THE EFFECTIVENESS AND EFFICIENCY OF ADMINISTRATIVE LAW: THE TRIBUNAL PERSPECTIVE

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The aspect of the topic I am focussing on today is about how we measure the effectiveness and efficiency of tribunals. My remarks are not confined to administrative review tribunals but are relevant to all tribunals which make decisions, including tribunals at the State level exercising civil or disciplinary jurisdiction.

Recently my Tribunal, the Consumer, Trader and Tenancy Tribunal in NSW, was the subject of choice for one of Sydney's morning radio announcers. It began with a call to the program from a landlord who complained about how the Tribunal was dealing with her case against her tenant. Over the next week several other people who had had matters before the Tribunal appeared on air – only one was complimentary in part; part of a tape recording of a hearing was played on air – illustrative of the perils of using humour in the hearing room. By the end of the week the Tribunal was described by the announcer as dysfunctional and all members were toffee-nosed private school educated idiots.

The Minister appeared on air three times to answer questions about the Tribunal and to defend its reputation. We were able to supply the Minister with facts and figures about our performance: 61,000 applications last year, 70% finalised within 35 days, 77% finalised at or before the first hearing. These statistics showed that we are efficient but what did they really say about the effectiveness of the Tribunal? How could the Minister convince listeners that the Tribunal is a valuable institution? What could she say about the quality of the work that we do?

Since tribunals by and large are publicly funded, taxpayers and governments are legitimately entitled to raise questions about whether funds allocated to tribunals are expended efficiently and effectively.

Tribunals today are part of the justice system in this country and elsewhere. In Australia many tribunals were established at a time when there was general dissatisfaction with the justice system, and in particular, the courts. Especially in the 1970s and 1980s the inadequacies of courts as providers of 'justice' were articulated and criticised. At that time the efficiency with which government programs were delivered, including those in the justice system, was examined and new methods were devised.

While there were no Dickensian *Jarndyce v Jarndyce* cases in the Australian courts, they were seen as too slow, too expensive, too formal and too complicated. Case management was introduced to overcome some of the perceived shortcomings of the courts. Many people went off to the United States to study it and courses were developed in Australia. Government also began to look at alternative ways to deal with disputes.

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The emphasis was all about reducing the delay and cost of the court system. Courts began to talk about trial date certainty and to measure such things as time to finalisation. That trend has continued. Key performance indicators were established for all courts in New South Wales in 2000[1]. There are four measures:

Backlog: the number of cases where the court is not meeting its time standards i.e. the number of "old" cases.

Overload: the number of cases on hand in excess of the number the court can be expected to process within time.

Clearance ratio: the ratio of new filings to finalisations.

Attendance index: measures the number of trips to the courthouse.

As we can see the measures are all about the numbers.

While courts were trying to reduce delay and cost to parties, at the State level in particular, areas of jurisdiction formerly exercised by the courts were given to newly created tribunals. New areas of jurisdiction, such as merits review, were exercised in newly formed tribunals. These tribunals, it was said, would be cheaper, quicker and more accessible than the courts. This expectation is reflected in the objectives of most tribunals which are variations on the 'fair, just, economical, informal and quick' mantra.

Today the annual reports of tribunals are replete with statistics, tables and graphs showing how many applications were received, how many matters were finalised and how quickly they were finalised. Some tribunals report on the cost per case as a measure of efficiency. At the Commonwealth level the work of the tribunal is referable to inputs, outputs and outcomes. The funding of some tribunals is directly linked to productivity. The emphasis in reporting is on how quickly and efficiently the tribunal deals with its caseload – not much different to the key indicators for the courts as set out above.

As Chief Justice Spigelman of NSW[2] has pointed out, statistics relating to matters such as cost and time to finalisation are matters which are both capable of assessment in quantitative terms and which provide information that is useful and the publication of which serves to enhance accountability. Our systems are geared to gather the numbers and arrange them in different ways to show how we are performing. Indeed, efficiency as embodied in matters such as timeliness has become the primary criterion by which a tribunal's performance is assessed. In a recent annual report one tribunal stated: 'Providing a high quality and expeditious appeal process is regarded as most important by (the tribunal) and this is reflected by a reduction in the time taken to finalise matters.'[3]

The emphasis upon quantitative measures is understandable. As has been stated by the Principal Member of the Refugee Review Tribunal and Migration Review Tribunal, 'There is a natural tendency to place greatest emphasis on quantitative measures…. not least because of the desire to be seen to be measuring performance using data that is capable of objective benchmarking.'[4]

It is also true that reporting upon such statistics is relatively easy to do. But are tribunals taking the easy way out and, indeed, are they stuck in a bit of a time warp? Do tribunals continue to measure their performance primarily according to those factors which were influential in their establishment? That is, tribunals were established, in part, because courts were too slow and too costly and tribunals, some 30 years later, still measure themselves according to those criteria. Success is seen through the prism of efficiency measured primarily in terms of timeliness. But is this enough?

As I said earlier, when faced with a sustained attack from a radio shock jock, examples of efficiency were not enough to sway the detractors. What could we say about our effectiveness? What is meant by 'effectiveness' in any event?

In preparing this paper I went to the Oxford English Dictionary to find out. It wasn't really much help: effectiveness = the quality of being effective. Effective has a variety of meanings, the most attractive of which is 'having an effect or result; actually usable'. It was this last phrase that set me thinking. If we were to say that what we should be measuring is whether tribunals are actually usable, what factors or attributes would be looking at?

We need to recognise the complexity of trying to assess whether tribunals are actually usable. The criteria are complex and different interests will articulate them differently. As we've seen, for some the speed of the proceedings and the prompt delivery of the decision are fundamental qualities. Others say that the most important thing is that the outcomes must be correct - that decisions must be legally sound and understandable. Many consider that treating people with dignity and respect is a priority, as is the independence of the tribunal. Some people say that a tribunal cannot be actually usable unless the tribunal is accessible to all those who may need its services.

Chief Justice Beverley McLachlin in speaking of the role of tribunals in Canada notes that: 'Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law.'[5]

The Council on Tribunals in the United Kingdom has established standards for tribunals which aim, among other things, to provide a tool for government and tribunals to assist in reviewing the performance of tribunals.[6] The standards include matters such as:

- providing open, fair and impartial hearings;
- being accessible to users;
- focussing on the needs of users; and
- offering cost effective procedures.

In order to assess whether tribunals are actually usable or effective we need to be able to 'measure' these aspects of a tribunal's performance. Therein lies the difficulty. As Spigelman CJ says, '…not everything that counts can be counted. Some matters can only be judged – that is to say, they can only be assessed in a qualitative way.'[7] That is, not everything can be reduced to statistics and graphs.

I will look briefly at three aspects by which tribunals might be able to judged as effective – correct outcomes, fair procedures and accessibility.

There appears to be a general prohibition on attempting to assess whether the outcomes produced in tribunals, that is the decisions themselves, are correct. There seems to be a belief that the notion of independence means that such an assessment should not be undertaken. In discussing the desirability of a performance appraisal system for members of tribunals, the Leggatt Review in the United Kingdom was at pains to stress:[8]

> Assessments are not concerned with the rightness or wrongness of decisions or with any aspect of them (like consistency) which depends on qualitative judgements of the decisions themselves or of other decisions with which they could be compared.

While I agree that tribunals should be independent and should be perceived to be independent and that decisions should be made without undue pressure from government, parties or anyone else, I do not think that the decisions themselves should be free from

scrutiny. If a tribunal's decisions cannot stand up to scrutiny then that must be an indicator that the tribunal is not being effective and that the quality of its work is below par.

I am not referring to the decisions of tribunals which may involve fine legal points about which great minds may differ. There is always room for error in those situations and, ultimately, the courts will advise on what is correct. I am really talking about the vast bulk of tribunals' work which is applying settled law to the facts. If a tribunal regularly gets that law wrong, clearly there is a problem. I hasten to add that this is not a common occurrence.

One of the greatest criticisms about tribunal decisions is that they are inconsistent. The response is usually that each case will turn on its own facts and there can be subtle degrees of difference in the evidence which lead to different outcomes in individual cases. That may be so, but we should not shy away from making assessments in this area. I agree with one of my Canadian colleagues when he says:[9]

> …consistency and coherency are attributes of decisions that become important only when we stop assessing decisions as individual events and begin judging them instead, or as well, as components of a body of work.

Consistency in decisions between one tribunal member and another is important because fairness dictates that parties in like situations should receive like results. Furthermore, as my Canadian colleague points out,[10] the tribunal's credibility, its own self-confidence and its effectiveness are all undermined by inconsistent decisions.

There will always be shades of grey where the exercise of discretion is involved and members of tribunals will have a range of views on significant issues, but glaring inconsistency is not a hallmark of quality.

A matter closely aligned with whether decisions of a tribunal are legally correct and consistent is whether those decisions are understandable. This is so whether the reasons for decision are given orally or in writing. A number of tribunals have a statutory duty to give reasons and for others we are moving ever closer to there being a common law duty to give reasons, particularly where the powers exercised by the tribunal can be classified as 'judicial' rather than 'administrative'.[11]

Those reasons must be able to be understood by the parties, particularly the losing party. It is therefore incumbent upon tribunals to produce cogent and understandable reasons for decisions. None of us wants to be the subject of a comment such as this:[12]

> I hope it is not unduly critical to say that the judge's summing up on this part of the case was not a model of lucidity.

These assessments, by and large, must be conducted in-house and a culture engendered within the tribunal that promotes consistency as a desirable principle and which encourages good practice in decision writing.

I was interested to read in the last Annual Report of the Social Security Appeals Tribunal that a particular project had been undertaken examining the standard, coherence and consistency among disability support pension decisions.[13] What was interesting was not so much that the project had been undertaken, but that it was reported upon.

Another aspect of assessing whether a tribunal is effective is whether or not the proceedings have been conducted fairly. Indeed, as well as consistency in outcomes, consistency in treatment between like cases is highly desirable. There are, of course, certain practical matters that tribunals can deal with procedurally to ensure that the principles of procedural fairness are adhered to. But what of the parties' perception of fairness?

The process by which the outcome is reached has a value which is separate from the outcome itself. It has often been stated that participants are well able to distinguish between the process and the outcome. If the process is not fair, then there is little reason why citizens should use the service of tribunals, regardless of how efficient they are.

A number of courts and tribunals conduct client satisfaction surveys in order to determine whether they are meeting needs of users. Chief Justice Spigelman has been scathing about such surveys and their application to the courts.[14] In his view client satisfaction surveys, if they are used at all, should be limited to matters of administration such as signage and facilities – here they 'may do some good and will do no harm'. They should, however, go no further and should not touch upon judicial administration, including case management.

That may be well and good for courts such as the Supreme Court of NSW, but for tribunals which deal with large number of self-represented parties, such surveys must have a focus on practice and procedure. How to deal with Supreme Court procedure is part of a lawyer's training; most applicants in the tribunal system are one-off players with no legal training. For a tribunal to be actually usable its procedures must be transparent and capable of being understood by the average party.

For tribunals, factors such as the anxiety engendered by being in a tribunal must be taken into account in the design of procedures. Hence, in tribunals, there is significant emphasis upon the information provided to parties prior to their arrival at the hearing room. Of equal importance are the skills and conduct of tribunal members who must ensure that proceedings are conducted fairly.

Client satisfaction surveys are a useful tool for assessing whether the practices and procedures of the tribunal, as well as administrative matters associated with the design of premises, helpfulness of informational material etc, are perceived to be fair by users of the system.

In 2006 the Victorian Civil and Administrative Tribunal published the results of a user survey in its Civil Claims List and has stated that the results of the survey will be used to develop initiatives to improve the hearing process in that list.[15]

Measuring the effectiveness of practices and procedures should not be confined to the hearing process. Many tribunals use various ADR processes to settle disputes. I have commented elsewhere on what may be the dangers of 'institutionalised' ADR used as a case management tool.[16] The fairness of these processes for the parties must also be assessed and modified where necessary

One of the hallmarks of tribunals is that they are more accessible than the courts. This is perhaps one of the most difficult aspects to measure. Through surveys we may be able to obtain some information about who does apply, but it is very difficult to extrapolate that information to ascertain who does not apply and what are the barriers to access. Certainly, further work needs to be done in this area.

Tribunals are in the early stages of grappling with how to measure the quality of the work they do and how to assess their effectiveness in qualitative terms. It is not sufficient for tribunals to rely on economic and efficiency indicators as measures of performance. Indicators of quality must be developed and articulated. Most importantly, these measures must be communicated to those with an interest in the work of tribunals. As Professor Neave, as she then was, has said:

> Measuring administrative justice should not be seen as a mechanistic process of identifying inputs, outputs and outcomes, but as an ongoing dialogue between the stakeholders in the system, including politicians, administrators, tribunals, lawyers and members of the public.[17]

For tribunals to be effective they must not only be efficient but must be actually usable by the people they have been set up to serve.

Endnotes

1 L Glanfield & E Wright, *Model Key Performance Indicators for NSW Courts* Justice Research Centre, February 2000
2 The Hon JJ Spigelman AC, 'Measuring court performance' (2006) 16 *Journal of Judicial Administration* 69
3 Social Security Appeals Tribunal, *Annual Report 2005-06*, p3
4 Steve Karas, 'Should tribunals be required to meet performance criteria and, if so, how would they be defined and enforced?' Council of Australasian Tribunals Queensland Chapter seminar 14 February 2003, www.coat.gov.au
5 Chief Justice Beverley McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1997) 12 *Canadian Journal of Administrative Law and Practice* 171
6 Council on Tribunals, *Framework of Standards for Tribunals* November 2002 (updated February 2006) www.council-on-tribunals.gov.uk
7 Spigelman, p70
8 Sir Andrew Leggatt, *Tribunals for Users One System, One Service – Report of the Review of Tribunals* March 2001, para 7.42.
9 S Ronald Ellis, 'Misconceiving Tribunal Members: Memorandum to Québec' 18 *Canadian Journal of Administrative Law and Practice* 189 at 200
10 at 201
11 See *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284
12 *R v Tao* [1977] 1 QB 141 at 143
13 Social Security Appeals Tribunal, *Annual Report 2005-06*, p 34
14 Spigelman, p77
15 Victorian Civil and Administrative Tribunal, *Annual Report 2005-06* p 9
16 Kay Ransome, 'The role of consensual dispute resolution in tribunals' (2004) 14 *Journal of Judicial Administration* 45
17 Marcia Neave, 'In the Eye of the Beholder – Measuring Administrative Justice' in R Creyke & J McMillan (eds) *Administrative Justice – the core and the fringe,* Australian Institute of Administrative Law Inc 2000 p 137.