

REPORT: A COMPLAINTS AND DISCIPLINE SYSTEM FOR THE AUSTRALIAN ANTHROPOLOGICAL SOCIETY?

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Introduction

This report considers the issue of whether the constitution of the Australian Anthropological Society should be changed so as to empower the Society to investigate and adjudicate complaints that members have not conformed to the tenets of the Society's Code of Ethics. In effect, it considers reasons for and against the Society developing a complaints and discipline system.

The first section considers the nature and function of complaints and discipline systems, including their relation with codes of ethics. The second section looks at considerations for and against the institution of a complaints and discipline system by the Australian Anthropological Society. In general terms, it is clear that a well-designed and functioning complaints and system complements and strengthens a code of ethics. However there may be particular reasons, such as lack of resources which make it inadvisable for the Society to attempt to institute such a system. The third section provides a schematic outline of a complaints and discipline system that might be put in place, should the Society decide to do so.

1: Codes of ethics and complaints and discipline systems

Codes of ethics. A code of ethics states the animating purposes and guiding ideals of a profession, organization or association, as well as presenting in broad terms guidelines to action in conformity to those purposes and ideals. Codes have at least three main functions, which can be called educative, integrative, and regulatory. Codes are **educative** in as much as they help members become clearer and more reflective about such matters as the basic ends of an occupation, the rights and duties of the members of the occupation, the constraints on their activity, the rights of clients and so on. They are **integrative** in as much as they help form and perpetuate a self-conscious community of practitioners, through the process of discussion, debate etc out of which codes arise and are revised, and through the individual and collective commitment to a common set of ideals and principles. Codes are **regulatory** in as much as they influence and constrain the behaviour of the members of the association, and the expectations of other stakeholders about that behaviour. To serve these functions, codes need to be seen as living things, open to revision in the face of new developments and the gaining of knowledge about their strengths and weaknesses.

Codes of ethics are one (important) element in what might be called a professional integrity system. Other elements in such a system can include a complaints and discipline system, professional education, research, as well as legal regulation. Jointly, these elements should assist members of a profession achieve its overriding purposes or goals in an ethical manner.

Complaints and discipline systems. Like a code of ethics a complaints and discipline system has a number of functions. The most important of these, in my view, is that of **grievance resolution**. These grievances may be held by clients, by research participants, by third parties affected by the behaviour of members, or by other members. It is common for grievances, especially those of clients, research participants and third parties, to rest on misunderstandings of the responsibilities of the practitioner, the rights of the client or research participant and so on. Such grievances can often be resolved through overcoming these misunderstandings. Other grievances may be resolved through discussion and negotiation or mediation. In many cases, bearers of grievances are motivated by the desire that the person or agency they believe has wronged them acknowledge and apologise for their wrongdoing. In the first instance, then, a complaints and discipline system may resolve grievances through providing information, or directing parties to a dispute towards the resources they need to settle it between themselves.

Where grievances cannot be resolved in these ways, they may need to be dealt with more formally. This may be through the discipline process of the complaints and discipline system, or it may be through a court or some other such forum.

The second function of a complaints and discipline system is the **detection of breaches of professional standards**. Here a distinction can be drawn between unsatisfactory conduct, on the one hand, and misconduct on the other. Unsatisfactory conduct is conduct that falls short of the standard of competence and diligence that can reasonably be expected of a competent practitioner, as a consequence of carelessness or haste, for example. Misconduct describes more serious breaches of occupational standards. It might involve deliberate wrong-doing, as when a practitioner holds themselves out as possessing qualifications or competencies they do not have, or gives a client false information in order to win a commission or a promotion. It might also involve negligent or reckless breaches of professional standards that the member should have known were likely to create substantial risks of harm or cost to others. Moreover, a pattern of behaviour might constitute misconduct even though any single element in that pattern by itself would not.

Further functions of the complaints and discipline system are involved in the responses made to breaches of professional standards. The third function of such a system is to reveal areas in which a member who has breached ethical standards needs **further development**, through training, supervision and the like.

Fourthly, in the case of serious breaches, the system may function to **sanction** the member and/or direct them to provide **restitution** to those harmed by their actions.

Fifth, the way in which the system processes complaints and responds to demonstrated breaches has an important role in **setting and reinforcing professional ethical norms**, by demonstrating the kinds of behaviours the profession sees as unacceptable and apt for sanctioning, and how seriously different sorts of breaches are regarded. The treatment of complainants by the complaints and discipline procedure itself sends important messages about the appropriate attitude to take to research participants, clients, and fellow members. Moreover, codes of ethics and the like tend to be couched in general terms. The AAS code, for example, enjoins researchers not to accept work for which they are 'insufficiently qualified'. But what counts as 'sufficient' qualification? The determinations of the panels empowered to adjudicate in complaints, then, in effect specify how the general statements of codes of ethics are to be interpreted in practice.

Finally, a complaints and discipline system has an important function in **gathering information** for use by individual members of a profession, work settings (such as universities or public sector agencies) and the profession as a whole. Data should be collected about the context, nature (eg conflict of interest, disrespect etc.) and frequency of complaints. Aggregated data of sources, kinds and frequency of complaints made, and upheld, can be used to identify ways in which sources of conflict can be removed or reduced (through, for example the development of a pro forma consent form), or where professional education is needed, or a public communication strategy needs to be developed or refined (for example, in cases where many complaints are shown to be based on a misunderstanding of the role of the anthropologist), or in which the code of ethics should be reconsidered. Against the background of such data for the profession as a whole (or relevant sub-groups thereof), information about individuals can be used to identify those who are 'at risk' (who have, say, an unusual number of low-level complaints made against them) and action, such as professional development and/or monitoring, to be taken. Likewise, comparisons of similar professional settings may reveal anomalous patterns of complaints (ie noticeably high or low compared to the norm) indicating the need for further investigation and, perhaps, action.

Ideally, a complaints and discipline systems will embody all these functions. However, there are a number of difficulties standing in the way of constructing a system which actually does this. Some of these difficulties are generic. For example, there is a tension, at least, between the 'grievance resolution' and 'sanctioning and restitution' functions, where fear of becoming liable for serious sanctioning will act as a disincentive for a practitioner to admit to mistakes, which, in turn, is likely to further fuel the complainant's sense of grievance.

Moreover, what might be broadly thought of as a professional 'culture' might militate against detection of wrongdoing, with colleagues unwilling to lodge complaints against each other, even in cases of egregious wrongdoing, or to treat complaints seriously if they have adjudicative responsibilities.

From the characterisation of the functions of a complaints and discipline system outlined above, we can derive a number of general characteristics which such a system should possess. The overarching requirements are that the system is constructed in such a way as

to achieve both procedural and substantive justice. That is, it should have fair, transparent and effective procedures in place which are likely to reveal the truth concerning (mis)conduct, and deliver responses appropriate to that conduct.

Procedural justice, in this context, encompasses more than just the regulations governing the workings of disciplinary tribunals. It also includes the broader ‘user-friendliness’ of the whole system, such as ease of access, speediness of dealing with complaints, support for participants, and so on, in so far as these affect the substantive justice of the way in which the system deals with wrongdoing. Most professional associations have, at best, limited investigative powers and lack coercive powers, and depend on volunteers to sit on tribunals. Their complaints and discipline systems, then, are only likely to function effectively if their members, and those affected by members’ actions, are willing to participate.

If potential complainants perceive that the complaint process is difficult or futile, or that they are likely to be met with hostility, they are obviously less likely to make or proceed with a complaint. That impinges on all the functions of the complaints and discipline system (for example, it distorts information about occupational malfeasance, subverts proper norms regarding practitioner/client relationships, magnifies rather than resolves grievances, and so on.) Similarly, if members perceive that the system is unreasonably harsh (or unreasonably lenient) or selectively applied, they may be less inclined to participate in or support it.

In the light of the account of the functions of a complaint and discipline system given above, there seem to be clear disadvantages in modelling the discipline portion of the system on the adversarial approach of eg Australian criminal courts in which one party aims to demonstrate wrong-doing on the part of another, and to exact as severe a penalty for that wrong-doing as possible. Such a system tends to encourage subjects of complaints to deny wrongdoing, making it more difficult for the truth to emerge, for wrongdoers to own their actions, and for complainants to have their genuine grievances addressed.

II: Considerations for and against the AAS adopting a complaints and discipline system for dealing with alleged breach of its code of ethics

A properly functioning complaints and discipline system would help maintain the effectiveness and relevance of the Society’s code of ethics. Such a system demonstrates that the Society does more than pay lip service to the ideals laid down in the code of ethics, provides guidance to members and others as to how the code should be interpreted in practice through its outcomes, and generates information which can be used as evidence in discussions about the revision and extension of the code. In my view, other things being equal, the Society should put in place such a system.

The main considerations which might tell against the institutions of a complaints and discipline system are practical in nature.

- Firstly, to be effective, the system has to be properly resourced. That is, the Society must be able to investigate and adjudicate complaints in a thorough and timely manner. If there are insufficient resources of money and (presumably voluntary) person-power to do this, either serious complaints will not be dealt with or the process will deliver unsatisfactory, unjust outcomes. Does the Society actually possess the necessary resources, and if so is it prepared to commit them to this purpose?
- Secondly, the people involved in running the complaints and discipline system have to be, and perceived to be, free from personal interests and bias, competent and fair-minded etc. Assuming that these people will mainly be volunteer drawn from the – relatively small - membership of the Society, will this in fact be possible, especially in relation to contentious matters?
- Thirdly, the system must not be self-defeating in that it deters anthropologists from becoming or remaining members of the Society. I do not know to what extent membership of the Society is seen as a mark of professional status. If non-membership is likely to stand in the way of employment, consultancies etc then the Society is well-placed to impose appropriate sanctions for serious breaches of its code of ethics, since these sanctions will be seen as the necessary cost of membership. If, on the other hand, membership of the Society is generally seen as a nice but non-central part of professional life (as eg philosophers tend to regard membership of the Australasian Association of Philosophy) then expulsion from the Society will not be experienced as a serious harm, and members might simply leave rather than accept other sanctions of any weight.

These considerations are, I think, cogent. However, how weighty are they? That is, as a matter of fact, how serious obstacles are they to setting up and running a well-functioning complaints and discipline system? If, for example, it is likely that there will be relatively few complaints, then the resource issue diminishes in weight. Similarly, if most of the complaints made can be diverted to other forums, or resolved through discussion and mediation, then there is little reason to be concerned about the effect of sanctions on membership numbers.

Information about these matters could be sought from cognate organisations which have, or have had, complaints and discipline systems in place, as identified in the Society's 'Ethics Accountability and Procedures Review' of May 2009. The Anthropological Association of Western Australia is an obvious source of information. Of those listed in the review, the Australian Association of Consulting Archaeologists has the most detailed system in place, and unlike a number of the other organisations which have allowances for sanctions, has sanctions other than expulsion available to it. The American Anthropological Association did have a complaints and discipline system, which it subsequently abolished. Reasons for that decision are given in the 'Final Report of the Commission to Review the AAA Statement on Ethics'. I list these reasons in bold below with my responses to them.

- 1. There was no specification in the Statement of Ethics as to the nature of sanctions for breaches.**

This is not, in itself, a reason to abolish the complaints and discipline system. It is a reason to adjust the Statement of Ethics.

2. Members are not required to commit to abide by the Statement of Ethics.

Again, this is not, in itself, a reason to abolish the complaints and discipline system. It is a reason to change the conditions for membership.

3. The Statement of Ethics does not apply to non-members.

How is this a reason not to have a system for enforcing the ethics of members?

4. There is only a limited number of kinds of complaints which can be made and acted on (presumably only those which reflected breaches of the Statement of Ethics.)

If the Statement of Ethics is thought to be incomplete it should be altered. If it is not, it is hard to see why this is a reason against a complaints and discipline system.

5. The existence of a complaints and discipline system leads some people to file complaints that would be better handled in other venues.

Perhaps, but if so it is a relatively simple matter to point them to those venues. Moreover, on-line information can be provided which will allow complainants to see for themselves where their grievances are likely to be best addressed.

6. The AAA does not possess the resources or expertise to engage in ‘due process’.

It is unclear what the AAA means by ‘due process’. An association’s disciplinary hearing is not a court (this is discussed further below). Numerous professional associations and the like run complaints and discipline systems, apparently satisfactorily.

7. The fact that no ethics case ever reached a final hearing stage and that no sanctions had ever been levied implied that the complaints and discipline system was not in fact taken seriously.

Perhaps. But again, presumably the response could be to start taking it seriously, rather than abolishing it, if there is in fact good reason to have it.

III: Outline of a complaints and discipline system for the AAS

Here I provide a schematic outline of a model complaints and discipline system for the AAS. My purpose in doing so is to give some idea of what would be involved in setting up and running such a system, to help the Executive to see to what extent it is feasible for the AAS. This outline includes details of the content of the system as well as the processes which may be put in place to achieve its functions. The content of the system will specify such things as: the purposes of the system, who can bring complaints, what kinds of behaviours can (and cannot) they complain about, who can adjudicate complaints, and what kinds of responses are available to those who do adjudicate? Processes include: information about complaints and discipline systems, procedures for making of complaints, filtering and classification of complaints, initial responses to complaints, assistance to complainants and subjects of complaints, adjudication of complaints, enforcement of sanctions, publicising of findings.

1) Information.

Information should be freely available to members of the public, and to members of the Society about how to lodge a complaint, the ways in which complaints will be handled, as well explanation of the purpose, structure and workings of the complaints and discipline system. (The development of the internet has obviously facilitated the promulgation of this information and made the lodging of complaints much easier.) Such information may explain:

What is the purpose of the complaint and discipline process?

- Resolution of disputes between anthropologists and research participants, anthropologists and clients, or between anthropologists.
- Detection of improper, incompetent conduct.
- Guidance to further professional development as needed.
- Guidance to members of the profession and others as to expected standards.
- Sanctioning in the case of serious misconduct.

Who may lodge a complaint?

- Research participants.
- Clients.
- Fellow practitioners.
- The Society (eg in case of adverse legal finding).

What cannot be complained about?

(Probably) **not**

- complaints about contractual or legal matters.
- obtaining financial restitution or compensation.

(though there may be advice about where to go to deal with these eg an alternative dispute mechanism such as a community justice centre, mediation or arbitration or through direct court action).

What can be complained about?

Conduct which does not conform to the standards specified or implied in the code of ethics.

Complaints should perhaps be classified as either:

- **Unsatisfactory professional conduct**, involving a substantial or consistent failure to reach reasonable standards of competence or diligence.
- **Professional misconduct**, involving more serious breaches of professional standards such as deliberate wrong-doing, or negligent or reckless breaches of professional standards that the member should have known were likely to create substantial risks of harm or cost to others.

2) Processing of complaints

On receipt of a complaint:

- Complainant may be required to provide further information.

- Determination of (lack of) *prima facie* case (complaint may be rejected as eg frivolous, vexatious, misconceived or beyond the powers of the disciplinary body).
- Complaints judged outside the system's scope may be referred on.
- If it is decided that there is a *prima facie* case to be answered, complaint is classified (as eg unsatisfactory professional conduct, or professional misconduct).
- Notification of subject of complaint of the nature of complaint, possible courses of action and all other relevant information within n (say 3) days of receipt of complaint, together with offer of support and advice.
- Response to complainant of determination regarding indicating whether there is a *prima facie* case to be answered, possible courses of action and all other relevant information within n (say 3) days of receipt of complaint, together with offer of support and advice.
- Staged, flexible process for resolution of complaint, including exploration of mediation and other means.

3) Panel hearing

If complaint cannot be otherwise resolved, it should go to an adjudicative panel hearing.

- The panel should be independent, impartial, objective and credible. The composition of the panel should be determined with regard to the nature of the complaint (eg does it concern a matter where technical judgment or specialised knowledge will be necessary). Typically, panel members will be drawn from the membership of the Society as well as other stakeholder groups, such as members of a community where research was conducted.
- The laws of evidence do not apply (though natural justice must be observed). The panel must be 'comfortably satisfied' that improper conduct has occurred, based on the evidence presented.
- There is a presumption in favour of open hearings, given the desirability of transparency. The panel may decide to close hearings in particular cases.
- It is not desirable for lawyers to represent parties to a dispute in hearing, given the need for expediency and economy. However, a respondent may be allowed to employ a legal representative who may attend but may not speak during a hearing unless invited by the Chair of the Panel and to the extent of issues defined by the Chair.

4) Outcome

If the panel decides that the complaint is upheld it may impose sanctions including:

- a fine;
- counseling;
- reprimand;
- admonition;
- the undertaking of specified professional development;
- the obligation for specified decisions to be referred from time to time to an appropriate person;
- the obligation to operate professionally for a specified time under the

- supervision of an appropriate person;
- expulsion from membership;
- suspension from membership;

The complainant and subject of complaint will be notified of the findings within n (say 3) days.

(My intention here is to list the range of sanctions which are available. The Society may decide, of course, that some of these exceed its powers.)

5) Appeal

- Grounds for appeal should be specified.
- If complainant, subject of complaint, or member of the professional body is dissatisfied with the finding or sanction imposed by the panel, and there is grounds for an appeal, they should be able to appeal to an independent review panel.
- Membership of the review panel should be different to that of the panel, though the criteria for membership should be the same.

(Alternatively, appeals could be heard at general meetings of the Society, as is the practice of the AAWA.)

6) Publication

- Where a complaint has been upheld, findings should be published (on-line), in an easily accessible form.
- In the case of serious misconduct, names should be named.
- In other cases, findings should be anonymised.

7) Analysis, review and revision

Data should be gathered about:

- source, number and kind (eg complaints of serious misconduct, professional incompetence etc.) of complaints.
- response to complaints (eg referral to panel, dismissal of complaint as trivial etc.).
- outcomes of complaints referred to panel (eg numbers upheld/dismissed, most commonly upheld kinds of complaints, action taken in response to upheld complaints).

This data can be used for such purposes as:

- public education programs (where eg common complaints demonstrate ignorance of relevant law etc.).
- professional education (where common complaints demonstrate lack of competence among membership, common failures of communication to clients etc.).

The peer review complaints and discipline system itself should be reviewed from time to time, with eg information gathered from complainants and respondents, as well as from other members of the Society, and other stakeholders. Such review may indicate the desirability of revision of parts of the system.

This outline is informed by the *Policy Statement on Complaints and Discipline Systems* published by the Professional Standards Council (http://www.lawlink.nsw.gov.au/lawlink/psc/ll_psc.nsf/pages/psc_publications)

and by information about the complaints and discipline systems of the following Australian organizations:

Institute of Chartered Accountants

Disciplinary policy paper at

http://www.charteredaccountants.com.au/member_complaints_discipline/disciplinary_policy_paper

General information about the complaints process

<http://www.charteredaccountants.com.au/A116917062>

Description of the complaints process

http://www.charteredaccountants.com.au/member_complaints_discipline/the_complaint_process

Engineers Australia

http://www.engineersaustralia.org.au/about-us/discipline-complaints/complaints-against-members/complaints-against-members_home.cfm

Australian Valuers Institute

http://www.valuersinstitute.com.au/main/page_professional_practice.html

Safety Institute of Australia

<http://www.sia.org.au/services/complaints-procedure/>