ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE MINISTER FOR JUSTICE

BETTER DECISIONS: Review of Commonwealth Merits Review Tribunals

Report No. 39

Australian Government Publishing Service
Reports of the Administrative Review Council

2. Repatriation Appeals, 1979
3. Review of Import Control and Customs By-Law Decisions, 1979
5. Defence Force Ombudsman, 1979
6. Entry to Cocos (Keeling) Islands and Christmas Island, 1979
8. Social Security Appeals, 1980
10. Shipping Registration Bill, 1980
14. Land Use in the ACT, 1981
21. The Structure and Form of Social Security Appeals, 1984
22. The Relationship between the Ombudsman and the Administrative Appeals Tribunal, 1985
23. Review of Customs and Excise Decisions: Stage Two, 1985
34. Access to Administrative Review by Members of Australia’s Ethnic Communities, 1991
35. Rule Making by Commonwealth Agencies, 1992
36. Environmental Decisions and the Administrative Appeals Tribunal, 1994
37. Administrative Review and Funding Programs, 1994
ADMINISTRATIVE REVIEW COUNCIL

DR SUSAN KENNY
PRESIDENT

14 September 1995

The Hon Duncan Kerr MP
Minister for Justice
Parliament House
CANBERRA ACT 2600

Dear Minister
In December 1993 you referred to the Council the terms of an inquiry into the tribunal system. I have pleasure in submitting to you the Administrative Review Council’s report Better Decisions: Review of Commonwealth Merits Review Tribunals, prepared in response to your reference.

Yours sincerely

Dr Susan Kenny
President

POSTAL ADDRESS: GPO BOX 3222, CANBERRA ACT 2601
5th Floor, Canberra House, 40 Marcus Clarke Street, Canberra
Telephone (06) 247 5100 Facsimile (06) 257 6121
ADMINISTRATIVE REVIEW COUNCIL

This Report was adopted at a meeting of the Administrative Review Council held in Sydney on 11 August 1995. The members of the Council at the date of that meeting were:

President
Dr Susan Kenny

Ex-officio members:
Justice Jane Mathews (President of the Administrative Appeals Tribunal)
Alan Rose AO (President of the Australian Law Reform Commission)
Philippa Smith (Commonwealth Ombudsman)

Other members
George Haddad
Stuart Hamilton
Dr Allan Hawke
Professor Marcia Neave
Sheila O’Sullivan
Tim Pallas
Alan Robertson
Stephen Skehill
Greg Wood

This project was guided by a committee comprising all members of the Council.

The Council acknowledges the contribution of the staff of the Secretariat to this report, particularly Nigel Waters (Senior Policy Adviser), Charles Beltz (Project Officer) and John Atwood (Acting Director of Research). The Council also acknowledges John McMillan, Senior Lecturer in Law at the Australian National University, who prepared the background information in Appendix B.
ADMINISTRATIVE REVIEW COUNCIL FUNCTIONS AND POWERS

Section 51 of the Administrative Appeals Tribunal Act 1975 sets out the functions and powers of the Council as follows:

“(1) The functions of the Council are:

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;

(c) to inquire into the adequacy of the law and practice relating to the review by the courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice;

(d) to inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures;

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to make recommendations to the Minister as to ways and means of improving the procedures for the exercise of administrative discretions for the purpose of ensuring that those decisions are exercised in a just and equitable manner.

(2) The Council may do all things necessary or convenient to be done for or in connection with the performance of its functions.”
ABBREVIATIONS

The abbreviations used in this paper are defined in the paper itself. However, there will not always be an explanation of the abbreviations used close to hand. The following comments and list of abbreviations are therefore intended to assist people in reading the paper.

References to legislation in this paper are always to Australian federal legislation, unless another source is specified.

Tribunals and review bodies - abbreviations

AAT..............................................................Administrative Appeals Tribunal
AIRC............................................................Australian Industrial Relations Commission
ART.............................................................Administrative Review Tribunal
HREOC.....................................................Human Rights and Equal Opportunities Commission
IRT..................................................................Immigration Review Tribunal
RRT...................................................................Refugee Review Tribunal
SART.............................................................Student Assistance Review Tribunal
SSAT.............................................................Social Security Appeals Tribunal
VRB...............................................................Veterans’ Review Board

Other abbreviations

AAT Act..........................................................Administrative Appeals Tribunal Act 1975
AD(JR) Act........................................................Administrative Decisions (Judicial Review) Act 1977
ADR..................................................................Alternative dispute resolution
AROs................................................................Authorised Review Officers
CROSROMD.....Committee for the Review of the System for Review of Migration Decisions
FOI Act.............................................................Freedom of Information Act 1982
IPPs..................................................................Information Privacy Principles
PREFACE

Merits review

Merits review undertaken by review tribunals involves the capacity to ‘step into the shoes’ of government decision makers and to remake administrative decisions according to the merits of individual cases. This process is essentially different from that of courts undertaking judicial review. As a rule, courts can find government decisions to be unlawful, but they do not remake those decisions according to their view of the merits of individual cases.

Throughout this report, the Council emphasises that review tribunals are different from courts, because review tribunals are part of the Executive arm of the Australian Government and cannot exercise judicial power.

STRUCTURE OF THE REPORT

This preface refers to some of the key recommendations made in the report. A full list of recommendations is provided immediately following Chapter 8. The recommendations in the report fall into two broad categories:

1. those that apply to all review tribunals, regardless of the structure of the review tribunal system (these recommendations are made in Chapters 1-7); and

2. those that concern the structure of the review tribunal system and the relationship between its constituent parts (these recommendations are made in Chapter 8).

The Council believes that implementation of the recommendations made in Chapter 8 is necessary to maximise the effectiveness of the merits review system in meeting its objectives. However, the recommendations made in Chapter 1-7 can stand alone and implementation of these recommendations would, of itself, significantly improve the performance of the system.

RECOMMENDATIONS THAT APPLY TO ALL REVIEW TRIBUNALS

Review tribunal objectives

In the Council’s view, all review tribunals should have the statutory objective of providing review that is fair, just, economical, informal and quick (Recommendation 3). As well as improving the quality of service provided by review tribunals to their users, pursuit by tribunals of these objectives will promote the objectives of the merits review system. The overall objective of the merits review system is to ensure that all administrative decisions are correct and preferable. The recommendations in this report all flow from this approach.

Accessibility of review tribunals and their processes

Review tribunals provide an important avenue of redress for people affected by administrative decisions. If those tribunals are to fulfil their functions effectively, people affected by administrative decisions must be aware of the making of those decisions and of their rights of review and how best to take advantage of those rights. This requires that potential applicants be aware of the existence of review tribunals and that they be assisted to take advantage of the services those tribunals provide.
Many recommendations in this report are made with all potential applicants in mind and will in some cases concern steps taken prior to the moment of first contact between applicants and review tribunals. Thus the Council recommends that:

- persons affected by administrative decisions should be notified of the making of those decisions and of their rights of review as a matter of course (Recommendation 52);
- it should be simple for applicants to apply for review (Recommendation 55);
- review tribunals processes, and information concerning tribunals and their processes, should be monitored continuously so that they meet the needs of applicants and other people that they are designed to assist (Recommendation 4 and 63); and
- review tribunals should give consideration to having a physical presence in more locations and to taking advantage of alternative forms of communicating with applicants (Recommendation 59 and 60).

Once an application has been made, it should be dealt with fairly and quickly, and in a way that allows applicants to participate in the review process and understand what is happening. With this in mind, the Council recommends that:

- tribunal processes should put applicants at ease and enable them to appear on their own behalf wherever possible (Recommendation 61 and 62);
- the Government should generally provide applicants with access to all information held by the Government that is relevant to the decision affecting them (Recommendation 10);
- consideration should be given to resolving cases through alternative dispute resolution (Recommendation 20);
- agencies whose decisions are being reviewed should assist review tribunals to bring about a resolution of the application (Recommendation 26); and
- the reasons for tribunal decisions should be capable of being easily understood by the people for whom they are prepared (Recommendation 28).

**Review tribunal members**

A review tribunal is, of course, only as effective as its membership. To be effective, tribunal members must be capable of performing the review function for which they are selected. They must also be able to make decisions free from undue influence in the performance of their functions and must also be perceived as being free from such influence. If this is not the case, the independence of review tribunals from the Government agencies whose decisions they are reviewing will be, or will be seen to be, diminished. The Council considers such independence, actual and perceived, to be essential to the credibility of review tribunals and of the merits review system as a whole.

The Council has made a number of recommendations relating to the selection, appointment and reappointment of tribunal members aimed at enhancing and protecting the credibility of review tribunals. In particular the Council recommends that:

- tribunals should be comprised of members with a wide range of skills and experience (Recommendation 32);
- all prospective members should be assessed against publicly-available selection criteria that relate to the tribunal’s review functions and statutory objectives (Recommendation 33); and
- assessment against selection criteria should be undertaken by a broad-based panel and appointments should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment (Recommendation 35 and 36).
Improving decision making

Review tribunals provide review of individual decisions. They are not charged with reviewing or developing government policy. Nevertheless, some review tribunal decisions raise issues that have a broader significance and a potential long-term impact on Government administration. Advantage can be taken of the reasons for these decisions to improve the quality of future agency decision making so as to benefit all Australians. This process is referred to in this report as the normative effect of tribunal decisions.

The Council has made a number of recommendations aimed at assisting an agency to use tribunal decisions to improve future agency decision making, including by promoting decision making that is consistent and equitable as between individuals in similar situations. In particular, the Council recommends that:

- agencies should formally acknowledge the potential normative benefits to be derived from review tribunal decisions (Recommendation 71);
- agencies should develop organisation structures and processes to maximise the potential normative benefits of review tribunal decisions (Recommendation 72); and
- agencies should respond quickly to a review tribunal decision that has potential implications for future decision making where they consider the decision to be incorrect: they should amend their policy and guidelines, seek to amend the law, seek further review of the decision or appeal against it, or make a public statement of their position in relation to the decision (Recommendation 73).

Management and administration of review tribunals

The way in which review tribunals are managed and administered can affect the way they are perceived by their users and the efficiency with which the objectives of the merits review system are achieved. With this in mind, the Council recommends that:

- each review tribunal should be funded by way of an appropriation of a single allocation of funds (Recommendation 79); and
- a Tribunals Executive be established to identify areas for cooperation between tribunals, planning and arranging for the provision of services common to all tribunals (Recommendation 85).

A NEW STRUCTURE FOR THE REVIEW TRIBUNAL SYSTEM

Reasons for structural change

All the recommendations made in this report can be characterised as either aiding applicants, enhancing the independence and credibility of review tribunals or ensuring that review tribunal decisions are used by agencies to improve decision making generally. It is clear that there is considerable overlap in the effect that can flow from implementation of the recommendations. For example, any reforms that enhance the independence and credibility of tribunals will improve tribunal decisions, which in turn will assist agencies to take advantage of the benefits of the normative effect of those decisions.

Although implementation of the recommendations made in Chapters 1 to 7 will result in necessary improvements in the merits review system as it is currently structured, the Council considers that the effect of these improvements would be enhanced by restructuring the tribunal system to create a whole that is greater than the sum of its constituent parts. With this in mind, the Council in Chapter 8 proposes a new structure for the tribunal system.
The Administrative Review Tribunal

In Chapter 8 the Council recommends the establishment of a new tribunal - the Administrative Review Tribunal (ART) - to replace the existing review tribunals. The ART will combine the best features of all existing review tribunals. The ART will be able to deal fairly, quickly and efficiently with individual applicants. It will also be able to ensure that cases raising issues of general significance can be identified at an early stage and be dealt with by authoritative Review Panels, so as to promote the normative effect of review tribunal decisions.

Promoting awareness of a single external merits review tribunal will be simpler and should make it more likely that applicants will be aware of their review rights in relation to government decisions. There will also be greater scope within a single organisation to rationalise the separate services now provided by the different review tribunals, both to applicants and potential applicants and in support of members and staff.

Applicants can expect that the ART will make the correct and preferable decision at the first opportunity. There will be no guaranteed access to a second level of external merits review. This reform will avoid unwarranted duplication of external merits review. At the same time, the ART will retain the capacity to permit cases that meet specified grounds to proceed to a second stage of external merits review - by Review Panels within the ART - to correct errors made at the first level.

The calibre of decision making of ART members will be enhanced if advantage is taken of the opportunity to appoint people to review a broader range of decisions than is currently possible in the case of members appointed to specialist review tribunals. At the same time, the ART will be able to retain specialisation among its membership to the extent considered desirable.
## CONTENTS

<table>
<thead>
<tr>
<th>ABBREVIATIONS</th>
<th>vii</th>
</tr>
</thead>
<tbody>
<tr>
<td>PREFACE</td>
<td>viii</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>1</td>
</tr>
</tbody>
</table>

### CHAPTER 1

**THE INQUIRY - BACKGROUND, SCOPE AND PROCESS**

**INTRODUCTION**
- Background To The Inquiry
- Aims Of The Inquiry

**THE SCOPE OF THE INQUIRY**
- Which bodies?
- Which aspects of merits review?

**HOW THE COUNCIL CONDUCTED THE INQUIRY**
- Discussion paper released for comment
- Supplementary discussion paper
- State and overseas experience considered
- Other views considered

**ADDITIONAL BACKGROUND INFORMATION ON THE MERITS REVIEW SYSTEM**

### CHAPTER 2

**OBJECTIVES OF THE MERITS REVIEW SYSTEM**

**INTRODUCTION**
- Background
- What is merits review?
- External review tribunals

**OBJECTIVES OF THE MERITS REVIEW SYSTEM**
- Introduction
- The Council’s view
- Weight to be given to government policy

**HOW WELL ARE THE OBJECTIVES CURRENTLY BEING MET?**
- The submissions
- The Council’s view
- Overall objective
- Specific objectives
- Misplaced criticism of the merits review system

**STATUTORY OBJECTIVES FOR INDIVIDUAL REVIEW TRIBUNALS**

**DIFFERENCES BETWEEN REVIEW TRIBUNALS AND OTHER DECISION MAKERS**
- Differences between tribunals and courts
- Differences between tribunals and agency decision makers
- Introduction
- The agency perspective
- The tribunal perspective
- Different outcomes to be expected
CHAPTER 3

REVIEW TRIBUNAL PROCESSES

INTRODUCTION

MERITS REVIEW AND PROCEDURAL FAIRNESS

Introduction

Awareness of judicial review

STYLE AND LEVEL OF FORMALITY OF TRIBUNAL PROCESSES

Introduction

Final or other merits review?

Formality and informality in tribunal processes

Features to be considered in relation to informality

Adversarial and non-adversarial approaches

PANEL COMPOSITION

Introduction

Multi-member panels?

Types of members

Criteria for numbers and type of members on tribunal panels

GATHERING INFORMATION

Agency documentation

‘New’ information and issues

Remitting cases for reconsideration by the agency

Powers to obtain evidence

Material to be disclosed during a review

PUBLIC JUSTICE, PRIVACY AND CONFIDENTIALITY

Openness of proceedings and decisions

Confidentiality and secrecy provisions

RESOLUTION OPTIONS

Decisions ‘on the papers’

Alternative Dispute Resolution

COLLECTIVE DECISION MAKING?

COSTS AWARDS IN REVIEW TRIBUNALS

REPRESENTATION

Introduction

Representation of Applicants

Assistance and representation prior to hearings

Assistance and representation at hearings

Role of lawyers

Training for applicants’ representatives

Agency participation in the review process

DECISIONS

Oral and written reasons for decisions

Content of reasons statements

CHAPTER 4

TRIBUNAL MEMBERSHIP

INTRODUCTION

Independence

The structure of the chapter

SKILLS AND EXPERIENCE

Legal skills

Specification of core skills and abilities

Judicial members

SELECTION AND APPOINTMENT OF MEMBERS

Selection process
CHAPTER 5 91

ACCESS, INFORMATION AND AWARENESS 91

INTRODUCTION 91
NOTIFICATION OF REVIEW RIGHTS 92
APPLICATIONS FOR REVIEW 95
  Form of application 95
  Time limits 96
  Application fees 97
LOCATION AND ACCESSIBILITY OF TRIBUNAL OFFICES 98
DESIGN AND LAYOUT OF TRIBUNAL PREMISES 99
GUIDANCE AND SUPPORT FOR APPLICANTS 101
  Interpreters and translation 102
  Tape-recording and transcripts 104
LEGAL AID AND ADVICE 104
AVAILABILITY OF TRIBUNAL DECISIONS 105
GENERAL PUBLIC INFORMATION 106
  Objectives 106
  Types of public information 106
    Practical information designed primarily for applicants 106
    Practical information directed mainly at regular users (agencies, advocates...) 107
  Performance information 107
  General principles of access to information 107
  Tribunal charters 108
  Statistical information 108
  Statutory obligations to report and publish 109
COMMUNITY LIAISON 110

CHAPTER 6 111

IMPROVING AGENCY DECISION MAKING 111

INTRODUCTION 111
  Improving the quality of decision making 111
  Agency culture 112
AGENCY ORGANISATION FOR RESPONDING TO REVIEW TRIBUNAL DECISIONS 112
  Introduction 112
  Formal commitment by agencies to enhancing the broader effects of review tribunal decisions 113
Departmental processes for maximising the effect of review tribunal decisions on the general quality of agency decision making

<table>
<thead>
<tr>
<th>Introduction</th>
<th>Communication</th>
<th>Staff training</th>
</tr>
</thead>
<tbody>
<tr>
<td>113</td>
<td>115</td>
<td>116</td>
</tr>
</tbody>
</table>

AGENCY RESPONSES TO REVIEW TRIBUNAL DECISIONS

<table>
<thead>
<tr>
<th>Introduction</th>
<th>Current practice</th>
<th>Issues concerning internal review</th>
</tr>
</thead>
<tbody>
<tr>
<td>117</td>
<td>118</td>
<td>119</td>
</tr>
</tbody>
</table>

CHAPTER 7
FINANCE, ADMINISTRATION AND MANAGEMENT

<table>
<thead>
<tr>
<th>INTRODUCTION</th>
<th>FINANCE AND ADMINISTRATION</th>
<th>The cost of merits review</th>
</tr>
</thead>
<tbody>
<tr>
<td>124</td>
<td>124</td>
<td>124</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Financial management</th>
<th>Management information</th>
<th>Financial management trends</th>
<th>Workload formulas</th>
</tr>
</thead>
<tbody>
<tr>
<td>125</td>
<td>125</td>
<td>126</td>
<td>126</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Financial and administrative links with agencies</th>
<th>Portfolio responsibility</th>
<th>Allocation of funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>126</td>
<td>126</td>
<td>127</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Opportunities for savings</th>
<th>Introduction</th>
<th>Personnel mix</th>
<th>Travel</th>
</tr>
</thead>
<tbody>
<tr>
<td>128</td>
<td>128</td>
<td>128</td>
<td>129</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Use of contractors</th>
<th>Sharing overheads</th>
<th>Other savings</th>
</tr>
</thead>
<tbody>
<tr>
<td>129</td>
<td>130</td>
<td>131</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TRIBUNAL STAFF</th>
<th>Introduction</th>
<th>Staff recruitment and responsibility</th>
<th>Staff training and development</th>
</tr>
</thead>
<tbody>
<tr>
<td>131</td>
<td>131</td>
<td>132</td>
<td>132</td>
</tr>
</tbody>
</table>

COUNCIL’S RECOMMENDATIONS: FINANCIAL IMPLICATIONS

CHAPTER 8
REVIEW TRIBUNALS - STRUCTURES AND RELATIONSHIPS

<table>
<thead>
<tr>
<th>INTRODUCTION</th>
<th>Purpose of chapter</th>
<th>Background</th>
</tr>
</thead>
<tbody>
<tr>
<td>136</td>
<td>136</td>
<td>136</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>STRUCTURAL CHANGE OF THE TRIBUNALS SYSTEM?</th>
<th>Conclusion: establishment of the Administrative Review Tribunal</th>
</tr>
</thead>
<tbody>
<tr>
<td>137</td>
<td>137</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ESTABLISHMENT OF AN ADMINISTRATIVE REVIEW TRIBUNAL</th>
<th>Overview</th>
<th>Basic structure of the Administrative Review Tribunal</th>
</tr>
</thead>
<tbody>
<tr>
<td>138</td>
<td>138</td>
<td>138</td>
</tr>
</tbody>
</table>
Diagram 138
Divisions of the ART 140
To which division should a case be referred? 141
Review Panels 142
Effecting the change 142
Membership of the ART 142
Membership structure 142
Cross appointment of members 143
Appointment to Review Panels 143
Qualifications of members 144
Appointment of members 144
Registrar 144
ART Executive Board 145
Financial and administrative links 145
REVIEW PANELS 146
Background 146
Limiting access to Review Panels: introduction 147
Limiting access to Review Panels: referral 148
Limiting access to Review Panels: permission for review 149
Introduction 149
Grounds of permission for review 149
Who can apply for permission? 151
The application for permission 151
Costs indemnity 151
Continued emphasis on ADR and early resolution 152
Nature of merits review 152
APPEALS TO THE FEDERAL COURT FROM THE ART 152
OBSERVATIONS ON THE COUNCIL’S RECOMMENDED STRUCTURE FOR THE MERITS REVIEW SYSTEM 154
Introduction 154
Independence 154
Awareness and access 155
Introduction 155
Better awareness among applicants of the review structure and process 155
Simpler, less complex processes 155
One level of external merits review to be the norm 156
Effect on formality of removal of further review as-of-right 156
Improved review in the veterans’ area 157
Quality of decisions 158
Efficiencies and savings 158
Introduction 158
Reduced likelihood of delay 158
More flexible use of resources 158
Cost of additional level of review? 159
Improved agency decision making 159
PRINCIPLES FOR LOCATION OF NEW REVIEW JURISDICTIONS 160
A NEW TRIBUNALS ACT? 160

LIST OF RECOMMENDATIONS 161

Appendix A 173
Terms of Reference 173
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>174</td>
</tr>
<tr>
<td>Review Tribunals - Background</td>
<td>174</td>
</tr>
<tr>
<td>C</td>
<td>190</td>
</tr>
<tr>
<td>List of Submissions</td>
<td>190</td>
</tr>
<tr>
<td>D</td>
<td>193</td>
</tr>
<tr>
<td>Council Submission to Senate Committee Inquiry</td>
<td>193</td>
</tr>
<tr>
<td>E1</td>
<td>197</td>
</tr>
<tr>
<td>E.2</td>
<td>198</td>
</tr>
<tr>
<td>Index</td>
<td>199</td>
</tr>
</tbody>
</table>
CHAPTER 1
THE INQUIRY - BACKGROUND, SCOPE AND PROCESS

INTRODUCTION

1.1. The Administrative Review Council (the Council) is an independent statutory body that advises the Australian Government on administrative law matters. The Council was established under the Administrative Appeals Tribunal Act 1975 (the AAT Act).

1.2. In December 1993, the Minister for Justice, the Hon Duncan Kerr MP, asked the Council to undertake an inquiry into the effectiveness of the Commonwealth (federal) system of external merits review tribunals (review tribunals). The terms of reference for the inquiry are reproduced at Appendix A.

1.3. This chapter briefly explains the background to the inquiry, and the aims the Council set for itself in undertaking the inquiry. The chapter then explains the scope of the inquiry, and the process that the Council followed in conducting the inquiry.

1.4. As part of the inquiry the Council issued a discussion paper, Review of Commonwealth Merits Review Tribunals, which is referred to throughout this report as ‘the discussion paper’. Copies of the discussion paper may be obtained from the Council.\(^1\)

1.5. The focus of the inquiry is on the five main Commonwealth review tribunals. They are:

- the AAT, which conducts merits review of a wide range of administrative decisions specified under more than 270 statutes, including review of the decisions of certain review tribunals;
- two specialist ‘first-tier’ tribunals - the Veterans’ Review Board (VRB) and the Social Security Appeals Tribunal (SSAT) - whose decisions may be reviewed by the AAT; and
- two specialist tribunals - the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT) - whose decisions are not subject to further merits review, although there is provision for referral of a review from these tribunals to a specially-constituted panel of the AAT in particular circumstances.\(^2\)

Background To The Inquiry

1.6. The AAT Act, which introduced broad reforms to the statutory merits review system, came into effect in 1975. There is now a substantial body of practical experience in the operation of the system, and there have also been a number of significant changes and developments in the intervening two decades. These factors mean that it is now timely to

---


\(^2\) The Council’s postal address is: GPO Box 3222, Canberra, 2601, Australia. Telephone inquiries may be made during normal business hours on 06-247-5100.

\(^3\) Section 381 of the Migration Act 1958 provides that the Principal Member of the IRT may, if the Principal Member considers that a decision reviewable by the IRT involves an important principle or issue of general application, refer the decision to the President of the AAT. The Principal Member of the RRT has a similar discretion in relation to decisions reviewable by the RRT (Migration Act 1958, section 443). These discretions are yet to be exercised.
examine the way different review tribunals operate and to reconsider the objectives of the merits review system.

1.7. The Commonwealth system of administrative law has been widely acknowledged as a world leader: one reason for this is that, through merits review, it offers to people affected by administrative decisions a broadly-available form of redress that is generally regarded as effective.

1.8. However, the system of review tribunals can no longer accurately be described as a coherent system. For example, there are major differences both between and within the different tribunals in such matters as:

- the degree of formality of proceedings, including the physical environment and the level of representation;
- the style of proceedings, including the use of techniques such as decisions ‘on the papers’, mediation, non-adversarial proceedings and adversarial hearings featuring cross-examination;
- the mix of skills brought to tribunal panels, including the use of single-member panels;
- the level of information and assistance provided by tribunals and agencies to applicants and to the broader community;
- the method of selecting tribunal members, their terms and conditions of appointment, and the level of professional development and support provided to them;
- the availability and style of internal review within decision-making agencies;
- the methods adopted to ensure that tribunal decisions are considered by agencies in the development of their policy, legislation and decision-making processes; and
- the cost of the merits review process.

1.9. Some of these differences are required by the legislation under which the tribunals operate. Others result from choices made by review tribunal managers, members and staff.

1.10. Some of the differences are justified because of the different nature of the decisions being reviewed by the various tribunals, and the differing needs of user groups. For instance, it may be appropriate for the procedures adopted during review of a complex licensing or taxation decision affecting a large business to be different from those adopted during review of a decision affecting a pension recipient. However, in the Council’s view, not all differences in the rules and practices of the various tribunals may be explained on this basis.

1.11. The environment in which tribunals operate is not static. For example, in the period since this inquiry commenced, the following legislative amendments have been made or are proposed in Bills before Parliament:

- in the Administrative Appeals Tribunal (the AAT):
  - the establishment of a small taxation claims tribunal within the AAT’s Taxation Division;\(^4\)
  - the incorporation of the Security Appeals Tribunal into the AAT as a new Security Appeals Division;\(^5\) and

\(^4\) This is proposed to be effected by the Law and Justice Legislation Amendment Bill (No 2) 1995, currently before the Parliament. See also footnote 204 and the accompanying text.

\(^5\) This is proposed to be effected by the Law and Justice Legislation Amendment Bill (No 3) 1994, currently before the Parliament. See also footnotes 83 and 205 and the accompanying text.
- a range of procedural amendments to implement recommendations of the 1991
  AAT review;  
• in the veterans’ jurisdiction:
  - a new mechanism for determining general principles about the cause of medical
    conditions;  
  - provision for reimbursement for applicants to the Veterans’ Review Board (VRB) of
    the cost of obtaining medical reports for use in VRB proceedings;  
• in the welfare rights jurisdiction:
  - the incorporation of the Student Assistance Review Tribunal (SART) into the
    SSAT;  
  - the vesting in the SSAT and AAT of jurisdiction over decisions under legislation
    administered by the Department of Employment, Education and Training,
    including decisions in the employment services area;  
• in the migration jurisdiction:
  - a new stream of bridging visas for illegal entrants, review of which by-passes
    internal review and requires a fast-track consideration;  
  - introduction of a facility for referral of important cases from the Immigration
    Review Tribunal (IRT) to a specially-constituted panel of the AAT;  
  - a range of procedural and administrative amendments to the Migration Act 1958 to
    implement recommendations of the 1992 report of the Committee for the Review of
    the System for Review of Migration Decisions (CROSROMD).  

1.12. At the administrative level, the following changes have occurred:
• the AAT has assessed the use of conference registrars and decided that they should
  continue to be used;  
• major changes have been made to internal review structures in the Australian Taxation
  Office and the Department of Employment, Education and Training; and  
• a new computerised decision-support system has been introduced in the Department of
  Veterans’ Affairs. That department is also committed to making greater use of existing
  internal review mechanisms.

---

6 Steering Committee for the Review of the Administrative Appeals Tribunal Report of the Review of the
Administrative Appeals Tribunal Canberra, 1991. Some changes recommended by the review were enacted by the
Administrative Appeals Tribunal Amendment Act 1993 while others were included in the Law and Justice Legislation
Amendment Bill (No 3) 1994, currently before the Parliament.

7 See Veterans’ Affairs Entitlements Act 1986 as amended by the Veterans’ Affairs (1994–95 Budget Measures)
Legislation Amendment Act (No 2) 1994. See also Appendix B, paragraphs 52 and 53.

8 See the Veterans’ Affairs Entitlements Act 1986, section 170A, inserted by section 34 of the Veterans, Affairs (1994–
95 Budget Measures) Legislation Amendment Act (No 2) 1994.

9 The SART was abolished as a result of amendments to the Student and youth Assistance Act 1973 by the Student

10 Employment Services Act 1994, Chapter 4, Part 4.10.

11 A bridging visa permits people unlawfully present in Australia, who would otherwise be subject to mandatory
  detention, to avoid mandatory detention pending final determination of applications for other visas.

12 See paragraphs 3.78 and 5.27.

13 See Migration Act 1958, section 381.

14 Committee for the Review of the System for Review of Migration Decisions Non-Adversarial Review of Migration
recommendations are proposed to be effected by the Migration Legislation Amendment Bill (No 5) 1995
currently before the Parliament.
1.13. Also, in May 1995 the Australian Government published the justice Statement\textsuperscript{15} which formed the Government’s response to the 1994 report \textit{Access to justice: An Action Plan}.\textsuperscript{16} The justice Statement included a range of initiatives to make the Australian justice system fairer and more accessible: some of these initiatives are directly relevant to review tribunals and the operation of the merits review system.

1.14. Where relevant, details of specific (or proposed) changes to the operating environment of tribunals are discussed in the body of the report.

**Aims Of The Inquiry**

1.15. In undertaking this inquiry, the Council sought to:
- assess the overall performance of the system of review tribunals;
- identify best practice within that system; and
- make recommendations for the development and adjustment of the system to enhance its performance.

1.16. In order to meet these aims, the Council reconsidered the reasons for the establishment of review tribunals and its evolution.

1.17. The Council sought to avoid duplicating the considerable body of findings and recommendations arising from other recent studies and reviews, including the CROSROMD report, the Veterans’ Compensation Review Committee (Baume Committee) report,\textsuperscript{17} and the justice Statement. The Council has taken these reports into account, and has not considered in detail issues dealt with in those reports.

**THE SCOPE OF THE INQUIRY**

**Which bodies?**

1.18. As noted at paragraph 1.5, this inquiry has focused on the five main Commonwealth review tribunals: the reason is that those tribunals all clearly and exclusively undertake merits review of administrative decisions and are therefore appropriate subjects for detailed study. In addition to those tribunals, the discussion paper also referred to the SART, which conducted merits review of decisions concerning student assistance payments. On 1 January 1995, the SART was incorporated into the SSAT.\textsuperscript{18}

1.19. The discussion paper invited submissions on whether the inquiry should extend to a number of other Commonwealth bodies, including:
- the Australian Industrial Relations Commission;
- the Trade Practices Tribunal;
- the professional services review tribunals;
- the Superannuation Complaints Tribunal;

\textsuperscript{15} Attorney-General’s Department \textit{Justice Statement} Canberra, 1995.
\textsuperscript{16} Access to Justice Advisory Committee \textit{Access to justice: An Action Plan} Canberra, 1994. The Access to Justice Advisory Committee, chaired by Ronald Sackville QC, was established by the Australian Attorney-General, the Hon Michael Lavarch MP, and the Australian Minister for Justice, the Hon Duncan Kerr MP, to undertake a comprehensive review of the Australian justice system.
\textsuperscript{17} Veterans’ Compensation Review Committee \textit{A Fair Go: Report on Compensation for Veterans and War Widows} Australian Government Publishing Service, Canberra, 1994.
\textsuperscript{18} The SART was abolished as a result of amendments to the \textit{Student and Youth Assistance Act 1973} by the \textit{Student Assistance (Youth Training Allowance) Act 1994}.\textsuperscript{
• the Employment Services Regulatory Authority;
• the Merits Protection and Review Agency;
• the Federal Police Disciplinary Tribunal; and
• the Defence Force Discipline Appeals Tribunal.  

1.20. The Council is aware that the principles and recommendations set out in Chapter 2 through to Chapter 7 of this report may be applicable to other bodies whose functions include undertaking merits review, although it has not had an opportunity during this inquiry to consider those bodies in detail. The Council therefore recommends that the Government should consider applying those recommendations to any body that undertakes external merits review of administrative decisions.

**Recommendation 1**

The Government should consider applying the recommendations made in Chapter 2 through to Chapter 7 of this report to any body that undertakes external merits review of administrative decisions.

1.21. However, the Council does consider it appropriate to comment specifically on the merits review jurisdiction of one of these bodies: the Australian Industrial Relations Commission (AIRC). The principal work of the AIRC involves the prevention and settlement of industrial disputes. The AIRC’s merits review jurisdiction covers review of certain findings of occupational health and safety investigations made under section 48 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. There have been very few reviews conducted under this jurisdiction, and the AIRC itself feels that the jurisdiction does not sit comfortably with its principal role of resolving industrial disputes. All interested parties favour a transfer of the jurisdiction to the AAT. The AAT already has jurisdiction to review similar decisions made under other sections of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. In the Council’s view the location of this merits review jurisdiction with the AIRC is anomalous, and the Council recommends that it be transferred to the AAT.

**Recommendation 2**

Merits review of decisions under section 48 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* should be transferred from the Australian Industrial Relations Commission to the Administrative Appeals Tribunal.

1.22. Because ‘tribunal’ is a word used to describe a wide range of bodies performing a variety of functions, not limited to merits review, there has been some misunderstanding of what Commonwealth review tribunals are, and are intended to do. This inquiry does not cover the range of other bodies that have been established to make primary administrative decisions or to enforce standards. These bodies include the Australian Broadcasting Authority, the Human Rights and Equal Opportunity Commission and the National Native Title Tribunal. It is also not concerned with the increasing range of industry ombudsman and complaint handling schemes, which generally are industry self-regulatory mechanisms.

---

that do not involve review of decisions made under statute.\textsuperscript{20} The inquiry has not examined these bodies because they do not undertake merits review of administrative decisions. Nor is the inquiry concerned with the Commonwealth Ombudsman, who investigates government decisions and maladministration, and has powers to make reports and recommendations, but who does not have power to remake administrative decisions.\textsuperscript{21}

\textbf{Which aspects of merits review?}

1.23. In order to report fully on the terms of reference, the Council has examined the operations of review tribunals, and has also looked at those aspects of agency processes that are closely connected to the aims and operations of review tribunals. These include merits review that is conducted within agencies themselves (internal review), and agency processes for dealing with any principles of general application to be derived from review tribunal decisions.

1.24. The Council is aware that there are continuing concerns about some aspects of government regulation and decision making which are not covered in the report. The Council considers it important that readers of the report understand its limits. In particular, the following matters are not within the focus of the Council’s inquiry:

- the question of which administrative decision-making powers should be subject to merits review - the Council notes that it has a continuing role in advising the Australian Government on that subject, and has developed and published guidelines for that purpose;\textsuperscript{22}
- the question whether other forms of reviewing government decisions are superior to, or should replace, merits review by review tribunals;\textsuperscript{23} and
- the extent to which legislation should provide detailed rules and/or reduce the extent to which decision makers may exercise discretion in individual cases.

\textbf{HOW THE COUNCIL CONDUCTED THE INQUIRY}

\textbf{Discussion paper released for comment}

1.25. The discussion paper was published in September 1994. Its preparation involved direct consultation with tribunals, agencies, and non-government organisations, as well as a review of previous reports and other literature.

1.26. The Council invited submissions on the issues raised in the discussion paper, with a closing date of 23 December 1994. A list of persons and organisations who made submissions is provided in Appendix C. Most of these persons and organisations agreed to have their submissions made publicly available, and they were put on deposit in libraries in Sydney and Melbourne, and were available on request from the Council’s secretariat in Canberra.

\textsuperscript{20} The Council notes that the Telecommunications Industry Ombudsman was required to be established under licences issued under the \textit{Telecommunications Act 1991}.

\textsuperscript{21} The functions of the Ombudsman are set out in the \textit{Ombudsman Act 1976}.


\textsuperscript{23} In Chapter 2 of this Report, the Council discusses the justification for external merits review, and supports a continuing role for review tribunals.
Supplementary discussion paper

1.27. The discussion paper introduced the subjects of cost analysis and comparative assessment of tribunal effectiveness, and noted that these subjects would be dealt with in a supplementary discussion paper on comparative tribunal expenditure. That paper (the supplementary discussion paper) was published in March 1995, and submissions on the issues it raised were received from most tribunals and agencies. The Council did not attempt to conduct detailed performance or efficiency audits of each tribunal.

1.28. During the course of the inquiry, the Council considered the available statistics on tribunal caseload and outcomes, with a view to drawing conclusions from analysis of the figures. The Council found the figures available from tribunals to be of limited use for the purpose of comparative analysis, for the reasons set out in Chapter 5.

State and overseas experience considered

1.29. The discussion paper included a brief summary of the most relevant experience in the Australian States and overseas. It was noted there that the report *Access to justice: An Action Plan* contains a useful summary of the administrative law mechanisms in place in the Australian States. A number of submissions referred to particular features of administrative review mechanisms in other jurisdictions. While reviews of administrative review tribunals are under way in both Western Australia and Victoria, the only significant development during the inquiry period was the New South Wales Attorney-General’s indication in May 1995 of the intention of the New South Wales Government to establish a general administrative appeals tribunal in that State.

1.30. Contact was made with administrative law bodies and academics in the United States, Canada, New Zealand and the United Kingdom. Overseas experience is referred to where relevant in the body of the report.

---

27 This indication was given in a speech given by the New South Wales Attorney-General, the Hon Jim Shaw QC, to the New South Wales Chapter of the Australian Institute of Administrative Law on 29 May 1995. Copies of the speech may be obtained from the (New South Wales) Office of the Attorney-General and Minister for Industrial Relations (telephone 02-228-8188).
Other views considered

1.31. The Council engaged consultants to seek the views of various groups, including clients of agencies, agency staff, tribunal members and staff, and welfare rights and other advocacy and advice workers. The aim of this was to ensure that all relevant views and opinions were brought to the Council’s attention, as the Council was concerned that written submissions would not necessarily represent the views of all interested parties.

ADDITIONAL BACKGROUND INFORMATION ON THE MERITS REVIEW SYSTEM

1.32. This report assumes a certain level of knowledge about merits review and its place in the Commonwealth system of administrative law. It does not repeat all the explanatory material contained in the discussion paper, although sufficient background information has been included to provide a context for the recommendations made. Appendix B describes the evolution of merits review in the context of broad-ranging administrative law reforms introduced from the early 1970s. This appendix provides background information on those reforms and many of the concepts discussed in this report. Readers unfamiliar with administrative law may find it particularly useful to refer to this appendix.
CHAPTER 2

OBJECTIVES OF THE MERITS REVIEW SYSTEM

INTRODUCTION

Background

2.1. In the course of the inquiry, it has become clear to the Council that there is a variety of views on what the objectives of the merits review system are, or should be. Without a clear understanding of those objectives, it is not possible to properly assess the success of the system. It is therefore important that the objectives be clarified to provide a foundation for the remainder of this report, and this chapter addresses that topic. It also describes the differences between review tribunals and other decision makers (agencies and courts), including the different role and environment of review tribunals.

What is merits review?

2.2. Merits review is the process whereby an administrative decision of the government is reviewed ‘on the merits’: that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision - affirming, varying or setting aside the original decision - is made. Merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker.28

2.3. Merits review is often described as a process by which the person or body reviewing the decision ‘stands in the shoes’ of the original decision maker (there is further discussion of this metaphor in paragraph 2.54 and following). This is because the reviewing person or body, like the original decision maker, must make findings of fact and apply the relevant law to those findings to make a decision, having regard also to any relevant government policy. In addition, the reviewing person or body may only exercise the powers and discretions that were available to the original decision maker.

External review tribunals

2.4. Merits review can be undertaken by a person or body within the government agency that made the decision under review. That type of merits review is called ‘internal review’, and is discussed in Chapter 6. However, the review tribunals being considered in this inquiry undertake ‘external merits review’: ‘external’, because the review is undertaken by a body external to the agency that made the original decision. What distinguishes these tribunals from bodies undertaking internal review is that they are established at some degree of arm’s length from the government agencies whose decisions they review in order to ensure that, to the greatest extent possible, their decisions are made, and are seen to be made, independently from those government agencies.

28 The Ombudsman may undertake a form of merits review while investigating government maladministration but does not have power to substitute her or his decision for that of the original decision maker - she or he can only make recommendations. Where a statutory merits review process exists which has the potential to resolve a complaint, the Ombudsman will usually suggest that a complainant follow that route.
OBJECTIVES OF THE MERITS REVIEW SYSTEM

Introduction

2.5. The discussion paper listed a number of suggested objectives of the merits review system, and invited comments on those suggestions. The objectives listed were:

- to achieve correct and preferable decisions,
- to be accessible and responsive;
- to promote better quality decision making by agencies; to allow improvements to policy and legislation;
- to be coherent; and
- to make efficient use of resources.

2.6. The discussion paper also asked submissions to identify the relative weight to be accorded each objective. Most submissions agreed that they were all valid objectives, but there was no clear consensus about their relative importance.

2.7. In their submissions, agencies tended to regard the objectives of improving the quality of their own decision making and making efficient use of resources as more important. Agencies also tended to view the objective of achieving the correct and preferable decision as requiring that review tribunals give greater regard both to government policy, and to the administrative and practical constraints on agency decision makers.

2.8. In general, most other submissions indicated that the two most important objectives are reaching the correct and preferable decision, and providing an accessible and responsive system. However, some submissions noted that these two objectives are not necessarily compatible.

The Council’s view

2.9. In the Council’s view, the overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable.

2.10. Achieving this objective involves more than ensuring that the correct and preferable decision is made in those cases that come before review tribunals. It also means that all persons who might benefit from merits review are informed of their right to seek review.

---

29 There is much comment, in the submissions about the difference between ‘objectives’, ‘goals’ and ‘strategies’. Whatever term is preferred, the purpose of this discussion is to determine what the merits review system should be aiming to achieve.


31 In the leading authority on the role and function of the AAT in undertaking merits review of decisions - the decision of the Full Federal Court in Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 - Chief Justice Bowen and Justice Deane said, at page 589, that the question for the determination of the AAT was whether the decision was the ‘correct or preferable one’ on the material before the tribunal. In the Council’s view, their Honours intended to convey the meaning that a decision must be correct, but that if there is a range of decisions that could be made, all of which would be correct, the decision maker has a choice as to the preferable decision. However, the phrase ‘correct or preferable’ may give the impression that a decision may be the preferable decision, even though it is not correct. For this reason, the Council prefers the phrase ‘correct and preferable’.

and are in a position to exercise those rights, and that the overall quality of agency decision making is improved. This overall objective therefore incorporates elements of fairness, accessibility, timeliness and informality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes.

2.11. In seeking to meet this overall objective, the Council considers that the merits review system should have several specific objectives. They are:

- providing review applicants with the correct and preferable decision in individual cases;
- improving the quality and consistency of agency decision making - there are two main ways this can be achieved:
  - by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (referred to in this report as the ‘normative effect’); and
  - by taking into account review decisions in the development of agency policy and legislation;
- providing a mechanism for merits review that is accessible (cheap, informal and quick), and responsive to the needs of persons using the system; and
- enhancing the openness and accountability of government.

2.12. The objectives noted in the previous two paragraphs are referred to collectively in this report as the objectives of the merits review system.

2.13. Independence, coherence and efficiency have also been suggested as objectives of the merits review system. In the Council’s view, while these are important attributes which contribute to achieving the objectives listed above, they are not objectives in themselves.

2.14. Independence is an attribute which can contribute to the overall objective of the merits review system by making it fairer and more credible, and by making government decision makers more accountable. However, while the quality of independence remains the same at different stages in the decision-making process, the way that it is achieved can vary: this is discussed in detail in Chapter 4.

2.15. If the merits review system is coherent, in the sense that its component parts are clearly and logically related, that coherence can help to make the system more accessible (due to better understanding) and more open and accountable (through enhanced visibility and credibility).

2.16. The efficient use of resources is always desirable, and it is increasingly being required of all elements of the merits review system.

Weight to be given to government policy

2.17. As noted in paragraph 2.7, some agencies argued in their submissions that review tribunals should be required to give greater regard to government policy, thereby changing the purpose of merits review from achieving the best result for the applicant (correct and preferable) to ensuring that the agency’s decisions are lawful and not unreasonable (correct and reasonable). In other words, it was suggested that provided an agency’s decision is both lawful and reasonable, review tribunals should defer to the agency’s view.
2.18. However, the Council considers that any development along these lines would be inappropriate. In the Council’s view, the current basis of merits review (that is, whether decisions under review are correct and preferable) provides people whose interests are affected by government decisions with the most effective means of ensuring that they receive the best possible decision. In the Council’s view, this basis of merits review does not require modification, although there may be some need to ensure that it is explained more clearly within agencies.

**HOW WELL ARE THE OBJECTIVES CURRENTLY BEING MET?**

**The submissions**

2.19. The Council’s assessment of the extent to which the merits review system is currently meeting its objectives is based on submissions made to the Council and consultations undertaken by the Council. Council members have also drawn on their own experience with the system.

2.20. Views vary on the success of the merits review system in meeting its objectives.

2.21. The system is generally seen as having succeeded in providing large numbers of people, affected by a diverse range of decisions, with a fair and accessible mechanism for having the decisions that affect them reconsidered. In some jurisdictions where new external merits review rights have been provided relatively recently (for example, social security and migration), these new rights represent a vast improvement over the previous situation. The Council also notes that there is fairly broad in-principle support for the less formal, more investigative approaches being taken by the specialist tribunals (particularly the SSAT, IRT and RRT).

2.22. However, there are concerns about specific aspects of the operations of most of the review tribunals, and many suggestions for improvements. Many non-government organisations consider the performance of review tribunals to be generally satisfactory, although they are critical of particular features.

2.23. Review tribunal members and staff who participated in the Council’s consultations generally considered that their tribunals were meeting their objectives. However, the response was not uniformly positive. Some tribunal members and staff consider that their tribunals place too much emphasis on fairness and consistency at the expense of simplicity, speed and low cost. Some AAT members consider that the AAT is too legalistic and that its decision making is too slow. A number of RRT members expressed concern about the effectiveness, efficiency and fairness of their tribunal, although the Council notes that these views may be based on those members’ dissatisfaction with the provisions of the Migration Act 1958, or an unwillingness to accept a non-adversarial approach to conducting review.

**The Council’s view**

*Overall objective*

2.24. The Council generally agrees with the views put to it about the merits review system’s success in meeting its objectives. In particular, the Council considers that the
system has gone a significant way towards meeting the overall objective of ensuring that all
administrative decisions of government are correct and preferable. It has done this by
providing large numbers of people, affected by a diverse range of decisions, with a
relatively fair and accessible mechanism for having the decisions that affect them
reconsidered.

2.25. Over the last two decades, the Council has observed some improvement in the
quality of decision making as a result of the reforms to Commonwealth administrative law
which commenced in the mid-1970s. Agencies and their staff are now more aware of the
legal framework within which their decisions are made, and most agencies have become
more focused on serving the needs of their clients. It is also now more common for a
decision to be accompanied by a statement which clearly sets out the reasons for the
decision.

2.26. However, doubts have been expressed about the extent to which these changes
reflect an underlying cultural change within agencies to embrace genuinely administrative
review as a necessary part of the processes of public administration.\(^{34}\) And it is clear that
there is room to improve the extent of the effect of tribunal decisions on the quality and
consistency of agency decision making. In particular, it is clear that improvements could be
made in the processes adopted by agencies to consider the implications of, and respond to,
review tribunal decisions. This is discussed further in Chapter 6.

Specific objectives
2.27. The Council’s assessment of the merits review system’s performance is also
qualified by the Council’s concerns about the ability of the system to currently satisfy its
other, specific objectives.

2.28. In general, review tribunals appear to be meeting the objective of delivering correct
and preferable decisions. However, the relatively high success rate of appeals both from
the AAT to the Federal Court (see the discussion of judicial review in paragraphs 3.6-3.11)
and from agencies and other review tribunals to the AAT,\(^{35}\) is an indication that there may
be room for improvement. In addition, there is some concern about different results being
reached in cases that are, or that are perceived to be, similar. This concern applies to all the
tribunals, although it tends to be raised more frequently in relation to the IRT and RRT. The
absence of clear reasons why different decisions are sometimes reached in apparently
similar cases leads the Council to the view that it is likely that not all applicants are being
treated equitably.

\(^{34}\) Mason, A Administrative Law-Form vs Substance address given to the 1995 Administrative Law Forum
(convened by the Australian Institute of Administrative Law and Institute of Public Administration Australia),
Canberra, April 1995 (publication of proceedings forthcoming). In addressing this conference, the former Chief
Justice of the High Court, Sir Anthony Mason, said that:

> Despite re-assuring statements that the [administrative law] system has brought about a significant
change in the administrative culture and an improvement in the quality of administrative decision-
-making, I am not altogether convinced that these statements are entirely accurate... [and] I doubt
that we have succeeded in bringing into existence a new and enduring administrative culture.

\(^{35}\) In the period 1993-94, 125 appeals from the AAT were filed at the Federal Court. Of these, 28% were either
allowed/remitted while 46% were dismissed/struck out (source: Administrative Appeals Tribunal Annual
Report 1993-1994). In 1993-94, 58% of applications finalised in the AAT’s Taxation Division were set aside or
varied (a figure considerably higher than in the preceding two years), while 52% of applications finalised in the
AAT’s General and Veterans’ Divisions were set aside or varied (these divisions comprise the remainder of the
AAT’s review jurisdiction). Of SSAT decisions appealed to the AAT during 1993-94, 48% were either set aside
statistics were provided in Administrative Review Council Review of Commonwealth Merits Review Tribunals -
2.29. The accessibility and responsiveness of the various tribunals that make up the merits review system varies. All tribunals are now devoting considerable time and effort to improving access to their services through outreach (efforts to bring government and a range of social services to people where they live or spend time) and community education, as well as through improved support and guidance to non-agency applicants. The time between the lodgement of an application for merits review and its finalisation will vary from case to case. In general, however, the Council notes that review by the SSAT tends to be relatively timely. The other review tribunals (particularly the AAT) tend to be less timely, although the Council notes that in the migration area there are often good reasons why some matters take a long time to resolve, and that delays in the proceedings may work in favour of applicants.

2.30. Review tribunals generally provide applicants with a relatively inexpensive form of review. However, the system as whole is viewed by some as being relatively expensive to government. The report discusses ways in which the system can be made more efficient: these include the structural changes recommended in Chapter 8, as well as specific recommendations aimed at improving the extent to which review tribunal decisions should be taken into account by other decision makers (including other tribunals), and improving the extent to which review tribunals cooperate in the use of resources.

2.31. In general, review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions. However, the value of this contribution has at times been affected by perceptions about review tribunals’ lack of independence from the agency or agencies whose decisions they review. Some of the sources of these perceptions are the arrangements for the appointment of review tribunal members, and for the funding and administration of tribunals. These perceptions damage the credibility of individual review tribunals and of the system as a whole.

2.32. The extent to which the system is meeting the objective of improving the quality of government decision making is discussed in paragraph 2.26.

2.33. In light of this assessment of the performance of the merits review system, it is clear to the Council that the challenge is to achieve improvements in the areas of:
- consistency and speed of review tribunal decision making;
- improving the effect of review tribunal decisions on the quality of government decision making;
- making the system more cost-effective; and
- improving the overall credibility of the system;

without sacrificing the valued features of the individual tribunals.

**Misplaced criticism of the merits review system**

2.34. The Council notes that some criticisms directed at review tribunals are, in essence, criticisms of the statutory provisions on which tribunals, as decision makers, are required to base their decisions. For example, there is dissatisfaction among some welfare rights groups with the removal from the Social Security Act 1991 of some of the discretions of decision makers. Similarly, criticism is sometimes directed at the migration review
tribunals in relation to matters that are beyond the control of those tribunals, such as the codification of eligibility criteria and procedures under the *Migration Act 1958*, and the fact that some assessments made as part of the decision-making process (for example, assessments of applicants’ qualifications and medical conditions) are not made subject to external merits review.

**STATUTORY OBJECTIVES FOR INDIVIDUAL REVIEW TRIBUNALS**

2.35. Currently, the emphasis given to the various objectives noted at paragraph 2.11 varies at different stages in the merits review system.

2.36. Three merits review tribunals (the SSAT, IRT and RRT) have the statutory objective of ‘providing a mechanism of review that is fair, just, economical, informal and quick’.\(^{37}\) It is largely within the discretion of each tribunal to determine how to meet this objective.

2.37. The AAT is required by the AAT Act to conduct proceedings with ‘as little formality and technicality, and as much expedition, as the requirements of the [AAT] Act and of every other relevant enactment, and a proper consideration of the matters before the tribunal, permit’.\(^{38}\) This formulation would seem to indicate that for the AAT, speed, informality and economy of decision making should generally be subordinate to a proper consideration of the merits of cases under review.

2.38. The Veterans’ Entitlements Act 1986 does not prescribe a statutory objective for the VRB.

2.39. Some submissions on the statutory objectives of review tribunals suggested that greater emphasis should be placed on achieving justice in individual cases in those review tribunals that make the final decision on the merits (the AAT, IRT and RRT), whereas the first-tier tribunals (SSAT and VRB) should be able to give a higher priority to informality and speed.

2.40. However, the Council considers that the objectives of the merits review system should be reflected in the same statutory objectives for all review tribunals, irrespective of differences in the nature of each tribunal’s jurisdiction and of their relationship to each other within the overall system. This would help to emphasise the distinctive character of review tribunals.

2.41. In the Council’s view, the appropriate statutory objective for all review tribunals is that currently prescribed in relation to the SSAT, IRT and RRT. The question of how to meet that objective - both in relation to the overall management of review tribunals and in relation to individual cases under review - should be left to the discretion of each tribunal. However, provisions in the statutes establishing each tribunal, particularly provisions dealing with the tribunal’s procedures and provisions, should be consistent with this statutory objective.

---

\(^{37}\) See *Social Security Act 1991*, section 1246 (SSAT); *Migration Act 1958*, section 353 (IRT) and section 420 (RRT).

\(^{38}\) *Administrative Appeals Tribunal Act 1975*, section 33.
Recommendation 3

All review tribunals should have the statutory objective of providing a mechanism of review which is ‘fair, just, economical, informal and quick’. Provisions in the statutes which establish review tribunals should be consistent with this statutory objective.

2.42. The Council notes that the statutory objectives of the review tribunals do not currently refer to the potential effect of their decisions on other decision makers (including agencies). In the Council’s view, it is appropriate that this objective of the merits review system is not incorporated into the statutory objectives of individual tribunals. Although review tribunal decisions can assist in improving the overall quality of government decision making, the primary responsibility for ensuring that they do rests with agencies. At the same time, tribunals can and should work cooperatively with agencies to enhance the effect of their decisions on the general quality of agency decision making. These issues are discussed in greater detail in Chapter 6.

DIFFERENCES BETWEEN REVIEW TRIBUNALS AND OTHER DECISION MAKERS

Differences between tribunals and courts

2.43. During the inquiry, the Council encountered some criticisms of tribunals, which were based on comparisons with features of courts (for example, tenure of appointments, reliance upon the rules of evidence, and the style of hearings).

2.44. Perceptions that review tribunals are part of the court system have been reinforced by the appointment of judges to the AAT, the inclusion of the word ‘appeals’ in the names of the AAT and SSAT, and by the adoption of court-like processes and procedures by some tribunals (the AAT in particular).

2.45. In the Australian States and some overseas legal systems, review tribunals may perform functions very similar to those performed by courts. At the State level, for example, there is no entrenched constitutional requirement of a strict separation of judicial and executive powers, and therefore there is not the same constraint of the extent to which State tribunals can be invested with functions that could also be performed by a court.

2.46. This flexibility is not, however, available at the Commonwealth level. The Constitution requires a strict separation of judicial power from Commonwealth legislative and executive powers. Only a court constituted in accordance with the provisions of the Constitution can exercise Commonwealth judicial power.

2.47. This constitutional principle has recently been restated by the High Court in Brandy v Human Rights and Equal Opportunity Commission (the Brandy decision). The High Court found that provisions in the Racial Discrimination Act 1975 allowing for determinations of the Human Rights and Equal Opportunity Commission (HREOC) to be enforced by way of registration in the Federal Court required HREOC to exercise Commonwealth judicial power. As HREOC was not constituted as a court within the terms of the Constitution, the provisions breached the requirements of the Constitution and were invalid.

2.48. There has been speculation about the possible implications of the Brandis decision for merits review tribunals. The Council takes the view that decisions of merits review tribunals, like original decisions, involve the exercise of executive power, and are therefore unlikely to infringe the constitutional requirement of separation of powers.\textsuperscript{40} If the legislation governing the making of an original decision is constitutional, then it should generally follow that review tribunal decisions made on review of the original decision will not infringe the requirements of the Constitution.\textsuperscript{41}

2.49. As a result of the required separation of judicial power from other governmental powers, review tribunals cannot exercise the judicial power of the Commonwealth. Review tribunals are therefore not an extension of the courts system, but are part of the executive arm of government. This does not in any way diminish the need for those tribunals to enjoy an appropriate degree of independence from the agency whose decisions it is reviewing; this is discussed in more detail in Chapter 4. However, the Council notes that, within constitutional limits, the statutory framework within which tribunals operate and the extent to which the processes and other characteristics of tribunals are court-like are matters within the discretion of the Government and the Parliament.

2.50. The constitutional requirement of a strict separation of judicial power from other governmental powers is seen by some as a limitation on the Australian Government’s ability to provide accessible alternatives to dispute resolution by courts. However, it can also be viewed as beneficial in the context of the Commonwealth system of review tribunals. For example, Professor Saunders has stated that the separation of powers doctrine:

\[
... \text{enables a clear distinction to be drawn between courts and tribunals; and it provides a framework within which tribunals can develop a special role for themselves in the Australian system of government, based on their own particular functions and procedures, rather than limping along as quasi courts}.\textsuperscript{42}
\]

2.51. The Council notes, however, that it is not a simple task to reconcile the place of review tribunals as part of the executive arm of government with their role of providing merits review that is, and is seen to be, independent of the agency whose decision is under review, and that is undertaken according to processes and procedures that are fair and impartial.

2.52. An important feature of the relationship between review tribunals and courts is the basis upon which a tribunal decision may be appealed to the courts. Aspects of this issue are discussed in Chapter 8 in light of the reforms that are recommended in that chapter. General issues relating to review by courts of administrative decisions have previously been the subject of Council advice.\textsuperscript{43}

\textsuperscript{40} The Council notes that a recent challenge to the power of the SSAT in relation to the determination of debts against the Commonwealth based on an argument that this amounted to an exercise of judicial power has been rejected - Justice Toohey of the High Court refused an application for prohibition against the SSAT: see Registrar, Social Security Appeals Tribunal ex parte Townsend (1995) 130 ALR 163.

\textsuperscript{41} As to the power of review tribunals to order costs, see paragraphs 3.158-3.162.

\textsuperscript{42} Professor Cheryl Saunders, Director of the Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne Constitutional Implications of Administrative Review - Food for Thought for Public Sector Managers (unpublished), 1993.

The Council has also recently issued a discussion paper on the scope of appeals from the AAT to the Federal Court.\(^4\)

**Differences between tribunals and agency decision makers**

*Introduction*

2.53. It is also important to clarify the nature of the differences between review tribunals and the agency decision-makers whose decisions they review.

2.54. As noted in paragraph 2.3, merits review is often described as a process by which the person or body reviewing the decision ‘stands in the shoes’ of the original decision maker. However, this is not a totally accurate representation of the role of review tribunals.

2.55. It is true that review tribunals exercise the same statutory powers and discretions as the original decision maker. However, they will often be asked to consider new or more detailed information. Review tribunals also operate according to different time and resource pressures, and may use different decision-making processes. Review tribunals also bring to their task a different perspective than that of the original decision maker. Some of these differences are discussed below.

*The agency perspective*

2.56. In making decisions in the exercise of statutory discretions, agency decision makers commonly give much weight to government policy, as expressed in departmental guidelines and instructions. In any agency, and most particularly in those agencies with high volume decision-making jurisdictions, individual decision makers will require the assistance of guidelines in applying the law to the facts in particular cases. Because of the volume of cases that they are required to handle, these decision makers often do not have the opportunity to research all of the relevant law for each individual case that comes before them.

2.57. Every agency therefore has a responsibility to ensure that its policies and guidelines are both consistent with the law, and, to the greatest extent possible, bring the agency’s collective knowledge and experience to bear on each individual case. Policies and guidelines are designed to make it easier for decision makers to understand and apply the law in individual cases, and to alert decision makers to factors that may make a standard application of the guidelines inappropriate. Some agencies have devised rule-based computer assistance for decision makers.\(^5\) The contribution that review tribunal decisions can make in the development of agency policies and guidelines is discussed in Chapter 6.

*The tribunal perspective*

2.58. Review tribunals do not operate under the same day-to-day pressures as agencies. They do not have to deal with the same high volume of primary decisions. They do not carry out a range of other functions which compete for time and resources. Tribunals do have their own budget and resource limits, but they are generally in a position to devote more time to the consideration of individual cases than are agency decision makers.


\(^{5}\) The Department of Veterans’ Affairs has recently introduced a Computerised Claims Processing System; the Department of Social Security has also experimented with a variety of expert systems and computer-assisted decision making.
2.59. A review tribunal’s principal focus is on the reconsideration of the merits of the particular cases before them, and on the rights or responsibilities of individual applicants as prescribed by law. Tribunals are required to have regard to relevant government policy (and in some cases must apply it), but the differences described above mean that tribunals are generally in a better position than agency decision makers to fully consider the law and facts in each individual case, and may therefore be less reliant upon policies or guidelines in deciding the appropriate outcome.

2.60. The extent to which the AAT should have regard to government policy was considered by Justice Brennan, in his capacity as the (then) President of the AAT in Re Drake and Minister for Immigration and Ethnic Affairs (No 2). Justice Brennan stated that the AAT should generally apply government policy, but that it is free to depart from it if it considers it appropriate to do so (such as where the application of the policy would produce an unjust decision in the circumstances). In that regard, His Honour said:

When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.

2.61. Some agencies argue that review tribunals should be required to give greater weight to government policy: this view and the Council’s response are discussed in paragraphs 2.17 and 2.18.

Different outcomes to be expected

2.62. Given the differences noted above, it is not surprising that review tribunals often arrive at a different conclusion to that of the agency decision maker, and either set aside or vary the decision. This is not necessarily a reflection on the quality of the agency’s decision, which may have been both correct in law and reasonable, but the decision may be set aside or varied because the review tribunal considered that it was not the best possible (preferable) decision. In other cases, the original decision may have been both correct and the preferable decision on the basis of the information before the decision maker at the time the decision was made: the review tribunal’s setting aside or variation of the decision may be based on new or additional information.

2.63. Although the aim of agency staff and administrative systems should always be to deliver the correct and preferable decision at the first opportunity, resource constraints and the large volume of decisions required to be made mean that this aim will not be able to be met in every case. The fact that an agency’s decision is changed by a review tribunal does not necessarily mean that the decision was ‘wrong’. However, a consistently high number of reversed or changed decisions would tend to suggest the existence of broader problems in the agency’s decision making, particularly if decisions are regularly being overturned on the basis that they are unlawful.

---

46 For example, section 499 of the Migration Act 1958 provides that the Minister may give general policy directions, not inconsistent with the Act or regulations, and a person or body having functions or powers under the Act must perform those functions and exercise those powers in accordance with the Minister’s general policy directions. The policy directions must be tabled in Parliament.

47 (1979) 2 ALD 634.

48 (1979) 2 ALD 634, pages 644-645.
CHAPTER 3

REVIEW TRIBUNAL PROCESSES

INTRODUCTION

3.1. In this chapter the Council considers the way in which merits review is provided by
review tribunals. After a general discussion of procedural fairness and other factors that
affect the style and level of formality of tribunal proceedings, the chapter follows the
progress of an applicant through review tribunal processes, from first awareness of review
rights through to the receipt of a decision.

3.2. The Council compares the rules and practices of the various review tribunals in
respect of such matters as: panel composition; agency documentation; collection and use of
information; representation; public justice and privacy; resolution options; and providing
decisions. Together, these practices give each tribunal a particular style or character. The
Council discusses these styles having regard to the objectives of the merits review system
set out in Chapter 2, and makes recommendations aimed at enabling tribunals to adopt
review processes that will best achieve those objectives.

3.3. The processes of review tribunals are discussed within the framework of the existing
tribunal structure, and the recommendations in this chapter provide in general terms for
tribunals to have greater control over proceedings before them and more flexibility in
relation to those proceedings. The Council considers that its recommendations in this
chapter will promote the ability of review tribunals to maintain control over proceedings
before them and give them additional flexibility in relation to review processes. This will
enhance the ability of tribunals to operate in ways that promote all tribunal objectives: in
particular, those relating to accessibility, as well as those relating to the provision of lawful
review (including compliance with the requirements of procedural fairness).

MERITS REVIEW AND PROCEDURAL FAIRNESS

Introduction

3.4. Review tribunals, like other administrative decision makers, are bound to comply
with the common law requirements of procedural fairness unless those requirements are
excluded or modified by statute. The question of what material should be provided by
agencies to applicants, exchanged between applicants and agencies and how it should be
presented to and considered by review tribunals is governed - in the absence of specific
statutory rules to the contrary - by those requirements. In the most general sense, the
requirements of procedural fairness are intended to ensure both that decision makers bring
an impartial mind to the issues for determination and that those affected by decisions are
aware of and have an adequate opportunity to respond to all the material that is to be
considered by decision makers in reaching their decisions.

3.5. In the area of migration decision making, the procedures to be followed in reaching
decisions have been codified, and breach of the specified procedures has replaced breach of
the requirements of procedural fairness as a ground of review before the Federal Court.
The following discussion does not refer to the migration procedures: it contains the
Council’s views on what it considers should be general principles.
Awareness of judicial review

3.6 The fact that decisions of the AAT, IRT and RRT are directly subject to judicial review by the Federal Court, through provisions for appeal to that court on a question of law or under the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act), has a particular influence on the 'culture' and style of those tribunals. Decisions of the SSAT and VRB, on the other hand, may be the subject of further merits review by the AAT. Courts often refuse to permit challenges to SSAT and VRB decisions by way of judicial review - under the AD(JR) Act, for example - because of the availability of the alternative avenue of review by the AAT. That avenue is in any case usually preferred by applicants because review by the AAT is on the merits rather than on the more limited grounds of lawfulness.

3.7 The function of the courts undertaking judicial review - including review of tribunal decisions on appeal - is to ensure that they have been made lawfully: this includes ensuring compliance with the requirements of procedural fairness. Tribunal members - particularly members of the AAT, IRT and RRT - are aware that their decisions, the manner in which they reach them and the reasons they give for them are subject to judicial review on lawfulness grounds.

3.8 One important difference between courts and tribunals in terms of procedure is that tribunals have been expressly relieved from the obligation to comply with the rules of evidence. Review tribunals may, for example, receive hearsay (or second-hand) evidence that might be ruled inadmissible in proceedings in a court, in which case it is up to the tribunal to decide what weight should be given to such evidence. The absence of a requirement for review tribunals to comply with the rules of evidence is not to suggest that the rationale for those rules is not relevant in the tribunal setting. The limits on the usefulness of such evidence applies in tribunals as well as in courts. However, tribunals are intended to operate in a relatively informal manner that directly addresses the merits of all material relevant to the review and avoids argument whether evidence should or should not be considered by the tribunal at all.

3.9 Achieving a procedural approach that provides fairness while promoting as far as possible the other objectives of merits review is a continuing challenge to all participants in the administrative review system. The courts have adopted a flexible approach to what is required of decision makers in terms of procedural fairness: it depends on a variety of factors, including, most notably for present purposes, the nature of the interests affected by the administrative decision in question and the statutory setting in which the decision is made, including the availability or otherwise of further review on the merits.

3.10 It has been argued that the courts have, on occasions, insisted on standards of procedural fairness in tribunals which, if applied generally, would make tribunals operate little differently from courts.

---

* Under section 10(2)(b)(ii) of the Administrative Decisions (Judicial Review Act 1977, the Federal Court has a discretion to refuse to grant an application for review on the basis that 'adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person ...'.

---
To paraphrase recent comments made by a former Chief Justice of the High Court, the ‘judge looking over the shoulder’ can inhibit tribunal members from adopting a range of different practices. The Council acknowledges the entrenched and valuable role of the courts in the administrative review system as guardians of the lawfulness of action by the executive arm of government, but does not accept that this judicial supervision requires tribunals to avoid the use of less formal and complex and more active, investigative procedures where appropriate.

3.11. In the Council’s view, the approach adopted by tribunals is conditioned as much by the attitude of tribunal members as it is by the decisions of the courts in particular cases. Tribunals and other decision makers must have the confidence to make decisions by adopting procedures that they consider to be fair without thinking that they must operate in accordance with the same procedural rules that apply in courts.

STYLE AND LEVEL OF FORMALITY OF TRIBUNAL PROCESSES

Introduction

3.12. There are many factors that affect the style and level of formality of proceedings in different tribunals, both in individual cases and across the range of cases reviewed by tribunals. The rules that tribunals operate under - whether statutory rules or those developed and applied by courts in supervising administrative decision making, such as the requirements of procedural fairness - set the framework for tribunal processes. In addition, the nature of the decisions being reviewed, the physical setting in which review takes place and the attitude and practices of those involved in the review process combine to give tribunals a particular style and approach to review.

3.13. The following discussion describes in broad terms how some of these factors have influenced the way review tribunals have operated to date and the ways in which people have perceived them. Whereas this chapter focuses on the rules governing review processes, Chapter 5 focuses on more practical aspects of review tribunals that affect their style and formality, including the provision of information and assistance to non-agency applicants and the use of facsimiles, telephones, video-conference facilities and other electronic means to communicate.

3.14. In general terms, the Council sees benefit in permitting procedures to be adapted to circumstances as appropriate: in particular, to the types of decisions under review and the types of people applying for review. Therefore, subject to its later recommendations about individual aspects of tribunal procedures, the Council does not consider that it would be useful to be overly prescriptive in relation to tribunal styles and levels of formality. Instead, the Council makes some general recommendations and otherwise leaves more particular issues for resolution by tribunals, which are better placed to make judgments about the various factors discussed in this section as they change over time.

---

50 In an address to a conference held in Canberra in April 1995 (see footnote 34), the former Chief Justice of the High Court, Sir Anthony Mason said that while an awareness within the administration of legal requirements was beneficial, ‘... there is the risk that overt and ostensible compliance with legal rules assumes an undue significance. In other words, legal forms may play a predominant part in decision-making.’ Of tribunals subject to direct and continuous judicial review in particular, he stated that ‘There is an unwillingness to run any risk of departure from what are thought to be the rules prescribed by the higher courts ... This is an approach which I have described in other contexts as ‘precedent as an attitude of mind’. It can lead to a preoccupation with abiding by rules and a stultification of a more flexible approach to decision-making.’
**Final or other merits review?**

3.15. Where a review is the final one in the sense that the merits of the original decision may not be reconsidered by another tribunal, the stakes involved are greater and the people affected by the decision being reviewed may well seek more actively to promote their interests. This in turn affects the way in which tribunal members see their role in the review process and the way courts will assess the content of the requirements of procedural fairness attaching to the conduct of particular review processes.

3.16. For example, it was suggested during the inquiry that the ability of the SSAT and VRB to operate in a relatively quick and informal manner, particularly in hearings, is due partly to the existence of the right to further merits review by the AAT following review by those tribunals. According to this view, those tribunals are able to give greater emphasis to speed and informality, with any shortcomings able to be remedied on further merits review.

3.17. By contrast, the IRT and RRT, despite having the same statutory objectives as the SSAT, were established to provide final merits review, as the AAT does in other areas. They do not operate as cheaply, or as speedily in hearings, as do the SSAT and VRB, in part because of the responsibility they have as the final decision maker. The Council makes recommendations in Chapter 8 that deal with the structure of the review tribunal system. Implementation of those recommendations would affect the style and approach adopted by review tribunals in reviewing different types of decisions.

**Formality and informality in tribunal processes**

3.18. There are many different views as to what constitutes an ‘informal’ tribunal, and also about the extent to which informality is an end in itself. There is broad agreement, however, that informality contributes to accessibility and is therefore desirable.

3.19. The following factors contribute to the level of formality of tribunals:
- the physical setting of tribunals;
- the level of openness of tribunal processes;
- the people actually involved in different tribunal processes and the attitudes of those people toward each other; and
- more specifically, the practices and customs followed by those people as part of the tribunal’s review process (sometimes as a result of rules).

3.20. The weight of argument put to the Council was that, to increase accessibility, tribunals and in particular the AAT, should become less court-like. The Council considers that while there remains some concern about the extent to which the AAT operates in an adversarial way in hearings, that tribunal has made itself considerably more user-friendly over recent years, and is continuing to do so. In particular, it has been able to promote the resolution of issues arising in reviews prior to hearings through the use of alternative means such as negotiated and mediated settlements. Some 75-80% of the AAT’s caseload is now disposed of through the use of these techniques. While these techniques raise distinct issues that warrant further examination - discussed later - they do provide a less formal and less complex forum in which applicants may come to better understand what is involved in the decision affecting them than is the case in a hearing.
3.21. In line with the Government’s access to justice initiatives, Commonwealth courts as well as tribunals are taking steps to make their processes more easily comprehensible to a broader range of people, to improve general public awareness of how they operate and to be firmer in their control over proceedings before them. However courts, because they are essentially different from tribunals (see Chapter 2), will always remain more formal than tribunals need be, and are unlikely to provide an appropriate procedural model for tribunals.

3.22. The Council does not consider that it should set down general rules about how informal a tribunal should be. The appropriate degree of formality depends on a range of factors: the types of decisions being reviewed, the issues that are at stake in those cases and, perhaps most importantly, the characteristics of the people for whom review is provided. These factors vary greatly between tribunals and areas of decision making and they change over time.

3.23. It is clear that there will be different expectations among tribunal users and that the requisite degree of control by tribunals over review proceedings will depend upon the circumstances. For example, review involving a social security decision (where applicants are typically unrepresented and in real need of having the decision reconsidered quickly) will differ from review of a customs or Australian Securities Commission decision, where applicants typically are companies having legal representation before tribunals. There is a particular need for sensitivity on the part of people dealing with applicants for refugee status: these applicants typically have a distrust of authority and may have experienced great trauma.

3.24. The Council considers that tribunals themselves are best placed to judge the needs of their users when it comes to determining appropriate levels of formality. The principle to be applied in making that judgment is that a review tribunal should make applicants feel as comfortable within the tribunal environment, including with the tribunal’s processes, as is consistent with the proper exercise of its functions. Maintenance of respect for the review process is one factor in that balancing process; there are disadvantages to excessive informality.

3.25. There is a real concern that if people find tribunals to be intimidating, they may not take advantage of their review rights for that reason, in which case the purpose of providing those rights will have been defeated. It is therefore critical that this concern be kept in mind in considering tribunal facilities and practices. However, given that a tribunal’s function is to reach the correct and preferable decision, there are aspects of tribunal processes that are necessarily intimidating to some extent. For example, where a person’s credibility is in issue, the tribunal may need to test it by asking appropriate questions.

51 The President of the AAT, Justice Jane Mathews, recently stated in NT94/281 and NT94/281 and Deputy Commissioner of Taxation (11 April 1995) that the years since 1989 ‘have seen increased openness in the litigation process, together with a move away from the traditionally adversarial ‘ambush’ method of conducting trials. This in my view is to be applauded. Little is to be gained in my view by adopting a confrontationist approach to litigation. This approach very frequently leads to an outcome which is welcome to no-one, at least to none of the parties. On the other hand, openness and co-operation can often serve to produce agreement where agreement had been thought to be impossible, and at the very least to focus upon the major issues in a case, thus containing what can sometimes be prohibitively expensive both in human and financial terms.’
3.26 Although the Council does not wish to be prescriptive in relation to setting standards of formality, it makes recommendations in other parts of this report which should promote cooperation between tribunals and the cross-fertilisation of ideas between tribunal members, including through training and development of tribunal members. The exchange of views between members should assist in the process of achieving appropriate standards of formality for different types of cases coming before review tribunals.

3.27. As with other aspects of tribunal operations, the views of tribunal users about appropriate levels of formality should be regularly sought. Such a process enables a proper judgment to be made in the interests of the people the review process is designed to benefit. Among tribunal users are agency officers as well as applicants: all views should be sought and the results made public.

3.28. Regardless of the balance that tribunals strike in terms of the levels of formality, an essential part of putting applicants at ease with the review process is to ensure that they have a realistic idea of what to expect in their dealings with a tribunal. This important responsibility is shared by tribunals and agencies, although other regular users of tribunals can also assist (see Chapter 5). The development of tribunal charters, discussed in that chapter, should assist in giving applicants an understanding of what to expect in their dealings with tribunals.

**Recommendation 4**

Review tribunals should monitor continuously the ways in which their review processes and other characteristics are perceived by applicants, so as to ensure that applicants feel as comfortable in their dealings with tribunals as is consistent with the proper exercise of the review function of tribunals.

**Features to be considered in relation to informality**

3.29. There has been criticism in the past of the court-like architecture and layout of some AAT hearing rooms, and of the co-location of the AAT with Commonwealth courts in some cities. The AAT has acknowledged these criticisms and is progressively moving out of court complexes. It has also made changes to some hearing rooms, although some people argue that these changes do not go far enough. The design of tribunal premises is considered further in Chapter 5.

3.30. Aside from comment about any physical similarities there may be between tribunals and courts, there was also comment about the tendency in some tribunals for court-like customs and practices to be used. Examples include:

- rising when the tribunal members enter the hearing room;
- bowing to tribunal members;
- administering oaths to witnesses as a matter of course;
- requiring ‘expert’ witnesses to qualify themselves before giving evidence;
- having participants stand when addressing tribunal members;
- making technical objections to the admission of certain evidence; and
- use of cross-examination.
3.31. To the extent that these customs and practices are not necessary in order to enable tribunals to perform their functions, the Council considers that they should be avoided, at least if they are in any way intimidating to applicants. Related issues of representation and openness of tribunals and decisions are dealt with separately later in this chapter.

3.32. Tribunals have a crucial role to play in allaying some fears that applicants may have about the review process by asserting appropriate control over review proceedings and informing people of what they can expect of the review process. As the Council’s recommendations would give tribunals a greater degree of flexibility in all procedural matters, these tasks would become even more important than is currently the case.

Adversarial and non-adversarial approaches

3.33. The terms adversarial on the one hand, generally used in association with the AAT, and non-adversarial or inquisitorial on the other, used in various ways to describe aspects of the procedures of the specialist tribunals, arose frequently in the course of the inquiry. Blanket use of such terms, particularly when there seem to be so many differing conceptions of what they mean, becomes unhelpful.

3.34. It appears that what people broadly had in mind when referring to the AAT as adversarial was the suggested tendency of that tribunal to see itself in the role of a neutral umpire of a dispute between two theoretically equal disputants. On the other hand, it appears that the phrases non-adversarial and inquisitorial were used, sometimes interchangeably, to refer to a merits review process in which:
- the agency involved does not seek to put its view separately from the documentary material it provides to the tribunal; and/or
- the tribunal is willing to rely to a greater extent on the agency documents, research and written submissions and is more active in setting the direction of the review, including at any hearing, rather than relying on the interested persons and/or their representatives to set that direction.

3.35. Use of the term ‘inquisitorial’ to describe a tribunal process often leads to comparisons with processes that are followed in some European courts. These differ amongst themselves and certainly from the processes that are followed in the Commonwealth review tribunals that are sometimes described as inquisitorial (the IRT and RRT in particular, and to some extent the SSAT and VRB). Apart from constitutional and institutional differences between the legal systems of which those bodies are a part, there are major differences in practice that should be acknowledged.

3.36. One difference among many that were pointed out to the Council during the inquiry was that European judges using an inquisitorial approach are generally given extensive training over a long period before they review decisions, to ensure that they are able effectively to extract all information relevant to the decision in question using an active, investigative approach without risking their appearance of impartiality and fairness. In general terms, those judges also place more reliance on reviewing documentary evidence and arguments and less on oral hearings.

3.37. The Commonwealth tribunals recognise that specific training is needed for more active investigative approaches, but it is arguable that the present system could never approach the civil law models without much more fundamental redesign. While there is
interest in learning from alternative models, the Council has not found any support for a major redesign of the administrative law system along European lines.

3.38. Rather than express any general preference regarding review processes by reference to any of the terms described above, the Council considers that it is more constructive for emphasis to be given to the various constituent procedures that make up the overall style or approach of a tribunal. The relevant question is whether those procedures provide fairness to those whose interests are affected, and assist the tribunal in performing its functions. Tribunals should also be able to use different procedural approaches to suit the cases before them, although broader styles and approaches are likely to develop.

3.39. There was considerable comment during the inquiry about the differences between the general approach to merits review of the AAT on the one hand and of the specialist tribunals - in particular the IRT and RRT (probably because they also provide final merits review) - on the other. The broad differences alluded to included issues of formality, discussed in the previous section of this chapter, and of tribunal attitudes and approaches to the review process, such as in the gathering and testing of evidence. Some of the more notable particular issues of the latter type are now discussed.

3.40. The migration tribunals operate in a way that places greater emphasis on written materials and on a process of continuous investigation, using hearings where necessary as part of that wider process. In the AAT only 20-25% of its caseload is now resolved by means other than negotiation or mediation. However, of those cases that proceed to a hearing, submissions to the Council suggest that the AAT has tended to adopt an adversarial approach, and to be content to allow other participants in the review process to determine the way in which the review is conducted.

3.41. The Council considers that the comments made during the inquiry perhaps exaggerated the extent of the differences between the AAT and other tribunals. The AAT appropriately adopts different approaches in hearing different types of cases. While the AAT tends to allow applicants and agencies to make their own cases where both are represented, it adopts a more active questioning role where agencies are unrepresented and assists applicants who are unrepresented to address all relevant issues and information. For instance, the AAT adopts a much less formal approach in relation to citizenship decisions of Department of Immigration and Ethnic Affairs - where the applicant is often unrepresented and the consequences of the decision are often simply that the applicant must wait to meet residential requirements - than it does in relation to criminal deportation decisions made by the same department.\footnote{Submission of the Department of Immigration and Ethnic Affairs (Submission number 74), paragraph 7.14.}

3.42. The Council notes that specific features of practice in the specialist tribunals, were the subject of criticism during the inquiry. For example, the general lack of agency representation in cases before the tribunals other than the AAT means that in those tribunals, members take a much more active role in eliciting information from applicants at hearings. They are obliged to ask questions of applicants and to test their veracity where relevant, rather than leaving the more contentious aspects of this process to be performed by agency representatives.

3.43. This type of approach has led to some people developing the impression that the specialist tribunal concerned is in some way partial to the agency or ‘out to get them’, with potential implications in terms of procedural fairness (bias or the appearance of bias on the
part of decision makers) and perceptions of tribunal independence more generally. These perceptions have been more keenly felt where tribunals are constituted by one member, in which event the questioning process cannot be shared and balanced between members. In addition, they were more strongly expressed in relation to tribunals from whose decision there is no further review on the merits.

3.44. Such criticism appears to be based in part on an unwillingness by some people to accept the different style and approach of these tribunals. It also appears to be based in part on the fact that work remains to be done to ensure that the procedures these tribunals adopt provide fairness in all cases and are seen by their users to do so. A decision-making process in which the tribunal adopts a more active investigative role rather than leaving the scope and direction of the process to be set by others involved in the review process requires greater care in order to ensure procedural fairness.

3.45. Thus there is some evidence that further training is required for tribunal members in order to ensure that when they take a more active role in the review process, the procedures they adopt are fair and are seen to be fair. However, the Council does not consider that there is any in-principle obstacle to the tribunals taking an investigative approach. Tribunals are charged with the task of establishing the facts relevant to the statutory decision in question and must ask the questions required to do that. In the absence of other persons to assist in that regard, or as an alternative to having them do so, active involvement on the part of tribunal members is one way of performing that task.

3.46. Nonetheless, the fact that some tribunal users and observers - and even some members - perceive an active investigative approach to be incompatible with fairness, is a real problem. Unless the vast majority of tribunal users believe that the process adopted by tribunals is fair, then the credibility required to make external merits review an effective form of redress for people affected by administrative decisions is put at risk. There remains a substantial educational task to win over the doubters - some practical suggestions to this end have been made in Chapter 5. The Council suggests that tribunals continue to adapt their processes to the needs of their users and to use different approaches in different types of cases.

**Recommendation 5**

Review tribunals should have sufficient powers and discretions to enable them to use whatever techniques and processes best serve their objectives, including techniques associated with an active investigative approach.

**Recommendation 6**

Training of review tribunal members should include a component on how to adopt an appropriate active investigative approach in hearings: members should always be aware of how their actions may affect the way their tribunal is perceived by its users.
PANEL COMPOSITION

Introduction

3.47. Tribunal selection and appointment policies and practices are discussed in Chapter 4. This section of the report deals with the deployment of the available members to best meet the review tribunal’s objectives. It considers how the tribunals should constitute panels for particular cases, including the advantages and disadvantages of using multi-member panels.

3.48. There is broad acknowledgment that the characteristics of particular cases dictate what sort of tribunal panel is appropriate for the hearing of those cases. A general preference for multi-member tribunal panels needs to be balanced against the resource implications. As a result of these competing factors, there is general support for tribunals to have the maximum flexibility and discretion in constituting panels.

Multi-member panels?

3.49. There is widespread support for the use of multi-member panels. The following is a typical comment in support:

Multi-member hearings enable a range of experience or perspectives to be brought to the task of review .... they increase the prospect of well informed and balanced decision making, which will attract broadly based agency and community confidence.

3.50. More detailed reasons given in submissions for using multi-member panels were that they:

- enable a diversity of backgrounds, perspectives and expertise to be brought to bear in the decision-making process (including greater balance in relation to cultural and gender issues);
- enable a sharing of responsibility for a decision and for the associated work involved, for example in the preparation of written reasons;
- are particularly useful when it comes to assessing such matters as the credibility and character of review participants;
- may be more suitable where the tribunal takes an active role in the process of gathering and assessing evidence (in that they are less likely to cause antagonism than if one member alone has to question an applicant and test his or her evidence);
- provide a good forum for training, peer monitoring, peer supervision;
- provide members with exposure to alternative ways of approaching hearings and decision writing;
- may provide a useful forum, with appropriately-skilled members, for the resolution of significant or complex cases; and
- increase equity and consistency.

3.51. The major disadvantage of using more multi-member panels is that additional costs would be incurred, in terms of sitting fees, the provision of papers and travelling costs. Another concern is that multi-member tribunals may be slower in reaching an agreed position and delivering decisions than single members.

Submission of the Australian Council of Social Service (Submission number 5), page 14.
3.52. However, some submissions argued that multi-member panels could produce efficiencies in both time and cost, on the grounds that:

- several members working together are more likely to ensure that all relevant information is brought out and tested at or before the hearing;
- several members are more likely to be able to make decisions quickly. It was suggested that a single member dealing with a complex case can sometimes experience a ‘decision paralysis’, contributing to lengthy delays.

3.53. As an example of the second point, it is clear that some RRT members, who in all cases sit alone and who make decisions which have very serious consequences for the applicant for refugee status sometimes find it necessary to consult colleagues prior to finalising some decisions. This often involves a lengthy explanation of the facts, which would not be the case if a colleague had been present at the hearing. In some cases, it is likely to be more cost efficient to have two or more members dealing with a case from the start.

3.54. The view that multi-member panels should be the norm was expressed most often in relation to the migration tribunals, where one-member panels are common (in the IRT) and mandatory (in the RRT). The IRT has the capacity to constitute multi-member panels, but in most cases has used single members. The RRT has no such capacity. The Committee for the Review of the System for Review of Migration Decisions (CROSROMD) report recommended that IRT panels should ordinarily consist of two or three members, but that ‘in a substantial minority of [IRT] cases it may be appropriate to constitute single-member tribunals’. Some of the criteria suggested by the CROSROMD report and by the Review of the Administrative Appeals Tribunal for the constitution of different-sized panels are discussed in paragraphs 3.64-3.66. The disadvantages of single-member review in the IRT and RRT is compounded by the fact that they make final decisions on the merits.

3.55. The Council considers that the advantages of multi-member panels justify the additional cost in many cases. Savings from the use of single members to deal with cases that would benefit from a multi-member panel are a false economy.

3.56. The proportion of cases which should be dealt with by panels comprising more than one member will vary according to the nature of the cases. It would not be appropriate to set quotas, although tribunals will necessarily have to make estimates for planning purposes and resource negotiations. It would assist tribunals in these negotiations if there was a clear statutory encouragement for multi-member panels where appropriate, as recommended by CROSROMD in relation to the migration tribunals.

3.57 Tribunals, in their discretion, should be able to constitute panels comprising any number of members. Currently membership of panels can vary from one in RRT and most IRT cases to four in those SSAT cases in which medical issues are involved. The Council does not accept that there is any necessary flaw in tribunals operating through two-member panels.

54 In 1993/94, for example, more than 80% of IRT cases were assigned to single members.
These have from time to time operated successfully in the IRT and provision is currently being made for their use in the AAT setting.\textsuperscript{70} The Council considers that as a general rule there should be no statutory prescription of the number of members that should be included in a tribunal panel for particular cases or types of cases.

3.58. As a result, limitations such as the mandatory single-member operation in the RRT should be abandoned. At the same time, the Council considers that there are good arguments for the retention of existing statutory preferences for multi-member panels in relevant legislation governing tribunals - as in the case of the SSAT and VRB\textsuperscript{58} - provided that there is some flexibility for the tribunals to vary from the generally preferred approach where it considers that to be appropriate.

**Types of members**

3.59. As for requirements for panels to comprise particular types of members, the Council again considers that tribunals should have maximum flexibility to constitute panels in the way they consider best suits their statutory objectives. Thus, provisions in particular statutes requiring tribunal panels to comprise members with certain types of skills and experience - for example, services members in the VRB and judges for particular types of cases in the AAT - should be removed. Similarly, the VRB’s inability to constitute panels with more than one senior or principal member (in combination) should be abandoned.

3.60. These proposals should not be taken to suggest that members with particular skills and experience should not be included in panels for the review of cases in which those skills are well suited. Rather, they are intended to allow the tribunal maximum flexibility to constitute panels that are appropriate to the circumstances of individual cases.

<table>
<thead>
<tr>
<th>Recommendation 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>The composition of panels to review particular cases should be left to the discretion of review tribunals.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recommendation 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>For all review tribunals, existing statutory prescriptions of panel composition should be removed and replaced with a statutory preference for multi-member panels in appropriate cases.</td>
</tr>
</tbody>
</table>

**Criteria for numbers and type of members on tribunal panels**

3.61. While the Council favours complete discretion for tribunals in relation to the constitution of tribunal panels, the principles and criteria used by tribunals in the exercise of that discretion will be most important and should be published.

\textsuperscript{70} The Government has introduced legislative amendments to allow the constitution of two-member AAT panels: see Schedule 2 of the Law and Justice Legislation Amendment Bill (No 3) 1994.

\textsuperscript{58} Section 1328 of the Social Security Act 1991 provides that the minimum number of members to constitute the SSAT is three other than in special circumstances. Section 141 of the Veterans’ Entitlements Act 1986 provides that the VRB shall be constituted by three members: there is also a means to constitute one-member panels, subject to ministerial approval.
3.62. The criteria need to be developed by each tribunal in consultation with user representatives, and may change over time as the rules governing different decisions and the needs of tribunal users change. The AAT is currently reviewing its listing policies and as part of that process is seeking the views of its regular users.

3.63. Tribunal policies and criteria in relation to panel composition need to cover not only numbers of members and particular expertise, but also level of experience and seniority. Most tribunals have available a hierarchy of members - presidential, senior and ordinary in the AAT, senior and ordinary in most others.\(^{59}\) Most also have a mixture of full-time and part-time members, and this is another variable to be considered in constituting panels.

3.64. CROSROMD listed the following factors as ones that could be taken into account in determining whether a single member tribunal would be appropriate:

- the review involves only simple questions of fact and the application of settled law;
- the applicant for review has indicated at the preliminary meeting a preference for a single-member tribunal; or
- the review is urgent and any unavoidable delay in assembling a multi-member tribunal would nullify the purpose of the review or would otherwise be unacceptable.\(^{60}\)

3.65. The Review of the Administrative Appeals Tribunal (the AAT Review) recommended that a member presiding on a tribunal panel should be assisted by a specialist member in cases involving the following:

- difficult technical, legal, medical, actuarial or scientific issues;
- difficult assessments of social or psychological functioning;
- environmental matters;
- new jurisdictions;
- substantial amendments to legislation already within jurisdiction; and
- cases involving an issue in respect of which conflicting views have been expressed in previous tribunal decisions.\(^{61}\)

3.66. Although these recommendations have not been formally embodied in policy, the AAT has used them to guide its listing practices. The AAT Review also suggested the following additional criteria for assigning cases to three-member panels, differently constituted according to how many and which of the criteria apply to the individual case:

- review of ministerial policy;
- decisions made by a minister or Secretary or Deputy Secretary (or equivalent) of a department or agency;
- potentially serious consequences for public administration;
- potentially significant impact on government revenue;
- issues of substantial community concern or public interest;
- issues of unusual public importance;

---

\(^{59}\) The RRT has been the only tribunal to have a completely flat structure, but amendments currently before the Parliament will provide for the appointment of senior members, bringing it into line with the IRT, SSAT and VRB. In the IRT and SSAT senior members have been appointed primarily to undertake a management role (although they continue to participate in hearings). In the AAT and VRB, it has been the practice to appoint senior members to reflect seniority and experience, without requiring them to take on management duties.


• sensitive issues of public policy or administration questions of law not previously considered by the AAT;
• complex issues of law and/or fact; unusually serious consequences for either of the parties; and
• substantial sums of money.\textsuperscript{62}

3.67. As a matter of practice, the AAT will often assign to three-member panels cases which involve an issue in respect of which conflicting views have been expressed in previous tribunal decisions.

3.68. Several submissions strongly favour another criterion for multi-member AAT panels: the decision under review is that of a first tier tribunal constituted as a multi-member panel. This suggestion reflects a level of disquiet amongst some tribunal members - particularly of the VRB but also of the SSAT - about decisions they make as a multi-member panel being overturned by a single non-specialist AAT member sitting alone.

3.69. The Council does not think that it is appropriate or necessary to constitute a multi-member AAT panel simply because the decision under review was made by a multi-member panel. It might however be appropriate for other reasons, such as the technical or other nature of the issues remaining in contention. If the only outstanding issues go to the interpretation or application of the law, it may be appropriate for one member to undertake the review.

3.70. Some of the criteria suggested above go to the issue of how tribunals can best deal with complex or otherwise significant cases. The Council considers that while some of these cases may be able to be appropriately dealt with by special panels within the relevant tribunal, there are substantial benefits to be achieved by enabling all cases raising issues of general importance to be targeted for the attention of tribunal panels specifically charged with responsibility for dealing with such issues. This subject is also discussed in Chapter 8.

Recommendation 9

Review tribunals should develop guidelines for determining how panels should be constituted in different cases. These guidelines should be developed in consultation with user groups and should be published.

GATHERING INFORMATION

Agency documentation

3.71. When an application for review is accepted, the decision-making agency provides the tribunal with written material about the case. This material provides the initial basis for the tribunal’s reconsideration of the merits of the applicant’s case. In some cases, the provision of this material to the tribunal will be subject to statutory provisions applying to confidential and secret information (see paragraphs 3.120-3.129). The same material, again subject to information properly withheld from disclosure, is generally made available to review applicants, in some cases because that is required by statute and otherwise according to the requirements of procedural fairness. The Council considers that this

material should be made available to applicants as a matter of course, as it may assist them in understanding the decision made and in making out arguments on review and there is no reason why it should not be made available for those purposes.

3.72. The statutes governing tribunals set out the requirements as to content of agency documentation. As a minimum, agencies supply tribunals with a statement of reasons that contains the findings on material questions of fact, refer to evidence or other material on which the decision was based and give the reasons for the decision. In most cases, however, tribunals will need additional information to that contained in an agency statement of reasons. In this respect there is some variation in the statutory content requirements, although the thrust of the requirements is similar.

3.73. The AAT provision, for example, requires the provision of documents in the possession or control of the decision maker and 'considered by him to be relevant to the review of the decision by the Tribunal.' 63 By comparison, the Department of Veterans’ Affairs has to supply to the VRB 'a report referring to the evidence under the control of that department that is relevant to the review', and 'all the relevant documents'. 64 These provisions may appear similar, but there is a significant difference. The AAT Act imposes a subjective test - what the decision maker thinks is relevant, while the Veterans’ Entitlements Act 1986 imposes tests that are objective - what is relevant. Concern has been expressed that agency documentation provided to tribunals (and to the AAT in particular) is sometimes incomplete or selective.

3.74. The Council considers that an objective test should be applied. While an officer will still have to determine whether documentation is relevant to the review, moving away from a subjective test will emphasise that it is not simply the individual officer’s opinion, but that of a hypothetical reasonable person, which should govern the decision.

3.75. The scope of agency documentation required may vary with the nature of the review jurisdiction, and the approach of the tribunal in question. For example, it apparently is the practice for entire files to be provided by the Department of Immigration and Ethnic Affairs to the IRT. 65 That tribunal takes the view that, as it undertakes an investigative form of review, it is appropriate that its members determine the relevance of the material on the file and the key issues to be resolved.

3.76. In other review jurisdictions, the view is taken that to require the provision of all material on an applicant’s file in relation to a particular decision would cause an unwieldy amount of information to be provided. Other tribunals are content for the agency to make the initial assessment of relevance, relying on the member’s examination of the documents and the applicant’s submissions to bring to light any ‘missing’ relevant material. This approach allows the tribunal to focus on certain key issues and not be distracted or delayed by extraneous material.

3.77. It is important that agencies include in the material provided to the tribunal any information that they have relied on in making the decision that is the subject of the review. This is not however necessarily the same as ‘all relevant information’. Agencies need to

---

63 Administrative Appeals Tribunal Act 1975, section 37 (1)(b).
64 Veterans’ Entitlements Act 1986, sections 137 (1)(a) and (4).
65 The VRB notes that it is also the practice of the Department of Veterans’ Affairs to provide entire files to the VRB.
bear in mind that a separate assessment of what is relevant should be made in response to the application for review.

3.78. The Council’s inquiry did not uncover any real concern about the statutory time limits imposed in different areas of decision-making for delivery of material to the tribunals, either in terms of the ability of agencies to provide material relevant to the review of a decision within the time, or in terms of unnecessary delay. The limits are 10 working days for the RRT and IRT (and two in relation to some IRT decisions, for example, bridging visa decisions), 28 days for SSAT and most AAT cases, and six weeks for the initial Department of Veterans’ Affairs report to the VRB.

3.79. It is not appropriate to be too prescriptive in relation to any subsequent additional information, which may come to light later or take time to retrieve or collate. For all tribunals, there is an ‘as soon as practicable’ provision for supply of any such additional material. The Council concludes that time limits may appropriately vary between jurisdictions, and, within broad limits, should be left for determination in relation to specific categories of decision. Bearing in mind the common objective of ‘quick’ review, an outer limit of 28 days might be a limit that agencies could aspire to achieve as often as is practicable.

3.80. In many cases, the statement of reasons that an agency may have provided to the applicant following its original decision (see Chapter 5) may also meet at least the initial needs of the tribunal. If so, then there is no need for the agency to have to prepare separate documentation - a copy of the reasons statement will suffice. The Council notes that the discipline involved in producing reasons for decisions has improved the general awareness among decision makers of the legal framework of decision making within which they operate.

3.81. The Council’s recommendations on this subject are aimed at setting minimum content standards for agency documentation and at overcoming the criticism that the information provided is, on occasions, selective or incomplete. Detailed arrangements and standards are best left to tribunals and individual agencies to work out together.

**Recommendation 10**

Subject to confidentiality and secrecy provisions, agencies whose decisions are under review should be required to provide review tribunals with:

- a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision; and
- information relevant to the review that is in the agency’s possession or control, including information that was relied on in reaching the decision.
Recommendation 11

A copy of that statement and other information provided to the review tribunal should be made available to the applicant, without the need for a request by the applicant, at the same time.

‘New’ information and issues

3.82. There is general agreement that the nature of merits review (see Chapter 2) requires tribunals to consider afresh (or de novo) the decision under review and make what they consider to be the correct and preferable decision at the time of reconsideration, on the basis of all relevant material that is before them.

3.83. The Council did however encounter some arguments from agencies that tribunals should, in limited circumstances, exclude material relevant to the decision that was not produced by applicants to decision makers at earlier stages of the decision-making process.

3.84. The Council is aware that it can be a source of frustration to decision makers at different stages in the decision-making process that their decisions are sometimes varied on review not because of any error, but because of changed facts or new information put to the reviewing person or body. Furthermore, from an agency perspective, the further along the decision-making process that new information is introduced, the greater the resources that generally will have been expended in order to deal with it.

3.85. However, it is important to appreciate, as already explained in Chapter 2, that merits review involves reconsideration of the original decision, not review of the reasonableness of the action of an earlier decision maker. New information can come to light at any point in the administrative decision making process. If such information arises after a reviewable decision has been made, any genuine merits review of that decision must take the fresh information into account. To preclude examination of relevant new information in the context of an administrative process would, in the Council’s view, detract from the objective of reaching the ‘correct and preferable’ decision and would transform the process of merits review into something more akin to judicial review.

3.86. There appears to be a particular problem with ‘new’ information in the veterans’ area in that some applicants for veterans’ entitlements (or their representatives) withhold or fail to obtain relevant information (typically expert medical evidence) until the original decision is under review by the AAT. They do not present that evidence at the VRB because they apparently think that the AAT is more likely to look on it favourably or that the Department of Veterans’ Affairs is more likely to make a concession at the AAT level because of the cost of contesting the claim.

3.87. In the Council’s view, altering the nature of the merits review process by excluding such information from consideration by the AAT would be an inappropriate response to this jurisdiction-specific problem. The problem appears to arise from a combination of factors:

- the particular nature of the matters at issue in many veterans’ claims, and the basis of the legislative entitlement;
- the relatively easy availability of advice and financial assistance for veterans to pursue their claims through all stages of review, including the AAT;
• the culture of suspicion of the Repatriation Commission and the VRB amongst veterans and the ex-service bodies that advise them;
• the high rate of concession by the Repatriation Commission at the AAT; and
• the AAT appears in some cases to adopt a more generous interpretation of the entitlement provisions than the VRB.

3.88. To some extent, the solution to this problem lies outside the scope of this inquiry, and has already been addressed by the 1994 Baume Committee Report. The Council notes that, assuming there is no change in the entitlement legislation, a partial solution appears to lie in appropriate incentives to encourage the production of all available information at the earliest possible time.

3.89. The Council would not favour statutory restrictions on the ability to produce fresh information, for the reasons given above. Recent changes to Veterans' Entitlements Act 1986, providing for reimbursement of the costs incurred by applicants in obtaining medical reports in support of applications to the VRB, should encourage the earlier provision of such evidence. These reports, paid for by the Government, are required to be produced in full. It may also be appropriate in some cases to limit entitlement to backdated payments to the date of production of relevant information. Such reforms should help alleviate the problem of 'new' information: a range of other reforms in the veterans' area, discussed shortly, should also assist.

3.90. Statutory requirements aside, the Council does not favour the view that applicants should be required to divulge material that they have obtained themselves and which may be adverse to their case. This is because it is generally up to government to explain its administrative decisions based on the material that it has authority to gather as part of the decision-making process: other information that applicants may or may not have obtained of their own accord should not affect this.

3.91. Another concern has also arisen most commonly in the veterans' area. Some applicants for veterans' entitlements (or their representatives), again apparently as a result of the factors referred to in paragraph 3.87, do not always raise all the issues involved in the original Repatriation Commission decision during reviews by the VRB, but seek to raise before the AAT issues that were not raised before the VRB. In other words, it was suggested that the VRB is sometimes effectively by-passed in relation to the consideration of some issues on review. For example, many original Repatriation Commission decisions are required to be reviewed by the VRB before they can be reviewed by the AAT. If only parts of the original decision (distinct decisions within the whole original decision) are reviewed by the VRB, can the AAT review the whole of the original decision, or only those parts reviewed by the VRB?

3.92. A Full Court of the Federal Court has recently held that an applicant for review by the VRB can limit the scope of review by the VRB - by indicating in their application which parts of the original decision are sought to be reviewed or by later withdrawing parts of the original decision from review. At the same time, the Court indicated that the applicant must clearly indicate that parts of the original decision were not being challenged and be made aware of the fact that this would preclude them from later challenging those parts.

---

That was not so on the facts of the case before the Court. If the scope of review were properly limited, the Court indicated further that the AAT would only be able to review those parts of the original decision that the VRB had reviewed. According to the Court, the legislative intention was that further review be available only after the VRB’s review had been carried out, and that to ‘permit a claimant or an applicant to by-pass the Board’s review would not be consonant with that intention’.

3.93. More generally, unless parts of an original administrative decision are clearly capable of distinct treatment on review - which will depend on the relevant statutory setting - and an applicant understands that review may be limited to part only of the original decision, to permit review of the whole original decision is appropriate. Otherwise, applicants who do not have a strong understanding of technical issues going to tribunal jurisdiction or who have obtained new and relevant information that was not previously available to them may be unfairly prevented from having reviewed all parts of the original decision that they wish to contest. In addition, considerable resources may be spent on technical arguments about the scope of review (arguments about jurisdiction and the doctrine of estoppel, for example) rather than on ascertaining the merits of the relevant case.

3.94. It should also be noted that the fact that the whole of an original decision is generally open to merits review at subsequent stages of the review process can work to the disadvantage as well as to the advantage of an applicant who seeks review of the original decision. For example, a later reviewing body might find that a person was not in fact entitled to a pension or that a pension should be reduced. That is a consequence of the responsibility of tribunals and other reviewers to make the correct and preferable decision as they see it on the facts before them. However, there are strong reasons of policy (related to speed and expense) why tribunals and agencies should seek to limit the range of issues remaining under consideration at those different stages - provided that they are satisfied that outcomes reached remain within the terms of the relevant legislation.

3.95. In addition to the Federal Court decision noted above, reforms in the veterans’ area that should help alleviate the above mentioned concerns include a more structured approach to original decision making, greater reliance on internal review rather than leaving the process of making concessions until after review by the VRB, and a new mechanism for resolving questions of medical causation. The Council considers these types of reforms to be consistent with the general principles set out by the Council above. The Council’s recommendations later in this chapter which are aimed at increasing the sanctions available to tribunals for deliberate misuse of the review process (as well as its recommendation on the structure of the tribunals system in Chapter 8) should also help alleviate these concerns, whether they arise in the veterans’ entitlements area or elsewhere.

3.96. Where new information produced by an applicant does not relate to the decision being reviewed, then it may be that a tribunal is without jurisdiction to deal with that information in its review of the decision. This would be the case, for example, if it became clear that the applicant was entitled to a different benefit, but the law did not give the original decision maker (and the tribunal on review) the discretion to award it. In these circumstances, the applicant for review may have to make a new claim (that is, to seek a new original decision). The Council notes that providing original decision makers with sufficient flexibility to consider alternative bases for considering applications can avoid the

---

69 See Veterans’ Affairs Entitlements Act 1986 as amended by the Veterans’ Affairs (1994-95 Budget Measures) Legislation Amendment Act (No2) 1994. See also Appendix B, paragraphs 52 and 53.
need for applicants to make new applications and is therefore desirable wherever practicable.

**Recommendation 12**

Review tribunals should be obliged to take into account all relevant information that is available to them at the time of the review.

---

**Remitting cases for reconsideration by the agency**

3.97. Where new information provided to a review tribunal does relate to the decision under review, the tribunal, notwithstanding the fact that it would be open to it to review the decision taking into account that information, may consider it appropriate to remit the whole or part of the decision to the agency for reconsideration. It may also be appropriate in some cases - for example, if the tribunal finds that information has been deliberately withheld - for entitlements to backdated payments to be limited to the date of production of relevant information.

3.98. Other than the VRB, each of the tribunals within the focus of this inquiry has the power to remit any decision to the relevant agency with directions (the VRB may remit cases for the purpose of assessment of rates of payment only). It may be the case that an agency is better placed at a particular point in time than the tribunal to deal quickly and effectively with the new information raised. The tribunals exercise this discretion having regard to their objectives. Where remitting a decision with directions is the best way for the tribunal to fulfil its statutory objectives, then that is the appropriate course for the tribunal to adopt.

**Powers to obtain evidence**

3.99. Tribunals have wide powers to obtain evidence, and the Council is not aware of any dissatisfaction with the nature or extent of those powers. The Council considers that tribunals should have the capacity to undertake additional inquiries or otherwise to seek additional relevant information at any stage of the review process, where that course, rather than remittal of the whole or part of a decision to the agency, appears to be the best way to achieve the tribunal's objectives.

3.100. The tribunal does not, however, have any scope to investigate wider issues than the agency decision maker could have done: that is, it must limit itself to issues relevant to the decision under review. The tribunal might however use its powers to obtain information, as an alternative to remittal, to supplement the information before it so that relevant information which the agency could reasonably have obtained is produced for the tribunal's consideration. It should do this by directing agencies to obtain such information for its use during the review. As with all information considered during the review process, all interested persons should be provided with an opportunity to make submissions as to the weight that should be given to information obtained at the request of tribunals.
Recommendation 13

Where a review tribunal finds it necessary to obtain additional information that the agency could reasonably have obtained, and remittal of the case to the agency is not appropriate, the tribunal should have power to direct the agency to obtain that information for use by the tribunal during the review.

Material to be disclosed during a review

3.101. The Council considers that as a general principle external review tribunals should be required to disclose to applicants all material that the tribunal intends to rely upon in reaching its decision subject to exceptions for reasons of confidentiality (which are discussed at paragraphs 3.120-3.129). This includes the material provided to review tribunals by agencies as a result of particular statutory requirements, additional information obtained by the tribunal (from witnesses and agencies) during the review process - typically shortly before or at hearings - and information that the tribunal itself brings into the process.

3.102. The Council is aware that there are practical limits to the application of this principle, apart from confidentiality constraints. The extent to which tribunal members may rely on particular knowledge or professional expertise that they bring to the decision-making process (whether as administrators, lawyers, doctors, social workers and so on) without providing an opportunity to the applicant to comment on their views is a difficult issue. Another example is that some information may be so widely and commonly known that it may be unnecessary to make reference to it. Rather than seek to prescribe limits, the Council considers that tribunals should be required to consider what information needs to be disclosed, and to err in favour of disclosure wherever the case for non-disclosure is not either required or clearly made out.

3.103. One area in which the Council considers that there is scope for improvement is in the provision of information other than adverse information upon which the tribunals intend to rely in reaching its decision. The rules of procedural fairness make it clear that adverse information must be disclosed in order that the applicant has an opportunity to make submissions on that information before the decision is made.

3.104. It has been suggested that certain information that is considered by tribunals to be neutral or favourable to applicants is not always provided to them, even though it could assist them to make a stronger case. While it is not the tribunal’s function to make the applicant’s case for them, if this information could readily be made available to applicants, and has not already been provided to them as part of the agency materials, then it is appropriate that this be done.

3.105. In the refugee decision-making context, it is said that applicants have, on occasion, needed to make use of the Freedom of Information Act 1982 (the FOI Act) in order to obtain information they considered relevant to the decision under review. The RRT makes use of a database of country information, compiled largely from Australian Government sources overseas and containing for the main part factual information. The Council considers that it is appropriate for the information on that database to be made available to applicants - subject to appropriate exemptions for reasons of confidentiality - and that it should be feasible to do so.
3.106. As a general principle, applicants should never have to seek recourse to the FOI Act in order to obtain information relevant to the review of decision involving them.

3.107. A further aspect of disclosure of relevant information which the Council has considered concerns the need for that disclosure to occur in such a way as to allow a reasonable opportunity in a practical sense for those affected by an administrative decision to prepare a response to it. In other words, the material must be provided to the relevant person or body so as to allow them sufficient time to respond to it before the decision is made.

3.108. Some agencies argue that the AAT applies different standards to failures by agencies to provide relevant information to applicants before a hearing than they do in the case of applicants. It was argued, for example, that it was unfair - given the high standards expected of agencies in this regard - that an applicant’s failure to provide agencies with medical reports in accordance with the AAT’s directions, so as to allow agencies an opportunity to respond adequately, should go unchecked.

3.109. The Council does not condone failures by applicants to comply with tribunal directions. If an applicant or, in particular, an applicant’s representative fails to comply with tribunal directions without good reason, the Council would expect the tribunal to invoke such sanctions as are open to it. Having said that, it is reasonable for tribunals to adopt a more lenient approach in the case of unrepresented applicants, since they are likely to be unfamiliar with tribunals and their processes.

3.110. Furthermore, if an agency considers that it has not had a reasonable opportunity to respond to information that is put forward by an applicant, there are ways of providing such an opportunity. The agency can, for example, seek an adjournment of the hearing, or seek to have the tribunal take into account its further comments about that information after the hearing but before the decision is made. In the latter event, the tribunal would be obliged to seek the applicant’s response to those comments.

3.111. It is worth noting in this context that, under the AAT Act, the decision maker and the applicant are both parties to a review and as such have rights to appear and be represented, and must be given an opportunity to present their respective cases. The provisions governing these matters in the IRT and RRT are somewhat different, particularly in relation to the extent of agency participation in the review process (see paragraphs 3.190-3.195). For present purposes it suffices to note that the AAT provisions have supported arguments that different (and perhaps more adversarial) standards of procedural fairness apply to reviews in the AAT.

3.112. The Council understands that in the tribunals such as the IRT and RRT, where there is more emphasis on continuing inquiries than on hearings alone, the consideration of new issues and new information and the provision of further opportunities to comment following a hearing is more common than in other tribunals. The Council does not see this as inappropriate: rather, that as with other aspects of using a more investigative approach, particular care is required in order to ensure compliance with the requirements of procedural fairness.

---

70 Administrative Appeals Tribunal Act 1975, sections 30, 32 and 39.
Recommendation 14

Subject to confidentiality and secrecy provisions, review tribunals should disclose to the applicant all the information, whether favourable, neutral or adverse, that it proposes to take into account in making its decision, and should give the applicant an opportunity to make submissions regarding that information.

PUBLIC JUSTICE, PRIVACY AND CONFIDENTIALITY

Openness of proceedings and decisions

3.113. There are competing public and private interests involved in the issue of whether tribunal proceedings and decisions should be open to the public. There is a clear public interest in ‘public justice’, that is, in justice being seen to be done. Openness contributes to the accountability objective of merits review - if both the processes and the decisions of tribunals are open to public scrutiny and analysis, weaknesses will be more easily detected and rectified. Accessibility is enhanced if tribunals’ successes and strengths can be promoted to bolster public confidence and encourage others to exercise their rights. It will also be easier to increase awareness and understanding of merits review amongst agency staff and others, and to promote normative effects, if tribunal decisions can be distributed and discussed, and if people can observe tribunals in action.

3.114. However, there are both private and public interests in tribunal proceedings and decisions not being open to the public, at least in some circumstances. First, there are privacy interests: both applicants and any witnesses are entitled to a presumption of confidentiality in their dealings with government, with any exceptions being clearly justified. This starting point is reflected in the Information Privacy Principles (IPPs) of the Privacy Act 1988, with which all tribunals and most agencies have to comply. Secondly, there is both a private and a public interest in informality and accessibility. Potential applicants may be deterred from exercising their review rights by the knowledge that proceedings will be in public or the decision published. This may particularly be the case where medical evidence, financial affairs or family history is involved.

3.115. These competing interests need to be balanced for each tribunal and area of review, and separately in respect of proceedings and decisions. For some applicants the publication of their personal information to the public at large may be more of a concern than the presence of a few strangers in the hearing. Others might have the opposite reaction. It may also be possible to satisfy some of the public interest objectives while protecting individuals’ privacy for instance by removing personal identifiers from decisions. While the IPPs should influence policy choices in this area they do not constrain them - express statutory provisions concerning public access take precedence over the relevant IPPs.

3.116. The present situation is that statutory provisions vary between tribunals. The AAT (except in the Taxation Division)\(^7\) and IRT hearings are open to the public and their decisions are also publicly available, although both tribunals are able to protect some or all

\(^7\) Section 14ZZE of the Taxation Administration Act 1953 modifies the Administrative Appeals Tribunal Act 1975 for the purposes of review by the AAT of taxation decisions by providing to the effect that review is not to be conducted in public unless the review applicant requests that it be conducted in public.
of the information gathered in particular cases. Hearings in the SSAT, VRB and RRT are private, although the tribunals sometimes permit people to observe proceedings (normally only with the applicant’s consent). RRT decisions must, by law, be published but with identifying particulars removed. The Social Security and Veterans’ legislation is silent on the matter of publication, but both tribunals follow a practice of only releasing case summaries with identifiers removed.

3.117. There is a particular issue relating to the privacy of third parties - either other persons mentioned in information before review tribunals or witnesses. While the applicant can be made aware of the degree of openness and has the choice of proceeding or not, third parties do not have the same choice. In the AAT and IRT, third parties, if they are aware of the relevant review proceedings, can request suppression of personal details, leaving the tribunals with difficult balancing decisions involving openness, privacy and procedural fairness. Where similar situations arise in the context of access under Freedom of Information legislation, third parties are entitled to be consulted.

3.118. To be consistent with the general direction of the Council’s recommendations, and recognising both the public and private interests involved, the Council’s preference in this area would be for a presumption of openness but to leave a discretion for tribunals to protect an individual’s privacy, with or without a request, in each case. The discretion would be exercised with regard to the privacy interests of individuals as well as the public interest in openness.

3.119. Despite this preference, the Council acknowledges that it may in practice be too onerous for tribunals to have to make an individual decision about openness in every case. In view of the general satisfaction with the current rules, this may be an area where a pragmatic approach is warranted, perhaps making some marginal adjustments but leaving some of the discrepancies in place. If the structural unification recommended in Chapter 8 is implemented, these issues will have to be resolved in any case. The Council also notes that the review of the Commonwealth Freedom of Information Act 1982 which it is carrying out jointly with the Australian Law Reform Commission is considering issues which overlap with those discussed here.72

Recommendation 15

A policy on openness of review tribunal proceedings and decisions should be developed by a working group comprising representatives of the tribunals, relevant agencies and the Privacy Commissioner.

Confidentiality and secrecy provisions

3.120. Members and staff of all tribunals are covered by the secrecy provisions of the Commonwealth Crimes Act 1914, which seek to prevent unauthorised disclosures of official information.73 The IRT, RRT and SSAT are also subject to customised versions of the general secrecy provisions of the Migration Act 1958 and the Social Security Act 1991

73 Crimes Act 1914, section 70.
respectively.\textsuperscript{74} Those versions apply the non-disclosure offence provisions to members and interpreters as well as staff.

3.121. There is a separate confidentiality issue relating to authorised disclosures. The principle that the applicant should generally be able to see all the information that is relevant to the review has been discussed earlier in this chapter. However, apart from the issue of third party privacy discussed above, there are other reasons why it will sometimes not be in the public interest to make certain information considered by a tribunal available, either to the general public or even, on occasions, to the applicant. These reasons include the obvious categories of national security and intelligence, but also extend to such matters as competitive commercial information, material provided in confidence by third parties,\textsuperscript{75} some medical or health information and cabinet documents. Current provisions relating to the protection of such information vary between the tribunals.

3.122. The AAT has a broad discretion to prevent the disclosure of information either because of its confidential nature or for any other reason. The Commonwealth Attorney-General\textsuperscript{76} (and State Attorneys-General in particular circumstances)\textsuperscript{77} can issue public interest certificates regarding information that he or she considers should not be disclosed by the AAT for a range of public interest reasons. The provisions prescribe the way the AAT must handle such information. They divide that information into two categories - national security and Cabinet information, which must not be disclosed beyond tribunal members, and other sensitive information which the tribunal has the discretion to disclose.

3.123. The exercise of that AAT discretion involves balancing the public interest stated by the Attorney-General’s certificate with the principle that ‘it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters’\textsuperscript{78} - in other words, procedural fairness to those whose interests may be affected by the decision. The AAT is also required to have regard to any relevant confidentiality provisions in the statutes conferring jurisdiction on the tribunal.

3.124. The Minister for Immigration and Ethnic Affairs can deny any information to the IRT or RRT which he or she certifies as being contrary to the public interest (for narrowly prescribed reasons) and can advise the tribunals about any lesser sensitivity of information provided; the tribunals can choose to disclose information in this category to the applicant after considering the advice.\textsuperscript{79}

3.125. Amendments currently before the Parliament will introduce an intermediate category of information that Department of Immigration and Ethnic Affairs can supply to the IRT, but on condition that it go no further, for any public interest reason.\textsuperscript{80} The Council has already commented on this issue in relation to the proposed changes in respect of the

\textsuperscript{74} \textit{Migration Act} 1958, sections 377 and 439; \textit{Social Security Act} 1991, section 1332.

\textsuperscript{75} The Department of Employment, Education and Training notes that although it currently has no capacity to issue public interest certificates, it does deal with sensitive information of this kind: for example, parents of students who have applied for student assistance on the basis of homelessness sometimes provide information to that department which they do not wish to be disclosed to the student.

\textsuperscript{76} \textit{Administrative Appeals Tribunal Act} 1975, section 36.

\textsuperscript{77} \textit{Administrative Appeals Tribunal Act} 1975, section 36B. For the purposes of this section ‘State’ includes the Northern Territory: section 3.

\textsuperscript{78} \textit{Migration Act} 1958, sections 374 and 375, and sections 437-440.

\textsuperscript{79} \textit{Migration Legislation Amendment Bill} (No 5) 1994.
IRT. The Council’s submission to the parliamentary committee looking at the amending Bill is contained in Appendix D.

3.126. Under this proposed approach, where such a certificate is issued, the IRT may be required to decide a case on the basis of information that it is unable to disclose to the applicant, even though it might consider that on balance it was necessary for the applicant to have the opportunity to respond to the information. While overriding the requirements of procedural fairness may be justified in particular, exceptional circumstances - for example, for the protection of defence interests, national security or international relations - the proposed amendments are not so limited. There is no provision for the review of a ministerial decision to issue a certificate. In the absence of any evidence that the current provisions, designed to protect vital interests, have failed to do so adequately in the IRT, the Council considers that the discretion of the tribunal to disclose information to applicants should not be further restricted.

3.127. The Council notes that it is not at this stage proposed to amend the identical provisions relating to the RRT, although in the case of the RRT, the tribunal has the ability to impose a non-disclosure condition on the release to the applicant of sensitive information. The equivalent provision for the IRT limits it to preventing onward publication. 

3.128. Neither the Social Security Act 1991 nor the Veterans’ Entitlements Act 1986 contains provisions about public interest certificates - presumably this was considered unnecessary because the sort of information those certificates would apply to was considered unlikely to arise or be relevant to cases in the SSAT and VRB (otherwise such information would be required to be disclosed to the applicants as part of the agency documentation).

3.129. The Council favours provisions that, as a general rule, leave to tribunals the balancing of the various interests at stake, such as interests of procedural fairness and government reasons for seeking to prevent disclosure of information relevant to a review. That is, it favours provisions like those applying in the AAT. The process to be followed when agencies claim that certain material should not be disclosed beyond the tribunal should be simple. Agencies should apply to the tribunal for a confidentiality order as soon as is reasonably possible. It should then be up to the tribunal to decide whether and, if so, to whom that material may be disclosed and on what, if any, terms. All relevant information should be provided to the applicant except those parts the tribunal considers should not be released for confidentiality reasons.

Recommendation 16

All review tribunals should be subject to the same provisions concerning confidential information and public interest certificates.

81 Migration Act 1958, section 440.
82 Migration Act 1958, section 378.
Recommendation 17

Subject to narrow exceptions, review tribunals should have the discretion to decide what information to release to applicants, having regard to both any government case for withholding information and the requirements of procedural fairness which would favour disclosure of all relevant information.

Recommendation 18

Review tribunals should be able to place conditions on the further disclosure of sensitive information.

3.130. There is a specific issue relating to review of decisions under the FOI Act. This concerns the procedures whereby the AAT obtains access to documents for which agencies have claimed an exemption from disclosure on one or more of the public interest grounds set out in the FOI Act, in order that it can fully review the decision. This issue is currently being examined by the Council and the ALRC in their joint review of the FOI Act, and is not dealt with here.

3.131. The Council further notes that the AAT has recently issued a draft revised practice direction relating to review of FOI exempt documents. It also notes that it is proposed that decisions on access to historic Australian Security Intelligence Organisation files under the "Archives Act 1983" be reviewable by the new Security Appeals Division of the AAT. This division may have the potential to deal with cases of particular sensitivity arising in other AAT jurisdictions, and perhaps even in other tribunals.

RESOLUTION OPTIONS

3.132. The legislation governing all the tribunals provides for an oral hearing for applicants. Applicants may of course choose not to appear at any hearing of their case. The fact that oral hearings are available in all tribunals does not mean that they are either necessary or the appropriate way to resolve every case. The Council considers that tribunals should seek to resolve the issues arising in reviews short of a hearing wherever possible: that is, where it appears to the tribunal that such a course is likely to lead to an earlier resolution. In practice, reviews generally proceed to a hearing unless the applicant opts to accept an earlier resolution of the review. There are a number of ways in which such resolutions may take place.

---

83 Proposed amendments by Part 1 of Schedule 1 of the Law and Justice Legislation Amendment Bill (No 3) 1994 will create a new Security Appeals Division within the AAT. This new division will deal with the review of adverse or qualified security assessments made under the "Australian Security Intelligence Organisation Act 1979" and the review of decisions made under the "Archives Act 1983" refusing access to Australian Security Intelligence Organisation records. As a result of the security aspects of such cases, special procedural requirements will be introduced, including those relating to the constitution of tribunals, the disclosure of certain documents and information in proceedings, and procedures at hearings and costs. There will also be restrictions on the publication of evidence and findings.

84 VRB applicants (and the Repatriation Commission) are specifically asked to indicate whether they intend to appear at any hearing of their review - "Veterans' Entitlements Act 1986", section 148(1). The other tribunals have no equivalent provision: where an applicant chooses not to appear at the hearing, the way the tribunal conducts the hearing will depend on the relevant procedural rules and the requirements of procedural fairness.
Decisions ‘on the papers’

3.133. One form of resolution without a hearing can be described as a ‘decision on the papers’. At present, the extent to which decisions may be made by different tribunals on the papers depends largely on their approach to gathering information relevant to the review and their use of pre-hearing processes.

3.134. The SSAT is able to hear and determine a review without oral submissions from a party at the hearing of the application.\(^\text{85}\) The VRB also has a procedure that enables it to finalise reviews in particular circumstances in the absence of parties,\(^\text{86}\) although this is limited to cases involving default by a party. Other tribunals also have facilities for dealing with default by applicants and others involved in review proceedings: these vary and appear to be adapted to the experience of the relevant tribunals in their respective review jurisdictions.

3.135. The IRT and RRT have a specific capacity to make a decision on the papers in the absence of a hearing provided that it is the decision ‘most favourable to the applicant’. The Council understands that such decisions are not made by the IRT or RRT against an applicant’s wishes. This type of provision emphasises that the tribunal is in charge of its decision-making process and enables those tribunals to dispose of appropriate cases quickly to the benefit of applicants. The Council considers this approach to be appropriate but considers that there is scope for different views to be taken as to what is a decision ‘most favourable to the applicant’.

3.136. The Council therefore considers that it should be possible in all cases for tribunals to make decisions on the papers, provided that the applicant gives informed consent to such an approach being taken. Tribunals could contact applicants at any stage prior to a hearing and indicate the decision they would make unless the applicant indicated a desire to make further representations.\(^\text{87}\) If the applicant did not wish to make further representations, the tribunal could make the proposed decision without proceeding any further.\(^\text{88}\) The approach taken by the tribunal to any further representations would have to comply with the requirements of procedural fairness.

3.137. The opportunity for applicants to meet someone face to face - often for the first time - who is able to give them an explanation of what was involved in the decision and to hear their side of the story is highly valued and lends credibility to review by tribunals. It therefore remains likely that many tribunal reviews will proceed beyond a consideration of the documentation. At the same time, if the opportunity is taken to provide applicants with

---

\(^{85}\) Section 1266 of the *Social Security Act 1991* provides to the effect that the SSAT can, where a party has advised the National Convener that they do not intend to make oral submissions to the SSAT, proceed to hear and determine the review without oral submissions from that party.

\(^{86}\) The VRB can conduct ‘in absentia’ reviews: section 148(4) of the *Veterans' Entitlements Act 1986* provides that, where a party fails to advise, within the time specified in the notice served on them, whether they wish to appear at the hearing of the review, the VRB may determine the application in the absence of that party.

\(^{87}\) In any circumstance where the tribunal expresses preliminary views, whether as to the decision it would make or as to factual findings, care must be taken to ensure that those views are expressed in such a way that leaves the tribunal open to persuasion otherwise should more submissions and evidence be forthcoming. An example of the difficulties that can otherwise arise is *Dobbie v Department of Social Security* (unreported, 7 April 1995), Full Federal Court (Chief Justice Black, Justices Jenkinson and Heerey).

earlier contact with agency decision officers and tribunal members or staff - through the use of alternative dispute resolution techniques discussed below - this face-to-face contact may be achieved without the need in as many cases to proceed to a hearing.

**Recommendation 19**

A review tribunal should not convene an oral hearing of a matter if it considers that the issues may be determined adequately without an oral hearing, and provided that the applicant gives informed consent to the tribunal adopting that course.

**Alternative Dispute Resolution**

3.138. Leaving aside decisions made on the papers, only the AAT routinely uses other techniques that might fall within what is known more generally as ‘alternative dispute resolution’ or ADR. Those techniques include bringing parties together in a confidential pre-hearing conference setting to explore the possibility of reaching a decision by agreement, and mediation. In either event, the outcome reached - as with decisions on the papers - must be one that the tribunal considers within the scope of the relevant legislation.

3.139. In the conference setting, the tribunal member or officer involved may take a more directive role than does a mediator: they may discuss the merits of the case (in confidence, and subject to not being a member of the tribunal panel that subsequently hears the case if it proceeds to a hearing). Mediation, on the other hand, is characterised by the neutrality of the mediator, the aim simply being to have the parties themselves explore the possibilities of agreement, with the mediator playing a facilitating role.

3.140. Mediation is a relatively new technique for the resolution of issues arising in reviews in a tribunal setting. The Access to Justice Advisory Committee noted in relation to ADR generally that while it makes a substantial contribution to access to justice, there are risks that some people may use ADR for cost reasons and that power imbalances may result in disadvantage for particular disadvantaged groups within the Australian community. The Committee recommended that there be regular reviews of government-funded ADR programs to ensure that they worked fairly and effectively. The AAT has recently commissioned an evaluation by the Australian Commercial Disputes Centre of its conference and mediation programs to assess the effectiveness and efficiency of its assisted resolution processes. The date for completion of the project is February 1996.

3.141. In the review tribunal setting, the AAT has pioneered the use of mediation and is evolving principles governing the circumstances in which it can be of use. The AAT’s experience to date suggests that mediation can assist in having review participants move away from previously entrenched views at an earlier stage in the review process. It also suggests that mediation is unlikely to succeed in situations where:

- an applicant sees the legislation as unfair, harsh or rigid;
- there is minimal financial risk to parties by proceeding to hearing;
- parties have adopted entrenched or positional bargaining stances;
- there is inconsistency between legislation and departmental policy;
- a party does not fully understand the distinction between the legislation and its administration by the department; or

---

• there is an absence of discretion available to the decision maker.\textsuperscript{90}

3.142. One concern raised during the Council’s inquiry about the use of ADR techniques, such as mediation, may have a particular significance in the context of administrative decision making: their success depends on those involved having equality of bargaining power. Government agencies are ‘repeat players’ when it comes to the review of administrative decisions. Those agencies have staff who are trained in the relevant law, in appearing before courts and tribunals, and in judging the relative strengths and weaknesses of the claims made by people in relation to decisions that affect them. Given that many people seeking review of administrative decisions will have had no previous experience of the process involved and little knowledge of the relevant law and policy, there is some concern that this imbalance might lead to people being deprived of the full benefit of an outcome that may have been achieved had they pursued their cases further. The Council considers that skilled mediators are aware of, and able to deal with, issues of power imbalance.

3.143. The use by the AAT of conferences and mediation techniques has provided AAT applicants who may wish not to participate in a hearing - for example, because they would prefer to have their case resolved without the formality that may be involved in holding a hearing or due to the public nature of some hearings - with other means of having the decisions affecting them reviewed in a cheaper and less formal and complicated manner. This has produced positive results and, provided that skilled mediators are available to ensure that applicants are not put at any disadvantage in ADR processes, the Council considers that there are many advantages to be gained from increasing the availability of ADR techniques.

3.144. The Australian Government announced in the May 1995 \textit{Justice Statement} that it would establish a specialist Advisory Council to ensure high standards in alternative dispute resolution and to develop informed policy advice for the Government on unresolved issues about the use and regulation of alternative dispute resolution.\textsuperscript{91} The Justice Statement deals with mediation largely by reference to its expanded use in relation to family law litigation, but it appears that the Advisory Council’s functions will concern the uses of alternative dispute resolution generally. The general concern about equality of bargaining strength should feature in the work of the Advisory Council. The particular ways in which that concern manifests itself in the context of merits review by Commonwealth tribunals may require separate consideration.

3.145. There is a question of principle as to whether ADR approaches detract from the function of tribunals to make the correct and preferable decision. If tribunals reviewing administrative decisions are generally charged with finding the single preferable decision from among those decisions that are lawful in terms of the relevant legislation, is it appropriate for them to allow the parties to agree on what is the preferable decision and leaving it to the tribunal to determine only whether the decision agreed upon is within the lawful range?

\textsuperscript{90} Submission by the Administrative Appeals Tribunal (Submission number 37), page 53.

\textsuperscript{91} Attorney-General’s Department \textit{Justice Statement} Canberra, 1995, page 31.
3.146. If the agency and the applicant seeking review of an administrative decision are able to agree on a decision that is lawful, it is difficult to see what interests would be served by any further expenditure of resources. Provided the tribunal is satisfied that the applicant has not been pressured or coerced into accepting a less favourable outcome, there should be no obstacle placed in the way of such settlements.

3.147. There is another broad concern that has been raised in relation to the use of ADR techniques leading to resolve cases without a formal tribunal decision. Decisions made following the use of ADR techniques contain no reasoning that assists in informing and improving decision making more generally. The lack of reasoning flows from the confidential nature of the environment in which the agreement of participants is obtained. Even if the tribunal were not restrained in that regard, it would be difficult to issue any guiding principles from a process in which the alternative views had not been fully argued and, where appropriate, tested.

3.148. Consistent with its comments about making decisions on the papers, the Council considers that if an applicant and an agency are in agreement about an outcome, then the objective of merits review in that particular case has been achieved. This necessarily involves acceptance of a possible loss of any wider normative effect from cases settled in this way. These important objectives have to rely on the (diminishing) proportion of cases that proceed to formal determination by the tribunals.

3.149. The Council invited submissions on the question whether ADR techniques, including mediation, might be used more widely in tribunals other than the AAT. The other tribunals expressed a range of concerns and reservations about the use of these techniques. They would clearly require a change of style in that the agencies, which are not currently represented, would need to be invited to participate in the pre-hearing processes of those tribunals, in appropriate cases.

3.150. The specialist tribunals question whether there is much scope for settlements or concessions in their review jurisdictions, and those relevant specialist tribunals whose decisions may be reviewed further by the AAT (the SSAT and VRB) are critical of the fact that there is a large proportion of settlements in cases that so proceed to the AAT. The SSAT and VRB see the increasingly codified (and decreasingly discretionary) nature of entitlement legislation in the social security, student assistance and veterans’ compensation areas as leaving little scope for negotiated settlements. The IRT and RRT see even less scope for mediation or other forms of ADR in their review jurisdictions, where decisions generally have an ‘all or nothing’ character.

3.151. The Council accepts that the scope for ADR, and for mediation in particular, may be limited outside the AAT. Nevertheless, the Council considers that all tribunals should seek agency representation in those cases in which the tribunal considers there is a prospect of resolving a case without a hearing. Given that such alternative techniques have worked in other settings and that an Advisory Council is to be established to examine the use of those techniques, the Council considers that all tribunals should have the capacity to use them where appropriate.
Recommendation 20

All review tribunals should explore the potential use of alternative dispute resolution techniques to resolve the issues arising in cases coming before them.

COLLECTIVE DECISION MAKING?

3.152. The Council suggested in the discussion paper that there may be scope for a more collective approach - greater involvement by the tribunal as a whole in the resolution of particular cases, including involvement on the part of members not part of the panel charged with deciding a particular case - to decision making within review tribunals. It was suggested that there may be room to develop a tribunal approach to issues capable of consistent application (the distinction being drawn between the independence of individual tribunal members and the independence of tribunals as an entity). This suggestion found no favour during the inquiry, other than with the Repatriation Commission.

3.153. The objective of such an approach is to improve the internal consistency of tribunal decisions, which is important in terms of both equity between different applicants for review and achieving normative effects from tribunal decisions. The Council prefers other means of achieving these things - including the use of Review Panels and other authoritative tribunal panels to deal with cases raising issues of general application, and improved mechanisms for disseminating the resulting information to decision makers - over any change to the accepted responsibilities of the member or panel assigned to review individual cases. Those responsibilities involve extremely sensitive issues that owe as much to convention as to legal prescriptions. As such, it is difficult to be prescriptive in this regard without carefully and more directly canvassing the views of all interested players.

3.154. At the same time, the Council did consider a range of activities that tribunal members sometimes engage in as part of the process of exchanging ideas generally or in relation to the review of particular decisions. The Council noted that new tribunal members should be encouraged to consult other members and that it would often be a useful strategy for tribunals to use such members as non-presiding members on multi-member panels to give them some experience in that setting before being more actively involved in conducting reviews.

3.155. The general principle behind the Council’s views on this subject is that there should be no possibility of influence upon tribunal members in the way they reach decisions in particular cases. At the same time, there was no reason why their general reasoning process and its quality could not be reviewed within the framework of the independent tribunal. Drawing that distinction can be extremely difficult to do and attempts to do so require great care. These issues arise in the context of performance appraisal of tribunal members, a subject discussed at paragraphs 4.74-4.83. The process by which decisions are reached in individual cases always remains subject to the requirements of procedural fairness.

3.156. The Council sets out its views here as an indication of its broad position on this subject and of the fact that it considers that further examination of these sensitive issues may be worthwhile. The Council considers the following activities to be consistent with the proper role of tribunal members:

- abstraction of generic points and legal interpretations from decisions for guidance of members;
• panel members seeking advice from research staff before finalising a decision; panel members seeking advice or guidance from senior members prior to a hearing;
• panel members seeking advice or guidance from senior members after a hearing, but before finalising their decision;
• designation of a member as an expert in a particular field, as the AAT now does, with the role of advising and assisting other members in relation to that field; and
• review of decisions by senior members after they are handed down, with feedback on substantive reasoning.

3.157. On the other hand, the Council has some concerns with the following practices, depending on the way in which they take place:
• review of draft decisions by research staff before they are finalised;
• review of draft decisions by senior members before they are finalised; and
• circulation of draft decisions, allowing for comment by other members.

In relation to these practices, as with advice and assistance to members generally, the key is that the relevant member or members remain responsible for the decision made. The closer the advice and assistance comes to the time when the decision is made in a particular case, the more care is needed to avoid the risk that the decision will be taken or will be seen to be taken, by a person other than the responsible member or members. Advice and assistance in particular cases should always be provided at the request of the responsible member or members and it should be clear that they are free to adopt or reject such advice and assistance as is provided to them.

COSTS AWARDS IN REVIEW TRIBUNALS

3.158. The Council raised in its discussion paper the question whether tribunals should have powers to award costs against parties to administrative review proceedings in particular circumstances. The general rule in tribunals at present is that each party should bear his or her own costs of the proceedings, subject to particular forms of financial assistance governed by the statutory rules applying to each tribunal.

3.159. The Council also noted in its discussion paper that the ALRC was conducting a major review of litigation costs and would be dealing with this subject in the context of that review. The Council has provided a submission to the ALRC inquiry which notes some reasons why, as a general rule, costs powers do not sit well with the role of review tribunals. It also notes that, in the context of this inquiry, the Council has come to the conclusion that a carefully-limited costs power, to be used as a disciplinary tool, should be provided to tribunals.

3.160. As the Council has made a range of recommendations in this report aimed at enhancing the degree to which tribunals have flexibility and control over their proceedings, it considers that the provision of a disciplinary costs power to tribunals would reinforce the capacity of tribunals to take firm control of proceedings. The Council considers that a power like that proposed for the AAT in the Law and Justice Legislation Amendment Bill (No 2) 1995 currently before the Australian Parliament, should be available to all merits review tribunals.

---


See clause 14 of the Law and Justice Legislation Amendment Bill (No 2) 1995.
3.161. That Bill proposes that the AAT have a discretionary power to award costs against a party, or the representative of a party, as a disciplinary measure in certain defined circumstances. Generally, these circumstances would amount to an abuse of the AAT’s review process: the Second Reading Speech to the Bill makes it clear that the power is not intended to be used to punish unrepresented people who may be unfamiliar with tribunal processes. The power will be able to be exercised where a party or a party’s representative deliberately engages in conduct so as to cause the other party to incur additional costs. Examples in the Bill of conduct that falls within the scope of the costs discretion include:

- failure to comply with an order or direction of the Tribunal;
- the doing, or omitting to do, anything that has resulted in the proceeding having to be adjourned; and
- vexatious conduct that does not result in the dismissal of the application.

3.162. Finally, the Council notes that in its submission to the ALRC inquiry, it drew attention to possible constitutional difficulties - following the decision of the High Court in *Brandy v Human Rights and Equal Opportunities Commission*94 - in providing tribunals with a costs power capable of being exercised against parties to review proceedings other than government parties. The Council understands that the Attorney-General’s Department is taking steps to ensure, as far as is possible, that the procedures for the enforcement of costs awards made under the proposed legislation described above will avoid constitutional difficulties.

**Recommendation 21**

All review tribunals should have power to make costs awards against any person involved in a review proceeding who, in the opinion of the tribunal, has deliberately engaged in inappropriate conduct that results in another person incurring unnecessary costs.

**REPRESENTATION**

**Introduction**

3.163. The Council invited comment in its discussion paper on the issue of when representation should be permitted and what role should be played in the review process by representatives. The rules on this subject vary as between the tribunals, both in relation to applicants and agencies. In some tribunals there are provisions allowing for other persons whose interests are affected by a decision to be joined to a review application: the following discussion is limited to discussing the role of representation in relation to applicants and agencies. Others who are joined would for present purposes usually be governed by the rules and practices applying in the case of applicants.

**Representation of Applicants**

*Assistance and representation prior to hearings*

3.164. All the tribunals currently have a discretion as to what involvement by representatives they allow: however, there is a significant difference between the starting point for applicants of entitlement to representation in the AAT, SSAT and VRB and of non-
entitlement in the IRT and RRT. There is currently a proposal to further limit the role of representatives in the IRT, discussed shortly.

3.165. Applicants’ rights to representation vary, although all the tribunals try to encourage and assist unrepresented applicants. Applicants to the AAT, SSAT and VRB may be represented. In the IRT and RRT, the applicant must be given the opportunity to appear to give evidence.\(^95\) The IRT and RRT are not required to allow any person to address them orally about the issues,\(^96\) and a person appearing to give evidence is not entitled to be represented or to examine or cross-examine any other person appearing to give evidence.\(^97\) Although applicants to the IRT and RRT are not entitled to be represented, the tribunal may allow them to be.

3.166. While tribunals encourage and support unrepresented applicants, many applicants seek advice and assistance, which is available from a variety of sources including legal aid authorities, non-government organisations, and private lawyers - see Chapter 5. Where applicants do have a representative or adviser, even if that person is simply a relative or friend, the tribunals should be prepared to deal with them, subject to satisfactory proof of identity and authority. At one point there were concerns about the way in which the Department of Social Security applied the Privacy Act 1988 provisions:\(^98\) some advocates were unable to assist as fully as they would have liked some applicants for review. A protocol was successfully established to overcome these concerns. In principle, the Council sees no difficulty with third parties assisting applicants in their dealing with tribunals outside the hearing context.

**Assistance and representation at hearings**

3.167. Most of the controversy about representation in tribunals relates to the role of representatives in hearings.

3.168. At any hearing, and to some extent in conferences and preliminary meetings, a range of activities may occur. The question that arises is whether, and to what extent, a person representing or assisting the applicant should be able to:
- make an introductory statement?
- speak to the applicant, or answer the applicant’s questions directed at that person, at any stage?
- request an opportunity to advise the applicant in private?
- answer questions on the applicant’s behalf if the applicant requests?
- ask questions of the tribunal?
- suggest lines of inquiry or possible evidence?
- make submissions at any stage during the hearing as to the law or facts in issue?
- ask questions of any witnesses or agency officers (if present)?
- make a closing statement?

3.169. Assistance of the first three types listed above is relatively uncontroversial. It is the last six that are viewed with suspicion by many members and observers since they are seen as potentially, and perhaps inevitably, leading to a formalisation of the hearing: the fear is that too much reliance will be placed on legal rules and adversarial techniques in circumstances where such reliance is not appropriate. The difficulty which the Council

---

\(^{95}\) *Migration Act 1958*, sections 360(1) and 425(1).

\(^{96}\) *Migration Act 1958*, sections 360(2) and 425(2).

\(^{97}\) *Migration Act 1958*, sections 363(6) and 427(6).

\(^{98}\) See paragraphs 3.113-3.129 of this Report for a general discussion of privacy and confidentiality issues as they affect tribunals.
faces is that, although adversarial techniques may produce undesirable consequences if relied on inappropriately, there are also circumstances where it is appropriate to permit their use, which can be very important to some applicants and of assistance to the tribunal in some circumstances.

3.170. The solution to this dilemma should lie in firm management by tribunal members in the exercise of their discretion to allow representatives to participate, but on the tribunal’s terms. This ideal can be frustrated in practice, particularly if representatives experienced in adversarial approaches confront relatively inexperienced tribunal members.

3.171. This broad issue was the subject of Council advice in May 1995 on proposed amendments to the *Migration Act 1958* to be made by the *Migration Legislation Amendment Bill* (No 5) 1994 (the Bill), which is currently before the Parliament. The current practices and procedures of the IRT are such that many applicants are able to present their cases effectively without representation. However, applicants are also able to be accompanied by a representative at an IRT hearing, and the IRT currently has a discretion to permit the applicant’s representative to present arguments and submissions on behalf of the applicant. The Council understands that these arrangements have had no adverse effect on the ability of the IRT to pursue in an effective way the tribunal’s objective of providing review which is fair, just, economical, informal and quick.

3.172. If the proposed amendments of the Bill are enacted, one effect will be that, although an applicant appearing before the IRT will be entitled to have an assistant present at the hearing to assist her or him, the assistant will not be able to present arguments to the IRT, or address the IRT, unless there are ‘exceptional circumstances’, which were narrowly exemplified in the second reading speech to the Bill.\(^99\)

3.173. In the inquiry on the Bill held by the Senate Legal and Constitutional Legislation Committee (the Senate Committee), the Council submitted that it supported the retention of the IRT’s existing discretions relating to the procedures to be observed during hearings, including the discretion to determine the extent to which an applicant’s assistant should be able to address the tribunal or advance arguments on behalf of the applicant. The Council considered that any narrowing of the IRT’s discretions, such as that proposed by the Bill, would need to be justified by compelling evidence that the existing discretions are impeding the IRT’s capacity to meet its statutory objective - the Council’s submission to the Senate Committee is reproduced in Appendix D.

3.174. A majority of the members of the Senate Committee, reporting on the Bill in May 1995, stated that:

> In view of the general satisfaction with the current practices of the IRT, any amendment which seeks to limit traditional liberties, such as the right of lawyers to fully represent their clients, should be subject to careful scrutiny.\(^100\)

\(^99\) According to the Second Reading Speech, the relevant proposed provision is not ‘intended to prevent assistants from commenting on minor and routine matters which could assist the tribunal, such as providing it with guidance or referring it to relevant parts of the documentation.’ It is also stated in the Second Reading Speech that, ‘People assisting applicants are not able to examine or cross-examine witnesses. They are not able to present oral argument to the tribunal without its consent, to be exercised at its discretion and only in exceptional circumstances - other than where there is a lack of proficiency in English - such as when the applicant has a mental disability.’ *Hansard*, House of Representatives, 9 February 1995, page 886.

3.175. However, the majority of the Senate Committee went on to recommend no amendments to the Bill. The other Committee members, in two dissenting reports, recommended maintenance of the existing IRT discretions.

3.176. As illustrated by its recent advice, the Council strongly opposes suggestions that the availability of representation or the role to be played by representatives in review proceedings should be excluded or limited by law: rather, it considers that tribunals should have maximum flexibility to determine the role to be played by representatives before them.

3.177. To exclude or limit the role of representatives by fixed rules allows the possibility that injustice will ensue in particular cases, with tribunals being unable to do anything to prevent that result. Tribunals should not be hampered in their capacity to use, or permit the use of by others, particular techniques for gathering and testing evidence, including cross-examination where appropriate, simply because of a concern that tribunals might become too formal or adversarial. The possible use of such techniques does not mean that the broader culture of a tribunal need necessarily change, particularly if the head of the tribunal has power, as should be the case, to issue practice directions that can guide the way in which the tribunal should generally operate in particular types of cases. If it be thought desirable, practice directions can be used to confine the role of representatives or assistants in the general run of cases within a tribunal while leaving tribunals with the flexibility to adopt procedures tailored to the circumstances of individual cases.

3.178. There are likely to be at least some cases before any review tribunal in which the use of different techniques for gathering and testing evidence, including adversarial ones, will be the best way for the tribunal to reach the correct and preferable decision. There are also likely to be cases where failure to permit the use of those techniques would result in injustice. In the Council’s view, tribunals are best placed to make the judgment about which cases are of this type, and this judgment should be made on a case-by-case basis.

3.179. At the same time, the Council does not consider that the role of representatives should be left at large. Rather, the Council considers that representatives should be required to comply with directions given to them by tribunals regarding the extent of their role in hearings before tribunals. In many cases this may mean that representatives would not be permitted to participate as they would wish. Such an outcome is consistent with the Council’s general view that the process to be followed in tribunal hearings should be for the tribunal to determine within the confines of their statutory function and objectives.

<table>
<thead>
<tr>
<th>Recommendation 22</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicants for review should be entitled to be represented or assisted in any dealings with a review tribunal.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recommendation 23</th>
</tr>
</thead>
<tbody>
<tr>
<td>The extent to which an applicant’s representative or assistant can participate in review tribunal proceedings should be left to the discretion of the tribunal. There should be no statutory limitations on the role that such representatives or assistants are allowed to play.</td>
</tr>
</tbody>
</table>
Recommendation 24

Review tribunal heads should issue practice directions concerning the role of applicants’ representatives and assistants, and seek to ensure that those representatives and assistants are fully aware of and understand the nature of their role and of any limitation upon it.

Role of lawyers

3.180. Many submissions to the Council were critical of the role of lawyers within the tribunal review process, suggesting that the presence of lawyers, both as tribunal members but particularly as representatives of applicants and agencies, has resulted in tribunals (and particularly the AAT) operating in court-like ways that are more complex, formal, costly and inaccessible than need be the case.

3.181. The Council has already stated that tribunals need not operate like courts (see Chapter 2). It also makes recommendations in this report aimed at increasing the level of awareness of the existence, role and processes of tribunals and reducing the level of formality of tribunal proceedings. However, it does not accept the proposition that to permit representation by lawyers is incompatible with these objectives.

3.182. The Council considers that to prevent lawyers as a group from participating as representatives in review proceedings is both irrational and unfair. If there is a problem with certain practices that affect complexity, cost and formality, then any solution should address those practices directly, regardless of who engages in them. There should be no discrimination against any particular group on the basis of an assumed correlation with the problem.

3.183. There is currently a provision in the Veterans’ Entitlements Act 1986 that excludes persons with legal qualifications from representing others before the VRB. This has the effect of preventing some workers in welfare and veterans’ advocacy services, who incidentally happen to have legal qualifications, from assisting applicants. It follows from the Council’s comments above that this provision should be repealed.

3.184. The Council’s support for lawyers being able to participate in tribunal processes does not imply complacency about the quality of legal representation. This issue is addressed below.

Recommendation 25

There should be no prohibition against lawyers - or any particular group - from advising or representing parties in review tribunal proceedings to the extent that advice and representation is permitted in the relevant tribunal.

---

3.185. There is considerable concern, shared by some tribunals, agencies and third parties, about the overall quality of representation, particularly in the veterans’ and migration areas. This concern related not so much to the professional competence of individual representatives, as to their familiarity with and understanding of tribunal processes.

3.186. There is a general need for better information and liaison, and appropriate training and professional development for those advocates and advisers who are likely to be regular or occasional ‘users’ of tribunals. Most of the tribunals have made efforts in this direction - such as a recent joint AAT/VRB/Department of Veterans’ Affairs program of training for advocates in ex-service organisations. One of the problems in this respect is that the volume of merits review work is not sufficient, except in a few limited areas, to support full-time specialists or even to permit part-timers to dedicate a significant proportion of their time to such work. Many advisers do not therefore have enough exposure to tribunals to become familiar with their processes, and are often also assisting applicants in a wide range of other courts, tribunals and dispute resolution bodies, all with their own practices and other characteristics.

3.187. There appear to be particular problems in relation to two specific professional groups. It seems clear that some lawyers, for a variety of reasons, are antagonistic to the alternative style and approaches being adopted by the specialist tribunals, and to an increasing extent by the AAT. It is perhaps understandable that lawyers who spend most of their time in courts, and only a little in tribunals, may tend to import court culture and process. The report of the Kerr Committee, which led to the establishment of the AAT, expressly recognised that the legal profession would carry a heavy responsibility for ensuring that the tribunals did not become too legalistic. The resistance of some lawyers to tribunal processes may in part be attributed to genuinely-held concerns (shared by many non-lawyers) about independence and procedural fairness. The Council has made recommendations aimed at strengthening independence and procedural fairness. It is to be hoped that there may be a general increase in willingness to help make alternative tribunal processes work. Legal professional bodies could also assist by fostering awareness and understanding among their members of the distinct role of review tribunals and the ways in which they operate.

3.188. The other area of concern in relation to the quality of representation is in relation to the advice and assistance provided to migration applicants. The Council received submissions to the effect that the Migration Agents Registration Scheme, intended to raise standards in the area, had not succeeded in stopping abuses and had excluded some experienced community-based advisers, thereby reducing the availability of sound, low cost advice.

3.189. This issue of regulation of migration agents is one that is not central to the Council’s inquiry. The Council notes that the parliamentary Joint Standing Committee on Migration has been inquiring over the past year into the registration scheme, and has recently

---

102 Commonwealth Administrative Review Committee Report Parliamentary Paper No 144 of 1971, Commonwealth Government Printing Office, Canberra. This report is discussed in greater detail in Appendix B.
published its findings.\footnote{Joint Standing Committee on Migration \textit{Protecting the vulnerable?} Canberra, 1995.} Because that Committee has been examining this issue in detail, the Council has not addressed it separately.

**Agency participation in the review process**

3.190. It is only in proceedings before the AAT\footnote{Administrative Appeals Tribunal Act 1975, sections 30 and 32.} and the VRB\footnote{Veterans' Entitlements Act 1986, section 147.} that respondent agencies currently have the right, as parties to the review, to appear and be represented, although the former SART operated under the same approach. In the SSAT, the Secretary to the Department of Social Security is a party to the review, but not for the purposes of having another person make submissions to the SSAT on her or his behalf or to make oral submissions: at the same time, the Secretary is expressly permitted to make written submissions.\footnote{Social Security Act 1991, section 1265.} In the rules governing representation in the IRT and RRT, there is no reference to parties to the review: the rules specify only that the Secretary to Department of Immigration and Ethnic Affairs may give the tribunals written arguments.\footnote{Migration Act 1958, sections 358(2) and 423(2).}

3.191. In the SSAT, IRT and RRT, the agencies concerned generally make written submissions, and are only involved in hearings if invited (or required) to be present by the tribunal. Those tribunals rarely find it necessary to invite the agency to attend review hearings. In the VRB, the Department of Veterans’ Affairs very rarely exercises its right to appear and the Board conducts most hearings in a broadly similar way to the SSAT. On the other hand, most agencies routinely exercise their statutory right to be represented before the AAT. Among these agencies are the Department of Social Security and the Department of Veterans’ Affairs which, having been unrepresented before the SSAT and VRB respectively, often wish to be heard if the decision under review proceeds further to the AAT - particularly if the agency has sought further review following the decision of the relevant first tier tribunal.

3.192. Absence of agency representation means that proceedings in the SSAT, IRT and RRT are generally less complex, costly and formal than might otherwise be the case. This in turn means that people are more likely to seek review and to be willing to appear in person, and that unrepresented applicants are more likely to be able to run their cases effectively. This increases the accessibility of those tribunals and reduces the direct costs per case.

3.193. There is a therefore a question as to whether agencies should be represented before review tribunals. In the Council’s view, the decision whether to be represented is one that agencies properly make for themselves, taking into account their interest in explaining or defending the particular decision in question, the broader effects of the decision in terms of policy development and community interests in the appropriate expenditure of public monies. It is appropriate that respondent agencies should be able, if they so desire, to make oral representations to a tribunal. If they do so, then it would be incumbent on the tribunal save perhaps in an exceptional case, to permit those representations. To forbid agency representation before tribunals would diminish the ability of tribunals to reach the correct and preferable decision. As a result, the overall costs of achieving the objectives of merits review would be likely to increase.

3.194. The Council has recommended elsewhere (Recommendation 20) that all tribunals should have the capacity to use alternative means of resolving reviews: these usually
require the participation of the agency whose decision is under review. The Council considers that all tribunals should seek agency participation in review proceedings for this purpose wherever the tribunal considers that such an approach is likely to lead to an earlier resolution of the issues arising in reviews. For this reason also there should be no exclusion of the possibility of agency participation in review proceedings.

3.195. The Council therefore considers that agencies should have the capacity to participate in review proceedings, including at hearings, wherever they consider such participation to be appropriate. The fact that agencies retain the opportunity to participate in review proceedings does not mean that they should routinely do so. For the reasons set out above, agencies should take into account the broader effects of their participation in review proceedings when deciding whether to be represented in particular cases. In addition, it would be helpful if agencies could formally indicate to the relevant tribunal as early as possible prior to a particular hearing that they did not wish to be represented. The tribunal could then inform the applicant of that fact - provided the tribunal did not consider agency participation at the hearing to be desirable - and the applicant might feel less need to be represented. This would be likely to lead to a simpler and quicker resolution of the issues arising in the particular case and, over time, of cases generally.

Recommendation 26

Agencies should have the capacity to participate in review tribunal proceedings to the extent they consider appropriate. They should also assist tribunals by participating in those proceedings where that is requested by a review tribunal, whether to enable an attempt to be made to resolve the issues arising in the review through the use of alternative dispute resolution techniques or otherwise.

Recommendation 27

Agencies should be encouraged to indicate in advance those cases in which they do not wish to be represented at any review tribunal hearing.

DECISSIONS

Oral and written reasons for decisions

3.196. An issue raised during the inquiry was how tribunals could strike an appropriate balance between delivering timely decisions and providing statements of reasons of a standard that would enable them to be used to promote better decision making generally. In particular, the Council questioned whether the increasing reliance by the AAT on delivering decisions accompanied by oral reasons, with written reasons to follow only on request, was a useful facility that might perhaps be extended to other tribunals.109

3.197. Comment on this issue was divided. Some saw the facility as a way of achieving efficiencies within tribunals and of enabling tribunals to deliver decisions more quickly than if a tribunal was required in all cases to prepare written reasons for its decision. Others placed more value on the discipline involved in producing written reasons for decision, and considered that unrepresented applicants may not be aware of their right to

109 Administrative Appeals Tribunal Act 1975, sections 42(1), (2), (2A) and (2B).
seek written reasons after the decision had been given and that too much use of such a facility might threaten the flow of useful information back into the general decision-making process (see Chapter 6).

3.198. In the Council’s view, these two views are not incompatible. The Council has no concerns with the practice of providing timely decisions with oral reasons. This enables the tribunal to inform the review participants - the applicant in particular - of the result of the decision affecting their interests, together with an outline of the tribunal’s reasoning, more quickly than might otherwise be the case. Generally speaking, it is desirable that a tribunal make a decision and give reasons within a reasonably short time after a hearing, at a time when the tribunal is better able to recall the facts and issues that were involved. The Council therefore considers the facility to provide oral reasons to be a useful one that should be available to all tribunals.

3.199. At the same time, recourse to such a facility should not detract from the ends served by the production of written reasons for tribunal decisions. Written reasons for tribunal decisions can be used to promote better agency decision making, and can help the applicant to better understand why a particular decision has been made. They may also assist parties to decide whether they should take the matter further - whether by further merits review or on appeal to the courts. The Council therefore considers that all those affected by tribunal decisions should be able to request tribunals to produce written reasons for a decision.

3.200. In the Council’s view, the initial decision whether to give a decision with oral reasons or to prepare written reasons should be left to the discretion of the tribunal panel involved. In simple and less contentious cases, tribunals would ordinarily be expected to be in a position to give an oral decision with reasons, thereby avoiding delay and saving on the resources that would be involved in producing separate written reasons. The practice of giving a decision with oral reasons would in all cases remain subject to a requirement that a written statement of reasons be provided wherever a person affected by the decision later requested such a statement. If a tribunal panel considered that an applicant required a written statement of reasons in order to understand properly why the decision was made - even in a simple and less contentious case - it could produce such a statement. In cases raising issues of general importance for agency decision making, tribunals would be expected to produce a written statement of reasons as a matter of course. Under the reforms proposed in Chapter 8, Review Panels would have a particular responsibility to consider and give particular attention to such issues, so as to promote improved government decision making.

3.201. Written statements of reasons should comply with the general content standards described below, regardless of whether they are provided with the decision or later, in response to a request in a case in which oral reasons were provided with the decision. The Council understands that AAT practice in some of these latter cases is to provide a transcript of the oral reasons. Where oral reasons give an outline only of the tribunal’s reasoning, the Council considers that the written reasons provided later might usefully provide more detail, provided that they represent the reasoning process of the tribunal and are consistent with the reasons provided earlier.10 If an oral decision fully discloses the tribunal’s reasoning process, a transcript of the oral decision will suffice for these purposes.

---

10 Under the Administrative Appeals Tribunal Act 1975 once reasons have been given, whether orally or in writing, the decision is complete. It is not open to the tribunal at a later time to add new reasons to those given before - see Ma v Federal Commissioner of Taxation (1992) 37 FCR 225, per justice Burchett.
Content of reasons statements

3.202. There are statutory requirements for all tribunals in relation to the content of their decisions and reasons for them.\textsuperscript{111} In all cases, these include a requirement on the tribunals to give reasons for their decisions. While the precise requirements vary, in the case of written reasons these requirements are broadly similar to those that apply to other administrative decision makers in specified circumstances under section 28 of the AAT Act and section 13 of the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act). What is generally required is a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

3.203. The Council has commented previously on the requirements under the AAT Act and the AD(JR) Act for administrators to provide written reasons for decisions.\textsuperscript{112} In this section of the report the Council endorses parts of that commentary and restates its views on the purposes and, in broad terms, the desirable content, of statements of reasons. The purposes served by the provision of statements of reasons were described by the Council previously as including:

- to overcome the real grievance persons experience when they are not told why something affecting them has been done; and
- to enable persons affected by a decision to see what was taken into account and whether an error has been made so that they may determine whether to challenge the decision and what means to adopt when doing so (further merits review, if available, or judicial review).\textsuperscript{113}

3.204. The requirements for reasons statements can only be set out in general terms because what is required to be provided in order to accomplish the purposes set out above will vary according to the nature of the decision in question. The more complex the decision, the greater the material likely to be required to be included in a statement of reasons.

3.205. A statement of reasons should include the actual reasons that led the decision maker to make the decision in question. Thus the statement should not omit anything that was in fact considered by the decision maker to be relevant, or incorporate anything that may have come to light since the decision was made. Thus a ‘material question of fact’ is a factual question that the decision maker considered and which was taken into account in reaching the decision. The legislation under which the decision is made will require particular facts to be established as part of the relevant decision-making process: these must be addressed in making decisions and the way in which they were, or were not established should be set out in the statement of reasons.

3.206. Evidence and other material that led the decision maker to make findings on the material questions of fact must be referred to in the statement (not necessarily included, but specified sufficiently to enable its identification). The Council considers that where reliance is placed on previous court or tribunal decisions, there should be at least a brief summary of

the substantive point rather than simply a legal citation (bearing in mind that most applicants, and even most agency officers, will not have ready access to a law library).

3.207. In other words, decisions should be relatively self-contained and free-standing. Material on which decisions are based could in appropriate cases include government policy statements outside legislation, including agency instructions and guidelines and, on occasions, relevant international treaties to which Australia is a party. Finally, the reasons should be explained: the statement should contain all the steps of reasoning linking the facts to the ultimate decision so as to enable persons affected to know how the decision was reached.

3.208. Tribunal decisions should be written with the same aims and general standards in mind as the decisions of other administrative decision makers. However, certain factors generally lead to tribunal decisions being more lengthy and detailed than other administrative decisions. Among these factors are that:

- tribunals are expected to make a particular contribution to improved government decision making through their illumination of legal principles and good administrative practices (see Chapter 6);
- as a result, tribunal decisions are generally published more broadly than other administrative decisions (at least in some form); and
- tribunals providing final merits review are more directly aware of judicial review by the courts (because of the appeal provisions in their parent legislation) than are other administrative decision makers.

3.209. The Council does not consider that these differences mean that tribunal decisions should not be written in such a way as to be capable of easy understanding by applicants, agency staff and, where decisions are published, members of the public. It has already been noted that different types of decisions involve different degrees of complexity. There are also general differences in the degree to which recipients of different types of decisions are able to understand the content of those decisions (see Chapter 5). Tribunals are best placed to make judgments on these matters. Nonetheless, the Council considers that tribunal decisions, like other administrative decisions, should be capable of easy understanding by the people for whom they are primarily written.

3.210. A comprehensive review in 1993 of judicial decisions addressing the adequacy of (AAT) reasons concluded with the following checklist of features of a well-constructed statement of reasons:

- Statutory and case-law requirements should be set out. When discussing legal principles it is preferable to state the proposition, the authoritative case and its page reference, rather than incorporating principles by reference to other cases. Evidence which is material to the deliberations and all findings of fact on material questions should be set out clearly and unambiguously. All material issues, even if they are not addressed by the parties, should be discussed. On vital issues, where evidence conflicts, clear findings as to which evidence is preferred should be made. Esoteric terms and complex legalistic language should be avoided. If concessions have been made, the Tribunal should

---

114 Following the decision of the High Court in Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 253, there may be a separate obligation upon administrative decision makers and tribunals to draw relevant treaty provisions to the attention of persons affected by administrative decisions as part of the requirements of procedural fairness, unless that obligation is displaced by the Government or the Parliament. The extent of those obligations is unclear at this stage, and the Government has sought to displace them generally through a ministerial statement issued by the Minister for Foreign Affairs and Trade and the Attorney-General on 10 May 1995. Reinforcing legislation—the Administrative Decisions (Effect of International Instruments) Bill 1995 - was introduced into the Australian Parliament on 28 June 1995.
indicate whether it is satisfied that such concessions are correctly made. Parties should be given an opportunity to deal with evidence and make submissions. All submissions seriously advanced should be considered. The connections between evidence, facts as found and conclusions reached should be indicated. The provision of reasons, in accordance with these themes, will ensure that the Tribunal performs sound administrative review.115

3.211. As noted above, the adequacy of tribunals decisions and of the reasoning contained in those decisions is subject to scrutiny, on appeal, by the Federal Court. The general influence of the prospect of judicial review has already been discussed in relation to the overall style and approach of tribunals (see paragraphs 3.6-3.11). It was suggested during the inquiry that some of the perceived problems with tribunal reasons, such as length, complexity and legal language, are a result of Federal Court supervision. In other words, the suggestion was that tribunal members may be inclined to write reasons ‘protectively’, with judicial review in mind at the expense of the real consumers of tribunal reasons - the applicant, agency and any other interested persons.

3.212. While that suggestion may have some substance in isolated cases, the Federal Court has shown in many cases that it is aware of and sensitive to the concerns of administrative decision makers, including tribunals, in relation to statements of reasons. It has stated, for example, that:

A court exercising supervisory jurisdiction over an administrative tribunal ought not lightly interfere with its decisions even if the court feels that the tribunal’s language may have a degree of looseness. Certainly it ought not to indulge in an exercise which over-zealously picks the tribunal up in the way it has expressed itself. That is particularly so when it appears properly to have understood the legal principles which it is to apply.116

Recommendation 28

Review tribunals should provide reasons for decisions that are self-contained, clear and easy to understand by the people for whom they are written.

Recommendation 29

Review tribunals should develop guidelines for the content and presentation of reasons for decisions, in consultation with user groups.

Recommendation 30

Written reasons for review tribunal decisions should meet the same standards whether or not an oral decision has already been given.

115 Katzen H ‘Inadequacy of reasons as a ground of appeal’ 1 A J Admin L, page 33.
CHAPTER 4
TRIBUNAL MEMBERSHIP

INTRODUCTION

Independence

4.1. The recent Justice Statement acknowledged that:
Judges and tribunal members are of pivotal importance to the proper functioning of our
courts and tribunals. They are responsible for administering the primary functions of
these bodies.\textsuperscript{117}

4.2. As explained in Chapter 2, tribunals are not courts - they are part of the executive
arm of government and an extension of the administrative decision-making process.
Tribunal members perform a function that is essentially different from that of judges in that
they review, on the merits, administrative decisions. Decisions of review tribunals do not
create legal precedent. Nonetheless, tribunal members must bring the same quality of
independent thought and decision making to their task as do judges.

4.3. Since the merits review system aims not only to provide justice to individual
applicants but also to improve future agency decision making in similar cases, review
tribunals have an important and complex relationship with government agencies. That
relationship is discussed in differing contexts in this report, but particularly in Chapter 6
through to Chapter 8. A degree of liaison between tribunals and agencies can promote the
aim of achieving the correct and preferable decision across a range of similar cases. As a
result, there is an ongoing relationship between review tribunals and government agencies.
This means that the possibilities for agencies to influence (or to be seen to influence) review
tribunals are increased and capable of exercise in subtle ways.

4.4. The Council therefore acknowledges that many issues of independence arise in
relation to tribunals as well as courts. It is crucial that members of the community feel
confident that tribunal members are of the highest standard of competence and integrity,
and that they perform their duties free from undue government or other influence. The
Council noted in its discussion paper that satisfaction with a tribunal’s performance
appears to be highly correlated with opinions as to the quality of its members,\textsuperscript{118} and this
point has been reinforced during the inquiry.

4.5. Applicants and the broader community must have reason to be confident that the
members of review tribunals both have the skills required to provide merits review and will
consider the merits of their cases in an impartial way, and make a different decision to that
of the relevant government agency where they consider that appropriate. In other words, it
is crucial to ensure that there is no perception (let alone any reality) that tribunals are in any
way subject to undue influence either in reaching decisions in particular cases or more
generally.

\textsuperscript{117} Attorney-General’s Department Justice Statement Canberra, 1995, page 62.
\textsuperscript{118} Administrative Review Council Review of Commonwealth Merits Review Tribunals – Discussion Paper Australian
4.6. Ensuring the credibility of tribunals through maintaining appropriate levels of independence for tribunals and their members is a recurring theme in this chapter. That independence is essential, but can be protected in ways different from those attaching to judges (for judges, principally through appointment to retirement age, subject to removal only in very exceptional circumstances by the authority of Parliament).

The structure of the chapter

4.7. The chapter begins with a discussion of the skills and experience required, and of the process of selection and appointment of, tribunal members. This is the key process in ensuring that tribunals comprise the best available people and that they are appropriately independent. It then covers related issues of terms of appointment and remuneration, and performance appraisal. The chapter also deals with professional development and with assistance provided to tribunal members.

SKILLS AND EXPERIENCE

4.8. Skills and experience are important at two levels - firstly in relation to the pool of members available to a tribunal, and secondly in relation to how the panels for particular reviews are constituted. The latter aspect is discussed later in this chapter. This section deals with the range of skills and experience available in the pool.

4.9. The Kerr Committee - the recommendations of which were largely responsible for the introduction of the Commonwealth system of administrative review - considered it important to have persons with administrative experience among the membership of their proposed general appeals tribunal, and also considered that it would be appropriate to draw members from outside the administration wherever possible.\(^\text{119}\)

4.10. In carrying out merits review, tribunals have to consider both the lawfulness and the merits of the decisions they are reviewing. While legal skills are clearly useful in respect of the first component, they may not be a relevant qualification for the merits component. It is generally accepted that merits review benefits from the wider range of skills and experience that a diverse membership makes available. Whether the right balance has been struck in review tribunals is a question that is touched upon in various parts of this report, and the answer is likely always to be a subject of contention.

4.11. Review tribunals currently include within their membership persons with skills and experience in a variety of areas, including, to give just a few examples, the law, administration, medicine, social work and the defence forces.

4.12. The following criteria for skills and experience were suggested during the inquiry as essential or desirable for tribunal members:

Understanding of merits review and its place in public administration:
- clear understanding of the nature and role of merits review
- understanding of government (knowledge of public sector management and processes)
- understanding of the administrative decision-making process

Knowledge of administrative review principles:
- knowledge of administrative law generally
- knowledge of principles underlying the review of administrative decisions including concepts of procedural fairness
- knowledge of the rules of evidence (even though they do not apply)

Analytical skills:
- capacity to interpret legislation
- conceptual and analytical skills and judgment
- ability to analyse and apply relevant law
- ability to apply administrative law principles
- capacity to analyse evidence

Personal skills and attributes:
- Empathy
- sound judgment
- gender and cultural awareness
- interpersonal skills, including ability to relate to people from different backgrounds
- ability to react appropriately where evidence produced at a hearing alters the picture painted by the papers
- ability to work cooperatively as a member of a team
- capacity to manage workload, set priorities and meet performance standards capacity for individual and independent thought
- strong sense of independence, tempered by an understanding of the nature of merits review and its difference from the role of the courts

Communication skills:
- written and oral communication skills of a high standard
- listening skills
- ability to appropriately and effectively use interpreters ability to write reasons in a clear and concise fashion

Legal skills

4.13. Although there is a general concern that some tribunal proceedings are too legalistic, there is a high degree of acceptance of the need for tribunals to be able to draw on legal skills and experience. For example, it is broadly agreed that tribunal members should have the capacity to interpret legislation, to understand legal arguments, and should know when and where to go for expert professional advice. Also, because of the ultimate supervision provided by the courts through judicial review, all members need to be well acquainted with the requirements of procedural fairness. The fact that tribunals are expressly relieved from the requirement to comply with the rules of evidence does not mean that members need not be aware of the reasons for the development and application of those rules. This understanding will help members to understand when and why, in specific cases, evidence should be treated particularly carefully.

4.14. However, these skills are not exclusively correlated with formal legal qualifications. Many members without legal qualifications, particularly if they are familiar with a particular area of decision-making, will already possess these capacities, and others can be trained. Tribunal members are also generally able to access specialised advice from their tribunal’s legal or research staff, as well as through informal liaison with other members.
Specification of core skills and abilities

4.15. It would be useful for tribunals to cooperate in the specification of a minimum set of core skills and abilities required of an effective tribunal member. These specifications could then be used in the process of designing training courses and materials and professional development activities. They should also be of assistance in the process of developing selection criteria for tribunal members. Core tribunal member skills and abilities is a subject which has been discussed at tribunal and administrative law conferences. A more formal exercise of agreeing on some common specifications should give greater clarity and focus to the justification for particular attributes, and hopefully lead to higher overall standards.

4.16. The Council acknowledges that, in dealing with particular types of decisions, there may be some specific requirements: the exercise of justifying departures from a common core set would be a useful test of whether current assumptions are valid. The Council notes that the responsibility for setting selection criteria for tribunal member positions is a ministerial one, but considers that this would usefully be done in consultation with tribunals.

4.17. A consensus on core skills and abilities would be a powerful unifying tool, demonstrating both to members and to others that the merits review task is, or should be, essentially the same in all jurisdictions, notwithstanding some appropriate variations and additional needs. As well as serving a useful purpose in relation to the establishment of appropriate selection criteria, such a consensus would promote appropriate ongoing training and development strategies for tribunal members.

Judicial members

4.18. Judges were appointed to the AAT at the outset because it was felt that the new tribunal required the status and authority that judges would bring to it in order to ensure that its decisions were given appropriate regard by departments. There is now a general view that review tribunals are an accepted feature of the administrative law landscape and that therefore this need has diminished, without perhaps having entirely disappeared.

4.19. The Council considers that there remain strong reasons why a judge is likely to be eminently suitable for appointment as President of the AAT - partly for the original status reason, partly because of independence considerations and partly to assist the tribunal in dealing with the most legally complex or significant cases. However, the Council considers that a person other than a judge should not be excluded from consideration for that position. The President would need to have high level legal skills, equivalent to those expected of a judge, high level experience in decision-making and dispute resolution, an ability to determine authoritatively any decision from the diverse range of matters that would come before the tribunal and the capacity to manage an organisation effectively. These qualities would ordinarily be found in a person who is a judge, or who has legal skills broadly equivalent to those of a judge. In relation to the President, it would be especially important to ensure that her or his independence, actual and perceived, was firmly established.

4.20. The Council makes other recommendations in this report - see Chapter 8 - aimed at promoting the treatment within the tribunal system of cases raising issues or principles of significance for future agency decision making. These changes may strengthen the case for a number of persons with high-level legal skills, but it should not be assumed, or
prescribed, that they must be a judge or that only a judge should deal with any particular type of matter.

**Recommendation 31**

Review tribunals should cooperate in the development of a minimum set of core skills and abilities required of an effective tribunal member, for use in organising professional development of members and in the process of developing selection criteria.

**Recommendation 32**

Subject to all members having the required minimum set of core skills and abilities, review tribunals should have available within their membership a wide range of additional skills and experience.

### SELECTION AND APPOINTMENT OF MEMBERS

#### Selection process

*Objectives and concerns*

4.21. The process by which tribunal members are selected and appointed - a ministerial responsibility - is critical to the aim of ensuring that tribunals comprise members with the skills required to perform effectively the functions of the tribunal and also to ensure that tribunals are able, and perceived to be able, to operate free from undue influence.

4.22. In addition to ensuring that members are appropriately qualified in the sense set out above, there is another important objective of selection processes: to ensure that the membership of tribunals reflects as closely as possible - consistent with merit-based appointments - the diversity of the Australian community, in terms of gender, ethnic origin, culture and background.

4.23. The trend in selection and appointment processes for tribunal members in recent years has been to open them up to greater public involvement, through:

- broader community consultation (formal and informal) on selection criteria;
- broader participation in selection panels;
- public knowledge of selection criteria and processes, and
- advertisement for prospective members.

4.24. The Council’s discussion paper noted that:

For most tribunals, batches of vacancies are now typically advertised, with express selection criteria, and a normal public service process followed to determine suitability. Recruitment panels will now typically include a principal or other senior member of the tribunal, a departmental representative, and a third party. The panel will normally put forward a list of suitable candidates, but will not rank them or make specific recommendations.\(^{120}\)

---

4.25. There is overwhelming support for a rational and transparent selection and appointment process, and for the proposition that more broadly-based consultation in that process is likely to assist in ensuring merit-based appointments. Some suggested that otherwise the conclusion would remain open that appointments were being made for reasons other than merit.

4.26. The only substantial factor weighing against use of an open and rational selection process in all cases concerned the occasional need for vacancies to be filled quickly: some tribunals and agencies noted during the Council’s inquiry that there were circumstances when flexibility was required in this regard.

4.27. In the Australian system of government, appointment of statutory officers, including tribunal members, is an executive (ministerial or cabinet) prerogative - even where the appointments are as a formality made by the Governor-General. However, the Australian Government has accepted that the trend towards more open and clearly merit-based appointments is desirable. Reconciling these two principles in a way that engenders public confidence can on occasions prove difficult.

4.28. The Council found during the inquiry that there remain significant concerns about the independence of tribunals, particularly in relation to the government agencies and ministers whose decisions they are reviewing. These concerns were expressed particularly in relation to the appointment processes for tribunal members. Criticism on this basis was not limited to any one tribunal. Several submissions did, however, refer to evidence provided to the parliamentary inquiry discussed below. The existence of concerns about independence, whether or not correctly based in fact, can itself damage the credibility of individual tribunals and the tribunal system, thereby undermining the function that tribunals were established to perform.

Inquiry into the IRT appointments process

4.29. Selection and appointment processes in relation to members of review tribunals attracted public attention in 1994 as a result of a parliamentary inquiry into a particular round of appointments to the IRT.

4.30. Following questions raised in the Australian and Victorian Parliaments concerning the round of appointments to the IRT announced by the Minister for Immigration and Ethnic Affairs in August 1994, an inquiry into that subject was conducted by the parliamentary Joint Standing Committee on Migration (the Committee). The Committee conducted three days of public hearings at which evidence was taken from a number of unsuccessful applicants for appointment or reappointment to the IRT and some other interested parties. The Committee tabled its report, *The Immigration Review Tribunal Appointments Process*, in Parliament in December 1994.

4.31. A majority of the Committee members found that nothing in the evidence presented to the Committee led to the conclusion that those who were appointed to the IRT had not met the relevant requirements or were in any way unsuitable for the positions, or that the Minister had acted improperly during the appointments process. The majority members went on to recommend that:
- the selection criteria for the appointment of Senior Members of the IRT specify that legal qualifications or a legal background or equivalent experience is desirable;
- interviews be conducted in all States where full-time members are to be appointed to the IRT; and
appointments to the IRT be staggered in order that a significant proportion of the Tribunal’s membership not be appointed at one time, so as to reduce any real or potential risks in relation to concerns that the appointments process provided specific ministers with the opportunity to influence unduly the composition of the IRT.

4.32. The majority members also noted that the Council’s inquiry into Commonwealth merits review tribunals was a more appropriate forum for discussing generic appointment issues.

4.33. A dissenting minority report by Opposition members was critical of the process followed in the recent appointments, and of particular appointments. Those members recommended a bar on active political involvement by full-time tribunal members and a minimum workload requirement for part-time members.

4.34. The Council has no comment on the particular round of appointments considered by the Committee. However, the fact that the inquiry took place, and the criticisms during the inquiry of the selection processes adopted lend support to the argument for more open and merit-based selection and appointment processes for all tribunals. Such processes would minimise the scope for speculation about the basis upon which members have been selected.

The Council’s view

4.35. The Council considers that the selection and appointment process for all tribunal members should be rational, merit-based and transparent. By this it means that:

- all prospective members should be assessed against selection criteria that relate to the tribunal’s review functions and statutory objectives;
- those selection criteria should be made publicly available, as should the various steps to be followed in the selection process itself, so that members of the public can see what skills are required of potential tribunal members and how candidates will be assessed;
- assessment against the criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments; and appointments should only be made from within a pool of people who have been through such a process and assessed as suitable to perform the required task.

4.36. This process does not detract from the executive prerogative to recommend or make appointments. Ministers should remain responsible for recommending appointments to review tribunals and for establishing the public selection process. They would still be able to suggest to an individual that they should seek appointment. They would retain the discretion to further evaluate candidates, by formal or informal means, after those candidates have been through the assessment process, and for choosing, from the pool of candidates found to be suitable by that process, those to be appointed.

4.37. Where there was a need for an appointment to be made promptly, people previously assessed as suitable for appointment could form a reserve list for use in such circumstances, provided the selection criteria against which they were selected remained relevant. If the principle were established that only candidates who have been assessed as suitable following such a merit-based selection process should be available for appointment, no doubt steps would be taken to ensure that a reserve pool was maintained.

Selection criteria

The CROSROMD report commented in 1992 in relation to the selection processes for the IRT that:
The Committee considers that the lack of clear specifications as to the skills necessary to perform the work of the Tribunal may result in the appointment of persons who are well qualified in their field, but not appropriately skilled for the Tribunal.\(^\text{121}\)

4.39. Selection criteria should be derived primarily from the core skills and abilities discussed above, together with any jurisdiction-specific qualifications that are considered necessary. The criteria should clearly distinguish between on the one hand any particular requirements (such as experience or qualifications) and on the other hand aptitudes or capacities to acquire, bearing in mind that all new members are likely to require some induction and ongoing training.

4.40. The Council accepts that the requirements in any particular round of appointments may vary from a standard set of criteria because of the desirability of achieving an appropriate balance or overall profile of members - in terms of part-time or full-time, gender, ethnic or cultural background, or particular expertise. If known in advance, some of these factors can be built into the selection criteria for the particular round of appointments. However, these factors may be also be taken into account separately by the minister when choosing from the pool of otherwise similarly suitable candidates.

**Assessment panels**

4.41. The typical selection process currently adopted in relation to tribunal appointments, outlined in paragraph 4.24, relies on assessments made by a panel, generally comprising a senior member of the tribunal, a representative from a government department, and a third person. In light of the overall process, such panels are more accurately described as assessment panels rather than selection, or even selection advisory panels. It has been suggested during the inquiry that the third member of a panel should be ‘independent’ of the government, and in particular that it is inappropriate for the third person to be from the office of the minister who will be making any appointments.

4.42. The Council endorses the general approach of establishing assessment panels to assess the suitability of prospective tribunal members. The Council considers that the particular composition of the panel is a matter for the relevant minister to determine. However, it considers that there is great value in consulting broadly, including with non-government organisations that have experience of the relevant area of review. That consultation could be formalised through participation on an assessment panel, although any such involvement should not be seen as amounting to representation of the interests of the relevant non-government organisation in the selection process.

4.43. In the Council’s view, it is in everybody’s interests for the selection process to be viewed as credible, and it is desirable that any panel be seen as not unduly weighted towards any short term departmental interests. That is why it is important that the views of people with experience and strong interests in the area of government decision making involved should be sought before appointments of review tribunal members are made. This does not mean that ministerial staff or departmental officers should be precluded from participating on assessment panels, provided that the panels are sufficiently broad-based to be viewed as credible: in this regard, the Council notes that the number of participants need not be three.

4.44. Under the Council’s preferred approach, once an assessment panel has assessed the suitability of candidates against the publicly-available selection criteria, the panel should note particular strengths and weaknesses of individual candidates, and may place candidates in broad bands of suitability, but should not place them in any strict rank order of merit. The minister should remain free to choose for appointment from those rated as suitable.

4.45. The assessments made by a panel should be documented, and while it would not be appropriate to provide for appeals against those assessments, candidates should be able to obtain a copy of their assessment. This would help to ensure that the assessment process was credible and accountable.

4.46. The Council notes that for many senior government positions, as well as for tribunal members, assessment of candidates usually relies on a combination of interviews and referee reports. In relation to tribunal members, there may be greater scope for the use of supplementary techniques, particularly given the nature of the skills and expertise that may be required. Panels could, for example, arrange to assess listening and questioning skills relevant to the role of tribunal members in hearings, along with analytical and writing skills, where panels consider that the capacity of candidates require such a demonstration.

Conclusion
4.47. The result of adopting the Council’s recommendations in this area would be that anyone appointed as a tribunal member, regardless of background or other qualities, will have been assessed as suitable by reference to publicly available criteria related to the tribunal’s functions. The Council considers that adoption of its recommendations in this regard would mark a further step in the Australian Government’s commitment to ensuring that the members of review tribunals are appropriately qualified and would enhance public confidence in those tribunals.

Recommendation 33
All prospective review tribunal members should be assessed against selection criteria that relate to the tribunal’s review functions and statutory objectives.

Recommendation 34
Selection criteria for review tribunal member positions should be made publicly available, as should information about the nature of the selection process to be followed.

Recommendation 35
Assessment of applicants for review tribunal membership against selection criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments.

Recommendation 36
Appointments of members of review tribunals should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment.
Recommendation 37

Assessment panels should consider the use of a range of techniques for testing the suitability of applicants for review tribunal membership.

Recommendation 38

The assessments made by assessment panels of the suitability of applicants for review tribunal membership against the selection criteria should be documented: applicants should be given access to their own assessment on request.

Who should be responsible for appointments?

4.48. Responsibility for recommending to the Governor-General proposed appointments to review tribunals is an executive one. That responsibility lies with the Attorney-General in the case of proposed appointments to the AAT, which reviews a broad range of administrative decisions, relatively few of which concern the Attorney-General’s own portfolio. In the case of the specialist review tribunals, the responsibility for recommending appointments lies with the minister responsible for the agencies whose decisions form all or a large part of the review workload of those tribunals.

4.49. The Council found considerable support in submissions and during its other consultations for removing responsibility for recommending the appointment of tribunal members from the minister responsible for the decisions under review by the tribunal in the case of specialist tribunals. The suggested alternative was that the minister responsible for a ‘neutral’ central department (the Attorney-General’s Department and the Department of the Prime Minister and Cabinet were the most commonly suggested), should be responsible for recommending to the Governor-General proposed appointments to all tribunals. This minister would consult with colleagues responsible for affected departments before making appointments.

4.50. It is worth noting that, in relation to the appointment of members to the AAT who are to be required to review taxation decisions, there is statutory provision for consultation between the Attorney-General, who is responsible for recommending appointments to the AAT, and the relevant portfolio minister. Administrative review of taxation decisions was transferred to the AAT when the Taxation Boards of Review were abolished in 1986. The Attorney-General had not been responsible for recommending appointments to the Taxation Boards of Review.

4.51. There are no such statutory consultation arrangements in place in relation to other areas of decision making that are subject to review by the AAT, although there are various governmental consultation arrangements set out in the Cabinet Handbook122 which apply to appointments requiring the approval of Cabinet. For example, the Attorney-General is not required by statute to consult the ministers responsible for social security, student assistance, veterans’ compensation or other areas of decision making subject to AAT review when recommending AAT appointments. However, the process of Cabinet approval prior

---

to a recommendations being forwarded to the Governor-General provides an opportunity for input, and it is unlikely that an appointment would proceed in the face of objections from another interested minister.

4.52. The transfer of responsibility for recommending appointments away from directly interested portfolios could be viewed as an important statement of independence. However, the Council considers at this stage that, if its recommendations concerning the selection process for tribunal members are implemented, there should be less scope for concern in relation to perceptions of lack of tribunal independence.

**Recommendation 39**

Subject to implementation of the Council’s other recommendations concerning the selection process for review tribunal members, responsibility for recommending appointments to review tribunals other than the AAT should continue to lie with the minister responsible for the agency whose decisions form all or a large part of the review workload of those tribunals. In the case of the AAT, that responsibility should continue to lie with the Attorney-General. Consultation on proposed appointments should take place where appropriate.

**Appointments to be staggered**

4.53. As noted earlier at paragraph 4.31, the majority of the Joint Standing Committee on Migration recommended that appointments to the IRT be staggered so that a significant proportion of the membership did not turn over at any one time. The Council agrees with that recommendation in relation to Commonwealth tribunals generally, both for the reasons put forward in the report and because it considers such an approach to be a matter of good management practice.

**Recommendation 40**

Appointments to review tribunals should be staggered so that the terms of a large proportion of a tribunal’s members do not expire at the one time.

**TERMS OF APPOINTMENT AND RE-APPOINTMENT ISSUES**

**Tenure**

4.54. The questions of what length the terms of appointment of tribunal members should be, and whether terms of appointment should be renewable or not, are vexed ones. At present, there are considerable variations in the rules concerning them.  

---

123 The Council noted that 'The term for which members are appointed varies both between and within the different tribunals, and has also varied from time to time - during one period all deputy presidents and most full-time members of the AAT were tenured. Currently, with the exception of presidential and some senior members of the AAT, who may have been appointed until retirement age, terms of tribunal members vary from 2 to 7 years.' Administrative Review Council Review of Commonwealth Merits Review Tribunals - Discussion Paper Publishing Service, Canberra, 1994, paragraph 4.75.
4.55. The Council does not consider that tribunal members should be tenured (appointed to retirement age). The needs of the users of review tribunals change over time, and no selection process can guarantee that a person considered suitable for appointment will remain so indefinitely in the light of changing circumstances and demands. Tenured appointments reduce the flexibility of tribunals to ensure that their pool of members remains appropriate to the current set of tasks. This is particularly the case because review tribunals may review decisions on their merits rather than on legal grounds alone.

4.56. The Council’s view of tenure is consistent with its general view of the role of tribunals set out in Chapter 2. Independence of review tribunals and their members is essential, but there is no reason why protecting that independence need detract from the ability of review tribunals to respond to the changing needs of their users.

Re-appointment

4.57. The legislation governing each of the tribunals that form the focus of this report currently allows for reappointment of members on expiry of their initial terms. The Council has in the past suggested that appointments to the AAT be made for a reasonably long fixed and non-renewable term. This suggestion reflected fears that members seeking reappointment might feel pressure to be ‘softer’ in their decision making, and that members considered to have made decisions considered contrary to the interests of the Government might not be reappointed for that reason.

4.58. A policy of non-renewable appointments would however mean losing the benefit of experienced members who might otherwise be prepared to stay on. It might also deter suitable candidates from seeking appointment, thereby reducing the pool of talent from which tribunal members could be drawn.

4.59. The Council found during the inquiry that these countervailing views each had their supporters, with no clear majority for one or other view. It also found general agreement that this was a difficult issue. Fears about independence need to be seen in the light of the differences between tribunals and courts discussed at the start of this chapter.

4.60. The Council considers on balance that the option of reappointment should remain open. Short of encouraging people by offering tenured appointments, which the Council considers no longer to be necessary or appropriate, the Council believes that providing only for a fixed single term appointment would unduly inhibit people from seeking appointment.

4.61. As for the length of term, the Council considers that a range from three to five years would be generally appropriate, across all tribunals. Terms shorter than three years are undesirable since they do not give the members any sense of security. It may be appropriate to appoint some senior members for longer terms, either initially or upon reappointment, to assist with continuity and to attract and retain the best qualified and able members.

Recommendation 41
Review tribunal members should be appointed for terms of between three and five years.

Recommendation 42
Review tribunal members should be eligible for reappointment.

Practical issues concerning reappointment
4.62. The Council acknowledges that the reappointment of some but not necessarily all tribunal members as their terms expire will lead to concerns about the basis of any reappointment decisions. Those concerns can be minimised if all members seeking reappointment are assessed according to public criteria. Once a member’s term of appointment has expired, there should be no expectation of automatic reappointment, and it should be made clear that members whose terms are due to expire will have to be assessed against the same criteria as new applicants - the criteria may have changed since their original appointment.

4.63. For members seeking reappointment, the assessment process need not be identical to that applying to new applicants, but should be undertaken by the same panel. As with other candidates, the panel’s role would be to establish that the person is suitable for appointment against the relevant selection criteria, and identify particular strengths and weaknesses for the information of the minister.

4.64. The Council acknowledges that this process may be viewed with some cynicism in circumstances where there is a member or members seeking reappointment who is or are widely regarded as outstanding. If the number of places available is limited, it may be perceived that other candidates do not really have a fair chance.

4.65. However, if all those seeking appointment, whether having been members before or not, must be assessed at the relevant time by a panel according to the process outlined earlier as suitable for appointment, the suggested approach is as fair as can be devised. At least the minister, in making a choice, will know the strength of the currently available field.

4.66. In the context of a system in which responsibility for appointments lies in the discretion of an individual minister, there is no way to prevent all speculation about the merits of appointments and reappointments. The Council’s recommendations aim to minimise adverse speculation by ensuring that all members appointed or reappointed have recently been assessed against the relevant publicly-available selection criteria and found to be suitable.

Recommendation 43
Members of review tribunals seeking reappointment on expiry of their terms should be required to apply for appointment in a competitive selection process and be assessed for suitability for reappointment against the same selection criteria as new applicants.
Full-time and part-time members

4.67. All tribunals currently have a mixture of full- and part-time members (see Appendix E.2). The appointment of part-time members has many advantages. It broadens the field of prospective members, ensures an input of current experience in other relevant areas of work, and gives tribunals flexibility to deal with fluctuations in workload among different types of cases. One disadvantage is a perception that part-time members employed on a casual basis may be vulnerable to undue influence, or feel pressure to conform in decision-making or other respects against their better judgment in order to secure continued income. Another characteristic that can be seen as both an advantage and a disadvantage is the concurrent experience which many part-time members may have of different decision-making processes.

4.68. The Council considers that all tribunals should enjoy the flexibility and the influence of differing perspectives and cross-fertilisation of ideas that part-time members bring to tribunals. Distribution of a tribunal’s caseload among full-time and part-time members is a matter for each tribunal to resolve for itself within the framework of its budget, and may appropriately vary from time to time. Consideration could be given by the Remuneration Tribunal to guaranteeing part-time members of all tribunals a minimum level of payment. Tribunals should also ensure that part-time members are given adequate opportunity to share in training and professional development and to participate in internal discussions.

Cross-membership

4.69. There is a reasonable incidence of active cross-membership of part-time members of Commonwealth tribunals, including between the migration and other tribunals. Many part-time members are also members of State tribunals. There are also many members who, while not currently serving on two tribunals, have prior experience of others.

4.70. Cross-membership is generally seen as advantageous, although there are some reservations about the potential for members to import inappropriate styles and approaches. The Council sees benefits in terms of cross-fertilisation of ideas in providing for cross-membership, provided that tribunal management and training and development of members suffice to ensure that only appropriate alternative procedural approaches are transferred between tribunals.

REMUNERATION

4.71. In the discussion paper, the Council raised two questions regarding the remuneration of tribunal members. Put bluntly, they were: who decides? and how much?125

4.72. In relation to the first question, the Council noted in that paper its recommendation in a 1993 letter of advice to the Government that all IRT and RRT members’ salaries should, like those of members of other tribunals, be set by the independent Remuneration Tribunal. The reasons for this recommendation were that the IRT and RRT arrangements (linking their salaries to public service grades) were capable of being changed by regulation, and that the relevant minister had complete discretion in relation to the remuneration of part-time members. Both these features were seen by the Council as incompatible with the

---

desirable degree of independence. The recommendation was accepted by the Government and is included in a Bill currently before the Parliament.  

4.73. As for the second question, the Council considers that it is not qualified to comment on levels of remuneration for tribunal members. The Council defers to the expertise of the Remuneration Tribunal, which was specifically established to deal with such questions. However the Council reiterates its previous views on matters of broader principle: tribunals need not be equated with the judiciary; and tribunal member remuneration should not be linked to performance appraisal.

**Recommendation 44**

The Remuneration Tribunal should be responsible for determining the levels of remuneration of review tribunal members.

**Recommendation 45**

Remuneration of review tribunal members should not be linked to performance appraisal.

**PERFORMANCE APPRAISAL**

4.74. There has been a general trend in government for agencies and other bodies to be held more accountable, both in-house and publicly, for performance against declared objectives and targets. In Chapter 5, the Council makes recommendations in relation to tribunals setting and reporting on corporate performance standards.

4.75. In the wider public service, corporate objectives are translated into performance targets for individual senior officers, and in some cases rewarded with performance pay - a component of salary linked to the achievement of agreed outcomes.

4.76. The issue of performance appraisal of tribunal members is more complex in that it also raises concerns about independence, including the appropriate relationship between individual members and tribunal management in respect of decisions in particular cases. The Council noted in the discussion paper that:

On the one hand, tribunal members cannot expect to be insulated from the wider trend. On the other hand, too much pressure to conform to an expected norm could threaten members’ willingness to fearlessly make what they believe to be the right decision in individual cases. It might also affect the degree of motivation of some members (which might be a good or a bad thing, depending on the circumstances). Performance is inevitably a consideration when it comes to re-appointment, but if criteria are not clear and public, there will always be a suspicion about the basis of re-appointment decisions ...

4.77. Some tribunals have already introduced a modified system of performance indicators and standards, and of feedback to members on how they measure up to those

---

126 The Migration Legislation Amendment Bill (No 5) 1994 proposes to amend sections 398 and 462 of the Migration Act 1958, and to repeal sections 399 and 463 of that Act.
standards. These can relate to administrative matters such as caseload and timeliness of written decisions, or more controversially to interpersonal skills, and quality of reasoning.

4.78. There is a consensus that it is not appropriate for targets to be set, or performance of individual members to be measured, in respect of review outcomes - in terms of set-aside or variation rates - these must remain an essentially unpredictable product of the ‘best’ decision in each individual case.

4.79. There is broad agreement that performance appraisal for members is both desirable and inevitable in respect of all other aspects of their functions. Performance standards may appropriately be developed for such matters as timeliness of decisions and written reasons, the process employed in dealing with cases, and the quality of reasoning.

4.80. In cases of under-performance, care will be needed to avoid pressure to improve in terms of output or process being seen as, or translated into, pressure to achieve particular outcomes in individual cases.

4.81. All members have a strong interest in the standards against which their performance is to be appraised, and should therefore be closely involved in the process of developing those standards. The responsibility for appraisal of members should lie with the head of the tribunal, although it may be appropriate for appraisal to be delegated or to establish a broad-based group within the tribunal to assist in the task, so as to alleviate concerns about personal factors affecting the objectivity of the process. Tribunals could usefully learn from the experience of the public service over the last few years with performance appraisal schemes.

4.82. As with selection criteria for appointment, the performance standards against which tribunal members are to be appraised should be made publicly available. They will be subject to periodic revision in the light of changing circumstances that affect tribunals: changes in clientele, legislative amendments, developments in (judge-made) case law and so on.

4.83. As already noted in paragraph 4.72, the Council has already advised against any linkage between performance appraisal and remuneration levels for individual tribunal members. It sees this suggestion as fraught with difficulties of principle and practice. This view was strongly supported during the inquiry and has also recently been endorsed by the Remuneration Tribunal:

The Tribunal has noted elsewhere in relation to the judiciary and members of Parliament that performance based pay arrangements are inappropriate. Similarly, there is a group of statutory office-holders whose functions must be performed independently within the statutory provisions of their office - indeed this is the very purpose of their statutory independence. Scrutineers of administrative decisions, appeal bodies and arbitrators fall into this category. Performance based pay is therefore clearly inappropriate for these offices.\(^{128}\)

---

Recommendation 46

Review tribunals should continue to develop performance appraisal schemes for their members, covering all aspects of the work of members other than outcomes in particular cases.

Recommendation 47

All review tribunal members should participate in the setting of appropriate standards against which their performance is to be appraised.

DEVELOPING AND ASSISTING TRIBUNAL MEMBERS

Training and development

4.84. Chapter Six of the Council’s discussion paper noted that most tribunals have in-house information services, which are generally viewed as important mechanisms for ensuring that members are kept up-to-date with changes in the area of decision making within their jurisdiction, such as changes to relevant legislation, policy (judge-made) case law, tribunal decisions and practices and procedures relevant to decision-making generally. Most tribunals also produce in-house information circulars that highlight interesting cases and new developments. Such services can assist both the correctness and consistency of tribunal decisions.

4.85. The level of in-house training provided to members varies markedly from one tribunal to another. Most tribunals run an induction course for new members, which may involve lectures about tribunal hearings and practices, visits to actual hearings and involvement in mock hearings.

4.86. Some tribunals, notably the AAT, have a formal professional development section which organises conferences, workshops and other training material. Development activities may include visits from academics and practitioners, and sessions on issues such as cross-cultural and gender awareness and skills development such as decision writing. Some tribunal members also attend the Commonwealth Review Tribunals Conference, which has been convened by the Council annually since 1991.

4.87. The Council’s recommendations on the appointment process are directed to ensuring that all members when appointed have a threshold level of competence, and possess if not all the required skills to commence conducting review when appointed, at least the aptitude and capacity to acquire them. It should not be assumed that having met the selection criteria for appointment necessarily means that a new member is equipped to undertake reviews immediately.

4.88. The Council considers that members should have demonstrated a minimum threshold of relevant skills before being expected to deal with actual review cases, rather than learning such skills on the job to the possible detriment of applicants and others. This is particularly important if they are to be required by tribunals to conduct hearings as single members. A variable component of induction training for new members should be directed to ensuring that members have reached this threshold. Once past this threshold, further on-the-job development is appropriate, for instance through participation on multi-member panels with more experienced members.

**Recommendation 48**

Review tribunals should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions.

**Recommendation 49**

The skills and experience of review tribunal members should be developed through their participation on multi-member panels where appropriate and through training and development programs.

4.89. Training and professional development for members is an obvious area that would benefit from cooperation between tribunals. Many of the skills, techniques and knowledge required are common, and while there are important jurisdictional differences, cooperation could also assist with the development of common approaches where that is appropriate, a process which the Council endorses.

4.90. The Council also considers that there is some scope for cooperation between courts and tribunals in relation to continuing education programs. Provided that the essential differences between the two types of bodies (explained in Chapter 2) are given adequate recognition, cooperation would appear to offer both potential savings and broader benefits - in terms of increased mutual awareness and understanding among judges and tribunal members. The Council notes the comment in the recent *Justice Statement* that:

Professional development for judges and tribunal members is an important means by which the quality of decision making may be enhanced. Such programs improve court and tribunal performance, enhance equality before the law and improve access to justice. The judiciary, tribunal members and court and tribunal staff who deal with the public need to be aware of the issues and concerns of the broad diversity of people who make up Australian society.\(^{132}\)

4.91. The Government made additional funds available as part of the Justice Statement for professional development programs for judges and AAT members along with court and tribunal staff. The programs to be funded under the Justice Statement will focus on gender, ethnicity and Aboriginal and Torres Strait Islander issues and the use of interpreters. It is arguable that tribunals have been quicker than courts to respond to these issues, no doubt in part due to the broader range of backgrounds from which tribunal members are drawn.

---

4.92. It was noted that the programs would be developed largely by the courts and tribunals themselves, although the existing role of the Australian Institute of Judicial Administration in providing professional development programs for the judiciary was noted. Greater interaction between all review tribunals and the Australian Institute of Judicial Administration and/or courts in the provision of professional development programs should be considered.

Recommendation 50

All review tribunals should seek to cooperate with each other and, where appropriate, with courts and the Australian Institute of Judicial Administration in providing professional development programs for their members and staff.

Research and administrative support

4.93. The Council noted in its discussion paper that the research and support services offered to tribunal members varies from one tribunal to another according to the nature of the particular tribunal’s work (quantity, diversity and complexity of workload), the needs of its members, and the tribunal’s budget. Many full-time members of the AAT, for example, are generally assisted by a secretary and an officer known as an associate, who assists the member in the preparations for hearings and in undertaking research for the preparation of written decisions.

4.94. In other tribunals, secretarial, administrative and research support is provided centrally and not allocated to individual members. Some tribunals maintain a central research and information unit. For example, the IRT’s Sydney-based research unit provides support for decision makers in the form of research, advice on legal principles and proof reading. Similarly, the RRT has devoted considerable resources to a research division, with staff in both of its registries, which provides members with the specific country information they need, drawing on the resources of the Department of Immigration and Ethnic Affairs and the Department of Foreign Affairs and Trade, as well as information obtained directly from overseas sources.

4.95. Members of first-tier tribunals like the SSAT and the VRB receive comparatively little research assistance, and are required in the main to undertake primary research themselves and to draw on the expertise of the tribunal panel members.133 If the Council’s proposals for structural changes outlined in Chapter 8 are accepted, then the level of research and other assistance provided may need to be reconsidered.

4.96. The Council considers that generally, research and other support staff should be used as a common resource rather than attached to particular members. Ensuring that limited resources are available as a common resource should be more cost-efficient and give tribunals more flexibility in seeking to achieve their objectives while responding to a constantly changing environment. At the same time, the Council acknowledges that tribunal members with management responsibilities may have particular needs that require specific forms of assistance.

 Recommendation 51

Review tribunal support staff, including research staff, should as a general rule be available to members as a common resource rather than being dedicated to individual members.
CHAPTER 5
ACCESS, INFORMATION AND AWARENESS

INTRODUCTION

5.1. This chapter deals with the provision of information and advice to actual and potential applicants for review, and to the general community, as well as with broader issues of accessibility. These issues are important because they contribute directly to one of the main objectives of the review tribunal system - that it be accessible and responsive. General information about tribunal processes and performance is also necessary to promote broader objectives of openness and accountability in government.

5.2. The availability of clear information, at the right time and in the right place, is crucial if the merits review system is to be accessible and responsive to the needs of potential applicants for review. They need to be aware of their rights and understand them. They also need to be able to easily find and deal with tribunals, without undue barriers in terms of cost, distance, or quality of information. With these things in mind, information concerning merits review should be accurate and easy to understand as well as, by definition, informative.

5.3. Responsibility for this task is shared between decision-making agencies and review tribunals. Intermediaries such as legal aid authorities and non-government organisations also play an important role in relation to providing information to potential review applicants. In designing information and access mechanisms, all these bodies need to be particularly aware of the barriers faced by specific groups within the community, including: people on low incomes; people from ethnic communities; people from non-English-speaking backgrounds; Aboriginals and Torres Strait Islanders; women; and people with disabilities.

5.4. The particular needs of ethnic communities and women in relation to their dealings with tribunals have received specific attention in reports published in 1991 and 1994, and are now routinely addressed in the Access and Equity plans which all agencies and tribunals are required to develop and implement.

5.5. The recent justice Statement, responding to the 1994 report *Access to justice: An Action Plan,* announced or reinforced a wide range of measures designed to assist in making the justice system - including the AAT in particular among Commonwealth review tribunals - more accessible and responsive, not only to special needs groups, but to the whole community. The Council welcomes in particular the support to be provided for the development of a charter by the AAT and the increased funding for legal aid and community legal centres. Where appropriate, *Justice Statement* initiatives are mentioned in more detail later in this chapter.

---


5.6. An important general principle about information, worth stating at the outset, is that it should be regularly tested to ensure that it is easily accessible and understood and is serving its purpose. Too often, organisations accept the output measures of numbers and variety of publications as sufficient performance indicators, without inquiring into their effectiveness. The evidence of continued confusion amongst clients about review rights and processes, despite the very considerable outreach and public information activities already undertaken, suggests a need for constant monitoring and review.

5.7. For convenience, this chapter is organised around the sequence in which applicants typically encounter the different aspects of information and advice relevant to the tribunal review process, from first notification of review rights, applying for review and initial dealings with a tribunal through to legal aid assistance and other advice.

5.8. This chapter concludes with recommendations concerning the provision by tribunals of general information to the wider community and arrangements for liaison with representatives of the broader community. The purpose of such information and contact is to ensure that tribunals remain responsive to changing expectations among their users and to serve the objective of openness and accountability. The role of tribunal charters is specifically discussed in the latter context.

**NOTIFICATION OF REVIEW RIGHTS**

5.9. The key to gaining access to administrative review mechanisms is that people affected by administrative decisions are informed by agency decision makers of the making of those decisions and of whatever rights of review are available to them. There is little point in providing review mechanisms if the people those mechanisms are designed to assist are unaware of the existence of the mechanisms or how to make use of them. Bearing this in mind, statutory notification standards should be as clear, comprehensive and consistent as possible. In light of evidence of continued confusion about review rights amongst review tribunal users, the Council considers that there is scope for improvement in relation to notification.

5.10. The responsibility for telling people about the making of administrative decisions that affect them and about their review rights lies with the agencies that make administrative decisions. At present, there is considerable variation in the statutory obligations of agency decision makers in terms of the form and content of notification of the making of decisions and of review rights.

5.11. The AAT Act imposes an obligation on agency decision makers to notify people affected by decisions that are reviewable by the AAT (whether directly or following another stage of review from which further review by the AAT is available) of the making of those decisions and of their review rights. That obligation is displaced where the decision in question is subject to a specific notification provision in another statute. Agency decision makers to whom that AAT Act notification provision applies are required to have regard to a Code of Practice (the Code of Practice) issued by the Attorney-General under the AAT Act. The Code of Practice is a legislative instrument which details content and form standards applicable to such notifications.

137 Administrative Appeals Tribunal Act 1975, section 27A.
5.12. Specific provisions in the *Migration Act 1958*, the *Social Security Act 1991* and the *Veterans’ Entitlements Act 1986* provide for people affected by decisions at particular stages in the review process to be informed by agency decision makers of the reasons for the decision and of their review rights. The standards prescribed by these statutes vary as to the required content of notifications and apply to types of decisions at particular stages in the review process rather than to reviewable decisions generally.

5.13. There is an issue as to whether the responsibility of agencies in relation to notification of review rights should be reflected in a general statutory obligation on all decision makers in a given area and attaching to all reviewable decisions, or whether there should be separate statutory obligations imposed in respect of original decisions, decisions on internal review and so on (different obligations in relation to decisions at different stages in the review process). There is also an issue as to whether there should be common standards of notification as between different areas of decision making.

5.14. The Council favours the approach to notification of decisions and rights of review in the AAT Act over the approach taken in other legislation, because it establishes a single set of standards common to all decisions reviewable by the AAT (unless displaced); those standards are not affected by amendments to legislation governing the making of different types of decisions, provided that the decisions remain reviewable. The Council considers that it would assist users of review tribunals if there were one set of notification standards applicable to all reviewable decisions in a given area of decision making, rather than having variations between stages in the review process.

5.15. Given the crucial part that notification plays in enabling people to take advantage of administrative review mechanisms, the Council can also see no reason in principle why there should not be a common set of high standards for notification of decisions and review rights applying to all areas of decision making. The AAT Act notification provision and the Code of Practice issued under the AAT Act provide the model that the Council considers should be adopted generally, because they impose high standards (the discussion below of standards for notification is based largely on the Code of Practice) and compliance with those standards should help to ensure that people affected by decisions are able to take advantage of their review rights should they so choose.

5.16. In relation to decisions that are reviewable by the AAT, the Council therefore considers that displacement of the Code of Practice by notification provisions contained in other legislation should always be for a clearly justifiable reason (unless the displacing provisions require higher standards than the Code of Practice in terms of the form and content of notification). In relation to decisions reviewable by review tribunals other than the AAT, the Council considers that the notification standards set out in the Code of Practice should apply generally (by law) and that variations should be for a clearly justifiable reason only.

5.17. As under the AAT Act, failure by agency decision makers to comply with statutory notification requirements should not invalidate the decision made. Such failure should, however, provide a basis for the exercise of discretion by the review tribunal or body to accept an application made outside the prescribed time limits, and may also call for a

---

separate inquiry by the Ombudsman (who may inquire into government maladministration).

5.18. By way of comment on the Code of Practice itself, the Council considers that decision makers should be required to follow the standards laid down, rather than be required to ‘have regard’ to those standards, as is currently the case. The Council also considers that all the standards in the Code of Practice should have the same status, rather than two different levels of authority. The Code of Practice is due to be reviewed by the Attorney-General’s Department: this review provides a useful opportunity for a comparison between the standards of the Code and those of the notification provisions in other legislation.

5.19. There is a further issue as to whether agencies should promote access to review mechanisms by enclosing appropriate review application forms with other notification material. This is the current practice in relation to some administrative decisions. Where this practice is followed, it appears to have caused few, if any, problems. Some agencies resist this practice on a variety of grounds. In relation to migration decisions, it is argued that this practice would be inappropriate because the person about whom the original decision is made is not always the person who can apply for review, while in the veterans’ jurisdiction, people clearly ineligible to apply for review have sometimes sent in applications for review.

5.20. In the Council’s view, the difficulties noted above are ones that could be addressed through more sophisticated targeting of intended recipients and/or through better explanations to people of their review rights. They should not detract from the principle that agencies and tribunals should make it as easy as possible for people to take advantage of those rights. Providing an application form is particularly important when time limits for making an application are short (see the discussion of time limits below).

5.21. Standards for notification should include:

- How, where and when to contact the review body (locations, hours, address, telephone and facsimile numbers).
- Any time limits for applications and the effect of not meeting them.
- Any cost (if none then the fact that applications are free), and any provision for refund of fees if the applicant is successful.
- Any provision for fee waivers, expenses or financial assistance.
- An accurate explanation:
  - of the difference between the tribunal and internal review;
  - that tribunals are not courts and do not have a court-like level of formality; and
  - of the options for representation.
- Explanation of any assistance available:
  - from the review body (video, interpreters, child care and so on); and
  - from other sources (including legal aid authorities and non-government organisations).
- An application form should always be enclosed.
- A brief explanation of the person’s right of complaint to the Ombudsman if dissatisfied with any aspect of the agency or tribunal’s handling of their case.

141 Section 27B(2) Administrative Appeals Tribunal Act 1975.
142 The Code suggest that notices should include most standards, but only that consideration be given to including some additional information.
5.22. The Code of Practice issued under the AAT Act indicates that where there are multiple levels of review, the notice should explain the next available stage of review in detail, and make a brief reference only to subsequent review options. The Council endorses this staged approach to notification, to avoid overloading applicants with information that is not immediately relevant, while making them aware in broad terms of the whole review structure.

5.23. Although not covered by the Code of Practice, tribunals notifying applicants of an unsuccessful final merits review decision should as a matter of good practice follow the same guidelines in relation to notification of appeal rights to the Federal Court. Such a notice should emphasise the different grounds of appeal, more formal processes and the advisability of seeking legal advice.

Recommendation 52
The requirements for notification of the making of all reviewable administrative decisions should comply, as a minimum, with all the standards set out in the Code of Practice issued under section 27B of the AAT Act.

Recommendation 53
The standards contained in the Code of Practice should be binding on all decision makers to whom the Code of Practice applies.

Recommendation 54
The Code of Practice should be reviewed to adopt the highest standards of content and presentation.

APPLICATIONS FOR REVIEW

Form of application

5.24. Practices in relation to the making of applications currently vary. Most tribunals require applications to be made in writing, but the SSAT is more relaxed about starting to process an application on the basis of an oral indication of intent to apply for review, leaving any necessary documentary formalities to be completed later. The Council considers that there are some disadvantages to being too informal, particularly in circumstances where disputes may arise about timing and where substantial entitlements are at stake (for example, over back-payments). The widespread availability of facsimile machines now allows written applications to be lodged without significant cost or delay, and the Council recommends that a statutory requirement to accept applications, and to start any statutory clocks, be linked to receipt of a signed and dated application. Tribunals should provide assistance to applicants who initially contact them by telephone to lodge written applications.

5.25. Initial information required from applicants should be kept to the minimum necessary, bearing in mind that the tribunal will normally subsequently receive a file or comprehensive summary of the case from the respondent agency. There are advantages in requiring applications to be made on standard forms, in terms of collecting all the
information necessary to contact the applicant and commence processing the application. Tribunals should not however be prevented from exercising discretion to accept written applications in other forms.

5.26. Any forms, like all other documentation, should be carefully designed to be easily understood and should be easy to complete, photocopy, and send by post or facsimile. If any fees are payable (this issue is discussed separately below), making payment should be made as simple as possible and there should be a capacity for people to use credit cards and to transfer funds electronically to the tribunal.

Recommendation 55

An application for review by a review tribunal should have to be made in writing, but not in any prescribed form. Review tribunals should encourage the use of simple, well designed forms, and should be flexible in their use of telephone, facsimile and face-to-face contact during the application process.

Recommendation 56

Processes for the payment of any application fees for review by review tribunals should be simplified should include the use of credit cards and electronic transfer of funds.

Time limits

5.27. There is currently a range of different time limits for applications for review within and between the tribunal jurisdictions. The shortest period is two days for bridging visa applications for review by the IRT, where the applicant is in administrative detention, and the longest is twelve months for review of some veterans’ entitlement decisions. Twenty-eight days is the norm for most IRT and AAT reviews. There are no time limits specified in the Social Security Act 1991: there is an effective practical time limit of three months because if an applicant receives written notice of an adverse decision and does not seek review within that period, arrears are payable (in the event of a successful outcome on review) only from the date of the application for review, not the date of the adverse decision.

5.28. Given the difficulties that many applicants can experience in locating and receiving advice, the Council favours a reasonable statutory minimum period for applications. Use of a short time limit as a deliberate way of deterring applications cannot be supported on any grounds - once a review right and machinery have been established, it would appear to be self-defeating not to allow an adequate period for individuals to consider whether to apply. Short periods can even be counter-productive if they lead to ill-considered precautionary applications with little chance of success. A longer period may allow contact between the potential applicant and their representative and the agency to clarify the reasons for the adverse decision, leading to a decision not to apply for review.

5.29. At present, the AAT, SSAT and VRB have discretion to accept applications outside the normal time limits, but the IRT and RRT do not have an equivalent flexibility - the time limits in the Migration Act 1958 are fixed and cannot be waived.
5.30. There are many potential reasons outside the control of the applicant which can lead to them not meeting a time limit. These include administrative error or delay by the agency, failure to adequately notify the decision, reasons or review rights, poor advice from a third party, and temporary absence from home. To ensure that potential applicants are not arbitrarily denied access to review, the Council recommends that all tribunals should have the discretion to accept applications outside the statutory time limits where the circumstances justify an exception.

**Recommendation 57**

There should be a general statutory minimum time period of 28 days from receipt by the applicant of notification in writing of the reviewable decision for making an application for review by a review tribunal.

**Recommendation 58**

All review tribunals should have the discretion to allow applications for review out of time where that is justified by the circumstances of the particular case.

### Application fees

5.31. A $300 application fee is currently prescribed by the rules applying to the AAT and the IRT. Applications to the other tribunals are free. AAT application fees are not payable by certain types of applicants, and the Registrar (or a Deputy Registrar) has a discretion to waive the payment of an application fee if the payment of the fee would impose ‘financial hardship’ on the applicant. The Registrar (or a Deputy Registrar) of the IRT has a discretion to waive the application fee if the payment of the fee has caused, or is likely to cause, ‘severe financial hardship’ to the applicant. The Council considers that the same test should apply to the waiver of fees by tribunals wherever fees are required, and it favours the ‘financial hardship’ test. It is also worth noting that any fee paid is refunded to applicants who succeed in the AAT and IRT. This is appropriate since the applicant receives what they were seeking from the Government at the outset: a correct and preferable administrative decision.

5.32. One suggested basis for introducing fees for external merits review is based on the ‘user-pays’ notion. The AAT and IRT fees represent less than 10% of the average cost to the tribunal of dealing with a case. To set fees at a level that would make a significant contribution to tribunal costs would clearly deter most applicants, except perhaps for a few taxpayers challenging large assessments and some commercial applicants.

5.33. Another argument put forward for application fees is that they deter frivolous or vexatious applications. While they might serve this purpose in some cases, the propensity to lodge such applications does not appear to be related to means. Fees are therefore a very blunt instrument for dealing with this problem, to the extent that it exists. Power to strike

---

143 Applicants who have been granted legal aid for the application, applicants who are in receipt of certain social security benefit cards, persons who are an inmate of a prison or otherwise lawfully detained in a public institution, a child under 18 years, and a person in receipt of AUSTUDY: AAT Regulations, Regulation 19(6).
144 Administrative Appeals Tribunal Regulations, Regulation 19(6).
145 Migration Regulations, Regulation 4.13.
out an application determined at any stage of the review process to be frivolous and vexatious - like the power of the AAT under section 42B of the AAT Act - is a better instrument for dealing with such applications. The use of such a power would be rare and targeted more accurately at the problem being addressed than is imposition of a general fee.

5.34. Having rejected the two main reasons for fees, the Council nevertheless considers that it is reasonable that those applicants with the means should make a contribution to the cost of tribunal review. At the same time, the Council considers that as a matter of principle application fees should never constitute a barrier to the exercise of review rights.

5.35. One means of protecting this principle while permitting greater contribution toward the cost of review proceedings by those with means would be through an elaborate scale of fees linked to means testing; this approach would be administratively cumbersome and costly, and the process of means testing would itself act as a deterrent.

5.36. As an alternative, the Council favours a range of exemptions for those on low incomes (defined by reference to an individual’s entitlement to a pension or other government assistance), and a broad discretion for tribunals to waive fees in cases of financial hardship - with consistent criteria. The fees payable by other applicants should be set at a level which is affordable by a person of average means - the current AAT and IRT fees are probably acceptable. Consideration could be given to seeking a more realistic contribution to the costs of review from commercial applicants to the AAT.

5.37. The Council notes that the Attorney-General’s Department is undertaking a review of fees for all Commonwealth courts and the AAT, and that the May 1994 Budget papers anticipated that these fees should increase in line with inflation to maintain their real value. In view of these developments, the Council does not make any specific recommendations in relation to application fees but suggests that the principles outlined above be taken into account by the Attorney-General’s Department in its review, and by other departments in relation to the SSAT, VRB, IRT and RRT.

LOCATION AND ACCESSIBILITY OF TRIBUNAL OFFICES

5.38. Tribunal premises are traditionally known as registries. Most of the tribunals have registries in all State and Territory capital cities, although the RRT has only two registries - in Sydney and Melbourne, where the bulk of refugee applications originate. Applicants in other cities, towns and country areas are serviced either by the tribunals convening panels in regional centres, by inviting applicants to travel to the main registries (the SSAT and VRB can pay travel expenses), or by holding telephone conferences and hearings.

5.39. Deciding on the number and location of tribunal registries or offices involves a trade-off between accessibility and cost. It would increase accessibility to have offices in more locations and there is evidence of demand for a greater regional presence by the high volume first-tier tribunals in particular. This would however involve significant additional overhead costs and, if smaller registries were to have locally resident members, there could be some loss of flexibility in the capacity of the tribunal to redirect work to available members. The volumes of review applications, even in the SSAT and VRB are too low to justify many, if any, additional separate premises.

5.40. A half-way house suggestion is the use of ‘agency’ arrangements whereby another existing organisation acts as a front office for one or more tribunals, but this would involve
training and quality control issues - tribunals may be reluctant to surrender direct control over the important point of initial contact with applicants and the public.

5.41. Co-location between tribunals may offer some prospect of allowing cost-effective servicing of additional offices - this subject is discussed further in Chapter 7. The same reasoning applies to the uniting review of different areas of decision making, a subject canvassed in detail in Chapter 8.

5.42. Tribunals make extensive use of telephone and facsimile contact, and this can often provide a satisfactory way of dealing with some stages of the review process for applicants outside the major cities. However, there is some evidence that the use of telephone hearings by the SSAT may disadvantage applicants who do not have the opportunity to present their case in person. Most tribunals use the telephone principally to make arrangements and conduct pre-hearing business and have not attempted to routinely conduct hearings by telephone.

5.43. Judicious use of telephone-conference and video-conference facilities can be helpful and efficient, particularly where there are witnesses involved in two or more locations. The Council nonetheless supports the presumption that a face-to-face oral hearing should normally be part of the process of review where an earlier form of resolution has not proved possible.

5.44. Given unavoidable resource constraints, it is unlikely, even with co-location, that tribunals will be able to justify any significant change in the number and location of their premises. Since large numbers of potential applicants will continue to be beyond easy reach of those premises, tribunals will need to continue to address accessibility with a combination of visiting panels, travelling expenses for applicants, and appropriate use of telecommunications.

<table>
<thead>
<tr>
<th>Recommendation 59</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review tribunals should cooperate in considering whether sharing of overheads, or use of agents, could make a physical presence in additional locations cost-effective.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recommendation 60</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review tribunals should continue to make appropriate use of ‘circuit’ panels and telephone and video conferences, and of payment of travelling expenses for applicants.</td>
</tr>
</tbody>
</table>

DESIGN AND LAYOUT OF TRIBUNAL PREMISES

5.45. There has been much criticism in the past of the unfriendly and even threatening character of some tribunal premises, particularly those of the AAT. There is a broader discussion of formality and informality in Chapter 3. The Council’s discussion paper gave an example of the type of criticism that was levelled against the AAT during the 1980s in

---

particular as a result of its co-location in some centres with Commonwealth courts. Such criticism led the Council to state in its 1988-89 Annual Report that:

Location with courts affects the perception of the AAT's role held by members of the AAT, the parties and their representatives. To place the AAT with courts encourages the view that the AAT is itself a court, with possible consequences in terms of both the functions and procedures of the tribunal. The Council stresses the importance for the AAT of keeping an identity separate from the courts. Thus, where it is necessary to locate the AAT in the same building as courts, other steps will need to be taken to maintain this separate identity.

5.46. This criticism has largely been met. The AAT now leases (or is in the process of leasing) separate premises for all registries except the Brisbane and Hobart registries.

5.47. The Council's consultations during the review have revealed that all tribunals are aware of the need for their premises to be as accessible and non-threatening to all users as is consistent with the performance of tribunal review functions. Although considerable improvements were noted, there remains some criticism in this regard. There is no shortage of suggestions for improvements, dealing with issues ranging from the style and location of signs, the use of appropriate lighting and colour schemes through to facilities for child care and for people with disabilities (including facilities for physical access to tribunals). In the latter respect, tribunals will need to fulfil their relatively new responsibilities under the Commonwealth Disability Discrimination Act 1992.

5.48. As well as these general environmental factors, there is also some concern about the need for facilities related to the review process itself and the needs of different types of participants in it. For example, there is often a need for facilities in which applicants may hold private conversations with their advisers, on occasions it is appropriate to maintain separation of parties while they wait for a hearing to commence, and there are some concerns also about the layout of hearing rooms.

5.49. Desirable improvements will clearly be subject to resource constraints, but some may be surprisingly low-cost, while the more expensive ones need to be designed into refurbishment or relocation strategies when they become necessary for other reasons, such as expiry of leases.

5.50. The Council suggests that many of these design and layout matters raise issues that are common to all tribunals, and are therefore a suitable subject for cooperative attention. The aim of such cooperation would be to develop appropriate common guidelines and standards. Any such joint exercise should involve seeking suggestions from regular users and from a sample of applicants.

**Recommendation 61**

Review tribunal premises should be as accessible and non-threatening to all users as is consistent with the proper performance of tribunal review functions. Details of tribunal design, layout and facilities should be left to the discretion of tribunals. A working group from all tribunals should be convened to develop common advisory guidelines on these matters. The views of review tribunal users should be sought as part of this process.


GUIDANCE AND SUPPORT FOR APPLICANTS

5.51. All tribunals are conscious of the needs of (non-agency) applicants for review in terms of guidance and support throughout the review process. The AAT makes specific provision for unrepresented applicants, and it is common policy for tribunals to assign responsibility for liaison with applicants to a specific officer or small team, although in some this responsibility transfers at various stages of the process - this may be confusing to applicants and should be avoided if possible.

5.52. Other suggestions to emerge from the Council’s consultations included:
- ensuring that applicants’ expectations are not unduly raised or false hopes engendered;
- writing and designing guidance material with the unrepresented applicant in mind, and not also trying to meet different needs of respondent agencies or regular advocates in the same literature or other media - different versions are preferable to a poor compromise that serves neither market well;
- following up applicants after the decision to ensure they have understood the reasoning and any remaining review and appeal rights; and
- monitoring and feedback mechanisms, including client surveys, to test the effectiveness of guidance and support arrangements including literature.

5.53. As already suggested in relation to tribunal location, tribunals should be able to assist with the travel and incidental expenses of applicants without adequate means. This would be more conveniently assessed by reference to pensioner or other concession status than through elaborate means testing, but tribunals should also have a discretion to assist applicants who fall outside these criteria, but are still in need. Since the cost of providing this sort of assistance in any particular time period would be unpredictable, tribunals should be reimbursed by the respondent agency, whose larger budgets are better able to absorb the cost.

5.54. If, as the Council suggests in Chapter 8 of this report, some cases are selected for special treatment on public interest grounds, the applicant will need additional support and assistance. This should include an indemnity against additional costs. This aspect of assistance is discussed further in that chapter.

5.55. Where applicants are represented, it will be reasonable for tribunals to assume a reduced need for direct assistance. However, tribunal experience is that the quality of representation varies considerably, and tribunals should offer support and guidance to represented applicants if it is obviously required.

5.56. The Council also considers that it is important for tribunals to have an active program of regular review of their strategies for the assistance of applicants. The aim of such reviews is to ensure that all applicants, including unrepresented applicants, enjoy the best possible access to the tribunal. The views of non-government organisations that provide advice and assistance to applicants should be sought as part of such reviews.
Recommendation 62

Review tribunals should provide appropriate assistance to (non-agency) applicants for review, particularly applicants who are unrepresented. This assistance should be characterised by:

- as far as is practicable, a single point of contact throughout the review process;
- appropriately designed literature and other explanatory material; and
- reimbursement of travel and incidental expenses for applicants without adequate means.

Recommendation 63

Review tribunals should regularly review their strategies for the assistance of (non-agency) applicants with a view to being as accessible as possible to applicants.

5.57. Review tribunals should not generally have to provide advice and guidance on tribunal processes and procedures to individual officers from respondent agencies. It is the responsibility of agencies to ensure that officers dealing with the tribunals are adequately trained and briefed on particular cases. However, tribunals should cooperate with agencies in training courses and materials - most have been giving increasing attention to this. They should also be sensitive to the occasional need to assist inexperienced officers appearing before the tribunal.

Interpreters and translation

5.58. Provision of interpretation services, where necessary with non-English-speaking applicants or witnesses, is both an essential tool for the tribunals to carry out their function effectively, and an aid to accessibility. The Council considers that the cost of interpreters should be seen as a necessary tribunal expense rather than as assistance to individual applicants.

5.59. In 1991, the Attorney-General’s Department recommended that there be a legislative right to an interpreter.\(^\text{149}\) All tribunals are currently able to provide and pay for interpreters where necessary, but are not required to do so, and do not have any dedicated funds for this purpose. Proposed amendments to the *Migration Act* 1958 currently before the Parliament - in response to Recommendation 26 of the CROSROMD report - will require the IRT to provide an interpreter, at the tribunal’s expense, where the tribunal considers it necessary (with or without a request from the applicant).\(^\text{150}\)

5.60. The Telephone Interpreter Service (TIS) can be used for preliminary contact with applicants, but a face to face interpreter may sometimes be necessary even for short preliminary conferences and meetings.

\(^{149}\) Attorney-General’s Department *Access to Interpreters in the Australian Legal System* Canberra, 1991.

\(^{150}\) New section 366C, proposed in Item 26 of Schedule 1 to the Migration Legislation Amendment (No 5) Bill 1994.
5.61. Because the demand for interpreters is unpredictable, there is a case to be made for this cost to be borne, or reimbursed, by the respondent agency, which can absorb the cost more easily in a larger overall budget.

5.62. Some tribunals have experienced difficulties with availability of appropriately qualified interpreters. The RRT in particular has a requirement for interpreters in a wide range of less common languages, and availability is sometimes further limited by conflicts of interest on the part of interpreters, such as affiliations with particular social groups within small communities.

5.63. It is important that interpreters are familiar with the functions and procedures of tribunals. While it may be appropriate for interpreters to offer advice to applicants rather than simply acting as an intermediary, there are dangers involved in doing so. Ideally, tribunals should be using the same interpreters regularly and should offer training and briefing sessions, but this will not always be possible.

5.64. Some tribunals have set out to make use of language skills of members and staff - for instance the SSAT has convened entire panels of fluent members to hear cases involving Italian and Greek applicants. The Council supports the appropriate use of such skills, but cautions against amateur language skills (however fluent) being seen as a substitute for trained professional interpreters.

**Recommendation 64**

There should be a statutory entitlement to an interpreter in review tribunal proceedings, where the tribunal considers an interpreter’s services are required. Interpreters who participate in these proceedings should be adequately briefed on review tribunal functions and processes.

5.65. Translation of documents is very expensive. It would be neither affordable nor reasonable to require tribunals to pay for the translation of information at the request of the applicant. The general rule should be that applicants are entitled to all relevant information in whatever language it is already available, and the choice of arranging for their own translations if they wish. This should not normally be necessary as the significant content of any information will be explained to a non-English-speaking applicant through an interpreter at a conference or hearing. Tribunals should however have the discretion to provide translations where they consider it necessary.

**Recommendation 65**

Review tribunals should have the discretion to pay for the translation of documents they consider relevant to the review and where translation would be beyond the means of an applicant.
Tape-recording and transcripts

5.66. The AAT, VRB, IRT and RRT routinely tape-record substantive hearings. Submissions to the Council supported the tape-recording of final merits review proceedings for two reasons:
- that they enable tribunal members to refer to the recording where necessary when making its decision and preparing reasons; and
- that they enable parties to refer to the recording, particularly when considering whether to appeal to the Federal Court and in preparing such appeals.

5.67. There appears to be little demand for tape recording of proceedings in the SSAT, and there are concerns that applicants could find recording equipment and the fact that what they say is being recorded to be intimidating.

5.68. The Council considers that while the decision should be left to the discretion of tribunals, routine tape-recording of tribunal proceedings could be a useful management practice and could assist in training, professional development and performance appraisal (see Chapter 4), and will also be of assistance if further review is sought of the decision or a complaint is made about the conduct of the hearing.

5.69. If the proceedings have been recorded on tape (whether audio tape or, in the case of an AAT video conference, video tape), parties should be entitled to request a copy of the tape free of charge. However, tapes should not be available to third parties as of right, even if the proceedings were conducted in public. Any third-party use (for instance, for research or educational purposes) should be at the discretion of the tribunal, subject to any appropriate conditions, and should be subject to the consent of the applicant.

**Recommendation 66**

Review tribunals should consider the benefits of routinely audio tape-recording proceedings. Where audio tape recordings are made, copies of tapes should be made available to the parties. Third-party use of those recordings should be at the discretion of the tribunals, and should be subject to the consent of the applicant.

5.70. Transcription of taped proceedings is very expensive. Tribunals will usually have transcripts made only when they are required for Federal Court appeals. If a transcript has been made then the applicant should be able to obtain a copy at a nominal charge. Respondent agencies can be charged the actual cost of reproduction.

LEGAL AID AND ADVICE

5.71. The availability of legal aid for merits review is currently patchy - between States and between jurisdictions. Assistance for legal representation is generally available, subject to means and merits tests, for AAT review, and in New South Wales for VRB proceedings. Given the non-adversarial nature of the processes in most cases reviewed by all the tribunals, the greater need is for free advice and support. While this is in principle available from Legal Aid Commissions, Community Legal Centres and other non-government organisations, a combination of resource constraints, other higher priorities, and uneven geographical coverage mean that review applicants cannot always get the advice they need.
5.72. The Council has previously made recommendations regarding legal aid for administrative law matters, and many of these were reiterated in the 1994 report *Access to justice: An Action Plan*. The Australian Government’s recent justice Statement announced a wide range of initiatives and increased funding in relation to legal aid, focussing not just on financial assistance for legal representation, but also on other forms of advice and support. The *Justice Statement* emphasised the need for increased aid for civil matters. A new national coordinating machinery is to be established with the aim of increasing access, equity and efficiency.

5.73. The Council defers to this new machinery, and to individual legal aid authorities, as the most appropriate forums to address this issue in more detail. It does however suggest that there should be greater equity and consistency in the availability of legal aid and advice for administrative review applicants. The Council also favours an increased emphasis on encouraging the use of non-legal advice and advocacy, as more in tune with the style of operation of merits review tribunals.

**Recommendation 67**

Legal aid authorities should seek to ensure a more consistent and equitable provision of legal aid and advice for review tribunal applicants, with an emphasis on non-legal advice and advocacy.

**AVAILABILITY OF TRIBUNAL DECISIONS**

5.74. As well as informing the applicant and agency of the outcome and reasons, tribunal decisions can serve several other purposes - both within the respondent agency and amongst a wider community of interested parties. However, there are a number of good reasons - which are discussed in paragraphs 3.113-3.129 - why it may not be either desirable or possible to make them publicly available. The desirable content and presentation of decisions to meet the immediate needs of the parties is discussed at paragraphs 3.202-3.212.

5.75. Once it has been determined whether to permit public access to some or all decisions of a particular tribunal, the Council considers that those decisions should be made as widely and easily available as possible. Tribunal decisions serve an educational purpose, assist potential applicants and advisers, and contribute to accountability. Summaries of significant cases can be published in annual reports. Legal publishers may choose to report some cases, but tribunals should supplement this by making all decisions available either on paper and, where possible, in electronic form - on disk and/or in on-line databases such as the SCALE system maintained by the Attorney-General’s Department.

---

154 This is an abbreviation for the database known as the Statute and Cases Automated Legal Enquiry which provides access to Acts of Parliament, delegated legislation, other legislation, cases, and opinions/advices provided by the Attorney-General’s Department.
Recommendation 68

Review tribunals should make their decisions as accessible as possible. Summaries of significant review tribunal decisions should be included in the tribunals’ annual reports.

GENERAL PUBLIC INFORMATION

Objectives

5.76. There are two reasons for ensuring that information about merits review tribunals and their processes is freely available to the general community. The first is to contribute to the accessibility objective - the more widely known are the existence and purpose of the tribunals, the more likely individuals are to be able to access the review system when they need it. Even though individuals are informed about review rights when they receive a decision, they are more likely to exercise those rights if they, or their family and friends, have heard about the tribunal, and have some understanding of what it can do.

5.77. The other reason for making information publicly available is to contribute to the openness and accountability of the merits review system. Only if the general community can see what tribunals are trying to do and assess their performance will the system be credible. Tribunal proceedings can also provide a window on government decision-making more generally, although there are competing values of privacy and confidentiality (discussed in Chapter 3). The Council’s consultations have revealed widespread support for the maximum openness and transparency of tribunal activities, processes and outcomes.

Types of public information

5.78. There is a wide range of information which is either already published, or which could be published, to serve these purposes. The information falls into three broad categories.

Practical information designed primarily for applicants

5.79. This category of general information should be actively promoted to potential applicants, for example in the form of a leaflet distributed by agencies. It includes:

- a simple explanation of the review process and how the tribunal goes about its job;
- a simple explanation of what information the applicant might usefully provide to the tribunal as part of the review process, and how that information might best be presented;
- information about what the tribunal might ask for or require from the applicant;
- details about the availability of advice and other support facilities;
- details about the availability of resolution options such as mediation; and
- details about the availability of information relevant to the review process, including decisions in similar previous cases.

Some of this information should have already been provided to applicants as part of the specific information required to be provided to applicants about his or her own case (see paragraph 3.71-3.81) but may need to be supplemented. Also, similar information should be available both to prospective applicants and for general community education.
Practical information directed mainly at regular users (agencies, advocates...)

5.80. This category of information should be continuously available on request and actively promoted to regular users. Individual applicants should also be able to obtain it on request, and it should be included, or at least summarised in annual reports. This category includes:
- practice directions or guidelines;
- details of case management processes and expected time frames;
- membership details, including brief biographies of members; and
- administrative organisation of the tribunal, with names and contact details.

Performance information

5.81. This category of information can conveniently be provided in periodical publications such as annual reports and corporate plans. It includes:
- the statutory basis and parameters of the tribunal’s operations;
- the philosophy and approach of the tribunal;
- corporate objectives and performance criteria;
- performance against the criteria; and
- review outcomes (statistics, and examples of cases decided).

5.82. The role of tribunal charters in bringing together some information from all three of these categories is discussed separately below.

General principles of access to information

5.83. The principle underlying the provision of public information is that it should be targeted at those who need it, in the most appropriate form, and at the point of need. Compliance with this principle involves a consideration of whether information should be provided in a range of community languages; this will depend on the nature of the people affected by different types of administrative decisions. It also requires creative use of all available media and channels of communication - tribunals should consider making some of this information available in electronic form, including through on-line access, as well as through well designed, plain language traditional publications. Videos and radio broadcasts can be effective alternatives to print media, and are known to be particularly useful for reaching people of non-English-speaking backgrounds.\footnote{Submission from the Office of Multi-cultural Affairs (Submission No. 64).}

5.84. Success in this area cannot be measured simply by the amount or variety of information provided. As with notices of reasons for decisions and review rights, Tribunals need to assess the effectiveness of publications and other general information, through user surveys and general liaison.

5.85. All of this general information should be readily available without charge. There should be no question of individuals having to use the slow and potentially costly access provisions of the \textit{Freedom of Information Act 1982} to obtain any of the information listed above.\footnote{A number of deficiencies in the current Freedom of Information system was highlighted by the (ongoing) joint review by the Council and the Australian Law Reform Commission, and is listed in Administrative Review Council, Australian Law Reform Commission \textit{Freedom of Information (Discussion Paper)} Australian Law Reform Commission, Sydney, 1995 (ALRC Ref: ALRC DP 59), page 11.}
Tribunal charters

5.86. Charters are widely seen as a useful device for setting out the aims and objectives of public sector bodies, against which they will be held publicly accountable. The development of tribunal charters was specifically recommended in the report *Access to justice: An Action Plan*\(^{157}\) and the *Justice Statement*\(^{158}\) announced additional funding for the AAT for this purpose.

5.87. Most tribunals have already commenced work on developing their own charter. The Council supports these developments, but emphasises the difference between a charter and other documents such as corporate plans. A charter should have an external focus and should aim to be a short, plain language statement of what users, taxpayers and the general community can expect from the tribunal. User representative groups should be involved in the development of charters to ensure that the document is realistic and meets their expectations.

Statistical information

5.88. The type and amount of statistical information currently published by tribunals varies considerably, reflecting underlying differences in the data they collect, and in the definitions they use. Because of these differences it has proved impossible to draw reliable conclusions from comparisons between tribunals on such indicators as the rates at which decisions are set aside, affirmed, withdrawn, settled by consent and sought to be reviewed further. As a result, the Council has had to form a view on many of the issues in this report on the basis of qualitative impressions and submissions, without the support of empirical evidence.

5.89. Another related weakness is the inconsistency in record-keeping between the tribunals and the agencies whose decisions they review. An attempt was made during the review to reconcile figures published by the main departments in their annual reports with those made available by the tribunals, but there were too many discrepancies. Comparisons and analysis are not assisted by the common practice of publishing figures for the numbers of cases processed in discrete time periods, but not tracing individual cases through the decision-making system. Published figures tend to be related to processes rather than outcomes. The value of the available statistics is largely limited to monitoring changes within tribunals between time periods.

5.90. As was noted in relation to courts in the report *Access to Justice: An Action Plan*, reliable statistical information can make an important contribution to performance evaluation and benchmarking (the latter meaning learning from appropriate comparisons)\(^{159}\). The current limitations are avoidable, and there is significant support for improvements in the consistency and accessibility of relevant statistical information about tribunal operations.

5.91. Someone needs to take responsibility for tracking individual cases through from first decision through to final review and appeal (as the case may be), which in some cases can be a period of several years. As these cases can move into and out of any particular


\(^{158}\) Attorney-General’s Department *Justice Statement* Canberra, 1995, pages 57-58.

\(^{159}\) Attorney-General’s Department *Justice Statement* Canberra, 1995, paragraphs 17.45-17.50, 17.62.
tribunal, this responsibility would be best located, in high volume review jurisdictions, with the decision-making agency.

5.92. For some time, the tribunals have been providing regular statistics to the Council, but they are of limited utility given the differences referred to above. The Council considers that there would be significant benefits from harmonising definitions and statistical recording practices between tribunals and relevant agencies. A joint working group, with professional assistance perhaps from the Australian Bureau of Statistics, could usefully meet to develop a set of common standards.

**Recommendation 69**

A working group comprising representatives of review tribunals and principal agencies should be established to devise a set of common definitions and record-keeping conventions, designed to provide useful statistics as a management and evaluation tool for each tribunal and for the merits review system as a whole.

**Statutory obligations to report and publish**

5.93. The AAT, SSAT and VRB are required by law to publish an Annual Report on the conduct of their administrative affairs, while the IRT and RRT, although not required by statute to do so, voluntarily produce an annual report. The Annual Reports are useful vehicles for making public much of the general and performance related material discussed above. The Council considers that all tribunals should be under a statutory obligation to report annually.

5.94. In terms of the content of reports, tribunals generally follow the guidelines for agencies issued by the Department of Prime Minister and Cabinet, to the extent that these are relevant. Those guidelines, and the statutory provisions, do not cover material on the outcome or results of tribunal decisions, but there is clearly a demand for Annual Reports to contain summaries of cases, and information about agency responses. While it would not be appropriate to specify detailed content in legislation, it would be helpful for there to be some common standards for all tribunals. These could be set out in a code of practice to be developed cooperatively by tribunals themselves and perhaps issued by the Attorney-General - as with the Code of Practice concerning notification of decisions and rights of review that has been issued under section 27B of the AAT Act.

**Recommendation 70**

All review tribunals should be required by law to publish an annual report. Annual reports should have to comply with content standards. These standards should be developed through cooperation between review tribunals and set out in a common code of practice.
COMMUNITY LIAISON

5.95. All tribunals have established both formal and informal mechanisms for liaison with regular tribunal users, including relevant agencies and non-government organisations that assist review applicants. This is seen as contributing both to the access and responsiveness objective and to promoting the normative effect of tribunal decisions on agency decision making. Periodic general liaison meetings appear to serve a useful purpose in allowing both information from the tribunals and feedback to it. General meetings are not however suitable for resolving specific difficulties, which are better dealt with through bipartite contact. Tribunals also need to be careful that the parties invited to liaison meeting are representative of all users, or at least be aware that other interests may need to be involved in other ways.
CHAPTER 6

IMPROVING AGENCY DECISION MAKING

INTRODUCTION

Improving the quality of decision making

6.1. External merits review will have a direct effect upon the interests of both the applicant and the agency whose decision is under review: the decision will be confirmed, set aside or varied, or remitted to the agency for further consideration.

6.2. However, there is potential for review tribunal decisions to also have a broader, more long-term effect on the quality of agency decision making. There are two ways in which this effect can be achieved:
   - by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (referred to in this report as the ‘normative effect’); and
   - by taking into account review decisions in the development of agency policy and legislation.

6.3. The question examined in this chapter is how these broader benefits can be maximised by agencies. Unless an agency has in place organisational structures and procedures that enable it to take account of tribunal decisions in the development of agency policy and legislation, and apply them in other individual cases, it will be unable to take full advantage of the significant potential benefits of merits review.

6.4. Recommendations made in other chapters of this report are aimed at making review tribunal decisions clearer and more consistent. This greater consistency will help agencies (amongst others) to understand tribunal decisions and, in particular, will make it easier for agencies to ensure that any points that are made in decisions, and which have broader relevance for agency policy or decision making are understood by all relevant officers throughout the agency. It will make it easier to convince agencies and their staff of the value of tribunal decision making. It needs to be clearly understood that agencies can only be expected to take merits review seriously as an aid to decision making and management if review tribunal decisions are consistent, reasoned and of high quality.

6.5. The prospects for achieving these effects depend on tribunals delivering high quality and consistent decisions. However, agencies must play the principal role. This chapter is concerned with matters within the direct control of agencies that can maximise the effect of review by tribunals on the quality of agency decision making. Those matters are discussed below under the following headings:
   - agency organisation for responding to merits review; and
   - agency responses to individual review tribunal decisions.

6.6. This chapter also discusses some aspects of internal review of agency decisions and, in particular, the relationship between internal review and external merits review.
Agency culture

6.7. In Chapter 2 the Council noted the importance of agencies recognising and accepting the potential for tribunal review to make a positive contribution to their decision making. The greater the level of acceptance by agencies of the role of merits review, the easier it is for agencies to reap the positive effects of merits review.

6.8. The reason for this is that if agency staff view merits review as a potentially effective mechanism for identifying errors in decision-making processes, and for contributing to their agency’s policy formulation processes, the potential benefits of merits review are much more likely to be fully realised than if agency staff view external review as an ‘intrusion’ or a threat to the independence of their decision making. In a nutshell, it is important that there is a cultural acceptance of the benefits of merits review throughout an agency.

6.9. There is great potential for decisions of review tribunals to assist with better management and administration within agencies. This potential is acknowledged by most agencies, at least at senior management level.

6.10. However, in recent years, pressures for efficiencies and savings, as well as a range of reforms to the organisation of agencies, have hindered acceptance of merits review in some respects. The objective of more cost-effective decision making is seen by some as being incompatible with the objective of improved quality of decisions, and improved client focus. To foster appropriate cultural change, it is important for agencies and their officers to accept that the two objectives are not incompatible and that they must be reconciled. Merits review can be an important tool and feedback mechanism that can contribute significantly to total quality management.

6.11. At the primary decision-making level many agency decision makers remain sceptical of the value of merits review. As noted in Chapter 2, agency decision makers may have a perspective on administrative decision making which is very different to that of review tribunals, and the fact that an agency’s decision is changed by a review tribunal does not necessarily mean that the decision was ‘wrong’. Nevertheless, it is not uncommon for agency decision makers to view the setting aside by review tribunals of decisions of themselves and their colleagues as a criticism of the standard of their decision making.

6.12. Many of the recommendations made in this chapter will assist with the development at all levels within agencies of an appropriate cultural acceptance and understanding of merits review.

AGENCY ORGANISATION FOR RESPONDING TO REVIEW TRIBUNAL DECISIONS

Introduction

6.13. The ways in which review tribunal decisions can have a lasting effect on agency decision making are varied and complex. However, it is clear that the significance of any effect will depend to a large extent upon whether the agency has in place appropriate

organisational arrangements for analysing and reacting to review tribunal decisions. This section discusses what arrangements may be appropriate.

6.14. Maximising normative and other general effects of review tribunal decisions involves more than the agency taking immediate action to implement a review tribunal decision. Not all decisions will have wider implications; some decisions turn on the facts of the particular case, and raise no issues about agency decision-making processes, or agency policy or guidelines. What is important is not that a normative effect is derived from every review tribunal decision, but that appropriate systems are in place so that where a review tribunal decision has the potential to improve the quality of the agency’s decision-making processes, then that potential is fully realised.

Formal commitment by agencies to enhancing the broader effects of review tribunal decisions

6.15. In general, those agencies that have a relatively large number of decisions that are subject to merits review formally acknowledge the potential effect of review tribunal decisions on the general quality of agency decision making.

6.16. For example, the Department of Immigration and Ethnic Affairs corporate plan includes a performance indicator of ‘consistency, timeliness and lawfulness of (the department’s) decisions as conveyed by review bodies and the courts’. As another example, section 1296 of the Social Security Act 1991 requires that in administering that Act, the Secretary to the Department of Social Security is to have regard to, amongst other things, the need to apply government policy in accordance with, and with due regard to, relevant decisions of the AAT and the SSAT.

6.17. Although this sort of formal acknowledgment does not, of itself, guarantee that review tribunal decisions will have the optimum effect on agency decision making, it can act as an impetus for appropriate organisational change, as well as aiding in the development within the agency of a culture that is aware of the potential value of review tribunal decisions. The Council therefore considers that all agencies should make a visible, formal and real commitment to promoting within the agency the normative effect of review tribunal decisions.

**Recommendation 71**

All agencies should actively promote the potential beneficial effect of review tribunal decisions on the general quality of the agencies’ decision making. As an important aspect of this, agencies should make a visible, formal and real commitment to promoting that effect.

Departmental processes for maximising the effect of review tribunal decisions on the general quality of agency decision making

*Introduction*

6.18. A formal commitment to promoting the potential effect of review tribunal decisions on the general quality of agency decision making is necessary, but is not of itself sufficient to ensure that these effects are realised. Agencies must also ensure that they put in place appropriate organisational systems. It is important that they have in place processes for:
• receiving review tribunal decisions and analysing their potential effects on agency decision making (including determining whether further review should be sought of, or an appeal made against, particular review tribunal decisions);
• effective and timely distribution of relevant review tribunal decisions (or a synopsis of decisions where that is sufficient), and identification of changes to legislation, guidelines and policies which should arise from those decisions; and
• training staff (particularly primary decision makers) in appropriate aspects of administrative law, including the role of external merits review.

6.19. In many agencies, the function of receiving and analysing review tribunal decisions is undertaken by a central legal policy section (which may also have a role in relation to internal review). In other agencies, the function of receiving and analysing review tribunal decisions is undertaken by regional officers, who then forward cases that may involve issues of general significance to the agency’s central office.

6.20. In the Council’s view, the advantages of using a central section of an agency to undertake these functions are that:
• it is likely to make the agency’s response to tribunal decisions more consistent if the same section is receiving and analysing review tribunal decisions; and
• it is easier to promote and enhance the effects of review tribunal decisions throughout the agency from a central point.

6.21. The Council understands that some agencies generally do not review the reasons given by review tribunals in decisions which affirm the agency’s decision. In the Council’s view, such reasons should be routinely analysed by agencies, because they may be very different from the reasons advanced by the agency to support the original decision.

6.22. In relation to review and distribution of tribunal decisions throughout agencies, and the processes for effecting changes to policy or legislation, practices vary between agencies. Three examples are given below.

6.23. In the Department of Social Security, SSAT decisions are generally reviewed by officers at the regional (primary decision) and area (internal review) levels, with the central office only involved if further review by the AAT is under consideration. However, AAT decisions on social security matters, and veterans’ matters which raise issues relevant to the Department of Social Security, are routinely reviewed by central office staff. These decisions are not circulated to staff; the department relies on the wide internal circulation of the independently produced Social Security Reporter, and a Social Security Act 1991 which is annotated by a non-government organisation and which makes extensive references to review tribunal decisions. Policy changes resulting from tribunal decisions are, like all policy changes, disseminated initially in a National Instruction, and are then incorporated into the Guide to the Administration of the Social Security Act. Both of these publications are available to agency decision makers in electronic form.

6.24. In the Department of Veterans’ Affairs, all review tribunal decisions are read by the relevant program area, the review area and the legal services group. However, given the high level of Federal Court appeals in the veterans’ jurisdiction, most changes to policy or legislation are generally in response to court decisions, and review tribunal decisions are considered to raise issues of possible normative effect only rarely. All AAT decisions are distributed to all advocates and within the legal services group, but are not distributed to primary decision makers: the view is taken that the computerised decision-making system
(which guides decision makers through the factors to be considered in reaching a decision) removes the need to inform primary decision makers about specific AAT decisions.

6.25. In the Department of Immigration and Ethnic Affairs, the executive support branch of the department monitors decisions, and draws implications from cases to the attention of relevant program areas. Digests of IRT decisions are included in the occasional in-house publication *Folk Law*, and these digests are accompanied by a specific instruction to decision makers not to apply IRT decisions until they receive official instructions.

6.26. The Council considers that the appropriate organisational arrangements to maximise the normative effect of review tribunal decisions will vary from one department to the next, and are a matter for each agency to determine. For example, organisational arrangements may need to be more sophisticated in agencies with rates of further review are high than in agencies where there is only occasional merits review of decisions.

6.27. Nevertheless, there are some common principles which the Council considers should guide agencies in framing organisational arrangements for normative impacts. These are set out below.

*Communication*

6.28. The broader effects of review tribunal decisions will not be felt within agencies unless agencies have in place effective channels for distributing information about review tribunal decisions, and any policy or legislative changes flowing from such decisions. This does not mean that a written copy of every decision should be sent to every decision maker and policy officer within the agency, merely that each agency’s communication systems should be such that relevant decisions can be brought to the attention of decision makers and policy officers in a timely fashion.

6.29. The increasing use of computer networks for distributing information in the form of bulletins, electronic mail, annotated legislation, policy statements, and case digests has the potential make it increasingly easy for agencies to bring relevant decisions and other information to the attention of decision makers. The use of these systems as an effective means of delivering information in an efficient and timely manner should be encouraged.

6.30. The Council also notes that some agencies rely upon publications produced outside the agency for the distribution to decision makers of general information about cases. Where a specific policy issue of concern to the agency arises, these are dealt with by the agency directly. The distribution of these publications can be helpful; however, it should not be seen as sufficient to satisfy the agency’s responsibility to provide decision makers with relevant information in a timely manner.

6.31. One issue that arose during the consultations was whether any benefit would be gained from circulating to an agency’s primary decision makers copies of AAT consent orders, on the basis that some general principles might be drawn from knowledge of the actual outcome in cases that are settled by mutual agreement. However, consent orders rarely contain any significant information about the reasons for settlement, and the respondent agency will in any event be aware of the reasons for the settlement. If a case raises any new issues of general interest that the agency considers should be brought to the attention of its decision makers, the agency would be able to alert decision makers to that issue. Agencies could usefully monitor the general trends in settlements, and include information about these trends in training for primary decision makers (see below), so that there is a better understanding of the overall approach of the agency to settlement of cases.
If nothing is known about the agency’s approach to settlement of cases, there is a risk that
decision makers will become sceptical about the value placed by the agency upon their
decision making.

Staff training

6.32. As noted above, it is important that an appropriate cultural acceptance of external
merits review is developed at all levels within agencies, from senior management through
to primary decision makers. It is particularly important that primary decision makers are
receptive to the potential benefit of tribunal decision making. This can only be achieved if
those decision makers have a sound understanding of the purpose and nature of merits
review, which is discussed in Chapter 2.

6.33. There is an understandable tendency for primary decision makers to view external
review as an intrusion, and a potential indictment on their decision-making abilities (or an
actual indictment in cases where their decisions are overturned on review). These attitudes
have the potential to breed a culture that is not receptive to merits review. In many cases
they are the product of an insufficient understanding of the function and role of merits
review in the decision-making process.

6.34. It is also important that the opinions and views of internal review officers and
officers in the legal policy review sections of agencies are sufficiently well regarded within
the agency so that primary decision makers will take those views into account in their
decision making. In order to achieve this, the organisational structure of agencies should be
such that legal policy review sections are sufficiently separate from primary decision
makers to avoid being influenced by the same operational pressures and culture that
influence primary decision makers. If their relationship is too close, it could prejudice the
ability of officers in legal policy review sections to consider decisions with the appropriate
degree of objectivity. However, this does not mean that legal policy review sections must
necessarily be centralised. Indeed, their place within the agency’s organisational structure
must be carefully balanced: this is because there can also be advantages in ensuring that
legal policy review sections are not so far removed from primary decision makers that they
lose their ability to understand the various practical issues that affect primary decision
making on a day-to-day basis.

6.35. In recent years it has been common for agencies to devolve and decentralise
authority for decision making. It might be thought that these initiatives would make it
more difficult for agencies to maintain control over the quality of primary decisions, and to
inform primary decision makers of the effects of relevant tribunal decisions and policy
changes. However, submissions to the Council suggest that these initiatives have had little,
if any, effect on the ability of agencies to maintain the quality of primary decisions.

Recommendation 72

Agencies should ensure that their organisational structures are such as to
maximise the potential beneficial effect of review tribunal decisions on the
quality of agency decision making. Those structures should provide for:
• appropriate levels of independence for legal policy and review staff;
• effective communication systems; and
• appropriate training for primary decision makers on the function and role of
merits review in the decision-making process.
AGENCY RESPONSES TO REVIEW TRIBUNAL DECISIONS

6.36. Where an agency’s decision is varied or set aside by a review tribunal, the agency must either accept the tribunal’s decision and implement it in the particular case, or if they wish the particular decision to be altered, seek further review of or appeal against the decision (as available). Review tribunal decisions do not create binding precedent. As a result, agencies need not follow them in other cases and there is scope for differences to emerge between an agency’s interpretation of the legislation or policies according to which it operates and a review tribunal’s interpretation of the same legislation and policy. The Council has found that there is some concern among non-government organisations in particular that there is a level of inequity in the outcomes achieved by different individuals as a result of different approaches being taken by agencies and review tribunals, and considers that steps should be taken, so far as is practicable, to eliminate any such inequity.

6.37. A review tribunal may, in its decision, express the opinion that the agency has not properly understood a statutory provision, has adopted a policy that is unlawful, or has made some other error that might recur in other decisions. There is a range of possible agency responses to such a decision. For example, the agency may instruct decision makers to adopt the view of the review tribunal in similar cases, and for this purpose the agency may change its policies or guidelines. If the agency does not take such steps, then individuals in similar circumstances may achieve different outcomes depending on whether they pursue their rights to review through to the review tribunal.

6.38. Where an agency considers that a review tribunal’s decision is not correct, it may seek further review of the decision, appeal against the decision to a court, or seek to amend the law to have Parliament clarify the policy intention. The Council acknowledges that there may be legitimate reasons why the agency does not pursue either of these options (for example, the implications of the decision may be limited because of the unusual facts involved, further review or an appeal may not be cost effective, and amending legislation can be a complicated and time-consuming exercise). Agencies may therefore prefer to respond to a review tribunal decision by informing their decision makers that the agency is of the view that the tribunal’s decision is not correct, and should not be applied in future similar cases.

6.39. However, the Council is concerned that it can be unsatisfactory for an agency to respond to a review tribunal decision that the agency considers to be incorrect only by advising its decision makers not to follow the decision in future similar cases. Such a response does nothing to resolve any difference of opinion between the agency and the tribunal, and may lead to different results for individuals according to how far they pursue their rights to review. It can also diminish the credibility of the tribunal in the eyes of agency decision makers and review tribunal users. The Council is firmly of the view that such an agency response is not acceptable, and considers that, in relation to review tribunal decisions with implications for future similar cases, agencies should be encouraged to make a public statement of their position in relation to the tribunal decision. For example, the agency may indicate that it will not follow the decision of the review tribunal in future similar cases, in which case the agency may want to indicate why it is taking that position. Such a statement will mean that all applicants may become aware of the difference of view between the agency and the tribunal. This should assist applicants in making choices as to whether to pursue their review rights further and should enable the inconsistency in views to be resolved in a speedy and open manner.
6.40. The Council notes that some agencies do regularly respond to particular review tribunal decisions by issuing public statements of the agency’s view of how a review tribunal decision will affect its approach to decision making. Some agencies also respond promptly to requests from applicants and non-government organisations for the agency’s response to a particular review tribunal decision. However, this practice is not followed by all agencies or in relation to all requests for a response.

6.41. The Council gave consideration to a suggestion that there should be an obligation on agencies to respond formally to every review tribunal decision. However, the Council considers that such an obligation is unnecessary, because only a relatively small number of review tribunal decisions adopt an approach that is inconsistent with that of the agency. When a review tribunal reaches a different outcome to that decided by the agency, it is often because the tribunal has made different conclusions as to the facts or credibility of persons providing evidence or has received new information. At the same time, the Council considers that review tribunals should be encouraged to raise with the relevant minister or agency head, or with the Ombudsman, the issue of the agency’s response to particular tribunal decisions where the tribunal adopts an approach inconsistent with that of the agency and where the inconsistency appears not to have been adequately resolved.

Recommendation 73

Agencies should be encouraged to respond to a review tribunal decision that has potential implications for future agency decision making and where they consider the decision to be incorrect. They should:

- amend their policy and guidelines, or
- seek to amend the law, to clarify the policy intention; seek further review of the decision or appeal against it to a court; or
- make a public statement of their position in relation to the review tribunal decision.

Recommendation 74

Review tribunals should be encouraged to raise with the relevant minister or agency head, or with the Ombudsman, concerns they may have about agency responses to tribunal decisions.

INTERNAL REVIEW

Introduction

6.42. ‘Internal review’ is merits review of an agency’s primary decision that is undertaken by another officer within the same agency (usually a more senior officer). The Council’s terms of reference do not require it to undertake a comprehensive assessment of the adequacy of an agency’s internal review mechanisms. However, some aspects of internal review are relevant to the objectives of the merits review system, and the discussion paper asked submissions to comment on those aspects. 161 The Council’s views are set out below.

6.43. Internal review can affect external review in a number of ways. For example, it has the potential to quickly and cheaply satisfy the concerns of a significant proportion of applicants who would otherwise seek more expensive review by an external tribunal, and, like external merits review, it can help to achieve improvements in the quality of agency decision making. On the other hand, internal review can act as a barrier to access, because it adds another layer to the review process. It is therefore important that internal review processes are carefully designed.

**Current practice**

6.44. In some jurisdictions, an applicant is not able to seek external merits review of an agency’s decision unless that decision has first been subject to internal review. Decisions that are subject to this requirement include certain decisions made under the Social Security Act 1991,\(^{162}\) the Student and Youth Assistance Act 1973,\(^{163}\) and the Migration Act 1958.\(^{164}\) Internal review is undertaken by Authorised Review Officers (AROs) in the Department of Social Security, by officers of the Migration Internal Review Office within the Department of Immigration and Ethnic Affairs, and by delegates of the Secretary in the Department of Employment, Education and Training.\(^{165}\)

6.45. In relation to agency decisions which are subject to direct review by the AAT, the question of whether internal review is a necessary precondition to seeking AAT review varies from one decision to the next according to the provisions of the particular statutes that provide for the rights of review.

6.46. Agencies may also, as a matter of policy, provide for internal review of their decisions even if that internal review is not required by statute: for example, the Australian Taxation Office will undertake internal review of its decisions on request.

6.47. In the past, it has been rare for veterans’ entitlement decisions to be internally reviewed, even though the Veterans’ Entitlements Act 1986 provides, in section 31, that the Repatriation Commission may at any time reconsider a decision that is adverse to the applicant. However, pursuant to a recommendation of the Baume Committee,\(^{166}\) the Repatriation Commission has recently begun to put in place organisational arrangements for making greater use of internal review.

---

\(^{162}\) Section 1239(1) of the Social Security Act 1991 provides that the Secretary to the Department of Social Security may review decisions made under the Act; however, sections 1239(2) and 1240(1) of the Act operate to exclude certain decisions from this requirement. Section 1247 of the Act provides, in effect, that an application may be made to the Social Security Appeals Tribunal for review of a decision only if the decision has already been subject to internal review.

\(^{163}\) Section 302 of the Student and Youth Assistance Act 1973 sets out the decisions which are internally reviewable by the Secretary. Section 304(4) of that Act provides that if a person applies for review of a decision, the Secretary or an authorised review officer may review the decision. Section 311 of the Act provides, in effect, that an application may be made to the Social Security Appeals Tribunal for review of a decision only if the decision has already been subject to internal review.

\(^{164}\) Section 338 of the Migration Act 1958 sets out which decisions made under the Act are subject to internal review. The effect of sections 346 and 411 of the Migration Act 1958 is that most (although not all) decisions made under the Act must be subject to internal review before they are able to be reviewed by either the IRT or the RRT.

\(^{165}\) The Department of Employment, Education and Training has established a working party to consider the question of whether the department should have its decisions internally reviewed by Authorised Review Officers.

6.48. In general, internal review is a relatively quick process. It is also generally undertaken without face to face contact between the agency and the applicant, although the Department of Social Security requires AROs to attempt to contact applicants by telephone, and the Department of Employment, Education and Training is encouraging its internal review officers to have more personal contact (mainly by telephone) with applicants.

Issues concerning internal review

Introduction

6.49. As noted above, internal review can have both a positive and a negative effect on external review. For applicants, internal review has the potential to be a relatively quick and easily accessible form of merits review. It can be an effective means of satisfying the large number of clients who would like the agency’s decision to be reviewed. If internal review were not available, these clients would be likely either not to seek any form of merits review or to use external review processes, which are often more expensive and time consuming for both the applicant and the agency. For agencies, internal review can also be a useful quality-control mechanism, particularly as it gives them an early opportunity to identify and correct systemic problems with their own decision-making processes.

6.50. However, internal review also has disadvantages. Because internal review is undertaken by officers of the same agency who made the original decision, it is viewed by some applicants merely as a barrier to the effective final resolution of their case, introducing delays (and, in some cases, additional cost) without delivering a truly impartial and objective reconsideration of their case.

6.51. There is also a risk that the quality of internal review will vary between different geographic regions within an agency, resulting in inconsistent and inequitable treatment of similar cases. This can affect the credibility of internal review. This is also a risk with external merits review, although it is much less of a risk because review tribunals are centrally managed and have relatively small staffs and memberships, making it easier for them to maintain quality control and consistency.

6.52. Many agencies have recognised these risks, and have made attempts to ensure that a high quality of internal review decisions is achieved. This is particularly the case in those agencies which make decisions that must be subject to internal review before they are able to be subject to external merits review. For example, the Department of Social Security has made efforts to ensure that internal review of its decisions is, and is seen to be, appropriately impartial and independent. In almost all cases, AROs are part of specialised units located at area offices, and are not in close proximity to primary decision makers. Even if AROs are located outside area offices, they are not located near the primary decision makers whose decisions they are reviewing.

6.53. Internal review can also be an effective way of reducing the reliance by applicants on the potentially more expensive external merits review mechanisms. In jurisdictions where internal review is a mandatory precondition to seeking external merits review, rates at which review by review tribunals is sought tend to be lower than in other jurisdictions.\footnote{In the migration jurisdiction, for example, of all Migration Internal Review Office decisions that affirm the department’s decision and which are reviewable by the IRT, only 32\% are appealed to the IRT (source: Department of Immigration and Ethnic Affairs, submission number 74; figures relate to 1993-1994). In contrast, that department’s decisions on applications for refugee status may be reviewed by the RRT without the need for internal review, and 79\% of all such decisions are appealed to the RRT.}
The Council acknowledges that many factors influence the rates at which review is sought at different stages of the review process, and that there are likely to be many applicants who do not proceed from internal review to external review for reasons other than that they are satisfied with the result on internal review (for example, because of ‘appeal fatigue’). Nevertheless, it seems clear that the volume of applications to review tribunals would be much greater if internal review was not available.

6.54. There is, however, a considerable degree of dissatisfaction with certain aspects of internal review processes, and a degree of scepticism about the ability of the internal review practices of agencies to contribute to the objectives of the merits review system. Some of the matters about which concerns have been raised are:

- delay in resolving internal review applications;
- the cost of internal review (in those jurisdictions where there is a fee for internal review);
- the degree of separation of internal review officers from primary decision makers (including referral back to those decision makers); and
- poor communication with applicants during internal review, and inadequate reasons and information about subsequent review rights.

**Delay**

6.55. A common criticism of internal review is that it takes too long for internal review decisions to be made. This criticism is particularly relevant in cases where the internal review affirms the agency’s decision: the applicant may view the internal review as being nothing more than an impediment (because of the additional delay and cost) to reaching the external review stage, and this can contribute to ‘appeal fatigue’.

6.56. Generally, there are no statutory time limits within which agencies must make their decisions on internal review. However, most agencies have introduced performance standards for timeliness of internal review,\(^{168}\) and have introduced measures to ensure improved performance against these measures. The Council notes that, in some cases, delays in internal review may be contributed to by the applicant: for example, the applicant may fail to respond to the agency’s requests for further information.

6.57. Nevertheless, the Council considers that, as a general principle, time limits should be introduced for internal review, in order to reduce the potential prejudice to clients that can result from lengthy delays in internal review. Generally a 28-day limit would be appropriate, although there may be circumstances in which it would be appropriate to modify this. After the expiry of the time limit, the applicant should be deemed to have applied for external review, and the case should be referred to the relevant review tribunal.

**Fees**

6.58. In most jurisdictions there is no application fee for internal review. However, application fees apply for internal review of:

- a decision made under the *Freedom of Information Act 1982*;\(^{169}\) and

---

\(^{168}\) The standards range from fourteen days in the Department of Social Security (internal review of decisions where, as a result of the primary decision, the client has been left without income) to four months in the Department of Immigration and Ethnic Affairs (immigration decisions reviewed by the Migration Internal Review Office).

\(^{169}\) A fee of $40:00 is currently prescribed for an application for internal review of a decision made under the *Freedom of Information Act 1982*: Freedom of Information (Fees and Charges) Regulations, regulation 5.
• an internally-reviewable decision made under the Migration Act 1958.\(^\text{170}\)

6.59. The Council’s view is that it is appropriate that there be no application fee for internal review. Fees for internal review create a barrier to access by clients to internal review, and make only a token contribution to the cost of the review. The Council has recently proposed that there be no application fee for internal review of decisions concerning freedom of information applications.\(^\text{171}\)

Separate internal review culture

6.60. One criticism of internal review from clients and client groups is the perceived lack of independence of internal review mechanisms: that internal review routinely involves the agency confirming its own decision. The Council notes that internal review, by definition, cannot be completely independent of the relevant agencies. Further, statistics on set-aside rates indicate that internal review can and does involve a genuine reconsideration by agencies of their decisions.\(^\text{172}\)

6.61. However, perceptions that internal review officers are not sufficiently independent of agency decision makers can arise from their physical proximity. Further, if internal review officers have close links with the decision makers whose decisions they review, there is a danger that those internal review officers will lose the objectivity required for undertaking internal review effectively.

6.62. In the Council’s view, it is important that agencies are organised so that internal review officers are distinct from primary decision makers. There are several reasons for this. If internal review is seen as a truly distinct aspect of agency decision making, that will help to promote within internal review sections the culture that their role is to undertake a genuinely fresh reconsideration of decisions. It will also give internal review the credibility within agencies necessary to enhance its normative effects. However, this does not mean that internal review officers should be totally isolated from primary decision makers and other agency staff. For example, it may often be appropriate for internal review officers to communicate with primary decision makers for the purpose of clarifying aspects of their decisions.

6.63. The Council also considers that the promotion of an appropriate culture within internal review sections would be greatly assisted if formal responsibility for internal review lay with a senior agency executive, such as a deputy secretary. That effect would be strengthened if the role of that senior departmental executive was combined with formal

\(^\text{170}\) Section 339(1) of the Migration Act 1958 provides that an application for internal review of an internally-reviewable decision made under that Act must be accompanied by the prescribed fee, if any. Regulation 4.04 of the Migration Regulations provides that the prescribed fee on an application for internal review of an internally-reviewable decision is $200, but that the Secretary may determine that the fee should not be paid in a particular case if she or he is satisfied that payment of the fee has caused, or is likely to cause, severe financial hardship to the review applicant.


\(^\text{172}\) During 1993-94, 6139 decisions concerning the Commonwealth Employment Service were lodged with authorised review officers; 64% of decisions reviewed by authorised review officers in that year were affirmed and 29% overturned. Appeals against AUSTUDY assessments lodged at the SART totalled 737 in 1993, of which 36% were successful (source: Department of Employment, Education and Training Annual Report 1993-94.) During 1993-94, Authorised Review Officers of the Department of Social Security set aside 29% of referrals for reviews (source: Department of Social Security Annual Report 1993-94). In the same period, the Migration Internal Review Office of the Department of Immigration and Ethnic Affairs set aside 15.7% of decisions (source: Department of Immigration and Ethnic Affairs Annual Report 1993-94).
responsibility for overseeing the promotion within the agency of the general effects of review tribunal decisions on the quality of the agency’s decision making.

Case management practices

6.64. Often the first opportunity for the applicant to put her or his case personally will not arise until the external review stage. It is a common practice for internal review to be undertaken without any personal contact with the applicant (other than receipt of the written correspondence associated with the application for review). It is often observed that some cases would not proceed to the external review stage if there were more personal contact with applicants at an earlier stages of the decision-making process. Most agencies recognise the desirability of having more personal contact with applicants at an earlier stage of the review process, and are taking steps to facilitate this. The Council considers that agencies should continue to explore opportunities for early resolution of issues through personal contact with applicants. In many cases, this could be achieved through telephone contact. At the very least, applicants should regularly be informed of the progress of their application.

6.65. It is also important that the reasons for internal review decisions are clearly explained to applicants. The Council has made recommendations in Chapter 3 for improving the clarity of tribunal decisions, and in Chapter 5 for improving agency statements of reasons. These recommendations apply equally to the outcome in internal review cases: applicants should be given clear, concise reasons, as well as a clear explanation of further merits review rights.

Internal review - conclusion

6.66. It is generally a matter for agencies to determine what internal review processes are appropriate, having regard to any factors that are specific to their decision-making environment. As the Council has not undertaken a comprehensive examination of internal review as part of this review, it is not in a position to make recommendations about all aspects of internal review. However, the comments made above should give agencies some guidance in the development of their internal review practices.

6.67. The Council notes that an applicant can benefit greatly from internal review if the agency’s decision is quickly set aside or varied in her or his favour. However, in the context of a system which also provides for independent external merits review, the Council considers that the most significant contribution to the merits review system is made by external merits review tribunals. Internal review can be a helpful adjunct, but is not a substitute for external review. In developing internal review policies, agencies should ensure that applicants’ access to external merits review processes is not prejudiced.

<table>
<thead>
<tr>
<th>Recommendation 75</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agencies should be encouraged to provide internal review of their decisions, provided it:</td>
</tr>
<tr>
<td>• is relatively timely;</td>
</tr>
<tr>
<td>• is not subject to an application fee;</td>
</tr>
<tr>
<td>• is undertaken by internal review officers who are sufficiently independent of agency decision makers; and</td>
</tr>
<tr>
<td>• involves an appropriate level of personal contact between internal review officers and applicants.</td>
</tr>
</tbody>
</table>
CHAPTER 7
FINANCE, ADMINISTRATION AND MANAGEMENT

INTRODUCTION
7.1. This chapter discusses issues relating to the management, funding and administration of tribunals. These issues have an important effect on the way that tribunals are able to fulfil their role and deliver their services.

7.2. In March 1995 the Council published a supplementary discussion paper (the supplementary discussion paper) containing comparative financial statistics for the external merits review tribunals. That paper raised a number of matters for discussion, including:

- whether the current administrative and financial arrangements of tribunals are appropriate;
- whether ‘benchmarking’ is a useful financial management technique in the review tribunals context;
- whether there was scope (or additional scope) for tribunals to recover the cost of delivering their services; and
- the potential for savings in different areas of expenditure.

7.3. The Council did not attempt a complete study of whether tribunals’ operations are cost effective: that was not required by the terms of reference, and would have been beyond the resources and expertise of the Council. Nevertheless, the information and views in submissions received in response to the supplementary discussion paper have enabled the Council to form views on a number of the issues relating to the administration of tribunals.

FINANCE AND ADMINISTRATION

The cost of merits review
7.4. Published figures indicate that the total direct cost to the Government for the operation of review tribunals system is around $50 million each year. Appendix E.1 shows the expenditure of each review tribunal during the 1993-1994 financial year, with that expenditure divided into several categories.

7.5. However, that appendix does not include indirect costs, such as the costs of agencies that participate in tribunal processes (including the cost of preparing for hearings), and expenditure on advice and assistance to applicants through legal aid authorities and government-assisted organisations. Also, some agencies provide administrative and other

---

support to review tribunals. The Council has not attempted to calculate the indirect costs of the merits review system: any such calculation would have been extremely problematic.\textsuperscript{178}

7.6. Views vary on what level of expenditure on the merits review system is justifiable. Some people consider $50 million to be an extravagant amount in light of the relatively small proportion of government decisions of which merits review is sought.\textsuperscript{179} Others consider that the cost is justified, because the merits review system provides an effective means for ensuring that individuals receive a fair and independent review: this view is reinforced by the fact that in some jurisdictions over half of the decisions of which merits review is sought are set aside or varied because the original decision was either incorrect or, in the view of the review tribunal, not the most preferable.\textsuperscript{180} A merits review decision also has the potential to contribute to the general quality of government decision making, so that its benefits can extend beyond the particular case.

7.7. Whatever view is taken of the cost-effectiveness of merits review, the Council considers that tribunals and agencies should be continually striving to deliver high quality review for reduced cost. The following section of this chapter looks at some ways this might be achieved.

\textbf{Financial management}

\textit{Management information}

7.8. The supplementary discussion paper included a comparative discussion of tribunal expenditure, based on figures supplied by the tribunals.\textsuperscript{181} However, the Council found that the preparation of that information was complicated by the fact that financial reporting methods and periods differ from one tribunal to the next. For that reason, any conclusions drawn from comparisons between tribunals had to be heavily qualified (see Appendix E.1). The submissions from tribunals, which focused on explaining their expenditure patterns, confirmed the Council’s concerns about the difficulty of comparing tribunal expenditure. The Australian National Audit Office (the Audit Office) and the Department of Finance also acknowledge these difficulties.

7.9. The fact that review tribunals do not have common financial reporting methods and periods prevents any useful comparisons from being made, and makes it difficult to monitor comparative tribunal performance. The Council therefore considers that tribunals should cooperate to develop common financial reporting standards (including categories of expenditure and reporting periods). This would enable tribunals to identify appropriate points of comparisons both between their own expenditures on similar activities, and with other organisations.

\textsuperscript{178} The Australian National Audit Office made some estimates for the total costs of merits review in the veterans’ compensation area in the course of a comprehensive audit undertaken in 1992 and 1993, but these estimates are still disputed by interested parties: \textit{Australian National Audit Office Efficiency Audit 1992-93 - Report No 8- Department of Veterans’ Affairs - Compensation Pensions to Veterans and War Widows} Australian Government Publishing Service, Canberra, 1993.


\textsuperscript{180} See footnote 35 and accompanying text.

**Recommendation 76**

Review tribunals should cooperate to develop common financial reporting standards (including categories of expenditure and reporting periods).

---

**Financial management trends**

7.10. Most review tribunals support the financial management practices of the Australian Public Service, including:
- the running costs system, which gives agencies the flexibility to use funds interchangeably for salaries or administration, and the ability to carry over unspent funds to subsequent financial years;
- accrual accounting and reporting; and
- resource agreements and advances to cover large one-off items of expenditure.

7.11. The tribunals consider that these practices have led to more certainty in the management of their resources, and have given them greater flexibility in planning their resource use. They have also made managers, including tribunal heads, more accountable for their expenditure.

---

**Workload formulas**

7.12. Both the AAT and the IRT favour the inclusion in their funding agreements with the Department of Finance of a component of funding that varies according to the tribunal’s workload. The Council agrees that funding agreements for tribunals should be able to be varied to take account of significant workload variations. The AAT cautions that it can be difficult to increase and decrease resource levels (particularly members and staff) in time to take account of changes in the tribunal’s workload. However, the Department of Finance submitted to the Council that funding agreements can be devised with formula that accommodate lead times and other variables.

---

**Recommendation 77**

Review tribunals should consider entering into funding agreements which include a formula for automatic adjustments in funding for significant workload variations, subject to adequate provision for lead times in adjusting expenditure.

---

**Financial and administrative links with agencies**

**Portfolio responsibility**

7.13. The Council acknowledges that where a review tribunal receives its funding through an agency whose decisions form all or a large proportion of the tribunal’s workload, the tribunal may find it easier to negotiate for resources, including supplementary funding to meet changes in workload. Such a relationship between tribunal and agency can also assist the development of close cooperation, with consequent benefits for access to information and mutual understanding.

---

102 The Council understands that the funding agreement between the Insolvency and Trustee Service, Australia, of the Attorney-Generals’ Department and the Department of Finance includes a formula which might be suitable as a model.
7.14. However, this kind of funding arrangement can also raise issues about whether the tribunal is sufficiently independent of the agency whose decisions form all or a large proportion of the tribunal’s workload. If a tribunal is dependent for resources on such an agency, it is possible that the tribunal’s independence will be (or be perceived to be) prejudiced by that arrangement. That is, the tribunal may be put under pressure, or be seen to have been put under pressure, to favour the agency if it is dependent upon the agency for the provision or negotiation of its funding.

7.15. The Council therefore considers that, as a general rule, review tribunal funding should not be provided for within the budget of an agency whose decisions form all or a large proportion of the tribunal’s review workload. The object of this general rule is to strengthen perceptions of the independence of review tribunals, and to increase the credibility of tribunals amongst all tribunal users.

Recommendation 78

Review tribunal funding should not, as a general rule, be provided for within the budget of an agency whose decisions form all or a large proportion of the tribunal’s review workload.

Allocation of funds

7.16. The AAT, IRT and RRT each receive funding through an appropriation of a single allocation of funds. These review tribunals value the independence and autonomy that this form of funding brings. Agencies funded in this way have complete discretion as to how to spend those funds to further their objectives.

7.17. The Council sees significant advantages in review tribunals being funded through a single allocation of funds. Such funding gives review tribunals maximum control over how to deploy their annual allocation of funds so that, for example, they can apply savings in one area of expenditure to meet cost overruns in other areas. This flexibility has been available within the three categories of expenditure (salaries, general administrative expenses and property operating costs) but there have been restrictions on movement of funds from one category to another. These restrictions have been removed for the 1995-1996 Budget. Another advantage of single allocations of funds is that they improve the transparency and accountability of tribunal funding, by making variations in funding easier to identify. This would strengthen perceptions of independence by protecting tribunals to some extent from changes to agency priorities.

7.18. The SSAT and VRB rely on the departments whose decisions they review to provide funding for their operations, and see some advantages in these arrangements. For example, if their workload increases and they require additional funding, they can seek that funding from the agency in the first instance. These tribunals are identified as separate sub-programs for the purpose of the agency’s accounts.

7.19. The Council notes that breaking the ‘ownership’ link that agencies have with the specialist review tribunals could affect the commitment of agencies to the normative effect of tribunal decisions. Several agencies argued that there could be a loss of understanding of relevant issues relating to the agency’s program delivery and decision-making environment. However, the Council notes that those agencies that have their decisions
reviewed directly by the AAT do not seem to treat the AAT’s decisions any less seriously than decisions of the specialist review tribunals.

7.20. The Council also notes that it is government policy that most budget-funded agencies should each financial year be required to achieve a 1.25% reduction in their expenditure (called the ‘efficiency dividend’). An additional saving will be required in the 1995/1996 financial year. Review tribunals have concerns about their ability to meet efficiency dividend targets, as well as the difficulty of obtaining approval for new policy proposals. These concerns are shared by all budget-funded agencies, and the Council considers that there is no reason why review tribunals should be insulated generally from these efficiency measures.

7.21. However, in the Council’s view there is a strong case for the remuneration of full-time members to be excluded from the efficiency dividend (including the additional 1995/96 saving). The reason is that, although it comprises a substantial component of tribunals’ total expenditure, this remuneration is largely outside the control of tribunals because it is fixed by the Remuneration Tribunal.

<table>
<thead>
<tr>
<th>Recommendation 79</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each review tribunal should be funded by way of an appropriation of a single allocation of funds.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recommendation 80</th>
</tr>
</thead>
<tbody>
<tr>
<td>The component of review tribunal funding representing the remuneration of full-time members should be excluded from the efficiency dividend.</td>
</tr>
</tbody>
</table>

Opportunities for savings

Introduction

7.22. There are four aspects of review tribunal operations which were identified in the supplementary discussion paper as having the potential for financial savings. The supplementary discussion paper invited submissions on the extent to which these savings could be realised. The four aspects are:

- personnel mix;
- travel;
- use of contractors; and
- sharing overheads.

Personnel mix

7.23. Compared to the cost of other staff, review tribunal members are a relatively expensive resource. Therefore, any appropriate use of tribunal staff to undertake functions currently undertaken by members offers the prospect of savings. The AAT’s use of conference registrars to conduct pre-hearing conferences, which were previously undertaken by members, provides an example of where the use of tribunal staff might be appropriate. However, there are limits on the extent to which tribunal staff can be used for functions currently undertaken by tribunal members, and the tribunals generally do not see

---

much scope for expanding the functions of staff vis-a-vis members. However, some tribunals have suggested that there should be more flexibility in the mix of members (full-time, part-time) available to them. The Council’s recommendations made in Chapter 4 should promote such flexibility. They should also permit more efficient use of tribunal support staff, which should ensure that tribunal members do not spend their time on administrative tasks that could be undertaken by specialist support staff.

Travel
7.24. Travel expenses (fares and travel allowances) are a significant cost for all tribunals. One potential for savings is to use telephone and video conferences for hearings and other meetings, as an alternative to travel. However, telephone and video hearings have limitations, and will not be appropriate for every hearing.

Use of contractors
7.25. Most tribunals already use contractors for a limited number of their services, and doubt whether there is much potential for expanding their use. However, the AAT makes more extensive use of contractors, and currently contracts out the following services:
- computer programming;
- internal audits;
- temporary secretarial support;
- recording of hearings;
- legal services;
- preparation of promotional material; and
- some training.

The AAT has suggested that it might also contract out:
- computer servicing and systems support;
- recruitment services; and
- more training

The AAT also considers that there is some potential for it to provide administrative services to other review tribunals (see paragraph 7.28 and following).

7.26. The Council acknowledges that contracting out is not without its difficulties, and that it must be undertaken in a way that ensures the services provided are reliable and of high quality, that provides appropriate protections against breaches of privacy and confidentiality, and that satisfies industrial relations requirements. However, these matters can be appropriately addressed if contracts are carefully framed. In light of the significant cost advantages that sometimes may be achieved by contracting out, the Council considers that tribunals should consider contracting out administrative services where to do so would be cost effective, provided it would not prejudice the quality of tribunal services.

Recommendation 81
Review tribunals should consider contracting out administrative services where it would be cost-effective to do so, and would not prejudice the quality of their own services.
Sharing overheads

7.27. Many of the submissions made to the Council suggested that there were significant savings to be made from tribunals sharing overheads, including office accommodation (co-location). The Audit Office suggested in its submission that there would necessarily be financial savings to be made from the establishment of fewer, larger tribunals.

7.28. The AAT considers that there should be more sharing of resources and services between tribunals: this is possibly because the AAT sees itself as being in a strong position to offer services to other review tribunals on a user-pays basis. Some of the resources and services that were suggested by the AAT as being able to be shared are:

- communications facilities (including video-conference equipment);
- information technology, such as computer systems and computer systems support;
- office accommodation (conference and hearing rooms); and
- training and professional development programs for members and staff.

7.29. Most other review tribunals have doubts about the extent of the savings that might be made from sharing resources and co-locating, and have some concerns about potential disadvantages of these arrangements.

7.30. The potential disadvantages include the risk that the separate and distinct identity of each tribunal would be lost. There is concern that greater sharing of resources among review tribunals would inevitably result in greater formality being ‘imported’ into the specialist review tribunals from the AAT, with those specialist review tribunals becoming less accessible. Sharing of resources would also raise issues about how to maintain the security, privacy and confidentiality of tribunal records and other information in the possession of the tribunal. Some submissions identified concern over these issues as the reason for ruling out any merger of the registry functions of review tribunals. The Council acknowledges that these risks would be involved in the sharing of review tribunal resources and services, but considers that they can be overcome if the sharing arrangements are properly managed.

7.31. It has also been suggested that sharing of resources by review tribunals could make the merits review system more expensive overall, because it might lead to the creation of a larger bureaucracy and the introduction of additional layers of management. The Council acknowledges that arrangements for the sharing of resources would need to be carefully planned and organised in order to ensure that the maximum benefit is derived. The Council is cautious about predicting that there would be major financial savings. However, there should be scope in many areas for more efficient use of resources and services: many resources and services require a minimum level of work if they are to be supplied or undertaken efficiently. Pooling demand for resources and service could also have the additional benefit of making it possible to provide a level of service, or a new type of service, that no individual review tribunal would be able to afford on its own. The Council therefore recommends that all review tribunals should share resources and services wherever it would be efficient to do so.

Recommendation 82

Review tribunals should share resources and services wherever it would be efficient to do so.
Other savings

7.32. Another suggestion made to the Council was the potential for greater use of electronic information (including CD-ROM and on-line databases) as an alternative to expensive hard copy texts and library searches by staff. The Council supports such initiatives, as much for the increased accessibility they offer as for any financial savings.

TRIBUNAL STAFF

Introduction

7.33. The number of staff employed by each review tribunals ranges from around 45 in the SSAT, VRB and IRT to around 125 in the AAT and RRT.

7.34. All staff of review tribunals are employed under the Public Service Act 1922: the one exception is the Registrar of the AAT, who is appointed by the Governor-General on the nomination of the President, and whose terms and conditions of appointment are set out in the AAT Act.

7.35. However, there are significant differences between review tribunals in terms of the administrative arrangements for the employment of staff.

7.36. Staff of the VRB are officers of the Department of Veterans’ Affairs who are assigned by the Secretary to that department to work for the VRB. Similarly, staff of the SSAT are officers of the Department of Social Security who are assigned by the Secretary to that department to work for the SSAT.

7.37. Staff of the IRT and RRT are appointed to their respective tribunals by the Minister for Immigration and Ethnic Affairs. Although pursuant to the Public Service Act 1922 these staff are the formal responsibility of the Secretary to the Department of Immigration and Ethnic Affairs, for staffing purposes the Principal Members of the IRT and RRT both act under full delegations from the Secretary. Further, staff of the IRT and RRT are subject to the directions of their respective Principal Members.

7.38. With the exception of the AAT Registrar, all staff of the AAT are appointed and employed under the Public Service Act 1922, and have such duties, powers and functions as are given to them by the AAT Act or by the President. The AAT Registrar has the same powers over the other staff of the AAT as if the staff consisted of a department of the Australian Public Service and the Registrar were the Secretary of that department.

184 Administrative Appeals Tribunal Act 1975, section 24C.
185 Administrative Appeals Tribunal Act 1975, Part IIIA, Division 2.
186 Veterans’ Entitlements Act 1986, section 172.
188 Migration Act 1958, section 408(2) (IRT); section 472(2) (RRT).
189 Section 408(3) of the Migration Act 1958 provides that the officers of the IRT have such duties and functions as are provided by the Act and the regulations, and such other duties and functions as the Principal Member directs. Section 472(3) makes a similar provision in respect of the RRT.
190 Administrative Appeals Tribunal Act 1975, section 24N(3).
191 Administrative Appeals Tribunal Act 1975, section 24N(5).
192 Administrative Appeals Tribunal Act 1975, section 24P.
7.39. There is no evidence that agencies abuse management and employment links with review tribunals. However, there are concerns that the employment of the staff of some review tribunals by the agencies whose decisions are under review can contribute to the perception that the tribunal does not enjoy the appropriate degree of independence from the agency whose decisions it reviews. Also, concerns have arisen over issues such as responsibility for staffing matters (such as performance appraisal and approving leave) that are not wholly within the control of either the tribunal or the agency.

**Staff recruitment and responsibility**

7.40. The practice of review tribunals recruiting their staff from the agency whose decisions are reviewed by the tribunal can be convenient, particularly for the smaller tribunals which may have only a few staff in each office. However, the Council is concerned that such practices can lead to perceptions about loss of the tribunal’s independence, and can also give rise to uncertainty about responsibility for, and management of, staffing matters.

7.41. The Council considered the following alternate options for staffing of review tribunals:

- requiring that no review tribunal staff are part of an agency’s staffing establishment, and that they are subject only to the direction of the principal member of the tribunal or the tribunal’s registrar;
- requiring that review tribunal staff who are drawn from agencies are formally detached from that agency’s staffing establishment for the period of their employment by the tribunal, and transferred to the staffing establishment of a central department; and
- requiring that all review tribunal staff be employed by a central tribunals service.

7.42. The Council considers that the best option for ensuring that staffing arrangements do not damage perceptions of review tribunal independence would be the first-mentioned option: for all review tribunal staff to be employed by the review tribunal for which they work, and to be subject only to the direction of the principal member of the tribunal or the tribunal’s registrar. Review tribunal staff should not be part of agency staffing establishments, and should have no reporting obligations to agency Secretaries.

**Recommendation 83**

All review tribunal staff should be employed by the review tribunal for which they work, and be subject only to the direction of the principal member of the tribunal or the tribunal’s registrar.

**Staff training and development**

7.43. Review tribunals indicated in their submissions that their staff should ideally have a range of skills, including:

- core public service skills as set out in core competencies for different grades of Commonwealth officers;
- skills that are necessary for staff of all review tribunals; and
- knowledge and skills relevant to the work of the particular tribunal for which they work.
7.44. However, review tribunals acknowledge that their relatively small staff establishments limit their ability to provide their staff with a full range of training and development opportunities. For this reason, the Council considers that tribunals should be encouraged to cooperate in the planning and provision of training for their staff, particularly training in skills common to staff of all review tribunals.

Recommendation 84

Review tribunals should cooperate in the planning and provision of training for their staff.

COUNCIL’S RECOMMENDATIONS: FINANCIAL IMPLICATIONS

7.45. It is difficult to quantify with any precision the cost implications of the recommendations made in this report. This is because the actual cost implications will depend to a large extent on the manner in which the recommendations are implemented.

7.46. Nevertheless, it is clear that the implementation of many of the Council’s recommendations has the potential to create significant savings in the cost of the merits review system. Areas of potential significant saving include faster and more efficient decision-making processes (including a greater emphasis on alternative dispute resolution techniques), the potential for sharing of resources and facilities between tribunals, and eliminating the duplication of external review by review tribunals in many cases (see Chapter 8).

7.47. The Council acknowledges that some of its recommendations do have the potential to add to the cost of the system: these include greater use of multi-member tribunals, and possibly increased use of the system as it becomes more accessible to applicants. Overall, however, the Council considers that the changes recommended in this report will lead to more efficient decision making, with less duplication of review levels and processes.

A TRIBUNALS EXECUTIVE

7.48. In this and other chapters of the report, the Council has recommended that tribunals cooperate in undertaking certain functions, such as:

- the development of policies and guidelines on the openness of tribunal proceedings and availability of decisions (recommendation 15);
- the planning and provision of training for members and staff (recommendations 49, 50 and 84);
- the development of guidelines for the recording of statistical information (recommendation 69);
- development of a code of practice for tribunal annual reports (recommendation 70); and
- the sharing of resources and services (recommendation 82).

7.49. There is also a need for tribunals to maintain ongoing liaison with each other, and to exchange information and ideas on matters such as developments in alternative dispute resolution, procedures for determining cases, and community education.
7.50. The Council was established in 1976, and since that time has monitored, and advised the Australian Government on, the development of the merits review system. The Council also convenes regular meetings of heads of tribunals, and since 1991 has organised an annual conference for members of Commonwealth merits review tribunals. Before and during this review it has been suggested that the Council should have a larger role in coordinating liaison between tribunals by, for example, arranging training of review tribunal members and staff, collating statistics on review tribunals, and convening working groups to develop common codes or guidelines. However the Council considers it would be inappropriate for it to take on that larger role, because the ongoing management and organisational responsibilities that it would involve are not suited to the Council’s role as a policy advisory body.

7.51. However, the Council does consider that there should be more formal arrangements for promoting and coordinating greater liaison and cooperation between review tribunals. For this reason the Council considers that a Tribunals Executive, comprising the principal members (possibly also the registrars) of the various review tribunals, should be established. The Tribunals Executive should have the function of identifying areas that are appropriate for cooperation between the various tribunals (including, for example, the functions identified in paragraph 7.48), planning that coordination, and, where appropriate, arranging for the provision of common services to all tribunals. The Tribunals Executive would meet as often as required (perhaps each quarter), and should be serviced by a small secretariat drawn from the staff of each tribunal. The Council notes that in addition to the functions noted above, the Tribunals Executive could assume responsibility for organising the annual conference for members of Commonwealth merits review tribunals.

Recommendation 85

A Tribunals Executive, comprising at least the principal members of each review tribunal, should be established. The Tribunals Executive should have the function of identifying areas appropriate for cooperation between the tribunals, planning that cooperation, and, where appropriate, arranging for the provision of services common to all tribunals.

MANAGEMENT OF REVIEW TRIBUNALS

7.52. The degree of control that a review tribunal’s management exercises over the operations of the tribunal will have a significant effect on the ability of the tribunal to meet objectives such as efficient and consistent decision making. In general, the Council has found the current arrangements for management of review tribunals to be satisfactory. This section sets out the current arrangements for management of review tribunals. The Council notes that some of these issues are relevant to the issues discussed earlier in this chapter; and that the related issue of the role of tribunal management in relation to individual decisions is discussed in paragraphs 3.152-3.157.

7.53. Most review tribunals have senior members with whom principal member’s management responsibilities can be shared. The exception is the RRT, which has a ‘flat’ management structure comprising the Principal Member and Members: there are no Senior Members. This has caused some difficulties in the tribunal’s management, and necessitated
a special arrangement for leadership in the Melbourne registry. However, amendments to allow the appointment of senior members are currently before the Parliament.\(^{193}\)

7.54. However, the Council is also aware that there are differences between the various review tribunals as to the extent to which they have the power to control the conduct of their own proceedings. One example is given in the following paragraph. In the Council’s view, there is no reason in principle why there should be significant differences between the way that review tribunals are permitted to exercise their powers, and the Government should examine these powers to ensure that any unjustified differences are removed.

7.55. The example referred to in the previous paragraph relates to the power of a tribunal to summon a person to a hearing to give evidence or produce documents. With the exception of the SSAT, that power is exercised in all review tribunals by the member presiding over the relevant hearing.\(^{194}\) In the SSAT, however, that power is exercised by the Secretary to the Department of Social Security on the request of the SSAT National Convener:\(^{195}\) the member presiding at a hearing has no power to summon a person to attend at a hearing. In the Council’s view, there is no basis for this difference.

**Recommendation 86**

The powers exercisable by review tribunals for the purposes of conducting reviews should be examined to ensure that any unjustified differences between the powers of the various review tribunals are removed.

---

\(^{193}\) See Schedule 1 to the Migration Legislation Amendment (No 5) Bill 1994.

\(^{194}\) See the Veterans’ Entitlement Act 1986, section 151(2) (VRB); the Migration Act 1958, section 363(3) (IRT), section 427(3) (RRT); and the Administrative Appeals Tribunal Act 1975, section 40(1A).

\(^{195}\) Section 1304 of the Social Security Act 1991 provides that the Secretary to the Department of Social Security may require a person to give information, or produce a document, to that department if the Secretary considers that the information may be relevant to the question of determining a person’s entitlement to a benefit under that Act. In a review before the SSAT, the SSAT has no separate power to summon persons to attend a hearing to give evidence or produce documents: if the SSAT wants a person to attend a hearing for that person and the person refuses to attend, it must request the Secretary to exercise her or his powers under section 1304. Social Security Act 1991, section 1269.
CHAPTER 8
REVIEW TRIBUNALS - STRUCTURES AND RELATIONSHIPS

INTRODUCTION

Purpose of chapter

8.1. The Council considers that the recommendations made in previous chapters are essential to achieve necessary improvements to the merits review tribunals system. However, even if all of these recommendations were implemented, that would not be sufficient to ensure that all of the objectives of the merits review system were achieved to the maximum extent. In order to achieve that there must be structural changes to the system. This chapter sets out the Council’s view of what structural changes are required. Whether or not the structural changes recommended in this chapter are implemented, the recommendations in the preceding chapters should be considered for implementation in their own right. If the structural changes are adopted, references in recommendations made in Chapter 2 to Chapter 7 to the various review tribunals should be read as references to the divisions in the reformed merits review structure.

Background

8.2. The major theme underlying the 1971 report of the Commonwealth Administrative Review Committee (the Kerr Committee)\(^{196}\) was the need to develop a comprehensive, coherent and integrated system of Commonwealth administrative law. The committee concluded that the role of performing external merits review should be conferred on a general administrative review tribunala.\(^{197}\) The committee nevertheless envisaged that the creation of a specialist tribunal would be justified in the special circumstance where the appropriate expertise did not exist in a general tribunal.\(^{198}\)

8.3. The final report of the Committee on Administrative Discretions (the Bland Committee)\(^{199}\) favoured the establishment of a general merits review tribunal more strongly. In the committee’s view:

[...] permit a continuing proliferation of tribunals would be wasteful of resources, inimical to the efficient functioning of government and calculated to cause public dissatisfaction ...\(^{200}\)

In short, we take the view that the fewer the tribunals there are the more likely will be the most economic use of resources and a better and more even resolution of individual issues because members of the tribunals will not be narrowly circumscribed in their jurisdictional range.201

8.4. The AAT was established in 1975 as a general merits review tribunal, consistent with the recommendations of the Kerr and Bland committees. However, since that time there have been significant developments in the merits review system, and the creation of specialist merits review tribunals, with their own processes and procedures, has challenged the notion that there is in fact a coherent ‘system’.

STRUCTURAL CHANGE OF THE TRIBUNALS SYSTEM?

Background

8.5. The discussion paper set out three possible models for restructuring the Commonwealth merits review tribunal system, and invited comment on those models.202 In summary, the models presented for discussion were as follows.

- Create a new external merits review tribunal, comprised of:
  - a General Division (which could be further divided into subdivisions) to review all cases in the first instance; and
  - a Review Division which would review cases raising a substantial question of law.
- Retain all existing specialist tribunals, and divide the AAT into a General Division and a Review Division. The Review Division of the AAT would review cases involving a substantial question of law that had proceeded with leave from a first-tier tribunal or from the general division of the AAT.
- Create two new tiers of tribunal review, with the first tier comprising a number of specialist review tribunals (based on the jurisdiction of the existing specialist tribunals and the general division of the AAT), and the second tier comprising a specialist review panel to review decisions of the first-tier tribunals that raise substantial questions of law or of mixed law and fact.

Conclusion: establishment of the Administrative Review Tribunal

8.6. In considering what would be the best structure for the merits review system, the challenge has been to design a system that retains all of the positive attributes of the individual merits review tribunals, but which also achieves greater perceived and actual independence, improvements in agency decision making, and improved accessibility and economic efficiencies. In the result, the Council has decided that a structure comprising various elements of all of the proposed models would best be able to achieve those goals.

8.7. A detailed description of the Council’s proposal is provided in the following section. The Council then describes the advantages of the new structure and considers, where relevant, any arguments against the proposal.

---

ESTABLISHMENT OF AN ADMINISTRATIVE REVIEW TRIBUNAL

Overview

Basic structure of the Administrative Review Tribunal
8.8. In the Council’s view, the various specialist review tribunals and the AAT should be united into a new, single tribunal, to be called the Administrative Review Tribunal (ART). The review jurisdiction of the ART should be performed by various divisions, with decisions of these divisions able to be reviewed by a Review Panel (but only with the approval of the ART President, not as-of-right).

Diagram
8.9. A diagram setting out the Council’s recommended structural reforms is set out on the following page.
RECOMMENDED STRUCTURE FOR THE MERITS REVIEW SYSTEM

FEDERAL COURT OF AUSTRALIA

APPEAL BY WAY OF JUDICIAL REVIEW UNDER THE ADJ(JR) ACT

REVIEW PANELS

APPEAL BY WAY OF JUDICIAL REVIEW UNDER THE ADJ(JR) ACT

ADMINISTRATIVE REVIEW TRIBUNAL

FURTHER MERITS REVIEW BY LEAVE

MERITS REVIEW AS OF RIGHT

PRIMARY DECISION MAKERS AND INTERNAL REVIEW STRUCTURES
**Divisions of the ART**

8.10. The Council notes that one of the particular strengths of the existing specialist review tribunals has been their ability to develop decision-making procedures and practices that are appropriate for, and tailored to, the types of cases and applicants that come before them. Some of these practices and procedures vary considerably between tribunals. A prominent consideration in the Council’s consideration of the structure of the system has been the desirability of maintaining the benefits that flow from the diversity of the existing system, while introducing the advantages that would flow from a more integrated system.

8.11. This is why the Council considers that the ART should be comprised of a number of divisions. These divisions should be broadly based on the jurisdictions of the existing merits review tribunals, and should therefore include the following:

- Welfare Rights Division;
- Veterans’ Payments Division;
- Migration Division;
- Commercial and Major Taxation Division;
- Small Taxation Claims Division;
- Security Division; and
- General Division (comprising the residual jurisdictions of the AAT).

8.12. The Welfare Rights Division would exercise the jurisdiction that is currently exercised by the SSAT, and the Veterans’ Payments Divisions would exercise the jurisdiction that is currently exercised by the VRB.

8.13. In relation to the establishment of a single Migration Division with the jurisdiction currently exercised by two specialist review tribunals (the IRT and RRT), the Council notes that the main justification advanced for the current separate existence of these two tribunals is the different nature of their casework: the RRT argues that review of protection visa (refugee) decisions involve more detailed and lengthier fact finding, and less legal interpretation, than review of decisions that are heard by the IRT. However, the Council notes that both the IRT and the RRT need to establish facts and assess credibility. While the amount of background country information relevant to refugee decisions is often substantial, the documentation in IRT cases can also be extensive. The Council notes that the CROSROMD report recommended that consideration be given to a merger of the RRT and IRT after two years operation of the RRT.\(^{203}\) The Council notes that this period would be well past by the time the ART is established, and considers that the presumption should be in favour of a merger of the two tribunals into the one division of the ART.

8.14. The other differences that have been suggested as justifying the existence of separate migration portfolio tribunals include:

- the RRT’s statutory restriction to single member operation (the Council has recommended that this restriction be removed - Recommendation 8); and
- the fact that each tribunal has different confidentiality provisions (the Council has recommended that the same rules on this subject apply to all review tribunals - Recommendation 16);

---

\(^{203}\) Committee for the Review of the System for Review of Migration Decisions *Non-Adversarial Review of Migration Decisions: The Way Forward* Australian Government Publishing Service, Canberra, 1992, Recommendation 13. The time frame was partly in acknowledgment of the backlog of refugee applications inherited by the RRT. The RRT has set a three year timetable for the processing of the initial backlog which will run into 1996, although this may need adjusting once the numbers of applicants transferred to the migrant visa stream becomes clear.
the flat management structure of the RRT (proposed amendments to the Migration Act 1958 will provide for senior members to be appointed to the RRT).

8.15. The Commercial Division of the ART should determine commercial and taxation cases (other than small claims taxation cases). These matters, which are currently heard by the AAT, are more likely to involve complex issues of fact and law, and to be generally suited to a more adversarial approach. By contrast, the Small Taxation Claims Division should hear the less complex taxation cases that involving smaller claims, and which are more likely to be suited to less adversarial decision-making processes. The Small Taxation Claims Division should have the same jurisdiction as that proposed for the Small Taxation Claims Tribunal within the AAT.204

8.16. The creation of a separate Security Division is justified on the basis of the sensitivity of security issues, and the special security and confidentiality processes that their determination requires. The Security Division should have the same jurisdiction as the proposed Security Appeals Division of the AAT.205

8.17. The General Division would exercise any review jurisdiction not within the jurisdiction of one of the divisions mentioned above.

8.18. One consideration underlying the Council’s recommendation for the establishment of separate divisions of the ART is that the positive attributes of the existing specialist tribunals should not be lost in the transfer to the new structure. Each division of the ART should be able to tailor its own procedures and processes in accordance with the types of cases and applicants with which it deals, subject only to the application of general minimum standards and safeguards (see Chapter 3), and to guidelines issued by the ART President.

8.19. Consistent with the discussion of review tribunal objectives in Chapter 2 (see recommendation 3), the statutory objectives of the ART, and of each division of the tribunal, should be to provide a mechanism for review that is fair, just, economical, informal, and quick. The Division Head of each division should be responsible to the President for meeting that objective within her or his own division.

To which division should a case be referred?

8.20. The Council considers that the question of which division an application for review should be assigned to would be determined by the Registrar of the ART (the appointment of the ART Registrar is discussed in paragraph 8.34). It should also be possible for the tribunal to refer an application from one division to another during the course of the decision-making process if it should appear appropriate to do so.

204 The Law and Justice Legislation Amendment Bill (No 2) 1995 proposes that where an application to the AAT for review of a taxation decision states the amount of tax that the applicant considers to be in dispute, and that amount is less than $5,000:00 (or such higher sum as is prescribed in regulations), the Taxation Appeals Division of the AAT, when hearing and determining the application, is to be known as the Small Taxation Claims Tribunal. Special provisions and procedures will apply to cases heard by the Small Taxation Claims Division: new Part IIIAA of the Administrative Appeals Tribunal Act 1975, proposed in Part 1 of the Schedule to the Law and Justice Legislation Amendment Bill (No 2) 1995.

205 Part 1 of Schedule 1 to the Law and Justice Legislation Amendment Bill (No 3) 1994 proposes the creation of a Security Appeals Division of the AAT.
Review Panels
8.21. The ART should also be able to convene Review Panels to review:
- decisions that are referred to a Review Panel because the decision raises issues of general principle or is unusually complex, and therefore warrants review by a Review Panel without first having been the subject of a decision of a division; and
- decisions of an ART division that fall within the grounds for review by a Review Panel.

The basis upon which cases should be able to come before a Review Panel is discussed in greater detail in paragraphs 8.42-8.72. Membership of Review Panels is discussed in paragraphs 8.30-8.31.

Effecting the change
8.22. The Council acknowledges that changing the structure of the tribunals system in this manner suggested may involve significant organisational changes. It would be necessary to handle these changes with some care, so that all potential efficiencies are realised. For that reason, it may be appropriate for the structural changes to be implemented in stages over a period of time (for example, 3 years), with each of the different review tribunals being brought into the ART at different times.

---

Recommendation 87
The VRB, SSAT, IRT, RRT and AAT should be united into a new tribunal, to be called the Administrative Review Tribunal (the ART).

Recommendation 88
The ART should be divided into seven divisions, namely:
- Welfare Rights Division;
- Veterans’ Payments Division;
- Migration Division;
- Commercial and Major Taxation Division;
- Small Taxation Claims Division;
- Security Division; and
- General Division (comprising the residual jurisdictions of the AAT).

Recommendation 89
Review Panels of the ART should be able to be constituted in order to review cases that are referred to them by the ART President or an ART division, or which fall within the grounds for seeking review by a Review Panel (see recommendation 97).

---

Membership of the ART
Membership structure
8.23. The membership of the ART should comprise:
- a President;
- Deputy Presidents (some of whom would be appointed Division Heads);
- Senior Members; and
- Members.
8.24. The President should be responsible for ensuring that the ART meets its statutory objectives, and for the overall management of the administrative affairs of the tribunal. In fulfilling these obligations, the President would, in practice, be assisted by the Division Heads and the ART Registrar. The Council notes that in order to be in a position to ensure that the ART meets its statutory objectives, the President should have the power to issue directions and guidelines to divisions and Review Panels as to the procedures to be followed in the conduct of cases. The President should also be responsible for deciding whether a case should be referred to a Review Panel without prior allocation to or hearing by an ART division, and whether to grant permission for review by a Review Panel. It should be possible for the President to delegate this function to a Deputy President.

8.25. In relation to the branch of the Australian Public Service consisting of the staff of the ART, the President should have the same powers as if that branch were a department of the Australian Public Service and the President were a Secretary of that department.

8.26. There would also be Deputy Presidents of the ART, of whom seven should be appointed as Division Heads to head the various divisions of the ART. Each Division Head would be responsible to the President for ensuring that the division operates in a manner consistent with the statutory objectives of the ART, and for the administrative operations of her or his division. In particular, Division Heads should be encouraged by the President to develop the procedures and processes that are most appropriate for dealing with the cases in their divisions, subject to the legislative requirements and consistently with any directions or guidelines issued by the President.

8.27. Deputy Presidents who are not Division Heads would assist the President in functions such as deciding whether to grant applications for permission to seek review by a Review Panel.

Cross appointment of members
8.28. Deputy Presidents, Senior Members and Members should be appointed to a particular division of the ART. However, it should be possible for a member to be cross-appointed to other divisions, and to hear cases in those other divisions from time to time. Such an arrangement would promote greater cross-fertilisation of ideas and exposure of members to different review procedures, and is one that the Council strongly endorses. Therefore, when a member is appointed to a division of the ART, consideration should also be given to whether the member is qualified for appointment to another division (or divisions) of the ART. It would be up to the relevant Division Heads (in consultation with the President) to determine when these members should be assigned to determine cases in other divisions, although the Council notes that cross-assignments may be particularly appropriate where, for example, one division is experiencing a particularly heavy backlog.

8.29. The ART President should be able to hear cases in all divisions of the ART.

Appointment to Review Panels
8.30. A member of the ART should be eligible to sit on Review Panels if that member’s instrument of appointment indicates that the member is eligible to do so. However, only the President, a Deputy President or a Senior Member should be eligible to preside over a Review Panel.

8.31. In order to promote enhanced normative effects and cross-fertilisation of ideas, the composition of Review Panels should always include the Division Head, a Deputy President or a Senior Member of the division that made the decision under review or to
which the application would otherwise be allocated. No member of the ART should sit exclusively on Review Panels.

Qualifications of members
8.32. It is likely that some members of the ART would have legal qualifications. However, the Council considers that, save for the President, no member should be required to have legal qualifications in order to be eligible for appointment to the tribunal. In order to be appointed as President of the ART, a person would need to have high legal skills, high level experience in decision-making and dispute resolution, and an ability to determine authoritatively any decision from the diverse range of matters that would come before the tribunal. These qualities would ordinarily (but not necessarily) be found in a person who is a judge, or who has legal skills broadly equivalent to that of a judge. In relation to the President, it would be particularly important to ensure that her or his independence, actual and perceived, was firmly established, and that she or he had organisational and management skills of a high order.

Appointment of members
8.33. Consistent with the principles set out in Chapter 4 (Recommendation 39), the minister responsible for the agency with portfolio responsibility for the tribunal should be responsible for recommending appointments to the tribunal. (The issue of which agency should have portfolio responsibility for the ART is discussed in paragraphs 8.36-8.41.) However, where an appointment (or cross appointment) is of a member to a division other than the General Division, that minister should make the appointment (or cross-appointment) jointly with the minister (or ministers) who has (or have) portfolio responsibility for the decisions that are reviewable by that division.

Recommendation 90
Membership of the ART should comprise a President, Deputy Presidents (including Division Heads of each division), Senior Members and Members.

Recommendation 91
Save for the President, legal qualifications should not be a prerequisite for appointment to the ART.

Recommendation 92
ART members should be eligible for appointment to more than one division of the ART. The minister responsible for the agency with portfolio responsibility for the ART (see Recommendation 95) should be responsible for recommending appointments to the ART. However, where an appointment (or cross appointment) is to a division other than the General Division, that minister should be responsible for recommending the appointment (or cross appointment) jointly with the minister or ministers who has (or have) portfolio responsibility for the decisions that are reviewable by that other division.

Registrar
8.34. There should be a Registrar of the ART. The function of the Registrar should be to assist the ART President in discharging the President’s responsibility for the overall management of the administrative affairs of the ART. The Registrar’s powers, and terms and conditions of appointment, should be set out in statute.
Recommendation 93
A Registrar of the ART should be appointed to assist the ART President in discharging the President’s responsibility for the overall management of the administrative affairs of the ART.

ART Executive Board
8.35. Consistent with the discussion in Chapter 7 (paragraphs 7.48-7.51), an ART Executive Board should be established. The Executive Board, whose membership should include the ART President and Division Heads, should have the function of facilitating liaison between the various divisions of the tribunal, and coordinating strategies and programs on issues of tribunal-wide interest (such as training, the provision of administrative support, the operation of an alternative dispute resolution program, and allocation of funds for the various divisions from the tribunal’s budget).

Recommendation 94
Consistent with Recommendation 85, an ART Executive Board should be established to facilitate liaison between the various divisions of the ART, and to coordinate strategies and programs on issues of tribunal-wide interest.

Financial and administrative links
8.36. An important issue is the establishment of appropriate financial and administrative links between the ART and government agencies. The Council’s views on financial and administrative links between review tribunals and agencies are set out in paragraphs 7.13-7.21. Consistent with the discussion in that section, the Council considers that administrative and other financial links of the ART should be with a department whose decisions seldom fall for review by the ART. These departments include the Department of Administrative Services, the Attorney-General’s Department, and the Department of the Prime Minister and Cabinet.

8.37. The transfer of administrative links of review tribunals to a ‘neutral’ agency met with strong support during the Council’s consultations. The SSAT and interested non-government organisations have already expressed support for the SSAT’s links to be moved to a central agency. Similarly, the VRB supports the transfer of its administrative links to a central agency, although the Council notes that the ex-service organisations that made submissions are divided on the issue. The IRT and RRT can see both advantages and disadvantages in such a transfer, and a majority of submissions that addressed this issue favoured the greater independence that would flow from such a transfer.

8.38. The allocation of resources from the various departments that currently have responsibility for the various tribunals to a neutral department could be addressed through initial transfers and the negotiation of workload-based formulas.

8.39. The Council is aware of suggestions that the Attorney-General’s Department’s current portfolio responsibility for the AAT may have contributed to the AAT becoming a more formal and adversarial body than might otherwise have been the case. A number of organisations indicated concern that any transfer of responsibility for review tribunals to the Attorney-General’s Department would have an undesirable ‘legalisation’ effect.
8.40. The Council notes, however, that since its inception the AAT has been managed, and has operated, with a high degree of independence from the Attorney-General’s Department, and that the AAT has developed its practices and approach without any significant influence by that department. In the view of the Attorney-General’s Department, the present style and operational methodologies of the AAT are very much of the AAT’s own making. In the Council’s view, the Attorney-General’s Department should be considered as one of the agencies eligible to assume portfolio responsibility for the new tribunal, along with the Department of Administrative Services and the Department of the Prime Minister and Cabinet.

8.41. In order to manage and provide central services (for example, research, alternative dispute resolution services, member training, secretarial and administrative support, recruitment services and so on), it would most likely be efficient and effective for the ART to establish a central secretariat servicing all divisions of the tribunal. However, this would be a matter for the discretion of the tribunal.

**Recommendation 95**

Either the Department of Administrative Services, the Attorney-General’s Department or the Department of the Prime Minister and Cabinet should have portfolio responsibility for the ART.

**REVIEW PANELS**

**Background**

8.42. Review and appeal rights can function not only as a quality control mechanism to ensure that the correct and preferable decision is reached in individual cases, but also as a mechanism for ensuring that cases of particular significance are given appropriate attention by suitably experienced and authoritative tribunal members.

8.43. The Council has hitherto been of the view that an applicant should be able to seek review by the AAT of a decision of a specialist review tribunal, and that in order to achieve both of the functions noted in the previous paragraph, this review by the AAT should be available as-of-right. However, in light of the recommendation that the existing review tribunals (including the specialist review tribunals) be united into a single review tribunal, it is appropriate to reconsider the links between different tiers of merits review.

8.44. The Council still regards the availability of a second tier of external merits review as most important. This is because cases that have particular significance for government or agency policy - because they raise an important issue or principle of general significance - should be able to be reviewed by a review panel that is able to give such decisions particularly careful and comprehensive treatment. Under the Council’s proposed structure, this review would be undertaken by Review Panels. The first-tier ART divisions would be less able to provide the same careful and comprehensive treatment, given that their primary focus would be on reaching the correct and preferable decision in an informal and speedy manner.
8.45. However, the Council considers that the general quality-control function of a second tier of external merits review (currently served in some areas by rights of further review by the AAT) would be much less important following the establishment of the ART. There are several reasons for this. First, all applicants to the ART would have access, at the first level of external merits review, to review by a tribunal that is, and is seen to be, free from any connection with the agency whose decision is under review. This will give applicants confidence that the ART divisions are independent and fair.

8.46. Second, having more experienced and better-trained members, and giving divisions the flexibility to constitute panels and adopt processes that are appropriate for particular cases, should ensure that no applicant can claim that proper consideration of her or his case has been prejudiced by an inadequate or unfair hearing process. The Council notes that the appropriate hearing process may, for some difficult cases, include taking extra time to hear and decide the case.

8.47. In summary, the Council considers that if persons affected by administrative decisions have ‘as-of-right’ access to merits review by a review tribunal that is fair, credible and accessible, then there is no justification for those persons to have an unqualified right to additional levels of external merits review. The qualification on this general principle is that there may be certain limited circumstances in which it is appropriate for cases to be subject to more than one level of external merits review.

8.48. Even with these changes, however, it is inevitable that there will be a small number of division decisions which, although they do not raise an issue or principle of general significance, involve a manifest error and should, for reasons of efficiency and practicality, also be able to be determined by a Review Panel. This is discussed further below.

Limiting access to Review Panels: introduction

8.49. The current structure for seeking further review of decisions of review tribunals has no effective mechanism for ensuring that particular attention is given to cases having normative effects. This is a significant criticism of the current structure, because the identification and correction of systemic errors is one of the main potential benefits of the merits review system. Currently, further review of decisions of the VRB and SSAT by the AAT is available as-of-right, and there is a wide range of other cases that fall within the original review jurisdiction of the AAT. Cases are therefore presented to the AAT for determination simply because the applicant would like the decision to be reconsidered. Whether the case raises an issue or principle of general significance will in many cases not be relevant to the applicant’s decision whether to seek further review by the AAT.

8.50. Also, the availability of further review as-of-right has contributed to particular problems in the veterans’ jurisdiction (these problems are discussed in paragraphs 8.98-8.99).

8.51. The Council therefore considers that the mechanism for limiting the cases which may proceed to a Review Panel should be consistent with the purpose for providing a second tier of review. It should therefore focus on limiting the range of cases that may be reviewed to cases that raise issues of general principle, and cases involving manifest errors. The Council notes that not all cases raising an important issue or principle of general significance will in fact be presented for consideration by Review Panels: some such cases will be settled or determined to the satisfaction of the applicant and the agency. However,
out of the pool of cases that either party would, for whatever reasons, like to have further reviewed, only those that warrant consideration (for the reasons noted above) by the Review Panels should receive it.

8.52. In the Council’s view, there should be two mechanisms for enabling cases to be considered by a Review Panel. They are:
- by the referral of a case from the divisional level; and
- by the application by one of the parties for permission for review by a Review Panel, on the basis that the case comes within the statutory grounds for seeking such review.

Both of these mechanisms are explained below.

8.53. The Council notes that, in terms of extracting normative effects from the merits review system, one difficulty is that cases that raise important issues or principles of general significance, but which are settled or decided in favour of the applicant at the first instance, are not the subject of a decision of the AAT accompanied by written reasons. The Council acknowledges, however, that once a decision has been made to the satisfaction of the parties, there can be no justification for subjecting it to another level of merits review merely to extract a normative effect. The objective of obtaining the correct and preferable decision at the earliest stage of the decision-making process should be seen as paramount.

### Limiting access to Review Panels: referral

8.54. When an application for review is received by the ART, it might immediately be apparent to the Registrar that the case raises a principle or issue of general significance, or complex issues of law or fact. Such cases should be able to be referred by the Registrar direct to the President for the President’s determination, whether the case should be decided by a Review Panel (that is, without the division itself first considering the case and making a decision). Applicants and agencies should be able to indicate on their applications that they consider the case should be referred to a Review Panel (on the basis that the issues raised are of general significance). This would assist the Registrar in the task of identifying cases raising principles or issues of general significance, but it should be within the discretion of the President whether to refer the case to a Review Panel.

8.55. It should also be possible for a case to be referred by a division if, at any stage during the division’s consideration of the case, if it becomes apparent to the panel hearing that case (or the relevant Division Head) that the case raises an principle or issue of general significance, or complex issues of law or fact, and might therefore be appropriate for consideration by a Review Panel. For example, an issue of general principle might emerge during the course of the hearing, the development of which would warrant consideration by a more senior, authoritative Review Panel. A similar referral process should be adopted here: the case would be referred to the President for the President’s determination whether the case should be decided by a Review Panel.

8.56. The justification for this mechanism is that it would help to ensure that the normative effect of review tribunal decisions is maximised, and it avoids the cost of what would probably be two hearings by the ART, one at a division level and one by a Review Panel.

---

206 As noted in paragraph 8.24, the President’s function should be able to be delegated to a Deputy President.
Recommendation 96
The ART President should have a discretion to refer a case directly to a Review Panel for determination without the case first having been considered or decided upon by an ART division.

Limiting access to Review Panels: permission for review

Introduction
8.57. In many cases, the fact that the case raises an important principle or issue of general significance will not be apparent until after the ART division has completed its consideration of the case. Indeed, the important principle or issue of general significance may arise because the ART division’s decision is inconsistent with another ART decision.

8.58. The Council therefore considers that it should be possible to apply to the ART for permission to have the decision of an ART division reviewed. That permission should be able to be granted only if the case falls within specific statutory criteria, which are described below.

8.59. The Council acknowledges that in terms of maximising normative effects, this mechanism would not be perfect, because cases already decided by an ART division would only be considered by a Review Panel if either the applicant or agency had an interest in seeking further review. However, it would at least place some rational, appropriately-adapted control on the types of cases coming before Review Panels.

Grounds of permission for review
8.60. In the Council’s view, the grounds for granting permission for review by a Review Panel should be set out in legislation, and should focus on the purposes for providing a Review Panel hearing, which were described in paragraphs 8.42-8.48. The first two grounds should be as follows:

- That, in the opinion of the ART President, the case raises a principle or issue of general significance.
  Cases falling within this ground might include, for example, cases requiring the interpretation of new legislation or policy of wide general application and cases raising an issue upon which different divisional panels have given conflicting opinions.
- That, in the opinion of the ART President, the decision of the ART division involved a manifest error of fact or error of law that is likely to have materially affected the decision.

8.61. The Council also acknowledges that applicants or agencies may come into the possession of new information that will materially affect the merits of their case, but which is not discovered until after the decision of a division has been made. The Council considers that if this material could not reasonably have been discovered prior to the finalisation of the case by the relevant ART division, and is discovered prior to the expiration of the time limits for applying for permission for further review, the applicant should be entitled to seek permission for review by a Review Panel. Therefore, the Council considers that the third basis of seeking permission for review should be:

- That new information is brought to the attention of the ART President which, in the President’s opinion, could not reasonably have been discovered prior to the finalisation
of the case before the ART division, and which would have materially affected the decision.

Even where this ground is satisfied, the President should have a discretion to remit the case back to the relevant ART division, with directions, rather than to grant access to review by a Review Panel, where to do so would be the most effective way to determine the case.

8.62. The basis for permitting further review of decisions in these circumstances is not to extract normative effects, but to avoid possible unfairness. Instead of having to use the new information to make a fresh application to the primary decision maker, which in some cases would not be permissible and in others would result in loss of entitlements (such as arrears of payments), the applicant will be able to have the benefit of merits review (including reconsideration of the fresh information) by a Review Panel.

8.63. The Council considers that it would only be in rare circumstances that this ground would be made out. In the case of new information that is discovered before the ART division makes its decision, it should be possible for the person with that information to make a written submission to the tribunal outlining that information. If the tribunal determines that the material is relevant, it could then provide for other participants in the review to comment on it (in most cases this should not require a hearing) before continuing to consider its decision.

Recommendation 97
The grounds for granting permission for review by a Review Panel should be:

- that, in the opinion of the ART President, the case raises a principle or issue of general significance;
- that, in the opinion of the ART President, the decision of the ART division involved a manifest error of fact or error of law that is likely to have materially affected the decision; or
- that new information is brought to the attention of the ART President which, in the President’s opinion, could not reasonably have been discovered prior to the finalisation of the case before the ART division, and which would have materially affected the decision.

Recommendation 98
Where the ART President is satisfied that there is new information within the grounds for granting permission to seek review by a Review Panel, the President should have the discretion to remit a case, with directions, to an ART division where to do so would be the most effective way to determine the case.

Recommendation 99
The ART’s procedures should provide a process whereby new information may be brought to the attention of the tribunal any time prior to the tribunal finalising its decision, and for that information to be brought to the attention of other participants in the review for their comment.
Who can apply for permission?
8.64. In the Council’s view, both the applicant and agency whose decision is under review should be able to apply for permission for review by a Review Panel.

Recommendation 100
The applicant and the agency whose decision is under review should each be able to apply for permission to seek review by a Review Panel.

The application for permission
8.65. The process for considering whether to grant permission for review by a Review Panel should be simple and uncomplicated.

8.66. An application for permission should be required to be made in writing, and lodged with the ART registry within twenty-eight days of the ART division notifying its decision. The application should refer to the statutory grounds upon which permission may be granted, and explain how the matter falls within at least one of those grounds.

8.67. A copy of the application for permission should be sent by the ART to:
- where the application is made by the applicant - the agency; or
- where the application is made by the agency - the applicant,

with an invitation to provide written comments on the application within a reasonably short period of time (for example, fourteen days).

Recommendation 101
Applications for permission to seek review by a Review Panel should be made in writing and lodged with the ART within 28 days of notification of the ART division.

8.68. For most applications for permission for review, the application should be able to be determined quickly and simply, without the need for an oral hearing. However, there will be cases where an oral hearing may be considered by the President to be necessary, and the President should therefore have a discretion to convene an oral hearing in appropriate cases.

Costs indemnity
8.69. The determination of cases by Review Panels would tend to take longer and involve more complex procedures than determinations made by ART divisions. This is because the cases coming before Review Panels would more often than not involve complex and difficult issues. It is also more likely that the participants in the review would be permitted to be legally represented. For these reasons, the cost to the parties of participating in a Review Panel review would be likely to be higher than the cost of participating in a review by an ART division.
8.70. Therefore, where a decision is either referred by the ART to a Review Panel, or permission for review by a Review Panel is granted on the application of the agency, the applicant may be required to involuntarily incur additional expense. The Council expects that in accordance with their current practices for court cases involving issues of precedent, agencies would often offer to indemnify the applicant against additional costs that are incurred. The Council would encourage such practices to be adopted by agencies. The Council also notes that the AAT Act currently provides that a person may apply to the Attorney-General in certain circumstances for the provision of assistance in respect of certain AAT or Federal Court proceedings.207 The Council considers that a provision to that effect should apply to the ART, but that it should be modified so that applicants are indemnified by agencies for the additional costs that they incur as a result of their case being reviewed by the Review Panel other than pursuant to an application made by the applicant.

**Recommendation 102**
Where an applicant’s case is reviewed by a Review Panel otherwise than at the applicant’s request, the applicant should be indemnified by the relevant agency for the additional costs incurred by the applicant as a result of the case being reviewed by the Review Panel.

**Continued emphasis on ADR and early resolution**

8.71. Although it is important to ensure that the normative effect of merits review is developed and enhanced, an important specific objective is to ensure that the correct and preferable decision is made in individual cases. For this reason, a focus on attempting to resolve cases by mediation and other alternative dispute resolution techniques should be maintained throughout all levels of the merits review process, including the Review Panel level.

**Nature of merits review**

8.72. Although cases will only be referred to a Review Panel on specific grounds, a Review Panel’s function should be to conduct merits review of the entire decision: that is, to determine what is the correct and preferable decision.

**APPEALS TO THE FEDERAL COURT FROM THE ART**

8.73. A party to a proceeding before the AAT is able to seek review of a decision by the Federal Court pursuant to the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). The AD(JR) Act provides that the Federal Court may refuse to grant an application for judicial review where there is an alternative avenue of review available to an applicant.208

---

207 *Administrative Appeals Tribunal Act 1975*, section 69.
The provision in section 44 of the AAT Act of another avenue of appeal to the Federal Court from decisions of the AAT (‘on a question of law’) means that the Federal Court only rarely hears applications for judicial review of AAT decisions under the AD(JR) Act.\(^\text{209}\)

8.74. The grounds for seeking review under the AD(JR) Act include the ground that the decision involved an error of law.\(^\text{210}\) Those grounds appear to be at least as wide as the ground for appeal provided in section 44(1) of the AAT Act.\(^\text{211}\)

8.75. Section 44 of the AAT Act is presently the subject of separate consideration by the Council;\(^\text{212}\) the Council therefore does not propose to make a recommendation as to the application of an equivalent provision to the ART.\(^\text{213}\) However, the Council considers that decisions of the ART should be subject to judicial review by the Federal Court. A question arises as to whether that review should be pursuant to the AD(JR) Act or pursuant to a provision equivalent to section 476 of the Migration Act 1958.

8.76. Section 476(1) of the Migration Act 1958 provides that an application may be made to the Federal Court for review, on a number of specified grounds, of certain decisions of the IRT and RRT. However, section 476(2) of the Act expressly provides that the grounds upon which an application for review may be made to the Federal Court do not include:

- the ground that a breach of the rules of natural justice occurred in connection with the making of the decision; or
- the ground that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

8.77. In the Council’s view, it would not be appropriate to provide for judicial review on the limited grounds set out in section 476 of the Migration Act 1958. It would not be appropriate to prevent the Federal Court from reviewing decisions on grounds that are available to applicants who seek judicial review by the High Court pursuant to its judicial review jurisdiction (which is referred to in Chapter III of the Constitution). To do so obliges applicants wishing to rely upon those excluded grounds to approach the High Court.

---

\(^{209}\) The Court has on occasions permitted review of certain procedural decisions of the AAT – see, for example, *Australian Postal Corporation v Hayes* (1989) 23 FCR 320.


\(^{211}\) The Council notes that in the Full Federal Court decision in *Minister for Immigration and Ethnic Affairs v Teo* (unreported, 13 April 1995), the Court observed that the jurisdiction it exercises upon an application under the *Administrative Decisions (Judicial Review) Act 1977* for an order for review is broader than the jurisdiction it exercises pursuant to a statutory provision which provides for appeal to the Federal Court ‘on a question of law’, at least where review of facts under the ‘no evidence’ ground of review under the *Administrative Decisions (Judicial Review) Act 1977* is concerned.


\(^{213}\) In the course of its deliberations on judicial review in the present context, the Council considered the possibility not only of amending a provision equivalent to section 44 to broaden the scope of an appeal, but also whether there was a need to retain such a provision, given the broader scope of review, at least in some respects, under the *Administrative Decisions (Judicial Review) Act 1977*. 
OBSERVATIONS ON THE COUNCIL’S RECOMMENDED STRUCTURE FOR THE MERITS REVIEW SYSTEM

Introduction

8.78. In the Council’s view, it is essential that the design of the merits review system is such as to advance the objectives of merits review. In Chapter 2, the Council noted that the system had gone a significant way towards meeting the overall objective of ensuring that all administrative decisions of government are correct and preferable. However, the Council noted its concerns about the ability of the system to meet its other, specific objectives to the maximum extent. In particular, it was noted that the merits review system had not been as successful as it could be in improving the quality and consistency of government decision making. The Council also noted its concerns about perceptions about review tribunals’ lack of independence from the agency or agencies whose decisions they review. The Council is concerned that review tribunals must be (and be seen to be) free of any undue pressure or incentive to favour the position of the agency whose decisions they review.

8.79. In this section the Council set out its view of what would be the benefits and disadvantages of its recommended structure for the merits review system. The Council is of the view that the ART would be able better to advance the objectives of the merits review system than would either its constituent divisions separately or the existing structure of Commonwealth tribunals. Apart from the features noted above, the ART would have maximum flexibility to respond to changing demands as a single organisation. The Council does not accept that the task of making the ART advance the objectives of the merits review system in an effective way would be beyond it, or that the size of a unified tribunal like the ART need result in inefficiencies. On the contrary, the Council considers that there is scope to rationalise some of the services now provided by separate organisations. The Council also considers that any difference between the ART and the AAT in terms of the size of the organisation and the scope of services provided would be of degree rather than of kind; the Council has found the AAT’s capacities in relation to management and administration to be well regarded. The ART, like existing review tribunals, would be publicly accountable through the usual parliamentary committee processes.

Independence

8.80. As noted above, the Council considers that tribunals must be (and be seen to be) free of any undue pressure or incentive to favour the position of the agency whose decisions it reviews. Unless this is achieved, there is a danger that potential applicants will lose confidence in the system’s capacity to provide fair and objective merits review of their case, and for this reason might not seek review at all.

8.81. The Council has found that applicants and agency clients place a lot of importance on the nature of the relationship between the agencies and tribunals that review their decisions, and consider that unless the appropriate level of independence is reached, the credibility of the merits review system may be prejudiced. In Chapter 2 the Council noted that the system’s credibility has at times been affected by perceptions about tribunals’ lack of independence from the agency (or agencies) whose decisions they review. The Council has found that the independence of some tribunals has been seen to have been compromised by the fact that they remained within the control and portfolio responsibility of the minister and agency whose decisions are under review.
8.82. The Council therefore considers that, as a general principle, the merits review system should guarantee to applicants access to review by a tribunal that is independent of the minister and agency whose decisions it is reviewing. A major advantage of the ART is that its structure is consistent with this principle.

Awareness and access

Introduction

8.83. The establishment of the ART would improve access to merits review in the several ways set out below.

Better awareness among applicants of the review structure and process

8.84. The ART would be in a position to provide a public education and access program that is much more comprehensive than that which any individual tribunal is currently able to provide. It would also overcome uncertainty on the part of potential applicants for merits review as to which tribunal should be approached for the purpose of applying for review. For example, people seeking review of decisions made in the migration portfolio may currently have to apply for review by any of the IRT, RRT or AAT, depending on the type of decision involved. Ascertaining which tribunal to apply to may be difficult for some applicants, especially those unfamiliar with review processes. Under the Council’s recommendations, there would be no cause for such confusion: all applications for merits review would be made to the same tribunal. It will be up to the ART Registrar to determine the division of the ART to which the application should most appropriately be referred.

8.85. The establishment of an integrated merits review structure would also make it easier to provide people with a clear, simple explanation of the different stages in the merits review process. The ART would be a ‘one-stop-shop’ of merits review, so it would not be necessary for applicants to seek further review of the decision of one tribunal by a different tribunal. This would also alleviate to some extent the incidence of ‘appeal fatigue’ that some non-government organisations have described.

Simpler, less complex processes

8.86. The ART would be in a position to employ flexible procedures and processes, aimed at reducing the level of formality and complexity of the hearing and the tribunal environment. This would make the review process less intimidating for applicants (particularly the vast bulk of applicants who use the system only once), and would also make it easier for them to conduct a case to their best advantage without the need for a lawyer or other formal assistance.

8.87. One possible disadvantage is the risk that the ART would become an expanded version of the AAT, with the result that the positive attributes of the existing specialist review tribunals are lost in the transition to the new structure. However, the Council considers that this risk would be able to be avoided if the ART is established with a firm commitment that it become a new type of review tribunal.

8.88. In considering the question of the structure of the merits review system, the Council was conscious of criticism that the AAT’s facilities and general approach to review can be overly formal, complex and ‘court-like’, and that these features would not be appropriate for hearing the types of cases that are currently heard by the SSAT, IRT, RRT and VRB. The AAT has become more responsive to its users in recent years and has made considerable efforts to change its style (these efforts are described in Chapter 3). The Council considers that some of the contemporary criticisms of the AAT fail to take these developments into
account. Nevertheless, a perception remains that the AAT can be unnecessarily formal and adversarial, especially in relation to its hearings. The Council notes that these perceptions are shared by some of the AAT’s own members.  

8.89. The Council considers that the recommendations made earlier in this chapter would prevent the ART adopting procedures and processes that are too formal or complex. These recommendations include:

- creating separate divisions of the ART, each with its own Division Head who is able to develop guidelines and directions for the processes and procedures to be followed in the particular jurisdiction; and
- ensuring that each division of the ART is able to adopt procedures that are as informal and simple as is consistent with reaching the correct and preferable decision in each case.

One level of external merits review to be the norm

8.90. The ART structure would increase the focus on achieving the correct and preferable decision at the earliest stage of the external merits review process. It would achieve this by removing guaranteed access to two tiers of merits review, and by promoting alternative modes of resolving decisions in all ART divisions. It will also provide safeguards to ensure the quality of decisions. This should result in improved, earlier access by applicants to correct and preferable decisions.

8.91. The ART would have the flexibility to ensure that its processes are as informal and simple as is appropriate to determine the issues fairly. Cases would progress to a second level of review only if that progression is able to be justified against specific grounds. The Council believes that this would encourage a higher standard of review at the first level of external merits review. The cost savings of this aspect would also be potentially very significant.

8.92. In those areas of decision making in which there is presently guaranteed access to two levels of external merits review, this may be seen as involving loss of a review right. Strictly speaking, this may be so, but the Council has recognised the need in specific circumstances for a mechanism to correct errors while attempting to place an emphasis on getting decisions right the first time on external review. In the Council’s view, it is the credibility of review tribunals, based on their independence from government agencies, that is the key reason people seek to use them. The Council therefore considers access to external review to be crucial, but does not see that there need be guaranteed access to two levels of external review. Indeed, if the purpose of guaranteed further review is to seek a different ‘preferable’ decision, the question may well be asked why there should not be three or any number of further levels of review.

Effect on formality of removal of further review as-of-right

8.93. Because most cases coming before the ART would be reviewed only once (by an ART division), there should be no expectation that any particular case will proceed to a second hearing before a Review Panel. The Council acknowledges that this may put pressure on the Welfare Rights Division and Veterans’ Payments Division to become more formal and adversarial than the existing SSAT and VRB, since applicants to the SSAT and VRB currently enjoy an avenue of further review by the AAT as-of-right. It is clear that the ‘security’ of this avenue gives the SSAT and the VRB considerable freedom to adopt speedy and informal hearing processes.

*Findings reported to the Council’s consultants.*
One aspect of this concern is that the removal of an as-of-right avenue of further review will lead agencies to seek to participate in hearings at the divisional level, and that if they did so, ART division hearings would become more formal and adversarial. However, the Council has recommended that the ART have greater flexibility than the existing review tribunals to control the manner of the participation of all parties, including agencies. The Council also notes that the Department of Immigration and Ethnic Affairs invariably does not appear in the IRT and RRT, which are for practical purposes final merits review tribunals. Agencies should be encouraged to adopt a similar approach under the ART model, and be selective in deciding which ART hearings they should attend.

The Council considers that its recommendations will be sufficient to enable the divisions of the ART to adopt an approach to review that ensure procedures are as informal as is appropriate in the circumstances of each particular case. The ART would be established with the objective of providing review that is fair, just, economical, informal and quick, and with the powers to enable it to achieve this objective.

On the assumption that many existing review tribunal members would be appointed to the ART, it is likely that a large majority of ART members would be experienced in the use of less formal decision-making techniques, which experience they should be encouraged to bring to, and draw upon at, the ART. Some cases will always take longer to resolve than others, but many more cases would be able to be resolved speedily through the ability of the ART to draw upon a broader range of modes of resolving reviews. The Council also notes that there is currently no right to seek further review by the AAT of decisions of the RRT and the IRT, yet those tribunals have been able to develop and foster procedures that are reasonably informal and non-adversarial, and which produce decisions that, given the nature and complexity of the decisions, are relatively timely.

For those cases that are currently only subject to a single level of external merits review, there is no reason why the formality and complexity of hearings would be adversely affected. Indeed, with the introduction of greater flexibility in decision-making processes - including more emphasis on alternative processes of dispute resolution - it is reasonable to expect that there would be a significant improvement in the quality of decision making in many cases.

Improved review in the veterans’ area

The establishment of the ART would have the additional benefit of improving the approach that some applicants take to merits review in the veterans’ area. Currently, applicants to the VRB have an avenue of further review by the AAT as-of-right and the right to receive legal aid for the conduct of their case in the AAT. These factors have contributed to a culture where some applicants approach the VRB with an expectation of eventually proceeding to the AAT, and they do not always present the VRB with all relevant information, or raise all relevant issues (see also paragraphs 3.82-3.96).

In the Council’s view, the absence of an avenue of further review as-of-right from the Veterans’ Payments Division of the ART to a Review Panel would introduce a strong incentive for applicants to present their best information and case at the earliest stage of the review process. There is a risk that this would have an adverse effect upon the time and complexity of hearings in the Veterans’ Payments Division: however, that division would be able to employ flexible hearing processes and procedures, with an emphasis on informality and use of alternative processes of dispute resolution in appropriate cases, so any change should not be significant. It would also reduce the overall time and cost of
many matters by providing for most cases to be finalised with a single level of merits review.

Quality of decisions
8.100. The quality of decision making at the ART divisional level would improve because of the ability of ART divisions to adapt their processes and procedures to their particular clientele, always with an emphasis on simplicity and informality. The access to a larger pool of members and a broader base of expertise, and the cross-fertilisation of ideas and experiences that would inevitably result from the establishment of the different divisions, would also assist in improving the quality of decision making within the ART.

Efficiencies and savings

Introduction
8.101. The establishment of the ART has the potential to introduce efficiencies and savings additional to those that would result from the implementation of recommendations made in other chapters of this report. Some of these potential efficiencies and savings are described below.

Reduced likelihood of delay
8.102. The ART would be able to adopt case management practices that are more flexible and efficient than those that are currently adopted in many review tribunals. For example, it would be possible to identify at an earlier stage in the review process (that is, at the first level of merits review) those cases that might benefit from alternative processes of dispute resolution, and to refer those cases to such processes. Conversely, where it is apparent from the outset that a case raises an important issue or principle of general significance, those cases would be able to be referred directly to an authoritative Review Panel for determination. Therefore, cases having potential normative effects would be able to be streamed, at the earliest possible opportunity, to the level of the ART designed to deal appropriately with such cases.

More flexible use of resources
8.103. There would also be greater flexibility in the use and allocation of members and staff than currently exists in the merits review system. Across the ART there would be a broader level of experience. The quality of the skills of members would also improve because members would have access to improved training and development programs. There would also be greater opportunity for members to sit on panels in some other divisions, and this would increase the expertise of those members and expose them to a range of different decision-making processes. And having a broader pool of expertise (including amongst part-time members) would make it easier to manage fluctuations in the tribunal’s overall caseload: members cross-assigned to several divisions would be able to sit in other divisions in order to clear backlogs and handle unusual increases in the volume of applications. Consequently, applicants would be less likely to face long delays in the resolution of their cases.

8.104. The establishment of the ART would also provide the Government with an opportunity to revise member and staff levels to ensure that optimum numbers and skills are established.

8.105. It is also likely that the elimination of unnecessary duplication through sharing of resources such as libraries, administrative support, central services (such as those required for ADR, training) and accommodation would result in significant long-term savings,
although the Council notes that the establishment of the ART would possibly involve initial capital expenditure over and above that of the existing merits review system.

Cost of additional level of review?
8.106. There might be thought to be a risk that the establishment of the ART would increase costs in some jurisdictions by providing for up to two levels of external merits review of decisions that are currently subject to a maximum of one level of external merits review. (These are decisions reviewable by the AAT other than on review from the SSAT and VRB, and decisions reviewable by the IRT and RRT.)

8.107. However, the Council notes that access to ART Review Panels would not be as-of-right. Applicants would need to establish that their cases fell within one of the limited grounds for a case to be considered by a Review Panel (these bases are discussed in paragraphs 8.57-8.63). The Council considers that only a limited number of cases would, in fact, be reviewed by both an ART division and a Review Panel. In the Council’s view, the additional time and expense that might be involved in this limited number of cases would be justified, because most of these cases would contribute to improved normative effects, or correct obvious errors. Further, the removal of an as-of-right second tier of external merits review in the social security and veterans’ jurisdictions would significantly reduce the overall workload (such second-tier review currently comprises around one half of the AAT’s caseload), and this would significantly reduce the overall cost of the merits review system.

Improved agency decision making
8.108. In other chapters of this report the Council has made recommendations that will enhance the effect that tribunal decisions have in improving agency decisions and decision-making practices. However, the Council considers that the establishment of the ART would provide significant additional enhancements to these broader effects of tribunal decisions.

8.109. Decisions of the various specialist merits review tribunals are not currently subject to further review by or within the same body, so that inconsistencies between the various tribunals (and, in some cases, between decisions of the same tribunal) are less able to be quickly identified, and are less likely to be resolved with authority and certainty. This causes unnecessary and avoidable uncertainty for agencies and their users.

8.110. Also, the merits review system does not currently provide an effective mechanism for ensuring that cases with potential normative effects are brought before the AAT. Further review of any decision of the SSAT or the VRB may be sought by the AAT, regardless of whether it raises an important issue or principle of general significance. In the case of the AAT’s original jurisdiction, there is no obvious means of singling out such cases for different treatment. In the case of decisions within the review jurisdiction of the IRT and the RRT, there is a mechanism for either tribunal to refer a case to a specially-constituted panel of the AAT. The intended purpose of this referral mechanism was that issues or principles of general significance could be determined by an authoritative tribunal, so as to maximise the normative effect of those decisions. The referral mechanism has yet to be used.

215 In the 1993-1994 financial year, 1078 SSAT decisions (not including SART decisions), and over 1500 VRB decisions were appealed to the AAT. This volume would be significantly reduced under the Council’s recommended structure.

216 In the case of the IRT the referral mechanism is provided by section 381 of the Migration Act 1958. In the case of the RRT, the referral mechanism is provided by section 443 of the Migration Act 1958.
8.111. A significant advantage of the ART is that it would maximise normative effects by providing a more effective mechanism for ensuring that cases raising issues of general principle are determined by a panel formed specifically for hearing such cases. Therefore, general principles arising from tribunal decisions would be easier for decision makers, agencies and other tribunals to identify. Further, because of the greater authority that the decisions would command (they would be determined by a panel that would be able to give greater attention to cases involving normative effects) they will be much more likely to be accepted by agencies and decision makers, and to have an effect on approaches to similar future decisions.

PRINCIPLES FOR LOCATION OF NEW REVIEW JURISDICTIONS

8.112. The Council remains committed to its long-standing preference for any new review jurisdiction to be accommodated within the existing merits review framework wherever possible, and to its opposition to the unnecessary proliferation of tribunals or review processes.

8.113. The Council previously accepted the need for the establishment of specialist merits review tribunals in high-volume jurisdictions. If the Council’s recommendations in this chapter are not accepted, that view remains valid. But if the Council’s recommendations as to structural change are accepted, there would scarcely ever be a need for a separate specialist tribunal. Rather, the question would be: is there a need to establish a separate division of the ART? The ART would have sufficient flexibility in the development of its processes and procedures to enable it to cope with new, high-volume jurisdictions.

8.114. The fact that the determination of particular types of decision require particular expertise would also be much less likely to justify the establishment of a specialist tribunal. This is because the ART would have a broad base of members which should cover all necessary areas of expertise.

A NEW TRIBUNALS ACT?

8.115. The Council has recommended earlier in this report that some of the proposed changes should be legislated, rather than left to administrative discretion. This could be achieved by amending the various portfolio statutes.

8.116. One question that will arise as a result of the implementation of the recommendations contained in this chapter is the extent to which statutory provisions relating to the review rights, and the operation of the various ART divisions, should be contained in a single Act.

8.117. The Council considers that this is a question that should be determined by the Government, although as a general principle, the Council considers that transparency and access are enhanced if legislative provisions of general application are contained in a single Act.
LIST OF RECOMMENDATIONS

CHAPTER 1
THE INQUIRY - BACKGROUND, SCOPE AND PROCESS

Recommendation 1
The Government should consider applying the recommendations made in Chapter 2 through to Chapter 7 of this report to any body that undertakes external merits review of administrative decisions.

Recommendation 2
Merits review of decisions under section 48 of the Occupational Health and Safety (Commonwealth Employment) Act 1991 should be transferred from the Australian Industrial Relations Commission to the Administrative Appeals Tribunal.

CHAPTER 2
OBJECTIVES OF THE MERITS REVIEW SYSTEM

Recommendation 3
All review tribunals should have the statutory objective of providing a mechanism of review which is ‘fair, just, economical, informal and quick’. Provisions in the statutes which establish review tribunals should be consistent with this statutory objective.

CHAPTER 3
REVIEW TRIBUNAL PROCESSES

Recommendation 4
Review tribunals should monitor continuously the ways in which their review processes and other characteristics are perceived by applicants, so as to ensure that applicants feel as comfortable in their dealings with tribunals as is consistent with the proper exercise of the review function of tribunals.

Recommendation 5
Review tribunals should have sufficient powers and discretions to enable them to use whatever techniques and processes best serve their objectives, including techniques associated with an active investigative approach.

Recommendation 6
Training of review tribunal members should include a component on how to adopt an appropriate active investigative approach in hearings: members should always be aware of how their actions may affect the way their tribunal is perceived by its users.

Recommendation 7
The composition of panels to review particular cases should be left to the discretion of review tribunals.
**Recommendation 8**
For all review tribunals, existing statutory prescriptions of panel composition should be removed and replaced with a statutory preference for multi-member panels in appropriate cases.

**Recommendation 9**
Review tribunals should develop guidelines for determining how panels should be constituted in different cases. These guidelines should be developed in consultation with user groups and should be published.

**Recommendation 10**
Subject to confidentiality and secrecy provisions, agencies whose decisions are under review should be required to provide review tribunals with:
- a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision; and
- information relevant to the review that is in the agency’s possession or control, including information that was relied on in reaching the decision.

**Recommendation 11**
A copy of that statement and other information provided to the review tribunal should be made available to the applicant, without the need for a request by the applicant, at the same time.

**Recommendation 12**
Review tribunals should be obliged to take into account all relevant information that is available to them at the time of the review.

**Recommendation 13**
Where a review tribunal finds it necessary to obtain additional information that the agency could reasonably have obtained, and remittal of the case to the agency is not appropriate, the tribunal should have power to direct the agency to obtain that information for use by the tribunal during the review.

**Recommendation 14**
Subject to confidentiality and secrecy provisions, review tribunals should disclose to the applicant all the information, whether favourable, neutral or adverse, that it proposes to take into account in making its decision, and should give the applicant an opportunity to make submissions regarding that information.

**Recommendation 15**
A policy on openness of review tribunal proceedings and decisions should be developed by a working group comprising representatives of the tribunals, relevant agencies and the Privacy Commissioner.

**Recommendation 16**
All review tribunals should be subject to the same provisions concerning confidential information and public interest certificates.
Recommendation 17
Subject to narrow exceptions, review tribunals should have the discretion to decide what information to release to applicants, having regard to both any government case for withholding information and the requirements of procedural fairness which would favour disclosure of all relevant information.

Recommendation 18
Review tribunals should be able to place conditions on the further disclosure of sensitive information.

Recommendation 19
A review tribunal should not convene an oral hearing of a matter if it considers that the issues may be determined adequately without an oral hearing, and provided that the applicant gives informed consent to the tribunal adopting that course.

Recommendation 20
All review tribunals should explore the potential use of alternative dispute resolution techniques to resolve the issues arising in cases coming before them.

Recommendation 21
All review tribunals should have power to make costs awards against any person involved in a review proceeding who, in the opinion of the tribunal, has deliberately engaged in inappropriate conduct that results in another person incurring unnecessary costs.

Recommendation 22
Applicants for review should be entitled to be represented or assisted in any dealings with a review tribunal.

Recommendation 23
The extent to which an applicant’s representative or assistant can participate in review tribunal proceedings should be left to the discretion of the tribunal. There should be no statutory limitations on the role that such representatives or assistants are allowed to play.

Recommendation 24
Review tribunal heads should issue practice directions concerning the role of applicants’ representatives and assistants, and seek to ensure that those representatives and assistants are fully aware of and understand the nature of their role and of any limitation upon it.

Recommendation 25
There should be no prohibition against lawyers - or any particular group - from advising or representing parties in review tribunal proceedings to the extent that advice and representation is permitted in the relevant tribunal.

Recommendation 26
Agencies should have the capacity to participate in review tribunal proceedings to the extent they consider appropriate. They should also assist tribunals by participating in those proceedings where that is requested by a review tribunal, whether to enable an attempt to be made to resolve the issues arising in the review through the use of alternative dispute resolution techniques or otherwise.
Recommendation 27
Agencies should be encouraged to indicate in advance those cases in which they do not wish to be represented at any review tribunal hearing.

Recommendation 28
Review tribunals should provide reasons for decisions that are self-contained, clear and easy to understand by the people for whom they are written.

Recommendation 29
Review tribunals should develop guidelines for the content and presentation of reasons for decisions, in consultation with user groups.

Recommendation 30
Written reasons for review tribunal decisions should meet the same standards whether or not an oral decision has already been given.

CHAPTER 4
TRIBUNAL MEMBERSHIP

Recommendation 31
Review tribunals should cooperate in the development of a minimum set of core skills and abilities required of an effective tribunal member, for use in organising professional development of members and in the process of developing selection criteria.

Recommendation 32
Subject to all members having the required minimum set of core skills and abilities, review tribunals should have available within their membership a wide range of additional skills and experience.

Recommendation 33
All prospective review tribunal members should be assessed against selection criteria that relate to the tribunal’s review functions and statutory objectives.

Recommendation 34
Selection criteria for review tribunal member positions should be made publicly available, as should information about the nature of the selection process to be followed.

Recommendation 35
Assessment of applicants for review tribunal membership against selection criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments.

Recommendation 36
Appointments of members of review tribunals should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment.

Recommendation 37
Assessment panels should consider the use of a range of techniques for testing the suitability of applicants for review tribunal membership.
Recommendation 38
The assessments made by assessment panels of the suitability of applicants for review tribunal membership against the selection criteria should be documented: applicants should be given access to their own assessment on request.

Recommendation 39
Subject to implementation of the Council’s other recommendations concerning the selection process for review tribunal members, responsibility for recommending appointments to review tribunals other than the AAT should continue to lie with the minister responsible for the agency whose decisions form all or a large part of the review workload of those tribunals. In the case of the AAT, that responsibility should continue to lie with the Attorney-General. Consultation on proposed appointments should take place where appropriate.

Recommendation 40
Appointments to review tribunals should be staggered so that the terms of a large proportion of a tribunal’s members do not expire at the one time.

Recommendation 41
Review tribunal members should be appointed for terms of between three and five years.

Recommendation 42
Review tribunal members should be eligible for reappointment.

Recommendation 43
Members of review tribunals seeking reappointment on expiry of their terms should be required to apply for appointment in a competitive selection process and be assessed for suitability for reappointment against the same selection criteria as new applicants.

Recommendation 44
The Remuneration Tribunal should be responsible for determining the levels of remuneration of review tribunal members.

Recommendation 45
Remuneration of review tribunal members should not be linked to performance appraisal.

Recommendation 46
Review tribunals should continue to develop performance appraisal schemes for their members, covering all aspects of the work of members other than outcomes in particular cases.

Recommendation 47
All review tribunal members should participate in the setting of appropriate standards against which their performance is to be appraised.

Recommendation 48
Review tribunals should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions.
Recommendation 49
The skills and experience of review tribunal members should be developed through their participation on multi-member panels where appropriate and through training and development programs.

Recommendation 50
All review tribunals should seek to cooperate with each other and, where appropriate, with courts and the Australian Institute of Judicial Administration in providing professional development programs for their members and staff.

Recommendation 51
Review tribunal support staff, including research staff, should as a general rule be available to members as a common resource rather than being dedicated to individual members.

CHAPTER 5
ACCESS, INFORMATION AND AWARENESS

Recommendation 52
The requirements for notification of the making of all reviewable administrative decisions should comply, as a minimum, with all the standards set out in the Code of Practice issued under section 27B of the AAT Act.

Recommendation 53
The standards contained in the Code of Practice should be binding on all decision makers to whom the Code of Practice applies.

Recommendation 54
The Code of Practice should be reviewed to adopt the highest standards of content and presentation.

Recommendation 55
An application for review by a review tribunal should have to be made in writing, but not in any prescribed form. Review tribunals should encourage the use of simple, well designed forms, and should be flexible in their use of telephone, facsimile and face-to-face contact during the application process.

Recommendation 56
Processes for the payment of any application fees for review by review tribunals should be simplified should include the use of credit cards and electronic transfer of funds.

Recommendation 57
There should be a general statutory minimum time period of 28 days from receipt by the applicant of notification in writing of the reviewable decision for making an application for review by a review tribunal.

Recommendation 58
All review tribunals should have the discretion to allow applications for review out of time where that is justified by the circumstances of the particular case.
Recommendation 59
Review tribunals should cooperate in considering whether sharing of overheads, or use of agents, could make a physical presence in additional locations cost-effective.

Recommendation 60
Review tribunals should continue to make appropriate use of ‘circuit’ panels and telephone and video conferences, and of payment of travelling expenses for applicants.

Recommendation 61
Review tribunal premises should be as accessible and non-threatening to all users as is consistent with the proper performance of tribunal review functions. Details of tribunal design, layout and facilities should be left to the discretion of tribunals. A working group from all tribunals should be convened to develop common advisory guidelines on these matters. The views of review tribunal users should be sought as part of this process.

Recommendation 62
Review tribunals should provide appropriate assistance to (non-agency) applicants for review, particularly applicants who are unrepresented. This assistance should be characterised by:
- as far as is practicable, a single point of contact throughout the review process;
- appropriately designed literature and other explanatory material; and
- reimbursement of travel and incidental expenses for applicants without adequate means.

Recommendation 63
Review tribunals should regularly review their strategies for the assistance of (non-agency) applicants with a view to being as accessible as possible to applicants.

Recommendation 64
There should be a statutory entitlement to an interpreter in review tribunal proceedings, where the tribunal considers an interpreter’s services are required. Interpreters who participate in these proceedings should be adequately briefed on review tribunal functions and processes.

Recommendation 65
Review tribunals should have the discretion to pay for the translation of documents they consider relevant to the review and where translation would be beyond the means of an applicant.

Recommendation 66
Review tribunals should consider the benefits of routinely audio tape-recording proceedings. Where audio tape recordings are made, copies of tapes should be made available to the parties. Third-party use of those recordings should be at the discretion of the tribunals, and should be subject to the consent of the applicant.

Recommendation 67
Legal aid authorities should seek to ensure a more consistent and equitable provision of legal aid and advice for review tribunal applicants, with an emphasis on non-legal advice and advocacy.
Recommendation 68
Review tribunals should make their decisions as accessible as possible. Summaries of significant review tribunal decisions should be included in the tribunals’ annual reports.

Recommendation 69
A working group comprising representatives of review tribunals and principal agencies should be established to devise a set of common definitions and record-keeping conventions, designed to provide useful statistics as a management and evaluation tool for each tribunal and for the merits review system as a whole.

Recommendation 70
All review tribunals should be required by law to publish an annual report. Annual reports should have to comply with content standards. These standards should be developed through cooperation between review tribunals and set out in a common code of practice.

CHAPTER 6
IMPROVING AGENCY DECISION MAKING

Recommendation 71
All agencies should actively promote the potential beneficial effect of review tribunal decisions on the general quality of the agencies’ decision making. As an important aspect of this, agencies should make a visible, formal and real commitment to promoting that effect.

Recommendation 72
Agencies should ensure that their organisational structures are such as to maximise the potential beneficial effect of review tribunal decisions on the quality of agency decision making. Those structures should provide for:
- appropriate levels of independence for legal policy and review staff;
- effective communication systems; and
- appropriate training for primary decision makers on the function and role of merits review in the decision-making process.

Recommendation 73
Agencies should be encouraged to respond to a review tribunal decision that has potential implications for future agency decision making and where they consider the decision to be incorrect. They should:
- amend their policy and guidelines, or seek to amend the law, to clarify the policy intention;
- seek further review of the decision or appeal against it to a court; or
- make a public statement of their position in relation to the review tribunal decision.

Recommendation 74
Review tribunals should be encouraged to raise with the relevant minister or agency head, or with the Ombudsman, concerns they may have about agency responses to tribunal decisions.
Recommendation 75
Agencies should be encouraged to provide internal review of their decisions, provided it:
- is relatively timely;
- is not subject to an application fee;
- is undertaken by internal review officers who are sufficiently independent of agency decision makers; and
- involves an appropriate level of personal contact between internal review officers and applicants.

CHAPTER 7
FINANCE, ADMINISTRATION AND MANAGEMENT

Recommendation 76
Review tribunals should cooperate to develop common financial reporting standards (including categories of expenditure and reporting periods).

Recommendation 77
Review tribunals should consider entering into funding agreements which include a formula for automatic adjustments in funding for significant workload variations, subject to adequate provision for lead times in adjusting expenditure.

Recommendation 78
Review tribunal funding should not, as a general rule, be provided for within the budget of an agency whose decisions form all or a large proportion of the tribunal’s review workload.

Recommendation 79
Each review tribunal should be funded by way of an appropriation of a single allocation of funds.

Recommendation 80
The component of review tribunal funding representing the remuneration of full-time members should be excluded from the efficiency dividend.

Recommendation 81
Review tribunals should consider contracting out administrative services where it would be cost-effective to do so, and would not prejudice the quality of their own services.

Recommendation 82
Review tribunals should share resources and services wherever it would be efficient to do so.

Recommendation 83
All review tribunal staff should be employed by the review tribunal for which they work, and be subject only to the direction of the principal member of the tribunal or the tribunal’s registrar.

Recommendation 84
Review tribunals should cooperate in the planning and provision of training for their staff.
**Recommendation 85**
A Tribunals Executive, comprising at least the principal members of each review tribunal, should be established. The Tribunals Executive should have the function of identifying areas appropriate for cooperation between the tribunals, planning that cooperation, and, where appropriate, arranging for the provision of services common to all tribunals.

**Recommendation 86**
The powers exercisable by review tribunals for the purposes of conducting reviews should be examined to ensure that any unjustified differences between the powers of the various review tribunals are removed.

## CHAPTER 8

### REVIEW TRIBUNALS - STRUCTURES AND RELATIONSHIPS

**Recommendation 87**
The VRB, SSAT, IRT, RRT and AAT should be united into a new tribunal, to be called the Administrative Review Tribunal (the ART).

**Recommendation 88**
The ART should be divided into seven divisions, namely:
- Welfare Rights Division;
- Veterans’ Payments Division;
- Migration Division;
- Commercial and Major Taxation Division;
- Small Taxation Claims Division;
- Security Division; and
- General Division (comprising the residual jurisdictions of the AAT).

**Recommendation 89**
Review Panels of the ART should be able to be constituted in order to review cases that are referred to them by the ART President or an ART division, or which fall within the grounds for seeking review by a Review Panel (see recommendation 97).

**Recommendation 90**
Membership of the ART should comprise a President, Deputy Presidents (including Division Heads of each division), Senior Members and Members.

**Recommendation 91**
Save for the President, legal qualifications should not be a prerequisite for appointment to the ART.

**Recommendation 92**
ART members should be eligible for appointment to more than one division of the ART. The minister responsible for the agency with portfolio responsibility for the ART (see Recommendation 95) should be responsible for recommending appointments to the ART. However, where an appointment (or cross appointment) is to a division other than the General Division, that minister should be responsible for recommending the appointment (or cross appointment) jointly with the minister or ministers who has (or have) portfolio responsibility for the decisions that are reviewable by that other division.
Recommendation 93
A Registrar of the ART should be appointed to assist the ART President in discharging the President’s responsibility for the overall management of the administrative affairs of the ART.

Recommendation 94
Consistent with Recommendation 85, an ART Executive Board should be established to facilitate liaison between the various divisions of the ART, and to coordinate strategies and programs on issues of tribunal-wide interest.

Recommendation 95
Either the Department of Administrative Services, the Attorney-General’s Department or the Department of the Prime Minister and Cabinet should have portfolio responsibility for the ART.

Recommendation 96
The ART President should have a discretion to refer a case directly to a Review Panel for determination without the case first having been considered or decided upon by an ART division.

Recommendation 97
The grounds for granting permission for review by a Review Panel should be:
- that, in the opinion of the ART President, the case raises a principle or issue of general significance;
- that, in the opinion of the ART President, the decision of the ART division involved a manifest error of fact or error of law that is likely to have materially affected the decision; or
- that new information is brought to the attention of the ART President which, in the President’s opinion, could not reasonably have been discovered prior to the finalisation of the case before the ART division, and which would have materially affected the decision.

Recommendation 98
Where the ART President is satisfied that there is new information within the grounds for granting permission to seek review by a Review Panel, the President should have the discretion to remit a case, with directions, to an ART division where to do so would be the most effective way to determine the case.

Recommendation 99
The ART’s procedures should provide a process whereby new information may be brought to the attention of the tribunal any time prior to the tribunal finalising its decision, and for that information to be brought to the attention of other participants in the review for their comment.

Recommendation 100
The applicant and the agency whose decision is under review should each be able to apply for permission to seek review by a Review Panel.
**Recommendation 101**
Applications for permission to seek review by a Review Panel should be made in writing and lodged with the ART within 28 days of notification of the ART division.

**Recommendation 102**
Where an applicant’s case is reviewed by a Review Panel otherwise than at the applicant’s request, the applicant should be indemnified by the relevant agency for the additional costs incurred by the applicant as a result of the case being reviewed by the Review Panel.
APPENDIX A

Terms of Reference

“Administrative law system should be
simple, affordable, timely and fair.”

Background
- overall assessment of the effectiveness of the way in which tribunal system has evolved.
- Growth in specialist tribunals has led to disparate practices and procedures.
- Discuss the following issues - to ensure the effectiveness and efficiency of the administrative review system.

Particular terms of reference
- the justification for external review;
- the composition of tribunals and the method of appointments to tribunals;
- the disparate initiating procedures between the specialist tribunals and the AAT;
- the different methods of remuneration for tribunal members - should the Remuneration Tribunal determine remuneration levels for all tribunal members and what should be the principles for differentiation between full-time and part-time members;
- the different costs regimes between tribunals;
- the equality of the respective tribunals;
- ensuring the independence of tribunals;
- the possibility of specialist tribunal heads sitting on appeals in the AAT;
- the desirability of having a central registry;
- whether the procedures of tribunals disadvantage the applicant in person;
- whether tribunal decisions feed back into the administrative process by improving systemic difficulties and redressing similar wrongs; and
- any other matters of concern that the Council considers appropriate to include.
APPENDIX B

Review Tribunals - Background

This appendix outlines the origins of the Commonwealth system of merits review tribunals and the way in which that system has developed. It is an updated version of the first twenty-two pages of Chapter 2 of the Council’s discussion paper. It discusses the role of merits review and the ways in which it complements other parts of the administrative law system. In particular, the appendix charts the establishment of the Administrative Appeals Tribunal (AAT) in 1975 and the subsequent creation of a range of specialist tribunals.

ORIGINS OF THE COMMONWEALTH ADMINISTRATIVE LAW SYSTEM

Introduction

1. This appendix introduces many of the themes and issues which are dealt with throughout the preceding report, but has been designed as a self-contained summary of the origins of the tribunal system within the context of broader administrative law reforms that were introduced progressively from the mid-1970s.

Scope of administrative law

2. Administrative law has a dual purpose - to ensure the lawfulness of decision making by government agencies, and to protect the rights and interests of people in relation to government. This is chiefly done by enabling a person who is adversely affected by a decision to challenge that decision. The challenge may be taken to a court (such as the Federal Court), an administrative tribunal (such as the AAT), or to an investigatory agency (such as the Commonwealth Ombudsman).

3. Other aspects of administrative law operate in a different way to protect individuals and to ensure the lawfulness and accountability of decision making. The Freedom of Information Act 1982 (the FOI Act) enables a person to obtain access to government documents. A written statement of the reasons for a decision can be obtained under the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act). One could also possibly include within the scope of administrative law the institutions and mechanisms that audit and scrutinise the legality, integrity, and efficiency of government decision making: examples include the Auditor-General, parliamentary committees, and (particularly in the Australian States) the anti-corruption agencies.

4. The focus of this report is upon one element of administrative law, namely the system of Commonwealth review tribunals in which a person may challenge a decision of a government agency. The unique role of those tribunals can best be understood by placing them in the context of other administrative law review agencies. In essence, there are five formal methods by which a person may directly challenge a decision of a government agency. These are described below.

Judicial review

5. Judicial review of Commonwealth decisions can be undertaken in the Federal Court, under the AD(JR) Act. The purpose of a judicial review action is to challenge the legality of a government decision. A decision is unlawful if it breaks one of eighteen criteria that are
defined in section 5 of the AD(JR) Act: examples include breach of natural justice, making a decision that was unauthorised, committing an error of law, or taking an irrelevant matter into account. When a judicial review action is successful, it is usual for the Federal Court to quash the decision, or to refer it back to the decision maker for further consideration. Ordinarily it is not part of judicial review for a court to substitute a new decision, or to award compensation to an aggrieved person.

6. There are other methods besides the AD(JR) Act which also enable judicial review of Commonwealth decisions. These include review by the High Court in its original jurisdiction conferred by section 75(v) of the Constitution, and review by the Federal Court under section 39B of the *Judiciary Act 1903*.

**Merits review**

7. Merits review of Commonwealth decisions is chiefly undertaken by administrative tribunals. The purpose of a merits review action is to decide whether the decision which is being challenged was the ‘correct and preferable’ decision. If not, a new decision can ordinarily be substituted. The process of merits review will typically involve a review of all the facts that support a decision.

8. The principal merits review tribunal is the Commonwealth AAT. It has a general jurisdiction embracing matters as diverse as social security, taxation, veterans affairs, employees compensation, freedom of information, and occupational licensing. Other merits review tribunals have a specialist jurisdiction, such as the Social Security Appeals Tribunal (SSAT), the Veterans’ Review Board (VRB), the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT).

**Administrative investigation**

9. Broadly stated, the function of the Commonwealth Ombudsman is to investigate whether there has been defective administration within a Commonwealth agency. That is, the Ombudsman investigates not only decisions, but also administrative activity - whether, for example, a decision has been made expeditiously, and has been explained adequately. If defective administration has occurred, the Ombudsman can recommend that appropriate corrective action be taken.

10. Other Commonwealth agencies have an investigative function that is comparable to that of the Ombudsman. For instance, whether Commonwealth administrative activity complies with human rights, anti-discrimination or privacy standards can be the subject of investigation by the relevant statutory officer. In some areas, these officers have determinative powers and can award compensation.

**Internal review**

11. Internal review is the process whereby original agency decisions are reviewed on their merits within the responsible government agency. Thus an internal review officer can usually substitute a new decision, if the decision under review is found to be defective on matters of law, merits or administrative process. In some areas of government administration there is now a formal system for the internal review of agency decisions. The internal review system is created and regulated by legislation, in the same way as other

---

1 This phrase is discussed at paragraph 2.5 of this Report.
review methods. Two examples are the Migration Internal Review Office, to review immigration decisions; and in the Department of Social Security the framework of Authorised Review Officers (AROs). Even where there is no statutory requirement, it is common for internal review systems to be established on an administrative basis within government agencies.

**Damages**

12. Compensation for defective administration can be awarded in limited circumstances defined by common law doctrines, such as negligent misstatement, false imprisonment, and conversion. An action for damages against the Commonwealth would usually be heard by a state Supreme Court or, less commonly, by the Federal Court or the High Court.

**Other aspects of administrative law**

13. In many ways, the system of administrative law is more complex, integrated and overlapping than the description that has just been given. There are, in the first place, agencies that perform a combination of functions. An example is the Merit Protection and Review Agency, which investigates personnel administration, but also adjudicates on the merits of disciplinary and promotion decisions. Secondly, there is a vertical relationship between some agencies. For example, an appeal can be taken from the SSAT to the AAT, and from there to the Federal Court. Thirdly, some Commonwealth agencies which have administrative law functions have a jurisdiction that extends to private sector and state government decisions, in addition to Commonwealth public sector decisions. Examples include the Sex, Race and Disability Discrimination Commissioners, and the Privacy Commissioner.

**The establishment of the Commonwealth system**

14. The present Commonwealth system of administrative law can be traced to a report in 1971 of the Commonwealth Administrative Review Committee (the Kerr Committee), named after the Chairman Sir John Kerr, then a member of the Commonwealth Industrial Court. The major features of the present system - the framework for judicial review, the AAT, the Ombudsman, and the Administrative Review Council - stem largely from the recommendations of that Committee. The significance of the Committee’s work, which is described more fully below, is appreciated best in the historical and administrative context in which the Committee reported.

15. Judicial review of administrative action has been possible from the inception of the Commonwealth. The inherent right of superior courts to conduct judicial review is an aspect of the common law developed in England, and adopted in Australia. Recognition of this supervisory jurisdiction was contained in section 75(v) of the Constitution, which empowers the High Court to issue against officers of the Commonwealth the remedies of mandamus, injunction and declaration. Each of those remedies can be used to ensure the lawfulness of government activity.

---

2 See also section 75(iii) which gives the High Court an original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.
In these earlier decades there was not, however, an active field of administrative law litigation. Costs, government secrecy, legal technicalities, and other factors combined to make judicial review a difficult and hazardous process.  

Administrative review tribunals had also been created prior to the 1970s. Notable examples were the Commonwealth Employees Compensation Tribunal, the War Pensions Entitlement and Assessment Appeals Tribunals, and the Taxation Boards of Review. Merits review processes were also created under a host of other individual legislative schemes. These included air navigation boards of review, the Law Officer established by the Designs Act 1906, a Specialist Recognition Appeal Committee under the National Health Act 1953, and the minister or departmental secretary under schemes regulating broadcasting, copyright, customs, social security, occupational licensing, and grant determination. The general picture emerging was of a system that was uncoordinated, that had grown as a response to the pressures felt in particular areas of administration, that contained many gaps and anomalies, and was not easily understood by the general community.

At the same time, administrative law reform activity in other jurisdictions drew attention to the options for change. In the United Kingdom, there was a developing framework of administrative law, based on the courts, tribunals, a Parliamentary Commissioner for Administration, and a Council on Tribunals. A landmark development that attracted attention in Australia was the report in 1957 of the United Kingdom Committee on Administrative Tribunals and Enquiries (the Franks Committee). The legislation which resulted from that report, the Tribunals and Inquiries Act 1958 (UK), established a Council on Tribunals to monitor the structure and operation of administrative tribunals, created some minimum uniform standards for tribunals, and imposed upon certain tribunals an obligation to provide reasons for decision.

Administrative law reform had also been occurring in New Zealand, notably the creation of an Administrative Division of the Supreme Court in 1968, and the appointment of an Ombudsman in 1962.

Between 1971 and 1974, five of the Australian states took similar action to create an Ombudsman or Parliamentary Commissioner. Reform proposals of a different kind had also been made in Victoria. Two reports in 1968, from the Victorian Statute Law Revision Committee and the Chief Justice’s Law Reform Committee, proposed the creation of a general administrative tribunal, an Ombudsman, and a reformed system of judicial review.
review. Academic and judicial commentators in Australia had also spoken in favour of administrative law reform.

21. The appointment of the Kerr Committee in 1968 marked the first comprehensive review of Commonwealth administrative law. In its landmark report in 1971, the Committee drew attention to the steady development of a vast range of administrative discretions that could be exercised in a way that detrimentally affected the life, liberty, property, livelihood or other interests of a person. The Committee considered that established mechanisms were unable adequately to correct administrative errors and to ensure justice for the individual. It was said that the principal reliance on parliamentary and judicial review was inappropriate; the remedies and principles for judicial review were unduly encumbered by technicalities; the Australian pattern of administrative tribunals was ad hoc; and access to review was often blocked by cost, official secrecy, and privative clauses. The Committee concluded that ‘it is highly desirable to encourage in Australia a comprehensive system of administrative law ... which is essentially Australian and which is specially tailored to meet our own experience, needs and constitutional problems.’

22. The Kerr Committee anticipated that there was a need for more detailed research on Australian law and government before its proposed new system was established. Two further inquiries were accordingly established. The Committee on Administrative Discretions (the Bland Committee named after Sir Henry Bland, the Chairman) issued two reports in 1973: an interim report examining the Kerr proposal for an Ombudsman, and a final report examining the proposals for administrative review. The second inquiry by the Committee of Review of Prerogative Writ Procedures (the Ellicott Committee, chaired by Mr RJ Ellicott, QC, then the Solicitor-General of the Commonwealth) examined the Kerr proposals for a reformed system of judicial review. The Ellicott Committee also reported in 1973.

23. The final report of the Bland Committee contained a thorough analysis of the existing Commonwealth framework for administrative review. Aspects of that framework that drew adverse comment from the Committee were the lack of any consistent pattern for administrative review; the inexplicable diversity among tribunals concerning their constitution and procedures; the frequent and inappropriate conferral of adjudicative jurisdiction upon the High Court and other courts; and the scant provision for external review of decisions concerning social security, welfare, customs, excise, and immigration, by contrast with the more generous facility for external review of professional, occupational and entrepreneurial regulation.

---

24. Following, in broad outline, are the main changes that resulted from those inquiries.

**Reformed judicial review**

25. The AD(JR) Act implements the similar proposals of the Kerr and Elicott Committees for a single enactment to codify the principles of judicial review, reform the procedures for commencing a judicial review proceeding, confer supervisory jurisdiction upon a specialist Commonwealth superior court (now the Federal Court), and create a right to the reasons for a decision.

**Ombudsman**

26. The *Ombudsman Act 1976* reflects more the revised proposals of the Bland Committee. The Kerr Committee had suggested a different title - General Counsel for Grievances - and had envisaged a body with a more active function, to proceed on behalf of a complainant to a court or tribunal to challenge a decision, and to intervene in the review proceedings of other bodies.

**Administrative review tribunals**

27. The *Administrative Appeals Tribunal Act 1975* (the AAT Act) implemented the Kerr and Bland proposals for the creation of an independent general administrative appeals tribunal, to exercise a jurisdiction that was both an extension and a replacement of existing arrangements. There was a similar philosophy of administrative review shared by both Committees, though their detailed proposals differed in some respects. The Act struck a balance - opting, for example, for the Kerr proposal that the President of the AAT be a judge (although the Act originally provided that all presidential members should be judges); and modifying the Bland proposal for three different tribunals by creating a single tribunal with three divisions (General Administrative, Medical Appeals, and Valuation and Compensation).

**Supervisory body**

28. Following a recommendation of the Kerr Committee (not endorsed by the Bland Committee), the Administrative Review Council was established by the AAT Act. The Council has a general function to oversee the system of administrative review, and to make recommendations for reform.

**Administrative procedure**

29. The proposal of the Kerr Committee for an Administrative Procedure Act to define a uniform code of procedure for administrative tribunals was not implemented.

30. Before returning to an analysis of the Commonwealth tribunal system, it should be noted that other elements of the Commonwealth administrative law system were

---

developed from a different initiative. The FOI Act originated in an election promise by the incoming Labor Commonwealth Government in 1972, was the subject of report by two inter-departmental committees and by the Senate Standing Committee on Constitutional and Legal Affairs in 1979, was a focus of vigorous public debate, and was enacted during the term of a Liberal Commonwealth Government in 1982. The genesis of the Privacy Act 1988 was a report of the Australian Law Reform Commission. The framework of human rights agencies has in large measure been established with a view to implementing international agreements made by Australia for furthering human rights protection.

Foundation principles and objectives of the Commonwealth system

31. The major theme underlying the report of the Kerr Committee was the need to develop a comprehensive, coherent and integrated system of administrative law. While the Committee did not spell out the concepts or principles which should underpin the new system, the major pillars were clear enough from the recommendations. Among these were the need for a system of administrative law to be comprehensive, accessible by the public, inexpensive, focused on substantive and not procedural issues, and based upon adequate disclosure and access to information. In one respect the Committee was firm about the major plank of the system it envisaged. The creation of an expanded framework for the review of decisions on their merits was treated as a central requirement. The Committee contended that 'The basic fault of the entire structure is, however, that review cannot as a general rule ... be obtained “on the merits” - and this is usually what the aggrieved citizen is seeking.'

32. The Kerr Committee examined three options for expanding the framework for merits review: conferring the function on a court, on specialised tribunals, or on a general administrative review tribunal. The Committee preferred the latter option, noting two advantages in particular: many areas of decision making would not justify the creation of a specialist tribunal, and creation of a general tribunal was preferable to the proliferation of specialist tribunals. The Committee nevertheless envisaged that the creation of specialist tribunals would be justified in special circumstances where the appropriate expertise did not exist in a general tribunal.

33. The Bland Committee spoke more strongly in favour of a general tribunal. The Committee argued that:
   To permit a continuing proliferation of tribunals would be wasteful of resources, inimical to the efficient functioning of government and calculated to cause public dissatisfaction. ... the fewer the tribunals there are the more likely will be the most economic use of resources and a better and more even resolution of individual issues because the members of the tribunals will not be circumscribed in their jurisdictional range.

---

21 Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information, 1979, AGPS. Chapter 2 summarises the history of the proposals to that point.
23 See Department of Foreign Affairs and Trade, Human Rights Manual, 1993, AGPS.
Other advantages claimed by the Committee included the efficient use of a finite pool of eligible membership, the need less and less for ‘the narrow compartmentalisation of issues’, and coordination of decision making. That argument has to be viewed in the context of the recommendation of the Bland Committee that three general tribunals be created, a general administrative tribunal, a medical tribunal, and a valuation and compensation tribunal.

34. Neither the Kerr Committee - as noted before - nor the Bland Committee articulated comprehensively the benefits of merits review. Mostly the objective was perceived as the correction of individual administrative errors, and the creation of an independent machinery for reconciling the tension inherent in securing justice to the individual while safeguarding administrative efficiency and ensuring the lawfulness of the administrative process. Whether a wider and normative impact on government would ensue was a matter only hinted at: ‘If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency. Our proposals, we believe, reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society.’

35. The tone was similar in the parliamentary speeches made in support of the new reforms. While the creation of the AAT was described as a ‘significant milestone’ and a ‘momentous event’ the description of the benefits was sparing.

36. It has been in later writings, written as an evaluation of the performance of the AAT and other merits review tribunals, that elaboration of the benefits of merits review has been undertaken. Benefits that are typically mentioned include the role of the AAT in clarifying the meaning of obscure legislative provisions; ensuring that administrators honour legislation according to its terms; furthering consistency in the administration of legislation; focusing attention on the accuracy and quality of agency manuals and guidelines; enhancing the quality of reasons for decision; providing an opportunity for the full and open consideration of issues of major importance; increasing the accountability of decision makers; and highlighting problems that should be addressed by law reform.

---

29 Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971, (Kerr Report), CGPS 1971, paragraph 364. Note too how the benefits of merits review were if anything downplayed by the Kerr Committee: “the purpose of extending the scope of administrative review is not to permit the review of decisions settling government policy or the change of established administrative policies but to permit the correction of error or impropriety in the making of administrative decisions affecting a citizen’s rights” (paragraph 354). See too the Final Report of the Committee on Administrative Discretions, Parliamentary Paper No 316 of 1973 (Bland Committee Final Report), paragraph 228.
30 Hansard, House of Representatives, 6 March 1975, page 1186 (Mr Enderby, Attorney-General).
31 Hansard, House of Representatives, 14 May 1975, page 2278 (Mr Howard).
37. A distinguishing theme in that list of benefits is the claim that merits review produces not only better decisions, but also better decision making. A review decision may have an immediate effect, not only on the decision under review, but in correcting erroneous decision-making practices, or highlighting misconceptions that arise within administration. In an incremental fashion, review can also produce more fundamental effects, such as higher quality decision making, an altered commitment to reasoned decision making, improved program development, and administrative and legislative reform.

38. It has to be said, on the other hand, that there has also been criticism of the role of merits review, and of the AAT in particular. The criticism has followed three main lines. It is said, in the first place, that too much attention has been given to external review of decisions, and comparatively too little attention has been given to other methods for enhancing administrative decision making. Competing priorities that are often mentioned include better training and personnel administration, mediation and alternative dispute settlement, and development of codes of conduct and citizens’ charters. A second line of criticism is that the disruptive effects of external review are often understated. Administrative resources, it is claimed, are often redirected away from the bulk of cases to a single dispute; government policy development and expenditure priorities can be undermined; and inappropriate legal paradigms can be impressed upon decision makers. The third major line of criticism, directed particularly at the AAT in earlier days, was that it inclined too often towards an adversarial mode of dispute resolution.

SUBSEQUENT TRIBUNAL DEVELOPMENTS

Introduction

39. This section of the appendix concerns the developments in the administrative tribunals system subsequent to those described above. The growth of the AAT, the policy issues involved in the creation of new tribunals, and the review tribunal system at present are all described. A major theme is the creation of new tribunals, which some critics have described as a return to the kind of uncoordinated administrative law system that was addressed by the Kerr and Bland Committees.

40. Other recent developments in Commonwealth administrative law, such as the changes to judicial review in the migration area (which came into effect on 1 September 1994), may be seen as another facet of this theme. A new, modified judicial system will apply to migration decisions to the exclusion of the other forms of broadly available judicial review (other than that provided for by the Constitution) previously open to people seeking judicial review of migration decisions.


34 See Part 8 (sections 475-486) of the renumbered Migration Act 1958, introduced by the Migration Reform Act 1992.
Growth in the AAT

41. Following the establishment of the AAT in 1975 some existing merits review tribunals were abolished, notably the Commonwealth Employees Compensation Tribunal, the Repatriation Review Tribunal, and the Taxation Boards of Review. Many other review procedures were subsumed in the new AAT structure, leading over time to a steady growth in the range of jurisdiction exercised by the AAT. At the time of its enactment in 1975, the AAT Act listed in a Schedule over 80 categories of reviewable decisions, covering occupational licensing (for example, patent attorneys and tax agents), customs, and broadcasting regulation. By 1995, appeals to the AAT could be made under more than 270 separate Commonwealth enactments.

42. Areas of jurisdiction that have been added since 1976 include freedom of information, social security, taxation, securities regulation, and compensation for land acquisition. The divisional structure of the tribunal has been adjusted to accommodate some of these changes. In many of those areas the AAT is the sole option for external merits review. In a very recent developments, there Bills before the Parliament that would establish a separate taxation small claims tribunal within the AAT and merge the Security Appeals Tribunal (which reviews decisions regarding security assessments of Commonwealth employees) into the AAT.

43. There has been a comparable growth in the number of applications handled annually by the AAT. In the reporting year 1977-78 there were 275 applications for review lodged with the tribunal, nearly half on Australian Capital Territory rating matters. The total number of lodgments did not increase appreciably until 1981-82, reaching 1,696, with 85% of lodgments being made in two new areas of jurisdiction, social security and Commonwealth employees’ compensation. The workload of the Tribunal continued thereafter to increase - 2,120 lodgments in 1984-85; 27,696 lodgments in 1986-87 (87% of which fell within the new taxation jurisdiction); 4,198 lodgments in 1989-90 (the bulk still falling within the social security, veterans entitlements, Commonwealth employees’ compensation, and taxation jurisdictions); and 4,794 lodgments in 1991-92.

44. During the life of the AAT there has also been some redefinition of its structure and procedures. These are described more fully in other sections of this report, but some of the significant developments can be noted briefly. On one side of the balance was a controversial legislative change introduced in 1987, imposing an application fee on most categories of administrative appeal. The effect of that change is perhaps reflected in areas like freedom of information appeals, where numbers of lodgments fell from a high of 318 in 1984-85 to 68 in 1990-91. On the other side of the balance, probably the period of greatest change and innovation has been occurring since 1990. Two significant events early in that period were the completion in 1991 of a report to the Commonwealth Government of a review of the Tribunal’s operations; and the adoption and refinement of a Corporate Plan

35 A Veterans’ Appeals Division was added by Regulation in 1984 (AAT Regulation 4A), and a Taxation Appeals Division by legislation in 1986 (section 19(2)(ba), Administrative Appeals Tribunal Act 1975).
36 Discussed at footnote 204 of this Report.
37 Discussed at footnotes 83 and 205 of this Report.
38 The statistics are to be found, until 1991, in the annual reports of the Administrative Review Council, and since 1991, in the annual reports of the Administrative Appeals Tribunal.
39 Administrative Appeals Tribunal Regulations (as amended by Statutory Rule No 23 of 1987).
by the Tribunal between 1990-92, committing the Tribunal ‘to achieve inexpensive and prompt, but effective and high quality, review of decisions’.\(^{41}\) Steps taken at the time which reflect that commitment included a revision of the Tribunal’s case management procedures, the adoption of Practice Directions to streamline the pre-hearing process and to apprise parties fully of the issues in dispute, the introduction of conference registrars, the use of video-conference facilities and the development of a computerised index and text retrieval system of Tribunal decisions. A prominent theme in recent years has been an emphasis upon enhancing community access to the Tribunal. A notable example of this emphasis has been the implementation of an Access and Equity program. Other significant innovations have included the introduction of mediation as a method of dispute resolution available to applicants, and the introduction of an outreach program for unrepresented parties.

**Creation of new tribunals**

45. There are now several other Commonwealth administrative tribunals and merits review structures that are integrated with or operate alongside the AAT. The purpose of the following discussion is to note briefly the circumstances surrounding the creation of these other review structures.

**Student assistance**

46. In 1974, before the creation of the AAT, the Student Assistance Review Tribunal (SART) was established to review decisions relating to student assistance and allowances such as AUSTUDY. Decisions of the SART were appealable by the student or the Department of Employment, Education and Training to the AAT. As of 1 January 1995, the SART was incorporated into the SSAT.\(^{42}\)

**Social security**

47. The first step towards the independent review of social security decisions was the creation of the SSAT, in 1975, by executive action. The function of the SSAT was confined at that time to making a recommendation to the Secretary to the Department of Social Security. From 1980, the Secretary’s decision taken on an SSAT recommendation could be appealed to the AAT. The SSAT was re-established in 1988, on a statutory basis as an independent external review body, with determinative powers.\(^{43}\) The change implemented a recommendation by the Administrative Review Council made in 1984.\(^{44}\) A decision of the SSAT can be appealed to the AAT either by the applicant or by the Department of Social Security. Another statutory change introduced in 1988 was the creation within the Department of Social Security of the position of Authorised Review Officer (ARO). Since 1993, a review by an ARO is compulsory before an application is made to the SSAT.\(^{45}\) In 1991, the SSAT’s jurisdiction was extended to decisions made by the Employment Secretary and his/her delegates under the *Social Security Act 1991*. As from 1 January 1995, review of decisions concerning student assistance decisions under the *Student and Youth Assistance Act 1973* will also be heard by the SSAT.

---


\(^{42}\) The SART was abolished as a result of amendments to the *Student and Youth Assistance Act 1973* by the *Student Assistance (Youth Training Allowance) Amendment Act 1994*.


\(^{45}\) Social Security Act 1991, section 1247.
48. In summary, there is now a formal three-tiered structure for the review of decisions on social security benefits and Jobsearch and Newstart allowances: internal review by an ARO, first-tier external review by the SSAT, and second-tier external review by the AAT. Similarly, in relation to decisions concerning student assistance decisions, the formal three-tiered structure is provided by recent legislative amendments. However, internal review is presently conducted by the delegates of the Secretary of the Department of Employment, Education and Training. There is currently a Working Party considering the question whether the Department should have decisions internally reviewed by an ARO.

49. The Administrative Review Council in its 1984 report argued that a two-tiered structure of external review was necessary in a mass-volume jurisdiction such as social security. It was emphasised that the SSAT and the AAT would be performing a different function and role. The SSAT would be expected to proceed in an informal and expeditious manner - an expectation reflected in a legislative direction to the SSAT to provide ‘a mechanism of review that is fair, just, economical, informal and quick’. The AAT would be expected to give more detailed attention to difficult cases that come before it, and to develop principles of general application. It was felt that neither tribunal could adequately perform all those functions.

Veterans’ affairs

50. There is a long tradition in Australia of a merits review structure applying to decisions about veterans’ pensions and benefits. From 1920 a decision made by Repatriation Boards (established in each state) could be appealed to the Repatriation Commission. From 1929, two kinds of independent appeal tribunals were established to hear appeals against decisions of the Commission - the War Pensions Entitlement Appeals Tribunals, and the Assessment Appeals Tribunals. Following an appraisal of the repatriation system by Mr Justice Toose in 1975, the two Appeals Tribunals were abolished and replaced by the Repatriation Review Tribunal, with limited provision for referral of cases from that tribunal to the AAT. There followed in turn two further reviews of the repatriation system in 1983 by the Administrative Review Council, and by an independent advisory committee appointed by the minister. These reviews resulted in the creation of the VRB in 1985, which inherited the outstanding caseload of the Repatriation Review Tribunal.

---

52 Repatriation Acts Amendment Act 1979, Parts IIIA and IIIB.
51. In summary, the review structure for decisions on matters such as disability pensions is along the following lines: after receipt of a claim by the Department of Veterans’ Affairs, a decision is made by the Repatriation Commission; first-tier external review of that decision can be undertaken by the VRB; and second-tier external review can be undertaken by the AAT.

52. Two further elements were added to that review structure in 1994. The newly-created bodies are the Repatriation Medical Authority, and the Specialist Medical Review Council, both constituted by specialist medical practitioners. A Statement of Principles prepared by the Authority, stating whether there is a causal link between service and disability, is a disallowable legislative instrument that is binding on the Repatriation Commission, the VRB and the AAT. The Council, at the request of the Commission, a veterans’ organisation, or a veteran, can review a Statement of Principles, or a decision of the Authority not to make a Statement. These bodies do not make decisions involving any particular cases; rather, they make delegated legislation that must be applied by decision makers where appropriate.

53. The justification given by the ARC in its 1983 report for recommending a two-tier structure of external review in the veterans’ affairs area was similar to that given in relation to social security. Repatriation, a high-volume jurisdiction, required a first-tier tribunal to decide matters speedily, informally, and quickly, and a second-tier tribunal to give more detailed attention to difficult issues of fact and law. In respect of the 1994 changes, the then Minister for Veterans’ Affairs gave as the reason for the creation of the Repatriation Medical Authority that it would provide the appropriate forum for the resolution of technical medical-scientific issues, and would ensure consistency on those issues at all levels of the determining system. The Explanatory Memorandum to the Bill commented that ‘It has become apparent that lay tribunals do not deal with medical-scientific issues consistently and that the adversarial approach to fact finding applied in administrative tribunals is inappropriate for determining medical-scientific issues that call for detailed technical knowledge.’

Immigration

54. From the time of its commencement, jurisdiction was conferred on the AAT to review decisions concerning criminal deportation, and to make a recommendation to the Minister. The first opportunity for independent merits review of other categories of immigration decisions came in 1982, with the creation by executive action of the Immigration Review Panel, with a non-departmental membership appointed by the minister. The Panel was confined to the role of making a recommendation to the minister. The lack of a statute-based system of external review was criticised in separate reports in 1985 by the Human Rights Commission and the Administrative Review Council and in 1988 by the Committee to Advise on Australia’s Immigration Policies. The result, in 1989, was the enactment of legislation to establish a new two-tier system of review: internally, by

---

57 Hansard, Senate, 12 May 1994, page 712 (Second Reading Speech of Senator Faulkner).
58 Administrative Appeals Tribunal Act 1975, Schedule Part XXII.
61 Committee to Advise on Australia’s Immigration Policies, Immigration - A Commitment to Australia, 1988, AGPS.
an officer of the Department of Immigration and Ethnic Affairs - in a unit later called the
Migration Internal Review Office; then externally, by the IRT.62

55. The establishment of the IRT in 1989 appears to have been a product of a willingness
on the part of the Commonwealth Government to subject a wider range of decisions to
external review, combined with a lack of confidence that the existing AAT was an
appropriate mechanism. This in turn reflected criticism of the AAT across a range of its
jurisdictions, in particular in its first decade of operations. These criticisms centred on
alleged excessive legalism and formality (with consequences for delay and cost of appeals),
and on alleged insensitivity by the Tribunal to the implications of its decisions for
government policy.

56. A further review of the immigration appeals system was undertaken in 1992 by the
Committee for the Review of the System for Review of Migration Decisions
(CROSROMD),63 leading to further legislative amendments.64 In 1993 the RRT was
established.65 Prior to that change, refugee decisions were the subject of inquiry and
recommendation by the Refugee Status Review Committee. Lastly, in 1992 the jurisdiction
of the AAT was extended, to give it determinative powers in relation to criminal
deportation decisions and decisions to refuse or cancel a visa of other ‘undesirable’
applicants.66

57. In summary, there are now different review structures applying to different
categories of immigration decisions.67 Certain decisions concerning visas and migrant entry
can be reviewed within a two-tier structure - internally, by an officer of the Migration
Internal Review Office, then externally by the IRT. A decision refusing a claim for refugee
entry (from 1 September 1994, a protection visa decision) can be appealed directly to the
RRT. There is no right of appeal from either the IRT or the RRT to the AAT, although both
have power to refer cases involving important principles or issues of general application to
the AAT.68 Some other immigration decisions, such as those concerning ‘criminal
deportations’, can be reviewed by the AAT. As from 1 September, 1994 there are expanded
rights of review by the IRT covering most on-shore applications for visa decisions.69

58. The creation of the IRT and the RRT has been a controversial development in the
Commonwealth tribunal system. The Administrative Review Council, on the one hand, has
been critical of the creation of both tribunals. In 1986, in a report on Review of Migration
Decisions, the Council recommended that the second tier of review in the migration
jurisdiction be provided by the AAT, rather than by a new tribunal.70 The Council referred
to the established record of the AAT as a suitable review body in migration matters, and to

63 Committee for the Review of the System for Review of Migration Decisions, Non-Adversarial Review of
64 The provisions of Migration Legislation Amendment Bill (No 5) 1994, currently before the Parliament, propose
to implement recommendations of CROSROMD. See the discussion at paragraphs 3.171- 3.179 of this Report,
and Appendix D.
65 By the Migration Reform Act 1992.
67 For a general summary, see Rodgers, T and Short, G “The Impact of Administrative Law: Immigration and the
page 243; Skehill, S “Codification of Judicial Review under the Migration Act 1958 and the New Migration
Merits Review Regime”, in Argument, S (ed) Administrative Law and Public Administration: happily married or
living apart under the same roof? 1994, AIAL.
68 Migration Act 1958, sections 381 and 443.
69 Under the changes introduced by the Migration Reform Act 1992.
the desirability as a general principle of conferring jurisdiction on the AAT rather than a specialist tribunal in the absence of special reasons to the contrary. This stance was reiterated by the Council in its annual report for 1988-89, in the following terms:

The logic of the integrated review system is that prima facie the AAT is the appropriate forum for merits review. The AAT was established as a tribunal of general jurisdiction capable of conducting quality review on the merits across a wide range of jurisdictions and drawing on the varied expertise and experience of its members. Its creation enabled merits review at the Commonwealth level to be streamlined and provided on an equitable basis. That rationale would be undermined by the creation of new review tribunals for jurisdictions that could adequately be dealt with by the AAT. ... There are some situations where the AAT does not provide the most suitable mechanism for review. [The Council then referred to instances in which it had recommended the creation of a public inquiry mechanism.] ... A different kind of question for AAT review is raised by mass volume jurisdictions. In social security, migration, veterans' affairs and students assistance matters the Council has taken the view that a two tier tribunal system represents the most cost effective way of providing review. The lower tier tribunal can be constituted to deal with applications quickly and informally. The AAT, as the upper tier tribunal can deal with the significantly fewer cases that raise difficult questions of fact and/or law and require more time and different procedures. This two tier external review model was not adopted by the Government, however, in the new arrangements for migration review implemented in 1989. Instead, the legislation provides for a specialist Immigration Review Tribunal ... with statutory internal review. This is the first significant example of fragmentation of the integrated review system and has been the cause of some concern to the Council. 71

59. The Council reiterated its concerns at the time of the creation of the RRT. In the Sixteenth Annual Report the Council summarised a view that it had expressed in advice to the Commonwealth Government:

The Council welcomed the decision to broaden the range of migration decisions to be subject to determinative merits review. The establishment of a new review tribunal, the RRT, however, was considered to be both unnecessary and undesirable, in the former instance because adequate and appropriate infrastructure for the provision of review refugee status decisions exists in the form of the IRT and in the latter instance because the proliferation of review tribunals detracts from the simplicity and efficiency of the Commonwealth administrative review system, which is one of its major strengths. 72

60. There has, on the other hand, been support expressed for the IRT in operation. The CROSROMD Committee recommended in 1992 (before the RRT had commenced operations) that the IRT be retained, concluding that it had ‘... as the final tier of review on migration decisions ... earned a reputation as a credible, fair and independent body for review of migration decisions’. 73 That conclusion was based in part on views expressed to the Committee by users of the IRT: ‘The general consensus of views was that the IRT is operating well as the final level of merits review.’ 74 By contrast, the Committee expressed some doubts as to the need to maintain a separate RRT:

[T]he Committee notes that there is potential for fragmentation of the migration jurisdiction and for undermining the integrity and consistency of decisions integral to Australia’s migration program. For this reason it believes that distinctions in the jurisdiction of tribunals must be monitored over time. In particular, as soon as the backlog is cleared in the new RRT, but in any event no later than two years into the life of the Tribunal, the Committee believes that the Government should examine the need for and viability of the RRT as a separate tribunal. Possibilities include integrating it with the IRT (perhaps with separate divisions), or integrating it and the IRT within a general AAT framework (perhaps in a separate division).75

### APPENDIX C

**List of Submissions**

<table>
<thead>
<tr>
<th>No</th>
<th>Submission From</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Townsville Community Legal Service Inc</td>
<td>09/05/94</td>
</tr>
<tr>
<td>2</td>
<td>Paul Baker</td>
<td>06/07/94</td>
</tr>
<tr>
<td>3</td>
<td>Queensland Law Society Inc</td>
<td>25/07/94</td>
</tr>
<tr>
<td>4</td>
<td>John Wade</td>
<td>25/07/94</td>
</tr>
<tr>
<td>5</td>
<td>Australian Council of Social Service</td>
<td>31/07/94</td>
</tr>
<tr>
<td>6</td>
<td>Graham Kenny</td>
<td>27/07/94</td>
</tr>
<tr>
<td>7</td>
<td>Welfare Rights Centre, Sydney</td>
<td>04/08/94</td>
</tr>
<tr>
<td>8</td>
<td>John McAuley</td>
<td>10/08/94</td>
</tr>
<tr>
<td>9</td>
<td>Confidential submission</td>
<td>15/08/94</td>
</tr>
<tr>
<td>10</td>
<td>Aboriginal and Torres Strait Islander Commission</td>
<td>17/08/94</td>
</tr>
<tr>
<td>11</td>
<td>Migration Institute of Australia</td>
<td>05/09/94</td>
</tr>
<tr>
<td>12</td>
<td>Australian Flying Corps and Royal Australian Airforce Association ACT Division Inc</td>
<td>21/10/94</td>
</tr>
<tr>
<td>13</td>
<td>Mrs MF Maber</td>
<td>07/11/94</td>
</tr>
<tr>
<td>14</td>
<td>Ron Witton</td>
<td>10/11/94</td>
</tr>
<tr>
<td>15</td>
<td>The Public Policy Assessment Society Inc</td>
<td>11/11/94</td>
</tr>
<tr>
<td>16</td>
<td>Joan Dwyer</td>
<td>16/11/94</td>
</tr>
<tr>
<td>17</td>
<td>Rosemary Balmford</td>
<td>01/12/94</td>
</tr>
<tr>
<td>18</td>
<td>Stephen Saunders</td>
<td>06/12/94</td>
</tr>
<tr>
<td>19</td>
<td>Confidential submission</td>
<td>08/12/94</td>
</tr>
<tr>
<td>20</td>
<td>Association of Pharmaceutical Manufacturers of Australia</td>
<td>08/12/94</td>
</tr>
<tr>
<td>21</td>
<td>Peter Furness</td>
<td>09/12/94</td>
</tr>
<tr>
<td>22</td>
<td>Kees de Hoog</td>
<td>14/12/94</td>
</tr>
<tr>
<td>23</td>
<td>Regular Defence Force Welfare Association</td>
<td>14/12/94</td>
</tr>
<tr>
<td>24</td>
<td>Michael de Rohan</td>
<td>13/12/94</td>
</tr>
<tr>
<td>25</td>
<td>Department of Industrial Relations</td>
<td>09/12/94</td>
</tr>
<tr>
<td>26</td>
<td>Gabriel Fleming</td>
<td>15/12/94</td>
</tr>
<tr>
<td>27</td>
<td>Ted Parker</td>
<td>21/12/94</td>
</tr>
<tr>
<td>28</td>
<td>Helen Goodman</td>
<td>21/12/94</td>
</tr>
<tr>
<td>29</td>
<td>Angela Smith</td>
<td>21/12/94</td>
</tr>
<tr>
<td>30</td>
<td>South Brisbane Immigration and Community Legal Service</td>
<td>22/12/94</td>
</tr>
<tr>
<td>31</td>
<td>Australian Securities Commission</td>
<td>23/12/94</td>
</tr>
<tr>
<td>No</td>
<td>Submission From</td>
<td>Date</td>
</tr>
<tr>
<td>----</td>
<td>---------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>32</td>
<td>Social Security Appeals Tribunal</td>
<td>29/12/94</td>
</tr>
<tr>
<td>33</td>
<td>Bar Association of Queensland</td>
<td>21/12/94</td>
</tr>
<tr>
<td>34</td>
<td>Peter Bayne</td>
<td>23/12/94</td>
</tr>
<tr>
<td>35</td>
<td>Refugee Review Tribunal</td>
<td>21/12/94</td>
</tr>
<tr>
<td>36</td>
<td>Immigration Review Tribunal</td>
<td>23/12/94</td>
</tr>
<tr>
<td>37</td>
<td>Administrative Appeals Tribunal</td>
<td>22/12/94</td>
</tr>
<tr>
<td>38</td>
<td>Australian Veterans and Defence Services Council</td>
<td>19/12/94</td>
</tr>
<tr>
<td>39</td>
<td>Returned Services League of Australia Limited - National Headquarters</td>
<td>20/12/94</td>
</tr>
<tr>
<td>40</td>
<td>Allan Ross</td>
<td>23/12/94</td>
</tr>
<tr>
<td>41</td>
<td>Agnes Borsody and three other members of the Refugee Review Tribunal</td>
<td>21/12/94</td>
</tr>
<tr>
<td>42</td>
<td>Confidential submission</td>
<td>20/12/94</td>
</tr>
<tr>
<td>43</td>
<td>Principal Member, Veterans’ Review Board</td>
<td>22/12/94</td>
</tr>
<tr>
<td>44</td>
<td>Vietnam Veterans’ Association, NSW Branch</td>
<td>22/12/94</td>
</tr>
<tr>
<td>45</td>
<td>Vietnam Veterans’ Association, National Council</td>
<td>25/12/94</td>
</tr>
<tr>
<td>46</td>
<td>Immigration Advice and Rights Centre, Sydney</td>
<td>25/12/94</td>
</tr>
<tr>
<td>47</td>
<td>Craig Colborne</td>
<td>23/12/94</td>
</tr>
<tr>
<td>48</td>
<td>Townsville Community Legal Centre</td>
<td>24/12/94</td>
</tr>
<tr>
<td>49</td>
<td>Attorney-General’s Department</td>
<td>03/01/95</td>
</tr>
<tr>
<td>50</td>
<td>Robert Todd</td>
<td>04/01/95</td>
</tr>
<tr>
<td>51</td>
<td>Australian Archives</td>
<td>22/12/94</td>
</tr>
<tr>
<td>52</td>
<td>Australian Customs Service</td>
<td>10/01/95</td>
</tr>
<tr>
<td>53</td>
<td>Department of Defence</td>
<td>11/01/95</td>
</tr>
<tr>
<td>54</td>
<td>Department of Social Security</td>
<td>11/01/95</td>
</tr>
<tr>
<td>55</td>
<td>Pat Carson</td>
<td>16/01/95</td>
</tr>
<tr>
<td>56</td>
<td>Department of Foreign Affairs and Trade</td>
<td>18/01/95</td>
</tr>
<tr>
<td>57</td>
<td>Law Council (Administrative Law Committee)</td>
<td>16/01/95</td>
</tr>
<tr>
<td>58</td>
<td>Aboriginal and Torres Strait Islander Commission</td>
<td>13/01/95</td>
</tr>
<tr>
<td>59</td>
<td>Legal Aid Commission of NSW</td>
<td>17/01/95</td>
</tr>
<tr>
<td>60</td>
<td>Department of Environment, Sport and Territories</td>
<td>19/01/95</td>
</tr>
<tr>
<td>61</td>
<td>Parish Patience Solicitors and Attorneys</td>
<td>25/01/95</td>
</tr>
<tr>
<td>62</td>
<td>Stephanie Forgie and other AAT members</td>
<td>24/01/95</td>
</tr>
<tr>
<td>63</td>
<td>Melissa Macken</td>
<td>24/01/95</td>
</tr>
<tr>
<td>64</td>
<td>Office of Multicultural Affairs</td>
<td>02/02/95</td>
</tr>
<tr>
<td>65</td>
<td>Department of Administrative Services</td>
<td>09/02/95</td>
</tr>
<tr>
<td>66</td>
<td>Repatriation Commission</td>
<td>08/02/95</td>
</tr>
<tr>
<td>No</td>
<td>Submission From</td>
<td>Date</td>
</tr>
<tr>
<td>----</td>
<td>-----------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>67</td>
<td>Law Council (Trade Practices Committee)</td>
<td>21/02/95</td>
</tr>
<tr>
<td>68</td>
<td>Department of Human Services and Health</td>
<td>22/02/95</td>
</tr>
<tr>
<td>69</td>
<td>Charles Sweeney</td>
<td>24/02/95</td>
</tr>
<tr>
<td>70</td>
<td>Department of Finance</td>
<td>03/03/95</td>
</tr>
<tr>
<td>71</td>
<td>Department of Employment, Education and Training</td>
<td>15/03/95</td>
</tr>
<tr>
<td>72</td>
<td>Auditor-General</td>
<td>24/03/95</td>
</tr>
<tr>
<td>73</td>
<td>Law Institute of Victoria</td>
<td>24/03/95</td>
</tr>
<tr>
<td>74</td>
<td>Department of Immigration and Ethnic Affairs</td>
<td>01/05/95</td>
</tr>
<tr>
<td>75</td>
<td>Victorian Immigration Advice and Rights Centre</td>
<td>29/03/95</td>
</tr>
<tr>
<td>76</td>
<td>Legacy Co-ordinating Council Inc</td>
<td>31/03/95</td>
</tr>
<tr>
<td>77</td>
<td>Veterans’ Advocacy Service (NSW)</td>
<td>05/04/95</td>
</tr>
<tr>
<td>78</td>
<td>Returned Services League - ACT Branch Inc</td>
<td>16/04/95</td>
</tr>
<tr>
<td>79</td>
<td>Russell Fox</td>
<td>27/04/95</td>
</tr>
<tr>
<td>80</td>
<td>Refugee Advice and Casework Service (Victoria)</td>
<td>01/05/95</td>
</tr>
<tr>
<td>81</td>
<td>Law Society of South Australia</td>
<td>27/06/95</td>
</tr>
</tbody>
</table>
APPENDIX D

Council Submission to Senate Committee Inquiry

26 May 1995

Senator Cooney
Chair
Senate Standing Committee on
    Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

Inquiry into the Migration Legislation Amendment Bill (No 5)1994

I refer to the Council’s submission, dated 24 March 1994, to the Committee’s inquiry into the Migration Legislation Amendment Bill (No 5) 1994 (the Bill). Since making that submission the Council has had a further opportunity to consider the Bill, and provides the following additional comments.

Procedures on hearings

2. The Council supports the proposition that merits review tribunals should be able to adopt procedures that are informal and cost-effective, provided that those procedures are fair and just. The Council notes that section 353 of the Act is consistent with this view: it provides that the Immigration Review Tribunal (the IRT), in carrying out its functions under the Migration Act 1958, must pursue the objective of providing a mechanism of review that is ‘fair, just, economical, informal and quick’. The Council understands that the current practices and procedures of the IRT are such that many applicants are able to present their cases effectively without representation. However, applicants are also able to be accompanied by a representative at an IRT hearing, and the IRT currently has a discretion to permit the applicant’s representative to present arguments and submissions on behalf of the applicant. The Council understands that these arrangements have had no adverse effect on the ability of the IRT to effectively pursue the objective spelt out in section 353 of the Act.

3. The Bill says that the Act should be amended so that if a provision of the Act provides that a person is not entitled to do something, or to be assisted or represented by another person, then, unless a provision expressly provides otherwise, the IRT does not have the power to permit the person to do that thing, or to be assisted or represented by another person.
4. Several existing and proposed provisions of the Act relating to proceedings in the IRT employ the phrase ‘is not entitled’. If the proposed amendments are enacted, one effect will be that although an applicant appearing before the IRT will be able to have an assistant present at the hearing to assist her or him, the assistant will not be able to present arguments to the IRT, or address the IRT, unless there are ‘exceptional circumstances’. Although the existence of exceptional circumstances will be a matter for the IRT to determine in each case, the second reading speech to the Bill indicates that ‘exceptional circumstances’ may be found to exist where the applicant is suffering from a mental disability, or is not proficient in English (see Hansard, House of Representatives, 9 February 1995 at 856). An applicant before the IRT will otherwise not be able to be assisted by another person.

5. In the Council’s view, the question whether it would be appropriate (having regard to the objectives of section 353) for the IRT to permit an applicant’s assistant to address the tribunal depends upon the particular circumstances of each case. To provide that the tribunal may only permit an assistant to address the tribunal if there are ‘exceptional circumstances’ (in the sense indicated in the second reading speech) might result in unfairness to the applicant in some cases. There may be circumstances that can not properly be described as ‘exceptional’, but in which the IRT would benefit from hearing from the assistant on a particular point that has arisen in the proceedings (for example, to provide suggestions on possible lines of inquiry, or to contribute to discussion on procedural issues that may be within the assistant’s experience before the tribunal). In the Council’s view it would be possible for this level of participation by an assistant to occur without the proceedings becoming overly legalistic or adversarial, as current IRT practice would seem to demonstrate.

6. The Bill also provides for the narrowing or removal of other discretions that the IRT currently enjoys in relation to the procedure to be followed during hearings. In particular, the Bill provides that a person should not be entitled to examine or cross-examine any person appearing before the IRT to give evidence. However, there may be cases in which it would assist the hearing if, for example, the applicant were permitted to ask questions of a person appearing to give evidence.

7. The Council therefore supports the retention of the IRT’s existing discretions relating to the procedures to be observed during hearings, including the discretion to determine the extent to which an applicant’s assistant should be able to address the tribunal or advance arguments on behalf of the applicant. The Council does not consider that this discretion should only be able to be exercised in ‘exceptional circumstances’. The Council considers that the IRT’s broad discretion to determine the level of participation of an applicant’s assistant enhances, rather than detracts from, the IRT’s capacity to meet its statutory objective.

8. It follows that the Council considers that any narrowing of the IRT’s discretions, such as that proposed by the Bill, would need to be justified by compelling evidence that the existing discretions are impeding the IRT’s capacity to meet its statutory objective.

9. If, however, the Committee is minded to recommend that the discretion be narrowed, then the Council would recommend that this should be achieved not by expressly prohibiting the tribunal from adopting the relevant practices, but by using more direct language (for example, by using the phrase ‘shall not’ in place of ‘is not entitled’).
Non-disclosure of information

10. The Council also notes that the Bill proposes amending the Act to insert a new section 375A and to amend section 376. The effect of these amendments is that in certain circumstances where the Minister has signed a certificate declaring that the disclosure of a document or information to any person other than the IRT would be contrary to the public interest (for any reason), the IRT will be unable to disclose to the applicant (or any other person) a document or information to which such a certificate applies.

11. In its forthcoming report on Commonwealth review tribunals, the Council will examine the operation of provisions that limit the ability of tribunals to disclose to applicants information that is in the possession of the tribunal and which is relevant to the issues in the case. At this stage the Council would like to note that although this question raises difficult issues relating to the protection of the rights and interests of third parties (including privacy rights), one effect of the proposed amendment is that the IRT may be required to decide cases on the basis of information that it is unable to disclose to the applicant, even though the IRT might consider that the principles of fairness would require disclosure to the applicant.

12. The Council further notes that the issue of a Ministerial certificate is not limited to circumstances of utmost importance (for example, for the protection of defence interests, national security or international relations), and that the Bill makes no provision for review of a Ministerial decision to issue a certificate.

Other provisions

13. The Council would also like to note its in-principle support for the remaining provisions of the Bill. In particular, it is pleased that its advice to the Minister for Justice of 11 October 1993 (copy attached) that the remuneration of members of the IRT and the Refugee Review Tribunal be determined on the same basis as members of other Commonwealth merits review tribunals has been taken up in the Bill.

Yours sincerely

Dr Susan Kenny
President
<table>
<thead>
<tr>
<th></th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>10</th>
<th>11</th>
<th>12</th>
<th>13</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>02</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>03</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>04</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>05</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>06</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>07</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>08</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>09</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>11</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>12</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>13</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>14</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>15</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>16</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>17</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>18</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>19</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>20</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>21</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>22</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>23</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>24</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>25</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>26</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>27</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>28</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>29</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Appendix E.1
Notes to Appendix E.1 - Tribunal Expenditure by Category 1993/94

1. Most SART related expenditure cannot be identified since the tribunal was administered as part of the Department of Employment, Education and Training.
2. 1993/94 was the first year of operation of the RRT, and some of the expenditure reflects start-up costs which will not continue.
3. Including $49,000 for casual staff recorded by IRT in administration.
4. Includes higher than market rate rents for premises in Commonwealth Court buildings.
5. Estimate by the Department of Social Security - the Department handles property operating expenses for the SSAT.
6. Included rent concessions which do not apply in 1994/95.
7. Estimate by the Department of Social Security - the Department handles property operating expenses for the SSAT.
8. Another $54,000 worth of computer services were provided free by the Attorney-General’s Department. Includes $22,000 for NOMAD system from the Department of Finance.
9. Another $171,000 worth of furniture was provided free by the Attorney-General’s Department.
10. Excludes members’ relocation expenses which in this year were paid out of salaries allocation.
11. One third of the library expenditure is for collections in individual members’ chambers. 1993/94 expenditure was less than usual due to pre-purchasing in 1992/93.
12. Paid by the Department of Veterans’ Affairs - estimated to be $7,000.
13. Total payments to consultants $45,000 - included in computer services, training and library amounts.
15. Major items include Auscript services ($566,000); access and equity ($32,000); industrial democracy ($11,000); decision indexing ($14,000) and senior officer expenses ($15,000).
16. Senior officer expenses of $10,000 are included in one of the other categories and the total.
17. Includes senior officer expenses ($11,000).
18. Revenue from application (filing) fees is paid directly to consolidated revenue and is not available to the tribunal. Other minor revenue can be used to offset expenditure.
# Appendix E.2

<table>
<thead>
<tr>
<th></th>
<th>AAT</th>
<th>SSAT</th>
<th>SART</th>
<th>VRB</th>
<th>IRT</th>
<th>RRT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges (part-time)</td>
<td>15</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time Members</td>
<td>19</td>
<td>23</td>
<td></td>
<td>5</td>
<td>11</td>
<td>41</td>
</tr>
<tr>
<td>Part-time Members</td>
<td>65</td>
<td>200</td>
<td>90</td>
<td>46</td>
<td>17</td>
<td>14</td>
</tr>
<tr>
<td>Total Members</td>
<td>99</td>
<td>223</td>
<td>90</td>
<td>51</td>
<td>28</td>
<td>54</td>
</tr>
<tr>
<td>Staff Full &amp; Part-time</td>
<td>122</td>
<td>36</td>
<td>6</td>
<td>54</td>
<td>45</td>
<td>131</td>
</tr>
<tr>
<td>% members Part-time</td>
<td>81%</td>
<td>90%</td>
<td>100%</td>
<td>90%</td>
<td>61%</td>
<td>26%</td>
</tr>
<tr>
<td>No of registry locations</td>
<td>8</td>
<td>8</td>
<td>6</td>
<td>7</td>
<td>6</td>
<td>2</td>
</tr>
</tbody>
</table>
INDEX

References are to paragraph numbers unless otherwise indicated

access and accessibility, 2.15, 5, 8.83-100
  Administrative Appeals Tribunal (AAT), 3.20
  as objective of merit review system, 2.5, 2.8, 2.10-2.12: being met?, 2.21, 2.24-2.26, 2.29
public justice, 3.113-3.131
Review Panels, 8.42-8.68
tribunal offices (registries), 5.38-5.50, 8.112-8.114
  see also fairness
access to information principles, 5.6, 5.83-5.85
accountability, 2.11-2.12, 2.14-2.15, 5.77
  see also openness
administration, 2.31, 7, 8.5-8.41
Administrative Appeals Tribunal (AAT), 8.4-8.5
  agency documentation, 3.73, 3.78
  agency participation in review process, 3.190, 3.191
  Annual Report, 5.93-5.94
  appeals from, 2.28, 3.6-3.7: see also judicial review
  appeals to, 2.28, 3.6
  applicants guidance and support, 5.51
  application fees, 5.31-5.32, 5.36-5.37
  changes made/proposed since inquiry commenced, 1.11,1.12
  contractors, 7.25
disclosure standards, 3.108-3.111
dispute resolution techniques, 3.138-3.151, 3.187
exclusion of material for consideration by, 3.86-3.92
funds, 7.16: workload formulas, 7.12
hearing room location, architecture and layout, 5.45-5.46
information disclosure, 3.122-3.123
Justice Statement announcement, 5.5
legal aid, 5.71
legalistic approach, 2.23, 3.20, 8.39
management, 8.40
members, 4.48, 4.50-4.51, 4.57: judicial, 4.18-4.19; training and development, 4.86, 4.91
notification provisions contained in other legislation, 5.16
openness, 3.116, 3.117
panel composition, 3.57, 3.59, 3.62-3.69
perception as part of court system, 2.44
processes, 3.20, 3.33-3.34, 3.39-3.41
question for determination, 2.5n
reasons for decisions, 3.196, 3.201, 3.210
regard to government policy, 2.60
representation before, 3.111, 3.186-3.187, 5.51
research and administrative support, 4.93
resource sharing, 7.28
review of Freedom of Information (FOI) exemptions, 3.130-3.131
Security Appeals Division, 1.11, 3.131, 8.16
staff, 7.33, 7.38
staff costs, 7.23
statutory objectives, 2.37, 2.39
tape-recording of hearings, 5.66, 5.69
time limits, 5.27, 5.29
timeliness, 2.23, 2.29
section 48 reviews to, 1.21
Administrative Appeals Tribunal (AAT) Act
appeals to Federal Court, 8.73-8.75
agency documentation provision, 3.73
notification standards, 5.11, 5.14-15, 5.17, 5.22
power to strike out frivolous and vexatious applications, 5.33
reasons statement, 3.202-3.203
rights to appear and be represented, 3.111
Administrative Decisions (Judicial Review) Act 1977, 3.6, 8.73-8.75
reasons statement, 3.202-3.203
Administrative Review Tribunal, Chapter 8
administrative support, 4.93-4.96
adversarial and non-adversarial approaches, 3.20, 3.33-3.46
representation of applicants, 3.169-3.170
agencies
culture, 2.26. 3.87, 6.7-12: internal review, 6.60-6.63
decision makers, 2.53-2.63
decision making, 6, 8.108-8.111: as objective of merit review system, 2.5, 2.7, 2.10-2.12,
2.25-2.26, 2.42
documentation, 3.71-3.81, 5.19-5.21, 5.24-5.26
links (financial and administrative), 7.13-7.15, 7.36-7.39, 8.36-8.41
participation in review process, 3.190-3.195, 8.94
reconsideration, 3.97-3.98
responses to review tribunal decisions, 2.26, 6.36-6.41
‘agency’ arrangements, 5.40
alternative dispute resolution (ADR), 3.138-3.151, 8.71
antagonism to, 3.187
Annual Reports, 5.93-5.94
‘appeal fatigue’, 6.53, 8.85
appeals
inclusion in names of review tribunals, 2.44
against review tribunal decisions, 2.28, 3.6-3.11
see also judicial review
appearance rights of agencies, 3.190-3.195, 8.94
applicants
guidance and support, 5.51-5.70
information designed for, 5.79
representatives, 3.163-3.189
application fees, 5.31-5.37
internal reviews, 6.58-6.59
applications for review, 5.24-5.37, 8.65-8.67
form, 5.19-5.21, 5.24-5.26
appointment of tribunal members, 4.21-4.70, 8.28-8.33
appraisal of members’ performance, 4.74-4.83
approaches taken, 2.21, 2.23, 3.33-3.46
  awareness of judicial review, 3.6-3.11
  and perception that tribunal part of court system, 2.44
  statutory objectives and, 2.39
see also informality
ASIO file review, 1.11, 3.131, 8.16
assessment panels, 4.41-4.47, 4.63
Attorney-General, 4.48, 4.50, 4.51
  Code of Practice, 5.11, 5.15-5.18, 5.22
  public interest certificates, 3.122-3.123
Attorney-General’s Department, 4.49, 8.39-8.40
Australian Industrial Relations Commission, 1.21
Australian Security Intelligence Organisation file review, 1.11, 3.131, 8.16
Australian Taxation Office internal review, 1.12, 6.44-6.46
availability of public information, 3.21, 5.76-95, 8.84
availability of tribunal decisions, 5.74-5.76
awareness, 5, 8.84-8.85
  of judicial review, 3.6-3.11
benchmarking, 5.90
bias, see fairness
Brandy v Human Rights and Equal Opportunity Commission, 2.47-2.48, 3.162

  case management practices, 6.64-6.65
charters, 5.86-5.87
  Administrative Appeals Tribunal, 5.5
citizenship decisions, 3.41
colocation of registries, 5.41, 5.44
Code of Practice, 5.11, 5.15-5.18, 5.22
coherecy, 2.5, 2.13, 2.15
collective decision making, 3.152-3.157
Commercial Division (ART), 8.15
commitment (agencies), 6.15-6.17
communication within agencies, 6.18-6.31
community information, 3.21, 5.76-5.94
  establishment of Administration Review Tribunal (ART), 8.84
community liaison, 5.95
composition of panels, 3.47-3.70
conference registrars, 1.12
conferences technique, 3.138-3.151
confidentiality, 3.120-3.131
  resource sharing implications, 7.30
consistency of decision making, 6.36-6.41
  agencies, 2.26, 2.56-2.57
  collective decision making, 3.153
  community liaison, 5.95
  internal review, 6.51
  tribunals: as objective of merits review system, 2.11, 2.23, 2.28 (normative effect)
consistency of record keeping, 5.89
constitution of tribunal panels, 3.61-3.70
constitutional law, 2.43-2.52
continuing education, see training and development contractors, 7.25-7.26
correct and preferable decision, 2.5, 2.7-2.12, 2.24-2.26, 2.28
alternative dispute resolution, 3.145
correct and reasonable decision, 2.17-2.18
cost savings opportunities, 7.22-7.32, 8.101-8.107
hindrance to cultural change, 6.10
costs, 2.30, 7.4-7.7
awarded, 3.158-3.162
Council recommendations, 7.45-7.47
indemnity, 8.69-8.70
interpreters and translation, 5.58-5.65
legal aid and assistance, 5.71-5.73
multi-member panels, 3.51-3.53, 3.55-3.56
office accommodation, 5.39
Review Panels, 8.106-8.107
statutory objectives, 2.36
veterans' medical reports, 3.89
courts, 3.10
difference from tribunals, 2.43-52, 3.8
similarities with tribunals, 3.29-3.32
see also judicial review
credibility, see accountability; openness criminal deportation decisions, 3.41
criticisms of merits review system, 2.23, 2.31, 2.34
appointment of members, 4.28
internal review, 6.50, 6.54
styles and approaches, 3.43-3.44
cross-membership, 4.69-4.70, 8.28-8.29
culture (agency), 2.26, 3.87, 6.7-6.12
internal review, 6.60-6.63
culture (tribunals), 3.6-3.7
decision making, see consistency of decision making; quality of decision making ‘decision paralysis’, 3.52
decisions
availability, 5.74-5.76
openness, 3.113-3.131
reasons, 3.196-3.212: provided by agency, 3.80
decisions ‘on the papers’, 3.133-3.137
delays, see timeliness
Department of Administrative Services, 4.49, 8.36
Department of Employment, Education and Training internal reviews, 1.12, 6.44, 6.48
Department of Immigration and Ethnic Affairs
agency commitment, 6.16
agency documentation, 3.75
appearance in IRT and RRT, 3.190, 8.94
circulation of decisions, 6.25
internal reviews, 6.44
Department of Social Security, 3.166
  circulation of decisions, 6.23
  internal reviews, 6.44, 6.48, 6.52
  participation in review process, 3.190, 3.191
Department of the Prime Minister and Cabinet, 8.36
Department of Veterans’ Affairs, 1.12, 3.86
  agency documentation, 3.78
  circulation of decisions, 6.24
  participation in review process, 3.191
deportation decisions, 3.41
Deputy Presidents (ART), 8.26-8.28, 8.30
design
  applicants guidance material, 5.3, 5.52
  tribunal premises, 5.45-5.50
development and training, see training and development disclosure, 3.101-3.131
discretions, see powers and discretions
dispute resolution, 3.132-3.151
Division Heads (ART), 8.26
Divisions (ART), 8.10-8.20
documentation (agency), 3.71-3.81
  applications for review form, 5.19-5.21, 5.24-5.26
Drake v Minister for Immigration and Ethnic Affairs, 2.5n
efficiency in resource use, 3.146, 8.103-8.105
  as objective of merit review system, 2.5, 2.7, 2.13, 2.16
  hindrance to cultural change, 6.10
  multi-member panels, 3.52
  staff, 7.23
electronic information, 5.75, 5.83, 7.32
enforcement, 2.47-2.48
  cost orders, 3.162
equity, see fairness
ethnic communities, 5.3-5.4
  access to public information, 5.83
  interpreters and translation, 5.58-5.65
evidence, 3.8, 3.99-3.100
  referred to in statements of reasons, 3.206
exclusion of material, 3.82-3.96
exclusion of representation, 3.167-3.179
Executive, 7.48-7.51, 8.35
experience of members, see qualifications of members
facsimile communication, 5.24, 5.42
fairness, 2.13
  as objective of merit review system, 2.10-2.12, 2.41: being met?, 2.21, 2.23,
    2.24-2.26, 2.28, 2.31
  alternative dispute resolution, 3.142
  decisions not binding precedent, 6.36
disclosure, 3.103, 3.108
  internal review, 6.51
new and relevant information, 3.93
procedural, 3.4-3.11, 3.43-3.46, 3.103
see also access and accessibility
fares (travel expenses), 5.38, 5.53, 7.24
Federal Court review, 2.28, 8.73-8.77
influence on content of reasons statements, 3.211-3.212
procedural fairness, 3.6-3.11
fees, 5.31-5.37
internal reviews, 6.58-6.59
members, 7.21
payment, 5.26
feedback into agency decision-making processes, 5.95, 6.13-6.35
as objective of merit review system, 2.10-2.12
final merits review, 3.15-3.17
finance, 2.31, 7.4-7.32, 8.36-8.41
see also costs
formality, see informality
review of decision, 3.130-3.131
fees, 6.58
frivolous applications, 5.33
full-time tribunal members, 4.33, 4.67-4.68
research and administrative support, 4.93
funding, see finance

gathering information, 3.71-3.112
General Division (ART), 8.17
goals of merits review system, Chapter 2
government policy
improvement as objective of merit review system, 2.5
regard given to, 2.17-2.18, 2.59-2.61: by agency decision makers, 2.56
guidance for applicants, 5.51-5.70

hierarchy of members, 3.63, 8.23
Human Rights and Equal Opportunity Commission, 2.47

immigrants, 5.3-5.4
access to public information, 5.83
interpreters and translation, 5.58-5.65
Immigration Review Tribunal (IRT), 1.11, 8.13
administrative links, 8.37
agency documentation, 3.75, 3.78
agency participation in review process, 3.190-3.192, 8.94
Annual Report, 5.93-5.94
application fees, 5.31-2, 5.36-5.37
appointment process, 4.29-4.34.34, 4.38
consistency of decision making, 2.28
dispute resolution options, 3.135, 3.150
funds, 7.16: workload formulas, 7.12
information disclosure, 3.120, 3.124-3.127
interpreters, 5.59
investigative approach, 2.21
judicial review of decisions, 3.6-3.7
new issues and information, 3.111-3.112
openness, 3.116, 3.117
panel composition, 3.54, 3.57
processes, 3.5, 3.17, 3.35, 3.39-3.40
remuneration of members, 4.72
research and administrative support, 4.94
review of decisions, 3.6-3.11, 8.110
representation before, 3.165, 3.171-3.175
staff, 7.33, 7.37
statutory objectives, 2.36, 2.39
tape-recording of hearings, 5.66
time limits, 5.27, 5.29
timeliness, 2.29
independence, 8.80-8.82
appointment processes, 4.4-4.46, 4.28
as objective of merit review system, 2.13-2.14, 2.31
internal review, 6.60-6.63
members’ performance appraisal, 4.76
informality
as objective of merit review system, 2.10-2.12, 2.21, 2.39
establishment of Administrative Review Tribunal (ART), 8.86-8.89, 8.93-8.97
applications for review, 5.24
procedural, 3.8, 3.12-3.46
resource sharing implications, 7.30
see also approaches taken
information, Chapter 5, 8.84-8.85
circulation within agencies, 6.13-6.31
electronic, 5.83, 7.32
management, 7.8-7.9
see also notification of review rights
information access principles, 5.83-5.85
information disclosure, 3.101-3.131
information gathering, 3.71-3.112
Information Privacy Principles, 3.114-3.115
inquisitorial approaches, 3.35-3.37
internal review, 1.12, 6.42-6.67
interpreters, 5.58-5.64
investigative approach, 2.21, 3.45-3.46
agency documentation, 3.75
judicial power, 2.43-2.52
judicial review, 2.28, 8.73-8.77
influence on content of reasons statements, 3.211-3.212
procedural fairness, 3.6-3.11
judicial members, 4.18-4.20 (also chapter 8)
justice, 2.39
public, 3.113-3.131
Law and Justice Legislation Amendment Bill (No 2) 1995, 3.160-3.162
lawyers, 3.180-3.184, 3.187
layout of tribunal premises, 5.45-5.50
legal aid and advice, 5.71-5.73, 8.69-8.70
legal skills of members, see qualifications of members
legislation, 8.115-8.117
improvements to, as objective of merit review system, 2.5, 2.11-2.12
see also statutory provisions
legislative objectives, 2.35-2.42, 8.19
liaison between tribunals, 7.48-7.51
liaison with the community, 5.95
limiting access to Review Panels, 8.49-8.68
location of tribunal offices, 5.38-5.44, 8.112-8.114
low income earners, 5.3
application fees, 5.31, 5.35-5.36
legal aid and assistance, 5.71-5.73, 8.69-8.70
management, Chapter 7, 8.23-8.41
mediation, 3.138-3.151, 8.71
medical causation cases (veterans), 3.86-3.96
Members (ART), 8.23, 8.28
membership, Chapter 4, 8.23-8.35
panel composition, 3.47-3.70
salaries and sitting fees, 7.21
training, 3.45
merits review
definition, 2.2
Migration Act 1958, 2.34
internal review provisions, 6.44: fees, 6.58
judicial review provisions, 8.75-8.77
notification standards, 5.12
right to interpreter, 5.59
secrecy provisions, 3.120
Migration Agents Registration Scheme, 3.188-3.189
Migration Division, 8.13-8.14
migration jurisdiction, 1.11
procedures followed in reaching decisions, 3.5
timeliness, 2.29
see also Immigration Review Tribunal; Refugee Review Tribunal
Migration Legislation Amendment Bill (No 5) 1994, 3.171-3.175
Minister for Immigration and Ethnic Affairs, 3.124
multi-member panels, 3.49-3.58, 3.67-3.69
new information and issues, 3.82-3.100, 3.111-3.112
non-adversarial and adversarial approaches, 3.33-3.46
non-English-speaking background, people from, 5.3-5.4
access to public information, 5.83
interpreters and translation, 5.58-5.65
normative effect, 2.11, 2.23, 2.28
notification of review rights, 5.9-5.23
   as objective of merit review system, 2.10

objectives of merits review system, Chapter 2
*Occupational Health and Safety (Commonwealth Employment) Act 1991* section 48 reviews, 1.21
office accommodation, 5.38-5.50, 8.112-8.114
Ombudsman, 5.17, 5.21, 6.41
openness, 2.15, 3.113-3.131, 5.77
   as objective of merit review system, 2.11-2.12, 2.31
oral and written reasons for decisions, 3.196-3.212
oral hearings, 3.133-3.137
organisation, Chapter 8
   for responding to tribunal decisions, 2.102.12, 6.13-6.35
overheads, 7.27-7.31

panel composition, 3.47-3.70
part-time tribunal members, 4.33, 4.67-4.69
performance appraisal of members, 4.74-4.83
performance evaluation, 5.90
   information, 5.81-5.82
   internal reviews, 6.56
permission for review (Review Panels), 8.57-8.68
policy
   improvement as objective of merit review system, 2.5, 2.11-2.12
   regard given to, 2.17-2.18, 2.59-2.61: by agency decision makers, 2.56
portfolio responsibility, 7.13-7.15
powers and discretions, 2.3, 2.53-2.63
   award costs, 3.158-3.162
   evidence, 3.99-3.100
   judicial, 2.43-2.52
   President (ART), 8.24-8.25
   strike out frivolous and vexatious applications, 5.33
   to summon, 7.55
President
   Administrative Appeals Tribunal (AAT), 4.19
   Administrative Review Tribunal (ART), 8.23-8.25, 8.29, 8.30, 8.54: permission
to review, 8.60-8.61
privacy, 3.113-3.119, 3.166
   resource sharing implications, 7.30
procedural fairness, 3.4-3.11, 3.43-3.46
   disclosure to applicants, 3.103
procedural formality, 3.12-3.32
processes, Chapter 3, 8.86-8.89
   advice and guidance, 5.57
   see also approaches taken
professional development of members, 3.45, 4.68, 4.84-4.92
public information, 3.21, 5.76-5.95, 8.84
public interest certificates, 3.122-3.128
public interest ground cases, 8.57-8.68
   support and guidance, 5.54
public justice, 3.113-3.131
*Public Service Act* 1922, 7.34, 7.37-7.38
publish and report obligations, 5.93-5.94

qualifications of members, 3.45, 4.8-4.20
  Administrative Review Tribunal (ART), 8.32-8.33
  Immigration Review Tribunal (IRT), 4.31
quality of Administrative Review Tribunal (ART) decisions, 8.100
quality of agency decision making, Chapter 6, 8.108-8.111
  as objective of merit review system, 2.5, 2.7, 2.10-2.12, 2.42: being met?, 2.25-2.26

*Racial Discrimination Act* 1975, 2.47
re-appointment of tribunal members, 4.57-4.66
*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*, 2.60
reasons for decisions, 3.196-3.212
reconsideration by agency, 3.97-3.98
record-keeping, 5.89
recruitment of staff, 7.40-7.42
Refugee Review Tribunal (RRT), 8.13-8.14
  administrative links, 8.37
  agency documentation, 3.78
  agency participation in review process, 3.190-3.192, 8.94
  Annual Report, 5.93-5.94
  application fees, 5.37
  consistency of decision making, 2.28
  dispute resolution options, 3.135, 3.150
  funds, 7.16
  information disclosure, 3.105, 3.120, 3.124, 3.127
  interpreters, 5.62
  investigative approach, 2.21, 2.23
  judicial review of decisions, 3.6-3.7
  members’ concerns about, 2.23
  new issues and information, 3.111-3.112
  openness, 3.116
  panel composition, 3.53, 3.54, 3.58
  processes, 3.5, 3.17, 3.35, 3.39-3.40
  registries, 5.38
  remuneration of members, 4.72
  research and administrative support, 4.94
  review of decisions, 3.6-3.11, 8.110
  representation before, 3.165
  staff, 7.33, 7.37
  statutory objectives, 2.36, 2.39
  tape-recording of hearings, 5.66
  time limits, 5.29
  timeliness, 2.29

Registrar
  Administrative Appeal Tribunal (AAT), 7.34
  Administrative Review Tribunal (ART), 8.34, 8.54
  registrars (conference), 1.12
registries, 5.38-50, 8.112-8.114
relationships, Chapter 8
remitting cases for agency reconsideration, 3.97-3.98
remuneration of tribunal members, 4.71-4.83, 7.21
part-time, 4.68
Repatriation Commission, 3.87, 6.47
reports, 5.93-5.94
financial, 7.8-7.9
representation, 3.163-3.189
Administrative Appeals Act, 3.111
applicants support and guidance, 5.51, 5.55
research and administrative support, 4.93-4.96
resolution options, 3.132-3.151
resource sharing, 7.27-7.31
resource use, see efficiency in resource use
responsibility for tribunal appointments, 4.36, 4.48-4.52
responses to review tribunal decisions, 2.26, 6.36-6.41
responsiveness, 2.5, 2.8, 2.10-2.12, 2.29
Justice Statement announcement, 5.5
community liaison, 5.95
see also access and accessibility review (internal), 1.12, 6.42-6.67
review applications, 5.24-37, 8.65-8.67
form, 5.19-5.21, 5.24-5.26
Review Panels, 8.8, 8.21, 8.42-8.72
appointment to, 8.30-8.31
costs, 8.106-8.107
rights of review, notification of, 5.9-5.23
rights to representation, 3.164-3.165
Administrative Appeals Act, 3.111
rights to seek review, 2.10, 8.42-8.72
savings opportunities, 7.22-7.32, 8.101-8.107
hindrance to cultural change, 6.10
secrecy provisions, 3.120
Security Appeals Division (AAT), 1.11, 3.131
Security Division (ART), 8.16
selection and appointment of tribunal members, 4.21-4.70
Senior Members (ART), 8.23, 8.28, 8.30
sharing overheads, 7.27-7.31
skills of members, see qualifications of members
Small Taxation Claims Division, 8.15
small taxation claims tribunal (AAT), 1.11
Social Security Act 1991, 2.34
administration requirement, 6.16
internal review provisions, 6.44
notification standards, 5.12
secrecy provisions, 3.120
time limits, 5.27
Social Security Appeals Tribunal (SSAT), 1.11, 8.12
administrative links, 8.37
agency documentation, 3.78
agency participation in review process, 3.190-3.192
Annual Report, 5.93-5.94
application fees, 5.37
applications for review, 5.24
dispute resolution options, 3.134, 3.150
funding arrangements, 7.18
information disclosure, 3.120, 3.128
interpreters, 5.64
investigative approach, 2.21
openness, 3.116
panel composition, 3.57, 3.58
perception as part of court system, 2.44
power to summon, 7.55
processes, 3.16-3.17, 3.35
registries, 5.38, 5.39, 5.42
research and administrative support, 4.95
review of decisions, 3.6, 3.16, 8.49, 8.110
representation before, 3.165
staff, 7.33, 7.36
statutory objectives, 2.36, 2.39
tape-recording demand, 5.67
telephone hearings, 5.42
time limits, 5.29
timeliness, 2.29
travel expenses, 5.38
speed, see time limits; timeliness
staff, 7.33-7.44, 8.23-8.34
costs, 7.23
staggered appointments, 4.53
State administrative review tribunals, 1.29
functions invested in, 2.45
statements of reasons, 3.196-3.212
provided by agency, 3.80
statistical information, 5.88-5.92
statutory objectives, 2.35-2.42
statutory provisions, 8.115-8.117
agency commitment, 6.16
agency documentation, 3.72-3.73
application for review form, 5.24
dissatisfaction with, 2.23, 2.34
information disclosure, 3.120-3.128
internal review, 6.44-6.45
notification standards, 5.9-5.23
openness of proceedings and decisions, 3.116
panel composition, 3.58-3.60
reasons statements, 3.202
report and publish, 5.93-5.94
rights to appear and be represented, 3.111
rights to interpreter, 5.59
strike out frivolous and vexatious applications, 5.33
strategies of merits review system, Chapter 2
structure, Chapter 8
for responding to tribunal decisions, 2.10-2.12, 6.13-6.35

*Student and Youth Assistance Act 1973*, 6.44
Student Assistance Review Tribunal (SART), 1.18, 3.190
summon, power to, 7.55
support for applicants, 5.51-5.70

tape-recording, 5.66-5.69
taxation decisions, 1.11, 4.50, 8.15
telephone contact/hearings, 5.24, 5.42-5.43
internal reviews, 6.48, 6.64
tenure of appointments, 4.54-4.56
terms of appointments, 4.54-4.70
test applied to agency documentation, 3.73-3.74
third party use of tape-recordings, 5.69
time limits
agency documentation delivery, 3.78-3.79
applications for review, 5.27-5.30
internal reviews, 6.55-6.57
response to disclosed information, 3.107
timeliness, 8.102
as objective of merit review system, 2.10, 2.23, 2.29, 2.39
performance standards for internal review, 6.56

training and development
‘agency’ arrangements, 5.40
agency staff, 5.57, 6.32-6.35
applicants’ representatives, 3.185-3.189
tribunal members, 3.45, 4.68, 4.84-4.92
tribunal staff, 7.43-7.44
transcripts, 5.70
translation, 5.58-5.65
travel expenses, 5.38, 5.53, 7.24
Tribunals Act, 8.115-8.117
Tribunals Executive, 7.48-7.51

*Veterans’ Entitlements Act 1986*
agency documentation provision, 3.73
internal review provisions, 6.47
notification standards, 5.12
reimbursement of medical report costs, 3.89
Veterans’ Payments Division (ART), 8.12, 8.93, 8.99
Veterans’ Review Board (veterans’ jurisdiction), 1.11, 8.12
administrative links, 8.37
agency documentation, 3.73, 3.78
agency participation in review process, 3.190, 3.191
Annual Report, 5.93-5.94
application fees, 5.37
dispute resolution options, 3.134, 3.150
funding arrangements, 7.18
information disclosure, 3.128
legal aid, 5.71
new information, 3.86-3.96
openness, 3.116
panel composition, 3.58, 3.59
processes, 3.16-3.17, 3.35
registries, 5.38, 5.39
remitting cases for agency reconsideration, 3.98
representation before, 3.165, 3.183, 3.186
research and administrative support, 4.95
review of decisions, 3.6, 3.16, 8.49, 8.110
staff, 7.33, 7.36
statutory objectives, 2.38, 2.39
tape-recording of hearings, 5.66
time limits, 5.29
travel expenses, 5.38
vexatious applications, 5.33
video-conference facilities, 5.43

waiver of fees, 5.31, 5.35-5.36
Welfare Rights Division (ART), 8.12, 8.93
welfare rights jurisdiction, see Social Security Appeals Tribunal
women, 5.3-5.4
workloads, 4.33, 7.12-7.15
written reasons for decisions, 3.196-3.212
provided by agency, 3.80