Codes of Conduct

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Throughout the 10-year process which has led to the introduction of the ART Bill and its accompanying Consequential and Transitional Bill, the focus has been on the simplification of review. In the objects clause of the ART Bill, the nearest object which relates to this aspiration is to provide an accessible mechanism for reviewing decisions that is fair, just, economical, informal and quick. I propose to concentrate instead on the issue of accessibility. How accessible is the ART likely to be to those coming into contact with it?

The *Macquarie Dictionary* defines 'accessible' as '(1) easy of access, approachable; (2) attainable'—and gives an example 'accessible evidence'; '(3) open to the influence of'—and gives as an example 'accessible to bribery'. I expect the drafter overlooked the third of these meanings when drawing up the objects clause. However, the first of those meanings—'ease of access' and 'approachability'—is, I assume, the principal meaning the drafter had in mind, although the second, that the ART provides 'attainable or available evidence or information', is something that the government may also have hoped would be achieved.

Let me make a couple of brief comments about those meanings. It is true that in the second reading speech the Attorney commented that front counter and registry personnel in the existing tribunals are likely to be appointed to the ART. To that extent, these persons are likely to be an experienced and perhaps to some users familiar face when they approach the new body. And indeed, if and when all the tribunals are located in one tribunals complex in each capital city, that too will be a major advance. Co-location of the principal merits review bodies is long overdue. I envisage the position with some pleasure when we can point on a map of our major cities and other centres to a tribunals building or complex, just as we currently can do in relation to a court building or complex.

What about availability of evidence—the second of those meanings that I referred to?

Without wishing to encroach on the next session, just let me say that I have concerns about two aspects of the legislation. The first is that, if an applicant attempts to support his or her application with new evidence, the person may be required to start the process again; and the second is that the tribunal is able to limit the questions of fact, evidence and the issues it considers. Both these provisions, if used sensitively, could be managerial aids which will produce more efficient but still effective and fair outcomes. However, concern remains.

The first, 'sending the matter back to the agency', if used frequently, could slow down the process, frustrate the applicant and certainly not lead to accessible administrative justice. The second, 'limiting the scope of review', is contrary to the very concept of merits review. Merits review enables the reviewer to remake the decision in the same manner as the agency—that is, knowing what were all the facts; having all the evidence, including generally new evidence; and using the law which the agency applied. To limit any one of these factors for the reviewer is like asking the boxer to go into the ring with one hand tied. If this provision is an attempt to undermine the essential aspects of merits review as we know it, the clause is worrying. If it has the effect of reducing the quality of the outcome for the individual, it also reduces the accessibility of the review body in the second sense referred to, and that too will be a disappointment.

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Others have discussed the faces of those before whom our applicant will appeal—the members of the hearing panels. Suffice it to say that there are likely to be fewer of those with legal training, at least in some divisions. I noted that the Attorney-General on the *Law Report* in the last fortnight indicated that it was likely that the President and/or the executive members will be legally qualified. Indeed, in that context, it is interesting to note that in its 25-year history, I believe only two of the senior members of the AAT have not had that qualification.

To turn to the ART itself, I note too that there is some suggestion that in terms of the migration division of the ART that membership is simply to be rolled over. Since a high proportion of these members have legal qualifications, it is hoped that there is no overall quota of people with similar backgrounds for the whole tribunal, since the preponderance of legally qualified members in that division would lead to a disproportionate number without legal qualifications in other divisions. I think it is probably true that most of us would accept that legal qualifications and some legal expertise should be spread across the new body. It should also be remembered, as the experience of the SSAT shows, that it is not the possession of legal qualifications *per se* which leads to legalism. Careful choice of members can avoid people who are likely to bring a more formal approach to the process that is to be the preferred ethos of the new body.

I will now turn to codes of conduct. The introduction of a code of conduct for members is to be welcomed but with caution. It will depend on the terms of the code as to how useful it is and how well it can contribute to making the tribunal a user-friendly, efficient and fair environment. In that context, however, I would like to make two points. First, developing the code of conduct is to be undertaken, according to the ART Bill, by the President in conjunction with a committee. The committee is to consist of the President, two executive members and an outsider. Although the committee can consult others, those others have no formal voice. By contrast, there are rules committees for both the Administrative Decisions Tribunal in New South Wales and the Victorian Civil and Administrative Tribunal. For example, the rules committee of the Administrative Decisions Tribunal comprises an equal number of members of the Administrative Decisions Tribunal and community members—a more democratic and evenly balanced representation of user members. It is a pity that a comparable group was not set up for such an important initiative as the ART. The code of conduct, as you will be aware, unlike the practice and procedure directions, is legislative in nature and breach of it can result in dismissal. Hence, devising an appropriate and fair code is a very important task for the tribunal. Involving more users in the process would also be seen as enhancing its accessibility to the community.

Second, let me point out that there are to be consultants appointed to the ART. They are to be appointed under contract. They will not be members of the tribunal. They will not be bound by the code of conduct, nor will they be subject to performance agreements. Since these consultants, like members, are to mediate, conciliate, conduct preliminary conferences and undertake inquiries, to make the member but not the consultant subject to the code of conduct and performance agreement has the potential to undermine the user's perception of the independence of such employees. It also appears to be discriminatory and perhaps needs to be rethought. After all, when it is recalled that over 70 per cent of cases before the AAT are settled without a formal hearing, and it is precisely these non-formal functions which the consultants or inquiry officers are to undertake, the anomaly is the more striking.

So how accessible will the new body be? That will depend in part on the as yet unwritten practice and procedures. However, a wise woman with a wealth of experience in this area, Pam O'Neill—a former sex discrimination commissioner, first head of the Immigration Review Tribunal, former member of the National Native Title Tribunal and former member of the ACT Administrative Appeals Tribunal—once noted that the culture of a tribunal is created by its members, not by its structure or its rules. That has been the strength of the SSAT.

Provided appropriate appointments are made to the new body, provided there is sufficient opportunity for interaction between those members and provided those members have an independent voice, an appropriate culture could develop at the ART as well. They will be up against a formal prescriptive couple of bills which, to my mind, have not avoided the legal culture said to have infused the Administrative Appeals Tribunal. If that happens, to get around that problem and to create the culture will be the challenge, it seems to me, for the new President and the CEO of the ART. It may happen, but it is yet to be seen whether it will occur.