Contemporary Decision-Making - Courts and Universities

3rd Australasian Conference of Ombuds and Deans of Students in Higher Education

Queensland University of Technology
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The Hon P de Jersey AC, Chief Justice of Queensland

Ombuds, deans of students, other distinguished guests: it is my honour to welcome you to the State of Queensland and this significant conference, the 3rd Biennial Conference of Ombuds and Deans of Students in Australasian Higher Eduction, which I am also privileged to open. I am honoured to have been asked to present the opening address. Higher education is a fundamental cornerstone of modern society, providing the refined knowledge and well-developed application which will ensure individuals exploit their full capacities, hopefully in the interests of the community. That being so, it is imperative this level of education remain accessible to all sectors of society. Basic to accessibility is ensuring justice and fairness are accorded to students and staff. How may that be done? Jurisprudence provides guidance, a matter to which I will come.

Courts of law and tertiary educational institutions have features in common – they are often large, complex and intellectually based. They demand fairness and impartiality grace their hallowed halls. It is elementary that the judges in the courts, and the staff at a

university or college, respect notions of fairness and justice, consistent with legal frameworks. Otherwise, the rule of law would in the courts be jeopardised, and in the higher education system, free thought and the expression of new ideas could become a myopic incantation of established principle, with participants discouraged from mental adventure lest they be stigmatised. Both fields exist to fulfil the same basic function – to serve the public.

In higher education, as in the courts, the stipulation for procedural and substantive fairness in decision-making and the exercise of sound discretionary judgment is crucial. University staff at all levels of the academic ladder are called upon to make discretionary decisions based on the resolution of disputed facts; and it is of course the prime duty of a judge to determine disputes rendering justice according to law. Disputes which touch on, to quote an Americanism, "life, liberty or property interests", are the everyday fare of the courts. Judges are often required to make judgements which deny personal liberty, determine who will care for children, influence local and State economies, and resolve the rights of private citizens in civil disputes, vastly impacting on their financial resources, their lives. The courts have also been given the considerable and sometimes exigent burden of reviewing the administrative decisions of executive organs of government – extending even to the management of prisoners. And the High Court, as the highest court of the land, sets down the ultimate law of the land, particularly by interpreting the Constitution.

Just as likewise, university staff also may be called upon to resolve disputes relating to a student's way of life and property interests, I suggest that higher education systems may look to the courts as a guide, especially through the comprehensive body of case law which has evolved over the centuries. These cases lay down a systemic approach to fair decision- making which can be helpful in the principled resolution of disputed facts in the academic setting.

These terms - procedural and substantive fairness – along with "natural justice", are rather bandied about in the legal world, and increasingly find their way into the lexicon of broader society. What do they mean?

"Natural justice" means, simply, fairness in the steps leading to the determination of an issue, and in the actual decision. Where a person's life, liberty or property interests are, have been or may be jeopardised, that person must be treated fairly. The courts have designed procedures to ensure that. For example, if a person were to come before a judge to plead his case against another, and that other were the judge's child, then that judge would disqualify him or herself. Every person is entitled to a trial free of bias or any perception of bias. Another illustration – when a person goes to trial and the issues are aired in court, the judge delivers a judgment to resolve the dispute. That judgment must, according to contemporary standards, be accompanied by a statement of the reasons for the judge's decision – whether written or delivered orally. Why? Because first, the parties are as a matter of fundamental fairness entitled to know those reasons and also, because judges are accountable for their decisions. Accountability is formally achieved

by judges discharging that obligation, ordinarily in public, to give comprehensive reasons for judgement, but also through the appeal process, which operates as an effective safeguard against occasional error.

Similarly, when a university or college proposes to deal with a student for misconduct or neglect, by, for example removing the opportunity for continued study, the institution must, first, notify the student of its inclination and, second, provide a hearing in accordance with procedures appropriate to the determination, giving the student a reasonable opportunity to express his or her point of view, perhaps even sometimes, in matters of grave consequence, with legal representation.

The courts have traditionally tended to defer to the administrative determinations of universities. It has been extremely rare for a court to intrude into an assessment of the propriety, for example, of academic evaluations or disciplinary action. Universities have been regarded as standing *in loco parentis* to their students, and have been taken to act in their students' best interests. While current law allows these institutions considerable latitude in determining how natural justice should in any particular case be accorded, there is nevertheless a clear expectation that internal procedures will be followed properly, for example, with basic notice requirements and the entitlement to a hearing – even if on the basis of written material, being respected.

A number of model student codes (Pavela, 1990; Stoner & Cerminara, 1990) and suggested hearing procedures (Bienstock, 1996) have been promulgated over the last

decade. No single model could exhaustively foresee the countless variations in factual circumstances likely to arise. Sometimes features will require a novel approach. From my own domain, I mention an extraordinary case which arose in our Supreme Court in September 2000 – Mr Justice Chesterman was required to decide, virtually at the last minute, whether a woman could remove a sample of her recently deceased husband's sperm for later artificial insemination.[1] The judge heard the application at 8 pm on 27 September. For physiological reasons, any removal of tissue had to occur by 10 pm that same day. Prior to 10 pm, he refused the application – publishing detailed reasons two weeks later. The judge ultimately found that the court had no jurisdiction to authorise such an action. He noted that

> "good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that arise. When they are not, the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support."[2]

Those words underline a paramount concern of the judiciary, that judges not be called upon to make law: that task falls to the legislature, the people's elected representatives. Judges are there to interpret the law, and on rare occasion, when warranted, to extend the common law if necessary to ensure a determination. The administrative decisions you make are likewise made in the context of a published regulatory framework, though some unforeseeable situations will require this exercise of a discretionary judgment in the absence of prescribed guidelines.

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[1] *Re Gray* [2001] 2 QdR 35
[2] Ibid at 42.

Institutions of higher education are astute to promote respect for the principles of natural justice by ensuring, essentially, that all official inquiries into disputed facts are conducted in a conventional and dignified manner; that any members of the institutional community who face adverse official action receive proper notice and are given a meaningful opportunity to plead their case; and that academic and disciplinary decisions are made by impartial committees or staff.

I was disturbed to read last week of the nightmare plight of a student of Bath University, Neil McDougall who, in response to his tutor's unexplained declaration that he was withdrawing his supervision of Mr McDougall's research, wrote to the university stating that "in the circumstances, I feel that I have no other option but to seek to complete my research elsewhere". Mr McDougall asserted emphatically that he was not surrendering his student position, but within a week his registration was terminated and he "entered into the void of university complaints' procedures". Mr McDougall continued: "sadly, or heroically, I am still exhausting all internal procedures: reviews of board of studies' decisions, appeals to the board of studies, complaints of maladministration, a submission of a grievance, complaints about the administration of the university's grievance procedure, obtaining a barrister's opinion, a re-submission of a grievance, a petition to the visitor, sitting in grievance committee hearings, investigations into the university administration's handling of the grievance procedure and petitions to the visitor for the release of documentation again, again and again". [3] The student's present frustration

[3] "And Justice for All" at <http://education.guardian.co.uk/adminsitration/story/0,9860,638120,00.html>

may be gauged against the feature that his tutor withdrew supervision as long as 11 years ago and yet he is still no closer to resolving his problem.

The last thirty years or so have witnessed an increasingly sharp focus on the rights of the individual – with corresponding emphasis, though perhaps less pronounced, on responsibilities. As a judge, I am called upon to adjudicate in relation to people's rights, *vis-à-vis* one another and the community. Likewise in your professional roles, ladies and gentlemen, you are concerned with the delineation, among other things, of students' rights – not just academic, no doubt, but embracing adjunct fields of human endeavour.

Assuming the role of adjudicator marks the transition from advocate to judge: from presenting a client's case for determination by another, to making that determination. Similarly, I imagine, the transition, say, from lecturer to Dean or Ombudsman: from the presentation of argument to foster thought, to the position of authoritative determination - though the Ombudsman role may be one more of influence than authority.

My past 16 years' judicial experience have witnessed substantial change in the way decisions are made in relation to people's rights. The two most dramatic concern the manner of informing the decision-maker, and the form in which the decision is expressed.

As to the former, whereas in 1971, when I commenced practice as a barrister, the format of court hearings was almost entirely oral, now, thirty years on, the written content predominates: documentary statements of evidence, written outlines of argument, written

submissions in full. While this reduces the forensic excitement of some courtroom performances, it certainly enhances the reliability of the decision. Reducing an argument to writing leads generally to a much more cogently analytical, disciplined presentation.

As to the form of the decision, whereas 3 decades ago judges still sometimes gave judgment – even in very substantial litigation – without expressing any reasons at all for their decision, now judges invariably provide most comprehensive reasons, both hopefully for the edification of the parties, and, as well, to facilitate appeals should there be error. The appeals process has therefore become arguably more intrusive, but probably more likely to ensure the eventual result is right.

I have focused on decision-making by a third party – the judge, the dean, the board. Another large change over the last two decades for dispute resolution in this State has been the embrace of consensual methods not dependant on the imposition of a decision, methods like mediation where the parties are assisted to an agreed outcome by a facilitator.

I expect similar developments have marked decision-making in the roles you fill. Receiving comprehensive submissions explaining why the particular decision is made, experiencing the process of the review of any imposed decision by an appeal-type tribunal: these are part of ensuring elementary fairness, to be gauged according to contemporary expectations – and of course expectations, as we know, change.

The modern approach to decision-making is demanding in what it expects of the decision-maker: especially these days, the capacity to master material of substantial dimension, and the ability to express concisely and comprehensibly the sometimes complicated reasons for the ultimate decisions. A further contemporary community expectation demands that the decision-maker present approachably – an authority figure no doubt, but one not unduly detached.

And so, as the form of decision-making has changed over recent decades, the talents required of the decision-maker have adapted to that change. Making decisions which affect the lives of other people carries sometimes very considerable responsibility. Every day all human beings make decisions which affect others. The particular decisions you, and I, are called upon to make, in our professional domains, can affect other people quite dramatically. It is, naturally, crucial that administrative and other pressures do not obscure a proper perception of the accordingly high level of responsibility we bear.

Another contemporary expectation concerns continuing education. Gone are the days when, upon appointment to a particular position, laurels were for "resting upon". A not insubstantial part of my annual report to the Parliament on the Supreme Court concerns the subject of "continuing judicial education" – the judges make conscientious efforts to keep up-to-date both with the substantive law, and with developments throughout the world in relation to legal process. An important part of such "continuing education" is attending conferences like this. The worth of collegial interaction is potentially immense:

exchanging information, observing the presentation of others, stimulating thought, solving problems, ascending ladders to new strata.

The subject-matter of our respective professional responsibilities is obviously of great significance – to the student (or litigant), to the university (or court), to the community. Discharging these responsibilities is a privilege, and doing so should, in our personal interests, while demanding, also be fulfilling.

As the process of decision-making has over the years been refined, the qualities expected of us have been varied. Conferences like this can be tremendously beneficial: pausing and reflecting, away from one's normal headquarters, pondering what we do, why and how; and what we should do, and how we might beneficially change.

I wish you well as you think laterally through this conference, and I trust its outcomes will benefit the student, the university, the community…and you.