PROCEDURES FOR A TRIBUNAL'S PURPOSE

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The development of the procedures of the NSW Community Services Appeals Tribunal.

The Community Services Appeals Tribunal was created by *the Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) (the *CAMA Act).* The Tribunal can make binding decisions on merits review of a range of decisions in the community services area. These include, for example:

- a decision to refuse to terminate ministerial guardianship of a ward;
- refusing to place a person on a register under the *Adoption Information Act 1990* (NSW);
- funding a disability service that does not comply with the principles in the *Disability Services Act 1993* (NSW);
- revoking a licence of a childcare centre.

The legislation includes a capacity for the jurisdiction of the Tribunal to be extended over time, including coverage of decisions of funded non-government services.

The Tribunal is part of a package the other main element of which is the Community Services Commission. The Commission is an ombudsman type complaints body but with a strong emphasis on proactive monitoring and review of community services.

In its first year of operation, the Tribunal has tried to develop procedures suited to its role and suited to the people who are involved in its hearings.

Fundamental factors

Four main factors have influenced the Tribunal in choosing its procedures.

First, the procedures need to be appropriate for the people who come to Tribunal hearings — people who have appeal rights or are otherwise involved in cases, in particular, consumers of community services. These people often find the formal, adversarial approach of a courtroom alienating and intimidating. They would be less likely to appeal to a court-like body or feel confident about participating in a hearing of such a body.[1]

Second, there is the nature of the role of the Tribunal. This is to 'stand in the shoes' of the person whose decision is being appealed and decide afresh what decision should be made. Just like the original decision maker, the Tribunal will find the information and views provided by public servants and consumers very important inputs to its decision. Also, like the original decision maker, the Tribunal may have a host of questions to ask and enquiries it wants made to allow it to make the best decision. The wide ranging experience of Tribunal members helps equip it for this role.

Another aspect of the Tribunal's role is that it is making legally binding decisions on very important issues. Obviously then, the desire to provide an informal environment in which people feel comfortable

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has to be balanced against the need for a rigorous approach that acknowledges the seriousness of the matters for decision.

Third, there is the *CAMA Act* which establishes the Tribunal. Provisions of the Act take the above factors into account and provide a framework within which the Tribunal must operate. One of the objects of the Act is to 'provide independent and accessible mechanisms for . . . the review of administrative decisions'. The Tribunal has to try to avoid formality and legal technicality. The Tribunal may inform itself in any way it chooses so long as this is not at the sacrifice of a fair hearing. The Tribunal has to assist parties to understand the issues in a case and give them a full opportunity to put their points of view. Parties may question witnesses, submit documents and otherwise put their points of view. Parties can only be represented by a lawyer or other person with the approval of the Tribunal (ss.3(1)(e), 52, 53, 55, 58, 59 and 97).

Fourth, there is the experience of other tribunals. Much in the Tribunal's procedures derives from those developed by other tribunals that operate in a comparatively informal and investigative way, for example, the NSW Guardianship Board.

How a case is handled

The procedures of the Tribunal are evolving as it gains experience. The procedures also vary to some degree depending on the individual case. However, the procedures are generally along the following lines.

When an appeal is made, the Department of Community Services has to give the Tribunal all the relevant documents it has. The Department also provides a report explaining why it made the decision. The appellant gets a copy of the report and documents.

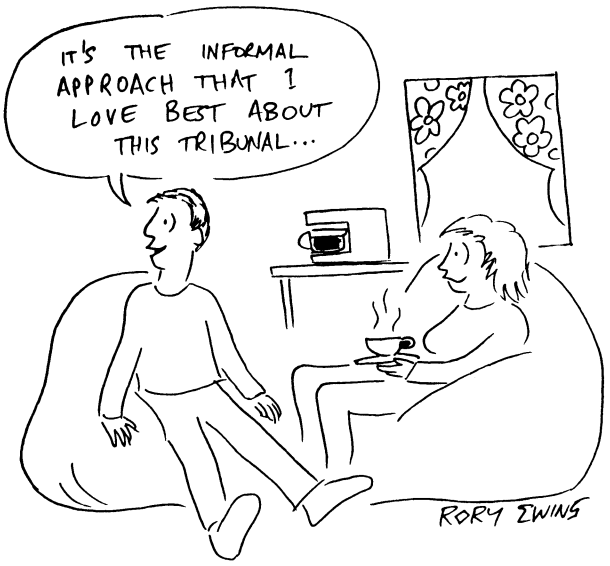
The President or Deputy President of the Tribunal then meets with the appellant and a representative of the Department to work out what the issues are, to explore compromise and to work out what needs to happen to prepare the matter for a hearing.

Tribunal staff and the parties then gather the information the Tribunal will need at the hearing. The staff act under guidance from the President or Deputy President. The Tribunal seeks to ensure that it has full and balanced information at the hearing. In some cases, the Tribunal investigator will conduct detailed enquiries on some issues and provide the Tribunal and the parties with a written report. The Tribunal quite often arranges for an independent expert to provide a report on some aspect of the case.

The Tribunal then conducts its hearing. This is as informal and non-legalistic as possible. The Tribunal has sought to achieve an environment in which people feel comfortable to put their points of view, but without sacrificing a rigorous exploration of the issues.

The three members of the Tribunal sit on one side of the table. The parties and other people who have information to provide sit on the other sides. If a party is represented, the representative sits next to the party.

The Tribunal members ask questions and discuss the issues with the parties and others present. This includes giving parties a specific opportunity to respond to material adverse to their case. Members seek to use plain English of a kind accessible to the people involved in the particular case, and to explain any legal issues that arise. Members generally



avoid an adversarial manner. The President or Deputy President presides at the hearing, explains the format at the beginning and reinforces or adds to this as the hearing proceeds.

The parties can also ask questions or provide information that the Tribunal has not covered. The Tribunal offers parties this opportunity at specific times but is also open to parties raising concerns at other times.

In some cases, people are questioned and have their say in turn or in groups. In other cases, the Tribunal has approached the hearing more on an issue by issue sequence.

Feedback on the Tribunal's hearing process has, to date, been largely positive. Two lawyers who have appeared for appellants have volunteered that their clients have been able to participate much more comfortably and fully than in court proceedings.

Representation of parties

Parties can only be represented by a lawyer or advocate with the approval of the Tribunal. People do not normally need to be represented because of the investigative and non-legalistic way the Tribunal conducts cases.

Where representation has occurred, its impact on the extent of formality and legal technicality has varied widely. In some cases, represented parties only personally participate in the hearing when specifically questioned. In others, parties have seen their representative more as a resource or support than a representative. The amount of questioning done by the lawyers has also varied but in all cases the Tribunal members have done the majority of questioning. When a party has brought along a particular person to provide information to the Tribunal, the Tribunal normally offers the lawyer for that party the opportunity to question the person first.

The Tribunal encourages unrepresented parties to bring a friend or other support person.

Listening to children

The Tribunal deals with many disputes about guardianship or custody of a child or young person. The Tribunal has been using a variety of approaches to allow children and young people to be heard in these cases and to protect their interests. In some cases, more than one approach has been used:

- tribunal investigations officer visiting the child, explaining the Tribunal's role, seeking the child's views and offering the child support or representation for the hearing;

  two older children (aged 9 and 13) have attended a hearing, each with a support person, and actively participated in the hearing;

  appointing a representative of the child whose task included obtaining the child's wishes;

  obtaining an independent expert assessment of matters including the wishes of the child or young person.

The Tribunal has been exploring this issue in detail through its Listening to Children Reference Group.

The role of the Department

The Tribunal has struck some uncertainty within the Department of Community Services about the Department's role at Tribunal hearings. A departmental officer or sometimes a lawyer has represented the Minister or Director-General in each case. In one case, the representative saw it as his role to fiercely defend the decision the subject of the appeal. The departmental representative does not need to take an adversarial role. The Tribunal is 'standing in the shoes' of the original decision maker. The correct role for the Department is one of assisting the Tribunal in the exercise of its function. This has been made clear by the Federal Court in relation to the Commonwealth Administrative Appeals Tribunal.[2]

Rationale for an investigative approach

The Tribunal is taking an investigative or inquisitorial approach to handling cases. The Tribunal takes an active role in gathering the information it will need for the hearing. In the hearing, the Tribunal rather than the parties takes the lead in identifying the important issues to be pursued and in how to pursue them. This can be contrasted with the traditional adversarial approach one finds in courts. In that approach, the judge takes a fairly passive role. It is for each party to decide what issues that party sees as important and how to pursue them. This approach tends to create a confrontational atmosphere in which opposing parties fight for a win.

The Tribunal is favouring procedures that are largely investigative on the basis of the factors discussed at the beginning of this article. To explain this in more detail, the Tribunal's rationale for this choice is as follows.

As an administrative review body, the Tribunal's task is to inquire into the matter and reach the best decision it can.[3] The Tribunal should choose the procedures best suited to this task.[4]

The *CAMA Act* specifically allows the Tribunal to question witnesses, seek out documentary evidence and inform itself in any way it thinks fit (ss.52(1), 53 and 55).

The *CAMA Act* calls for the Tribunal's membership to have a wide range of relevant experience. For a particular case, the Tribunal is to include at least one member with experience directly relevant to the case. Thus, the Tribunal should be well equipped to identify and explore the key issues (ss.92(2) and 95(2)).

It cannot be assumed that it will be in the interests or knowledge of the parties to present all of the information or arguments that the Tribunal needs to make the correct decision. This is particularly important as there are often vulnerable people who are not parties but whose interests the Tribunal should consider; for example, the child in a wardship case, or the consumers of a childcare centre or of a disability service. The procedures of a tribunal should serve the purpose of its jurisdiction, for example, ascertaining what is in the best interests of a ward.[5] Also, a decision of an administrative review body on a particular case may affect similar decisions to be made by the primary decision maker in the future.[6]

- The Tribunal is obliged to pursue informality and to avoid legal technicality and form (*CAMA Act,* s.52(2)). An adversarial approach tends to promote formality and legalism. This issue is particularly important for this tribunal because of factors present in its potential appellants and others with an interest in appeals — factors such as youth, intellectual disability, limited education, Aboriginality, social disadvantage. These factors often lead to people feeling highly intimidated by adversarial models. This can hamper the capacity of a tribunal to determine the truth of a person's evidence,[7] assuming the person is willing to participate in the tribunal's processes in the first place.[8]
- The Tribunal has to be 'accessible' (*CAMA Act,* s.3(1)(e)). Many potential appellants will not have access to a lawyer and would be daunted by being expected to present a case or by the atmosphere that can be created by legal representation.
- Representation requires leave (*CAMA Act,* s.58). This suggests that it is not meant to be the norm. The Tribunal's general procedures should be based on ensuring no disadvantage for an unrepresented party. This requires an investigative approach because of the nature of the client group and the common imbalance between an appellant and the Department in capacity to present a case. This imbalance is an argument against a normal adversarial approach even when appellants are represented.[9]
- The Tribunal is required to take reasonable steps to achieve a conciliated solution to cases (*CAMA Act,* s.46(1)). This calls for an interventionist approach and would be discouraged by an adversarial approach.

Compare the AAT

The Community Services Appeals Tribunal (CSAT) is obviously taking a much more investigative approach than the Commonwealth Administrative Appeals Tribunal (AAT). Is this divergence justified given that the legislative bases of the two tribunals are fairly similar?[10]

There are critics of the predominantly adversarial nature of AAT hearings who would prefer a more investigative approach. These include Professor Whitmore who was a member of the Kerr Committee whose recommendations led to the establishment of the AAT.[11]

There seem to be two main barriers to the AAT taking a more investigative approach. These are its lack of investigative staff and doubts about how far the Federal Court would allow the AAT to go down an investigative path.[12]

The caselaw on this issue is equivocal. On the one hand, in *Ladic v Capital Territory Health Commission* (1982) 5 ALN N45, Fox J of the Federal Court said that as an administrative body, the task of the AAT is 'to inquire', even though it 'often finds it helpful to follow, in general, the course of proceedings in a court of law'.

Also, in the High Court decision *Bushell v Repatriation Commission* (1992) 109 ALR 30 at 43, Brennan J made the following observations about the role of the AAT:

> Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the board [Veterans Review Board] and the AAT is an administrative decision maker, under a duty to arrive at the correct or preferable decision in the case according to the material before it. If the material is inadequate, the Commission, the board or the AAT may request or itself compel the production of further material.

On the other hand there are the views of Deane J in the Federal Court in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 402-3. Deane J acknowledged that there are circumstances in which the AAT needs to raise matters that a party does not wish to raise. However, he felt that parties should generally be left to present their cases as they saw fit. Undue interference with the way an unrepresented party conducts a case might lead to a failure to extend to the party an adequate opportunity to present the case.[13]

Another concern that is sometimes raised is that an investigative approach detracts from the perceived impartiality of the Tribunal.[14] Thus, the legal objections to an investigative approach are founded on the principles of procedural fairness. The requirements of procedural fairness of course depend on the circumstances, including the nature of the inquiry, the subject matter and the rules under which the decision maker is acting.[15] The hearing rule generally requires that a party 'is entitled to know the case sought to be made out against him and to be given an opportunity of replying to it'.[16] The rule thus does not automatically require that proceedings take the traditional adversarial form of the courtroom. If as Brennan J sees it, the role of the AAT is in substance inquisitorial, then it is logical that the tribunal should take the lead in identifying and pursuing issues, rather than leaving this to the parties.[17]

CSAT's approach does not mean that the parties are denied a chance to provide evidence, to ask questions and otherwise argue their point of view as allowed by s.59 of the *CAMA Act*. It rather means that the Tribunal generally takes the lead in identifying issues and asking questions, and then the parties are given this opportunity. Often, parties are satisfied with the Tribunal's questioning and have little they wish to add. The above concerns of Deane J frankly assume a quite unrealistic capacity of the average person to present and argue a case to a passive recipient in a forum in which that person will appear probably only once in a lifetime. Many appellants to CSAT would be daunted by being expected to do so.

Nor should an investigative approach, thoughtfully implemented, give rise to a reasonable apprehension of bias. A tribunal can avoid this apprehension by being even handed in its questioning and explaining why it is or is not probing particular issues.

In the circumstances of CSAT, it would seem to the writer that the factors discussed in **Rationale for an investigative approach** (above) are more than sufficient to justify a predominantly investigative approach.

References

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3. *Ladic v Capital Territory Health Commission* (1982) 5 ALN N45
4. *Re Saverio Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5.
5. In *Re K* [1965] AC 201 at 219.
6. Dwyer, Joan, 'Overcoming the Adversarial Bias in Tribunal Procedures', (1991) 20 *Fed L Rev* 252 at 258-9.
7. Dwyer, Joan, above, pp.259-60.
8. Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, paragraph 3.25
9. Dwyer, Joan, above, pp.256-7.
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11. Whitmore, H., 'Commentaries', (1981) 12 *Fed L Rev* 117. See also Dwyer, Joan, above.
12. Pearce, *Australian Administrative Law*, paragraph 246.
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14. Balmford, R., above.
15. *Kioa v West* (1985) 159 CLR 550 at 584.
16. *Kioa v West* at 582.
17. See *Bond v Australian Broadcasting Tribunal (No 2)* 84 ALR 646 at 656-7 and 666-7 where Wilcox J took a view along these lines in relation to the Australian Broadcasting Tribunal.

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