Conducting a fair and effective hearing

Paper delivered to the 2018 Annual Conference of the Administrative Appeals Tribunal

Twin Waters, Queensland, 29 May 2018

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Decisions made by tribunal members are final determinations which affect people's rights. Even where a right of appeal is available, it is seldom exercised.

Reflecting the important role entrusted to tribunal members, we are subject to legal obligations. Among other things, we are bound by the rules of procedural fairness, except to any extent to which those rules are modified by governing legislation. The rules of procedural fairness are divided between the obligation to give each party an opportunity to be heard and the obligation to bring a completely unbiased mind to the determination.

Conducting a fair and effective hearing is no easy task and demands a wide range of skills. The focus of this paper is on hearings conducted in the Administrative Appeals Tribunal where the applicant is self-represented and there is no contradictor, or no effective contradictor. Hearings of this type present particular challenges, especially where, as is often the case, the applicant lacks the ability to articulate their case or obtain evidence and the quality of the available material is poor.

This paper is in two parts. The first examines habits developed and, importantly, maintained by effective tribunal members. The second examines questioning techniques.

Habits of Highly Effective Tribunal Members

1. They remember that this case is a very important event for the applicant

What for the tribunal member may be the umpteenth case of the same kind that they are dealing with, in most cases is the ONLY case that is important to the applicant. In many, if not most cases, it will be the first time the applicant has had contact with the justice system or appeared in a court or tribunal.

Effective tribunal members do not assume that the applicant has an understanding of what is likely to happen in the proceedings, the role of the tribunal member or the issues that must be determined.

Effective tribunal members appreciate that more often than not the applicant will be apprehensive and nervous. They will have developed techniques to put the applicant at ease.

When sitting in a narrow jurisdiction the effective member will guard against appearing to be bored or to have "heard it all before".

2. They identify in advance the key issues to be determined

Preparation is the key to an effective hearing. It requires thorough knowledge of the relevant legislation, relevant authorities and the tests to be determined. In addition, it requires careful consideration of the available material, even where it is voluminous and apparently irrelevant. It is not uncommon for a self-represented applicant who is unable to identify the issues to be determined, to "throw everything into the pot" and bury information that could assist their case.

Careful preparation enhances a tribunal member's ability to conduct an effective hearing. As Justice Garry Downes AM, former President of the AAT pointed out, it will make your job easier, give you more satisfaction and, importantly, increase the likelihood of achieving the ultimate goal: making the right decision.[1]

3. They are aware of the bias rule

"Justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 per Lord Hewart CJ.

The English comic "Beachcomber", who had apparently observed some unusual judicial behaviour, put a useful slant on this maxim: "Justice must not only be done, it must be seen to be believed."

The test of apprehended bias is well-known: "[W]hether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide".[2] The bias rule is intended both to ensure fair hearings and to ensure the reputation of the justice system.

The rule against bias requires tribunal members to approach their task with an open mind. This is not necessarily an empty one. It is permissible to bring knowledge and experience to a case. The question is always one of degree and context.[3]

A tribunal member's reputation for efficiency and fairness takes time to earn but can be quickly lost. The pages of "Justinian" are full of stories of judges and lawyers behaving badly. And the legal profession is full of gossips.

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[1] The Honourable Justice Garry Downes AM, former President AAT, 'Preparation, Preparation' (Paper presented at 2008 Motor Accidents Authority Medical Assessment Service Assessors Conference, Sydney, 1 November 2008).
[2] *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48 [11]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 [6]; *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427; [2011] HCA 48 [31].
[3] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2000) 205 CLR 507; [2001] HCA 17 [71].

4. They are aware of their own biases

We all have automatic thinking processes. They are natural and, in fact, they are evolutionary protective mechanisms. But they can lead to bad decisions being made for the wrong reasons.

Effective tribunal members:

- review how they arrive at decisions and the factors that consciously or otherwise influence their decisions;[4]
- continually ask themselves whether in making a decision or a finding of fact, they are responding intuitively or whether their conclusions were the product of careful, rational thought;
- are conversant with the body of scientific evidence which casts doubt on the ability of decision-makers, be they judges, tribunal members (or indeed anyone else) to tell truth from falsehood on the basis of appearances;[5]
- recognise that demeanour evidence is notoriously unreliable.[6]

5. They raise the issues that trouble them but keep an open mind

In *Vaukata v Kelly*[7] the High Court said:

> ... a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.

The applicant should be left in no doubt as to what you have identified as the key issues to be determined and not left in the dark about any significant issues that they need to address.

6. They communicate using simple and direct, non-legal language

It is no easy task to communicate in simple, non-legal language when the relevant legislation is written in anything but simple, non-legal language.

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[4] See H Bennett and G Broe, 'The neurobiology of achieving a "comfortable satisfaction"' (2014) 26 *Judicial Officer* Bulletin 8, 65-69.
[5] *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 [31].
[6] *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 [31]; *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co* (1924) 20 Ll L Rep 140 152.
[7] *Vaukata v Kelly* (1989) 167 CLR 568 571.

Effective tribunal members:

- avoid archaic words such as, “pursuant to”, “in lieu of”, “further and better particulars”, “deemed”;
- avoid legal jargon;
- explain, in simple language, complex terms that might be relevant to the determination of the application: "home equity conversion agreement";
- do not assume that an applicant understands what is meant by key terms used in the jurisdiction: “Impairment Tables”, “Australia’s non-refoulement obligations”;
- avoid figurative expressions: “seen better days”, “as clear as mud”, “Dutch courage”.

A number of excellent resources are available on the use of plain English in a hearing context.[8]

7. They work effectively with interpreters

It goes without saying that there is nothing fair and effective about a hearing where the tribunal member lacks the skills to work effectively with the interpreter.

Being able to work effectively with interpreters is an essential part of a tribunal member’s tool kit.[9] Members who have mastered the art of using simple, direct, non-legal language are half way there.

8. They explain at the outset what will happen during the hearing

A concise opening statement by the tribunal member is essential for an effective hearing. While the AAT provides parties with detailed information written in simple language before the hearing, it would be unsafe to assume it has been read or understood by every applicant.

The opening statement should include matters of procedure and substance:

- How you should be addressed
- Your role
- The likely length of the hearing and whether there will be any breaks
- The material received from the applicant

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[8] See for example, Judicial Commission of NSW, *Equality before the Law Benchbook*, (2017) 2.3.3.4, 3.3.5.3, 5.4.3.3. 2.

[9] Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, (2017) ; Sandra Hale, ‘Helping Interpreters to Truly and Faithfully Interpret the Evidence: The Importance of Briefing and Preparation Materials’, (2013) 37(3) *Australian Bar Review 307;* The Hon Justice Melissa Perry and Kristen Zornada, ‘Working with Interpreters: Judicial Perspectives’ (2015) 24(4) *Journal of Judicial Administration* 207, 208–9.

- The material you propose to take into account in making the decision
- The key issues, which in your view need to be decided
- Your understanding of any agreed facts and non-contentious issues.

The opening statement provides an invaluable opportunity to put the applicant at ease and set the tone for the hearing. It is worthwhile investing time in getting it right. It needs to be comprehensive but not too long. If a lot of issues need to be covered it might be advisable to deal first with, say, procedural issues, invite questions and then move on to the substantive issues. A three-minute uninterrupted monologue is probably the most an applicant (or indeed anyone) is able to absorb.

9. They control their temper

In *Damjanovic v Sharpe Hume and others*,[10] the NSW Court of Appeal was highly critical of a District Court judge who lost her temper with a witness whom she evidently found exasperating:

> Her Honour: I will have an answer to that question, it is a simple one, he said it yes or he said it no, it seems to be extremely difficult for this man to answer a simple question, I would like an answer it (sic), ask it, did you say that or not?
>
> A. I give Mrs …
>
> Her Honour: Mr Damjanovic shut up now answer the question you were asked, did you say what Mr Cohen just put to you that it was words to the effect …
>
> A. … (not transcribable) …
>
> Q. No you will listen to me, did you say in Croatian words to the effect, is this the correct phrase 'May God fuck their mothers'?
>
> A. It's something that I meant but I not met it"…
>
> "Her Honour: That will do, it can be put to Mr Zelvic (sic) in cross-examination, I think we have enough versions, enough people in this room who speak the language for that to not be a correct translation for it to have been cooled by now and I note spectacular silence from the plaintiff 's representative.
>
> A. They all lie here your Honour and they stuck together.
>
> Vukic: Your Honour, I have to be silent, I have been directed to silence …
>
> Her Honour: Was the translation made by Mr Spehar correct or not correct?

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[10] *Damjanovic v Sharpe Hume and ors* [2001] NSWCA 407.

Vukic: I didn't hear him.

Her Honour: How very convenient, anything in re-examination?
(Emphasis added by the Court of Appeal).

Difficult as it can sometimes be, tribunal members have to be emotionally well-regulated. If steam is building up, take a short adjournment.

10. They give the applicant a real opportunity to be heard

The opportunity to be heard must be real not illusory. You are half way there if you have identified the issues to be determined in simple terms.

Generally, the obligation will not be met by merely inviting the applicant to comment on their application, for example:

> Now Mr Applicant tell me why you believe that the decision made by Department not to grant you a protection visa was wrong. [Issues: whether the applicant has (i) a well-founded fear of persecution in the country of nationality, and (ii) whether there is a real risk that they will face significant harm if removed from Australia.]
>
> Now Mrs Applicant tell me why you believe you have an entitlement to the disability support pension? [Issues: what is counted as an asset; how and when is the value of an asset assessed; whether the total value of the applicant's assets exceeds the "asset cut-off limit".]

The applicant must be given the opportunity to comment on, and, if appropriate, give evidence in relation to each issue to be determined.

Before announcing or reserving the decision give the applicant a last opportunity to add information or make any further statements.

11.They don't make irrelevant statements about controversial topics

Tribunal members are not appointed as commentators on controversial topics of the day.

Don't offer personal opinions about controversial topics that are irrelevant to the proceedings. In 2015, a NSW District Court judge was heavily criticised by the Judicial Commission for off-the-cuff comments about paedophilia. He was barred from hearing sexual assault cases as a result.

Don't assume that the applicant shares your views and interests. Yes, it might be Melbourne but not everyone is interested in AFL.

12.They make effective use of the time allocated for the hearing

The days have long passed where it is appropriate for either tribunal members or judges to allow the parties to determine the length of the hearing.

Giving the applicant a real opportunity to be heard does not prevent constraints being placed on the scope and the length of an applicant's evidence/submissions.

While there will be exceptions and it will be sometimes necessary to grant or offer an adjournment, as a general rule an effective tribunal member will complete the hearing in the time allocated for the hearing. The applicant should be on notice of this expectation from the start of the hearing.

Principles, Red Flags and Tips for asking effective questioning

Introduction

Making findings of facts where an applicant is unrepresented and there is no contradictor presents real challenges. To make relevant findings of fact without adopting the role of an advocate for either the applicant or the Department requires a combination of independence, fairness and inquisitorial skill. It is no easy task.

The manner in which tribunals conduct their proceedings is often as important as the substance of their decisions. Asking questions in an inappropriate way, or making inappropriate comments during proceedings, may not only distort the fact-finding exercise but may result in a tribunal's decision being overturned on the ground of apprehended bias.

This part of the paper seeks to help tribunal members avoid falling into appealable error by learning from the mistakes of others. It also offers tips for asking questions in an appropriate and efficient way.

Permissible questioning

It is not only appropriate for tribunal members to ask questions, it may be unfair if they fail to do so. The question is how to do so.

While tribunal members have a duty to determine the real issues in the case, "entering the arena" or appearing to take sides can lead to a miscarriage of justice.

There is no clear line here. Asking questions and expressing doubts about aspects of evidence are a commonplace part of this role: see *NADH v Minister for Immigration and Multicultural and Indigenous Affair*s [2004] FCAFC 328 per Allsopp J.

In some cases "robust and forthright testing" of a witness or applicant may be appropriate*: SZOAF v Minister for Immigration and Citizenship* [2010] FAC 431 at [17] per Barker J. It is all a matter of degree and context.

Section 41 of the *Evidence Act 1995* (NSW) and its state equivalents 11 provides a useful starting point in identifying what constitutes permissible questioning. It imposes an obligation on the court to disallow a "disallowable question" whether or not objection is taken to the question (s 41(5)).

A "disallowable question" is defined to mean a question which is misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype (s 41(1)).

A question will not be disallowable merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness (s 41(3)(a)), or because the question requires the witness to discuss a subject that could be considered distasteful to, or private by the witness (s 41(3)(b)).

Red flags suggesting that a tribunal member is or gives the appearance of being biased

1. An aggressive or querulous tone

In *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872, Kenny J heard an appeal from the Refugee Review Tribunal. She listened to the tapes of the hearing. In relation to the behaviour of the tribunal member she made a number of comments:

"The tone of the Member's opening remarks can best be described as querulous or peevish." (*VFAB* at [43])

"At best, from the applicant's viewpoint, her tone of voice conveyed a very real suspicion that he was not telling the truth and that she was very much inclined to disbelieve him and his story." (*VFAB* at [44])

"In listening to the tapes, the Member's aggressive style of questioning is plain enough." (*VFAB* at [46])

2. Discourtesy to parties or their representatives

"[The Member] was unfairly dismissive of explanations politely offered to her." (VFAB at [43])

"The Member repeatedly asked [the applicant] to spell into English non-English language names, expressly referring disparagingly to inconsistencies with his evidence before the first Tribunal." (*VFAB* at [44])

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11 See for example, s 41 of the Evidence Act 2008 (VIC) ; s 21 of the Evidence Act 1977 (QLD); s 26 of the Evidence Act 1906 (WA).

3. Belligerence towards parties

"From the outset of her questioning of the applicant, the Member adopted a somewhat belligerent style". (*VFAB* at [44])

4. Close-mindedness

"One way or another, from the beginning of the hearing, the Member expressed her doubt about the applicant's truthfulness." (*VFAB* at [47])

"The Member appeared over keen to detect inconsistencies in the applicant's evidence… When it became apparent there was no such inconsistency, she failed to acknowledge her mistake. This contrasted with her practice of regularly commenting on matters that were unfavourable to the applicant's case (in a conclusive way and not to afford him an opportunity to respond)." (*VFAB* at [59])

"Whether or not she meant to, the Member tended to turn virtually all the applicant said against him…" (*VFAB* at [59])

"By this point, there can be little doubt that a fair-minded observer, properly apprised of the nature of the proceeding, would apprehend that the Member considered the applicant to be untruthful and his claims implausible. There appeared to be nothing he could say that could tell in his favour…" (*VFAB* at [63])

In *Khadem v Barbour and Commissioner of Taxation* (1995) FCA 673, the Federal Court considered whether comments made by a Senior Member of the AAT gave rise to reasonable apprehension of bias. The Senior Member told Mr Khadem in the middle of the proceedings:

> "… the reason I am reluctant to continue with these proceedings is <u>because in my view you have not been honest with this Tribunal</u> and there is the likelihood that very serious matters are going to be raised which will affect you and your family."

This statement by the Senior Member at that point was sufficient for the Federal Court to find that a reasonable apprehension of bias had arisen.

In *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, Flick J commented on various exchanges in the Refugee Review Tribunal:

> The exchanges that occurred went well beyond a mere expression of reservation as to whether what the Tribunal member was being told should be accepted – the exchanges exposed the Tribunal member expressing a concluded view before the entirety of the hearing had even concluded that she did not believe the applicant: (at [35]).

One of the relevant exchanges was quoted by Flick J:

"The Appellant when asking '*What else can I say?'* was told by the Tribunal member that she did not *'know what you can say because I don't believe… what you've told me…'* (at [35])

5. Misusing evidence

"… the Member's hostile attitude, underscored by the tone in which she questioned the applicant, either led her to misquote his evidence or prevented her from accurately processing what she heard." (*VFAB* at [49])

"[The Member's] questions and comments regarding his evidence about the date of the by-election were misleading." (*VFAB* at [51])

6. Bad temper

"Following a similar heated argument with the applicant, the Member mistakenly averred that she had asked a question about 'supporters'…" (*VFAB* at [49])

"… while sustained ill-temper can give rise to a reasonable apprehension of bias, momentary outbursts and misunderstandings in the often stressful world of adjudication must be tolerated, so long as they pass and do not affect the functions of the adjudicator." (Robertson J in *SZRUI* at [95] citing Kirby J in *Minister for Immigration; ex parte AB* (2000) 177 ALR 225 at 230.

7. Repetitiousness

"In numerous passages, the Member's repetitive style and her adverse commentary on the applicant's evidence conveyed the impression that she was disposed to regard him as untruthful and as fabricating his claim." (*VFAB* at [50])

"In the last hour of the hearing, the Member revisited the applicant's evidence on numerous matters. She pursued him on apparently mistaken bases and on matters of seemingly little significance to his claim…" (*VFAB* at [64])

"… in the present case a properly informed lay person might reasonably apprehend, from the continual challenges to the appellant's truthfulness and to the plausibility of his account of events, and from the terms of those challenges, the possibility (real and not remote) that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account of events…" (Robertson J in *SZRUI* at [101])

8. Talking over witnesses or parties

"Throughout this part (as in other parts) of the hearing, the Member frequently 'talked over' the applicant." (*VFAB* at [51])

9. Hectoring witnesses or parties

"[The Members'] was a hectoring approach." (*VFAB* at [51])

"… the Appellant as told on at least two occasions not to be *'silly'*" (*SZRUI* at [35]). Robertson J, in the same case, found about a dozen such instances of the claimant being told by the Tribunal, "Don't be silly". (At [87])

10. Making groundless adverse comment

"The Tribunal did not, as the Member claimed, mention the wrong date several times. As the applicant said, he corrected his evidence a fortnight later. The Member's remark that this was 'quite a long while' was groundless. As with virtually all her commentary on the applicant's evidence, it was adverse to him." (*VFAB* at [51]

11. Raising irrelevant but prejudicial issues

"A short, though apparently irrelevant, discussion on the fate of the camp manager that followed could only have served to increase disquiet about the Member's openness to the applicant's case." (*VFAB* at [53])

12. Impatience and expressions of frustration

"The Member's frustration with the applicant, perhaps more apparent on listening to the tape than on reading the transcript, was unfair… The applicant was not to blame for this misunderstanding on the Member's part." (*VFAB* at [53])

13. Unfair questioning

"To some extent, [the Member's] questioning was unfair … He was pursued into an area that would have been more appropriate for an expert on ballistics…" (*VFAB* at [57])

14. Sarcasm

"Sometimes [the Member] was sarcastic or impatient…" (*VFAB* at [58])

"It is obviously undesirable for decision-makers in the course of a hearing before them to be sarcastic or to make fun or mockery of witnesses or to show high personal indignation. In some cases this may be sufficient to establish actual bias…" (Robertson J in *SZRUI* at [91])

15. Insensitivity

"The Member showed a lack of sensitivity towards the applicant. While he clearly became distressed on occasion when asked about his wife and family, he did not allow this to prevent him from answering further questions. He was not, however, allowed an opportunity to compose himself." (*VFAB* at [61])

16. Argumentativeness

In *SZRUI,* Robertson J criticised a member of the Refugee Review Tribunal, among other things, for arguing frequently with an applicant:

"While there is no clear line between testing and arguing, the relevant part of the course of the hearing took the form of lengthy statements on the part of the Tribunal rebutting what the claimant said rather than testing the material, leading to a reasonable apprehension that the Tribunal was arguing its fixed position." (At [88])

"When regard is had to the record of the hearing (on tape and in transcript) it is apparent that the Member argued with the applicant about his evidence as he gave it." (*VFAB* at [57])

17. Discouraging submissions

Kenny J quoted the Member in *VFAB* saying at the end of the hearing and before hearing final submissions "… I think I have absolutely enough submissions to sink a battleship. You have sent in so much. I am not asking for any more submissions. I hope you've covered everything that you want to cover. If you haven't, of course, let me know now but I don't think I could manage anything more. I'm snowed under with your submissions."

Kenny J then commented at [66], "In this context, there was apparently little that [the applicant's migration agent] might say on the applicant's behalf…"

Effective questioning technique

To examine witnesses effectively, tribunal members must pay attention to:

- The fundamental principles of procedural fairness and relevance
- The purpose of the examination
- Communication skills
- Legal questioning technique.

Procedural fairness and relevance

Tribunals are different from courts. They are engaged in an inquisitorial process in which fact-finding is not constrained by the rules of evidence.

It is, however, fundamental that inquisitorial methods must be both fair and relevant or the proceedings will miscarry.

The purpose of questioning

Simply put, the purpose of examining witnesses is to find the relevant facts.

If, as in the cases mentioned above, the tribunal loses sight of that purpose, the danger is that it will also lose objectivity and therefore the capacity to make accurate and appropriate findings of fact.

Communication skills

While this is not the occasion for a full discussion of the application of communication skills in hearings, it is self-evident that actively listening and treating witnesses respectfully are key ingredients of any successful examination.

Basic questioning technique

1. Use open-ended questions

You get better information if witnesses are allowed to provide information in their own words. Non-leading questions should therefore be the general method of examining witnesses in tribunals.

Q: (leading) Did you see a man with blonde hair in the vicinity of the house?

Q: (open) Who did you see in the vicinity of the house?

A: A man was near the front gate.

Q: What was he wearing?

How to ask open-ended questions

Orientate the witness by taking them to the topic.

Q: I want to ask you about your arrival at the camp. When you first got there, did someone introduce you to X? (This is a leading question suggesting the answer but it directs the witness to the topic.)

A: Yes.

Q: Who was that?

A: Y

Q: How did you meet Y?

Non-leading questions are usually asking Who, What, When, Where, Why or How.

2. Keep it simple

Use simple language that is easily understood. Using the word “discombobulate” will discombobulate most witnesses.

3. One question at a time

Compound questions incorporate two or more questions in one. They can confuse witnesses and distort the evidence.

Q: Did you go the Post Office on Tuesday and, if so, did you buy three books of stamps and a DVD?

Q: Did you see anything unusual outside the camp or was it too dark to see?

Instead:

Q: Did you go to the Post Office on Tuesday?

A: Yes, I went to buy some stamps.

Q: How many stamps did you buy?

A: Three.

Q: Anything else?

A: Oh yes, I bought a DVD.

4. Don't assume facts in issue

Q: When did you stop taking drugs? (If there is no evidence that the witness was using drugs before the question is asked).

Q: How fast was the man running away? (If there is no evidence of a man running away at the time the question is asked).

5. Lay a foundation for questions

Q: Were you using drugs in 1998?

A: Yes.

Q: When did you stop taking drugs?

6. Sequence questions logically

Q: Doctor, did you examine Mr Z on 31 June 2017?

Q: Did you have any information about him before you saw him that day?

Q: How did you conduct the examination?

Q: What findings did you make?

Q: What other investigations did you carry out?

Q: What were the results of those investigations?

Q; As a result of the examination and investigations, were you able to reach a diagnosis?

Q: What was that diagnosis?

Bad questions

The cases referred to above are full of examples of bad questions.

Here is a short list of questions to avoid:

1. Irrelevant questions
2. Compound questions
3. Questions with elaborate preambles that may confuse the witness
4. Questions that misquote the evidence
5. Argumentative questions
6. Rude, unnecessarily embarrassing or offensive questions
7. Questions that ask a witness to comment on the state of mind of another person

   ("What did X think about that?" "How did X feel about that?" – Instead ask "Did X <u>say</u> how he felt about that?" or "What did you observe about X after the incident?")

8. Questions asking a witness to comment on another witness's evidence

   ("So if X said …, that would be a lie, would it?" This a common form of improper question – it is irrelevant what one witness thinks about another witness's evidence; it asks for an impermissible opinion; and it is unfair to the other witness who cannot respond.)

Conclusion

No one suggests that it is easy to do all this well, especially under stressful conditions. Yet the quality of our administrative law system depends on tribunal members developing these skills.

This is not an abstract concept. The Australian community has a legitimate expectation that hearings conducted by the AAT, and indeed any court of tribunal, will be conducted fairly, the parties will be treated with respect and the decision-maker will bring an unbiased mind to the decision.

When members conduct hearings fairly, competently and courteously not only do they enhance the Tribunal's reputation, they are likely to enjoy the satisfaction that comes from doing the job well and earning the respect of the parties and their tribunal colleagues. Good luck for the future.