



**THE LAW SOCIETY
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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23 August 2011

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RB;rp

The Honourable John Rau MP
Attorney-General
DX 336
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Dear Mr Attorney

Options for reform of Administrative Review in South Australia

We refer to the Society's previous submission in relation to the establishment of a State-based Administrative Appeals Tribunal and our subsequent discussions.

I had asked our Administrative Law Committee to try to distil their submission to a number of distinct pages for ease of reference and I herewith enclose a copy of what I believe to be an excellent paper from the Committee, dated 10 August 2011, for your consideration.

The Committee recognises that consultation with other stakeholders may well be necessary and some costings will need to be undertaken as to whether or not the establishment of a local Tribunal can be achieved out of savings generated. The Society is of course only too happy to be involved in this process.

Should you require anything further please do not hesitate to contact us.

Yours sincerely

Ralph Bönig
PRESIDENT

Law Society of SA (LSSA)

Administrative Law Committee

Options for reform of Administrative Review in SA

EXECUTIVE SUMMARY

1. South Australia is lagging behind in relation to reform of administrative review mechanisms when compared to other states. South Australians are being denied access to cheaper, efficient, better co-ordinated and more informal dispute resolution mechanisms for the review of government decisions.
2. Real efficiencies could be made with the amalgamation and joint administration of a broad range of existing boards and tribunals and the provision of a 'one stop shop'. Resources currently devoted to the existing structure could be used to fund a new body. The Supreme, District and Magistrates Courts could be freed from minor civil, disciplinary and administrative review to be able to focus on their core business.
3. A policy decision needs to be made whether to empower such an amalgamated body with broader functions than strict merits review.
4. In relation to the merits review function, the 'cogent reasons' limitation should be abandoned but special provision should be made for the consideration of government policy.
5. The new body could be judge led, with a few full time generalist members and a broader panel of sessional members with particular expertise.
6. Providing up to date ADR processes is essential to achieve quick, cheap, fair, informal and efficient access to justice.
7. It is recommended that a senior person be appointed for a short period to consult stakeholders, liaise with interstate tribunals and to formulate a workable and cost efficient structure for implementation.

BACKGROUND

For some time the Executive of the Council of the LSSA has supported reform of the system of administrative review in South Australia. Recently the Attorney-General has expressed public support for such reform but only if such can be achieved without significant additional expenditure. Neither the LSSA nor any of its committees has the resources or expertise to properly cost any particular option for reform. Further there are now many existing examples from the other states as to how reform might be achieved and each jurisdiction has developed a different model. Before any serious consideration can be given to the costs of reform, a commitment needs to be made at a policy level as to the model to be adopted that best suits the needs of South Australia. However, we are of the view that reform which seeks to rationalise and amalgamate some or all of the existing, uncoordinated and disparate bodies into a 'one-stop shop' will undoubtedly be a more efficient use of resources. Existing resources expended in a fragmented way in the current system would be available to transfer to the operating budget of the new body¹, and considerable efficiencies would

¹ In Queensland, QCAT was established using only the existing resource allocation of the boards and tribunals that were transferred to QCAT.

be able to be achieved as review of administrative decision making is streamlined. In the longer term real savings could be achieved in terms of money spent on accommodation, member fees, registry and administrative support and the streamlining of forms and information resources.

The Administrative Law Committee of the LSSA offers the following suggestions as to the critical elements that would need to be addressed in reforming civil and administrative review in South Australia and through the President is keen to be further engaged in any initiative suggested by the Attorney General that would progress this overdue reform.

SA LAGGING BEHIND

Both NSW ADT and VCAT have been operating for more than 12 years. The WA SAT is in its seventh year of operation. The ACT reformed their system of civil and administrative review 2 & ½ years ago. QCAT was established 18 months ago. South Australia, Tasmania and Northern Territory remain the only states and territory that have not reformed civil and administrative decision making and review².

Despite expressions of support for reform, little real progress has been made toward settling on the structure, jurisdiction and functions of a super tribunal in South Australia. As a result, South Australians continue to lag behind almost all other states in Australia in terms of their access to review of government decision making and quick, low-cost, efficient and fair dispute resolution mechanisms. Review of administrative decision making and resolution of minor civil disputes are currently provided in SA through a mishmash of disparate boards, tribunals and courts³. The attempt at rationalisation through the establishment in 1991 of the Administrative and Disciplinary Division of the District Court (ADD) is not only incomplete but antiquated and prohibitive in terms of cost and formality⁴.

As the ADD is a division of the District Court, the structure and processes are necessarily more formal and legalistic. Although there are some non-adversarial features, the court lacks the flexibility of approach in practice and procedure that can be achieved in a tribunal setting. In exercising the appellate power there is a considerable restriction in that there can be no departure from the original decision unless there are "cogent reasons". This is in stark contrast to all other Australian merit review tribunals that require the review to reach the 'correct and/or preferable' decision. Although there is some deference paid to lawful government policy in all other systems, to extend this restriction to the review power itself is an unnecessary limitation of the power of review available in SA.

² As indicated at the recent AIJA Tribunals Conference (Melbourne 9 & 10 June 2011) the Tasmanian Attorney-General has appointed a committee to investigate the establishment of a super tribunal.

³ The Executive of the Council of the LSSA has previously submitted submissions as to the existing system of administrative review in SA and its criticisms of the lack of coordination, rationalisation and accessibility.

⁴ The District Court in the ADD is the only avenue of review for an owner of a house declared substandard by a local council under the *Housing Improvement Act 1940*; for a cat or dog owner against a decision of a council for a destruction order or an order preventing future ownership of a dog; by a livestock brand owner against registration and compliance decisions of the Chief Inspector of Stock; or the parent of a child against a decision of the Minister as to enrolment of that child in a special school. These are only a few examples of matters that would best be dealt with by a more informal and accessible tribunal process.

Except in guardianship matters where a pro-bono representation system exists, there is little non-costly legal advice or assistance available to applicants. Unlike many other administrative review tribunals where it is expected that many applicants will be self-represented and procedures are developed to cater for this⁵, in the ADD, there are considerable difficulties faced by the self represented litigant. Although the critical issue of ADR mechanisms will be discussed in more detail later, the District Court is simply not equipped to provide the necessary skilled and targeted ADR processes so successfully provided in all other systems in Australia.

There is limited provision of accessible information to the public about the nature of the jurisdiction, the procedures, what to expect at a hearing, nor are there easily accessible or understandable rules or lists of relevant cases for the public. Contrast this situation with the extensive and updated websites, information guides and registry support services provided by the other tribunals. Locating the majority of the administrative review function within the necessarily formalised District Court effectively prevents a user friendly, easily accessible 'shop front' aimed at assisting and guiding potential applicants in a field that is best suited to informal and non-adversarial dispute resolution approaches.

These inadequacies were highlighted recently through the national health practitioner regulatory reform where a new tribunal had to be established (albeit under the administrative support of the Industrial Court and Commission). In other states this function was simply referred to the existing civil and administrative tribunal to sit alongside all the other occupational and professional regulatory functions in one overarching tribunal. We continue with a range of review and disciplinary bodies dealing with occupational and professional regulation (including a separate system for legal practitioners). This is but one of many areas which calls out for rationalisation and reform.

The balance of administrative review in SA is provided by disparate subject specific tribunals and other statutory decision making bodies; other Courts including the Supreme Court, the District Court (not in the ADD), the ERD Court and the magistrates court dealing with civil and consumer matters (previously the responsibility of the Consumer Tribunal⁶); as well as Ministers and other public officials.⁷

It is evident that we lack a more accessible and functional avenue of review of government and legislative ministerial decision making when matters such health licensing and regulation (under the Reproductive Technology (Clinical Practices) Act, the Sexual Reassignment Act and matters pertaining to the licensing of private hospitals), state taxation issues, some cruelty to animal issues, controlled substances and some aspects of the Petroleum (Submerged lands) Act are vested in the Supreme Court.

⁵ For example the system of 'outreach' by case offices for all selfrepresented applicants at the Federal AAT and the facilitation of one-off legal advice appointments from the Legal Services Commission.

⁶ Eventually disbanded in 1995.

⁷ See the paper provided by the Administrative Law Committee to the AG in 2006 entitled *Inconsistencies in the SA Merit Review process*, M Matanda.

Further small claims and small business and commercial disputes currently dealt with in the Magistrates Court would be dealt with more quickly and efficiently outside of a court system but in a more informal tribunal setting with upfront and targeted ADR.

ADMINISTRATIVE REVIEW IN OTHER JURISDICTIONS

There are a number of existing interstate models of an overarching administrative tribunal.⁸ Succinct summaries describing the jurisdiction role functions processes and structure are available elsewhere⁹ and could be provided if required.

Each is different in terms of:

- a. whether they exercise original or only appellate jurisdiction;
- b. the breadth of that jurisdiction;
- c. the exact nature of the review undertaken;
- d. whether the administrative tribunal is bound to make decisions in accordance with relevant and lawful policy;
- e. the levels of review and appeal (including whether there is an internal appeal);
- f. whether the tribunal is headed by a Judicial officer and whether specialist members are engaged full time or on a sessional basis; and
- g. how ADR processes are provided.

OPTIONS FOR SOUTH AUSTRALIA

1. The structures developed in other jurisdictions reflect the pre-existing legislation, the previous boards and tribunals and other factors peculiar to each state. Rather than assess the merits of each structure, we are of the view that this State should develop a model that best suits the current circumstances in SA. For example, although in some states jurisdiction in relation to planning and land and environment issues and also child protection and youth issues are included in their administrative review tribunal, we may decide that in SA, as these issues are being appropriately dealt with by the ERD Court and the Youth Court, that these jurisdictional areas will not be included.
2. Given the relative size of our state's population and the comparatively lower volume of matters that are likely to be dealt with by an administrative review tribunal, it might be argued that in order to maximise flexibility and reduce duplication, we should provide that our new body be given the original jurisdiction to adjudicate some classes of disputes, and to exercise occupational disciplinary functions as well as provide merits review and exercise an internal appellate function.

⁸ NSW, Vic, WA and Queensland.

⁹ *An Analysis of The Nature of The Administrative Appeal Jurisdiction of the District Court of South Australia*, C Byrt, MALP Honours Dissertation, Faculty of Law, University of Sydney, 2006.

On the other hand, it could also be argued that limiting the functions of such a body to the provision of full merits review of administrative decision making¹⁰ would be clearer and less confusing.

3. As discussed above the current power of review of the Administrative and Disciplinary Division (ADD) of the District Court Act requiring 'cogent reasons' before departing from the original decision is in our view, vague and difficult to apply with consistency, and tends to lengthen litigation. It is also unnecessarily restrictive and should be abandoned. This limitation is not in keeping with the current widespread acceptance of the provision of a full merits 'de novo' review of administrative decisions and the imperative to determine the 'correct or preferable' decision.
4. In relation to the merits review function the full range of powers should be available including affirming the decision, varying, setting aside and substituting a fresh decision, setting aside and remitting for fresh consideration in accordance with any direction of the tribunal.
5. As is currently accepted in all Australian systems of merits review, special provisions could be made when considering the application of government policy. Such limitations are generally uncontroversial and there are a range of formulas that could be adopted.
6. In order to achieve the greatest efficiency and to enhance access to justice, ADR processes (both informal and formal) should be a vital ingredient of the practices and processes of the unified tribunal. Over the last 20 years, ADR mechanisms have come of age. There are now a significant numbers of ADR practitioners who are accredited and have high levels of expertise in this field. The effectiveness of dedicated ADR processes is well acknowledged.

Further procedures whereby respondent agencies were required to provide relevant documents early would also enhance efficiency and transparency. It is envisaged that a majority of applicants to this tribunal would be self-represented. Considerable experience from other merits review tribunals shows that a compulsory, upfront and prompt conference process which aims to assist parties to identify issues, gather necessary information and informally discuss concerns, enhances the efficient, quick and durable settlement of a vast range of disputes. More formal ADR processes (conciliation, mediation, case appraisal or neutral evaluation techniques) could also be provided for in suitable matters.

In some states and in some areas¹¹ this process is provided by a separate ADR service, but is a compulsory but effective preliminary step required before proceeding to any tribunal hearing. We have the opportunity in SA to lead the country again in setting up an innovative and forward looking ADR process that captures both minor civil matters and administrative review. Whether this is provided within an amalgamated tribunal context or as a stand-alone service

¹⁰ As is provided for by the Commonwealth *Administrative Appeals Tribunal Act 1975*

¹¹ The Victorian Accident Compensation Conciliation Service

as a compulsory preliminary process requires a policy decision. But the critical aspect is that ADR processes need to be available more broadly particularly in the context of a system of civil and administrative review. Obviously not all matters can resolve through ADR and indeed there are many matters not amenable to ADR which will require a hearing. The provision of such ADR services will ensure a high level of matters is resolved early, in a way that is satisfactory to parties and as cheaply and as efficiently as possible.

7. Leadership and membership of any new administrative tribunal is also critical. It is our view that although it is not necessary to head the new body with a senior judicial officer, this would have considerable advantages in terms of credibility and acceptance of the tribunal and its decisions, the setting of standards for members and the ability to provide internal review. With the exception of the new body in the ACT, all other of the amalgamated tribunals are headed by senior judges.

As for other members, given the broad range of issues an amalgamated tribunal would be dealing with, it would be critical to ensure the availability of a broad range of members with particular expertise were available to hear matters. The number and types of members would depend on which of the existing tribunals were incorporated into the new body. There are different models interstate some with few full time members and a greater number of sessional members, and other systems with more full time and part time members and fewer sessional members. Given the smaller size of South Australia it might be more economical if there were a few full time members with generalist skills and then a broader panel of sessional members with particular expertise that could be called upon to sit in a number of areas.

8. A key issue is the jurisdiction of the proposed new administrative tribunal. Ideally, this should subsume as many of the existing merits review bodies in South Australia as possible, in order to achieve the 'one stop shop' goal. If necessary, that jurisdiction could be subdivided into a number of divisions, with members assigned to those divisions in accordance with their expertise.

In order to make the efficiencies needed to sustain a new tribunal, at a minimum, the functions currently conferred upon the Administrative and Disciplinary Division of the District Court should be transferred to the new body. There are 70 or so Acts that confer jurisdiction on the ADD. Many of the existing 'stand-alone' tribunals and boards could also be incorporated. Jurisdiction could also be progressively transferred to and consolidated within the new body once it was established.

9. We make the following suggestions as a means of encouraging further and more extensive discussions of how to achieve the establishment of a unified administrative review tribunal in SA.

A divisional structure as adopted by the interstate bodies appears to be effective and the following divisions are suggested:

Vocational, Occupational and Disciplinary

This division could exercise the newly conferred jurisdiction of the Health Practitioner's Tribunal as well as the disciplinary jurisdiction of the ADD (Conveyancers, Land Agents, Land Valuers, Plumbers and Gasfitters, police Complaints and Discipline, Teachers Registration Board registration appeals and disciplinary proceedings etc.). The functions of the Legal Practitioners Disciplinary Tribunal could also be transferred this division. It could take the functions of the Equal Opportunity Tribunal, the functions under the various pieces of superannuation legislation, and the reviews under the Training and Skills Development Act.

Human & Community Services, Housing and Local Government

The Residential Tenancies Tribunal could be incorporated under this division with original decisions being made at a lower level and any appeals going to the appeals level within the tribunal. This division would also deal with the jurisdiction of the Public Housing Appeals Panel, the matters under the Housing Improvement Act, the Local Government Act, and the Supported Residential Facilities Act. The jurisdiction of the Guardianship Tribunal (including the Mental Health Act matters) could also be located here and as with the RTT any appeals going to the higher appeals level within the tribunal. Matters under the Electoral Act, Dog and Cat Management, Historic Shipwrecks, Freedom of Information, and Health and Community Services could also be referred.

Tax, Regulatory and Business Licensing

This division could exercise the jurisdiction currently exercised by the ADD in areas such as Associations Incorporations, Co-operatives, Dangerous Substances, Essential Services Commission, Food Act, Gas Act, Gene Technology, etc. It could also take over the jurisdiction of the Supreme Court in relation to the Casino Act, the Controlled Substances Act, the Taxation Administration Act

Commercial and Civil

This division could deal with Building Work Contractors, Consumer Credit, Credit Administration, State Lotteries, and possibly civil *inter-partes* matters from the Small Claims and Business and Consumer Division of Magistrate's Court.

10. The supervisory jurisdiction of the Supreme Court in relation to judicial review cannot be excluded in the light of the High Court's decision in *Kirk v Industrial Court (NSW)*. However, the grant of remedies in the nature of the prerogative writs under the Supreme Court Civil Rules 2006 is attended by numerous complexities, which will lengthen litigation.¹² This difficulty can be avoided by the provision of a statutory appeal on a question of law only, to the Supreme Court, from all decisions made by the new tribunal, thus obviating the need for judicial review.

¹² Whether consideration should be given to enacting legislation like the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* to provide clearer heads of jurisdiction and better procedures as recommended by the 1984 SA Law Reform Committee is another issue but outside of the scope of this proposal.

Subject to whether the membership of the tribunal includes a senior judicial officer, and to provide for the existing levels of review currently available in some areas (e.g. appeals in the guardianship area and residential tenancies area) a level of internal appeal should be provided for significant matters. Experience in other jurisdictions shows the number of internal appeals is relatively small and limits the number of appeals being directed to the Supreme Court.

11. It would be necessary to undertake a brief consultation process with the broad range of stakeholders that would be affected by these proposals. This would be an essential step to ensure a successful outcome. We are not suggesting a broad enquiry as has been adopted by other jurisdictions prior to the establishment of their respective tribunals. There is sufficient experience and expertise now available from the other tribunals to justify the establishment of an overarching tribunal. However to ensure the model fits our SA needs and to provide leadership and a focus, it is suggested that the government should appoint a senior person for a 3 to 6 month period to consult stakeholders, liaise with interstate tribunals and to formulate a workable and cost efficient structure for implementation.

Clare Byrt
Chairperson
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Law Society of South Australia
10 August 2011