IS THERE TOO MUCH NATURAL JUSTICE? (1)

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The theme of this seminar is: 'Is there too much natural justice?' I am going to speak on the Federal administrative law experience, particularly the experience in administrative tribunals. While there are many ways in which tribunals such as the Administrative Appeals Tribunal (AAT) and the Social Security Appeals Tribunal (SSAT) might be improved, I would suggest that one way we could make these institutions less effective is to throw out the rules of natural justice.

Natural justice is, of course, more accurately referred to as procedural fairness. Fairness is a flexible concept, and what is fair in one situation may not be fair in another. It is for this reason that the content of the rules of procedural fairness are not fixed and immutable, but vary with the circumstances. In a case where a person's livelihood is at stake, the content of the rules is pretty much the same as the rights of a party in court proceedings. The party whose interests may be affected by the decision is entitled to notice that the decision may be made, an oral hearing with an opportunity to cross-examine witnesses and adduce evidence, and to be represented by a legal practitioner.

The factors which can affect the contents of the rules of natural justice include the nature of the interest affected and the nature of the power to be exercised.

Ultimately, however, it is a question of what a statute bestowing a decision making power intended. The two limbs of the natural justice are the right to be heard and present evidence, and the right to have a matter determined by an unbiased adjudicator. I would have thought that there was not much quarrel with the bias rule. Rather, it is the right to be heard that raises the question: 'Is there too much natural justice?'

Federal administrative review system

One feature of the Federal administrative review system is that, in some areas, there is a two tiered system of review. These areas are, notably, social security, veterans' entitlements and students' assistance matters. In these areas, decisions of boards and tribunals (such as the SSAT) can themselves be reviewed by the AAT.

In this context, it is necessary to keep in mind that the rules of procedural fairness which the first-tier review bodies are required to apply are affected by the very fact that there is another tribunal by which the decisions of first-tier bodies can be reviewed. In addition, statutory modification of the right to be heard is quite usual. For instance, in the case of the SSAT, the Secretary of the Department of Social Security (DSS) has no right at all to make representations to the tribunal.

Procedural fairness

As mentioned before, the rules of procedural fairness are variable. It is very important to recognise that they are not an injunction to behave like a court.

The rules of procedural fairness are sufficiently flexible to allow for the following:

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- Tribunals can limit the number of witnesses called by a party. If the number of witnesses being called by a party is such that the hearing of a matter becomes too lengthy, then the tribunal can refuse to allow more witnesses to be called. Of course, the tribunal must always be prepared to hear why these additional witnesses are necessary.

- Similarly, if a witness is unlikely to establish anything that has not already been established, or if a witness simply adds 'more of the same' to the evidence, then the tribunal can refuse to hear the evidence. The same applies to other forms of evidence.

- The rules of procedural fairness only require cross-examination when there is no other equally-effective means of controverting material which has been placed before the decision maker. What advocates and parties often try to achieve by cross-examination can be more effectively achieved by bringing evidence in rebuttal, whether it be by bringing a new witness or some other evidence. No tribunal is required to allow cross-examination just because advocates feel like doing battle with the weapons with which they are most familiar.

Indeed, there is no general right to cross-examination. In *O'Rourke v Miller*,[1] the High Court held that there was no denial of procedural fairness in circumstances where a police officer's probationary appointment was terminated on the basis of complaints from two members of the public. The officer was not given the opportunity to cross-examine the two members of the public. The Court (Deane J dissenting), on a construction of the relevant regulations, considered that a probationary constable only has a right to have the opportunity to be presented with the material against her or him and to present material in response.

- At the level of the AAT, it will generally be the case that a party is entitled to cross-examine a person whose oral evidence forms part of the case against her or him. Nonetheless, any tribunal has wide discretion to control its processes, including the power to avoid irrelevancies and to curb repetition (*Wednesbury Corporation v Minister of Housing and Local Government*[2]).

- The classic case where cross-examination is useful is where a witness's credit is in issue. Where there is medical evidence, cross-examination may help to define the limits of what a doctor has said or to establish that the medical opinion is based on a particular set of facts. Other evidence may then establish that this basis for the opinion is in fact wrong.

The essential point is that the rules of procedural fairness are flexible. Of themselves, these rules cannot be ossifying, as they are inherently flexible.

However, this flexibility itself is a source of problems. Because the rules of procedural fairness are flexible, there can be a tendency for decision makers to apply them at the highest level. If parties (and, more particularly, their legal representatives) are allowed to do what they want and to control the proceedings then there will be no denial of procedural fairness. There is a temptation to apply the maximum rules of procedural fairness for the reason that this obviates the need to worry about whether a response tailor-made for the individual situation will stand up to judicial review. This can also be in some cases a form of laziness on the part of the decision maker.

In the AAT, the tendency to give maximum content to procedural fairness

is compounded by the fact that most of the members of the Tribunal have been trained as lawyers. Many parties before the Tribunal are represented by lawyers. The result is that the proceedings of the Tribunal are sometimes conducted with more regard to the procedures of the courts than with regard to the question of fairness.

The AAT is required by its Act to conduct its proceedings with 'as little formality and technicality, and with as much expedition, as the requirements of this Act and of every relevant enactment and proper consideration of the matters before the Tribunal permit'.[3] However, this requirement does not feature highly in judgments of the Federal Court. It has not prevented the Federal Court holding that a party is entitled to withhold material evidence until the hearing of a matter in order that the party may use it in cross-examination of the other party. On appeal from the AAT, the Federal Court will find an error of law if procedural fairness has not been accorded. It will not find an error of law because there has been insufficient informality, flexibility or expedition, although these are factors relevant to the question of what constitutes fairness in the circumstances. It is perhaps unrealistic to expect members of the AAT whose decisions are subject to review by the Federal Court to apply the rules of fairness flexibly and efficiently if, on appeal, the decision will be set aside if the Court does not agree with the Tribunal's assessment that, in the circumstances, procedural fairness was accorded to the party. In these circumstances, it is natural to err on the side of giving as much fairness as possible.

Reasons for procedural fairness

We cannot reject the application of the rules of procedural fairness if, in the circumstances, to do so is to lose more than we gain.

The notion underlying procedural fairness is that, by ensuring that the process is fair, the chances that an unbiased decision maker will make the best decision in the circumstances is maximised. That is why a party must be able to bring all the relevant evidence before the decision maker. Cross-examination is designed to test the accuracy and truthfulness of evidence.

The purpose of administrative review is to get better decisions made. Without achieving this goal, administrative review would be futile. If a review body simply repeats the exercise engaged in by the primary decision maker then its decisions are unlikely to be significantly better.

In making their decisions, review bodies need to base their decisions on the best quality evidence available. One side of the story is not the best quality evidence available. The SSAT does not hear both sides of the story and, from time to time, cases come before the AAT where the SSAT's decision would have been a lot better had the Secretary of DSS put the other side of the story. In one such case recently, DSS made a decision to recover overpayments of unemployment benefit from a recipient, on the basis that he had not declared his wife's income. The recipient's case was that he was not living with his wife but was entitled to benefit at the married rate because he was living with another woman in a marriage-like relationship and she was not employed. In such a case, the credit of the persons concerned is crucial. The SSAT had no reason not to accept the veracity of what it was told by the recipient.

Under cross-examination at the AAT hearing, the recipient was asked about a fishing trawler. He denied any knowledge of it. On the next day of hearing, the recipient was taken by his counsel through documents relating to a fishing trawler and signed by a person using the same name as that of the recipient. He denied it was his signature. On the final

day of hearing, the recipient changed his entire story, admitting that he had owned the fishing trawler. In light of these admissions, the Tribunal was not able to accept the version of events put by him in relation to other matters in which it was necessary to prefer the recipient's evidence over that of other witnesses.

The usefulness of cross-examination is also often apparent in veterans' cases heard by the Tribunal. In cases where a veteran has operational service, he or she will be entitled to a disability pension if it is established that there is a reasonable hypothesis connecting the disability with war service. Medical experts often give opinions heavily influenced by notions of scientific proof and feel understandably uncomfortable with a concept that a mere hypothesis can be said to establish a causal link. In the result, there is often a situation in which a medical witness for the veteran says that there is a hypothesis linking a disability and war service. The Repatriation Commission then presents evidence from an expert that the two are not linked. However, when asked under cross-examination 'would you say the hypothesis is not reasonable?', it is not unknown for the expert to be unwilling to go this far. In this way, cross-examination can be a great help in clarifying just what the positions of the various members are.

It is also important to recognise that, by broadening the type of evidence which can be admitted in tribunal proceedings to include hearsay, opinion and other evidence which the courts have traditionally regarded as unreliable, there is a need to ensure that other safeguards are adequate. One of these safeguards is procedural fairness.

Criticism of procedural fairness

Criticism of procedural fairness arises because the process which is perceived to result is seen as defective. The process is seen as legalistic. It is seen as lengthy and costly. It is seen as inaccessible. But these defects in the process are not always the result of procedural fairness.

It is very popular to criticise tribunals such as the AAT for being too legalistic. To a degree, some of this legalism is unavoidable. The *Administrative Appeals Tribunal Act 1975* provides for the presidential members of the AAT to all be lawyers and allows for parties to be legally represented. As I mentioned above, the presence of lawyers is one factor which tends to make proceedings legalistic. It has to be recognised that there are plenty of cases before the AAT in which all the trappings of court proceedings are entirely appropriate. For instance, in one matter I heard last year, the parties were all either government agencies or major corporations. The parties other than the government agency were all represented by QCs. The agency was represented by a barrister. In such a case, the parties may well operate most efficiently in a court-like environment, simply because that is the environment with which they are most familiar.

Of course, that is not a typical case. There are many cases in which the tribunal should try to be as flexible as possible. But legalism is a product of the inflexible application of procedures, not the product of giving too much fairness. The same can be said for the criticism that the Tribunal is too slow and is inaccessible. It is not the application of procedural fairness that makes it so. It is the application of procedures in inappropriate circumstances.

There is a down-side to procedural fairness. It is time-consuming. We cannot totally eliminate that.

The real question is: 'How can we ensure that fairness is given without applying procedures inappropriately?' An interesting example is provided by the proposed Refugee Review Tribunal. It is proposed that the rules of procedural

fairness will be applied by spelling-out the procedures to be followed. The Refugee Review Tribunal will operate on a non-adversarial system, similar to that of the existing Immigration Review Tribunal. Failure to follow these procedures would be a ground of judicial review. This would replace the ground that the rules of natural justice were not observed.[4] This seems to be an attempt to preserve the essence of the rules of procedural fairness while minimising the down-side.

The AAT is attempting to make hearings happen more quickly and last for a shorter period when they do. One way the Tribunal is doing this is by having more rigorous pre-hearing processes, in the course of which, parties can attempt to settle disputes and define issues. Evidence can be outlined in advance and statements of facts and contentions and issues used to help see exactly where there is a dispute.

There is also a need to be more flexible in hearing processes, especially where there are unrepresented parties involved. Inappropriate language, such as words like 'discovery' and 'cross-examination', make unrepresented applicants feel as if they are in over their heads. Instead, parties should be told precisely what it is they are being asked to do. For instance, instead of saying 'you may now cross-examine the witness' we should be saying 'you can now ask the witness a few questions'.

Procedural fairness, properly understood, is a question of nothing more than fairness. When it is understood in these terms, then the question 'Is there too much natural justice?' becomes little more than 'Is there too much fairness?'. Preventing people having their say can be convenient. But is it fair?

Endnotes

1 (1985) 156 CLR 342.

2 [1966] 2 QB 275.

3 *Administrative Appeals Tribunal Act 1975*, s33.

4 Press release by the Minister for Immigration, Local Government and Ethnic Affairs, 15 July 1992.