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

Parliamentary Inquiry into the Jurisdiction & Operation of the *Administrative Decisions Tribunal*

Discussion Paper

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CONTENTS

Appendices

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CHAPTER ONE

INTRODUCTION

The Committee on the Office of the Ombudsman and the Police Integrity Commission commenced an inquiry into the operation and jurisdiction of the New South Wales Administrative Decisions Tribunal (ADT) upon receiving a referral on 8 June 2000 from both Houses of Parliament, made in accordance with s.146 of the *Administrative Decisions Tribunal Act 1997*. This section provides for a parliamentary inquiry by a joint committee into the jurisdiction and operation of the ADT. The Committee conducting the inquiry must report on the results to the Legislative Council and Legislative Assembly as soon as practicable after the expiry of 18 months from the establishment of the ADT.

The Committee advertised the inquiry and called for submissions on 1 July 2000. The submissions received (a list is attached at Appendix 1) cover a wide variety of issues, both minor and complex, some of which had significant implications for the operation of the ADT.

On 11 October 2000, the Committee resolved to conduct preliminary public hearings to explore further the issues raised in submissions to the review and to table the submissions. The Committee also decided to prepare a discussion paper following the public hearings, for distribution to interested persons, appropriate departments and other relevant bodies. It planned then to consider the need to obtain further evidence for the inquiry in light of any submissions made in response to the discussion paper. This approach to the conduct of the inquiry is intended to promote fuller debate of the issues raised in submissions as well as other issues relating to the operation and jurisdiction of the ADT.

Evidence was taken at a public hearing held on 17 November 2000 from the following individuals:

Judge Kevin O'Connor	President NSW Administrative Decisions Tribunal
John North	President Law Society of New South Wales
Gregory Kirk Amanda Cornwall	Principal Solicitor Senior Policy Officer Public Interest Advocacy Centre
Christopher Puplick Angelene Falk	President Senior Legal Officer Anti-Discrimination Board of New South Wales
Alan Robertson SC	Barrister

Peter Garling SC Barrister - representing the New South Wales Bar Association and NSW Bar Council

This paper aims at giving an outline of the major issues which the Committee considers central to the inquiry. It is divided into three major sections dealing with the ADT's jurisdiction, operation, and the measurement and review of its performance. The discussion paper focuses on the areas considered by the Committee to be priorities for its review. It does not include discussion of all the issues raised in submissions or evidence. The transcript of the public hearing held on 17 November 2000 can be found on the Committee's web site and copies of tabled submissions can be obtained through the Committee Secretariat (details on inside cover).

The Committee is prepared to consider additional submissions made to the review and may examine these further in evidence prior to making a final report. Proposals have been made, where the Committee considered appropriate, for the purpose of further discussion. The Committee welcomes comment on the proposals and any other aspect of the discussion paper.

CHAPTER TWO

JURISDICTION

The ADT's jurisdiction can be divided into two areas:

1. review jurisdiction, which involves the external review on the merits of classes of administrative decisions as provided for in the enabling legislation under which the original decision is made; and
2. original jurisdiction, which involves making a decision in the first instance in relation to a matter or dispute.

2.1 REVIEW OF REVIEWABLE DECISIONS

The review jurisdiction of the ADT involves the relevant division of the ADT reconsidering an administrator's decision based on all the material on which the administrator has relied, the administrator's statement of reasons for the decision, and any further submissions and relevant evidence. The ADT may affirm the administrator's decision if it is held to have been correct. However, if the ADT considers the administrator's decision to have been wrong, it may vary the decision or set it aside. A decision that is set aside may be remitted to the administrator for reconsideration in light of the ADT's views. Appendix 2 provides a list of the ADTs' enabling legislation and legislation conferring jurisdiction. The divisions of the ADT involved in external merits review include the General Division, the Community Services Division, the Occupational Regulation Division and the Revenue Division.

Despite the wide range of categories of reviewable decisions cited in the Minister's second reading speech, the ADT has advised that only a relatively small proportion of the 72 or more acts which confer jurisdiction on the ADT have given rise, in practice, to applications for review. The principal categories of review applications to date relate to: security industry licensing; passenger transport licensing; commercial fishing licensing; refusals under the *Freedom of Information Act*; pawnbroker and second hand dealer licensing; driving suspensions following alcohol readings exceeding the prescribed limit; school registration disputes; and decisions as to funding of community services providers.[1]

Judge O'Connor gave evidence to the Committee that, although the Community Services, Agriculture, Transport and Attorney General's portfolios are represented in the schedule of jurisdictions under the ADT Act, portfolios that have significant administrative decisions remain outside the ADT's jurisdiction. He noted that the ADT Act does not provide the same level of comprehensive coverage as is found under the legislation establishing the Commonwealth Administrative Appeals Tribunal or the Victorian Civil and Administrative Tribunal.[2]

Criteria for reviewable decisions

When introducing the ADT Bill and cognate legislation into the Legislative Council in June 1997, the then Attorney General, the Hon. J.W. Shaw, QC, MLC, indicated that

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1 ADT submission dated 6/10/00 para. 13.

2 Evidence 17/11/00

in the following eighteen month period the Government would review all administrative decisions which are made under State legislation to determine which should be reviewable by the ADT. The following categories were given as a guide:

1. The granting or refusal to grant a licence, permit, registration, authority or approval for an activity or item.
2. Suspension, termination, revocation or cancellation of a licence, permit or authority.
3. Service of a notice directing or requiring the doing of an act or the ceasing to do of an act in order to comply with a legislative requirement.
4. Determination of an entitlement or eligibility for a (financial or like) benefit or assistance.
5. Satisfying of safety or other standards.
6. Exclusion of persons from property, places or institutions.
7. Determination of an entitlement to moneys.
8. Remittance of penalties, interest, debts or fees.
9. Consenting to, or refusal of consent, and the imposition of conditions relating to lending guarantees, or leasing.
10. The selection or appointment of receivers or administrators.
11. The acquisition, disposal or dealing with property.
12. Certification or refusal to certify matters.
13. The protection of vulnerable persons.[3]

These categories were described as 'indicative for the purpose of assisting in identifying decisions amenable to inclusion in the jurisdiction of the ADT'. The list was considered neither exhaustive nor prescriptive of matters for inclusion.[4]

2.2 ORIGINAL JURISDICTION

The original jurisdiction of the ADT was established primarily through the merger of a number of pre-existing tribunals[5] and the transfer of their jurisdiction to the ADT. Consideration also was being given to the integration of a further 21 tribunals. [6]

The Hon. J.W. Shaw gave the following reason for the view that it was both necessary and appropriate to merge tribunals into the ADT:

> The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making.
>
> The variations in tribunals as to functions, operation and constitution are enormous. The criticisms which are made of tribunals are therefore general and do not apply to all tribunals. However, it is appropriate for me to set out some of the Government's concerns with the operation and proliferation of tribunals which justify the proposal to rationalise these bodies.
>
> Of significant concern is the fact that tribunals often exist within government departments and agencies in circumstances where clear conflict of interests may

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3 The Hon. J.W. Shaw, 2R LC Hansard, 27/06/97 p.11279-80.

4 ibid, p. 11280.

5 Namely, the Equal Opportunity Tribunal, the Legal Services Tribunal, Boxing Appeals Tribunal, Veterinary Surgeons Disciplinary Tribunal, the Community Services Appeal Tribunal and the Schools Appeal Tribunal. Further legislation, commencing on 1 March 1999, transferred the retail leases jurisdiction of the Commercial Tribunal to the ADT.

6 The Hon. J.W. Shaw, 2R, op,cit, p.11281

> arise. In some cases the department which administers a tribunal may also have a role in prosecuting or defending a matter in the tribunal.
>
> This creates, at the very least, an impression of lack of independence which is some times all too real. It gives little confidence to an aggrieved person whose matter is being dealt with by the tribunals.
>
> Tribunals often do not have a commitment to or capacity to apply principles of natural justice.
>
> Indeed, it could be suggested that the extensive judicial attention to setting out rules of procedural fairness has been, at least in part, a response to the manner in which proceedings are often conducted in tribunals.
>
> The corollary to this is that tribunals may be come arbitrary in their approach. The difficulty and cost of obtaining judicial review and the fact that they are not bound by their own precedents does little to generate consistency and coherence in decision making.
>
> It must also be questioned whether the resources currently allocated to tribunals is an efficient use of government funds. Each tribunal tends to have its own infrastructure and administrative support. This has resulted in duplication of hearing rooms which may often go unused for significant periods and duplication of facilities in the form of registries and research and executive support.
>
> The proliferation of tribunals is not only an inefficient application of resources. It may also be inequitable for litigants between one tribunal and another as a result of different application fees and time frames for dealing with matters depending on how well the tribunal is resourced.[7]

Mr Shaw specifically noted that the ADT would not replace all existing tribunals, on the grounds that a number have jurisdiction "in relation to matters which do not come within the definition of administrative decisions." However, "where there is a clear justification to retain a specialist tribunal it may be appropriate to provide that the ADT act as the appellate body", to ensure consistency of administrative decision making and the application of procedural fairness principles to the decision making and review processes. [8]

In the area of professional disciplinary matters, the Minister referred to the proposed Legal Services Division of the ADT and stated that:

> As further professional disciplinary tribunals are merged with the ADT, it is proposed to develop generic procedures for professional disciplinary matters as a separate chapter of the ADT bill to maximise a consistency of approach to essentially similar matters.[9]

At present the ADT's original decisions jurisdiction can be basically divided into the civil claims work of the Equal Opportunity and Retail Leases Division and professional discipline proceedings, that is, the Legal Services Division (legal practitioners and licensed conveyancers) and the General Division (in respect of veterinary surgeons).[10]

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7 ibid, pp.11281-2.
8 ibid, p.11282.
9 ibid.
10 ADT Submission para.5.

2.3 EXPANSION OF JURISDICTION

Some tribunals have been merged with the ADT since its establishment, for example, the Community Services Appeals Tribunal and the Commercial Tribunal. However, various other tribunals continue to operate in New South Wales outside the auspices of the ADT, and it has been submitted to the Committee that a number of these separate tribunals, and statutory adjudicative and review bodies, should be integrated into the ADT.

It is difficult to obtain a definitive listing of all the tribunals operating in New South Wales. However, the Committee considers that the following list of tribunals operating in New South Wales could be considered for merging with the ADT:

Chiropractors and Osteopaths Tribunal
Coal Compensation Review Tribunal
Contract of Carriage Tribunal
Fair Trading Tribunal
Government and Related Employees Appeal Tribunal
Greyhound Racing Appeals Tribunal
Guardianship Tribunal
Harness Racing Appeals Tribunal
Independent Pricing and Regulatory Tribunal
Local Government Pecuniary Interest Tribunal
Marine Appeals Tribunal
Medical Tribunal
Mental Health Review Tribunal
Nurses Tribunal
Racing Appeals Tribunal
Remuneration Tribunals including the Statutory and Other Offices Remuneration Tribunal and Local Government Remuneration Tribunal
Transport Appeal Boards
Residential Tribunal
Victims Compensation Tribunal

Developments have occurred in relation to certain of these tribunals. For instance, a review has recently been completed by the Department of Fair Trading into the NSW Residential Tribunal and the Fair Trading Tribunal,[11] focussing on the issue of whether the Residential and Fair Trading Tribunals should be merged. In addition, this review examined alternative models for the efficient and effective delivery of Tribunal services including transfer of the Fair Trading and Residential Tribunals to the ADT (clause 7, schedule 5 of the *ADT Act*, if commenced, would provide for the transfer of the Fair Trading Tribunal to the ADT).[12] The Committee understands that the review has been completed and the report is currently under consideration by the Minister for Fair Trading. The Committee noted that at present Judge O'Connor heads both the ADT and the Fair Trading Tribunal, and that a degree of other

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11 The Fair Trading Tribunal was established in March 1999 through the amalgamation of the Consumer Claims Tribunals, Commercial Tribunal and Building Disputes Tribunal. The Residential Tribunal was formed as a restructuring and renaming of the previous Residential Tenancies Tribunal.

12 Department of Fair Trading, "Review of the Fair Trading and Residential Tribunals – Consultant's Brief".

common membership also exists between the two tribunals. However, the ADT has indicated that the infrastructure and registry needs of both tribunals are provided from within the respective separate portfolios and that there are significant practical and operational differences.[13]

The Committee received a number of submissions proposing the extension of both the external merits review and original jurisdiction of the ADT. The Public Interest Advocacy Centre (PIAC) submitted that the jurisdiction of the ADT should be extended to include merits review of the following decisions:

- public housing decisions, including housing applications, eligibility for priority housing with the Department of Housing, rehousing applications, housing assistance, and tenancy management;
- decisions not already reviewable by the Community Services Division of the ADT, for example, boarding house licensing decisions;
- decisions of the Guardianship Board[14].

The PIAC also referred to proposals made by various bodies for the following functions to be conferred on the ADT: allowing appeals to the ADT on questions of law from decisions of the Guardianship Board, the Protective Commissioner, the Public Guardian and the Mental Health Review Tribunal; extending merits review to include environment and planning decisions; and, merits review of prisoner security classification decisions, parole decisions, and of disciplinary decisions in government schools.[15] Judge O'Connor indicated he did not wish to comment specifically on the PIAC proposals concerning the Housing area, guardianship jurisdiction and aspects of the Community Services portfolio's decision-making.[16]

The NSW Law Society submitted that the inquiry needed to examine the progress of conferring jurisdiction on the ADT as originally intended by the Government and that the ADT needs to be enhanced to extend its operation to accommodate recently conferred jurisdiction relating to consumer appeals.[17] The Law Society held that:

> The pace of conferring jurisdiction needs attention to overcome resistance to change. Arguments for retaining merits review within agencies risk claims for breach of natural justice as processes continue to be seen as unfair.[18]

In the view of the Law Society conferring jurisdiction on the ADT of the range of review and appeal provisions of NSW statutes gives "the opportunity to provide for consistency and fairness in matters for review or appeal". It argued that the process

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13 ADT submission, para. 23.

14 PIAC submission, dated 30/8/00 The Public Bodies Review Committee of the Legislative Assembly is currently conducting an inquiry into the Office of the Protective Commissioner and the Office of the Public Guardian. The terms of reference for the inquiry include an examination of the effectiveness of complaint mechanisms within the Office of the Protective Commissioner and the Office of the Public Guardian and the response of both Offices to the recommendations contained in the Auditor General's Performance Audit Report No. 66. The latter strongly recommended that a simpler, quicker and cheaper means of obtaining external review of the decisions of OPC and OPG should be developed and implemented as a matter of urgency.

15 ibid, pp.3-5.

16 Judge O'Connor, comments tabled 17/11/00.

17 NSW Law Society submission, dated 18/8/00.

18 ibid.

of review and appeal should be the same across statutes as the "issue is the review or appeal on the merits of decisions made". [19] The President of the Law Society, Mr John North, gave evidence that there should be a strong case made for any exception to the ADT's review jurisdiction. He also indicated the Law Society's support for extending the ADT's original jurisdiction, including the merging of the Fair Trading Tribunal.[20]

Elizabeth Ellis, Faculty of Law, Wollongong University, submitted that:

> A relatively small number of new review rights have been created since 1997 when legislation to establish the Tribunal was introduced. It is difficult to obtain information about the creation of new review rights and not easy to discern a coherent policy where new rights have been created. Such findings are at odds with the Act's statutory objects and the government's expressed commitment to administrative law reform when the original ADT legislation was introduced.[21]

Also, she had found that the number of new review rights invoked in review applications to date has been limited.[22]

The impact of an expanded jurisdiction for the day to day operations of the ADT may be difficult to gauge. For example, Mr Robertson SC gave evidence that an estimated 1,200 merits reviewable decisions under Corporations Law had not resulted in a great number of additional applications to the Commonwealth Administrative Appeals Tribunal for review. He noted it was impossible to tell the impact on the ADT's workload from just listing or identifying reviewable decisions.[23]

Judge O'Connor described the ADT's jurisdiction at present as "principally one drawn from responsibilities distributed across the courts and tribunals attached to the Attorney General's portfolio".[24] He commented that:

> A major policy question is whether there are tribunals in other portfolios whose responsibilities should be housed within the ADT structure. Should there be a policy statement as to what kind of departmental and ministerial decisions should be subject to external review, and then a thorough examination to see what decisions are amenable to external review and which ones are not, and whether that is reasonable in terms of the principles stated.[25]

In considering the question of an expanded jurisdiction for the ADT, Judge O'Connor drew a distinction between its merits review and original jurisdictions of the ADT, submitting that:

> The general principle upon which the General Division of the ADT is founded is that it should be the lead forum in NSW for the external review of administrative decisions affecting citizens. Proposals for new jurisdiction should first be tested by reference to that principle. If the proposal is not one connected with the review of administrative decisions, then what is being sought is new original jurisdiction for the ADT analogous to that presently exercised in the EOD, LSD and RLD. There is greater

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19 ibid.
20 Evidence, 17/11/00.
21 Elizabeth Ellis, Faculty of Law, Wollongong University, submission dated 17/8/00.
22 ibid.
23 Evidence 17/11/00
24 Judge O'Connor, tabled comments 17/11/00.
25 ibid.

> room for policy argument, I feel, on whether the ADT is the most suited forum for new original jurisdictions. Nonetheless the VCAT model in Victoria represents 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.[26]

In his view there should be a presumption of external review to the ADT in relation to administrative decisions "which are in the nature of decisions that affect citizens in an individual way, as distinct from generic decisions that affect individuals".[27] He told the Committee:

> **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. . . .[28]

The principle of broad rights to bring an appeal is supported by the Administrative Review Council (ARC) in its guidelines on identifying merits reviewable decisions. The ARC holds that:

> As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.
> . . .
> The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.
>
> If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.
>
> The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.[29]

With regard to the professional discipline area of the ADT's original jurisdiction, Judge O'Connor told the Committee that he saw merit in "the proposition that there be some form of coordinated professional discipline tribunal environment".[30] While he did not advocate the ADT for this purpose, it was apparent from the following evidence that he did not rule out a role for the ADT:

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26 ibid.
27 ibid.
28 Evidence 17/11/00
29 ARC , *What decisions should be subject to merits review?*, July 1999, paras. 2.1, 2.4-2.6.
30 Evidence 17/11/00.

> **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?
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> **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.[31]

There appeared to Judge O'Connor to be:

> . . . 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.[32]

When questioned about the advantages of having professional conduct matters determined by a tribunal like the ADT, Judge O'Connor stated:

> **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. . . .[33]

2.4 COMMENT

It appears to the Committee that the original impetus which led to the merging of tribunals and the establishment of the ADT has since declined, and there seems to be no apparent intention to proceed with a systematic integration of existing tribunals, as foreshadowed in the Minister's second reading speech on the original legislation. In particular, there has been no further progress in integrating professional disciplinary tribunals into the ADT.

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31 ibid.
32 ibid.
33 ibid.

It is probably neither practical nor appropriate to embark upon a program of complete integration of all existing State tribunals into the ADT. However, it is the opinion of the Committee that a comprehensive assessment of the scope for further merging of existing tribunals in New South Wales into the ADT was intended to be a consequence of the ADT's establishment. Indeed, without such evaluation many of the problems of fragmentation which prompted the establishment of the ADT will remain, and the full benefits of rationalisation and standardisation will be only partly realised.

In the area of external merits review of administrative decisions, the Committee has not been advised of any efforts to formulate, on a systematic basis, criteria for determining which decisions that should fall within the reviewable decision jurisdiction of an ADT. Consequently, it is difficult to envisage how or on what basis the jurisdiction of the ADT is expected to expand so as to achieve optimum efficiency and effectiveness in improving the quality of administrative decision-making. The Committee considers that it was the intention of the Parliament that there should be a comprehensive approach to administrative review, and this intention would imply a full assessment of matters that should be reviewable. Therefore, the Committee has been prompted to make the following proposals:

2.5 PROPOSALS

1. **Legislation should be brought forward to merge separate tribunals with the ADT, unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT.**

2. **Explicit criteria for determining administrative decisions which should appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General's Department in consultation with the ADT. The Attorney General's Department should consult all departments and agencies to identify administrative decisions which currently meet the criteria and should therefore be subject to external merits review by the ADT.**

3. **There should be a presumption in future that all administrative decisions provided for under new legislation, which meet the criteria developed by the Attorney General's Department and the ADT, should be subject to external merits review by the ADT.**

4. **The proposed Administrative Review Standing Committee should monitor the progress achieved in merging existing tribunals with the ADT and also have an ongoing role in the further review and development of criteria for defining the appropriate extent of the ADT's merits review jurisdiction (see Chapter 6 for discussion of the proposed Administrative Review Standing Committee).**

CHAPTER THREE

OPERATION

3.1 INTRODUCTION

The Australian Law Reform Commission identified several factors influencing the procedures used by tribunals, including:

- the resources available to tribunals and their decision makers (for example, whether a tribunal has the resources to conduct its own investigations, the number of tribunal members and the tribunal's caseload)
- the personal preferences of tribunal decision makers and the membership and 'culture of the tribunal (for example, lawyer members may be more comfortable with courtroom based procedure)
- the nature of the case (for example, the complexity of the questions of fact, law or credit raised by the case and whether there is a further level of review available)
- factors relevant to the parties (for example, their level of relevant knowledge and experience and the nature and extent of their representation in the proceedings, if any)
- decisions or dicta of appeal or review courts concerning alternative adjudicative or dispute resolution processes.[34]

The ALRC also highlighted a recommendation by the Administrative Review Council that:

> Review tribunals should have sufficient powers and discretions to enable them to pursue whatever techniques and processes best serve their objectives, including techniques associated with an active investigative approach.[35]

The Committee has had regard to such factors and considerations in examining the operation of the ADT.

3.2 VARIATIONS IN PRACTICES & PROCEDURES

In his second reading speech on the ADT Bill, the Minister stated that the ADT "[would] have a discretion to adapt its procedures to the circumstances of the application before it".[36] Also, the different divisions of the ADT would be able "to operate relatively autonomously, with different rules and procedures which are appropriate to the functions exercised by each division." He also anticipated that there would be variations in the rules and procedures used within a division depending on the nature of the matter under consideration.[37]
It is evident to the Committee that the operation of the ADT differs significantly between its original and review jurisdiction. Proceedings in the divisions involved in

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34 Australian Law Reform Commission, *Issues Paper 24: Review of the adversarial system of litigation*, pp.3-4 (www.austlii.edu.au/au/other/alrc/publications/issues/24).

35 ibid, p.4; originally, Administrative Review Council Report No. 39, *Better Decisions: Review of Commonwealth Merits review Tribunals*, AGPS Canberra 1995, rec.5.

36 The Hon. J. W. Shaw, op. cit., p. 11280.

37 ibid.

the original jurisdiction of the ADT tend to be more adversarial and reliant on the fact-finding methods used in courts, eg. formal receipt and testing of evidence, whereas the practices and procedures used by the divisions involved in the ADT's merits review jurisdiction are more flexible and less like those employed by the courts. In the General Division "there is less need to test evidence and limited need to lead fresh evidence".[38]

The ADT outlined its general approach as follows:

> While the Tribunal uses some of the methods ordinarily employed in courts and tribunals for the receipt and testing of evidence (for example, the giving of sworn evidence and allowing cross-examination), it seeks to avoid unnecessary use of those processes. Wherever possible in its merits review work, it seeks to adopt a format which more approximates to a round-table discussion. This is, we believe, the appropriate course to adopt where there are not significant disputes as to fact, and that is often case. The Tribunal is also at pains to make it clear that in its merits review role it sees its role as one of 're-assessing' the administrator's decision, rather than adjudicating over an adversarial contest between the parties.[39]

The need for formality in certain of the ADT's divisions exercising original jurisdiction was apparent:

> While legislation such as the Anti-Discrimination Act refers to the role of the Tribunal as one of 'inquiry' into a complaint, care must be taken once there are disputes of facts not to deviate too far from the traditional methods used in the Australian legal system for resolving such disputes, otherwise the Tribunal is at risk of having its decision set aside on appeal or review.[40]

In the Legal Services and Equal Opportunity Divisions "matters have a notable adversarial character to them, because of the size and seriousness of the private issues at stake".[41] The legal expertise of the parties to matters in the Legal Services Division is another obvious factor contributing to the adversarial nature of its proceedings. Matters dealt with by the Anti-Discrimination Board are referred to the Equal Opportunity Division if conciliation is inappropriate or unsuccessful. Consequently, such matters tend to involve more intractable disputes and be more adversarial in character.[42]

The ADT noted the following operational trends in its submission to the review:

- increased use of pre-hearing conferences in the case of Freedom of Information Act matters in the General Division, and in all matters in the Equal Opportunity and Retail Leases Divisions (there was already a significant emphasis on this procedure in the Community Services Division, and that has been maintained)

- increased use of structured mediation sessions in the Equal Opportunity Division
- less complexity in the paperwork required from the parties
- a web-site of quality containing all relevant information bearing on procedures in the Tribunal with links to relevant legislation and decisions

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38 ADT submission, para.75.
39 ibid, para. 12.
40 ADT submission, para. 18.
41 ibid, para. 71.
42 ibid, para. 72.

- a routine practice of publishing electronically all written reserved decisions and oral, ex tempore decisions of significance, and
- an increased emphasis on member professional development (subject to resources).[43]

The submissions received by the Committee do not suggest that there are major problems with the practices and procedures used by the ADT. For instance, the NSW Law Society submitted that the ADT is "operating effectively" and that the "processes of merits review are proving the worth of bringing together administrative review procedures and processes under a range of statutes which confer jurisdiction on the ADT". It observed that the ADT mainly needed more time to incorporate newly conferred jurisdiction and that the level of formality of proceedings "should reflect the nature and seriousness of each case before it."[44]

However, the submissions received do raise issues about:

- the extent to which tribunal procedures between Divisions and across the ADT should be standardised; and
- the extent to which merging tribunals should retain their specific processes and procedures when merged into the ADT;
- the formulation of final rules for the ADT;
- whether the divisional and tribunal rules support the objectives of the legislation; and,
- provision of advice to persons affected by decisions which are reviewable by the ADT;
- registry services.

3.3 RULES

Initially, the practices and procedures applied in the various divisions of the ADT were those of the merging tribunals which were retained as far as possible. It was envisaged that general ADT's practices and procedures would gradually emerge and develop and that special jurisdictional practices would be maintained or developed as appropriate.[45] Interim rules for the transitional period, effective from 6 October 1998, were provided for by regulation under the *Administration Decisions Tribunal Rules (Transitional) Regulation 1998* and give requirements relating to documentation, commencement and conduct of proceedings and appeals. The Interim Rules include the practice and procedures of the former Legal Services Tribunal as provided by the *Legal Tribunal Rules 1995*, since repealed. Tribunal divisions can adopt their own procedures formally through rules and informally through directions or guidelines.[46] The ADT's procedures are internally monitored and the ADT intends to consult with user groups as part of this internal review process.[47]

The submissions received by the Committee, which raise issues of practice and procedure do so largely in relation to the operation of the Legal Services Division.

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43 ibid, para. 6.
44 NSW Law Society submission, dated 18/8/00.
45 ADT, *Annual Report 1998-9*, December 1999, p. 27.
46 ibid, p.13.
47 ibid.

The Office of the Legal Services Commissioner (OLSC) submitted that "greater attention needs to be given to the Rules which guide the operation of the ADT and, in particular, the Legal Services Division".[48] It held the view that the rules of the ADT need to be refined and settled in consultation with key stakeholders: a view shared by the NSW Law Society.[49]

The OLSC claimed that proceedings in the Legal Services Division are by nature highly legalistic and that the current Interim Rules of the ADT give inadequate guidance or certainty on particular procedural matters, such as, the form and presentation of informations, affadavits or interlocutory applications.[50]

Commenting on the "machinery issues" raised by the OLSC and Bar Association, Judge O'Connor advised that the rules of the Legal Services Division "are simply a continuation of those that applied to the former Legal Services Tribunal".[51] The ADT had not made any substantive changes to the rules that were adopted following appropriate consultation with all relevant parties, including the OLSC. He indicated that the ADT would be quite happy to revisit the rules if there were any particular problems and undertook to refer that matter to the Rule Committee for examination.[52]

The OLSC also supports the development of standardised forms to promote consistency and minimise the chance of matters failing or being delayed on minor technical grounds.[53] Judge O'Connor stressed that the absence of standard forms for the filing of informations needed to be understood in the context of professional discipline proceedings. The ADT had "avoided seeking to prescribe forms in relation to the way in which disciplinary charges should be formulated"[54]. Judge O'Connor gave evidence that he had been cautious about giving directions to official prosecutors about how they might structure their informations (the ADT does have a form of reply to an information, for the assistance of practitioners who are charged). The ADT had not received reports of any problems. However, Judge O'Connor indicated that the ADT would be prepared to refer the issue of how informations are structured, and the implications for the rights of the people who have to respond to informations, for examination and he undertook to refer these issues to the ADT's Rule Committee.[55]

Another proposal put by the OLSC was that there should be a separate divisional rule in the Legal Services Division allowing a period of six months between the making of a decision to refer a practitioner to the ADT and the initiation of proceedings. Currently Rule 14 of the Interim Rules requires applications to be initiated within 28 days. While the 28 day period may be appropriate in other divisions, the OLSC claimed that the application of such a short time limit in the Legal Services Division did not allow sufficient time for respondents to seek counsel's advice, obtain affidavits from witnesses and gather supporting evidence, before presenting a matter to the ADT. [56]

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48 OLSC submission, dated 26/7/00.
49 Evidence 17/11/00.
50 OLSC submission, dated 26/7/00.
51 Judge O'Connor, comments tabled 17/11/00.
52 ibid and evidence, 17/11/00.
53 OLSC submission, dated 26/7/00.
54 Judge O'Connor, comments tabled on 17/11/00.
55 Evidence 17/11/00.
56 OLSC submission, dated 26/7/00.

The NSW Bar Association also considered the 28 day time limit to be inadequate and suggested a period of three months for the following reasons:

- The records of the minutes of the Bar Council's resolution need to be settled before they can be actioned. Because of the complexity – and importance to the individual concerned – great care is taken with the minutes; they are not drafted in a hurry.
- Bar Council briefs solicitors and counsel in its Tribunal matters. Files are often large and matters complex. It is logistically very difficult, and at times impossible, for a matter to be referred to [its] solicitors and for [the solicitors] and counsel, in turn, to draft the originating process in a period of 28 days.[57]

In its supplementary submission,[58] the OLSC agreed with the Bar Association's proposal that a 90 day time limit would be the most appropriate period between the formal decision to take disciplinary proceedings against a practitioner and filing in the ADT. The President of the NSW Law Society, Mr John North, gave evidence that the Society was of the view that a matter involving the professional livelihood of an individual should not be delayed and that the current 28 day period should stand.[59]

Judge O'Connor considered that the concerns of the OLSC and Bar Association "appear to be driven by the need to have time to undertake any additional investigative steps after the formulation of the complaint". He suggested that it may be a matter for the current NSW Law Reform Commission review of the procedures for dealing with complaints against legal practitioners under Part 10 of the *Legal Profession Act 1987.*[60] In evidence he stated that the proposal for an extended period may be advantageous to the ADT:

> I have got no particular views on that. It may well be that that is a good thing. . . . 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.[61]

Delays within the Legal Services Division in obtaining hearing dates and the handing down of decisions were raised by the OLSC, which submitted that:

> While the Legal Services Division of the ADT does not have a particularly onerous workload (there were 82 matters before the Division in the 1998/99 financial year), OLSC has experienced some significant delays in obtaining hearing dates and, following the hearing of a(sic) matter, in receiving decisions.[62]

The OLSC supported its criticism by citing a specific case in which it had sought an order to have a legal practitioner struck off and three months after the matter was heard by the Tribunal it was still awaiting a decision, during which time the practitioner had been free to continue practicing.

Judge O' Connor advised that the statutory time limit for publication of reasons for decisions after completing hearings is 6 months. The ADT's internal guideline is as soon as possible and no later than 2 to 3 months. He commented that:

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57 Bar Association submission dated 15/8/00.
58 OLSC supplementary submission, dated 8/11/00.
59 Evidence 17/11/00.
60 Comments tabled 17/11/00.
61 Evidence 17/11/00.
62 OLSC submission 26/7/00.

> Factors that can impinge on achieving the internal target include the number of complex matters that a judicial member has dealt with in a particular period and conflicts between their day to day work demands and their responsibilities as a part-time member of the ADT. This can be particularly acute in the case of the leading practitioners who often preside in legal profession discipline proceedings. The ADT routinely reminds members of the need for timeliness, and if there is a patter of late decisions, I am of the view that the members should not continue to be listed.[63]

The Committee notes that from the commencement of operations in the Legal Services Division on 6 October 1998 until the end of the first annual reporting period on 30 June 1999, 10 of the 26 matters disposed of in this Division were determined in less than 6 months from the date of publication. Five matters were determined within 12 months from the date of application; five within more than 12 months; and 6 within more than two years.[64] These early statistics must be viewed in light of the transfer of matters to the Division in 1998 (59 in total).[65]

In response to the criticism of delays in timetabling of matters, Judge O'Connor clarified that "to a greater extent than is true in other work in the tribunal the timetable in professional discipline matters is driven by the prosecuting party and to a lesser extent the respondent practitioner". It should not be assumed that delays originated with the ADT. The Judge told the Committee that it was his experience that the prosecuting party in professional discipline matters, that is 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. Often there are interchanges occurring between the prosecutor and the respondent practitioner about the scope of the proceedings or the evidence and the ADT is, to a large extent, in the hands of these parties.[66]

Another of the contributing factors to delays is the need to coordinate three part-time members with competing commitments, combined with the need to accommodate the legal representatives of the parties involved.[67] Although it would be possible for the ADT to move towards a "more activist approach to time-tabling" such matters, Judge O'Connor considered that professional discipline proceedings are to a significant extent party driven and appropriately so.[68]

The Committee noted submissions that the High Court decision in the Barwick case has resulted in a significant hiatus with matters then before the ADT but that the delay is temporary and the *Legal Profession Act 1987* has been amended to overcome the problem.[69]

The OLSC also recommended training for all registry staff in the rules and procedures of the Legal Services Division, or having dedicated registry staff for this particular division.[70] This was the first occasion on which Judge O'Connor had heard any such comment from Legal Services Division users of the Registry. He was

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63 Judge O'Connor, comments tabled 17/11/00.
64 ADT, *Annual Report 1998-9*, p.37.
65 ibid, p.23.
66 Evidence 17/11/00.
67 Judge O'Connor, comments tabled 17/11/00.
68 ibid.
69 OLSC supplementary submission 8/11/00.
70 OLSC, submission dated 26 July 2000.

prepared to have the Registrar examine specific concerns and pointed out that two of the three officers that belonged to the former Legal Services Tribunal Registry continue to work in the ADT Registry. Judge O'Connor told the Committee that all staff are expected to be generally conversant with the work of all ADT Divisions and they receive regular training.[71]

Delays in the release of information under FOI, resulting from the number of appeal steps available and the time taken in the ADT's procedures for dealing with FOI matters, were cited by the PIAC as the basis for its call to remove the ADT's FOI jurisdiction and create an independent office of the Information Commission.[72] Although supportive of the initial transfer of the FOI appeal function from the District Court to the ADT in 1998, the PIAC is now critical of the current time taken to hear FOI matters in the General Division of the ADT and for any subsequent appeals.

PIAC submitted that the average completion time for FOI complaints to be heard by the ADT was a minimum of 10 weeks and that matters subject to appeal after the initial ADT merits review could take more than a year to resolve. It illustrated the problem through its own experience in appealing to the ADT an FOI application for a copy of an Ombudsman report on the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*. The PIAC proposed that "the FOI complaints function of the Ombudsman and the FOI appeal functions of the ADT should be combined and enhanced by creating an independent office of the Information Commissioner in NSW"[73]. PIAC also suggested fast-tracking FOI matters within the ADT.

Judge O'Connor gave evidence 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.[74]

He indicated to the Committee that he would be happy to pursue the issue and the PIAC's fast-track proposal with the FOI users group of the ADT. The latter includes representatives of the PIAC. He considered that the ADT is producing a reasonable body of work on FOI and that arguments about the advantages and disadvantages of administering the FOI external review function through a tribunal or a model such as the FOI Commissioner was a matter for the Committee to examine. [75]

3.3.1 COMMENT

The Committee regards the issues raised in relation to the rules of the ADT's Legal Services Division and procedures as largely machinery matters that can be

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71 Judge O'Connor, comments tabled 17/11/00.
72 PIAC submission dated 29/8/00.
73 ibid.
74 Evidence, 17/11/00.
75 ibid.

addressed through the conduct of the parties involved and facilitated, if necessary, by minor changes to the divisional rules of the ADT. The Committee notes that many of the factors leading the OLSC and the Bar Association to propose lengthening the period between the formal decision to take disciplinary proceedings against a practitioner and filing in the ADT relate to processes external to the ADT.

With regard to the criticisms of delays experienced in the ADT's FOI jurisdiction and the proposal for an Information Commissioner, the Committee notes that Judge O'Connor gave evidence of his intention to raise the issues with the ADT's FOI users group. The Committee considers this to be an appropriate initial course of action in the process by which the problems in this area can be identified and resolved. It is of the view, at this stage, that it would be preferable to endeavour to fine-tune the current system for external review of FOI applications rather than changing the system significantly through the creation of the office of FOI Commissioner.

The Committee has considered the particular features associated with professional disciplinary proceedings in the ADT's original jurisdiction, that is, the adversarial nature of proceedings, the significant private issues at stake and the legal expertise of the parties involved. It accepts the view of the ADT that professional discipline proceedings are to a significant extent party driven and that this is appropriate. However, the Committee considers that the ADT should seek to communicate more systematically with the regular users of such divisions in order to address problem areas and seek to resolve them. Consequently, the Committee proposes:

3.3.2 PROPOSALS

5. The Rule Committee of the ADT conduct a review of the rules of the Legal Services Division, involving consultation with representatives of the major users of this Division, in particular, the Office of the Legal Services Commissioner, the Bar Association and the Law Society.

6. The Rule Committee examine the feasibility of amending the rules of the Legal Services Division to provide for a period of three months between the formal decision to take disciplinary proceedings against a practitioner and filing in the ADT.

7. A consultative mechanism be put in place whereby the ADT will regularly consult with user groups, and periodically survey representative samples of users of the ADT, to identify any problems experienced in the operation of the ADT and possible procedural improvements.

3.4 RULE COMMITTEE

The *ADT Act* provides for the Rule Committee, constituted in accordance with s.92 of the Act, to make the rules of the ADT and to ensure that the rules are as flexible and informal as possible. The Rule Committee also may make rules of the ADT relating to the conduct of proceedings in a particular Division if this has been recommended by the Rule Subcommittee established under s. 97 for that Division.

The Rule Committee comprises the President (who is the Chair), each Divisional Head, a number of ADT members appointed by the Minister on the nomination of the President, and a number of persons appointed by the Minister. The Committee first met on 26 May 1999.[76] The President calls the first meeting of the Rule Committee and may call subsequent meetings of the Committee as considered necessary (s.96(6)). Generally, the Rule Committee is to regulate its own procedure (s.96(2)). Prior to making a rule of the ADT, the Rule Committee is required to undertake public consultation in accordance with s.98 of the Act which provides for circulation of a draft of the rule and consideration of written submissions received in response. The President may certify that the public consultation process is unnecessary if the rule should be made expeditiously.

Section 97 provides for the establishment by the Rule Committee of a subcommittee for each Division of the ADT. The subcommittees are to make recommendations to the Rule Committee in connection with the exercise of any of its functions in relation to that Division. The membership of each divisional subcommittee comprises the Divisional Head of the Division (also chairperson), one other judicial member who is a member of that Division, one non-judicial member who is a member of that Division, and three persons (not being members of the ADT) who represent community and other relevant special interests in the area of the Division's jurisdiction.

Information provided by the ADT indicates that to date the Rule Committee has not been very active. Elizabeth Ellis, Faculty of Law, Wollongong University suggested that "development of the Rule Committee's role may assist in the adoption of the most effective practice and procedure"[77]. The ADT submitted that:

> In line with the desire of the President and the Divisional Heads, the Rule Committee has not been active at this stage in formulating rules. The present view of the President and the Divisional Heads is that, with the exception of professional discipline proceedings, detailed rules should be avoided as a way of administering procedures in the Tribunal.
>
> The reality of life in the Tribunal is that it routinely deals with unrepresented parties. Consequently, the approach to date has been to develop procedures through guidelines and practice notes and to convey the requirements through standard letters settled in some instances in consultation with user groups. So as to ensure that any views to the contrary held in the Rule Committee are known, all such approaches are reported to the Committee for comment. If it were to take the view that a higher-order set of arrangements by way of formal Rules was necessary, that course would be adopted.[78]

3.4.1 COMMENT

An initial assessment of the Rule Committee, as it presently operates, suggests that it is under-utilised and may not be fulfilling the role envisaged for it by the Minister in the second reading speech on the ADT Bill. On that occasion the Minister stated:

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76 ADT, *Annual Report 1998-9*, op.cit., p.27.

77 Elizabeth Ellis submission dated 1/9/00.

78 ADT submission, paras128-9.

> I have taken account of the criticism which has been levelled against the Commonwealth and Victorian tribunals that despite legislative prescription for information and flexibility the actual hearings have become formal and adversarial.
>
> To overcome such problems the New South Wales ADT will have a rules committee which includes community and stakeholder representation to ensure that the procedures do not become stultified.
>
> This is a unique proposal in the common law world and has the potential to be a significant model for future developments of tribunals so as to ensure that the tribunal meets the needs for which it is established. [79]

The variations in the operation of the ADT's divisions appropriately reflect the practice of the various tribunals which merged to form the ADT and the somewhat divergent nature of the matters dealt with in the different divisions. However, the Committee proposes that the scope for further standardisation of basic ADT procedures should be actively examined and reviewed on an ongoing basis by the Rule Committee. The Rule Committee also could monitor the use of alternative dispute resolution techniques, mediation and preliminary conferences for resolving matters, particularly given the emphasis on flexibility of procedures and accessibility. It also would seem appropriate for the proposed Administrative Review Standing Committee to have a role in examining the ADT's procedures from the wider perspective of general operational efficiency.

The Committee considers that the Rule Committee should always have regard to the views on procedural issues being expressed through the user groups. This is not to say that these views should be treated as overriding the primary responsibility of the Rule Committee which should be to ensure that the rules of the ADT promote the objectives of the legislation which established it.

3.4.2 PROPOSALS

8. That the Rule Committee have an ongoing responsibility to consider:

- **a. the scope for further standardisation of rules applying in the various divisions of the ADT;**
- **b. whether the rules are able to further encourage the use of alternative dispute resolution techniques;**
- **c. whether the rules provide the maximum appropriate support encouraging accessibility and informality of proceedings.**

3.5 REPRESENTATION

The Committee received a number of submissions raising concerns about the extent to which applicants are represented in proceedings before the ADT. The PIAC referred to the ADT's annual report for 1998-9 which indicated that almost invariably applicants seeking review of a government decision have appeared without legal assistance while respondents are competently represented. It is the view of the PIAC that:

> While this may be acceptable in the first year of the ADT given the large percentage of appeals involving security industry licences, where the legal issues where(sic)

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[79] The Hon. J.W. Shaw, 2R LC Hansard, 27/06/97, p.11280.

> straight forward, it is not acceptable as general institutional practice in the ADT. Clearly a Tribunal in which only government agencies are legally represented and not the applicant is at risk of at least appearing to be biased, and at risk of producing biased outcomes.[80]

The PIAC believed the *ADT Act* should be amended to provide legal representation for parties only by leave of the ADT where not to do so would prejudice the applicant. Under the PIAC proposal "either both parties would not have legal representation, with the ADT taking on a more inquisitorial role, or the ADT should ensure the applicant is legally represented". The PIAC considered that the assumption that legal representation be allowed as a matter of routine should be restrained because of the need for the ADT to remain informal and accessible.[81] Another proposal put to the Committee was that the ADT should be a "lawyer-free zone".

The President of the Law Society, Mr John North, indicated that the Law Society disagreed strongly with the PIAC position. The Law Society drew on research by the Law Faculty, Wollongong University, which claimed that only 25 percent of the matters in which parties were represented proceeded to a full hearing, whereas 45 percent of matters in which one party was unrepresented proceeded to a full hearing.[82] It is relevant to note that in correspondence subsequent to her submission Ms Elizabeth Ellis, Faculty of Law, Wollongong University, identified a need for further data on the relationship between applicant representation and 'success' and applicant representation and 'disposal type'. [83]

Mr North also referred to the report of the Australian Law Reform Commission into the federal civil justice system[84] and its view that tribunals should look to having legal representation as far as possible. Mr North told the Committee that unrepresented litigants in any court or tribunal proceedings cost more than if they had received proper legal assistance. He considered representation shortened rather than lengthened proceedings, that it led to resolution of matters before hearing stage and that it enables identification of the issues involved. The Law Society was of the view that legal representation should be as widely available as possible.[85]

Similarly, Mr Peter Garling SC, representing the NSW Bar Association and the NSW Bar Council gave evidence that these bodies would oppose any legislation that barred lawyers appearing for parties at the ADT and supported the status quo. They saw a need for parties without legal expertise to be able to access professional advocacy services. Mr Garling also saw representation as a factor which assists a party to focus on the real issues in a case.[86]

Section 71(1) of the ADT Act provides that a party to proceedings before the ADT may appear without representation, or be represented by an agent, or, if the party is an incapacitated person[87], may be represented by a person appointed by the ADT.

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80 PIAC submission, dated 30/8/00.

81 ibid.

82 Evidence 17/11/00.

83 Letter from Elizabeth Ellis dated 16/11/00.

84 Australian Law Reform Commission, Report 89, *Managing Justice: A review of the federal civil justice system*, 2000.

85 Evidence 17/11/00.

86 Evidence 17/11/00.

87 An 'incapacitated person' is defined as: a minor; or a person totally or partially incapable of representing himself or herself in proceedings before the Tribunal because they are

Section 71(2) of the Act contains the limitation that the ADT may order that the parties not be represented by an agent of a particular class for presentation of oral submissions if it considers this to be appropriate, having regard to the following factors:

(a) the complexity of the matter and whether it involves a question of law,
(b) whether each party has the capacity to present the party's case by oral submissions without representation;
(c) the stage that the proceedings have reached,
(d) the type of proceedings
(e) such other matters as the Tribunal considers relevant.

This limitation does not apply in respect of proceedings before an Appeal Panel of the ADT.

The ADT identified the representation of parties as a matter warranting attention. It advised that:

> The Act effectively allows legal representation at all stages of all matters before the Tribunal except for the making of oral submissions. This is a limited and unusual provision, and is substantially different from the situation that existed in relation to some of the tribunals which merged with the ADT. More usually a tribunal will have discretion whether to allow representation in the proceedings, by a lawyer or anyone else, according to specified criteria.[88]

The ADT clarified its position in the following terms:

> It is not suggested that representation be excluded or severely restricted in the Tribunal. That would be inappropriate for many of the matters in the Tribunal's diverse jurisdiction. Nor should different mandatory provisions be prescribed for different provisions. That would be to move away from achieving the highest level of conformity appropriate across the Tribunal.[89]

One of the emerging trends within certain divisions of the ADT is that applicants are generally unrepresented while respondents, often a government agency or large organisation, have legal representation or are represented by an officer with litigation experience. The ADT advised:

> There is no restriction on legal representation in the Tribunal . . . Very few matters in the Tribunal have involved lawyers on both sides. The typical equation is one where the applicant appears in person and the respondent is represented. The Tribunal registry staff are familiar with sources of assistance available to litigants, such as the Legal Aid Commission and pro bono schemes, and they refer people there whenever appropriate.[90]

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intellectually, physically, psychologically or sensorily disabled, of advanced age, mentally incapacitated or otherwise disabled or they are of a class of person prescribed by the regulation.

88 ADT submission, para.141.

89 ibid., para 142.

90 ibid., para. 93.

Judge O'Connor commented that in the case of the General Division in which he routinely sits, he felt that "in-house government lawyers have, without exception, adopted a facilitative and sensible approach to their role and in their dealings with unrepresented applicants". Presiding Members of the ADT also take "a facilitative approach in seeking to ensure that unrepresented parties put their best case forward". However, Judge O'Connor did recognise that this approach may not be so readily found in more strongly contested proceedings such as those in the Equal Opportunity Division.[91]

The President of the NSW Anti-Discrimination Board, Mr Chris Puplick, giving evidence on the Equal Opportunity Division, indicated that as individuals bring most complaints there will be a very high proportion of people whose legal rights are not as well served as they might be because they cannot afford legal representation when involved in proceedings against large companies or departments. He told the Committee that the legislation enables the ADT to give as much flexibility as possible to the parties involved in proceedings before it. Mr Puplick also recognised that "it is not always the complainant who is the most meritorious in these situations" and that sometimes the respondent is the person or organisation who is genuinely aggrieved. Mr Puplick argued that a smaller core of well experienced people in the Equal Opportunity Division would be able to "develop the rules and procedures which would maximise the fairness element of the whole system."[92]

The ADT recommended legislative amendments to include a provision in the *ADT Act* similar to s.62 of the Victorian *Civil and Administrative Tribunal Act* (VCAT). The latter provides that a party may appear personally, or may be represented by a professional advocate in certain specified circumstances[93], or may be represented (including by a professional advocate) as permitted or specified by the ADT. The section also lists those persons who may be represented by a professional advocate in a proceeding. According to the ADT, such an amendment would address some of the issues raised by the Public Interest Advocacy Centre and also offer a high level of conformity across the ADT in the area of representation.[94]

Judge O'Connor described s.62 of the VCAT as "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".[95] However, in the following evidence Judge O'Connor acknowledged the inadequacies of this particular statutory provision as a complete answer to the question of imbalance of legal representation in proceedings before the ADT:

> **CHAIR**: That does not really get at the problem
> **Judge O'CONNOR**: It does not get at the problem in some ways.

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91 Judge O'Connor comments tabled 17/11/00.

92 evidence 17/11/00.

93 These circumstances include if the party is a person which the Tribunal has permitted or specified is able to be represented by a professional advocate eg a minor, where another party to the proceeding is a professional advocate; another party to the proceeding, permitted by the Tribunal to be represented by a professional advocate, is so represented; or if all the parties to the proceeding agree.

94 ADT submission, paras.142-3.

95 Evidence 17/11/00.

> **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.[96]

The PIAC also supported calling upon the Public Interest Clearing House, or services such as the pro bono schemes of the Law Society and Bar Association, to assist in appropriate cases.[97]

3.5.1 COMMENT

The Committee is concerned about the material before it concerning the extent to which applicants to the ADT tend to be unrepresented while respondents are represented. It considers that it is manifestly inequitable if applicants are unable to participate in proceedings on an equal footing with respondents. The Committee is aware that there are potential risks at least to the perceived independence of Tribunal Members if they become involved in providing guidance to unrepresented applicants.

The Committee is uncertain of the extent to which applicants have experienced difficulties in trying to obtain assistance in presenting their cases, and the extent to which an unmet demand for representation exists. It notes the ADT's advice that it refers individuals to sources of possible assistance where appropriate. In addition, some assistance is provided by the Legal Aid Commission to applicants before the Equal Opportunity Division by way of duty solicitors.

The Committee has given careful consideration to the issue of representation. The issue is a difficult one. Obviously, there is the important objective of ensuring that the ADT's proceedings are informal, flexible and free from excessive legalism, which may best be effected by limiting rights to representation.

The option of giving the ADT a discretion to determine whether representation should be permitted in particular proceedings appears superficially desirable. However, in the view of the Committee this approach can involve the ADT in making decisions that can fundamentally affect the prospects of parties to proceedings before a hearing has substantively commenced. Even the provision of advice to a party that a right exists to challenge the representation of an opposing party can create the appearance of partiality. Moreover, the Committee considers that attempts to limit representation so that an unrepresented party can object to another party being represented allows a party without representation to dictate the level of assistance which the opposing party can utilise. Any such arrangement of limiting rights to representation can then create a further imbalance if one party is more able to present a case without the assistance of a professional advocate.

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96 ibid.

97 PIAC submission, dated 30/8/00.

The Committee has reached the view that the right of parties before the ADT to have their case presented in the most capable and persuasive manner should be seen as paramount to other considerations. To so present a case will in most circumstances involve legal representation. In particular, parties to ADT proceedings, particularly from more disadvantaged backgrounds, may lack the skills to present their cases in such a way as to obtain a fair hearing without representation. Accordingly, the Committee holds that there should be no limitations on the right of any party to be represented in proceedings before the ADT.

The real crux of the problem is the need to ensure that parties before the ADT who require representation to present their case are able to receive appropriate assistance. The Committee is aware of the potential cost implications involved. However, it believes that it is a necessary component of having the ADT operate effectively for parties before it to be able to present their cases properly and adequately. The Committee suggests that consideration be given to trying to implement some form of duty solicitor scheme, limited to proceedings where a government agency is the respondent, on a pilot basis as a trial solution for resolving the issue of access to legal representation. In this regard, the Committee notes that the pilot scheme successfully trialed in the former Equal Opportunities Tribunal has been continued in the Equal Opportunity Division.

The Committee also considers that the Administrative Review Standing Committee should monitor the impact on the operation of the ADT of developments in respect of representation of parties.

3.5.2 PROPOSALS

9. That consideration be given to implementing some form of duty solicitor scheme, limited to proceedings where a government agency is the respondent, on a pilot basis as a trial solution for resolving the issue of access to legal representation.

10. That the proposed Administrative Review Standing Committee monitor the impact on the operation of the ADT of developments in respect of representation of parties.

3.6 ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ADT is empowered to use a variety of ADR and early dispute resolution techniques in carrying out its functions, including making decisions on the papers; using assessors; early neutral evaluation and advice; preliminary case conferences; and mediation. To date it has used mediation, preliminary conferences and decisions on the papers.[98] Judge O'Connor advised that in some cases in the ADT's merits review jurisdiction there have been several instances of early resolution of matters where the legal officer representing a government agency has taken the initiative to find a resolution by revising the agency's original decision. As a result the cases have not proceeded.[99]

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98 ADT, *Annual Report 1998-9*, p.30; also ADT submission para. 97.

99 ADT submission, para.97.

The ADT disagreed with the report of the Faculty of Law, University of Wollongong, which concluded that there is a lack of emphasis on ADR in the General Division.[100] Judge O'Connor emphasised that:

> . . .the Tribunal actively deploys alternative dispute resolution facilities where it sees them as appropriate and subject to resource considerations. ADR has been very actively used in the Equal Opportunity, Retails Leases and Community Services Division. It is not appropriate to the Legal Services Division. It is used in the FOI list of the General Division. We have not seen it as particularly practical or appropriate for the other work of the General Division. It takes both parties to be agreeable for ADR to proceed. Agencies, for what I see as understandable public policy reasons, are not interested in negotiating licensing decisions, and I do not detect any demand of that kind from(sic) those that have lost or been denied renewal of their licence.[101]

He requested the Committee consider where, in relative terms, ADR is an appropriate technique and where it is less appropriate in the context of a tribunal with multiple jurisdictions. The ADT had formed a provisional view "that mediation as an alternative form of dispute resolution is often not appropriate in merits review matters" and that other alternatives, such as preliminary conferencing, may be.[102]

3.6.1 MEDIATION

The ADT does not undertake mandatory mediation. However matters in the Retail Leases Division are required by the *Retail Leases Act* to have been to mediation before being referred to the ADT.[103]

The ADT submitted that it has actively used mediation in resolving civil claims matters in the ADT's original jurisdiction, ie. the Equal Opportunity and Retail Lease Divisions, but that it has not seen mediation as appropriate to professional discipline proceedings.[104] It is relevant to note that mediation was a well established practice in the former Equal Opportunity Tribunal. In the ADT, mediation is conducted by the appointed Tribunal members who are trained mediators.[105]

The ADT's Annual Report for 1998-9 gives the following statistics on the use of mediation in Divisions across the ADT and success rates:

DIVISION	No. mediations conducted	Settled at mediation	Settled after mediation	Proceeded to hearing	Pending
General *	3	0	0	0	3
Community Services #		0	0	0	
Equal Opportunity *	40	12	6	3	19
Retail Leases +		0	0	0	

* Figures given for 6/10/98-30/6/99
# Figures given for 1/1/99-30/6/99

100 ibid., para.102.
101 Judge O'Connor comments tabled 17/11/00.
102 ADT submission, para. 102.
103 ADT *Annual Report* 1998-9, p.30.
104 ADT submission, paras 98 & 103.
105 Ibid, paras. 104-5.

+ Figures given for 1/3/99-30/6/99

Mediation figures supplied for by the ADT for the year 1999-2000[106] were:

DIVISION	Referred to mediation	Settled at mediation	Settled after mediation	Proceeded to hearing	Pending	Success rate
Equal Opportunity	52	27	4	3	18	91.18%
General Division	3 pending					
Community Services	3	-	-	-	3	-

When deciding whether the circumstances are appropriate for a referral to mediation, the ADT is aware that although mediation makes a substantial contribution to access to justice it involves the risk that people may use ADR for cost reasons and power balances may result in disadvantage.[107] In cases where matters are inappropriately referred to mediation there is a cost to the ADT in having to conduct both mediation and hearing.[108] The ADT's submission indicates that the "extent to which mediation is appropriate to merits review of administrative decisions is problematic" and the circumstances where its use is appropriate are limited.[109]

3.6.2 PRELIMINARY CONFERENCES

Section 74 of the *ADT Act* gives the ADT the power to confer informally with parties before commencing to determine an application and, in the opinion of the ADT, this offers greater scope than mediation for intervention and resolution of matters before proceeding to a formal hearing.[110]

The ADT noted the Wollongong Report referred to the "high proportion of cases disposed by Tribunal determination" in the General Division and explained that to date the ADT has targeted its resources towards developing its procedures for preliminary conferences in the Equal Opportunity Division.[111] The ADT submitted that focussing resources on the early resolution of equal opportunity matters optimises savings in hearing time and associated expenditure. Matters are resolved in discussions following conferences or are directed by the ADT to successful mediation. If matters proceed to hearing from conferences, the hearings proceed more efficiently as areas of agreement and dispute have been identified.[112]

3.6.3 NEUTRAL EVALUATION

Under Part 4 of the *ADT Act* the ADT may refer a matter to a neutral evaluator for assessment of its merit and likely outcome, providing the parties agree and the

106 ADT submission, Table 7.
107 ibid, para.99.
108 ibid, para.100.
109 ibid, para. 101.
110 ibid, para. 109.
111 ibid, paras.109-111.
112 ibid, para.112.

circumstances are appropriate. This process would help parties to decide whether to proceed to a contested hearing or pursue opportunities for settlement.[113] The ADT considers neutral evaluation to be "a useful capability" for dealing with matters involving complex questions of fact in the Retail Leases, Equal Opportunity and General Divisions. The ADT advised that:

> The volume and nature of the Tribunal's business has not yet warranted the expense of establishing and administering a neutral evaluation scheme. It is possible that features of such a scheme will be included in the developing role for pre-trial conferences . . . [114]

3.6.4 COMMENT

The Committee considers that it is probably too early in the life of the ADT to draw any firm conclusions about the effectiveness of alternative dispute resolution and early resolution techniques. However, the Committee strongly supports the use of mediation and other procedures which fall short of full hearings of the ADT to resolve matters. Such an approach is likely to be more cost effective, and to be consistent with the object of reducing legalism and formality in the conduct of the ADT.

3.7 MEMBERSHIP

Issues concerning the ADTs' membership which the ADT has flagged as matters warranting attention include the:

- process for selecting and appointing ADT members
- constitution of Tribunal panels
- issue of full-time member versus part-time members

3.7.1 SELECTION AND APPOINTMENT OF TRIBUNAL MEMBERS

The OLSC made the following submission in relation to the process of appointment of members of the Legal Services Division, as provided by s.162 of the *Legal Profession Act 1987*:

> While there is no doubt that merit plays a large role in present appointments made by the Attorney General, there is a lack of transparency in the process which does not assist in addressing the perception, widely held in the community, that the disciplinary system governing lawyers is controlled by lawyers and acts to protect fellow practitioners. This perception is compounded by the fact that the professional Councils (Law Society and Bar Association) not only function as a union or guild representing their members, they also have a role in investigating and prosecuting practitioners and in advising the Attorney General about appointments to the Tribunal.[115]

It proposed that public confidence in the independence and integrity of the Legal Services Division would be greatly enhanced if lay and professional members of the ADT were appointed following a transparent and open merit selection process. The

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113 ibid, para. 107.
114 ibid para. 108.
115 OLSC submission dated 26/7/00.

OLSC considered that such a process would also ensure greater diversity of candidates for appointment to the ADT.[116]

In contrast, the President of the NSW Law Society, Mr John North, told the Committee that the Society believes the existing process for appointment of ADT members works well and that he was unaware of any suggestion of improper appointments to the ADT.[117] Nor did Mr Peter Garling SC, representing the NSW Bar Council and the NSW Bar Association see any need to change the existing appointment process. [118]

Judge O'Connor referred to the question of a selection process for ADT members as a sensitive policy issue forming part of the wider debate on the extent to which there should be calls for expressions of interest in relation to statutory appointments, tribunal members and possibly judges. He preferred not to comment any further on the issue except to say:

> . . . that there will, I suspect, always be a need to invite some people to be considered for appointment because they have not presented in a call for expressions of interest. This would, I suspect, tend to be particularly true in finding eminent members of professions to sit on disciplinary panels.[119]

3.7.2 CONSTITUTION OF TRIBUNAL PANELS

The current statutory provisions requiring some Divisions of the ADT to sit with mandatory multi-member panels largely reflect the way in which previous tribunals operated before merging with the ADT.[120] The Equal Opportunity and Community Services Divisions must have three member panels; the Legal Services Division is usually constituted by a three member panel and occasionally a two member panel; the General Division must sit with one or three member panels depending on the relevant enabling legislation (see schedule 2 of the *ADT Act*).[121]

The ADT submitted that these requirements commit ADT resources at a level that may not have regard to the complexity of law or fact involved in a matter. Divisional Heads have discretion as to which members they appoint to sit on a Tribunal panel but they do not possess any discretion with regard to the number of members that should constitute a panel.[122] The ADT is of the view that:

> Some discretion in the number of members who sit on a panel in a matter, having regard to the nature of the issues involved, would enable the more efficient and effective use of the Tribunal's resources.[123]

It has proposed amending the *ADT Act* to include a provision similar to s.64 of the Victorian *Civil and Administrative Tribunal Act*, which provides that, subject to the rules, the Tribunal is to be constituted for the purposes of any particular proceedings by up to 5 members. If the Tribunal is constituted at a proceeding by one member

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116 ibid.
117 Evidence 17/11/00.
118 ibid.
119 Judge O'Connor comments tabled 17/11/00.
120 ADT submission, para. 136.
121 Ibid, para. 137.
122 Ibid, para. 138.
123 Ibid, para. 139.

only, that member must be a legal practitioner; if constituted by more than one member, at least one must be a legal practitioner. The President determines how the Tribunal is to be constituted for the purposes of each proceeding.[124]

3.7.3 FULL-TIME VERSUS PART-TIME TRIBUNAL MEMBERS

Section 13(4) of the *ADT Act* provides that a member of the ADT may be appointed on a full-time or part-time basis but the President is taken to be appointed on a full-time basis. At present the President of the ADT, Judge O'Connor, also heads the Fair Trading Tribunal.

The ADT submitted that its efficiency would be improved by the presence of some full-time members and a reduction in the number of part-time members:

> While it will always be necessary for there to be a fair complement of part-time members in a tribunal with a series of specialist, relatively low-volume jurisdictions, at present there is, arguably, too great a number of part-time members. The Legal Services Division has approximately 60 part-time members to deal with a low volume of work.[125]

The ADT advised that this leads to very occasional involvement by members with the work of the Legal Services Division, preventing the development of a strong body of expertise and cohesion of practice and approach. The ADT had made representations to the Attorney General with a view to progressively reducing the number of part-time members in the ADT, especially in the Legal Services Division.[126] According to the ADT:

> A corps of full-time members would enable the more efficient use of time, more effective use of resources, and greater consistency of decisions in a developing jurisdiction. It would provide a resource through which such needs in a modern tribunal as professional development, and monitoring member performance could also be secured.[127]

This view was shared by the President of the NSW Anti-Discrimination Board, Mr Chris Puplick, who gave evidence that building up a core membership of senior members would be preferable to having a very small core of senior members and a large number of part-time members. Mr Puplick was of the view that strengthening the core of experienced, legally qualified membership of the ADT would improve the operations of the Equal Opportunity Division which tends to deal with increasingly complex and difficult material. [128]

The Law Society shared concerns about the possibility that part-time members may hear matters too infrequently to develop sufficient experience in ADT proceedings. It held that part-time members needed to balance their duties with the ADT with their professional commitments and supported a review of the number of part-time members in the Legal Services Division.[129]

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124 ibid.
125 ibid., para. 148.
126 ibid., para. 149.
127 ibid., para. 150.
128 Evidence 17/11/00.
129 ibid.

Judge O'Connor gave evidence to the Committee that the Attorney General is "reasonably well disposed" towards a reduction in the number of members on the ADT's various lists of part-time members. From a management perspective, he told the Committee:

> 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.[130]

On the other hand, a broad list of part-time members may provide a broader array of options to deal with a particular matter. Judge O'Connor was of the view 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. . . . but there is some contention about these views and I am also responding partly to the suggestions . . . about having many professions inside [the Tribunal's] 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. . . .But my views are not necessarily fully shared in the legal profession.[131]

3.7.4 COMMENT

It appears to the Committee that the current requirements for the constitution of Tribunal panels, which reflect the arrangements that previously existed in merging tribunals or which are provided for in relevant enabling legislation, are inappropriate to the needs of the ADT. In order to encourage both consistency in how the ADT is constituted in various proceedings, and to prevent the inefficient use of resources through statutory requirements as to the number of members who must sit in particular divisions, the Committee considers there would be merit in introducing greater flexibility and uniformity in this area. The President of the ADT, or relevant Divisional Head, should be given greater discretion to determine the composition of Tribunal panels in particular proceedings. The Committee also considers it unnecessary, having regard to the resource implications involved, for a Tribunal panel to consist of more than three members.

The Committee is of the view that the ADT would benefit, in terms of consistent decision-making and improved expertise, if it were to include some full-time members. It notes that the President indicated that this would foster professional development and enable monitoring of member performance. The Committee is aware of the resource implications of appointing more full-time members to the ADT but considers that, on balance, the advantages of a greater number of full-time members would enhance the ADT's management and effectiveness. It notes that the Attorney Generals' Department is considering a proposal for the creation of a full-time Deputy President position.[132] While the Committee supports such a proposal as a useful first step, a more comprehensive examination of the membership needs of the ADT seems warranted. In particular the level of part-time membership appears to have significant implications for the more effective operation of the ADT.

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130 ibid.

131 ibid.

132 ADT submission, para. 148.

3.7.5 PROPOSALS

11. That the *ADT Act* be amended to provide:
- **a. the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;**
- **b. if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner;**
- **c. if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and**
- **d. the President, or relevant Divisional Head, determines how the ADT is to be constituted for the purposes of each proceeding.**

12. That the *ADT Act* be amended to provide for some full-time members of the ADT and that the appropriate resources be provided.

13. That the *ADT Act* be amended to provide for the creation of a position of full-time Deputy President of the ADT.

14. That an examination of the membership structure of the ADT be conducted, focussing on the extent of part-time membership, with particular reference to the Legal Services Division.

3.8 RESOURCES

Funding for the ADT forms part of the budget allocation for the Human Rights Services Program of the Attorney General's Department. Budget and staffing figures for ADT are available for 1999-2000: its first full year of operation. The allocation from Attorney General's Department during this period was $1,525,569. Funding of $1,124,761 was provided from the Public Purpose Account for the operation of the Legal Services Division. However, the amount expended from the Public Purpose Account was considerably less that the allocation because of the reduction in the number of matters to be heard following the High Court's decision in *Barwick v Law Society of NSW* (3 February 2000). The allocation for the current 2000-2001 financial year of $1,327,617 from the Attorney General's Department and $1,118,073 from the Public Purpose Account may be increased as a result of additional funding for the new Revenue Division.[133] The ADT possesses a total of 10 effective full-time staff.

Peter Garling SC, representing the Bar Council of New South Wales and the Bar Association of New South Wales, gave evidence that in terms of its legal resources the ADT is under-resourced. Mr Garling explained that it is not possible during a hearing for members of the ADT or parties to a matter to consult relevant judgments or law reports as the ADT does not have a library. He considered the lack of such a resource to be an impediment to the efficient operation of the ADT.[134]

3.8.1 COMMENT

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133 ibid., paras 27-29.

134 Evidence 17/11/00.

Evidence given during the preliminary public hearing raises concerns about the extent to which the ADT may be under-resourced in certain areas. Questions of funding always constitute a difficult issue due to the many competing demands on budgetary allocations. However, for the ADT to be able perform its functions and fulfil the objects of the Act effectively it must have adequate funds and resources. Consequently, the Committee considers there is a need for a review of the total resources available to the ADT to perform its full range of functions across all divisions, including in respect of research and library needs.

3.8.2 PROPOSAL

15. That a review be conducted of the total resources available to the ADT to perform its full range of functions across all divisions, including in respect of research and library needs.

CHAPTER FOUR

MEASURING & REVIEWING PERFORMANCE

4.1 OBJECTS & GOALS

Section 3 of the *ADT Act* provides:

The objects of this Act are as follows:

(a) to establish an independent Administrative Decisions Tribunal:

  i. to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and

  ii. to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and

  iii. to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law,

(b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,

(c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner,

(d) to provide a preliminary process for the internal review of reviewable decisions before the review of such decisions by the Tribunal,

(e) to require administrators making reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for their decisions on request,

(f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services andprograms,

(g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales.

The following goals are identified by the ADT in its Annual report for 1998-9:

- to provide a central focus for many statutory administrative processes
- to draw together many of the disparate functions of smaller review bodies
- to provide a clearly recognisable, publicly identifiable forum for review
- to minimise administrative error and stimulate administrative efficiency
- to achieve a balance between justice to the individual and the preservation of the efficiency of the administrative process
- to develop a uniform body of legal precedent and principles
- to achieve a reduction in formal legal precedent and principles and in doing so to increase accessibility and reduce costs
- to foster mediation and other forms of alternative dispute resolution
- to provide an integrated tribunal service to the people of New South Wales[135]

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135 ADT, *Annual Report 1998-9*, p.8.

4.2 PERFORMANCE REPORTING – ACTIVITIY, OUTPUTS & OUTCOMES

During the period 1997-2000 the total number of matters disposed of by the ADT has increased significantly as follows:

1997-8	1998-9	1999-00	2000-01
126	223	564	896[136]

The ADT supplied to the Committee the following activity figures for the various divisions from the date of commencement of the ADT on 6 October 1998 until 30 June 2000, which indicated that the General Division and Equal Opportunity Division deal with the greatest proportion of matters within the ADT[137]:

Division	Matters filed	Matters pending
General Division	570	126
Community Services Division	26	13
Equal Opportunity Division	181	125
Legal Services Division	58	42
Retail Leases Division	62	25
Appeal Panel	44	30

Case flow statistics for each division contained in the ADT's annual report for 1998-9 include details of the number of:

- matters transferred from the District Court
- applications filed
- disposed
- pending

The outcomes are presented under the categories of:

- Decisions under review affirmed
- Decisions under review set aside/ Recommendation made/Decision varied
- Application withdrawn Dismissed/No appearance Dismissed/Agreement reached Dismissed

Research undertaken by the Faculty of Law, Wollongong University on case outcomes, measured in terms of success of the outcome for the applicant, showed:

> Of the 44 [General Division] cases disposed by determination of the Tribunal, 23 per cent (10 applications) were successful. If, however, the [Security Industry Act] cases are removed from the analysis, 47 per cent of GD cases were successful. Of the 'unsuccessful' cases, one was dismissed because there had been no internal review, an omission which perhaps could have been addressed at an earlier stage of the review process.
>
> The success rate for FOI cases was slightly higher, with 52 per cent (17 of 33 applications) successful. (FOI application also constituted 40 per cent of the successful [General Division] cases even though they only constituted 21 per cent of the sample).

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136 NSW Treasury, *Budget Estimates 2000-01, Budget Paper No. 3*, Volume 1, 4-33.

137 ADT submission, para.30.

> In relation to the [Community Services Division] cases, only 1 of the 7 disposed of by the Tribunal was successful but a further 2 cases were recorded as 'partially dismissed/reserved'.[138]

Statistics gathered in the study on case duration showed the median time between application and disposal for General Division cases was 78 days; for FOI cases it was 127 days and for Community Services Division cases it was 141 days.[139] Ms Ellis was unaware of any performance standards set by the ADT against which these times could be measured but indicated that they did compare favourably with the median time to disposition in the AAT.[140]

Other statistics provided by the ADT in its Annual Report for 1998-9 include:

- Mediation: number conducted; settled at mediation; settled after mediation; proceeded to hearing; pending.
- Timeliness – time from date of application to date of determination/disposal: number disposed of in less than 6 months.
- Appeals to Appeal Panel: number lodged.
- Outcome of Appeals: orders made; withdrawn/discontinued; pending.
- Supreme Court Appeals: number lodged.
- Outcome of Appeals: orders made; dismissed;withdrawn/discontinued.

4.2.1 COMMENT

Given that the ADT is in its early stages of development, the Committee considers that it is ideally placed to undertake the strategic planning, and the gathering of statistical data, which would enable its performance to be measured and for comparisons of best practice to be made. A comprehensive performance reporting system, providing meaningful information on the performance and achievement of desired outcomes, is essential to evaluating the extent to which the ADT efficiently and effectively performs its functions and realises the objectives of the Act. Key performance indicators provide an indication of agency performance, both qualitatively and quantitatively, and should be appropriate, relevant, accurate, timely, complete and comprehensive. They should focus on the primary purposes of an agency, its programs and activities.[141] A performance reporting system incorporating these features would enable the ADT as a whole, and its particular Divisions, to set internal targets, monitor performance over time and facilitate benchmarking with similar administrative review bodies in other jurisdictions.

4.3 THE CASE FOR AN ADMINISTRATIVE REVIEW STANDING COMMITTEE

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138 Elizabeth Ellis, submission, dated 1/9/00; the statistics cover the period from the commencement of each division until 31 December 1999.

139 ibid., dated 1/9/00, para 3.6.

140 ibid.

141 NSW Audit Office, *Key Performance Indicators – Government-wide Framework; Defining and Measuring Performance (Better Practice Principles);Legal Aid Commission Case Study*, August 1999, p.2.

One of the issues considered by the Committee is whether there is a need for the establishment of a body in New South Wales to perform a similar role to that of the Commonwealth Administrative Review Council (ARC).

4.3.1 BACKGROUND

The Commonwealth Administrative Review Council is established under Part V of the *Administrative Appeals Tribunal Act 1975*. Its membership comprises the President of the Council (appointed by the Governor), the Commonwealth Ombudsman holding office under the *Ombudsman Act 1976*, the President of the Australian Law Reform Commission, and no fewer than 3 or more than 10 other members (unless more is prescribed by regulation). The latter members are appointed by the Governor-General on a part-time basis. Members are appointed for a maximum three year period but are eligible for re-appointment. They may also be appointed for the duration of a specific project.

Membership of the ARC requires extensive experience at a high level in industry, commerce, public administration, industrial relations; or the practice of a profession or the service of a government or of an authority of a government; or an extensive knowledge of administrative law or public administration; or direct experience, and direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions.

The Council performs a wide-ranging role in oversighting the Commonwealth administrative law system exercising the following functions under the *Administrative Appeals Tribunal Act*:

s.51(1)

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

Amendments to the Act in 1999,[142] gave the Minister a discretion to give written directions to the President of the Council, in respect of the performance of its functions or the exercise of its powers, and the Council must comply with any such directions. The Minister also may refer matters, in writing, to the President of the Council for inquiry and report. The Council reports to the Minister who must present each of the Council's reports to Parliament within 15 sitting days of receiving the report. Section 58 of the Act requires the Council to prepare and furnish to the Minister, for presentation to Parliament, an annual report on the operations of the Council for each year.

The Council provides reports and letters of advice to the Attorney General who generally tables the reports in Parliament. The reports are always published. The Council also plays an advisory role on administrative law issues, making submissions to Parliamentary Committees and advising the Government and government bodies on legislation and proposals with administrative review implications. One of the Council's stated priorities is to raise community awareness of administrative review, for example, through publications such as the journal *Administrative Review*. Current projects include: an assessment of internal review of agency decisions, with a view to developing a best practice guide; and, an examination of the ethical responsibilities, accountability and personal and professional standards of merits review tribunal members, with the aim of developing a code of conduct. An exposure draft of principles of conduct for members of Merits Review Tribunals was released by the ARC in December 2000. The Council also publishes guidelines on the classes of decisions that should be subject to merits review and the preparation of statements of reasons. It recently reported on a review of the federal *Freedom of Information Act* 1982 and an examination of accountability systems relevant to the contracting out of Government Services.[143]

A review of the ARC was conducted in 1997 by the Senate Legal and Constitutional Committee. The Senate Committee concluded that "the evidence received by the Committee supports the view that the Administrative Review Council has been an

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142 s.51A inserted by Act No. 125 of 1999.

143 http://law.gov.au/aghome/other/arc.

effective body, providing useful and timely advice on administrative review matters". It considered that "there is a continuing need for the Commonwealth Government to receive advice and recommendations on administrative review and decision-making, and to promote a comprehensive, affordable and cost-effective administrative law system." The Committee opposed suggestions that the ARC should be abolished and its functions transferred to the Attorney-General's Department and recommended that the ARC "should remain as a separate and permanent body, provided that it is making a significant contribution towards an affordable and cost-effective system of administrative decision-making and review."[144]

4.3.2 EVIDENCE

In considering the question of whether an Administrative Review Council or equivalent body is needed in New South Wales, the Committee sought expert evidence from Mr Alan Robertson SC. Mr Robertson's specialisation in administrative law includes previous membership of the Commonwealth Administrative Review Council. He described the ARC as "a standing law reform body . . . designed to keep the Commonwealth administrative law system under review"[145]. He also highlighted similarities in the development of the administrative law system at Commonwealth level and in New South Wales. The Administrative Review Council was established at the commencement of the Commonwealth system partly with the purpose of monitoring the new system and its development. This is relevant to the New South Wales administrative law system where the ADT is relatively new, leading to newly formed relationships between the ADT, the District Court, the Supreme Court and the Ombudsman.[146]

Mr Robertson considered that the complexity of the administrative law system, both in a technical sense and in terms of its breadth, was another factor supporting the case for a standing law reform committee to take an overall look at the system. [147] He gave evidence that a standing law reform committee offered independent expert oversight of the administrative law system not available through a government department such as the Attorney General's Department. In Mr Robertson's view government has an interest in administrative law, in the sense that in every administrative law case, by definition, one of the entities is the Government or a government agency or government officer. For this reason, Mr Robertson stated that "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". [148]

Mr Robertson translated the membership of the Commonwealth ARC into a State context, suggesting a broad range membership for a similar body in New South Wales, namely, the President of the ADT, the Director-General of the Attorney's General's Department, a representative of the District Court, the judge in charge of the Administrative Law Division in the Supreme Court, an academic, a practitioner, one or two representatives of users groups. He gave evidence that the presence of departmental heads on the Commonwealth ARC meant that the Council had useful advice available on the feasibility of its proposals. However, he did warn that

144 www.aph.gov.au/senate/committee/legcon_ctte/arc/index.htm
145 Evidence, 17/11/00.
146 ibid.
147 ibid.
148 ibid.

inclusion of these particular members in the ARC led to a tendency for the body "to perhaps become to some extent a captive of the senior bureaucrats".[149] Not wanting to overstate the issue, Mr Robertson indicated that he considered there to be a "fine line" between having the necessary input of experienced and senior officials, as to the feasibility of reform, and insufficient innovation in the standing law reform committee's proposals.[150] Such a committee would have an educational and a training role for agencies throughout the government system and, if operating with mainly part-time members, would not be too expensive.

In conclusion, Mr Robertson stated:

> 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. [151]

Similarly, the President of the ADT, Judge O'Connor, considered that a body like the Administrative Review Council would be able to provide a number of support services to assist in improving the standard of performance of tribunal members, measuring performance of members, gathering more detailed business statistics, continuing education of members and circulation of information to members.[152] He told the Committee:

> **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.[153]

4.3.3 COMMENT

The Committee is of the view that there may be merit in establishing a standing committee in New South Wales to perform functions analogous to those of the Commonwealth Administrative Review Council. In particular, the Committee considers that the establishment of such a body at an early stage of the ADT's operation may enhance its future development. Such a body would be able to monitor and give expert advice on jurisdictional issues, such as, criteria for determining the classes of reviewable administrative decisions which would appropriately fall within the ADT's jurisdiction, the assessment of tribunals and similar bodies in New South Wales which could be merged into the ADT, and regular review of the operational efficiency and effectiveness of the ADT. Giving such a body

149 ibid.
150 ibid.
151 ibid.
152 ibid.
153 ibid.

an ongoing role in the oversight of the administrative law system in New South Wales may help to achieve a coordinated, consistent approach to policy making in this area. The Committee has noted that factors affecting the conferral of jurisdiction on the ADT often cross several Ministerial portfolios creating implications for a concerted approach to the ongoing expansion of the ADT's jurisdiction.

Obviously, the establishment of an Administrative Review Standing Committee would require sufficient funding and resources. However, expert witnesses to the Committee have not indicated the level of funding involved to be prohibitive. For these reasons, the Committee has proposed:

4.3.4 PROPOSALS

16. The *ADT Act* should be amended to provide for the establishment of an Administrative Review Standing Committee with the following functions:

- **a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;**
- **b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;**
- **c. to regularly assess, evaluate and report on the operational efficiency of the ADT, its effectiveness and performance;**
- **d. oversight of the administrative law system in New South Wales, performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).**

SUMMARY OF PROPOSALS

1. Legislation should be brought forward to merge separate tribunals with the ADT, unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT. (p13)

2. Explicit criteria for determining administrative decisions which should appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General's Department in consultation with the ADT. The Attorney General's Department should consult all departments and agencies to identify administrative decisions which currently meet the criteria and should therefore be subject to external merits review by the ADT. (p13)

3. There should be a presumption in future that all administrative decisions provided for under new legislation, which meet the criteria developed by the Attorney General's Department and the ADT, should be subject to external merits review by the ADT. (p13)

4. **The proposed Administrative Review Standing Committee should monitor the progress achieved in merging existing tribunals with the ADT, and also have an ongoing role in the further review and development of the criteria for defining the appropriate extent of the ADT's merits review jurisdiction (see Chapter 6 for discussion of the proposed Administrative Review Standing Committee). (p13)**

5. **The Rule Committee of the ADT conduct a review of the rules of the Legal Services Division, involving consultation with representatives of the major users of this Division, in particular, the Office of the Legal Services Commissioner, the Bar Association and the Law Society. (p21)**

6. **The Rule Committee examine the feasibility of amending the rules of the Legal Services Division to provide for a period of three months between the formal decision to take disciplinary proceedings against a practitioner and filing in the ADT. (p22)**

7. **A consultative mechanism be put in place whereby the ADT will regularly consult with user groups, and periodically survey representative samples of users of the ADT, to identify any problems experienced in the operation of the ADT and possible procedural improvements. (p22)**

8. **That the Rule Committee have an ongoing responsibility to consider:**
- **a. the scope for further standardisation of rules applying in the various divisions of the ADT;**
- **b. whether the rules are able to further encourage the use of alternative dispute resolution techniques;**
- **c. whether the rules provide the maximum appropriate support encouraging accessibility and informality of proceedings. (p24)**

9. **That consideration be given to implementing some form of duty solicitor scheme, limited to proceedings where a government agency is the respondent, on a pilot basis as a trial solution for resolving the issue of access to legal representation. (p29)**

10. **That the proposed Administrative Review Standing Committee monitor the impact on the operation of the ADT of developments in respect of representation of parties. (p29)**

11. **That the *ADT Act* be amended to provide:**
- **a. the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;**
- **b. if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner;**
- **c. if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and**
- **d. the President, or relevant Divisional Head, determines how the ADT is to be constituted for the purposes of each proceeding. (p36)**

12. That the be amended to provide for some full-time members of

13. That the be amended to provide for the creation of a position of

14. That an examination of the membership structure of the ADT be particular reference to the Legal Services Division. (p36)

to perform its full range of functions across all divisions, including in

16. The should be amended to provide for the establishment of an

a.
administrative decisions which would appropri
ADT's external merits review jurisdiction;
ongoing review of the ADT's jurisdiction with particular focus on

Wales, for the purpose of recommending whether th
appropriately be merged with the ADT;
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Tribunal Act 1975