



25 January 2012

Dear Director,

Following the appearance of Mr Joe Catanzariti and Ms Heather Moore on behalf of the Law Society of NSW at the public hearing on 16 December 2011, the Standing Committee on Law and Justice requested that the Law Society provide responses to supplementary questions and questions taken on notice. Those responses are now enclosed.

Mr Catanzariti also indicated at the hearing that the Law Society might provide further comments in relation to the position of the Workers Compensation Commission. The Law Society's view continues to be as conveyed by Mr Catanzariti, that is, that the Society would have significant concerns about any proposal to include the Workers Compensation Commission in an amalgamated tribunal.

Please contact Ms Heather Moore on : _____ or _____ if you have any questions in relation to the Law Society's responses.



Justin Dowd
President

Opportunities to consolidate tribunals in NSW: Law Society of NSW responses

A. Supplementary questions

1. What is the Law Society's view on merging the health professional disciplinary tribunals either into a new NCAT as set in Option 3 of the Government's Issue Paper, or within a proposed Employment and Professional Services Commission as set out in Option 1?

In responding to this question, it is noted that the Law Society's submission preferred a modified version of Option 2A in the Government's Issues Paper, rather than Option 3 or Option 1. In relation to Option 1, the Employment Law Committee referred to the point made in the Issues Paper that professional disciplinary matters have a focus on public protection and are not simply employment issues. The Committee added that both the Administrative Decisions Tribunal (ADT) and the health professional tribunals hear matters brought by individuals.

While the Law Society is not in a position to comment on the operation of the health professional disciplinary tribunals, the Society notes that the current arrangements for legal professional disciplinary matters, which are dealt with in a specialised division of the multi-functional ADT, are working satisfactorily. The Society is unaware of whether there is any characteristic of health professional disciplinary matters which would preclude this approach, which is a question the Parliamentary Committee may wish to put to the medical profession.

2. The Law Society's Business Law Committee (p 7) has raised issues relating to administrative delays and a lack of consistency in decision making at the CTTT. How could these issues be addressed in the creation of a super tribunal for NSW?

As noted by Mr Catanzariti at the public hearing (p 9 of the transcript), the Law Society's understanding is that there are a number of drivers in this tribunal reform agenda. One issue concerns the Industrial Relations Commission (IRC) and the anticipated reduction in its workload. Another concerns the effectiveness and quality of the decision-making of the Consumer, Trader and Tenancy Tribunal (CTTT). A third is the overall desirability of consolidation of tribunals. The interplay between these issues is complex and the Law Society notes that separate measures may be required to address the issues which arise in relation to the CTTT.

However, the Society notes that during the tribunal reform process, close examination of the operational, procedural and personnel aspects of the tribunals in question, including the CTTT, will have to be undertaken. This may allow the Government an opportunity to effect both consolidation and an improvement in the processes and decision-making of the CTTT (or the tribunal/division of tribunal that assumes the responsibilities of the CTTT).

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| 3. What is the Law Society's view on how other state jurisdictions have handled consolidation of tribunals? And are there any lessons that NSW could learn from those experiences? |
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Guardianship matters

In respect of the Guardianship Tribunal, the Law Society notes that a report is expected from the Victorian Law Reform Commission on 31 January 2012 in relation to guardianship reform in Victoria. While the Society is not yet aware of what the report will recommend, the Society understands that the Victorian Civil and Administrative Tribunal (VCAT) has examined the structure, processes and practices of the Guardianship Tribunal with a view to improving VCAT in this regard.

Employment and industrial relations matters

As noted by the Employment Law Committee in the Law Society's written submission, VCAT is not directly comparable in respect of employment and industrial relations matters as VCAT does not have an industrial/employment jurisdiction, which is at the core of Option 3 set out in the Government's Issues Paper.

Strata and community title matters

In the area of strata and community title disputes, it may assist to compare the processes in each of Victoria, Queensland and New South Wales.

In Victoria there is an owners' corporation list within VCAT with dedicated members who sit only on owners' corporation matters. The Society understands that members share judgments and have a developed expertise.

The Society is informed by the Property Law Committee's contacts that in Queensland:

1. There is no separate strata division in the Queensland Civil and Administrative Tribunal (QCAT): strata matters are referred to the Minor Civil Disputes Division.
2. Strata and community title disputes are referred to either the office of the Commissioner for Body Corporate and Community Management (the "Commissioner") or QCAT for determination.
3. Simple body corporate issues are referred to the Commissioner's Office for determination.
4. QCAT determines:
 - (i) more complex disputes; and
 - (ii) appeals from the Commissioner's Office.
5. Certain appeals on legal issues may be made from QCAT to the District Court.

The Society has been advised that there is a general view amongst practitioners in strata and community title disputes in Queensland that decisions by the CTT (the tribunal absorbed into QCAT) were more specialised, with a better understanding of the issues at hand. It has been suggested that there is general disappointment in the process and in the quality of decisions issuing from QCAT.

The Property Law Committee notes that in New South Wales:

1. Disputes are first mediated.

2. If mediation is not successful dispute resolution occurs by way of adjudication on paper through the CTTT.
3. Any appeal from the adjudicator's decision lies with a member of the CTTT who may be an adjudicator or a member of the CTTT (in other words, an internal appeal process).
4. Limited rights of appeal on issues of law lie to the District Court.

The Property Law Committee's view is that the issues with quality of decision-making and effectiveness of process arising in New South Wales and Queensland appears to be attributable, at least partly, to the lack of specialised focus. This can then have a flow-on effect on the quality, qualifications and experience of the decision makers. This can be contrasted with the arrangements in Victoria where there is a specific owners' list and dedicated members with appropriate qualifications and experience.

B. Questions taken on notice

1. In response to Mr Shoebridge's request for more detail on the model proposed by the Employment Law Committee (ELC), the ELC reiterates that a modified Option 2A is the better option. The ELC proposes the creation of a Workplace and Employment Division in the new NSW Administrative and Employment Tribunal (NEAT). This Division would consist of a former judge of the IRC, and be staffed by former Commissioners from the IRC. Depending on the workload of this division, the remaining judicial members of the IRC could be appointed to the Supreme Court. Appeals from the new Workplace and Employment Division of the NEAT could be heard by in the Supreme Court by the newly-transferred judicial members.

The ELC proposes that Option 2A would be even more effective if the common law employment jurisdiction of the District Court was also transferred to this Workplace and Employment Division. The Judges of the Industrial Court are experienced in that area because of the nature of the work they have done in their current roles, and certainly are more specifically qualified in that area than the judges of the District Court.

The ELC notes that if Option 2A is taken up, in time more than one judicial member may be required in the Workplace and Employment Division, particularly if common law claims that would arise in the District Court's jurisdiction were to be embraced in this Division.

The ELC suggests also that judicial members could be appointed to more than one Division as this can be an efficient use of expertise. An obvious example is a joint appointment to deal with complaints of discrimination arising in an employment context.

The ELC would propose the retention of a separate Professional Discipline Division.

As noted in the Law Society's written submission, the ELC's view is that this is the better option as it preserves the IRC's current arbitral and conciliation functions in the public sector (including Local Government) and the jurisdiction of other matters such as Regulated Contracts and internal governance of registered organisations that cannot be initiated by individuals.

2. In response to the Hon Sarah Mitchell's question on the appropriate oversight department within the Government, the Society reiterates the view of the Property Law Committee set out in the Society's written submission that if one

consolidated tribunal is to be established, its judicial officers should have the benefits of judicial training and education afforded to such officers in other courts administered by the Attorney General's department (regardless of which department ultimately has oversight responsibility). The Society notes again that it is important to avoid the perception of conflict of interest or bias and, if possible, the oversight department should therefore not be administered by a Minister responsible for policy-making in one of its jurisdictional areas. It would also be desirable for the oversight department to be in the position to take a multi-disciplinary or at least a broad consultative approach to policy-making in relation to the tribunal.

3. In response to Mr Shoebridge's question regarding an internal appeal (on both merit and law within a consolidated tribunal), the Society notes that it is difficult to respond given that it is not yet clear what functions would be included in a consolidated tribunal. The Society notes that the elements of an appropriate appeals structure are highly dependent on the area of law under consideration. The Society notes the Property Law Committee's observation that a criticism from some NSW practitioners is that in an internal appeal process (as currently exists in NSW), the quality of the decision-makers at the appeal level is no different than at first instance.
4. In response to the question from the Hon. Peter Primrose in relation to amalgamating the Mental Health Review Tribunal, the Society has no comments, save to note again that the Guardianship Tribunal should remain a separate tribunal.
5. The Society's view is that the question from the Hon. Peter Primrose about what tribunal or tribunals might be appropriate for consolidation should be considered alongside Mr Shoebridge's question in relation to the Society's view of the fundamental principles that the Government should apply in reforming tribunals in NSW.

The Society notes that the Government's Issues Paper states that there are benefits to a "citizen-focussed" approach to the reform of Tribunals. This is consistent with the key objective of the tribunal system which is to provide a means by which disputes can be resolved which is relatively cheap, informal and quick. However, it does not necessarily follow that a "citizen-focussed" approach will in every case be achieved by consolidation or uniformity. Indeed, it is likely that citizens will have different needs depending on the particular tribunal and type of matter in which they are engaged. It is therefore the Society's view that the Government should examine the various elements that underlie an outcome that provides the best access to justice for the community. This requires consideration of the users of various tribunals as well as the nature of the matters determined. Cost effectiveness and streamlined processes provide obvious benefits for the community and it is appropriate that the Government should look for opportunities to improve efficiency (for example, by eliminating duplication). However, the retention and further buttressing of expertise and specialisation in structure and decision-makers will also contribute to Government's ability to provide cost effective and streamlined processes. These are ultimately the factors which impact on whether a member of the community is able to have meaningful access to justice.