NORTHERN TERRITORY OF AUSTRALIA

Report on Appeals from Administrative Decisions

Northern Territory Law Reform Committee

Report No. 14

June, 1991

Northern Territory Law Reform Committee

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TELEPHONE

Hon. Daryl Manzie, M.L.A.
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My dear Attorney,

I have pleasure in presenting the Report on Appeals from Administrative Decisions which was adopted by the Committee on 28 June.

The Committee proposes a system of administrative review based on the models already operating in Victoria, the A.C.T. and the Commonwealth.

The first element of the proposed reforms is a requirement for a person who makes a decision of an adminstrative character pursuant to the statutory power to give reasons for that decision, if required. The provision of reasons is often a sufficient answer to a person's concerns about a decision.

We consider the right to reasons for a decision should be independent of the right of review, though both rights should be subject to a number of exclusions.

The second element is the creation of a general appeals tribunal which will have power to review those decisions, unless the power of review is excluded, or is conferred on a more appropriate body.

The final element of the proposed reforms is the establishment of an Administrative Review Committee to examine the process of administrative review on a continuing basis and advise the Government accordingly.

The Committee is aware of a present review of the Commonwealth Administrative Appeals Tribunal, and it may be that its recommendations should be considered in light of the matters arising out of that review.

M.F. HORTON
ACTING CHAIRMAN

3 July 1991

WIPR254

The Northern Territory Law Reform Committee is:-

Chairman: Justice Brian Martin
Justice Sir William Kearney
(until 28th September 1990)

Members of the Committee as at the date of this report:-

Jim Dorling
Harry Giese*
Max Horton*
Judith Kelly
Peter McNab*
Ian Maughan*
Margaret Orwin*
Sally Thomas*

Members co-opted for this reference:-

Bob Eadie (Ombudsman)
David Hawkes (Public Service Commissioner)

Sub-Committee for this reference:

Harry Giese (Chairman)
Bob Eadie
David Hawkes
Judith Kelly
Peter McNab
Ian Maughan

Executive Officer:-

Stephen Herne
Linda Weatherhead (Acting 1 March - 16 November 1990)

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* Members present when the Report was adopted.

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1. INTRODUCTION

The increasing complexity of society has resulted in increasing regulation. The State impinges on just about everything we do and the rights of individuals depend increasingly on decisions made by delegated officers within public Departments. A democracy requires accountability. The decisions made must be reasoned and open to challenge.

Other jurisdictions within Australia have addressed review of administrative decisions as part of a system of administrative review which includes Freedom of Information legislation, improved models of Judicial Review and the setting up of specific tribunals for review on the merits of administrative decisions.

Access to review of administrative decisions has benefits for the decision-maker and those affected by the decision equally. The decision-maker will have the guidance provided by the review process and the precedents established which will improve the quality of decision making. The person affected will have access to written reasons for the decision and the opportunity to review it, increasing confidence in and accountability of, the decision making process.

As a matter of principle there should always be a right of appeal from an administrative decision. At present, leaving aside the role of the Ombudsman, there are two principal methods by which the decision may be reviewed. The first is where a right of appeal is granted by statute and the second where the matter is taken to the Supreme Court by way of judicial review. These methods are seldom utilised because they are costly, time consuming and somewhat lacking in accessibility. In some cases there is no right of appeal against an administrative decision.

The Attorney-General has asked the Committee to examine and report to him on whether the present system for dealing with appeals from administrative decisions needs reform: Appendix "A1" sets out the full terms of the reference, as well as the manner in which the Committee has conducted the reference.

The Committee, in making its proposals for a new system of administrative review has worked from the assumptions that this system should be relatively:

- Accessible
- Informal
- Independent
- Quick
- Inexpensive

Other jurisdictions have set the pace in establishing processes for administrative review which review a decision on its merits. The Committee agrees that review on the merits is desirable and concurs with the comments of the Kerr Committee:-

> "The basic fault of the entire structure (of an appeal system) is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained on the merits - and this is usually what the aggrieved citizen is seeking". (Commonwealth Administrative Review Committee Report, Parliamentary Paper No. 144 of 1971, p. 58)

The use of a right of review on the merits would change the emphasis of the present appeal system. The emphasis would shift from asking - "is this decision wrong in law?" or "was it unreasonable for the decision-maker, on the material before him or her, to have arrived at this decision?" to asking - "is this the correct or preferable decision to make on the material before the Tribunal?"

The Committee has addressed the issue of providing a right to obtain reasons for an administrative decision as an essential first step to the right of appeal against the decision. However, the Committee considers that the right to reasons is so fundamental to both public accountability and proper decision making practices that it may be appropriate to entrench this right independently of any system of administrative review.

2. BACKGROUND

(a) What is an administrative decision?

For the purpose of the Committee's enquiry, an administrative decision is a decision made under a statutory power, such as a decision by the Registrar of Motor Vehicles to cancel a driving instructor's licence.

Administrative decisions are made by persons and bodies such as ministers, tribunals, and public servants. Decisions cover many matters including town planning approvals, licensing of occupations, employment, discipline and the grant of permits.

(b) Classifying administrative decisions

Part of the problem with present rights of appeal is that there is no consistency in approach. There is sometimes, but not always an appeal. It may be to an individual, a Board, a Tribunal or a Court and it may be a full appeal or restricted to particular areas.

The classification of administrative decisions is often determinative of the nature of appeal. For example decisions related to industrial relations matters usually go to a non-judicial body comprising employer and employee representatives. Professional licensing usually is under the control of the particular profession involved subject to Government approval of professional standards. Activity licensing (e.g. licence to drive a taxi) is often reviewed in the Local Court.

(c) How can you challenge an administrative decision?

An administrative decision may be challenged to two ways:

- Appeal
- Judicial review

Appeal

The right to appeal against a decision is a right conferred by statute. Unless an Act provides for such an appeal, there can be no appeal. Accordingly, all aspects of a right of appeal must be set out in the Act or in regulations made under it. These include the scope of the decision that may be appealed against, time limits within which to appeal, and the powers of of the appellate body. This type of review is a review on the merits.

Judicial Review

Judicial Review is the procedure by which a person who is dissatisfied with an administrative decision asks the Supreme Court to rule that the decision-maker has made a legal error concerning the jurisdiction or procedure that has been used to make a decision. The Court does not have a right to substitute its view on the merits of the decision.

The function of judicial review is to determine the legality of administrative decisions.

Judicial review is a right that only exists at common law in the Territory, that is, it is independent of statute. The law and procedure concerning judicial review is not being considered by the Committee.

(d) What is the Role of the Ombudsman?

The Ombudsman may investigate any "administrative action" taken in any Department or authority but may not investigate any action which may be challenged by statutory appeal or judicial review unless in the Ombudsman's opinion it is "unreasonable" to resort to the formal remedy or "the matter merits investigation to avoid injustice": Ombudsman (Northern Territory) Act s.14(1)(a), (6) and (7).

On completion of an investigation, the Ombudsman reports to the principal officer of the Department and the Minister and may recommend various courses of action. For example, the report may record that the administrative decision "was wrong" and that the Department should "rectify" the decision (s. 26); it may further request that notification be given within a specified time of any action taken to give effect to recommendations made. Where the Ombudsman is not satisfied with the steps taken, a report on the position may be furnished to the Minister; who "shall" table the report within 3 sitting days.

There is no right of appeal against a refusal by the Ombudsman to investigate a complaint though the grounds on which investigation may be refused are specified (s.18).

3. OVERVIEW

Administrative decisions, often made by Ministers, statutory authorities or public servants, are difficult to challenge.

When a decision has been made affecting the interests of an individual or group, those affected:-

(i) should receive notice of the decision and reasons for it; and

(ii) should have effective means of challenging it if they think it is unfair or unreasonable.

It is with these objects in mind that the Committee has made recommendations for the reform of "Appeals from Administrative Decisions".

Providing information about the decision and the means to challenge it ensures greater compliance and acceptance of the decision and improvements in the quality of decision making.

A key element of the proposed reforms is the requirement of a decision-maker to give reasons for a decision, whether or not the person affected wishes to apply to have the decision reviewed. The provision of reasons is often a sufficient answer to a person's concerns about a decision.

If the reasons do not provide an adequate answer to those concerns a person affected by the decision may apply to an appropriate tribunal for review of that decision. Central to the recommendations of the Committee is the establishment of a "General Appeals Tribunal" to review most administrative decisions. There is an opportunity for limited further appeal to the Supreme Court from the decision of the Tribunal.

The advantages of such a tribunal are:

(a) most administrative appeals, subject to a few exceptions, would go to the one body, overcoming the confusion as to whether there is an appeal and if so, where does it go to;

(b) it would be more independent and appropriate than some presently constituted administrative appeal bodies;

(c) it would be accessible; applying would be easy, the procedures would be well publicised, and use of the Tribunal would not be expensive;

(d) it would be informal; the atmosphere would be very different from that of a court;

(e) it would be quick and efficient; the Tribunal would ensure that unnecessary delays do not occur and that information gathering would take place in ways that would limit the time necessary for hearings and personal attendance; and

(f) it would review decisions on the merits of that decision and would not be restricted to a review of questions of law.

The Tribunal would have the expertise to deal with the many areas that involve administrative decisions because it would draw its members from a pool which would include 'specialists' in various fields, where appropriate.

To oversee the operation of this new system an Administrative Review Committee will be set up. This committee will have a role in guiding the decision-making process, ensuring that the procedures of the tribunal achieve its aims of accessibility, and publicising the role of the Tribunal and information on how to apply to the Tribunal.

A list of the recommendations made in this Report is contained at Appendix "C".

4. A GENERAL APPEALS TRIBUNAL

(a) The use of courts

(Recommendation 1)

The use of courts is inappropriate in the review of administrative decisions on the merits because of formality, costs and delays associated with their procedure.

The formality and costs of court proceedings are closely related. The formality derives from the evidence-gathering process; the costs derive from the fact that, as the procedures are so far removed from the experience of an individual, it is necessary for a citizen to engage an expert (a lawyer) to conduct the case on his or her behalf. The costs of so doing can be prohibitive.

(b) Use of Ministers

(Recommendation 2)

The use of Ministers to review decisions of their own Department should be avoided.

In 1932 a Committee on Ministers Powers (Donoughmore Committee) put forward two major arguments in favour of transferring appellate jurisdiction from Ministers to a tribunal. The first was "that it was inappropriate for a quasi-judicial function to be performed by a Minister who as a politician may either be influenced or appear to be influenced by political considerations" and the second that it was wrong that an appeal made from the decision of a person appointed by the Minister or subject to his or her direction should finally be determined by the Minister.

The appellate authority should both be independent and be seen to be independent.

(c) Use of tribunals

(Recommendation 3)

A separate tribunal, a general appeals tribunal, should be established to specialise in appeals from administrative decisions.

The use of tribunals as a means of reviewing government decisions has the advantage of accessibility and independence. In most cases what people are seeking in administrative review is a review on the merits. A tribunal, vested with statutory jurisdiction, can provide such a review.

A general appeals tribunal is less formal and more flexible than a court.

A general appeals tribunal will consolidate and rationalise existing appeal structures and create a coherent system whereby those appeals are determined according to a consistent pattern of procedures by a body independent of government.

5. ORGANISATION OF TRIBUNAL

(a) Composition

(Recommendation 4)

The General Appeals Tribunal should consist of:

(i) A Chairperson who is the Chief Magistrate or another Magistrate nominated by the Chief Magistrate;

(ii) Judicial members being other Magistrates;

(iii) Members being those persons appointed by the Attorney-General; and

(iv) A Registrar appointed specifically to manage the Tribunal, to perform ancillary duties and to exercise the jurisdiction of the Tribunal where specified.

The Committee noted that the Commonwealth and Victorian AAT's are both chaired by a judicial officer at least equal to an intermediate court judge. The Committee considers such a person is necessary to assess the likely issues and the appropriate composition of the General Appeals Tribunal for a particular appeal.

The Committee concluded it was appropriate to appoint Magistrates to this position for five reasons:-

(i) A judicial officer was considered to possess the necessary legal and administrative skills.

(ii) Of the 47 existing rights of appeal it was proposed to assign to the General Appeals Tribunal, 27 were already assigned to the Local Court or a body constituted by a Magistrate.

(iii) Based on existing statistical information, the volume of appeals does not appear sufficient to cause disruption to the workload of Magistrates.

(iv) The judges of the Supreme Court were generally committed to hearings of higher priority and longer duration and were unlikely to be readily available.

(v) The recommendation is consistent with the cost consideration of the Terms of Reference.

The Attorney-General should appoint the panel of members from which the Chairperson should constitute the Tribunal in each case. The Act would not require any particular process to be observed in the nomination of members.

The legislation should provide for a term of office sufficient to allow non-judicial members time to develop experience and provide continuity; for the disclosure of interests of such members, and for the removal from office of such members.

(b) Constitution

(Recommendation 5)

The General Appeals Tribunal should be constituted only in the following manner:

(i) Judicial member plus 2 members;

(ii) Judicial member sitting alone; or

(iii) In conference only, a Judicial member, the Registrar or a single member sitting alone.

The Committee noted that both the Commonwealth and Victorian AAT could be constituted by a member sitting alone.

It would be for the Chairperson to determine the appropriate composition in each case. The Committee considered the establishment of divisions not justified by the likely volume of appeals, particularly having regard to the fact that the process required to create and maintain divisions would inevitably introduce time-consuming complications.

6. JURISDICTION

(a) What is a decision?

(Recommendation 6)

A decision reviewable by the Tribunal should include a decision of an administrative character which:-

(i) alters rights or imposes liabilities;

(ii) has a real practical effect although not altering rights or imposing liabilities;

(iii) is a failure or refusal, for whatever reason, to take a decision or perform an act.

. The above formulation is based in part on the judgment of Lockhart J in Director-General of Social Services v. Hales (1983) 5 ALN No 116.

. "Decision" as defined in the Commonwealth AAT Act includes a reference to:-

(i) making, suspending, revoking or refusing to make an order or determination;

(ii) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(iii) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(iv) imposing a condition or restriction;

(v) making a declaration, demand or requirement;

(vi) retaining, or refusing to deliver up, an article; or

(vii) doing or refusing to do any other act or thing.

. The definition should make it clear that decisions which could be classed as:-

. judicial (eg a decision by the Supreme Court)

. legislative (eg a decision to make regulations)

would not be subject to review. Consideration might also be given to confining decision to those made by a class of public official.

It is desirable that any definition adopted should not be restrictive. The Tribunal should not be bogged down in jurisdictional questions but should make every effort to exercise jurisdiction where it appears there is a meaningful dispute to be settled.

The Committee initially saw merit in adopting a procedure on the lines of section 10 of the Ombudsman Act 1976 (Cth) which enables the Commonwealth Ombudsman to issue a "certificate of unreasonable delay". The effect of such a certificate is that a decision is deemed to have been taken not to do the act or thing in question. However, in the opinion of the Northern Territory Ombudsman (who also acts as agent in the Territory for the Commonwealth Ombudsman) such a procedure appears unnecessary in the Territory context since, in exercise of his general powers under the Ombudsman (Northern Territory) Act he is invariably able, without cost to the applicant, to persuade a Government agency to take the decision or other action in question (albeit not necessarily a decision or action favourable to the applicant), or at the very least to formally refuse to take it.

The Ombudsman has also pointed out that neither he nor his staff are aware of any case ever having arisen in the Territory in relation to a Commonwealth Government agency in which the section 10 certification procedure has been used.

Having regard to the Ombudsman's view, and to the desired objective of devising a system which will operate informally and inexpensively, the Committee has decided not to recommend the adoption of a certification procedure such as that presently existing in the Commonwealth sphere.

(b) Decisions to be reviewed by the General Appeals Tribunal

(Recommendation 7)

All decisions under an enactment should be reviewable by the General Appeals Tribunal subject to certain specified exemptions.

In the Territory there are presently 5 different types of appellate bodies. At the date of this paper there are 117 statutory rights of appeal against administrative decisions. Of these:-

- 24 appeals go to the Supreme Court;
- 31 appeals go to the Local Court;

- 35 appeals go to 32 different specialist tribunals;
- 9 appeals go to 9 different individuals;
- 16 appeals go to 9 different ministers.

The growth of specialist tribunals is an indication of an attempt to provide the most appropriate appellate structure. The Committee has not approached the problem of reform of the administrative appeals system by starting from the position that there are "too many" tribunals. It has, however, considered consistency of appeal mechanism a priority. In most cases the appropriate structure for appeal will be the General Appeals Tribunal given that the Tribunal may be constituted to draw on specialist expertise.

Options for Reform

The question of which administrative decisions are to be subject to review is essential to any reform to any reform of the administrative appeal system. There appear to be two primary policy options for reform:

A: opt out

B: opt in.

The first option starts from the position that every administrative decision should be reviewable unless it is specifically exempted. The second option requires that the only administrative decisions that will be reviewed are those that are specifically identified.

Whichever policy option is adopted, a decision to include or exclude a particular administrative decision should be made on a consistent policy basis. The matter should not be determined on an ad-hoc basis, or as a result of individual departmental decision making in accordance with unspecified criteria.

A: Opt Out

The Committee has recommended that every administrative decision made under an enactment be reviewable by the Tribunal except the following:-

- those where an existing right of appeal lies to another more appropriate body (see Recommendation 8),

- those exempted for reasons of policy.

For reasons of policy, we believe the following decisions should be excluded:-

(a) decisions by the Administrator

(b) decisions by Cabinet or a Minister to enter into an agreement with the Commonwealth or a State or Territory

(c) decisions of the Parliament or of a Committee of Parliament, or decisions pursuant to standing orders of the Parliament

(d) recommendations of the Electoral Distribution Committee under the Electoral Act

(e) decisions relating to the administration of criminal justice

(f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to or may result in, the bringing of such proceedings

(g) decisions in connection with the enforcement of judgments or orders for the recovery of moneys

(h) decisions in connection with the prevention or settlement of industrial disputes, or otherwise relating to industrial matters

(i) decisions in connection with personnel management (including recruitment, appointment or engagement, promotion and organisation discipline and dismissal) with respect to the Public Service, the Police Force or Teaching Service or any office created by statute

(j) decisions by the Treasurer or Auditor-General under the Financial Administration and Audit Act

Policy Basis for Exclusions

Exclusions (a), (b) and (c) relate to fundamental decisions of executive and legislative policy. It would not be appropriate to provide a right of appeal against these decisions, given the availability of judicial review to ensure the legality of the decision - making process.

Exclusion (d) relates to a decision by an independent Committee whose function it is to recommend electoral boundaries to the Legislative Assembly. The Committee considers the availability of judicial review sufficient to ensure the legality of the decision - making process.

Exclusions (e),(f) and (g) relate to decisions involving the freedom of government to commence civil or criminal proceedings. Suitable procedents exempting such decisions can be found in the ADJR Act, schedule 2, items (e), (f) and (m).

Exclusions (h) and (i) relate to the management and dispute resolution procedures of the public sector. The policy basis for exclusion is contained in the commentary relating to Recommendation 8.

Exclusion (j) relates to decisions about the financial management of the public sector. To the extent that such decisions involve solely matters of government policy (such as a decision on the amount of an appropriation) the Committee considers it inappropriate to provide a right of appeal, given the availability of judicial review. To the extent that such decisions involve day to day financial decisions, the committee considers the existing "checks and balances" structure of

- the Auditor - General,
- the Public Accounts Committee of the Assembly,
- the Ombudsman, and
- judicial review

to be a more appropriate method of ensuring proper decision - making, than that provided by a right of appeal

B: Opt In

The Committee has recommended against this option. However, if it were to be adopted, a suitable precedent could be found in the Administrative Appeals Tribunal Act 1975 (Cwth) s.25.

(c) Decisions excluded from review by the General Appeals Tribunal

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(Recommendation 8)

Those decisions that should be excluded from review by the General Appeals Tribunal should be excluded because of their nature and special requirements on appeal. Most would fall within the general categories of industrial relations and professional matters.

Exclusions from the jurisdiction of the Tribunal should be made only where there is a special case for the exclusion.

Decisions in industrial relations matters could be excluded. These decisions often go to a body consisting of persons nominated by the employee and the employer.

Specialisation in this area is desirable because of the sensitivity of issues and a discrete body of law that supports these decisions.

Decisions related to professional licensing matters could also be excluded. These decisions most usually go to a body containing members drawn from that occupation. The involvement of occupational members is desirable e.g. in determining appropriate qualifications.

It is important that all statutory decisions in these general areas are considered to determine whether an exclusion is appropriate.

(d) Scope of Review

(Recommendation 9)

The General Appeals Tribunal should have power to review de novo (i.e. afresh) the whole decision and should not be confined to matters raised before the original decision maker.

The statutory provisions as to the scope of the appeal provided for, vary widely. The appeal may be limited to the evidence and arguments put before the decision maker or the appellate body may rehear the matter, i.e. it is not confined to the evidence and arguments before the decision maker. For example, an appeal to the Local Court against a refusal to grant a land agent's licence can only be made on specific grounds; an appeal against a refusal to grant a radiographer's license can be made on any grounds.

The widest possible power of review should be given to ensure that all issues raised before a General Appeals Tribunal can be dealt with. Any limit on the power of the review may also be a limit on the ability to do justice in the particular case.

(e) Government Policy

(Recommendation 10)

No special provisions should be made in respect of the way that the General Appeals Tribunal reviews decisions involving Government policy.

There is a concern that an AAT would have to interfere with the policy of the elected Government when deciding administrative questions.

Victoria has dealt with the policy question by, in effect, providing that if the policy is published in the Government Gazette it is binding on the AAT.

The Committee considers the Victorian approach a reasonable response to the problem, but considers the better approach involves two more basic propositions. Firstly, the decision to create a right of appeal against an administrative decision in itself involves a decision to subject the application of Government policy to review. Secondly, existing methods of review involve consideration of the application of Government policy.

The Committee considers that the common law approach as applied to the operation of the Commonwealth AAT Act, is appropriate. This approach is reflected in the judgment of Bowen CJ and Deane J in Drake v. Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60 reviewing a decision under the Commonwealth AAT Act as follows:-

"If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the Tribunal to take into account in reviewing the decision. On the other hand, the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be."

This approach was taken further by Brennan J, presiding over the AAT in Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 who stated that the Tribunal ought to apply Ministerial policy unless there are cogent reasons to the contrary. It would, however, be a cogent reason if the policy would work an injustice in a particular case.

7. APPLICANTS FOR REVIEW

(a) Who may apply?

(Recommendation 11)

Any person, group or organisation whose interests are affected by a decision should be able to apply for the decision to be reviewed by the General Appeals Tribunal.

Parties need not have a direct personal stake in proceedings.

The right to apply should extend to 'third parties' where they have an interest, or where there is a matter of public interest involved. These third parties may be individuals or groups.

A similar provision to that contained in the Commonwealth AAT Act (s.27) in relation to persons who may apply should be adopted. Standing under that Act is attributed to a person or persons whose interests are affected, including an organisation or association of persons where the decision relates to a matter included in the objects or purposes of the organisation or association.

(b) Decision makers

(Recommendation 12)

A decision-maker should be able to apply for an advisory opinion from the Tribunal where provision is made for this under an enactment.

Where decisions are complex, affect large numbers of people, raise a novel problem or require application of legal principles the decision maker should be encouraged to apply to the Tribunal for guidance.

An advisory opinion should not bind the decision-maker.

(c) Joinder of parties

(Recommendation 13)

Joinder of parties should be consistent with the criteria for those who can apply i.e. any person, group or organisation whose interests are affected may be joined in proceedings.

Any person, group or organisation whose interests are affected by a decision may apply to be joined in proceedings. Re-litigation of the same issues is to be discouraged.

(d) Representative actions

(Recommendation 14)

A group of persons or an organisation should be able to act by a representative where similar issues and similar relief would arise if individual actions were taken.

Representative proceedings ensure a single decision on issues in which all members of a group have the same interest without the necessity to litigate each member's case individually.

(e) Right of the Attorney-General to intervene

(Recommendation 15)

The Attorney-General should have a right to intervene in proceedings.

In matters of law the Attorney-General could assist the Tribunal by fully arguing points for the benefit of the Tribunal. In matters of government policy the Attorney-General could argue the content and appropriateness of government policy in its application to a particular case. The Attorney-General should bear the costs of intervention.

8. REASONS FOR DECISIONS

(a) Entitlement to reasons

(Recommendation 16)

There should be an entitlement to reasons for an administrative decision. ... That right should be independent of the right to apply for review, however it should be subject to the same exclusions as the right of review.

Reasons for a decision should be given on request where no application for review has been made to the Tribunal, and automatically on the making of an application to the Tribunal.

A request should be made within 28 days of the decision, or such longer period as the Tribunal allows.

Those persons whose interests are affected by a decision should have standing to obtain reasons for that decision, subject to the exclusions provided to the entitlement above.

There is no general common law duty to give reasons for an administrative decision (Public Service Board of New South Wales v. Osmond (1986) 159 CLR 656).

A statutory requirement to give reasons has the following advantages:-

(i) Public scrutiny encourages rational decision making consistent with existing law and policy;

(ii) It instils public confidence in the decision making process and supports the principle of accountability of those vested with the power to make decisions;

(iii) It enables the applicant to realistically assess whether a decision should be challenged, whether by judicial review or administrative review and may be an effective prerequisite to their use;

(iv) Grounds of challenge can be defined and particularised prior to review saving time and money before the reviewing body;

(v) It allows proper supervision of the decision making process, assists in the maintenance of consistency, and draws attention to wrongful application of policy.

In formulating the entitlement to reasons for an administrative decision, there appear to be two primary policy options: to link the entitlement to the right to apply for review, or to make it independent.

It would be consistent to apply the same list of exclusions to the requirement to give reasons as well as to the right of review.

A decision not to apply the list of exclusions from the right of review to the entitlement to reasons may achieve little practical effect except to add unnecessarily to administrators' burdens. It should be borne in mind that the Ombudsman already has power to look into complaints about failure to give reasons for decisions, and to make recommendations accordingly. (Ombudsman (Northern Territory) Act, section 26(1)(9e) and (2)(e)).

An administrative decision adversely affecting a person may be either subject to an appeal/application to the Tribunal and, if not, may be amenable to judicial review. If the entitlement to reasons for decisions were to be limited to those matters for which the Tribunal has jurisdiction, it would preclude a person adversely affected by a decision from receiving reasons for the decision and may prejudice his or her ability to obtain relief by way of judicial review.

We have recommended that the entitlement to reasons should be independent of the right of review that we have proposed in Recommendation 7 although subject to the same exclusions. However, if option B to Recommendation 7 were to be adopted, and the right of review confined to specific decisions, then it would be still appropriate to consider whether this second right should be more extensive bearing in mind the derivation of the list (i.e., in the main, Schedule 2 to the Commonwealth ADJR Act, which lists the specific exclusions from the requirement under that Act to furnish reasons for decisions).

Confining duty to the exercise of specific statutory powers to make decisions

An alternative approach is to impose a duty to give reasons for specific decisions or a specific class of decisions. This approach has been adopted in New South Wales: see the Health Legislation (Reasons for Decisions) Amendment Act 1987.

On this approach, there would be a duty to give reasons for an administrative decision only if the particular Act expressly provided such a duty. However, the Committee does not favour this approach.

(b) Form and adequacy of reasons

(Recommendation 17)

Reasons for decisions should be in writing and should be proper and adequate and deal with the substantive issues raised.

In particular, the reasons should set out the findings and refer to the evidence or other material on which those findings were based. Relevant documentary material should be provided with the reasons.

Where reasons are inadequate the applicant should be able to make further application to the Tribunal for an order that the decision-maker provides for further and better particulars of the reasons for the making of the decision.

The provision of reasons should be expected to meet a standard sufficient to answer the questions "Why was that decision made?" and "What factors were taken in to account?"

(c) Time limits

(Recommendation 18)

Reasons for decisions should be given within 28 days of request. In special circumstances an extension or abridgement of this time may be ordered.

Time limits ensure that all the material on which the decision is based is still available and enables the challenge of a decision to proceed without delay.

Any limitation period on the lodging of an action should not commence until the reasons are provided where a request for reasons has been made.

(d) Exemptions

(Recommendation 19)

Exemptions from the requirement to give reasons should only be available on the following grounds:-

(i) Where the decision could be the basis for a claim in a judicial proceeding that the information should not be disclosed; and

(ii) For security, defence and international relations reasons and for documents of Cabinet, Executive Council and committees of Cabinet, on certification and specification of grounds of exemption by the Attorney-General.

Recommendation 19 is based on the Commonwealth AAT Act (s.28). It would be appropriate to bear in mind the provisions of s.42C of the Evidence Act (N.T.) and s.22 of the Ombudsman Act (N.T.) in applying this exemption.

Application is to be made to the Tribunal for exemptions. Only in the case of (ii) would these exemptions be granted automatically on production of certification.

(e) Effect of failure to give reasons

(Recommendation 20)

Where there is a failure to give reasons on request or where the reasons are inadequate the requesting party may apply to the Tribunal for an ex-parte order that reasons be given within a specified time.

A party who fails to comply with an order to give reasons within a specified time would be in contempt of the Tribunal and may be punished accordingly.

The requirement to give reasons must be capable of being enforced.

The Ombudsman under the Ombudsman Act (NT) can investigate failure to give reasons by a Department or agency and make a report to the responsible Minister to the effect that reasons should be given. If the matter is not satisfactorily resolved the Minister is required to table the report in the Legislative Assembly.

When decision-makers have been late with a statement of reasons it has usually been because, in a bulk jurisdiction, they have been over-worked and under-resourced. What is normally done in the Commonwealth AAT is to set down such matters for a directions hearing and to cajole rather than coerce. Penalties of one kind and another are, perhaps best left out of a system of administrative law, where an atmosphere of cooperation is preferable. Accordingly, it is envisaged that the contempt power would only be used in the most exceptional circumstances.

9. INITIATION OF REVIEW

(a) Notice of decision

(Recommendation 21)

Notice of the decision and the right to review should be given by the decision-maker.

The first step to a review of a decision is receipt of the decision itself.

Adequate notice must be given of the decision.

- Where a decision directly affects a person's rights personal notice of that decision should be given.
- Where the exercise of the power of general effect is involved public notice should be required.

(b) Information about the Tribunal

(Recommendation 22)

Information about the Tribunal , its jurisdiction and procedures should be readily available.

The Administrative Review Committee should have responsibility for the education and publicity functions relating to the Tribunal.

The right to review by the Tribunal should be set out in the relevant statute under which the decision is made as well as in a specific General Appeals Tribunal statute.

Officers of community agencies and government departments should be provided with information and training on the processes of the Tribunal so that they too can provide assistance.

(c) Form of the application

(Recommendation 23)

The application should generally be by way of standard form which should be made available widely. However, other methods of application, including oral application, should be accepted.

A standard form requesting basic information only, e.g. name and address of the applicant, who the decision maker was and why the decision should be reviewed, should be the usual form of application.

The form should alert the applicant to his or her entitlement to reasons and the procedures providing for request and supply.

The form should be printed in all common community languages and assistance in filling it out should be provided by the staff of the Tribunal and through information brochures and a telephone information service if resources permit.

The form should be available through community agencies, government departments, local councils and post offices as well as from the Tribunal itself.

Use of the form should not be a strict procedural requirement. Written applications and applications by phone should all be accepted and confirmed by the Tribunal. Only in exceptional circumstances would an oral application not be accepted.

(d) Fees

(Recommendation 24)

A fee which constitutes a modest contribution towards administrative costs should be payable on lodging of the appeal.

The imposition of a fee is intended to discourage applications which are frivolous or vexatious.

The Registrar of the Tribunal should have power to waive fees in cases of hardship.

The fee should be set by the Tribunal.

(e) Time limits and delays

(Recommendation 25)

Time limits should apply to the lodging of an application, the filing of material relevant to the application, any response by the respondent and the setting down of the preliminary conference. An application to the Tribunal for review of an administrative decision is to be made within 28 days of the date of:-

(i) the applicant receiving notice of the decision; or
(ii) where a request has been made for a statment of the reasons for decision, the applicant receiving such a statement.

A discretion should be given to the Tribunal to accept applications outside this period.

Included in the aims of a General Appeals Tribunal are the expeditious and efficient disposal of administrative appeals.

Delays may impact on the functioning of the Tribunal and the processing of complaints within the system. Delays may:-

(i) discourage the potential applicant from applying;

(ii) affect the flow of information;

(iii) inflict serious hardship on those the decisions affect; and

(iv) create problems in terms of presenting relevant evidence.

Injustice may result, however, if there is no discretion to vary time limits.

(f) Internal review

(Recommendation 26)

Internal review processes prior to the lodging of an application with the Tribunal should be encouraged.

Internal review provides an opportunity for the decision-maker or the body responsible for the decision to reconsider the decision.

The provision of internal review or the opportunity to reconsider a decision within a department has the advantage of providing a quick resolution of a complaint and saving the costs incurred in the hearing of the matter by a tribunal.

It is less likely to harm the future relationship between the parties, for example where an applicant is required to have further dealings with the Department making the decision.

(g) Settlement or withdrawal

(Recommendation 27)

Once an application has been lodged with the Tribunal, withdrawal should be by leave of the Tribunal and settlement of the matter should be by consent order.

Once an application is before the Tribunal it has exclusive responsibility for the matter and is obliged to come to a decision.

Withdrawals should always come to the attention of the Tribunal. A withdrawal may result in one party gaining an unfair advantage, e.g. where pressure is brought to bear by the other party, or the applicant feels intimidated by the process of the Tribunal.

Settlements should be registered with the Tribunal to ensure that the settlement is fair and so that others affected by the decision may receive, in effect, the flow-on benefits where the decision is changed.

(h) Preliminary applications and stays

(Recommendation 28)

The General Appeals Tribunal should have the power to grant interim relief and stays.

The Commonwealth AAT is empowered to "make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or part of that decision as the Tribunal ... considers appropriate."

The review process can be used unfairly to "buy time" and advantage a party. Delays can be lengthy. It is important that the Tribunal have the power to adjust, in an interim way the rights of the parties from the time of the application where the circumstances warrant it.

(i) Conferences

Conferences

(Recommendation 29)

The Tribunal should have power to conduct the review by use of conferences either at its direction, or by agreement of the parties.

A compulsory conference prior to the hearing gives the parties an opportunity to come to their own solution rather than have a decision imposed on them. Under these circumstances the parties are more likely to accept the decision and the future relationship between the parties may not be jeopardised. It assists the parties in talking to each other with the possibility of settling before incurring the financial and emotional costs of a full hearing.

The conference should aim at narrowing the issues and identifying common ground. This allows the Tribunal to take control of proceedings at an early stage and to make sure the parties are prepared for the hearing and all relevant documents are filed. It allows a hearing to be scheduled and an estimate to be given as to the length of time of the hearing.

While one conference before the hearing may be compulsory, the parties or the Tribunal may consider it necessary to schedule other conferences or hearings or to determine interim applications.

Telephone conferences

(Recommendation 30)

Telephone conferences should be available if the parties agree.

There may be problems associated with the requirement to attend a conference in person.

Telephone conferences (as are widely used in some other tribunals) should be utilised to minimise cost and improve accessibility, but only where the parties agree.

Procedure

(Recommendation 31)

Procedures at a conference should be kept informal.

Parties should feel free to fully discuss all of the issues at the conference stage and costs should be kept to a minimum.

Informality, the lack of presence of a full tribunal, and the use of mediation techniques are expected to assist these processes.

Privacy and confidentiality

(Recommendation 32)

All conferences should be held in private and confidentiality of admissions and discussions relating to the merits of the dispute should be preserved, subject to the recommendation below relating to evidence.

This guarantee of confidentiality enables full and frank discussion of the issues.

Evidence

(Recommendation 33)

Evidence from the conference could be introduced at the hearing only by consent of all the parties.

Where agreement has been reached between the parties or the issues in dispute have been narrowed the material from the preliminary conference should be able to be introduced thereby saving the parties and the Tribunal time and money at the hearing stage.

Settlements

(Recommendation 34)

Settlement reached at a conference should be approved and registered by the Tribunal.

Parties should be protected in the settlement process. To ensure a settlement does not significantly disadvantage either party the Tribunal should be involved in the settlement process.

(j) Notice of hearing

(Recommendation 35)

The Tribunal should give sufficient notice of the hearing to the parties and should provide procedural information about the hearing with that notice.

Providing adequate notice and procedural information, assists in the efficient operation of the Tribunal by preparing the parties for the hearing and facilitating the smooth running of the hearing.

10. PROCEDURE AT HEARING

(a) Procedure

(Recommendation 36)

(i) The Tribunal should be free to determine its own procedure in a way which avoids undue formality and technicality while dealing with matters in an expeditious manner.

The Tribunal should have sufficient flexibility to tailor procedures to the specific circumstances of the individual case. It must, however, be kept in mind that the Tribunal should strive to avoid lack of uniformity and inequality of treatment.

The problem of procedures becoming overly formalised is a difficult one to guard against and is dependent on other factors such as legal representation, composition of the Tribunal and the issue involved.

(Recommendation 37)

(ii) The decision-maker should lodge material documents with the Tribunal prior to hearing.

Lodging of documents narrows the issues, gives the parties an indication of the matters likely to be raised at hearing, and assists the Tribunal which has no previous knowledge of the matter.

(Recommendation 38)

(iii) The Tribunal should conduct proceedings in a broadly adversarial manner but using "inquisitorial" powers where appropriate.

A strict adversarial procedure has its limitations because reliance is placed on the parties to adduce all the evidence. Inquisitorial powers allow the Tribunal to play a greater role.

(Recommendation 39)

(iv) The Tribunal should at any time be able to subpoena witnesses, examine witnesses on oath, and request production of further information.

. The Tribunal should have the power to compel evidence to be produced where relevant information is not before it.

(Recommendation 40)

(v) The Tribunal should generally conduct its hearings in public.

. Where the Tribunal is satisfied that the proceedings should be closed or publication or disclosure of evidence should be restricted for cogent reasons such as an intrusion on personal privacy, exceptions will be made.

(Recommendation 41)

(vi) Contempt provisions should apply to the operation of the Tribunal.

. Persons who interrupt the proceedings of the Tribunal, create disturbances, wilfully delay proceedings, ignore an order of the Tribunal or generally do any act or thing which would constitute contempt of a court of record should be in contempt of the Tribunal.

(b) Rules and forms of evidence

(Recommendation 42)

The Tribunal should not be bound by rules of evidence but should be free to inform itself on any matter in such manner as it thinks appropriate.

. It is not always appropriate to adopt the strict rules of evidence for the General Appeals Tribunal because:

(i) some relevant matters may be excluded from the Tribunal's review of the decision;

(ii) it may serve to increase costs; or

(iii) it may create unnecessary technicalities in the Tribunal's procedure.

Except to the extent that is dictated by natural justice the Tribunal should be able to maintain flexibility as to reception of evidence and how it is to be adduced.

Evidence may be introduced in a variety of methods including written submissions, affidavits, or oral evidence. The Tribunal may consider it appropriate to receive telephone evidence at the hearing or the parties may agree to the introduction of evidence from the preliminary conference. Persons could be authorised by the Tribunal to take evidence on its behalf.

(c) Representation

(Recommendation 43)

(i) All parties should have a right to representation before the Tribunal.

It is important that all the evidence is presented before the Tribunal and that this burden should not rest on the individual.

The respondent agency is likely to have expertise and experience in these matters and therefore the applicant should also have representation.

(Recommendation 44)

(ii) Representation should not be restricted to legal representation.

Representatives other than lawyers, such as para-legals, friends, family or related professionals, may also have a role before the Tribunal and may overcome some of the objections to legal representation such as cost and formality.

The ability of a Tribunal to identify inequalities in representation and take an active role in "levelling the playing-field" may eliminate some of the problems associated with legal representation. The General Appeals Tribunal will be able to use its inquisitorial powers to ensure all information necessary for the review is before the Tribunal.

11. POWERS OF THE TRIBUNAL

(Recommendation 45)

The Tribunal should be empowered to:-

(a) Affirm the decision under review;
(b) Vary the decision under review; or
(c) Set aside the decision under review; and

(i) make a decision in substitution for the decision so set aside; or

(ii) remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal..

(d) Make such order or orders as appropriate including, without limiting the generality of this power, a power to order identification and notification of persons who are or are likely to be affected.

(e) Award compensation (but not damages).

A decision of the Tribunal should be binding on all parties.

- The widest possible powers are necessary to ensure justice in each case.

- The power to award compensation would be a wide power, largely in the discretion of the Tribunal, to award "just compensation for loss arising from the effects of the original decision". This would not be the same as a general power to award damages.

(Recommendation 46)

The Tribunal should not be empowered to award costs, except:-

(i) in favour of the person applying for review if-

- that person has been put to unnecessary or unreasonable expense because of the actions of the decision maker in the conduct of the application for review (whether the person is ultimately successful in the action or not); or

- the appeal is successful and the costs are reasonable having regard to the nature of the dispute and complexity of that matter.

(ii) In favour of a Department if the person applying for review has acted vexatiously or frivolously or otherwise not in good faith in applying for a review of a decision.

A power to award costs may deter potentially meritorious cases and possibly influence the running of other cases on the basis of financial considerations rather than on the grounds of merit. In addition, as individual decision-makers do not meet costs personally they may not be directly influenced by costs awards or deterred from pursuing unmeritorious actions likely to "starve" the applicant.

Costs awards coupled with the allowance of legal representation could lead to formality, delay, unnecessary steps being taken in the proceedings and increased costs all around.

Awards of costs merely based on success in the application may penalise the party acting in good faith and lead to financial hardship.

Determining the quantum of costs can contribute to overall cost and delay.

In adversarial proceedings legal representation for applicants will be desirable if not necessary. In such circumstances costs should normally be recoverable by successful applicants and in exceptional, clearly defined circumstances, by successful agencies.

In the case of commercial disputes, particularly in the area of review of tax assessments, consideration may need to be given to the imposition of a traditional costs-indemnity rule.

Such a rule should be coupled with the introduction of procedures for dealing with frivolous and vexatious proceedings by providing for their summary disposal and, with a provision for costs to be awarded against applicants in these circumstances, either during or at the conclusion of proceedings.

12. APPEALS

(Recommendation 47)

An appeal from the General Appeals Tribunal to the Supreme Court on a point of law only should be available from the decision of the General Appeals Tribunal. Similar appeal rights should be applicable to every other appellate tribunal.

A general appeal or review on the merits should not lie to a court since, in most cases, it will constitute an appeal from a body expert in a particular subject to a body without specific experience. Decisions which fall within the Tribunal's special competence, because of the qualifications and experience of its members or of its procedures (e.g. the decisions on matters of fact, policy and discretion), should be left intact. By contrast, the Supreme Court is the body with the relevant experience and skills to determine disputes on questions of law.

13. THE ADMINISTRATIVE REVIEW COMMITTEE

(a) The role of the Committee

(Recommendation 48)

An independent body to be known as the Administrative Review Committee should be created by statute to keep under review all of the procedures, including those of the Courts and other bodies, by which administrative decisions may be challenged.

The recommendations of this report are aimed at improving the quality of administrative decision making and ensuring that easy access is available to a review system. Setting up a General Appeals Tribunal only goes part of the way towards achieving these aims; it is limited to the nature of the appeals within its jurisdiction and the individual matters that come before it. The Tribunal forms part of a system that needs to be monitored, reviewed, assessed and supervised by a body independent of the Government and the Tribunal itself.

Several common law jurisdictions have sought to fill this role by the creation of permanent institutions seeking to encourage widespread improvement in the administrative process across jurisdictional lines. These bodies include:-

(1) The Administrative Review Council (Commonwealth)
(2) The Council on Tribunals (UK)
(3) The Electoral and Administrative Review Commission (QLD)

Both the Administrative Review Council and the Electoral and Administrative Review Commission (EARC) have wide-ranging and comprehensive functions. EARC is a relatively new body and has broad scope for innovation. The Administrative Review Council is responsible for ascertaining and keeping under review all classes of administrative decisions, the adequacy of law and practice relating to the review or lack of review of administrative decisions; the suitability of bodies and procedures of bodies conducting these reviews, and the making of suggestions to improve the review system. It is a similar role to that envisaged for the Advisory Committee.

(b) The appropriate forum

(Recommendation 49)

The Administrative Review Committee should be empowered to review existing legislation to recommend whether a right of review should be created or to ensure that future rights of appeal or review lie to the most appropriate appellate tribunal.

- There are many cases where legislation does not provide a specific right of review by a Tribunal. In the light of recommendations in this document consistent means of review should be provided for all decisions under an enactment.

- The bodies established to adjudicate on particular classes of cases should be specially designed to fulfil their particular role. The wide variations in procedures and constitutions which now exist are much more the result of ad hoc decisions and historical accident than of the application of general and consistent principles.

(c) Decision-making process

(Recommendation 50)

The Committee should have a role in reviewing procedures, formulating guidelines, and consulting with Departments with respect to the decision-making process.

- There is no recognised standard to which various administrative decision-making procedures or appellate procedures have to conform. Although there are legal restraints on the procedure which an administrative decision-maker may adopt in making a decision, by and large there are no formal guidelines on how the decision maker should go about deciding an issue.

(d) Internal review

(Recommendation 51)

The Administrative Review Committee should perform a reviewing and advisory function in relation to internal reviews including their effectiveness, independence and consistency.

The Committee should give encouragement and guidance in setting up internal review processes. Their effectiveness and appropriateness should be monitored.

(e) Maintenance of informal procedures and accessibility of the General Appeals Tribunal

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(Recommendation 52)

The Administrative Review Committee should monitor the procedural aspects of the operation of the General Appeals Tribunal to ensure that it maintains accessibility and that informality is preserved.

Tribunals often develop procedure to such an extent that it mimics that of the Courts. It is important that the procedure of the Tribunal continues to support its aim of accessibility and informality.

(f) Dissemination of information

(Recommendation 53)

The Committee should have a further role as an educator in promoting awareness of the administrative review system and providing information to decision makers and applicants alike. Its reports will be public documents and should be tabled in the Legislative Assembly. Close links with parliamentary committees should be maintained.

Legislation in itself is ineffective when not accompanied by promotion and review. These functions are best carried out by a body removed from the day-to-day operations of the Tribunal.

(g) Composition of the Committee

(Recommendation 54)

The Administrative Review Committee should include community representatives and possibly a member or members of the Legislative Assembly.

The Administrative Review Council of the Commonwealth consists of three ex-officio members:-

- The President of the Administrative Appeals Tribunal;
- the Commonwealth Ombudsman; and
- the Chairperson of the Law Reform Commission;

and ten other members who have had extensive experience "at a high level of industry, commerce, public administration, industrial relations, practice of a profession or the service of a Government or of an authority of Government or ... an extensive knowledge of administrative law or public administration" (s.50 AAT Act)

14. OTHER MATTERS

There are a number of specific issues which have not been addressed by the Committee in this document. Our recommendations are intended to provide the basis for a general system of administrative review on the merits.

The area of administration of the Tribunal is one of these issues. It was thought this matter could be left to Government and Parliamentary Counsel.

The importance of security of tenure of members of Administrative Tribunals in particular is an issue that has been recently raised by the Administrative Review Council. The recommendations of the Council should be taken into account when implementing this report. (1990 Admin Review, 25)

Various other issues including:-

(i) Questions not required to be answered before the Tribunal;

(ii) the manner in which questions are to be decided;

(iii) limitations on time for appeals from decisions;

(iv) the availability of stays and interim applications on appeal from the Tribunal;

(v) reference of questions of law from the Tribunal to the Supreme Court; and

(vi) the protection of members, representatives and witnesses;

are all dealt with successfully under the two AAT systems already operating in Victoria and the Commonwealth.

APPENDIX "A"

A1: TERMS OF REFERENCE

I, the Honourable JAMES MURRAY ROBERTSON, Attorney-General, refer to the Northern Territory Law Reform Committee, the following terms of reference:

1. To identify and provide details of all present Northern Territory statutory provisions conferring a right of appeal from administrative and executive acts to a court, or appellate body other than a court.

2. To report on the law as it applies to those appeals and as to the rules of practice, procedure and evidence relating thereto.

2A. To consider and report on whether or not in each case the power to make an administrative or executive decision, from which an appeal lies, has been conferred on the person or body most appropriate to make that decision.

3. To consider and report as to whether or not in each case it is appropriate that the appeal lie to a court or body.

4. To consider and report whether or not in each case it is appropriate that a further appeal should lie from the decision of the court or body adjudicating on such an appeal.

5. To consider and report whether or not it would be appropriate to establish a Tribunal or Tribunals constituted by a Magistrate or a Judge of the Supreme Court of the Northern Territory to which such appeals could lie and, if so, the law and rules of practice, procedure and evidence which ought to apply.

In considering these Terms of Reference and when making its recommendations, the Committee is asked to bear in mind that it is unlikely that the Northern Territory Government would be prepared to establish any fresh system of appeal from administrative or executive acts which are not specifically provided for by statute nor any which would, in the ordinary course, lead to a requirement for additional resources.

Note

The Attorney-General directed that the words underlined be added to the Reference on 26 May 1987.

The Attorney-General directed that paragraph 2A be added to the Reference on 27 April 1989.

A2: CONDUCT OF REFERENCE

Working Papers : Appellate Structure

In February 1987, the Executive Officer tabled a working paper on Appeals from Administrative Decisions. A subsequent volume was tabled in February 1988. The papers listed each Act or regulation in the N.T. which conferred a right of appeal from an administrative decision. It provided information on the composition of the body making the administrative decision, the composition of the appellate body, the time limit for appeal and the decision from which the appeal lay.

Questionnaire

On 4 November 1987, the Committee sent a questionnaire to the Local Court and all appellate bodies other than courts which the Committee had identified as being authorised to hear appeals from the administrative decisions.

The questionnaire sought details of

1. The person making the administrative decision;

   These decision-makers were subsequently contacted for the purpose of obtaining statistical information.

2. The appellate tribunal, in particular

   - its membership
   - the appeal provision
   - appeal procedure
   - decision making obligations (eg: is there a duty to give reasons for the decision?)
   - powers of appellate body to deal with an appeal

3. Rights of further appeal.

Follow-up

These bodies to which the questionnaire was sent were subsequently contacted for the purpose of obtaining statistical information, once in 1988 and once in 1989.

Subcommittee

Taking into account all of the information gathered in the process described above, the Committee concluded that the establishment of a specific tribunal along the lines of an AAT was appropriate. A subcommittee was established in August 1989 to consider the structure of the Tribunal. The sub-Committee reported to the Committee in September and their report was adopted with one amendment. The report attempted to identify and provide details of all present Northern Territory statutory provisions conferring a right of appeal from administrative and executive acts to a court,

or appellate body other than a court. The report was circulated extensively for comment (Discussion Paper on Appeals from Administrative Decisions: Appellate Structure, December 1989).

Responses

The responses to the Discussion Paper were considered by the Committee and changes were made to the paper in the light of these responses.

Sub-Committee

The sub-Committee considered the issues raised in the working paper, and as a result of consultations on the Discussion Paper, and reported to the Committee in November 1990. The Sub-Committee's report was circulated for comment to a number of people identified by the Committee as having expertise in the area of law under review. These comments were taken into account and a draft Report was tabled by the Sub Committee at the April meeting of the Committee.

Report

Subject to a number of changes, the Committee adopted the report of the sub-Committee and agreed to present it to the Attorney General on 28 June 1991.

APPENDIX "B"

REFORMS ELSEWHERE

1. Australia

Commonwealth

In 1971 the Commonwealth Administrative Review Committee published a report known as the Kerr Report. Among other things the Committee recommended that an Administrative Review Tribunal be established. The Committee expressed the view that the Tribunal should be presided over by a Judge, and in addition that there should be two other members, one of whom should come from the Commonwealth Department or authority responsible for administering the decision under review, the other being a lay member drawn from a panel of persons chosen for their character and experience in practical affairs.

In 1975 the majority of the Committee's recommendations were put into effect by the enactment of the Administrative Appeals Tribunal Act.

The Commonwealth machinery for appeals from administrative actions is outlined in detail by Professor Dennis Pearce in his book "Commonwealth Administrative Law".

Composition of Appellate Tribunal

The Administrative Appeals Tribunal Act 1975 established the Administrative Appeals Tribunal ("the AAT"). The AAT is a general appeals tribunal but sits in divisions (general, valuation, compensation and such others as are prescribed). The Act provides for the appointment of presidential members who have qualifications for federal judicial appointment, and non-presidential members who have qualifications relevant to the particular categories of matters that come before the AAT.

Divisions

The Tribunal is divided into the following divisions:

(a) General Administrative Division;
(b) Medical Appeals Division;
(c) Valuation and Compensation Division;
(d) Such other divisions as are prescribed.

At the time of writing, the Veterans' Appeals and Taxation Divisions are the only additional divisions that have been prescribed. Non-presidential members must be assigned to a particular division or divisions of the Tribunal, and can sit only in that division.

Powers of Appellate Tribunal

The AAT has powers to review the merits of decisions made under specific enactments and to affirm or vary the decision under review, substitute its own decision, or remit the matter to the decision-maker for reconsideration. The Act includes detailed provisions concerning the procedure of the AAT.

The most significant feature of the AAT, and that which distinguishes it from previous review bodies, is that it is empowered to substitute its decision for that of the primary decision-maker and to exercise all his powers in determining what decision should have been made under an enactment. The Tribunal does not exist simply to hear argument on whether the original decision was wrong.

It listens to the applicant and to the decision-maker and determines what it considers to be the best decision in the circumstances. In arriving at its decision, the Tribunal is entitled to have access to all documents that are relevant to the decision. Other review bodies may have limitations imposed upon the material to which they are to have access, but there are no such limitations on the Tribunal (or the parties before the Tribunal).

Australian Capital Territory

In 1989 the Governor-General made Ordinances for the Australian Capital Territory, which has since achieved self-government, providing for a separate AAT for the A.C.T. which, in all material aspects, is identical with the Commonwealth AAT.

Victoria

Victorian administrative law appellate machinery has been reformed along the lines of the Commonwealth model.

The Administrative Appeals Tribunal Act 1984 established an Administrative Appeals Tribunal very similar to the Commonwealth's AAT. However, the actual appellate jurisdiction conferred on the Victorian AAT is (at this stage) relatively small.

Composition of Appellate TribunalThe President of the tribunal must be a County Court judge. Deputy Presidents may be County Court judges or persons qualified to hold such office. Other members of the tribunal must be legally qualified or persons with special knowledge or skills in respect of which decisions may be made. Although lay members may be appointed, it is understood that as yet no such persons have been appointed to the tribunal. The constitution of the tribunal for sittings is regulated solely to the extent that only a legally qualified member of the tribunal may preside over its hearings: s.21.

Divisions

The tribunal comprises a General Division, a Taxation Division and such other Divisions as may be prescribed: s.19.

It embraces decisions relating to -

- freedom of information requests
- taxation assessment
- crimes compensation, motor accident compensation
- superannuation benefits
- adoption appeals
- estate agents' licences
- town planning (added in 1987)

Powers of Appellate Tribunal

The powers are identical to the Commonwealth AAT except as follows:

Where,

(a) the Minister administering the Act creating the right of appeal certifies that there was in existence at the time of making of the decision a statement of policy applying to decisions made under the Act,

(b) the Tribunal is satisfied that, at the time of making the decision -

  (i) the applicant was aware of the statement of policy;
  (ii) persons who may apply for review could reasonably have been expected to be aware of the statement of policy; or
  (iii) the statement of policy had been published in the Government Gazette; and

(c) the person by whom the decision was made stated, when giving reasons for the decision, that the person relied on that statement of policy when making the decision -

the Tribunal, in reviewing a decision shall, to the extent that the statement of policy is within power, apply that statement of policy.

South Australia

The 1984 Report of the Law Reform Committee of South Australia Relating to Administrative Appeals made recommendations along the lines of the Commonwealth model. The Committee also envisaged the possible creation of an Administrative Division of the Supreme Court. The Report has not been implemented.

The principal recommendations were:

- The establishment of a General Appeals Tribunal to hear most administrative appeals.

- The enactment of a procedural code for such a tribunal.

- The retention of specialist appeal tribunals in the cases of bodies within specialised fields of discourse, but with amendments to prevent failures of natural justice or inadequate hearing or review procedures.

- Questions of law should be identified and isolated where possible for decision by the Supreme Court as speedily as is compatible with the other work of the Court. This may necessitate the creation of an administrative division of the Supreme Court.

- The establishment of an Administrative Review Committee.

New South Wales

The Report of the Law Reform Commission of New South Wales on Appeals in Administration in 1973 recommended the establishment of a Public Administration Tribunal presided over by a Supreme Court Judge and including non-judicial members. The Report has not been implemented, but an Administrative Law Division of the Supreme Court has been created.

Composition of Appellate Tribunal

The Commission recommended that the Tribunal be presided over by a Supreme Court Judge and that members of the Tribunal, other than judicial members, should be selected from a panel of persons having special experience in administration, commerce, industry or administrative law.

Powers of Appellate Tribunal

The Tribunal was intended to have two functions, namely to hold inquiries into the official actions of public authorities and to hear appeals. In the case of inquires, it was proposed that where a public authority takes official action, objection may be made to that official action by the Attorney-General or by any person who claims to be adversely and substantially affected by the official action.

In some cases, the Tribunal might in its discretion decide that it would or would not inquire. It was recommended that the Tribunal might allow an objection to an official action:
(a) where the official action was beyond the power of the public authority concerned; or
(b) where the Tribunal was satisfied that the official action was harsh, discriminatory or otherwise unjust.

The Tribunal might then set the official action aside or remit it to the public authority concerned for action in accordance with the directions of the Tribunal.

The Commission recommended that rights of appeal to the Tribunal should be conferred by legislation other than the Act setting up the Tribunal. The Commission held the view that the greater part of the jurisdiction of the Supreme and Local Courts to hear and determine administrative appeals could be transferred to the Tribunal, together with the jurisdiction of a number of ad hoc bodies which are not utilised enough to gain specific expertise in their field.

Subsequent developments

Section 53(3B) of the New South Wales Supreme Court Act 1970 - 1981 created an Administrative Law Division of the Supreme Court. This Division has jurisdiction to hear a number of appeals relating to administrative decisions. It also has jurisdiction to hear proceedings involving a public body or a public officer where mandamus, prohibition, certiorari, injunction or declaration is being sought.

Western Australia

The administrative law machinery recommended by the Law Reform Commission in Western Australia is very different from the Commonwealth model. Unlike the Commonwealth model which involved the creation of the AAT as a general appeals tribunal, the thrust of the proposals in Western Australia is to graft an administrative appeals system onto the present structure comprising the Supreme Court, Local Court and specialist appellate tribunals.

The recommendations are contained in the Law Reform Commission's Report on Review of Administrative Decisions: Appeals, Project No. 26 - Part I (January 1982).

The main thrust of Part I of the Report can be summarised under the following headings:

(i) An Administrative Appeal System

The Commission recommended that an administrative appeal system should be developed which should consist of -

- an Administrative Law Division of the Supreme Court;
- an Administrative Law Division of the Local Court; and
- a limited number of specialist appellate bodies.

Where there is an appeal in the first instance to the Administrative Law Division of the Local Court or to a specialist appellate tribunal there should be a further appeal on points of law to the Administrative Law Division of the Supreme Court. There should be provision for points of law to be considered and determined by the Full Court of the Supreme Court.

(ii) Criteria for Recommendations as to Appropriate Appellate Body

The matters proposed for the Administrative Law Division of the Supreme Court are:

- all those rights of appeal presently conferred on the Supreme Court and the District Court; and

- appeals relating to the licensing, registration or disciplining of people in various professions, occupations, livelihoods or commercial activities which involve rights, benefits or privileges of such an important or complex nature that it would be appropriate to have the appeal determined by a Supreme Court Judge.

The matters proposed for the Administrative Law Division of the Local Court are:

- matters in which there were present rights of appeal to the Local Court, Courts of Petty Sessions or a Stipendiary Magistrate; and

- a number of other matters which should be transferred to this Division from certain appellate bodies because they should be within the jurisdiction of the ordinary court system but are not of such importance or complexity as to require determination by the Supreme Court.

Certain specialised appellate bodies (e.g. Land Valuation Tribunals, Town Planning Appeal Tribunal, Licensing Court) should be retained if the cases in which the decision in question is of such a specialised nature that a better decision in unlikely to be obtained on appeal unless the body designated to hear the appeal has expertise in the matter the subject of the appeal. Of the many existing specialist appellate tribunals, the Commission specified only 7 that should be retained.

(iii) Lay Members

The Commission recommended that provision should be made for the appointment of lay members to the Administrative Law Divisions in appropriate cases. While in other jurisdictions there is provision for appointment of lay members to administrative tribunals, this proposal to appoint lay members to the Local Court and the Supreme Court seems novel, even though the appointment would be for a limited purpose.

(iv) Powers of the Appellate Body

The Commission recommended that the various appellate bodies in the administrative appeal system should have power to exercise all of the powers and discretions conferred on the original decision-maker and should have power to -

- affirm the decision;

- vary the decision; or

set the decision aside and make a decision in substitution for the decision so set aside, or remit the matter for consideration in accordance with any direction or recommendation of the appellate body.

A Judge of the Administrative Law Division of the Supreme Court should have power, either on his own motion or on application of a party to an appeal, after giving the parties an opportunity to be heard in chambers, to remit a matter from the Administrative Law Division of the Supreme Court to the Administrative Law Division of the Local Court or vice versa.

(v) Costs

The Commission recommended that each party to an appeal should bear their own costs, unless there are special reasons for the appellate body to order one party to pay the costs of the other.

(vi) A Code of Procedure for Appellate Bodies

The Commission recommended that a code of procedure for the appellate bodies in the administrative appeal system should be developed.

(vii) Ongoing Review

An ongoing body should be established to review rights of administrative appeal and the appeal process.

Part II of the Report recommends:

- reform of the procedures for judicial review; and
- a requirement, subject to exceptions, that, on request, administrative decision-makers give the reasons for their decisions to persons affected by them.

Queensland

The Electoral and Administrative Review Commission (E.A.R.C.) was set up by statute in 1989 and provides reports to the Premier and the Legislative Assembly on the achievement and maintenance of "honesty, impartiality and efficiency in public administration of the State" (Electoral and Administrative Review Act(Qld) s.2.9)

The functions of the Commission include to investigate and report in relation to : "the whole or part of the public administration of the State, including any matters pertaining thereto specified in the report of the Commission of Inquiry, or referred to the Commission by the Legislative Assembly, the Parliamentary Committee or the Minister" and "all or any of the matter specified in the Schedule to the Act".

The relevant matters in the Schedule are as follows:

"9. Elimination of inappropriate considerations from -

(a) decisions made by or on behalf of the Government;

(b) advice tendered to the Governor-in-Council;

(c) discharge of functions and exercise of powers by units of public administration.

10. Availability to the public of information concerning -

(a) decisions made by or on behalf of the Government;

(b) discharge of functions and exercise of powers by units or public administration.

...

14. Administrative appeals and judicial review of administrative decisions and actions."

EARC has already produced reports on Freedom of Information and Judicial Review with the latter including a detailed section on "reasons for decisions". A report on review on the merits is expected soon.

2. New Zealand

(i) The Orr Report

In 1964, G.S. Orr prepared a report entitled Administrative Justice in New Zealand. The report recommended the establishment of an Administrative Court, the jurisdiction of which would include most appellate functions of the Supreme Court and Magistrates Courts in respect of tribunals and other administrative authorities, and in addition that a right of appeal should be granted from tribunals where none already existed. It was further suggested that the jurisdiction of the proposed Court need not be confined to hearing appeals from administrative tribunals, and that a right of appeal to the Court should be granted from some decisions of officials and administrative authorities other than tribunals.

(ii) P.A.L.R.C.

In July 1966, the New Zealand Minister of Justice set up the Public and Administrative Law Reform Committee. The body ceased functioning in 1986. The matters which were referred to it included appeals from administrative tribunals, the constitution and procedure of such tribunals and the judicial control of administrative acts.

First Report: Composition of Appellate Body

In its First Report (1968) the principal recommendation was for the setting up of an Administrative Division of the Supreme Court to hear appeals from specified administrative tribunals and to exercise the existing jurisdiction of the

Court in the field of administrative law. Although it recommended the creation of an Administrative Division, it did not assume that it ought to be the appellate body for all tribunals. The Committee studied the functions, powers and procedures of each tribunal separately and subsequently made such recommendations as to appeals, and on procedure as was appropriate to the particular tribunals.

For example, in its First Report, the Committee recommended that the jurisdiction of the Land Valuation Court, the Transport Licensing Appeal Authority and the Trade Practices Appeal Authority should be absorbed by the Administrative Division, and that there be an appeal, with leave, to the Division from decisions of the Town and Country Planning Appeal Boards. It considered the Transport Charges Appeal Authority and the Price Tribunal were not appropriate to be absorbed by the Administrative Division, or that there ought to be a right of appeal to the Division from these decisions.

Fourteenth Report: Right to Compensation

The Committee in its Fourteenth Report (1980) recommended that -

"...whenever a new statute confers powers that, if exercised unlawfully will cause economic loss, consideration should be given to the inclusion of a provision relating to compensation for losses flowing from any unlawful decisions given by the donee(s) of the power... We would propose that new statutes be examined with the aid of the following guidelines for the Committee and others concerned:

(a) how great is the risk that innocent persons will suffer loss as the result of legally erroneous decisions taken in good faith...

(b) ...

(c) whether the common law already provides an adequate remedy? In such a case, it is unlikely that we would recommend the imposition of statutory liability.

(d) whether the imposition of liability in the particular instance is seen as analogous to circumstances where liability already exists."

Nineteenth Report: Government Directions to Statutory Bodies

In its Nineteenth Report (1986) the Committee recommended -

- Directions to administrative decision-makers on what policy they should apply should be given only by a Minister. Authority to give policy directions should be excluded from any power of delegation.

- Directions should be given in writing.

- Directions should be published in the Gazette and laid before the House of Representatives as soon as practicable after they are given. Exception to this should be made only where the public interest does not require immediate publication and publication would be inimical to economic or commercial interests.

- Directions should be restricted to considerations of policy, and should not be given where they might interfere with:

  (i) the duty of independent tribunals to act judicially; or
  (ii) the determination of individual applications, allegations, or cases which relate to a particular person or organisation..

- Before a policy direction is given, the Government should, wherever practicable, consult with individuals and organisations likely to be affected by the direction.

3. <u>England</u>

(i) <u>Franks Committee</u>

The Committee on Administrative Tribunals and Enquiries (the Franks Committee) in 1957 recommended that there should be:

- an appeal on fact, law and merits from a tribunal of first instance to a specialist appellate tribunal, except where the tribunal of first instance was "exceptionally strong and well qualified"; and

- an appeal on a question of law to the courts, except in the case of a limited number of specified tribunals.

The Franks Committee considered, and rejected, the option of creating a general administrative appeal tribunal, giving as reasons that, in its view;

- a general tribunal could not have the experience and expertise in particular fields which should be a characteristic of tribunals;

- the establishment of a general appellate body would involve a departure from the principle whereby all adjudicating bodies in England, whether inferior courts or tribunals, are in matters of jurisdiction subject to the control of the superior courts; and

- final determinations on points of law would be made by the general administrative tribunal in relation to tribunals but by the superior courts in relation to matters decided by the courts, and this would create two systems of law, "with all the evils attendant by this dichotomy".

(ii) Law Commission

A major reform in the field of administrative law flowed from the 1976 Law Commission recommendation that there should be a form of procedure to be entitled "an application for judicial review" under which an applicant could apply to the Court for any of the five separate remedies covered by judicial review. This recommendation was partially put into effect in 1977 in the Supreme Court Rules, Order 53.

This method of judicial review has, however, indirectly led to the creation of an Administrative Law Division in the High Court. With the removal of technical constraints in applications for judicial review, the number of applications materially increased.

"A specialised administrative court - albeit one which lacks the distinctiveness and constitutional status of a body like the French Conseil d'Etat has been established, even if it has been achieved by administrative stealth rather than by the democratic process of legislation"

Apart from recommending a more simplified procedure to apply to judicial review, the Law Commission made recommendations that the Court be entitled to award damages in appropriate cases. The Commission recommended that where the Court, having decided on an application for judicial review thatillegality had occurred (in respect of which a claim for damages has been joined with the application), is satisfied that such a claim is in law maintainable, and that there is no dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages, it should be able to make a formal award of damages and if there is dispute as to any of these matters the Court should have power to give appropriate derections for their separate determination. Illegality in this sense includes orders made beyond power, mala fides, in breach of the rules of natural justice or by detournement de pouvoir.

(iii) JUSTICE - All Souls Review

In 1988 a Committee of Review established by the organisation JUSTICE and All Souls College, Oxford , published a report, "Administrative Justice: Some Necessary Reforms". This wide-ranging report deals with a number of topical issues, including reasons for decisions, judicial review, review on the merits, standing, and compensation for loss caused by defective administrative action.

APPENDIX "C"

SUMMARY OF RECOMMENDATIONS

4. THE USE OF COURTS

(a) The use of courts

(Recommendation 1)

The use of courts is inappropriate in the review of administrative decisions on their merits because of formality, costs and delays associated with their procedure.

(b) Use of Ministers

(Recommendation 2)

The use of Ministers to review decisions of their own Department should be avoided.

(c) Use of tribunals

(Recommendation 3)

A separate tribunal, a general appeals tribunal, should be established to specialise in appeals from administrative decisions.

5. ORGANISATION OF THE TRIBUNAL

(a) Composition

(Recommendation 4)

The General Appeals Tribunal should consist of:

(i) A Chairperson who is the Chief Magistrate or another Magistrate nominated by the Chief Magistrate;
(ii) Judicial members being other Magistrates;
(iii) Members being those persons appointed by the Attorney-General; and
(iv) A Registrar appointed specifically to manage the Tribunal, to perform ancillary duties and to exercise the jurisdiction of the Tribunal where specified.

(b) Constitution

(Recommendation 5)

The General Appeals Tribunal should be constituted only in the following manner:

(i) Judicial member plus 2 members;
(ii) Judicial member sitting alone; or

(iii) In conference only, A Judicial member, the Registrar or a single member sitting alone.

6. JURISDICTION

(a) What is a decision?

(Recommendation 6)

A decision reviewable by the Tribunal should include a decision of an administrative character which:-

(i) alters rights or imposes liabilities;
(ii) has a real practical effect although not altering rights or imposing liabilities;
(iii) is a failure or refusal, for whatever reason, to take a decision or perform an act.

(b) Decisions to be reviewed by the General Appeals Tribunal

(Recommendation 7)

All decisions under an enactment should be reviewable by the General Appeals Tribunal subject to certain specified exemptions.

(c) Decisions excluded from review by the General Appeals Tribunal

(Recommendation 8)

Those decisions that should be excluded from review by the General Appeals Tribunal should be excluded because of their nature and special requirements on appeal. Most would fall within the general categories of industrial relations and professional matters.

(d) Sccpe of Review

(Recommendation 9)

The General Appeals Tribunal should have power to review de novo (i.e. afresh) the whole decision and should not be confined to matters raised before the original decision maker.

(e) Government Policy

(Recommendation 10)

No special provisions should be made in respect of the way that the General Appeals Tribunal reviews decisions involving Government policy.

7. APPLICANTS FOR REVIEW

(a) Who may apply?

(Recommendation 11)

Any person, group or organisation whose interests are affected by a decision should be able to apply for the decision to be reviewed by the General Appeals Tribunal.

(b) Decision makers

(Recommendation 12)

A decision-maker should be able to apply for an advisory opinion from the Tribunal where provision is made for this under an enactment.

(c) Joinder of parties

(Recommendation 13)

Joinder of parties should be consistent with the criteria for those who can apply i.e. any person, group or organisation whose interests are affected may be joined in proceedings.

(d) Representative actions

(Recommendation 14)

A group of persons or an organisation should be able to act by a representative where similar issues and similar relief would arise if individual actions were taken.

(e) Right of the Attorney-General to intervene

(Recommendation 15)

The Attorney-General should have a right to intervene in proceedings.

8. REASONS FOR DECISIONS

(a) Entitlement to reasons

(Recommendation 16)

There should be an entitlement to reasons for an administrative decision. That right should be independent of the right to apply for review, however it should be subject to the same exclusions as the right of review.

Reasons for a decision should be given on request where no application for review has been made to the Tribunal, and automatically on the making of an application to the Tribunal.

A request should be made within 28 days of the decision, or such longer period as the Tribunal allows.

Those persons whose interests are affected by a decision should have standing to obtain reasons for that decision, subject to the exclusions provided to the entitlement above.

(b) Form and adequacy of reasons

(Recommendation 17)

Reasons for decisions should be in writing, should be proper and adequate and deal with the substantive issues raised.

In particular, the reasons should set out the findings and refer to the evidence or other material on which those findings were based. Relevant documentary material should be provided with the reasons.

Where reasons are inadequate the applicant should be able to make further application to the Tribunal for an order that the decision-maker provides for further and better particulars of the reasons for the making of the decision.

(c) Time limits

(Recommendation 18)

Reasons for decisions should be given within 28 days of request. In special circumstances an extension or abridgement of this time may be ordered.

(d) Exemptions

(Recommendation 19)

Exemptions from the requirement to give reasons should only be available on the following grounds:-

(i) Where the decision could be the basis for a claim in a judicial proceeding that the information should not be disclosed or

(ii) For security, defence and international relations reasons and for documents of Cabinet, Executive Council and committees of Cabinet, on certification and specification of grounds of exemption by the Attorney-General.

(e) Effect of failure to give reasons

(Recommendation 20)

Where there is a failure to give reasons on request or where the reasons are inadequate the requesting party may apply to the Tribunal for an ex-parte order that reasons be given within a specified time.

A party who fails to comply with an order to give reasons within a specified time would be in contempt of the Tribunal and may be punished accordingly.

9. INITIATION OF REVIEW

(a) Notice of decision

(Recommendation 21)

Notice of the decision and the right to review should be given by the decision-maker.

(b) Information about the Tribunal

(Recommendation 22)

Information about the Tribunal , its jurisdiction and procedures should be readily available.

(c) Form of the application

(Recommendation 23)

The application should generally be by way of standard form which should be widely available. However, other methods of application, including oral application, should be accepted.

(d) Fees

(Recommendation 24)

A fee which constitutes a nominal contribution towards administrative costs should be payable on lodging of the appeal.

(e) Time limits and delays

(Recommendation 25)

Time limits should apply to the lodging of an application, the filing of material relevant to the application, any response by the respondent and the setting down of the preliminary conference. An application to the Tribunal for review of an administrative decision is to be made within 28 days of the date of:-

(i) the applicant receiving notice of the decision; or
(ii) where a request has been made, for a statement of the reasons for decision the applicant receiving such a statement.

A discretion should be given to the Tribunal to accept applications outside this period.

(f) Internal review

(Recommendation 26)

Internal review processes prior to the lodging of an application with the Tribunal should be encouraged.

(g) Settlement or withdrawal

(Recommendation 27)

Once an application has been lodged with the Tribunal, withdrawal should be by leave of the Tribunal and settlement of the matter should be by consent order.

(h) Preliminary applications and stays

(Recommendation 28)

The General Appeals Tribunal should have the power to grant interim relief and stays.

(i) Preliminary conferences

(Recommendation 29)

The Tribunal should have power to conduct the review by use of conferences either at its direction, or by agreement of the parties.

Telephone conferences

(Recommendation 30)

Telephone conferences should be available if the parties agree.

Procedure

(Recommendation 31)

Procedures at a conference should be kept informal.

Privacy and confidentiality

(Recommendation 32)

All conferences should be held in private and confidentiality of admissions and discussions relating to the merits of the dispute should be preserved, subject to the recommendation below relating to evidence.

Evidence

(Recommendation 33)

Evidence from the conference could be introduced at the hearing only by consent of all the parties.

Settlements

(Recommendation 34)

Settlement reached at a conference should be approved and registered by the Tribunal.

(j) Notice of hearing

(Recommendation 35)

The Tribunal should give sufficient notice of the hearing to the parties and should provide procedural information about the hearing with that notice.

10. PROCEDURE AT HEARING

(a) Procedure

(Recommendation 36)

(i) The Tribunal should be free to determine its own procedure in a way which avoids undue formality and technicality whilst dealing with matters in an expeditious manner.

(Recommendation 37)

(ii) The decision-maker should lodge material documents with the Tribunal prior to hearing.

(Recommendation 38)

(iii) The Tribunal should conduct proceedings in a broadly adversarial manner but using "inquisitorial" powers where appropriate.

(Recommendation 39)

(iv) The Tribunal should at any time be able to subpoena witnesses, examine witnesses on oath, and request production of further information.

(Recommendation 40)

(v) The Tribunal should generally conduct its hearings in public.

(Recommendation 41)

(vi) Contempt provisions should apply to the operation of the Tribunal.

(b) Rules and forms of evidence

(Recommendation 42)

The Tribunal should not be bound by rules of evidence but should be free to inform itself on any matter in such manner as it thinks appropriate.

(c) Representation

(Recommendation 43)

(i) All parties should have a right to representation before the Tribunal.

(Recommendation 44)

(ii) Representation should not be restricted to legal representation.

11. POWERS OF THE TRIBUNAL

(Recommendation 45)

The Tribunal should be empowered to:-

(a) Affirm the decision under review;
(b) Vary the decision under review; or
(c) Set aside the decision under review; and

(i) make a decision in substitution for the decision so set aside; or
(ii) remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

(d) Make such order or orders as appropriate including, without limiting the generality of this power, a power to order identification and notification of persons who are or are likely to be affected.

(e) Award compensation (but not damages)

A decision of the Tribunal should be binding on all parties.

(Recommendation 46)

The Tribunal should not be empowered to award costs, except:-

(i) in favour of the person applying for review if-

- that person has been put to unnecessary or unreasonable expense because of the actions of the decision maker in the conduct of the application for review (whether the person is ultimately successful in the action or not); or

- the appeal is successful and the costs are reasonable having regard to the nature of the dispute and complexity of that matter.

(ii) In favour of a Department if the person applying for review has acted vexatiously or frivolously or otherwise not in good faith in applying for a review of a decision.

12. APPEALS

(Recommendation 47)

An appeal from the General Appeals Tribunal to the Supreme Court on a point of law only should be available from the

decision of the General Appeals Tribunal. Similar appeal rights should be applicable to every other appellate tribunal.

13. THE ADMINISTRATIVE REVIEW COMMITTEE

(a) The role of the Committee

(Recommendation 48)

An independent body to be known as the Administrative Review Committee should be created by statute to keep under review all of the procedures including those of the Courts and other bodies, by which administrative decisions may be challenged.

(b) The appropriate forum

(Recommendation 59)

The Administrative Review Committee should be empowered to review existing legislation to recommend whether a right of review should be created or to ensure that future rights of appeal or review lie to the most appropriate appellate tribunal.

(c) Decision-making process

(Recommendation 50)

The Committee should have a role in reviewing procedures, formulating guidelines, and consulting with Departments with respect to the decision-making process.

(d) Internal review

(Recommendation 51)

The Administrative Review Committee should perform a reviewing and advisory function in relation to internal reviews including their effectiveness, independence and consistency.

(e) Maintenance of informal procedures and accessibility of the General Appeals Tribunal

(Recommendation 52)

The Administrative Review Committee should monitor the procedural aspects of the operation of the General Appeals Tribunal to ensure that it maintains accessibility and that informality is preserved.

(f) Dissemination of information

(Recommendation 53)

The Committee should have a further role as an educator in promoting awareness of the administrative review system and

providing information to decision makers and applicants alike. Its reports should be public documents and should be tabled in the Legislative Assembly. Close links with parliamentary committees should be maintained.

(g) Composition of the Committee

(Recommendation 54)

The Administrative Review Committee should include community representatives and possibly a member or members of the Legislative Assembly.

Government Printer of the Northern Territory