ACT TRIBUNALS: OPTIONS FOR STRUCTURAL CHANGE

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This paper looks at the role of tribunals, how ACT tribunals are structured and what options exist for increasing efficiency and cost-effectiveness of ACT tribunals. A review of tribunal structures is being conducted by the Department of Justice and Community Safety – in accordance with a government announcement in the 2006 budget that the 'government will review tribunal structures, with a view to increasing efficiency and cost-effectiveness'.

But before I start I would like to make it clear that Government has not yet made any decisions about what changes will be made – that will occur later in the year – and will follow further discussions with those involved and our stakeholders.

A role for tribunals

Tribunals can be defined as 'bodies with judicial or quasi-judicial functions set up by statute and existing outside the usual judicial hierarchy'.[1] This general definition of tribunal includes three tests for whether an entity is a tribunal.

The three tests

Firstly, does the entity exercise judicial power or exercise quasi-judicial functions? That is not to say that a Tribunal must only exercise judicial or quasi-judicial functions. Tribunals may also exercise non-judicial functions, such as providing education, managing a trust fund, investigating complaints and issuing licences. Tribunals that also exercise these non-judicial functions are often called boards or councils.

Secondly, is the entity established by a law or is it established by the Executive? Tribunals are usually established by law – and, to be effective, that law should make clear provision for:

How the tribunal is constituted;

- What jurisdiction the tribunal has;
- What governance arrangements apply to the tribunal; and
- What tools the tribunal has for managing its business.

Thirdly, to what extent does the entity operate outside of the traditional judicial hierarchy? Although tribunals operate outside of the judicial hierarchy, they do have judicial oversight. In the ACT, the self-government Act has the effect that the Supreme Court may examine any tribunal hearing – and, in addition, most tribunal laws provide that an appeal may be heard by the Supreme Court Act 1933, in some cases de novo, in others just on questions of law.

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At a more pedestrian level, a number of our existing tribunals are legally distinct from the courts but share resources such as members, hearing rooms and libraries.

Discussion – access to justice

Tribunals are generally established outside of the judicial hierarchy where the needs of a particular jurisdiction are not fully met by the courts.

Tribunals serve an essential role in ensuring access to justice. Tribunals are as important as courts because they provide an accessible and affordable alternative to the courts. Tribunals deal with issues that often require the assistance of specialist or community members – whether in the area of mental health, guardianship or occupational matters.

Increasingly, in other jurisdictions, minor civil claims are being dealt with quickly and effectively by tribunals, outside the procedural niceties considered necessary for dealing with criminal or commercial disputes. Tribunals like the NSW Consumer, Trader and Tenancy Tribunal have broad jurisdictions concerning small disputes – particularly those types of disputes where the parties will have an ongoing relationship such as tenancy or unit title disputes.

In the ACT, a number of tribunals meet some of these needs. The Essential Services Consumer Council and the Residential Tenancies Tribunal deal with specific subject matters, but cannot deal with broader or underlying civil disputes between the parties which are outside narrowly confined jurisdictions.

How ACT tribunals are structured

There are about 20 ACT entities which act as tribunals. ACT tribunals tend to deal with four basic categories – civil disputes, rights, occupational review and administrative review. These tribunals deal with about 10,000 matters a year.

The tribunals cost the ACT about $2 million dollars per annum – about half of which goes to the remuneration of the 130 members. The rest goes towards accommodation and the salaries of the 28 people involved in supporting the tribunals and related on-costs, such as rental. There is only one full time tribunal member but there are more full-time support staff. Every one else in the tribunal system works part time – indeed, some tribunal members are yet to be called to sit on a matter.

ACT tribunals include:

- ACT Architects Board
- Administrative Appeals Tribunal
- Consumer and Trader Tribunal
- Credit Tribunal
- Discrimination Tribunal
- Essential Services Consumer Council
- Guardianship and Management of Property Tribunal
- Health Professionals Tribunal
- Legal Profession Disciplinary Tribunal
- Liquor Board of the ACT
- Mental Health Tribunal
- Remuneration Tribunal
- Residential Tenancies Tribunal
- Sentence Administration Board
- The Racing Appeals Tribunal

To this I might include a couple of offices, to the extent that they conduct hearings:

- Commissioner for Fair Trading
- Commissioner for Surveys
- Construction Occupations Registrar

Finally, having regard to the approach taken in other jurisdictions, I perhaps should include within this mix the broader range of small civil disputes, included in the small claims jurisdiction.

Systemic legislative problems

Considering these entities, my first observation is that there is no standard tribunal model in the ACT. My department's research suggests that ACT tribunals tend to be built from scratch, often drawing on older interstate models.

Because of this, ACT legislation dealing with tribunals deals inconsistently with important elements concerning the constitution, jurisdiction, governance or powers of the tribunal. These defects expose stakeholders - those people who use our tribunals to the risk of appeal or undeserved loss.

In examining the sufficiency of the legislative framework four questions should be asked.

Firstly, is the tribunal constituted so that it can operate effectively and independently? For example:

- Who should appoint members – and on what basis?
- Does the legislation give the power to the president to assign matters for hearing?
- Does the legislation provide rules of continuance to deal with the death or resignation of a member during a hearing?

Secondly, is the jurisdiction cast effectively? For example:

- Is the jurisdiction de novo or is it a review?
- Is the tribunal acting in an inquisitorial or adversarial environment?
- Do the rules of evidence apply – if not, what does?
- Is the role of the tribunal frustrated because of boundary issues – is the jurisdiction cast too narrowly?

Thirdly, are the governance arrangements clearly set out? For example:

- Does the legislation allow for active management of the tribunal by the president?
- Can the tribunal make quality referrals of matters outside jurisdiction?
- Can the president review decisions made by a tribunal member – or do they go on appeal to the Supreme Court?

Finally, does the legislation contain a full tool set of provisions? By this I mean does the tribunal have all the provisions and powers necessary to operate effectively and expeditiously. For example:

- Does the tribunal have the power to make the full range of orders necessary to deal with the jurisdiction of the tribunal?
- Does the tribunal have the power to compel witnesses?
- Can the tribunal deal quickly with vexatious or unmeritorious matters?
- Can the tribunal make recommendations for reform when necessary?

Other difficulties

Other difficulties might be identified with the current structure of ACT tribunals. For example, many tribunals sit infrequently. Members, staff and other resources may be under utilised and may not get experience in dealing with matters. The activities of COAT (Council of Australasian Tribunals) in supporting these members are welcomed. Because of fragmentary jurisdictions and the size of tribunals, access to existing tribunals may be problematic – there is no single entry point for the public to access tribunals.

These difficulties impact on access to justice, the cost of justice, support for members and support for officers in registries or secretariats. Faced with the same problems, in order to promote the goal of access to justice, some jurisdictions have chosen to:

- co-locate tribunals, near to the legal precinct, but outside of the court buildings;
- provide training for tribunal members and support staff;
- provide a single point of access to tribunals for the public; and
- establish standard application forms and information pack on what it means to be a party to a tribunal hearing.

If the ACT were to adopt a similar approach to improve access to justice, it would be necessary to streamline the legislation governing the existing tribunals and have common rules for the operation of ACT tribunals.

What options exist for increasing efficiency and cost-effectiveness?

I mentioned earlier that the cost to the ACT of the existing tribunal structure is approximately $2million. Reorganising this area may produce a number of benefits to our community – enhancing access to justice while enabling us to use savings from better utilising our resources to improve the skills of those people who have chosen to work in this area.

Any changes to the structure of tribunals should ensure that tribunal members are fully supported. Most of these members are paid, although some are voluntary positions. Some of the members sit infrequently, whereas others sit every week. There is currently no standard training for tribunal members; there is limited opportunity for career progression and no opportunity for members to hear matters outside of the jurisdiction they were appointed to.

Changes to tribunal structures should also ensure that officers in tribunal registries or secretariats are supported. The structure should provide opportunities for career advancement, training and expansion of skills as officers work across numerous tribunal jurisdictions.

In examining options for tribunal structures the review is guided by a number of principles for tribunals, taken from a speech by the Chief Minister, Mr Jon Stanhope MLA, on the *Future directions for tribunals in our Territory in 2004*. [2] The principles are that:

- tribunals should be independent, open, fair and impartial;
- tribunals should be accessible to users;
- tribunals should have the needs of users as their primary focus;
- tribunals should offer cost effective procedures;
- tribunals should be properly resourced and organised; and
- tribunals should be responsive to the needs of all sections of society.

Further, in examining the structure of ACT tribunals it is important to recognise that it is not possible to remove all of the differences in the different tribunal jurisdictions. Some of the

differences in ACT tribunals are necessary to ensure that the needs of stakeholders in different jurisdictions are met. For example, the clients in the hardship jurisdiction of the Essential Services Consumer Council may require immediate action by the tribunal registry to restore power followed by a fast informal hearing process.

Stakeholders appearing before the Residential Tenancies Tribunal require similarly expedited proceedings. The relatively informal processes adopted in these jurisdictions provide a contrast with the level of formality expected by stakeholders appearing before disciplinary tribunals such as the Health Professionals Tribunal and the Legal Profession Disciplinary Tribunal. In disciplinary tribunals and in other specialist tribunals, it is sometimes also considered an advantage for the tribunal panel to include an expert in the relevant field under consideration.

Finally, any structure for ACT tribunals will need to be consistent with the *Human Rights Act 2004*. In particular, s 21 of the *Human Rights Act 2004* provides that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The review is considering four major options for change to the structure of ACT tribunals. The options are:

- Consolidation of tribunal secretariats;
- Cross appointment of members to different tribunals;
- Partial consolidation of tribunals; and
- Consolidation of tribunals.

The first option of consolidation of tribunal secretariats and registries could be achieved in a number of different ways. Ideally, all tribunal secretariats and registries would be combined and any functions not suited to a tribunal registry would be retained within the current area of the department. A combined secretariat could then report through the Courts Administrator or as a stand- alone secretariat.

The second option of cross appointment of tribunal members has commenced. To date there are a number of tribunal members who are appointed to more than one tribunal. As additional vacancies arise many are filled by existing tribunal members. However, cross appointments alone will not solve the problems identified with the current structure of tribunals.

The third option of the partial consolidation of tribunals recognises that the structure of tribunals could be improved but allows some flexibility in how tribunals would be consolidated. A partial consolidation could occur of those tribunals located in the court, with a policy of future consolidation of tribunals. Other options for consolidation include consolidation of like tribunals or consolidation of industry regulation tribunals.

The consolidation of tribunals is not a new idea. Victoria consolidated its tribunals in 1998 and New South Wales created the Consumer, Trader and Tenancy Tribunal in 2002.

The fourth option of the consolidation of tribunals would be similar to the model for the Victorian Civil and Administrative Tribunal. This Tribunal includes numerous lists representing the previous tribunals. The consolidated tribunal would be headed by a president and would have a number of deputy presidents heading up different divisions. The different divisions could represent the four tribunal categories that I mentioned earlier. That is, separate divisions could hear matters dealing with civil disputes, rights, occupational and administrative review.

The consolidated tribunal would have a common pool of members, would have an emphasis on single member hearings and would have modern streamlined legislation. In the future the consolidated tribunal could also include a small claims jurisdiction, like the consolidated tribunals in Victoria or New South Wales.

Even in this consolidated model, there are likely to be some tribunals not included in the consolidation. For example, the Remuneration Tribunal should remain as a stand-alone tribunal as it requires independence from other tribunals so that it can determine remuneration for tribunal members without feeling compromise or pressured to make a particular decision.

Where to from here?

So, where to from here? The next step is for the review team to meet with all ACT tribunals, to cost the different options for reform and then to put options to government. I anticipate that options will be put to government later this year, with a view to implementing changes to the structure of ACT tribunals next year.

Endnotes

1 Rutherford and Bone, Osborn's Concise Law Dictionary, 8th ed., 1993, 331. The ACT *Legislation Act 2001* includes a less comprehensive definition of tribunals. The Act defines tribunals as an "entity that is authorised to hear, receive and examine evidence". This broad definition includes some boards and committees and some statutory office holders.

2 Chief Minister Jon Stanhope MLA, Speech to Council of Australasian Tribunals, *Future directions for tribunals in our Territory*, 20 July 2004.