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Dear Director,

The University of New South Wales branch of the Council for Civil Liberties would like to thank the Attorney General for this opportunity to make a written submission to the review of the policy objectives of the *Administrative Decisions Tribunal Act 1997*.

Our organisation is an autonomous branch of the New South Wales Council for Civil Liberties based at the University of New South Wales. Our members are students at the university.

1. Summary

Our submission focuses on three main issues associated with the policy objectives of the ADT: the importance of the independence of the Tribunal; a recommendation to reverse the presumption that the Act only applies when it is 'given jurisdiction by an enactment'; and a recommendation to incorporate into the Act a new policy objective recognising human rights.

One of the major policy objectives of the *Administrative Decisions Tribunal Act 1997* (NSW) is to establish a Tribunal that is independent.¹ It is crucial that the public perception of the independence of the Tribunal and its members is maintained. This can be secured by ensuring that members are appointed and renewed on merit, by a transparent process and are given some form of tenure. The participation of legal professionals is also essential to this point.

Today the public expect an automatic right to the review of administrative decisions. Under the *ADT Act* such a 'right' only exists when expressly conferred under an enactment. This should be replaced by a presumption that any decision made under an enactment is reviewable by the Tribunal, unless an Act expressly states otherwise.

Finally, the UNSW Council for Civil Liberties recommends that a new policy objective be added to the *ADT Act* stating that the ADT protect and preserve human rights.

¹ *Administrative Decisions Tribunal Act 1997* (NSW) s 3(a)

2. Securing the independence of the ADT

2.1 Independence of Tribunal members

The independence of Tribunal members from government and other influences is important in order to avoid perceptions among the public of a lack of independence and conflicts of interest. This is especially true for the top-tier appeal panels.²

While the tenure of judicial officers assures the independence of such appointees, the appointment of non-judicial officers as both judicial³ and non-judicial⁴ members is more problematic.

The UNSW Council for Civil Liberties acknowledges the recent *Report on the Jurisdiction and Operation of the ADT* by the Committee on the Office of the Ombudsman and the Police Integrity Commission.⁵ The Committee canvassed solutions to the problem of improving the independence of Tribunal members, including the introduction of some form of ‘tenured’ terms that would enshrine the independence of the ADT and its members.⁶

The Committee’s discussion paper⁷ also dealt with the issue of the full-time and part-time basis of tribunal membership.⁸ An increase in the number of full-time members, both judicial and non-judicial, and a corresponding reduction in the number of part-time members, will help to foster a more efficient, consistent and skilled Tribunal.

Furthermore, while part-time membership brings welcomed talent to the ADT, the process by which the large number of part-time members are selected may give rise to the perception that some are political appointments or are subject to undue influence. This compromises the Tribunal’s image of independence.

The UNSW Council for Civil Liberties recommends that the Attorney General, or the NSW Law Reform Commission at the Attorney General’s direction, investigate options for reform of the process of the appointment and renewal of tribunal members to ensure that they are based on merit, carried out in a transparent manner and based on some form of tenure.

² Brennan, Sir Gerald, “The Review of Commonwealth Administrative Power: Some Current Issues” in Creyke, R, and P. Keyzer (eds), *The Brennan Legacy*, Federation Press, Sydney, 2002, at 19

³ *ADT Act* s 17 (2)(b) – ‘legal practitioner of at least seven years standing’

⁴ *ADT Act* s 17 (3)

⁵ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*, November 2002, ISBN 0 7347 6881 8. (available from the committee at www.parliament.nsw.gov.au)

⁶ note 5, at 36-8

⁷ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal: Discussion Paper*, March 2001 (available from the committee at www.parliament.nsw.gov.au)

⁸ “Full-time versus part-time tribunal members”, note 7, at §3.7.3. This issue was also canvassed at the federal level: Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, at 84 [§§ 4.67 & 4.68] (available from the ARC at www.law.gov.au/aghome/other/arc)

2.2 Constitution of tribunal proceedings

In the interests of securing the independence of the Tribunal, the relevant judicial members⁹ should continue to exercise the responsibility for appointments to tribunal panels hearing a particular matter.¹⁰

The recommendation of the Committee on the Office of the Ombudsman and the Police Integrity Commission that the relevant judicial members also be given the flexibility to select the number of members to sit on each panel is a meritorious one.¹¹ Such an arrangement will help to achieve the Tribunal's objectives of being efficient, effective and expeditious¹² by allowing for a more efficient allocation of Tribunal resources.

The UNSW Council for Civil Liberties supports the amendment of the ADT Act to allow the President, or relevant Divisional Head, to nominate the number of members on a panel.

The composition of any Tribunal panel, especially at the top of the Tribunal hierarchy, should consist of at least one legal professional.¹³ The skills that legal professionals bring to the Tribunal will help to ensure that proceedings are efficient, effective and fair,¹⁴ and will also help to ensure that the need for judicial intervention is rare.¹⁵

The UNSW Council for Civil Liberties recommends a continued strong presence of legal professionals in the ADT.

2.3 Proposal for the amalgamation of tribunals

One of the Committee on the Office of the Ombudsman and the Police Integrity Commission's major recommendations was the amalgamation of several existing tribunals into the Administrative Decisions Tribunal.¹⁶

If such a proposal is to be implemented, then the Attorney-General should be responsible for the expanded ADT. Other ministers presently administering other tribunals should have no direct responsibility.

The Attorney General is currently responsible for the courts. Similar independence from the functions of individual government departments is necessary and would seal a commitment to the independence of the decisions of the ADT.

Concerns about maintaining the expertise of specialists from smaller tribunals can be addressed by making arrangements for the Tribunal to call on experts from government departments when necessary.¹⁷

⁹ President, or Deputy President appointed as a Divisional Head pursuant to *ADT Act* s 16

¹⁰ *ADT Act* s 22

¹¹ recommendation #10(d): note 5, at 55. See also "Constitution of Tribunal Panels", note 7, at §3.7.2

¹² *ADT Act* ss 3(b) & 3(c)

¹³ see also recommendations #10(b) & 10(c) of Committee on the Office of the Ombudsman and the Police Integrity Commission report, note 5, at 55

¹⁴ *ADT Act* s 3(b)

¹⁵ note 2, at 18

¹⁶ recommendation #1: note 5, at 56

3. 'given jurisdiction by an enactment'

Section 3(a) of the *ADT Act* states that the ADT can hear matters only when a jurisdiction is conferred upon it 'by an enactment'. This appears to run counter to the contemporary expectation of the public of an automatic right to appeal an administrative decision. This popular expectation arises from the fact that in our advanced democracy citizens have a legitimate expectation to such review of administrative action. Indeed the role and scope of the ADT require that it be made more accessible to citizens.¹⁸

The UNSW Council for Civil Liberties recommends that the *ADT Act* be changed to provide for a presumption that decisions made under *any* enactment are reviewable by the ADT.

At the moment express Parliamentary provision is required to confer a right of review. With the proposed reform, express Parliamentary provision would be required to *deny* review of administrative decisions, rather than to *confer* it.

This reversal of the presumption is more in keeping with the legitimate expectations of a citizen's right of review of administrative decisions. It is particularly important when matters of civil liberty are involved.

Furthermore, the alternative to review in the ADT can prove a costly one for government, in both an economic and political sense: the correction of administrative errors by political or judicial means.

A similar recommendation was made by the Committee on the Office of the Ombudsman and the Police Integrity Commission.¹⁹ A similar presumption exists in some federal legislation.²⁰

4. Using the ADT to safeguard human rights

The UNSW Council for Civil Liberties was disappointed by the NSW Parliament's Standing Committee on Law and Justice's majority finding not to introduce a statutory Bill of Rights in NSW.²¹ Such an innovation would have guaranteed, in a positive form, the civil and political rights of every NSW citizen.

Despite this failure of the Committee and the Legislature to rise to the challenge of enshrining such important rights in law, a fragile subset of civil and political rights remain at common law and are expressed as 'negative' rights, i.e. in terms of what a government may *not* do to a citizen.

Since our civil liberties continue to be expressed in this manner, the review of administrative decisions is central to the maintenance of such liberties.

¹⁷ note 2, at 10

¹⁸ *ADT Act* s 3(b): 'to ensure that the Tribunal is accessible...'

¹⁹ recommendation #3, note 5, at 56

²⁰ *Administrative Decisions (Judicial Review) Act* 1997 (Cth) s 3(a) ("decision to which this Act applies"): decisions of an administrative character are reviewable under the Act, except for expressly scheduled exemptions.

²¹ Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report No. 17, 3 October 2001, at 114. (available from the committee at www.parliament.nsw.gov.au)

The UNSW Council for Civil Liberties recommends that Section 3 of the ADT Act be modified to include as a policy objective of the ADT:

to protect and preserve human rights as set down in the *Universal Declaration of Human Rights* (1948), subject only to a clear and express statutory provision to the contrary.

Because such an objective is subject to express abrogation by the Legislature, it presents no challenge to the fundamental principle of parliamentary sovereignty.

In many ways this proposal enhances the pre-existing policy objectives of the ADT. For example, it reinforces the stated goal that the ADT promote administrative compliance with Parliamentary legislation ‘for the benefit of the citizens of New South Wales’.²² It also strengthens the Tribunal’s commitment to the common law principles of natural justice and procedural fairness.²³

In this way, the ADT could help to safeguard human rights in NSW, at least at the level of administrative decisions and within the jurisdictions of the other civil divisions. It would also provide a check to controversial legislation that impacts directly on civil liberties and human rights in general, such as increased police powers.

An example is the recently assented terrorism legislation.²⁴ While the issuing of an authorisation of special police anti-terrorism powers²⁵ would not be reviewable by the ADT, due to express Parliamentary prohibition,²⁶ the requirement for a statement of reasons²⁷ explaining the need for any search made under the *Terrorism (Police Powers) Act* could be made reviewable by the Tribunal.²⁸

Though the review of the statement would take place after the event and grant no substantial remedy to an aggrieved citizen, a simple declaration made by the ADT, in the spirit of the proposed new policy objective, could help to restore any damage made to the good reputation of a citizen by intrusive investigative methods.

The provision of an accessible, efficient and expeditious mechanism for such declarations would help to safeguard the right of every citizen to be free from arbitrary interference with his or her privacy and from attacks upon his or her honour or reputation.²⁹

5. Conclusion

We hope that our submission will prove useful in the review process.

²² ADT Act s 3(g)

²³ particularly through *Universal Declaration of Human Rights* (1948) Art. 10 (right to a fair & public hearing by an independent and impartial tribunal)

²⁴ *Terrorism (Police Powers) Act* 2002 (NSW)

²⁵ made pursuant to *Terrorism (Police Powers) Act* 2002 (NSW) ss 5 or 6

²⁶ *Terrorism (Police Powers) Act* 2002 (NSW) s 13

²⁷ made pursuant to *Terrorism (Police Powers) Act* 2002 (NSW) s 23(2)

²⁸ obviously allegations of a more serious nature are best dealt with in more appropriate forums, for example serious police misconduct is usually dealt with by the procedures under Part 8A of the *Police Act* 1990 (NSW) or by the Police Integrity Commission under the *Police Integrity Commission Act* 1996 (NSW).

²⁹ *Universal Declaration of Human Rights* (1948) Art. 12

Yours Faithfully,

Peter Garay and Michael Walton,

on behalf of the
University of New South Wales Council for Civil Liberties