

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

**Organisation:** Council of Social Service of NSW (NCOSS)

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## **Submission**

### **Standing Committee on Law and Justice Inquiry into Opportunities to Consolidate Tribunals in NSW**



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Council of Social Service of NSW (NCOSS)  
66 Albion Street, Surry Hills, 2010

Ph: 02 9211 2599, Fax: 9281 1968, email: [info@ncoss.org.au](mailto:info@ncoss.org.au)

## **RECOMMENDATIONS**

1. A program of community education and consultation is required as part of the development and implementation of recommendations.
2. A framework should be used to assess the effect of consolidation on the operation of tribunals that goes beyond cost and capacity. It must take into account administrative law principles and access to the most vulnerable in the community.

## **1. ABOUT NCOSS**

The Council of Social Service of NSW (NCOSS) is the peak body for the social and community services sector in New South Wales. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in NSW. It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at the Commonwealth level.

NCOSS provides an independent voice on welfare policy issues and social and economic reforms. It is the major coordinator for non-government social and community services in NSW.

## **2. INTRODUCTION**

NCOSS welcomes the opportunity to engage in this inquiry. Tribunals play an important part in the relationship between consumers, service providers and government. They are part of the legal framework in which specific legal rights are conferred upon people to challenge decisions and to scrutinise processes. The principles that allow community members to challenge decisions are part of a mature legal and political system.

The Committee's short time frame for submissions has not allowed NCOSS to consult widely with its members or to develop a significant analysis and response to the Issues Paper. Instead the focus of this submission questions the basis on which consolidation is assessed and the need for wider community consultation.

NCOSS is concerned that the focus of the terms of reference on the cost and efficiency of tribunals will fail to lead to a thorough analysis of how each tribunal can achieve its outcomes. The public must have confidence that tribunals are fair and have faith in the integrity of its processes. Confidence in the process will increase the likelihood of compliance with decisions and reduce disputes being taken to higher courts. This submission suggests the Inquiry use a broader framework for its assessment to ensure public confidence is maintained.

NCOSS submits that there is also a need for ongoing community education and consultation in the development and implementation of any recommendations accepted by government. This is important given that the tribunals, particularly the health and consumer tribunals, provide a service to disadvantaged populations and those most unlikely to access civil action in higher courts, where that is possible.

## **3. APPROACH TO THE INQUIRY**

### **Ensuring access to justice**

The 2002 report on the operation of the Administrative Decisions Tribunal (ADT) <sup>1</sup> in NSW referred to in the Issue Paper, used the Victorian Civil and Administrative Tribunal (VCAT) as an example of a consolidated body that could be duplicated in NSW.<sup>2</sup> Ten years after VCAT was established, the President of VCAT conducted a review in 2009. The submissions from

the consumer bodies to that review list a range of unmet expectations from the creation of VCAT. This included the need to:

- improve access to vulnerable consumers, particularly in the provision of information and service delivery in rural areas; and<sup>3</sup>
- improve training, support and guidance for members to improve decision making skills and more support for applicants meeting 'special circumstances'.<sup>4</sup>

These two issues are of particular interest to NCOSS because access to tribunal members in rural areas and for low income and vulnerable consumers were put forward as the benefits of consolidation in the 2002 ADT report.<sup>5</sup> It was claimed, that this would be achieved in part because one panel of tribunal members would be available in regional centres and hear cases that were currently the responsibility of several specialist tribunals. This assumes that on one day members may be hearing consumer complaints on widely differing matters, for example domestic builders on one day and applications for Guardianship on the next day. Losing the expertise on current tribunals was also a concern for many of those giving evidence at the 2002 ADT inquiry. Victoria was given as an example of how consolidation had provided new opportunities for training for members, a Professional Development and Training Committee was established and members were able to 'broaden their experience and knowledge' in order to sit on a range of inquiries.<sup>6</sup> Yet, nearly ten years after this report, the community services supporting clients most at risk, described a lack of specialist skills and called for better informed and trained members. Senior Rights Victoria submitted that their clients 'have experienced inconsistent decision making as well as situations in which efficiency appears to take priority over quality decision making.'<sup>7</sup>

NCOSS has reports that members of the Industrial Relations Commission are already sitting on non-industrial commissions, without appropriate background and training. A set of core skills could be described as necessary for all members, for example, high standards of ethical conduct and communication skills suited for an ethnically diverse community. However, specialist panels require specialist skills that will be determined by the type of matters they will hear, the technical knowledge required (legal or otherwise), and the nature of the orders that can be made. Appropriate safeguards need to be in place before matters are heard by Commissioners without experience or knowledge of a particular area.

Service providers' submissions to the VCAT review also indicate that the processes and structure that applied to everyone appearing before VCAT put vulnerable individuals at a disadvantage and that processes needed to be more flexible and better meet the needs for those meeting special circumstance criteria.<sup>8</sup> In bringing together tribunals there is a risk that adopting the most 'efficient' process for all hearings will not take into account the needs of some vulnerable parties such as those appearing before the Mental Health Tribunal or Guardianship Board.

This is not to overlook advantages that may result from the consolidation of some small tribunals. For example, health professional boards could benefit from access to a larger body that could provide corporate services, training, monitoring and accountability expertise and consistent approach to appointments, while ensuring expertise from the professions is part of the decision making processes.

### **Focus of the inquiry**

NCOSS is concerned that the focus of the Committee's terms of reference is on opportunities to make tribunals 'quicker', 'cheaper' and 'faster'. This is reinforced in the Issues Paper with most of the content focussing on the capacity of the Industrial Relations Commission and how its responsibility can be expanded to fill capacity. The Issues Paper is silent on the concerns raised in the 2002 report on the jurisdiction and operation of the Administrative Decisions Tribunal (ADT), such as how tribunal members will gain the expertise needed for specific health and consumer matters and the decision making processes that currently attempt to meet the special needs of its clients.<sup>9</sup>

Procedural fairness, administration and structure of judicial institutions are all important to the delivery of justice, not only the economic efficiency of the service. A study of California's state civil cases identified perceptions of procedural fairness as the strongest predictor of whether members of the public approve of or have confidence in its courts.<sup>10</sup> A Canadian case<sup>11</sup> challenging a decision of the British Columbia Liquor Control and Licensing Branch found that the rules and conditions that affect the structure of a tribunal could be a reason for judicial review. The case took into account the structure of the tenure and terms of appointment of tribunal members, operational policies and guidelines, administrative constraints and the independence of members.

A comprehensive, advanced and effective tribunal system is based on administrative justice (individuals rights are protected), executive accountability (the state can be called on to justify decisions) and good administration that demonstrates fairness, consistency, and transparency. Any review of tribunals should take this into account and ensure that standards are maintained and improved.

### **Framework and Principles**

In undertaking this inquiry NCOSS suggests that members consider the frameworks available for monitoring and improving the quality of court management and outcomes. For example, the Framework for Tribunal Excellence by the Council of Australian Tribunals<sup>12</sup> currently under consultation or the *International Framework for Court Excellence*<sup>13</sup> to widen the scope of inquiry and ensure the effective delivery of tribunal services. The two frameworks have a similar set of principles and follow a continual improvement management model. The Australasian Institute of Judicial Administration (AIJA) is a signatory to the Court Excellence Framework and most jurisdictions in Australia have adopted it as a continual improvement management tool, including the Land and Environment Court NSW and the Magistrates' Court of Victoria. When adopting the Framework, Ian Gray, Chief Magistrate in Victoria stated that he considered it 'an excellent tool to assist courts to establish a comprehensive framework for performance measurement and evaluation.'<sup>14</sup> Other frameworks such as that produced by the European Commission for Efficiency of Justice also provide checklists for ensuring that courts promote the quality of justice through its structure and systems and the quality of the judiciary.<sup>15</sup> The AIJA endorsed framework is one premised on research that public perception

is influenced by how parties are treated and whether the process is fair.<sup>16</sup> It provides a useful set of principles by which the structure of tribunals in NSW could be assessed and any changes measured. The principles are:

1. Court Management and leadership
2. Court policies
3. Human, material and financial resources
4. Court proceedings
5. Client needs and satisfaction
6. Affordable and accessible court services
7. Public Trust and confidence.

In applying this framework the inquiry should also ensure that the values that underpin these criteria are met:

- equality
- fairness
- impartiality
- independence of decision making
- competence
- integrity
- transparency
- accessibility
- timeliness and certainty

### **3. CONCLUSION**

The government should ensure that tribunals establish and maintain public trust. The public must have confidence that tribunals are fair and have faith in the integrity of its processes. Confidence in the process will increase the likelihood of compliance with decisions and reduce disputes being taken to higher courts (when there is a recourse to another court). Consolidation should be considered in light of whether it is the best way to achieve the objectives of the particular tribunal.

Further consultation with the community is required prior to any changes that could affect a tribunal's ability to:

- be accountable for the expenditure of public funds and use of resources and proper exercise of statutory powers;
- deliver inclusive and fair practices;
- provide predictable and consistent in decision making;
- make reports public, provide education and information and systems to encourage public feedback;
- ensure transparent appointment processes and tenure of its members;
- reduce the cost and time involved in pursuing a claim;
- ensure the background and skills of its members is appropriate to the matters; and

- ensure respect for parties regardless of their language or cultural background and their capacity to engage a legal representative.

#### 4. RECOMMENDATIONS

A program of community education and consultation is required as part of the development and implementation of recommendations.

A framework should be used to assess the effect of consolidation on the operation of tribunals that goes beyond cost and capacity. It must take into account administrative law principles and access to the most vulnerable in the community.

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<sup>1</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the ADT*, (November 2002), (27)

<sup>2</sup> *Ibid.*

<sup>3</sup> Financial and Consumer Rights Council, 15 June 2009, submission to the VCAT review.

<sup>4</sup> Seniors Rights Victoria and PILCH Homeless persons legal clinic, Submission to the VACT Review, (June 2009).

<sup>5</sup> *Ibid* n i, 8.

<sup>6</sup> *Ibid* n l, 7.

<sup>7</sup> *Ibid* n iv, 14.

<sup>8</sup> *Ibid* n iv.

<sup>9</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the ADT*, (November 2002), (27)

<sup>10</sup> Centre for Court Innovation, *Procedural Fairness in California*, Judicial Council of California, (May 2011).

<sup>11</sup> *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001) 2SCR 781.

<sup>12</sup> A Framework for Tribunal Excellence at <http://coat.gov.au/docs/FrameworkTribunalExcellenceDraft.pdf> on 21 November 2011.

<sup>13</sup> International Consortium for Court Excellence 2008, Van Duizend, (2010).

<sup>14</sup> Ian L Gray, Chief Magistrate, *Magistrates' Court of Victoria Adopts International Framework for Court Excellence*, (September 2009) at [www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home](http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home) at 4/11/2011.

<sup>15</sup> European Commission for Efficiency of Justice, *Checklist for promoting the quality of justice and the courts*, adopted by the CEPEJ at its 11<sup>th</sup> plenary meeting, (Strasbourg 2-3 July 2008); Finnish Court of Appeal of Rovaniemi 'Quality Model'; Netherlands judicial system 'RechtspraakQ model'; UN Practice Note *Access to Justice*, 9/1/2004.

<sup>16</sup> International Consortium for Court Excellence, n 2, End notes (14).