Report into Natural Justice Issues Relating to the Launceston City Council's Termination of the Director of the Queen Victoria Museum & Art Gallery

Compiled by Dr Sennin Charles

This report has been compiled from material that is in the public domain. It is totally independent in that it has not been commissioned, sponsored or paid for in any way by any person, other than myself.

The report has been produced in response to a large number of public statements that have been made by various connected parties. These statements appear to rely more on assertion than proof, in particular the issue of affording Natural Justice.

In the public interest and in the spirit of the free speech that has prevailed, this report is an attempt to correct that imbalance, with the aim of protecting and promoting Social Justice in the community concerned.

Dr Sennin Charles
October 22, 20210

Disclaimer

Whilst all due care and attention has been given to the compilation of this report, no responsibility is accepted for any errors or omissions that may have occurred. Nor should this report be considered as constituting legal advice. Parties wishing to use or act on any of the contents of this report are advised to seek their own, independent legal advice before doing so.

Background

The Director of the Queen Victoria Museum & Art Gallery (QVMAG) Mr Patrick Filmer-Sankey was dismissed on August 11, 2010 by the Launceston City Council (LCC) General Manager (GM) Mr Robert Dobrzynski.

He was dismissed on the grounds that he failed to provide a safe working environment within the QVMAG, specifically the Natural Sciences section.

Although no formal complaints had been made against the Director, the GM formulated allegations against him on the basis of a report prepared by Sage Management Pty Ltd, which the GM had himself commissioned. Many of those contributing to the Report were reportedly promised that totally confidentiality would be given, interestingly Filmer-Sankey says he was not given this assurance.

This Sage Report has not as yet been released to any party facing allegations as an outcome, despite numerous requests for it to be made available.

Questions have arisen in the public forum as to the appropriateness of some of the GM's actions, in particular whether or not he had afforded Natural Justice to the Director.

The GM, Mr Robert Dobrzynski, very publicly (30 August 2010) described the process he used to develop the allegations against Mr Filmer-Sankey, summing up with the emphatic statement that Natural Justice had been served.

In a letter to *The Forum* in the 16 September 2010 issue of the Launceston Examiner Alderman Rob Soward stated:

> "At the Launceston City Council meeting on Monday, September 6, I asked a number of questions over the situation at the Queen Victoria Museum and Art Gallery. In the presence of 10 Aldermen and a packed public gallery the general manager provided extremely detailed and factually accurate answers to the questions that covered the issues ratepayers, residents and friends of the museum had raised with me. Other aldermen also asked questions to allay their concerns as well. These questions were also answered in depth with factual information by the general manager. The minutes of this meeting will be available on the council website for all to see. If anyone walked out of that meeting and thought natural justice had been denied to anyone then they either weren't listening to the answers or they were unwilling to believe the truth. The conduct of some in the public gallery, particularly in the council foyer afterwards, leads me to believe that no amount of information or evidence will ever make them believe the truth."

As these statements have been made very publicly, it is in the public interest that the evidence is examined to see if indeed it fits with these assertions of fact and "truth".

Natural Justice

Natural Justice is not to be found in any Act as it is part of Common Law, and one of the cornerstones of the English legal system, from which our law is derived. As such, all government departments – State, Territory and Federal – are required to observe it, by law.

The Osborne Concise Law Dictionary definition of natural justice is as follows:

> "The rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the right of others; e.g. a government department. The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be judge in his own cause, so that a judge must declare any interest he has in the subject-matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested."

In even plainer English:

A complaint must be formally made, and the accused must be formally notified of that complaint (ie "charged"), including:

- Who made it
- What the complaint was (not a summary but the actual complaint in full)
- All the evidence relating to the complaint which is to be considered in assessing the issue
- A person is entitled to a fair and unbiased hearing.

For additional information attached is an extract from *The Law Handbook (ch: Grounds for Review)* by Fiona L. McKenzie, Barrister

Evidence of Breaches of Natural Justice by the Launceston City Council

The Sage Report Brief

As the full brief for the Sage Report is not available at this time, reliance has been placed on extracts and public statements made by the General Manager himself, in particular during the LCC meeting of September 6, 2010. In commissioning a report in which those interviewed were invited to make statements with the assurance of absolute confidence, the GM was creating an untenable situation in which it should have been clear from the outset that evidence was not going to be available to any affected party, and thus potentially denying them Natural Justice. This constitutes evidence of a serious error of judgement by the GM, the repercussions of which arise in several places below.

Allegations

> "The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case, and **correcting or contradicting any relevant statement prejudicial to his case**, and not to hear one side behind the back of the other….. **Relevant documents which are looked at by the tribunal should be disclosed to the parties interested"**

The General Manager has repeatedly claimed that extracts from the Sage Report were made available to Filmer-Sankey in the allegations he was served on the 23rd July 2010, and thus "Natural Justice has been served" (to quote from his statements at a public meeting on 30 August 2010).

However, in the GM's response to Filmer-Sankey's reply, he clearly cites yet further material from the Sage Report – material that had not been made available previously – and this material he uses to rebut Filmer-Sankey's response to the allegations. In effect, he issued a *revised* (fresh) set of allegations, to which Filmer-Sankey was denied an opportunity to respond, as this was also a letter of termination.

This is evidence of a clear breach of Natural Justice on at least one count.

Bias & Judicial Temper

> "The chief rules **are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case**, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other."

When Filmer-Sankey met the GM on July 30, 2010 (when Filmer-Sankey handed over his response to the allegations against him) he alleges that the GM offered to let him go amicably with a payout, this being before the GM had read Filmer-Sankey's written response to the allegations made against him.

Further, on August 6, 2010 the GM allegedly handed Filmer-Sankey a letter of resignation to sign, which Filmer-Sankey declined to do.

On August 11, the GM presented Filmer-Sankey with a letter of termination.

If these events are indeed correct, and the GM has not refuted them, then this would indicate that the GM had already decided that Filmer-Sankey was to go, prior to considering his response to the allegations the GM had made against him.

It is difficult to see how the GM could claim a lack of bias in his assessment of Filmer-Sankey's case, if these events are a true representation.

In addition, during the LCC meeting of September 6, 2010, the GM made several statements about workplace injuries that were alleged to have occurred, citing them as fact and indeed "proven" (*see below*). He clearly indicated that these matters influenced his decision in relation to dismissing the Director. This potentially indicates bias, especially as none of this material has been disclosed.

It would appear that this issue is evidence of a breach of Natural Justice in at least one instance.

Refusal of the GM (and the LCC) to release the Sage Report and other relevant material

> "… to give each party the opportunity of adequately stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and **not to hear one side behind the back of the other…..Relevant documents which are looked at by the tribunal should be disclosed to the parties interested**."

> " ..in concluding that Mr Mayor, we are aware of individuals, employees who have suffered psychological injury as a consequence of the activities of bullying and harassment at QVMAG, and an employee who suffered psychiatric illness and some employees having resigned.
>
> "..two things Mr Mayor, one, bear in mind the allegations that were proven, that the allegations were proven that the Director, who had the primary responsibility for QVMAG and had a duty of care to provide a safe work environment, failed to deliver on that duty of care and tangible harm was proven to employees.. so a very significant legal position there would be no circumstance under which, in that environment, I would be renewing the contract for a further period of twelve months." *transcript of the GM's replies in the Sep 6 Council Meeting*

In the first paragraph above, the GM is citing what amounts to hearsay, and citing it as fact. No record of any workplace-related injury – which is a legal requirement in such cases – has been produced, if indeed it exists.

In none of the material issued by the GM is there any evidence of "tangible harm proven to employees". Again, there should be a large amount of evidence for this: for harm to be proven, some form of tribunal or authority would need to have assessed the evidence, and deemed it so. Yet there is no record of any this being provided, nor is there even evidence of unproven harm being provided. Again, this amounts to hearsay.

The GM is clearly stating that this "evidence" and these "facts" were important in his decision-making process, despite none of it being made available to Filmer-Sankey, before or since his dismissal. One is left with a distinct impression that this material, in some form or other, is contained in the Sage Report, but it is impossible to verify this. It is possible, however, that it may exist in another form, in which case, likewise, it should have been made available. But until then, it is simply hearsay being presented as solid fact.

The GM (and the LCC meeting of September 6, 2010) has refused to release the Sage Report to Filmer-Sankey on the grounds that to do so would breach the undertaking of confidentiality to those who were interviewed, and that to do so could endanger their mental health, thereby breaching Occupational Health & Safety (OH&S) requirement. The concerns relating to OH&S are important, however, one does not have the option of breaching one law in order to avoid potentially breaching another.

Yet the GM appears to consider he does: at the Council Meeting cited above, he goes on to say: "the most fundamental legal and moral obligation that I have as General Manager is to ensure a safe working environment…", whereas his actual fundamental legal obligation is to ensure the Law, in its entirety, is obeyed, to the letter and in spirit.

(This is a requirement for Aldermen, set out in the opening paragraph of the Code of Conduct, so they – and the GM – should have been aware of it, yet none thought this worthy of remark when it was made in response to questions in a Council Meeting.)

Clearly, this situation is of the GM's own making in that he commissioned and acted on a secret report and perhaps other material. To then hide behind the issue of OH&S requirements does not give the GM the right to breach Natural Justice in denying those against whom he has made allegations a right to view the relevant material.

One way out of this dilemma would have been for the GM to have identified key issues of concern to him, ie the allegations he made, and to have then approached those concerned and invited them to have made formal complaints, the contents of which, and any related evidence, would then be made available to all parties concerned. If any person declined to make a formal complaint for whatever reason, then that matter should have been excluded, ie dropped. This would have been in accordance with standard workplace policy and procedures.

It should also be pointed out that the GM has repeatedly stressed that the Sage Report was "independent". The Report was commissioned by the GM and paid for by Council on his authority. It is simply a consultant's report, nothing more, nothing less.

Without casting aspersions on the as-yet-unseen Sage Report, the process and methodology of any report is itself a crucial part of the evidence – how material was collected and compiled must be open to scrutiny by all affected parties, which is why any investigating officer or professional is required to appear, in person, to give evidence before a court or tribunal on their reports under consideration.

The use of selected extracts by the GM in no way circumvents or satisfies this requirement, especially as there is good evidence that the GM did not actually do this, as he claims. Indeed, several questions have been raised as to the methodology and appropriateness of some aspects of the report, aspects which are themselves highly material to the allegations that the GM extracted from it.

Thus, the refusal of the GM to disclose the Sage Report and any other relevant material to Filmer-Sankey is evidence of a serious breach of Natural Justice on more than one count

The following is an extract from *The Law Handbook (ch: Grounds for Review)* by Fiona L. McKenzie, Barrister

Available online at:

http://www.lawhandbook.org.au/handbook/ch21s02s06.php

Natural Justice

There are two key components to "natural justice":

1. being given a reasonable opportunity to be heard (the "fair hearing rule"); and
2. having a decision made by a decision-maker who is free from actual *bias* or the appearance of bias (the "bias rule").

The principles of *natural justice* (today sometimes described as "procedural fairness"), apply at first glance to all administrative decision-making situations. However, they only bind administrative bodies where a judgment is being made that may have the effect of interfering with an interest of the individual. They do not apply when general policy, for example, is being determined.

Over the years, the courts have widened the notion of interest to include "legitimate expectations". An individual may have a legitimate expectation where they satisfy express statutory criteria, or where an assurance has been given or where a regular course of conduct has been followed. The High Court decided that the ratification by Australia of the United Nations' *Convention on the Rights of the Child* could serve as the basis of a legitimate expectation that decision-makers would act in conformity with the Convention (*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20). However, the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6 doubted the reach of the *Teoh* case (above) and focused on concepts such as real unfairness.

1. FAIR HEARING RULE

If a situation is one in which *natural justice* should be given, the next question is what procedures should have been followed. Legislative procedures may overlap with *common law* obligations of natural justice. To start with, read the Act governing the body or official responsible for the decision. Major authorities are usually governed by a strict procedure laid down by an Act. These Acts usually answer questions such as:

1. How much notice must be given of a hearing before the authority holds it?
2. Can a person appearing before the authority have legal representation?

3. How many persons must sit on the authority?
4. Are the proceedings governed by strict rules about the presentation of evidence?
5. Is a party entitled to cross-examine?

The common law rules of natural justice will usually supplement statutory procedures for a fair process. Where nothing is said in the Act, the presumption is that a person with an interest in the decision will be given an opportunity to be heard before an adverse decision is made.

The natural justice arguments that most often lead to a finding in favour of the citizen involve failure to:

- give adequate notice of a hearing;
- give a person a sufficient opportunity to present a case; or
- give a person notice of something that is unknown or "not obvious" to them.

(See: *Administrative Power and the Law* (details in "Further reading", below) for further discussion on this topic.)

2. NO BIAS RULE

The other rule of *natural justice* is that the proceedings should be free from *bias* or the appearance of bias.

Under the *common law*, the general standard used by the courts is to ask whether a reasonable person would have held that the decision made by the body was not free from bias. A lot depends on the status of the *tribunal*, the significance of the decision-making body and the extent of the evidence of bias.

It is easiest to show bias where a decision-maker has a direct *pecuniary* interest in the outcome of a matter, for example, where the decision-maker is a major shareholder of a company that will be affected by the decision. However, simply holding shares in a company affected by the decision may not be sufficient if, for example, the shares are in a large publicly listed company and the decision is unlikely to affect the share price (*Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] 2 VR 573).

There are other situations where a person may be biased. The person may be a relative of one of the parties, or have had a past professional association with one of the parties, or in the past expressed hostility to views being put by one of the parties. There are no easy answers as to whether these situations will be sufficient to amount to bias. It is often a question of degree.