's own organisational area/area of expertise (unless they believe they cannot be, or be seen to be, impartial). However, this may not always be the case with directed or referred Investigations.
  - Depending on the complexity and facts of the case, an investigation will generally involve the following:
    - initial investigation (to gather evidence/assess whether the case should proceed);
    - an interview with the student, and
    - a decision (or other resolution of the case).

## Initial Investigation

1. Start record keeping immediately.
2. A person making an allegation must be informed that it is normally not possible to keep their names secret. Verbal allegations must be transmitted formally in writing/email [Rule 28].
3. Gather evidence. This could involve conducting interviews with the parties involved/witnesses, checking documents (including electronic), and physical inspection of a location. [See the section on interviews below.]

## Evaluate the case

4. Evaluate the case in order to determine if the complaint:
  - a. has merit or does not have merit;
  - b. is serious enough to require invoking the disciplinary process;
  - c. ought to be handled at your level (if major penalties might be necessary for the case to be escalated to a higher level Rule 36c).

## Make your decision

5. No merit/not serious enough to invoke the disciplinary process: refer the case back with your decision and recommendations for action (if any; this could include a recommendation for mediation).
6. Merit: either accept the case for investigation and interview, refer it to a higher level or (exceptionally) defer the case until the results of an interview in another jurisdiction are complete.
  - If concurrent hearings of the matter are in progress (e.g. criminal), you are allowed to handle the case while this is in process [Rule 31] unless and until a court order is issued to stop other processes.
  - Do not over-escalate the case. If necessary, seek advice but without giving more detail than is necessary so that the investigation is not compromised. Be careful not to seek advice from a person who might later hear an appeal against your decision. See Rules 43-44 for a list of those who may hear Appeals.

## Senior officers' delegation

- Senior officers of UNE [Rule 25] may delegate the gathering of evidence. The choice of delegate will be determined by the estimate of the delegate's experience and skills. In general, Professional Staff of HEO7 or below or a lecturer Level B or below would not be asked to gather evidence.

## Contacting the Student [Rule 37-42]

1. Avoid making any statements that may be seen as pre-judging the outcome. Keep the tone entirely neutral – [Template B1](#).
2. Any claims by the student to refer the matter to his/her solicitors, to an Ombudsman or any other statutory authority should be answered with the statement that referral is within the student's right but this does not halt the process. A student who absents him or herself from the University process will be assumed not to want to defend the allegation [Rule 40].
3. Any liaison with another person assisting the student is entirely at your discretion. While a student may give consent for a parent or friend to contact you, you are not required to debate the case. You may be prepared to discuss the processes involved including the ability of the student to make his or her own case with a person present (but not with right of speaking/acting as an advocate at the pre-appeal phase) [Rule 37d]. You should not discuss the matter with any parent, friend, or other party who has not shown you the student's written consent to contact you.

## Interviews

### Interviews

*These are part of the investigative process when information is being collected.*

Choose a location which is:

- quiet
  - non-threatening
  - discreet
1. Notes must be kept throughout an interview and made available to the student concerned and added to the central file.
  2. Any attempt to abuse or intimidate should be recorded in your notes [this may constitute an additional offence under Rule 10m]. If the situation deteriorates, attempt to calm the student and if necessary warn the student that you will have to terminate the interview until later when he/she is ready to be constructive in providing information or defending him/herself. A short break may be all that is required.
  3. A suggested sequence (which may be varied according to circumstance) is:
    - a. introduce yourself;
    - b. explain the investigative process, your role in it, and the purpose of the interview;
    - c. listen to the individual's story (be sympathetic but neutral; do not express opinions about the seriousness of the complaint or of guilt or innocence);
    - d. ask clarifying questions as required;
    - e. summarise the outline of events/key details and ask the interviewee to confirm you have them correctly;
    - f. thank the interviewee for attendance and explain what will happen next.
  4. Do not engage in legal or quasi-legal debate about due process, rules of evidence, cross-examination, etc. Seek advice from the UNE Legal Office at any time if you are concerned but do not let yourself be drawn into a court-type argument by a student wanting to test his/her legal advocacy skills. Chairs may need to explain this to Committee members before the hearing starts.
  5. The aim of the interview is to go through the case information; to ask questions on points that may be unclear; for the complainant/witnesses/student to state what they know; for the student to reply to the allegation or seek mitigation; and for a

decision to be made on the balance of the probabilities. As noted, to meet the requirements of procedural fairness, decisions must:

- a. be reasonable
  - b. take into account relevant considerations
  - c. disregard irrelevant factors.
6. Questions to the witnesses may be posed by the student through the Investigating Officer (as in parliamentary/committee style), who shall remain in control of the questioning process. This must be explained to the student before the hearing starts. Based upon the responses, follow-up questions may be asked but under no circumstances should the student be allowed to cross-examine the witness.
  7. The aim of a question and answer process is to obtain clarity on the facts, not to attempt to try a case to beyond reasonable doubt. If at any stage the situation becomes heated, it may be appropriate to suspend the proceedings briefly.
  8. The Investigating Officer may ask any questions but should also avoid attempting to cross-examine either witnesses or the student.

## DECIDING ON AN APPROPRIATE PENALTY [Rules 11-24]

- You are required to impose a penalty that is commensurate with the seriousness of the offence. Note that if at the end of your interview it becomes apparent that the appropriate penalty is beyond your authority, then the matter should be referred to a higher authority. 'Seriousness' is determined by two main considerations:
  - a. the culpability of the student, and
  - b. the harm caused or risked being caused by the student.

### Culpability

- Culpability derives from the following:
  - a. the intention to cause harm, with the highest culpability when an offence is planned. The worse the harm intended, the greater the seriousness;
  - b. the recklessness as to whether harm is caused, that is, where the student appreciates at least some harm would/may be caused but proceeds; giving no thought to the consequences even though the extent of the risk would be obvious to most people;
  - c. the knowledge of the specific risks entailed by his/her actions even though he/she did not intend to cause the harm that resulted, and/or
  - d. the extent of negligence.
- Culpability should be the first factor in determining the seriousness of a breach.

### Harm

- Types of harm are diverse. For example, individuals may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress.
- The nature of harm will depend on the personal characteristics and circumstances of the victim and your assessment of harm will be an effective and important way of taking into consideration the impact of a particular breach on the victim.
- In some cases no actual harm may have resulted and you will be concerned with assessing the relative dangerousness of the student's conduct. You should consider the likelihood of harm occurring and the gravity of the harm that could have resulted.
  - **Harm to the University Community:** some offences cause harm to the University community at large (instead of, or as well as, to an individual victim) with consequences that may include economic loss, harm to the

University's public image or academic standing, or interference with teaching and learning.

- **Other types of harm:** other types of harm are more difficult to define or categorise but may also need to be taken into account. For example, violence to one person certainly causes significant harm to the victim but other people associated with the victim may also suffer psychological distress and/or financial loss.
- **Harm to the public good:** some conduct is prohibited purely by reference to public feeling or social mores. In addition, public concern about the damage caused by some behaviour, both to individuals and to society as a whole, can influence public perception of the harm caused, for example, by the supply of prohibited drugs or impact adversely on the perception of the integrity of a UNE degree.

### Assessment of culpability and harm

- The precise level of culpability will be determined by such factors as:
  - motivation
  - whether the act was planned or spontaneous
  - whether the student was in a position of trust (such as a college tutor)
  - the level of harm caused
  - other aggravating factors.
- Culpability is greater if the student targets a vulnerable victim.
- Where serious harm results but was unintended and beyond the control of the student, culpability will be significantly influenced by the extent to which the harm could have been foreseen.

### Aggravating factors

- If present in a breach, aggravating factors indicate:
  - a. either a higher than usual level of culpability on the part of the offender, or
  - b. a greater than usual degree of harm caused by the offence (or sometimes both).
- The list below includes the most important aggravating factors but it is not comprehensive and the aggravating factors are not listed in order of priority. On occasions, two or more of the factors listed will describe the same feature of the breach and care needs to be taken to avoid double counting.

Factors indicating higher culpability:

- breach committed whilst on probation, exclusion or suspension for other breaches
- previous record of breaches
- failure to respond to previous allegations
- breach motivated by, or demonstrating, hostility to the victim based on his or her actual or perceived race or ethnic group or religion or sexual orientation or disability or membership of a minority group
- deliberate targeting of vulnerable victim(s)
- planning of a breach
- an intention to commit more serious harm than actually resulted from the breach
- operating in groups or gangs

- breaches of professional ethics and standards
- commission of the breach for financial gain (where this is not inherent in the breach itself)
- high level of profit from the breach
- an attempt to conceal or dispose of evidence
- failure to respond to warnings or concerns expressed by others about the student's behaviour
- commission of a breach while under the influence of alcohol or drugs
- use of a weapon to frighten or injure victim
- deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the breach
- abuse of power
- abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- multiple victims
- an especially serious physical or psychological effect on the victim or others, even if unintended
- a sustained assault or repeated assaults on the same victim
- victim is particularly vulnerable
- location of the breach (e.g. in an isolated place)
- breach is committed against staff of the University in the course of, or associated with, their duties, or persons providing a public service
- presence of others (e.g. relatives, especially children or partner of the victim)
- additional degradation of the victim (e.g. taking photographs of a victim as part of a hazing breach)
- in property breaches, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or studies).

### Mitigating factors

- Some factors may indicate that a student's culpability is unusually low or that the harm caused by a breach is less than usually serious. These include:
  - a greater degree of provocation than normally expected
  - mental illness or disability
  - youth or age, where it affects the responsibility of the student
  - the fact that the student played only a minor role.

### Reduction of penalty

- You may reduce the severity of a penalty where a student makes a frank acknowledgement of a breach at the first reasonable opportunity. This allows for:
  - a reduction in fines (but not in a restitution payment)
  - a reduction in time in exclusion
  - a reduction from expulsion to exclusion.

- Credit may also be given for ready cooperation and genuine expression of remorse, frank acknowledgement of the character of the breach, or willingness to engage in remedial action.

## COMMUNICATING YOUR DECISION [Rule 38-39]

- The results of an interview/investigation must be communicated in writing to the student.- [Template B2](#).

### Student Visa Holders

- Cases involving student visa holders are conducted in exactly the same way as for any other student. However, you inform UNE International of any decisions involving exclusion or expulsion from UNE. [See also under Appeals below.]

## APPEALS

*The appeal process is invoked by the student in response to the original Investigating Officer's decision and penalty*

In the first instance, the Appeal Officer/Chair of the Student Conduct Appeals Committee should review the original papers and make a judgment whether [Rule 53]:

- the original proceedings had an aspect that would give rise to the need to hear the case in full, or
- the evidence did not support the decision, or
- the penalty was inappropriate.
- Where the case is to be reinvestigated, the Appeal Officer/Chair may proceed to conduct the review as a full hearing – [Template B3](#). Otherwise, the Appeal Officer/Chair should proceed to a restricted review of the original case.
- Where an appeal is to be restricted to a review, a student's attempt to turn it into a full hearing should be rejected.
- The decision whether to accept new evidence is for the Appeal Officer or the Chair of the Student Conduct Appeals Committee. Normally, new evidence should not be accepted unless it can be demonstrated that it was not available originally – if new evidence is allowed it is more likely that the Appeal Officer/Chair will proceed to hear the case in full [Rule 55].
- The advice on third-party representations, solicitors' letters and requests for deferment also applies to appeals.
- If the decision is to uphold the appeal or vary the penalty, the Appeal Officer/Chair must provide confidential reasons for that decision to the PVCA. This is to ensure that any errors in the earlier investigation are reported and amendments made in the rules and/or guidance information if required to avoid further occurrences.
- If the decision is made to uphold a major penalty, Student Administration and Services should be advised as soon as possible to arrange for its implementation. There are statutory provisions that can limit actions on a student's enrolment and records and timing of the decision can be critical.
- Appeals are a continuation of the same TRIM file as the original investigation.
- Decisions of the Student Conduct Appeals Committee must be communicated by the Chair to the Student [Template B4](#) and the Manager, International Services and Compliance (UNEI) if the decision is to terminate a student visa holder's enrolment. (Rule 35)

### Appeal hearings

- These are part of the formal determination process by an Appeals Officer or the Student Conduct Appeals Committee.



- The rules make clear that the process is not a trial in legal form and not subject to courtroom 'rules of evidence'. Your role is to decide whether the case is proven on the balance of the probabilities [Rule 30].
- Do not engage in legal or quasi-legal debate about due process, rules of evidence, cross-examination, etc. Seek advice from the UNE Legal Office at any time if you are concerned but do not let yourself be drawn into a court-type argument by a student wanting to test his/her legal advocacy skills. Chairs may need to explain this to Committee members before the hearing starts.
- The aim of the hearing is to go through the case information; to ask questions on points that may be unclear; for the complainant/witnesses/student to state what they know; for the student to reply to the allegation or seek mitigation, and for a decision to be made on the balance of the probabilities. As noted, to meet the requirements of procedural fairness, decisions must:
  - be reasonable
  - take into account relevant considerations
  - disregard irrelevant factors.
- Notes should be taken of the questions and an answer for record keeping purposes, but a verbatim record is not required.
- Questions to the witnesses may be posed by the student through the Appeal Officer/Chair who shall remain in control of the questioning process. This must be explained to the student before the hearing starts. Based upon the responses, follow-up questions may be asked but under no circumstances should the student be allowed to cross-examine the witness.
- The aim of a question and answer process is to obtain clarity on the facts, not to attempt to try a case to beyond reasonable doubt. If at any stage the situation becomes heated, it may be appropriate to suspend the proceedings briefly.

The Appeal Officer, Committee Chair or Committee members may ask any questions but should also avoid attempting to cross-examine either witnesses or the student.

### **Ratification of the Major Penalty of Expulsion**

- Once the appeal process has been exhausted and a penalty of Expulsion has been resolved upon, the Chair must forward all the papers [Template B5](#) to the Vice-Chancellor for ratification of the Student Appeals Committee's decision.
- The decision of the Vice-Chancellor is then conveyed to the Committee Chair who must then inform the student of the final decision - [Template B4](#).

### **Ratification of the Major Penalty of Revocation of Award**

Revocation is a major penalty reserved for the recommendation of the Vice-Chancellor and the approval of Council. Investigating Officers/Chair, Student Conduct Appeals Committee may, if he/she feels appropriate, recommend to the Vice-Chancellor revocation of an award in addition to any other major penalty. Alternatively, the Vice-Chancellor may decide to add to any penalty a recommendation of revocation [Rule 61].

- If the Vice-Chancellor supports the revocation, the recommendation will be referred to the Academic Board for its endorsement and report to Council.

### **Further correspondence after the appeal**

- Further correspondence after the appeal, from whatever source, should be referred to the Pro Vice-Chancellor External Relations