persons to be removed from Australia (those without a valid visa or whose visa is cancelled) and the criminal deportation provisions. The Committee noted that it is possible to circumvent the 10 year rule by cancelling the permanent visas of non-citizens and having them removed from Australia rather than deported. However, a non-citizen who is removed may apply for a visitor's visa after 3 years or migrant entry after only one year. Non-citizens who have been deported or whose visa are cancelled for criminal conduct are excluded for life.

The Committee considered that this gave greater rights to non-residents than to permanent residents and recommended that all non-citizens removed because of criminal convictions should be subject to the same limitation as applies to criminal deportees (Recommendation 13). In response to evidence against the lifetime ban on re-entry, the Committee recommended that the Minister be given power to grant a visa to a previously deported person, in the public interest or on compassionate or humanitarian grounds, that such a power should not be subject to either merits review or judicial review but that Parliament should be advised of the reasons within 15 sitting days (Recommendation 17).

Adequacy of existing deportation arrangements

The Committee recommended that criminal deportation should be expanded to encompass mentally ill non-citizens who have committed actions normally expected to attract a sentence of at least 12 months, and whose actions demonstrate their continuing threat to society (Recommendation 14). Other recommendations deal with multiple offences which each result in a sentence of less than 12 months (Recommendation 15), removal of references to death sentences (Recommendation 16) and deportation to places other than the deportee's country of nationality at the deportee's request or with their concurrence (Recommendation 21).

The Committee also recommended that the Ministerial policy statement should be revised to identify all the factors that may be taken into account in considering a deportation case and clarify, as far as possible, the weight to be given to each factor (Recommendation 18).

Australian Law Reform Commission Issues Paper 24

In April 1998, the Australian Law Reform Commission released an issues paper concerning federal review tribunals and the adversary system, *Issues Paper 24: Review of the adversarial system of litigation—Federal tribunal proceedings.* Comments and submissions were sought by 17 July 1998.

The issues paper dealt with a wide range of issues concerning federal review tribunals. A number of the issues and questions raised by the Commission are mentioned below.

Representation and Participation

- restricting non-legal representation:

  – the paper notes that federal merits review tribunals do not place any particular restrictions on non-legal representation. However, in some other jurisdictions non-legal representatives are restricted. For example, in the Victorian Administrative Appeals Tribunal representation by a person other than a legal practitioner at a hearing in its general division is only permitted with the consent of the

tribunal. The paper asks whether high levels of legal representation hinder the development of less formal or more effective dispute resolution approaches and whether there are categories of federal review tribunal proceedings in which representation should be restricted.

- participation of representatives:

  – the paper notes that in the Administrative Review Council Report *Better Decisions* the Council considered that representatives should be able to make an introductory statement, speak to and answer the applicant's questions and request an opportunity to advise the applicant in private. The Council recognised the concern that assistance beyond this sort of very limited involvement might lead to an undesirable formalisation of the hearing. The Council recommended that there should be no statutory limitations on the role that representatives or assistants should play but rather that it should be left to the discretion of the tribunal;

  – the paper also notes that the Guilfoyle review agreed that the extent to which applicants' representatives can participate in proceedings should be left to the tribunal;

  – the paper discusses the position in the IRT and RRT where the right of representatives or other persons assisting applicants to present arguments or address the tribunal is limited. The paper queries the impact of rules and practices concerning representation in federal review tribunals.

- representation in the ART:

  – the paper notes that the Government is considering whether the role of representation and the level of representation in review proceedings should continue in its present varied forms in the proposed divisions of the new ART. Should the present restrictions applying in the IRT, RRT and SSAT be lifted and the rules on representation be made consistent with the general discretion presently exercised by the AAT, or should new general restrictions apply to the ART?

  – the paper suggests that, where representation is restricted, one option would be to permit an agency to request the ART to allow the agency and the applicant to make submissions or appear with or without representation where a case raises precedent issues or is to be determined by a multi-member panel;

  – it is suggested that practice directions could also provide that, where representation is permitted, it is permitted to all parties on equal terms;

- the effects of representation:

  – the paper discusses whether applicants without representation are disadvantaged in tribunal hearings. For example, whether if the law or facts are complicated or credibility is at issue, applicants and the tribunal process would be better served if the applicants or other parties were represented. Also, what types of representation are best suited to tribunal proceedings?

- assisting unrepresented applicants:

  – the paper looks at the ways in which the various federal tribunals assist unrepresented applicants and queries whether federal merits review tribunals should have an explicit legislative duty to assist applicants.

- role of agency representatives:

– the paper notes that the Federal Court has held that the duty of an agency's representative in the AAT is to assist the tribunal to reach the correct decision. However, in some social security and compensation matters the AAT has criticised counsel for departments for being unnecessarily adversarial;

– the paper queries whether the advent of outsourcing and competition between AGS and private law firms for some government business may introduce a different litigation culture to tribunal proceedings;

– the paper asks whether the role of government representatives before review tribunals should be considered analogous to the DPP's functions in criminal cases before courts, so that the representatives and agency:

* must give full disclosure of all relevant facts and documents; and

* not place undue emphasis on defeat of an application?

Should that role be mandated for all representatives of respondent agencies, including where government legal work is outsourced?

Courts and Tribunals

- tribunals and the judicial model:

– the paper looks at the characteristics of tribunals which have given rise to the criticism that tribunal processes too closely resemble those of courts. The paper asks in particular, whether non-legal members of federal review tribunals are taken to have a role subordinate to legal members and whether non-legal members are used effectively in federal review tribunal proceedings.

The paper also asks whether there is a minimum level of formality necessary to meet applicants' expectations that their grievances will be dealt with in a serious and dignified manner.

Judicial Review of Tribunal decisions

- judicial review:

– the paper examines the courts' supervisory jurisdiction over tribunals. According to the issues paper, the statistics for the number of cases filed in the Federal Court in 1996-97 are as follows:

Tribunal	Tribunal cases finalised by decision	Judicial review/Appeals filed in the Federal Court
AAT	1358	181
IRT	2436	173
RRT	4245	419

The paper asks whether the number of judicial review cases in the Federal Court's indicative of deficiencies in the tribunal proceedings and, if so, in what types of cases and what are the deficiencies.

Does judicial review in the Federal Court operate to improve tribunal procedures? Does judicial review place too legalistic a stamp on federal review tribunal procedure? Has the Federal Court imposed adversarial processes and assumptions on federal review tribunals and, if so, what can be done about this?

Australian Law Reform Commission Issues Paper 25

Background

The Australian Law Reform Commission's Issues Paper 25 : *Review of the Adversarial System of Litigation : ADR – its role in federal dispute resolution* was released in June 1998. Comments and submissions were sought by 31 August 1998.

Matters of interest

The following aspects of the Paper may be of particular interest to *Admin Review* readers.

Chapter 1 asks for views on a number of general issues. In particular, what role, if any, should federal courts and tribunals have in facilitating or providing alternative dispute resolution (ADR). The Paper also asks whether federal courts and tribunals should have the power to require parties to use mediation or other ADR processes to attempt to resolve their disputes before having access, or further access, to court or tribunal procedures. Should increased dispute resolution options be adopted by courts and tribunals exercising federal jurisdiction? Is an ADR focus outside the court or tribunal and/or before proceedings commence the most desirable?

Chapter 2 examines ADR processes and briefly describes those processes. Para 2.36 takes the view that AAT conferences are a form of conciliation and that the Administrative Review Council's *Better Decisions* report has "described the difference between AAT conferences and mediation as relating to the former's more 'directive role of the tribunal member or officer'." The Chapter asks which forms of ADR might be most suitable for courts and tribunals, what sort of facilities use of these processes require, how could the use of these processes be fostered and evaluated.

Chapter 3 examines the role of federal courts and tribunals and their relationship with ADR processes. The Chapter notes that the constitutional obligation of federal judges to act judicially constrains the way in which judges may use ADR processes. The judicial power is differentiated from arbitral power, administrative functions or adjudication. Arbitral power is exercised by tribunals such as the Australian Industrial Relations Commission, the Copyright Tribunal and the National Native Title Tribunal.

The Chapter discusses various views on whether ADR should be integrated or separate from court and tribunal processes. A concern noted in relation to the privatisation of dispute resolution is the implications of this trend for the development of legal precedent and normative decision making.

Paras 3.63 - 3.74 discuss the AAT's ADR program and notes proposed changes which are likely to arise from the Government's consideration of the