



STUDENT BEHAVIOURAL MISCONDUCT RULES

Investigation and Penalty Guidelines

These Guidelines are provided for members of UNE staff authorised to conduct student conduct investigations and hearings, impose penalties and hear appeals.

INTRODUCTION

In 2007 the University established a new set of Student Behavioural Misconduct Rules to apply in 2008. These Rules differed from those replaced in:

- authorising senior operational managers to investigate and determine minor issues of misbehaviour;
- reserving serious matters to senior managers; and
- limiting the hierarchy of appeals (preventing the ‘maintaining of the rage’).

These Rules are designed to ensure that disciplinary matters are handled effectively but quickly and simply, while maintaining throughout the principles of natural justice and procedural fairness.

The application of a disciplinary investigation and penalty process can be stressful for those involved—the alleged offender, any affected persons such as a complainant, the Investigator and the University community generally. In particular, the Investigator may feel under pressure from the authoritative role he or she holds and the potential for resentment from the alleged offender. It is a natural instinct of many managers to want to avoid the disciplinary role or spread the load by invoking an extensive committee hearing and appeal processes.

However, these instincts and approaches often cause more problems through the inevitable delays resulting to the process, which often cause more stress and anxiety. The effectiveness of the disciplinary process can also be blunted when outcomes are delayed by weeks or months—long after the alleged event occurred and memories have faded.

These Guidelines are designed to be read in conjunction with the Rules to provide clarity, additional support, and guidance in determining an appropriate penalty when necessary. Adherence to these guidelines will help you ensure that the disciplinary process—while sometimes an unwelcome and unattractive duty—is made as simple and painless as possible. It will also help ensure consistency of decision-making and that decisions are appropriate, accord with procedural fairness, and are less subject to challenge. You might also find useful the material available on the NSW Ombudsman’s web-site at the following URL: <http://www.ombo.nsw.gov.au/guideorganisations/guidepubsecagencies.html>. Your suggestions for improvement of these Guidelines are always welcome.

Professor Stephen Colbran

Deputy Vice-Chancellor (Academic Planning and Renewal)

25 October 2007

CONTENTS

Background	3
Investigations	3
Initial Investigation	4
Senior Officers' Delegation	5
Record-Keeping	5
Contact with the student	5
International students	6
Interviews and Hearings	6
Interviews	6
Hearings	7
Deciding on an appropriate penalty	8
Culpability	8
Harm	8
Assessment of Culpability and Harm	9
Aggravating Factors	10
Factors indicating higher culpability	10
Factors indicating a more than usually serious degree of harm	11
Mitigating factors	11
Reduction for acceptance of guilt	11
Communicating your decision	12
Appeals	12
Ratification of Major Penalties	13
Rescission	13
Further correspondence	13

BACKGROUND

The Student Behavioural Misconduct Rules are designed in accordance with the principles of natural justice/procedural fairness. These principles need to be kept firmly in mind when applying the Rules in order to provide effective and fair disciplinary action. Following these principles will also help ensure the quality and consistency of disciplinary decision-making and protect the decisions from challenge.

Principles of Natural Justice/Procedural Fairness

There are three fundamental planks to natural justice/procedural fairness:

- **‘The Hearing Rule’** — the right to a fair hearing (material used in decision-making should be disclosed to the alleged offender; the alleged offender must be given an opportunity to be heard before the final decision is made).
- **‘The Bias rule’** — the decision-maker must be impartial.
- **‘The No Evidence rule’** — decisions must be based on material logically capable of providing proof.

Decision-making

In accordance with natural justice/procedural fairness, decisions must therefore:

- be reasonable;
- take into account relevant considerations; and
- disregard irrelevant factors.

‘Relevance’ and ‘irrelevance’ will vary according to the context and will need to be determined by the Investigator.

INVESTIGATIONS [Rule 8]

An Investigator may commence an investigation when:

- a direct complaint is made to them;
- a complaint is referred to them by another Investigator who is unable to investigate themselves;
- they become aware of an offence; or
- a more senior member of UNE directs them to.

An investigation will normally be within the Investigator’s own organisational area/area of expertise (unless they believe they cannot be [and be seen as] impartial). However, this may not necessarily be the case with directed or referred Investigations.

Depending on the complexity and facts of the case, an investigation will generally involve both of the following:

- initial investigation (to gather evidence/assess whether the case should proceed); and
- a hearing (or other resolution of the case).

Initial Investigation

Commence record-keeping immediately—if any verbal allegations are made, in order to initiate an investigation they must then be transmitted to you formally in writing/email [Rule 8.1]. If you do accept any initial verbal or telephone statements, you should make contemporary notes and initial and date them. [See the proforma at the end of these Guidelines].

Gather evidence. This could involve conducting interviews with the parties involved/witnesses, checking documents (including electronic), and physical inspection of a location. [See the section on interviews below].

Assess the case [Rule 8.5] in order to determine if the complaint:

- has merit;
- is serious enough to require invoking the disciplinary process;
- ought to be handled at your level (if major penalties might be necessary [Rule 5.1 (b)] then the case should be escalated to a senior manager).

Make your decision:

- No merit/not serious enough to invoke the disciplinary process—refer the case back with your decision and recommendations for action (if any; this could include a recommendation for mediation).
- Merit—either accept the case for investigation and hearing, refer it to a higher level, or (exceptionally) defer the case until the results of a hearing in another jurisdiction are complete.

NB. If concurrent hearings of the matter are in progress (e.g. criminal), you **are** allowed to handle the matter while this is in process [Rule 8.3] and in general encouraged to do so. However, if you consider there are pressing reasons for deferral, be mindful that civil and criminal proceedings can take several months—you should seek advice from the UNE Legal Office before deciding.

Do not over-escalate the case—if necessary seek expert counsel but without giving more detail than is necessary so that the investigation is not compromised. Be careful not to seek advice from a person who might later hear an appeal against your decision.

Senior Officers' Delegation

Senior officers of UNE [6.1 (e-f)] may delegate the gathering of evidence. The choice of delegate will be determined by the estimate of the delegate's experience and skills. In general, the requirements would not be expected of General Staff of HEO8 or below or a lecturer Level B or below.

Record Keeping

This is essential to the integrity of the process. TRIM is the mandatory repository of all records. Help with scanning of hard-copy can be provided through the Manager, Customer Services in the Student Centre. Advice on use of TRIM and file creation can be obtained from the Manager, Records Management Office.

Contact with the Student [Rule 8]

This process is laid out in the Rules 8.6-8.11.

Avoid making any statements that may be seen as pre-judging the outcome ('serious complaint', 'grave matter' etc.). Keep your tone throughout all contact entirely neutral—pleasant even.

Any claims by the student to refer the matter to his/her solicitors, to an Ombudsman or any other statutory authority should be answered with the statement that referral is within the student's right but this does not halt the process—a student who absents him or herself from the University process will be assumed not to want to defend the allegation [Rules 8.3 and 8.9].

Any liaison with another person assisting the student is entirely at your discretion. While a student may give consent for a parent or friend to contact you, you are not required to debate the case but you may be prepared discuss the processes involved including the ability of the student to make his or her own case with a person present (but not with right of speaking/acting as an advocate at the pre-appeal phase) [Rule 8.6 (d)]. You should not discuss the matter with any parent, friend, or other party who does not have the student's consent to contact you.

Solicitors' letters, letters from parliamentary representatives etc. should be discussed with the Director, Student Administration and Services. If necessary, support will be given to you to respond to these letters to allow you to proceed with your investigation uninterrupted.

You may receive requests on various grounds to defer the deadline for the student's defence to the allegation [Rule 8.7]. Where good grounds exist, a short delay may be appropriate but do not allow momentum to be lost in the process by overly long or repetitive delays. It is the student's responsibility to find time to respond, not for you to give way. Claims for extra time

while legal opinion is sought or the student has ‘referred the matter to his/her advocate’, are not acceptable.

International Students

Cases involving international students are conducted in exactly the same way as for any other student. However, there is an additional requirement to inform the Directorate of English Language and International Services of any decisions involving exclusion or expulsion from UNE.

INTERVIEWS AND HEARINGS [Rule 8]

Interviews

These are part of the investigative process when information is being collected. Interviews leading directly to a determination should be managed as a hearing.

Choose a location which is:

- quiet;
- non-threatening; and
- discreet.

You might consider using the interview rooms in the Student Centre. It is ‘neutral territory’ and allows privacy in discussion but all parties can be seen in the room. To book a room, contact the Manager, Customer Services in the Student Centre.

Notes must be kept throughout an interview. [See the proforma at the end of these Guidelines].

Any attempt to abuse or intimidate should be recorded in your notes [this may constitute an additional offence under Rule 4.14 (e)]. If the situation deteriorates, attempt to calm the student and if necessary warn the student that you will have to terminate the interview until later when he/she is ready to be constructive in providing information/defending him/herself. A short break of 10 minutes may be all that is required.

A suggested sequence (which may be varied according to circumstance) is:

- Introduce yourself.
- Explain the investigative process, your role in it, and the purpose of the interview.
- Listen to the individual’s story (be sympathetic but neutral; don’t express opinions about the seriousness of the complaint or of guilt or innocence).
- Ask clarificatory questions as required.

- Summarise the outline of events/key details and ask the interviewee to confirm you have them correctly.
- Thank the interviewee for attendance and explain what will happen next.

Hearings

These are part of the formal determination process either by an Investigating/Appeal Officer or by the Student Conduct Appeals Committee.

The rules make clear that the process is not a trial in legal form and not subject to courtroom ‘rules of evidence’. Your role is to decide whether the case is proven on the **balance of the probabilities** [Rule 8.2].

Do not engage in legal or quasi-legal debate about due process, rules of evidence, cross-examination etc. Seek advice from the UNE Legal Office at any time if you are concerned but do not let yourself be drawn into a court-type argument by a student wanting to test his/her legal advocacy skills. Chairs may need to explain this to Committee members before the hearing starts.

The aim of the hearing is to go through the case information; to ask questions on points that may be unclear; for the complainant/witnesses/student to state what they know; for the student to reply to the allegation or seek mitigation; and for a decision to be made on the balance of the probabilities. As noted, to meet the requirements of procedural fairness, decisions must:

- be reasonable;
- take into account relevant considerations; and
- disregard irrelevant factors.

Notes should be taken of the questions and answers for the records but a verbatim record is not required. [See the proforma at the end of these Guidelines].

Questions of the Witnesses. Questions may be posed by the student of the witnesses through the Investigating/Appeal Officer/Chair (as in parliamentary/committee style), who shall remain in control of the questioning process. This must be explained to the student before the hearing starts. Based upon the responses, follow-up questions may be asked but **under no circumstances should the student be allowed to cross-examine the witness** [Rules 8.6 (e) and (f)].

The aim of a question and answer process is to obtain clarity on the facts, not to attempt to try a case to beyond reasonable doubt. If at any stage the situation becomes heated, a witness can be

excused temporarily and the proceedings suspended for a few minutes while the student may be counselled.

The Investigating/Appeal Officer, Committee Chair or Committee members may ask any questions but should also avoid attempting to cross-examine either witnesses or the student.

DECIDING ON AN APPROPRIATE PENALTY

You are required to impose a penalty that is commensurate with the seriousness of the offence. Note that if at the end of your hearing it becomes apparent that the appropriate penalty is beyond your authority then the matter should be referred to a higher authority. ‘Seriousness’ is determined by two main considerations:

- the **culpability** of the student; and
- the **harm** caused or risked being caused by the student.

Culpability

Culpability derives from the following:

- the **intention** to cause harm, with the highest culpability when an offence is planned. The worse the harm intended, the greater the seriousness.
- the **recklessness** as to whether harm is caused, that is, where the student appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people.
- the **knowledge** of the specific risks entailed by his/her actions even though he/she did not intend to cause the harm that resulted.
- the extent of **negligence**.

Culpability should be the first factor in determining the seriousness of a breach.

Harm

Types of harm are diverse. For example, individuals may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress.

The nature of harm will depend on the personal characteristics and circumstances of the victim and your assessment of harm will be an effective and important way of taking into consideration the impact of a particular breach on the victim.

In some cases no actual harm may have resulted and you will be concerned with assessing the relative dangerousness of the student’s conduct. You should consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

Harm to the Community

Some offences cause harm to the University community at large (instead of, or as well as, to an individual victim) and may include economic loss, harm to public image, or interference with teaching and learning.

Other types of harm

Other types of harm are more difficult to define or categorise but may also need to be taken into account. For example, violence to one person certainly causes significant harm to the victim but other people associated with the victim may also suffer psychological distress and/or financial loss.

Harm to the public good

Some conduct is prohibited purely by reference to public feeling or social mores. In addition, public concern about the damage caused by some behaviour, both to individuals and to society as a whole, can influence public perception of the harm caused, for example, by the supply of prohibited drugs.

Assessment of Culpability and Harm

The precise level of culpability will be determined by such factors as:

- motivation,
- whether the act was planned or spontaneous, and/or
- whether the student was in a position of trust (such as a college tutor)

Culpability is greater if the student:

- deliberately causes more harm than is necessary for the commission of the breach, or
- targets a vulnerable victim.

Where serious harm results but was unintended and beyond the control of the student, culpability will be significantly influenced by the extent to which the harm could have been foreseen.

Aggravating Factors

If present in a breach, aggravating factors indicate:

- either a higher than usual level of culpability on the part of the offender, or
- a greater than usual degree of harm caused by the offence (or sometimes both).

The list below includes the most important aggravating factors but it is not intended to be comprehensive and the aggravating factors are not listed in any particular order of priority. On

occasions, two or more of the factors listed will describe the same feature of the breach and care needs to be taken to avoid 'double counting'.

Factors indicating higher culpability:

- breach committed whilst on probation, exclusion or suspension for other breaches
- previous record of breaches
- failure to respond to previous allegations
- breach motivated by, or demonstrating, hostility to the victim based on his or her (or his or her presumed):
 - race or ethnic group
 - religion
 - sexual orientation
 - disability
 - membership of a minority group
- deliberate targeting of vulnerable victim(s)
- planning of a breach
- an intention to commit more serious harm than actually resulted from the breach
- operating in groups or gangs
- breaches of professional ethics and standards
- commission of the breach for financial gain (where this is not inherent in the breach itself)
- high level of profit from the breach
- an attempt to conceal or dispose of evidence
- failure to respond to warnings or concerns expressed by others about the student's behaviour
- commission of a breach while under the influence of alcohol or drugs
- use of a weapon to frighten or injure victim
- deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the breach
- abuse of power
- abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- multiple victims
- an especially serious physical or psychological effect on the victim or others, even if unintended
- a sustained assault or repeated assaults on the same victim

- victim is particularly vulnerable
- location of the breach (for example, in an isolated place)
- breach is committed against staff of the University in the course of, or associated with, their duties, or persons providing a public service
- presence of others (e.g. relatives, especially children or partner of the victim)
- additional degradation of the victim (e.g. taking photographs of a victim as part of a hazing breach)
- in property breaches, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or studies)

Mitigating factors

Some factors may indicate that a student's culpability is **unusually** low, or that the harm caused by a breach is less than usually serious. These include:

- a greater degree of provocation than normally expected
- mental illness or disability
- youth or age, where it affects the responsibility of the student
- the fact that the student played only a minor role

Reduction for acceptance of guilt

You may reduce the severity of a penalty to reflect an early guilty statement. This is granted to students who enter a guilty statement at the first reasonable opportunity and allows for:

- a maximum one-third reduction in fines (but not in a restitution payment)
- a reduction in time in exclusion
- a reduction from expulsion to exclusion

Credit may also be given for ready co-operation and genuine expression of remorse.

COMMUNICATING YOUR DECISION

The results of a hearing should be communicated in writing to the student. Keep your final written statements simple so that they are completely clear. An example is given at the end of these Guidelines [p. 16].

Do not engage in further debate with the student or anyone else at this point so that you do not compromise your own decision.

Complaints about your handling of the case can be referred to the UNE or NSW Ombudsman and do not hold back from suggesting this [Rule 8.17 (c)].

Any arguments after your decision are now a matter for the Appeal Officer/Committee and you should suggest that the student now concentrates on the next stage—this way you keep momentum in the process—do not let the appeal be stalled by reopening and re-debating old arguments [Rule 8.12].

APPEALS [Rules 7 and 8]

The appeal process is invoked by the student in response to the original Investigating Officer's decision and penalty [Rule 8.12]

In the first instance, the Appeal Officer/Chair of the Student Conduct Appeals Committee should review the original papers and make a judgment whether [Rule 8.13]:

- the original hearing had any aspect that would give rise to the need to re-hear the case in full; or
- the original hearing had no evident flaws and the process should be restricted to whether:
 - the processes were fair and in accordance with the Rules,
 - the evidence was appropriate to support the decision, and
 - the penalty was appropriate for the seriousness of the offence.

In the case of the former, then the Appeal Officer/Chair may proceed to conduct the review as a full re-hearing. In the case of the latter, then the Appeal Officer/Chair should proceed to a restricted review of the original case. Where an appeal is restricted to a review, students may attempt to turn it into a re-hearing. Appeal Officers/Chairs should avoid this.

In either event, the decision whether to accept new evidence is for the Appeal Officer or the Chair of the Student Conduct Appeals Committee. Normally, new evidence should not be accepted unless it can be demonstrated that it was not available at the original hearing—if new evidence is allowed it is more likely that the Appeal Officer/Chair will proceed to re-hear the case in full [Rule 8.14].

The advice on third-party representations, solicitors' letters and requests for deferment given on p. 6 above also applies to appeals

If the decision is to uphold the appeal or vary the penalty due to maladministration, the Appeal Officer/Chair must provide confidential reasons for that decision to the Deputy Vice-Chancellor

(Academic). This is to ensure that any errors in the earlier investigation are reported and amendments made in the rules and/or guidance information to avoid further occurrences.

If the decision is made to uphold a major penalty, this should be discussed with the Director, Student Administration and Services as soon as possible to arrange for its implementation. There are statutory provisions that can limit actions on a student's enrolment and records and timing of the decision can be critical.

Appeals are a continuation of the same TRIM case file as the original investigation.

Once the appeal has been heard, a letter is sent to the student [Rule 8.17]. Keep it simple so there is no room for further argument. Examples of responses to successful and unsuccessful appeals are given at the end of these Guidelines [pp. 16-17]. Note that these examples supply the core of the response, they will need to be adjusted according to circumstance. In the event of a successful appeal, if you consider an apology is warranted, you can consult the NSW Ombudsman publications 'Fact Sheet 1: Apologies' and 'Apologies: A Practical Guide'. These are available in pdf at the NSW Ombudsman's website, at the following URL: <http://www.ombo.nsw.gov.au/guideorganisations/guidepubsecagencies.html>.

Decisions of the Student Conduct Appeals Committee must be communicated by the Chair to the Vice-Chancellor [Rule 8.18].

Ratification of Major Penalties of Exclusion and Expulsion

Once the appeal process has been exhausted and a penalty of Exclusion or Expulsion has been resolved upon, the Chair must forward all the papers to the Vice-Chancellor for ratification of the Student Appeals Committee's decision. The decision of the Vice-Chancellor is then given to the Committee Chair who may then inform the student of the final decision, and inform the Director of Student Administration and Services that the penalty may be processed.

Rescission

Rescission is a major penalty reserved for the recommendation of the Vice-Chancellor and the approval of the Council. Investigating Officers/Chair, Student Conduct Appeals Committee may, if he/she feels appropriate, recommend to the Vice-Chancellor Rescission of an Award in addition to any other major penalty. Alternatively, the Vice-Chancellor may decide to add to any penalty a recommendation of Rescission [Rule 6.3].

Further correspondence after the Appeal

Further correspondence after the Appeal, from whatever source, should be referred to the Deputy Vice-Chancellor (Academic).

CONFIDENTIAL - STUDENT CONDUCT

TELEPHONE/INTERVIEW/HEARING REPORT PROFORMA

Student's name: _____ ID No.: _____

Investigator's Name: _____ TRIM reference: _____

Date: _____ Time start: _____

Location: _____ Time end: _____

Present: _____

NARRATIVE

COMMUNICATING THE RESULT OF A HEARING—SAMPLE

I have investigated this case and all the evidence presented to support both the allegation and the evidence in your defence.

I have decided that there is sufficient evidence on the balance of probabilities to support the allegation that you breached Student Conduct Rule(s):

quote the rule(s)

After considering the seriousness of the offence, the circumstances surrounding it, and any mitigating factors, I have decided in this case to award the penalty:

that you be placed on probation for the remainder of this academic year

You have the right to seek appeal against my decision by writing to [quote the next level authorised to hear the appeal]. This appeal must be made within 10 calendar days of receipt of this notice of imposition of penalty. I suggest you read carefully the rules previously sent to you for the conduct of appeals.

COMMUNICATING THE RESULT OF AN UNSUCCESSFUL APPEAL—SAMPLE

I/The Appeals Committee has/have considered your appeal and determined that there is no evidence to suggest that the original decision was unjust, inappropriate, or unduly harsh. Accordingly, my/our decision is that you breached Student Conduct Rule(s):

quote the rule(s)

and that the penalty:

that you be placed on probation for the remainder of this academic year

is upheld.

Although you have the right to seek a review of the conduct (but not of the outcomes) of the original investigation and your appeal by the UNE Ombudsman or NSW Ombudsman, this letter completes the UNE appeal process. Arrangements have been put into place for the implementation of the penalty with immediate effect.

COMMUNICATING THE RESULT OF A SUCCESSFUL APPEAL— SAMPLES

1. Variation of Penalty

I/The Appeals Committee has/have considered your appeal and decided that there is evidence to suggest that the original penalty was disproportionate to the seriousness of the offence. Accordingly, my/our decision is that you breached Student Conduct Rule(s):

quote the rule(s)

and that the penalty be changed to:

a fine of three penalty points and a restitution payment of \$150.

Although you have the right to seek a review of the conduct (but not of the outcomes) of the original investigation and your appeal by the UNE Ombudsman or NSW Ombudsman, this letter completes the UNE appeal process. Arrangements have been put into place for the implementation of the penalty with immediate effect.

1. Reversing of Decision

I/The Appeals Committee has/have considered your appeal and decided that there is evidence to suggest that the original decision was incorrect. Accordingly, my/our decision is that you have not breached Student Conduct Rule(s):

quote the rule(s)

and therefore no penalty applies:

a fine of three penalty points and a restitution payment of \$150.

NB These samples provide the core of the letters, but will need modifying according to circumstance. For example, you may consider that a fuller introduction and/or conclusion are warranted under some circumstances. If you decide an apology is appropriate as a part of upholding an appeal, you may find the material at the NSW Ombudsman's site useful; the URL is:

<http://www.ombo.nsw.gov.au/guideorganisations/guidepubsecagencies.html>