All By Myself: Access to Justice for Self-Represented Applicants in Merits Review Tribunals

By Fatima Paras*

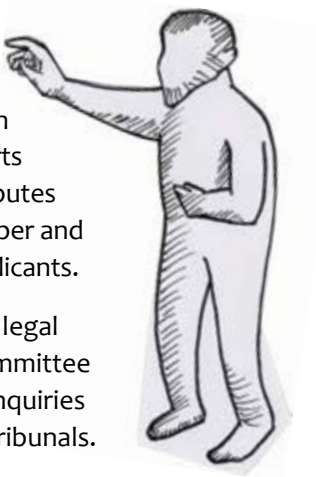
Court proceedings can often be an intimidating process for individuals, particularly for those who appear before courts without legal representation. An alternative body which has been developed to assist socially vulnerable groups are merits review tribunals ('tribunals'). Tribunals encourage socially disadvantaged groups to seek a review of administrative decisions through their cost-effective, informal nature which emphasises fair and just outcomes. With this in mind, it is common for self-represented applicants to appear before tribunals.

This article will investigate whether tribunals are an effective body to seek justice for self-represented applicants. It will argue that tribunals are effective institutions which effectively break down many of the barriers to justice faced by self-represented applicants, but that improving legal support and addressing some administrative issues will improve tribunals' ability to cater to self-represented applicants. The argument will focus on examining the procedures and policies of tribunal hearings.

This article is divided into two sections. First, the development of Australian tribunals will be discussed in order to explain how tribunals were developed to assist self-represented applicants. Second, analysis into the procedures and policies of a tribunal hearing will be conducted. It is through this analysis that any difficulties experienced by self-represented applicants will be identified. Bringing these issues to the fore can assist tribunals to improve access to justice for self-represented applicants in a tribunal hearing.

A. THE HISTORICAL RELATIONSHIP BETWEEN TRIBUNALS AND DISADVANTAGED GROUPS IN SOCIETY

Tribunals began to develop in 19th Century Britain, but, the current structure of tribunals did not emerge until the early 20th Century, as a response to the rise of the welfare state.[1] Adjudicative functions were transferred from the courts to tribunals following criticism of the courts from trade unions in relation to the courts' treatment of claims under the Workmen's Compensation Act and other legislation that dealt with the hours of work for child factory workers.[2] Tribunal structures were further developed by the appointment of a 'court of referees' to examine appeals decisions pertaining to unemployment insurance and the *National Insurance Act 1911*. These two developments were catalysts in tribunals' non-adversarial and informal nature.[3] The Honourable Justice Baker argued that such developments which were in response to the welfare state led to greater access to administrative justice.[4] Tribunals were established to be free of political direction other than public decision-makers, have experts from the area of law reviewing disputes and were likely to be quicker, cheaper and friendlier in their dealings with applicants.



The role played by tribunals in the legal system changed following the Committee on Administrative Tribunals and Enquiries (Franks Committee) Review into tribunals.

> “Representation will minimise issues arising from tribunal members tempting the possibility of becoming partial in their attempt to inquire during a hearing.”

The Franks Committee shifted the aspirational objectives of tribunals – namely, cheapness, accessibility, freedom from technicality, expedition and the expertise of presiding members – to become their permanent characteristics.[5] The shift meant that aims of cost, access, informality and decision-makers from the field in question were no longer aims of tribunals which could be brushed to the side, but, something which had to be embodied by the tribunal.

On a theoretical level, self-represented applicants are able to effectively seek justice in tribunals because of their characteristics of specialised knowledge, informality, quick and minimal restriction from technicality and rules of evidence.[6] Most self-represented applicants do not have the legal expertise to be able to effectively argue their case before a court. Tribunals are an appropriate body to resolve legal issues faced by self-represented applicants because they were established to alleviate many of the problems faced by self-represented applicants in dealing with the technicalities of court processes.

Characteristics of UK tribunals heavily influenced the features and structures of Australian tribunals. Most Australian tribunals bear the common principles of ensuring that procedures are carried out in a ‘fair, just, economical, informal and quick’ manner.[7] However, there is a conflict between the statutory objectives of tribunals.[8] Attempts to have a quick solution to an issue may not result in a fair or just outcome whilst trying to provide a fair hearing may not be economical for the tribunal or any of the parties involved. Meeting the objective of tribunals continues to be a point of contention among administrative law actors as the elements of the objective of tribunals should be weighed equally against each other.[9]

Questions must be raised regarding whether the objectives of tribunals assist or hinder self-represented applicants’ ability to succeed in their appeal. The next section will analyse how tribunals aim to minimise the barriers to justice for self-represented applicants in hearings.

B. PROCEDURES AND POLICIES OF TRIBUNAL HEARINGS WHICH ARE DESIGNED TO ASSIST SELF-REPRESENTED APPLICANTS

This section will focus on two features of tribunal hearings – the duty to inquire, and the non-applicability of the rules of evidence – and analyse whether these features hinder access to justice for self-represented applicants in tribunals.

1. The duty to inquire

Tribunals are bodies with inquisitorial features. One such inquisitorial feature of a tribunal is its procedural power to ‘inform itself on a matter as it thinks fit’.[10] It is a discretionary power of the tribunals.[11] There is no obligation on tribunals to apply the power and the circumstances of the matter will dictate when it may need to probe into an issue or fact in order to better inform its decision.

Matters where self-represented applicants appear before a tribunal may be a circumstance where a tribunal will use its power to inform itself as it sees fit. As a matter of procedural fairness, tribunals often assist self-represented applicants by helping them frame the legal issue/s at hand and directing them to evidence that legally and logically bears on their argument.[12] The need to help self-represented applicants in identifying legal issues by cross-examining witnesses was emphasised in *Winn v Blueprint Instant Printing Pty Ltd*.[13] However, it must be noted that the assistance to be given by the tribunal to applicants is often dependent on the requirements placed on a decision-maker by statute.

A more active role played by a tribunal member in proceedings involving self-represented applicants raises the issue of partiality. Groves identifies the possible

conflict:[14] a tribunal member could provide procedural fairness by assisting self-represented applicants, yet, it could also make the decision-maker more partial to one party than the other. The conflict essentially stems from a tribunal member attempting to balance two roles: being an investigator and acting as a neutral decision-maker.[15] Empirical research conducted into inquisitorial processes in Australian tribunals by Bedford and Creyke revealed that tribunal members are aware of the possibility of acting partially.[16] Current safeguards against tribunal members acting partially ensure tribunal members are conscious of their procedural fairness obligations and that they do not extend their assistance to become a form of advocacy for the applicant.[17] It is a rather weak preventative measure because it is solely relies on tribunal members to be cautious of their actions during a hearing.

A better safeguard must be implemented as tribunal members are only human and balancing the role of decision-maker and investigator is difficult as the line between the two can be blurred in some circumstances. Possible alternatives could include expanding assistance given by legal aid or other community legal centres to self-represented applicants.[18] Legal aid has support programs with many tribunals where their solicitors go to a tribunal to give advice to self-represented applicants. Having representatives for applicants removes the need for a tribunal member to be more active in the hearing and can rely on a representative for the applicant to provide the relevant information and issues.

2. Not bound by the rules of evidence

One of the procedural rules of tribunals is that they are not bound by the rules of evidence.[19] Tribunals are able to examine any evidence that they see fit in order to make a correct or preferable decision. They can also attach varying degrees of 'weight' to evidence based on reliability.

Self-represented applicants can be disadvantaged by the ability of tribunal members to examine any evidence that it sees fit to make a correct or preferable decision. Applicants may volunteer information to the tribunal that may impact on matters that they may have before the tribunal in the future. It is likely that the information that they communicate to the tribunal will be based on a minimal level of legal knowledge. A legal representative can articulate information to the tribunal that has been considered in relation to other laws and the applicant's circumstances. This was a problem faced by the applicant in *Filsell*.[20]

Mr Filsell was an employee of the Department of Finance and Administration. In 1995, he suffered an injury which resulted in pain in his neck and shoulders. He claimed for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRC Act') and the claim was approved by Comcare. Mr Filsell made another claim for compensation in 1997 for a psychological injury stemming from his employment with the Department. Comcare denied the application and the Administrative Appeals Tribunal (AAT) affirmed the original decision by way of a consent order.

In 2006, Mr Filsell made a further claim for compensation for depression and anxiety – it was subsequently denied by Comcare. Mr Filsell appealed the decision and presented medical evidence that certified that his conditions were a consequence of the injury that he suffered in 1995 and work stress. Comcare's decision in 2006 was affirmed by the authorised review officer (ARO) on the grounds that Mr Filsell did not satisfy the definition of suffering a disease under the SRC Act.

In 2007, an ARO revoked the AAT's affirming decision based on its own reconsideration on the grounds that the 2006 claim for compensation was the same injury claimed in the 1997 compensation. A decision was not substituted in place of the revoked decision because the 1997 claim had already been decided and consequently provided Comcare's response to the 2006 application.

In a review of the ARO's 2007 decision, Jarvis DP ruled that Mr Filsell's application should not be dismissed in light of new medical evidence.[21] The new evidence differed from one of two medical opinions relied upon by the ARO to reject the 1997 application. Mr Fisell also made reference to having acted under duress when he signed the agreement that gave rise to the consent decision of the Tribunal.[22] The presiding member held that claim should be explored separate to the issue raised in the 2009 hearing. Mr Filsell was self-represented in the 2009 hearing.

In 2010, the Tribunal considered whether the affirmation of the Tribunal in the 1999 matter, by way of a consent order, was made under duress.[23] Transcripts and other pieces of evidence of communication between Mr Filsell and Comcare relating to the 1999 hearing were relied upon by Senior Member Dunne in making the decision. The claim that the consent order was made under duress was dismissed by Senior Member Dunne as Mr Filsell accepted the agreement as he considered other opportunities open to him against the respondent.[24] Mr Filsell was able to make a decision, albeit under extreme pressure and reluctance, and the decision

was not made with illegitimate pressure from Comcare's representatives.

For self-represented applicants, such as Mr Filsell, legal representation could protect them from providing possibly detrimental evidence to the Tribunal. In the case of Mr Filsell, a review of duress would not have arisen if he was legally represented in the 2009 hearing. A legal representative could have inquired about the circumstances surrounding Mr Filsell's agreement with Comcare and also considered Mr Filsell's claim in light of a legal definition of duress. Though Mr Filsell had the assistance of an advocate in the 2010 matter, the advocate was not a legal representative and could not give legal advice to Mr Filsell in relation to the strength of his argument.

Essentially, legal representation provides a safeguard for applicants by not providing the tribunal with evidence which is detrimental to the applicant in any future related matters between the same parties. Tribunals should encourage self-represented applicants to appear before the tribunal with legal representation for this very reason. Encouragement can be in the form of explicitly asking the applicant to find legal representation or even building better relationships with legal aid or community legal centres.

C. CONCLUSION

Tribunals have been designed to assist society's most vulnerable and to encourage them to bring forward cases against government departments with as little hassle for the applicant as possible. It is for this reason that most applicants before a tribunal appear without legal representation. The process involved in appealing an administrative decision and the tribunal itself ensures that it is not an intimidating environment towards self-represented applicants.

This essay examined various tribunals to determine their capacity to provide self-represented applicants access to justice. It was argued that tribunals are bodies which effectively provide justice for self-represented applicants but providing legal support and improving small administrative matters will enhance tribunals' ability to cater for self-represented applicants.

After a discussion of the historical background of tribunals, this essay focused on tribunal hearings, in particular a tribunal's duty to inquire and the fact that tribunals are not bound by evidence. The importance of having legal representation to support applicants was explained because of the inherent problem that self-represented applicants have a minimal level of legal knowledge. Representation can minimise any problems faced by self-represented applicants in relation to the partiality of tribunal members or communicating detrimental evidence to the tribunal.

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14. Groves, above n 12, 195.
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