AAT Conference Address: 2005

It is a great honour to address members of the Administrative Appeals Tribunal from around Australia. I had the privilege of appearing as a barrister in your Tribunal on many occasions; and of appearing in the Federal Court to defend and sometimes try to defeat AAT decisions. All of those experiences gave me enormous respect for the depth of learning and width of life experience of members of the Tribunal.

You play an important role in ensuring that the administration of government is fair, transparent and accountable. This is a necessary service to the citizens in a democracy to reduce the alienation and objectification which is so often an aspect of large, complex societies run by often distant governments.

Another reason I am so pleased to be able to speak to you is that I share the experience of being a member of a Tribunal. I spent a couple of years as a part-time member of the Social Security Appeals Tribunal and then was the first member and subsequently the first President of the Queensland Anti-Discrimination Tribunal, as well as a hearing Commissioner for the Human Rights and Equal Opportunities Commission.

One of the most useful things I learned from being a tribunal member, given my present position, was that I liked making decisions, in other words that judgment making was congenial to me. In most walks of life and indeed in one's personal and social life, being judgmental is normally considered to be a personality defect. For a judge and a tribunal member, it is a genuine occupational requirement. However it is daunting to be a speaker before a group of people used to passing judgment on others.

The Role of Tribunals

Tribunals are the modern day engine room of the Australian justice system. They perform an important function and impact on many areas of life. Indeed an individual member of society is more likely to encounter a tribunal than they are to find themselves in a court.[1] That individual may count themselves as fortunate, as tribunals are often considered to be "faster, simpler and cheaper than recourse to the courts".[2] In fact that is often their statutory charter. They may be considered a forum in which people can adequately represent themselves without suffering some of the disadvantages they would face in a court, particularly concerning rules of evidence.[3]

One of the main functions of tribunals is the task of administrative review, either in a tribunal set up specifically to hear actions concerning a particular department or in a tribunal with a broader mandate where a particular department is frequently called upon to respond to a claim. In either of these situations, two goals of administrative review are acknowledged as desirable. These are:

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1 Downes G, 'Tribunals in Australia' (2004) 84 *Reform* 7-9 at 9

2 Sir A Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (2001) Chapter 2, 6.

3 Kingham F, 'Reforming Queensland's tribunals: Procedural reform to realise the rhetoric' (2004) 14 JJA 31 *Journal of Judicial Administration* 31-44 at 32.

1. To redress individual complaints; and
2. Improve the quality generally of primary decision making.[4]

We are certainly in a better position now then the dark old days when such decisions were not capable of challenge. Chief Justice Warren from Victoria has noted that:

> "Once upon a legal time, there were boards, tribunals and decision making bodies that made decisions that in turn impacted on the citizen, sometimes dramatically, that were never challenged. Old, well-established institutions, such as the Medical Registration Board and the Teachers' Registration Board, made decisions that were never challenged. As government expanded and, in particular, respect and recognition for consumers' needs and rights were acknowledged, the community witnessed a shift in executive overview. Thus, registration powers and control expanded from doctors, teachers and nurses to chiropodists, motorcar trades, travel agents and even brothel owners."[5]

Due to an increase in governmental regulation, such decisions can impact on virtually all members of the community. It is imperative that decisions are being made correctly, and that if they are not, they are capable of being corrected upon review.

The newly appointed Queensland Attorney-General, the Honourable Linda Lavarch, in a recent address at the Annual General Meeting of the Queensland State Chapter of the Council of Australasian Tribunals, announced an intention to consider the position and organisation of the civil and administrative review system in Queensland.

Queensland has recently started making changes to its system of specialised tribunals and review bodies after the Department of Premier and Cabinet in 2001 circulated a discussion paper entitled *Appeals from Administrative Decisions*. This paper made a number of key findings regarding the tribunal structure in this state. It found:

- There were over 30 specialist review bodies undertaking external review of decisions;
- Internal review processes varied substantially between agencies and for different decisions;
- Aggrieved persons were not always notified of their right to seek review;
- There were areas of decision making not subject to external merits review.

Queensland is well placed to consider its options for reform as it can draw upon the experiences in other states and territories, in which substantial changes have been made. It appears that most jurisdictions have followed one of two paths. The first path, followed in South Australia and Tasmania, involves consolidation of the jurisdiction of review into administrative divisions within the courts. The second path is the consolidation of the different tribunals into one generalist tribunal with both original and review jurisdictions. This path was blazed by New South Wales[6] and

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4 Barker M and Simmonds R, 'Delivering administrative justice in WA' (2004) 84 *Reform* 23-28 at 23.

5 Chief Justice Warren, *The Growth in Tribunal Power*, speech to the Council of Administrative Tribunals, 7 June 2004.

6 Creyke R, 'Tribunals and Access to Justice' (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 64-82 at 66, citing the *Administrative Decisions Tribunal Act 1997* (NSW). The Tribunal was officially launched on 25 February 1999.

followed in Victoria with the creation of the Victorian Civil and Administrative Tribunal, but has been most recently adopted in Western Australia with the creation of the State Administrative Tribunal.

In her address, the Queensland Attorney-General raised a number of options for reform. These included:

1. Consolidation of all administrative review within a specialist division of the court;
2. Consolidation within a tribunal structure;
3. A hybrid system with further small scale amalgamations among existing tribunals. [7]

The first two options mirror the paths taken in other jurisdictions, while the third would simply be a continuation of a process already under way in Queensland. This has occurred with the creation of a new Commercial and Consumer Tribunal to replace the Queensland Building Tribunal (QBT), the Property Agents and Motor Dealers Tribunal, the Retirement Villages Tribunal and the Liquor Appeals Tribunal. The same process has also commenced with respect to a proposed amalgamation of the Land Court, the Planning and Environment Court and the Land and Resources Tribunal into the Land and Environment Court, a proposal which has caused some controversy.

In 2001, the former Attorney-General Rod Welford flagged that 'efficiency would improve by having a shared registry where people could file all their applications in one place.'[8] This has occurred in Queensland to some extent with the co-location of a number of tribunals to one common address. 259 Queen St in Brisbane city has now become home to:

- the Guardianship and Administration Tribunal;
- the Land and Resources Tribunal;
- the Children Services Tribunal;
- the Land Court as well as the Aboriginal Land Tribunal, the Torres Strait Islander Land Tribunal;
- the Queensland Gas Appeals Tribunal;
- the Retail Shops Leases Tribunal;
- the Commercial and Consumer Tribunal; and
- the Racing Appeals Tribunal.[9]

Co-location of this nature has a number of advantages. There is no longer a wasteful duplication of resources as not only premises can be shared, but also libraries, IT systems, and registry and counter staff.[10] It also means that the community can access a range of services from a central location that has access for people with mobility

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7 Attorney-General (Qld) Linda Lavarch, Speech to 3rd AGM of the Qld State Chapter of the Council of Australasian Tribunals (C.O.A.T), 20 September 2005.

8 Monk S, 'Tribunal plan to review government decisions', *Courier Mail* (Brisbane), 6 September 2001.

9 Above, n 7.

10 Creyke R, ''Better Decisions' and federal tribunals in Australia' (2004) 84 *Reform*10-14 at 13.

impairments, that is close to public transport and car parking.[11] Finally, a centralised tribunal centre like this acquires a visibility and a presence which improves its standing in the community.[12]

While there are competing arguments for and against all of these options, it would seem that this is the best time for Queensland to go back to basic principles. Any proposed changes should ensure that the universal aim of tribunals is being met in the best possible manner. This universal aim, as encapsulated neatly by the AAT President, Justice Downes,

> "…is to resolve disputes fairly, informally, efficiently, quickly and cheaply. It should not be thought that that the goals of economy, speed and efficiency compromise the supervening requirement for fairness. The absence of formality and the technical requirements of the rules of evidence do not displace due process, natural justice or procedural fairness."[13]

This universal aim is reflective of the historical origins of tribunals. The early tribunals often reflected significant areas of Government administration, where Members would review decisions made by Government 'on the merits'.[14]

It has been noted that, although the second goal of administrative review, that is improving the quality of primary decision making, is constantly acknowledged, little is done to achieve it in an institutional sense.[15] The importance of administrative review tribunals in achieving this second goal must not be understated. This is because the implications of erroneous decisions are many. Individuals in the community may end up losing benefits that they are rightly entitled to. This will then cost time, expense and an understandable level of stress to go through the process of review. Individuals may choose not to review the incorrectly made decision, and will continue on without their proper entitlements. Moreover it increases a sense of alienation of the individual from government. These are all arguments that the widest selection of administrative review mechanisms should be adopted to keep the government accountable.[16]

Bearing in mind that this is a primary goal of administrative review, research conducted in 2000 has flagged some serious concerns about whether this goal is being met. A survey called Views of Commonwealth Agencies to External Review of Administrative Decision Making made a number of findings in this respect. This survey found that 61% of administrative officers had access to a central database where they could access information on tribunal or court decisions. Of this group, 48% did not feel that they had sufficient time to absorb administrative developments relevant to their role. Interestingly, 79 per cent of officers nevertheless thought that the administrative law system achieved its core objectives.[17] This same project found

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11 Attorney-General (Qld) Linda Lavarch, Speech to 3rd AGM of the Qld State Chapter of the Council of Australasian Tribunals (C.O.A.T) (20 September 2005).

12 Above, n 6, 73.

13 Above, n 1, 8.

14 Above, n 10, 10.

15 Above, n 6, 80.

16 Above, n 6, 68.

17 McNee B, 'Administrative Review – observations and reflections', 2001 Blackburn Lecture, 15 May 2001, citing Pearce, McMillan and Creyke, *External Review Project Draft Report*, (unpublished) December 2000, 17-19.

that a main way that such information was shared was through informal methods of communication such as the use of email and through discussion with colleagues.[18]

If the outcomes of decisions of administrative review bodies are not being incorporated into the decision making process in a global sense, then the potential of external review to produce substantive change in the policy and practice of government departments is seriously undermined.[19] Improving the quality of decisions generally will mean that fewer and fewer individuals will have to go through the process of review. This is a desirable outcome for all parties concerned.

This is an important issue that Queensland has the opportunity to address as it puts its own review system in the spotlight. Several suggestions have been made as to how tribunal decisions can be incorporated into decision making at first instance. One suggestion that has been advocated is the use of Ombudsman to fulfil this role, as its officers are familiar with such processes and because the office itself is held in high regard generally.[20]

Another important facet of any tribunal, or court for that matter, is a commitment to access and equity service commitments. These commitments may address a broad range of issues, including but by no means limited to:

> "…community education, translation services, flexible hours of service, language and communication issues for non-English speakers, accessible hearing rooms, accommodating persons with a physical disability, culturally sensitive practices, the needs of Indigenous Australians, and so on."[21]

Tribunals need to be an exemplar of those values which they hope will imbue administrative decision making. A seemingly minor, yet quite profound, example of the values that must inform practice occurred while I was sitting as the President of the Anti-Discrimination Tribunal in Queensland. I heard a matter involving a complaint about discrimination on the basis of mobility impairment concerning an insufficient level of access to a government owned building. At this stage in the Tribunal it had been the practice of the bailiff to say 'All Stand' as the Member entered the room as generally happens in courts. This was a direction with which a number of people in the room, including the complainant who used a wheelchair, were unable to comply. After this incident, the words the Bailiff says were changed to 'All Rise', which is more consistent with 'give your attention', but importantly does not impose an unnecessary requirement on those attending. That practice has now been adopted in the court in which I sit.

Self-represented Litigants

The less formal nature of tribunals, coupled with the kinds of decisions that are reviewed, has led to a number of people representing themselves in their claims. This has led to procedures being adopted to assist self-represented litigants present their

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18 Above, n 6, 81, citing Pearce, McMillan and Creyke, *External Review Project*, findings for theme 6.

19 Above, n 6, 81.

20 Ibid.

21 Flemming F, 'Barrier-Free Justice' (2004) 84 *Reform* 29-32 at 29.

arguments to tribunals. For example, the Administrative Appeals Tribunal employs client service officers, and for larger registries, employs dedicated outreach officers to assist individual representing themselves. The AAT also holds preliminary conferences before specialised conference registrars in nearly all matters. These registrars are able to assist unrepresented claimants.[22] It is implicit in the notion of procedural fairness that people should be able to put forward their best case possible, regardless of whether or not they can afford legal representation.

Fleur Kingham, the Deputy President of the Land and Resources Tribunal, proposes, based on the rationale and rhetoric employed in relation to tribunals, a fundamental shift in assumption in the way in which tribunals proceed. She proposes that tribunals proceed on the basis that all parties will be self-represented, as opposed to engineering ways to assist self-litigants to deal with the processes themselves. This means that the basis of the procedures used in the tribunal would be the needs of the self-litigant. She proposes the following set of generic objective for tribunals:

- To provide opportunities for effective involvement regardless of whether a party is legally represented;
- To create an early and enduring focus on issues rather than legal form or technicalities;
- To efficiently access technical expertise to assist resolution or determination of disputes;
- To promote and assist resolution by the parties, not determination by the tribunal;
- To promote early determination by the tribunal if a dispute cannot be resolved by other means.[23]

Ms Kingham then offers some ideas as to a possible step-by-step plan that could achieve this fundamental change in the assumptions behind the practice and procedure of the tribunal. One example is an initial information session to provide case specific information, which could be followed by a case summary to clarify and define the nature and scope of the dispute. Her focus appears to be on determination by the tribunal as the least preferred option, which would require a greater and more effective utilisation of alternative dispute resolution procedures. An approach such as this may be more suitable for something like the Land and Resources Tribunal, but an extra step may be required for other types of decisions. For example, when dealing with a review of a decision of Centrelink in relation to a carer's payment that has been mistakenly ceased, an ADR type process may meet the requirement for individual justice but will have a limited effect on the quality of the decision making generally. To achieve this secondary objective, an extra step of some kind would be necessary to ensure that outcomes of mediated settlements of this nature can still be effectively incorporated into government decision making.

Ms Kingham noted three main impediments to procedural reform of this nature. Firstly, she cites the legalistic culture of many tribunals but notes that this is hardly surprising given that members reflect the culture from which they are drawn. She refers to comments of Justice Kellam who noted the need for a 'concerted focus by presidential members to change the culture of tribunal members to one in which

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22 Above, n 1, 9.
23 Above, n 3, 34.

hearings are styled according to the matter'.[24] The second main impediment noted is resort to civil procedure rules that focus on preparation for an adversarial hearing, although this is only an issue for some tribunals. Finally, she refers to the constraints imposed by the legislation conferring jurisdiction on the tribunal, which may contain provisions directing how a matter will commence, who can be heard about what matters and when costs will be awarded.[25]

Independence

The idea that the decision maker is free from bias is also integral to procedural fairness. Unlike judicial appointments, appointments to tribunals are only for a limited period of time. As such, independence is one of the most pressing issues for tribunals.[26] In a Report published by the Administrative Review Council in 1995, it was noted that:

> "It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence."[27]

Related to this is the fear that tribunals may be dominated by those parties who constantly appear before them. These concerns can be addressed in a number of ways. The first is to ensure that the process of appointment is managed through a single, preferably neutral agency. This process would involve public advertising of the position listing the necessary criteria required to do the job. The appointment could then be made out of the pool of applicants who meet the criteria, the duration of which would be for what is considered an adequate length of time for the particular tribunal. Also, it has been suggested that there should be judges on a tribunal with the advantage of the usual judicial tenure. Judicial members could be listed to hear controversial or political cases, which would also serve to insulate tribunal members on lesser terms from any political consequences.[28]

This independence is also important in the context of assisting self-represented litigants. Although a tribunal member may only be providing a party with a minimum level of assistance to help present their case, it must be remembered that procedural fairness cuts both ways. Tribunals must be, and importantly, be seen to be, fair to all parties and also impartial. It has been noted that lawyers, who are used to pressing a procedural advantage at a hearing to further their prospects of a favourable outcome, can be critical of tribunal members assisting a self-represented party during the hearing.[29] This means that care must be taken to ensure that they do not become too involved in assisting parties, especially when such assistance may appear to extend to advocacy.[30]

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24 Kellam J, paper presented at the Australian National University's Public Law Weekend, 11 November 2002

25 Above, n 3, 39.

26 Above, n 6, 76.

27 Administrative Review Council, *Better Decisions: report of Commonwealth merits review tribunals*, Report No 39 (1995) at [4.4].

28 Above, n 6, 76-77.

29 Above, n 3, 35.

30 Above, n 1, 9.

Council of Australasian Tribunals

The way forward for the development of tribunals may be made more uniform by the creation of the Council of Australasian Tribunals, set up in June 2002. The creation of this body was an initiative of the Administrative Review Council, and will be responsible in part for introducing performance standards, minimum skill sets for members and for professional development training. The creation of this body brings Australia into line with Canada and the United Kingdom, who have existing organisations dedicated to the development of tribunals.[31]

Personal experience

May I turn to my personal experience of the advantages of tribunals. So far as procedure is concerned, one of the things I learned is that the rules of evidence exist to serve the interests of justice and have no independent existence apart from that; or shouldn't have. I sat on a tribunal that was not obliged to follow the rules of evidence which meant that I very rapidly became aware of which rules of evidence were actually useful and necessary to fact finding and which were not.

I remember an early case in which a non-lawyer asked a series of leading questions of a woman whose supporting parent benefit had been cut off because the Department had evidence she was living in a de facto relationship which she had not disclosed. The questions were in the following style: You don't cook for him do you?; You don't share bank accounts, do you?; You don't do his washing do you?; He doesn't give you money for the shopping does he, or for the housekeeping does he?; and on the questions rolled. The applicant readily agreed that no, she didn't do any of those things and the advocate confidently submitted that the answers conclusively demonstrated that the woman was not living in a de facto relationship. On the contrary, I observed quietly, we know that she was prepared, indeed only too happy, to agree with your assertion that she wasn't and we have no idea whether or not she was or was not in a de facto relationship. It was a telling demonstration of why answers given in response to leading questions, while a useful technique of cross-examination to test evidence which has already been given, are not useful in getting a witness to first tell their own story.

On the other hand, I often learned a great deal from non-legal members of that Tribunal. A psychiatrist described what we were likely to find in an applicant who had frontal lobe damage. That description has stayed with me to this day because it helped us to understand that the applicant's bizarre behaviour was not intentionally socially disruptive, but a result of the injury he had received. That knowledge has informed many decisions that I have been called upon to make since.

There are many areas of the law and practice and procedures which Tribunals play an important role. My experiences in tribunals have shown me the importance of social security law to vast numbers of the Australian population. This is just one example of the importance of fairer decision making by government officials. And it is an area of law, poverty law, about which many lawyers are lamentably ignorant.

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[31] Above, n 10, 13.

I have also observed the importance of mediation and of case management, in helping to achieve justice on an individual level with a minimum level of fuss and expense.

Appearing before tribunals made me realise a couple of things. These include the importance of justice in individual cases and also the need for courage when acting for an unpopular client. As a barrister and as a member, I was also struck by the amazing diversity of applicants. It is also important to recognise the value of those members of the legal profession who are prepared to act for low fees or no fees for the most disadvantaged in our community.

While sitting as a member, I soon realised to appreciate the wealth of life experiences of the parties who appear in tribunals and the members of tribunals, particularly non-legal members.

Being called upon to make decisions that will impact either positively or negatively on an individual is no easy task. Each of us must have the courage to make a decision which is correct, even if it makes you unpopular. Linked to this is the need to have a broader view rather than just the immediate outcome of the individual case. This shows the importance and necessity of careful and thorough reasoning.

Conclusion

You do important work both for the individual, for government and for the health of our democracy. It has been my pleasure to work with many of you and an even greater pleasure to address you today.