Referees' reports in universities

Re Kamminga and Australian National University (13 March 1992, AAT) involved review of a decision refusing Dr Kamminga access, requested under the *Freedom of information Act 1982* (the FOI Act), to six referees' reports that had been provided in support of two job applications he had made at the Australian National University. An example of the type of letter requesting the reports was given to the Tribunal. It requested the referee's comments "on an 'in confidence' basis".

The University relied on four provisions of the FOI Act in support of its claim for exemption. They were: that it could reasonably be expected that their disclosure would have a substantial adverse affect on either the assessment of personnel by the University [section 40(1)(c)] or the proper and efficient conduct of the operations of the University [section 40(1)(d)]; that the documents were obtained in confidence [section 45]; and that the documents were internal working documents the disclosure of which would be contrary to the public interest [section 36(1)].

Regarding the claim for exemption under section 36(1), the Tribunal, constituted by the President, Justice O'Connor, and Members Attwood and Julian, considered the public interest in both confidentiality and in relation to the quality of referees' reports and the selection of staff. On the first point, the Tribunal took the view that in the absence of special circumstances, a document is only exempt on the ground of confidentiality if it is exempt under section 45, at least where the confidentiality arises out of an understanding between an agency and an outside person that a document is "confidential". That is, the public interest in confidentiality is not a factor to be taken into account under section 36(1). As for the second point, the University argued that referees' reports, if available to applicants, would be less candid and helpful and would lead to the selection of poorer quality staff. The Tribunal considered, however, that there may be cases where adverse comment is made that is unfounded or out of context, and that in such cases the selection of the best staff might be facilitated by giving access to the reports. It was not satisfied that the public interest in the maintenance of high standards of scholarship in the University would be undermined by disclosure of the reports, so the argument under section 36(1) failed.

Following its reasoning in relation to the section 36(1) claim, arguments relating to the candour and quality of referees' reports were also rejected by the Tribunal in respect of the claims made for exemption under sections 40(1)(c) and (d).

In considering the claim for exemption under section 45, the Tribunal noted a 1991 amendment of the FOI Act, the effect of which is to limit exemptions on the basis of confidentiality to situations where disclosure would constitute an action for breach of confidence at general law. It noted that it is unclear whether the term "breach of confidence" covers contractual rights to confidence. In the present case, there was found to be no contractual or proprietary basis for a claim of confidentiality. The question for the Tribunal therefore was whether the referees who wrote the reports would, if the reports were disclosed, have an action in equity against the University for breach of confidence. In this regard the test set out by Justice Gummow in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 14 FCR 434, was applied with the result that the reports were exempt from disclosure under section 45.

Transcript of court judgment

Re Altman and Family Court of Australia (16 April 1992, AAT) concerned an application before the President of the AAT, Justice O'Connor, for access to a transcript of an *ex tempore* Family Court judgment under the *Freedom of Information Act 1982* (the FOI Act). Mrs Altman's request had been directed to the Commonwealth Reporting Service (CRS – now known as Auscript), but was later transferred to the Principal Registrar of the Family Court. Access to the document was refused by the Court.

It was argued on behalf of the Court that, pursuant to section 5 of the FOI Act, the transcript was not a document to which the Act applied. It also argued, on three grounds under the FOI Act, that the transcript was an exempt document and that therefore, under section 18(2) of that Act, it was not required to give access to it.

The Tribunal first considered whether the transcript was precluded from the operation of the FOI Act by section 5. The Tribunal found that the Family Court was an "agency" within the terms of the FOI Act and that "every person has a legally enforceable right to obtain access in accordance with the FOI Act to a document of an *agency*, other than an exempt document." Section 5(b), however, excluded certain persons from the definition of "agency" (judges or other officers of a court), while section 5(c) specifically included others, such as court registry staff. The Tribunal thus found that paragraphs (a), (b) and (c) of section 5 are concerned with the question "to whom can an application for access to a document be made?" In determining whether access to a document may be sought from a particular court official, the Tribunal noted that a distinction needed to be made between the judicial and administrative functions of that person. The Principal Registrar could not, therefore, when acting in a quasi-judicial capacity, be requested for access to a document, but could be when acting in an administrative capacity.

As for the proviso following those paragraphs, namely "but this Act does not apply to any request for access to a document of the court unless the document relates to matters of an administrative character", the Tribunal found that this addressed the question "what sort of documents are not to be disclosed under the Act?" The Tribunal found that:

> "These words exclude the operation of the FOI Act where the document in question is a 'document of the court' *and* does not relate 'to matters of an administrative nature'. Where both these conditions are fulfilled there is a de facto exemption from disclosure by virtue of the fact that the FOI Act does not apply."

While finding that documents of the court that relate to the determination of particular matters would be unlikely to relate to matters of an administrative nature, and that an unsettled transcript of proceedings is "clearly judicial", the Tribunal did not conclude that the operation of the FOI Act was necessarily excluded. It found that the transcript was not a "document of the court" and that both conditions required for exemption had therefore not been fulfilled. The phrase "document of the court", like the phrase "document of the agency" used elsewhere in the FOI Act, was found by the Tribunal to denote possession of a document. The transcript was not a document of the court because it was a document in the possession of the CRS, which was "an agency" for the purposes of the FOI Act. It did not matter that Mrs Altman's request for access had been transferred to the Family Court by the CRS – this did not alter the nature of the document, only the party to whom the request was taken to be directed.

Several specific grounds in the FOI Act for exemption from disclosure were also considered. Counsel for the Family Court argued under section 37(1)(b) that disclosure would "prejudice the enforcement or proper administration of the law", on the basis that if judges were required to provide *ex tempore* transcripts they would be dissuaded from giving *ex tempore* judgments. The Tribunal found that there would be "little risk or possibility that judges would be discouraged to the extent required to create an exemption". On the same reasoning, the Tribunal did not accept the argument under section 40(1)(d) that disclosure of the transcript of the *ex tempore* judgment could reasonably be expected to "have a substantial adverse effect on the proper and efficient conduct of the operations of an agency". Arguments for exemption under section 46(a), on the basis that disclosure could amount to "contempt of court", were also considered, but not accepted, by the Tribunal. [MD]

Previous AAT decision

In *Re VXV and the Department of Social Security* (1 May 1992, AAT) the Tribunal, constituted by Deputy President Thompson, addressed the issue of the practice and procedure of the Tribunal in reviewing a matter which had been previously decided by the AAT and remitted to the Department with directions.

The case involved an application for access to four documents under the *Freedom of Information Act 1982* (the FOI Act). The AAT had decided in the earlier proceedings that the documents were exempt documents under section 38 of the FOI Act, except to the extent that they contained information relating to VXV's personal affairs. The matter was remitted for

reconsideration with directions that, unless the Department decided that the document was an exempt document under section 41, access was to be given in relation to VXV's personal affairs. It had not been argued that the documents might be exempt under any other sections.

The matter reached the Tribunal after access was again refused by the Department. When an officer of the Department informed the Tribunal that the Department intended to present a case that the documents were exempt under either or both sections 40 and 45 of the FOI Act, the Tribunal drew his attention to its previous decision and ruled that, in respect of the question whether VXV was to be given access to the documents if they were not exempt under section 41, the Tribunal was functus officio (a duty, having been discharged, cannot be discharged again).

The question to be determined therefore was whether or not the documents were exempt under section 41 as it stood at the time of making of the decision under review on the basis that disclosure of them would involve unreasonable disclosure of information relating to the personal affairs of any person. In the result access to the documents was denied on that basis by the AAT.

The Courts

Natural justice and remedies

In *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11, Mr Ainsworth claimed that he had been denied natural justice by the Criminal Justice Commission in relation to its inquiry into the introduction of poker machines into Queensland. The Full Court of the Queensland Supreme Court had determined that there had been no denial of natural justice because the Act establishing the CJC required the provision of procedural fairness only in "proceedings" and the CJC's report had not involved the carrying out of any "proceedings", by which the Full Court meant the carrying out of something akin to a hearing.

In a joint judgment, four Justices of the High Court, Chief Justice Mason and Justices Dawson, Toohey and Gaudron (Justice Brennan writing a separate judgment reaching the same result), determined that "proceedings" should not be confined to formal hearings. However, the judgment went further, not relying upon the particular provisions of the Act relating to procedure:

> "... a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save as to the extent of clear contrary provision."

The judgment made it clear that even if "proceedings" were to be narrowly defined, a duty of fairness would be implied in all areas involving the CJC's functions and responsibilities, complementing any express fairness provisions.

The judgment also determined that procedural fairness will operate to protect a person's reputation. In this case, without consulting Mr Ainsworth at all, the CJC had released a report that was highly critical of him and certain companies with which he was associated, making a recommendation that they not be permitted to participate in the gaming machine industry in Queensland. The report did not have any legal effect on Mr Ainsworth or the companies. The Court was required to consider what would be an appropriate remedy in this instance. It noted that mandamus could not lie because the CJC, which had in any event reported already, was under no duty to undertake to investigate the Ainsworth group of companies. Moreover, as the report had no legal effect, a writ of certiorari, which has the function of quashing the legal effect or consequence of decisions, was also inappropriate. The Court concluded that the appropriate remedy was to make a declaration. According to the joint judgment:

> "The present case involves no mere hypothetical question. At all stages there has been a controversy as to the Commission's duty of fairness. A report has been made and delivered... That report has already had practical consequences for the appellants' reputations. For all that is known, those consequences may extend well into the future. It is appropriate that a declaration be made in terms indicating that the appellants