

Standing Committee on Law and Justice

Opportunities to consolidate tribunals in NSW

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Executive summary

This Inquiry has required the Committee to consider proposals for significant changes in the administrative justice system of New South Wales – options for consolidating tribunals.

Tribunals form an integral part of the New South Wales justice system. They offer a low cost and timely recourse for a variety of civil disputes. There are a number of decision making bodies within New South Wales that are considered tribunals.

Stakeholders described the current tribunal system as complex and bewildering. Potentially, some level of consolidation may reduce this complexity and we have recommended that the NSW Government pursue this approach. The idea of consolidating tribunals is not new to New South Wales. The Administrative Decisions Tribunal (ADT) and the Consumer Trader and Tenancy Tribunal (CTTT) are the result of consolidating tribunals and more recently, two employment related tribunals were merged into the Industrial Relations Commission (IRC) in 2010. Other Australian jurisdictions including Victoria, Western Australia, the Australian Capital Territory and Queensland all have ‘super’ tribunals.

Options for consolidation

The Committee was provided with three options for consolidation that were presented in the Ministerial Issues Paper that was provided to the Committee with the terms of reference.

Option 1 proposes renaming the IRC the ‘Employment and Professional Services Commission’ and expanding its jurisdiction to include the Equal Opportunity Division of the ADT and the health professional tribunals. There was general qualified support for this option as a more acceptable choice than the other options. Some stakeholders were against the IRC being changed in any way. A number of others were of the view that other jurisdictions could be effectively incorporated into the IRC.

Option 2A proposes adding to the ADT’s jurisdiction and renaming it the NSW Administrative and Employment Tribunal (NEAT). All the functions of the IRC would also transfer to the ADT, in effect closing the IRC. All the functions of the Industrial Court would transfer to the Supreme Court. Option 2B is the same as Option 2A but would create a single Employment and Professional Discipline Division within the new NEAT. Few stakeholders favoured these options over Option 1.

Option 3 involves creating a comprehensive NSW Civil and Administrative Tribunal called NCAT which would consolidate the CTTT, the ADT, Guardianship Tribunal, Mental Health Review Tribunal, health professional tribunals and employment functions of the IRC.

There was some support for Option 3, however, some stakeholders did raise concerns about the potential impacts of this level of consolidation. In particular, these stakeholders were concerned that the consolidation of the tribunals mentioned in this option could create a tribunal so large that some issues would be swamped by claims in the current jurisdiction of the CTTT which could also lead to increased cost and delay. Other concerns included that consolidation on a large scale might lead to a loss of specialist expertise in the various areas of law that each of the current tribunals cover.

On the other hand, those in support of Option 3 pointed to possible improvements to access to justice and efficiencies from the creation of a ‘one stop shop’.

The Committee was also presented with alternatives to those options contained in the Issues Paper, which we believe are due consideration by the NSW Government. We appreciate the time and effort stakeholders have made in providing comments on the options available.

Access to justice

Inquiry participants told the Committee that whether or not the Government decides to consolidate tribunals, it needs to ensure that any reforms improve access to justice for all tribunal users. The Committee strongly supports this notion and believes that access to justice is the overarching principle in this Inquiry.

We do believe that a consolidation of tribunals will improve access to justice for the people of New South Wales and provide a ‘one stop shop’ for minor disputes and review of administrative decisions. This view is strongly supported by the experiences in other Australian jurisdictions which have found that access to justice has improved as a result of tribunal consolidation, especially for people in regional and rural areas. Accordingly, we have recommended that the NSW Government pursue the establishment of a new tribunal that consolidates existing tribunals where it is appropriate and promotes access to justice.

Although the Committee has not received sufficient evidence to determine the most preferable method for consolidation, we are confident that our recommendation for an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders would be well-equipped to do so. We have recommended that this panel be established to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, and prepare a detailed plan for the implementation of consolidation, including which tribunals should be consolidated. We believe it would be appropriate that the panel’s Chair be a nominee of the Attorney General.

We have made this recommendation in the knowledge that the task is immense and involves multiple complexities. The process of developing an effective consolidated tribunal involves matters of law and policy that are highly technical and involve a wide variety of legal subject matter. We are especially grateful to the individual tribunals that made submissions to this Inquiry for the effort and depth they went to in order to explain to the Committee their jurisdiction, priorities and client base. The expert panel should use this valuable evidence to inform its work.

Key issues raised by stakeholders and also highlighted by other jurisdictions was that the consolidation of tribunals must ensure improved access to justice in conjunction with improved efficiencies and that an effective consolidated tribunal must be established with adequate resources. As such, the Committee has recommended that these factors, along with ensuring equitable access to all citizens, are paramount in the work of the expert panel in determining the method and implementation of a consolidated tribunal in New South Wales.

The Committee is also mindful that access to justice involves ensuring community awareness of a consolidated tribunal and its role, especially in the context of a consolidated tribunal that would handle a range of different jurisdictions. Therefore we have recommended that the NSW Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal, including in culturally and linguistically diverse languages, so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

In addition, the provision of online services for tribunal users is an important factor in ensuring access to justice, especially for those tribunal users located regionally. Therefore, the Committee has also recommended that the NSW Government examine the possibility of providing more comprehensive and accessible online services for a consolidated tribunal.

The Committee acknowledges that procedural fairness is important. This was echoed in the concerns of some stakeholders who believed that the consolidation of a particular tribunal may lead to the loss of its specialist expertise. They believed that procedural fairness was also about ensuring the tribunal member that hears a particular matter has suitable expertise in that area to make a fair and just decision. This was of a particular concern for those inquiry participants focussed on industrial relations, guardianship and mental health matters.

While the Committee acknowledges these concerns, we are of the view that sufficient mechanisms exist to avoid such a loss of expertise through the use of specialist lists and divisions within a tribunal and ongoing professional development for tribunal members. These have been utilised successfully in other jurisdictions and we have recommended that this approach be taken in a consolidated tribunal in New South Wales.

In addition, to ensure tribunal members gain the relevant training and experience to work across divisions, we have recommended that tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

Another concern to a number of stakeholders was the need for an internal appeals process in a consolidated tribunal, again to ensure access to justice. Stakeholders did caution that there is a need to carefully consider how an internal appeals process could be accessed, to avoid an overwhelming number of appeal requests that can potentially drain a tribunal's resources. There was some suggestion that a monetary threshold could be put in place. However, while a monetary threshold may be suitable in most civil claims, this would not be applicable in other areas of law, such as human rights matters.

The Committee acknowledges that limiting appeals to only the courts can create a barrier to the availability of appeals for some people due to the cost, delay and formality of court processes. Ensuring access to justice is also about ensuring an accessible appeal mechanism. In the Committee's view it is important that the establishment of a new consolidated tribunal incorporates in its structure a mechanism for internal appeal. Learning from other jurisdictions we recognise that it is important to set this up at the outset and to ensure that it is sufficiently resourced.

We also note the importance of setting thresholds for accessing an appeals process, as is demonstrated in other jurisdictions, and therefore we recommend that an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

The Committee heard that the existing access to some tribunals in New South Wales on a regional basis is important and should be captured in any plans for a consolidated tribunal. This is particularly the case for the existing tribunal infrastructure of the CTTT and the IRC which has the potential to be utilised for a consolidated tribunal.

People in regional and rural New South Wales will be better served by a tribunal system that has the resources and capacity to operate and resolve disputes locally. Accordingly, the Committee

recommended that the NSW Government consolidate facilities (such as office space, registries, court and tribunal rooms) between tribunals and establish ‘one stop shops’, where appropriate, which will enable users in metropolitan and regional centres to have access to tribunal services through single points of contact. This will allow for the full utilisation of the facilities which already exist and the broadening of their use to the general public – thus further enhancing the public’s access to justice.

We have also made recommendations that relate to the provision of reasons for tribunal decisions, consolidating back-end services under one government department and developing user friendly forms and practices wherever possible.

Specific tribunals

The Committee was also specifically asked to review the operation of the CTTT. Overall, we believe that the CTTT is providing an effective avenue to have consumer disputes resolved in a relatively timely and effective manner. However, we acknowledge that there are some areas where improvements can be made by the tribunal including timeliness of finalising matters in certain divisions. We have made recommendations for the need to investigate ways to more accurately measure the quality of decision making in the tribunal and that consideration should be given to an internal appeals process. These issues should also be considered by the expert panel.

The Committee believes that the key factors that make particular tribunals effective, such as the Guardianship Tribunal, the Mental Health Review Tribunal, the IRC and the CTTT can be captured and drawn upon in any new consolidated tribunal. We believe it is important to have separate divisions within the consolidated tribunal which can focus on particular areas of law and draw on and implement specialist features of the existing tribunals. To ensure these issues are considered by the expert panel we have asked that it should consider stakeholder comments in relation to evidence on the specific tribunals received by the Committee. We have also recommended that the panel give consideration to the nature of the jurisdiction of existing tribunals and whether it is appropriate that their functions be exercised within a broader tribunal.

The Committee is keen to ensure that the issues raised by stakeholders regarding potential negative impacts of consolidation are not only minimised but avoided. To this end, we have recommended that the NSW Government review the effectiveness of the new consolidated tribunal model three years after the enabling legislation has come into effect.

It is hoped that with this approach the consolidation of tribunals will benefit people in their contact with the administrative justice system of New South Wales.

Summary of recommendations

- Recommendation 1** **29**
 That the NSW Government pursue the establishment of a new tribunal that consolidates existing tribunals, where it is appropriate and promotes access to justice. This does not preclude the possibility of further consolidation of existing jurisdictions within tribunals already in existence.
- Recommendation 2** **30**
 That the NSW Government appoint an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, including preparation of a detailed plan on the method for consolidation and implementation.
- Recommendation 3** **30**
 That the expert panel consider the Committee’s recommendations in this report, as well as the following issues raised during the inquiry:
- Consolidation of tribunals must ensure improved access to justice in conjunction with improved efficiencies, particularly in regional areas
 - There must be equitable access to justice for all citizens
 - Adequate resources must be allocated
 - Lessons from other jurisdictions are considered
 - The nature of the jurisdiction of existing tribunals and whether it is appropriate that their functions be exercised within a broader tribunal.
- Recommendation 4** **30**
 That the NSW Government review the effectiveness of a new consolidated tribunal model, its processes, procedures and service delivery, three years after the enabling legislation has come into effect.
- Recommendation 5** **35**
 That the NSW Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal, including material directed to culturally and linguistically diverse communities.
- Recommendation 6** **35**
 That the NSW Government examines the possibility of providing more comprehensive and accessible online services such as online filing and fully accessible online court files for a consolidated tribunal.
- Recommendation 7** **38**
 That specialised lists or divisions be created within a consolidated tribunal to capture the skill and expertise of tribunal members and the flexibility of procedures that reflect the range of jurisdictions in any consolidated tribunal.
- Recommendation 8** **39**
 That tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

- Recommendation 9** 39
That any consolidated tribunal have a simple, user friendly standard set of forms that are able to be completed online.
- Recommendation 10** 39
That any consolidated tribunal have user friendly practices and procedures.
- Recommendation 11** 39
That any persons affected by an administrative tribunal decision be provided with reasons for that decision, to a quality and extent consistent with the issue in dispute.
- Recommendation 12** 41
That an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.
- Recommendation 13** 46
That the NSW Government consolidate, wherever appropriate, facilities (including office space, registries, court and tribunal rooms) between tribunals and establish ‘one-stop-shops’ in metropolitan and regional centres to have access to tribunal services through single points of contact.
- Recommendation 14** 46
That the NSW Government consolidate back-end services across tribunals under one government department, eliminating any undue duplication.
- Recommendation 15** 57
That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the tribunal investigate ways to more accurately measure the quality of decision making in the tribunal.
- Recommendation 16** 63
That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the NSW Government and the Consumer, Trader and Tenancy Tribunal consider establishing an internal appeals panel in the tribunal with an appropriate threshold.