

Stream - Character and virtue in the professions

The 'Good' Member: A virtue-based approach to Australian tribunal work

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The unique features of Australian administrative tribunals require that a distinctive approach be taken to the theory underlying their operation. Having been structurally defined across three decades by elements of both the judiciary and bureaucracy, it is beholden upon the rather youthful Australian administrative tribunal sector to now more closely delineate the appropriate parameters of practice.

Inquisitorial at heart, administrative review is sharply differentiated from adversarial legal practice, with a heavy onus being placed upon individual members during the course of tribunal adjudication. Along with legal and subject-specific expertise, external merits review work requires a large amount of *phronesis* or 'practical wisdom' on the part of sitting members. For this reason, an aretaic or virtue-based articulation of Australian tribunal philosophy is useful both in descriptive and normative terms.

After some 30 years of professional, efficient - but occasionally disparate - delivery of administrative justice, the Australian tribunal sector is well positioned to stop and reflect upon the core excellences of the tribunal member's role. An emphasis upon member character will go some way to ensuring integrity of decision-making within this diverse and fluctuating sector of administrative justice.

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In discussing legal ethics, at least in the Australian context, we are often querying the best ways in which solicitors, barristers and judges carry out their duties in the adversarial paradigm. My work comes at the question of legal ethics from the angle of inquisitorial practice, which is arguably one of the largest means by which civil adjudication occurs in this country.

In coming before a tribunal or other administrative review body, Australians find themselves faced with an inquisition – and I mean that in the nicest possible way! Since the advent of the “new administrative law” in the mid-70’s, which led to the Administrative Decision (Judicial Review) Act and the Administrative Appeals Tribunal, tribunal work has grown exponentially (Creyke, Arsenault, Minogue). These bodies are statutory constructions and whilst legal representation might be allowed in some jurisdictions, more often than not tribunal members convene, review and then determine outcomes without recourse to the usual adversarial ‘feeding’ of relevant information from the bar to the bench.

A very common day at the office for Australian tribunal members involves having access to departmental reasons for decision, sometimes without the department present, a copy of the paper file and the presence of an aggrieved party uncertain of little except their deeply-held displeasure regarding the decision at hand.

So what sort of ethical compass is required of tribunal members? Administrative law as a distinct discipline is a relatively young addition to the Australian legal landscape and tribunal practice is similarly fresh-faced. Certainly, tribunals can look to the judiciary for guidance – yet courts they are not, for both constitutional and practical reasons. Other nations can similarly provide glimpses of appropriate approaches to practice, yet the unique blend of American and Westminster principles in Australia’s administrative make-up makes comparative analyses of limited assistance.

Tribunals form a unique part of Australian adjudicative practice and yet the philosophical and ethical principles underlying this practice remain remarkably underdeveloped. The sector has been so very busy for 33 years that there has been little time to stop and reflect upon the ethical requirements of the tribunal member’s role. Today I will advocate that the best starting point for remedying this omission is through a concentration upon the virtues or ‘excellences’ of this role. Virtue theory is not everybody’s cup of tea and arguably has limited use in some areas of legal ethics. Yet approaching the issue from virtue, or ‘taking the aretaic turn’ is vital in tribunal adjudication due to 2 key features of this system:

Firstly, it is inquisitorial at heart. Often without adversaries to point out potential errors of fact, process, law and logic, the tribunal member must rely solely upon her or his capabilities to arrive at the correct decision. Systemic and institutional issues, whilst important, must take a back seat in the formulation of an appropriate model for adjudication in this context. Personal integrity and the individual character traits of each member are key to administering justice in this arena.

Secondly - For many applicants – this is it. Administrative review bodies, including tribunals, are cheap. Often their statutory mandate requires that they get to their decisions “quickly, efficiently and professionally”, and in that order of importance, some might argue. There will often be no filing fee and setting up an appeal time

might be as simple as making a phone call to the secretariat. Legal representation might be either unavailable or not required. So, the system is accessible and cost-effective for applicants. As we know, however, the case with the judiciary can be vastly different. For this reason, the tribunal is often the end of the road financially and emotionally for many parties. In a practical sense, the tribunal member's decision is crucial and final. We are not generally talking about corporate entities with a legal slush fund. The people coming before tribunals and administrative review bodies are sick and injured workers, migrants with language barriers, social security recipients with Grade 6 education, those afflicted by mental illness – the list goes on. They have trodden through the mass of complaints and 1st tier review mechanisms within a department, often without sighting a human being. They have eventually found their way to the only affordable, independent adjudicator able to look over their case – a tribunal. They will not be able to afford court after this. They are often at the end of their personal resources. So, I raise the query again – what is an appropriate ethical stance for tribunal members, with the extensive decision-making burden that they face?

As Kingham notes, procedural reform is long overdue in tribunal practice and must reflect the increasing numbers of self-represented clients (Kingham undated: 3-4)

I argue that a very personal, virtue-based approach to tribunal ethics is required. I will now lay out the specifics and the reasoning behind this thought:

But before I do so, let me attempt to limit the extent of my discussion by providing a basic definition of the term 'tribunal' – By this I mean 'an adjudicative body possessing reasonable impartiality from a primary agency or agencies, which provides determinations that are compelling or binding upon persons. Appeal or enforcement rights to a higher adjudicative body are generally available following such determinations' (Christou 2008).

Context

Taking the aretaic turn or the stance from virtue in traditional jurisprudence is a relatively recent phenomenon (Solum 2003, Ranney) and reflects a growing international interest in the nature of judges and judging. (Gianni, Thomas, Einstein, Omar, Raban, Sajo et al). As we have seen with recent revived discussion of a potential National Judicial Commission, there is a sense of growing community interest in the character of our adjudicators.

Some work has been done to date on the establishment of Australian guides to tribunal conduct, and I will run through some of the core contributions in this regard:

The Administrative Review Council released the Guide to Conduct for Members of Merits Review Tribunals in 2001. As with most codes of conduct, this is mostly a proscriptive tool, outlining the ethical and other limits effecting a member's conduct. Typically, issues of conflict of interest, perceived bias and the usual negative parameters for practice are covered in the guide. As I will discuss later, there is significant scope to detail the aspirations and excellences of member conduct, rather than simply focussing on the requirement to reject bottles of whiskey at Christmas from stakeholders, and to declare shares in applicant companies. These requirements fall within the aretaic category of temperance and are limited in their

ability to provide a blueprint for aspirational conduct. Such guides are, if you like, about the 'don'ts', rather than the 'dos' of member conduct.

Members are also pointed to resources such as the excellent *Judicial Ethics in Australia* by Justice Thomas. Again, however, this work is largely restricted to setting out the limits of judicial practice, and is also directed almost exclusively to courts rather than Tribunals.

The Council of Australasian Tribunals has a useful bench book for existing Tribunal members, but from anecdotal discussion, whilst being generally useful for addressing day to day practice, this guide does not address any issues of the deeper ethical underpinnings of tribunal work. Further, it is currently available only to member bodies of COAT and is not therefore accessible by those interested in, aspiring to join or commenting upon constituent tribunals.

Legislation and case law of course provide a truncated form of ethical compass but, like other guides to tribunal practice principles, are either general or purely pragmatic in their application to tribunal work. Tribunal members understand, on the whole, that they are bound by the principles of procedural fairness – but how this translates within the specific constraint of tribunal work is an issue that requires further articulation.

Challenges

I've noted that a central challenge to the articulation of tribunal virtues is the sheer busyness of the sector. Another hurdle is the ambiguous mandate of tribunal members, which are, on the one hand expected to behave with judge-like impartiality and on the other, exhibit the case-by-case knowledge of a seasoned bureaucrat. For this reason, any discussion of ethics relevant to the sector must be based upon the unique reality of this hybrid sector.

Taking the aretaic turn

I argue that structural issues should be put to one side to allow for examination of the underlying 'excellences' of tribunal work, and in particular the individual character traits of individual sitting members.

As we know, virtue ethics centres upon the character of decision-makers, rather than outcomes or rights. If Singer's (3) ethics embraces central human questions such as "what is the right/ best answer?", virtue ethics examines the actual human being acting or omitting to act and specifically answers questions related to character.

Aristotle posited that a virtue is developed through habit and that, conversely, a corrupt person is one who has failed to habitually practice the virtues in daily life. The Aristotelian virtues include, but are not limited to honesty, courage, compassion, generosity, fidelity, integrity, fairness, self-control, and prudence (Velasquez et al: 1). This approach differs from those ethics concerned with rights (deontology) and those concerned with outcomes (teleology).

Virtue ethics, as a sub-category of ethical discourse has a long pedigree of relevant academic discussion. (Aristotle, Anscombe 1958, Crisp and Slote 1997) As Aristotle

has stated:

"...we call "virtues" those dispositions which are praiseworthy." (Aristotle: 20).

Where aretaic or virtue-centred approaches diverge from other schools of thought is in the rejection of the assumption that values can be successfully excised from the practice and explanation of law.

From the point of view of Ranney and others, it is questionable to deny the effect that the personality and culture of lawmakers has upon the articulation of a society's laws. I argue that aretaic ethics both describes the bulk of current practice and provides a useful normative focus for future tribunal operation, as it correctly places the character of those working within tribunals at the forefront of analysis. Querying the personal worth and integrity of tribunal members is a necessary, if uncomfortable requirement for any discussion on tribunal philosophy.

'Practical wisdom' or *phronesis* is thus the logical starting point for the development of an enduring tribunal theory. The foundations are already in play on a daily basis; the best tribunal members will be those with a keen sense of fairness, an exemplary grasp of the technical issues and the ability to 'juggle' the competing requirements of natural justice and resource constraints. Practical wisdom requires adjudication on the ground, sometimes on the run, with an eye to the clock, to the tribunal secretariat and to an often ill-defined group of stakeholders. Acknowledging this reality marks an initial step in the characterisation of tribunal work, as well as the core excellence in tribunal membership. Tribunal work can be described as 'grass roots' justice whereby the limited resources available to members tend to breed innovative and client-centred approaches to the extraction of relevant data and the formation of just decisions. Difficult to quantify and certainly challenging to recruit and train for, *phronesis* nevertheless forms the appropriate core of tribunal theory. It is important that any application of virtue principles not be limited to proscriptive rules regarding appropriate behaviour. Ongoing discussion regarding the core excellences of the role remains vital. The reason for the need to extend tribunal ethics beyond the mere existence of codes is due to the limited success of codes across a variety of professions and jurisdictions (Preston: 174). One can distil into words the prescriptive aspects of a role, but how does this extend the practical knowledge of the member? How can discussion among members be facilitated if the extent of their ethical reflection consists of a cursory reading of the tribunal's code of ethics upon their induction? Despite practical difficulties in creating such a dialogue, the need continues to grow in order to both garner and maintain public support for professional institutions. As Preston states:

"...it is increasingly evident that given the complexity of contemporary societies, the practices of public administration, legislation and commerce demand education and training in certain skills and knowledge, together with *structured opportunities to reflect on the principles which underpin these practices*" (Preston 2001: 174. Emphasis supplied).

Aristotle's conviction that beneficial virtues can be learned through habit bodes well for those involved in the recruitment and training of tribunal members. For a relatively young adjudicative sector, virtue ethics in this way provides a best-fit as

philosophical backdrop to practice; the virtues of excellent tribunal membership can be learned and developed.

In searching for justice in the quagmire of a dense, highly technical caseload whilst simultaneously utilising limited resources of time and support, the mandate of the tribunal officer must necessarily be more closely aligned with a morally informed approach to the law. Tribunal work is a messy, pressured, deeply human endeavour and should accordingly be pursued from a normative desire to establish a decision-making character that best delivers this service. Virtue ethics thus provides a useful starting point for the development of aspirational principles for members.

Virtue Jurisprudence – revived interest in the ‘excellences’ of judging

Virtue jurisprudence essentially examines the characteristics and human excellences necessary for the successful application of the law by judges and is a useful blueprint for tribunal practice principles. So exactly what virtues are we talking about? Solum (2003) focuses upon five core judicial virtues in his in depth discussion on this model, which are intrinsically Aristotelian.

These are:

- Judicial courage
- Judicial wisdom
- Judicial intelligence
- Judicial temperament, and
- Judicial temperance

The virtues are contrasted with what Solum terms the judicial vices, noted to be:

- Judicial cowardice
- Judicial foolishness
- Judicial incompetence
- Judicial bad temper
- Judicial corruption

In terms of the virtues or excellences, *Phronesis*, or ‘practical wisdom’ is pivotal to the aretaic approach. *Phronesis* calls on members, for example, to discern a one-sided take-over by a vexatious applicant; to help a party understand jargon without becoming their advocate; to be mindful of the limits of appropriate inquisition. In non-adversarial practice, practical wisdom is vital to a fair outcome.

In the aretaic paradigm, courage is also raised as an important trait for judges and is equally necessary for tribunal members – the ability to pull the socially influential yet bullying advocate into line, to raise the inquiry that might open a Pandora’s box within a case, despite calls from tribunal management to streamline practices. This is perhaps the most challenging characteristic to foster and uphold in a tribunal system that has untenured membership.

Technical intelligence regarding the subject matter is crucial, yet it can be queried whether this is currently recruited for in the Australian tribunal community. It may seem like an obvious requirement, yet in the tribunal context this characteristic must be actively sought due to the non-adversarial nature of tribunal work. In the judicial

parallel, commentators point to the need for intellectual honesty, being a thorough analysis of all issues and law, followed by ownership of the resultant decision (Einstein para 18-25). It is insufficient to 'outsource' one's decision to subordinates and the same premise must be applied to tribunal members. This is particularly so for non-legal members who might feel influenced by their tribunal president or other legally trained members in the formation of their opinion. Here, intellectual honesty combines the virtues of both intelligence and courage; a thorough grasp of pertinent concepts combined with the courage of the tribunal member to make and defend her or his own decision. Intelligence and competence regarding the material before the tribunal is arguably of greater importance than in the judicial equivalent. This is due to the fact that in the non-adversarial tribunal, the member must deduce all relevant material, often without the assistance of representatives, as in the adversarial model. Ignorance is inexcusable, particularly as there is often no counsel to 'feed' the adjudicator relevant information.

Good temperament is also an essential excellence for tribunal members. Temperament roughly amounts to a person's outward personality and includes their manner, voice and mood as experienced by others. Good temperament is essential to justice delivery in tribunals. There is currently little practical guidance, for example, on reducing aloofness with non-represented parties, on being approachable by all members of the community and on not letting resources constraints shorten one's patience in the tribunal room. When we examine the corollary vice of bad temper, it is easy to imagine how the lack of good temperament might serve to intimidate and otherwise thwart an applicant, particularly one who is unrepresented. It is inexcusable for the tribunal member to bring her or his bad mood or gruff manner to the hearing table, particularly in those circumstances where counsel is not available to navigate the substance of the proceedings on behalf of a timid tribunal client. If bad temperament reduces the quality or extent of evidence elicited, leading to an erroneous decision, clients often have no recourse to the courts for financial reasons. The value of this characteristic in tribunal practice cannot, therefore, be overstated.

Temperance – the resistance to temptation - might well be called the well-documented virtue. It is my opinion that temperance is amply dealt with in current codes of conduct and legislation. As previously discussed, the literature concerning what judicial and quasi-judicial officers should not do is extensive². This proscriptive documentation does little to assist our understanding of excellences in the normative sense. Thus, whilst certainly essential, the virtue of temperance does not require specific expansion in the current work. In short, there is much already written on the 'don'ts' (such as enacting legislation and codes of conduct) and not a lot on the 'do's' of tribunal practice, meaning the excellences to which the sector aspires.

The importance of virtue in tribunal practice

²*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 90 per Deane J, *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ; *Webb v R* (1994) 181 CLR 41 at 61; *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 at 263; *R v Gough* [1993] AC 646 at 659 per Lord Goff of Chieveley], *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505 at 555 per Burchett J, to name just a few classic cases of the need for restraint in judges.

Ongoing training, pro-active peer support and multi-member panels wherever possible can arguably alleviate the effects of deficiencies in the character of each individual member. Often, the aretaic virtues cannot all practically reside in one member and for this reason, the inclusion of lay people, field experts and non-legal professionals on panels remains vital. Multi-member panels are sometimes seen as cumbersome and unnecessary in certain contexts (O'Connor 2006), yet it is a rare member that can sit singly on a complex case and imbue the outcome with all of the virtues noted above. Streamlining tribunals and reducing multi-member panels wherever possible should thus be approached with extreme caution.

Setting aside the possibility of 'leaning on' one's colleagues, tribunal members should strive to attain those virtues that most closely support the role's purpose. Transmuting Solum's classification, the key virtues or excellences attaching to the tribunal role would ideally include:

- Member courage
- Member wisdom
- Member intelligence (technical)
- Member temperament

In examining openly the manner in which one might be lacking in the noted virtues (for example, a tendency towards irritation when faced by a verbose applicant), a member might well be able to remedy this lack through conscious habit.

Habits form the core of Aristotle's *Nichomachean* thesis. To develop appropriate habits in the tribunal room, members should have access to adequate guidance and discussion forums regarding what characteristics to foster and develop for effective tribunal practice.

Issues of training and institutionalisation of appropriate practice principles based upon the noted virtues will now be discussed.

Bringing aretaic theory to daily tribunal practice

So how to we imbue tribunal memberships with the outlined virtues?

Increasingly, merits review bodies are finding themselves under pressure to perform within limited financial and time constraints. The idea of taking further time and energy out to "learn" ethics or principles of best practice may seem rather unattractive to members of these bodies.

Codes of conduct tend to be limited to proscribing activity, to describing what ought not to be done by professionals in a particular role. This can be seen in the subject matter traversed by the ARC in the Guide to Standards of Conduct for Tribunal Members (ARC 2001). Such guides assume an inherent understanding of what one should in fact be doing on a daily basis on the one's practice. Experience in various professions reveals that the mere existence of codes of conduct is inadequate for the promotion of ethical norms in an institutional context (Ladd: 271). Thus, it can be seen that laws, rules, precedents and guidelines are limited in their generality. It is argued that ongoing, live education and debate amongst tribunal professionals is necessary in order to flesh out the 'bones' of these documents. Ongoing professional

development and peer discussion of practical issues faced by tribunal members is proposed to be an important adjunct and supplement to any static codes.

In the Canadian experience, judges have found significant benefit in the introduction of on-line, learning resources, developed recently by the National Judicial Institute. For the past eight years, the Institute has made available web-based, self-paced and trainer-led programs for judicial officers, in both synchronous and asynchronous formats. This has provided an excellent means by which judges in the various provinces of Canada can meet in an online "community" for the purposes of discussion and professional development (Gianni). Member-only chat-rooms provide a forum for the dissemination of role specific guidance amongst peers in a very immediate and practical manner. The potential for judges and tribunal members to 'get online' with one another in a strictly members-only forum in order to workshop problems of practice is considerable. For example, being able to query the application of the rule against bias in a particular medical tribunal and to receive immediate feedback from peers with experience in the field, provides an example of the excellent uses to which such systems might be applied. The essential benefit of any e-learning or online community model is the reduction in constraints traditionally provided by time and travel. As noted by one Australian commentator, the Canadian example provides an excellent template for Australian training of arbitrators, who face similar geographical constraints when attempting to discuss professional issues with peers (Barker).

Internal ownership of tribunal practice norms is increasingly required. It is not sufficient to draw only upon common law to delineate one's mandate; this only tends to cover boundary issues and does not provide sufficient description of the central virtues of tribunal work.

Examining one's faults and weaknesses is a challenge in any professional context, yet the endeavour is crucial to ensure integrated, just outcomes from tribunal officers. Marie Antoinette might well have pronounced in relation to self-represented tribunal applicants "Let them get representation." The social injustice of this stance is somewhat self-evident has been described throughout this work

Communication among the various bodies themselves would be vital for ongoing discussion related to these unifying principles. This is particularly so in light of the geographical and sometimes social distances between various tribunals. The practice principles need to be centrally administered but universally developed in order to maintain currency and validity. E-learning and interactive discussion will ensure that the articulation of these principles remains alive as tribunal members continue their important work.

Lord Newton in the United Kingdom has emphasised that the principles underlying tribunal work should be further explored. Bilson, speaking from the Canadian experience, provides a somewhat more poetic decree:

""To prepare for the future, administrative tribunals need to look deep into their souls and to consider whether they are doing all they can to meet the objectives which prompted the original rationale for their creation." (Bilson: 5)

Australian tribunals find themselves at an exciting crossroads after 30 years of practice on a largely unstructured basis, particularly in state and territory

jurisdictions. It is timely to begin an articulation of the excellences underlying the tribunal member's role, rather than relying solely upon legal and ethical dictates regarding mandate. Aretaic principles form a useful starting point for this endeavour, primarily due to their aspirational and character-centred nature. Debate regarding this stance will no doubt be fierce. Yet such debate on the philosophical principles of the sector is to be invited, to ensure the development of a robust and vital theory to which practitioners can refer and which they themselves can help to develop. The ongoing challenges of constitutional placement and resource constraints can in part be alleviated by regular articulation and examination of the excellences of tribunal work. Aristotle's virtues, albeit modified for modern experiences, are of immediate use to tribunal members and a worthy of consideration in any discussion of appropriate tribunal practice. This is largely due to the importance in aretaic theory of *phronesis*, which is particularly useful to tribunal members as an explanatory and normative tool. This does not, of course, preclude tribunal theory from being approached from alternate philosophical camps. In fact, rigorous debate in this arena would be a welcome development. The aretaic stance does, however, provide an excellent platform from which to commence this philosophical journey.