Dealing with Government Administrators, the Political System and the Media

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In a perfect world all tribunals would always be generously funded, their role valued and understood, our inevitable mistakes placed sensitively in context and our reasons accurately reported by a media alert not to misrepresent even our most contentious decisions.

That is not the real world in which heads of merits review tribunals must operate. I propose discussing six subjects where effective working relationships with government, and in some cases the broader political system and media are legitimate to be maintained and in some instances even cultivated.

Independence: fostering understanding of the role of independent merits review

Government 'agencies' are immersed in a culture which deifies measurement, productivity and benchmarking. There is remarkably little understanding within the larger government bureaucracy of the unique requirements for independence of judicial and quasi-judicial bodies. Australia lacks a tradition of self-management akin to that in the United States. Critical decisions having potential impacts on institutional independence can be proposed as without adequate regard to such consequences. It is important for heads of merit review tribunals to be aware that on occasions it will be necessary to make their concerns known within the councils of government in order to resist inappropriate intrusions in the name of accountability. To be most credible in that regard heads of tribunals should ensure to the greatest degree that they can, that they are fostering a culture of effective and accountable decision-making appropriate to the quasi-judicial space they occupy within their own organisations. Explicit adoption of the ARC Code of Conduct, if that has not already been achieved, is suggested as a sensible starting point.

Appointments

Heads of tribunals have a legitimate interest in both the quantity and quality of those appointed to be members of their tribunals. It is useful to open and maintain good channels of communication about those processes and to make government aware where there is a need to make an appointment and of the skill-sets that are desirable in an appointee. Good working relationships may also properly see heads of tribunals or their nominees participating in pre-appointment processes. Heads of tribunals are uniquely positioned to put forward views with respect to reappointments particularly if a member has been performing exceptionally well or poorly. However we misunderstand the proper relationship between a head of tribunal and government and risk damaging the standing of our tribunals and their independence from the executive if we engage in anything that could be construed as 'political' to insist on, or resist, a particular appointment.

Funding

In my view it is increasingly inescapable that heads of tribunals will find themselves taking some part in articulating the funding requirements of their tribunal to the Executive - and in very rare cases, more widely. That is entirely proper. Where a tribunal head has developed a good grasp of their organisation's critical funding requirements there will be rarely any person better placed to make sure that those requirements are not overlooked within governmental/departmental planning and budget processes. This is not a once a year budget-round concern. It may become critical to ensure that government is made aware of resource challenges at other times - particularly if new areas of jurisdiction or changes to the law affecting existing areas of jurisdiction are in contemplation. If relationships between the tribunal and government are on a sound footing,

the latter should welcome advice in advance of problems emerging. However, it is important to distinguish between the sadly too common challenge of having to deal with a tight financial envelope and more serious funding shortfalls which warrant mention in annual reports or otherwise made public in terms suggesting crisis or criticism. Public complaint is rarely the best advocacy and should be reserved, if at all, as a last resort.

Our Rationale

Heads of tribunals cannot presume that a supportive understanding of the rationale for independent merits review will exist at all levels within all agencies of executive government. Merits review has become a standard accountability mechanism but all accountability mechanisms can have their opponents (or reluctant adherents) and there may be some sore toes within particular agencies particularly if a tribunal has set aside their decisions in the recent past. One of the virtues asserted for independent merits review is that it will improve the standard of decision making within the organisations whose decisions are subject to review. That will not happen if those agencies perceive review as illegitimate and develop an adversarial view towards our role. So long as tribunal heads take care never to appear to negotiate their tribunal's independence and functions, in my view it is entirely proper for heads of tribunals to undertake, on behalf of their organisation, routine consultations within government and particularly with agencies whose decisions are routinely subject to review, to ensure understanding (and ideally supportive understanding) of each other's perspectives.

Heads of tribunals also have a part to play in ensuring that the terms upon which any new area of jurisdiction is to be conferred on a tribunal is appropriate - not just that it will be properly resourced.

Finally, there may be a case for some broader advocacy of the merits of independent merits review. We can easily take its value for granted and forget how unique and important in global terms this right is. It is quite some time since merits review was newsworthy and exciting. Articulating and defending the importance of merits review may not be the top priority for busy Attorneys. It should be ours.

Controversy and the media

Some tribunal cases are bound to be of interest to the media. Reporting of controversial decisions is inevitable. Such reporting will not always be fair. A head of tribunal needs to think about strategies to anticipate and respond to the inevitable reporting of such decisions. They might include:

- an internal pre-warning system;
- settled protocols for access to documents filed in the tribunal;
- ensuring that if a tribunal makes an embarrassing mistake Ministers are advised, preferably in advance of the story hitting the press; and
- a decision tree about who should, and who should not respond to the media about controversial decisions and in what circumstances.

Not every controversy needs to be responded to. Indeed most should not be. There is a legitimate public interest permitting criticism, constructive and otherwise, of what we do. However, there can be serious consequences for morale within a Tribunal if a grossly unfair attack on a decision maker occurs without the member receiving support from their tribunal head. In rare cases that consideration may justify or require a public clarification of the tribunal's role or a more specific defence of the member. It once was expected that the defence of judges and quasi-judicial officers was the responsibility of the Attorney-General. Attorneys have recently recommitted to that role but there are many urgent competing demands on any Attorney and there may be occasions where if anything is to be said in defence of a member it will have to be said by the member's tribunal head. It is **never** appropriate to ask a decision maker to publicly justify their own decisions.

Equally importantly, Ministers should be kept well informed about good news stories and tribunal successes.

Initiatives

It is not the role of a head of tribunal to drive broad social policy debate. However, good ideas are not unique preserves of the Executive and the Legislature. Every head of tribunal has opportunities, through conference papers and submissions to make constructive contributions to practice and policy development relevant to merits review. Those opportunities can and should be taken.

An interesting example is the research on jury attitudes toward sentencing conducted by Professor Kate Warner which followed a suggestion in a conference paper made by then Chief Justice of Australia, Murray Gleeson. Professor Warner's research showed that jurors generally did not think that the sentences in matters which they determined guilt had been too light.

A tribunal head might usefully contribute to debate about how independent tribunals can better measure their own performance from the users points of view measured against their expectation that we should provide review that is fair, just economical, informal and quick.

Finally it is proper for heads of tribunals to propose or oppose policy ideas and initiatives; subject to those matters being both unconnected with any partisan controversies and relevant to their tribunal's role. By its President the AAT has made relevant, and we trust useful, submissions to a number of enquiries and senate committees.