Public Accounts Committee
Parliament of New South Wales

Report on

Legal Services

Provided to

Local

Government

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FIFTY-SEVENTH REPORT

OF THE

PUBLIC ACCOUNTS COMMITTEE

(Inquiry pursuant to Section 57(1) of the Public Finance and Audit Act 1983, concerning the Legal Services Provided to Local Government)

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TIIE PARLIAMENT OF NEW SOUTH WALES-1991

From left:
Phillip Smiles (Chairman), George Souris (Vice Chairman), Allan Walsh, Terry Griffiths, John Murray

Members of the Public Accounts Committee

The Members of the Public Accounts Committee of the Forty-Ninth Parliament are:

Mr Phillip Smiles, LLB., B.Ec., M.B.A., Dip. Ed., M.P., Chairman

Phillip Smiles was elected Member for Mosman in March 1984. A management and marketing consultant since 1974, Phillip Smiles has been involved with entrepreneurial business activities since his teens. Since entering Parliament he has been actively interested in areas of small business, emergency services, welfare and financial analysis. He was appointed a Member of the Public Accounts Committee in 1984 and was elected Chairman in 1988.

Mr George Souris, B.Ec., Dip. Fin. Mangt., F.A.I.M., F.A.S.A., C.P.A., M.P., Vice Chairman,

George Souris was elected Member for Upper Hunter in 1988. An accountant in public practice for 12 years, George Souris also served as a Shire Councillor in Singleton for seven years, four of which were as Deputy President. At university he was a Rugby Blue, represented N.S.W. Country, Australian Universities and Australian Colts rugby teams. He is the N.S.W. Parliament's appointed Member of the University of Newcastle Council. George Souris has experience in taxation and business management and an interest in financial analysis. He is a member of Rotary and other community organisations.

Mr John Murray, B.A., M.P.

John Murray, formerly a teacher, was elected Member for Drummoyne in April, 1982. An Alderman on Drummoyne Council for three terms, John Murray was Mayor of the Council for five years and served four years as Councillor on Sydney County Council. He has served as a member of the Prostitution Committee and the House Committee, and is a former Chairman of the Public Accounts Committee.

Mr Allan Walsh, B.A.(Hons), Dip. Ed., M.P.

Allan Walsh was elected Member for Maitland in September, 1981. Following eight years as a Mirage fighter pilot with the R.A.A.F., he was involved in business management. Allan Walsh has also taught industrial relations, management and history at technical colleges.

Mr Terry Griffiths, M.P.

Terry Griffiths was elected Member for Georges River in 1988. Prior to being elected to Parliament he was the Chief Executive of the Scout Association of Australia. Before this he was an Army Officer. He is a graduate of the Officer Cadet School Portsea, a graduate of the School of Military Engineering and a Fellow of the Australian Institute of Management. He has been actively involved in Lions, Rotary and other community organisations.

* Mr George Souris, M.P., Member for Upper Hunter, was appointed to the Committee on 23 February 1989, and elected Vice-Chairman on 2 March 1989. Mr Souris replaced Miss W. Machin, M.P., who was appointed to the position of Chairman of Committees on 23 February 1989.

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Chairman's Foreword

On few occasions during the seven years I have been a Member of the New South Wales Public Accounts Committee, has the Committee released a report of more fundamental importance than this one.

Throughout the period of the Inquiry the Public Accounts Committee received continuing evidence of a massive blowout in legal service costs funded by the State's 176 Local Councils and Shires, a preparedness by a number of Councils to shelve their planning management duties by encouraging any planning issue that might involve some controversy to be settled in the Land and Environment Court and Aldermen and Councillor making decisions apparently without reference or concern to the costs thereby incurred by both their Council and the applicant rate payer.

The framers of the Local Government Act of 1919 would not have foreseen that legal costs would rise to a level, as now has occurred, which requires a separate reporting framework.

Reported expenses in this area nearly doubled in the five years between 1982-87 and have continued to increase during the three years thereafter. The Land and Environment Court is clogged with cases that are appeals from Council decisions that may well have been settled in a more speedy fashion and without the tens of thousands of dollars legal costs incurred if only an alternate dispute resolution process was available and/or Councils across the State exercise the leadership role that they were elected to perform.

Rate payers and tax payers in New South Wales have a right to be concerned at what passes for appropriate planning decisions in this State. It is to be hoped, for the sake of the bank balances of building applicants and Councils alike that this report will provide a significant impetus for changes that must be made.

In fairness to the State's Local Government sector this Inquiry revealed the complexity of the wide range of responsibilities faced by each individual Council under the existing Local Government Act with its *655* sections, 103 audit answers and over 1,000 separate provisions. If Council attitudes and self-management must change following this report so, equally, must the long-promised reform of the Local Government Act be made a reality sooner rather than later.

In conclusion, I would like to thank my fellow Committee Members who exhausted hundreds of their precious hours to significantly contribute to this report, the many Councils which very generously and frankly provided information, not always in their favour to the Committee, and Mr Andrew Kelly for his professional dedication in assisting the Committee with this report.

Phillip Smiles L.L.B., B.Ec., M.B.A., Dip. Ed., M.P.
Chairman

Executive Summary

Local government is a great consumer of legal services. A number of recent governmental inquiries into the cost of justice reflects the fact that legal services are rarely cheap. The annual expenditure on legal costs by some Councils runs into as much as hundreds of thousands of dollars of ratepayers' funds.

The Committee experienced enormous difficulty in obtaining detailed breakdowns of legal costs incurred by local government. Details of costs in different areas of Councils' activities and in various types of court action had been sought. Councils were unable to readily provide the information sought by the Committee.

The extent of local government legal costs may be partly attributed to the diffuse and complex nature of its legislation. The current review of the Local Government Act 1919 should help ameliorate many problems. Other reasons behind the level of costs include the nature of the functions carried out by local government and the level of scrutiny under which it operates.

Many Councils pointed to the planning system established under the Environmental Planning and Assessment Act 1979 as the source of the most significant increases in legal costs. This legislation is renowned for its complexity.

The Committee believes that the planning system could be vastly simplified by the consolidation of all levels of planning instruments to enable a "one plan" system for each parcel of land. Despite initial costs in altering the system, the Committee recognizes substantial cost benefits in planning administration as well as for all parties involved in land transaction. Moreover, reduced complexity means less scope for legal challenge. The Committee also suggests that plans be cast in plainer English.

The Committee suggests a stronger emphasis on strategic planning. Councils which operate systems of well drafted and up to date plans which are regularly reviewed should be less likely to attract legal challenge.

A great deal of legal expense is incurred in the development application process due to opportunities for merits based appeals. Sharper focus on well drafted conditions of consent and reasons for refusal is warranted. Problems experienced by Councils arising from "deemed refusals" are also evident. Legislative amendment is suggested in order to overcome potentially costly problems in certain circumstances. The lack of adequate resources to cover complex proposals is another area of concern,

particularly smaller Councils. The Committee recommends the establishment of a State-wide panel of independent experts to assist in these cases.

In addition to exploring the planning system itself, the Committee gave consideration to related aspects of the internal decision making processes within local government. The Committee is convinced that more attention to preventing and resolving potential conflict early in the process can serve to minimize costs by reducing opportunities for later legal action. It is suggested that Councils leave behind some entrenched attitudes and develop a more client-oriented service approach in carrying out their functions.

The Committee believes that greater attention should be given to the provision of information services, particularly at the pre-lodgement stage. In regard to the actual assessment of proposals, more emphasis is needed on the development of negotiation skills and dispute resolution techniques. Furthermore, clear and accessible policies on internal procedures and processes are recommended, including the areas of public consultation and delegation of authority. The Committee supports ready public access to certain Council documents and suggests a legislative change in this regard.

One problem of particular concern to the Committee is a tendency on the part of some Councils to avoid difficult decisions in determining development applications which inevitably result in costly appeals to the Land and Environment Court. In order to help overcome this problem, the Committee suggests stronger networks of planning controls, better feedback to the elected representatives on the cost impact of their decisions and more emphasis on resolving disputes earlier in the process. The Committee also suggests the introduction of public hearings by an independent and appropriately qualified person who would make recommendations to the Council before the final decision is reached.

Litigation in the Land and Environment Court is costly. Councils are frequently involved in actions before this Court in defending appeals against the determination of development and building applications, and responding to judicial review proceedings.

The Court has become increasingly dominated by lawyers, including senior counsel, even in simple merits appeals where questions of law may not arise. The Committee urges Councils to consider reduced reliance on legal representation in merits appeals.

Apart from legal representation, a major cost factor in actions before the Court may be excessive expert evidence. The Committee suggests that opportunities for the restriction of expert evidence be investigated.

The Court has recently introduced optional mediation and compulsory issues conferences in some classes of its jurisdiction in an attempt to facilitate the resolution of disputes prior to full hearing. Whilst the Committee supports these moves, it notes that Councils must be prepared to delegate sufficient authority to the persons attending such conferences to enable real agreements to be reached. Councils will need to adopt new administrative mechanisms to ensure their success. Any agreement reached will need to be binding on the parties.

An existing alternative forum for the resolution of planning and environmental disputes is the Commission of Inquiry. This mechanism has the particular advantage of enabling many parties to be heard. It also has flexibility in its procedures. The Committee encourages reduced reliance on legal representation before Commissions of Inquiry.

The Committee recommends an expanded role for Commissions of Inquiry to enable Councils to request the Commissioners to conduct a public hearing in respect of major local and controversial developments before the Council reaches its final decision. The Committee is of the view that this would minimize the number of appeals to the Land and Environment Court against Council decisions.

The Commissioners should have the discretion to decline such a request. In these cases, the Committee suggests that Councils have the option to request the Local Government and Shires Associations to appoint a suitable person from an established panel to conduct a "mini" inquiry and make recommendations to the Council.

Other options to resolve costly disputes are already available to Councils outside the traditional systems. Significant interest has recently arisen in the application of alternative dispute resolution techniques, and in particular mediation, to environmental conflicts. Opportunities exist for consideration prior to the lodgement of an application and indeed both before and after a Council's decision. The Committee does stress, however, that further investigation is required on how such techniques can be integrated into the existing system.

One type of legal action which is particularly difficult to resolve before entering the courtroom is that of disputes between elected representatives, and between elected representatives and the Council, where public conflict may even be the initiator's prime objective. Some Councils have incurred significant legal costs as a result of such actions. The Committee believes that a more cost effective means to resolve these disputes be developed and suggests a system of arbitration by an independent statutory officer.

The Committee also explored the need for cost-effectiveness in the direct provision of legal services. The Committee is convinced that Councils should regularly review their external legal services. A legal services committee or subcommittee could fulfil this role. This review would preferably involve calling for tenders, particularly for specialist legal advice, although it is stressed that the ultimate decision should not be based on the level of fees alone. Councils which experience high legal costs might also consider the options of in-house legal services and the establishment of panels of key legal advisers.

In order to minimize costs, Councils must review their own internal arrangements in regard to legal consultation. Problems are evident concerning excess staff access to legal advisers and the assembling of documents passed on to solicitors. The Committee recognizes advantages for Councils in the appointment of legal services officers who would be responsible for the co-ordination and monitoring of all contact between a Council's administrative structure and its legal advisers.

Increased accountability and better information is needed on local government legal expenditure to both elected representatives and the community. The current annual statements of accounts are considered insufficient; the requirements should be altered in order to provide a detailed breakdown of all legal costs. A legal services committee would be in the prime seat to make regular reports to a Council detailing legal costs and summarising individual actions. The costs quoted should also involve internal costs, such as staff time. This would enable aldermen and Councils to be more aware of the cost implications of their decisions. Details of legal expenditure in the Annual Report to ratepayers and other media would also put residents in a better position to assess the performance of their Councils in the management of costs in the legal arena.

Recommendations

1. It is recommended that the Department of Local Government, the Local Government and Shires Associations, tertiary institutions, the private sector and individual Councils be encouraged to initiate training programmes for local elected representatives on legal aspects of local government, and that Councils be encouraged to sponsor the participation of their elected representatives at such training programmes.

   Chapter 2

2. It is recommended that the scope for on-the-spot fines for infringements under Council jurisdiction be increased.

   Chapter 2

3. It is recommended that the Minister for Local Government and Minister for Planning investigate the consolidation of the various levels of environmental planning instruments in New South Wales into a form which provides one comprehensive planning document for each parcel of land.

   Chapter 3

4. It is recommended that the Department of Planning prepare State Environmental Planning Policies and Regional Environmental Plans in plain English and prepare guidelines for distribution to local government on the preparation of local environmental plans in plain English.

   Chapter 3

5. It is recommended that Councils be encouraged to prepare all planning documents, including development control plans and other advisory documents, in plain English.

   Chapter 3

6. It is recommended that the reasons given by Council for refusal of a development application or the imposition of conditions of consent pursuant to Section 92(2) of the Environmental Planning and Assessment Act 1979 be made more explicit and precise and be written in plain English.

   Chapter 3

7. It is recommended that Section 96 of the Environmental Planning and Assessment Act 1979 be amended in order to extend the standard 40 day period (for which an undetermined development application is deemed to have been refused) in the following cases:

   a. when a Council makes a reasonable request to another authority for advice on a development application;

   b. when a Council advertises the development application or seeks the advice of adjoining owners/occupants and otherswhich might reasonably be affected by the proposal, in accordance with a relevant environmental planning instrument or development control plan; and

   c. when a Council makes a reasonable request to an applicant, in writing, seeking further information or an amendment to the development application.

   Chapter 3

8. It is recommended that each Council develop a 'fast track' approval mechanism for development applications which comply with all relevant environmental planning instruments and policies.
   Chapter 3

9. It is recommended that the Local Government and Shires Association consider the establishment of a panel or panels of experts in environmental assessment and other fields, wherein upon the request of a Council, the Associations would appoint an expert to provide consultancy services to that Council in the assessment of a development application where the limited resources of that Council do not enable such assessment to be adequately carried out.
   Chapter 3

10. It is recommended that local government building staff be encouraged to undertake training programmes in planning and environmental assessment.
    Chapter 3

11. It is recommended that each Council undertake a comprehensive review of its development and building processes with a view to promoting not only efficiency but also open and service-oriented systems.
    Chapter 4

12. It is recommended that Councils rationalise the provision of their information services and employ senior rather than junior officers, who have undergone or are undergoing training in public relations, negotiation skills and dispute resolution skills, to attend to enquiries from members of the public.

Chapter 4

13. It is recommended that each Council provide a designated suitably furnished area or room for informal and formal meetings involving planning and other matters.

Chapter 4

14. It is recommended that each Council set up an appropriate mechanism for pre-lodgement development and building enquiries wherein potential applicants can receive, by appointment, on-the-spot advice from appropriate senior officers.

Chapter 4

15. It is recommended that each Council formulate its own policy on advertising and/or notifying members of the public of development applications; that the formulation of the policy include a process of public consultation; that the policy be made freely available to members of the public on request and be periodically reviewed; that Councils be encouraged to place such policies in development control plans.

Chapter 4

16. It is recommended that Councils ensure that officers dealing with building and development applications undergo adequate training in negotiation skills and meeting procedure.

Chapter 4

17. It is recommended that, where appropriate, Council officers convene meetings between applicants and interested parties in order to discuss concerns and attempt to resolve any disputes, and that such meetings be convened away from enquiry counters and public areas within the Council office building in an appropriately furnished designated room.

Chapter 4

18. It is recommended that the Environmental Planning and Assessment Act 1979 be amended in order to require Councils to assemble and maintain a package of copies of certain documents relating to each development application, which would be made available for inspection to any person upon his or her request; that the package would contain, at a minimum, the following documents as soon as they are available: the application form, accompanying plans and supporting information, letters of advice from external public authorities, any Council resolutions which are directly relevant to the application and the Council's determination pursuant to Section 91.

Chapter 4

19. It is recommended that each Council formulate its own policy on the delegation of authority to determine development applications; that the policy be made freely available to members of the public and be periodically reviewed.

Chapter 4

20. It is recommended that training programmes be established for Council professional and technical staff aimed to assist them in conducting merits appeal cases for their Councils in the Land and Environment Court.

Chapter 5

21. It is recommended that those Councils with considerable and frequent expenditure on Land and Environment Court matters consider creating new positions for specialist officers whose prime duty, inter alia, would be the preparation of merits appeal cases and appearances in the Land and Environment Court.

Chapter 5

22. It is recommended that the Minister for Local Government and Minister for Planning liaise with the Attorney-General to investigate ways to restrict the extent of expert evidence submitted in merits appeal cases.

Chapter 5

23. It is recommended that the Minister for Local Government and Minister for Planning liaise with the Attorney-General to investigate the appropriateness or otherwise of having merits appeal cases relating to development and building applications heard *de novo*.
Chapter 5

24, It is recommended that Councils delegate sufficient authority to their officers attending mediation and issues conferences in the Land and Environment Court to enable them to reach agreements with the other party, if possible, which would be satisfactory to the Council.
Chapter 5

25. It is recommended that provision be made in the Environmental Planning and Assessment Act 1979 for Councils to have the discretion to require an. independent and qualified person to conduct public hearings in respect of major local and controversial developments, and therein have the discretion to request a Commissioner of Inquiry to carry out the inquiry.
Chapter 6

26. It is recommended that the person appointed to conduct the public hearings have powers under the Environmental Planning and Assessment Act similar to those contained in Section 120 of the Act relating to Commissioners of Inquiry.
Chapter 6

27. It is recommended that the qualifications of a person eligible for appointment to conduct a public hearing should be those set out in Schedule 1 of the Environmental Planning and Assessment Act, Clause (1).
Chapter 6

28. It is recommended that the office of the Commissioner of Inquiry receive increased funding to carry out these additional responsibilities.
Chapter 6

29. It is recommended that the Local Government and Shires Associations establish a panel or panels of independent and suitably qualified persons to conduct public hearings in respect of controversial developments at the request of member Councils.
Chapter 6

30. It is recommended that Councils encourage potential applicants of proposals likely to be of a controversial nature to consider the option of participating in a mediation conference with potentially adversely affected parties prior to lodgement of the application, to be conducted by a suitably qualified and impartial person.
Chapter 7

31. It is recommended that in bases where a development or building application involves significant conflict, Councils consider encouraging the applicant to consider the option of participating in a mediation conference with other relevant parties, to be conducted by a suitably qualified and impartial person.
Chapter 7

32. It is recommended that the Minister for Local Government investigate the establishment of an independent statutory office which will arbitrate on matters referred to it involving disputes between (i) elected representatives and (ii) elected representatives and a Council, involving allegations of breach of statutory duty.
Chapter 8

33. It is recommended that Councils consider the relative advantages of the employment or joint employment of in-house solicitors.
Chapter 9

34. It is recommended that in-house solicitors employed by Councils be permitted to enjoy a right to limited private practice as specified in an appropriate contract of employment.
Chapter 9

35. It is recommended that agreements for the provision of external legal services be in written form and specify hourly charges for various levels of service.
Chapter 9

36. It is recommended that each Council establish a legal committee or subcommittee to:
    a. review the standard and cost of external legal services;
    b. monitor budgeting on legal services;
    c. review and monitor both internal and external legal costs on a case by case basis;
    d. report to Council accordingly.
Chapter 9

37. It is recommended that Councils review their arrangements for the provision of external legal services every four years, being two years after each full Council election.
Chapter 9

38. It is recommended that Councils which frequently require specialist legal advice consider appointing a core group or panel of legal firms in order to provide a range of expertise and choice in costs.
Chapter 9

39. It is recommended that each Council appoint a Legal Services Officer to act as the main contact between Council and its legal advisers.
Chapter 9

40. It is recommended that all access to a Council's external legal advisers by Council's administration, other than the Council's chief executive, only be made through the Council's legal services officer.
Chapter 9

41. It is recommended that the legal services officer maintain a library of legal documents, items of advice and standard contracts in order to avoid unnecessary duplication of legal services.
Chapter 9

42. It is recommended that the legal services officer be given the responsibility to supervise the passing of files and documents between Council and its legal advisers and attempt, where possible, to minimise the extent of materials forwarded to the legal advisers.
Chapter 9

43. It is recommended that Councils frequently involved in legal actions consider the benefits of having a legal audit carried out into their policies, practices and procedures; the audit would be overseen by a special committee assisted, where appropriate, by specialist lawyers.
Chapter 9

44. It is recommended that the Department of Local Government require a detailed breakdown of each Council's total legal costs to be a separate item in the Annual Statement of Accounts.
Chapter 10

45. It is recommended that the legal services committee or subcommittee of each Council make monthly reports to the Council, together with appropriate recommendations, specifying the overall legal costs for the year to date, a breakdown of such costs and a summary of current or recently finalised legal actions in terms of costs, progress and outcomes.
Chapter 10

46. It is recommended that any reporting of legal costs to Council's legal services committee/subcommittee or the full Council specify both direct and indirect costs, with indirect costs relating to staff time.
Chapter 10

47. It is recommended that Council officers working on legal actions record their time spent on such duties.
Chapter 10

48. It is recommended that Council's legal services officer keep and maintain records of staff time spent on legal matters.
Chapter 10

49. It is recommended that reporting of legal actions, be made part of the Council's Annual Report to ratepayers, with a summary of costs and outcomes of actions taken.
Chapter 10

1. Introduction

Preamble

1.1 Local government in New South Wales is big business. Councils employ some 41,000 people, control assets estimated at $10 billion and have a turnover in excess of $3.3 billion.[1]

1.2 The role of local government has undergone tremendous change since its inception. Local authorities were originally set up to raise funds for the provision of certain infrastructural services, directed primarily towards the protection, improvement and enjoyment of Private property. In terms of efficiency and effectiveness, such services were then believed to be best carried out at the local level. As a service provider to property owners, local government's portfolio has expanded significantly throughout its history.

1.3 In the late twentieth century, local government's agenda has widened further to encompass activities such as the direct provision of social services, the promotion of cultural and tourism activities and environmental planning and protection. This expansion of activities has been the direct result of community expectations and demands. It has been accompanied, of course, by greater costs and increased pressure on funding sources.

1.4 Local government is a creature of State legislation. Notwithstanding the fact that Councils are democratically elected, they are entirely reliant on the New South Wales Parliament for the delineation of their statutory powers. Accordingly, it is Parliament which sets the groundrules. At the same time, Parliament has a responsibility to heed changes in society and community demands. From time to time, the ground rules will need to be changed. The Committee recommends certain change in this Report.

1.5 The Committee notes, however, that legislative change is not always the most effective means for local government reform. Councils can be encouraged to adopt fresh practices or consider new ideas within the existing statutory framework. The notion of encouragement rather than regulation sits well with the autonomous nature of local authorities. The Committee seeks to encourage new approaches in this Report.

1 Department of Local Government Annual Statements of Account, Total Expenditure, 1990

1.6 In setting the legislative ground rules, the Parliament has chosen to confer a considerable degree of autonomy on Councils. Local government is recognised as a legitimate and vital partner in government. It is generally in a far better position to gauge and respond to the electorate's concerns at the local level. As a result, local government is renowned for its diverse approaches to a wide range of issues.

1.7 The fragmented nature of local government, however, means that issues which confront local government as a whole may not be able to be effectively addressed in a unified way. The Local Government and Shires Associations, to a large extent, remedy this potential problem. State Government authorities, in particular the Department of Local Government and the Department of Planning, also have a role to play.

1.8 The Committee is convinced that the provision and cost of legal services to local government is an issue which deserves attention beyond the level of individual Councils. It is the Committee's belief that the issue has not been dealt with in a comprehensive manner until now.

Background to the Inquiry

1.9 During the course of investigations leading to its Report on the Auditing of Local Government,[2] the Committee was alerted to significant increases in legal expenditure on the part of local government over recent years.

1.10 In his letter to the Committee outlining the proposed Terms of Reference for the current Inquiry, the Honourable David Hay, M.P., Minister for Local Government and Minister for Planning, stated:

"I have been concerned by various personal representations made to me and by recent press reports regarding the costs of legal services and litigation being generated by local government councils." 3

1.11 The Committee shares the Minister's concerns. Legal expenditure by some Councils can be measured in hundreds of thousand dollars. The magnitude of sums involved demands some scrutiny as to the efficiency and effectiveness of

2 Public Accounts Committee, 53rd Report, Auditing of Local Government, January 1991

3 Letter dated 21 May 1990

local government decision making and financial management in the legal area.

1.12 In receiving various information during its Inquiry into Local Government Auditing, the Committee was distressed to learn that such scrutiny appears to be somewhat lacking. A local government auditor, for instance, remarked in evidence that:

> *"In 1988 my fee of $27,000 was 0.18 per cent of the total expenditure of the Council. Yet, by way of argument, in that same year the Council spent nearly $270,000 on its solicitors who are never questioned on their appointment every year." 4*

1.13 The desirability of an effective review of external legal services is only one issue. The adequacy of accounting and reporting mechanisms to provide sufficient feedback on the nature and extent of legal expenses to both elected representatives and the public is another. A case in point was brought to the Committee's attention in its discussions with North Sydney Municipal Council's Town Clerk, Mr R. Kempshall during the Auditing of Local Government Inquiry.[5]

Committee:	*How much per annum does the Council pay in legal fees?*
Mr Kempshall:	*How much? I do not know - about a million dollars. That is, it was a million dollars last year.*
Committee:	*Are your ratepayers aware of, what I perceive to be, a huge expenditure on litigation ?*
Mr Kempshall:	*I believe the ratepayers are well aware of it, yes.*

4 Minutes of Evidence, Inquiry into Auditing of Local Government, Mr R. Ferrier, 23 April 1990, p. 381

5 Minutes of Evidence, Inquiry into Auditing of Local Government, Mr R. Kempshall, 23 April 1990, pp. 388-390

Committee: *Your ratepayers are well aware of it?*

Mr Kempshall: *Yes, I would say the majority would be.*

Committee: *Why does not reference to that litigation appear in this document; the 1987 Annual Report issued to ratepayers by North Sydney Council?*

Mr Kempshall: *It is not highlighted in there, no.*

Committee: *But you have highlighted $51,000 for library services and $100,000 in grants'?*

Mr Kempshall: *Yes, but that is a statutory format, I am sure you will find.*

Committee: *A statutory format?*

Mr Kempshall: *There is a line item in the budget for library fees. it is separate charge. The legal costs are part of the development and controls budget or part of general.*

Committee: *That is on the expenditure style, but then you have for community development $690,000?*

Mr Kempshall: *Yes.*

Committee: *You have $469,000 for development control and $567, 000 for town planning. Quite a number of items receive special mention in this very brief versionof your finances?*

Mr Kempshall: *Yes, it is very brief*

Committee: *Yet legal expenditure of $1 million is not mentioned in this report?*

Mr Kempshall: *No, that is correct. There is no reason for that other than that it is the format that was set up. I can assure you that it has been well mentioned in the papers and in letters to the editors of newspapers on a number of occasions.*

1.14 As a result of receiving the above and other evidence along the same lines, the Committee found that:

"...when the Local Government Act was enacted, legal expenses were regarded as an overhead which should be apportioned to each particular fund activity for which it was incurred. Over the intervening years, the scale of legal activity has increased to the extent that it now may warrant separate reporting as an activity in its own right." 6

1.15 The issue of public accountability for legal expenses has thus played a major role in this Inquiry.

1.16 Local government in New South Wales is currently undergoing major change. Its primary legislation, the Local Government Act, 1919, is being totally rewritten. Indeed, local government legislative reform is sweeping the nation. In late 1989, it was reported that:

"It has taken many years, but finally the problem is being tackled and by next year, most States will have revised the tomes that make up their Local Government Acts."7

1.17 In July 1990, the Department of Local Government issued its White Paper on Phase 1 of the Local Government Act Review. That paper states that:

"Now 70 years old, the Local Government Act has been heavily amended and has grown in size and

6 Public Accounts Committee, 53rd Report, Auditing of Local Government, January 1991, p. 158

7 *Local Government Updating Legislation,* October 1989, Directions in Government, Vol. 3, No. 79, p. 59

complexity. That it is now flawed and overdue for revision is undisputed." 8

1.18 A major objective of the new legislation is to "*simplify and express more clearly the functions and powers of councils." o*

1.19 The basic balance of powers between State and local government will remain unaltered. It is proposed that there will be a move away from a legislative scheme which seeks to set down all the specific powers and duties of a Council in terms of providing goods and services to a community. Instead, Councils will be empowered to do *"all things necessary or convenient"* to carry out such general functions as will be listed in the statute?

1.20 Another significant initiative in the local government sphere is the Local Approvals Review Program (L.A.R.P.). In a submission to the Committee, the Chairman of the Local Approvals Review National' Steering Committee, the Honourable Mr Justice R. Else-Mitchell, Q.C., C.M.G., outlined the background to and concerns of L.A.R.P.:

"L.A.R.P. is a national program that arose from the Special Premiers' Conference on Housing in March 1989. It aims to address the administrative aspects of development and building control at the local government level. The National Steering Committee provides policy direction to the program...

The Committee is very much aware of the time and costs involved in development and building approvals. A national report for the Commonwealth Office of Local Government has estimated some $1 billion per annum in savings from reforms to the approvals process."11

1.21 At the outset of this Inquiry, the Committee was concerned that a very significant proportion of local government's legal costs arises from the planning process. This view was confirmed during the course of the Inquiry.

8 N.S.W. Department of Local Government, July 1990, White Paper Local Government Act Review, Phase 1, p. 7

9 Ibid, p. 8

10 ibid

Submission, 16 November 1990

Accordingly, the Committee considers the major issues being examined under L.A.R.P. as having pertinence to this Inquiry:

* *internal management processes and structures used by local government to handle matters such as rezoning subdivision, development and building applications;*

* *the clarification and rationalisation of building and development control responsibilities between States and local government;*

* *mechanisms for improving awareness and understanding within the community of local policies, design criteria procedures and guidelines;*

* *effectiveness of community and industry consultation and participation mechanisms within the development control process; and*

* *staff development and client servicing approaches in local government." 12*

1.22 Throughout the course of this Inquiry, the Committee was aware of several other concurrent inquiries into Various aspects of legal services and costs. These comprise:

* The Australian Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Cost of Justice;

* The Trade Practices Commission's Study of Competition Restrictions in the Professions;

* The N.S.W. Government's Review of Legal Services to Government; and

* The Law Reform Commission of Victoria, The Cost of Litigation.

12 Office of Local Government, Department of Immigration, Local Government and Ethnic Affairs, *Local Approvals Review Program*, explanatory leaflet, n.d.

1.23 The Committee arranged a one day seminar at Parliament House on 19 October 1990 with representatives from the above inquiries to share information and views.

1.24 In addition to specific studies and inquiries, the Committee is very mindful of a general community concern regarding the costs of legal services and litigation. In recent times, there has been a growing interest in alternative methods to resolve legal disputes. This interest is now being translated into new initiatives.

1.25 These various innovations reflect growing concern on the part of the Government, the judiciary, the legal profession and the public towards the escalating cost of justice. The costs to localgovernment are no exception. As indicated earlier, information and evidence received by the Committee in earlier inquiries led the Committee to the view that local government has lost control of its reins over legal expenditure. It was principally against this background that the Committee decided to conduct an inquiry into the provision and cost of legal services to local government.

Focus of the Inquiry

1.26 The high legal costs incurred by local government revealed in the Local Government Auditing Inquiry prompted the Committee to raise fundamental questions, which have remained as underlying themes to this Inquiry. What are the primary sources of these costs? Can the costs be readily contained? Can new approaches or alternative systems be introduced to help minimise the costs?

1,27 The Committee soon discovered that a major source of legal expenditure is litigation in the Land and Environment Court. This also has ramifications for State Government which finances the operationof the Court. The accessibility of the Court to the ordinary citizen is also an issue of concern.

1.28 Upon learning of the deficiencies in statutory reporting mechanisms for reporting legal costs, the Committee became conscious of possible gaps in the internal reporting procedures of Councils. The Committee considers it to be of paramount importance that elected representatives are aware of the costs of their decisions, including those decisions most likely to attract legal action.

1.29 The Committee is concerned that the community be kept informed of costs incurred. Modern society demands a high level of accountability on the part of

all public authorities, including local government. Easy access to accurate information allows the electorate to assess the ability of its political representatives to manage the public purse.

1.30 Finally, the Committee believes that a Council should be a service oriented organisation. The Council/client relationship is of fundamental importance. A poor relationship can lead to antagonism on both sides and may jeopardise the resolution of any dispute which may arise. A constituent who feels wronged, or treated badly, may seek redress in another authority, such as the Office of the Ombudsman or the Court. The potential impact on legal costs for both parties is obvious. Accordingly, in carrying out this Inquiry, the Committee placed some emphasis on the internal workings of Councils and the Council/client relationship with a view to exploring ways *to* minimise potential conflict early in the decision-making process.

Terms of Reference

1.31 On 21 May 1990, the Honourable David Hay, M.P., the Minister for Local Government and Minister for Planning, requested that the Public Accounts Committee conduct an inquiry into legal services provided to local government with the following terms of reference:

"1. To examine the use of external legal consulting and practitioner services by local government, their terms of engagement and the extent of the use of legal service and of the Land and Environment Court in resolving local planning matters.

2. To review the costs of legal services undertaken throughout local government and recommend methods of accountability for the costs of legal services.

3. To review the impact of statutory legal requirements of State and Federal Government Departments on local government's legal costs.

4. To consider any other matters relating to the use of legal services within local government."

Method of Investigation

1.32 The Committee conducted its inquiry between May 1990 and April 1991 concurrent with a number of other inquiries and activities pursuant to Section 57 of the Public Finance and Audit Act 1983. The method of investigation included:

* a review of submissions and correspondence received in response to advertisements issued in the press;

* analysis of responses to letters of notification to Members of Parliament, relevant N.S.W. Government authorities and professional organisations;

* analysis of responses received from local government authorities in relation to a detailed questionnaire sent to all city, municipal and shire councils throughout N.S.W.;

* public hearings;

* liaison with persons involved in other official inquiries considered to be of relevance to this inquiry;

* consultation with relevant professional organisations;

* formal and informal consultations with various officials from State and local government, both N.S,W. and interstate;

* a review of relevant legislation and other materials.

1.33 The abovementioned questionnaire was forwarded to all 176 Councils on 17 August 1990. A copy of the questionnaire appears at Appendix 4. Those Councils which failed to return the questionnaire are listed in Appendix 5.

2. The Legal Environment of Local Government

Introduction

2.1 Whilst investigating reasons for the high legal costs expended bylocal government, the Committee received considerable evidence pointing to the litigious nature of modern society. In a submission to the Inquiry, Sly & Weigall, a legal firm specialising in local government law, described this:

"In society generally there is an increasing propensity to litigate. This propensity not only spreads to local government but is probably accentuated with respect to local government. Two factors which contribute to this are first that local government makes an excellent defendant. That is to say, Councils are perceived to be wealthy. This is, of course, not the case... Secondly, with increased property values over the last 10 years there has been increasing pressure from land developers. This pressure generally is brought to bear on local Councils in the first instance, often resulting in Land and Environment Court proceedings." 1

2.2 Councils become involved in legal costs through a number of ways. A Council may initiate litigation itself. This aspect is particularly important in local government's enforcement role. Councils are also frequently involved in defending legal actions. Information received by the Committee indicates that defending actions in the Land and Environment Court comprises the greatest growth area in legal costs. Legal costs are also incurred simply through obtaining legal advice.

2.3 This chapter is primarily introductory wherein the Committee sets the context of the Inquiry by briefly examining local government legislation, Council functions and the level of scrutiny under which Councils operate, and the implications of each in terms of legal costs.

1 Submission, 24 August 1990

The Legislation

2.4 Local government law is diffuse and complex. As a result Councils have become heavily reliant on their legal advisers. Local government law is now a distinct specialisation in the legal profession.

2.5 The Local Government Act 1919 remains as the primary legislation. The constitution and administration of local government areas are laid down in this Act, together with the primary duties, functions and powers of Councils. A host of Ordinances made under the Act add further detail.

2.6 The Local Government Act has been amended many times since its inception. The Committee agrees with the Local Government and Shires Associations that it is *"labyrinthine and arcane".*[2] *AS* noted in Chapter 1, it is currently being revised. The Committee supports these moves to simplify an unnecessarily complex piece of legislation.

2.7 A major problem of the Local Government Act in terms of attracting legal costs has been the application of the doctrine of *ultra vires.* This doctrine rules that an authority's powers are limited to those powers which are either expressly conferred by the statute or conferred by necessary implication.

2.8 The spectre of ultra vires has plagued local government throughout its existence. There is a history of tension between the two opposing standpoints that (i) Councils can legally do anything other than that which the legislation expressly forbids, and (ii) CoUncils can only act within the power expressly conferred on them. Between these irreconcilable positions are intermediary views depending on the extent to which one is prepared to imply further powers.

2.9 Local government has suffered considerable legal challenge on the grounds of *ultra vires.* The Committee anticipates that the new legislation will help to overcome this problem. In his evidence before the Committee Mr J. Mant, solicitor and consultant in the review of the Act, stated:

"In the new Act we have tried to prescribe the least possible things because the more your prescribe the more you finish up in court. I am very hopeful that after the first couple of years of the new Local Government Act the legal fees will be a lot

2 Submission, Mr D.J. McSullea, Acting Secretary, 17 September 1990

less because the rushing off to get legal opinions as to whether people have the power to do this or that should not be as necessary. In the first couple of years of operation there will be plenty of legal work. With any new major piece of legislation people will be testing out or finding out what it really means." 3

2.10 A second major piece of legislation which confers considerable powers to local government is the Environmental Planning and Assessment Act 1979. This statute is exceedingly complex. Evidence received by the committee has pointed to the planning functions of Councils as the most litigious and costly in terms of legal expenditure. The Committee explores the planning and environmental assessment system in some detail in Chapter 3.

2.11 A number of other statutes are also important to local government. Examples include the Clean Air Act 1970, the Pure Food Act 1908, the Heritage Act 1977 and the Public Works Act 1912.

2.12 The Committee is aware that local government law often involves unchartered waters. A pioneer Council which tests the waters can expect legal challenge and expense. Section 94 of the Environmental Planning and Assessment Act, which refers to payment by developers towards the provision of public amenities and services, provides a case in point. It remains a somewhat murky area more than ten years after its enactment.

2.13 Due to the complexity and frequent uncertainty of the legislation, the Committee is aware that some Councils seek legal advice before almost every move. The Committee is of the view, however, that on many occasions, the need to consult specialist legal advice is quite unnecessary.

2.14 The Committee supports increased training opportunities for elected representatives on legal aspects of local government. A better understanding of the systems set up by the legislation should help to restrict the tendency of some Councils to seek legal advice in a knee-jerk fashion. It is noted that some lawyers have indeed conducted training programmes for Council staff on cost-effective ways to instruct their solicitors?

3 Minutes of Evidence, 8 November 1990, pp. 138

4 Refer, for example, Minutes of Evidence, Mr J. Bingham, November 1990, pp. 22 and 23, and Mr W. Henningham, 8 November 1990, p. 153

Recommendation 1

It is recommended that the Department of Local Government, the Local Government and Shires Associations, tertiary institutions, the private sector and individual Councils be encouraged to initiate training programmes for local elected representatives on legal aspects of local government, and that Councils be encouraged to sponsor the participation of their elected representatives at such training programmes.

Functions of Local Government

2.15 The *White Paper* on Phase 1 of the Review of the Local Government Act distinguishes between the positive and regulatory functions of local government.

2.16 The positive functions relate to the *"provision of goods, facilities and services to a community"*? They include things such as construction and maintenance of roads and other public works,. provision of open space, libraries, community development services and cultural activities. Councils are required to make decision on the allocation of limited resources in these areas.

2.17 Regulatory functions relate to:

i. determining applications of various permissions;
ii. issuing orders; and
iii. dealing with offences.

2.18 The determination of applications for planning and building approval can attract significant legal costs due to the existence of appeal mechanisms, as will be discussed in later chapters. Councils must also ensure that they follow the correct procedures and reach their decisions in accordance with principles of administrative law.

5 N.S.W. Department of Local Government, July 1990,*White Paper Local Government Act Review,* Phase I, p. 10

2.19 Councils have wide powers to issue orders to require the carrying out or cessation of certain works and activities. This enforcement jurisdiction of Councils can involve significant legal costs. In his evidence before the Committee, for example, Mr G. Loupos, South Sydney City Council's in-house solicitor, noted that *"when we issue fire orders it costs in the vicinity of $8,000 to $10,000." 6* the Committee is aware that the cost of administering fire safety is a particular problem in the City of South Sydney where old and dilapidated residential buildings are common.

2.20 . Local government has jurisdiction over a number of offences. These relate to various matters such as non-compliance with planning instruments and conditions of approval, traffic and parking, behaviour in public places, unclean food premises and littering? In some cases, Councils may seek civil action to ensure compliance. This is particularly relevant in the planning area where Councils seek injunctions from the Land and Environment Court. In other cases, Councils may need to consider prosecution. In their submission to the Committee, the Local Government & Shires Association note that *"quite often, these prosecutions do not even cover the cost of the proceedings by the Council." 8*

2.21 Various evidence put to the Committee suggested ways for Councils to minimize legal costs in this area. A recurrent suggestion was that more work can be done by well trained in-house staff rather than outside lawyers. In his evidence before the Committee, Mr J. Bingham addressed this issue:

"A lot of day-to-day legal work can be done by in-house lawyers or local lawyers, or even paralegals on staff. I again refer to Wyong Council, a very well managed Council, one of my clients. it has officers in-house who are not lawyers but whom we have trained. They conduct their own prosecutions and handle their own summonses for recover of rates. We have trained them on how to prepare an information. We have actually given them a whole set of information for common offences. We have told them how to particularise it so that if there is no appearance by the defendant the matter proceeds on the basis of the facts on the summons and we

6 Minutes of Evidence, 8 November 1990, p. 113

7 N.S.W. Department of Local Government, July 1990, *White Paper Local Government Act Review*, Phase I, p. 12

8 Submission, Mr D.J. McSullea, Acting Secretary, 17 September 1990

have given them all the procedures so that they know what to do," [9] .

2.22 The Committee also notes that South Sydney City Council employs an in-house solicitor whose duties involve a significant amount of prosecution work. This issue is examined further in Chapter 9.

2.23 A second possibility is greater scope for on-the-spot fines and infringement notices. Opportunities exist in areas such as health, traffic matters and building safety. On this point the Local Government & Shires Associations advised the Committee that:

"It is proposed that many offences which are now required to proceed under summons will, in the future, be able to be actioned by way of an infringement notice. It is expected that the Police Department, through the Self Enforcing Infringement System (S.E.I.N.S.) will take much of the onus of collecting fines off Councils which participate in the system." 10

2.24 The committee supports such moves and recommends wider scope for Councils to avoid the prosecution process in dealing with minor offences.

Recommendation 2

It is recommended that the scope for on-the-spot fines for infringements under Council jurisdiction be increased.

Scrutiny of Local Government

2.25 The Committee is fully aware that local government operates under considerable scrutiny. The Ombudsman of New South Wales, for instance, has the power to investigate the conduct of Councils, including individual

9 Minutes of Evidence, pp. 17-18

10 Submission, Mr D.J. McSullea, Acting Secretary, 17 September 1990

staff members and elected representatives. In his 1990 Annual Report, the Ombudsman reported that his office had received 716 new complaints against local government.[11]

2.26 A more recent investigative body is the Independent Commission Against Corruption. The first new major public investigations carried out by the Commission on involved local government planning matters. The Commission's 1990 Annual Report stated that *"a breakdown of the complaints/reports indicates the two largest areas of complaint by far, were Local Government, 36.5% and Police, 15.9%."*[12] Public attitude surveys carried out for the Commission have indicated that *"... a significant cross-section of the voting population in New South Wales ... believes that serious corruption exists, in particular in the Police Force, Local Government and the Department of Corrective Services."*[13]

2.27 In addition to the above, the Committee notes that the Department of Local Government's inspectorate has wide investigatory powers.

2.28 The impact of the high level of scrutiny on the tendency of Councils to seek legal advice was articulated to the Committee by Mr R. Ball, Town Clerk of Waverley Municipal Council:

"Someone might want to challenge the Council because of some wrong course Of action. If it happens to be an officer of the Council, that officer is open go. If it happens to be a partner of a major law firm, criticism will not come so quickly. You can defend yourself so much more easily before the Ombudsman or anyone if you have written legal advice from a law firm, but if it was advice by the employed legal officer, I am not sure it is treated with the respect that it deserves." 14

2.29 In his evidence before the Committee, Mr B. O'Keefe Q.C. emphasised the impact of investigative bodies on Councils' enforcement role.

11 The Ombudsman of New South Wales, Annual Report to 30 June 1990, p. 67

12 Independent Commission Against Corruption, Annual Report to 30 June 1990, p. 23

13 ibid, p. 76

14 Minutes of Evidence, 8 November 1990, p. 126-127

"...the Council has to look over its shoulder to know whether it is doing the right thing and whether it is acting in accordance with law. That tends then to lead to the Council perhaps being a bit tougher than might otherwise be the case in relation to persecutions, which in turn costs money, and you rarely recoup from the malefactor all that you pay in bringing him to justice." 15

2.30 The Committee recognises that the high levelof scrutiny has served to augment local government legal costs. The Committee is also convinced that this level of scrutiny must be maintained in order to meet community demands.

2.31 The Committee is of the view, however, that Councils may often overreact to enquiries from investigative bodies in rushing for costly legal advice. A more co-operative and less defensive attitude may, in many cases, sort out the problem. Furthermore, the Committee is of the view that better training of councillors and alderman in aspects of local government law, including the roles and jurisdiction of the Various investigative authorities, should help to curb any tendency to rely on excessive legal advice. Receiving legal assistance at the outset to ensure all relevant practices and procedures are being carried out in a proper manner may also be worth consideration. As discussed in Chapter 9, Councils should also have management systems in place which avoid any unnecessary duplication of legal advice. A further important source of assistance is the Local Government Code of Conduct,[16] an advisory document which *"explains in practical terms how such important principles as good faith, public duty, honesty and integrity should be manifested in the daily business of Council members and their staff."*[17]

15 Minutes of Evidence, 8 November *1990,* p. 83

16 The Local Government Code of Conduct was developed by a Working Party convened by the Minister for Local Government in July 1989. The Working Party included representatives from the Office of the Ombudsman, the Independent Commission Against Corruption, the Department of Local Government and the Local Government and Shires Associations. The Code of Conduct Principles was issued in early 1990.

17 Independent Commission Against Corruption, Annual Report to 30 June 1990, p. 66

3. Planning and Environmental Assessment

Introduction

3.1 The introduction of the Environmental Planning and Assessment Act ('the Act') in 1979 was greeted with considerable fanfare. For the first time in New South Wales, the planning function of local government was removed from the Local Government Act 1919 and given its own piece of legislation. The planning profession saw that town planning as a discipline now had the legislation it deserved. The new system was innovative and allowed wide opportunity for new approaches for the preparation and implementation of planning strategies. As a result of public pressure, it also created increased access for public involvement in the planning process. Corresponding legislation created the Land and Environment Court which was given the power to review certain decisions made under the Act.

3.2 Ten years down the track, the Committee is aware that the planning system still has its admirers. In his evidence before the Committee, Mr Jeremy Bingham, solicitor and Lord Mayor of Sydney City Council, remarked:

"It is the best legislation in Australia. Indeed, I think it is the best legislation in the world." 1

3.3 On the other hand, the Committee is aware of considerable criticism. The focus of much of the dissatisfaction, as perceived by the Committee, is directed towards the high level of complexity which has developed and the resultant scope for legal actions.

3.4 On this point, the Committee was interested in the opinion of Mr R. Kempshall, Town Clerk of North Sydney Municipal Council. Evidence received by the Committee reveals that North Sydney Municipal Council has the highest level of legal expenditure on planning matters of all local government authorities throughout the State. In his evidence before the Committee, Mr Kempshall commented that the planning legislation "...*must*

1 Minutes of Evidence, 7 November 1990, p. 4

*be a lawyer's delight"*2 and that the system *"...allows litigation to escalate out of all proportion." 3*

3.5 The Committee is sympathetic with Mr Kempshall's concerns and shares his view that the planning system is highly complex and litigious. Indeed, it might be said that the system has passed from the hands of the planners to the palms of the lawyers.

3.6 On this point, the Committee was reminded by Mr J. Mant, a solicitor with wide experience in planning systems across Australia, of the intrinsic nature of development control systems to attract legal costs:

"I think we need to recognise that however we try to keep planning systems simple, by the nature of the beast they are complex. People do not like having land use controls put over their property and they try to find every loophole around them. The name of the game in development is to get more development than the vendor thought you were able to, so people are constantly pressing the system for expansion to development rights and the system is constantly putting complications in their way. All planning systems are complex legal nightmares and wherever you find that, you find lawyers." 4

3.7 Whilst acknowledging the inevitability of legal costs, the Committee wishes to stress its alarm at the very extent of legal costs borne by local government in the planning arena and the subsequent burden imposed on ratepayers and the community at large.

3.8 The Committee requested a number of witnesses to identify what areas are having the most significant impact on local government legal costs. The common response related to the planning system and the Land and Environment Court.

3.9 The Committee requested Mr D. McSullea, Acting Secretary of the Local Government and Shires Associations, for instance, to*"outline the statutory or legal requirements which have the most impact on local government legal costs":*

2 Minutes of Evidence, 7 November 1990, p. 68

3 Ibid., p. 71

4 Minutes of Evidence, 8 November 1990, p. 128

Committee: *I would think the one that has the most impact in the size of those costs would be the planning powers.*

Mr McSullea: *Through the Land and Environment Court?-A. Yes.* [5]

3.10 A related question was put to Mr F. Thomson, Shire Clerk of Warringah Shire Council:

Committee: *Your Council describes legal matters as onerous. Which matters do you see as most in need of reform?-*

Mr Thomson: *Action before the Land and Environment Court, particularly town planning matters.*

Committee: *Is that the only area you see as being in need of reform?-*

Mr Thomson: *Obviously there are areas of clarification and detail... (i) terms of time, effort and cost we have to look at town planning as being outstanding.* [6]

3.11 Figures obtained by the Committee from the questionnaire forwarded to all Councils gave further evidence of the huge impact of planning and development control on local government legal costs.

3.12 In this chapter, the Committee examines the planning and environmental assessment system in overview. The purpose of the chapter is to set the context for a substantial part of the remainder of this report, in addition to identifying areas for improvement.

5 Minutes of Evidence, 17 December 1990, pp. 167-168

6 Minutes of Evidence, 7 November 1990, p. 38

3.13 At its bare bones, the planning system comprises two primary mechanisms:

i. plan making (or strategic planning), i.e., the preparation of strategies aimed to achieve various planning objectives;

ii. plan implementation (or development control) i.e., the implementation of those strategies through the assessment and prohibition of development proposals; and

Each is dealt with in turn below.

Plan Making

Overview

3.14 The Act provides the framework for the formulation of planning strategies. In some cases, detailed procedural requirements are laid down for their preparation. These strategies are designed to achieve various planning objectives relating to a diversity of planning issues, such as building design, environmental protection, traffic matters and the provision of certain facilities. The three main methods used by planning strategies to achieve such objectives are:

i. acquisition of private property

ii. incentives

iii. regulation of development

3.15 Planning by regulation is by far the most common and familiar. Broadly speaking, development is regulated by (a) zoning controls and (b) standards - i.e., specified criteria against which development proposals are assessed.

3.16 The planning strategies may be legally binding or merely advisory in nature. Those with statutory force are known as *"environmental planning instruments"*. Some pre-1980 statutory plans still exist in some areas and are known as *"deemed environmental planning instruments."*

Types of Plans

3.17 The Act sets up a hierarchy of three species of environmental planning instrument:

i. State Environmental Planning Policies
ii. Regional Environmental Plans
iii. Local Environmental Plans

3.18 The preparation of State Environmental Planning Policies is the domain of State Government. It is local government, however, which generally enforces them. State Environmental Planning Policies deal with issues *"of significance for environmental planning for the State."* [7] They may relate to a single site, the entire State of something in between. As a rule, State Environmental Planning Policies tend to regulate or deregulate provisions in local planning instruments.

3.19 Regional Environmental Plans are also prepared at State Government level and generally implemented by local government. They deal with issues *"of significance for environmental planning for the region to which, or to part of which, that plan is intended to apply."* [8] Regional Environmental Plans adopt a variety of forms.

3.20 Local environmental plans are prepared at the local level but receive final approval from the Minister. Along with those pre-1980 local instruments still in existence [9], they provide the primary vehicle for local government strategic planning and development decisions. A local environmental plan may relate to a specific site (i.e., a *"spot rezoning");* an entire local government area or something in between. They can even cross Council boundaries.

3.21 In addition to environmental planning instruments, there is a range of non-statutory plans. Section 72 of the Act enables Councils to prepare Development Control Plans in order to provide *"more detailed provisions"* than already contained in local planning instruments. These plans have

7 S.37 Environmental Planning and Assessment Act

8 S.40 Environmental Planning and Assessment Act

9 i.e., Planning Scheme Ordinances and Interim Development Orders

become an increasingly popular planning tool for Councils and boast a vast range in both form and content. Whilst recognised in the Act, development control plans carry persuasive rather than statutory force.

3.22 Another advisory document is the development control code, set up under State Environmental Planning Policy No. 28. These plans provide additional controls in relation to medium density residential development.

3.23 Councils also produce a host of other non-statutory planning documents which carry a wide variety of names such as codes, policies, guidelines and schedules. These policies usually relate to functional issues such as car parking requirements, landscaping policy and building design guidelines.

Multiplicity of Plans

3.24 Whilst examining the various types of plans produced under the New South Wales planning system, the Committee was soon struck by the sheer multiplicity of controls which can apply to just one piece of land.

3.25 A land owner, developer or casual inquirer who wants to find out what planning controls apply to a certain block of land may well need to consult a library of documents. The land might easily be affected by, say, several State Environmental Planning Policies, a Regional Environmental Plan, a deemed environmental planning instrument amended by a number of subsequent local environmental plans in addition to a potential army of development control plans and other policy documents. The result, for most people, must be confusion.

3.26 The Committee is also mindful of problems which must arise for Councils who have the statutory responsibility to implement these intricate webs of plans, let alone the obligation to explain them to a puzzled person at the front counter.

3.27 The hierarchy of planning controls established by the Act is a major element of the New South Wales system designed to share the responsibilities between the different levels of Government. The Committee holds grave concern, however, that the complexity which has Since developed can too easily lead to confusion and error on the part of both public and decision maker. A direct result can be' conflict and potential legal expense. Furthermore, the Committee has little doubt that the potential legal pitfalls

created by the sheer complexity must encourage users, including Councils, to rely heavily on legal assistance.

3.28 Whilst exploring these problems, the Committee became aware of considerable support for the notion of consolidating the various layers of planning instruments into a simpler form. Mr D. Johnson, Town Clerk of Blacktown City Council, for example, argued before the Committee:

"... you have the Act itself and you have a host of S.E.P.P.s and REPs and different documents that need to be gone through. If that could be put into a more simple document it would probably not only help Councils but developers as well. I am sure it causes them confusion, from what we see at our end." 10

3.29 The case for consolidation was also put with some force to the Committee by Mr J. Mant:

"One of the biggest problems is the enormous complexity with which the rules are expressed. We have four levels of plans and various other documents which are given statutory effect. There is no obligation on the Government to bring together a single co-ordinated document which sets out the rules for every block of land as there is, say, in Victoria and South Australia - you just go to one document and it is up to local government and to the State Government to ensure that their various controls are brought together in that one document and are reconciled." 11

3.30 A point of particular interest to the Committee raised by Mr Mant was the experience of planning systems interstate which have adopted the *"one document"* approach.

3.31 The Committee investigated the concept of a one plan system and recognised substantial cost savings, not only for local government in its administration of the planning system, but also for all parties involved in land transactions. Fewer documents can only help to de-mystify and decrease costs in the conveyancing process.

10 Minutes of Evidence, 17 November 1990, p. 216

11 Minutes of Evidence, 8 November 1990, p. 128

3.32 The Committee further believes that a simpler, one plan system has the potential to be readily adapted to computer systems. The Committee expresses the hope that basic information on each parcel of land, including a simplified set of planning controls, may one day be readily accessible on computer to the public in places such as public libraries and Council offices.

Recommendation 3

It is recommended that the Minister for Local Government and Minister for Planning investigate the consolidation of the various levels of environmental planning instruments in New South Wales into a form which provides one comprehensive planning document for each parcel of land.

Language of Plans

3.33 In addressing the general issue of complexity of planning controls, the Committee also examined the type of language used in planning documents.

3.34 The Committee found that environmental planning instruments are generally expressed in legalistic and inaccessible language: Even many non-statutory planning documents, such as development control plans, where the opportunities are far wider for an innovative approach, are still often cast in these terms.

3.35 The Committee notes with interest the following comments by the Victorian Law Reform Commission in its report Plain English and the Law:

"Laws which are not written in plain English impose unnecessary costs on Government and on the community at large. A document that is not readily comprehensible takes longer to understand, is more likely to need a translator and is more likely to be misunderstood." 12

12 Victorian Law Reform Commission, Report No. 9 Plain English **and the** Law, June 1987, p. 59

3.36 A movement for promoting plain English in the law would appear to be gaining momentum. The Victorian Law Reform Commission is generally recognised as a pioneer in the plain English drafting of legislation and delegated legislation. A centre for Plain Legal Language has been set up in Sydney funded by the Law Foundation of New South Wales. In July 1989, Parliament's Regulation Review Committee issued its Report recommending guidelines to *"require statutory rules to be drafted in plain English so that they are clearly and unambiguously expressed." 13* The guidelines are now incorporated in the Subordinate Legislation Act. It appears to the Committee, however,that the push for plainer English has yet to catch up with the architects of our planning documents.

3.37 The Committee is nevertheless aware that some Councils have attempted to adopt plainer English in some documents. One Council at the forefront is Sutherland Shire Council, which recently prepared a consolidated *'plain English"* draft local environmental plan. The Committee applauds the Council for its philosophy and efforts.

3.38 Making our plans easier for all users to understand should, in the opinion of the Committee, reduce opportunities for potential misunderstanding and conflict. Planning documents should be framed in language designed for use by members of the community rather than the planners and their legal advisers. A move in this direction is fully endorsed by the Committee, which recognises it as but one step in encouraging a more client-oriented environment in local government.

3.39 The Committee does note, however, that the preparation of new plans and rewriting of existing ones may well attract legal attention and challenge as new approaches are tested, The Committee is hopeful, however, that such actions would settle whilst the new system is gradually fine-tuned and takes root. The need for legal assistance at the outset in drafting a new style of plan will, of course, involve costs which should, in the opinion of the Committee, be ultimately outweighed by the benefits of a more user-friendly system.

13 Regulation Review Committee, Legislation for the Staged Review of New South Wales Statutory Rules, Report, July 1989, p. 41

Recommendation 4

It is recommended that the Department of Planning prepare State Environmental Planning Policies and Regional Environmental Plans in plain English and prepare guidelines for distribution to local government on the preparation of local environmental plans in plain English.

Recommendation 5

It is recommended that Councils be encouraged to prepare all planning documents, including development control plans and other advisory documents, in plain English.

Public Involvement

3.40 One of the specified objectives of the Environmental Planning and Assessment Act is *"to provide increased opportunity for public involvement and participation in environmental planning and assessment." 14* This aim is reflected in mandatory procedures laid down in the Act and accompanying Regulation for the public exhibition of draft planning strategies and consideration of public submissions prior to their finalisation.

3.41 All environmental planning instruments, with the exception of State Environmental Planning Policies[15] must undergo a process of public consultation during their preparation. The same applies also to development control plans.

3.42 In the case of draft local environmental plans, the plan must be placed on public exhibition for a minimum of fourteen days. Advertisements concerning the exhibition must be placed in at least one local newspaper *"on at least 2*

14 Section 5 (c) Environmental Planning and Assessment Act

15 Refer Section 39(2) Environmental Planning and Assessment Act

separate occasions..." 16 There is no legislative requirement for affected land owners or occupants to be formally advised.

3.43 Draft development control plans must be publicly exhibited for a minimum period of 21 days. Public notice of the exhibition must be placed in a local newspaper on at least one occasion. The decision of the Council to prepare the development control plan in the first place must also be advertised[17].

3.44 It is the Committee's view that these statutory rules for public consultation in the plan making process should be regarded by Councils as minimum requirements rather than standard practice. It is noted that many Councils go further than the bare statutory formulae in encouraging effective public input in strategic planning.

3.45 In its exploration of possible ways to minimise the legal costs for local government in the planning area, the Committee was impressed by the extent of support for a greater emphasis on public involvement in the strategic planning process.

3.46 A case in point was provided to the Committee by Mr P. Woods, President of the Local Government Association of N.S.W. and an Alderman on Concord Municipal Council. In his evidence before the Committee, Mr Woods related an interesting approach to the formulation of planning strategies for the Rhodes Peninsula involving the establishment of a representative advisory committee. The Committee understands that the model has had some teething problems but nevertheless recognises significant potential in such a system. The area includes substantial outmoded industrial development and the local Council decided to explore future land-use options: a typical setting, in the opinion of the Committee, for the type of major planning controversy which can well find ultimate expression in legal action. In describing the Council's approach, Mr Woods said:

"...we in fact set up a representative committee of four representatives of the developer industrialists, four representatives of residents on Rhodes Peninsula, and Council as a whole. Arising out of that we got an agreement. We got moneys raised for various investigations that were carded out

16 Refer Section 66 Environmental Planning & Assessment Act and Clause 7 Environmental Planning and Assessment Regulation

17 Refer Clauses 21 & 22 Environmental Planning and Assessment Regulation

to develop a plan and to develop a road study. As a consequence, we now have - instead of warring parties -industrialists, developers and residents working together with Council as a whole, coming in at appropriate times in terms of the development on a consensus approach to the redevelopment of the peninsula." 18

3.47 The Committee is convinced that Councils need to consider innovative ways to encourage the participation of interested parties and members of the public in the formulation of planning strategies. This includes both local environmental plans and planning policy. It is the Committee's view' that a more open and co-operative approach should assist to minimise opportunities for ultimate conflict. Strategic planning carried out behind closed doors where public input is restricted to the bare statutory requirements can too easily lead, in the Committee's opinion, to frustration and suspicion on the part of the community. These are the right ingredients for misunderstanding and controversy; legal action and expense can well be the end result.

3.48 The Committee also suggests that Councils consider ways to demystify the strategic planning process. Advertisements plæced in newspapers, for example, could be cast in plainer English, exhibitions could be made easier to understand and public input could be encouraged beyond formal written submissions.

3.49 The Committee wishes to stress that public involvement can only arise from public awareness. Councils need to ensure that the community is well informed of strategic planning proposals. On this point, the Committee is concerned that the legislation as it stands does not require Councils to advise persons of any draft local environmental plan or exhibition which may have an adverse impact on the use and enjoyment of their land. It is the Committee's view that each Council should develop its own policy to address this situation.

18 Minutes of Evidence, 17 November 1990, pp. 172-173

Plan Implementation

Overview

3.50 Planning strategies are implemented through the development application process.

3.51 For any piece of land under the New South Wales planning system, the relevant environmental planning instruments should delineate what types of activities are:

i. permissible without development consent;
ii. permissible with development consent; and
iii. prohibited.

3.52 Activities which do not need development consent are those which the architects of the relevant instrument saw as having an insignificant planning impact. The carrying out of such activities may still need some type of approval other than development consent.

3.53 Activities which are prohibited comprise those which the architects of the relevant instrument recognised as totally inappropriate for the land concerned. The consent authority does not have the power to consider development applications for such activities?

3.54 It is the activities which are permissible with consent which involve most of Council's development control resources by means of assessing and determining development applications. The applications are assessed by Council in terms of the relevant strategies: environmental planning instruments, development control plans and various policy documents.

3.55 The Committee is aware that the practice of planning instruments to so categorise types of activities can easily lead to dispute. If a particular activity is difficult to classify, legal argument may arise. The activity may be undefined or the definition provided ambiguous. The would-be applicant, of

19 Refer, however, Section 100A Environmental Planning and Assessment Act which gives the Minister power, in some circumstances, to approve "prohibited development'

course, will be eager to argue that his or her proposed activity is permissible with or without consent. The consent authority, on the other hand, may interpret the plan otherwise. Such a dispute is a common case in the Land and Environment Court with potential cost implications for all parties concerned.

3.56 In considering this problem, the Committee came to the conclusion that the onus must lie with the plan makers to ensure their plans are well drafted, up to date and regularly reviewed. The cost of good legal assistance at the preparation and review stages may well outweigh potential expense further down the track.

Assessment of Development Applications

3.57 Councils must assess each development application in accordance with Section 90 of the Act. This section sets down a list of some 23 *"heads of consideration",* each of which must be considered as far as it is relevant. It is noted that *"there is nothing in the legislation which indicates what weight must be given to each of these factors so long as they are all considered." 2o*

3.58 Section 90(1)(a) refers to environmental planning instruments, including draft ones, and development control plans. Planning policy documents other than development control plans can be considered under other relevant heads of consideration, including S.90(1)(9): *"the circumstances of the case." 21*

3.59 A considerable number of witnesses before the Committee stressed the importance of having well formulated and clear planning strategies to assist the determination of development and avoid potential legal costs.

3.60 In explaining Woollahra Municipal Council's apparently high success rate on development application matters in the Land and Environment Court, the Town Clerk, told the Committee that *"...the codes and policies drive everything. If they are flawed then our decision making is flawed." 22*

20 Mr D. Farrier, *Environmental Law Handbook,*1988, Redfern Legal Centre Publishing, p. !15

21 Ibid, p. 16

22 Minutes of Evidence, 8 November 1990, p. 144

3.61 The same sentiment was echoed before the Committee by Mr Barry O'Keefe, Q.C., former Mayor of Mosman Municipal Council, who argued that a good set of planning strategies should help to avoid those development decisions based on political motives rather than sound planning practice and which often, in the long run, attract considerable legal expense:

"I think you do need, in the main, guts in order to stand up for what you believe are the correct principles. But the Council has to have laid down what those principles are. If you have not thought your principle through, you are just wandering around. You are playing mates or paybacks or responding to pressure. A lot of those costs go back to even before the decisions as to what the material on which you can make your decisions will be. So the structures and policies of the Council are very important in that regard." 23

3.62 The Committee urges Councils to embark on programmes to formulate strong and clear networks of development control strategies. Evidence before the Committee indicates that those Councils which have developed a comprehensive set of planning policies which are consistently applied and kept up to date should expect a decline in legal costs. Whilst the elected Council should be involved in the formulation stage, the application of the policies should be able to be delegated to the professional staff away from the political arena.

3.63 The Committee does note that the introduction of new controls can add short-term legal expense as the fresh policies are tested and challenged. This was stressed in evidence by both Mr Mant, Solicitor, and Mr W. Taylor, Town Clerk of Ku-ring-gai Municipal Council. Mr Taylor, in his evidence before the Committee, attributed fluctuations in legal expenditure by his Council to the introduction of new residential controls:

'7 do not think that the size of legal expenses necessarily is a measure of performance. In our case...it has been an inevitable part of introducing better planning controls.,' 24

23 Minutes of Evidence, 8 November 1990, p. 87

24 Minutes of Evidence, 17 December 1990, pp. 219-220

Determination of Development Applications

3.64 In accordance with Section 91(1) of the Act, a Council must determine a development application by either:

i. approving it unconditionally;
ii. approving it subject to conditions; or
iii. refusal.

3.65 In exercising its discretion, the Council must observe Section 90 and its planning instruments and policies as outlined above.

3.66 An applicant who is dissatisfied by the Council's determination, in accordance with Section 97 of the Act, may appeal to the Land and Environment Court. This may be an appeal against a refusal or conditions imposed.

3.67 The Committee notes that Section 90 of the Act includes some notably imprecise items which must be considered by Councils, such as *"the existing and likely future amenity of the neighbourhood," 25 "the circumstances of the case" 26* and *"the public interest." 2*,

3.68 In his evidence before the Committee, Mr W. Kempshall, Town Clerk of North Sydney Municipal Council, referred to *"the circumstances of the case"* as *a "very broad concept"* which potentially invites political considerations? In a similar sense, Mr F. Thomson; Shire Clerk of Warringah Shire Council, spoke of *"amenity"* as a *"vague"* and *"ill defined"* term being *"a very difficult concept to come to terms with." 29*

3.69 In reference to *"the public interest"*, the Committee notes with interest some recent comments of the Honourable Mr J. Cripps:

25 Section 90(1)(o)
26 Section 90(1)(q)
27 Section 90(1)(v)
28 Minutes of Evidence, 7 November 1990, p. 70
29 Minutes of Evidence, 7 November 1990, p. 45

"Judges of the Land and Environment Court are mandated by the Parliament to have regard to the "public interest" although it won't tell us what that interest is." 30

3.70 The Committee is concerned that these three heads of consideration - namely *"the existing and likely future amenity of the neighbourhood", "the circumstances of the case"* and *"the public interest"* - can be used by Councils to justify decisions based on political motives rather than well formulated planning principles.

3.71 An analogous case was presented in evidence to the Committee by Mr G. Moore, who in 1989 successfully appealed to the Land and Environment Court against a decision by Warringah Shire Council to refuse a building application for a tennis court. In the court's judgement, the Assessor noted:

"Despite the four days of evidence, it is still not clear why the respondent Council...rejected the recommendation of its Divisional Manager - Environmental Services to approve this tennis court subject to conditions, and chose instead to refuse it as being contrary to the amenity of the area, without further explanation until required so to do for the purpose of this heating..." 31[emphasis added]

3.72 The legal cost borne by both parties is one matter. The apparent failure of the Council to provide adequate reasons for its decision is another.

3.73 Section 92(2) of the Act requires Councils, when issuing a notice of determination of a development application[32] to *"indicate the reasons for the imposition of the conditions or the refusal."* The Committee wishes to express its concern, however, that the reasons often given are vague and unhelpful terms. It would appear that terms such as *"amenity"* and *,'the public interest"* are often used.

3.74 The Committee considers that Councils have a responsibility to justify their decisions in clear, written terms. It is the Committee's belief that such a

30 The Honourable Mr J.S. Cripps, *Courting the Public Interest in* Polemic, Vol 2 No. 1, February 1991, p. 40

31 Moore v. Warringah Shire Council, No. 20437/1988, p. 22

32 other than an unconditional consent

practice should help minimise opportunities for any decisions based on spurious reasons. Furthermore, it should assist dialogue between Council and the aggrieved applicant. Better communication can only increase the possibility of the parties reaching agreement before arguing the matter in the Land and Environment Court.

Recommendation 6

It is recommended that the reasons given by Council for refusal of a development application or the imposition of conditions of consent pursuant to Section 92(2) of the Environmental Planning and Assessment Act 1979 be made more explicit and precise and be written in plain English.

Deemed Refusals

3.75 Section 96 of the Act states that development applications which have not been determined within a specified period of time after lodgement may be *"deemed"* to have been refused. A deemed refusal enables the applicant to appeal to the Land and Environment Court.

3.76 In the vast majority of cases, the period for a deemed refusal is 40 days. The period is only extended if (a) an environmental planning instrument requires the consent authority to obtain the concurrence of the Minister or another public authority prior to granting consent;[33] or (b) the development is *"designated." 34*

3.77 It is generally recognised that since the introduction of the legislation, many Councils have not been able to achieve the 40 day target. In a comprehensive study of development applications received by 14 NSW Councils in 1986 Jonathan Falk Planning Consultants found that only 41 per cent of applications were determined within the 40 day period. The median period for determination ranged between Councils from 20 to 74 days?

33 Refer sections 78 and 96(i)(b) Environmental Planning and Assessment Act

34 Refer sections 96(1)(c), 158 and 29 Environmental Planning and Assessment Act

35 Jonathan Falk Planning Consultants, Study into the Processing of Development Applications, Rezoning Requests & Other Related Matters, prepared for the N.S.W. Department of Environment & Planning **and the** Local Government and Shires Associations of NSW, 1987, Summary of Report, p. 4

3.78 The Committee asked some of the local government representatives who appeared before it to provide estimates of their Councils' average processing times for development applications. Mr J Bourke, of South Sydney City Council, suggested 80 days.[36] North Sydney Municipal Council's Town Clerk, Mr R. Kempshall, referred to *"about two and a half months"*,having been reduced from about five months in 1989.[37] Mr A. Payne, of Willoughby Municipal Council, told the Committee that whilst 50% of applications dealt with by his Council are processed within 40 days, a complex project may well take about 12 months.[38]

3.79 In examining reasons for the high level of expenditure by Councils in the Land and Environment Court, the Committee received convincing evidence from a high proportion of witnesses that appeals against deemed refusals comprise a major factor of legal expenditure in the Land and Environment Court. A number of reasons for the delays in processing applications were provided.

3.80 One reason frequently advanced to the Committee was delays caused by referrals of applications to other authorities. Mr Regnis, Woollahra Municipal Council's Town Clerk, for example, stated in evidence:

"Legal expenses can arise out of the frustration of applicants caused by the delays in the discharging of applications. Often
as not, those delays are entirely out of the hands of the local authority...some of the delays are caused by the fact that we
have to wait .for other authorities to come back to us." 39

3.81 The Committee is aware that Councils often have a statutory duty to refer a development application to other authorities. The relevant environmental planning instrument may require the Council to seek the concurrence of an authority before issuing approval. Alternatively, it might require more consultation. In the former instance, the 40 day deemed refusal period is extended to 60 days. In the latter case, the 40 day period remains the same. In both instances, the time pressure and possibility of appeal do not work against the referral authority.

36 Minutes of Evidence, 8 November 1990, p. 103
37 Minutes of Evidence, 7 November 1990, p. 57
38 Minutes of Evidence, 7 November 1990, p. 74
39 Minutes of Evidence, 8 November 1990, p. 152

3.82 It is also evident to the Committee that a Council may decide to refer an application to another authority at its own discretion in order to obtain expert advice. For example, a Council might consult with the State Pollution Control Commission, the National Parks and Wildlife Service or NSW Agriculture and Fisheries.

3.83 It is the firm view of the Committee that a Council which makes a reasonable request of another authority for expert information in order to assist its assessment of a proposal ought not to be penalised by the costs of a premature appeal.

3.84 Another reason put to the Committee concerning why Councils exceed the 40 day period was that a good proportion of that period can be spent inviting public comment on a proposal. In his evidence before the Committee, Mr F. Thomson, for example, explained the implications of Warringah Shire Council's public notification policy:

"When you get a develop[ment] application in, it has to be processed within 40 days...We have a notification policy that puts it out from 14 days to 28 days, depending on what it is, for public comment. We notify all neighbours and we get back their comments. We assess the comments and they are built into a report. A staff report is prepared incorporating those comments. Obviously the 40 days is looking very thin by the time you go through that procedure alone..." 4o

3.85 In some cases, public exhibition of a development application is required by an environmental planning instrument or the legislation itself. In other cases, a Council might seek public comment at its own discretion. The Committee is aware that numerous Councils' follow a policy to advise and invite comments from adjoining owners, and others which might reasonably be affected by a proposal.

3.86 The Committee is of the opinion that Councils should not be discouraged from adopting sensible policies which promote public input into the decision making process but at the same time do not unduly delay the development process. It would appear that the incidence of appeals against deemed refusals can serve to penalise Councils who choose to adopt this practice.

40 Minutes of Evidence, 7 November 1990, pp.47-48

3.87 A third reason cited to the Committee for determination extending beyond 40 days was insufficient information accompanying the original application and delays experienced by Councils in seeking further details from the applicant. On this point, the Committee notes the advice of the Local Government and Shires Associations in their written submission:

"...delays in determining applications are usually brought about by factors in the control of the applicant or otherwise outside the control of the Council...It should be noted that the Phase I Review of the Local Government Act includes a provision allowing Councils to seek further information of an applicant, with the period to deem refusal not commencing to run until that information has been supplied." 41

3.88 The Committee considers that a corresponding provision should be inserted in the Environmental Planning and Assessment Act.

3.89 In the three instances outlined above, the Committee is convinced that the 40 day rule can place unrealistic expectations on Councils which are trying to do their job well. The Committee wishes to stress that a quick decision is not necessarily the best one.

41 Submission, Mr D. McSullea, Acting Secretary, Local Government and Shires Associations of N.S.W., 26 June 1990

Recommendation 7

It is recommended that Section 96 of the Environmental Planning and Assessment Act 1979 be amended in order to extend the standard 40 day period (for which an undetermined development application is deemed to have been refused in the following cases:

a. when a Council makes a reasonable request to another authority for advice on a development application;

b. when a Council advertises the development application or seeks the advice of adjoining owners/occupants and others which might reasonably be affected by the proposal, in accordance with a relevant environmental planning instrument or development control plan; and

c. when a Council makes a reasonable request to an applicant, in writing, seeking further information or an amendment to the development application.

Efficiency Issues

3.90 The Committee wishes to emphasise that the above recommendation to soften the deemed refusal provision does not in any way detract from the importance the Committee places on efficiency in the approval process. The need for enhanced efficiency and cost effectiveness in local government regulatory processes was highlighted in the Commonwealth Department of Immigration, Local Government and Ethnic Affairs' report *Local Government Regulation of Land and Building Development*.[42] It is also reflected in the Local Approvals Review Program (L.A.R.P.) and the Local Government and Shires Associations' recent Development Assessment Manual.[43]

42 Office of Local Government, Department of Immigration, Local Government and Ethnic Affairs, *Local Government Regulation of Land and Building Development*, June 1989

43 Blinkhorn & Wiggins, *Development Assessment Manual*, Local Government & Shires Associations of N.S.W., October 1990

3.91 The Committee received evidence that a significant number of applications exceed the 40 day period due to internal decision making processes. The Committee was not surprised to note that many applications which are determined at Council rather than officer level fall into this category. Whilst many of these applications would be complex in nature and may well necessitate an extended period for assessment, the Committee suggests that those proposals which otherwise comply with all the relevant plans and policy, may not necessarily require the full scrutiny of the Council.

3.92 The importance of a good network of planning policies to assist the assessment of development applications has already been examined above. It is the Committee's view that those proposals which satisfy all relevant plans and policies may be able to be processed with minimal delay at staff level.

Recommendation 8

It is recommended that each Council develop a 'fast track' approval mechanism for development applications which comply with all relevant environmental planning instruments and policies.

The Need for Expert Advice

3.93 The Committee has already referred to the practice of Councils to consult with expert authorities at their discretion. It is also noted that in assessing complex or controversial proposals, a Council might engage consultants to provide specialist advice which the Council would otherwise not have access to.

3.94 A case in point was provided in evidence before the Committee by Mr J. Walsh, General Manager/Shire Clerk of Port Stephens Shire Council. Mr Walsh told the Committee about a sand mining application which had appeared to involve a koala habitat. The Council had deferred its consideration of the proposed and commissioned studies into the impact of the proposal on the habitat. As a result, application was somewhat delayed and the applicant appealed against the Council's deemed refusal?

44 Minutes of Evidence, 17 December 1990, pp. 202-203

3.95 The problem of having to seek expert consultant advice would seem to particularly affect small rural Councils where in-house resources are limited and many proposals involving significant environment impact, such as mining and intensive animal agriculture, tend to arise.

3.96 It is important to note that the legislation sets up a narrow category of developments, known as *"designated development"*;[45] which tend to undergo a more rigorous assessment than other proposals. The development application must be accompanied by an Environmental Impact Statement (E.I.S.)[46] The application and E.I.S. are placed on public exhibition and are thus open to public scrutiny.[47] Objectors to the application enjoy third party appeal rights to the Land and Environment Court?

3.97 Many designated developments comprise *"heavy industry with high pollution potential."* The category also includes extractive industry and some intensive animal agriculture? Many of these uses occur in rural areas where poorly resourced Councils must face not only the cost of assessment but also the potential expense of appeals for which there is greater opportunity. In its submission to the Committee, Sly and Weigall, a major law firm which specialises in planning law, notes the tendency for such Councils to rely on specialist legal advice when dealing with designated development?

3,98 Whilst the Committee supports the concept of designated development, it is aware of the high legal costs often borne by smaller Councils in dealing with it. Evidence was received, for example, regarding the high costs of some appeals involving extractive industry proposals in rural areas.

3.99 A major problem recognised by the Committee is the need for ready access to specialist information. This may be relevant to both designated and non-designated development. A determination based on detailed and accurate information may well avoid the costs of an eventual appeal.

45 Refer definition in Section 4 Environmental Planning and Assessment Act 1987

46 Refer Section 77(3)(d) ibid

47 Refer Sections 84, 86 & 87, ibid

48 Refer Section 98 ibid

49 Refer Mr D. Farrier, *Environmental Law Handbook*,1988, Redfern Legal Centre Publishing, p. 269

50 Submission, Sly & Weigall, 24 September 1990

3.100 The Committee is aware that some Council officers provide consulting services to other Councils who do not have the same level of expertise. The Committee supports this practice as well as any suitable arrangements for joint employment.

3.101 A further alternative would be the establishment of a Statewide panel or panels of appropriate experts, perhaps including retired local government officers, who would be readily available to provide specialist advice to a Council on a standard scale of charges. The Committee supports this notion and suggests that the Local Government and Shires Associations may be in the best position to set it up and monitor its operations.

Recommendation 9

It is recommended that the Local Government and Shires Associations consider the establishment of a panel or panels of experts in environmental assessment and other fields, wherein upon the request of a Council, the Associations would appoint an expert to provide consultancy services to that Council in the assessment of a development application where the limited resources of that Council do not enable such assessment to be adequately carried out.

Public Consultation

3.102 The Committee has already referred to the practice of some Councils to exercise their discretion in seeking public comment on development applications.

3.103 Councils have a statutory duty to invite public participation in the development application process in only a limited number of circumstances.[51]

51 Refer Mr D. Farrier, *Environmental Law Handbook*, 1988, Redfern Legal Centre Publishing, pp. 110-113

i. if the development is designated;

ii. if the development is prohibited and the Minister has invoked his or her powers under Section 101 of the Act;

iii. if public consultation is required by the relevant environmental planning instrument; or

iv. where the applications for a residential flat building and attracts Section 342ZA of the Local Government Act.[52]

3.104 Many Councils, however, go much further than the bare statutory formulae in encouraging public input. As noted above, the Committee *"supports"* sensible policies which promote public input into the decision making process but at the same time do not unduly delay the development process.

Building Control

3.105 Whilst the above examination has been devoted primarily to planning functions, the Committee is aware that some of the issues also apply to building control.

3.106 Building control is exercised pursuant to Part XI of the Local Government Act 1919. It is a separate system to the planning regime although both do overlap to some extent.

3.107 Many activities require both development consent and building approval to be carried out. Some developments, such as the erection of a dwelling-house in most residential zones, require building approval only. The Committee notes that the proposals for the erection of a dwelling or even a mere addition can become relatively controversial on a neighbourhood level. Disputes can arise which have the potential to lead to legal action. The Local Government Act enables applicants who are aggrieved by a Council's decision in relation to a building approval to appeal to the Land and Environment Court.

52 Whilst Part XIIA of the Local Government Act was repealed, this provision is saved in certain circumstances by Clause 14(1) Miscellaneous Acts (Planning) Savings and Transitional Provisions Regulation, 1980

3.108 The equivalent of Section 90 of the Environmental Planning and Assessment Act is Section 313 of the Local Government Act 1919. It contains some planning oriented items for consideration. Such items tend to be more difficult to assess than technical building matters and can thus easily become the focus of an appeal. It is important, therefore, that Officers dealing with building applications involving some planning assessment be adequately trained. In some instances, building applications are referred to town planners for comment. In others, it is building staff who carry out the assessment.

Recommendation 10

It is recommended that local government building staff be encouraged to undertake training programmes in planning and environmental assessment.

3.109 On this point, the Committee sees merits in the general breakdown of narrow staff specialisations within local government and a greater sharing of expertise. The Committee is of the view that many of the costly administrative problems experienced by Councils stem from an unnecessarily rigid separation of duties amongst staff.

4. Aspects of Local Government Decision Making

Introduction

4.1 In examining the legislative scheme for local government regulatory processes, and in particular the statutory framework for the development control process, the Committee came to the firm conclusion that high legal costs borne by Councils are not necessarily the direct result of statute.

4.2 As the Inquiry proceeded, it became increasingly clear to the Committee that high legal costs are often rooted in internal decision making processes which may be inefficient, out of date, flawed or inflexible.

4.3 The Committee supports a new philosophy in local government decision making. Decision making processes must be adapted to encourage openness and enable disputes to be resolved at an early stage in the process.

4.4 A change in decision making requires a change in attitude. It is the Committee's desire that local government develop a more open and client-oriented approach. Decision making behind closed doors, officious personnel and a reluctance to make difficult decisions must be left behind.

4.5 In this chapter, the Committee examines certain aspects of the decision making process relating to development control. During the course of this Inquiry, these particular aspects arose as issues which appeared to the Committee to warrant particular attention. The list, however, is not exhaustive.

4.6 The Committee considers that many of the general issues raised in this chapter may also be relevant to other Council activities. In particular, the thrust towards a more client-oriented culture relates to local government as an entire institution.

4.7 The aspects of decision making considered by the Committee in this chapter are:

* pre-lodgement enquiries;
* public access to the decision making process;
* delegation to staff of determining powers; and
* avoidance of decisions by the elected Council.

Setting the Context and Efficiency Issues

4.8 The Local Government and Shires Associations' recent *Development Assessment Manual* recognises ten steps in the development application process:[1]

1. Enquiries
2. Lodgement, Registration, Receipt by Planning Section
3. Fees and Filing
4. Commence Referrals
5. Commence Advertising
6. Acknowledgment
7. Request for Additional Information
8. Assessment and Planning Report
9. Determination and Notification
10. Follow-up and Monitoring

4.9 A similar sequence may be seen to apply to the building approval process although fewer steps are usually involved. Opportunities for referral and advertising are less extensive. The assessment may be of a purely technical nature. Requests for amended plans may be expected to occur earlier in the process.

4.10 The question of efficiency in both processes is frequently raised. In a recent national report entitled *Local Government Regulation of Land and Building Development*, it was noted that:

"A review of media articles revealed a strong and pervading view that Councils caused considerable delays to development through inefficient and ineffective regulation. The fact that all States have instituted review

1 Blinkhorn & Wiggins, *Development Assessment Manual*, Local Government & Shires Associations of N.S.W., October 1990, p. 1

of regulatory activity demonstrates the extent to which such views have become to be accepted as correct." 2

4.11 Comprehensive reviews of the New South Wales regulatory systems were undertaken in 1983[3] and 19874. More recently, funds have been granted under the national Local Approvals Program (L.A.R.P.) to ten Councils across Australia, including four N.S.W. metropolitan Councils, to *"undertake pilot projects to review the processes of managing development and building control at the local level."* [5]

4.12 Inefficiency in approval processes result in delay and frustration. The opportunities for appeal, in particular the "deemed refusal" provision examined in Chapter 2, pave the way for potential legal expense. In view of the obvious need for Councils to avoid legal costs where possible, the Committee supports all recent efforts aimed to achieve greater efficiency in the approval processes. In particular, the Committee applauds the Local Government and Shires Associations for its recent *Development Assessment Manual aimed to 'provide guidance for Councils on efficient and effective processing of development applications."*[6] The Committee commends the Manual to all Councils.

4.13 In view of the number of recent and current projects which address the question of overall efficiency in the approval process, it was clear to the Committee that to embark on another comprehensive review, even with an emphasis on legal costs, would be of little value. Instead, the Committee chose to focus on specific stages or aspects in the decision making process which, during the course of this inquiry, arose as issues which needed to be addressed.

2 Office of Local Government, Department of Immigration, Local Government and Ethnic Affairs, *Local Government Regulation of Land and Building Development*, p. 15

3 Ms P. Goldin, *Development and Building Control in New South Wales: A Study into the Processing of Development and Building Applications*, Local Government and Shires Association of NSW, 1983.

4 Jonathan Falk Planning Consultants, *Study into the Processing of Development Applications, Rezoning Requests and Other Related Matters*, prepared for the N.S.W. Department of Environment & Planning and the Local Government & Shires Associations of N.S.W., 1987

5 National Steering Committee of the Local Approvals Review

6 Blinkhorn & Wiggins, *Development Assessment Manual*, Local Government & Shires Associations of N.S.W., October 1990

4.14 The Committee does urge all Councils to review their individual approval processes with a view to minimizing delays and maximizing available resources. The above mentioned *Development Assessment Manual* should provide a good starting point.

4.15 The Committee wishes to stress, however, that improvement in efficiency should not mean fewer officers dealing with enquiries or reduced public access to professional staff. A major thrust of the. Inquiry, as recognised by the Committee, is to encourage local government to adopt a more client-oriented approach. The Committee is convinced that a greater emphasis on providing information and services in a more open manner should help to avoid later conflict.

Recommendation 11

It is recommended that each Council undertake a comprehensive review of its development and building processes with a view to promoting not only efficiency but also open and service-oriented systems.

Preliminary Enquiries

4.16 For most people, the first point of contact with a Council will be the front counter. The contact may be made by telephone or in person. The person seeking information may be a potential applicant for development consent or building approval. The proposal may well be one which will attract public controversy further down the line. On the other hand, the enquirer may be a local resident wishing to find out whether or not Council has approved some nearby activity. Alternatively, he or she may be trying to ascertain the truth about a local rumour concerning an unpopular development proposal.

4.17 Enquiry counters are generally attended.by officers who are relatively inexperienced or are situated at the lower levels of the staff hierarchy. The Committee believes this situation has several potential implications which can easily lead to frustration and antagonism on the part of the public. It is the Committee's view that such feelings can easily provide the first link in the

chain towards unnecessary conflict which may well find ultimate expression in legal action.

4.18 In the first place, inexperienced staff can give advice which is imprecise, misleading or wrong. The potential for legal conflict is obvious. The Committee is aware that some Councils place notices at their enquiry counters warning members of the public that the Council denies liability for verbal information given. The Committee regards such a device as an unsatisfactory solution to placement of junior staff at the enquiry counter.

4.19 Secondly, counter staff may need to frequently refer to more senior officers in order to answer non-routine enquiries. Such a practice, whilst based on sound motives; can lead to frustration on the part of the enquirer, a lack of confidence in the officer concerned and an inefficient use of time for all concerned.

4.20 Thirdly, it is apparent that enquiry staff, let alone many other Council officers, do not possess sufficient skills in public relations or negotiation techniques: The Committee is concerned that a mere disagreement or misunderstanding at the counter can too easily lead to unnecessary confrontation. It is the Committee's opinion that counter staff should be equipped to help defuse such situations. Furthermore, adequate knowledge of the planning and building systems combined with good public relations skills should help to avoid such conflict arising in the first place.

4.21 The Committee is convinced that Councils should embrace a wholly fresh outlook to the provision of information services. It is suggested that Councils adopt an approach oriented towards servicing clients rather than administrative convenience.

4.22 A starting point could be the rationalisation and upgrading of those positions involving the provision of information to the public. Such positions should carry a high level of responsibility and, hopefully, prestige. The officers concerned would need appropriate training in the areas of public relations, negotiation techniques and dispute resolution skills. In the long term, the Committee would be pleased to see such officers recognised as a separate "information industry" within local government rather than being mere appendages to the traditional Council departments.

Recommendation 12

It is recommended that Councils rationalise the provision of their information services and employ senior rather than junior officers, who have undergone or are undergoing training in public relations, negotiation skills and dispute resolution skills, to attend to enquiries from members of the public.

4.23 The benefits of having well-trained 'staff at the enquiry counter will be diminished, however, if the physical environment where the information services are provided is insufficient or poorly designed.

4.24 It appears to the Committee that many of the enquiry facilities provided by Councils are not conducive to meaningful interaction between Council and client.

4.25 Privacy is a major issue. Many persons seeking development or building approval would regard information provided to Council officers to be of a confidential or sensitive nature. The Committee is concerned that many counter facilities do not provide an adequate level of privacy.

4.26 The Committee is also concerned that some facilities do not cope easily with a situation where a group of people wishes to discuss a matter. There may be problems of physical space, noise and privacy.

4.27 The Committee supports the notion that Councils should provide a specially designated area or room to supplement the enquiry counter. These rooms could also be used for meetings with applicants and interested persons at later stages in the application process. The rooms should be comfortable and sufficiently versatile to provide for both formal and informal meetings.

Recommendation 13

It is recommended that each Council provide a designated suitably furnished area or room for informal and formal meetings involving planning and other matters.

4.28 The Committee understands that the vast majority of Councils, if not all Councils, encourage potential applicants to liaise with Council officers prior to lodgement of an application.

4.29 The Committee is aware that some Councils have formalised this concept by setting up a staff advisory panel, sometimes called a "development control unit." These panels often serve additional functions, such as determining applications under delegated authority of the Council. An example of such a mechanism was provided in evidence to the Committee by Mr P. Walsh, General Manager/Shire Clerk, Port Stephens Shire Council:

"A representative from each department and the chairman from the administrative department were given delegated authority to deal with all development applications, unless Council chose to call one up for whatever reason it wishes. This development assessment panel, which meets once or twice a week; interviews members of the public. People do not have to make development applications; they can put forward proposals which they can discuss with officers of that panel and get some idea, if they wish to proceed, of the conditions Council may be looking for. That has been received very favourably from the majority of people who have dealt with it." 7

4.30 The Committee supports the concept of a development control unit or other similar administrative mechanism to encourage negotiations between potential applicants and Council at the pre-lodgement stage.[8] The Council

7 Minutes of Evidence, 17 December 1990, p. 209

8 It is **noted that** the aforementioned *Development Assessment Manual* issued by the Local Government and Shires Associations contains advice and discussion on establishing a multi-functional advisory panel or development assessment **unit.**

may or may not decide to levy a charge for the service. In either case, the Committee encourages dialogue and negotiation between applicants and Council as early as possible in the decision making process. Early identification of problems should assist to minimize potential delays and conflicts later in the process.

Recommendation 14

It is recommended that each Council set up an appropriate mechanism for pre-lodgement development and building enquiries wherein potential applicants can receive, by appointment, on-the-spot advice from appropriate senior officers.

Public Access to the Decision Making Process

Public Consultation in the Development Application Process

4.32 The statutory requirements for public participation in the development application process have already been referred to in Chapter 3. The Committee has also noted that many Councils go beyond their statutory duties to encourage public input in the decision making process.

4.33 The Committee received conflicting evidence on the implications of increased public input on legal costs.

4.34 Mr W. Bourke, Town Clerk of South Sydney City Council, told the Committee that:

"The present climate means that we have to have a lot of residential and community consultation. I have no doubt that has increased the legal costs of all Councils enormously, and it will continue to do that. While ever we ask people their

attitudes to development we will have conflict, and when there is conflict we finish up in court." 9

4.35 On the other hand, Mr M. Ball, Town Clerk of Waverley Municipal Council, stated in evidence before the Committee that his Council's policy to "notify all people who are adjacent to the development site and any others who might reasonably be affected" has not resulted in increased litigation?

4.3 In regard to North Sydney Council's policy to maximize public participation through its precinct system, Council's Town Clerk, Mr R. Kempshall, expressed his view to the Committee that it "...can be a positive way of reducing litigation."[11]

4.36 On the balance of all the information before it, the Committee is convinced that an open approach which seeks to get parties talking to each other early in the process should assist to minimize opportunities for later conflict and legal expense.

4.36 On this point, the Committee was particularly impressed by comments made by Mr W. Henningham, solicitor and former Secretary of the Local Government and Shires Associations:

"In my experience... I found that if the community was involved in a way that meant something at the right time, before the Council made the decision, that reduced many subsequent problems. If the community suddenly finds out that a building has been approved about which it has strong concerns, the Council has to hose down community concerns without having the ability to do anything about it, because the Council cannot rescind its decision. Councils need the ability to determine policies as to how they carry out the process of notification..." 12

4.38 It is the Committee's view that each Council should develop its own policy on public consultation in the development application process. Furthermore, the

9 Minutes of Evidence, 8 November 1990, p. 102

10 Minutes of Evidence, 8 November 1990, p. 123-124

11 Minutes of Evidence, 7 November 1990, p. 67

12 Minutes of Evidence, 8 November 1990, p. 153

Committee believes that the policy itself should undergo a process of consultation.

Recommendation 15

It is recommended that each Council formulate its own policy on advertising and/or notifying members of the public of development applications; that the formulation of the policy include a process of public consultation; that the policy be made freely available to members of the public on request and be periodically reviewed; that Councils be encouraged to place such policies in development control plans.

Public Consultation in the Building Application Process

4.39 In relation to public consultation in the building application process, the Committee received considerable evidence from local government representatives concerning the cost implications of the recent Land and . Environment Court case of Porter v. Hornsby Shire Council.[13] In Porter, the Honourable Mr J.S. Cripps, interpreted Section 312A of the Local Government Act to require all Councils to notify adjoining owners and persons whose enjoyment of land could be detrimentally affected of any building application received. The decision was later upheld by the Court of Appeal.

4.40 Whilst the Committee agrees in principle with theconcept of informing potentially affected persons of building applications, it recognises that in a perhaps very limited number of cases, public notification could well be unnecessary and only serve to delay and add cost. A minor and hardly visible alteration to a dwelling or the erection of a shed on a remote farm provide obvious examples.

13 Land & Environment Court, No. 40251 of 1989

4.41 It is the view of the Committee that, similar to the recommendation above in relation to public consultation in the development application process, each Council should develop its own policy in relation to seeking public comment on building applications. Again, the Committee believes that the policy itself should be developed with the assistance of public input.

A New Approach

4.42 The Committee wishes to stress that policies which merely increase opportunities for formal written submissions are likely to be insufficient. The Committee urges Councils to consider innovative ways to increase the general accessibility of the decision making processes.

4.43 The Committee notes that letters of notification and newspaper advertisements lodged by Councils are often couched in legalistic and officious terms. The Committee suggests that Councils cast such items in plainer English.

4.44 Councils may also consider allowing applicants and interested parties to voice their cases in person and receive a proper hearing.

4.45 In his evidence, Mr Mant, solicitor, described the concept of Councils convening meetings between potential objectors and applicants at the neighbourhood level:

"...some Councils have precinct committee arrangements and other arrangements for getting those people in and making them feel as though they are being listened to. But lots do not. There is not a tradition of a proper hearing process, which is standard in America and which is used in Victoria in some circumstances: I have been a party to that process. I think that is a most effective way of getting very productive input at an early stage..I think there are lots of cases that could be sorted out earlier than they are - before the lawyers get into their combative modes."[14]

4.46 The Committee supports arguments for pre-determination hearings and recommends that Councils consider putting such systems into operation.

14 Minutes of Evidence, 8 November 1990, p. 135

4.47 It is important, however, that both the procedural and physical environment set up for hearings or a mere exchange of views should be designed to encourage effective dialogue. On this matter, the Committee was interested to learn the following experience related by Mr Mant:

"I went to a Council recently to represent a client at the Planning Committee or the Building and Planning Committee. You go into a long narrow room. There is a long table like the one I am sitting at now. There are three rows of chairs at the end of this long room and Council members and the staff sit round the table. The chairman has his back to the public. Files are out, people stand around and look at the files and then someone says, 'Mr Mant, do you want to say something on behalf of your client', so you come up and stand beside the table and you say something. Then you go back. The neighbour then comes up and says something and goes back. There is more muttering the hands go up and you say as you go out, 'What happened?' You go from that sort of decision-making to a three day hearing in court."[15]

4.48 The above provides a good example of a non-client oriented environment which is likely to engender frustration and suspicion. It should be avoided.

4.49 The Committee is mindful that promoting public awareness of development proposals can itself produce disputes. As Mr Barry O'Keefe, Q.C., remarked to the Committee, "the more people you tell the more objections you are going to get - whether they are justified or not." [16] The Committee believes, however, that Councils should focus on attempting to resolve these disputes earlier in the process rather than allowing them to arise later when legal action may be the only forum to settle the conflict.

4.50 The Committee holds the view that the role of dealing with and trying to settle these disputes should be fulfilled by the professional officers who actually assess the proposals. The Committee is concerned, however, that many of these officers may not have the skills to assist them to convene meetings between antagonistic parties, identify the issues in conflict, attempt to mediate towards a common agreement within Council's guidelines and defuse any unresolved problems. It would appear to the Committee that

15 Minutes of Evidence, 8 November 1990, p. 129

16 Minutes of Evidence, 8 November 1990, p. 97

whilst many of these officers already deal in trying to resolve conflicts, the process is often carried out at the work station with the aid of written submissions rather than in an actual meeting with the parties.

4.51 It is the Committee's firm view that if a Council is serious about developing a more client-oriented approach, it must ensue that its professional and technical officers are adequately trained in people skills and are prepared to encourage more open dialogue between applicants, objectors and the Council itself.

Recommendation 16

It is recommended that Councils ensure that officers dealing with building and development applications undergo adequate training in negotiation skills and meeting procedure.

Recommendation 17

It is recommended that, where appropriate, Council officers convene meetings between applicants and interested parties in order to discuss concerns and attempt to resolve any disputes, and that such meetings be convened away from enquiry counters and public areas within the Council office building in an appropriately furnished designated room.

Access To Documents

4.52 In considering the general issue of public access in the decision making process, the Committee also addressed the specific issue of the availability of Council files and records to members of the public. It is noted that some Councils do pursue a policy of public access to the vast majority of their documents.

4.53 The Committee is aware of the Government's intentions to extend the Freedom of Information legislation to local government. Such moves have the Committee's full support.

4.54 It is the Committee's firm view that decisions made on development and environmental matters behind closed doors and away from public scrutiny can only exacerbate misunderstandings and conflict.

4.55 After having considered various options to promote public access to Council documents, the Committee came to the conclusion that legislative change is warranted.

4.56 Current statutory provisions already provide some public access to specific documents. Section 104 of the Environmental Planning and Assessment Act, for instance, requires Councils to keep a public register of development consents. Statutory opportunities for public exhibition of development applications and accompanying plans have already been referred to in Chapter 3.

4.57 The Committee proposes that certain documents involved in the development application process be made public documents and readily available for public inspection. The Committee envisages a "package" of copies of certain original documents, which will be added to as the process proceeds. It should be available for any person to inspect without appointment. At a minimum, the package would contain:

*the application form

* accompanying plans and supporting information
* letters of advice from outside public authorities
* the final report prepared by Council officers
* any relevant Council resolutions (including later amendments)
* Council's determination.

Recommendation 18

It is recommended that the Environmental Planning and Assessment Act 1979 be amended in order to require Councils to assemble and maintain a package of copies of certain documents relating to each development application, which would be made available for inspection to any person upon his or her request; that the package would contain, at a minimum, the following documents as soon as they are available: the application form, accompanying plans and supporting information, letters of advice from external public authorities, any Council resolutions which are directly relevant to the application and the Council's determination pursuant to Section 91.

4.58 The Committee wishes to stress, however, that a statutory duty to require Councils to make available certain documents for public scrutiny will not necessarily be sufficient to encourage a more client-oriented approach. New attitudes will also be important. The need for officers involved in the provision of information services to be skilled in public relations and other related areas has already been emphasised. The need for such skills to be carried through beyond the preliminary enquiry stage is vital.

4.59 A member of the public who wishes to inspect the abovementioned package of plans should be able to expect an officer to be available to competently explain the proposal and its implications in lay terms. Furthermore, the enquirer should be able to peruse the documents and plans at a table, preferably at a distance from the hustle of the enquiry counter. The designated room suggested by the Committee earlier in this chapter could fulfil this purpose.

Determination of Applications by Delegation

4.60 Sections 151 of the Environmental Planning and Assessment Act and 530A of the Local Government Act enable Councils to delegate their decision making powers to determine development and building applications respectively. The power might be delegated to a committee of elected representatives, a committee of staff members (sometimes called a 'Development Control Unit') or a specified officer.

4.61 Approaches to delegation vary significantly from Council to Council, reflecting the autonomous nature of local government. A study of the development application processes in 15 New South Wales Councils in 1986 revealed a "wide variation in the amount of delegation between Councils, from 20 per cent in one Council to 96 per cent in another."[17]

4.62 In his evidence before the Committee, Mr M. Regnis, Town Clerk/General Manager of Woollahra Municipal Council, described the delegation mechanism at Woollahra. It serves as an interesting example:

"Something in the order of 90 per cent of building and development applications that we receive are discharged at a staff level, that is the Chief Building Surveyor, Chief Town Planner or their staff, under the umbrella of the delegations. Almost all the remaining 10 per cent go up to the development control unit. That is a staff unit...and it consists of the Town Clerk; Municipal Engineer, Chief Town Planner and Chief Building Surveyor. It deals with matters that are reported to it just as if they are being reported to the aldermen. Copies of the business agendas go to the Development Control Unit. A monitoring safeguard system is in place in that an alderman can call the matter out of the jurisdiction of the Development Control Unit. If he or she does, it goes to the Aldermanic Committee, which is our Building and Development Committee.

17 Johnathan Falk Planning Consultants, *Study into the Processing of Development Applications, Rezoning Requests & Other Related Matters*, Summary of Report, prepared for the New South Wales Department of Environment & Planning and the Local Government & Shires Associations of New South Wales, p. 7

The way it has been operating in recent months, something of the order of 20 to 25 per cent of matters that go to the Development Control Unit are called out of their jurisdiction to the Building Development Committee. Both of them have powers of decision making. With the Building and Development Committee there is again a safeguard built into the system in that an alderman can call it out of the jurisdiction of Building and Development to go up to the full Council. Again, something of the order of 20 to 25 per cent of matters that go to Building and Development go up to full Council for decision. There is, if you like, a real pyramid of decision making." [18]

4.63 It is acknowledged that the Woollahra experience is probably more complex than most cases. In any event, the Committee believes that delegation of decision making powers to officer level is essential for reasons of efficiency in all but the smallest of Councils.

4.64 In the case of development applications, the Committee fully supports the delegation of determination powers to staff level where:

i. the proposal complies with all relevant Council policy; and

ii.. the Council has adopted a clear policy which clearly specifies which matters are to be dealt with under delegation.

4.65 On the point of compliance with relevant plans, the Committee has already stressed in Chapter 3 the advantages of Councils developing strong and dear networks of planning strategies. A proposal which complies with all the relevant plans should be able to be dealt with on a "fast track basis" at staff level without the potential delays and uncertainties which may arise if it goes before the elected Council. The Committee is convinced that such an approach should help to reduce eventual legal costs arising from appeals.

4.66 In regard to the need for a policy on delegation, the Committee is aware that some Councils do not have a clear, written policy which is readily available to potential applicants and the community. The Committee recommends that all Councils who delegate their powers should formalise their practices into written policy. Such an approach, in the Committee's view, will enable applicants and the community to learn the ground rules in the first place and

18 Minutes of Evidence, 8 November 1990, pp. 142-143

thus help prevent conflict which may later arise. It would be one part of the open and client-oriented approach to regulatory activities which the Committee urges Councils to adopt.

Recommendation 19

It is recommended that each Council formulate its own policy on the delegation of authority to determine development applications; that the policy be made freely available to members of the public and be periodically reviewed.

Avoidance of Decision Making

4.67 In his evidence before the Committee, Mr J. Bingham, Lord Mayor of Sydney and a solicitor specialising in local government and planning law, referred to a tendency on the part of some Councils to avoid difficult development application determinations by bowing to political pressure and allowing the matter to be sorted out later in appeal:

"Many Councils - and some are right out there in the forefront - will not grasp the nettle, and if there is significant resident objection they will refuse an application regardless. It does not matter that it complies with the local environmental plan or with the development control plan. It does not matter that it is similar in all respects to one they approved last week. If there is significant resident objection they will knock it back and will take on an appeal."[19]

4.68 This issue has been a major concern to the Committee since the outset of this Inquiry. It involves decisions, or lack of decisions, at the elected representative level based on political expediency rather than sound planning principles. Such decisions are usually made contrary to staff advice and may even contravene the planning policies established by the Council itself. Furthermore, these decisions are made in full awareness that an appeal from

19 Minutes of Evidence, 7 November 1990, p. 6

the aggrieved applicant to the Land and Environment Court is highly likely. The chances of success in defending the appeal may be poor. In anyevent, the Council's involvement in the appeal will incur significant costs.

4.69 An example was provided to the Committee by Mr G. Moore of Avalon in regard to a building application he had submitted in 1988 to Warringah Shire Council for a tennis court. Despite a staff recommendation for approval, the application was refused. Mr Moore appealed to the Land and Environment Court. The case lasted four days. In the judgement, Assessor J. Fitz-Henry remarked that despite all the time spent in hearing evidence, it was not apparent why the Council had refused the application in the first place. The Council lost the case?

4.70 The costs of such an .appeal are not insubstantial. Mr Moore told the Committee that his costs were in the order of $28,000.[21] The Committee also asked Warringah Shire Council's Shire Clerk, Mr F. Thomson, to specify the costs incurred on Council's side. In his evidence, Mr Thomson was unable to provide a figure but estimated that "...if the applicant spent $28,000, we would be spending at least that much, if not twice as much."[22] The Committee was surprised to receive subsequent advice from Mr Thomson that the case cost Council a minimum of $22,803.34, including internal costs?

4.71 The Committee sought to examine the extent to which this problem of avoidance of decision making occurs. Most Shire and Town Clerks who appeared before the Committee were ready to admit that the practice does indeed occur. The Committee was not surprised, however, by the fact that they were generally reluctant to attribute the practice to their own Councils.

4.72 In his evidence before the Committee, Mr D. McSullea, Acting Secretary of the Local Government and Shires Associations, expressed the view that the practice "is very limited"?

20 Refer Moore v. Warringah Shire Council, Land & Environment Court, No. 20437 of 1988

21 Minutes of Evidence, 7 November 1990, p. 26

22 Minutes of Evidence, 7 November 1990, p. 43

23 Attachment to letter, Warringah Shire Council, 17 December 1990

24 Minutes of Evidence, 17 December 1990, p. 171

4.73 Mr Mant, on the other hand, was of the opinion that the practice is more widespread:

'[As you have no doubt heard, a lot of the reasons that people go on appeal are because Council knocked it because they do not want to be seen to be taking the responsibility of making the decision.

Mr Griffiths: *Do you think that is widespread?-4. I think it occurs, yes. It occurs quite often.*

Mr Souris: *Would you say some Councils are more prone to that? -4. Yes I would."* [25]

4.74 Mr Barry O'Keefe, Q.C., referred to the practice as "dressing up...a legal case what is really a lack of political conviction."[26] He went on to tell the Committee that:

"My experience is that there are areas in which Councils do not have the fortitude to say yes when they should say yes. They say no and it is easy for them to say, 'Don't blame us, blame the Land and Environment Court.' I have no doubt about that. I have appeared in the cases."[27]

4.75 Mr S. Blackadder, Town Clerk of Rockdale Municipal Council, offered similar evidence:

"I think any person sitting in this seat would be telling a white lie if they said that Councils go to court knowing that they are going to win. I suggest, and ! have seen in other Councils where the political decision is taken to give it to the Land and Environment Court. There is no question about that." 28

4.76 The Committee wishes to express its strong condemnationof the practice of avoiding difficult decisions and transferring them, at considerable cost to both

25 Minutes of Evidence, 8 November 1990, p. 130

26 Minutes of Evidence, 8 November 1990, p. 129

27 **ibid**

28 Minutes of Evidence, 17 December 1990, p. 195

Council and the aggrieved party, to the Land and Environment Court. With insufficient data, it is difficult to ascertain the extent to which the practice occurs and pinpoint those Councils who are more prone to adopt it.

4.77 A possible signal considered by the Committee is the proportion of development applications considered by Council where the staff recommendation is overturned. The Committee asked several local government representatives who appeared before it to make an estimate on how many applications are determined against staff advice.

4.78 The figures received varied widely. At the lower end of the scale, Mr Thomson could only recall *"5 ... perhaps 6"* occasions in the case of Warringah Shire Council during the previous two years,[29] thereby suggesting that the Moore case noted above was an . exception. In the middle of the range, Mr M. Regnis suggested that *"...less than 1 in 10 would be overturned"* by Woollahra Municipal Council? At the top of the range by far,the Committee was distressed to learn Mr Kempshall's estimate of 30% for North Sydney Municipal Council.[31]

4.79 Without identifying the Council concerned, the Committee sought a reaction to the 30% figure from Mr Barry O'Keefe, Q.C., Mayor of Mosman Municipal Council and former President of the local government Association of New South Wales:

"For me, 30 per cent is incredibly high. If you rejected one agenda item out of 50 agenda items that would not be abnormal. If you modified another couple and put in a few more conditions, that would be quite normal. One would normally find that the officer would say: "I did not think about that. That is a good idea." For me, 30 per cent is really horrendous."[32]

4.80 The Committee concurs with Mr O'Keefe's view.

29 Minutes of Evidence, 7 November 1990, p. 45

30 Minutes of Evidence, 8 November 1990, p. 143

31 Minutes of Evidence, 7 November 1990, p. 59

32 Minutes of Evidence, 8 November 1990, p. 143

4.81 The Committee does recognise the lawful right of elected Councils to overturn the recommendations of their staff. After all, Council officers are not elected. Nevertheless, it is the view of the Committee that in the planning arena at least, a high incidence of rejection of staff advice may well reflect either, or a combination of, poor advice in the first place, a lack of confidence in the staff, or a cavalier and perhaps opportunistic attitude on the part of the elected representatives towards their decision making powers.

4.82 Avoiding difficult decisions as discussed may well be a lawful exercise of the powers conferred on local government by the legislation. Its lawfulness, however, does not detract from the Committee's opinion that a pattern of such decisions (or lack of decisions) can only be seen as a moral abrogation of a Council's responsibilities.

4.83 In exploring ways to minimize this practice and thereby reduce local government legal costs, the Committee did not consider recommending legislative change to curb Council powers. The Committee places value on the mandate given to local representatives through both the legislation and the democratic process to make decisions on planning and environmental matters which are responsive to the needs and desires of the local electorate.

4.84 The Committee does, however, recommend some changes in direction.

4.85 Firstly, the Committee recommends a stronger emphasis on strategic planning with significant community involvement in the formulation of the plans. As noted earlier, the Committee is convinced that a strong, clear and up to date set of planning controls should assist the decision making process at Council level on development matters.

4.86 Secondly, the Committee recommends opportunities for difficult matters to be referred to an impartial and suitably qualified third party prior to the determination by Council. The third party's recommendations would have persuasive force only. This notion is examined further in Chapters 6 and 7.

4.87 Thirdly, at the risk of repetition, the Committee urges Councils to adopt a more open and service-oriented approach in carrying out their decision making processes. The Committee holds the firm belief that better systems can allow problems to be aired and, hopefully, resolved, earlier in the process rather than in stormy Council meetings or the Land and Environment Court. In this regard, the Committee adopts the advice of Mr J. Mant:

"We have to get better decision.making processes that people feel happier about at the Council level, that they feel as though they were actually listened to and that it had real consideration. I am sure in most cases it does but you do not get that feeling. If you did more of it at the original decision-making process, perhaps there would be less to be done at the court." 33

4.88 The Committee is concerned that to many people, their local Council is little different to a police station. It is seen to be a place where officers have considerable power to enter and inspect peoples' premises and can generally make things difficult. Staff attending the counter may be officious and too busy. Information may be hard to obtain. The Council may seem to be more concerned about potential negligence actions than assisting their clientele. The Committee hopes to see these attitudes become a thing of the past as local government moves towards a new image.

33 **Minutes of Evidence, 8 November 1990, p. 129**

5. The Land and Environment Court

Introduction

5.1 In his evidence before the Committee, the President of the Local Government Association of N.S.W., Mr P. Woods, expressed his belief that the Land and Environment Court has had the *"greatest impact"* on increases in local government legal costs.[1]

5.2 The Committee has already examined the nature and cost implications of the planning and environmental system as set up under the Environmental Planning and Assessment Act. It is the Committee's view that the high legal costs suffered by local government under this system tend to be incurred by direct involvement by Councils in actions before the Land and Environment Court.

5.3 In this chapter, the Committee examines the background and jurisdiction of the Land and Environment Court ('the Court'), with a focus on Council involvement in legal action. The Committee then addresses some of the major concerns raised in evidence before it regarding particular aspects of the impact of the Court on local government legal costs.

Background

History

5.4 The Land and Environment Court recently celebrated its tenth anniversary. It was established by the Land and Environment Court Act 1979. This Act was part of the total package of new environmental planning legislation introduced at the beginning of the 1980s.

5.5 Since its inception, the Land and Environment Court has remained unique amongst its counterparts in other jurisdictions throughout Australia: it is **the**

1 Minutes of Evidence, 17 December 1990, p. 170

"only tribunal in its specialist area in Australia which enjoys the benefits of a combined jurisdiction within a single court." 2

5.6 Upon its establishment, the Court was also novel in N.S.W. In presenting the Land and Environment Bill in 1979, the then Minister for Planning and Environment, the Honourable D.P. Landa, described it in the following terms:

"...a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute resolving techniques..."[3]

"The Court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The Court in consequence, will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice perrait.. " [4]

5.7 The Court replaced a number of appellate and review bodies:

* The Local Government Appeals Tribunal
* The Clean Waters Appeal Board
* The Land and Valuation Court
* The Valuation Boards of Review

Jurisdiction

5.8 At the outset, the Committee considers it essential to distinguish 'between merits appeals and judicial review. The former involve appeals against the discretionary decision of an authority whereby the court or tribunal stands in the shoes of that authority and reconsiders the matter afresh. It is essentially a re-hearing of the original decision. The parties to the case - i.e., the person aggrieved by the decision (the applicant) and the decision maker (the

2 *The Land & Environment Court of New South Wales - Ten Years in Review 1990* Environmental Law Reporter, Special Supplement S90-013, p. 11

3 Second Reading Speech - Hansard 21 November 1979, p. 3350

4 Ibid, p. 3355

respondent) - will argue the various merits of each side of the case. Points of law may or may not arise.

5.9 Judicial review of an administrative decision, on the other hand, is generally unconcerned with whether the decision was a good or bad one in the first place. It focuses on the lawfulness of the decision. For example, the relevant authority may not have followed the proper procedure. Common law principles of administrative law come into play.

5.10 The Land and Environment Court's jurisdiction includes both merits appeals and judicial review. It also exercises a criminal jurisdiction. It is this mix which provides the Court's uniqueness. All of these functions are relevant to local government. The types of matters which bring Councils to the Court are outlined further below.

5.11 Sections 17 to 21 of the Land and Environment Court Act specify the five classes of jurisdiction of the Court:

* Class 1: Environmental Planning and Protection Appeals

* Class 2: Local Government and Miscellaneous Appeals

* Class 3: Land Tenure, Valuation, Rating and Compensation Matters

* Class 4: Environmental Planning and Protection Civil Enforcement

* Class 5: Environmental Planning and Protection Summary Enforcement

Councils and the Court

5.12 Class 1 appeals are the most common action involving Councils in the Land and Environment Court. Of the total number of Land and Environment Court cases from January 1988 to June 1990 listed by Councils in the Committee's questionnaire, over 50% (51.9%) fell into the Class 1 jurisdiction.

5.13 Class 1 cases are merits appeals .involving development matters. The vast majority are appeals made by aggrieved applicants against a Council pursuant to Section 97 of the Environmental Planning and Assessment Act. These

actions would concern either a condition or conditions which the Council has attached to a development consent or the Council's refusal of a development application. The refusal might be a *"deemed refusal"* due to the Council's failure to determine the application within a specified period of time, as discussed in Chapter 2.

5.14 The opportunity for third party appeals against Councils under Class 1 is very limited. Pursuant to Section 98 of the Environmental Planning and Assessment Act, third party appeal rights extend only to an *"objector"* to designated development. The Committee notes that far wider opportunities for third party planning appeals exist in other State jurisdictions.

5.15 Class 2 proceedings are also merits appeals. The most common are actions against Councils pursuant to Section 317L of the Local Government Act, involving Council decisions (or lack of decisions) on building applications. Only an aggrieved applicant can appeal against building application determinations. 23.2% of local government cases in the Land and Environment Courts listed in the Committee's questionnaire relate to Class 2.

5.16 Class 3 relates to valuation and compensation matters. Only 3.7% of proceedings involving Councils listed in the Committee's questionnaire fell under this category.

5.17 The class 4 jurisdiction embraces judicial review. It involves *"certain of the injunctive, supervisory and declaratory jurisdiction previously exercised by the Supreme Court in relation to a planning or environmental law."*[5]

5.18 Of particular interest to the Committee is that Class 4 includes proceedings pursuant to Section 123(1) of the Environmental Planning and Assessment Act, which reads:

Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

5.19 The Committee notes that Section 123(1) opens the Court's doors wide to any person seeking judicial review of a Council's actions under the Environmental Planning and Assessment Act. The provision is considerably

5 M. Rodgers, *Winning Planning Appeals - Problems Facing the Solicitor*, paper presented at Winning Planning Appeals Conference, International Business Communications, p. 2

more generous than the traditional common law rights of standing to sue. Section 123(1) thus provides an avenue for any person to attack a Council decision through the Court in cases where he or she has no third party rights to appeal under Class 1 or 2. This provision is addressed in more detail by the Committee below.

5.20 Section 123(1) also enables Councils (or, indeed, a private citizen) to take civil action against persons who are in breach of the provisions of an environmental planning instrument (for example, carrying out a prohibited use) or conditions attached to a development consent. A Council often seeks an injunction to ensure cessation of the offending activity. In this regard, the Committee notes the following comments of the. Honourable J.S. Cripps, Chief Judge of the Court:

"At least 90% of the applications brought to the court in its class 4 jurisdiction are applications by Councils seeking to enforce compliance with their local environmental planning instruments."[6]

5.21 Class 4 proceedings comprised 19.8% of the actions listed by Councils in the questionnaire. The Committee is mindful, however, that actions brought against Councils under Section 123(1) can be particularly costly due to the difficult areas of law which may arise.

5.22 Class 5 involves the Court's criminal jurisdiction. Whilst Councils have the option to prosecute persons who breach planning laws, civil action under class 4 tends to be *"a more effective remedy."*[7] A mere 1.4% of Land and Environment Court actions listed by Councils in the Committee's questionnaire comprised Part 5 proceedings.

Personnel

5.23 Section 7 of the Land and Environment Court Act 1979 states that *"the Court shall be composed of a Chief Judge appointed by the Governor and such other judges as the Governor may from time to time appoint."* There are currently

6 The Honourable Mr J.S. Cripps, The *People v The Offenders*, Dispute Resolution Seminar Papers, Department of Housing and Local Government (Qld.), quoted in submission, Environmental Defenders Office, 27 November 1990

7 The Land and Environment Court, A Layman's Guide to Procedures and Terms, p. 3

four judges, including the Chief Judge, the Honourable Mr J.S. Cripps. In addition to the judges, Section 12(1) empowers the Governor to appoint I *"any qualified person to be a conciliation and technical assessor of the Court."* Nine assessors are currently employed by the Court. They are skilled in areas which are the bread and butter of local government, such as town planning, environmental assessment, building, engineering, architecture, valuation and law.

5.24 Matters in Classes 1, 2 or 3 may be heard by a Judge, one or more assessors or a Judge assisted by one or more assessors. Cases in Classes 4 and 5 can only be heard by a Judge.

5.25 The fact that decisions based solely on merits issues can be determined by Judges is of special interest to the Committee. In this context, a recent comment by the New South Wales Premier, the Honourable N. F. Greiner, M.P., is pertinent:

"...in New South Wales it is quite possible that at the end of the day it will be judges who finally decide whether or not a development proposal is acceptable, and whether it should go ahead. Now, I'm not having a go at judges, but it strikes me as very odd that we should think that lawyers are best placed to make a decision about whether a development is good for society." 8

5.26 In raising this issue, the Committee does not intend any criticism of Judges of the Land and Environment Court. The Committee acknowledges that the Judges are well respected by both the users of the Court and the community at large. The point of concern for the Committee is that whilst there is a system of merits appeals dominated by Judges, higher calibre and hence, more expensive advocates will be attracted to plead the issues. The direct result will be higher costs for the users, including local government and the community at large. The Committee also is of the belief that an excessive presence of lawyers may add unnecessary complexity to cases which should otherwise fall on their merits alone.

8 Address by the Honourable N.F. Greiner, M.P., Public Issue Dispute Resolution Conference, Brisbane, February 1991

Caseload

5.27 The following table outlines the number of applications in the Land and Environment Court from 1987 to 1990 according to the relevant division? It includes actions in which Councils were not parties.

Year	Class 1	Class 2	Class 3	Class 4	Class 5
1987	667	632	414	275	23
1988	723	682	428	302	40
1989	877	710	228	320	193
1990	629	503	314	314	317

5.28 The Committee notes a steady increase in Class 1 and 2 appeals until 1989 with a marked dropback in 1990, which the Committee attributes to the general downturn in building and development activity.

5.29 The Committee further notes a significant increase in Class 3 matters from 1989 to 1990. It is the Committee's understanding that this is due to the compulsory farmland rating system introduced in 1990 which appears to have attracted numerous appeals by aggrieved landowners. It is the Committee's view that this high number of appeals should settle as new case law arising from the initial disputes begins to crystallise.

5.30 In regard to Class 4 matters, the Committee discerns no major trends other than a general stability in the figures.

5.31 In regard to the dramatic increase in Class 5, the Committee is of the understanding that the vast majority of prosecutions are being instigated by the N.S.W. State Pollution Control Commission and the Waste Management Authority of N.S.W. rather than individual Councils.

5.32 In reference to the general caseload, the Committee notes the following comments made in August 1990:

9 *The Land & Environment Court of New South Wales - Ten Years in Review* 1990 Environmental Law Reporter, Special Supplement S90 - 013, p.12, supplemented by telephone advice

"...there has been little respite from the heavy listing of the judges and assessors. The maintenance of high levels of registrations in Classes 4 and 5 has meant that the judges remain fully listed for several months in advance, so that as a result an increasing proportion of' Class I planning matters (including many of the "bigger" cases) are being listed before the assessors.

As a consequence of the increasing caseload, "delay" in terms of the waiting time, or range of available dates for hearing once at call-over, has increased accordingly. In the absence of additional judicial and assessor resources, increases in listings, potential, backlog (i.e. pending matters) and delay, would appear to be unavoidable consequences of the Court's burgeoning workload, it has only been the introducing of a number of successful measures and initiatives in recent times which have improved the efficiency of the Court in terms of its handling and disposal of matters and averted serious delay problems."[10]

The Cost of Litigation

5.33 Information contained in the Council questionnaires returned to the Committee confirms the view expressed by Mr Woods in paragraph 5.1 above.[11] Indeed, the extent of local government expenditure on Land and Environment Court litigation as revealed in the survey caused the Committee considerable alarm. Figures submitted to the Committee in the questionnaire appear at Appendix 6.

5.34 Land and Environment court costs provide a huge portion of the Council budget for those authorities whose areas involve considerable development pressures. Such pressure can lead to complex planning and environmental issues which may not besorted out until brought before the Court.

10 *The Land and Environment Court of NSW - Ten Years in Review* 1990 Environmental Law Report Special Supplement S90-013, p. 11

11 Minutes of Evidence, 17 December 1990, p. 46

5.35 In the metropolitan area, for instance, the Committee notes that North Sydney Municipal Council spent $808,100 in 1989 on 52 matters listed before the Land and Environment Court.[12] This was the highest figure provided to the Committee.

5.36 The Committee also notes high costs incurred by some Councils in rural New South Wales. Between 1 January and 30 June 1990, Coffs Harbour City Council had spent $228,321 on only four matters. In response to one of the points raised in the questionnaire, the Town Clerk, Mr P. Harvey, stated:

"Council is most concerned with the legal costs involved to defend its decisions in the Land and Environment Court. This year Council is predicting that legal costs for the two (2) appeals, concerning Council's decision to refuse two Hard Rock Quarry Development Applications, will amount to $450,000.

Any Council would find it difficult to sustain unpredicted costs of this extent. To this Council, it means that services will have to be cut in other areas to absorb these costs."[13]

5.37 The above information causes the Committee grave concern. Comparable evidence before the Committee was given by Mr J. Walsh, General Manager/Town Clerk, Port Stephens Shire Council. The Committee was distressed to learn of the costs involved in two particular cases defended in the Land and Environment Court. One case involved a hotel tourist resort development whilst the other concerned a sand mining application. Both cases cost the Council in the order of $100,000 each.[14]

5.38 The Committee is aware that many rural Councils have incurred little or no expenditure in the Land and Environment Court. The Committee is very mindful, however, that just one complex case can have a significant impact on a small Council's budget. Mulwaree Shire Council, for example, had spent $36,985 on only two matters before the Court in the first six months of 1990.[15]

12 Questionnaire compiled by Mr R. Kempshall, Town Clerk, North Sydney Municipal Council, 2 October 1990, Q.7(a)

13 Questionnaire compiled by Mr P. Harvey, Town Clerk, Coffs Harbour City Council, 2 October 1990, Q. 14

14 Minutes of Evidence, 17 December 1990, p. 193

15 Questionnaire compiled by Mr R. Wotton, Shire Clerk, Mulwarree Shire Council, 13 September 1990, Q.7(a)

The Committee is sympathetic with the Shire Clerk's comment, Mr C. Wotton, that the most crucial issue for his Council in regard to legal expenses is the *"high cost of Land and Environment Court matters which are far too complex and costly."* [16]

5.39 The problem of costs for small Councils was further illustrated in an example provided to the Committee in evidence by Mr Jeremy Bingham, solicitor:

"A few years ago I acted for Gunning Shire Council against a quarry company that wanted to pull out river gravel, sand and top soil from the Ash River. The problem was that the heavy 45 tonne trucks that were going to be used to haul the material away were going to damage the main road to such an extent that it would have been destroyed.

The Department of Main Roads did not have the money to maintain the road, nor did the Council. We had to oppose it and we got into what was then a novel question of proving with expert evidence that enormous amount of damage to roads that those heavy vehicles cause. In that case we established that one such truck in one trip does as much damage as 10,000 motor vehicles on a road such as that. It was necessarily a 12 day hearing. It was a big issue and it cost that Council a lot of money. It had to proceed with the case because it was lifeblood to it to keep its road functioning. The Council was successful but there was no order made for costs, as it was a development appeal. That bill for costs in the annual budget of that Council was huge. But the alternative was much worse; that is, having the road destroyed.

There is no way that Council could have budgeted for that cost. The same legal action for one of the bigger metropolitan Councils would have been just a bit of a bump; it would have not been significant. However, for that Council it was significant. There is no way of guarding against that." [17]

16 Ibid, Q.s 13. & 14.

17 Minutes of Evidence, 7 November 1990, pp. 12-13

5.40 The Committee has also received evidence that the sheer cost of Land and Environment litigation may deter a Council from initiating or defending a particular action. The Local Government and Shires Associations, in their submission to the Committee, cite a telling example:

A member Council was recently quoted estimated legal costs of $700,000 to fight a case. A significant issue of principle is at stake, but the Council is in no position to outlay such a large amount of money. 18

5.41 The Committee wishes to stress that in addition to incurring direct legal expenses in Land and Environment Court actions (solicitors' and barristers' fees, expert witnesses' costs, etc.) Councils also suffer internal costs. The Committee regards these as hidden costs. They comprise salaries paid to staff involved in preparing cases and attending court, which includes both professional and secretarial staff, and other incidental costs such as photocopying and the preparation of evidence.

5.42 In his evidence before the Committee, Mr F. Thomson, Shire Clerk, Warringah Shire Council, estimated that litigation involves *"about 15%"* of the available time of his Council's town planning staff?

5.43 On the same point, at the Committee's request, Mr R. Kempshall, Town Clerk, North Sydney Municipal Council, provided the Committee with the following estimates of *"direct administrative costs associated with Appeals to the Land and Environment Court":*

1988 $80,000
1989 $87,000
1990 $95,000 [20]

5.44 The Committee also requested Mr J. Walsh, General Manager/Shire Clerk, Port Stephens Shire Council, to provide details of internal costs incurred by his Council in the two major Land and Environment Court cases discussed in

18 Submission, Mr D.J. McSullea, Acting Secretary, Local Government and Shires Association, 26 September 1990

19 Minutes of Evidence, 7 November 1990, p. 42

20 Submission, 13 November 1990

evidence and referred to above in paragraph 5.37. The costs, provided later in writing to the Committee, were $8,479 and $10,675 respectively.[21]

5.45 The Committee views the magnitude of internal costs incurred by Councils with considerable concern. Of even greater concern to the Committee, however, is the fact that Councils do not appear to consider these hidden costs when budgeting for legal costs or reviewing their legal expenditure.

Representation Before the Court

5.46 The Committee notes that the Land and Environment Court's publication entitled A Layman's Guide to Procedures and Terms advises would-be litigants in the following terms:

Q. 18 Do I have to have a solicitor before I can appear in the Court?

A. No. However, if you do not wish to appear on your own behalf, you may pay a solicitor or barrister to represent you. Except in Class Five cases (criminal jurisdiction) you may authorise an agent in writing to appear for you. The agent does not need to have any particular qualifications; however, an understanding of the principles applying in the case would be an advantage.[22]

5.47 Throughout its Inquiry, the Committee has received considerable evidence supporting the view that the Land and Environment Court has become increasingly dominated by lawyers at merits appeal hearings.

5.48 A random survey of 68 court files relating to Class 1 applications heard by the Court in 1989 revealed what the Committee regards to be an overwhelming representation by lawyers,[23]

21 Information prepared by Mr S. O'Connor, Manager Community Planning, Port Stephens Shire Council, 7 January 1990

22 The Land Environment Court, A Layman's Guide to Procedures and Terms, p. 7

23 Ms L. Reid, *Courts and Cost - Are There Better Ways to Resolve Planning Disputes?* Unpublished B.T.P. Thesis, University of New South Wales, 1990, pp. 28-29

TABLE 5.1

Representation of Applicant at a Hearing

TYPE	No.	%
Barrister	39	57
Solicitor	18	27
Self Representation	9	13
Planning Consultant	2	3
TOTAL	68	100%

Representation of Respondent at a **Hearing**

TYPE	No.	%
Barrister	12	18
Solicitor	53	78
Council Officer	3	4
TOTAL	68	100%

5.49 It is stressed that in Class 1 proceedings, the respondent is most often a local government authority. In the above survey, the Committee notes that over 95% of the respondents were represented by a solicitor or barrister. Council officers were used in only 3 cases.

5.50 In evidence before the Committee, the Shire Clerk of Warringah Shire Council, Mr F. Thomson, stated *"Given the effluxion of time I believe that Court has become more legalistic. We are now getting barristers and Queen's Counsel regularly appearing there."*[24]

5.51 Mr Thomson went on to explain his view of the impact of this perceived trend:

"... it is escalating the costs, time and effort involved for everyone. It is ceasing to be a merit determination and is moving more to a legalistic determination."[25]

5.52 The Committee was also interested to hear a similar opinion from Mr S. Blackadder, Town Clerk of RockdaleMunicipal Council:

24 Minutes of Evidence, 7 November 1990, p. 46

25 Ibid

"I think with the way that the Court operates at the present -and certainly I suppose that was not its intention when originally structured - there has been a departure there and the court has been captured by the lawyers."[26]

5.53 The Committee further notes that similar viewpoints were expressed by numerous Councils in answers contained in, and attachments to, its questionnaire. Similar opinions were also conveyed to the Committee by members of the public in various written submissions. Mr C. Tidd, for example, advised the Committee of his view that Council expenses *"have been magnified by the legal fraternity and their invasion of a process."*[27] Mr J. White, Architect, wrote to the Committee of his view that *"...no one can use the Land .and Environment Court any more without using full legal services..."*[28]

5.54 The above and other evidence received by the Committee leaves it in no doubt concerning a domination by the legal profession in merits appeals in the Land and Environment Court. The Committee's main concern is the cost implications for local government parties appearing in Court.

5.55 A case in point is Amatek Limited v. Wingecarribee Shire Council & ors.[29]. This was a Class 1 appeal involving Council's deemed refusal of a development application for a hard rock quarry. The case ran from 5 November to 10 December 1990 and involved forty witnesses. Further down the track the applicant filed a Notion of Motion to reopen the matter. It sought to tender fresh evidence and amend the development application. The matter was later heard by the Court but by that stage, the Council had dispensed with its legal representatives, apparently on the grounds of cost, and was represented instead by its Shire President?

5.56 The Committee wishes to stress that legal representation is an expensive business. The high cost of legal services and associated community concerns is well reflected by the number of recent government inquiries into this area, such

26 Minutes of Evidence, 17 December 1990, p. 193

27 Submission, Charlez Tidal, 12 February 1991

28 Submission, James White, James E. White & Associates Pty. Limited, Chartered Architects, 5 November 1990

29 Land and Environment Court, No. 10150 of 1990

30 Refer judgement, ibid., Stein J., p. 18

as Australian Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Cost of Justice, as outlined in Chapter 1.

5.57 The Committee does recognise that lawyers lend important skills in the resolution of disputes. Nevertheless, the Committee does raise the question of whether legal representation is really necessary in merits appeals where it is technical, social and economic issues which must be determined rather than matters of law.

5.58 During its Inquiry, the Committee received some suggestions that the system should be somehow altered to encourage or even require the participation of lay persons in arguing merits appeals. Hornsby Shire Council, for instance, in response to the Committee's questionnaire, went as far as suggesting that, inter alia, *"...advocacy on merit issues [be] limited to expert witnesses rather than through legal practitioners."*[31]

5.59 A proposition was forwarded to the Committee by the Local Government Engineer's Association of New South Wales, recommending a system of arbitration without legal representation:

"Use of assessors, as done within the Land and Environment Court, but without the need for legal representation from either side, could be considered as a practical means for resolution of many disputes." [32]

5.60 The Committee does not advocate the compulsory removal of legal representation but places value on the right of users of the Court to choose their own level of representation. In this respect, the Committee acknowledges the view expressed by Mr D.J. McSullea, Acting Secretary of the Local Government and Shires Association:

"...I would point out that Council, comprising elected representatives of the local community, is free to determine what legal services and resources are used in respect of its various functions." [33]

31 Reply to Question 14 of the Committee's questionnaire; response compiled by prepared by Mr M. Eastcott, Town Clerk, Hornsby Shire Council, received 7 November 1990 '

32 Submission, 18 January 1991, Mr D.J, Hains, Secretary

33 Submission, 26 September 1990

5.61 However, with a view to cost savings and bearing in mind the nature of the disputes determined in merits appeal hearings, it is the Committee's opinion that lay representation should be encouraged and increased. The Committee thus endorses the following recommendation contained in the 1989 national report entitled Local Government Regulation of Land and Building Development:

"The appeals system should be de-legalised with a move away from the use of rules of evidence and a greater accessibility for lay people to appeals."[34]

5.62 On this point, the Committee was interested in a submission by Mr E. Cassidy,[35] an employee of Leichhardt Municipal Council. Mr Cassidy refers to initiatives by his employer involving the *"avoidance of the use of external solicitors in favour of utilization of experienced expert technical staff,"* such as town planners and health and building surveyors, in Class 1 and 2 matters. He goes on to estimate the cost savings to .Council as *"in the vicinity of tens of thousands of dollars"* and refers to an apparently high success rate in the Land and Environment Court.

5.63 The Committee notes that increased participation by Council staff in Class 1 and 2 matters will require the setting up of suitable training programmes. The Local Government and Shires Associations and tertiary institutions may be in a suitable position to organise such courses.

Recommendation 20

It is recommended that training programmes be established for Council professional and technical staff aimed to assist them in conducting merits appeal cases for their Councils in the Land and Environment Court.

34 Department of Immigration, Local Government and Ethnic Affairs, Office of Local Government, *Local Government Regulation of Land and Building Development*, June 1989, p. 39

35 Submission, 25 September 1989

5.64 The Committee is mindful that a potential problem which may deter Councils from using their own staff to conduct merits appeals cases is a possible desire on the part of some Councils to match the same level of representation employed by the opposing side. In evidence before the Committee, for example, Mr T. Dover, Drummoyne Municipal Council's Town Clerk, referred to his Council's approach:

> *"We have a policy whereby we match fire with fire. In other words, if no legal representation is before an assessor, our officers go along and handle it themselves. But if there is legal representation of any type, we match it."*[36]

5.65 The Committee also regards the evidence of Mr. F. Thomson, Shire Clerk of Warringah Shire Council, as relevant to this issue:

> *Committee:* *"You are saying the Councils are not the initiators in terms of the additional fees incurred through counsel, it is the converse, it is the applicant who is coming to the court with counsel?..."*
>
> *Mr Thompson:* *"My belief would be that the applicant wants to be represented with the best quality of advice andlegal .representation."*
>
> *Committee:* *"That is putting the onus on Councils to respond?..."*
> *Mr Thomson:* *"NaturalS."*
> *Committee:* *"That is a growing trend?"*
> *Mr Thomson:* *"I certainly believe it is and it is an expensive trend."*[37]

5.66 In regard to matching barristers, the Committee notes from Table 5.1 above that applicants in Class 1 appeals, in stark contrast to respondents (mostly Councils), are far more likely to instruct barristers. The figures suggest to the Committee, therefore, that the practice to *"match fire with fire"* is far from universal. Mr. J. Bourke, Town Clerk, South Sydney City Council, gave

36 Minutes of Evidence, 17 December 1990, p. 182

37 Minutes of Evidence, 7 November 1990, p. 47

evidence to the Committee that his Council, for instance, has *"only used counsel on two or three occasions"* and that its external solicitors generally do not engage barristers at all?

5.67 In regard to the need to matching legal representation at all, it is the Committee's view that the instigation and utilisation of advocacy training opportunities for Council staff should help to further weaken any tendency to *"match fire with fire"*. The Committee suggests that metropolitan Councils facing high legal costs in Class 1 and 2 matters even consider offering special staff positions wherein the major duty would be representing Council in Court.

Recommendation 21

It is recommended that those Councils with considerable and frequent expenditure on Land and Environment Court matters consider creating new positions for specialist officers whose prime duty, inter alia, would be the preparation of merits appeal cases and appearances in the Land and Environment Court.

5.68 On the matter of staff representation in court, the Committee wishes to stress two further points. Firstly, a Council should not expect its own staff to defend a decision in court which the Council made against staff recommendations.

5.69 Secondly, a Council which chooses to be represented by its staff rather than external lawyers may, in some circumstances, attract criticism from some constituents on the grounds that it may not appear to be sufficiently Serious about winning the case. It is the Committee's view that a real trend towards increased representation by lay persons in merits appeals should help serve to weaken such criticism. In any case, Councils should take a broader outlook toward their operations and the costs involved and be over sensitive to Such easy criticism.

38 Minutes of Evidence, 8 November 1990, p. 106 88

5.70 Whilst the above discussion has been devoted to merits appeal hearing, the Committee wishes to stress its acknowledgment of the importance of legal representation in Class 4 and 5 matters.

Expert Witnesses

5.71 An expense often incurred by Councils in the Court is the hiring of expert witnesses. The Committee accepts the definition of an expert witness as "a *professional person with competence in a discipline that is of relevance to the Court's activities."*[39] Expert witnesses play a major role in merits appeal cases, where the Court is interested in the correctness, or soundness of a Council decision. Experts appearing in the Court include town planners, architects, building professionals, heritage and landscape advisers, environmental and social scientists, engineers and other professionals.

5.72 The Committee understands that many Councils tend to utilise their own in-house professional officers to provide expert evidence when defending merits appeals in the Court. The Committee, in general, supports this approach.

5.73 The Committee does recognise, however, two instances where a Council should seek external expert assistance. The first case is where a Council makes a decision contrary to the advice of its own expert officers. In this situation, it is the Committee's view that the Council should be prepared to pay the cost of hiring an outside expert or experts.

5.74 The second instance is where a Council does not have the necessary expertise in-house. The Committee recognises that this can apply to small rural Councils in particular, whose areas often attract developments with significant environmental impact. Mining and intensive animal agriculture provide examples. Furthermore, the concept of designated development can augment this problem by widening the opportunities for appeal.

5.75 The Committee is mindful that a lack of adequate technical expertise can perhaps be even more critical at the original assessment stage, as highlighted in Chapter 3. In that chapter, the Committee recommended the establishment of a panel or panels of various specialists wherein a Council could request the Local Government and Shires Associations to appoint a panel member to assist

39 Mr P.A. Mitchell, *Problems Facing the Planning Consultant*, paper presented to *Winning Planning Appeals Conference*, Sydney, 5 October 1990, p. 1

it in assessing a difficult proposal to provide ready assistance to Councils in assessing proposals. The Committee is convinced that members of the same panel could also assist in providing expert witness services.

5.76 Whilst the Committee supports the use of external expert witnesses by Councils in some circumstances, it is mindful that the situation can get out of hand. In his evidence before the Committee, Mr Jeremy Bingham cited the extreme example of *"the case of the 13 university professors."*[40] The matter involved a development application for a three tower office complex in the southern central business district. According to Mr Bingham,*"seven said it was a great development and six said it was terrible."*[41] Sydney City Council which had opposed the development was unsuccessful in defending the appeal.

5.77 The provision of expert evidence can be an expensive item for Councils. Parramatta City Council, for example, spent $39,998 in 1989 obtaining expert witnesses in only four Land and Environment cases?

5.78 With respect to minimising expenditure on expert witnesses, it was suggested to the Committee by The Australian Association of Consulting Planners that, inter alia, several practices be introduced and enforced in the Land and Environment Court:

i. Keeping to a minimum the number of expert witnesses whilst balancing the need to cover all relevant issues;

ii. Reducing the time that witnesses spend giving evidence by*"taking as read"* their reports and avoiding lengthy, unproductive cross examination;

iii. Insisting on applicants and respondents providing clear statements of issues prior to the hearing and obtaining, wherever possible, agreement between experts, prior to the proceedings, on whatever ground might exist;..." [43]

40 Minutes of Evidence, 7 November 1990, p. 8

41 IbM

42 Questionnaire compiled by Mr R. Muddle, Town Clerk, Parramatta City Council, 20 August 1990, Q. 11

43 Submission by Mr H.M. Sanders, President, Australian Association of Consulting Planners, 23 January 1991

5.79 The Committee considers the above areas worthy of investigation. A further problem is the excessive amount of written evidence sometimes provided by some expert witnesses. In his evidence before the Committee, Mr W. Henningham, Solicitor, stated that some experts are *"virtually producing books"* which "significantly increases the costs of Councils or appellants." [44] The Committee concurs with Mr Henningham's view that *"there is really no need to produce all that material."* [45]

5.80 The above evidence has led the Committee to the view that the system can allow costs to get out of hand in relation to the provision of expert evidence. The Committee suggests that opportunities for restricting the extent of expert evidence be investigated. Increased reliance on written submissions and the restriction of evidence to the matters in dispute may provide a starting point.

Recommendation 22

It is recommended that the Minister for Local Government and Minister for Planning liaise with the Attorney-General to investigate ways to restrict the extent of expert evidence submitted in merits appeal cases.

Awarding Costs

5.81 In considering ways to defray local government legal expenditure, the Committee examined the notion of awarding costs in the Land and Environment Court.

5.82 The Court's approach to awarding costs in merits appeals was recently described by the Chief Judge, the Honourable Mr Justice J.S. Cripps:

The Court has a policy that in merit planning and building appeals, costs ordinarily will not be ordered to be paid by the unsuccessful party. This rule is subject to exceptional circumstances as, for example, where a developer withdraws an appeal on the day of hearing?

44 Minutes of Evidence, 8 November 1991, p. 153

45 ibid., p. 91

46 The Honourable Mr Justice J.S. Cripps *Courting the Public Interest,* Polemic, Vol 2 No. 1, February 1991

5.83 In receiving evidence and reviewing submissions before it, the Committee did note some support for an extension of the Court's policy on awarding costs in merits appeals.

5.84 The Australian Association of Consulting Planners, in a submission to the Committee, suggested that the awarding of costs may have *"the most potential as an effective method"* to minimize the incidence of those *"...cases [which] come before the Land and Environment Court which appear to be following decisions by Local Councils which appear to be based solely on political considerations..."*[47]

5.85 An example of a case in which costs were awarded against a Council on the grounds of an apparently irresponsible decision is McCalden & Anor v. Newcastle City Council, wherein Assessor FitzHenry noted:

"The Court is of the opinion that there has been a dereliction of duty by Council in that it chose to ignore the professional advice of its officers and yield to persuasion based on premises which the evidence has shown has little foundation in fact and consequently did not act in good faith in exercising its discretion to withhold consent in this application."[48]

5.86 The Committee regards the above case, however, as exceptional.

5.87 Responses to the questionnaire also alerted the Committee to support on the part of some Councils for costs to follow the event in Class 1 and 2 matters. It would appear to the Committee that many Councils do feel aggrieved paying costs after successfully defending an appeal. Furthermore, the Committee acknowledges the viewpoint of some Councils that the spectre of awarding costs may deter some prospective applicants from appealing against sound Council decisions. Fewer appeals, of course, mean less Council expenditure.

5.88 Whilst the Committee is cognizant of various arguments supporting the notion that costs should follow the event in merits appeal actions, it formed the view on all the evidence before it that the current system to award costs in exceptional circumstances only is the best approach The Committee is mindful that the spectre of costs could further reduce the general accessibility of the

47 Submission by Mr H.M. Sanders, President, Australian Association of Consulting Planners, 23 January 1991

48 Land and Environment Court, No.10618/1982, quoted in L. Reid, *Courts and Costs - Are There Better Ways to Resolve Planning Disputes*, B.T.P. Thesis, University of New South Wales, 1990, p. 76

that the spectre of costs could further reduce the general accessibility of the Court to ordinary citizens. Whilst the awarding of costs might provide a deterrent to Councils who avoid difficult decisions by passing on cases at great cost and with often little chance of success to the Court (as discussed in Chapter 4), the Committee is uncertain whether the disadvantages of such a system would be outweighed by the benefits.

5.89 The Committee is aware that costs do follow the event in other jurisdictions of the Court. In these matters, the practice is supported.

Hearings *de novo*

5.90 Merits appeals in the Land and Environment Court are held *de novo.* In other words, *"a matter is heard anew rather than being totally concerned with the original determination."*[49]

5.91 Throughout its investigations, the Committee became aware of several concerns regarding the impact of this aspect on local government costs. The major concerns perceived by the Committee were:

* that valuable time can be wasted in the preparation and presentation of evidence which relates to common ground between the parties; and

* that the introduction of fresh material, in particular the re-drawing of plans for the particular proposal in dispute, can catch parties by surprise and thereby render much of the preparatory work for the case irrelevant;

* that some developers, due to tactical reasons, may delay the production of amended plans until the Court hearing, those plans representing the actual proposal which they had intended to carry out from the outset.

5.92 The N.S.W. Chapter of the Royal Australian Institute of Architects, in a submission to the Committee recommended greater emphasis on identifying the issues in dispute and restricting argument thereto:

49 Ms P.F. Ryan, The *Land and Environment Court,* Local Government Planning and Environment Service, Butterworths, p. 12064

As the hearings are do novo, issues apparently resolved before the Council may be repudiated and matters apparently not in dispute raised... this consume[s] valuable time and cost..A solution would be to limit the issues to be determined by the Court to those in dispute at the time of any refusal.[50]

5.93 The Committee was particularly distressed to learn of instances where the Court considers proposals which are significantly different to the plans accompanying the development application which was originally placed before the Council. At the same time, the Committee is mindful that the restriction of some evidence may prevent the best decision being made.

5.94 The Committee wishes to stress that some of the problems may be able to be remedied to some extent through pre-hearing conferences or meetings in which the issues in dispute are agreed upon and common ground established. The introduction of amended plans .for the proposal in dispute could thus be introduced prior to the hearing rather than inside the court room.

Recommendation 23

It is recommended that the Minister for Local Government and Minister for Planning liaise with the Attorney-General to investigate the appropriateness or otherwise of having merits appeals cases relating to development and and building applications heard *de novo.*

Resolution of Disputes Prior to Hearing

5.95 Section 34(1) of the Land and Environment Court Act states that in Class 1 and 2 proceedings, *"...the registrar shall, unless otherwise directed by the Chief Judge, arrange a conference between the parties to the proceedings or their representatives, to be presided over by a single assessor"*

50 Submission, Mr R. Dinham, President, N.S.W. Chapter, Royal Australian Institute of Architects, 11 February 1991

5.96 The Committee notes that after a review of the system in 1984, compulsory conciliation conferences were disbanded. A practice direction then issued by the Chief Judge required that they only be held when requested by both parties.

5.97 The Committee understands that the purpose of the conference was to assist the parties to reach an agreement without the need to proceed to a full hearing. Such an objective is supported by the Committee. It is noted that in 1989, however, that approximately only 30 conferences were held, of which 16 resulted in the case being disposed.[51]

5.98 In carrying out its investigations, the Committee noted support on the part of some Councils for the return of the compulsory conciliation conference. The Committee was puzzled by this attitude. It is the Committee's understanding that a major reason behind the high failure rate of conciliation conferences was that Councils were sending officers to the conferences without sufficient authority to strike an agreement with the other party. Another reason apparent to the Committee was that unreasonable pressures were placed by some parties on the assessors convening the conferences to predict the outcomes of cases without the benefit of a full hearing.

5.99 The Committee strongly supports the concept of pre-hearing conferences aimed to assist parties to resolve disputes without the need for a full hearing.

5.100 The Committee notes with interest a recent initiative of the Court in this direction. A practice direction has been issued, effective from 1 May 1991, to offer optional mediation conferences in most Class 1, 2 and 3 matters, including appeals in respect of development and building applications. The concept of mediation is explored further below in Chapter 7.

5.101 Furthermore, compulsory issue conferences are to be held in all Class 4 matters following the filing of all affidavits. The Court recognizes the "*primary purpose*" of the conference is *"to explore the possibility of settlement."*[52]

5.102 The Committee notes with enthusiasm the Court's initiatives put in place during the course of this Inquiry.

51 Ms L. Reid, *Courts and Costs - Are There Better Ways to Resolve Planning Disputes*? B.T.P. Thesis, University of New South Wales, 1990, p. 26

52 Land and Environment Court, Practice Direction: Mediation and Issues Conferences

5.103 The Committee wishes to stress that in order to be successful, Councils must be prepared to delegate sufficient authority to their representatives attending such meetings to enable them to reach agreements, if possible, with the other party.

Recommendation 24

It is recommended that Councils delegate sufficient authority to their officers attending mediation and issues conferences in the Land and Environment Court to enable them to reach agreements with the other party, if possible, which would be satisfactory to the Council.

5.104 The Committee realises that problems may arise in Councils being reluctant to delegate sufficient authority to persons attending mediation conferences. If a Council is serious about the concept of mediation, however, it is essential that it gives careful thought to how to approach the process. At the very least, the Committee notes that it is important that the person attending the conference has clear instructions, a signed certificate of delegation and sufficient authorisation to negotiate towards a real agreement. In later chapters, it is recommended that Councils appoint a Legal Services Officer to perform certain duties. The Committee suggests that such an officer may be given the responsibility to ensure the smooth running of all administrative processes in relation to mediation.

5.105 On the question of sufficient authorisation, the Committee endorses the following advice contained in the Court's practice direction:

"It is expected that persons appointed to act on behalf of any of the parties to a mediation' will have the authority to authorise a resolution of the dispute. If a party does not have that authority it will substantially weaken the mediation process...[in Class 4 conferences] it is requested that the parties have present a representative who is authorised to settle the matter at the conference or who can obtain instructions at short notice as to whether an agreement to settle on a particular basis is authorised.[53]

53 Ibid

5.106 Finally, the Committee notes that agreements reached between parties in mediation conferences in terms of conditions imposed in a development consent or building approval should be made binding.

The Court and Alternatives

5.107 The Committee wishes to emphasise that there are alternatives to full Court hearings for the resolution of planning and environmental disputes. In the United Kingdom, for instance, wide use is made of appeals disposed of by written representations. The Commission of Inquiry provides an alternative mechanism under the New South Wales system, examined by the Committee in the following chapter. Considerable support has arisen in recent times for alternative dispute resolution techniques, such as mediation, which is reflected in the recent moves by the Land and Environment Court. The Committee examines these techniques in more detail in Chapter 7.

5.108 Whilst some effort might be given to researching cost effective alternatives to the Court system, the Committee wishes to stress that such efforts may be better placed in trying to minimize the escalation of disputes in the first place. Whilst it is easy to point to the costliness of Land and Environment Court actions, the Committee suggests that Councils take a closer look at their own decision-making processes, as discussed in Chapter 4. The Committee encourages all Councils to adopt a more client oriented approach and consider mechanisms to help prevent or defuse disagreements earlier in the process.

6. Commissions of Inquiry

Introduction

6.1 The Commission of Inquiry provides an alternative mechanism under the planning system for the resolution of planning and environmental disputes. Unlike litigation, however, it comes into play before rather than after the relevant decision is made.

6.2 In this Chapter, the Committee examines existing opportunities for Commissions of Inquiry to be held in relation to local government decisions, in addition tO their basic characteristics and the cost impact on local government. The Committee also explores the potential for inquiries to play a greater role in cases where Councils are faced with particularly difficult planning decisions.

Background

6.3 The position of a Commissioner of Inquiry was set up by the Environmental Planning and Assessment Act, 1979. The basic role of a Commissioner is to undertake public inquiries into a wide range of planning and environmental issues, including specific development projects, as referred to him or her under the provisions of the Act.

6.4 There are currently four full-time Commissioners *"with a range of qualifications and experience, including law, planning and development control, building regulation, local government, engineering and environmental control.* [1] Sometimes additional Commissioners are appointed in relation to specific inquiries. The Commissioners operate at arm's length from Ministers, the Government and Councils.

6.5 The Committee notes that the Commissioners *"are presently conducting in the order of 25 or more Inquiries per year."* [2]

1 Commissioners of Inquiry, *Commissions of Inquiry for Environment and Planning and How They Work*, April 1988, p. 5

2 Mr J. Woodward, Chairman, Commissioners of Inquiry, Address to the National Environmental Law Association (N.S.W. Division) Pollution Conference, 15-16 June 1990, p. 6

Characteristics of Inquiries

6.6 The Committee wishes to stress that Commissions of Inquiry provide a fundamentally different mechanism for the resolution of planning and environmental disputes than does the Land and Environment Court.

6.7 In the first place, the Committee has already noted above that unlike litigation, the Commission of Inquiry is held prior to the final decision by the relevant authority. It thus follows that the findings of a Commission of Inquiry are not binding. Unlike Court orders, their force is merely persuasive.

6.8 A Commission of Inquiry is inquisitorial rather than adversarial in nature. A Commissioner has wide powers to seek information pursuant to Section 120 (3) of the Environmental Planning and Assessment Act 1979.

6.9 An Inquiry may involve a multiplicity of parties and witnesses, as was recently emphasised by the Chairman of the Commissioners of Inquiry, Mr J. Woodward:

"Commissions of Inquiry are not two party appeal proceedings. Commissioners hear numerous technical witnesses. A recent example which is typical may illustrate the breadth of inquiries - a proposed marina and hotel resort on the Hawkesbury River which was recommended for refusal by the Commission. In all, 42 parties made a total of 219 submissions to this Commission of Inquiry. In addition, 47 witnesses appeared, 32 were expert witnesses. In some inquiries numbers of parties and witnesses considerably exceed these figures. The Castlereagh Expressway Inquiry involves a total of 729 submissions (including background documents), and a total of 288 parties making submissions."[3]

6.10 There is greater opportunity for flexibility in the inquiry process in comparison to court proceedings. The Committee is aware, for instance, that some inquiries have involved a form of mediation outside the inquiry room in bringing technical experts together with the aim of narrowing the areas of dispute. This reflects the wide discretion on procedures enjoyed by the Commissioners.

3 Mr J. Woodward, Chairman, Commissioners of Inquiry, Address to National Environmental Law Association (N.S.W. Division) Pollution Conference, 15-16 June, 1990, p. 7

Furthermore, this ability provides strong contrast to Court proceedings where experts can only be heard in a formal setting one after the other.

6.11 On the question of comparing Council involvement in inquiries as opposed to litigation, the Committee was interested in the comments of Mr P. Walsh, General Manager/Shire Clerk, Port Stephens Shire Council:

Committee: *"Do you believe there is less trauma from the Council's point of view when it is involved in a Commission of Inquiry rather than in a court case?"*

Mr Walsh: *"There probably is because, it being not a legal hearing in the sense that a court case is, you can probably more argue merit cases than you can necessarily in a law court.*

Committee: *"Do you feel more comfortable putting a point of view from the Council's aspect in that arena rather than within the legal constraints of the court?"*

Mr Walsh: *"I do, yes.*

Committee: *"Do you believe the general public would have a similar feeling?"*

Mr Walsh: *"I think they would probably feel less threatened because it is not the same - there could be savagery of cross-examination. It seems to me that the process of the Commission of Inquiry seems to find out and try to come to a decision following inquiry rather than the court system, which by nature is an adversarial system which has to have winners and losers."*[4]

4 Minutes of Evidence, 17 December 1990, p. 204

Statutory Opportunities for Inquiries

i. Inquiries into Development Projects

6.12 In the case of an application for development which is *"designated"* under the Environmental Planning and Assessment Act 1979, the Minister may direct that an inquiry be held. The Minister then becomes the consent authority. The decision to direct an inquiry in this case is purely at the discretion of the Minister, although there is nothing to stop any party requesting him to do so.

6.13 A Commission of Inquiry can also arise with any development application subject to a Ministerial direction under Section 101 of the Environmental Planning and Assessment Act 1979. Such a direction serves to take a particular development application or class of development applications out of the hands of a Council. The Minister thus becomes the determining authority and has no option other than to direct an inquiry if so requested by theapplicant or the Council. Should the proposal also be designated, an *"objector"*[5] also has the right to request an inquiry. The Committee notes that this provision affects some Councils more than others, such as those dealing with coal mining proposals. These developments are both *"designated"* and subject to a Section 101 determination, thereby opening the door wide for persons other than the Council to request an inquiry to be held.

ii. Section 119(1)(a) Inquiries

6.14 Section 119(1)(a) of the Environmental Planning and Assessment Act 1979 gives the Minister discretion to direct inquiries on a wide range of matters:

"Any matters relating to the administration and implementation of the provisions of this Act or any environmental planning instrument or relating to the administration and implementation of the provisions of any other Act administered by the Minister."

6.15 The Committee notes that the Minister may direct such an inquiry be held on a request by an interested person or authority, such as a Council, or on his own motion. The very wide scope of the potential subject matter is worthy of note. An inquiry might, for example, relate to a specific development application or

5 Defined under Section 4, Environmental Planning and Assessment Act, 1979

a more general planning issue. It is stressed, however, that whether or not such an inquiry is held rests entirely on the Minister's discretion.

iii. Section 121 Dispute Settlement Inquiries

6.16 Section 121 of the Environmental Planning and Assessment Act 1979 allows an inquiry to be held to investigate and help settle disputes between public authorities and Councils. On this point, the Committee notes the following statement made by the Commissioners of Inquiry:

Section 121 has generally not been used by Councils. It is open to the community to request Councils to resolve matters under this section of the Act.[6]

iv. Local Environmental Plan Inquiries

6.17 Section 68 of the Environmental Planning andAssessment Act refers to public inquiries arranged by Councils in relation to submissions received in the local environmental planmaking process. Whilst the section does not refer specifically to Commissions of Inquiry, the Commissioners may still be involved:

These hearings are conducted by Commissioners where a Council requests a Commissioner be made available. In these cases Council has the responsibility to set up and publicise the hearing. The Commissioner reports his findings and recommendations to Council.[7]

6.18 The Committee wishes to stress that the public inquiry cannot be directly compared to the Land and Environment Court in these instances as there is no avenue for merits appeals in the local environmental plan-making process.

v. Other Inquiries

6.19 The legislation provides other opportunities for Commissions of Inquiry to be held, The Committee considers these inquiries to have little or no impact on local government expenditure:

6 Commissioners of Inquiry*Commissions of Inquiry for Environment and Planning and How They Work,* April 1988, p. 9

7 ibid, p. 8

* inquiries held under Section 119(1)(c) of the Environmental Planning and Assessment Act relating to *"activities"* under Part V of the Act, these involve certain proposals which do not require development consent; and

* inquiries held under the Heritage Act 1977.

Non-Statutory Inquiries

6.20 The Committee was interested to learn that the Commissioners of Inquiry are also conducting some inquiries at the request of Councils outside the statutory provisions. These tend to relate to *"major matters of concern" 8* to local government authorities and range from local environment plans across wide areas to site specific projects. An example of the latter was an inquiry requested by Lismore City Council into a proposal for a rare earth processing plant.[9] All the requests relate to matters wherein the final decision still rests with the Council.

6.21 The Committee is aware that the Commissioners are receiving a growing number of requests from Councils for such non-statutory inquiries. The Committee is further aware that the Commissioners have declined a number of requests. It is the Committee's understanding that it is those requests involving site specific projects which are less likely to be acceded to.

6.22 The Committee commends the Commissioners of Inquiry for undertaking these inquiries. At the same time, the Committee is mindful of the lack of statutory blessing and a corresponding lack of legal protection for the Commissioners. The Committee is also aware of budgetary constraints.

6.23 The Committee considers that the incidence of a growing number of Councils requesting these types of inquiry reflects a real desire on the part of many Councils to seek the assistance of an independent, qualified and well respected third party in reaching difficult decisions.

8 Ibid

9 Ibid

Costs

6.24 In addressing the question of costs, the Committee was made aware of conflicting viewpoints.

6.25 The Committee wishes to stress that in assessing the costs involved, it is important to distinguish between:

i. those inquiries actually requested by Councils; and

ii. those inquiries initiated by a party other than the Council (including the Minister).

6.26 In the former instance, a Council may well view the inquiry as a cost effective means to investigate a difficult issue, such as a controversial development application or a complex local environmental plan.

6.27 In the latter instance, the Council may well regard itself as an unwilling party to the Inquiry. In these cases, the costs would be viewed by the Council as an unnecessary and additional cost burden.

6.28 An example of the latter case was conveyed to the Committee in a submission by Drummoyne Shire Council, concerning a recent inquiry into the Council's proposal to rezone land in Five Dock:

> *"The Council was put to considerable expense in engaging a consultant to prepare a submission to the inquiry and in retaining a competent lawyer, expert in planning law, to pursue its interests at the hearings and inspection."*[10]

6.29 The Council informed the Committee that it estimates its expenditure to be in the order of $10,000. The Committee was also advised that the Council resolved to request *"the Minister for Local Government and Planning be requested to reimburse the Council for its costs incurred in relation to the Commission of Inquiry."* [11]

10 Ibid

11 Ibid

6.30 Another example of a Council's dissatisfaction involving yet higher costs in an inquiry was conveyed to the Committee by Singleton Shire Council.[12]

"In 1988/89 Council was involved in a Commission of Inquiry under the Environmental Planning and Assessment Act as a result of Council refusing a development application for a new coal mining development adjacent to the township of Singleton;

"The applicant lodged an appeal.against Council's refusal and the appeal process through the Commission of Inquiry necessitated engagement by Council of Counsel, solicitors and expert witnesses to argue Council's the community's case.

Paid out costs of this inquiry were:

1988 -	*$20,215*
1989	*$198,069"*

6.31 The Committee is aware that Singleton Shire is in an area which attracts proposals for coal mining and associated projects, which are subject to a Section 101 Ministerial determination. As outlined above, the Council or the applicant may require the Minister to hold an inquiry into these cases. Because these developments are also *"designated"* under the Environmental Planning and Assessment Act, there is also wide scope for persons other than the Council to require that an inquiry be held.

6.32 In contrast to the above, in his evidence before the Committee, Mr J. Walsh, General Manager/Shire Clerk, Port Stephens Shire Council, spoke in very favourable terms about a recent inquiry in which his Council was involved. Mr Walsh drew the Committee's attention to the approximate costs incurred and the general nature of proceedings. The inquiry was held into a proposal involving an aluminium smelter. The Committee was particularly interested in a comparison drawn by Mr Walsh between the inquiry and two major Land and Environment Court cases in which his Council had appeared.

6.33 At the request of the Committee, Mr Walsh provided figures on the overall costs incurred by Council in the two court actions and the inquiry. The Committee was interested to learn that whilst the court actions incurred costs

12 Questionnaire compiled by Mr H. Wilson, Singleton Shire Council, 20 September 1990, Q. 16

of about $110,000 and $104,000 respectively, the Council's involvement in the inquiry cost a mere $4,400 or thereabouts?

6.34 It was clear to the Committee that a primary reason behind the huge difference in costs is the fact that the Council chose not to utilise legal advice or representation in the inquiry. The Council instead relied on the services of its in-house staff and one external technical consultant.

6.35 From the evidence before it, the Committee understands that in the Port Stephens example, the decision to hold the inquiry was initiated by the Minister. The Minister was also the consent authority.

6.36 The above and other evidence led the Committee to form the view that Councils should consider reduced reliance on legal services if involved in a Commission of Inquiry. The fact that inquiries involve the *"...assessment of the merits of a development project, planning or environmental matters in dispute, through a process of public inquiry",* rather than the adjudication of matters of law, is emphasised. In many ways, the Committee believes that **arguments** presented in Chapter 6 relating to lay representation in merits appeals in the Land and Environment Court are relevant here also. It is the Committee's view that the excessive costs incurred by some Councils in Commissions of Inquiry have resulted from unnecessarily high legal profiles.

Opportunities for Council Initiated Inquiries

6.37 The Committee is convinced that Commissions of Inquiry can play a valid role in the decision making process of Councils when difficult decisions are involved. The Committee has already noted that a growing number of Councils have sought the assistance of an independent, qualified and well respected party, in the form of the Commissioners of Inquiry, to provide objective advice on complex planning and environmental matters.

6.38 A major focus of the Committee's Inquiry has been to investigate ways to enable the resolution of disputes before the Council makes a final decision, thereby minimizing the opportunity for costly litigation. On this point, the Committee was impressed by evidence presented by Mr J. Mant, solicitor:

13 Information prepared by Mr S. O'Connor, Manager, Community Planning, Port Stephens Shire

Council, 7 January 1990

"...I think we spend far too little on making decisions right in the first place and far too much on the appeal stage. I see the Commission of Inquiry as a way of making decisions right in the first place; and sometimes that is going to be expensive."[14]

6.39 On the question of cost, Mr Mant told the Committee that*"..the Commission of Inquiry is an alternative to an appeal and it is a cheaper alternative to an appeal - a lot cheaper." is*

6.40 In Chapter 4, the Committee examined the tendency of some Councils to avoid politically difficult decisions by passing them on to the Land and Environment Court, often at considerable expense.

6.41 The Committee is of the view that appeals to the Court against Councils' decisions in respect of development applications (or even in respect of Councils own works projects) would be considerably minimized if a Council had the discretion and powers to call for a public hearing conducted by an independent qualified person and to receive a report from that person for its consideration prior to a Council making a decision.

6.42 The Committee considers that such independent public hearingbefore a council determines a local major controversial proposal would assist in dispute resolution among the various and diverse views of the community in respect of these matters and avoid, in many cases, appeals to the Courtafter decisions are made by Council.

6.43 These public hearings would provide an informal forum in which residents may put their views on a proposal and in which technical information from developers and Council officers and government agencies may be presented and assessed. After the hearing the person who conducted it would report his or her findings and recommendations to Council, who after consideration of the report would then determine the matter.

6.44 Public hearings of this kind should be informal, laws of evidence should not apply, residents and others should be able to express their views without the need for legal representation, inspections by the person conducting the hearing should be undertaken (in the presence of interested parties) of the site and surrounding areas involved in the particular matter.

14 Minutes of Evidence, 8 November 1990, p. 136

15 Ibid

6.45 Such public hearings would be similar to those currently available to Councils under Section 68 of the Environmental Planning and Assessment Act in respect of rezoning proposals in Draft Local Environmental Plans but with additional powers in respect of procedure and related matters for the person conducting the public hearing. That person needs powers to determine procedures, to call parties before the hearing, to require production of documents and to utilise innovative, informal, non-legal procedures such as mediation between parties on issues in dispute or disputed technical data and expert opinions. Powers in relation to these matters similar to those available to a Commissioner of Inquiry under Section 120 of the Environmental Planning and Assessment Act would be appropriate.

6.46 A person with appropriate qualifications who has standing in the community and who is at *"arms length"* from the Council concerned (such as a Commissioner of Inquiry appointed under the Environmental Planning and Assessment Act), should conduct such public hearings.

6.47 The Committee is of the view that the legislation should be amended to enable Councils to request a Commissioner of Inquiry to conduct an independent and public hearing in respect of major local and controversial developments. The Commissioner of Inquiry, however, should have a discretion in deciding whether or not to hold a full Commission of Inquiry. It is not the Committee's intention that Commissioners become involved in minor neighbourhood disputes. In these cases, a Council may consider an alternative form of hearing. This matter is discussed further below.

6.48 In order to ensure efficiency in the approval process, the Committee considers it desirable that a decision to hold an inquiry be made within a specific period of time.

6.49 In recommending an expanded role for Commissioners of Inquiry, the Committee is aware that increased levels in funding will be necessary.

Recommendation 25

It is recommended that provision be made in the Environmental Planning and Assessment Act 1979 for Councils to have the discretion to require an independent and qualified person to conduct public hearings in respect of major local and controversial developments, and therein have the discretion to request a Commissioner of Inquiry to carry out the inquiry.

Recommendation 26

It is recommended that the person appointed to conduct the public hearings have powers under the Environmental Planning and Assessment Act 1979 similar to those contained in Section 120 of the Act relating to Commissioners of Inquiry.

Recommendation 27

It is recommended that the qualifications of a person eligible for appointment to conduct a public hearing should be those set out in Schedule I of the Environmental Planning and Assessment Act 1979, Clause (1).

Recommendation 28

It is recommended that the office of the Commissioner of Inquiry receive increased funding to carry out these additional responsibilities.

6.50 In cases where the Commissioners of Inquiry decline to conduct a hearing into a matter requested by a Council, that Council may still be convinced that a hearing by another suitably qualified and independent person would be appropriate. In these cases, the Council would carry the cost of the inquiry in its entirety. Such a mechanism might be regarded as a *"mini"* Commission of Inquiry.

6.51 The Committee regards the following comments presented in evidence by Mr Mant as very relevant:

"... if you have a hot issue where Council want to be arm's-length at least at the beginning stages, you can have that going on away from the hurly-burly of Council politics and the people feel as though they have been properly heard and that they do not have to go off to court to do it. If you get someone in to hear all the parties, the neighbours, the developers and so on and they do a report and a recommendation, it can quite often make it easier for Council to arrive at a decision. As you have no doubt heard, a lot of the reasons that people go on appeal are because Council knocked it because they do not want to seem to be taking the responsibility of making the decision." [16]

6.52 It is the view of the Committee that a panel or panels of appropriately qualified and independent persons be established to assist Councils in this manner. Retired Council officers may be able to provide a valuable role.

6.53 The Committee suggests that the panel or panels be established and monitored by the Local Government and Shires Associations. Councils would not be able to nominate a particular panel member to hear a case. Instead, the Council would apply to the Associations for a panel member to be appointed to a particular matter. The Associations would need to be convinced that the person appointed is suitably independent from the matter.

6.54 The Committee wishes to stress that the instigation of such an inquiry would be at the discretion of a Council. The Council may or may not decide to first approach the Commissioners of Inquiry.

16 Minutes of Evidence, 8 November 1990, p. 130

Recommendation 29

It is recommended that the Local Government and Shires Associations establish a panel or panels of independent and suitably qualified persons to conduct public hearings in respect of controversial developments at the request of member Councils.

7. Alternative Methods to Resolve Disputes

Introduction

7.1 In Chapter 1 the Committee adverted to a growing interest amongst both professionals and the community in methods other than litigation to resolve disputes.

7.2 The general dissatisfaction with traditional methods to solve disputes is summed up well in a recent submission by the Law Society of N.S.W. to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Cost of Justice:

"... the traditional adversary system of justice simply cannot handle the load which our complex, highly litigious society casts upon it. It needs a faster, much less formal, more accessible and less expensive alternative concerned not with legal niceties but with practical business-type solutions, to stand alongside it." [1]

7.3 The Committee recognises that in response to increasing dissatisfaction with the costs and delays associated with litigation, a number of initiatives have arisen. Some of these initiatives and the concepts behind them are, in the opinion of the Committee, of potential relevance to Local Government.

7.4 In this chapter the Committee addresses recent initiatives and thinking in the sphere of alternative dispute resolution techniques. The Committee then briefly examines the potential for applying such techniques in disputes involving local government. Some emphasis is given to the concept of mediation.

1 The Law Society of N.S.W., submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Cost of Justice, quoted in Ms L. Reid, *Courts and Costs , Are There Better Ways to Resolve Planning Disputes?*, unpublished B.T.P. Thesis, University of New South Wales, 1990, p. 122.

7.5 It appears to the Committee that the recent push for alternative ways to resolve disputes places considerable emphasis on the concept of mediation. It may be described as:

"... a process directed to enabling the parties to resolve their dispute by agreement. A neutral third party may be involved, but his endeavours will be to encourage an expeditious settlement forged by the parties themselves. There is no 'decision'. The process does not purport to involve the application of rules. What is aimed at is agreement." 2

7.6 Mediation is a fundamentally different approach from traditional techniques to resolve disputes:

"Mediation is an objective and amicable process of resolving disputes. It provides for the intervention of an impartial, third party who assists the disputants to reach their own mutual agreement concerning their differences. The goal of mediation is generally not to recommend a settlement but rather to facilitate negotiations and communication between the parties until a resolution is obtained or an impasse is evident. The mediator attempts to guide the parties so that they may reach their own satisfactory solution to their problems." 3

7.7 In various parts of the United States the application of mediation techniques to resolve disputes has become an established practice in various fields, including the resolution of environmental conflicts.

7.8 The first serious attempt to use mediation in the resolution of disputes in NSW was the establishment of the Community Justice Centre in 1980. Disputes between neighbours, including building matters, have provided a significant proportion of matters dealt with in this forum.

7.9 In 1986 the Australian Commercial Disputes Centre (A.C.D.C.) was established by the NSW Government. It seeks to assist both private and public concerns to resolve*"any dispute concerning the operation of a business activity..."*. The A.C.D.C. claims that

2 Australian Commercial Disputes Centre Ltd, *Mediator Training Manual*, 1991, p. 3

3 Ibid, p. 5

"...[its] experience in over 200 disputes shows that using the Centre generally means:

1. *Disputes are resolved for a significantly lower cost than the cost of litigation or arbitration.*

2. *Disputes are resolved within 1 or 2 days of meetings.*

3. *Where both parties agree to use its services the Centre has a record of reaching a final binding settlement in over 90 per cent of cases."*[4]

7.10 The A.C.D.C. has been primarily involved in mediating disputes of a commercial nature. In his evidence before the Committee, Mr D. Newton, Secretary General of the A.C.D.C., provided an interesting example of mediating a commercial dispute involving local government:

'Ms an example I cite the construction of council chambers for a city council in the country. This dispute related to a claim for approximately $900,000 for extra work carried out by the construction company. I acted as mediator in this dispute.

Mediation took place in March and April this year and involved 34 hours over a period of 22 days. Mediation resulted in a final settlement. The cost of mediation to the council was approximately $4,900, other expenses of around $50 and estimated legal costs, because the council used an outside solicitor, of $3,000. The total cost to resolve this commercial contractual dispute was around $8,000. That would compare with typical legal costs to prepare for arbitration or litigation of between $50,000 to $100,000 for a commercial construction case - anywhere from 15 per cent through to 8 per cent of the costs of preparing for arbitration or litigation. Leaving aside the actual arbitration and litigation hearing, the cost to the council was substantially less."[5]

4 Mr D.A. Newton, Secretary General, Australian Commercial Disputes Centre*Dispute Resolution Services,* Information Paper, December 1990.

5 Minutes of Evidence, 8 November 1990, p. 156

7.11 In October 1991 the NSW Supreme Court will be conducting a pilot Settlement Week Programme. The aim is to refer numerous cases awaiting hearing to trained mediators in an attempt to clear the backlog and promote a more cost effective way to resolve disputes.

7.12 Recent moves towards speedy and inexpensive resolution of environmental disputes have also been made by the Land and Environment Court, as discussed above in Chapter 5.

7.13 Of particular interest the Committee is the Public Decision Making and Dispute Resolution Group, an organisation set up with the support of the A.C.D.C. and the Department of Local Government. The functions of this Group, as conveyed to the Committee, are to:

> *"1. Provide assistance to government departments such as the Department of Local Government in its review of decision-making processes in local government to provide for more responsible and responsive decision making and dispute resolution;*
>
> *2. Provide a forum for disputes to be resolved with the members of the group offering the expertise that can assist in this respect;*
>
> *3. Develop a system of mediation of public disputes;*
>
> *4. Develop a system of facilitation of community issues."* [6]

7.14 It appears to the Committee that interest in mediation and other non-litigious forms of resolving disputes is already gaining some momentum in local government planning circles. In a recent newsletter for town planners, for instance, Mr D. Winterbottom, Director of Development and Planning at Wollongong City Council, encourages the town planning profession "*..to try and move the whole system into one of mediation rather than confrontation"?*

6 Submission, 16 October 1990

7 Mr D. Winterbottom, *Local Government Line: Environmental Mediation* Aust Plan, February **1991, p. 4.**

7.15 In early April 1991, the Royal Australian Planning Institute and Local Government Planners Association jointly conducted a seminar entitled, *Mediation and Negotiation: Alternative Dispute Resolution for the Environment.* The Committee notes with interest the following comments by one of the speakers:

"Mediation would seem to be the preferred method of dispute settlement but it has not, so far, been formalised within the procedures leading to determination and remains only an option, depending very much upon the practices of individual Councils. As community intervention, both oven and covert, is probably the most significant single source of appeals, resolving the community's role in dispute resolution is therefore long overdue." s

Mediation of Local Government Planning and Building Disputes

7.16 Whilst much of the current momentum involving mediation is directed towards solving disputes of a commercial nature, it is clear that significant interest has recently been focussed in the area of the environment. The Committee is of the view, however, that mediation of environmental conflicts is a far more complex issue than mediation of commercial disputes.

7.17 In the first place, unlike commercial law, planning and environmental law is essentially a branch of public law. It involves decisions of public authorities made in the public interest rather than on a commercial basis. There is no guarantee that the public interest will always be represented at the mediation table.

7.18 Secondly, the decision-making authority, usually a council, may find itself in a somewhat awkward position in mediation. If it is a party to mediation, it is quite likely that it may also have the dual role of being final arbiter further down the line. If it acts as mediator itself, it may not be recognised as being sufficiently impartial.

8 Mr T. Byrnes, Planning Consultant,*An Overview - Are Alternative Approaches Justified?* Paper presented to seminar entitled, Mediation and Negotiation: Alternative Dispute Resolution for the Environment, Royal Australian Planning Institute, Local Government Planners Association, 3 April 1991, p. 1

7.19 Despite the above, the Committee is of the view that mediation techniques may have a significant role to play in the prevention of escalation of planning and environmental disputes. Nevertheless, more work needs to be done on calculating how mediation can be successfully incorporated into existing processes.

7,20 There are three areas in which utilisation of alternative dispute resolution techniques may be considered in the approval process:

i, prior to the submission of the application;

ii. during the assessment stage prior to Council's determination; and

iii. subsequent to Council's determination but prior to the commencement of an appeal.

7.21 In all these cases, it is important to distinguish the role of the Council It may play the mediatory or facilitator itself or be a mere party to the proceedings.

i. Pre-lodgement Stage

7.22 The importance of well trained personnel to provide information services and lend negotiation skills in dealing with potential applicants and other interested parties was highlighted in Chapter 4 above.

7.23 It will sometimes be clear to a Council officer from the outset that a proposal is likely to cause conflict. The conflict may arise at a neighbourhood level or extend across a wider community. In some cases, the applicant may alert the Council to existing or potential dispute conflict.

7.24 In his evidence before the Committee, Mr W. Henningham stressed the desirability of applying dispute resolution techniques in the case of major controversial proposals at the pre-lodgement stage:

"... if a major development is proposed for an area, it is most desirable that a trained facilitator should conduct a facilitation between the Council, the developer, interested members of the community , action groups and anyone who has an interest in or concern with the issue with the objective of achieving a development application that is compatible with

the local environment and also compatible with the needs of the local people." 9

7.25 The Committee sees merit in Mr Henningham's suggestion. Whilst the description may not meet the purist's formula for mediation, the Committee wishes to stress that it is less interested in semantics than encouraging opportunities for the prevention and resolution of disputes early in the decision-making process.

7.26 It is noted that Mr Henningham referred to the Council as a mere party to the process rather than being the actual facilitator or arbitrator. The Committee endorses this approach. In the case of major controversial proposals, it is considered important that the facilitator be seen as independent and at arm's length from both the proponent and objectors. The Council itself may well support the proposal or be in sympathy with the objectors.

7.27 A second point raised by the Committee is that whilst the proposal is still at pre-lodgement stage and the Council has not received any application fee, the Council should not be expected to fund the conference other than meeting the cost of sending its representative. It is suggested that it would be more appropriate for the proponent of the development to consider paying the mediator's fee.

7.28 In the case of pre-lodgement proposals involving conflict at the neighbourhood level, it may well be appropriate for a Council officer to suggest and convene a mediation conference between the neighbours. The objective of the meeting would be to assist the parties to reach agreement on a proposal which is also consistent with the Council's rules and objectives. In this context, the mediator may need to play a more assertive role than is traditionally assumed in mediation conferences. The Committee wishes to stress that the officer would need to be adequately skilled in mediation and negotiation techniques. In cases where agreement cannot be reached or the Council is not seen by the parties as sufficiently impartial, it might be suggested that parties utilise the services of a suitably qualified external mediator. In this case the Council could also be represented at the conference.

9Minutes of Evidence, 8 November 1990, p. 154

7.29 Mediation conferences on Council premises would need to be held in an appropriately furnished and private room. The need for councils to provide such facilities was addressed by the Committee in Chapter 4.

Recommendation 30

It is recommended that Councils encourage potential applicants of proposals likely to be of a controversial nature to consider the option of participating in a mediation conference with potentially adversely affected parties prior to lodgement of the application, to be conducted by a suitably qualified and impartial person.

ll. Pre-Determination Stage

7.30 In his evidence before the Committee, Mr A. Payne, Chief Executive/Town Clerk of Willoughby City Council, described an interesting example of a Council's attempt to resolvea dispute concerning a controversial local development:

"We had the Temple Emanuel at Chatswood wanting to expand its premises in a residential area. We had a residential action group which was very definitely against it. Both sides had good arguments. What I suggested to Council was that we get our solicitor to come with me to a meeting between the parties, including the Temple's consultant and the resident's representative and sit down at the table and sort it out. probably after two meetings of a couple of hours that was resolved and was a saving to both parties. There was give and take either way. Both parties were completely satisfied. It think they realised that if it had got into a court situation there would be a lot of money spent and it was not warranted, delays and expenses, so we were able to sort that one out. I think it depends on the calibre of the fellow that you have sitting down and acting as a catalyst. You would have to have someone very skilled in the mediation area to be able to do that. We had Jeremy Bingham: He was very good but I would

say that saved us quite a considerable amount of money in court costs and it saves the applicant a lot of money too. But you cannot always do that."[10]

7.31 The above case provides evidence that Councils may consider innovative ways to resolve planning conflicts without having to resort to litigation.

7.32 In Chapter 6 the Committee recommended an expanded role for Commissions of Inquiry at the pre-determination stage to assist the resolution of disputes in complex cases. Mediation of a dispute by a qualified person provides another option. Similar to public inquiries, environmental mediation enables the participation of a number of parties and the involvement of an impartial chairperson. Councils might consider utilising the services of members of the Public Decision Making and Dispute Resolution Group and other qualified persons to explore the possibility of mediation, or indeed attempting it, in appropriate cases.

7.33 The Committee notes that some Councils already encourage some form of mediation in the environmental decision-making process. Several Councils have set up systems of resident precinct Committees and the like, which enable public discussion on proposals before the Council. These discussions often lead to negotiations and the modification of proposals.

7.34 The Committee is mindful, however, of potential problems in the mediation process when local government is involved, as stressed to the Committee by Mr J. Mant, solicitor:

"In order to have a successful mediation, both parties have got to be prepared to do a deal, or to try to do a deal, and if a deal is stitched up, to agree to it then and there. If you have to go back to a Council meeting in two weeks time, it is very hard to run a mediation. That is one of the issues that has to be sorted through."[11]

7.35 The issue raised by Mr Mant is also relevant to pre-appeal mediation conferences. Mr Mant went on to emphasise the issue of delegation by Councils of sufficient authority to enable mediation:

10 Minutes of Evidence, 8 November 1990, p. 79

11 Minutes of Evidence, 8 November 1990, p. 134

"If the Council officer or the Councillor says that they will go with a proposal and everyone is happy, when it goes to Council, Council must make a decision. They cannot say that they have been bound by that previous agreement. That is a difficulty."[12]

7.36 Whilst the Committee supports the use of mediation and other relatively inexpensive techniques to resolve planning disputes, it is recognised that the issues require further scrutiny. The Committee commends the efforts of the Public Decision Making and Dispute Resolution Group in this regard.

7.37 In the meantime, the Committee suggests that individual Councils consider the option of mediation in appropriate cases. The issue of whether Council should play the role of the mediator itself is again important. The Committee notes that the mediator must be seen by all parties as impartial. Whilst it may be appropriate for the Council to provide a mediation role in minor disputes between neighbours, it is suggested that in most cases, an appropriately qualified external mediator should be sought. The Committee is of the view that Councils should generally restrict themselves to negotiation and facilitation rather than mediation.

Recommendation 31

It is recommended that in cases where a development or building application involves significant conflict, Councils consider encouraging the applicant to consider the option of participating in a mediation conference with other relevant parties, to be conducted by a suitably qualified and impartial person.

iii. Pre-Appeal Stage

7.38 The introduction of optional mediation conferences by the Land and Environment Court is certain Class 1, 2 and 3 matters was raised in Chapter 5. The Committee notes the responsibility of the Court to monitor and review the successor otherwise of these conferences.

12 Ibid

7.39 The Committee also wishes to point out that other opportunities for mediation are not necessarily extinguished once the final determination of an application has been made by a Council. Whilst a determination can only be revoked in very limited circumstances, there is nothing to stop a Council inviting an applicant to request reconsideration by submitting a fresh application with amended plans.

iv. Attitudes

7.40 Opportunities for innovate ways to resolve disputes depends much on the willingness of elected representatives and staff to embrace new ideas. The need for Councils to adopt a more open and service-oriented approach to their activities was explored in Chapter 4. This new approach must incorporate a preparedness to release the shackles of some entrenched procedures and attitudes in order to pave the way for more responsive, cost-effective and innovative government at the local level.

8. Legal Actions Involving Elected Members

Introduction

8.1 In the course of receiving evidence for this Inquiry, the Committee became aware of concerns on the part of a number of persons, especially Town Clerks and senior executives of Councils, as to the incidence of and costs relating to legal actions involving individual elected representatives.

8.2 These actions include:

i. actions between elected representatives, including the Mayor or Shire President; and

ii. actions between an elected representative and the Council.

8.3 In this chapter, the Committee examines examples of the types of actions which arise under' this category, their cost impact on Councils and opportunities to minimize those costs.

Nature and Costs

8.4 The Committee found that responses to the questionnaire did not enable a clear picture to be drawn of the overall incidence and costs of these types of actions across local government. Instead, the Committee relied on specific examples provided to it in various submissions and evidence.

8.5 The Committee found these actions to be relatively rare. Observations by a number of Town Clerks and senior executives, however, led the Committee to the belief that the number of such actions is growing and warrants some consideration.

8.6 The Committee received evidence that actions between elected representatives would often appear to be based on political motives. Whether or not an action is initiated for political point scoring alone, the Committee is mindful that actions involving elected representatives often arise from

politically volatile environments. As a result, such disputes are unlikely to be resolved at the negotiating table or by way of mediation.

8.7 Actions against elected representatives are typically based on allegations of a breach of statutory duty. In accordance with the evidence before the Committee, one of the more frequent allegations leading to prosecution involves Section 46C of the Local Government Act, which relates to the disclosure of pecuniary interest.

8.8 On the matter of the initiation of an action, the Committee was interested in evidence by Mr T. Dover, Town Clerk of Drummoyne Municipal Council:

'7 find it a very simple matter for a person to go along and initiate a prosecution. They can go to the Chamber Magistrate, formulate the information, the summons, and lay it before the court at the cost of $40 and the thing proceeds from there. Often after several hearings in the local Court it might find its way to the Supreme Court, and you could end up with legal representation at the level of counsel, and quite considerable costs of defence. That is the part that is easy, to start it off, but to conclude it can run into very substantial figures." [1]

8.9 The Committee notes that even though a Council may not be a party to such action, it may still decide to cover the costs of the person concerned.

8.10 In his evidence before the Committee, Mr W. Taylor, Town Clerk, Ku-ring-gai Municipal Council, described two actions between that Council and one elected representative:

"Council granted open-ended leave of absence to an alderman. Subsequently the alderman left New South Wales. Council wished then to put an ending date on that leave of absence. That alderman instigated legal action and was successful. The other legal action between Council and the same alderman related to the suggestion that the person had received some financial gain 'by credit extended for a Council conference. Council was unsuccessful." [2]

1 Minutes of Evidence, 17 November 1990, p. 185

2 Minutes of Evidence, 17 November 1990, p. 221

8.11 The Committee was appalled to note that two actions cost the Council in the order of $63,000.[3]

8.12 Mr T. Dover, Town Clerk of Drummoyne Municipal Council, in evidence before the Committee, described an action by one alderman of that Council against four others on a pecuniary interest matter which proceeded to the Supreme Court. Whilst the Council was not a party to the case, it bore the cost of losing the services of its senior executive, Mr Dover, for about three days whilst he appeared as a witness in court, in addition to his preparatory requirements.

8.13 In his evidence before the Committee, Mr Dover described another case in which an alderman took action against both the Town Clerk and another elected representative:

"The former Mayor took an action against myself and Alderman Fitzgerald, who was then the Mayor, on the basis that I had given him a document without the prior approval of the Mayor in accordance with Ordinance 1. That matter started in the local Court, and the Council supported me in the litigation, and we advanced it to the Supreme Court to get a declaration that there was no case to answer. We were successful in that action. There was bad feeling between the particular alderman and the former Mayor at the time, and that is how it found expression before the courts." 4

8.14 The Committee notes that whilst the action was unsuccessful, the Council suffered from having its Town Clerk away from duties and appearing in court for *"the best part of a couple of weeks"?* Furthermore, the Committee notes Mr Dover's evidence that Council time involved in debating the matter and preparing materials amounted to *"days and days".*[6]

8.15 The Committee considers the above illustrations provided by Mr Dover as good examples of the excessive hidden costs borne by Councils in these actions, even where the Council is not a party to the action.

3 Ibid

4 Minutes of Evidence, 17 December 1990, p. 184

5 Ibid

6 Ibid, p. 185

8.16 In reviewing the responses to the questionnaire, the Committee was concerned to note that Hornsby Shire Council expended well over $50,000 between January 1988 and June 1990 in relation to legal costs on litigation between elected members and the Council. Furthermore, in a submission to the Committee, the Shire President, Councillor Brian Carey, expressed his Concern in relation to legal expenses incurred by the Council in relation to allegations against him involving a pecuniary interest issue:

"I have been concerned for some time about what I consider to be a grave misuse of public funds in obtaining legal advice on matters which could best be described as pursuing a vendetta...These legal advices sought by Council...cost the Council's ratepayers $3,950. It is this amount that I believe to be a blatant misuse of Council funds."[7]

8.18 The Committee did not investigate the details behind Councillor Carey's statements. The submission did provide evidence, however, of a general belief that many of the types of actions discussed in this chapter, and the various accusations which can lead to such actions, would appear to be initiated by concerns of political expediency rather than sound financial management.

8.19 The Hornsby matter also drew the Committee's attention to the fact that substantial legal costs can be incurred as a result of mere allegations which may never result in litigation. The Committee is sympathetic to a Council's sensitivity to accusations of impropriety against their members and senior staff.

Potential Solution

8.20 The Committee has already noted its view that the types of disputes discussed in this chapter are often unlikely to be resolved through negotiation or mediation. These disputes often involve considerable hostility. Furthermore, the party who initiates the action may well be seeking confrontation and the publicity which it will necessarily attract.

8.21 The Committee sought to examine alternative methods to deal with these disputes with a view to minimizing the potential costs imposed in local government.

7 Submission, 13 September 1990

8.22 The Committee did receive evidence supporting the concept of arbitration by a neutral third party. In view of this support, the Committee sought the opinions of Mr Dover and Mr Taylor on the idea of an Ombudsman to determine such matters. Both witnesses responded to the concept in favourable terms:

The Committee: *Considering the disputes that have gone on between aldermen, and aldermen and Council, however one cares to define it, at Drummoyne in recent years, is there a case arising from that for a local government Ombudsman to facilitate resolution of such disputes prior to it going to a court, with the associated expense?*

Mr Dover: *Yes, I would certainly agree with that. Anything that could be done to avoid the matter proceeding to court would be a big advantage to local government. I think the problem is you have two very strong individuals with their own particular thoughts on matters and neither is prepared to yield, and obviously the 'matter proceeding to litigation as the only way of resolving it. The introduction of someone of the calibre of an Ombudsman would be quite useful." s*

The Committee: *An Ombudsman could have statutory authority to compel people to be party to an investigation. Would that have changed the situation.*

Mr Taylor: *Yes, it would. If there was compulsion for both parties to come to the table and discuss it, and accept the ruling that would be great. Indeed, that is what the*

8 Minutes of Evidence, 17 December 1990, p. 189

Council thought the court would do because other negotiation sources failed.[9]

8.23 The Committee considers that the introduction of an independent statutory officer to oversee these matters is well worthy of investigation. It is the Committee's view that such a person should have the power to make binding determinations on the matters brought before him or her. In this respect, the officer would be fundamentally different to the New South Wales Ombudsman whose powers are merely recommendatory.

8.24 An alternative to the above is some form of arbitration under the auspices of local government itself, perhaps under the Local Government and Shires Associations. The Committee notes that such a mechanism would have the advantages of being self-regulatory and funded directly by local government.

8.25 On the balance of considerations, the Committee prefers the former mechanism which may be integrated into the future Local Government Commission. The Committee understands that the referral of a matter to the Commission would not be mandatory.

Recommendation 32

It is recommended that the Minister for Local Government investigate the establishment of an independent statutory office which will arbitrate on matters referred to it involving disputes between (i) elected representatives and (ii) elected representatives and a Council, involving allegations of breach of statutory duty.

9 Minutes of Evidence, 17 December 1990, p. 221

9. Legal Services to Local Government

Introduction

9.1 Local government, due to its intrinsic nature, the complexity of its legislation and the level of scrutiny under which it operates, is a frequent consumer of legal services.

9.2 Legal services are rarely cheap. The number of recent governmental inquiries into legal services and the cost of justice reflects this fact; Information received from the Committee's questionnaire reveals that councils are currently paying between $60 and $400 per hour for solicitors' services. Fees paid to barristers are even higher.

9.3 This Inquiry, however, is not an investigation into legal fees. It is concerned with legal costs. Various ways to defray local government costs have already been examined. In this chapter, the Committee explores the need for cost-effectiveness in the provision of legal services and opportunities for cost saving.

9.4 In assessing Councils' responses to the questionnaire, the Committee noted a variety of approaches towards obtaining legal services.

9.5 A handful Of Councils employ internal solicitors. These Councils also seek external legal services if the need arises.

9.6 The majority of Councils enjoy some form of agreement to retain the services of one or more firms of solicitors. In some cases, these agreements are notably longstanding. One major provincial council, for example, has retained the same firm since 1895. Numerous Councils, however, including metropolitan authorities, advised the Committee that they do not retain any particular firm of solicitors.

9.7 A common approach seems to involve retaining a local firm of solicitors for the more routine work, such as conveyancing and some prosecutions, whilst seeking the services of a specialist firm for more complex matters. The Committee supports this approach and notes its concern that Councils which

solely rely on a small firm may find themselves instructing counsel in matters which could otherwise be readily dealt with by a competent specialist solicitor.

9.8 A recent tendency has been the establishment by some Councils of panels of legal advisers. A panel is set up to provide a range of services and some choice in costs.

9.9 The various approaches reflect the autonomous nature of local government and each Council's ability to choose the level and method of legal services it regards as most appropriate to its needs. The Committee is concerned, however, that in many cases Councils do not review what these needs are and how they might best be met. It would appear that in some instances, Councils' approaches to obtaining legal services have become entrenched without any adequate review.

In-House Solicitors

9.10 In examining the question of in-house legal staff, the Committee sought evidence from representatives of two Councils which employ internal solicitors.

9.11 Waverley Municipal Council employs a solicitor with a strong background in planning and environmental law. The Town Clerk, Mr R. Ball, spoke in glowing terms to the Committee about the advantages afforded to the council. Mr Ball indicated that the solicitor represents the Council in 99 per cent of cases before the Land and Environment Court and estimated a success rate of *"about 90 percent".*[1] *It* was admitted, however, that the present officer "*...would be extremely difficult to replace..." 2*

9.12 The Committee also received evidence from Mr G. Loupos, Legal Officer with South Sydney City Council. Mr Loupos advised the Committee that he is generally not involved in Land and Environment Court work; these matters tend to be referred to one specialist firm. Instead, Mr Loupos' duties involve:

1 Minutes of Evidence, 8 November 1990, p. 118

2 Ibid, p. 119

"... conveyancing, leasing preparation of licences for the engineering department, general advice matters, summonses for the enforcement of ordinances and summonses in relation to planning matters such as unauthorised works, basically in the Local Court. Actions are taken in the Local Court and the District Court. I am also involved in debt recovery matters for rates and sundry debts."[3]

9.13 In his evidence before the Committee, Mr J. Bourke, South Sydney City Council's Town Clerk, stated that "*...the amount of revenue that the legal officer generates for council far exceeds his wage*"[5]. Some emphasis was made by Mr Bourke on the recovery of costs of summonses issued by Mr Loupos, who added that *"every time we take court action we recover professional costs and we have recovered costs of more than three times my income"*[6]. In 1990, the Council issued about 9,000 summonses under the Local Government Act and Ordinances? The Committee is mindful that this figure would be far higher than many other cases.

9.14 The Committee was also interested in a recent investigations by Melbourne City Council into its legal services, including the benefits or otherwise of having in-house legal staff. Upon consulting all other mainland capital city Councils, except Darwin, the Council noted a *"clear trend"* towards the recruitment of in-house legal staff. After a comprehensive review of its own situation, Melbourne City Council decided to continue its current practice of *"maximising in-house provision of legal advice"*. It is noted, however, that complex and specialised matters are still referred outside?[7]

9.15 A number of persons who appeared before the Committee were very sceptical of the notion of in-house lawyers. The major reason given was that higher calibre solicitors would more likely be attracted to higher remuneration levels in the private sector. Mr A. Payne, Chief Executive/Town Clerk of Willoughby City Council, for instance, told the Committee that:

3 Minutes of Evidence, 8 November 1990, p. 101

4 IbM

5 ibid, p. 102

6 ibid, p. 101

7 Report to Economic & Corporate Services Committee, 18 January 1991, attached to letter from Ms E. Proust, Chief Executive Officer, Melbourne City Council, 5 February 1991

"We have trouble keeping good staff as it is now in the traditional fields of planners, health and building surveyors and top administrative people because we cannot meet the market price that private enterprise is paying. I should think if you have a good in-house solicitor you would probably only have him for 12 months and he would be headhunted by the private firms. We did have a look at it. We felt we were getting good service so we maintained consultants or outside practitioners." s

9.16 The Committee recognises the persuasive nature of Mr Payne's argument. As a result, it is suggested that a Council interested in employing in-house legal staff should thus consider offering flexible packages of employment, including a right to limited private practice.

9.17 In his evidence before the Committee, Mr F. Thomson, Shire Clerk of Warringah Shire Council, was also reluctant about the notion of in-house lawyers, on the grounds of the diversity of legal advice required by a Council

"The general purpose Council has a whole range of legal issues that have to be advised on. We have one that advises on conveyancing one on workers compensation and one advising on public liability and they are experts in that field... You cannot expect one professional solicitor to cover those range of options, and keep up to date with them all." 9

9.18 Whilst the Committee acknowledges Mr Thomson's stance, it is noted that the same assertion could be made of a small private firm. Furthermore, the Committee is of the view that an in-house Council solicitor should not be expected to be able to deal with all issues which may arise. Complex and specialised matters may well need to be referred to external advisers. In this situation, the internal solicitor could ensure that the instructions are sufficiently specific and provide a sieve to help prevent requests which are plainly unnecessary. Direct briefing of counsel would also be possible.

9.19 After having considered all the evidence before it, the Committee formed the view that the appointment of internal legal staff by Councils is at least worthy of serious consideration. Of course, such advice is irrelevant to smaller

8 Minutes of Evidence, 7 November 1990, p. 78

9 Minutes of Evidence, 7 November 1990, p. 47

Councils with minimal legal costs. In some cases, joint employment between several authorities might be considered.

Recommendation 33

It is recommended that Councils consider the relative advantages of the employment or joint employment of in-house solicitors.

Recommendation 34

It is recommended that in-house solicitors employed by Councils be permitted to enjoy a right to limited private practice as specified in an appropriate contract of employment.

A Legal Services Committee

9.20 From the outset of this Inquiry, the Committee was concerned that many Councils do not have a written agreement with their principal legal advisers. The Committee is of the view that the commitment of important terms to writing is essential in the event of a dispute. Furthermore, the agreement could provide a yardstick against which reviews of services are carried out. A written agreement is considered important whether a Council instructs only one, two or more or an entire panel of solicitors.

Recommendation 35

It is recommended that agreements for the provision of external legal services be in written form and specify hourly charges for various levels of service.

9.21 The Committee devoted considerable thought to the ..issue of periodic review of legal services. As a general principle of promoting cost-effectiveness and better accountability of public funds, the Committee supports the review of all major private services provided to public authorities. Legal services to local government is no exception. In particular, the Committee emphasises the need to monitor and review specialist legal services where scale fees are less prevalent.

9.22 The level of review required should remain in the hands of each Council. The Committee does recommend, however, that each Council establish a legal services committee or sub-committee whose role, inter alia, would be to monitor and review legal services. The Committee would need to provide a written report to the Council which would make the final decision. In the case of Councils with limited legal expense, an existing committee might fulfil this role. The functions of a legal committee in Councils is discussed further in Chapter 10.

Recommendation 36

It is recommended that each Council establish a legal committee or subcommittee to: a. review the standard and cost of external legal services; b. monitor budgeting on legal services; c. review and monitor both internal and external legal costs on a case by case basis;

d. report to Council accordingly.

Issue of Tendering

9.23 The issue of tendering for legal services was raised a number of times in evidence before the Committee. Mixed opinions were received. The most common criticism was that a decision based on price tag alone may not be cost-effective. A few hours work by a specialist lawyer at a relatively high rate might fix a problem which could take days for an inexperienced junior to obtain only first base. The 'Committee accepts this argument but notes that hourly rates, in addition to experience and expertise, would still need to be

an important element in the consideration process. The Committeesupports the notion of tendering for legal services on this basis as part of a Council's review of specialist legal services.

9.24 In choosing its external legal services, a Council might also consider whether a firm demonstrates a propensity to litigate or prefers to assist its clients to stay out of Court as far as possible. The Committee was very interested to note a number of key Councils which experience significant development pressures and local planninig conflicts are infrequent visitors to the Court, despite any lack of tendency to approve everything which comes before them. The Committee believes that their choice of legal advisors plays a key role in their relatively low legal costs.

9.25 The Committee is of the view that Councils should review their legal services every four years, mid-way during their elected term.

Recommendation 37

It is recommended that Councils review their arrangements for the provision of external legal services every four years, being two years after each full Council election.

Legal Panels

9.26 The Committee has already noted above a recent trend on the part of some Councils to establish panels of external legal firms.

9.27 The Committee recognises two main roles for legal panels. These roles may be mutually exclusive, depending on the representation of firms on the panel.

9.28 The first role is to provide a variety of specialties. In its most inflexible form, a panel would provide one firm for each specialised area. For example, a Council might always instruct one firm on industrial disputes and so on.

9.29 The second role is to encourage some sense of competition between those firms on the panel. Any request for assistance would thus be capably handled

by a number of firms on the panel. In his evidence before the Committee, Mr D. Johnson, Town Clerk of Blacktown City Council, referred to a panel of 10 firms consulted by his Council designed *"to encourage performance by the legal firms involved"?*

9.30 The Committee recognises benefits of combining the two roles to provide Councils with a range of services and choice in costs amongst a group of reasonably competitive firms.

9.31 The panel system, however, may have recognisable drawbacks. In a recent staff report to Manly Municipal Council on the question of legal services, the following potential disadvantages were noted:[11]

> *"i. Administrative difficulties;*
>
> *ii. Difficulties associated with liaison and communication;*
>
> *iii. A lack of regular reporting on issues;*
>
> *iv. .4 decrease in the advice provided to council free of charge*
>
> *v. .4 lack of consistency and approach on issues."*

9.32 The Committee is aware that the close relationship which can arise between a Council and its principal legal advisers may bring cost advantages. Good working relations between Council staff and the solicitors can develop. Furthermore, the Committee has received evidence that the solicitors are more likely to give informal advice without charge.

9.33 At the same time the Committee is mindful that Council personnel and junior solicitors can be reasonably mobile between workplaces, thereby requiring *"good working relations"* to be built afresh. Secondly, the Committee suspects that firms seeking increased local government clientele but hitherto locked out by seemingly fixed Council/solicitor relationships may well offer

10 Minutes of Evidence, 17 December 1990, p. 212

11 Report from Town Clerk, Manly Municipal Council, *Legal Services - Result of Calling of Expressions of Interest and Subsequent Interviews*, 5 March 1991

attractive packages. The periodic review of legal services by tender would enable Councils to become aware of such services.

9.34 On the balance of all the evidence, the Committee formed the view that those Councils which frequently require specialist legal advice should consider the relative advantages of establishing a panel of legal advisers. Whilst the Committee is unconvinced that apanel would provide the most cost-effective alternative in all cases, it recognises sufficient benefits to suggest that further investigation by some councils may well be worthwhile.

Recommendation 38

It is recommended that Councils which frequently require specialist legal advice consider appointing a core group or panel of legal firms in order to provide a range of expertise and choice in costs.

Internal Arrangements

9.35 In the above discussion, the Committee briefly raised the advantages of hav ing in-house legal staff provide a contact between Council and external firms in those cases where the matter is unable to be dealt with internally. In its recent review of its legal services, Melbourne City Council noted that its own administrative arrangement, which involved several in-house solicitors, had:

"... resulted in far more specific instructions being given to its external advisers and the elimination of vague and costly requests being transmitted from operating departments directly to external service providers."[12]

9.36 It is the view of the Committee that such benefits would have a substantial impact on lowering legal costs. The notion of Councils employing a Legal

12 Report to economic & Corporate Services Committee,, 18 January 1990, attached to letter **from** Ms E. Proust, Chief Executive Officer, Melbourne City Council, 5 February 1991.

Services Officer to provide the link between a Council's administrative structure and its external advisers is thus strongly supported. The Committee wishes to emphasise, however, that the contact officer need not necessarily be a registered solicitor.

9.37 In his evidence before the Committee, Mr W. Henningham, solicitor and consultant to Sly Weigall, a major firm specialising in local government law, noted the experience of one of the firm's client councils:

"Wyong Council employs a legal services co-ordinator. ! understand that the appointment has been very successful. It enables one central point within the Council to deal with its solicitors."[13]

9.38 The Committee commends all Councils to appoint a legal services officer to co-ordinate its legal services. In the case of Councils with relatively little legal expenditure, the role could provide an additional but important duty for an existing senior member of staff. The Committee suspects that many Shire Clerks already fulfil this role.

9.39 In the case of Councils with large legal budgets, the Committee suggests the appointment of a full-time officer. The position may well be very attractive to persons with an interest in law. It may even decide to encourage its legal services co-ordinator to study law on a part-time basis. In any event, this is the Committees believes that the position of would rapidly develop into a widely recognised professional sub-specialty throughout local government. It is the view of the Committee that in time, formal recognition under an appropriate award would be necessary.

Recommendation 39

It is recommended that each Council appoint a Legal Services Officer to act as the main contact between Council and its legal advisers.

13 Minutes of Evidence, 8 November 1990, p. 153

9.40 The Committee was concerned to note that some Councils allow numerous officers relatively unrestricted access to their external legal advisers. Whilst in some cases the law firm might provide on-the-spot telephone advice free of charge to a valued client, in other cases the meter will be ticking. Without adequate co-ordination of requests for legal services, it is quite possible that some requests will duplicate or at least be very similar to previous requests. The information required may indeed already be at hand.

9.41 The Committee supports the notion of restricted access to legal advisers and only with the prior approval of a designated officer. The legal services co-ordinator could perform this function.

9.42 Furthermore, such an officer could be given the responsibility to maintain a library of items of advice, standard forms of contract and the like. In some cases such documents may well provide the answers to a legal enquiry and thus circumvent the need to resort to external legal assistance.

9.43 In considering the notion of Councils having a designated officer provide the main contact between a Council's administrative structure and its external legal advisers, the Committee was particularly impressed by the internal administrative arrangements adopted by Melbourne City Council. In that Council, all requests for external legal services must be *"routed through the Manager- Legal Services for assessment of in-house capacity to supply some or all of the required service."* [14] This was one of a number of strategies implemented *"to inject greater discipline and cost consciousness into the Corporation's recourse to legal proceedings, and getting adequate value for money for legal services..."*[15]

9.44 The Committee was further interested to note that Melbourne City Council's legal services section adopts a practice of direct briefing of barristers, which has demonstrably reduced legal costs. In preparing for litigation, a considerable amount of work in assembling documentation is carried out in-house.

14 Report to Economic and Corporate Services Committee, 18 January 1991, attached to letter from Ms E. Proust, Chief Executive Officer, Melbourne City Council, 5 February 1991

15 Ibid

Recommendation 40

It is recommended that all access to a Council's external legal advisers by Council's administration, other than the Council's chief executive, only be made through the Council's legal services officer.

Recommendation 41

It is recommended that the legal services officer maintain a library of legal documents, items of advice and standard contracts in order to avoid unnecessary duplication of legal services.

9.45 The Committee was also concerned to receive evidence from Mr J. Bingham, solicitor, regarding the poor management practices of some councils in collating information to be conveyed to their legal advisers:

"When we are faced with a difficult matter, whether it is a development appeal or a dispute over some old deed involving approval of a resort development 20 years ago, we receive a stack of files. That is the way in which we are briefed. We handle that by employing a solicitor at $220 an hour to go through that stack of files, collate it, son it out, photocopy relevant pans and then produce a brief with the relevant information in chronological order. Often the files are not even in chronological order, or there are multiple files .... Ten hours for a solicitor's time at $220 an hour amounts to $2,200. If a Council clerk does that work his hourly rate is much less and its is not an external payment; it is part of the cost of running the Council."[16]

16 Minutes of Evidence, 7 November 1990, p. 22

9.46 The Committee is of the view that a well trained legal services officer could hope to reduce such problems by supervising the flow of documents between a Council and its solicitors. In his evidence before the Committee, Mr Bingham also referred to opportunities for a Council's legal advisers to assist in training staff in this area. The Committee supports this notion. Whilst such training might attract initial costs, it should help to minimise needless expense further down the track. The Committee suggests that Councils also consider fostering training programmes conducted on a joint basis between several more Councils.

Recommendation 42

It is recommended that the legal services officer be given the responsibility to supervise the passing of files and documents between Council and its legal advisers and attempt, where possible, to minimise the extent of materials forwarded to the legal advisers.

9.47 In its examination of the various legal services provided to local government the Committee was interested to learn of a concept known as *"legal audit"*. It is a service designed to prevent unnecessary future legal costs by scrutinising a Council's procedures, policies and practices to check for legal vulnerability. It would concentrate on issues such as advertising requirements, delegation policies, preparation Of contracts, contents of planning strategies, certification of minutes and others. It would also be supplemented by training staff in routine legal matters.

9.48 The Committee Supports the legal audit as a mechanism to assist the reduction of legal costs particularly in the case of those Councils frequently involved in legal action.

9.49 The Committee suggests that legal audits be overseen by the legal services committee. The bulk of the actual work would probably need to be carried out by a private legal firm with specialists in local government law.

Recommendation 43

It is recommended that Councils frequently involved in legal actions consider the benefits of having a legal audit carried out into their policies, practices and procedures; the audit would be overseen by a special committee assisted, where appropriate, by specialist lawyers.

10. Reporting on Legal Matters and Accountability

Introduction

10.1 A major thrust of this Inquiry has been to encourage Councils to make better decisions in order to avoid excessive. legal costs. A decision, however, is only as good as the information on which it is based. In this chapter the Committee examines the general availability or otherwise of good information on local government legal expenditure. More specifically, the Committee considers the questions of availability of sufficient information to both the decision-makers in local government and the community.

Access to Information on Legal Expenditure

10.2 The Committee experienced enormous difficulty in obtaining detailed breakdowns of legal costs incurred by local government. The questionnaire forwarded to all Councils was designed to elicit details of costs involved in different areas of Councils' activities and in various types of court action. Specific information was sought on the number, type and costs of Land and Environment Court matters. The Committee was appalled, however, by the obvious inability of Councils to readily provide the information sought.

10.3 Many Councils advised the Committee that the information required was simply unavailable. Other Councils which did provide the information highlighted the difficulties experienced in putting it together. Hornsby Shire Council, for example, advised the Committee that 130 hours had been involved in compiling the answers.[1] In his evidence before the Committee, Mr R. Kempshall, North Sydney Municipal Council's Town Clerk, said that the questionnaire had involved *"hundreds of hours"* of senior officers' and indeed Council's own solicitors' time.[2]

1 Mr M. Eastcoff, Shire Clerk, Hornsby Shire Council, letter attached to questionnaire, 25 October 1990

2 Minutes of Evidence, 7 November 1991, p. 61

10.4 Furthermore, the Committee was concerned that many of the figures provided may be inaccurate. A significant proportion of Town and Shire Clerks who appeared before the Committee referred to errors in the information they had previously provided or sought to provide supplementary figures.

10.5 The Committee raised the question of Councils' inability to extract the desired information with Mr J. Bingham, solicitor and Lord Mayor of Sydney City Council[3]:

Committee: *"...why has it been so difficult for many Councils in New South Wales to supply this Committee with details of their expenditure on legal services over the last few years?"*

Mr Bingham: *"I do not have any idea why that would be difficult. I should have thought that would be a simple matter of pulling out the figures."*

10.6 Prior to receiving responses to the questionnaire, the Committee had shared Mr Bingham's mistaken belief.

10.7 Whilst the inadequacy of the responses was of considerable disappointment to the Committee, it was very revealing. The main conclusion drawn by the Committee, other than the extremely high levels Of legal costs incurred by some Councils, was that local government has insufficient mechanisms to check where such costs are being expended. Mr Kempshall, Town Clerk, North Sydney, remarked to the Committee that:

"I would have to agree that having regard to the sort of analysis that this questionnaire sought and I do not take issue with it, it is not readily available. Perhaps a number of Councils are saying that. It took a lot of effort to get the figures out. Perhaps as a result we need to go away and look at how we should maintain our records to make retrieval easy. I would not disagree with that."[4]

3 Minutes of Evidence, 7 November 1990, p. 12

4 Minutes of Evidence, 7 November 1990, p. 65

10.8 All the evidence leads the Committee to the view that the obvious lack of readily available information on how Councils are spending ratepayers' money in the legal area can only mean that local government has lost control over its legal costs.

10.9 The Committee is concerned that decisions are being made by aldermen and Councillors in a piecemeal fashion on matters involving significant legal costs without the benefit of the larger picture. Elected representatives need to be aware of the cost impacts of their decisions. Only well compiled and accurate information will serve this purpose.

Annual Statements of Accounts

10.10 In his evidence before the Committee, Mr D. McSullea, Acting Secretary of the Local Government and Shires Associations, expressed the view that most councils are *"not taking the dissection [of legal costs] far enough down the track."* [5]

10.11 Each of the 176 of councils in N.S.W. must submit an audited Annual Statement of Accounts to the Secretary of the Department of Local Government on or before a certain date each year. The document is comprised of a number of items relating to revenue and capital income and expenditure.

10.12 Legal expenditure is an important component in a number of the separate categories listed in the Annual Statement of Accounts. However, there is often discretion as to which category a certain .transaction or expense may be allocated. For example, purchases of land for a health or recreational purpose can be stated either as part of the cost of the asset acquired or as a legal expense in the sense of a trading activity. The result is that direct legal costs can be hidden amongst various items and thereby difficult to ascertain.

10.13 The Annual Statement of Accounts must be made available for public inspection. In its current form it gives the community little idea of the extent and details of legal expenditure.

10.14 The Committee is of the view that the requirements for the provision of Annual Statements of Accounts should be amended in order that sufficiently

5 Minutes of Evidence, 17 December 1990, p. 177

detailed information on legal expenditure is compiled and can be made publicly available.

10.15 The Committee gave some thought to what kind of cost breakdown would be most useful to both Councils and the public. In its questionnaire, the Committee sought to elicit details of expenditure according to both court jurisdiction (with further breakdowns of Land and Environment Court expenditure) and disparate Council activities. A combination of both methods is considered most appropriate. The Committee encourages Councils and the Department of Local Government to assess the various options available.

Recommendation 44

It is recommended that the Department of Local Government require a detailed breakdown of each Council's total legal costs to be a separate item in the Annual Statement of Accounts.

Reporting to the Council

10.16 The Committee is aware that budgeting for legal expenses is a difficult task for anyone. Costly litigation is often quite unforeseen. In his evidence before the Committee, Mr B. O'Keefe remarked that *"increased avenues for appeal and climate-provoking appeals are a real problem for Councils in their budgeting."* [6] *The* Committee is especially mindful that just one court battle, such as a Class IV action in the Land and Environment Court, can have a particularly major impact on a smaller Council's budget strategy.

10.17 Due to the sheer uncertainties of legal costs, the Committee raises no objection to Councils which exceed their legal budgets in a responsible manner. The budget must be recognised as a management tool rather than a rigid formula. A Council may need to be prepared to overstep its budget if it feels that an important principle is worth arguing in court. This is particularly relevant, for example, when a Council introduces new planning strategies which can be expected to be tested in the Land and Environment Court.

6 Minutes of Evidence, 8 November 1990, p. 87

10.18 The Committee wishes to emphasise, however, that for individual decisions involving potential legal costs to be made in a sufficiently responsible manner, the decision makers must be conversant with both the cost implications of their decisions and the extent of legal expenditure to date.

10.19 The Committee is mindful that the cost implications of an individual decision can be difficult to predict. Nevertheless, accurate information on the costs of previous decisions of a similar nature would assist.

10.20 The Committee is convinced that elected representatives are generally not receiving sufficiently detailed information on legal expenses incurred by their Councils. The difficulties experienced by Councils in responding to the Committee's questionnaire indicates that such information is currently not readily available to anyone. It is the Committee's view that armed with detailed feedback on the legal costs of their individual decisions, elected representatives will be in a far better position to make responsible decision in terms of potential legal costs. An obvious example is those difficult planning decisions, discussed in Chapter 4, which can be passed onto the Land and Environment Court at considerable expense for all parties concerned.

10.21 The Committee was pleased to receive evidence that some Councils have made recent moves to improve internal reporting mechanisms on legal costs. Some Councils, for example, ensure that each elected member receives an analysis of every case involving that Council before the Land and Environment Court after the judgement is handed down, including legal fees. In some cases, the practice would appear somewhat ad hoc.

10.22 The Committee is of the view that all Councils should introduce a formal mechanism to ensure that legal costs are both (a) adequately monitored and (b) reported in sufficient detail to the elected representatives and senior staff. In Chapter 9 the Committee recommended that all Councils establish a legal services committee or sub-committee. Such a committee would be in a prime position to fulfil this role.

10.23 In his evidence to the Committee, Mr W. Henningham, solicitor and former Secretary of the Local Government and Shires Associations, stated the view that:

"Each Council needs to have a legal services committee to co ordinate the legal matters in which a Council is involved, to review and monitor the costs being paid for the results being obtained and to develop strategies, if certain trends are observed in

the cases in which the Council is involved, in consultation with its solicitors, to avoid downsides if they are becoming obvious."[7]

10.24 The Committee supports Mr Henningham's advice and notes that some Councils have already recognised the benefits of constituting a legal services committee.

Recommendation 45

It is recommended that the legal services committee or subcommittee of each Council make monthly reports to the Council, together with appropriate recommendations, specifying the overall legal costs for the year to date, a breakdown of such costs and a summary of current or recently finalised legal actions in terms of costs, progress and outcomes.

10.25 The Committee is mindful that when litigation is in progress, it may be quite improper for the matter to be discussed in public. Issues of confidentiality and *sub judice* come into play. In some cases, the Committee suggests that it may even be unwise to talk about litigation strategies *in camera*. In his evidence before the Committee, Mr B. O'Keefe advised that:

"... there are some people on Councils who cannot stop talking about anything that is on the agenda and who want to beat their breasts about anything that the Council has done that may disadvantage someone, however right the Council may be. Litigation, and advice that you receive in respect of litigation, is something that if communicated abroad may weaken your negotiating position in relation to the 'ultimate disposition of the matter." 8

10.26 In view of the above, the Committee wishes to emphasise that Councils must take care in setting the agenda of their legal services committee.

7 Minutes of Evidence, 8 November 1990, p. 153

8 Minutes of Evidence, 8 November 1990, p. 96

10.27 In his evidence before the Committee, Mr J. Bingham referred to the advantages of having a legal services committee privately review controversial decisions made by a Council away from the public gallery:

"The decision having been made with the gallery buzzing and angry, clapping the right speakers and booing the wrong ones, a subcommittee has to look at the matter at another time rationally to question what action is appropriate to achieve the goals for the municipality or shire, and whether it is worth the expense."[9]

10.28 Whilst some decisions, of course, would be irrevocable, the committee could consider the various options open to Council and the cost implications of each.

10.29 A further point which the Committee wishes to emphasise is that legal costs do not only involve direct expenses such as solicitors' fees etc. As was highlighted in Chapter 5, the hidden internal costs borne by a Council in staff time through preparation for legal action and attending court can constitute a significant and frequently overlooked item. It is suggested, therefore, that reporting mechanisms to Councils on legal expenditure involve both internal and external costs. As a consequence, staff involved in legal work will need to keep records of time spent on various matters. Whilst this additional duty might be greeted with some reluctance, the Committee would stress that it is standard practice for most professionals in the private sector. Furthermore, the Committee is of the view that the provision of information on the full internal legal costs of some Council decisions will raise the consciousness of many decision makers. AS a result, the quality of decisions should improve.

Recommendation 46

It is recommended that any reporting of legal costs to Council's legal services committee/subcommittee or the full Council specify both direct and indirect costs, with indirect costs relating to staff time.

9 Minutes of Evidence, 7 November 1990, p. 18

Recommendation 47

It is recommended that Council officers working on legal actions record their time spent on such duties,

Recommendation 48

It is recommended that Council's legal services officer keep and maintain records of staff time spent on legal matters.

Reporting to the Public

10.30 The Committee holds the view that adequate information on legal costs borne by a Council must also be made available to the public. Only with sufficient details will the electorate be able to assess the performance of Councils in the management of public funds in the legal arena.

10.31 The Committee received a number of submissions from residential precinct committees in North Sydney Municipality supporting the high level of legal expenditure by their Council on Land and Environment Court matters. The submissions were hardly spontaneous. On 11 October 1990, North Sydney Council's Precincts Co-ordinator wrote to all the Council precinct committees, providing figures required for the Committee's questionnaire on the number and cost of Land and Environment Court matters, in addition to other information and urging the committees to lodge submissions in relation to this Inquiry if they were "*...satisfied with Council's general approach...*"[10] The Committee does not doubt the sincerity of the precinct committees' support for their Council's level of expenditure. The point which must be made, however, is that the residents were only able to make their assessment of the Council's performance on the basis of the information provided.

10 Letter to all precinct committees from Ms J. Walker, Precincts Co-ordinator, North Sydney **Municipal** Council, 11 October 1991, attached to letter to the Committee from Mr R. Kempshall, Town Clerk, 13 November 1990.

According to the Town Clerk's evidence before the Committee, it would appear that such information was not readily available at all until the Committee's questionnaire had been addressed. The Committee expresses the hope that North Sydney Municipal Council continues this new practice of providing ratepayers with a summary of legal costs incurred. Indeed, the Committee recommends that all Councils throughout the State make reports to their ratepayers on legal expenditure.

10.32 In accordance with section 654A of the Local Government Act, Councils must forward to each resident a copy of their Annual Report. The Annual Report includes financial statements and must be "*... in a form approved by the Minister...*".

10.33 The Committee is of the view that the Annual Report provides an excellent opportunity for Councils to convey details of legal expenditure to their ratepayers. It is suggested that at a minimum, Councils provide a summary of costs and outcomes of all court actions finalised in the precious financial year. Such a public reporting mechanism, in the view of the Committee, can only help to promote more cost-effective and responsible decision making in the area of legal services to local government. It will enable public access to important information which, prior to this Inquiry, was simply unavailable. It will also provide one of many services of a *"new look"*, client-oriented and modern local government industry of the 1990s and beyond.

Recommendation 49

It is recommended that reporting of legal actions, be made part of the Council's Annual Report to ratepayers, with a summary of costs and outcomes of actions taken.

Appendix 1

Call for Submissions

Inquiry into Legal Services provided to Local Government

The Public Accounts Committee has received a reference from the Minister for Local Government and Minister for Planning, The Hon. D. A. Hay, M.P., under Section 57 (].) of the Public Finance and Audit Act 1983 to Inquire into legal services provided to local government in New South Wales.

The Terms of Reference of the inquiry are "To inquire and report upon Local Government in New South Wales, in particular:

U} To examine the use of external legal consulting and practitioner services by local government, their terms of engagement and the extent of the u se of legal service and of the Land and Environment Court in resolving local planning matters.

(2) To review the costs of legal services undertaken throughout local government and recommend methods of accountability for the costs of legal services:

(3) To review the Impact of statutory/legal requirements of State and Federal Government Departments on Local Government's legal costs.

(4) To consider any other matters relating to the use of legal services within local government."

Submissions relevant to this inquiry from interested parties and members of the public are invited. Submissions will be treated as public documents unless

otherwise requested and should be sent to.

The Director

Public Accounts Committee, Parliament House, Macquarie Street, Sydney, NSW 2000. Closing Date for Submissions: 28 September, 1990.

iries should be directed to Ms Victoria Walker on (02) 230 2629.

Phillip Smiles,

LL.B.. B. Ec., M.B.A., Dip. Ed., M.P, Chairman

Appendix 2

Submissions Received

Date	Name
05/09/90	Kerry Mcintosh
14/09/90	David J Marshall, Alderman, Drummoyne Municipal Council
17/09/90	Brian Carey, Shire President, Hornsby Shire Council
19/09/90	Gordon S. Smith, J.P.
20/09/90	D.J. McSullea, Acting Secretary, Local Government and Shires Associations of N.S.W.
24/09/90	J. Gooch, Hon. Secretary, Concerned Residents Action Group, Baulkham Hills Shire (C.R.A.G.)
24/09/90	Thomas Carroll, Production Director, Ashland Pacific Pty. Ltd.
25/09/90	Sly and Weigall
26/09/90	David Hall
27/09/90	Edward A. Carmody
28/09/90	Sonia Fenton, Alderman, South Sydney City Council
29/09/90	Local Government and Shires Associations of N.S.W.
02/10/90	Brian Phillips, Town Planner
03/10/90	Eric A. Jury, Chairman, E.A.J., A Jury Family Group Member
07/10/90	J. Gooch, Hon. Secretary, C.R.A.G.
09/10/90	Eric A. Jury, Chairman, E.A.J., A Jury Family Group Member
12/10/90	J. Gooch, Hon. Secretary, C.R.A.G.
17/10/90	Robert Young, President, Ku-ring-gai Ratepayers Association
19/10/90	Tony R. Mears, Alderman, Drummoyne Council
19/10/90	W.A. Henningham, Chairman, Public Decision Making and Dispute Resolution Group
29/10/90	Mrs U. J. Wilkins, Secretary, Hayes Precinct, North Sydney

Date	Name'
30/10/90	Lee-Anne Reid, Chairperson and Sharyn Ingarfield, Secretary Holtermann Precinct, North Sydney
05/11/90	Ann Short, Secretary, Brightmore Precinct, North Sydney
06/11/90	Ms Leone Healy
07/11/90	James White, James E. White & Associates Pty Ltd Chartered Architects
07/11/90	Mrs Adria Taylor, Secretary, Bennett Precinct, North Sydney
07/11/90	C. Pearsall, Chairman, Parks Precinct, North Sydney
09/11/90	Alan Luchetti
10/11/90	Kevin J. Blume, Director, Hill & Blume, Registered Surveyors
12/11/90	Terri Fisk, Secretary, Bridgeview Precinct, North Sydney
15/11/90	Dick Pym
15/11/90	E.A. & P. A. Fullilove
19/11/90	The Hon. Mr Justice R Else-Mitchell, Chairman, Local Approvals Review Committee, Commonwealth Office of Local Government
20/11/90	Eric A. Jury, Chairman, E.A.J., A Jury Family Group Member
21/11/90	Mark Richardson, Director, Legal Aid Commission of N.S.W.
21/11/90	C. G. Rayner, Chairman, Bay Precinct, North Sydney
25/11/90	Mr & Mrs D. R. Watson
26/11/90	Sharyn Ingarfield, Secretary, Holterman Precinct, North Sydney
28/11/90	Carlene Blumberg
28/11/90	Mr & Mrs T. Meigan
29/11/90	Maria Comino, Solicitor, Environmental Defender's Office Ltd
07/12/90	T. & K. Mcintosh
10/12/90	Secretary, Plateau Precinct Committee, North Sydney
14/12/90	David de Carvalho, President, The Law Society of New South Wales
14/12/90	T.W. & M.K. Suters
20/12/90	Trevor J. Harrison, Chairman, Cremorne Point Precinct, North Sydney

Appendix 2 (continued) ·

Date	Name
03/01/91	Keith Fountain
21/01/91	D.J. Hains, Secretary, The Local Government Engineers' Association of New South Wales
24/01/91	H.M. Sanders, President, Australian Association of Consulting Planners
12/02/91	Richard Dinham, President, N.S.W. Chapter, Royal Australian Institute of Architects
15/02/91	Charlez Tidd
18/02/91	D.J. McSullea, Acting Secretary, Local Government & Shires Associations of N.S.W.
18/03/91	G.C. Uther, G.C. Uther & Co., Chartered Accountants
28/03/91	Don and Shirley Broadbent
29/03/91	G.C. Uther, G. C. Uther & Co., Chartered Accountants
02/04/91	Associate Professor John Toon, President, Royal Australian Planning Institute, (N.S.W. Division)

Appendix 3

Witnesses at Public Hearings

Date of Hearing	Name of Witness
7 November 1990	Mr J. Bingham, Solicitor
	Mr G. Moore, Company Director
	Mr F. Thomson, Shire Clerk/General Manager Warringah Shire Council
	Mr R. Kempshall, Town Clerk North Sydney Municpal Council
	Mr A. Paynes, Chief Executive/Town Clerk Willoughby Municipal Council
8 November 1990	Mr B. O'Keefe, Q.C.
	Mr J. Bourke, Town Clerk South Sydney City Council
	Mr G. Loupos, Legal Officer South Sydney City Council
	Mr R. Ball, Town Clerk Waverley Municipal Council
	Mr J. Mant, Solicitor
8 November 1990	Mr M. Regnis, Town Clerk/General Manager Woollahra Municipal Council
	Mr W. Henningham Solicitor/Consultant
	Mr D. Newton, Solicitor, and Secretary-General Australian Commercial Disputes Centre

Appendix 3 (continued)

Date of Hearing	Name of Witness
17 December 1990	Mr D. McSullea, Acting Secretary
	Local Government and Shires Associations of New South Wales
	Mr P. Woods, President
	Local Government Association of New South Wales
	Mr T. Dover, Town Clerk
	Drummoyne Municipal Council
	Mr S. Blackadder, Town Clerk Rockdale Municipal Council
	Mr J. Walsh, General Manager/Shire Clerk Port Stephens Shire Council
	Mr D. Johnson, Town Clerk Blacktown City Council
	Mr W. Taylor, Town Clerk
	Ku-ring-gai Municipal Council

Appendix 4

Questionnaire and Follow-Up Letter

Forwarded to All Councils

Public Accounts Committee

Parliament House, Sydney 2000

Telephone: 230 2631

230 2111

Fax: 230 2831

PARLIAMENT OF NEW SOUTH WALES

LEGISLATIVE ASSEMBLY

7 September 1990

Dear Sir,

I refer to my letter and questionnaire of 17 August 1990 concerning the Committee's inquiry into legal services provided to local government.

To assist the Committee in this inquiry could you provide answers to the following three additional questions

1. How many staff are employed in Council's statutory planning department? How many full time? How many part time?

2. How many development applications were received by Council in the years -

   1988 1989 1990

3. How many building applications were received by Council in years -

   1988 1989 1990

For those councils experiencing difficulty in compiling the information sought by the previously advised deadline of September 28, the Committee has extended the due date to close of business on Friday, October 5, 1990.

Yours faithfully

Victoria Walker [6]

Director

Appendix 4 (continued)

Public Accounts Committee of New South Wales

Review of Legal Services to Local' Government QUESTIONNAIRE For Town Clerks, Shire Clerks and City Managers

1. a. Your name

b. Your title

c. Name of Council: (City, Municipality or Shire)

2. a. Does your Council have a legal subcommittee? YES/NO

b. If so, what is the number of elected representatives on the Committee?

c. Number of Council officers?

d. What are the functions of the Committee?

e. How often has it met in the last 12 months?

Internal Legal Management

3. a. Does Council have a legal section or a specialist legal officer?.

b. Are legal matters dealt with within the specific departments of Council concerned with the particular action?

c. Does Council have a policy of using their own staff to represent them in Court?

d. In what jurisdictions do these officers appear?.

e. In what percentage of cases would Council be represented by these officers:

1. In local courts
2. In district courts
3. In the Land and Environment Court
4. In higher courts

f. Please provide a profile of the Council staff empowered to handle legal matters:

Job Title	Council Department	Full-time or Part-Time Duty	Legal Qualification

g. What was the administrative budget (including salaries, working expenses) for Council's legal section/officers handling legal matters **in:**

1. 1988
2. 1989
3. 1990 (to June 30)

External Legal Management

4. a. Does Council retain a firm of solicitors?

b. How long has Council used this firm or its key legal advisor within the firm?

c. Are all of Council's legal matters referred to them?

d. Do they refer matters to other specialist firms?

e. How many firms has Council employed in the last five years?

f. What was the method of selection used?

g. Was a legal committee of Council involved in selection?

h. Does Council have a contract with its solicitors? Briefly describe its terms.

i. How often is this contract reviewed?

i. Are competitive quotations sought as part of a review?.

k. What is the range of hourly rates paid to Council's? 1. solicitors 2. barristers

I. Were these rates outlined in an initial contract?

m. If not, what means were used to settle the terms on which legal advisors are retained by Council ?

Authorisation for Expenditure

5. a. What are the procedures laid down by Council to manage and authorise legal expenditure?

b. How many officers other than heads of departments would regularly be in touch with Council's legal advisors?

c. Does a report go to Council prior to an officer

1. seeking legal advice;

2. initiating a Land and Environment Court action?

d. If advice is received that Council is exposed to legal challenge, what are Council's procedures?

e. What types of legal costs may be incurred under delegated authority?

f. .What percentage of Council's legal costs does this amount to?

Appendix 4 (continued)

	to June 30		
	1988	**1989**	**1990**

Legal Costs

6. a, What were Councils total court costs in the three years listed?
1, in local courts
2. indistrict courts
3. in the Land and Environment Court
4. in higher courts
b, Please provide a breakdown of Council's legal costs in the following categories for the three years listed,
1. Conveyancing
2. Development and Planning
3. Public Liability
4. Health Services
5. Commercial activities
6. Recreation and Cultural Amenities
7. Building Control
8. Litigation between
i. council and the public
ii. council and employees
iii. council and elected members
c. Please specify any other areas of significant legal expenditure.

Land and Environment Matters

7. a. How many matters in the years listed involved the Land and Environment Court and what was the cost to Council?
1. Number of cases
2. Cost
b. How many matters in these years were under the different classes of the Land and Environment Court Act?
1. Class 1
2. Class 2
3. Class 3
4. Class 4
5, Class 5

Matters Brought By Council

8. a. How many matters in the Land and Environment Court in the years listed were initiated by Council.
b. What was the total cost of these cases?
c, In how many of these cases were costs awarded to Council?
d. How many cases were settled out of Court?
e, What was the cost of legal advisors on these matters?

to June 30

1988 1989 1990

Matters Brought Against Council

9. a. How many cases in the Land and Environment Court were initiated against Council?
b. What was the total cost of legal advisors in · these cases?
c. In how many cases were legal costs awarded to Council?
d. What was the value of legal costs awarded?
e. How.many cases were settled out of court?
f. In how many cases was the litigant
i. a ratepayer
.ii. a developer
iii. an architect/consultant
iv. ' a third party appeal

Recurrent Litigation

10. a. How many litigants have brought cases against Council in the Land and Environment Court on more than one occasion over separate matters?
b. How many occasions for each of these litigants in the in the years listed?
c. Does Council have any comment on the impact on Council of these recurrent litigants?

Expert **Witnesses**

11. a. How many matters in the Land and Environment Court involved the Council calling of expert witnesses in the years listed?
b. 'Who initiates a proposal to call an expert witness?
c. Who in Council makes the decision whether or not to call in an expert witness?
d. Is cost a consideration in the decision? If so, please explain.
e. What was the total cost to Council of expert witnesses in 1988, 1989, 1990 to June 30.

Other **Issues**

12. **How does Council assess and monitor the** performance of its legal advisors in order to ensure that ratepayers receive value for money for Council expenditure on legal services?

13. What are the most critical issues for your Council in regard to legal costs?

14. What is your Council's view on the issue of legal costs in relation to matters heard in the Land and Enviroment Court?

15. What is your Council's view on the impact of statutory/legal requirements of State and Federal Government Departments on Local Government's legal costs?

16. Are there any other matters relating to Council's use of legal services which you think are important for the Committee to consider in this Review?.

Appendix 5

Councils That Did Not Respond to the Committee's Questionnaire

Ash field	Merriwa
Bathurst	Murray
Baulkham Hills	Murrundi
Bega Valley	Queanbeyan
Botany	Richmond River
Central Darling	Scone
Cobar	Snowy River
Concord	Sydney City
Coolah	Tamworth
Copmanhurst	Tweed (Q.s 6-11)
Crookwell	Ulmarra
Deniliquin	Wagga Wagga
Dumaresq	Walcha
Eurobodalla	Warren
Evans	Wentworth
Gunnedah	Windouran
Jerilderie	Wollongong
Leeton	Yarrowlumla
Marrickville	Yass
Manilla	Young

Appendix 6

Expenditure by Councils in the Land and Environment Court

SOURCE: PUBLIC ACCOUNTS COMMITTEE QUESTIONNAIRE 1990

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Albury	-		1
			$1 650
Armidale	-	-	-
Auburn	5	4	2
	$4 719	$10 305	$8 340
Ballina	1	6	-
	$1 820	$94 720	-
Balranald	-	-	-
Bankstown	5	10	6
		$25 451 $22 515	$34 117

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Barraba	-	-	-
Bellingen	3	1	3
	$121 176	$26 082	$5 940
Berrigan	1	4	-
	$ 420	$4 037.10	-
Bingara	-	-	-
Blacktown	?	?	?
	$202 363.77	$245 212.64	$121 832.44
Blayney	1	-	-
	$1 492	-	-
Bland	-	-	-
Bogan	-	-	-
Bombala	-	-	-
Boorowa	-	-	-
Bourke	-	1	cont
	-	$1 080	$3 046
Brewarrina	-	-	-

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Broken Hill	1	-	-
	$1 263	-	-
Burwood	8	9	6
	?	?	?
Byron	11	23	14
	$36 043	$71 015	$4 653
Cabonne	-	2	-
	-	**$2 197**	-
Camden	1	3	3
	$30 378	$22 111	$4 624
Campbelltown	6	12	10
	$14 906	$55 194	$113 551
Canterbury	16	10	12
	$30 466	$63 687	$37 221
Carrathool		-	-
Casino			
Cessnock	8	10	3
	$41 376	$35 418	$18 311
Coffs Harbour	6	4	4
	$21 000	$15 259	$228 321
Conargo	-		
Coolamon	-		-

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Cooma-Monaro	2	2	3
	$15 162	$24 291	$5 315
Coonabarabran	-	-	-
Coonamble	-	-	-
Cootamundra	1	-	-
	-	$6 250	-
Corowa	-	1	-
	-	$23 000	-
Cowra	-	-	-
Culcairn	-	-	-
Drummoyne	24	20	4
	$41 595	$35 248	$45 055
Dubbo	1	-	-
	$1 145	-	-
Dungog	-	1	-
	-	$ 400	-
Fairfield	15	17	11
	$69 716	$141 400	$92 788
Forbes	-	-	
Glen Innes	-		
		-	**8**
	-	-	$2 459
Gilgandra	-	-	-

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Hawkesbury	24	12	6
	$66 107	$126 206	$31 661
Hay	-	-	-
Holbrook	-	-	1
	-	-	$3 000
Holroyd	6	6	6
	$29 845	$22 183	$27 427
Hornsby	20	28	12
	$46 916	$159 833 $38 726	
Hume	-	-	-
Hunters Hill 26		16 7	
	$40 288	$90 734	$45 446
Hurstville	20	11	4
	$25 581	$26 594	$10 048
Inverell	].	-	-
	$4 000	-	-
Junee	-	-	-
Kempsey	**6**	**2**	**2**
	$15 755	$21 077	$3 090
Kiama	1	6	4
	$9 945	$59 379	$27 229

Name of Council	NO. CASES AND $ EXPENDITURE			
	1988		1989	JAN-JUNE 1990
Kogarah	4		5	3
	$41 464		$37 717	$15 948
Ku-ring-gai	88		71	31
	$542 203	$312 359	$279 662	
Kyogle	1		1	1
	?		?	?
Lachlan	-		-	-
Lake Macquarie	?		?	?
	$6 688		?	?
Lane Cove	21		13	4
	$121 219		$156 301	$37 334
Leichhardt	30		44	27
	$139 000	$218 000	$140 000	
Lismore	23		7	1
	$6 916		$22 303	-
Liverpool	11		14	16
	$47 626	$47 477	$156 742	
Lockhart	-		-	-
Maclean	-		1	-
	-		**$9 000**	-
Maitland	-		3	1
	-		$4 467	$1 453

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
Manly	21	17	4
	$89 774	$124 487	$47 542
Moree Plains	-	1	-
	--	?	--
Mosman	12	18	11
	$82 220 $77 973	$57 923	
Mudgee	-	-	1
	-	-	$5 000
Mulwaree	2	2	2
	$1 270	$6 025	$36 985
Murrumbridge	-	-	-
Muswellbrook	8	1	5
	$2 325 $7 086	$2 173	
Nambucca	-	3	3
	-	**$9 951**	**$4** 816
Narrabri	1	1	1
	$5 664 $ 625	$3 669	
Narrandera	-	-	-
Narromine	-	-	1
Newcastle	4	2	2
	$15 850	$35 770	-

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE 1990
North Sydney 29	52	42	'
	$471 800 $808 100	$349 600	
Nundle	-	-	-
Nymboida	-	-	-
Oberon	-	-	-
Orange	-	1	1
	-	$10 000	-
Parkes	-	-	10
	-	-	$ 833
Parramatta	65	23	23
	$133 913 $183 686	$43 296	
Parry	2	-	-
	$44 597	-	-
Penrith	7	21	4
	$17 862	$137 934	$89 408
Port Stephens	2	3	1
	$6 000 $8 000	$1 500	
Randwick	31	36	24
	$71 420 $84 892	$33 185	
Rockdale	27	27	14
	$57 477 $64 902	$ 42 540	

Name of Council	NO. CASES AND $ EXPENDITURE			
	1988		1989	JAN-JUNE 1990
Ryde	8		11	3
	$12 885		$11 773	$2 140
Rylstone	2		-	-
	$1 135		-	-
Severn	-		-	1
	-		-	$ 700
Shellharbour	2		2	2
	$12 000		$60 000	$7 000
Shoalhaven	30		29	31
	$71 063	$37 902	$55 686	
Singleton	-		-	2
South Sydney	-		70	74
	-		$334 387	$361 440
Strathfield	13		15	1
	$29 765	$61 081	$2 311	
Sutherland	35		48	14
	$49 000	$70 000	$15 000	
Tallaganda	-		1	1
	-		$6 000	$10 000
Temora	-		-	-
Tenterfield	-		-	-

Name of Council	NO. CASES AND $ EXPENDITURE				
	1988		1989		JAN-JUNE 1990
Tumbarumba	-		-		-
Tumut	-		-		-
Urana					
Wakool	-		-		1
	-		-		$1 185
Walgett	-		-		-
Warringah	56		75		35
	$181 100	$300 391	$175 954		
Waverley	34		16		17
	?		?		?
Weddin	-		-		-
Wellington	-		-		-
Willoughby	53		99		44
	$191 205	$281 746	$144 103		
Wingecarribee	**5**		**4**		**5**
	?		?		?
Wollondilly	1		4		3
	$2 279	$1 770	$4 975		

Name of Council	NO. CASES AND $ EXPENDITURE		
	1988	1989	JAN-JUNE *1990*
Woollahra	29	42	32
	$62 966	$69 179	$62 034
Wyong	12	20	9
Yallaroi	-	-	-