MEMO

greater WELLINGTON
THE REGIONAL COUNCIL

TO All Councillors

FROM David Harmer

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Procedural Fairness

Councillors have expressed an interest in receiving information about principles of natural justice, procedural fairness and, in particular, bias.

Preliminary comment

This is a complex area of public law in which minor contextual variations can lead to different and apparently anomalous results. For this reason, the following explanation should be treated as a guide. Whether the law applies as described will depend on the particular circumstances of the case.

It is useful to start with a brief description of the following concepts:

1. What is 'natural justice'?

2. What is 'fairness' or 'procedural fairness'?

3. When do these rules or doctrines apply?

Natural Justice

Historically 'natural justice' has been an elusive and imprecise concept. It is important to note that it is now in much more common use by non-lawyers than by lawyers or judges. However, there are two foundation rules of natural justice which endure to the present day.

First, the 'hear the parties rule'. In essence this rule requires that in a dispute of any kind, no decision should be made without 'hearing' (that is, considering and understanding the position of every party to the dispute). This is the first rule of natural justice.

Second, there is the 'freedom from bias' rule. The essence of this rule is that a decision maker should never make a decision on a matter on which he/she has an interest in the outcome. This is the second rule of natural justice.

These rules were developed as rules of judicial conduct. They applied not only to judges, but to all persons 'acting judicially' – in other words, in a role or capacity where there was an expectation that these standards of judicial conduct ought to be followed. It was not until the mid/late 20th century that the extension of the rules of natural justice into executive decision making (in a non judicial context) began to be developed.

As principles of conduct in government/administrative decision making, the difficulties presented by these rules became immediately apparent. What standard of 'hearing' is required where there is no 'dispute' (in the civil sense), but rather a proposed exercise of some statutory power which may directly or indirectly affect or disadvantage particular people? Similarly is a decision in furtherance of a published plan or policy tainted by 'bias'?

The more the courts sought to adapt standards of judicial conduct to 'quasi judicial' decision making (particularly where civil rights might be directly affected) the more concepts and rules of natural justice had to be refined to fit the different context.

For these reasons, from the mid 1970s the courts began to shape a doctrine of procedural 'fairness'. Rather than having to enquire whether the decision maker was required to act judicially and, if so, on what basis, the requirement was now expressed as one in which statutory decision making affecting rights would have to be procedurally fair.

Procedural fairness

This new doctrine of procedural fairness underlies much of the subsequent statutory expression of public rights of participation in decision making now found widely in legislation affecting local government (the most obvious example being the requirements relating to 'decision making' found in the Local Government Act 2002). While it was initially a response to the awkwardness of fitting the rules of natural justice into non-judicial areas, it quickly became apparent that the exact requirements would vary according to a number of factors.

These variable factors would include the statutory context in which a decision was made; the nature of the power being exercised; the purpose for which the power is exercised; the process described for making the decision; and the potential for impact on public and private rights and expectations.

When do the concepts apply?

The application of the requirement for procedural fairness is pervasive through statutory decision making. Accordingly, a more helpful question is 'To what extent do the concepts apply in a particular situation?'. As noted above, the range of factors which are relevant to this question is so broad that apparently anomalous answers can be given in different contexts. In the local government context, the requirements have been at their strictest in the fields of regulation and licensing.

For example, if Council wanted to impose a restriction on the use of a property then it would be under a strict obligation to consider submissions made by affected parties, and ensure that its decision reflected an understanding of those submissions. At the other end of the continuum, a council proposing to adopt general policies might not be required to follow any of the rules of 'fairness' other than a requirement to ensure that decisions were free of self-interest or bias.

In a statutory context this has lead to strict procedural regimes under acts such as the RMA, as well as licensing statutes such as the Sale of Liquor Act. But these were quite clearly differentiated from more 'governmental' powers such as making bylaws, making rates or selling property. These kind of powers required public notice to be given, and inherently allowed for the possibility that potentially affected persons could raise an objection before a final decision was made and expect to have that objection considered, they did not directly involve the public in decision making.

Under statutes such as the RMA, Council is required to formally notify proposals, conduct hearings at which proponents and objectors can be heard, and then make a decision within the ambit of the statute and further defined by the proposal and objections to it. The more governmental powers such as long term plans and strategies, rates and bylaws, are subject to a consultative regime in which the Council must fully explain and publicly notify its proposal and consider submissions but, significantly, its decision is not limited by the submissions at all.

Differentiating between types of procedure

The principle distinction the RMA regime and the LGA is that the former involves a process of adjudication, and the latter a process of consultation. It should be emphasised that this is a generalisation and that in some cases the distinction may not really exist or be of limited practical value. However, it is a useful distinction to bear in mind when evaluating where on the continuum of procedural requirements a given case might fall.

With a consultative procedure, the Council is primarily concerned to inform itself as to the views of its community on a defined proposal. The general rule on consultation (in addition to the specific requirements of the LGA) involves the formulation of a proposal, the provision of supporting information and explanations, and the creation of an open minded opportunity for members of the community to persuade the Council in one direction or another. However, Council is ultimately not required to do anymore than honestly consider submissions that are made during the consultative process. It is certainly not required to agree with any of the submissions.

By way of contrast, the position under the RMA is that having proposed a policy or plan , the Council is locked into a significantly more formal system involving a second round of 'further submissions', the consideration of 'evidence"; and ultimately making a decision within the strict ambit created by the proposed policy statement/plan and the decisions requested in various submissions. There is there a right of appeal. This has been seen as a process involving significantly higher 'judicial' requirements than policy initiatives under other legislation. The position in relation to resource consent applications is even more clear cut – this is a straight adjudication.

Bias

Regardless of the type of decision, a minimum requirement of 'fairness' is that the decision maker is free from bias. This requirement was well illustrated by the recent disqualification of Justice Laurie Greig from participating further in the case of Ahmed Zaoui. Justice Greig was reported to have expressed the view that, if it were up to him, Zaoui would be "outski on the next plane". In doing so, Justice Greig expressed an 'apparent bias' which compromised his ability to hear the case.

While it is important to note that Justice Greig was participating in a process which was inherently judicial in nature, it is essential that Councillors avoid 'apparent' or 'presumptive' bias when exercising decision making powers of any kind.

'Apparent' and 'presumptive' bias explained

The term 'presumptive bias' is used to describe the situation where a decision maker has a direct pecuniary interest (or an interest capable of a monetary value) in the outcome. The term 'presumptive' is somewhat misleading. Where such bias exists the law is said to raise an irrebuttable presumption of disqualification (however, a presumption that can not be rebutted is not a presumption at all; it is binding rule).

'Apparent' bias arises where there is a perception or real likelihood of bias (other than as a result of a pecuniary interest). Justice Greig's disqualification was as a result of his 'apparent' bias.

Predetermination

Predetermination is a particular form of 'apparent' bias. A decision maker will be disqualified where statements reveal a prior judgement or personal hostility or favouritism towards one of the parties, or a bias in favour of a particular outcome. The Courts have held that a decision maker who is acting in a consultative (rather than judicial context) can express tentative views without tripping the disqualification rule. Nevertheless, Councillors should be careful not to express views about the exercise of a statutory power which suggest they have closed their mind to an honest consideration of submissions or have predetermined the outcome.

Acknowledgement

The discussion of the principles of natural justice and procedural fairness contained in this paper is mostly taken from advice provided to Greater Wellington by Phillips Fox.

Further help

The Council Secretariat holds a copy of *Constitutional and Administrative Law in New Zealand* which contains a comprehensive discussion of the principles discussed above.

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