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Procedural fairness, University academic policy and the role of independent advocacy

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Procedural Fairness

• Applies to administrative decisions made by individuals and committees and where the decision might affect a person’s rights, interests or legitimate expectations.

• Close association with natural law which has history dating back to Greeks in 6th century BC

• 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.
Legitimate expectations

- Policies create expectations about the exercise of administrative powers
- These expectations may be disappointed in a range of ways:
  - When the University has:
    - acted in breach of a promise or undertaking made to a particular student or to a class/cohort of students;
    - has not applied current policy or guidelines in determining a particular case, and without good reason – i.e. the policy has been applied inconsistently
      - Possibly improper discrimination or
      - an existing policy was changed and a new one applied to the disadvantage of students who stood to benefit from the earlier policy and who may even have conducted their affairs in reliance upon it.
Principles of Procedural Fairness

There are three main principles:

1. **Hearing rule** - the right to a fair hearing before a decision is made;

2. **Bias rule** - a decision must be made by decision-maker/s with no vested interest, prior involvement in the case or preconceived ideas/bias;

3. ‘**No evidence**’ rule – the right to have the decision based on logically probative evidence.
Procedural Fairness and Policy Development

- Where a policy has the potential to affect a student’s rights, interests or legitimate expectations - it must conform to the rules of natural justice.
  - The objective of procedural fairness is to ensure that decision-making is fair and reasonable.
  - HOWEVER - whether a decision complies with natural justice depends not on whether the decision itself is fair and reasonable (substantive merit), but on whether a fair and proper procedure was followed in making the decision.

- In this context - how does independent advocacy play a part in the University’s obligations?
A student adversely affected by a decision should be given:

- All the information and documentation which was provided to the decision makers.
  - Frequently students require assistance to obtain this or even determine what they should be asking for in the first place.

- Adequate time to prepare a response.
  - Students really benefit from independent advice prior to seeking review or disputing a decision.

- The opportunity to present his or her case either in person or in written documentation or both.
  - Written submissions can be reviewed and assistance provided to ensure they properly set out arguments against the available grounds.
The role of independent advocacy in enforcing the right to an objective decision

- Bias may be actual or apparent (apprehended bias).
  - Apprehended bias is where a reasonable and informed person would suspect that the decision-maker is not impartial – he/she does not have to actually behave in a biased way.

- Where the decision-maker is a committee, the rule is ‘one biased, all biased’ and the committee must be reconvened.

- If actual bias is alleged, the test is whether the decision-maker is actually incapable of considering the matter fairly.

- Advocates assist in objectively identifying situations where a reasonable suspicion of bias exists so corrective action can be taken.
The role of independent advocacy in enforcing the right to an evidence-based decision

- The decision should be based on a clear and explicable rationale.
- It is good administrative practice to provide the reasons for a decision:
  - The Ombudsman Victoria can accept a complaint on the grounds that reasons for a decision should have been, but were not, given.
- In the case of an appeal, the reasons must be revealed to the appellant to allow him/her to prepare a case
- Often the provision of reasons is not part of policy or procedure (or the procure is not complied with)
  - advocates frequently contact the original decision maker to request reasons or further and better particulars of allegations
  - Necessary to provide advice to student as to merits of complaints and prospects of success or to assist student to understand case to be met.
Consequences of breach

Firstly - a breach of natural justice can often be “cured” - e.g. student not given a proper hearing - a fresh hearing can be given.

- Otherwise a breach may give grounds for student to appeal from original determination internally:
  - Formal grievance;
  - Appeal to Academic Board

- May be basis for external review:
  - Ombudsman Victoria or
  - Judicial Review at Federal Court
Recommendations

• Promotion of the ‘Information for University Decision-Makers  Procedural Fairness / Natural Justice and Other Considerations’ for staff responsible for making decisions at first instance.

• Incorporation into policy and statute of students’ right to seek independent advice and advocacy [recommendations of the Review of Complaint Handling in Victorian Universities, Report of Ombudsman Victoria (2005)].

• Ensure Advocacy Service has input in all policy development affecting students.
Some tips to applying policy

• Policy criteria, if they are to influence administrative decisions, should be carefully, formally and precisely drafted.
  – Avoid clauses which are too aspirational or vague or undefined or they will be challenged even where there may not be good grounds;

• Any policy documents which affect students should be made available to students.
  – Particularly relevant for ‘internal policies’. Freedom of Information Acts state that unless this is done - the policy cannot be relied upon to the disadvantage of a person who is unaware of it.

• The document that records a decision (eg. Investigation report or statement of reasons) should refer to any policy that was relied on in reaching the decision and explain how the policy was balanced or weighed against the facts of the case.
Some tips to applying policy

• Policy should not obstruct the facts of a case being considered.
  – That is - a decision should not be reached by inflexibly or automatically applying a policy without evaluating the merits of the case.
  – Despite the fear of ‘flood-gates opening’ or attempts at consistency – this can in fact be a legal error.

• There are many ways this error can occur.
  – Refusing to make an exception to an established policy or practice;
    • Relying on a policy in an email response to students without mentioning the student’s particular circumstances or facts is often a give away.
  – Striving for consistency for its own sake (‘To be fair we must be consistent ...’) usually suggests that a common rule was applied and the individual merits of the case were ignored.
Contact Information

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