Procedurally fair? Fairly procedural?

... ethics, fairness and welfare practice

Phillip A. Swain

This paper examines the principles of procedural fairness and their application to welfare practice. The paper considers whether social workers ought to measure the adequacy of their practice, not just against those requirements ususally set out in the professional Codes of Ethics, but also against the procedural fairness expectations of decision-making more usually the province of courts and like bodies. The paper concludes that these expectations are not only in keeping with the Code of Ethics, but that competent practice demands no less of practitioners.

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***Phillip Swain**, LLB(Hons), Dip.Soc.Studs., SJD, MSW(Michigan), Grad.Dip.Comp., has practised as a lawyer and as a social worker, principally in child protection, access to adoption information, and the family support service fields. He is currently Senior Lecturer at the Department of Social Work, University of Melbourne, and also teaches in the social work course at Monash University.*
Contact address: Department of Social Work, University of Melbourne, Parkville, Vic 3052.

The business of practice in the human services is the business of decisions, choices, discretions and assessments. Social workers and other human service workers may argue that their task is to assist client decision-making, rather than to take it over, but often the dictates of authority, training and position mean that the worker is cast into the role of making the decision. How then should they decide? Are there ethical obligations to be borne in mind when exercising discretions or making assessments? What does the social worker need to do to ensure that decision-making is procedurally fair for all concerned?

This paper explores the meanings of procedural fairness expectations and their applicability to decision-making in the human services. The paper also examines the relevance of these principles to the ethical demands of professional practice, as contained in the Australian Association of Social Workers' Code of Ethics for practice.

PROCEDURAL FAIRNESS – AN OVERVIEW

> ...[a] delicately balanced cluster of procedural features... (Allars 1991, p.409)

Welfare practitioners, if they consider procedural fairness requirements at all, often assume them to be the concern of courts, tribunals and other legal bodies alone. Whether legislatively required or not, a generally accepted requirement of courts and the like is that they need to demonstrate procedural fairness in the way they operate and make decisions (Allars 1993, p.20) – many would feel uncomfortable about a judicial process that did not appear to be 'fair' to those involved. But even in legal settings 'fairness' in an absolute sense may be practically unattainable. For instance, the need for quick decision-making may contradict the objective of ensuring that all parties have full access to the materials on which the decision is to be based, and the opportunity to challenge that basis, all of which are elements of procedural fairness. Hence any consideration of procedural fairness needs to be made within the context of what is practical in the particular setting concerned (Olsson 1992).

Procedural fairness requirements are especially important for administrative review tribunals as in these jurisdictions the focus will frequently be a decision by the state to grant access to services, facilities or entitlements. Bodies such as the Social Security Appeals Tribunal or Administrative Appeals Tribunal at Commonwealth level, and guardianship or mental health review boards at State level, make or review critical decisions as to the right to receive pensions or benefits, to psychiatric treatment or release from care, or to have control over one's life decisions or financial arrangements. In decision-making in areas such as these, there is often great inequality of power in and influence over the decision-making process between the parties. As Walpole (1994, p.8) suggested:

> [Administrative law is] based on the concept of natural justice or procedural fairness, which has as its root the idea of the valiant individual man taking action against the might of the executive as the effective arbiter of State power ... the individual is necessarily pitted against its [the State's] excesses ...

Allars (1993) argues that the actual content of procedural fairness – what has to be done to meet the requirements of 'fairness' – is flexible and varies with legislative obligations, the particular

circumstances of the case, and the stage of the decision-making process (Allars 1993, p.21-22; see also Pearce 1994). Inevitably there are tensions relating to the balance between formal and informal processes, between adversarial and inquisitive approaches, between informality and expedition of the process, and between the principles of justice and the demand for decisions to be reached quickly (Bayne 1989, p.207). There is no one level of fairness and informality that is applicable to all situations or cases; what will be required will vary with the particular circumstances of the case, the interests to be protected and the power or discretion that is to be exercised.

So what, in broad terms, do procedural fairness considerations require of decision-making processes? Hayley Katzen (1995) suggests that:

> Compliance with ... rules of procedural fairness requires no more than a mind that is open to the evidence presented, honesty about opinions and the airing during the hearing of any position or knowledge of which the parties are not aware (p.179).

In more specific terms procedural fairness rules (sometimes loosely referred to as the 'rules of natural justice') include what are known as the hearing rule, the no evidence rule, and the bias rule. Translated into everyday terminology the hearing rule incorporates the right to be heard by the decision-maker, to know of appeal rights, and the right to be provided with reasons for the decision reached by the decision-making body concerned (Craig 1994, pp.150-151). The decision-maker should ensure that each party has been given a reasonable opportunity to present their case, though there is no obligation to ensure that each party makes best use of that opportunity. This in turn relates to the evidence rule – an applicant is entitled to be assured that the decision will be made based upon only relevant, cogent and (if required) probative evidence or information. Those who work in the business of making decisions which affect the rights of others need to be 'open and unashamed in their reasoning' (Todd, 1991, p.148). The rationales for decisions need to be explicit. If decision-makers rely upon their background knowledge, whether acquired through formal training or experience, it ought to be presented to participants to allow an opportunity for it to be refuted or challenged. Similarly,

> ... adverse allegations ... which are significant, relevant and credible [should be] disclosed to the applicant so that he or she has an opportunity to controvert them (Allars 1996, pp.273-4).

Taking a child welfare example, if the basis for a decision to limit parental access to a child in substitute care is, for instance, the agency's understanding that a parent has a history of prior notifications of alleged abuse, or a worker's professional assessment that a parent has limited parenting skill, those bases ought to be made explicit at the time the decision is being considered, so that the parent concerned can challenge them or offer alternative information.

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Fairness requirements also demand that what is to be considered by the decision-maker be relevant to the decision under review (Bayne 1995, p.12). This in turn links to the third procedural fairness rule, the no bias rule – that is, the requirement that there be no real or apparent bias in the decision-maker. This includes the need to ensure that the decision-maker has no interest – and no appearance of interest – in any particular outcome. The appearance of bias, and hence the suggestion that procedural fairness requirements might not have been met,

> ... is satisfied where a fair-minded informed member of the public or a party to the proceedings might reasonably suspect that the [decision-maker] might not bring to the decision-making process a fair and unprejudiced mind (Allars 1996, p.278).

How many agency review processes, which often incorporate review of case planning decisions by senior agency staff, would satisfy this requirement? Using such processes, how is the client public to be reassured that the person reviewing the earlier decision will not simply affirm the assessment of their colleague, or be captured by the culture of the organisation concerned?

The objective of procedural fairness is clarity and certainty, with '...predicability, so that people are not caught out by secret, unclear or retrospectively operating legal rules...' (Allars 1993, p.22). Hence an obligation within procedural fairness requirements is to ensure that applicants are given proper, adequate, intelligible reasons, which deal with the substantial issues raised, for the decision that is made (Armstrong 1994, p.93). As Bayne has suggested, '[u]nless reasons are given, the decision cannot be distinguished from an arbitrary one' (1992, p.303). Applicants and clients are entitled to be reassured that the decision is one that is based on logically probative evidence (the evidence rule) rather than on unsubstantiated or irrelevant material, and that the decision itself is within the ballpark of what would be considered a reasonable outcome by other practitioners presented with the same situation. A decision which is so unreasonable that no other practitioner could have reached the same conclusion, may not withstand a challenge on fairness grounds. If no other reasonable child welfare worker would place a child in a group setting, the practitioner who decides to do so will need to present cogent and strong reasons based upon relevant information for acting in a way which most of her or his professional colleagues would not. Provision of reasons enables parties to see the extent to which their arguments were noted and accepted, aids accountability, and allows the wider community to determine the basis on which matters will probably be decided in the future. Although the failure to give adequate reasons will not of itself invalidate the decision in question, where the reasons given by a court or tribunal are such that it is impossible to determine the reasoning process used, it has been held that the resulting decision may be set aside (Bayne 1992, p.306; see also *Dornan v Riordan* (1990) 24 FCR 564).

CODES OF PRACTICE REQUIREMENTS

The Code of Ethics of the Australian Association of Social Workers ('the AASW') provides a useful example of Code requirements for professional practitioners in the human services. Social workers in Australia are bound by the AASW Code, but only if they are members of that Association. A limitation in Australia is that registration with the Association is not mandatory for the title 'social worker' to be used, as is the case in other jurisdictions such as the United States and Canada, where stricter controls over minimum standards and competencies exist. In Australia anyone can claim to be a 'social worker', regardless of training, background or experience.

The Code of Ethics of the AASW ('the Code') was adopted by the AASW in July 1989 and revised in November 1993. The Preamble to the Code states that it:

> ... provides a set of standards by which the social work profession (or the social worker) can distinguish what is legitimate or acceptable behaviour within social work practice. [It] identifies standards of practice which adequately reflect the value base of the profession and stress basic principles on which to make ethical decisions.

Any Code of Ethics essentially presents a '... compilation of the ethical provisions relevant to the practice of [the] profession ... to which the members of that profession are expected to adhere' (Loewenberg & Dolgoff 1989, p.20). Codes provide guidelines to professional conduct and acceptable behaviour and standards of practice (Charlesworth et al 1990, Chapter 2) and represent '[the]... profession's response to the inevitable dilemmas of service provision ...' (O'Connor et al 1995, p.222). Codes cannot provide answers for the dilemmas of practice such as where choice between the 'lesser of two evils' is required (Loewenberg & Dolgoff 1989, p.22) – as will sometimes be the case with decisions in child welfare practice. If the child is placed in care, will appropriate support services or treatment facilities to allow the child to eventually return to family care be available? How quickly? If not placed, will the risk of further abuse continue? Are in-family protective arrangements sufficient to guarantee the safety of the child? Codes are guidelines to practice and, as such, general in nature and cannot prescribe how the social worker should act in a concrete practice situation (Gray 1995, p.69).

The AASW Code provides guidelines for social work practice regarding issues such as informed consent, client self-determination, confidentiality and privacy.

... a commitment to encouraging client participation, to sharing the basis on which decisions are made and their rationales, to ensuring that clients are aware of the decision-making process and have the opportunity to challenge the outcomes of it, all sit comfortably with the ethical obligations incorporated into the AASW Code.

The Code requires that an informed consent be obtained in relation to participation in research activities, and before any electronic recording or observation of client behaviour takes place. However, no such requirement is specified in relation to everyday social work tasks which are neither recorded nor observed. The use of information obtained in the course of the everyday home visit or interview, and the decisions which might flow from such social work activities, need not be preceded by an informed consent. Such a consent, according to the AASW Code, appears to be a matter particularly associated with research processes rather than with daily professional practice. But ought the ethical practitioner apply such a limitation? Of course, since no-one can ever be fully informed, whether a consent is *informed* is a matter of relativity (Torcyzner 1991, p.126). The critical questions are when should an informed consent be required and what steps must be taken by the practitioner to discharge the obligation in this regard?

To be informed a consent requires several pre-conditions. First, the person whose consent is sought must know what is to occur during the intervention, and must be informed about the anticipated results and about what will occur if consent is not given. Secondly, consent can be neither real nor informed unless it is voluntarily given as '[c]onsent is only meaningful when it is given freely ...' (Loewenberg & Dolgoff 1989, p.61). Finally, the person giving the consent must be competent to do so. He or she must have the capacity to sufficiently understand the information given by the practitioner as to be able to use it so as to reach a decision as to whether or not to consent at all (O'Connor et al 1995, pp.228-229). The outcome should be a situation in which the person '... can participate and make an intelligent rational decision about himself (sic) ...' (Parry 1981, p.537).

The Code also incorporates several requirements regarding client self-determination, including the obligation on the social worker to:

> ... provide clients with accurate information regarding the extent and nature of services available to them and will not knowingly withhold such information ...
>
> ... apprise clients of their rights and the implications of services available to them...
>
> ... justify any action which violates or diminishes the civil or legal rights of clients. (Article 4.5)

Other obligations under the Code include the requirement to make no misrepresentations as to qualifications, competence or experience (Articles 4.7 & 4.8), and to continue professional education toward the development of competence (Article 4.8). However, what these obligations actually require of the social worker in everyday practice remains unclear.

Another key ethical requirement for social workers is a commitment to client self-determination (Code article 4.5). The law strongly supports the right of the individual to self-determination, to the right to decide for oneself the course of

what is to occur even in situations of life-threatening illness (Freckelton 1993, pp.38-9). This right is an acknowledgment of the importance of '... that part of someone's behaviour that emanates from his or her own wishes, choices and decisions ...' (O'Connor et al 1995, p.84) and is a cornerstone principle of the helping professions.

The right of autonomy (to control one's body and what is done to or upon it) and the right to self-determination (to decide for oneself) have within medical discourses been held to prevail over the duty to provide treatment. Thus a patient can refuse treatment, even if this will lead to deterioration in health or even to death, so long as he or she has made an informed decision in this regard (*R v. Johnson* (1903) 9 ALR (CN) 11 cited in Lanham 1990, p.407). Likewise O'Connor et al (1995) point out that '... we are capable of making our own choices and decisions, no matter how silly these may appear to others' (p.84). Hence, the right to make an informed consent follows from the right to autonomy: that is, the principle, long recognised by common law, that '... a man (sic) is the master of his own body and may deal with it in whatever way he chooses, however irrational ...' (*Dessi v. USA* (1980) 489 F Supp 722 cited in McLean 1989, p.92).

Table 1: Procedural fairness exercise

Task – take as the basis for discussion your current or a past employer, or another community/welfare agency you are familiar with, and consider a decision which was or could have been open to challenge by those involved. List and discuss how well the agency/worker met procedural fairness principles, and what could have been done differently.

the setting :

the decision in question:

Fairness consideration	What was done	What should/could have been done differently
the action taken by the agency/worker was within its (legal) powers?		
all the legislatively required procedures were followed or met?		
only relevant information or considerations were taken into account?		
the decision was (would be) considered 'reasonable' by similar other agencies/ professionals?		
there was an opportunity for the 'client' to be heard and to respond to worker/ agency views?		
the decision-maker had no interest/bias (perceived or real) in the decision to be made?		

FAIRNESS PRINCIPLES AND HUMAN SERVICES PRACTICE

Ought practitioners generally, and social workers in particular, to take heed of the several procedural fairness rules discussed earlier? It is here suggested that the fairness rules provide useful guidelines for everyday practice, and that they sit very comfortably with the ethical obligations to which practitioners ought to subscribe.

Social workers often hold positions of considerable authority in respect of clients' lives, with power to influence access to knowledge, resources, finances and information. The power held by social workers is often exercised on behalf of the State, hence the inequality and powerlessness often experienced by participants in legal processes (Swain 1995, p.235) are replicated or even magnified when an individual seeks to question or overturn a decision made by an agency. What might a procedurally fair decision-making process in the human services look like? Certainly to be so characterised the process must allow all the parties a sufficient opportunity to know what the dispute is about, to be informed of the arguments to be presented by others, to be present at the decision-making, to present alternative arguments, and to be heard by the decision-maker. A person affected by the decision ought also to be given clear reasons for that decision, and should be confident that the decision-maker had no interest in any particular outcome. They must know what further appeal rights exist if still dissatisfied with the outcome after being informed of the reasons for it.

Table 1 provides a useful chart against which agency decision-making can be assessed from the perspectives of procedural fairness. Though most agency decisions (to allow a child to return to parental care, to grant financial assistance, to place the patient in a particular ward, to waive payment of a tenancy bond, to place a family under supervision on limited reporting provisions, or whatever) are unlikely to be challenged in a legal sense in a court, should not those making these decisions nevertheless be able to account and present a clear rationale for them?

CONCLUDING COMMENTS – AN OBLIGATION OF PROFESSIONALISM?

Human service practice ought to avoid becoming excessively procedural, but needs to strive to be procedurally fair. Not every decision by the practitioner will lead to the legal dissection of its rationale that can occur in formal legal settings. Nevertheless a commitment to encouraging client participation, to sharing the basis on which decisions are made and their rationales, to ensuring that clients are aware of the decision-making process and

have the opportunity to challenge the outcomes of it, all sit comfortably with the ethical obligations incorporated into the AASW Code. Further a commitment to procedural fairness is likely to promote decision-making that is seen as valid by clients. The experience in administrative review forums is that to be listened to, to be given the opportunity to present one's argument and to hear what is said in response, is important for clients – even if the resulting decision is not to their liking. Just as it is important for clients before administrative review tribunals to be heard, so it is for clients in their everyday dealings with social workers. To resort to defensive social work practice ought not to be necessary (Besharov & Besharov 1987, pp.517, 520; Collingridge 1991, pp.16-17); rather, a commitment to fairness is implicit in what welfare practice ought to be all about. □

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