

RESEARCH NOTE: COLLECTING INFORMATION ABOUT TRIBUNALS

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Introduction

This note reports briefly on a research project undertaken by the Centre for Court Policy and Administration, which is part of the Law Faculty at the University of Wollongong.

The background against which the project was initiated is the continuing proliferation of tribunals, at both state and federal government levels. While in recent years governments have set up an increasing number of tribunals to make primary administrative decisions on a wide range of issues or to review decisions which might formerly have been reviewed by the courts,¹ the establishment of these new tribunals seems to have been largely an ad hoc process, particularly at the state level. No attempt had been made to collect information about tribunals across Australia, nor does there seem to have been any attempt to identify the range of appropriate tribunal models which could be utilised to achieve a specific objective.

While steps have been taken in some jurisdictions at least to identify the tribunals operating in that jurisdiction,² as yet there is no clear picture of the part played by tribunals in our system of government. The Administrative Review Council (ARC) has been

interested in the operation of tribunals for a number of years but its functions are limited to inquiring, reviewing and making recommendations in respect of Commonwealth tribunals reviewing administrative decisions.³ The ARC recently published a report on a review of Commonwealth merits review tribunals.⁴ It has no jurisdiction in respect of state tribunals.⁵ In the states and territories, the departments of courts administration see control over the establishment and operation of tribunals as part of their function. But tribunals are established under a variety of ministerial portfolios and, in the past at least, there appears to have been little co-ordination or oversight of tribunal activities as a whole. Between the different jurisdictions, communication about tribunals is limited largely to discussions between specialist tribunals with similar functions who meet from time to time at annual conferences or to consider common problems.⁶

Recognising the lack of any comprehensive information about the part played by tribunals in our system of government, the Centre for Court Policy and Administration decided to undertake a small research project, the main objective of which was to develop, test and refine a research methodology for the collection of information about tribunals with a view to establishing a database. But before starting on the methodology, the first issue which had to be resolved was what we meant by "tribunal" in the context of the project.

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Defining "tribunal"

Determining whether a particular body is a tribunal is less easy than might at first appear.⁷ Taking as an example the names given to tribunals, while some do include tribunal in their name, others use Agency, Authority, Board, Commission or Council.⁸

The traditional dictionary definition of "tribunal" is a court or seat of justice. Modern usage, however, suggests that in a legal context, at least, the word "tribunal" is used in contradistinction to "court" to mean a body (which could be constituted by a single person) in which administrative decision-making powers are vested, whether it *makes* primary decisions itself or *reviews* such decisions.

A tribunal which makes primary decisions will typically be adjudicating disputes or making determinations about entitlements or the exercise of rights. If a tribunal reviews a decision, this may involve not only an examination of the process followed by the original decision-maker and the evidence relied upon, it will also involve a re-examination of the merits of the decision - with the tribunal standing in the shoes of the original decision-maker. Some tribunals may only *recommend* particular action (for example, to the responsible minister) rather than make a *determination*.

An important characteristic of tribunal decisions, like court decisions, is that they often affect the rights, privileges, duties or obligations of individuals or associations.⁹ Thus, in making their decisions, which will include determining the material facts and interpreting and applying the law, tribunals are expected to act in accordance with principles of fairness and justice.¹⁰ In relation to this project and in the context of the characteristics of courts and tribunals,

it should be noted that no attempt has been made to address the difficult issues raised at Commonwealth level by the doctrine of separation of powers. Whilst the distinction between judicial and executive functions, recently highlighted by the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission*,¹¹ is an important consideration in the design of Commonwealth tribunals, it was not felt necessary to address this in defining the term "tribunal" for this project.

Thus, for the purposes of the project, the broad meaning of tribunal was adopted, that is including both tribunals *making* primary decisions and tribunals *reviewing* primary decisions, either within or external to other administrative structures, or as a mixture of both. Although this description of a tribunal is relatively straightforward, in practice, as noted above, identifying a particular body as a tribunal can be difficult. This is not something explored more fully in this project.

In testing the research methodology developed, we focused, quite consciously on two tribunals whose main function is primary decision-making. The reason for this is that the ARC and others currently studying the operation of tribunals have tended to focus on review tribunals and have not looked at the operation of primary decision-making tribunals. We did not wish to duplicate their work. Moreover, these studies have focused on Commonwealth tribunals. We therefore chose to test our methodology with two state tribunals, the NSW Guardianship Board and the NSW Residential Tenancies Tribunal. Nevertheless, we think that the information which emerged from our testing is sufficiently general in nature

to cover all types of administrative tribunals as we have defined them.

The approach adopted

In determining how to develop a research methodology to collect the required data for the establishment of a tribunals database, a range of research methods was considered in the context of the resources likely to be available for such a project. Our aim was that the data collection process should be sufficiently straightforward to be carried out by a research assistant with only minimal knowledge of tribunals. Another aim was that the process should be economical in terms of time (and therefore money). This meant that more time-intensive methods of data collection such as extensive interviewing could only be used sparingly where essential. The methodology ultimately adopted comprised the following:

- *A master list of data to be collected about tribunals was devised.* The intention is for this master list, which comprises a number of different classifications, to be the primary reference point for a researcher undertaking data collection and collation. The master list is also a useful starting point for developing design and evaluation criteria, discussed below (see **Other Proposed Action**).
- *A search list of public documents was devised, identifying the information that particular categories of document can be expected to yield.* Much of the information required for a database is readily available from public documents and can be easily collated from this source. When available from public documents, the information need not be sought elsewhere – duplication in the

collection process should be avoided.

- *Observation of tribunal hearings and viewing of premises.* An observer should attend tribunal hearings and view tribunal premises recording his/her observations with regard to specified criteria. This is necessary to ascertain how a tribunal actually works. For example, a tribunal's stated procedures may not reveal the full picture of what happens in practice. The physical premises and the way they are equipped, for example the layout of the hearing room or whether specific facilities such as a phone or tea/coffee machine are provided, can have a significant effect on how an applicant responds to the process.
- *Questions for tribunal management.* A list of questions was developed for a researcher to ask of tribunal management. Detailed information about tribunal management does not always appear in public documentation. Information about the tribunal's internal administrative process, for example its case management system, is important.
- *A questionnaire for tribunal members.* A standard questionnaire for tribunal members was designed and tested for use with a variety of tribunals.
- *Questions for stakeholders.* A list of questions was developed for a researcher to ask of stakeholders. For the purpose of this project, a stakeholder was defined as any party to a tribunal decision-making process, or person or class of person or organisation representing that party (including, for example, community agencies), whether directly or indirectly, who is interested in the outcome of that

tribunal decision. However, in many situations, it is just too difficult to ask questions of individual applicants. An applicant leaving the premises after a hearing often will not feel inclined to answer questions about what has just happened, and that person's response may well be coloured by the outcome of the hearing. Therefore it is not intended that questions be asked of individual applicants. But it is more feasible to approach the departments, agencies, organisations etc involved, and more can probably be achieved from doing so because they will have more extensive experience of dealing with the tribunal.

This methodology was tested and refined by its application in collecting data about the NSW Guardianship Board and NSW Residential Tenancies Tribunal. Copies of the documents relevant to the six components of the research methodology, together with comments on their usage, appear in a more detailed report available from the Centre for Court Policy and Administration.

Establishing a tribunals database

Now that the original objective of the project - the developing, testing and refining of the research methodology for collecting information about tribunals - has been achieved, the next step would be to use the methodology to establish a database of information about tribunals. Such a step depends, however, on further funding being available.

Other proposed action

As the project progressed, we became aware of how the methodology and data collected might aid both the

design of new tribunals and the evaluation of existing tribunals.

Tribunal design criteria

Having identified the information which should be recorded on a database, it is not difficult to formulate a series of standard questions to elicit relevant information which will inform tribunal design. For example, this might assist the development of a flow chart/algorithm identifying the options as to structures, powers, procedures etc which can be used to achieve a particular result in terms of the functions of a proposed or existing tribunal. Such an approach could be useful where a new tribunal is being proposed and the specific form it might take is under consideration. Moreover, where the evaluation of an existing tribunal is being conducted, design options could be used to assess whether the current design (including, for example, structure, composition, powers, procedures, access, case management, accountability) is best suited to the performance of the tribunal's functions, or whether there are alternative design features which would promote the better performance of its functions.

The standard questions designed to elicit relevant information to inform tribunal design might include the following (which are intended as examples and do not aim to be comprehensive):

- (a) Is the decision made by the tribunal significant for the individual?
- What factors make the decision significant for the individual?
 - financial effect - impact on the person's livelihood
 - removes/limits privileges or rights eg personal liberty (such

- as freedom of movement, right to work by imposing licensing requirements)
- imposes factors eg reputation/social standing, self-esteem, family life, personal interests such as recreational pursuits.
- In terms of tribunal design and process, the more significant the decision, the greater the need for:
 - access to information/advice
 - representation: what form of representation? Legal, other, as of right?
 - a right to be heard - in person or only to make written representations?
 - public hearings
 - the process to be quick but fair?
 - formality/informality: what level?
 - tribunal members with appropriate qualifications and expertise
 - multi member tribunals (drawing on part time members) so that a variety of views are brought to bear
 - a demonstrably independent tribunal
 - appropriate remedies?
 - a power to investigate for the tribunal if the necessary information is not before the tribunal?
 - a further avenue of appeal on merits, law or both?
- (b) Is the decision made by the tribunal significant for the government?
- What factors make it significant for the government?
 - Financial cost: effect on the tribunal's composition, powers/procedures, remedies
 - provision of government information?
 - Public interest/benefit, social or welfare considerations: effect on the community
 - government's mandate
 - whether it is newsworthy and its effect on electoral/ community support - will it affect votes?
- In terms of tribunal design and process, the more significant the decision is, the greater the need for:
 - tribunal independence and objectivity
 - economical tribunal composition and processes
 - efficient management
 - an opportunity to put the government's case to the tribunal, whether in the form of a written submission or presentation at a hearing
 - representation on the tribunal itself
 - policy and rule making
 - accountability

Evaluation of tribunals

Secondly, having identified the relevant data and designed appropriate classifications required for the database, this information could

also be used for designing a method for evaluating a variety of existing tribunals. For example, it may be possible to identify a set of "standards and indicators" for this purpose. This emerged from a realisation that the constraint of designing a methodology that could be undertaken by a research assistant, also suggested the possibility of developing a set of clear observation statements or indicators.¹²

To develop standards and indicators of general application will be difficult and time-consuming. Nevertheless, a preliminary attempt to draft a set of standards and indicators of accessibility, which follows, suggests that this is feasible.

We have not yet tried to assign values to these standards and indicators. Once developed, the application of these standards and indicators to particular tribunals should be relatively straightforward.

Principle: ACCESSIBILITY

To ensure that the tribunal is accessible to all those who are entitled (who have standing) to bring a matter to the tribunal for determination (whether this involves a primary decision or the review of a primary decision).

**Standard 1:
Physical access**

Indicators

(a) Access for making an application

- can this be made orally (eg by phone) or must it be made in writing?

- is the tribunal registry accessible for lodging an application either personally or by phone (008 toll free number?) or by post?

(b) Access to premises and hearing

- are the tribunal premises and hearing venues easily accessible by public transport?
- does the tribunal pay the travel and accommodation costs of attending a hearing?
- does the tribunal take account of any travel limitations of the applicant?
- does the tribunal hold out of office hearings (eg country locations) to suit applicants?

(c) Scheduled hearing times

- does the tribunal schedule times to suit applicants?
- are out of business hours hearings scheduled?

(d) Access to tribunal premises, hearing rooms etc

- is provision made for those with disabilities?
- are the premises, hearing rooms etc court-like or more informal in appearance?

**Standard 2:
Financial access**

Indicators

(a) Financial cost to the applicant

- is there an application/filing fee?
- is legal aid available?

- can the applicant be ordered to pay the costs of the other party?

**Standard 3:
Intellectual access**

Indicators

(a) Understanding of the tribunal's jurisdiction, powers, procedures etc:

- would any person be able to understand these?
- for this purpose, does the tribunal provide written information or oral advice? Are tribunal members or staff available to give advice?
- if oral advice is given, is this given before, at or during the hearing?
- is written information or advice available from other agencies?

(b) Publicity/education

- does the tribunal seek to publicise itself? If so, what form does the publicity take?
- does the tribunal engage in education programs? If so, what form do these take?

(c) Representation

- can an applicant be represented before the tribunal? Legal representation? Other form of representation? By whom?
- Does the tribunal assist unrepresented applicants during the course of the hearing?

**Standard 4:
Language/ communications**

Indicators

(a) Interpreters

- available in a range of languages?
- available at the applicant's request?
- arranged at the tribunal's cost?
- arranged by the tribunal?
- arranged taking into account different cultural perceptions?

(b) Facilities available for the hearing impaired

- what facilities are available?

Conclusion

The project having been completed, where next? As suggested above, the Centre for Court Policy and Administration proposes to use the methodology developed to establish a tribunals database. In view of other work being undertaken at the ARC and at the Law Faculty of the Australian National University, initially the Centre proposes a database for New South Wales tribunals. This would entail, as a first step, a search to prepare a list of all existing NSW tribunals. There is no such list currently. The second step would involve using the methodology developed to establish the database. Ultimately, the Centre would like to see the database extend to include all state and Commonwealth tribunals. But as with many projects, we are dependent on appropriate funding being available.

Endnotes

- 1 The Victorian Supreme Court drew attention to this in their annual report dated 1 December 1989. See "Victorian Supreme Court's concern over development of specialist tribunals" (1990) 64 ALJ 305.
- 2 For example: Queensland. Electoral and Administrative Review Commission, *Report on Appeals from Administrative Decisions*, Brisbane: The Commission, 1993; Rick Snell, "Hunting for the Etceteras: Tribunals and Statutory Bodies in Tasmania" forthcoming in the *Australian Journal of Public Administration*; Mark Aronson, "An Administrative Appeals Tribunal for New South Wales: Expansive Legalism, or Overdue Reform?" (1993) 52 *Australian Journal of Public Administration* 208 at 211ff.
- 3 *Administrative Appeals Tribunal Act 1975* (Cth), s51.
- 4 *Better Decisions: Review of Commonwealth Merits Review Tribunals*. See also the Administrative Review Council Discussion Paper, *Review of Commonwealth Merits Review Tribunals* (Canberra: AGPS, 1994). The merits review tribunals in which the ARC is primarily interested are the Administrative Appeals Tribunal, the Immigration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal, the Student Assistance Review Tribunal and the Veterans' Review Board.
- 5 By contrast, in Britain, the Council on Tribunals is responsible for keeping under review the constitution and working of most tribunals in England and Wales, and Scotland (the latter being the responsibility of the Council's Scottish Committee). The Council also advises on proposals for the establishment of new tribunals, although this function is not recognised in its governing Act. The Council was established by the *Tribunals and Inquiries Act 1958* but now operates under the *Tribunals and Inquiries Act 1971*, as read with the *Transfer of Functions (Secretary of State and Lord Advocate) Order 1972*. On statutory recognition of the Council's advisory function, see its *Annual Report for 1990-1991* (London: HMSO, 1991) at para 3.51.
- 6 Eg meetings between tribunals with responsibility for reviewing decisions on mental health.
- 7 Discussed eg by Lindsay Curtis, "Agenda for Reform: Lessons from the States and Territories", and Rosemary Balmford, "The Life of the Administrative Appeals Tribunal - Logic or Experience?" in Robin Creyke (ed), *Administrative Tribunals: Taking Stock* (Canberra: Centre for International and Public Law, 1992), at pp 32 & 50 respectively.
- 8 Lawrence Maher, "The Australian Experiment in Merits Review Tribunals" in Oliver Mendelsohn & Lawrence Maher (eds), *Courts, Tribunals and New Approaches to Justice* (Rundona, Victoria: La Trobe University Press, 1994), p 73 at p 74; Martin Partington, "Rethinking the Structure of Administrative Justice in Britain: A Proposed Agenda" in Mendelsohn & Maher op cit 107, at 120.
- 9 Lindsay Curtis, "Agenda for Reform: Lessons from the States and Territories" in Robin Creyke (ed), *Administrative Tribunals: Taking Stock*, op cit, p 32 at p 34.
- 10 Lawrence Maher, "The Australian Experiment in Merits Review Tribunals" in Mendelsohn & Maher op cit 73 at 75.
- 11 *Brandy v Human Rights and Equal Opportunity Commission*, Full Bench of the High Court, judgment of 23 February 1995.
- 12 J Goldring, R Handley, R Mohr & I Thynne, "Evaluating Administrative Tribunals" in S Argument (ed), *Administrative Law & Public Administration - happily married or living apart under the same roof?* (Canberra: Australian Institute of Administrative Law, 1994), p 160.

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