Handling Disputes, Allegations and Investigations within Not-for-Profit Organisations

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- A member of the Editorial Board of the CCH *School Principals Legal Guide*.
- The editor of Emil Ford's *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
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Disputes, Allegations and Investigations

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What is this paper about?

No matter how corrupt and unjust a convict may be,
he loves fairness more than anything else.

Anton Chekhov, Russian dramatist 1860-1904

This paper is about what to do when things happen that you hope will never happen. Unfortunately, our hopes for a trouble-free, peaceful existence for our not-for-profit organisations (NFPs) are all too frequently dashed. When disputes and allegations arise, those governing, leading and managing NFPs are often shocked and surprised. When one considers that most NFPs revolve around people - the people on the board/committee (the governors), the members, the staff, the supporters and the beneficiaries – it should not shock or surprise us when there are differences that escalate to disputes that lead to allegations that need to be investigated.

What surprises me is how ill-equipped and unprepared so many NFPs are when the disputes and allegations arise and when investigations have to be carried out. This paper will both equip and prepare the governors, leaders and managers of NFPs to deal with such matters.

I will consider disputes that arise between:

(a) governors;

(b) members; and

(c) governors and members.

The Rules

The first place to look when a dispute arises is the document that contains the rules of the NFP. For most NFPs, being companies, incorporated or unincorporated associations, this will be the Constitution or the Rules. While this should be the first place to look each time a dispute arises, it should not be the first time that governors or leaders have looked at these documents and, particularly, at the provisions dealing with dispute resolution.

Typically, companies limited by guarantee will have provisions like these which are in the ACNC's template constitution for a charitable purpose company limited by guarantee:

Dispute resolution and disciplinary procedures

16. Dispute resolution

16.1 The dispute resolution procedure in this clause applies to disputes (disagreements) under this constitution between a member or director and:
- (a) one or more members
- (b) one or more directors, or
- (c) the **company**.

16.2 A member must not start a dispute resolution procedure in relation to a matter which is the subject of a disciplinary procedure under clause 17 until the disciplinary procedure is completed.

16.3 Those involved in the dispute must try to resolve it between themselves within 14 days of knowing about it.

16.4 If those involved in the dispute do not resolve it under clause 16.3, they must within 10 days:
- (a) tell the directors about the dispute in writing
- (b) agree or request that a mediator be appointed, and
- (c) attempt in good faith to settle the dispute by mediation.

16.5 The mediator must:
- (a) be chosen by agreement of those involved, or
- (b) where those involved do not agree:
  - i. for disputes between members, a person chosen by the directors, or
  - ii. for other disputes, a person chosen by either the Commissioner of the Australian Charities and Not-for-profits Commission or the president of the law institute or society in the state or territory in which the **company** has its registered office.

16.6 A mediator chosen by the directors under clause 16.5(b)(i):
- (a) may be a member or former member of the **company**
- (b) must not have a personal interest in the dispute, and
- (c) must not be biased towards or against anyone involved in the dispute.

16.7 When conducting the mediation, the mediator must:
- (a) allow those involved a reasonable chance to be heard
- (b) allow those involved a reasonable chance to review any written statements
- (c) ensure that those involved are given natural justice, and
- (d) not make a decision on the dispute.

17. Disciplining members

17.1 In accordance with this clause, the directors may resolve to warn, suspend or expel a member from the **company** if the directors consider that:
- (a) the member has breached this constitution, or
- (b) the member's behaviour is causing, has caused, or is likely to cause harm to the **company**.

17.2 At least 14 days before the directors' meeting at which a resolution under clause 17.1 will be considered, the secretary must notify the member in writing:
- (a) that the directors are considering a resolution to warn, suspend or expel the member
- (b) that this resolution will be considered at a directors' meeting and the date of that meeting
- (c) what the member is said to have done or not done
- (d) the nature of the resolution that has been proposed, and
- (e) that the member may provide an explanation to the directors, and details of how to do so.

17.3 Before the directors pass any resolution under clause 17.1, the member must be given a chance to explain or defend themselves by:
- (a) sending the directors a written explanation before that directors' meeting, and/or
- (b) speaking at the meeting.

17.4 After considering any explanation under clause 17.3, the directors may:
- (a) take no further action
- (b) warn the member
- (c) suspend the member's rights as a member for a period of no more than 12 months
- (d) expel the member
- (e) refer the decision to an unbiased, independent person on conditions that the directors consider appropriate (however, the person can only make a decision that the directors could have made under this clause), or
- (f) require the matter to be determined at a **general meeting**.

17.5 The directors cannot fine a member.

17.6 The secretary must give written notice to the member of the decision under clause 17.4 as soon as possible.

17.7 Disciplinary procedures must be completed as soon as reasonably practical.

17.8 There will be no liability for any loss or injury suffered by the member as a result of any decision made in good faith under this clause.

The Model Constitution for incorporated associations in NSW includes:

10 Resolution of disputes

(1) A dispute between a member and another member (in their capacity as members) of the association, or a dispute between a member or members and the association, are to be referred to a community justice centre for mediation under the *Community Justice Centres Act 1983*.
(2) If a dispute is not resolved by mediation within 3 months of the referral to a community justice centre, the dispute is to be referred to arbitration.
(3) The *Commercial Arbitration Act 1984* applies to any such dispute referred to arbitration.

11 Disciplining of members

(1) A complaint may be made to the committee by any person that a member of the association:
(a) has refused or neglected to comply with a provision or provisions of this constitution, or
(b) has wilfully acted in a manner prejudicial to the interests of the association.
(2) The committee may refuse to deal with a complaint if it considers the complaint to be trivial or vexatious in nature.
(3) If the committee decides to deal with the complaint, the committee:
(a) must cause notice of the complaint to be served on the member concerned, and
(b) must give the member at least 14 days from the time the notice is served within which to make submissions to the committee in connection with the complaint, and
(c) must take into consideration any submissions made by the member in connection with the complaint.
(4) The committee may, by resolution, expel the member from the association or suspend the member from membership of the association if, after considering the complaint and any submissions made in connection with the complaint, it is satisfied that the facts alleged in the complaint have been proved and the expulsion or suspension is warranted in the circumstances.
(5) If the committee expels or suspends a member, the secretary must, within 7 days after the action is taken, cause written notice to be given to the member of the action taken, of the reasons given by the committee for having taken that action and of the member's right of appeal under clause 12.
(6) The expulsion or suspension does not take effect:
(a) until the expiration of the period within which the member is entitled to appeal against the resolution concerned, or
(b) if within that period the member exercises the right of appeal, unless and until the association confirms the resolution under clause 12,
whichever is the later.

12 Right of appeal of disciplined member

(1) A member may appeal to the association in general meeting against a resolution of the committee under clause 11, within 7 days after notice of the resolution is served on the member, by lodging with the secretary a notice to that effect.
(2) The notice may, but need not, be accompanied by a statement of the grounds on which the member intends to rely for the purposes of the appeal.

(3) On receipt of a notice from a member under subclause (1), the secretary must notify the committee which is to convene a general meeting of the association to be held within 28 days after the date on which the secretary received the notice.
(4) At a general meeting of the association convened under subclause (3):
(a) no business other than the question of the appeal is to be transacted, and
(b) the committee and the member must be given the opportunity to state their respective cases orally or in writing, or both, and
(c) the members present are to vote by secret ballot on the question of whether the resolution should be confirmed or revoked.
(5) The appeal is to be determined by a simple majority of votes cast by members of the association.

Section 140(1) of the *Corporations Act* states:

> *A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:*
>
> *(a) between the company and each member; and*
>
> *(b) between the company and each director and company secretary; and*
>
> *(c) between a member and each other member;*
>
> *under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.*

Section 26 (1) of the *Associations Incorporation Act 2009 (NSW)* states:

> *Subject to this Act, an association's constitution binds the association and its members to the same extent as if it were a contract between them under which they each agree to observe its provisions.*

Because the constitution is a contract binding the NFP and its members, the dispute resolution and discipline provisions ought to be followed meticulously. As Daly AsJ observed in *Jin Song Han v Australian Kung Fu Federation Inc*[1], "a club or association must strictly adhere to the relevant rules".[2] In support, Daly AsJ cited Ashley J in *Hodginson v Yarra Valley Country Club Inc*:

> *... there is clear authority for the proposition that there must be strict compliance with the rules of a club or similar body which pertain to expulsion of members ... where the rules on a natural reading convey a particular meaning, adoption of a procedure which does*

[1] [2014] VSC 36
[2] *Jin Song Han v Australian Kung Fu Federation Inc* [2014] VSC 36 at paragraph 37

> *not strictly comply with the procedure conveyed by that meaning should be considered impermissible.*[3]

and Batt J in *Andricciola v Italian Community of Keilor Association Incorporated*:

> *... the power of expulsion must be exercised in strict conformity with the rules by which it is given, otherwise the purported expulsion will be inoperative.*[4]

It also means that an NFP needs to know with some certainty what form its current constitution takes. In *Jin Song Han v Australian Kung Fu Federation Inc,* the Federation was relying on a version of its rules which had supposedly been passed at an AGM. Unfortunately for the Federation, it was found that the motion to make the changes was passed by an insufficient number of votes to effect the change. Therefore, the Federation was following suspension and expulsion procedures that did not conform to the actual rules in force. Accordingly, the Court found that neither the suspension nor the expulsion of Mr Jin Song Han complied with the rules and declared both to be invalid.

Mediation

Many constitutions and rules also have provisions requiring some form of informal dispute resolution; for example, by mediation[5]. This is a sensible procedure to adopt for most disputes. However, mediation is not normally appropriate in disciplinary matters or when allegations of serious criminal conduct or of child abuse are made. In such case, the Police and other relevant authorities ought to be notified in accordance with legal and policy requirements.

That an NFP's constitution does not have a mediation clause is no reason not to consider mediation. There is much evidence that mediation can lead to a more cost effective, timely and efficient resolution to a dispute than the formal process set out in the constitution, if any, or, worse still, litigation. Other advantages of mediation include:

[3] [1996] 1 VR 421 at 429
[4] [2001] VSC 364 at [54]
[5] Such as clause 16 of the ACNC's template constitution and clause 10 of the Model Constitution for incorporated associations in NSW

(a) the mutually agreed resolution at mediation is more likely to have both parties satisfied than a judge imposed solution;

(b) mediation is generally more flexible than litigation and allows the parties to shape the process to meet their needs;

(c) mediation may also preserve the working relationship of the parties involved; and

(d) mediation, being private in nature, is less likely to adversely affect the reputation of the parties than litigation which is usually very public.

For many faith based NFPs, engaging in a mediation process is consistent with the beliefs of their members[6]. For example, many Christian organisations will seek to follow Jesus' teaching in Matthew 18:

> *If your brother or sister sins, go and point out their fault, just between the two of you. If they listen to you, you have won them over. But if they will not listen, take one or two others along, so that 'every matter may be established by the testimony of two or three witnesses.'*

This reflects the pattern set out in clause 16 of the ACNC's template constitution:

(a) Those involved in the dispute must try to resolve it between themselves (16.3)

(b) If those involved in the dispute do not resolve it between themselves, they must tell the directors about the dispute in writing and attempt in good faith to settle the dispute by mediation (16.4)

Investigations

Governors and leaders in NFPs normally need to investigate when allegations are made against people within their community. Governors allege misconduct by other governors; members allege misconduct by other members; members allege misconduct by governors and *vice versa*. There is nothing new in this. However, in days gone by, it was relatively easy for governors and leaders to ignore such allegations or to dismiss them as

[6] PeaceWise (peacewise.org.au) is an Australian NFP which provides training, resources and mediators for Christian organisations wishing to adopt Biblical peace making processes.

frivolous. That, fortunately, rarely happens today. With a much greater community emphasis on good governance and on transparency, NFP governors and leaders have been far more diligent when allegations have been made.

When disciplinary issues arise (often by way of a complaint about conduct by a member that could lead to disciplinary action), the procedures to adopt are normally set out in the constitution as noted above. However, it is often appropriate for the leaders or governors dealing with the complaint to investigate the matter before continuing with the constitutional process. There are at least two reasons for doing so:

(a) An investigation can determine whether or not the alleged misconduct is of a nature that falls to be dealt with under the NFP's disciplinary provisions.[7]

(b) An investigation can also determine with greater particularity the content of the alleged misconduct, thus allowing this to be put to the subject as required by the constitution.

NFP governors and leaders have rarely been trained in conducting investigations. Allegations of abuse, harassment and bullying are often investigated in a highly charged atmosphere with pressure being brought to bear by angry people. The result is frequently less than perfect. It is therefore important that NFPs engage competent external investigators if they do not have among their employees appropriately trained and experienced people.

It is particularly appropriate to engage an external investigator where:

(a) the allegation is against the CEO; or

(b) the allegation is against a member perceived to be close to the CEO (for example, a relative, long term friend or colleague); or

(c) the NFP does not have the required skills or resources to conduct the investigation.

The law reports are full of cases where incompetent investigators or NFP governors and leaders have failed to investigate fairly, often leading to the whole process being set aside. Those attacking such flawed investigations

[7] In *Dickason v Edwards* (1910) 10 CLR 243, the High Court judges each doubted that the vulgar language used by the subject was "calculated to bring disgrace on the Order" which is the expression in the relevant rule under which he was charged.

and disciplinary processes will typically do so by pointing to a failure to afford procedural fairness. As Campbell J said in *McClelland v Burning Palms Surf Life Saving Club*:

> *In Australia, the preferable view is that natural justice comes to operate in private clubs and associations by the rules of those private organisations being construed on the basis that fair procedures are intended, but recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part.*[8]

What is procedural fairness?

Procedural fairness (or natural justice, as it is sometimes called) refers to a body of principles that have evolved to provide fairness to people who are being investigated or charged or who are the subjects of administrative action which may adversely affect them. While these principles are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that procedural fairness usually means simply observing practical fairness. In other words, as Young CJ in Eq said in *Hedges v Australasian Conference Association Limited*:

> *Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways.*[9]

Gleeson CJ of the High Court of Australia put it this way:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*[10]

Mason J, in the High Court's decision in *Kioa v West*, said:

> *The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.*[11]

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[8] [2002] NSWSC 470 at [97]
[9] [2003] NSWSC 1107 at [121]
[10] *In re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502 at 511
[11] (1985) 159 CLR 550 at 585

He also said:

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[12]

What does procedural fairness look like?

Some try to summarise the principles of procedural fairness into what are often described as the 'hearing rule' and the 'right to an unbiased decision'. However, there is potentially much more to procedural fairness than these two things. The principles of procedural fairness which NFPs must take into account in dealing with disputes and allegations are:

Fully informing the subjects of the allegations against them

The person against whom the allegations have been made (the subject) must be told the substance of those allegations. The High Court of Australia's decision in *Kioa v West* is very important in this regard:

> *... recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it*[13]

In practice, this means putting the allegations to the subject with sufficient particularity as to allow the subject to respond to them meaningfully.

Young CJ in Eq describes this as "putting to the person against whom action is to be directed a clear statement of the matters he or she must answer"[14]. By comparison, in *Hedges*, the investigator's policy was that "Perpetrators aren't told the allegations prior to interview."[15] Clearly, people against whom allegations are made must be given every opportunity of knowing what has been alleged against them and by whom[16]. This is particularly important in NFPs where broad descriptions like "behaviour is causing harm to the company" are used. Where such expressions are used, natural justice requires that sufficient particulars be given[17].

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[12] (1985) 159 CLR 550 at 585
[13] (1985) 159 CLR 550 at 587 per Mason J
[14] *Hedges*, [2003] NSWSC 1107 at paragraph 124
[15] *Hedges*, [2003] NSWSC 1107 at paragraph 32
[16] *Carter*, [2004] NSWSC 737 at paragraph 121
[17] *Plenty and Plenty v Seventh-Day Adventist Church of Port Pirie* [2003] SASC 68

In *Kelson and McKernan v Anne Forward in her capacity as Director of the Merit Protection and Review Agency*[18], one element of the procedural oppression found by the Court was the "vagueness, imprecision and lack of specificity" of the allegations. The Court found that, while the subjects were given an opportunity to comment on the allegations, what was being asked of them was unfair.

Not only must the subject be told the substance of the allegations, he or she must also be given a reasonable opportunity to prepare a response to the allegations. A reasonable time must be provided to allow the subject to prepare evidence and to prepare a case in response to any adverse evidence to be taken into account by the investigator or decision-maker[19].

Fully informing the subject of the likely consequences

Just as the subject must be informed of the allegations, so too must he or she be told the nature of the proceedings against him or her. This must include references to the statutes, rules or policies under which the investigation is proceeding and to the possible penalties or disciplinary action which could follow. It is also important that NFPs inform a member when the member's misconduct is so serious that it may well merit suspension or expulsion. Otherwise, the member may not appreciate the gravity of the matter or what procedural rights there are available to him or her. In *Carter v NSW Netball Association*[20], not only did Ms Carter not know the nature of the proceedings against her, it seems that the Netball Association also failed to correctly identify the nature of the proceedings.[21] According to Palmer J, that compounded the injustice of the proceedings.[22]

Giving the subject the opportunity to provide an explanation or make representations

Once the subject knows what allegations have been made, he or she must be given ample opportunity to respond.[23] While this will normally mean giving him or her time to consider the allegations and an opportunity to respond in person at a meeting, it may be appropriate to allow a written response. This

[18] (1995) 60 FCR 39
[19] *Lever v Frederick and Anor* (unreported, SC(SA), Debelle J, No SCGRG2271/96, 4 December 1996, BC9605977)
[20] [2004] NSWSC 737
[21] A similar situation arose in *Forbes v Boston* [1999] NSWSC 1217 (14 December 1999)
[22] [2004] NSWSC 737 at [120]
[23] *Carter*, [2004] NSWSC 737 at [122]

is often referred to as "the right to be heard". The elements of this right will vary from case to case but will generally include all or some of:

1. a reasonable opportunity and adequate time to make submissions, give evidence and call witnesses in support[24];
2. notice of:
   (a) the time, date and place of the hearing;
   (b) the subject matter and potential adverse consequences of the decision;
   (c) the case to be answered;
3. disclosure of material to be relied on by the decision-maker;
4. disclosure of any adverse conclusion not obviously open on the known material[25].

In *Student A v Dublin Secondary School*, the Irish High Court was concerned that

> *expulsions were put in place before either the students or their parents had an opportunity of making representations prior to the imposition of the most severe penalty to be imposed by a school. This is an essential aspect of fair procedures. It … is also, it seems to me, an essential requirement of natural justice.*[26]

In *R v English Schools Foundation*, the Court found that the school and the Foundation, in what was apparently its anxiety to deal rapidly with the problem, failed to listen to what either the student had to say in his defence or in mitigation or what his parents had to say on his behalf. In the circumstances, "that was plainly a breach of natural justice; to put it another way, it was a failure to act fairly." [27]

Ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered

It is often correctly said that investigations within private entities like NFPs are not bound by the rules of evidence. Nevertheless, it must be remembered

[24] Such opportunity was not given in *Jin Song Han v Australian Kung Fu Federation Inc*
[25] See the cases supporting the existence of these elements listed by McClellan J in *Hall v University of New South Wales* [2003] NSWSC 669 at paragraph 68
[26] [1999] IEHC 47 at [33]
[27] [2004] HCFI 651 at [39]

that these rules are a useful guide to any investigator. They should only be departed from "where consideration of equity, good conscience and substantial merit so justify."[28] Evatt J made the same point in *R v War Pensions Entitlement Appeal Tribunal; exp Bott*:

> *After all, [the rules of evidence] represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and solicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".*[29]

Young CJ in Eq was critical of the investigator in *Hedges* for accepting gossip and hearsay. At one point, he said: "The bizarre allegation that was also put to the investigator as fact based on hearsay that the plaintiff had had a love child with the lady which the lady categorically denied, was another feature which should have registered a red light with the investigator."[30]

The relevant standard of proof for investigations by NFPs is "on the balance of probabilities". Such investigations do not amount to criminal proceedings, no matter how serious the allegation. Accordingly, to find that an allegation is sustained requires proof on the balance of probabilities - the ordinary standard of proof required of a party who bears the onus in civil litigation in Australia. It is often suggested that this civil standard is given an extra dimension where the issue under consideration is more serious. The basis for this suggestion is found in the judgment of Dixon J in *Briginshaw v Briginshaw*:

> *The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law*

[28] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2004] NSWIRComm 65 at [322]
[29] (1933) 50 CLR 228 at 256
[30] [2003] NSWSC 1107 at paragraph 63

> *for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, an inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.* [31]

It is not uncommon for NFPs to be required to investigate alleged behaviour which could constitute criminal activity in situations where the Police have already investigated but decided against bringing charges. The NFP finds itself in the invidious position of having to investigate the alleged criminal activity when the Police have decided that there is not enough evidence to prove what is alleged beyond reasonable doubt - the appropriate burden of proof in criminal matters. The decision by the Police not to charge a person cannot be relied upon by the NFP as being determinative of the issues which are the subject of the investigation. As the Full Bench of the Industrial Commission said in *Wang v Crestell Industries Pty Ltd* (an employment case):

> *The onus of proof in such a case is on the employer and the standard of proof must be such as to enable a positive finding that the misconduct occurred. The standard is, of course, the civil and not the criminal one, but the requisite degree of satisfaction must have regard to the seriousness of the alleged conduct and gravity of the consequences of the finding*.[32]

The High Court made similar comments in *Neat Holdings Pty Limited v Karajan Holdings Pty Limited*:

[31] (1938) 60 CLR 336 at 361-362
[32] (1997) 73 IR 454 at 463-464

> *... the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*[33]

It is also important to consider all relevant evidence. This especially includes evidence that the subject puts forward. The investigator must speak to all the people involved, look at any relevant documents and make other relevant enquiries - all with a view to making a finding or findings on the balance of probabilities, as to what happened. While this may appear obvious, sadly, it is clearly not always obvious to experienced investigators, let alone occasional investigators. For example, the investigator in *Carter's Case*, a former police officer, was criticised because she failed to interview any of the witnesses who could have given a contrary view of events to that put forward by those making the allegations.[34]

Ensuring that the decision-maker acts fairly and without bias

There should be a neutral investigator[35] and decision-maker. Obviously, this means that they have to be, and have to be seen to be, objective and impartial. It is not always appreciated that neutrality can be affected by a conflict of interest. For example, executive officers who know that they should be impartial and yet have some personal relationship with either those making the allegation or the subject necessarily have a conflict of interest. However, the circumstances of the case will determine whether a particular relationship between various parties will be important enough to amount to a denial of natural justice.

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[33] (1992) 67 ALJR 170 at 170-171
[34] [2004] NSWSC 737 at [26], [28], [33], [34] and [45]
[35] *Hedges*, [2003] NSWSC 1107 at [18]

In the very early High Court of Australia case of *Dickason v Edwards*[36], Griffith CJ interestingly did not speak of natural justice or procedural fairness but, using plain English unusual for those times, of "natural fair play". One of the rules of natural fair play was that "a man cannot be judge in his own cause". In this case, the officer of the Ancient Order of Foresters, who had allegedly been abused by the subject using vulgar language, chaired the Judicial Committee which heard the charge against the subject and the District Appeal Committee which heard the subject's appeal. Two members of the High Court quoted with approval Lord Esher in *Allinson v General Council of Medical Education and Registration*[37] where he said that there must not be any reasonable or substantial ground for suspecting bias in persons acting judicially. Isaacs J added:

> *So that the principle seems to me to be this — that if the person whose presence is challenged can be fairly said to be biased, either by reason of his necessary interest, or by reason of some pre-determination that he has arrived at in the course of the case, then he ought not, on these principles, to act ...*

In the Canadian case of *C.D. v. Ridley College*, a student sought to have a decision of a Discipline Committee set aside because of an apprehension of bias. The student argued that the fact that the Committee was comprised largely of other school principals who all knew the College principal professionally and personally gave an impression of unfairness. The Court said:

> *If such a committee did create an apprehension of bias it would only be in the eyes of the applicants and the apprehension would be unreasonable. As well, it must be remembered that the test is not whether there might be an apprehension of bias but, instead, it is whether there will be, in the mind of a reasonable person, a reasonable apprehension of bias.*[38]

Allowing the subject to have an advocate

In some cases, procedural fairness will dictate that people under investigation be allowed legal representation. In *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs*, Drummond J referred

[36] (1910) 10 CLR 243
[37] (1894) 1 QB 750
[38] 1996 CanLII 8121 (ON S.C.) at [35]

to various cases on the circumstances in which a right to legal representation is an element of natural justice and said:

> *The effect of the cases is that in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the 'right to legal representation' is an element of natural justice.*[39]

Ensuring that the subject is given a chance to deal with matters adverse to his or her interests

Procedural fairness requires that no evidence should be before an investigator or decision-maker without the knowledge of the subject, who must have an opportunity to comment on it. In particular, allegations adverse to the subject should be disclosed to him or her before any decision is made. Only if adverse material is disclosed to the subject will he or she have a reasonable opportunity to present his or her case attempting to contradict or comment upon the adverse material. Thus, procedural fairness has required disclosure of adverse material taken into account in relation to decisions of domestic bodies dismissing or disciplining members[40]

Brennan J pointed out in *Kioa v West* that:

> *A person whose interests are likely to be affected by the exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance…*
>
> *Nevertheless, in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the*

[39] *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557 per Drummond J at 570
[40] *Gleeson v New South Wales Harness Racing Authority* (1990) 21 ALD 515

> *decision to be made. It is not sufficient for repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it.*[41]

Providing an appeal process in some situations

If the constitution provides for an appeal, clearly there is a right to appeal. However, procedural fairness does not always require there to be a right to an appeal. One must consider all the circumstances when deciding what is fair. Many organisations would not function if all disciplinary actions, no matter how minor, were subject to appeal.

So what must NFPs do?

Put very simply, NFPs must:

(a) ensure that they know what their rules say;

(b) follow those rules to the letter;

(c) unless the rules expressly negate the application of the principles of procedural fairness, understand and apply those principles;

(d) explore mediation wherever possible;

(e) only appoint competent and experienced investigators.

Things do happen that you hope will never happen. However, if you are well prepared, those apparently difficult and unresolvable situations can become opportunities for growth, renewal and restoration.

[41] (1985) 159 CLR 550 at 629