Fair Procedures and Natural Justice
Guidance for Consultation

NOTE: When you have reviewed this guidance please open the hyperlink at the end of the document to provide your feedback.
Fair Procedures and Natural Justice

Background
The HSE’s Incident Management Framework requires managers to consider on receipt of an incident report whether the issue reported is appropriate to the Framework or whether an alternate review/investigation process is more appropriate. The HSE’s Guidance on making decisions about appropriate review/investigation pathways should be referred to if clarification is required. Use of the Incident Decision Tree may also assist managers in making such decisions.

The purpose of an incident review under the Framework is to examine the effectiveness of systems in place to prevent the incident so as to identify actions can be taken to reduce the risk of a similar incident occurring in the future. Whilst the actions of individuals are examined as part of the overall system, the focus of an incident review is not on the actions of the individual nor should it be used as a mechanism to apportion individual blame.

Irrespective of the pathway chosen there is a common requirement for all reviews/investigations to comply with the principles of Natural Justice and Fair Procedures.

What is meant by Natural Justice and Fair Procedures?

Natural justice is legal language for two ancient rules from the Romans who believed that some legal principles were self-evident and did not require a statutory basis.

The first is a rule against bias is known as “nemo iudex in causa sua”. It means that no person can judge a case in which they have an interest. This is why those being asked to conduct a review must be sufficiently removed from the incident i.e. have no direct management responsibility for the area within which the incident occurred. The degree of independence required for members of the review team will depend on the seriousness of the matter under review.

“Audi alteram partem” means “hear the other side too”. It is most often used to refer to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. The principles of natural justice represent the basic requirements of fair procedure. The minimum requirements are:

- Notice to the employee of the specific allegation to which he or she must answer and of the likely consequences if the allegation is established.
- An opportunity which must be real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or mitigate his or her conduct.
- An unbiased consideration of the employee’s explanation in the sense that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.
What is required to ensure that reviews carried out under the Incident Management Framework comply with these principles?

Adherence to these principles is ensured by the review;

1. Having a clear terms of reference which set out the matters under review, the scope of the review, membership of the review team, review commissioner etc
2. Advising staff involved in the incident of the terms of reference and what is required of their involvement in the process e.g. submitting a personal recollection of events, attending for interview, the right to be accompanied if required to attend an interview.
3. That staff members participating in or affected by the outcome of the review process will be provided with an opportunity to review the draft report.
4. That staff members participating in or affected by the outcome of the review process are requested to provide feedback on issues of factual inaccuracy and provide general comment on the report.
5. That any report arising from the review will be pseudo-anonymised to protect the identity of service users and staff.
6. That there is a system in place to govern the acceptance of the final report to ensure that it has been developed in line with the terms of reference and carried out in line with fair procedures and natural justice.

Feedback from staff participating in the review process should be a stepped process where participants are provided with the entire report in the following order;

1. That where issues of individual culpability are identified which may result in an adverse finding relating to an employee that the employee be advised of these, provided with detail of the manner these are reflected in the draft report and provided with an opportunity to refute the finding or to explain or mitigate his or her conduct/action. Based on this feedback any required changes must be made to the draft report prior to circulation to other staff for factual accuracy checking by them. The person must receive feedback on all items raised by them in their feedback, along with reasons for the basis why these are accepted or rejected. A copy of the amended report should be provided to them with this feedback.

2. The report when amended should go in full to all participants and the process repeated i.e. they are asked to comment and feedback. Issues relating to factual inaccuracy for which there is evidence must be changed and where observations or comments are received the review/investigation team may make changes or decide to leave as is. It is recommended that individual staff should receive feedback on all items of feedback provided to them along with reasons for the basis why these are accepted or rejected.

The following deals in more detail with the key issues of hearings, bias and evidence as they relate to Natural Justice and Due Process.
Hearings – audi alteram partem

- An employee must know the detail of any adverse findings made against them and the evidence in support of those findings.
- They must be allowed an opportunity to present their case where their employment rights may be adversely affected by a review.
- The review team must allow the employee an opportunity to prepare their case and defend themselves with evidence and arguments.

Bias – nemo iudex in causa sua

- The review team must be unbiased throughout the review and when making any findings which may adversely affect a person.
- The review team must act without bias in all procedures connected with the making any findings which may adversely affect a person.
- The review team must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence without preference for one person over the other.
- The review team should avoid conflicts of interest and anything that would appear to be bias.

Evidence

- Any decision must be based upon logical proof or evidence.
- The review team should not base their decisions on gossip, speculation or suspicion.
- The review team should be able to show the evidence on which their recommendation or decision is based.
- All the evidence must be provided to the person who may be adversely affected.

Provide your feedback on this document here