

## ADMINISTRATIVE LAW AS IT AFFECTS COMMISSIONS OF INQUIRY

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In March of this year I was President of a Commission of Inquiry (“the Commission”), enquiring into the death of a 19 year old soldier in 2RAR, being part of the International Stabilisation Force in East Timor.

A preliminary issue which was considered prior to the Commission commencing its sittings was whether the Commission should be open to the public or not. The view of Counsel assisting and myself was that it should be open because the Commission’s Terms of Reference required the Commission to report on:

- (i) *the sufficiency of any actions and decisions taken by Defence personnel which are materially relevant to the deceased’s death, both prior and subsequent thereto.*
- (ii) *any weakness or deficiencies (isolated or systemic) in Defence systems, policies, equipment, practices, procedures and training proximately associated with the deceased’s death.*

In other words, the Terms of Reference contemplated identification of any evidence tending to show in a material way that some act(s) or omission(s) in Australian Defence Force procedures, or on the part of Australian Defence Force personnel, caused or contributed to the deceased’s death which act(s) or omission(s) could and should have been identified by ADF and properly dealt with. Such identification was implicit in the terms of reference which contemplated rectification of any identified fault found.

It seemed to us entirely inappropriate that the Australian Defence Force should investigate itself in anything other than an open hearing, subject to the consideration of issues relating to security or involving procedural fairness to a person in the context of the Commission’s proceedings. In *Victoria v. Australian Building Construction Employees Builders’ and Labourers’ Federation* (1982) 152 CLR at 25 Mason J, as he then was, speaking of a restraint of proceedings in public of a Royal Commission observed:

*However, this restraint, limited though it is, seriously undermines the value of the Inquiry. It shrouds the proceedings with a cloak of secrecy denying to them the public character which to my mind is an essential element in public acceptance of an Inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the Inquiry is unfair or oppressive. Especially is this so when the Inquiry has power to compel attendance and testimony. The denial of public proceedings immediately brings in its train other detriments. Potential witnesses*

*and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings are less likely to come forward, and the public kept in ignorance of developments which it has a legitimate interest in knowing is left to speculate on the course of events.*

In the event the Terms of Reference directed that the Commission should conduct its Inquiry in public. However the family of the deceased made application at the commencement of the sittings for the Commission to be closed to the public for its duration. Their Counsel relied on the potential damage to the deceased's reputation if the Commission was conducted in public with the attendant publicity that such a course would engender.

Materials gathered prior to the hearing indicated that contrary to standing orders, the deceased had fitted a magazine to his rifle whilst inside the accommodation area, and walked to the latrine block. He was found behind a locked cubicle door in the latrines with his rifle at instant i.e. the firing mechanism was cocked, there was a round in the chamber and the safety catch was off and three cartridge cases from rounds fired by the deceased's rifle were on the floor. He had sustained significant head wounds.

It is well established that reputation is an interest which affords the person affected the standing to insist on natural justice/procedural fairness (refer *Annetts v. McCann* (1990) 170 CLR 596. However, in the case of *ICAC (Independent Commission Against Corruption) v. Chaffey & Ors.* (1993) 30 NSWLR 21, Gleeson CJ, as he then was, stated at 28:

*The authorities amply demonstrate that potential damage to the reputation of a person who is the subject of a complaint being investigated at a hearing by the Commission enlivens the requirement to observe the rules of natural justice and entitles that person to procedural fairness; eg, *Mahon v. Air New Zealand Limited* [1984] AC 808. There remains to be considered however the question of the practical content of those rules in a given case. There is a fallacy in passing from the premise that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation. ... Where an obligation to observe procedural fairness is imposed by law upon a decision maker its practical content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of a particular case; *Hotocher v. Minister for Immigration* (1990) 169 CLR 648 at 652 per Deane J.*

At p.29 he stated:

*The authorities have repeatedly warned against making the uncritical assumption that what is required in a court is also necessary for an administrative body. Even so there are powerful reasons why curial justice is administered openly even if that involves damage to reputation and our ideas of fairness in judicial proceedings do not encompass a requirement to protect people from adverse publicity.*

At p.30 he continued:

*Considerations of public interest which support an open hearing and which were taken into account by the Commissioner included a need for public confidence in the operations of the Commission and the assistance to the investigative process which might be gained by the giving of wide publicity to the allegations being investigated. It was for the Commission to determine the weight to be given to such considerations.*

In *Chaffey's* case the majority of the Court refused to rule that the New South Wales Independent Commission against Corruption should conduct its hearings in private to avoid damage to the reputation of policemen being accused of corrupt conduct by a convicted criminal, despite potential damage to their reputation.

Other cases supporting the principle of open hearings are *Victoria v. Australian Building Construction Employees and Builders Labourers Federation* (1992) 152 CLR 25 at 97 and 98; *R v. Chief Registrar of Friendly Societies: Ex parte New Cross Building Society* [1984] QB 227 at 235; *R v. Malvern Justices: Ex parte Evans* [1988] 1 QB 548; *Nixon v. Random House Australia Pty Ltd* (2001) 2 VR 523 and *Minister for Immigration and Indigenous Affairs v. X* [2005] FCAFC 217 (13/10/2005).

For obvious reasons this Inquiry did not involve issues of natural justice/procedural fairness to a person facing pending proceedings where publication of the Commission's proceedings might place him in jeopardy in relation to such pending proceedings and thus provide a basis for the application that was made. Rather the application was simply based on potential damage to the deceased's reputation if the Inquiry was not conducted in camera.

The deceased and his family were represented by experienced Senior Counsel who had access to all of the materials obtained by the Commission in its investigations and who would be participating fully in the Inquiry and would have every opportunity to address all issues in relation to the deceased's reputation. In the circumstances I was satisfied that natural justice/procedural fairness would be accorded to the deceased by his being represented by Senior Counsel in the circumstances already outlined and ruled that the proceedings should be in open hearing.

As it turned out on the day prior to my signing a report prepared for ADF following the conclusion of proceedings, a witness did come forward as a consequence of the publicity that the proceedings had received in the press, with information concerning a conversation she had had with a person she believed was the deceased some months prior to his death.

Natural justice/procedural fairness makes two demands before a person's legal rights are adversely affected or their "*legitimate expectations*" disappointed:

- (i) an opportunity to show why adverse actions should not be taken (*audi alteram partem*); and

(ii) a decision maker whose mind is open to persuasion or free from bias.

No more elaborate set of rules as distinct from flexible guidelines can be distilled from these two principles; refer *Justice in Tribunals* 2<sup>nd</sup> ed. JRS Forbes at 100.

However, as indicated in *Chaffey's* (supra) concepts of natural justice/procedural fairness, required in judicial proceedings, are not to be regarded as axiomatically applicable in administrative enquiries. Because a Commission of Inquiry is purely investigatory in character and cannot result in any determination of rights or of legal liabilities on the resolution of issues, rules against bias which developed in relation to judicial decision making should not be unthinkingly applied in relation to administrative investigations or decisions: refer *Royal Commissions and Permanent Commissions of Inquiry – Steven Donaghue* at 147; *Ebner v. Official Trustee* 176 ALR 644 at 646, 647; *R v. Maurice ex parte Attorney-General (NT)* 1987 17 FCR 422 at 438; *Karounos v. Corporate Fairs Commission* [1989] 50 SASR 484 at 489 and *Chaffey's* case (supra) at 29.

Moreover the rules of natural justice/procedural fairness will not be given a content that undermines the purpose of coercive legislation, because statutory powers must be exercised:

*In accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interest and purposes, whether public or private, which the statute seeks to advance or protect, or permits to be taken into account as legitimate considerations:*

refer *Royal Commissions and Permanent Commissions of Inquiry—Steven Donaghue* at 172; *Kioa v. West* (1985) 159 CLR 550 at 585.

Similarly, it was stated in *Laws v. Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 89: “The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a Tribunal and requires it to perform the statutory functions entrusted to it. Or to put the matter another way, the statutory requirement that the Tribunal perform the functions assigned to it, must prevail over and displace the application of the rules of natural justice. These rules may be excluded by statute; *Twist v. Randwick Municipal Council* (1976) 136 CLR 106 at 109-10; *Saleni v. MacKellar* (No. 2) 1977 137 CLR 396 at 401; *FAI Insurances Limited v. Winneke* (1982) 151 CLR 342 at 348-9.”

Further the right to cross examination of witness in an administrative enquiry is not to be regarded as an inevitable concomitant of natural justice – refer *Kingham v. Cole* 190 ALR 679 at 685-687.

As a means of controlling proceedings in the Inquiry, a practice note not dissimilar to the practice note referred to in *Kingham's* case (supra) was issued pursuant to the authority granted in the Instrument of Appointment, in respect of the practices and procedures proposed to be adopted in respect of the Commission's Inquiries. An

example of this type of control is paragraph 5 of that practice note which read as follows:

*A person granted leave to appear before the Commission of Inquiry is subject to the Commission of Inquiry's control and to such extent as it considers reasonably appropriate, the Commission of Inquiry may:*

- (a) limit the particular topics or issues upon which the person legally represented may examine and cross examine.*
- (b) impose time limits upon the examination, cross examination, re-examination and submissions.*
- (c) require that submissions as to issues of law, fact and/or possible adverse findings be provided in writing only, specifying the relevant findings of fact which they dispute or which they contend are available and ought to be found and the basis of the contention, including appropriately referenced evidence and where the finding contended would be adverse to another person the reference to the opportunity to such other person to respond.”*

The practice note provided for control of the calling of witnesses, provision of documents, notification of legal issues and the like. Of course pursuant to the provisions of s.26 and 29 of the Commonwealth *Evidence Act* a Court can control the manner and form of the questioning of witnesses. In the subject Inquiry Counsel for the family took a most constructive approach and it was not necessary to utilise the note at all.

A Commission of Inquiry is not intended to be an alternative to a Coronial Inquest (although it may be that a Coroner would decline to conduct an Inquest if he was satisfied that the Commission of Inquiry had rendered it unnecessary to do so) but is intended to inform Command of any matters that may require rectification or attention in the operations of the Australian Defence Force. What constitutes natural justice/procedural fairness is to be determined in this context and having regard to the particular circumstances of the Inquiry.

In this case, the Counsel assisting the Inquiry liaised extensively with the Queensland Coroner (pursuant to a protocol between the Coroner's Office and the ADF) utilising the expertise within the Coroner's office in relation to ballistics evidence, pathology evidence and fingerprint evidence. Following the conclusion of the initial Inquiry the deceased's family asked that the funeral director who had organised their son's funeral be called to give evidence that in his view the deceased had suffered minimal head injuries and such injuries as he observed were inconsistent with the damage described by the pathologist. We did call this person and at the same time utilised the services of the Queensland Government Pathologist in relation to the issues raised.

Quite apart from the advantage to the Commission of Inquiry in utilising the expertise available from the Queensland Coroner's office, an additional usefulness is the perception that a civil authority has been involved in what would otherwise be an all military proceeding. In other Inquiries relatives of deceased service personnel have on

occasions been dissatisfied with the ADF proceedings and sought Coronial inquests, expressing them to be a more open type of Inquiry.

Commissions of Inquiry, whilst according procedural fairness/natural justice, should not be permitted to become unduly prolonged. As well as utilisation of the control procedures earlier referred to, the approach of legal practitioners representing persons potentially affected by an enquiry may also assist significantly in this regard. In a paper jointly presented by Justices Helsham and Parker (both former distinguished members of the RAAF Reserve), titled “Role of Legal Practitioners in Boards of Inquiry” their Honours stated:

*The basic role of such a legal practitioner is to assist a service Tribunal that is conducting an administrative and not a judicial inquiry in accordance with the regulations and in particular with regulation 50 which frees it from adherence to legal procedures and forms. This places some restraints on those activities of a legal representative that might be considered appropriate in other situations, for example, where he is representing the interests of a client in a judicial proceeding. It requires him to have special regard not only the interests of the person affected, but also to the objective of such an Inquiry which to get to the truth of the matters under investigation. A legal practitioner has a role to play within these parameters but care must be taken not to use forensic skills to divert the course of the proceedings or detract from its functions.*

It is probably too early to make generalised comments concerning the recently instituted Commissions of Inquiry but properly controlled (whilst still according natural justice/procedural fairness) they should become a useful method of providing necessary advice to CDF in a timely and cost effective manner.