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

Better Decisions report, including what the ALRC describes (at para 3.73) as the expected preferred model of a tribunal utilising "a 'non-adversarial approach', with an onus on members to be 'proactive and interventionist' and a presumption that the parties are not represented before it." These changes will have particular implications for the use of ADR processes.

Some issues raised in this Chapter are whether conciliation and evaluation models are appropriate or useful for some federal tribunal matters and whether ADR techniques can be utilised or blended with existing federal tribunal processes more effectively.

The Chapter also asks about the extent to which tribunal members should be involved in ADR, should parties be persuaded to use ADR and what forms of persuasion are appropriate, whether aspects of matters could be referred to ADR during a hearing, and training of tribunal members.

Chapter 4 is concerned with the processes used by the National Native Title Tribunal.

Chapter 5 considers whether there are types of cases or circumstances where ADR should not be used, the use of private and community schemes and internal/external court and tribunal schemes, the assessment of cases for referral to ADR and issues of voluntary/mandatory ADR use, including funding issues.

Chapter 6 examines ADR practice and process issues, including impartiality, confidentiality, liability, reporting to the court or tribunal and agreements reached following ADR processes. Some issues raised in this Chapter are whether it is desirable for the federal government to enact legislation to support clauses that provide for ADR processes, including mediation, to be used prior to the commencement of litigation and for the outcomes to be enforceable; and whether there should be additional safeguards for confidentiality required where mediators, conciliators or other third party neutrals are based within a court.

Chapter 7 is concerned with education, training and accreditation and **Chapter 8** is concerned with practice standards for ADR practitioners.

Chapter 9 considers future use of ADR. Some issues raised in this Chapter are could or should ADR processes be supported by the federal government and others as services separate and alternative to the federal courts and tribunal system. How will ADR processes be affected if they are more closely integrated into federal court and tribunal processes? Do objectives and performance indicators need to be developed for such federal court and tribunal related ADR programs? Should federal courts and tribunals be responsible for assisting unrepresented parties in their choice of and use of alternative processes?

Report of the House of Representatives Standing Committee on Family and Community Affairs on the Competitive Tendering of Welfare Service Delivery

The Committee's report – ***What Price Competition?* A report on the Competitive Tendering of Welfare Service Delivery** – was presented to the House of Representatives on 29 June 1998.

The Committee's 15 recommendations included that

R.1 the government agency remains accountable for the efficient and effective delivery of services, irrespective of whether welfare services are provided to clients by government agencies or through a contractor.

R.14 a clear statement of the contractor's responsibilities and those of the contracting agency should be set out in the service agreement. This statement should cover:

- Accountability of the service provider to the contracting agency for the services that they are providing. The government must be able to ensure that the contract is being fulfilled in a timely and appropriate manner, and that the legitimate scrutiny role of government is not being hindered by a lack of relevant information;

- Accountability of the service provider to the consumer of the service. Where welfare services are contracted out to non-government organisations, the consumer is the third party. As consumers of the service are not a party to the agreement, they may not necessarily have directly enforceable right against the service provider, such as the provision of information access rights, privacy protection and complaints mechanisms;

- Accountability of the contracting agency to the service provider. Questions of accountability in contracting out often focus solely on the responsibilities of the service provider However, it is also important that contracting agencies acknowledge their responsibilities to service providers by ensuring that the tender process is transparent and encompasses adequate mechanisms for unsuccessful tenderers to seek review, as well as adequate mechanisms for successful tenderers to seek redress for problems faced in performance of the contract.

Reorganisation of Human Rights and Equal Opportunity Commission

On 8 April 1998, the Attorney-General, the Hon Daryl Williams AM QC MP, issued a news release regarding the legislation he introduced that day to reorganise the Human Rights and Equal Opportunity Commission, Australia's principal human rights organisation. The legislation, introduced into the House of Representatives, had its second reading on 8 April 1998.

The news release states:

> The protection afforded to all Australians under Commonwealth anti-discrimination laws will be fully maintained under the reorganised Commission.
>
> The Human Rights and Equal Opportunity Commission will be reorganised to become the Human Rights and Responsibilities Commission with more focussed functions and a streamlined structure.
>
> The new Commission's primary functions will be to focus on education and dissemination of information on human rights and assisting the general community and business sector to comply with obligations under federal anti-discrimination laws.
>
> These functions will be additional to the Commission's current functions.
>
> The structure of the new Commission will consist of a President and three Deputy Presidents.
>
> Removing the top-heavy structure of six specific Commissioners will help develop a more effective organisation which will better protect everyone's rights.
>
> Under the new structure, one Deputy President will be assigned general responsibility for sex discrimination and equal opportunity, one will have responsibility for human rights and disability discrimination and one will deal with race discrimination and Aboriginal and Torres Strait Islander social justice.
>
> The Deputy Presidents will also be able to develop expertise in other areas as necessary without, as under the old structure, the need to consider appointing specialist Commissioners as each new area develops.
>
> The Privacy Commissioner will be separated from the Commission and a statutory Office of the Privacy Commissioner will be established.
>
> While the reorganised Commission will ensure that the interests of more vulnerable sections of the community are properly protected, the establishment of Deputy Presidents with more general responsibilities will remove perceptions that the Commission seeks only to protect sections of the community for whom a specific Commissioner exists.
>
> The Human Rights Legislation Amendment Bill (No. 2) 1998 introduced on 8 April 1998 underlines the Government's commitment to the effective and equitable protection and promotion of human rights for all Australians.
>
> The new commission will retain existing powers to investigate and conciliate complaints. Problems which exist following the High Court's *Brandy* ruling which affect the enforcement of determinations by the Commission will be addressed by separate legislation now before the Senate. That legislation will transfer the hearing function of the