

A Guide to Standards of Conduct for Tribunal Members

A paper presented by the Honourable Alan Demack AO, Queensland Integrity Commissioner, to a Seminar organised by the Queensland State Chapter of the Council of Australasian Tribunals on Friday 14 February 2003.

May I begin by offering my warmest congratulations to those who established the Council of Australasian Tribunals (COAT) Anyone who has watched the development of our social structures and the laws which support them will be well aware of the important role tribunals have today. The definition of tribunal in the COAT Constitution identifies the bodies to which I refer: -

“Any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.”

When we look back over the twentieth century, we see an enormous change in the relationship between citizens and the State, between citizens and corporate trading entities, between citizen and citizen, and between non-citizen and the State. At every point, both citizens and non-citizens have been accorded rights which would have been unimaginable before 1948.

This has happened because there has been a greater recognition of the mutuality of rights and obligations. Citizens have rights which the State recognises and also obligations which the State requires be fulfilled. Similarly, the State has rights which it asserts over against its citizens and also obligations towards its citizens. It is through the political process that these rights and obligations move from being ideas to being clothed with substance.

Once such rights acquire substance, disputes concerning their application must be resolved. If all such disputes are to be resolved, the Court system must be supplemented, and it is here that tribunals have come to the fore.

This has happened to some extent because the State has given its citizens many rights which acquire substance through administrative action to determine whether specified conditions have been fulfilled. If a citizen disagrees with the decision, the State has come to accept the obligation to provide a tribunal to determine that dispute. Other tribunals determine disputes between citizens and exercise disciplinary responsibilities without having the formal procedures of a court.

In addition, the State has the need to ensure that the tribunals which adjudicate upon those rights are acting justly and consistently. The expansion of the rights of individuals has been closely followed by discussion about the role of tribunals. *A Guide to Standards of Conduct for Tribunal Members* prepared by the *Administrative Review Council* (September 2001) is an important contribution to this discussion. While this *Guide* was prepared for Commonwealth merits review tribunals, it is relevant and helpful for the members of all tribunals.

In Queensland, the *Public Sector Ethics Act 1994* identifies five ethics principles which it declares are fundamental to good public administration. From these five principles it expounds ethics obligations which apply to all public officials.

The ethics principles in the *Public Sector Ethics Act 1994* are very similar to the seven values identified by the *Administrative Review Council* in the *Guide*, so that it is helpful to examine the ethics principles in relation to the making of decisions by tribunal members.

The ethics principles are: -

- ? respect for the law and the system of government,
- ? respect for persons,
- ? integrity,
- ? diligence,
- ? economy and efficiency.

Respect for the law and the system of government

The *Administrative Review Council* identifies one of its seven values as 'respect for the law'. Queensland adds 'and the system of government'. For our purposes today, this is a very important phrase. Our system of government has three arms: the legislative; the executive; and the judicial. In broad terms, the legislature is responsible for making laws, the executive or administrative arm is responsible for carrying out those laws and the judicial arm is responsible for the interpretation and enforcement of those laws.

The definition of tribunal which is used in the COAT Constitution places tribunals in the executive/administrative arm. Certainly one of the tasks of tribunal members is to interpret the laws the legislature passes, but this is subject to review by the judicial arm. Essentially, tribunals ensure that citizens enjoy the rights recognised by the legislature through the proper administration of the law. This is their place within the system of government.

On the other hand, the members of the legislature are not part of the system of government only because they are law makers. They are also part of the political process, because they are the elected representatives of the people. They are directly answerable to the public will, both through the ballot box and through a variety of democratic pressures.

So the phrase "respect forthe system of government" removes some of the difficulties that arise when issues such as accountability and transparency are discussed. If tribunal members respect the system of government, they will keep clear of the political process. Elected representatives are accountable through the ballot box and other expressions of public opinion. Members of tribunals are accountable through the legislation under which they are appointed and by which they may be dismissed.

On the other hand, many decisions which governments make will be based on material which cannot be made public at the time. The members of tribunals must base their decisions on material which is made known to the parties before the hearing is concluded.

Some of the obligations involved in respect for the law and the system of government are: -

- ? adherence to the legislation under which the tribunal operates,
- ? adherence to the legislation or common law which creates the right/rights in dispute,
- ? beginning each hearing with a mind open to be persuaded either way by the material and arguments presented,
- ? allowing each party to present the material the law allows, and to answer material and argument presented by the other party/parties,
- ? making the parties aware of any additional material the tribunal has which may influence the decision,
- ? preparing and delivering reasons which provide a rational basis for the decision,
- ? eschewing the temptation to enter the political process when a careful consideration of the law and the material produces a decision which appears to be unjust.

Each of these obligations should be strictly followed. Sound ethics in this respect requires that these legal obligations be strictly observed. Only the last dot point requires elaboration. On rare occasions the rational analysis of the acceptable material and the application of the law to that material can produce an injustice. This will be because of some inadequacy in the provisions of the law. This should be clearly stated in the reasons for the decision, so that relevant authorities can make appropriate changes. Of course, the authorities may lodge an appeal from the decision on the basis that the reasoning is fallacious. The tribunal member should not publicize the issue, for to do this is to enter the political process, something that does not show respect for the system of government.

Respect for persons

We can begin looking at what is involved in ‘respect for persons’ by quoting from the *Administrative Review Council Guide*.

“A tribunal member should be patient, dignified and courteous to parties, witnesses, representatives, tribunal staff and officials and others with whom the member deals, and should require similar behaviour of those subject to their direction and control.”

This dignified patience and courtesy has to extend to –

- ? litigants with language difficulties,
- ? timid litigants and witnesses,
- ? litigants with physical and/or mental disabilities,
- ? self-represented litigants who are unfamiliar with the tribunal’s processes,
- ? self-represented litigants who are overfamiliar with the tribunal’s processes,
- ? people whose cultural perceptions about tribunals are different from the way the tribunal actually functions,
- ? parties, witnesses and representatives who want to use the tribunal as part of the political process.

Inevitably the natural disposition of the tribunal member will come into play when dignified patience and courtesy are required. There will be wider variations in applying this ethics principle than can be tolerated under respect for the law and the system of government.

Integrity

The word ‘integrity’ comes from the Latin ‘integritas’. The *Oxford English Dictionary* includes “wholeness, entireness and completeness” among the

meanings of the Latin word. 'Integrity' has come to mean "moral excellence, honesty, wholeness, soundness" (*Oxford Pocket Australian Dictionary*).

Within the five ethics principles, this is the one which integrates the others to produce sound decisions. It brings to mind the following description of the work of the Common Law Judges in seventeenth century England by Sir Matthew Hale in *The History and Analysis of the Common Law of England* (p.255):-

"by this means their Judgements and their Administration of Common Justice carry a Consonancy, Congruity and Uniformity one to another"

Consonancy speaks of harmony, congruity speaks of the exact coincidence of the just decision and the actual decision and uniformity speaks of an equal justice for all. Such integrity will be expressed by: -

- ? a commitment to intellectual honesty, both in deciding what issues have been proved and in applying the law to those issues,
- ? an acceptance of the obligation to reach a decision, the fundamental duty of a decision maker,
- ? refusing any gifts or favours which would raise the appearance of a conflict of interest in the mind of a reasonable person,
- ? disclosing to the parties any personal interest which the parties may think suggests partiality.

Diligence

The *Administrative Review Council Guide* offers the *Macquarie Dictionary* definition of diligence as "constant and earnest effort to accomplish what is undertaken: persistent exertion of body or mind". This carries some sense of stress which should be kept to a minimum in the day to day work of a tribunal.

It is helpful to concentrate on the idea that diligence involves a commitment to the completion of the task with an attention to detail. The parties should be able to see that their material and arguments have been listened to and

analysed. In tribunals where members acquire a body of knowledge of which parties may be unaware, any matter which may influence the decision should be disclosed so that the parties can respond.

However, diligence should not be embraced so enthusiastically that every stone is raised and examined. Hearings should not be interminable and judgments should be delivered in a timely way.

Economy and efficiency

Economy and efficiency are brought together in what is a reality-check ethics principle. We live in an age when the “what if” brigade charge about with a persistence that would astonish the Light Brigade. Recently I watched a TV program about a brilliant ancient Greek inventor named Heron. He described his work very fully in books, at least one of which has survived through a 16th century copy. The program concluded with questions to the effect, what if that book had not been ignored for so long and what if Heron’s understanding of the power of the steam had been used to develop the steam engine in the Middle Ages? Such questions cannot be answered. Speculation about them adds nothing to the common good.

Questions such as “what if I am not being told the whole truth?” and “what if someone else knows something about this, but has not come forward to give evidence?” encourage decision makers to procrastinate, and generally for no good purpose. Economy and efficiency help to bring issues into focus. They remind us that public resources are limited and must be used effectively.

So it seems to me that the five ethics principles identified in the *Public Sector Ethics Act 1994* provide a helpful guide to sound decision making by tribunal members. They focus upon the way public duty should be discharged and can readily be committed to memory: -

- ? respect for the law and the system of government,
- ? respect for persons,

- ? integrity,
- ? diligence,
- ? economy and efficiency.

These remarks are not a substitute for the careful study of the *Administrative Review Council's* relevant and helpful *Guide*. They are offered in the hope that they will be of some use.