

14. Procedural Fairness

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A common law duty

14.1 The common law recognises a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.¹ In *Kioa v West* (1985), Mason J said:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.²

14.2 This chapter discusses the source and rationale of the principles of procedural fairness; how procedural fairness is protected from statutory encroachment; and when laws that encroach on it may be justified. The ALRC calls for submissions on two questions about this duty.

1 *Kioa v West* (1985) 159 CLR 550. See also David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) [12.34]. The common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers': Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285. The 'particular requirements of compliance with the rules of natural justice will depend on the circumstances': *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 16–17 [48].

2 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). Justice Mason's approach to natural justice in *Kioa* is at odds with that of Justice Brennan in *Kioa* who reasoned that 'there is no freestanding common law right to be accorded natural justice by the repository of a statutory power ... There is no right to be accorded natural justice which exercise independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power': *Ibid* 610–12. In *Plaintiff M16/2010E* a unanimous decision of the High Court suggested that the different approaches in *Kioa* to the foundation of the duty have not affected the application of the principle in subsequent cases: *Plaintiff M16/2010E* (2010) 243 CLR 319, 352 [74].

Question 14–1 What general principles or criteria should be applied to help determine whether a law that denies procedural fairness is justified?

Question 14–2 Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

14.3 Issues of procedural fairness generally arise in the context of decisions made by government departments and officials as well as quasi-judicial bodies such as tribunals.³ Such decisions may affect people in a range of contexts;

- decisions may curtail a person’s liberty, for example by detaining them in immigration detention; or
- affect their freedom of movement such as through deportation or resettlement; or
- have a significant effect on their economic well-being, for example, by decisions determining their entitlements to government pensions or other support.

14.4 Principles of procedural fairness recognise the power imbalance which may exist between an administrative decision-maker, such as a delegate representing a government agency, and an individual citizen.

14.5 While procedural fairness is protected at common law, statute also provides some protection for individuals. For instance, a breach of the rules of natural justice is a ground for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁴

14.6 In extra-curial commentary, Chief Justice Robert French has said that procedural fairness is ‘indispensable to justice’, and has highlighted five inter-related rationales for the duty to afford procedural fairness:

- That it is instrumental, that is to say, an aid to good decision-making;
- that it supports the rule of law by promoting public confidence in official decision-making;
- that it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism;
- that it gives due respect to the dignity of individuals; and
- by way of participatory or republican rationale—it is democracy’s guarantee of the opportunity for all to play their part in the political process.⁵

3 Principles of procedural fairness overlap with the principles of a fair trial and principles of judicial review, discussed in Chapters 8 and 18.

4 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 1(a).

5 Chief Justice Robert S French, ‘Procedural Fairness—Indispensable to Justice?’ (2010) 1–2.

14.7 Procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias.⁶ The hearing rule requires a decision-maker to inform a person of the case against them and provide them with an opportunity to be heard. The extent of the obligation on the decision-maker depends on the relevant statutory framework and on what is fair in all the circumstances. In *Commissioner of Police v Tanos* (1985), Dixon CJ and Webb J held that

it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by an judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard.⁷

14.8 The bias rule of procedural fairness requires that a decision-maker must not be biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or ostensible bias).

14.9 The rule against bias and the hearing rule are drawn from natural law and influenced by the work of the medieval philosopher and theologian, Thomas Aquinas.⁸ Chief Justice French explained:

As a normative marker for decision-making it [the rule against bias] predates by millennia the common law of England and its voyage to Australian colonies.⁹

14.10 Procedural fairness in its contemporary form, developed in the common law in the early 17th century.¹⁰ Starting as a principle relating only to judicial functions, the application of natural justice was extended in the mid-19th century to all ‘quasi-judicial’ decisions in *Cooper v Board of Works for the Wandsworth District* (1863).¹¹

14.11 In *Lam* (2003), Callinan J explained that ‘natural justice by giving a right to be heard has long been the law of many civilised societies’:

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca’s *Medea*, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.¹²

6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

7 *Commissioner of Police v Tanos* (1985) 98 CLR 383, 395. ‘The fundamental rule is that a statutory authority having power to effect the rights of a person is bound to hear him before exercising the power’: *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ) quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

8 French, above n 5. The hearing rule appeared in cases in the medieval Year Books: HH Marshall, *Natural Justice* (Sweet & Maxwell, 1959) 18–19.

9 French, above n 5.

10 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9]; French, above n 5, 3.

11 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863). The court in this case extended natural justice to decisions interfering with property rights.

12 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 45 [140]. Callinan J was quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–379.

Protections from statutory encroachments

Australian Constitution

14.12 The *Australian Constitution* does not provide express protection for procedural fairness.

14.13 However, at least in respect of judicial functions, s 71 of the *Constitution* may provide some protection for procedural rights. Section 71 provides:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

14.14 In *Re Tracey; Ex parte Ryan* (1989), Deane J stated that s 71 is the ‘Constitution’s only general guarantee of due process’.¹³ Similarly in *Leeth v Commonwealth* (1992), a majority of the High Court stated:

It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.¹⁴

Principle of legality

14.15 The principle of legality provides some protection for procedural fairness.¹⁵ When interpreting a statute, courts will presume that Parliament did not intend to limit procedural fairness, unless this intention was made unambiguously clear.¹⁶ In *Miah* (2001), McHugh J held that the ‘the common law rules of natural justice...are taken to apply to the exercise of public power unless clearly excluded’.¹⁷

14.16 In *Annetts v McCann* (1990), Mason CJ, Deane and McHugh JJ said:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment.¹⁸

Bills of rights

14.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The right to procedural fairness for persons

13 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 580.

14 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

15 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

16 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

17 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93.

18 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). Quoted with approval in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

affected by the exercise of public power is expressed differently in other jurisdictions. In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.¹⁹ In New Zealand, the human rights legislation requires observance of natural justice principles.²⁰

14.18 In Canada, any deprivation of life, liberty and security of the person must be informed by principles of fundamental justice according to the Canadian *Charter of Rights and Freedoms*.²¹

Justifications for encroachments

14.19 In some circumstances ‘urgent action’²² to prevent a greater harm may be said to justify limits on procedural fairness.²³ For example, a prison warden may place a prisoner in isolation without notice if they suspect the prisoner is planning a riot.²⁴ In other circumstances, it might be justified to isolate people in quarantine, to avoid the spread of infectious diseases.²⁵

14.20 There may also be circumstances where an area of law or policy is overly complex and would be better served by the application of an exhaustive legislative code, rather than common law procedural fairness. While this will be rare, it can arise in planning law where decisions may be overly difficult and involve a range of interested parties.²⁶

14.21 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.²⁷

14.22 Although some laws that deny or limit procedural fairness may be justified, the ALRC invites submissions identifying laws that are *not* justified, and explaining why these laws are not justified.

19 *United States Constitution* amend V.

20 *Bill of Rights Act 1990* (NZ) s 27(1).

21 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) s 7.

22 Wilcox J referred to cases of ‘urgency’ which may legitimate the suspension of procedural fairness in *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 421.

23 Matthew Groves argues that ‘courts have generally been reluctant to exclude *all* elements of natural justice’: Groves, above n 1, 305.

24 See for example, *McEvoy v Lobban* [1990] 2 Qd R 235.

25 *R v Davey* [1899] 2 QB 301, 305–6.

26 For more on this issue, see Alexandra O’Mara, ‘Procedural Fairness and Public Participation in Planning’ (2004) 62 *Environmental and Planning Law Journal*.

27 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

