

What is this Information Sheet about?

The purpose of this information sheet is to provide guidance to organisations about the procedural fairness requirements of the Western Australian Reportable Conduct Scheme (**the Scheme**).

Information relating to procedural fairness can be found in sections 19X and 19ZA of the *Parliamentary Commissioner Act 1971* (**the Act**).

What is Procedural Fairness?

Employees who are the subject of reportable allegations are entitled to be afforded procedural fairness during the investigation into their conduct. Procedural fairness requires that a **fair and proper procedure** be followed by an agency during the decision-making process of a reportable conduct investigation.

Procedural fairness is sometimes referred to as “natural justice.” For consistency, the term procedural fairness is used in this fact sheet.

The main elements of procedural fairness include:



To whom is Procedural Fairness important?

Procedural fairness is relevant to:

- Individuals negatively affected by a government decision;
- Individuals investigating a matter or preparing a report for a decision maker; and
- Decision-makers.

Why is Procedural Fairness important?

Procedural fairness is important because it ensures that investigations promote **transparency** and are conducted in a manner that is **fair to everyone** involved.

The rules of procedural fairness apply to decisions where the outcome may negatively affect the rights, interests, or reputation of an individual or corporation.

Except for when excluded by statute, decision-makers exercising discretionary powers must comply with procedural fairness requirements where their decision may affect the rights, existing interests, or legitimate expectations of a person.

To ensure compliance with procedural fairness during an investigation:

- The subject of an investigation must be given a reasonable opportunity to respond to any adverse material and allegations made against them;
- Decision-makers must be impartial and free from conflicts of interest;
- Decision-makers must consider all relevant information before reaching a decision, including evidence and both sides of a case; and
- Decision-makers must provide reasons for their decisions based on this evidence.

Informing the employee

Section 19X of the Act outlines the procedural fairness requirement to inform the subject of a reportable conduct investigation on the case to be met and to give them a reasonable opportunity to respond to any adverse material or allegations made against them.

The Scheme provides for an employee who is the subject of a reportable conduct investigation with the opportunity to make submissions at **3 critical stages** of an investigation:

- **Before any adverse finding is made**, the head of the organisation¹ must inform the employee that they are the subject of an investigation, inform the employee of the reportable allegation or conviction investigated, and give the employee the opportunity to make submissions responding to the allegation or conviction (section 19X(2)(a));
- **After considering the submission(s) made by the employee**, the organisation must inform the employee of the proposed adverse finding, and give the employee the opportunity to make submissions responding to the proposed adverse finding (section 19X(2)(b)); and
- **Before any disciplinary or other action is taken** due to the findings, the organisation must inform the employee of the proposed action to be taken and give the employee an opportunity to make submissions responding to the proposed action (section 19X(2)(3)).

Additionally, as soon as possible after the end of an investigation, the head of the organisation must provide the employee:

- Written notice stating that the investigation has ended (section 19ZA(2)(a)); and
- A written report setting out the findings of the investigation and the reasons for those findings (section 19ZA(2)(b)) (this does not need to be the same written report provided to the Ombudsman).

¹ A reference to the head of the organisation includes a delegate of the head of the organisation.

The requirements for procedural fairness are summarised below:

1. **Before any adverse finding is made**, inform the employee that they are the subject of an investigation and of the reportable allegation or conviction being investigated, and give the employee the opportunity to respond to the allegation or conviction (section 19X(2)(a)).

AND

2. **After considering the submission(s) made by the employee**, inform the employee of the proposed adverse finding, and give the employee the opportunity to respond to the proposed adverse finding (section 19X(2)(b)).

AND

3. **Before any disciplinary or other action is taking due to the findings**, inform the employee of the proposed action to be taken and give the employee the opportunity to respond to the proposed action (section 19X(2)(3)).

AND

4. **as soon as possible at the end of the investigation**, provide the employee with written notice that the investigation has ended (section 19ZA(2)(a)); **AND** provide the employee with a written report setting out the findings of the investigation and reasons for those findings (section 19ZA(2)(b)).

Giving sufficient information to employees

There is an expectation for employees to be given **sufficient** information about an investigation to allow them to make meaningful submissions. This does not mean that employees are entitled to every single detail of the investigation; rather, they should simply receive enough information to understand the scope and nature of the allegations made against them.

Information on the case to be met **must** include:

- A description of the possible decision;
- The criteria for making that decision; or
- Any information on which a decision would be based. This includes any prejudicial information relating to the employee that may be used in the decision-making process.

Employees are not required to be notified of the case at hand as soon as the organisation is notified of the reportable allegation or conviction. What constitutes “reasonable notice” depends on the specific circumstances of the case, including its complexity and the urgency of a decision.

Organisations must consider the most appropriate opportunity to notify relevant persons so that the investigation is both timely **and** procedurally fair. This means ensuring that:

- The integrity of the investigation, including any concurrent investigations (for example, WA Police investigations), is protected. Organisations should consider whether disclosing certain information to the subject of allegation could potentially compromise the investigation. For example, could this present an opportunity for critical evidence to be destroyed?
- The wellbeing of everyone involved in the investigation is protected. This includes protecting the wellbeing of not only children, but also the subject of allegation, witnesses, and the family of the alleged victim.

Confidentiality

A crucial aspect of procedural fairness is the need to keep the identity of alleged victims and witnesses confidential, wherever possible. Investigators must comply with the confidentiality policies of the specific organisation as well as those required by procedural fairness.

Employee submissions

Employee submissions made under section 19X of the Act must be genuinely considered in the decision-making process. Considering both sides of a matter is crucial to procedural fairness because it ensures that there is no reasonable perception of bias from decision-makers.

In their submissions, employees may:

- Deny the allegation(s);
- Provide evidence to potentially disprove the allegation(s);
- Explain the allegation(s); and
- Provide context that they believe should be accounted for in the decision-making process.

Depending on the specific circumstances of a case, employee submissions may be delivered in writing or in-person. The type of hearing should be proportional to the nature of the decision. For example, a formal hearing should occur for investigations that could result in severe consequences for the individual, while submissions for low-risk cases may simply be delivered via an exchange of letters.

Employees should be encouraged to seek advice from lawyers and union representatives before putting forward submissions.

Employee submissions are crucial to the investigation process because they:

- Ensure that decision-makers consider the relevant factors of a case, including both sides of a matter.
- May raise the need for further inquiries to be made before the decision is finalised.
- Reduces the likelihood of a decision being challenged.

Evidence-based decisions

According to procedural fairness, **decisions, findings, and recommendations** that are made in relation to reportable conduct allegations must be logically **supported by evidence**.

Section 19ZA(b) of the Act requires organisations to provide subjects of reportable allegations with a written report that sets out the findings of the investigation, including the reasons for those findings (this does not need to be the same written report provided to the Ombudsman).

When making a finding in response to a reportable conduct allegation, decision-makers should consider:

- All relevant facts of the case, including employee submissions;
- Assigning appropriate weight to relevant factors, and not to irrelevant or insignificant factors; and
- Explaining the rationale behind the proposed findings, and documenting this.

Where to get help

Organisations covered by the Scheme should contact the Ombudsman for clarification and guidance, and to talk through any issues of concern.

- Telephone: (08) 9220 7471
- Email: reportableconduct@ombudsman.wa.gov.au

Further information is also available on the Ombudsman's website at www.ombudsman.wa.gov.au.

