REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

REVIEW OF ADMINISTRATIVE DECISIONS TRIBUNAL

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At Sydney on Friday, 17 November 2000

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The Committee met at 10.00 a.m.

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PRESENT

Mr P. G. Lynch (Chair)

Legislative Council	**Legislative Assembly**
The Hon. P. Breen	The Hon. Deirdre Grusovin
The Hon. R. Colless	Mr M. J. Kerr
The Hon. J. Hatzistergos	Mr W. D. Smith

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KEVIN PATRICK O'CONNOR, Judge of the District Court, and President of the Administrative Decisions Tribunal, 15th Floor, 111 Elizabeth Street, Sydney, sworn and examined:

CHAIR: Could you state what your occupation is and in what capacity you appear before the Committee?

Judge O'CONNOR: I am a judge of the District Court and the capacity in which I appear is as President of the Administrative Decisions Tribunal, which is my principal office.

CHAIR: Did you receive a summons issued under my hand to attend before this Committee?

Judge O'CONNOR: Yes.

CHAIR: I think we have received a submission from you or from the tribunal. Do you have any objection to that submission being made public?

Judge O'CONNOR: No.

CHAIR: We have also received, of course, today some helpful comments from you in relation to other people's submissions. I take it you would be happy to have that document tabled as well?

Judge O'CONNOR: Yes, that is satisfactory.

CHAIR: Do you have any opening comments you would like to make before we proceed to questioning?

Judge O'CONNOR: Well, my opening comments are really now recorded in writing in the comments that I have given you. I think just as a simple introductory comment it needs to be observed that the tribunal is a new tribunal. It has only been operating now for two years. Its jurisdictions have grown from the original three that it had on the day of commencement, 6 October 1998, which was the General Division, the Equal Opportunity Division and the Legal Services Division. A few months later the Community Services Division was added, and a few months after that, the Retail Leases Division, and we now have a division about to commence called Revenue Division. We are just waiting for some appointments to be made to that division, and then that division will be commenced. So it is a small tribunal at this stage with relatively specialist divisions.

The highest volume of work measured by number of applications is clearly in the General Division, so to that extent it could be said, I think, that the Parliament's initiative is giving rise to a response. Relatively small numbers of matters are filed in the other divisions, but if you stand back and look at the relative complexity of the work as between the divisions, it starts to even up more greatly. I guess more of the simple matters are to be found in the General Division than in other divisions, whilst there are obviously complex matters in the General Division as well, especially around freedom of information. So that gives you a picture of the tribunal.

It is a small tribunal, I think, by the standards of some of the tribunals I am connected with. The Fair Trading Tribunal has 14,000 matters a year. Another tribunal, the Residential Tribunal, has 50,000 matters approximately a year. This is a tribunal at this stage with less than a thousand matters a year. The registry is a relatively small registry. It is a tribunal that has one almost full-time head—me—because I have another responsibility to head another tribunal, and then a part-time Deputy President, who is relatively active, Deputy President Hennessy, who is here today. Then after that we really move over to truly part-time membership in the sense of relatively occasional involvement with the tribunal's work by the other two deputy presidents and the part-time members as a whole. We have a very large number of part-time members, which has its pros and cons in terms of the orderly administration of the tribunal and the management of lists and so on. So that might give you a general picture. I am happy to go to the specific matters that I have referred to in the comments or answer any questions from the Committee.

CHAIR: It might be helpful if you just went for a little while to this document.

Judge O'CONNOR: What I have done with the comments that have been received is organised them by reference to division of the tribunal. That seemed as logical an approach as any. The Legal Services Division comments are the ones that I have led off with. The first comment has to do with the desirability of there being a

longer time allowed between the formal decision to take proceedings in the tribunal and the actual lodgement of the application founding those proceedings. I have got no particular views on that. It may well be that that is a good thing. You will have to hear from the bar and the Legal Services Commissioner on those matters. It would presumably lead to the value from the tribunal's point of view that an apparent delay in the tribunal's proceedings because they want to do more investigation is managed before lodgement in the tribunal. So, to the extent that there might be a perception of delay in the tribunal because of a factor of that kind, which we do not control, that would be dealt with in the pre-lodgement phase.

There was some criticism in the Legal Services Commissioner's submission of the current rules of the Legal Services Division. All I can say in our defence is that we have simply imported the rules of the old Legal Services Tribunal at this stage, and we are obviously quite happy to revisit the rules if there are any particular problems. I will refer that matter to the Rule Committee for examination. But certainly the old rules of the Legal Services Tribunal were formulated after appropriate consultation with all the relevant parties, including that office. There is some criticism of the absence of standard forms for the filing of informations. That needs to be understood, I think, in the context of professional discipline proceedings. Certainly I have been cautious about saying to official prosecutors in matters of that kind how they might structure their informations, and it may be that we should at some stage look at that question of how they are structured.

There are implications for the rights of the people who have to respond to informations, and, again, I am happy to refer that question out. There is a suggestion that there is some delay in the setting of hearing dates for Legal Services Division matters. I was really at pains in these comments to inquire whether that is said to flow in some way from the tribunal itself. The reality, at least as I have experienced in these professional discipline matters, is that the prosecuting party, the official regulator, such as the Bar Association, the Law Society or the Legal Services Commissioner, is the body which really drives the progress of such a proceeding, and often there are interchanges occurring between the prosecutor and the respondent practitioner about the scope of the proceedings or the getting on of evidence and so on, and we are really, to a large extent, in the hand of the parties in that class of our business.

We could move to a more activist approach to time-tabling those matters, but at this stage we have certainly taken the view that it is an area which appropriately is, to a significant extent, party driven.

I have then just made the observation that then you have the complexities of getting three part-time members together to hear the case, who themselves are busy, and to co-ordinate that with the legal representatives who invariably are present in these cases and are often themselves eminent practitioners. I am happy to take on board those comments but I think there needs to be some understanding of the environment in which these sorts of matters are brought forward in the tribunal.

As to the Equal Opportunity Division area, various issues are raised. One is the question of whether there should be a cap on damages. That is a public policy issue that has been debated in New South Wales for 20 years now, I think. My own view is there is no particular need for caps in the area, but I suspect, given the New South Wales Law Reform Commission's view that there should be $150,000 cap, that there will remain a cap, so I will leave it to the Parliament to sort out whether there should be a cap and what amount it ought to be.

I do agree that there would be benefit from clearer conduct orders in the Anti-Discrimination Act in relation to the remedies that are available in anti-discrimination cases, but I am not quite sure whether that is an issue for this Committee. I guess it is if it is raised. There is the question of intervening in proceedings before the tribunal raised by the President of the Anti-Discrimination Board. I have just simply listed some of the issues that I would ask the Committee to address if it goes down the route of permitting intervenor involvement in proceedings in the tribunal, and I think the Committee is probably familiar with debates about the role of amicus curiae and so on. There is a reference to joinder of the perpetrator in proceedings before the tribunal. I am not an expert on the specific nature of this problem, but I am told that there is a tension between the Anti-Discrimination Act and the tribunal's Act in relation to that issue, and I think it is one that might be appropriately referred to the Attorney General to consider.

As to the General Division, there are a number of comments in the submissions on the area of freedom of information. I have made, I think, the basic point in the course of several comments, that I do not see freedom of information procedures as particularly conducive to dealing with controversial requests for access to documents made in a political climate. The processes that are set up under the Freedom of Information Act, and then the processes that are to be followed when matters are lodged in the tribunal inevitably introduce significant time periods. If an agency takes the stance that it will resist a request, then inevitably you are looking

at a saga that is going to go on at the agency level probably for several weeks, if not months, in some of the instances we have seen. And then at the tribunal it is inevitable, I think, that the matter cannot really be disposed of under several weeks unless we introduce a fast-track stream of the kind that is advocated. I am happy to take that issue up with the FOI users group of the tribunal, which has agency and advocate representatives on it. In fact, the Public Interest Advocacy Centre [PIAC] is represented on that users group. If there is some way in which we can fast track FOI matters after they arrive at the tribunal, I am happy to see what we can do to assist that.

The Information Commissioner model is introduced as a possibility for the administration of external review of FOI matters in New South Wales. I am reasonably familiar with that model from my time as Federal Privacy Commissioner. I often went to meetings where at the table there were Information Commissioners from various jurisdictions who had roles in respect of freedom of information. It is an interesting model. I have not got any particular criticisms of it.

What we see in New South Wales at the moment is the first significant period of external adjudication of FOI matters. The District Court period was a relatively inactive period. As best the practitioners in the field can judge, there are only about 10 recorded decisions that are in circulation from the District Court in that 10-year period. So the New South Wales Act does lack the degree of analysis and interpretation that is familiar in other jurisdictions in the country at this stage.

So we have been thrown that ball. I think we are producing a reasonable body of work on the subject, but there are arguments pro and con whether you administer the FOI external review function through a tribunal or through a model such as the commissioner's office, and I simply leave that to the Committee to pursue.

As to broader issues in relation to the tribunal, the Minister for Agriculture in his submission raises the question of whether two-tier examination in the agency is a good thing in all circumstances. The Committee will be aware that one of the fundamental policy propositions of the administrative review discussion in the last 25 years has been that good decision making in agencies and fair treatment of citizens is fostered by having the first decision in an agency able to be reviewed internally at another tier in the agency.

That proposition is reflected in the Act that Parliament passed, so I guess my submission would be that if you still embrace that philosophy, be cautious in removing second-tier review within agency structures. But I acknowledge that there are some circumstances where it probably does not make a lot of sense, and the circumstances that have most vividly been brought to our attention are where the office holder holding and exercising the discretion is in fact the principal officer of the agency, such as the Director-General or the Minister, and in those circumstances it may be perceived to be tokenistic to have inevitably a more junior person review the decision of the principal officer.

CHAIR: Although, if we were all living in an ideal world, the place where we would want the correct decision to be made in a fair and proper manner would be the agency involved.

Judge O'CONNOR: I just note that point. It would be worth while at some point for some research or study to be done on the question of what difference does second-tier review in fact make on a day-to-day basis in agencies. Are the second-tier reviewers actually operating with higher quality or better information before them or in a manner which is relatively independent to the first decision maker or do they see themselves as simply people who act loyally to the agency and merely endorse what has come up from below?

We cannot tell from where we are whether that second-tier review makes any significant difference to the decisions that occur at the first-tier level or adds to the quality of the reasoning that might have been made at the first-tier level in the agency. I think that is a real issue in relation to the practical value to citizens of second-tier review. In some instances, of course, they are quite anxious about the matter that has given rise to the adverse decision and would prefer to get to the external forum relatively quickly rather than go through a further tier of the department. So, I think they are issues worth looking into as to the real quality of that facility.

The question of a selection process for ADT members is raised. I have simply indicated there that that is a sensitive policy issue. It is one that is in common discussion as to the extent to which there should be calls for expressions of interest in relation to statutory appointments and tribunal members and possibly judges. So I will leave that with you.

The Legal Services Commission refers to delays in the publication of reasons for decisions. I have simply indicated there that the statutory time limit is six months. The internal guideline is to publish the decision as soon as possible and not later than two to three months after the case, but I have then made some observations about the practical difficulties that sometimes arise in adhering to the internal guideline. I am happy to answer questions on what I have said there.

The University of Wollongong material makes one point that we have been somewhat concerned about and that is the suggestion that the tribunal is not using alternative dispute resolution as actively as might be appropriate. I have been at some pains in these comments to emphasise, and I think I did this in the main submission, that we do quite actively use the facility in equal opportunity, retail leases and community services division matters.

I have the view until otherwise advised, and I think the parties do, that alternative dispute resolution ought not play any role in the professional discipline environment where formal charges are brought by an official authority against a practitioner and, certainly, in the General Division we have used what I would regard as alternate dispute resolution methodologies, case conferences for freedom of information matters.

We have not used them in the licensing area. I am open to discussion on the point, but I do not detect any demand either from the parties who are applicants or the agencies to, in a sense, negotiate their decisions about refusals of taxi licences, bus licences, firearms licence renewals and the like. That is seen as a matter that should appropriately go to formal determination. I ask the Committee to think about the question of whenever ADR is a relatively appropriate technique and where it is a less appropriate technique in the environment of a tribunal with multiple jurisdictions.

There are comments made as to the need to strengthen the information practices of the tribunal. Basically, I would agree with that and agree that our practices need refinement. I have set out in the material those things that I think we have done well to date and, certainly, we are keen to increase the quality of the written material that we distribute to differentiate between the divisions and different classes of problems. So, we are relying still on relatively general communications, umbrella or universal communications rather than highly targeted ones, but we see that as a priority for this year and, hopefully, we can report progress over the next few months on that matter.

There was some reference to the layout of our hearing rooms in the University of Wollongong study. This is a non-stop issue in the world of tribunals. There are great cultural differences on this matter among members and the considerations that are in play have partly to do with the demonstration of the authority of the tribunal to the parties and, in the case of some members in some of our more volatile environments, the considerations have to do with security. Nevertheless, I have personally sought wherever possible to move to more informal layouts and even plane layouts like we see here today.

Now that we have had some opportunity to redesign our hearing rooms, we have moved in that direction. I am quite happy to respond as best one can to any good suggestions about physical arrangements that promote an appropriate interchange between the parties and the tribunal while maintaining the degree of separation that you sometimes need in hotly contested or emotional matters.

There are references in the PIAC submission to extensions of jurisdiction. They are really fairly significant policy issues that the Committee may wish to deal with. I have simply uttered some general principles that I see may be appropriate to looking at questions of extension of jurisdiction, and I have put forward the view that, as I perceive it, the ADT in its General Division is seen as the lead forum in New South Wales for the external review of administrative decisions affecting citizens.

So it seems to me that if a proposal for new jurisdiction which has those characteristics is a proposal for external review of an administrative decision affecting citizens, then it would be logical, I think, to allocate that jurisdiction to the ADT. On the other hand, there may be more arguable policy considerations around the question of whether you confer on the ADT new original jurisdictions, that is, jurisdictions that involve civil disputes as you see in equal opportunity, retail leases, or professional discipline proceedings as you see in legal services. So I think in approaching these questions you need to categorise the proposal that is being put forward, and I would certainly argue relatively actively that proposals for the external review of administrative decisions ought ordinarily be allocated to the ADT. It has got the business structure that fits that area.

Then I have simply mentioned, as you must know, that the model in Victoria, the Victorian Civil and Administrative Tribunal [VCAT], does represent a significant endorsement by one Parliament of the proposition that an umbrella tribunal structure can house a strong external merits review jurisdiction and an array of original tribunal jurisdictions.

PIAC mentions the question of imbalance of legal representation in proceedings before the tribunal. This is a significant issue. We routinely deal with unrepresented applicants and represented respondents. The only exception to that would be in the professional discipline area, where invariably both sides are represented, but in equal opportunity it is typical to have an unrepresented applicant and a represented respondent, and it is typical in the General Division in government matters.

This is a very difficult discussion because wherever you have got an entity that appears in a corporate form it is entitled to some form of professional representation. There is a provision in the Victorian Act, section 62, to which I have drawn your attention, which you might find interesting. I have not set out the text of it. It is a complicated attempt to actually deal with this imbalance issue—the circumstances in which, in essence, an unrepresented applicant can, by virtue of that fact, limit the level of representation of the respondent—and it seeks basically to say that the respondent, if it is a corporation or government agency, can have someone there but if they have got legal qualifications they are out.

CHAIR: That does not really get at the problem.

Judge O'CONNOR: It does not get at the problem in some ways.

CHAIR: If you have someone appearing in every case for a respondent, whether they have got legal qualifications or not, they are going to have the expertise developed.

Judge O'CONNOR: That is the problem I am leading to. I think this is a very difficult problem and, obviously, we should be looking at forms of assistance to unrepresented applicants that, in a sense, go towards equalising the balance. We have initiated discussions with the Legal Aid Commission in regard to that matter. They do routinely attend as duty solicitors at Equal Opportunity Division matters, and there may be some room for exploration of that area. But it is one of those discussions that the more you look into it, the more difficult it becomes to find a reasonable answer.

Then, finally, there is a further reference to this question of legal representation in my submission. I have simply made the point that I have felt that in the General Division of the tribunal the in-house government lawyers who have appeared for the agencies have generally been, I think, quite facilitative and sensible in dealing with the many unrepresented applicants that we see in that environment. We have had a number of occasions where on a review of the file from the department and hearing more from the unrepresented applicant about his or her circumstances the Government lawyers have taken the case away and resolved it without pursuing it any further. Something has come to notice which alters the foundation of the decision that was before the tribunal. But, equally, I recognise that in the Equal Opportunity Division, for example, where proceedings can become very intense, you are not likely necessarily to find respondent lawyers being as chivalrous in their approach to dealing with applicants.

They are the comments that I have made today which are not in the nature of the general comments that I gave you in the original submission but they are responses to some of the points that are raised in the other submissions.

CHAIR: I thank you for that. That has, I think, in fact probably made our task a bit easier rather than having to go through and pick out question after question. It has, I think, covered a lot of the ground we probably wanted to deal with, and that has been very helpful. I know you have avoided saying which extra jurisdictions should be included, and you have done that very adroitly. You would agree, I guess, as a general principle that there is a lot of merit to getting a standardised system to review decisions and on that basis there would be some merit in trying to expand the current jurisdiction of the tribunal?

Judge O'CONNOR: I certainly think the policy that was reflected in the legislation was that there should, in a sense, be a one-stop shop for external merits review of administrative decisions, and that that should be a reasonably sophisticated and specialist operation, hopefully with relatively informal procedures and ones that enable the case to be properly analysed in a manner which is insightful as to the balance between the interests of citizens and the interests of good administration.

So, if that is the kind of thinking that underlies that aspect of the tribunal's legislation, then I would certainly see it as appropriate for there to be a kind of a "why not" approach to new conferral of external review jurisdiction. That is, if administrative decisions come before you in legislation which are in the nature of decisions that affect citizens in an individual way, as distinct from generic decisions, then you should be really asking why should there not be external review provided in respect of that decision to the external review forum and then, obviously, any decisions affected in that way are then affected, in turn, by the internal procedural rights that are set out in the legislation, such as rights to ask for statements of reasons, rights to internal review and so on. So there are consequences attached to such a decision that do not bear simply on the tribunal; they also bear on the rights of the citizens within the agency environment. But that would be my view on that subject, whereas, as I have said in the submission, I think where you are looking at fresh original jurisdictions, there is probably a much broader debate that could be had.

CHAIR: Do you get a sense that there is a resistance from currently existing tribunals or structures to come within the ADT umbrella?

Judge O'CONNOR: When I first read the legislation, I guess the point that struck me, having been in and around government in different capacities for a long time, was which portfolios were presenting and which portfolios were not presenting through the schedule of jurisdictions at the back of the Act. It was reasonably evident that parts of Community Services were presenting, reasonably significant presentations from Agriculture, some presentations from Transport, but most of the presentations, as you would expect, were from within Attorney General's. There are portfolios that have, I think we all know, significant administrative decisions that may be thought to be missing from the list. So you need to look at that. There may be special reasons why those portfolios consider they should maintain separate review environments. But when you look at the ADT Act you do not have the impression of comprehensiveness of coverage that you get when you look at the old Commonwealth legislation or the Victorian legislation.

CHAIR: One obvious gap, it seemed to me, was professional proceedings against doctors. I remember that at the time the legislation was introduced a whole lot of lawyers were complaining that they were being included within the ADT jurisdiction but what happened to the doctors.

Judge O'CONNOR: I think that is a different subject in some ways to the one I have just addressed. I have been addressing in those last few comments the area of external review of administrative decisions, but what we are now moving to, and it is an important subject, is this question of professional discipline, the external professional discipline forum, and that is not a function, for example, that is found in the VCAT structure in Victoria. They have left the external professional discipline forums in Victoria with the sort of traditional specialist tribunals but here in New South Wales we do have lawyers and veterinary surgeons, as I am well aware, inside the structure, and I certainly see merit in the proposition that there be some form of co-ordinated professional discipline tribunal environment.

I am not thereby wishing to say it should necessarily be in the ADT, but there does seem to me to be a case for having professional discipline tribunal responsibilities conducted by a forum which might have several lists. They might have some members who move between the lists. It seems to me in principle that there is a case to be made for consumer members sitting across professions rather than being seen as somehow specialists to a particular profession because, presumably, what you are looking at in the discipline of a registered practitioner from a consumer's point of view is the quality of service and the standards of practice vis-a-vis consumers who can present before any of these professions at any time. There may be a case for a head of jurisdiction, a senior presiding member who himself or herself may be a judge and moves between some of these lists with a view to encouraging a relatively uniform view of professional responsibilities and possibly also in relation to matters of penalty and so on. And obviously you are going to have to have your technical specialist from the particular profession also sitting on the tribunal. I think it is an interesting question how you organise professional disciplinary tribunal structures..

The Hon. P. BREEN: Are you aware of any submissions or representations to the current inquiry by the Law Reform Commission into the conduct of discipline in the legal profession?

Judge O'CONNOR: No, I am not aware of the submissions they have received.

The Hon. P. BREEN: You do not know whether the tribunal itself, for example, might be in a position to make a submission on that issue?

Judge O'CONNOR: The issue I have just raised goes really to the question of collecting together professional discipline jurisdictions in the one business environment. I do not want to be seen as advocating that that should necessarily be the ADT. I was simply responding to what I do see as some values that might be promoted by some gathering together of professional discipline tribunals into a closer environment.

The Hon. P. BREEN: Is there a difficulty within the ADT when you have different criteria for assessing professional conduct as opposed to administrative decisions?

Judge O'CONNOR: Yes. Professional discipline is obviously a very serious of area of work for courts and tribunals. At the higher end you are normally applying strictly the rules of evidence, that is, where there is an allegation that might lead to the deregistration of the practitioner you are usually applying strictly the rules of evidence and you are meant to apply a higher standard of proof than a normal standard of proof. Obviously you are dealing with someone's reputation and livelihood, so those cases are quasi-criminal in style, and they are seen as a branch of public law. In a way that is not true of external review of administrative decisions, where what we are doing normally is seeking to ascertain the correct and preferable decision in an environment of transparency and, hopefully, a degree of co-operation from the agency to seek to get to the best decision in relation to the matter. And it is a more inquisitorial process. But when you move to professional discipline, you are dealing, at the higher of professional discipline, with an adversarial rather than an inquisitorial environment. At the lower level it is more inquisitorial, and that is often done confidentially—lower tier professional conduct complaints.

Mr SMITH: Judge, when you talk about the Information Commissioner model, could you briefly explain a little to me about that model and then comment whether you think it might be a better system than the one we have in place?

Judge O'CONNOR: How I saw it operate was that the Information Commissioner had a public service office in the way an Ombudsman has a public service office. So that the Information Commissioner could receive complaints from the public, the office would investigate them, the complaint might then give rise to an administrative adjudication, a ruling, and that ruling would be a ruling from a specialist official, usually the commissioner or a senior delegate. The ruling would appear on various decision databases.

So that is basically what used to happen on that side of the agency. Then the agency would usually have a community education and information provision arm. The commissioner would often then go out and speak at public forums and advocate the legislation and, often, would in turn also have a policy role and appear before parliamentary committees of this kind to make submissions on what is desirable by way of alteration of the law or improvement of the law. So it was a multidimensional role and, obviously, you had to have some Chinese walls operating at times in the agency to make sure that there was not a perception that in the role of adjudication you were affected by the things you might have said as advocate.

That is kind of the downside of the model, but it has a lot of strengths. That downside - as I might perceive it - a possible conflict of roles is, to some extent, put to us as a gap in the tribunal structure where, of course, we do not see ourselves as advocates for the laws that we deal with in that sense. But that is the nature of the commissioner model. In Queensland it is a very active office. It has produced numerous authoritative decisions. The same is true in Western Australia. It is seen as a model that is less inaccessible than a tribunal or court model and usually less formal. They are the characteristics.

CHAIR: Returning to the jurisdictional aspects, I note from your submission that there are some 72 enactments which confer jurisdiction on the tribunal, but it seems to be that only a very small number of those actually give rise to matters in the tribunal. What is the reason for that?

Judge O'CONNOR: Well, we do not know. Did the agencies give up jurisdictions that were not active? I do not know. I think in the last year, about 20 of the Acts produced applications but, as I have said in my submission, it is probably four, five or six of those Acts that dominate our business.

The Hon. J. HATZISTERGOS: Could I go to the question of the Legal Services Division. A number of the representations seem to suggest that the procedures of the tribunal are inappropriate for dealing with professional conduct complaints, notwithstanding the fact that there are special rules that deal with this division. There are issues, for example, like legal representation, the way the hearing is conducted, the nature of the matter and the task that the tribunal is asked to undertake.

You have not in any of your comments here today specifically embraced the proposition that other professions should also come on board in terms of subjecting themselves to the ADT's jurisdiction. Is it that what you are suggesting is that it may be more appropriate that professional conduct be dealt with by a body other than the ADT?

Judge O'CONNOR: I would not go that far, either, but I accept the thrust of those initial comments which is to the effect that professional discipline practices and procedures may need to be differentiated more greatly than is necessary in other parts of the tribunal from the mainstream provisions as to practices and procedure, but I have not seen the issues that have been raised as really fundamental when it comes to effecting appropriate adjustments.

The main one that has come up is this timing issue, this need to get the matter into the tribunal in a relatively quick period after the formal decision to lay a complaint back in the regulatory body. That can be adjusted by a relatively simple provision. I do not see that as a matter that requires a great deal of attention.

I would be asking you to compare the position now in respect of some of these submissions with the position that existed in the Legal Services Tribunal three years ago. I would be surprised if these problems are new problems connected with the transfer of jurisdiction, but I am happy to take that away and answer more specifically.

The Hon. J. HATZISTERGOS: What are the advantages of having professional conduct matters being determined by a tribunal like the ADT?

Judge O'CONNOR: The ADT is a multidivisional tribunal. It provides some possibility for the cross-use of presiding members. It enables that work to be done in a better environment from the point of view of resources. If I can just take that point a bit further, the old Legal Services Tribunal had three registry staff to handle about 40 filings a year. It seems to me that was disproportionate and you are getting better value for money if you put quite small jurisdictions into multijurisdictional structures and then obviously you have got to have appropriate segmentation in the practices and work arrangements of the tribunal so there is not a loss of quality of services to the incoming jurisdiction. But I do not detect that. There are one or two comments along those lines, but I have not had them brought up with me directly. I would be happy to look into the specifics.

What I think is more fundamental to understanding the work of a professional discipline jurisdiction is this question of progress of the matters. It is reasonably plain that professional associations that bring the charges in our tribunal and the practitioners who respond to those charges themselves seem to engage in a considerable amount of activity alongside the tribunal proceedings about the progress of the proceedings, the content of the charges, the facts to be agreed, the material to be put on, and so on, all of which contribute to delay from a public point of view that the public may not see as appropriate.

But I am at pains in these comments to say that I do not think the delay is tribunal generated, although there may be a view that the tribunal should seek to push these matters forward more quickly and we could move to a more activist relationship. But I would be surprised if you would find that in any professional discipline tribunal at this stage.

The Hon. J. HATZISTERGOS: One of the submissions related to the question of spanning the time period between the decision to lodge the complaint with the tribunal and the actual laying of the information. I think the Legal Services Commissioner has suggested that that period be expanded from the current 28 days to a period of up to 90 days.

Judge O'CONNOR: And the Bar said 90 days.

The Hon. J. HATZISTERGOS: Do you think it is appropriate that the people subject to these issues should have to wait that long from the date of making the decision up until the laying of the information?

Judge O'CONNOR: I do not know whether I am in the best position to comment on all of these factors, but I am happy to come back and hear what the professional bodies have to say in support of the case for the change. I am wondering whether the case for the change has something to do with the Barwick decision in the High Court. What was going on, at least in the legal profession environment as I understand it before the Barwick decision, was that the public complaint would be lodged with the standards section of the Law Society

and a similar element of the Bar Association and it would be investigated. At the end of a relatively long investigation process, a formal complaint would be constructed (if that was thought appropriate) and then that was quickly lodged in the tribunal. What the High Court said is that if you look at the statutory schemes, after the formal complaint is made, then there has to be a formal investigation of the complaint as it now stands and that that was a gap, as I perceived the decision, in the structure of both the Law Society and the Bar Association and for that reason they invalidated the complaint in Barwick.

None of that had anything to do with the tribunal but, obviously, what it introduces is a business element into the way those professional bodies have handled complaints in the past which is different. That is, there is to be a post-complaint investigation as well as the pre-complaint investigation. If that is where these submissions are coming from, it seems to me it is inevitable there is going now to have to be a time period allowed after the formulation of the formal complaint to allow for a meaningful investigation before it goes to the tribunal.

I think you will have to explore that more with the professional bodies. I am happy to respond on that but I suspect that is partly where this difficulty is coming from.

CHAIR: So that no-one accuses us of misrepresenting the views of the Legal Services Commissioner, there is a subsequent letter from him which I suspect you have not seen and, for the purposes of clarity, I will put that on record. Part of the letter says, "I have noted that the Bar Association agrees with the current limit of 28 days to file Information referring a practitioner to the ADT is inadequate. On further consultation with my staff now responsible for this area, I agree that the three months proposed by the Bar Association is adequate, rather than the six months suggested in my submission."

Judge O'CONNOR: Certainly any contribution you can make to the subject of timeliness in respect of professional discipline matters would be useful. That is, when should proceedings that flow from a public complaint actually reach a tribunal and then how long should they be before the tribunal.

Mrs GRUSOVIN: I note in your submission that you talk about the provision in the Fair Trading Tribunal Act providing that the Fair Trading Tribunal become part of the Administrative Decisions Tribunal.

Judge O'CONNOR: That question has not yet been resolved. It has been looked at. Also the review being conducted by the Minister for Fair Trading in relation to the future of the Residential Tribunal and Fair Trading Tribunal, whether or not they should be merged.

Mrs GRUSOVIN: Just coming back to your comments about the way in which some tribunals manage their affairs in terms of formality, et cetera, and the question of whether or not it is an informal hearing process or conducted very much as a quasi court, I wondered if perhaps you had any thoughts on what can be done to ensure that some of these tribunals conduct their affairs in the spirit that the legislation was created. I believe, if you come back to the residential tribunal, what is happening and what was meant to happen is quite contrary.

I think there is a lot of disquiet among the community and certainly myself who deal with constituent problems constantly and departmental problems, I might say, in terms of dealing with the Residential Tribunal that it is really very worrying. I think there needs to be some thought of reform. I do not know how we do it.

Judge O'CONNOR: I guess we all know that this is a huge subject and the Fair Trading Tribunal, which I am also chair of, is obviously committed to dealing with matters as expeditiously and informally as is practicable and, in a sense, the ADT has the same commitment. But you are dealing, certainly at fair trading and often at the ADT, with significant interpersonal conflicts. Over at fair trading I think a dispute over the home maybe second to a dispute over the marriage in terms of the intensity of feeling that is involved and the level of criticisms that may flow.

The scope, I think, for high levels of informality is obviously affected by questions of the degree of conflict, the seriousness of the issues that are raised and the complexity of the factual material that is before the tribunal. So, subject to all those constraints, I think most of the part-time members in the tribunals I am connected with are very wedded to the values that you are expressing but practically implementing them in some of these environments is not at all easy. Then over your shoulder you have sitting the Court of Appeal and the Supreme Court. And the courts of the country, as you know, have strong views about adherence to requirements of procedural fairness and clarity as to exercise of jurisdiction and applications of evidentiary

standards. Even though they are not rules of evidence, it still has to be evidence that is probative and so on. So you have all those factors in play when you look at this issue.

Certainly I think in both tribunals we try to remove unnecessary formality, but one cannot, I think, go to the extent that some would argue is appropriate at times. I am simply trying to convey through these answers what I see as the complexity of the discussion. We have environments in which it is more one-to-one. Deputy President Hennessy is here, and the Community Services Division, as I understand it—I have not sat there—operates in a more inquisitorial environment dealing with people who often have some form of disability. The communication environment there, I think, is much closer to the model that you are referring to. But, certainly, in more contested disputes, I think it is difficult to move as close to the informal model as people might like.

Mrs GRUSOVIN: I was perhaps specifically thinking in terms of my concern about the Residential Tribunal.

Judge O'CONNOR: I am seeking to avoid commenting on the Residential Tribunal.

Mrs GRUSOVIN: I know that it is difficult and nobody knows quite what to do, but it just appears that there are those who wish to conduct hearings in a manner which I believe is quite contrary to the legislation that conceived the tribunal.

Judge O'CONNOR: I think the best suggestion I can make is maybe to convey your comments to the chairperson of the tribunal and to the Minister. I would prefer not to comment.

Mrs GRUSOVIN: I would be very grateful to have that occur.

Judge O'CONNOR: I would prefer not to debate the Residential Tribunal.

Mrs GRUSOVIN: Perhaps there is one other question. In terms of the operation of the tribunals, are you convinced that there is adequate resourcing in terms of the waiting periods that people have to endure before their matters are heard or resolved?

CHAIR: Can I just interrupt and ask when you are answering that could you also deal with the new jurisdiction that has come in as a result of the legislation this year. I think the Treasurer said something like he expected there to be 200 instead of 20 applications.

Judge O'CONNOR: Yes. Well, the resources issue is one that heads of jurisdiction are conservative about making public comments on. But certainly one could always benefit from greater attention to questions of resources. The main gap that I see applicable to both tribunals that I have been ventilating in recent times to the Fair Trading Tribunal review and also in annual reports that are to come is that there is no clear recognition in the conventional structures of the need for a professional support service to assist in improving the standard of performance of members, measuring performance of members, gathering more detailed business statistics, assisting in continuing education of members, circulation of information to members and so on.

The classic model in the court system is that the judges somehow have all of that in their head and the registry gets on with administering the documentation and the listing and the arrangements for hearings and advice to the parties and so on. But there is an area of demand, as I perceive it, in the community today that is reflected in various reports about the quality of performance of members. You do need some specialist professional resources to assist you to do that, especially in the environments I am in where you are substantially reliant on part-time members and have very little even in the way of full-time members to turn to to assist you with these things. So that is an aspect of resourcing that has not had the attention in the past that I suspect it may deserve in the future.

Then there are issues obviously to do with the timeliness of the practical flow of applications and hearings, and certainly I think some of that can be assisted by infrastructure improvements. I am thinking, obviously, of computerised management of data and more simple forms of lodgement. But there will always be a period of a necessary delay in proceedings where there is a contest. The person who makes the allegation or makes the application must recognise the need for the person against whom they have made the allegation to give meaningful responses to the process, hopefully before you sit down to hear the case. But if you have to move straight into a hearing, even then you have got to allow a reasonable period for the person who is sued to

prepare their case, so I am guarded about moving to models that would bring matters on for hearing extremely quickly.

Now, on the question of the Revenue Division, the Revenue Division involves an area of work I am yet to become very familiar with, but I am told that it is applications by taxpayers for review of decisions of the Office of State Revenue in relation of State taxing matters and that we are expecting the first significant volume of work after the next set of land tax notices go out, which is late January. We therefore are aiming to have the division in place no later than to receive that flow of work, but at the moment there needs to be appointments made. It is an extremely specialist area of work and there is a relatively small community of potential appointees. I think there are discussions going on at the moment to seek to identify who might be people who could be credibly appointed to handle that class of work.

As to the issue of the jump in the number of applications, I have spoken to one of the very experienced practitioners in the field, and it is certainly her view that that is likely. She says that is so because the forum is inexpensive compared to filing in the Supreme Court, which is where these taxpayers went in the past. So she was of the view that there was a body of what might be called less financially significant disputes which were not viable in the Supreme Court previously because of the risk of costs that are likely to come into the tribunal. So that seems to be where that view is coming from, but we are all waiting to see what happens in practice. We are just not sure at this stage what the amount of work will be.

CHAIR: Just a couple of specific points. The issue about part-time members in the Legal Services Division—is there a figure for the optimum number?

Judge O'CONNOR: There is certainly a difference of view on the optimum number.

CHAIR: You are pursuing that with Attorney General, I think I saw.

Judge O'CONNOR: The Attorney General is reasonably well disposed, I think, to some reduction of the number of members we have on the various lists of part-time members. I am approaching it, I suppose, partly from a management perspective. It is just a lot of members to have to service in a tribunal with a relatively small volume of work when you compare it to the number of part-time members. It tends to inhibit the ability to obtain levels of expertise in your part-time members by doing work for you on a relatively regular basis.

I think the argument against what I am saying is simply that a broad list gives you, maybe in certain circumstances, a broader array of options to deal with a particular matter. You do not have to call the people up all the time. They are there if you want them. My view certainly is that tribunals should have part-time members who are relatively active within their jurisdictions, subject to their competing full-time work, and in that way you build up a body of expertise and specialisation and hopefully the community gets the value of that. That is where those thoughts are coming from, but there is some contention about these views and I am also responding partly to the suggestions that have come from a couple of parts of the room about having many professions inside your structure. If every profession puts up 50 members for your panels and you have 10 professions in there, suddenly you have 500 members. That seems to me to be quite unmanageable. So that is where those thoughts are coming from. But my views are not necessarily fully shared in the legal profession.

CHAIR: At the Federal level there is a body called the Administrative Review Council. Do you think there is any merit in a similar body operating in New South Wales?

Judge O'CONNOR: I think there is some value because that body actually fulfils some of the professional services needs that I have alluded to already. It is a body within the Commonwealth environment that does do systemic work on issues of administrative review that would be of value to the political process, to the Parliament, and then it does other work which is in the nature of assisting tribunals in the education of members and the conduct of conferences and the preparation and release of good quality publications and newsletters. All of these things add to the quality of the professional environment at the practical level in tribunals, and I think they do a lot of good work in that area. So they are the arguments in favour of a facility of that kind. They give systemic advice to the Minister and the Parliament and they give more specific assistance to tribunals. They are not the total answer on the issues I have raised but they certainly make a contribution.

CHAIR: In your submission you talked about the costs rule of VCAT.

Judge O'CONNOR: Yes.

CHAIR: Have there been any steps to implement that in New South Wales, to adopt that as a rule here?

Judge O'CONNOR: What was it about VCAT? The costs, did you say?

CHAIR: I think in your submission, as I recall reading it, you set out the costs rule, and there was a suggestion that that might be going to be adopted here, or something similar.

Judge O'CONNOR: I must say I cannot recall that part of the submission very clearly now.

CHAIR: It was late last night when I read it, so I might have got it wrong.

Judge O'CONNOR: The costs rule in the ADT is basically a rule that each party bears their own costs unless there are special circumstances. I am not sure whether that is that different from the VCAT rule. I might have missed something.

CHAIR: Paragraph 131 of your submission. I do not desperately need an answer now.

Judge O'CONNOR: I am happy to come back with comments on that. I see what you are saying. Yes, this is a costs rule that gets down to more detail about the circumstances in which you can make costs orders as a sanction for inappropriate conduct. Oh, no, I am sympathetic to that proposition. One of the difficulties in tribunals is that you have both parties come before you bearing their own costs but it is still possible for parties to engage in conduct which is really not defensible in terms of creating unexpected costs for the other side. It can work both ways. It can be applicants who simply absent themselves from proceedings that a government party has come to, or the opposite—an applicant turns up and the government party or corporate organisation, for some reason, does not attend. That is a very simple example, but in those sorts of circumstances, I think it would be useful to have a power to order costs as a sanction and a deterrent to bad practice of that kind without throwing the whole burden of cost in the case at the person. It is a complex issue. It seems a good idea to leave both parties bear their own costs but that can mask other injustices as the process goes along. Now, that I have looked at that provision again, yes, I am very much supportive of a provision of that kind.

CHAIR: Thank you for coming. Thank you for your assistance. It has been most helpful. It is possible that other issues will arise that it would be appropriate to get your views about. If that is the case, we will be in contact, and we will probably do that by correspondence, I think.

(The witness withdrew)

JOHN FREDERICK STUART NORTH, President, Law Society of New South Wales, 170 Phillip Street, Sydney, before the Committee:

CHAIR: The Law Society, of which you are President, has made a submission. You have no objection to that being made public?

Mr NORTH: None at all, Mr Chairman.

CHAIR: It has been previously tabled in our proceedings. I guess if we can perhaps start with what I think is probably the major issue in this review, and that is the jurisdiction of the ADT, do you have any views about how broad the jurisdiction should be, what else should be included either in terms of specific agencies and issues or just as a matter of general principle?

Mr NORTH: The Law Society has always strongly endorsed the setting up of the ADT and has a vested interest in it continuing to function efficiently, and broadly supports the enlarging of the jurisdiction. Without going into all of the specific agencies that might be included, included in that broadening is the Fair Trading Tribunal. Others, of course, and I was fortunate to listen to the previous speaker, will need careful consideration by the Committee and in, due course, the Parliament, but broadly we do support the widening of the jurisdiction, and the basis of that is that we think that will ensure consistency and fairness in all matters that are under review and appeal.

CHAIR: You may not be in a position to comment on this, and if that is the case, that is fine, but one of the suggestions in one of the submissions was that jurisdiction be extended to include decisions by the Department of Housing about whether to allocate emergency housing to people, whether to put them on the housing list. Would you have a view about that?

Mr NORTH: I have not been instructed on that particular point, but if you look at the general thrust of the Law Society's submission, it is that as far as possible the ADT should have overriding jurisdiction in most of these matters. Anyone who stood outside it would need to make a fairly strong case as to why they stand outside. Allied to that, of course, is you would then need to look at the question of the resources of the ADT which we understand at the moment only has the one full-time member, if you put aside the Fair Trading Tribunal as being totally separate, and perhaps you would need more full-time members.

CHAIR: I think the resources implication flow naturally from the extension of the jurisdiction. One of the things that has been put to us in submissions is that the ADT should be as much as possible a lawyer-free zone. I think it was the PIAC proposal that legal representation should only be permitted in the General Division by leave where failure to allow representation would prejudice an applicant. What would your view be about that? Would you agree with the proposal that the merits of the case are better examined if they can hear directly from the parties rather than legal representatives getting in the way?

Mr NORTH: We strongly refute PIAC's view. That probably does not come as a surprise to you, Mr Chairman, or the members of the Committee, but it is not from the point of view that lawyers say, "Lawyers should be there because we want to make a living." What has been shown by the University of Wollongong study of ADT's submissions is that of the matters in which parties were actually represented, only 25 per cent proceeded to a full hearing. By contrast, in matters where people on one side were unrepresented, 45 per cent proceeded to a full hearing.

Even more importantly, if you have people who are vitally interested in their own matters, they are not able to take the step back that is necessary if you are unrepresented to look at what are the crucial issues, and the time involved for any tribunal in any jurisdiction in this country in dealing with unrepresented litigants is one of the biggest problems we have in justice. The latest report—I think it is report No. 89—from the Australian Law Reform Commission, actually says that tribunals should look to having legal representation as far as possible or at least to have as many people who understand the jurisdiction that they are before. Unrepresented litigants do not.

The full Federal study that took four years came down to say that one of the biggest problems we have in all courts is the growth in unrepresented people, and that is a direct result of the lack of legal aid and the lack of legal representation. The one thing that we have been trying hard to impress on governments of all persuasion, both State and Federal, for a number of years is that unrepresented defendants actually cost each

system that they appear before a lot more money than if people were properly legally aided and, thereby, legally represented.

It is just true. You just need to talk to any working member of any tribunal or any court, and one of the most difficult things they have to deal with is unrepresented litigants. Now, there will be matters at the very lower end of the ADT scale where you do not need full-blown legal representation and I am sure Committee members are aware of that, but it is an absolute furphy to say that legal representation lengthens the proceedings. We believe that it not only shortens the proceedings, and the Wollongong review shows that it actually stops a lot of proceedings going to a full-blown hearing, but we also thinks that it actually gets to the issue of the matter which is a very difficult thing to do when you are unrepresented and it is your vital interest that is involved.

JOHN FREDERICK STUART NORTH sworn and examined:

CHAIR: Did you receive a summons issued under my hand to attend before the Committee?

Mr NORTH: Yes, I did.

Motion by Mr Smith, seconded by Mrs Grusovin, agreed to:

That Mr North's previous evidence be adopted.

CHAIR: In relation to the issue of legal representation before the tribunal, I know the Law Society runs a pro bono scheme. Does that extend to the ADT?

Mr NORTH: As far as I know it extends to any field of law. The difficulty, of course, is the lack of resources, so we still have far too many people in the ADT who are unrepresented who should be represented.

CHAIR: Does the Law Society have a view about changes that would be necessary or appropriate to procedures of the ADT as they currently are?

Mr NORTH: Yes. The Law Society supports the proposal that the interim rules need further refinement from a practical point of view and that should be done in consultation with the ADT and all of the other parties that are interested in its function. However, in relation to the question of timing for complaints involving legal practitioners, as these are matters that involve someone's professional livelihood, we think that it would be unjust to delay the proceedings.

I was interested to hear that the Legal Services Commissioner had pulled back from six months to three months, but the Law Society view is that we can, despite the difficulties mentioned by the previous speaker, deal with informations being filed within the 28-day period.

CHAIR: That is despite the potential problems out of Barwick?

Mr NORTH: That is right. We hope that, with the assistance of the review that is going on now and the Parliament, those anomalies in the legislation hopefully will be fixed up, but we think it is such an important matter that we should stay within the 28-day period.

CHAIR: The office of the Legal Services Commissioner also has put to us a view that there is a lack of transparency in the process by which members of the Legal Services Division are appointed, and he specifically refers to the role of the Law Society. I think you have probably seen the submission. Do you have a view about that?

Mr NORTH: Yes. That is a difficult question. The Legal Services Commissioner does not actually set out what should be done to give the transparency. If he is actually suggesting that there should be a list of selection criteria setting out the qualities necessary for somebody to form part of the tribunal, we are opposed to that. We have been involved in a lot of discussion on this level in regard to judicial appointments, and we see that when you start setting down a list of desirable criteria for appointments to these positions, either the quasi judicial position of the ADT or to courts themselves, you lay the whole system open to attack because virtually

anybody who is interested in any particular appointment can look to the person who is appointed and can then look at the list of criteria and start saying, "Well now does he or she fill that criteria?"

We believe that the appointment to the ADT works well. There has not been a hint, as far as we know, of anything by way of improper appointments. The appointments should continue to be made by the Attorney General in consultation with the various—I hate that overused word—stakeholders, such as the Law Society, the Bar Association and the Legal Services Commission.

The Hon. P. BREEN: Could I just ask about that question of unrepresented litigants. Are there any figures in that study that you referred to as to what the success rate is for people who are unrepresented as opposed to those who have a lawyer?

Mr NORTH: I will take that on board. We might come back to you because I have not been instructed on that, but the figures that I think I gave just prior to you coming back into the room, Mr Breen, were that only 25 per cent of cases in which lawyers represent people actually go to a full hearing, whereas 45 per cent of unrepresented cases go to a full hearing, so in terms of savings of time and money for the whole system, we think that is very, very important. Looking at whether or not you do better with a lawyer or not, other studies have shown not in the ADT but in the court system and the Federal studies that I referred to earlier that you do better and you get a better result if you are legally represented.

CHAIR: Can I just interpose and point out the extraordinary efficiency, as usual, of our secretariat. In a letter that was faxed to us this morning Elizabeth Ellis from the University of Wollongong said:.

> As indicated in my own submission, the University of Wollongong's research showed no clear picture at this early stage between applicant representation and success.

I think that is the study that was being referred to by Mr North. So I think the answer is no-one actually knows yet.

The Hon. P. BREEN: There is also a question, or a problem anyway, that some people do not want representation, and as these tribunals, like the ADT, become less and less formal, that does create an environment in which people think, rightly or wrongly, "I can handle it myself." There are no wigs, no gowns, no formal rules. That would suggest to me that the system needs to adapt to unrepresented litigants rather than seek to somehow direct them into representation. Do you think I am on the wrong track with that?

Mr NORTH: I do, only because of the old adage, "If you act for yourself you have a fool for a client", because it is extremely difficult when you are personally involved in a matter to stand back, delineate the issues, run the proper issues and put them before a tribunal, or indeed a court. I think the previous speaker spoke about the difficulty that there is in dealing with unrepresented people even for the people who are the represented side, and the amount of time and the explanations that are necessary to go into it really do not save the State any money at all. It is far better to fund proper representation in serious matters than it is to try to adapt to the unrepresented litigant, because they are just such a wide-ranging group of people. Of course, Mr Breen, there are a number of people who are the exceptions to the rule who will make a very good fist of any appearance they make before a tribunal, but the vast majority of people flounder and they do not know what they are doing.

The Hon. J. HATZISTERGOS: What are we to make of the findings from the University of Wollongong, which suggest that when lawyers are involved in cases there is a greater tendency on the part of litigants to withdraw?

Mr NORTH: Well, I think it shows that somebody is standing back from a matter and giving advice that obviously is being accepted by the applicant and you are not getting matters in the tribunal to anywhere the same extent that you are with unrepresented people. I think the question of Mr Breen's was a good one, to see what the success rate is, and no doubt that can be looked at if the university takes it on further. But it is absolutely pointless to have people running unmeritorious matters in court or in a tribunal, and legal representation obviously do not want to withdraw if there is the possibility of success. They are not going to withdraw just for withdrawal's sake, so the matter, obviously, after having been looked at, must be unmeritorious.

The Hon. P. BREEN: Perhaps another possibility is a compromise, too. If someone else is independent, they could help in resolving the outstanding issues. That could be a reason.

Mr NORTH: Yes, but I understood from the question that you were saying that there was not even any settlement; there was just a withdrawal.

The Hon. J. HATZISTERGOS: Yes. I was not dealing with the question of settlement.

Mr NORTH: I was dismissing the matters in which legal advisers may be able to help their clients to reach a settlement before you get to a full-blown hearing; I was just answering about—

The Hon. J. HATZISTERGOS: Pure withdrawal.

Mr NORTH: —pure withdrawal,.

The Hon. P. BREEN: I had misunderstood that.

Mr NORTH: And that would just be on legal advice.

Mrs GRUSOVIN: Could I not raise the question of the impact of costs and whether or not that plays a role in matters being withdrawn as well as the question of whether or not it is unmeritorious?

Mr NORTH: It may, of course. If the person does not wish to pay the legal costs and they still think they have a meritorious claim, then they would, one would think, not pay the legal costs and be one of the large number of people who go before the tribunal in an unrepresented capacity. Costs will always have an effect on any sort of tribunal hearing. If a lawyer is approached, they may well give a client an estimation of costs that scares the client, but the client, if they have a meritorious claim, will then say, "Well, I cannot afford that. I will go in some other way to the tribunal." At least I hope that would happen. I do not have any information to say that that does not happen.

CHAIR: You will have heard, I think, the discussion with Judge O'Connor about the Legal Services Division. Does the Law Society have a view about the optimum number of part-time members in the Legal Services Division of the tribunal?

Mr NORTH: We would be willing to discuss that with the ADT in conjunction with the Attorney General. We would agree that it is not much use having such a number of part-time members that nobody gets any experience. It would be pretty hopeless if part-time members are only going to sit on one matter a year, but, then again, part-time members have to continue in their own practices or in their own work, so, therefore, it is a balance, and we would be willing to discuss the numbers of people with both the ADT and with the Attorney General.

The Hon. J. HATZISTERGOS: I want to go back, if I could, just to the point about legal representation.

Mr NORTH: Yes.

The Hon. J. HATZISTERGOS: The VCAT in Victoria, which is the parallel body that reviews administrative decisions, has a section 62 in its Act which limits the cases in which legal representation can be provided or is available to circumstances where a person is referred to in the section—there is a list of people where it is appropriate to have legal representation: where one party is a professional advocate; where another party to the proceedings allowed to be represented and is in fact represented—that is a leave provision; and in circumstances where all parties appearing before the tribunal agree that legal representation should be permitted. Is that sort of restriction something that the Law Society of New South Wales could live with if it was incorporated into the Act?

Mr NORTH: I think the Law Society's point of view is that legal representation should be as widely available as possible because, in effect, that will cause the tribunal to work more efficiently, quickly, and to the benefit of the client, but of course we would be willing to look at that Victorian section and we could, in fact, get back to the Committee if you would like. I have seen it, but my instructions really are that we totally refute PIAC's argument that legal representation lengthens proceedings and that lawyers are always legalistic in their approach, because we say that the statistics, not just in this tribunal but over the whole country, say that that is not so.

The Hon. P. BREEN: Judge O'Connor raised a question about separating the conduct of the discipline of lawyers out of the Legal Services Division of the tribunal and having some other tribunal that dealt with professional conduct. My understanding is that there are about 50 legal matters a year that the tribunal deals with now. Judge O'Connor said overall there are 1,000. If those 50 were to go out, would you have a view about that?

Mr NORTH: I think the Law Society view is that the ADT is an appropriate environment to deal with these matters. It is, of course, 50 too many, Mr Breen. When you consider we have 16,000 members and there are 2,000 at the bar, there are always going to be some to go there. But we support the ADT and we support the widening of the jurisdiction.

CHAIR: Has the Law Society experienced delays in delivery of decisions from the tribunal?

Mr NORTH: To an extent, and we have supported the submission that perhaps because the ADT is a relatively new body there needs to be a look at not only its rules but also some more education and training for the people who work within it, but we are not making a strong complaint to say that the delays are untenable or too long at this stage.

CHAIR: Are there any other matters that you would like to raise with us that we have not specifically asked you about?

Mr NORTH: There was a submission, we believe, from the Anti-Discrimination Board that proposed that the statutory limit on damages in the Equal Opportunity Division of the tribunal actually reflect the jurisdiction of the District Court. We do not agree with that, because the jurisdiction of the District Court is now $750,000 and it is a court dealing with significant matters. Indeed, in motor vehicle accident matters it has unlimited jurisdiction. So we do not think that large sums of money should be awarded in this tribunal when it does not invoke and use proper legal procedures and you have restricted rights of appeal from it. I thought I should make that point on behalf of the society.

The Hon. J. HATZISTERGOS: Is it not the case, though, that the Human Rights and Equal Opportunity Commission [HREOC], which is a similar body, particularly in the equal opportunities area, has unlimited jurisdiction in terms of awarding damages but it has not gone ballistic in terms of its awards notwithstanding that fact?

Mr NORTH: That might be so, but you have a Local Court, which is staffed by magistrates, which has a jurisdictional limit of $100,000, and deals with quite serious matters, and there is a recognised avenue of appeal. The same with the District Court. This tribunal was set up to deal with things in an informal way and to deal with them expeditiously. We feel that it might be just too wide a brief to allow them to reflect the same amount of damages as what is now a very important court, the District Court.

The Hon. J. HATZISTERGOS: Can I just ask you something about the procedures of the tribunal. It has been put to us that those procedures should vary according to the subject matter that is being dealt with. In professional discipline it may be more appropriate to be more formal and restrictive in terms of procedures and rules governing admission of evidence but in the General Division, dealing with more straightforward matters, an inquisitorial style may be more appropriate. Do you agree with that submission and, if so, does it necessarily follow that there is probably less need to have legal representation in those areas where the tribunal can, by nature of the subject matter, adopt a more inquisitorial style?

Mr NORTH: We partly agree because we think that matters involving deregistration or the loss of your professional livelihood necessarily need to be treated very seriously and, indeed, people need to be legally represented, but, to go back to the General Division and an inquisitorial approach, the problem was highlighted by the previous speaker in that nearly always one side is represented in some manner and even an inquisitorial approach will not solve that dilemma where the other side is unrepresented because automatically the side that is represented will understand the nature of the proceedings and have an advantage, so we do think that in most cases proper legal representation should be available, but it should not be bells and whistles; it should suit the nature of the case, and the informality of the tribunal really should reflect the nature and seriousness of each case that is before it.

The Hon. J. HATZISTERGOS: Bearing that in mind, is it not appropriate that the decision, for example, as to whether representation should be provided in those run-of-the-mill-type cases where it may not be required in every case, be left to the best discretion of the tribunal by a leave provision or something?

Mr NORTH: We would prefer to see people have the right to be legally represented because we do not know how that discretion would be exercised across the wide range of matters that we say should now come before the ADT. I think you would lose the whole rationale for having an ADT, which should be to give some consistency to the administrative law in this State. The reason we say you should have a broader jurisdiction is to try to get some consistency across all of the different jurisdictions, pull them in under that umbrella but then, within that umbrella, have a consistent and fair approach.

The Hon. J. HATZISTERGOS: Can I ask you a question about the second-tier review. You would be aware that before the matter comes before the tribunal there has to be a second-tier review within the agency. Some agencies have suggested that that is not appropriate, that it just consumes extra resources. Do you have a view on that?

Mr NORTH: Yes, the Law Society's view is that generally a well-conducted review within the agency is of assistance as long as there is then avenue for appeal to the ADT. I agree with Judge O'Connor, that it may become difficult where you are asking some junior officer to review somebody more senior, but in most cases we do see merit in the review within the agency prior to going to the ADT.

The Hon. J. HATZISTERGOS: On the question of jurisdiction, you understand there is a proposal and there is provision that would allow the transfer of some administrative review currently conducted in the Local Courts, and I am talking particularly about vehicle registration, drivers licences, to go to the ADT. If that were to happen, however, there would need to be a second-tier review within the RTA before the matter would go to the tribunal. Now, is that desirable and, if not, why not?

Mr NORTH: Those are difficult matters because they often involve driving matters and cancellations of licences and everything else. They involve people being pretty desperate to get a decision quickly. What we would loathe to see from the Law Society's point of view is a further delay by putting more administrative hoops between someone getting a decision on a matter as important as that because it can mean that that person cannot, if they are in the country or out in the suburbs, work until they get such a decision.

You might recall that some of these matters, the cancellation of licences, was taken to the ADT and that meant that people in the country were dealing with a matter in front of a magistrate in terms of its criminal context and then having to run to the ADT to talk about the cancellation. The Law Society would really like to see those matters discussed fully and the procedure streamlined. If it goes into the ADT then it must be streamlined. The last thing we want to see is people having to go before a magistrate and argue a criminal matter and then have to go to the expense of going before the ADT to argue this other matter. There has got to be some real thought put into how those sorts of matters are dealt with.

The Hon. J. HATZISTERGOS: In any event, you are not in favour of the second-tier review in the RTA in those cases?

Mr NORTH: I have not put any thought into that, and it would be something that I think we should perhaps get back to you about because I think that is a difficult area. The last thing we as a Law Society want to see is people having to go to different forums to obtain the one thing, and that happens a lot out of driving matters because you have got a criminal sanction for the actual offence and then you have the problem of cancellation and so on.

CHAIR: I thank you for your attendance and the assistance you have provided to the Committee.

(The witness withdrew)

GREGORY JOHN KIRK Principal Solicitor, Public Interest Advocacy Centre, Care of Public Interest Advocacy Centre, Level 1, 46-48 York Street, Sydney, and

AMANDA JANE CORNWALL, Senior Policy Officer, Public Interest Advocacy Centre, Care of Public Interest Advocacy Centre, 46-48 York Street, Sydney, affirmed and examined:

CHAIR: Mr Kirk, did you receive a summons issued under my hand to attend before the Committee?

Mr KIRK: I did.

CHAIR: Ms Cornwall, did you receive a summons issued under my hand to attend before the Committee?

Ms CORNWALL: I did.

CHAIR: I think you have been provided with some of the other submissions that have been made to the inquiry. Perhaps the easiest thing to begin with is to ask whether you have any comments to make on any of those other submissions?

Mr KIRK: Yes, Mr Chairman. I Thank you the Committee for the opportunity to address you today. There are a number of issues in our submission that also come up in some of the other submissions that have been made. Some of those centrally relate to the fact that there are a large number of part-time members of the tribunal and no full-time members. The problems we have experienced in relation to that relate to conflicts of interest as the first problem. That has arisen mostly in the Community Services Division and it is a problem which is quite likely to arise when you have part-time people who are selected to be on the tribunal because they have experience in relation to the issues being dealt with, and we have no difficulty with that and their expertise is helpful.

But we have certainly experienced situations on a number of occasions where the part-time member or one of the part-time members on the panel chosen has a more direct involvement with the issues in dispute. In one instance they are working on a contractual basis with one of the parties, with the relevant department and not just generally working for them but working on those particular issues.

We see that problem as inevitably a sort of potential problem and it does not appear at the moment that the tribunal has the necessary procedures to check that before the parties appear on the day, so that when they are selecting panels to deal with matters it would be good if those issues were explored, any connections that panel members have with a particular party or with the issues in dispute. Otherwise, it only comes out fortuitously whether or not they do have such a connection and then there is the potential for the hearing to have to be abandoned, rescheduled and the costs that that involves.

Another problem that relates to part timers is about delays. That is not so much in getting decisions once we have had a hearing, but it is in actually getting a hearing set down. Because people are part time and have other commitments and you have to get a panel of three together, there are often problems in getting them at short notice. Certainly, some of the matters we have had before the tribunal were urgent and needed an urgent decision, particularly disputes in relation to funding of particular institutions in the disability services area. They are funded on an annual basis. If it takes more than a year to deal with the appeal from the funding decision, then the money is already spent and there is no point in going on with it.

So for both of those reasons, we would support some of the comments made in the tribunal's submission to you where they suggest that it would be good to have some or more full-time members and that it would be good to have a discretion in the President as to whether a panel of three was necessary for particular matters. We think a discretion like that would be helpful. They have suggested a broad discretion. We think it might be better to have some criteria so the parties know how that decision is going to be made.

A second area where there seems to have been a fair bit of comment from other submitters relates to legal representation. PIAC had involvement at a policy level in supporting the establishment of the tribunal and dealt with the Government both before and during the time it was being established. Through that we have always supported the position that legal representation should be limited, not from the point of view that lawyers

need to be kept out of these things but from the point of view that if there is to be legal representation it has to be on an equal basis and balanced.

Realistically speaking, many litigants before this tribunal are not going to have resources themselves or access to the resources through legal aid to have representation. That is just a fact of life that we have to deal with and the tribunal should be designed around that. Legal aid is not going to change dramatically enough to allow people who appear before this tribunal on average matters to have legal representation.

So our concern is that when there are lawyers, it should be on an equal basis and that one party should not be greatly advantaged, usually the dominant party and often in review situations the Government by having representation when the other party does not have access to that.

The Wollongong review suggests that there is some inequality creeping into this issue before the tribunal and that that sort of balance is not occurring. In that context, we would support the rule in the Victorian tribunal, VCAT, which has also been proposed by the ADT, setting out some criteria for circumstances where representation would be allowed. We support the existence of a rule and generally speaking we think the VCAT rule is a good place to start in terms of the criteria.

The tribunal has a difficult role in terms of balancing the obvious accessibility and informality that it needs to have to deal with the people who appear before it with the necessary rigour because it is dealing with legal issues and they have importance to people. We have seen instances where that balance has not been achieved; it has slipped one way or another.

One thing that would be very helpful would be ensuring that litigants who are appearing in person had access to help from the registry but also to make sure that that help is accurate. I would not say this was a suggestion that the registry was not providing that, but certainly recently we saw an instance of someone who got advice from the registry in relation to the filing of their application, that it could be filed by facsimile. They did that. The other side contested it so that it was filed by facsimile and then a hard copy came a week later.

Unfortunately, in the meantime, the time for making the appeal had lapsed and after a hearing in the tribunal which upheld the early date for filing by facsimile, the Supreme Court has recently overturned that so that this person, having acted on the reliance of the registry advice, has really had their appeal nullified and they cannot proceed with it. We only say that to stress the importance of that rather than to make any particular criticism of the tribunal generally.

Another problem in terms of informality we have experienced is where lawyers are involved, and certainly in the cases where we have been attending representing one party, but there is a tendency for parties that are legally represented to still try to take advantage of the informality. They are there with a professional advocate but then the professional advocate tries to get away with submitting material that it would not normally be able to submit before a court and would not be acceptable to a court and falling back on the general idea that this is supposed to be an informal tribunal. I think where there are professional advocates involved the standard should be maintained to ensure that the necessary rigour to make accurate legal decisions is kept.

Finally, on the issue of costs, in terms of accessibility of the tribunal, we support the general rule that has existed against costs being awarded against unsuccessful applicants. The threat of an adverse costs order is, in our experience, a very significant barrier to people who are considering taking on any litigation, including matters before the tribunal. But we would also support the idea that there should be some criteria as to circumstances where costs might be awarded, and those being proposed by the ADT in its submission we generally support and do not see difficulty with.

They also raise the idea that there might be a general reversal of that position in relation to appeals and that the costs might always follow the event in appeals to the appeal panel within the tribunal and, whilst they are still working on a proposal in relation to that, we would not support it as a general idea at the moment. The last thing on costs that the ADT submits is that it would be best if all of the costs rules applicable in the ADT were set out in one place. We would certainly support that, rather than people having to search for conflicting rules that may be applicable to particular proceedings in other legislation. I think Amanda might have a couple of matters to deal with as well.

Ms CORNWALL: There are two issues that I would just like to highlight, in particular the issue of the jurisdiction of the Administrative Decisions Tribunal. I found the submission from the Wollongong study

particularly helpful. As this study highlights, it is actually quite difficult to identify precisely what is the jurisdiction of the tribunal but, of course, from the outset we were quite excited about the potential impact that the Administrative Decisions Tribunal would have on the performance of executive government. The Government promised that it would extend the review jurisdiction of the tribunal in a staged manner. There was a promise that the criteria for the jurisdiction would include decisions about vulnerable people and decisions about benefits, amongst other things, but it seems that, as we all feared at the time, since the tribunal has been created the impetus for extending its jurisdiction has faltered, and the Wollongong study actually highlights it is perhaps worse than that, in that not only has there been very little new jurisdiction but it is very hard to find out what that is. In fact, quite seriously, they identify the possible failure of agencies to notify people of their rights to appeal. We would certainly reinforce that point in our submission. If that indeed is happening, that needs to be picked up. I guess that does raise an issue of whether that is, in fact, the tribunal's jurisdiction to chase that up or the Ombudsman's perhaps, but we would certainly like to see more about that investigated as part of this inquiry.

The other issue that we have raised in particular in the review jurisdiction is the FOI jurisdiction. Once again there was a great promise that moving FOI appeals from the District Court into a tribunal that would be much more clearly a merits review jurisdiction would offer the likelihood of a greater number of appeals and a greater rate of compliance by government agencies. What we appear to have seen is no more than an average of 10 FOI appeals a year, although the Ombudsman reports 10,000 FOI applications a year and at the same time the Ombudsman continues to highlight a high level of lack of compliance with FOI obligations by government agencies. So the low number of appeals to the ADT should not be able to be easily interpreted as a high level of compliance by government agencies and, therefore, a lack of need to appeal. We then, of course, go on to propose an Information Commissioner to replace the current ADT appeal jurisdiction and the Ombudsman's role plus an enhancement of that function to fill a gap with promoting and monitoring compliance. We will leave it there for now.

CHAIR: I guess one of the curious things about the submission is the quite logical argument that the jurisdiction should be expanded but then raising the issue of an Information Commissioner, which to some extent takes away part of the jurisdiction. How do you reconcile those two apparently conflicting positions?

Ms CORNWALL: Well, there are areas where we suggest the tribunal's jurisdiction should be expanded. We identify that there are quite a large range of decisions in the community services area that are not subject to merits review. It is rather a labyrinthine area with many different provisions. Some decisions in that area do not apply or are not covered by the ADT because they are decisions that are referred through the Family Court, for example. That really needs to be looked at, and that we highlight. Guardianship decisions is another area that from an early stage has been flagged but does not seem to have been followed, and with public housing appeals also there is a separate review panel that exists in that area.

Very early on in the discussions about the ADT's jurisdiction it was flagged that there would be a logical move to shift those decisions into the ADT. So we are looking for an expansion in those areas where the Government is making decisions about vulnerable people, where they are making decisions about government benefits, but what we are highlighting with the FOI jurisdiction is that so far it has been somewhat disappointing in having the impact of improving compliance with FOI obligations and that more needs to be done in that jurisdiction that is more holistic, if you like, by combining both the complaints jurisdiction of the Ombudsman and the merits review appeal jurisdiction of the ADT. So what we are highlighting with that one, unlike the others, is that it has not had the desired effect, and we are proposing that more needs to be done.

Mr KIRK: One other thing just in relation to freedom of information which makes it particularly difficult to be run on a tribunal basis in terms of appeals is that the person seeking the documents is not allowed to see the documents that the exceptions are claimed over, so particularly for an unrepresented litigant it is a terribly difficult task, and even with representation it is difficult to mount a coherent argument about why particular exemptions do not apply to documents that you are not allowed to see, so that is another reason why we think an alternative process might be superior.

CHAIR: Going back to the jurisdictional issue, in terms of things that should obviously be added in to the jurisdiction, are there any obvious things other than the ones that you have set out in the submission? In other words, if this Committee wants to come up with a wish list, should there be anything added to it other than what has been specified in the submission already?

Ms CORNWALL: The ones that we have explored in the submission are really quite strongly representative and similar to those areas covered by the VCAT, for example, and those areas, we would suggest, are the result of our consultations with community organisations and community legal centres, so I guess the short answer is no.

CHAIR: In terms of the Department of Housing ones, are you suggesting that there be an appeal from the Housing Appeals Committee to the ADT or that the ADT take over the role of the Housing Appeals Committee?

Ms CORNWALL: We are suggesting that the ADT take over the role of the committee. We certainly would not be wanting to add any more tiers of appeal.

CHAIR: Those appeals are against determinations to grant emergency housing, to place people on the waiting list?

Ms CORNWALL: Yes.

CHAIR: And what else?

Ms CORNWALL: We have set out some of them in our submission. The list is here: housing applications, eligibility for priority housing with the Department of Housing, rehousing applications, housing assistance and tenancy management.

CHAIR: So it would not cover people being on the list and not being allocated something because there is nothing available?

Ms CORNWALL: No, it is a merits review jurisdiction.

CHAIR: I had this awful feeling of 10,000 applications coming in or how many there are on the waiting list, and that is an issue about resources; it is not about decision making.

Ms CORNWALL: Yes, that is the limit of a merits review jurisdiction; it cannot force government to do things.

CHAIR: Actually there is a political issue that needs to be resolved rather than the legalistic one.

Ms CORNWALL: That is right.

Mrs GRUSOVIN: I could possibly suggest to you that perhaps it would be good if we could look at the question of the merits in relation to convictions by the department in terms of the difficulties that are experienced in the tribunal as it now operates. In fact, there are tenants who are continually having a breach of their tenancy lease in terms of the fact that they are being denied reasonable enjoyment of their homes. I just want you to be aware that it operates in two directions and that there are difficulties also in dealing with the rights of tenants. Those rights are very often denied because of the difficulties at the present moment of dealing with people who are causing a great deal of distress.

CHAIR: There are a lot of lawyers on this Committee, which you can see from the earlier witnesses. There are also a lot of lower House members who spend half their lives trying to deal with the Department of Housing.

Mrs GRUSOVIN: And trying to look after the rights of people.

CHAIR: Perhaps something less self-indulgent. The conflict of interest aspect—I am just wondering the size of the issue in terms of the frequency of the cases. I appreciate that to some extent you will not know, but in terms of the cases that have come to your attention, is it just the one or just the two or is it a much broader issue than that?

Mr KIRK: No, I think it is only two, both in community services. But they both involve the same client, once when we were representing them and once when they were without representation, and they are a peak body. But that is from, I think, a relatively small number of applications within that division.

CHAIR: Part of the problem is how do you know anyway.

Mr KIRK: Yes. There may be other instances, of course. It was only because the client knows the field so well that he was able to tell us.

Mr SMITH: If I can ask Mr Kirk a question. We have heard Mr North commenting about those who are represented and those who are unrepresented who appear before the tribunal. He was saying that 45 per cent do not go to a full hearing if they have representation and only 25 per cent if they have not got representation do not go to a full hearing. You have mentioned this issue of imbalance. Do you think that in fact that imbalance has led to that positive statistic of 45 per cent in that we have, if you like, somebody acting there with a bigger hammer and the issue is resolved and that is why it does not go any further? In other words, is it more complex than what he was saying—that with representation we have more efficient outcomes? Could it be in fact this imbalance that is giving that outcome rather than the fact that there is legal representation?

Mr KIRK: I guess I cannot argue with the statistic that people with legal representation seem to be less likely to go to a full hearing, but I do not think that changing the rules about when you allow representation and when you do not will make any difference to that, because the vast majority of people who do not have representation now and may well be more likely to go to a full hearing still will not have representation unless you make it compulsory. They are still not going to be able to afford a lawyer. The right to representation is not the crucial issue; it is whether or not people actually have access to it. If you give an equal right to representation and it is open slather, the people who do not have it now will still not have it and they will be at a disadvantage relative to the people who are able to have representation who might be against them.

CHAIR: I think you might have been in part of the discussion about the transparency in the appointment of members to the tribunal, especially the Legal Services Division. Do you have a view about that?

Mr KIRK: No, I must admit we certainly do not know and have not heard any criticism of it at all.

CHAIR: The Legal Services Commissioner has put to us that the Law Society and the Bar Association are consulted in the appointment of members of the Legal Services Division. The Law Society functions as defender of the lawyers as well as prosecutor and is also involved in the selection of people who sit on the tribunal and points to that as being potentially a problem , certainly, in terms of how people perceive it.

The Law Society has said in fairly robust terms earlier today that they do not think there is anything wrong with the process at all and they would be horrified at the preparation of a list of appropriate qualifications or characteristics of potential tribunal members. Would PIAC be inclined to one side or the other in that argument?

Mr KIRK: I think in terms of perception, I tend to have some sympathy for the Legal Services Commission's position, that it does not sound appropriate for a party, someone who is a regular litigant in that division to be making representations as to who should sit on the panel. In terms of criteria, that strikes me as an excellent idea in terms of making sure that you have got a range on paper that everyone can see of the qualifications that are desirable in someone suitable to sit on the tribunal.

The Hon. P. BREEN: If I can just touch on the question of people's rights to access to the tribunal, there is a problem generally which I hope that the current inquiry by the Law Reform Commission will look at and that is of people not knowing, even after going to the authority or the relevant government department, what their rights are in relation to legal services, for example.

Often people will be fiddling around with a conduct problem when in fact they have a negligence problem and they never actually get the opportunity of getting proper advice about that until quite often six years down the track. Once the statute of limitations comes into play, someone then says, "You should have been suing the solicitor for negligence" or "You should have been pursuing that aspect of the solicitor's activities."

That seems to me to be similar to the problem you were alluding to and that is people not knowing and having anybody they can go to to put them on the right track as to where redress lies. Do you think that the tribunal could in some way fix that problem that society seems to have?

Mr KIRK: In relation to complaints about legal practitioners, I would have thought it was incumbent upon the Legal Services Commissioner. By the time a matter gets to the tribunal it is perhaps too late, anyway, and few get to the tribunal relative to the broad number of complaints originally made to the commission. I had understood that the Commissioner did take the approach of trying to make clear at the outset when complaints came in what the Commissioner's process could achieve and could not achieve and asking the consumer what they were seeking to get out of this in the light of that information. So, in relation to legal practitioners, I think the responsibility lies there and I certainly hope that it is being fulfilled, but I do not know.

Ms CORNWALL: It is interesting to make the parallel with medical practitioners, for example, where the Health Care Complaints Commission has jurisdiction. There is clearly a division between those people who sue a doctor for damages and those people who complain to the Health Care Complaints Commission. You rarely get them doing one or the other. It is only when people do not have a meritorious legal claim that lawyers suggest they make a complaint. There is a difficulty in that area as well. Certainly, the Commissioner does not see it as her role in that area to advise people of their legal rights.

The Hon. P. BREEN: That is in the health context of the Health Care Complaints Commission. I think the water is a bit more murky in the legal area, though. If you ring the Legal Services Commissioner with a problem, the Legal Services Commissioner sees himself as all things to all people and tries to bring the inquiry in, but does not have any processes in place to actually advise people about negligence.

Ms CORNWALL: It would be beyond the statutory role at present. I am not suggesting it could not be extended, but technically it would be beyond, to provide advice formally to be recognised as the agency to provide advice to people on their private civil rights.

The Hon. P. BREEN: In my short experience here, I have seen numerous cases of people who had, on the face of it, negligence claims against legal practitioners and nobody ever advised them about it. They just presumed that because the question of a solicitor's conduct is being looked at either by the Bar or the Law Society, that is the whole issue and no-one has ever actually said to them that there is also the question of negligence.

Ms CORNWALL: The same thing happens in the health area. I would concur with Mr Kirk's comments that the proper agency to do that would be more likely the Legal Services Commissioner rather than the tribunal.

CHAIR: Can I return to the issue of legal representation. I guess the problem that I see is that if you start putting impediments in the way of people having legal representation, you get to a situation where the applicant is there with no expertise and the respondent will usually be a government department, someone without legal qualifications and all the rest, but doing this every day, and you have an automatic imbalance. There is a separate issue about the cost of representation. That is a separate issue but the ideal solution is to have the representation for the applicant because there will inevitably be an imbalance.

Ms CORNWALL: It does depend on the jurisdiction. In the original submission that we put to the Government, we did a survey of community legal centres that appear in areas like migration review, refugees and also in what was the Community Services Tribunal. Where you have people who are particularly vulnerable, an inquisitorial process has been very strongly favoured by agencies such as the Administrative Review Council. They have done quite a lot of research on this.

I think obviously in areas such as the Equal Opportunity Division where you have private legal rights being determined and a clearly adversarial process, both parties need representation to be most effective. Where you have merits review jurisdiction, such as the General Division, it is not just legal issues that are being argued. It is actually the merits of the case, and there is much more potential there for the member to drive the process, to have more of an inquisitorial process.

Certainly, the experience of the Victorian Administrative Appeals Tribunal as it originally was and in the Federal jurisdiction in the AAT, it is quite well documented that as those tribunals grow and the more lawyers move into them, the more highly legalistic they become. We have put that there is an issue about equality and if one party is going to be represented, then really for justice to be seen to be done the other one should be represented too.

Our study point was that legal representation should only be by consent where the tribunal member has more control over it rather than the parties coming in and assuming they have a right, which is the case in the ADT at present. If you reverse the onus and give the tribunal more control over whether there is legal representation, we have argued it would be a better, more equitable forum.

The Hon. P. BREEN: Do you see any merit in separating out those aspects of the tribunal that are more legalistic and involve questions about legal representation, for example, the Legal Services Division, having a different tribunal, call it something else?

Ms CORNWALL: I do not think it matters whether they are different divisions or different tribunals, but certainly we have argued that you need different procedures for those different forums.

The Hon. P. BREEN: One of the problems of contamination of administrative-type decision makers by lawyers is the question of mixing different divisions together so that it becomes blurred over time. One area is not legalistic and the other area is more to do with negotiation.

Ms CORNWALL: We certainly have not come across any evidence that the members of the different divisions are, to use your word, contaminated. They have a clear understanding of the different natures of the parties, the role of the different divisions. But I guess it is certainly something to keep an eye on to see whether that does occur because we are seeing this trend to an amalgamation of civil and administrative tribunals throughout the country. I guess there is no straight answer. We do not quite know how that is going to be done.

Mr KIRK: That issue might arise more pointedly if the proposal to bring the Fair Trading Tribunal in as a division of the ADT was proceeded with.

The Hon. P. BREEN: I was thinking of that. I am familiar with legal issues, so I know there are quite a lot of legal issues dealt with now by the Fair Trading Tribunal, particularly questions of costs because of the $25,000 ceiling. People can go to the Fair Trading Tribunal and have a good argument with their solicitor that they cannot have anywhere else. So that would be an interesting question if they decided to bring in fair trading. What do you see as the most serious difficulty with the ADT as it stands at the moment?

Mr KIRK: I am not sure, but I think it is the lack of public awareness of what jurisdiction it has and the fact that its jurisdiction needs to be extended. I think the problems arise there more than in its day-to-day practices.

CHAIR: Neither of those issues can be resolved by the ADT.

Ms CORNWALL: No. I guess our focus is on the General Division and the Community Services Division which is a review of government decisions. The ADT is part of a package of accountability measures and perhaps there is a question, to some extent, that concerns about the profile of the ADT could be addressed if, for example, the President of the tribunal had perhaps a higher profile dialogue with government agencies about what their obligations are. That tends to take away then the perception of independence, so that is always a contention.

CHAIR: It is always a difficult path to tread.

Mr KIRK: I guess in a related area, someone like the banking ombudsman, which is a private body run by the banks but fulfils a similar function, particularly earlier on, had a very high public profile for customers and also has had a fairly strong role in trying to get banks to change their ways at a policy and internal management level.

CHAIR: I thank you for coming along and helping the Committee with its deliberations.

(The witnesses withdrew)

(Luncheon adjournment)

CHRISTOPHER JOHN GUELPH PUPLICK, President, Anti-Discrimination Board of New South Wales, Level 17, 201 Elizabeth Street, Sydney, and

ANGELENE CORYN FALK, Senior Legal Officer, Anti-Discrimination Board of New South Wales, Level 17, 201 Elizabeth Street, Sydney, affirmed and examined:

CHAIR: Mr Puplick, did you receive a summons issued under my hand to appear before the Committee?

Mr PUPLICK: I did.

CHAIR: Ms Falk, did you receive a summons issued under my hand to appear before the Committee?

Ms FALK: I did.

CHAIR: The board has made a submission to the committee. I take it you do not have any problems with that being made public?

Mr PUPLICK: No, Mr Chairman.

CHAIR: Can I perhaps commence the questioning? Are you generally satisfied with the present operation of the Equal Opportunity Division of the ADT?

Mr PUPLICK: Mr Chairman, the answer to that is, in general terms, yes. The Equal Opportunity Division of the ADT performs a very important function as part of the overall suite of responses to human rights issues in New South Wales and obviously plays a key role in adjudication of complaints made under the Anti-Discrimination Act which have either been declined by the president and a review of that decision is sought or where the board has attempted to conciliate matters and a conciliation has not proved possible and the complainant has requested a judicial determination of the matter.

We send approximately 10 per cent of the 1,380 cases that we get each year, or that we got in the last year, I should say, to the tribunal one way or the other, and the fact that the tribunal is there and people know that at the end of the day they can have matters resolved effectively in a court of law if they are not successful in having the matter conciliated I think makes it clear to them that they have genuine opportunities for redress and for what they see as justice in the system. I am very pleased that there is a specific Equal Opportunity Division of the tribunal where there can be some expertise built up in discrimination matters, although I would suggest that it might be worthwhile the Committee considering whether in fact all matters under the Anti-Discrimination Act should automatically go only to the Equal Opportunity Division and not some matters go to the Equal Opportunity Division and some to the General Division.

In the General Division there tends not to be the same degree of expertise and experience that there is in the Equal Opportunity Division. I think that the other thing is that it would be worthwhile and might improve the operations of the division if there were a greater concentration on building up a core membership of senior members rather than having a very small core of senior members and bringing a very large number of part-time members into the process. Given that the material that is going to the Equal Opportunity Division tends to be more and more complex and difficult material, I think that would improve the operations. It would be a resource question, of course, that the Government would have to address, but in general I think that the Equal Opportunity Division has been doing a very good job with limited resources in the period of time that it has been in operation.

CHAIR: I think one of the points in your submission was about increasing the jurisdiction of monetary amounts that can be awarded by the tribunal and bringing that into line with the current District Court limits. I must say that the Law Society this morning was fairly firm in its opposition to that proposal. The opposition was based, as I understood it, on a concern that because the tribunal deals in a non-formal, non-legalistic way perhaps in some of its jurisdictions, it is inappropriate to have a monetary limit, or effectively no monetary limit, on the tribunal, because as was pointed out to us, the jurisdiction for motor vehicle claims now in the District Court is unlimited. I am just wondering how you would respond to that, whether perhaps the comments you were making might have been better restricted just to the Equal Opportunity Division, and generally how you would respond.

Mr PUPLICK: I think it needs to be remembered that when the old Equal Opportunity Tribunal was set up, the maximum damages which were capable of being awarded by that tribunal were specifically set at the maximum damages that were then available at the District Court. That was the figure that was actually picked when the tribunal was originally established. The District Court then took off in terms of the maximum amount of damages and the tribunal remained the same. I have to say to you that with a maximum cap of $40,000, when we get cases which are really, really egregious cases, where people have suffered significant loss and where they have been put through some of the most horrendous treatment, mistreatment, vilification, abuse, threats and all the rest of it, if at the end of the day they have been legally represented and if in particular what they have had to do is fight the Department of Education or Corrective Services or police or Treasury or social welfare departments, which have unlimited pockets for engaging counsel, for dragging matters out, for making litigants go through the hoops time after time, if the litigant has had to have legal representation, the $40,000 does not go very far at the end of the day and people can end up with almost nothing and be discouraged from pursuing their rights because they know that even if they get the maximum damages they are going to end up with virtually nothing once the representatives of the Law Society, appearing in a different capacity, have gouged their bit out of the whole system. So, to that extent, I do not think that the criticisms are well made.

The Law Reform Commission in its examination of this matter specifically recommended that the damages threshold be lifted to $150,000 in most instances but $250,000 where the tribunal was presided over by a District Court judge. The other thing that I would like to draw to the attention of the Committee is the experience in the United Kingdom. The Commission on Racial Equality in the United Kingdom a couple of years ago had a maximum damages of £11,900. When that damages limit was removed the commission started to award far more substantial amounts and in one case awarded an amount against a local government department or a local government authority in the United Kingdom which was in excess of £100,000.

I can tell you from discussions with my colleagues in the United Kingdom that it concentrates the mind of departments and of respondents when they think that they are in for substantial damages, particularly since in some private sector circumstances those damages are tax deductible to the respondent anyway. So the idea that you actually have a meaningful financial penalty rather than $40,000, which in the budget of a department like health or education is mere petty cash, substantial damages, in my view, will actually concentrate their mind about whether in fact they want to fight this matter through to the end or whether they want to be reasonable and to settle it or to change their procedures in a way which will avoid similar instances coming before the tribunal.

CHAIR: The principle that you would argue for is not the equality of the District Court and the tribunal but an acceptance of a substantial verdict being able to be made by the tribunal?

Mr PUPLICK: I am not wedded to a specific figure, Mr Chairman. I think it simply needs to be set at a level that has some relativity to damages in other jurisdictions which might be hearing claims for compensation or damages which are equivalent to the sort of damage which is done to people in the anti-discrimination legislation framework.

CHAIR: From the submission we have received from the tribunal, the disposal rates in the Equal Opportunity Division are slower than those in the General Division. The tribunal figures indicate that 55 of the total 151 disposals in the Equal Opportunity Division were disposed of within 12 to 24 months of application and a further 21 were disposed of over 24 months after application. Do you consider those rates satisfactory? Are there any other steps that the tribunal might be able to take to improve those disposal rates?

Mr PUPLICK: Chairman, I think it needs perhaps to be re-emphasised that the material that we are sending over to the tribunal is becoming increasingly complex and increasingly difficult, which is why I made the point earlier about strengthening the core experienced, legally qualified membership of the tribunal. So the tribunal is put in a position that, compared with some other matters that might be dealt with in the General Division, they do in fact have to come to grips with a lot of very complicated issues, particularly in areas of disability-related complaints which are now becoming the fastest and most significant group of complaints that the board and the tribunal is dealing with.

The second is that the tribunal has, traditionally like the board, extended a great deal of leeway to the parties, particularly to complainants. A lot of the complainants are people who are otherwise unrepresented. They are often people who do not have very good English language skills. They are people who are not used to court situations. They are people who have not necessarily kept records, pieces of papers, receipts and all of

those sorts of things, and so very frequently it is the parties themselves who go to the tribunal and when in the tribunal then ask for an extension of time to deal with matters.

Sometimes cases are adjourned to allow the parties to actually negotiate with each other and so something which appears to be a couple of weeks delay may in fact be a couple of weeks that has been set aside to allow the parties to see if they could resolve the matter between themselves because the whole anti-discrimination framework is attempting to promote a conciliated rather than an adjudicated outcome, and the tribunal, as I say, has resource limitations. So, I think that in that case I would not be critical of the rate at which the tribunal deals with matters.

In terms of the other matters which might be capable of being dealt with, I think it is worth examining whether, in fact, the right that people have to automatically take certain matters to the tribunal would not in fact be better dealt with by allowing the tribunal some latitude to determine on the basis of granting or not granting leave for a matter to proceed.

There are matters, for example, which I, as President, characterise as frivolous, vexatious, misconceived or lacking in substance. In a number of instances, my decision is not one that is accepted by the complainant. The complainant then seeks to have that reviewed by the tribunal. At the moment, the tribunal is required to give that a full hearing.

It seems to me if the tribunal were empowered to look at the papers and come to a judgment on the papers that here is clearly a case which is lacking in substance or which in fact has simply misunderstood the scheme of the Act or is clearly frivolous or vexatious and were able on the papers to say, no, we do not think that the President's decision in this instance is wrong; we are not going to grant leave for the matter to be taken to a full hearing.

So if I decide that a complaint is frivolous, that somebody has complained to me of anti-Irish jokes that have been put on a tea towel sold by some shop in The Rocks or some throw-away line that has been heard on a radio station, they come to me, I look at the matter and say this is simply a frivolous complaint, they then have the right to take that matter for a full hearing. The tribunal actually has to have a hearing into that, whereas if they were able to deal with matters on the basis of the papers, I think a lot of their case work could be avoided.

I think the other thing is the question of whether the tribunal itself should either be encouraged or allowed to develop a more aggressive procedure in terms of the awarding of costs against unsuccessful applicants where the applicant persists in a case which is clearly without merit. Judicial Member Rees, in a recent case involving Mr Crewdson, in fact raised this question as to whether the tribunal should be more prepared to use the potential deterrent of costs where a matter clearly is not one of merit. I think that needs some further consideration, but I would not in any sense rule it out as an option.

CHAIR: I will not comment on the propriety of dismissing the frivolity of Irish jokes with Breen, Lynch and Brereton sitting on the Committee.

Mr PUPLICK: The Attorney General at the time very specifically, with reference to the then Premier, said that the Act was not intended to cover matters of jokes, including Irish jokes or, as I say, in relation to the then Premier, Hungarian jokes.

CHAIR: One of the comments in the tribunal's submission to us noted that monitoring compliance with orders made against respondents in equal opportunity matters is very difficult to assess. Is there anything the tribunal can do about that or does the tribunal simply have to stand back and say that it is up to the parties to come back if there has not been compliance?

Mr PUPLICK: No, I think there are some potential options around for the tribunal. I think if it is made clear that the tribunal's orders are clearly enforceable and people understand that and that there is no legislative barrier to the enforceability of the decisions, it seems to me no reason that you could not look at a thing like compliance certificates, that if an order is given, for example, that a certain company must undertake a training program which has been managed or provided by the Anti-Discrimination Board or by some other organisation to deal with sexual harassment in the workplace, and the tribunal says, "Part of our order is that within six months you will have had anti-discrimination training or anti-sexual harassment training in the workplace", that in fact a system which is a compliance certificate that reports back to the tribunal that within six months such

and such training was undertaken and the level of participation was X, Y and Z, those sorts of reporting back to the tribunal should not be too difficult to deal with.

Clearly, unless the tribunal has additional resources, it is not going to be able to send people out to do on-the-spot inspections, but I think that statements coming back in saying, "Yes, it is true, such and such a payment was made within the 30 days that I was told to make the payment, such a training program was undertaken within the six month period", I think that those formal compliance certificates at a level which the tribunal would accept as being proof that something had in fact been done, not just a letter back saying, "Yes, we have done something", is probably one of the things that could be addressed.

CHAIR: Would that mean legislative change to allow that to happen or is that power already there with the ADT?

Mr PUPLICK: I am advised that it may need some legislative change to ensure that such system was in place and such compliance certificates had to be provided.

The Hon. P. BREEN: You have mentioned the leeway the complainants get when they are not legally represented. There was some question or some debate this morning between the Law Society and the Public Interest Advocacy Centre about the veracity of allowing lawyers on a more expensive basis. The Public Interest Advocacy Centre suggested that the whole regime is set up in order to facilitate the conciliation process and that once you bring the adversarial element into it, it becomes more complex. On the other hand, the Law Society said that people ought to be represented because usually the defendant, or whatever it is called—the other side—is funded by the Government or some organisation whereas an applicant has to rely on their own resources. The Law Society suggested that there should be some system in place to provide lawyers for people seeking to get decisions. What do you think about that?

Mr PUPLICK: Mr Breen, the tribunal does have a sort of duty solicitor type of service available to advise people, but funding for that, I think, was actually provided by the Law Society or the Law Foundation, I think, in the first instance. That has certainly been very worthwhile. There is a reasonable amount of work that is done pro bono by a number of the major private firms around town and the board is quite active in trying to put people in touch with pro bono solicitors. The generally shrinking legal aid dollar has meant that this has been one of those areas where it is really not a priority matter for anybody to get legal aid compared with issues in the criminal justice system, so it does in fact go back to that.

It is certainly true that the really difficult cases tend to involve large companies or government departments, and they are always well represented at public expense. So to the extent that either the tribunal moves increasingly to more of the alternate dispute resolution, the mediated settlement, and indeed the tribunal does offer a mediation route for people once they arrive there, but I guess it would be a difficult public policy question to say that people should have access to particular types of legal representation in the anti-discrimination jurisdiction when it is so hard to get in a variety of other jurisdictions. I think it goes to a much larger public policy question. But the fact that most complaints are brought by individuals does mean that there will be a very high proportion of people whose legal rights will not be as well served as they might have been because they simply cannot afford the legal representation if they are up against something like the Police Service or the Health Department.

The Hon. P. BREEN: Do you think that the tribunal bends the rules sufficiently to facilitate those people who are not represented?

Mr PUPLICK: The tribunal in fact does not have to bend any rules. The legislation specifically says that the tribunal may in fact be very flexible. The legislation itself actually positively encourages the tribunal not to be overly concerned about the rules of evidence and deliberately encourages the tribunal to give as much flexibility as possible to the parties. It has to be said that it is not always the complainant who is the most meritorious in these situations. Sometimes the respondent is the person or organisation that is being genuinely put upon in the circumstances and so I think that, again, this goes back to the idea that if you had a smaller core of well experienced people in the division and you confined the matters to the Equal Opportunity Division, they, I think, would develop the rules and procedures which would maximise the fairness element of the whole system.

The Hon. P. BREEN: Just finally, there was a suggestion by PIAC this morning that the lawyers get the best of both worlds. When they want to argue procedural issues they say, "Well, you know, this is supposed

to be a tribunal where strict rules do not apply," yet on the other hand, where it is to their advantage, they then use the principles of evidence and procedural fairness and so forth to argue their client's case, whether it is the respondent's or applicant's. Do you think that the lawyers get the best of both worlds as it stands?

Mr PUPLICK: I think that it is an inherent feature of any formal judicial system that there have to be various rules, otherwise the whole process becomes unmanageable and ungovernable. I think it really depends on the leadership of the tribunal as a whole, of the division in particular, to ensure that the tribunal has before it a real commitment to fairness and to equity in the whole process. I do not think you can construct a system which cannot be twisted and bent by legal argument as long as you are operating within a framework which requires you to judge was a particular piece of legislation breached or not breached. My colleague reminds me that the other element of this, of course, is the inquiry process of the tribunal itself—in other words, the tribunal does not simply have to take what the various parties say to it; it has the capacity, if it wants to, to actually seek out information so that it can inform itself properly as to the facts of the matter and then come to the appropriate conclusions.

CHAIR: One of the proposals in your submission dealt with allowing the president of the board to intervene in ADT inquiry proceedings. That has not as yet elicited a series of howls of protest. I am just wondering whether you have put that proposal before to anyone, whether it has within put to the Attorney, for example.

Mr PUPLICK: It has been put to the Attorney and to others on a number of occasions. Any of those qualitative amendments to the ADT Act have always been dealt with on the basis of saying that the Law Reform Commission is examining this question. In the report of the Law Reform Commission there is support for the president to have a capacity to intervene where there is a public interest in a matter, and of course we do support that very strongly. As you know, Mr Chairman, I have, as President, the power to intervene in matters in the Industrial Relations Commission as a result of the 1996 Industrial Relations Act, to deal with questions about discrimination in industrial awards and enterprise agreements, and it is slightly nonsensical that I actually have power to intervene in another jurisdiction in my own right and do not in the jurisdiction which is central to my work.

May I give you an example of exactly the sort of case where this would be important? There was a complaint which went to a very important issue of public policy, namely, whether the Public Sector Management Act overrode various anti-discrimination provisions. If the answer to that is yes, then the Anti-Discrimination Act is substantially weakened. The case proceeded and the tribunal in the first instance held in favour of the complainant and rejected the respondent's argument about the Public Sector Management Act. The respondent appealed, and in the process the respondent made an offer to the complainant to give the complainant their job back. The complainant accepted their job back. Part of the condition for that was that the complainant would not challenge the appeal. So the appeal went forward with no contradictor.

I was not able to appear to contradict the proposition. The complainant was out of the loop because the complainant had got their job back on the basis that they would not contest the appeal. The appeal, therefore, went forward uncontested, and a very significant issue in terms of public policy was left without anybody to argue the case, which I think was an important public interest case. So I believe that that is a clear example of when a complainant is either not in a position or a matter does not have an active contravenor. In those sorts of circumstances, if there is a public interest test, I would be perfectly happy for the legislation to prescribe that the president should intervene only where there is a public interest in those matters. It might be more broad, but that as a very de-minimis position, I think, would substantially strengthen the Act, not the least reason being that it would discourage departments from pursuing a course of action which is designed to bully the complainant out of having the matter heard by the tribunal in they knew that in fact in those circumstances the issue of principle might be tested by the president rather than be tested by an individual complainant, who might be subject to all sorts of pressures not to proceed.

CHAIR: It might just persuade them not to be bullied out of it, and not to be bribed out of it either.

Mr PUPLICK: Indeed.

The Hon. J. HATZISTERGOS: Have there been any instances of bullying or bribery that have come to your attention?

Mr PUPLICK: Well, the one that I have just described.

The Hon. J. HATZISTERGOS: That is one case.

Mr PUPLICK: In my judgment. In terms of bullying I must say that I think there have been a number of occasions. I know there have been a number of occasions where complainants have said to me or to my officers, "Look, I simply cannot go on with this. The respondent has made it clear to me that they will fight me all the way through the tribunal and, if necessary, in the Supreme Court, and, if necessary, in the High Court, and, frankly, I do not have the resources, I do not have the energy or the time or anything else to pursue this matter, so, I am sorry, I am out of here."

The Hon. J. HATZISTERGOS: Is that not a question, then, of providing some resources? Why should it be you who takes the cause on? If there was a fund or pro bono assistance or some body that could adequately ventilate his interest, why should you be intervening in a situation where, for one reason or another, the complainant does not want to?

Mr PUPLICK: Because the Anti-Discrimination Act charges me as president with a number of responsibilities. Among those responsibilities are the advancing of the principles of anti-discrimination, the education of the community and the promotion of human rights and equal opportunity. If that is best achieved through the judicial process, the question is why I should be empowered to spend money in relation to education and spend money in relation to promotional activities and spend money in relation to advocacy issues but be prohibited from discharging that advocacy role within the body which, by judicial determination actually sets the rules under which I then have to operate. Part of the argument is that the tribunal from time to time tells me under the Act what my powers and responsibilities are and I am not entitled to be in the tribunal to argue with them an interpretation of my powers and my responsibilities but they can hand down a decision that says, "These are your powers and responsibilities," and I do not have the capacity to be an advocate.

The Hon. J. HATZISTERGOS: Mr Puplick, with the greatest of respect, it seems to me that you are moving on from the question that was put to you before. It is a different argument from saying that you are going to take a role in the merits or otherwise of the decision which involves the complainant and the body in question that may have been the perpetrator of discrimination and it is an entirely different question to say that you want a right to intervene to argue over the interpretations of provisions in statutes that may or may not have an impact on your role. The second scenario seems to me a legitimate form of intervention. The first I have some difficulty with when you are taking an activist role on the part of one party to a dispute. Why should you be allowed in there to take what is a partisan role, one might say, in a dispute between two parties?

Mr PUPLICK: As I said, sir, in relation to that at the beginning, I think that where the issue concerned is an issue of public interest, that that in fact is a legitimate role for the President of the board. I think the other thing I should draw attention to is that in most of the other jurisdictions around Australia, my counterparts are in fact active intervenors under their statutes in the equal opportunity legislation which operates in those other States and Territories.

The powers of the President of the Anti-Discrimination Board vis-a-vis intervention in the judicial process in the public interest are more limited in New South Wales than they are in almost any of the other States and Territories. The merits or otherwise of this argument were canvassed at enormous lengths in the report of the Law Reform Commission which supports the proposition of the limited role of the President to intervene.

It does not necessarily mean intervention will always be on the side of the complainant. The tribunal itself does have the power from time to time, if it wishes, to call the President to inform him of particular matters. However, it does seem to me that where there are significant public interest issues raised, public interest issues in relation to things like coverage of the Internet, hate speech on the Internet, for example, where the arguments are very often arguments which do not necessarily go to the particularities of the case that is before the tribunal but which raise broader public interest and public policy questions, the President, in my view, should have a capacity to intervene. I do not say that the intervention should be confined to being on behalf of one of the two parties.

The Hon. J. HATZISTERGOS: The other States that you say have greater capacity for their presidents of their anti-discrimination boards to intervene, do they have a public interest advocacy centre, and where would you see the role of the public interest advocacy centre alongside whatever intervention you undertake on behalf of the public interest?

CHAIR: Presumably the public interest advocacy centre does not have a statutory role in this.

Mr PUPLICK: It does not. What we are seeking in the way in which we presented our submission is, I guess, more of a traditional amicus brief in the proceedings. As to the question as to whether those other jurisdictions have equivalence of PIAC, the answer is I do not know as a matter of fact, but I presume that there are equivalent community legal centres or public interest advocacy centres in those other States and Territories.

But it does seem to me that the fundamental principle is that where anti-discrimination legislation is in some respects under challenge and there is a public interest in the court being as well-informed as possible on that, it is unacceptable to say that is a function for the private sector. It is not. It is a core function of human rights agencies funded by public money. It is not a function to say that your human rights will depend upon the extent to which a public interest advocacy centre can independently fund itself to protect the human rights of the people of a State or Territory. That is a core function of anti-discrimination agencies, it seems to me, and it is a key responsibility of government to have them in a position that they are funded and empowered to do so.

CHAIR: Is not your strongest argument that, subject to there being public interest tests, you have got the power to intervene in the industrial relations system under the 1996 legislation, and it is bizarre that you would not have a similar power to intervene in the ADT?

Mr PUPLICK: Exactly, and that is recognised in the Law Reform Commission report.

The Hon. J. HATZISTERGOS: You have some role, do you not, in matters of intervention that go to the ADT whereas you are limited in matters that go to the Industrial Tribunal?

Mr PUPLICK: No, quite the contrary. When a report goes from me to the ADT, that is the end of the matter. I do not even get automatically notified, unless I go chasing it, that the case is on at a particular time or that a judgment is being given. We have to actually go scrambling around the place from time to time to find out whether the cases we are interested in have been heard, if so, whether judgment has been given and, when judgment has been given, we have to chase up and make sure what the judgment was.

Once the matter leaves the Anti-Discrimination Board and goes to the tribunal, we have no further contact with it whatsoever. It is only if the tribunal were to call us to seek to clarification of a matter or call us to give evidence, then we might be involved, but that happens very, very rarely. Once the matters are out of the board and into the hands of the tribunal, we have nothing further to do with them.

At the Industrial Relations Commission level, we have the right, subject to the leave of the commission in most circumstances, to indicate that we have an interest in a particular matter. There are some where the commission has specifically asked us to present evidence to them. Because of resource restraints, we get numerous requests to intervene in the Industrial Relations Commission proceedings which we do not take up.

We simply do not have the resources to intervene in hearings about every award or enterprise agreement, so we have to be very selective about that and I would have thought exactly the same would happen in the ADT. You know, we would not have the resources to be there for every complainant in every case. We would have to be genuinely very selective about the occasions on which we sought to appear.

The Hon. J. HATZISTERGOS: I suppose what I was saying before is that you have a role in the matters that go before the tribunal in the sense that you are involved in the initial complaint, assessing it, dealing with it, conciliating it, whatever, forming, no doubt, some views about it in the course of trying to resolve it and then, of course, the matter goes to the tribunal for, in effect, determination. A matter for the tribunal in that sense cannot be activated unless there is a complaint.

Mr PUPLICK: Yes.

The Hon. J. HATZISTERGOS: So your role there is much more involved than in the Industrial Relations Commission where you have no initial responsibility. You are called in.

Mr PUPLICK: That is correct, but it has to be remembered that there are really two parts to this. The first, where a decision of mine is being challenged and that decision may be that the decision is lacking in substance, that it is frivolous, misconceived, vexatious, or that it is not a contravention of the Act. I make a

decision about that and I make that decision by and large by looking at what the complainant has brought to us as the complaint. That is capable of being challenged, and I have indicated how I think handling that could be improved by the tribunal.

The other matter is where we have conducted an inquiry and attempted to conciliate a matter, the conciliation has failed and the complainant has requested the referral of the matter to the tribunal. But I want to make it quite clear, I am prohibited from making any sort of determination in those cases as to which of the parties is in the right or in the wrong or whether neither of them or both of them have merit to their case.

My role is not as a mediator or as an arbitrator but purely as a conciliator. I do not come to any formalised judgment about the merits of the particular case that ends up before the tribunal.

The Hon. J. HATZISTERGOS: But you are involved in the case and you may have formed views about the case in the course of the conciliation. You see, would you not be better off saying that there may be a better case for the Attorney General to become more activist in this area in terms of putting submissions on the issues rather than necessarily involving yourself?

Mr PUPLICK: That is complicated by the fact that the Attorney General in New South Wales and in the Australian political system is also a political figure. The question of whether the Attorney General would become an activist in supporting cases against his own department, against the police department, against the health department which might end up costing the public revenues considerable sums of money, puts even the best Attorney General in a very invidious position in terms of saying, "Well, I am going to become an activist in the case which involves one of my colleague Minister's departments."

The Hon. J. HATZISTERGOS: Is not that what happens now when he prosecutes them for breaches of offences? He does it all the time.

Mr PUPLICK: In most of those cases there is a significant role for the Director of Public Prosecutions, and in other cases the prosecutions are prosecutions that flow almost automatically under land and environment legislation and under breaches of the Public Health Act and all the rest of it. Where there are clear breaches of legislation, a prosecution occurs, but this we are not talking about prosecutions.

We are talking about the question, will the Attorney General become an activist in saying to the Minister for Education, "I am about to really go through your department because I think that your attitude towards disabled students is unsatisfactory." Is the Attorney General going to become an activist in saying to the police Minister, "You have an unacceptable level of sexual harassment in the Police Service and, therefore, I am going to become an activist in getting you into the tribunal to clean that up"? Is he going to say to the Minister for Corrective Services, "There is too much sexual harassment and discrimination going on in the prison system. I am going to have you in front of the Equal Opportunity Division in order to make orders for you to change your practices"?

The Hon. J. HATZISTERGOS: Assuming he does not, are you saying you should and would?

Mr PUPLICK: I would have to consider that matter and, if it were in the public interest, yes, I certainly think that that is the role of the President of the Anti-Discrimination Board. The Government can determine at the end of the President's term whether they think that the President has discharged his or her responsibilities properly or not.

Ms FALK: I speak in relation to the industrial jurisdiction particularly. I am the officer at the board who has primary carriage of a lot of those matters. I understand you seem to have some concern about the connection of the President to matters that may come before the ADT and then a continued role for the President in that regard.

In the industrial matters where the President has intervened, they often involve matters of discerning potentially unlawful discrimination in, for instance, industrial awards generally. It may be that an individual matter may come before the President as a complaint regarding those very issues that were before the Industrial Commission.

However, the President has intervened a number of times very effectively in a manner which goes to the general public policy issues that arise in those cases, for instance, whether or not equal pay for equal work

for men and women should in fact be afforded in awards. That might be a matter that comes before the President in terms of whether or not a woman or a man has been paid the same in their employment as a discrimination complaint.

So there is a need to retain a degree of impartiality around the particularity of matters in the Industrial Commission and I would envisage that that same kind of anonymity or objectivity in relation to matters could also occur in the ADT. It may be in the example that the President gave in terms of the recent disability discrimination matter that an intervention could have brought to the tribunal's attention the decisions that would be relevant in terms of determining whether or not the Public Sector Management Act, for instance, overrode the Anti-Discrimination Act. That would be a matter of law rather than one that went particularly to the facts of that case.

The Hon. J. HATZISTERGOS: I have no difficulties with those sorts of issues. I have more difficulty in terms of involvement on the merits of a finding of discrimination against individuals. I suppose what concerns me is that it was suggested earlier in the President's comments that he would take on cases where an individual may be inclined not to take it on simply because he did not have the resources or because he wanted to clean up the operations of a particular Minister's department or something. I am not quite sure what form that takes.

Ms FALK: Certainly, a model like that would be one that the Committee could consider. Whether or not the Committee chose to go down that course would be a matter for you, but certainly in Western Australia that commissioner there actually acts as the advocate for complainants and brings matters to the tribunal. Consequently, they have very few decisions in the tribunal because most matters are sorted out within that commission, or if they do go to the tribunal they are only those matters that are of particular public interest. For instance, there has been a recent decision on caring responsibilities and whether or not the failure to provide job sharing arrangements discriminates against women. That was a major public policy case that that commissioner decided to run on behalf of the complainant in that tribunal, and that is another model.

Mr PUPLICK: I think the other thing, sir, is that I would not want you to think that the only areas that would attract the president's attention would be purely in the public sector. One of the things that is very frustrating is to see, for example, an industry sector or a particular operation in an industry sector that constantly appears as a repeat respondent before the tribunal, and there are a number of areas. For example, there are a number of real estate agencies or a number of hotels where the treatment of indigenous people is quite unacceptable, and the complaints keep on coming time and time and time and time again against the same respondent.

The indigenous people concerned are rarely in a position that they can pursue all of those matters at great length and great complexity through the legal system. Despite the fact that they lodge complaints and we attempt to conciliate them, we are unsuccessful and the matter is then potentially going to the tribunal. In circumstances like that it does seem to me that there is a role for the president to say, "Look, this is a matter which clearly is a systemic problem which needs to be addressed, and it is a matter which should be brought to the attention of the tribunal and the tribunal should be asked to determine is this a systemic problem? If it is, is it appropriate for the tribunal to make some order to try to overcome it?

The Hon. J. HATZISTERGOS: So you would facilitate some form of class action, would you?

Mr PUPLICK: It might not be a class action. Representative actions are already provided for under the legislation. It may well be that in a particular instance the president would intervene in support of a particular complaint which actually addressed the specific issue, the specific respondent and the whole history of that issue encapsulating a good case.

CHAIR: Thank you very much for the attendance of both of you today. It has been most helpful for our Committee deliberations. If we have any further issues arising out of your evidence from any other witnesses we will obviously be in touch.

(The witnesses withdrew)

ALAN ROBERTSON, Barrister, Ground Floor, Wentworth Chambers, 180 Phillip Street, Sydney, sworn and examined:

CHAIR: Mr Robertson has not made a submission. That is because we got him to come here because of his expertise, and he has, essentially out of the goodness of his heart, come here to give evidence and help us. I would like to place on record my thanks to him for being so co-operative. For the purposes of the record, could you state your occupation and the capacity in which you are appearing before the Committee?

Mr ROBERTSON: Yes, my occupation is a barrister. I am appearing before the Committee by invitation to assist it in relation, primarily anyway, to the question of whether there should be an administrative review council or equivalent body in New South Wales.

CHAIR: And did you receive a summons issued under my hand to attend before the Committee?

Mr ROBERTSON: Yes, I have a summons.

CHAIR: The first and most obvious question is, I guess, do you think we should have an administrative review council in New South Wales? Could you perhaps outline for us its role in the Federal jurisdiction, what it involves, what it does, and then perhaps whether you then think it is useful for that to be replicated in New South Wales?

Mr ROBERTSON: All right. Well, I have had distributed, I think, a photocopy of section 51 of the Commonwealth Administrative Appeals Tribunal Act, which sets out the functions of the Commonwealth council. I will not go through those in detail just at the moment. I thought I might indicate an overview of what it does in the Commonwealth sphere and perhaps pose a few questions that would be relevant to the overall question of whether New South Wales should have such a body or not, because of course there has been from time to time questioning about the continued relevance of the Commonwealth body. Although I was looking for it this afternoon, I could not find it, but about three or four years ago the Federal Parliament had a committee looking precisely into the question of the continued relevance and need for the Commonwealth body. I remember giving evidence to that committee. A report was produced which contains, if I may say so, a very useful discussion of the various factors pro and against having such a body. So it might well be useful to the Committee to perhaps get in touch with the people at the Federal Parliament and get a copy of that. It was about three years ago.

CHAIR: Thank you.

Mr ROBERTSON: The Administrative Review Council, so far as the Commonwealth is concerned is really by a different name a form of law reform body. It is a standing law reform body but it is a law reform body on a particular field or topic, so it does not have a general jurisdiction whether by reference or of its own motion, but it is designed to keep the Commonwealth administrative law system under review. What it does is it operates both in a sense at an everyday level; it deals with people who write in, whether they are from the bureaucracy or individuals who say, "Look, such and such a decision is provided for in a statute. There is no merits review. There should be"; or a bureaucracy would write in and say, "We are amending the Wheat Marketing Act and a question has arisen about whether a decision to permit the export of wheat should be subject to merits review. What do you think?" So that is at the sort of everyday level.

It also conducts research and makes recommendations to the Attorney-General in relation to more structural matters: what is the relationship between judicial review in the courts, merits review in the tribunals, the Ombudsman's office, and matters of that sort.

So I suppose that is an overview. But the question that needs to be addressed is: why do you need a standing law reform committee in relation to this particular topic? What is special about the administrative law system? Part of the answer from a government perspective must be that, by definition, administrative law is something which the Government has an interest in in every case. I am not using "the Government" in any sense of the party that happens to be in power. But in every administrative law case, whether it gets to a court or a tribunal or it does not, one of the entities is the Government or a government agency or a government officer by definition—whether it is the State of New South Wales or the Roads and Traffic Authority or whatever it might be. So that is why, in a sense, a government has a closer interest in the administrative law system than it would

have, for example, in the commercial law system, because mostly that is disputes between private individuals. That is one factor.

Another factor is that certainly the Commonwealth Administrative Review Council was set up at the beginning of the system, so part of its purpose was meant to be to see how the system was going to be put in place, to keep an eye on it as it developed, so the newness of the system was a factor there, and it may be a factor in New South Wales, because of course the ADT is relatively new, and, therefore, the relationship, for example, between the ADT, the District Court, the Supreme Court, the Ombudsman, all of that is relatively new, although of course some of the institutions have been in place for a very long time.

Another factor perhaps relevant to this question of why you might need a standing law reform committee on this particular topic is, as may be apparent from what I have been saying, the breadth of the topic, it is the reach of it across, in a sense, all agencies and the institutions that I have referred to, and probably a few more institutions as well. So the fact that it is across departments, across agencies, perhaps suggests that there needs to be a body taking an overall look at it.

I suppose the last factor that comes readily to mind is that it can be a pretty complex system by the time you tie in all those agencies, all those possible avenues for review of decisions, the number of administrative decisions that are made every day, and of course there are millions made every day, and, luckily, most of them are uncontroversial, but it is a complex field, both in a technical sense and in terms of its breadth.

I suppose the next question that arises is, "Well, why can't you get a government department or officers of a government department to do it? Why can't the Attorney General's Department perform this role of keeping an eye on the system?" I suppose my answer to that would be, "Well, think of the advantages that you might get from having an independent expert body which is not within any one agency in the system but, in a sense, stands outside them." In a sense, that is part of the answer. But you can get a centralised body with a pretty high profile, depending on who you appoint to it, with a capacity to bring in those who are involved in the system but are from outside the Government, where that body should not therefore be limited to the Government view. All of this, of course, is in the context that the Government is on one side in all these disputes and potential disputes. It has an educational role, a training role for agencies right throughout the government system, and it should not be, if it operates with, say, mainly part-time members—and I will come to the question of membership in a moment—too expensive. That obviously is going to be a factor.

In terms of membership, the Administrative Appeals Tribunal Act for the Commonwealth describes certain people who are ex officio members and then it allows other people to be appointed by the Governor-General. The sorts of people that you tend to find there would be, say, the Ombudsman, ex officio, and I am translating from Commonwealth into State language. You would probably find you had the head of the ADT; you would probably find you had the head of the Attorney's General's Department; the District Court still does a fair amount of administrative law work, so you might have somebody from there; you might well have the judge who is in charge of the Administrative Law Division in the Supreme Court; you might well have an academic, somebody who is expert in administrative law; you might have a practitioner; you would certainly have one or two from users groups, one would think, whether it is from one of the social welfare groups or consumers groups or whatever it might be. So you get that broad range of membership.

There is perhaps one word of warning about membership, and I am talking now about the Commonwealth body. It was found very useful to have heads of department on the council because they could give a pretty good indication of what was going to be feasible and what was not. The risk and the danger, I suppose, would be that because you had those high-level people, there was a tendency from time to time for the body to perhaps become to some extent a captive of the senior bureaucrats. I do not want to overstate it. Perhaps I could put it this way. There is a fine line between having the necessary input of experienced and senior officials as to what is possible by way of reform and so on, but at the same time, you do not want the result of that to be that this standing law reform body is insufficiently innovative in its proposals, so there is a tension there between having the expertise, but there is no point putting that up to government, because it will not work, and the body saying, "Oh, well, we will not even bother thinking about it." It depends, of course, on what body you want, what sort of body you were planning for, but if you overload the membership in that way, it tends to be a recipe for conservatism to some extent, which may be a good thing or not. So I suppose that is all by way of introduction.

If I can come, then, Mr Chairman, to your question of whether New South Wales should have such a body, with all those things I have mentioned—the newness of the system, the complexity of the system, the

breadth of the system—unless there is some body within either a government department now or a body that could be set up, or two or three people who are given that task, then it would seem both from an involvement of citizens point of view, an expertise point of view, like a good idea to think about having such a body. As I say, that would have the advantages of being able to, from outside the system or, in a sense, above the system, see how it worked and how it might best be co-ordinated. It does not only flow, of course, from the existence of the ADT, although that might be one of the things that it first did, because there is still, I think, unfinished business as to what the extent of the ADT's jurisdiction should be.

CHAIR: Absolutely.

Mr ROBERTSON: I know originally with the former Attorney General it tended to be, I think, the areas that he had responsibility for that went in first just to show that it was quite safe.

CHAIR: It was perhaps those areas that were least able to resist his requirement that they go in.

Mr ROBERTSON: That is another way of putting it. So there is some unfinished business there. It is not only a matter of a straight, "Well, should there be a review or not?" There are some technical questions which have certainly been the subject of papers and discussions as to what criteria you have when you are asking the question: "Here's an administrative decision. Should it be subject to independent merits review?" It is not always easy either to arrive at criteria or indeed to apply those criteria to a particular case. But certainly that was work that the Administrative Review Council when it was first set up did and, surprisingly, 25 years later, it is still doing it to some extent.

As I said before, people are still suggesting new areas for merits review, asking questions whether such and such a topic should be the subject of merits review. It is a government issue because almost by definition, the more that you can get into merits review and the more you can channel decisions into merits review, the less there is the demand on the much more limited resources, probably, of the courts and certainly the much more expensive avenues of court intervention, which tend to be unsatisfactory of their nature because you are only looking at, in those forums, whether a decision is lawful, and mostly people who challenge decisions will only challenge them on that limited ground if that is the only ground available. They are not actually interested in whether it is lawful; they are only interested in getting it reversed on the merits. So there is that aspect of it as well. But I have probably talked enough, at least to begin with. I hope I have given an overview, and then you have the list of functions, formal as they are and dry as they might sound, of the Commonwealth body in that section 51 of the Commonwealth AAT act.

CHAIR: I must say that it is a very interesting slant on it. It seemed to me that, in a sense, the major issue about this review was what you have termed the unfinished business. I have certainly been struggling with what we do about that. I have been trying to elicit from people today what other things ought to be added into the jurisdiction. The judge from the tribunal was very careful in what he said, as I guess is appropriate for someone in his position, but PIAC has put up a couple of proposals about what should be included. At the end of the day that is a very unsatisfactory way to work out what you should add in and what you should not, but if there is to be a body such as this that does a whole lot of things, but amongst those things is able to identify what other areas might be added on over a period of time, that strikes me as being a very useful addition to the structure in this State.

Mr ROBERTSON: Could I add one other thing perhaps that I did not go into at all, and it really comes up acutely in what is presently being proposed for the Federal AAT. As you probably know, there are two bills, I think, before the Federal Parliament to change that body into an administrative review tribunal, so it has a different name, with similar sorts of functions, but what is happening there, and this flows directly from what you were saying just now, Mr Chairman, is that the new body is going to be an amalgamation of a number of tribunals, large tribunals, tribunals with large amounts of case work, which have either been set up since the 1970s or which have continued.

So what is proposed there is to bring together the migration of review tribunal, social security tribunal, and put them all, for the sake of administrative cost saving, in one body. So, when you were talking about unfinished business, there are two aspects to it, at least. One is that there are all sorts of decisions made by government agencies in New South Wales which are not the subject of any merits review. But as well, my impression is that there is a large number of questions still to be asked. I do not know how many review tribunals there would be, but there would be a few dozen and there would be a real question as to whether you need to keep them separate and independent for their undoubted expertise on a particular area, medical review

matters and so on, or whether you can get the best of both worlds and have suitably qualified people go into a more centralised review tribunal and, therefore, get the economies of scale and single registries and co-location of tribunals and all those other sorts of matters that are presently being debated in the Commonwealth.

I think there are two aspects to the unfinished business. There are no doubt a large number of Acts, statutory instruments, where nobody has ever gone through them systematically and said should this be a decision subject to merits review. Then you have the proliferation, the existence of how many dozen there are registration boards, disciplinary boards and so on. So I think there is a couple of aspects to that.

CHAIR: I think that is right and that is certainly clear from some of the evidence we have had today, that there are those two categories of decisions or decision-making bodies. Part of the problem is that nobody has actually been able to give us a list.

Mrs GRUSOVIN: Probably nobody knows.

CHAIR: I think that is right, which is why the establishment of an ongoing body to look at those issues is not a bad way to go.

Mr ROBERTSON: Something I have not said yet but the Administrative Review Council had 10 part-time members. It had a part-time president who I think originally or from time to time, anyway, was from industry or commerce, more recently I think has been from a university, so you had the part-time president, you had the nine or 10 part-time members, including the senior public servants, but in terms of a secretariat, the people who produce the agenda and research papers, there was a director of research and I think only two or three other research officers, and then there was the secretarial support.

So, you are not talking about an enormous bureaucracy there. Obviously you have to get the right people, but in terms of what you were talking about, Mr Chairman, I can remember in terms of identifying decisions that may be the subject of merits review, one of the projects that went on to the council when I was there was that somebody said, "There is the new Corporations Law. Nobody has read it to see how many sorts of decisions there are that should be the subject of merits review."

First off, the Parliament took a short cut and said that every decision under this Act except the following six will be subject to merits review. Somebody then did an exercise which suggested there were 1,200 merits reviewable decisions but, of course, in terms of applications that have been made, there has not been a great flood of them because the system seems to have worked pretty well.

So, all I am saying on that aspect is you cannot tell just from listing or identifying discretionary decision making. You cannot tell what sort of business is going to eventuate. It may be that it is just not a matter of controversy at all. On the other hand, you could just list, say, one decision, going from the Federal sphere, say, under the Migration Act and it could be that it leads to 500 cases a year. You just cannot tell by looking at it.

You probably could tell to some extent by just seeing how much is litigated presently in either the District Court or the Supreme Court, and one of the factors would be is this a useful use of everybody's resources, a lot of lawyers' fees, court time, formality and delay and so on. Would we defuse this area of dissatisfaction as between members of the public and the public servants if we did move that into a merits review body?

CHAIR: The other side to that coin, the last point is there is a new jurisdiction added to the ADT dealing with appeals from the Office of State Revenue. Currently, there are appeals to the Supreme Court of about 12 a year. The expectation is that there will be 200 a year once it goes to the ADT because you would get away from the high cost and very formalised procedure of the Supreme Court.

Mr ROBERTSON: Then one has to ask the question, is it a good idea, is it a good thing for people who are at present unhappy about their Office of State Revenue decisions but cannot afford to take it any where? Is it a good thing that they have somewhere to go? Then also, of course, you have to look even in that sort of case that some of these decisions may be grouped so that you could get one hearing—this happened in the Commonwealth—as one issue and then you also ask yourself, well, if all of that is decided for one year and if the ADT merits review body says, "This is what we think the section means", nobody has ever given it any

external review before, whether with all of that, the question of law going up to the Supreme Court, it may be that settles that controversy and you do not get a repeat business.

These are sort of speculative matters but some of those results have happened in the Commonwealth sphere, anyway. My personal opinion is that somewhere along the line New South Wales is probably going to derive some benefit from what I have called a standing law reform committee. Quite when in the process it might be useful to have one and what style of body might be appropriate are other questions.

Mr SMITH: Resources seem to be an issue that bedevils us on a daily basis. You said it should not be too expensive to set up. Any ball park notion of how much?

Mr ROBERTSON: If you had a limited number of people such as I mentioned, say, a director of research, two or three other people and then if you had other part-time experts, whether from university or so on, it would not be too difficult to get out the Commonwealth figures but my recollection is that they were operating on a figure, I think, of about $1 million a year. But those figures are always a bit flexible because you do not know whether they are bringing in the real estate, the electricity, the superannuation or what have you.

I think that would be a top figure. Of course, it would a matter for government as to whether they thought that would be a useful expenditure of money. But it does come back to the point I made first, when you are looking at economies in this area, you have to realise that the Government is a party to each decision and is a party to each decision that is litigated. So there is a lot of cost in there which, if you can reduce the cost of disputation, whether in the courts or tribunals, it might be a worthwhile investment.

CHAIR: Any further questions? If not, I thank you very much for your attendance. That has been very helpful. Thank you for coming.

(The witness withdrew)

(Short adjournment)

PETER RICHARD GARLING, Barrister, Level 5, St James Hall, 169 Phillip Street, Sydney, before the Committee:

CHAIR: Perhaps if we could start with the substance of the Bar Association's submission, which deals with the limitation issue, or limitation period, there are two things I should mention to you. One is that we have got a supplementary view from the Legal Services Commissioner, which the Bar Association will not have seen as yet because it has only recently come into us. Just so that you know what it says, part of it reads:

> I have noted that the Bar Association agrees that the current limit of 28 days to file an information referring a practitioner to the ADT is inadequate. On further consultation with my staff now responsible for this area, I agree that the three months proposed by the Bar Association is adequate, rather than the six months suggested in my early submission.

That is from Steve Mark. On the other hand, this morning, John North from the Law Society said that his view was that there needed to be no extension of the 28-day period. He thought that was an adequate period. So I would be interested in having, I guess, your response to what the Law Society said this morning.

Mr GARLING: We adhere to our three-month submission. We selected that period as a realistic minimum period. In one sense, it would be easier for us to agree with the Legal Services Commissioner's original submission of six months, but can I tell you fundamentally why we need more than 28 days? There are a number of reasons. The first is a technical reason. The Bar Council meets once a month. At its subsequent meeting it ratifies the terms and the detail of the resolution which it made the previous month, so in strict theory, until that resolution to commence proceedings is ratified or confirmed, then the resolution is open to challenge. So that just in the ordinary progress of events, 28 days does not allow that process to take place. That is the first point.

The second point, which is one of practicality, is that at present under the rules of the tribunal, we are obliged to file at the time we file the information a very detailed affidavit setting out essentially the basis upon which the tribunal has jurisdiction. You will appreciate that parties cannot confer jurisdiction on the tribunal by consent if that has not already arisen, because it is a statutory tribunal. So the tribunal, after a couple of decisions under its previous guise, the Legal Services Tribunal, went to the Court of Appeal—one was a case called *Nutt v The Law Society* and one was a case called *Stone v The Bar Association*—and dealt with the absence of jurisdiction or conferral of jurisdiction by consent point by saying, "You have got to file this very detailed affidavit proving that we have jurisdiction."

That encompasses all of our investigations, our resolution process—in other words, providing evidence of the procedure through which we have been demonstrating that we have complied with part 10 of the Legal Profession Act. In big cases that takes quite a while to put together, because what happens as a matter of practicality, because we do all our own investigation in house and without reference to external solicitors and counsel—partly a cost issue but partly efficiency—is that once the resolution is passed we move from internal investigation and disposition to retaining external solicitors and counsel. They have to be given the papers, the papers have to be put into a brief, the brief has to go to the counsel to draft the information and prepare the material and come back, and that just takes time. We do not think 28 days really gives us enough chance to do it and, on the other side of the coin, we do not think that 90 days, or three months, is an unreasonable period in the sense of delaying the commencement of proceedings unacceptably. We think that therefore, it is just a constraint that we can live without. That is really the way we put it.

May I just contrast the Law Society, which has a very large internal professional conduct department and, therefore, often they appear themselves. Their solicitors are very well qualified. They often appear in the tribunal themselves, and they often themselves do the information and material, whereas the way the Bar Association's investigation process works is different. Ms Barrett, who is sitting on my left, is the Professional Affairs Director. She has an assistant. They are the only two full-time employees dedicated to discipline. We have four committees, who are all voluntary members, who sit and do it supported by Ms Barrett and her assistant and some secretarial assistance, I might say, but we do not have quite the same internal resources as the Law Society does and, hence, I can see why they would be happy with 28 days but for us we need longer.

CHAIR: Thank you for that explanation. I was going to try to get to why there might be a difference. But that makes it very clear as to why there would be different forces acting.

Mr GARLING: I am also told that the other difference is that the resolutions to institute proceedings by the Law Society are not made by the council but by their committees that have delegated authority, which meet more frequently than the council does.

CHAIR: That makes sense too, I suppose. One of the things that was said today, as I recall, was that the implications of Barwick's case had caused a whole lot more work to be done. Is that a fair assessment? In addition to that we have also been told that there have been some amendments to the legislation that were meant to remedy some of those defects. Is that accurate? Have the defects been cured in that way?

Mr GARLING: Certainly Barwick meant that there were some additional procedural steps before one gets to the tribunal. The amendments have substantially helped, but overall, if you compare our investigatory processes now with, say, two or three years ago, they are slower and more careful to ensure that our i's are dotted and our t's are crossed. But I do not think that makes any real difference once we get to the tribunal. In fact, if anything, it seems to me that the amendments that were made by that post-Barwick legislation makes it procedurally slightly easier in the tribunal because the ability of the tribunal to amend informations once it has them before it is more free than it used to be.

CHAIR: Turning to the Legal Services Decision of the tribunal, there seems to be a fairly lively controversy about the number of part-time members of the tribunal. Does the Bar Association have a view about whether there is an optimum number of part-time members and how that part of the system is working now?

Mr GARLING: We are in favour of part-time members. The benefit of part-time members, and I am speaking not of what we might call the lay member but of legally qualified part-time members, is that they bring to the tribunal their knowledge of practice and what is happening in practice, what the standards of barristers are in practice and, therefore, form the specialist nature of the tribunal.

The benefit of that for a moment in terms of presenting cases before the tribunal is that the parties do not call expert witnesses to say what lawyers do or do not do. So you are immediately saving considerable witness time at a hearing because there is no point calling, in our case, a senior Queen's Counsel to tell another senior Queen's Counsel what the standards of the profession are. So, we think it is important to have part-time members who are currently in practice.

Now, the more permanent you make part-time members, the further you remove them from practice. So, we think that is not desirable. We would like to see the balance on that continuum to be towards the person with current practice experience. Now, as to whether there is an optimum number to achieve the level of hearings that we require is really something that we know little about because we do not see how they are allocated and so on. We would add this: it has been our experience that from time to time that it has been hard for the tribunal to constitute a hearing panel for a specified period because the difficulty of having practising members is their availability to sit.

CHAIR: Practising members obviously practise.

Mr GARLING: Correct. So, in one sense, if you have only three "part-time members", they are not going to be doing much practising; they will be doing more sitting. Yes, they will be readily available, but they will not have the strength of what is currently happening in practice. At the other end of the scale, if you are going to have people who are practising lawyers sitting as part-time members, you will probably need more to keep up the level of hearing dates required to be obtained within a reasonable period. So that is the trade-off. I have posed the problem, Mr Chairman. I do not know if I have given you the answer.

CHAIR: I am not sure there is an easily accessible answer. I guess the other problem is, of course, that if you start imposing on part-time members too frequently they will be disinclined to do it because it will bite into their practice and their primary interest is their practice rather than being on the tribunal.

Mr GARLING: Yes, or else you get the other difficulty which is the part-time member you attract is the one on the verge of retirement or the one who is running their practice down for whatever other reason. I immediately add that I am not suggesting that is the present position, but that is the theoretical difficulty if you limit unduly the number of part-time members.

May I add to that, in my experience of the Legal Services Division, we have not had a problem with part-time members not being competent or appropriate or adequately informed to conduct a hearing. I mean,

perhaps the point would be stronger in the sense of getting fewer part-time members if you had a competency or experience problem in terms of conducting hearings, but that has not been identified as a problem in the 12 years or so that there has been a tribunal under one name or the other dealing with barristers' discipline.

CHAIR: One of the other issues that arises about the Legal Services Division in the tribunal is the selection of the part-time members. The Legal Services Commissioner has expressed his concerns about the lack of transparency whereby members are chosen, his argument being, "Well, this is about barristers. The Bar Association has a role of protecting barristers. Now they have a role of choosing who sits on the tribunal." We put corresponding concerns to the Law Society this morning and they, perhaps not surprisingly, did not take kindly to that sort of criticism. They specifically rejected a proposal which might have a set of criteria written down by which you would select potential part-time members. I am just wondering what the Bar Association's view might be about that.

Mr GARLING: We do not take offence, but the question is, I suppose, firstly: is there an identified problem with the part-time members over the last few years in terms of competence, ability, preparedness to sit and conduct? So if there is not an identified problem, the first thing we would say is there does not appear to be a need to change the existing system.

CHAIR: If I can just interrupt you, in fairness to Mr Mark, I should say he was pointing to the perception of a problem; he did not specifically itemise it as a problem.

Mr GARLING: So if we put the problem to one side, it becomes a question of perception. It does not seem to us to be a real perception. Yes, it is a hypothetical or theoretical perception that that may happen but, in reality, what happens in the cases we are involved in, is that there is the council who turns up, there is the barrister who turns up, who is most often now represented because the current Bar's professional indemnity policy provides for the costs of representation before disciplinary tribunals, so there is usually no problem about funding representation. Now, that being so, there is a limited panel of solicitors for the bar. The bar I think has perhaps five or so firms of solicitors on its panel. The insurers who fund most of the litigation have, similarly, a limited number of solicitors on their panel, so you end up with a very limited number of users in fact.

The real difficulties come not so much from the method of appointment, because it is understood that barrister X or barrister Y is on the tribunal. No-one really says, "I wonder how they got there?" The question usually is, "Do I know them?" from the barrister's point of view either positively or negatively. In other words, "Are they an appropriate member to sit on this particular case?" And informally that seems to get sorted out in most cases before the hearing starts. So we do not see there is any real thrust in the perception.

The number of members of the public who actually turn up so far as barristers are concerned is usually not very high. It may be greater for the Law Society. Usually for us most of the cases that are taken may be generated by an original complaint by a member of the public but more often than not the content of the complaint is something that the Bar Council has identified in the course of its investigation so that there is not that broad interaction with the public. Quite frankly, for the number of cases a year we have there, which is about on average perhaps seven or eight cases a year that go to a hearing, we do not think it is a problem. I might say, more broadly speaking, in the absence of a widespread policy of calling for applicants for positions in the judicial branch, as judges, which does not happen, we see no need to, in effect, replicate that procedure here.

CHAIR: We now have a quorum so I might do some of the formalities now.

PETER RICHARD GARLING sworn and examined:

CHAIR: In what capacity are you appearing before the Committee?

Mr GARLING: I appear today as the representative of the Bar Council of New South Wales and the Bar Association of New South Wales.

CHAIR: Did you receive a summons issued under my hand to attend before the Committee?

Mr GARLING: I did, Mr Chairman, and I attend in response to that summons.

CHAIR: We should now move a resolution to adopt the previous evidence that has been given.

Motion by Mr Smith, seconded by Mrs Grusovin, agreed to:

That Mr Garling's previous evidence be adopted.

(Letter from the Legal Services Commissioner dated 8 November tabled.)

Has the Bar Association experienced any significant delays in matters before the tribunal?

Mr GARLING: We have experienced delays that we would rather did not happen. We attribute it to a couple of issues. By way of background, may I say that we compare it with our previous experience of the Legal Services Tribunal and its predecessor in title. No doubt the Committee will appreciate, but you will forgive me for reminding you, that prior to 1988 there was no formal system of discipline for barristers. The Bar Council merely moved the Supreme Court in its inherent jurisdiction. With the introduction of the Legal Profession Act, a formal disciplinary system commenced, and the tribunal—and, again, you will forgive me for not announcing each of its names—set itself up on level 10 of the old Carlton Hotel building in Elizabeth Street. There we had two full courtrooms, a number of conference facilities and rooms, and access to photocopying and other facilities, which were dedicated to the Law Society and the Bar Association's disciplinary process.

That translated itself to the current premises of the ADT, where there were two courtrooms or hearing rooms. One was a large and entirely adequate room. The other was a small room which was suitable for directions hearings, legal argument, but not suitable for taking evidence and having a full hearing, and we had that to ourselves. We experienced not much difficulty in getting cases on. Since the commencement of the ADT and the consolidation of it into its current premises, because of the commitments of the tribunal and the fact that it has other hearings to take place and other usages for the room and because only one room is really suitable for the hearings that the bar is involved in, we find that there are often delays in just having that room available because of its other usages, and we regret very much those delays. In our view, for the tribunal to continue to function effectively, so far as we are concerned, it needs more space, more hearing space and more than it presently has.

The Hon. J. HATZISTERGOS: Can you justify that in light of the filings that exist in the Legal Services Division?

Mr GARLING: I think so.

The Hon. J. HATZISTERGOS: The President of the ADT hotly disputed that. He said that there were only about 40 filings and he indicated that making resources available, special resources, for those 40 filings would not be justified.

Mr GARLING: Well, I would say in answer to that that one has to differentiate between what is involved in a filing. It is rare that a case in which the bar is involved would take less than three days, leave aside one in which there is complete agreement by the barrister to everything alleged by the Bar Council—a rare occurrence—but if there is any defence at all or any issue in dispute, it is rare for it to be done in under three days, and usually more. So that one cannot equate a filing in the Legal Services Division with, necessarily, a filing in one of the other divisions of the court that may involve an hour or two hours by way of hearing or debate. So that is the first point.

Secondly, one has really got to ask the question: how many days a year would such facilities be used? In our view and our experience from previous premises, the facilities would be used for a substantial part of the year, the predominant part of the hearing days in the year if you take the view that fundamentally in any year there are about 200 hearing days that a tribunal will sit for, 200 to 220 hearing days, a year by the time you eliminate weekends and holidays and the like. We would think that 40 filings a year would occupy at least a substantial courtroom for most of 220 days a year.

The Hon. J. HATZISTERGOS: Perhaps you should sort that out with Judge O'Connor.

Mr GARLING: My second answer to it, of course, is that it is a matter of funding, but the Legal Services Division is funded separately and there is no reason why that funding should not be applied to secure adequate premises and resources.

CHAIR: One of the views that has been put to us is that as far as possible the ADT should be a lawyer-free zone. Now, in fairness to the people who have put that to us, I do not think they seriously propose that in relation to the Legal Services Division, for pretty obvious reasons, I would have thought. Does the Bar Association have a view generally about whether the ADT should be a lawyer-free zone?

Mr GARLING: Yes, we do. Can I leave out of that answer the Legal Services Division for a moment because I must say that one's experience would be that the greatest fear I have appearing for the Bar Association in that jurisdiction is that a barrister will turn up representing himself or herself.

CHAIR: If you act for yourself you have a fool for a client.

Mr GARLING: And because the insurers fund it, it is not a problem. May I move to the other parts of the tribunal? We would oppose any legislation that barred lawyers appearing. Fundamentally, we oppose it for a number of reasons. One is that that part of the tribunal is dealing with a review of an original decision so that one has a department of government or a statutory authority or corporation appearing on one side of the record. There is nothing to prohibit that body or corporation having either an in-house lawyer or someone who is legally trained or someone who engages for a substantial part of their working year in the job of being an advocate in that jurisdiction, so that one cannot preclude one side of the proceedings before the tribunal where there is a professional or an experienced advocate appearing for one party. Now, the only way of balancing that apparent unfairness or imbalance is to permit the other side of the record to have a professional advocate. Now, once one looks at it that way in those general terms, we would say that the best source and most readily available source of professional advocacy is the bar.

The Hon. J. HATZISTERGOS: What would your response be to what the president of the tribunal told us, and that was that in matters now where the parties are not legally represented his experience has been that both the tribunal and the advocate on behalf of the agency that is appearing are very sensitive to the unrepresented litigant in a way that ensures fairness is able to be provided and that their interests are not overlooked?

Mr GARLING: Well, our response to that is, firstly, it depends on the individual, so instead of a principle which permits fairness, you are reliant on the performance of the particular individual appearing. There is no external check or balance on that. So that if one has an individual who is regularly appearing before a tribunal and a tribunal member regularly seeing that individual, so that you have a bit of a comfortable sock and comfortable slipper routine—

The Hon. J. HATZISTERGOS: No, I accept that, Mr Garling, but I suppose what my question is going to is not so much whether or not that is appropriate but do you accept what he is saying in terms of the way the tribunal is currently functioning, that that is a feature that has not created too much of a problem for unrepresented litigants?

Mr GARLING: Since our members have not appeared in those cases, I am not possessed of any material that would enable me to comment one way or the other.

The Hon. J. HATZISTERGOS: There have been other studies done by the University of Wollongong—I do not know if you have seen them—about those cases where people have been unrepresented and what their fortunes may or may not have been.

Mr GARLING: It is not so much a matter of fortune, is it, because presumably the underlying merits do not change if you have a lawyer present. It is a question of efficiency in part. The point you make I understand, but can I also make this point, that one of the roles of a lawyer appearing in this tribunal is to edit the particular client's complaints before they get to the tribunal. So that you tend to be able to say to a client, "I know you are complaining about one to six in the decision, but I can tell you that one is normal, there is no point in complaining about two and three because your complaint has no merit". A real editing process does take place before the client's case gets to the tribunal. So that that, I would have thought, assists the tribunal to concentrate on the real issues in the case. That is the first point I would make.

The second point is that the barristers' rules now provide a mandate for the conduct of counsel to ensure that only real issues are raised and dealt with. Thirdly, it has been the experience that, as we would understand it more broadly within the Commonwealth Administrative Tribunal, there are regularly decisions of that tribunal acknowledging the assistance that lawyers have given them in reaching their decision.

Whilst it may be, of course, that the tribunal molds itself to do its best where people are not represented, we would think that in the balance of representation as against non-representation, the balance falls in favour of representation.

The Hon. J. HATZISTERGOS: What would your response be to a proposal that has been put to us and, that is, that we adopt a provision in our legislation which is similar to section 62 of the Victorian Act? Perhaps I should indicate what that does. That section allows a person to be represented in cases where a person is a person referred to in subsection (2) and then there is a list of circumstances where it is appropriate for those people to be legally represented, depending on the nature of the issues to be determined.

A second case is where one party is a professional advocate. A third case is where another person in the proceedings is allowed to be represented is in fact represented, so leave has been granted to a representative to appear, in effect, and the fourth case where all parties agree that there should be legal representation.

Mr GARLING: And what other cases could there be, is my immediate response?

The Hon. J. HATZISTERGOS: I am not sure. In other words, you do not have a right of appearance per se which currently the Act provides. You get to appear either if you are a person designated in the legislation, there is a professional advocate or there is a party to the proceedings who has been granted leave or all parties agree.

The answer to your question as to what other cases there might be, I understand at the moment in some of the anti-discrimination cases which might only involve, I dare say, an employer and a complainant, and there is no desire to have legal representation on either side, that case might be able to proceed.

Mr GARLING: And who is appearing for the employer, which is presumably a corporation?

The Hon. J. HATZISTERGOS: I do not know.

Mr GARLING: That raises the issue that I raised earlier, which is if you have got a government agency or a corporate employer, they have to be represented by someone. In government agency circumstances—

The Hon. J. HATZISTERGOS: I do not know. What happens if they are a sole trader?

Mr GARLING: I do not know the numbers of those cases in this tribunal. Of course, there may be a sole employer.

The Hon. J. HATZISTERGOS: I take it from your answer that you would not be greatly troubled by a provision like that?

Mr GARLING: No, I think I would be because our position is that the current position should remain.

The Hon. J. HATZISTERGOS: A moment ago you said, "Well, what other cases are there?" They would all be covered by that provision. I assumed from that response you would not be greatly concerned because you thought most of your cases would be covered.

CHAIR: I think you can assume that that is his general position and that if there are other cases that fell outside those four, then he would have troubles. If those four cases covered the entire field, he would not.

Mr GARLING: Correct.

CHAIR: I have one further issue I want to touch on and that is the position of the Bar Association about the expansion of the ADT's jurisdiction. Does the Bar Association have a view about the ADT jurisdiction being widened to include other areas?

Mr GARLING: Not really. We do not have a general position about that. I think it is a matter of looking at the particular areas into which it may be widened and forming a view. So I really cannot advance that position.

CHAIR: Are there any further questions? Are there any further things you wish to put to us that we have not touched on?

Mr GARLING: May I raise one matter that we do not advance positively but we invite the Committee to think about it because it is a matter that, if it is to be implemented, needs widespread debate and examination and exploration and it would only be after we had the benefit of that that we would form a concluded view and that is this: a reading of the submissions that I have seen to this Committee, and our experience generally tells us, that the Legal Services Division of this tribunal is quite different from the other parts of its jurisdiction. They are original hearings, usually seriously disputed factual questions and seriously disputed questions of professional standards applying to those particular facts. It is not a particularly comfortable fit with the sort of merits review and other decision review process.

Throughout New South Wales, there are a variety of forums for professional discipline. So, in generally the medical area, the tribunal is a District Court judge and other members covering doctors, dentists, nurses, midwives and so on. There is a statutory racing tribunal. It may have a different name but deals with disciplinary issues from the racing industry. You have got this section of the ADT dealing with the legal profession and the veterinary profession.

We wonder whether or not consideration needs to be given in due course or perhaps raised and discussed of, in effect, a professional disciplinary tribunal covering a range of professions, and then we can debate the structure of it and those sorts of things, but we raise that. We do not raise that to say we are dissatisfied with our present structure. We do not raise it to say that you should remove us from the ADT, but we raise it as a sort of broader issue that is worth exploration.

The Hon. J. HATZISTERGOS: Have you consulted other professional bodies about that?

Mr GARLING: No, we have not started to have widespread consultation. We do not hear a public demand for it, but we are curious about why we have, for example, a tribunal in the medical area where you have a District Court judge, a tribunal in the legal area that is presided over not by a judge, usually the hearing panels are presided over a member of the profession and so on, and in the racing tribunal, for example, it is presided over by a senior silk appointed by the Minister, I think, as the chairman of the tribunal, but it is an interesting issue that perhaps needs to be aired and considered. It may be something that the Law Reform Commission may want to think about.

CHAIR: It certainly echoes some things that have been said today and, I guess, central to the whole issue of what is in and what is out. Certainly, at the time the legislation was first introduced, I remember a whole lot of complaints about the lawyers are in but the doctors are out and there seemed, frankly, not a lot of logic to that at the time.

The major issue about this inquiry is really how do we sort out the unfinished business, how do we sort out what comes in or what goes out? In a sense a parliamentary committee may well be the worst possible body to try to do that, although Mr Robertson had some interesting ideas about the establishment of a State-based administrative review council that might be able to fulfil the function of a law reform commission, and have a role in what is in and what is out. That is playing on my mind as something that might come out of this Committee which would then be able to address those sorts of issues you raised.

Mr GARLING: We are not saying there is an immediate need to do it, but we raise it as a potential issue. The other issue that we would wish to raise, and it is a discrete issue relevant to the Legal Services Division of the tribunal, and that is, as you appreciate, there is what we would describe as an internal appeal process within the tribunal. So that in the General Division and the other divisions where you have a single member sitting, there is an appeal to three members of the tribunal. The hearing panel for a Legal Services Division matter is three people and there is presently an appeal to three other people internally.

The difference is that in the appeals with which we have been concerned, instead of a senior silk presiding over the appeal panel, the President of the tribunal presides and that is really the only difference, and

that is a limited right of appeal. You can only appeal on the merits by leave. You can appeal on questions of law. We do not think that that internal appeal process is a necessary part of the ADT's function and we think it is expensive and unnecessary because the statutes provide for an appeal to the Supreme Court.

So that instead of the ordinary process of a hearing panel plus an appeal in the Legal Services Division you get a hearing panel plus two layers of appeal and not much differentiation between the hearing panel and the first layer of appeal. So we are opposed to that remaining a part of the Legal Services Division procedure, and we would invite you to think about whether it is necessary and cost effective. The third point we would wish to make, which runs a little into an answer I gave earlier about length of time to get hearing dates, is that we do think that in terms of its legal resources the tribunal is underresourced. It does not have a library. If in the course of a hearing we say, "As Judge X said in the High Court in volume 127 of the *Commonwealth Law Reports*," they cannot even walk out and have a look at volume 127 of the *Commonwealth Law Reports*, and that is an impediment to the efficient operation of the tribunal.

CHAIR: It says something about Judge O'Connor's great restraint that that has not surfaced in this hearing to date before this.

Mrs GRUSOVIN: We asked about resourcing, too. We gave him every opportunity.

Mr GARLING: He is probably being unduly modest but he does need some help.

Mrs GRUSOVIN: He looked embarrassed.

Mr GARLING: As do the other tribunal members when that arises. With respect, we can take as many cases along as you like, anticipating that that is all that will be raised, but—

CHAIR: You cannot run this sort of procedure without a library. It is just absurd.

Mr GARLING: In the course of that someone will say, "But wasn't there another case about this or that?" as often happens in the course of debate, and everyone says, "Oh, well, I think so," and then phone calls are made back to chambers to say to secretaries, "There is a case called *Smith v Something*. Go and find it." It does not work.

CHAIR: It is just going to create delays.

Mr GARLING: So they are the additional matters we would wish to raise, Mr Chairman.

CHAIR: That is a fascinating one. It is almost a pity the press are no longer here.

Mr GARLING: Only Ms Hennessy.

Mr SMITH: Just on that last point about resources, Mr Robertson raised the notion of the Administrative Review Council, and I asked him about resources there. He still had a ball-park figure of about a million bucks. If push came to shove, would you see it would be maybe better if this administrative review council were to be considered to just forget that and put the extra resources into what we already have?

Mr GARLING: That is a really difficult question, Mr Smith, because I appreciate the general notion of an ARC, but I am not quite sure what Mr Robertson had in mind in putting forward his model, and it is a question of balance. I suppose, in part, if you were to remove legal discipline from your administrative decision area, the question does not really arise. If you leave it in there, the balancing of those sorts of resources is a very delicate and difficult issue, and I am not sure I can express any view about it.

CHAIR: I think it is up to the people who are elected to actually make those decisions. I would thank you for your attendance and your assistance. It is much appreciated.

(The witness withdrew)

(The Committee adjourned at 5.00 p.m.)