

**Submission  
No 76**

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE  
TRIBUNALS IN NSW**

**Name:** Ms Leshia Bubniuk

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The Hon David Clarke MLC  
Chair  
Standing Committee On Law And Justice  
Legislative Council NSW

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE  
TRIBUNALS IN NSW**

I welcome the opportunity to provide my submission to the Standing Committee on Law and Justice (the Committee). Hopefully my brief submission will assist the Committee to recommend options that would improve the accessibility of our diverse and dispersed people across NSW, and people visiting NSW, to obtain effective, prompt, appropriate and enforceable outcomes using Tribunals in the NSW Justice system.

I rely on my life experiences as a child of refugees whose first language and culture was Ukrainian and my community and professional experiences over more than 30 years. I have held positions as a non-judicial member of the Administrative Decisions Tribunal (for more than 10 years) and in policy, research and diversity at Legal Aid NSW for over 20 years. I have been an active member in the Australian-Ukrainian community. I am bi-lingual and have a non-visible disability. It is in this context that I present my humble views and avail myself to the Committee during their deliberations.

Kind regards

Leshia BUBNIUK

I strongly believe that a pivotal consideration that should be recognised by the Committee in its decision making is the profile of the NSW community currently serviced by Tribunals and how their decisions can promote improved accessibility to our community and visitors.

## **1. The people of NSW**

The Australian Bureau of Statistics indicates that as at 30 June 2009, almost one in three Australians live in NSW. The total population for NSW (as at 2009) grew to over 7.1 million.. The population of NSW has an average annual growth rate of 1.5%. This increase can be attributed to natural increases that account for about 33% of the net increase and overseas migration which accounts for the greater proportion (or about 66%) of the state's growth.

Our NSW population continues to age, with over 25% being over 55 years of age in 2009 and increasing at the rate of 2,8%.

Based on the assertions and research opined by the Human Rights Commission of Australia one in five persons in our community have a disability. These disabilities include physical and non-visible disabilities such as depression, Aspergers Acquire Brain Injuries, dyslexia. NSW. People with disabilities have an equitable right to have access to tribunals in the NSW justice system. Using this assertion, 1.4 million people in NSW would identify as having disabilities. Mental Health issues impacts on many persons who are, or could be potential users of the States many Tribunals.

We are a multiculturally diverse state, over 189 languages or dialects are spoken by the people of NSW. English language competencies and an understanding of the "Westminster" justice system differ markedly by potential users of the justice system. A substantial proportion of the state's population identify as having a non-English cultural heritage.

The Tribunals identified for potential consolidation also are used by persons visiting NSW.

Accessibility to Tribunals in NSW differs markedly. The availability of interpreters, advocates or paralegals to assist persons to seek protection of their rights differs markedly across Tribunals.

## **2. Terms of Reference – My response**

I will craft my response using the format provided in the Terms of Reference (the Terms).

1. I have received and read the Issues Paper kindly provided by the Committee's Secretariat. I will include references contained within this document.

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2. In conducting the review consider the following specific issues:

a) opportunities to reform, consolidate, or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters having regard to:

- i) *the current and forecast workload of the IRC ((including the Commission in Court Session) as a result of recent changes such as the National OHS legislation and the Commonwealth Fair Work Act.)*
- ii) *the current and forecast workload of other Tribunals (such as the Administrative Decisions Tribunal (ADT) and health disciplinary Tribunals.)*
- iii) *opportunities to make Tribunals quicker, cheaper and more effective.*

**i) *the current and forecast workload of the IRC ((including the Commission in Court Session) as a result of recent changes such as the National OHS legislation and the Commonwealth Fair Work Act.)***

2 a) i) With respect to the current and forecast workload of the IRC NSW, following recent changes to the Nation OHS legislation and NSW OHS legislative amendments have and will impact on the workload of the IRC and its judicial and non-judicial members.

These members also have a right to remain in their roles until they reach 70 or resign. Reassignment of these officers to undertake duties in comparable roles within the Justice system should be considered in isolation of the main focus of this review which is to consider consolidation that provides improved accessibility and cost effective outcomes to the NSW community, independent of where they reside or their competencies or financial situation.

The Issues paper identifies that the jurisdiction of the IRC is limited to public sector employees, which constitute between 10-15% of the NSW workforce. Other employees in the private sectors have been referred to the commonwealth jurisdiction subject to conditions.

However another important role of the IRC are matters dealing with the registration, recognition and regulation of industrial organisations in NSW and applications under the Child Protection (Prohibited Employment) Act 1998 and matters under the Police Act 1990.

The referral of current functions undertaken by the IRC to Fair Work Australia and to other Tribunals should be governed by what is in the best interests of the NSW community, and ensuring that equitable outcomes are achieved.

Referral of IRC functions should also not impede the NSW government from implementing their current and future agenda.

**2 a ii) *the current and forecast workload of other Tribunals (such as the Administrative Decisions Tribunal (ADT) and health disciplinary Tribunals.)***

The workload of the ADT and health disciplinary tribunals which has been provided infers that the NSW community and visitors to NSW are aware of their jurisdiction, roles, responsibilities and costs involved in having matters determined by these tribunals.

These figures may reflect the inabilities and frustration of the community to access the Tribunals as they expose themselves to costs orders or have to wait for years to have their matters considered.

The CTTT has clearly demonstrated that it is a more accessible Tribunal that has protocols that are user-friendly. An important factor is that matters are dealt with in a relatively simple and prompt manner. By comparison matters dealt with by the ADT and health Tribunals may take considerable time with outcomes that compromise a person's rights to seek redress or compensation available through other jurisdictions.

Current workloads of these Tribunals are not reflective of their potential to deal with matters submitted by an informed community, aware of their rights and how to access the justice system to have their rights protected.

**2 a)iii) *opportunities to make Tribunals quicker, cheaper and more effective.***

I strongly believe that NSW civil and administrative Tribunals should be consolidated and placed within the Justice portfolio. Major benefits that would flow from such a consolidation, I suggest, would include the ability to develop accessibility protocols that better meet the ongoing needs of NSW people and the implementation and monitoring of government initiatives.

Victoria, which has a similar multiculturally diverse, disabled and ageing community provides a model that can be adapted to better meet NSW needs. Also Victoria has a proactive and inclusive Multicultural Commission that has been proactive in involving its communities in consultative processes to develop inclusive service delivery models. Victoria does not have to contend with rural isolation that is experienced in NSW, however Queensland and Western Australia would provide guidance in this aspect of service delivery.

VCAT has demonstrated the benefits of a single portal, to access resolutions to disputes that is accessible, prompt and effective. They have demonstrated innovative approaches.

A consolidated Tribunal with clearly defined divisions, would provide opportunities to better resource tribunals as well as provide resources to

improve the promotion of the roles and accessibility protocols to the people of NSW.

Tribunal members would also benefit by having resources directed at ongoing competency and knowledge development as well as resourcing technical and research support to ensure prompt and informed decision making.

Generally, Tribunals are accessible as they offer “self representation” where appearances by solicitors are determined at the discretion of the presiding member(s). This affords the parties an equitable environment where the member or members play a primary role in determining the facts in the matters. Tribunals have an inquisitorial role which differs from the courts which are governed by rules of evidence and practice rules that are far more prescriptive and more dependent on the services of lawyers to advocate on behalf of clients.

Tribunals should aim to provide resolutions that are based on decision making that is understood by the parties. Furthermore orders made should be enforceable and compliance monitored by government agencies, and not reliant on the capacity and goodwill of the parties.

Tribunals where a person's livelihood is being determined generally include a panel of “professional and/or experts” and community representation to ensure that the public interest is protected during the hearings and in crafting the decisions. There is concern when tribunals only include persons from specific professions as the public cannot be satisfied that there is a perceived or actual bias.

I am mindful that such a consolidation would need major legislative changes across jurisdictions and the reallocation of resources, staff and IT capabilities.

Appointments to tribunals should be increased from 3 to five years or should include both permanent and part-time appointments to encourage inclusion from all spheres of our community.

The role of judicial and non-judicial members should be reassessed, as judges have access to tipstiffs who undertake research and support in crafting decisions that provide the parties with the reasoning and the authorities that underpin the decision. This level of support is not available to tribunal members who often rely on their own support mechanisms to access such information. Law undergraduates or recent graduates especially those with disabilities could provide such support using e-communication. Retired members of the judiciary, legal profession could also be employed to undertake such legal research for such tribunals. Such support would provide benefits to all parties.

In summary, I support the consolidation of Tribunals in NSW based on the adaptation of the VCAT model. Secondly I support the appointment of non-judicial members to Tribunals to better reflect the community and the public interest in decision making.

**2 (b) options that would be available in relation to the IRC in Court Session, should the Commission’s arbitral functions be consolidated with or transferred to other bodies;**

The IRC in Court Session is equivalent in status to the Supreme Court, and has the capacity to hear both civil and criminal matters. When considering the options, that being a transfer to other bodies or consolidation into other bodies, the Committee members may place themselves in the role of clients who wish to have such matters determined if it impacted on them personally.

Delays that may occur, as the procedures and protocols of superior courts generally have more complex access requirements and a dependence on seeking legal experts.

Where possible, where a person’s livelihood or retirement entitlements are in dispute, then access protocols and costs play a major role in aiming to achieve equitable and achievable outcomes within a defined timeframe. I suggest that the word “reasonable” lends itself to broad and differing interpretations. The community’s understanding of reasonable time and costs often differ markedly from that of the legal profession.

These matters could be transferred to the Supreme Court , where practice rules are developed to address appropriate access and outcome protocols. Alternatively jurisdiction could be transferred to the Commonwealth. The impact on the NSW government to implement its legislative agenda would need to be considered before such options are recommended for consideration.

- 2. (c) the jurisdiction and operation of the Consumer Trader and Tenancy Tribunal (CTTT), with particular regard to:**
- i. its effectiveness in providing a fast, informal, flexible process for resolving consumer disputes;**
  - ii the appropriateness of matters within its jurisdiction, having regards to the quantum and type of claims and the CTTT’s procedures;**
  - iii the rights of appeal from CTTT decisions**

The jurisdiction of the CTTT impacts on a broader cross-section of the community which can be attested to by the quantum of disputes that it deals with annually. Most people in the community are continuously undertaking transactions that involve goods, services or tenancy issues on an ongoing basis. The location of the CTTT within the financial portfolio is the anachronism. Basically the issues in dispute can be seen as a breach of contract, where the roles and responsibilities of the parties is in dispute. The title clearly articulates its core functions and is able to be translated into many languages. The CTTT has accommodated diversity protocols to a far greater degree than other tribunals in NSW.

**2 (c) I i. its effectiveness in providing a fast, informal, flexible process for resolving consumer disputes;**

Over 60,000 disputes are dealt with by the CTTT annually. These disputes are dealt with in a user-friendly environment, where assistance in preparing, and providing information to the parties and the members is encouraged and where possible supported. The CTTT's procedures are clearly articulated using both words and diagrams on its website, or provided in a format sought by the party.

The diverse needs are met, as there is prompt recognition that people communicate differently and therefore need information and assistance using differing means. Disability and linguistic competencies are addressed in non-confronting manner. Use of e-communication is used to communicate and to serve documents.

Clearly the aim of this tribunal; and its administrative and judicial components is to resolve matters promptly, effectively and in a cost effective manner.

The dissatisfaction from the Orders made focuses on the enforcement of orders. Parties with orders may have difficulty in enforcing the Orders as they are often reliant on the ethical and moral goodwill of one party.

Non-compliance, or breaches of Orders often require an application to the Local Court or other Courts that involve costs to seek compliance.

Where Orders are made that are in favour of the applicant, non-compliance occurs after the period where a formal request can be lodged to seek a transcript of the reasons for the decision and subsequent Orders made.

Other issues of concern about decisions made by the Tribunal are linked to their jurisdiction and the Orders that they are able to make. Many find it difficult to understand that members and their decision making is governed and they are not at liberty to exercise powers beyond their scope.

**2 (c) ii the appropriateness of matters within its jurisdiction, having regard to the quantum and type of claim and the CTTT's procedures**

Please refer to 2 (c) i above.

**2 (c) iii the rights of appeal available from CTTT decisions**

Appeals from decisions made in CTTT can only be made on a matter of law to the District Court. Such Appeals must be made within 28 days to the District Court.

Appeals to the Supreme Court must be made within 21 days of the date of the decision, and can only be made in respect sections 65 and 67 of the CTTT Act which rely on breaches of procedural fairness or that the CTTT does not have jurisdiction.



As the CTTT is based on appearances by the parties, and that solicitors can only act at the discretion of the presiding member, then the right of Appeal is seriously compromised where either party is not aware that they have a right to Appeal or that they would need to seek legal advice, often at their own expense.

Appeals to the District and/or Supreme Courts involve substantial costs and the exposure to legal costs should the Appeal be dismissed or fail.

Appeals would be limited to those in the community eligible to receive a grant of legal aid and/or those who have the capacity to pay for legal representation and costs should their appeal fail. Interpreters in the civil jurisdictions are not readily available at no costs to the parties as is the case in the criminal jurisdiction.

Appeals from decisions of the CTTT are not accessible to the general community who are not protected by indemnities from costs available to legal aid applicants.

**2 (d) any consequential changes which might arise.**

As stated throughout my submission accessibility to the Tribunals within the Justice system that meets the needs of the diverse communities of NSW that includes protocols for the aged, people with disabilities, with mental health issues and those in regional and rural communities should be included in your considerations.

Tribunals provide the portal for access to justice where self representation should be promoted and representation provided to those who seek or need assistance.

**3. That the Committee Report by 29 February 2012.**