

THE 'GOOD' TRIBUNAL MEMBER – AN ARETAIC APPROACH TO ADMINISTRATIVE TRIBUNAL PRACTICE

ALISON CHRISTOU*

[A]s tribunal members we are the keepers of a rare commodity in this world – a reservoir of public trust and confidence ... The question for us today is how do we fulfil our role as guardians of this valuable national asset?¹

I INTRODUCTION

The last 34 years of administrative law practice in Australia have been characterised by the proliferation of administrative and other tribunals. Despite this rapid growth – or perhaps as a result of it - a clear articulation of the aspirational goals of tribunals has yet to occur in any coherent fashion. Some formal parameters currently exist to assist tribunal members in their work, including legislative and ethical guidelines. What is missing from tribunal theory, however, is a sustained examination of the normative excellences of the tribunal member's role. A stance from virtue ethics is adopted as a starting point for this endeavour, on the basis that improved decision-making commences with the promotion of 'practical wisdom' or *phronesis* for individual members. The recent work of virtue jurisprudence scholars is adjusted to reflect the unique tribunal environment, with the approach to judicial virtues adopted by Solum² forming the basis of analysis. The Australian tribunal sector is generally seen to have operated adequately to date, however a more normative approach to practice principles within the tribunal field is required, in order to enhance the integrity, functioning and reputation of the sector.

II POWER, RESPONSIBILITY AND OPERATIONAL AMBIGUITY

Tribunals inhabit an uneasy zone between the judiciary and the bureaucracy, two professions that are fortunate enough to have well-documented parameters for practice.³ When analysing the decision-making mandate of tribunals, regulatory bodies, and quasi-judicial commissions, appropriate approaches to practice are far from clear. These entities tend to be part judge/part administrator and the tension between these roles can be significant. The tensions arise from a variety of sources, including disparate requirements for formality, varying levels of accountability and an unclear mandate in the context of existing laws and policies.

* Alison Christou is a Research Scholar with the Centre for Public, International and Comparative Law at the TC Beirne School of Law, University of Queensland. She is a current Committee Member of the Australian Institute of Administrative Law (QLD Chapter), a Legal Member of the Queensland Mental Health Review Tribunal, and a former Legal Member of the federal Social Security Appeals Tribunal.

¹ Murray Chitra, 'Ethics, Values and Vision: The Tribunal Community as the Guardian of Its Own Integrity' (Paper presented at the Conference of the Council of Canadian Administrative Tribunals, 2000) 2.

² Lawrence Solum, 'Virtue Jurisprudence: A Virtue-Centered Theory of Judging' (2003) 34(1-2) *Metaphilosophy* 178.

³ See, eg, Terry Cooper, *The Responsible Administrator: An Approach to Ethics for the Administrative Role*, (4th ed, 1998); Justice J Thomas, *Judicial Ethics in Australia*, (2nd ed, 1997).

Despite such an uneasy operational premise, tribunals affect the lives of individuals and organisations in often-profound ways through the decisions they make.⁴ A decision at this level, whilst not judicial, can have far-reaching economic, social and legal effects on system users. As the number and powers of tribunals increase, an obligation rests with members to identify and articulate the underlying theory and principles relevant to their practice. As the Canadian Bilson stated at the turn of the millennium: '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'.⁵ Complete reliance upon neat 'best practice' packages being delivered from organisations such as the Administrative Review Council (ARC) and the Council of Australasian Tribunals (COAT)⁶ down to the vast number of tribunals across the nation will not, in themselves, suffice as a means of developing member excellence on a day-to-day basis. An ongoing, peer-motivated conversation regarding the challenges and aspirations of tribunal members is also required. This will ideally promote and inform the development of something akin to a discernible jurisprudence for the tribunals sector. Rather than focussing upon the 'don'ts' of tribunal practice, such as the myriad guidelines regarding bias, inappropriate formality and potential conflict, there is a need to actively develop the excellences – or the 'do's' – of the tribunal member's role. Such an approach correlates with the increasingly popular regulatory approach to administrative law, which emphasises the ability of the administrative justice system to influence and guide the future behaviour of decision-makers⁷. This normative, aspirational focus requires more from administrative law than the mere delineation of legal limits: 'The emphasis in the regulatory approach is on the future'.⁸ An aretaic approach to tribunal decision-making, which details the desirable characteristics of a 'model' tribunal adjudicator, coexists comfortably with the forward-looking ideals of the regulatory paradigm.

The greatest challenges facing the development of a cohesive tribunal philosophy arise from the very framework within which tribunal decision-makers practice in Australia. These systemic challenges are invariably connected with the uneasy socio-political position of such bodies within the justice system. A well-defined profession or organisation tends to display similarly well-structured membership requirements, funding arrangements, membership regulation and decision-making procedures⁹. Such is not the case with administrative tribunals, where an ambiguous yet unavoidable placement between the executive 'proper' and the judiciary tends to create a lack of intra-sector cohesion. On the one hand,

⁴ For various accounts of these effects, see, eg Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (1992); Bedford & Creyke, 'Inquisitorial v Adversarial Processes in Australian Tribunals' in C Finn (ed), *Shaping Administrative Law for the Next Generation* (2005); John McMillan, 'Administrative Tribunals in Australia – Future Directions' (paper presented at the International Tribunals Workshop, Australian National University, 2006).

⁵ Beth Bilson, 'Singing the Millennium Blues: The Future Direction of Administrative Tribunals' (paper presented at the Conference of the Council of Canadian Administrative Tribunals, 2000) 5.

⁶ Relevant documents include the ARC's *A Guide to Standards of Conduct for Tribunal Members* and the COAT's Practice Manual for Tribunals.

⁷ For an excellent discussion of legal versus regulatory approaches to administrative law, see, Cane and McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) 7-12.

⁸ *Ibid* 9

⁹ For a general overview of professions and 'professionalization', see, Keith Macdonald, *The Sociology of the Professions* (1995).

tribunals are provided with operational guidance in the form of laws, policies and codes formulated by the legislative and executive arms. Yet they are also charged with the duty to act impartially – in some cases with quasi-judicial aloofness – in the application of these rules. Against this backdrop of uncertain mandate, tribunals are also challenged by disparate membership requirements, institutional ‘newness’ on the legal landscape and perennial resource constraints. At least in terms of numbers, tribunals are predominantly inquisitorial, with only the larger generalist bodies such as the Administrative Appeals Tribunal displaying a more adversarial sensibility. Thus the prevailing investigative mode in itself limits the extent to which tribunal practice can be meaningfully informed by judicial example; adversarial tactics and passive adjudication are generally inappropriate in the tribunal setting. The noted challenges exist both within individual tribunals and across the quasi-judicial sector generally. Thus, some of the greatest operational and philosophical hurdles for individual tribunal members arise from the very adjudicative structures within which their decisions are made.

Further, identifying exactly – or even approximately – how many tribunals or tribunal-like bodies currently exist in any given jurisdiction has proved elusive in the Australian experience.¹⁰ That a taxonomy of Australian tribunals is urgently required is not in dispute. As Curtis notes:

Considering the practical importance of tribunals in the administration of justice in state and territory administrations, they have been paid remarkably little attention in the academic literature. ... Any projected study of State and Territory tribunals is therefore immediately confronted with the question ‘what is to be regarded as a tribunal?’ for the purpose of the study. Much of the academic discussion of tribunals in Australia assumes that the term is well defined. Unfortunately that is a mistaken assumption...¹¹

Tribunals and other merits review bodies also commonly operate in an isolated manner from one another, both technically and physically.¹² The need for separation from ‘parent’ departments is well established, yet tribunals are often unnecessarily divided from one another for the purposes of professional development and resource sharing. In some cases individual tribunals justify procedural peccadilloes on the basis of the highly specific subject matter, however inconsistency of standards between tribunals has been identified as a major concern for the sector.¹³ If a lack of unification in tribunal practice persists, political and social pressure may lead to an increase in uncomfortably proscriptive standards upon tribunals as a whole.¹⁴ It is

¹⁰ Council of Australasian Tribunals, Minutes of Inaugural Meeting (2002), COAT 34.

¹¹ L Curtis, ‘Agenda for Reform: Lessons from the States and Territories’ in R Creyke (ed), *Administrative Tribunals: Taking Stock* (1992) 35.

¹² Professor Gianni elucidated these phenomena in his presentation – ‘Online Learning and Tribunals’ (Speech delivered at 10th Annual Tribunals Conference, Australian Institute of Judicial Administration, 2007). A studied response from M Barker, ‘Reply to Professor Gianni’s Presentation’ at the same colloquium, confirmed that the ‘tyranny of distance’ that effects communication between tribunals in Canada correlates with the Australian experience.

¹³ See, B Cotterel, ‘Presentation to the 7th Annual AIJA Tribunals Conference’ (2004) *Australian Institute of Judicial Administration*, 6.

¹⁴ See, eg, the calls for change made by stakeholders in the business and community sectors, exemplified in P Kell, ‘The 30th anniversary: challenges for administrative law – a consumer perspective’ (2007) 58 *Administrative Review*; K Lahey, ‘The 30th anniversary: what business needs from the law and decision makers’ (2007) 58 *Administrative Review*.

preferable that change is generated from within the sector.¹⁵ Pausing regularly to examine, share and develop core member excellences will be a crucial part of the sector's future development.

Articulation of the 'goods' of tribunal membership will improve both the sense of unity felt by members and the esteem within which stakeholders hold the sector. Whilst the promulgation of legislative, procedural, policy and ethical parameters for individual tribunal members is important for the system of administrative law, it is equally important that a theoretical discussion of Aristotle's *arete* or 'goods' of tribunal practice commence, in order to combat the systemic challenges of distance, newness, ambiguous mandate and disparate subject matter that bedevil the sector in its current form.

III APPROACHING TRIBUNAL PHILOSOPHY

...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*.¹⁶ (*emphasis added*)

Ethical codes, legislative guides, policy pronouncements and procedural maps for administrative review practitioners have all been produced, yet the actual philosophy and normative 'dreams' of Australian tribunal work have not received adequate attention. After almost 35 years of relentless and fast-paced tribunal practice, surely some philosophical reflection is called for? Internationally, and particularly in Europe, there is an acceptance that judicial officers must have specialist training in the nuances of their role, both at induction and during the course of their career. Correlating requirements within the tribunal community will undoubtedly follow. The Consultative Council of European Judges has stated: 'The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern...'¹⁷

The Council goes on to recommend essential training for all new judges including those from common law countries where, traditionally, advocacy experience alone has been viewed as sufficient preparation for the judicial role.¹⁸ This move towards role-specific training and reflection for judges has begun to be mirrored in the tribunal community, at least to some extent.¹⁹ On-the-job training with no supportive contextual theory is increasingly a thing of the past; the judicial trend in Europe whereby 'these theoretical and practical programmes should not be limited to techniques in the purely legal field but should also include training in ethics and an introduction to other fields' and 'the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge',²⁰ reflects a growing expectation that adjudicatory institutions will be peopled by individuals

¹⁵ This point was emphasised at the inaugural meeting of COAT in 2002 at 37.

¹⁶ Noel Preston, *Understanding Ethics* (1996), 174 (my emphasis).

¹⁷ Consultative Council on European Judges, '*Opinion No 4- On Appropriate Initial and In-Service Training for Judges at National and European Levels*' (2003) 2.

¹⁸ *Ibid.*

¹⁹ See, eg, C O'Connor, 'Professional Development of Tribunal Members' (paper presentation at the 10th Tribunals Conference of the Australasian Institute of Judicial Administration, Melbourne, 2007).

²⁰ Consultative Council on European Judges, see above n 17, 5.

with a well-rounded character and a better awareness of their professional role in society.

Virtue, as an aspect of moral philosophy, will be demonstrated as just one point of possible commencement for the development of an enduring ‘tribunal jurisprudence’. It is the author’s hope that competing thoughts towards, let us say, a teleological, a deontological, a positivist or even a post-modern tribunal philosophy might also arise; the debate is indeed welcome. Of crucial importance is the need to examine and broaden the theory underlying tribunal practices, including the social context of decision-making by members. For present purposes, ‘virtue’ is not used herein in the lay sense of a pious cleanliness or moral high ground. Within this analysis, the central focus of virtuous practice is taken to signify an articulation of normative excellence for individual professionals. Virtue is synonymous with the Greek *arete* or ‘excellence’ – an aretaic view is thus an examination of excellent individual characteristics in a particular setting.

Virtue ethics, as a sub-category of ethical discourse has a long pedigree of relevant academic discussion.²¹ As Aristotle has stated: ‘...we call “virtues” those dispositions which are praiseworthy’.²² Neo-Aristotelian approaches to virtue ethics hold that the possession of certain personal characteristics is essential for the achievement of a ‘good’ or ‘flourishing’ life (*eudaimonia*). Transferred into professional life, virtue ethics requires that a role can only be carried out appropriately by an individual in possession of certain characteristics that are employed in a situation-appropriate manner. Thus, when viewing a role such as that of the tribunal member through the lens of virtue ethics, it is possible to commence the articulation of those characteristics that are desirable for professional practice in the sector. The normative dimension of virtue ethics reveals itself to be of particular significance to a ‘young’ sector such as the Australian tribunals community. A key question arises: what sort of person does either the new or experienced tribunal member seek to become? Applications of virtue ethics have been made successfully in the areas of administration²³ and the judiciary²⁴ yet almost no discussion is available on the very useful applications of virtue ethics to tribunal practice.

Tribunal work is reliant upon common sense above all and, for this reason, the Aristotelian requirement of *phronesis* or ‘practical wisdom’ in the application of personal virtues becomes centrally relevant. Practical wisdom, in the context of tribunals, acknowledges 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 community-focussed approaches to the extraction of relevant data and the formation of just decisions. For this reason, the practising or ‘habit forming’ of certain excellences by such practitioners is integral to the delivery of justice in this arena.

In analyses of adversarial practice, the standard conception of law stipulates that the advocate’s loyalty to their client will assist in an accurate and impartial

²¹ See, eg, Aristotle, *The Nicomachean Ethics* (HG Apostle translation, 1975); G Anscombe ‘Modern Moral Philosophy’ (1958) *Philosophy* 33, 1-19; R Crisp & M Slote (eds) *Virtue Ethics: Oxford Readings in Philosophy* (1997).

²² Aristotle, *ibid*, 20.

²³ See, Terry Cooper, *An Ethic of Citizenship for Public Administration* (1991); Terry Cooper, *The Responsible Administrator: An Approach to Ethics for the Administrative Role* (1998); Preston, see above n 16, 158.

²⁴ A recent and comprehensive overview of the field of virtue jurisprudence can be found in: L Solum and C Farrelly (eds), *Virtue Jurisprudence* (2008).

application of the law. That is, two advocates methodically dissecting the facts and law will undoubtedly reveal the correct outcome in any given matter. Yet if we remove adversarial practice – and most specialist tribunals are indeed inquisitorial by nature – the adjudicator personally becomes central to the articulation of the law and thus more acutely a prisoner to her or his own fallible discretion. It is, in fact, impossible for the non-adversarial adjudicator to operate in a passive manner. Their own thoughts and predilections must come into play, as competing advocates with case-specific knowledge are often absent. At this point, normative guidance becomes crucial. Analysis of the character of the adjudicator is essential to tribunal theory, hence casting doubt upon the standard conception as a worthwhile explanatory or normative paradigm for this non-adversarial realm. Some theorists propose that the more strident aspects of adversarial tactics can be tempered by a 'moral dialogue' between lawyer and client,²⁵ yet guidance regarding the nature of this dialogue is not defined for tribunal members, who must 'converse' with all relevant stakeholders equally. The judiciary has itself noted from time to time that even in adversarial proceedings, available law can sometime 'run out', leaving the judge with a dilemma requiring personal insight and moral questioning based upon prevailing public policy.²⁶ Tribunal members, particularly those in smaller state-based agencies, must call upon this individual discretion on a daily basis and cannot 'hide' behind any prevailing onus of proof. Crucially, they are not bound by the rules of evidence. Questions of both fact and law arise continually in a time-poor environment, requiring cogent, humane and practical thought processes. The ability to prioritise and address competing issues of law and fact remains one of the greatest challenges for tribunal members. Certainly, government policies will provide a skeletal framework within which to manage particular issues, such as the emphasis to be given to medical information or expert testimony²⁷ yet, at the end of the day, the tribunal adjudicator is left with a vast collection of variables that require individual assessment in each presented matter. Further, as noted by Edgar, the interpretation of government policy by tribunals is a complex problem, coloured by the particular regulatory environment within which each body sits.²⁸ The ability to practically contextualise competing policies is certainly aided by tribunal members with requisite *phronesis*.

Tribunals, it can be seen, are faced with the limited usefulness of available law and policy on a daily basis and must employ often extremely practical measures to arrive at the correct outcome as applicable to the given circumstances. One need only peruse the storyboards and other colourful aids used by the Victorian Intellectual Disability Review Panel for the purposes of information retrieval from intellectually disabled applicants,²⁹ to see an illustration of the need for practical wisdom in the tribunal room. Whilst this might appear to be simply a matter of differing evidentiary

²⁵ See, eg, Stephen Pepper, 'Lawyers' Amoral Ethical Role: A Defence, A Problem and Some Possibilities' (1986) 4 *American Bar Foundation Research Journal* 613.

²⁶ The debates between Dworkin and Hart highlight the enduring tension between pure judicial application and necessary interpretation of the law. On this point, see Suri Ratnapala, *Jurisprudence* (2009) 178-182.

²⁷ For example, in fields such as workers' compensation and social security quite comprehensive policy guidance is available regarding certain fact scenarios (see version 1.151 of the *Guide to Social Security Law* published by the Australian Government), yet this must still be applied to the individual nuances of each case.

²⁸ Andrew Edgar, 'Tribunals and Administrative Policies: Does the High or Low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143.

²⁹ See, Lynn Coulson Barr's illuminating work presented at the 10th Annual AIJA Tribunals Conference (2007) particularly slides 5-15 – available at: <<http://www.ajia.org.au>>.

requirements, the ability to personally interpret such data in an appropriate manner is a skill of unique importance to the inquisitorial forum. As stated, tribunals often do not have the luxury of relying on the onus of proof, *stricto sensu*, to deny an application. The non-adversarial role of tribunal members is necessarily active and involved in the matter, via means that might arguably be unacceptable in the adversarial arena.

Aristotle's conviction that beneficial virtues can be learned through habit bodes well for those involved in the recruitment and training of tribunal members. In searching for justice in the quagmire of a dense, highly technical caseload whilst simultaneously utilising limited resources of time and support, the tribunal member's role can be strengthened by training and mentoring structures focussed upon the development of excellence, rather than mere proscription against professional vice. Tribunal work is a messy, pressured, deeply human endeavour and should accordingly be pursued from a normative desire to reach the best practical outcome in challenging circumstances. Virtue ethics will be seen to provide a useful starting point for the development of aspirational principles for both members and tribunals as a whole.

IV IDEAS FROM VIRTUE JURISPRUDENCE

An increasing focus on the ethics and practices of the judiciary has become an indisputable reality³⁰ and will inevitably flow through to other bodies involved in the resolution of disputes, including tribunals. In Canada, the move towards the enhancement of judges as members of a 'community of education' is an excellent example of attempts to unify the approaches taken by judges to their daily tasks.³¹ This involves judges engaging in a steady dialogue during and between cases, regarding their approaches to various questions of law and fact. In doing so, best practices tend to emerge, reflecting the aretaic notion of forming habits of excellence. The need to establish the virtues of practice will also invariably infiltrate the emerging 'integrity arm' as a whole, of which tribunals form a critical part. The integrity arm is recognised by many as a necessary overseer of governmental activities³² and generally includes those institutions charged with ensuring consistency and transparency within the traditional three arms of government, such as ombudsmen and assorted commissions. The character of those individuals peopling this newly recognised arm will become of increasing importance as the fourth arm strives for broad community acceptance. Aretaic approaches provide a useful corollary to this development, as well as a meaningful starting point for training of both tribunal members and the integrity branch of government as a whole.

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. The acknowledgement and discussion of the personal characteristics of a 'good' judge have become an increasingly relevant and indeed necessary endeavour.³³ As Stone states: '...any

³⁰ See, eg, J Thomas *Judicial Ethics* (1997); C Einstein, '*Judicial Ethics [In Court Perspective]*' (paper presented to National Judicial College, 2004); Andras Sajo (ed), *Judicial Integrity* (2004); Gianni, see above n 12.

³¹ Gianni, see above n 12.

³² The leading Australian commentators on the fourth arm of government are Professor J Macmillan and Justice J Spigelman. For a useful overview see, Justice Spigelman, 'The Integrity Branch of Government' (speech delivered at AIAL National Lecture Series on Administrative Law No 2, Australian Institute of Administrative Law, ACT, 2004).

³³ Solum and Ferrelly, see above n 24.

Judge's performance depends not only on his legal knowledge or skills, but also on the adequacy of his own life experience and social knowledge'.³⁴

Virtue jurisprudence is a relatively new field of scholarly enquiry. Prominent United States legal theorist Solum focuses upon five core judicial virtues in his in depth discussion on this model, which are intrinsically Aristotelian.³⁵ These are:

- Judicial courage
- Judicial wisdom
- Judicial intelligence
- Judicial temperament
- 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

Solum's analysis is by no means the only example of the application of virtue ethics to legal theory and practice. Prominent scholars in law and philosophy currently examining virtue and the law include Professors Sherry, Duff, Huigens and Hursthouse, to name a few.³⁶ Whilst some restrict their discussion to particular legal areas such as torts or criminal law, Solum presents a useful and recent account of virtue and the practice of judging, which has particular resonance for tribunal adjudication.

V 'GOOD' MEMBERS – TOWARDS ARETAIC TRIBUNAL JURISPRUDENCE

In examining the applications of virtue jurisprudence to administrative tribunals, one might question the need to develop decision-making theories of any depth in this context. Yet the increasing prominence of tribunals requires that the theory and principles underpinning their work be further explored, articulated and developed. Adopting an Aristotelian or virtue-based approach to tribunal work is particularly prudent due to the varied nature of tribunal endeavours, the challenges of resource constraints and the myriad of disgruntled clients with divergent claims on multitudinous subject matters. As Kingham notes, procedural reform is long overdue in tribunal practice and must reflect the increasing numbers of self-represented clients.³⁷ Aretaic ethics, in concerning themselves principally with 'practical wisdom', require that a certain level of common sense imbue the work of a 'good' tribunal member. How can a member adequately carry out her duties without the

³⁴ J Stone, *Social Dimensions of Law and Justice* (1996) 686.

³⁵ Solum, see above n 2.

³⁶ These writers and others can be found in the anthology collated by Farrelly and Solum, see above n 24.

³⁷ Fleur Kingham, 'Reforming Queensland's Tribunals: Procedural Reform to Realise the Rhetoric' (2004) 14(1) *Journal of Judicial Administration* 31. See also the recent *accesscourts* initiative in Queensland, coordinated by the Public Interest Law Clearing House and designed to enhance the experience of self-represented litigants.

ability to bring a deeply practical approach to the maelstrom of everyday tribunal cases? *Phronesis* requires a practical tribunal member, with, it might be described, her or his 'feet on the ground' in the face of a large and varied caseload. *Phronesis* deals with the particular and the changing³⁸ and requires, beyond intellectual wisdom, a certain amount of 'street smarts'. Yet intellect must also remain a key feature of this jurisprudence, as a deep understanding of the subject matter is crucial to good tribunal work. A legal member on a scientific tribunal, for example, might have all the necessary understanding of natural justice and general administrative law tenets possible, yet fail to understand the complexities of the chemical engineering problem before him or her. *Phronesis*, or 'practical wisdom' calls on members, for example, to discern a one-sided take-over by a vexatious applicant (individual or otherwise); 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.

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.³⁹ It is insufficient to 'outsource' one's decision to subordinates or otherwise 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 personally, often without the assistance of representatives as in the adversarial model. Ignorance is inexcusable, particular as there is often no counsel to 'feed' the decision maker 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, yet often overlooked as a requisite personal characteristic. 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

³⁸ These traits are explored further by, Costas Douzinas and Adam Gearey, '*Critical Jurisprudence: The Political Philosophy of Justice*' (2005) 120.

³⁹ Einstein, see above n 30, 18-25.

substance of the proceedings on behalf of a timid tribunal client. As the Honourable Justice John Byrne has quite rightly stated, 'nobody needs grumpier judges'⁴⁰ and the same applies to tribunal members. Further, if bad temperament leads to an erroneous decision, clients often have no recourse to the courts for financial reasons. The practical value of virtuous temperament in tribunal practice work cannot, therefore, be overstated.

Temperance – the resistance to temptation – might well be called the well-documented virtue. It is the author's 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 extensive⁴¹ and includes the rule against bias, the necessity of a fair hearing and the need for arbitrators to refrain from excess or delinquency in their private and professional lives. As noted, 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.

If a case reaches court following hearing by a tribunal, any legal anomaly at the administrative stage will hopefully be detected. But getting to court in the first instance can be an insurmountable hurdle for many an applicant, for inescapable socio-economic reasons. It is all too common that a person's need to access justice in the courts is circumvented by the barriers imposed by culture, structure and history. 'The cost and inconvenience of judicial review, whether by special or general courts, deter recourse to it by some whose causes may be just'.⁴² Thus the onus placed upon tribunal members to imbue each decision with the aretaic excellences at the tribunal level is both significant and necessary.

Transmuting Solum's classification, the key virtues or excellences attaching to the tribunal role would ideally include:

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

It is not intended that a complete exposition of moral theory be made, nor an exhaustive analysis of alternatives to virtue theory. Such activities are beyond the scope of the present work. It is contended, however, that the centrality of character and habit within aretaic theory provide useful platforms for the development of both tribunal practice principles and an enduring tribunal jurisprudence.

⁴⁰ J Byrne, 'The Future of Litigation: The Queensland Perspective' (2009) *Hearsay*.

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

⁴² W Gellhorn *Ombudsmen and Others* (1967) 421.

VI RECRUITING AND TRAINING FOR EXCELLENCE

The ability to form and develop positive habits occupies the core of Aristotle's *Nichomachean* thesis.⁴³ 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: 'Just as the ability to run a marathon develops through much training and practice, so too does our capacity to be fair, to be courageous, or to be compassionate. Virtues are habits.'⁴⁴

Human resource limitations can be central to the challenge of recruiting for and inculcating the noted virtues of tribunal practice.⁴⁵ 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 and their secretariats. One of the reasons that cultivation of core tribunal principles is so important, however, is that the perception of a professional, unified and consistent sector of decision makers will contribute significantly to improving the level of respect directed towards tribunals from all levels of government and the community. They will be seen as more than 'just another section of the department' or, in the alternative, a forbidding court-like structure and, one would hope, be trusted for their integrated approaches to decision-making. Developing theoretical frameworks and discussion within the merits review community has the two-fold effect of improving operations and reinforcing the points of similarity between such bodies across the globe.

In line with the Aristotelian concept that virtue is acquired through habit, one might well ask – on what issues do tribunal members most need ongoing training and advice? What practice habits should they be seeking to acquire? Many advocate that in querying the quality of an institution, it is necessary to confer with the external users of the services provided. Mitchell succinctly notes in relation to the improvement of administrative tribunals: 'Looking at the needs of users might ensure that we don't put the cart before the horse'.⁴⁶ Training forms an essential ingredient in the maintenance and development of integrated tribunal practices. Consumer and industry groups continually seek to have input into Australian administrative review processes and this interest is to be encouraged.⁴⁷ Recently there has been some move away from mere codes of conduct and an increase in the issues of character noted above. Dwyer, for example, has mentioned the need for continuing training of tribunal members beyond the bounds of the adversarial system. She nominates such skills as 'flexibility to undertake new enquiries or change procedures', 'willingness to share...experience and learning', 'working with the parties' and perhaps most importantly 'a willingness to acknowledge that the adversarial system is not the only effective way of resolving disputes between parties'.⁴⁸ Elements of temperance, practical wisdom and courage are all in evidence in these thoughts presented by one of Australia's most senior tribunal practitioners and may well inform the kernel of normative Australian practice principles.

⁴³ See above n 21.

⁴⁴ Ibid at 6

⁴⁵ Kingham, see above n 37, 422 for the judicial equivalent.

⁴⁶ Bill Mitchell, 'Administrative Review in Queensland in 2006' (2006) 51 *AIAL Forum* 13, 24.

⁴⁷ See above n 14.

⁴⁸ J Dwyer, 'Smoothing the Sharp Corners of the Adversarial System – The Experience of the Administrative Appeals Tribunal' in Sampford et al (eds), *Educating Lawyers for a Less Adversarial System*, (1999) 41.

As with all theory, the concept of ethical tribunal practice must be bedded down in practical structures in order to be viable. As Cooper notes, it is important for people to learn how to brainstorm solutions, to avoid 'either/or' thinking and to become comfortable to working with complex ideas: 'Use whatever methods or techniques are necessary to move beyond either-or thinking, because until at least the most significant alternatives are acknowledged, we risk overlooking the best solution'. Resistance to such black-and-white determinations is well served by the aretaic approach of *phronesis*, which demands a balanced, humane and insightful approach to decision making. In developing such training and decision-making systems, a central motivation should be the development of integrity in the solutions and outcomes that the organisation generates. Coherency in values training will assist in the development of coherent organisational outcomes. As Wilenski notes, the attainment of a consistent ethical approach to public work is not only desirable, but indeed necessary: 'The need for administrators to exercise value judgements is integral to our system of government, and the conflict between the different legitimating principles is irreconcilable. We need to develop a coherent theory to accommodate this reality'.⁴⁹

How human resource practitioners can best recruit for the noted tribunal excellences is an area for much deeper investigation. Minogue notes also that appropriate human resources are the cornerstones of a tribunal's knowledge base: '...an understanding of the importance of acting fairly and rationally, and understanding the role and jurisdictional limits of a tribunal member, are matters best dealt with through the appointment of members with appropriate skills and knowledge'.⁵⁰

Yet in Minogue's analysis, we are once more faced with a description of role that is easily met by prescriptive legislation. How to recruit and train for member excellence in the normative and practical sense within the parameters of a particular tribunal's mandate and subject area might be more difficult to articulate. 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 several 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.⁵¹ 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 and ethics is considerable. For example, being able to query a policy's relevance in a particular medical tribunal and to receive immediate feedback from relevant, experienced peers, provides an example of the excellent uses to which such on-the-spot 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.⁵²

⁴⁹ Peter Wilenski, *Public Power and Public Administration* (1986) 63.

⁵⁰ Matt Minogue, 'Principles of Conduct for Members of Merit Review Tribunals' (2001) 54 *Administrative Review* 46.

⁵¹ See above n 12.

⁵² *Ibid.*

It is proposed that a combination of minimum annual hours for continuing professional education of tribunal members is essential, whether undertaken in the modes of e-learning, static academic courses or face-to-face conferences. A portion of such training would necessarily be devoted to the development of the key excellences of the tribunal member's role. There are presently some training opportunities for new Australian tribunal members;⁵³ it remains to be seen if these will concentrate merely upon the limitations of the role, or whether discussion of tribunal ethics and aspirational practice principles will be included. It is proposed that ongoing professional education be offered and monitored by bodies such as COAT, and that lively discussion of normative ideals be encouraged among appointed tribunal members. State branches of COAT can go a long way to establishing and championing the needs of smaller tribunals, as well as keeping them in touch with national developments. If the United Kingdom model of the Council of Tribunals is followed, COAT might well find itself at 'the hub of the wheel of administrative justice'⁵⁴ in Australia.

VII CONCLUSIONS – TOWARDS COHERENT TRIBUNAL PRACTICE PRINCIPLES

All tribunal members have gains to make in studying and adopting a robust tribunal philosophy within their deliberations. Prior technical knowledge or professional affiliations neither replace nor necessarily prepare the tribunal member for her or his specific adjudicatory role. The strengths and weaknesses of tribunal members will vary and must necessarily be addressed at the individual level of professional development. As Raban describes in relation to the interpreters of the law generally: 'Whilst some may master the principles of proper practice intuitively...others may need explicit guidance in order to perfect their performance'.⁵⁵ 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. Nor can tribunal officers rely upon legislation and policy alone to define what it is that they are able to do in practice: '...legislation dealing with tribunals deals inconsistently with important elements concerning the constitution, jurisdiction, governance or powers of the tribunal. These defects expose stakeholders – those people who use our tribunals – to the risk of appeal or undeserved loss'.⁵⁶

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. A three-fold approach to developing tribunal practice principles in Australia would be preferable. Firstly, ARC, COAT and the Australasian Institute of Judicial Administration could look to providing more normative, organic and consistent opportunities for member development. Such opportunities, whether in the form of guidelines, symposia or online training tools will ideally be easily accessible, open to critique and able to inspire tribunal members to question issues of character and habit. Secondly, individual tribunals need to self-assess and train from within in order to develop codes and other tools pertinent to the particular types of decisions made within that institution. Induction and training programs will ideally contain an

⁵³ See above n 19.

⁵⁴ L. Newton, 'The 30th anniversary: an international perspective' (2007) 25 *Administrative Review* 37.

⁵⁵ Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (2003) 112.

⁵⁶ Renee Leon, 'ACT Tribunals: Options for Structural Change' (2006) 51 *AIJAL Forum*.

element of ethical inquiry, in particular the issues surrounding what makes a 'good' tribunal member. Thirdly, 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.

Australian tribunals find themselves at an exciting crossroads after more than three decades of practice on a largely unstructured basis, particularly in specialised state and territory jurisdictions. It is timely to begin an articulation of the excellences underlying the tribunal member's role, rather than relying upon either proscriptive rules or the practice principles of related governmental or judicial sectors. 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 considerable. 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 tribunal practitioners can refer and which they themselves can help to develop. It is not sufficient to rely upon those governing principles that underpin the more general work of either the executive or the judiciary; for better or worse, tribunals are hybrid organisations that occupy a unique position between the public sector proper and the judiciary.⁵⁷ 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 – the 'dos', rather than the 'don'ts'. Aristotle's virtues, albeit modified for modern experiences, are of immediate use to tribunal members and are 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. The aretaic stance provides an excellent platform from which to commence a philosophical journey for tribunal professionals. As stated, this does not preclude tribunal theory from being approached from alternate philosophical camps. In fact, rigorous debate in this arena would be a welcome development as the sector inevitably continues to grow in stature, reach and responsibility.

⁵⁷ For an earlier discussion of this hybrid nature in the context of ethical discourse, see, Christou, 'A Moveable Feast; Identifying Ethical Norms within Quasi-Judicial Practice' (speech delivered at AIJA Tribunals Conference, 2004).