

Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison

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Summary

In the field of administrative law, the judiciary has traditionally exercised control over the administrative actions of the executive through judicial review. However, judicial review is neither the most effective nor the most efficient primary control mechanism for systemic administrative improvement. In a country faced with a task of 'transformative constitutionalism', and hindered with scarce resources, there is good cause to limit judicial intervention as the first response to administrative disputes. The major theme of this thesis is to investigate the feasibility of administrative tribunal reform in South Africa, using two other commonwealth countries, Australia and England, as a basis for comparison.

Australia and England have been chosen for comparison because they share similar administrative law traditions and they can provide working models of coherent tribunal structures. The Australian tribunal system is well-established and consists of tribunals which fall under the control of the executive, while tribunals in England have recently undergone a significant transformation, and are now part of the independent judiciary.

The South African government currently spends, indeed wastes, a significant amount of money on administrative law litigation. Due to the limitations of judicial review, even after the high costs of litigation and the long duration of court proceedings, the results achieved may still be unsatisfactory. Furthermore, judicial review is unsuited to giving effect to systemic administrative change and the improvement of initial decision-making.

Australia and England have begun to move away from the traditional court model for the resolution of administrative disputes. Both have indicated a preference for the important role of tribunals in the administration of disputes. Tribunals have been shown to offer the advantage of being speedier, cheaper, more efficient, more participatory and more accessible than traditional courts, which contributes to tribunals being a more available resource for lay people or people without sophisticated legal knowledge, and provides wider access to remedies than courts.

The English and Australian models indicate a few important trends which need to be applied universally to ensure a sustained tribunal reform and a system which provides a higher level of administrative redress than the over-burdened and institutionally inept courts currently do. These include co-operation among government departments and tribunals; open and accountable systemic change; the need for supervision and evaluation of the whole of administrative law by an independent and competent body; and ultimately a focus on the needs of users of state services.

At the same time, there are arguments against administrative tribunal reform. These include the costs of reform; the ways to establish tribunals; and the level of independence shown by the tribunals. These arguments are especially relevant in the South African context, where the government faces huge social problems and a scarcity of resources. However, after an analysis of the valuable characteristics of tribunals and the role that they serve in the day to day administration of justice, it is difficult to see how these objections to tribunals can outweigh their potential importance in the administrative justice system.

The need for sustained systematic reform in South Africa is one that cannot be ignored. Tribunals offer a valuable alternative to judicial review for the resolution of administrative disputes. Furthermore, the tribunal systems of Australia and England demonstrate how the effective creation and continued use of comprehensive tribunal structures contributes firstly to cost reduction and secondly to ease the administrative burden on courts who are not suited to cure large-scale administrative error.

Opsomming

In die administratiefreg oefen die regsprekende gesag tradisioneel beheer uit oor die uitvoerende gesag deur middel van geregtelike hersiening. Geregtelike hersiening is egter nie die mees doeltreffende of effektiewe primêre beheermeganisme om sistemiese administratiewe verbetering teweeg te bring nie. In 'n land met die uitdagings van 'transformatiewe konstitusionalisme' en skaars hulpbronne, kan 'n goeie argument gevoer word dat geregtelike inmenging as die eerste antwoord op administratiewe dispute beperk moet word. Die deurlopende tema van hierdie tesis is 'n ondersoek na die lewensvatbaarheid van hervorming van administratiewe tribunale in Suid-Afrika, in vergelyking met die posisie in Australië en Engeland, waarvan beide ook, tesame met Suid-Afrika, deel vorm van die Statebond.

Hierdie lande is gekies vir regsvergelykende studie aangesien hulle 'n administratiefregtelike tradisie met Suid-Afrika deel en beide werkende modelle van duidelike tribunale strukture daarstel. Die Australiese tribunale stelsel is goed gevestig en bestaan uit tribunale onder die beheer van die uitvoerende gesag, terwyl die tribunale stelsel in Engeland onlangs 'n beduidende hervorming ondergaan het en nou deel van die onafhanklike regsprekende gesag is.

Die Suid-Afrikaanse regering mors aansienlike hoeveelhede geld op administratiefregtelike litigasie. Selfs na hoë koste en lang verdragings van litigasie mag die resultate steeds onbevredigend wees as gevolg van die beperkings inherent aan geregtelike hersiening. Tesame met hierdie oorwegings is geregtelike hersiening ook nie gerig op sistemiese administratiewe verandering en verbetering van aanvanklike besluitneming nie.

Australië en Engeland het onlangs begin wegbeweeg van die tradisionele hof-gebaseerde model vir die oplossing van administratiewe dispute. Beide toon 'n voorkeur vir die belangrike rol wat tribunale in die administrasie van dispute kan speel. Tribunale bied die bewese voordele om vinniger, goedkoper, meer doeltreffend, meer deelnemend en meer toeganklik te wees as tradisionele hofe, sodat tribunale 'n meer beskikbare hulpbron is vir leke, oftewel, persone sonder gesofistikeerde regs kennis en dus beter toegang tot remedies as tradisionele hofe verskaf.

Die Engelse en Australiese modelle dui op enkele belangrike tendense wat universeel toegepas moet word om volgehoue tribunale hervorming te verseker en om 'n stelsel te skep wat 'n hoër vlak van administratiewe geregtigheid daarstel as wat oorlaaide en institusioneel onbekwame hofe kan. Dit verwys bepaald na samewerking tussen staatsdepartemente en tribunale; deursigtige en verantwoordbare sistemiese veranderinge; die behoefte aan toesighouding en evaluasie van die hele administratiefreg deur 'n onafhanklike, bevoegde liggaam; en uiteindelik 'n fokus op die behoeftes van die gebruikers van staatsdienste.

Daar is egter terselfdertyd ook argumente teen administratiewe tribunale hervorming. Hierdie argumente sluit in die koste van hervorming; die wyses waarop tribunale gevestig word; en die vlak van onafhanklikheid voorgehou deur tribunale. Hierdie argumente is veral relevant in die Suid-Afrikaanse konteks waar die regering voor groot sosiale probleme te staan kom en

daarby ingesluit, 'n tekort aan hulpbronne ook moet hanteer. Daarenteen is dit moeilik om in te sien hoe enige teenkanting en teenargumente met betrekking tot die vestiging van administratiewe tribunale swaarder kan weeg as die potensiële belang van sulke tribunale in die administratiewe geregtigheidstelsel, veral nadat 'n analise van die waardevolle karaktereenskappe van tribunale en die rol wat hulle speel in die dag-tot-dag administrasie van geregtigheid onderneem is.

Die behoefte aan volhoubare sistemiese hervorming in Suid-Afrika kan nie geïgnoreer word nie. Tribunale bied 'n waardevolle alternatief tot geregtelike hersiening met die oog op die oplossing van administratiewe dispute. Tesame hiermee demonstreer die tribunale stelsels in Australië en Engeland hoe die doeltreffende vestiging en deurlopende gebruik van omvattende tribunale bydra, eerstens om kostes verbonde aan die oplossing van administratiewe dispute te verlaag en tweedens, om die administratiewe las op die howe, wat nie aangelê is daarvoor om grootskaalse administratiewe foute reg te stel nie, te verlig.

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Table of Contents:

List of Abbreviations

Chapter 1: Introduction and the Research Question	18
1 1 Introduction	18
1 2 Rationale	19
1 3 Research Aims	20
1 4 Hypotheses	20
1 5 Methodology	21
1 6 Division of Chapters	22
Chapter 2: Limitations of Judicial Review: South African Judicial Review	25
2 1 Introduction	25
2 2 Historical Origins, Underlying Features and Criticism of Judicial Review	26
2 2 1 Introduction and Justification of Judicial Review	26
2 2 2 <i>Ultra Vires</i> Doctrine	28
2 2 3 Difference between Appeal and Review	32
2 2 4 Counter-Majoritarian Difficulty – Is Review Democratic?	34
2 2 5 Facilitation of Review: The Traffic-Light Metaphor	35
2 2 6 Prominence of Review	38
2 2 7 Criticism of Review: Limits and Limitations	39
2 3 Judicial Review in South Africa	42
2 3 1 Introduction	42
2 3 2 Case Law	43
2 3 2 1 Marginal and Peripheral	45

2 3 2 2 Negative and Retrospective	45
2 3 2 3 Sporadic and Random	46
2 3 2 4 Expensive, Slow, Time-consuming and Daunting	49
2 3 2 5 Unconstitutional	50
2 4 Conclusion	51
Chapter 3: Defining Features of Tribunals	53
3 1 Introduction	53
3 2 Historical Origins of Tribunals	53
3 3 Characteristics of Tribunals	56
3 3 1 Finality and Enforceability	57
3 3 2 Independence	58
3 3 3 Public Hearings	60
3 3 4 Expertise	61
3 3 5 Reasons	62
3 3 6 Appeal	63
3 4 Informing Principles of Tribunals	63
3 4 1 Franks Report	64
3 4 2 Unique Features of Tribunals	65
3 4 2 1 Cost and Speed	65
3 4 2 2 Participation	66
3 4 2 3 Informality	66
3 4 2 4 Specialisation	67
3 5 Supervision of Tribunals	67

3 5 1	Central Supervisory Body	68
3 5 2	Administrative Appeals to a Higher Body	70
3 5 3	Judicial Review by Courts	70
3 6	Scope of Tribunals	71
3 6 1	Judicial and Non-Judicial Review	72
3 6 2	Errors of Fact and Errors of Law	74
3 7	Conclusion	75
	Chapter 4: Australian Tribunals and the Administrative System	76
4 1	Introduction	76
4 2	Federal Government	76
4 3	General Administrative Structure	77
4 3 1	Kerr Committee Report	77
4 3 2	Administrative Appeals Tribunal (AAT)	77
4 3 3	Federal Courts of Australia	78
4 3 4	Ombudsman	78
4 3 5	Freedom of Information and Privacy Legislation	79
4 3 6	Australian Human Rights Commission	80
4 3 7	Administrative Review Council	80
4 3 8	Judicial Review by Courts	81
4 4	Tribunals	83
4 4 1	History	83
4 4 1 1	Kerr Committee Report and Tribunals	83
4 4 1 2	Bland Report and Ellicott Report	85

4 4 2	Constitutionality	85
4 4 3	Tribunal Structure	86
4 4 3 1	Administrative Appeals Tribunal	86
4 4 3 1 1	Structure of the AAT	87
4 4 3 1 2	Procedures of the AAT	88
4 4 3 1 2 1	Formality of the AAT	88
4 4 3 1 2 2	Fact-finding in the AAT	89
4 4 3 1 3	Success of the AAT	90
4 4 3 2	Specific Tribunals	92
4 4 4	Merits Review and Judicial Review	93
4 4 4 1	The Distinction	93
4 4 4 2	Is Merits Review Working?	95
4 5	Supervision of Tribunals	96
4 5 1	Administrative Review Council	96
4 5 1 1	Composition of the ARC	96
4 5 1 2	ARC Supervision of Tribunals	97
4 5 1 3	Success of the ARC's Supervisory Role	98
4 5 2	Other Forms of Tribunal Supervision	99
4 5 2 1	Legislative Supervision	99
4 5 2 2	Supervision by the Ombudsman and the Auditor-General	99
4 5 2 3	Judicial Supervision	99
4 6	Conclusion	100

Chapter 5: English Tribunals and the Administrative System	101
5 1 Introduction	101
5 2 General Administrative Structure	102
5 2 1 System of Government	102
5 2 2 Constitutional Reform	102
5 2 3 Relationship between the Executive and the Judiciary	103
5 2 4 Relationship between the Courts and Tribunals	105
5 2 5 Parliamentary and Health Services Ombudsman	106
5 3 Tribunals	106
5 3 1 History	106
5 3 1 1 Franks Report	106
5 3 1 2 Leggatt Report	107
5 3 1 3 White Paper: <i>Transforming Public Services: Complaints, Redress and Tribunals</i>	109
5 3 2 Tribunal Reforms	110
5 3 2 1 Tribunals Service	110
5 3 2 2 <i>Transforming Tribunals</i>	111
5 3 2 3 <i>Tribunals, Courts and Enforcement Act 2007 (TCEA)</i>	112
5 3 2 3 1 First-Tier Tribunals	112
5 3 2 3 2 Upper Tribunals	113
5 3 2 3 3 Other Tribunals	116
5 3 2 3 4 Senior President of Tribunals (SPT)	116
5 3 2 3 5 Tribunal Presidents' Group (TPG), Tribunal Judges' Executive Board and the (TJEB) and the Tribunal Services Executive Team (TSET)	118

5 3 3	Supervision of Tribunals	120
5 3 3 1	Administrative Justice and Tribunals Council (AJTC)	120
5 3 3 2	Senior President of Tribunals (STP)	122
5 3 3 3	Other forms of Supervision	123
5 3 3 3 1	Tribunals Service (TS)	123
5 3 3 3 2	Court of Appeal	124
5 3 4	Tribunals Transformed: The Success of the 2008 Reforms and Future Developments	125
5 4	Merits Review in Tribunals: The Value of the Distinction	126
5 5	Conclusion	127
Chapter 6: Tribunals and Administrative Justice in South Africa: Developments and the Current Position		129
6 1	Introduction	129
6 2	Developments in Tribunals	130
6 2 1	History of Tribunals: the Call for Tribunal Reform	130
6 2 1 1	South African Law Reform Commission Report 1992	130
6 2 1 2	Conferences on Administrative Justice: The Breakwater Declarations	133
6 2 1 2 1	Breakwater I: <i>Administrative Law Reform</i>	133
6 2 1 2 1 1	Govender: Administrative Appeals Tribunals	133
6 2 1 2 1 2	Breakwater Declaration	135
6 2 1 2 2	Breakwater II: <i>Administrative Justice in South Africa</i>	136
6 2 2	Development of National Legislation to give effect to the	

Right to Just Administrative Action	137
6 2 2 1 South African Law Reform Commission <i>Report on Administrative Justice</i> (1999) and Draft <i>Administrative Justice Bill</i>	137
6 2 2 2 Portfolio Committee on Justice and Constitutional Development: Things Fall Apart	139
6 2 2 3 Criticism of <i>PAJA</i> from the perspective of Tribunals	143
6 2 3 Administrative Review Supervisory Body	145
6 2 3 1 Administrative Review Council (ARC)	145
6 2 3 2 Support for the Establishment of the ARC	146
6 3 Tribunals Today: The Current Tribunal Landscape	147
6 3 1 Four Major ‘Types of Tribunals	149
6 3 1 1 ‘Dispute-Resolution’ Tribunal	149
6 3 1 2 ‘Administrative Appeal’ Tribunal	151
6 3 1 3 ‘Supervisory’ Tribunal	156
6 3 1 4 ‘Combined Comprehensive’ Tribunal	159
6 3 1 4 1 Competition	159
6 3 1 4 2 Employment	161
6 3 1 4 3 Tax	163
6 3 2 Evaluation of the South African System: Some Lessons from Australia and England	164
6 4 Future for Tribunals: Legislative Reform and the ARC	166
6 5 Conclusion	168

**Chapter 7: The Establishment of the Administrative Review Council
and Comprehensive Tribunal Reform in South Africa:**

The Commonwealth Comparison	170
7 1 Introduction	171
7 2 ‘Unknown Cost’ of Poor Decision-Making	173
7 3 Major Objections to Tribunal Reform in South Africa	172
7 3 1 Practical Implications	173
7 3 2 Budgetary Implications	174
7 4 South African Financial Reality	175
7 5 General Trends in Australia and England	176
7 5 1 Australia	177
7 5 1 1 Value of the Australian ARC	177
7 5 1 2 Cost of Tribunal Reform and Some Suggestions: Queensland	178
7 5 1 3 Success of the Australian Tribunals	180
7 5 2 England	182
7 5 2 1 Administrative Justice and Tribunals Council (AJTC) and Co-operative Government	182
7 5 2 2 Tribunals: Cost and Accessibility	184
7 6 Conclusion: Advantages and (outweighed) Disadvantages of Tribunals	185
8 Bibliography and Sources	188

List of Abbreviations

AAC - Administrative Appeals Chamber

AAT - Administrative Appeals Tribunal

ATA - Administrative Appeals Tribunals Act 1975

ADR – Alternative Dispute Resolution

ALRC – Australian Law Reform Commission

AJTC – Administrative Justice and Tribunals Council

ARC – Administrative Review Council

Australian ARC – Australian Administrative Review Council

CCMA – Commission for Conciliation, Mediation and Arbitration

CRA - Constitutional Reform Act 2005

CSU – Conciliation Service Unit

DCA - Department for Constitutional Affairs

DHA – Department of Home Affairs

DoJ – Department of Justice

DSD – Department of Social Development

EAT - Employment Appeals Tribunal

EARC – Electoral and Administrative Review Council

ECHR - European Convention on Human Rights

ET - Employment Tribunal

ETS - Employment Tribunal Service

FSAB – Financial Services Appeal Board

HRA - Human Rights Act 1998

HRC – Human Rights Commission

IAB – Immigration Advisory Board

IT – Independent Tribunal

ITA – Income Tax Act 58 of 1962

LRA – Labour Relations Act 66 of 1995

PAJA – Promotion of Administrative Justice Act 3 of 2000

PFA – Pension Funds Adjudicator

PSC – Public Service Commission

QICAR – Queensland Independent Commission for Administrative Review

RAA – Refugee Appeal Agency

RAB – Refugee Appeal Board

RHT – Rental Housing Tribunal

SALRC – South African Law Reform Commission

SARS – South African Revenue Service

SASSA – South African Social Security Agency

SPT - Senior President of Tribunals

SSAT – Social Security Appeals Tribunal

TCEA - Tribunals, Courts and Enforcement Act 2007

TJEB - Tribunal Judges' Executive Board

TS - Tribunals Service

TSET - Tribunals Service Executive Team

TPG - Tribunal President's Group

VCAT - Victorian Civil and Administrative Tribunal

CHAPTER 1: INTRODUCTION AND THE RESEARCH QUESTION

1.1 Introduction

In the field of administrative law, the judiciary has traditionally exercised control over the administrative actions of the executive through judicial review.¹ However, judicial review is not the most effective or efficient primary control mechanism for systemic administrative improvement. In a country faced with a task of ‘transformative constitutionalism’,² and hindered with scarce resources, there is good cause to limit judicial intervention as the first response to administrative disputes. The major theme of this thesis is to investigate the feasibility of administrative tribunal reform in South Africa, using two other commonwealth countries, Australia and England, as a basis for comparison.

Judicial review is problematic as the primary mechanism dealing with an administrative complaint, and the reasons for this will be examined. Several South African, as well as international law sources will form the basis for the argument against judicial review as a primary control mechanism. Although there are other alternatives to judicial review in dispute resolution of administrative law, this thesis will focus on the role of tribunals.

Tribunals are informal investigative or quasi-judicial bodies which deal almost exclusively with administrative law, and usually on a highly specialised level. Tribunals need to have the following features in order to be efficient and effective agents of administrative justice and to provide a valuable alternative to courts: they must be accessible, cost-efficient, speedy, and approachable; consist of specialised tribunal members with particular expertise; give adequate reasons for their results; present a unified and coherent structure; and provide opportunities for review.

The particular countries which have been selected for comparison have been chosen because they share similar administrative law traditions and they can provide working models of coherent tribunal structures. A comparative study of commonwealth jurisdictions will be highly relevant as they “present the comparativist with a significant degree of doctrinal and

¹ This position is explained in Hoexter “The Future of Judicial Review in South African Administrative law” (2000) 117 *SALJ* 484 and Hoexter “Judicial Policy Revisited: Transformative Adjudication in Administrative Law” (2008) 24 *SAJHR* 281.

² Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146.

institutional similarity, overlying a substratum of considerable cultural difference.”³ Because they share concepts, legal language and institutions, commonwealth jurisdictions offer important lessons to each other and new institutions and systems can be imported with more ease than from non-commonwealth countries. Australia and England will be examined with regard to their respective systems of tribunals. The Australian tribunal system is well-established and consists of tribunals which fall under the control of the executive, while tribunals in England have recently undergone a significant transformation,⁴ and are members of the independent judiciary. This difference will be briefly discussed.

In South Africa, one of the greatest concerns would be a department with severely limited resources and budget. The Department of Justice has already expressed these concerns, and the thesis will analyse the relative advantages and disadvantages of tribunal reform. Another major concern is the concept of the separation of powers. However, this thesis will not delve deeply into the complex myriad of separation of powers concerns as there is not sufficient space to do them justice.⁵

1 2 Rationale

The major rationale behind this thesis is that in order to give justice to the vast array of rights in our Constitutional Bill of Rights, there must be sufficient mechanisms to give practical effect to the rights of claimants. Whether the dispute exists with regard to the right to water, to housing or to any other constitutionally entrenched right, unless there is fair, accessible and efficient dispute resolution machinery, such rights will not bear any fruit.

³ Saunders “Apples, Oranges and Comparative Administrative Law” in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 427.

⁴ *Tribunals Courts and Enforcement Act* 2007.

⁵ The doctrine of the separation of powers is one of the driving forces behind the position of tribunals as members of the executive in Australia. However, the traditional tripartite distinction of functions has been brought into question recently, with authors expressing support for a fourth ‘integrity branch’ of government. This fourth branch would explain the existence of the myriad of other institutions that provide administrative support and control functions. For a discussion on this see Spigelman, ‘The Integrity Branch of Government’ (2004) *Australian Institute of Administrative Law National Lecture Series on Administrative Law* No 2; Creyke “Administrative Justice: Beyond the Courtroom Door” in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 262; McMillan “Re-thinking the Separation of Powers” *Federal LR* (2010) 12.

In certain provinces, especially the Eastern Cape and Kwa-Zulu Natal, judicial review arguably results in more detrimental protection of important socio-economic rights than advancing them. An analysis of four social assistance cases will illustrate the limits and limitations of judicial review in Chapter 2. If judicial review is not the most effective mechanism, it then becomes apparent that alternative systems must be investigated.

Two commonwealth countries, Australia and England, who share a legal background, legal language and legal institutions, especially in administrative law, have incorporated a system of administrative tribunals into their legal structure and place importance on both their effective functioning and the coherence of their structure. Australia and England have structured their tribunal systems differently and each falls under a different sphere of government. The comparison between them will allow for greater understanding of which aspects of the system could provide useful information for reform of the South African tribunal system.

1 3 Research Aims

The thesis aims to address one major issue, namely the suitability and feasibility of tribunal reform in administrative law in South Africa. In doing so, the thesis will attempt to; assess the current South African position regarding judicial review as the primary mode of distributing administrative justice in order to show that it is dissatisfactory and that alternative systems may require consideration; consider the nature and function of tribunals generally to create a basic standard against which tribunals can be measured; describe and evaluate the Australian system of tribunal justice; describe and evaluate the English system of tribunal justice; evaluate the current South African position regarding tribunals and to draw comparisons with the systems of Australia and England; and lastly discuss the advantages and disadvantages of the various options of tribunal reform.

1 4 Hypotheses

Certain underlying assumptions inform the research in this thesis. Firstly, judicial review is not ideally suited as the primary control mechanism of the administrative actions of the executive by the judiciary. Judicial review has occupied a prominent position in South African administrative law historically, but cannot solely provide the level of administrative

justice that is guaranteed in the Constitution. S33 guarantees a right to administrative justice⁶ which calls for a comprehensive system which provides for more than the retrogressive control function provided by judicial review.⁷

A comparative study of commonwealth jurisdictions will prove highly relevant and useful as they often share contexts, legal language and legal institutions. Particularly in administrative law, Australia, England and South Africa share a common heritage and a similar understanding of the underlying principles of commonwealth administrative law.

Cost⁸ and budgetary considerations are pivotal concerns of any government when considering changing an old, and implementing a new, legal institution. This is especially true of South Africa's young democratic government.

The separation of powers doctrine is an important safeguard against the abuse of power. Any form of tribunal system which is instituted in South Africa should be done with careful consideration of where exactly tribunals integrate into the composition of government, and should not in any way undermine the value of the separation of powers. However, this underlying assumption will inform the research in this thesis, but a full discussion of the implications of the doctrine is beyond the scope of the study.

1.5 Methodology

The thesis consists largely of literature-based analysis of three commonwealth jurisdictions' respective approaches, procedures and institutions regarding tribunal justice and its relationship with administrative law. The thesis will consist mainly of comparative law research.

⁶ S33(1) Constitution of the Republic of South Africa, 1996 ("the Constitution").

⁷ The nature of judicial review, the problems it encounters and the reasons behind these failures will be explained in Ch 2.

⁸ 'Cost' in this context will refer to more than the actual budgetary allocation and will reflect the costs involved in proper administration. Ch 7 explains this more clearly.

In Chapters 3, 4 and 5 a brief historical perspective of the development of each jurisdiction will be considered in order to evaluate the reasons why, and the manner how, each incorporates tribunals to give effect to administrative justice.

1 6 Division of Chapters

Chapter 2 aims to assess the current South African position regarding administrative justice. Judicial review occupies a primary place in administrative law as the main control mechanism of the judiciary against actions of the executive. The criticism against judicial review, as well as case law illustrating this point, will be examined in order to show why it should not retain this prime position.

Chapter 3 will outline the general nature and composition of tribunals. Different theoretical conceptions of tribunals will be considered and the most important features of tribunals will be highlighted. A basic standard against which tribunals should measure up will be identified and delineated with reference to the features most commonly regarded as the key elements of tribunals.

Chapter 4 discusses Australia's fairly well-established and structured system of tribunal justice. The Australian administrative law system consists of 'courts administering rights of review and appeal, alongside a range of other, often more accessible, mechanisms to enable citizens to scrutinise and challenge decisions by government.'⁹ This chapter will engage in a descriptive study of the composition and hierarchy of the administrative legal system in place in Australia, as well as the supervisory bodies which maintain it. The focus will be on tribunals and their position within the Australian executive and arguments for and against the Australian conception of tribunal justice will be examined in this chapter.

Chapter 5 will evaluate the newly-restructured English tribunals. South African Administrative Law has to a large extent followed in the footsteps on English administrative law generally, albeit lagging slightly behind.¹⁰ England's administrative tribunals have recently undergone radical change. Leading up to this change were several pivotal moments

⁹ Creyke "Administrative Justice" in *Comparing Administrative Justice Across the Commonwealth* 259.

¹⁰ Corder illustrates that although South African administrative law is based on English Administrative Law, it largely failed to develop in the same way as the Administrative Law of other commonwealth countries did and did not undergo the same progressive changes. Corder "Comparing Administrative Justice Across the Commonwealth: A First Scan" in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 2.

in the legal development of administrative and constitutional law in England, the most noteworthy of which will be considered in this chapter.¹¹

The structure of the new tribunal system will be described and evaluated. The *Tribunals, Courts and Enforcement Act*¹² creates new structures, namely First-tier and Upper tribunals and an Administrative Justice and Tribunals Council. Judicial review still retains a prominent role in the system, and it remains to be seen what its position will become alongside the new developments. Unlike the Australian tribunals, the tribunals in England are not part of the executive but fall under the sphere of the judiciary. This difference will also be briefly discussed here.

Chapter 6 will provide an overview of some of the existing tribunals in South Africa. The historical development of tribunals is described, as well as the objections to reforming administrative appeals and tribunals. The chapter will also discuss why reforms were not introduced in the drafting of the constitutionally-ordained administrative law legislation, namely the *Promotion of Administrative Justice Act*,¹³ despite being recommended by the South African Law Commission.¹⁴ A further point is that provision is made in the Constitution for tribunal justice,¹⁵ and that its implementation would not be unconstitutional. An analysis of some of the current South African tribunals will be provided to illustrate why reform of tribunal processes is required. The differences between the various types of tribunals will be discussed in order to show their fragmentation and the disparity between their procedures. The English tribunals suffered from similar deficiencies prior to their recent restructuring. Unlike the coherent and organised Australian system, it will be argued that the ad-hoc establishment and the lack of a coherent overarching structure in South African tribunals hinders and detracts from the standard of administrative justice which they are implemented to administer.

¹¹ *Report of the Committee on Tribunals and Inquiries* Cmnd 218 (1957) “Franks Report”; *Leggatt Tribunals for Users: One System, One Service* (2001); *Tribunal, Courts and Enforcement Act* 2007; *Constitutional Reform Act* 2005.

¹² 2007.

¹³ 3 of 2000.

¹⁴ South African Law Reform Commission Project 115 *Report on Administrative Justice* August (1999).

¹⁵ S33(3) of the Constitution.

Chapter 7: While comparative analysis of commonwealth countries is useful and relevant, there is considerable danger in merely importing legal concepts and institutions into the domestic scene. Rather, the valuable and insightful knowledge and experience should be collated into a coherent collection, and then should be critically evaluated as to its suitability in the South African context.

This chapter seeks to analyse the various objections to tribunal reform in South Africa. The objections are largely to the proliferation of government departments and to the cost involved in establishing a reformed tribunal system. Through analysis of the establishment and successful implementation of the Australian and English tribunal systems, the chapter will provide counter-arguments to those objections. Furthermore, the advantages and disadvantages of both the English and Australian systems will be evaluated and conclusions will be drawn about the possibility of reform in South African tribunals.

CHAPTER 2: LIMITATIONS OF JUDICIAL REVIEW: SOUTH AFRICAN JUDICIAL REVIEW

2.1 Introduction

The courts in common law countries have historically employed judicial review as a primary control mechanism of the actions of the executive. In South Africa this is especially true in light of the role that courts played during the rule of Apartheid.¹

This chapter seeks to analyse judicial review as a general administrative control process by looking generally at its common-law origins, features and criticisms. Judicial review of social assistance decisions in the Eastern Cape will provide the basis for an explanation as to why judicial review may not be the most effective or efficient primary control mechanism in the South African context. A proper role for judicial review will be carved out, and space created for the consideration of alternative dispute resolution mechanisms.

An underlying assumption of this chapter is that judicial review is being used in a manner for which it was not designed. As a primary avenue of administrative justice, it fails to accord the level of justice that it should. The criticisms which relate to judicial review do so largely because it is being relied on to perform all the tasks which should be allocated to a larger and more integrated system of administrative law.

The aim is not to argue for the eradication of judicial review,² as there is no doubt that it is a necessary and important safeguard to maladministration. The aim is rather to analyse the nature of judicial review and its precise functioning. Through this, an appropriate place for the courts and judicial review can be determined, both constitutionally and institutionally, within a inclusive system of administrative justice.

¹ Hoexter notes ‘...judicial review was given special prominence during the decades of Apartheid, when South African lawyers placed great reliance on judicial intervention in administrative matters to remedy the injustices of political and legal oppression.’ Hoexter “The Future of Judicial Review” (2000) *SALJ* 484.

² Hoexter (2000) *SALJ* 494 ‘the criticisms of review should not be viewed as arguments for its abolition. Rather they are arguments for an integrated system in which review can play an appropriate role.’

2 2 Historical Origins, Underlying Features and Criticism of Judicial Review

2 2 1 Introduction and Justification of Judicial Review

In order to understand the South African model of judicial review of administrative action, it is important to contextualise it within a broader commonwealth conceptualisation. This section is concerned with the general, historical development of judicial review, while a more focused discussion of the current South African position will follow in Section 3. For the dual reason that it both originated and obtained primacy in England, judicial review was transplanted to most other common law countries and has historically been the most important instrument to curb administrative power.³ Furthermore, there has been a recent trend within certain commonwealth countries to capture the judicial review function in legislation.⁴

Before considering the proper role of courts in reviewing administrative action, it should firstly be established why and how courts are empowered to intervene. In a model of separation of powers, each branch of government has their own constitutional and institutional function.⁵ However, there are times when those strict boundaries will be infringed. One such case is when the courts review the acts of the administrative branch.⁶ However, these infringements are part of the concept of the separation of powers and fulfill the role of checks and balances against public power.

Public authorities cannot act as they please. Their actions must be lawful and legitimate and they may only exercise the powers given to them expressly or impliedly either by Parliament,⁷

³ 'In Britain, as in the principal countries of the Commonwealth...disputes between citizen and government are adjudicated by the ordinary courts of law.' Wade & Forsyth *Administrative Law* 9 ed (2004) 22. For the criticism and debate surrounding judicial review see s 2 3 6 on the Prominence of Review and s 2 3 7 on the Limit and Limitations of Review below.

⁴ These countries include South Africa and Australia, and this concept is discussed further in this chapter in s 2 3, and in Ch 4 s 3 3, respectively.

⁵ Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" 1999 *PL* 448 499 distinguishes between the constitutional competence, or the proper role of institutions within a democratic society, and institutional competence which involves practical considerations about the capacity of each institution to make certain decisions.

⁶ 'The powers of all public authorities are subordinated to the law...they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power...The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.' Wade & Forsyth *Administrative Law* 5.

⁷ This construction relies on a theory of Parliamentary sovereignty, such as exists in England.

or by the Constitution.⁸ The basis for judicial review is that the courts have the power to evaluate conduct of the executive which falls outside of their mandate.⁹ The reason for this is that all public power is subject to a form of judicial control.¹⁰ Judicial review involves a process whereby courts can identify and cure illegalities and irregularities committed by the administration. A clear, if somewhat dated, definition of the role of judicial review can be found in *Consolidated Investment Co v Johannesburg Town Council*¹¹ where Innes CJ stated

whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by Legislature; it is a right inherent in the Court...¹²

A more recent statement about the role of judicial review of administrative action can be found in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*¹³ where it was stated that

it seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.¹⁴

⁸ In South Africa, the functions and powers of public authorities have their basis in the Constitution of the Republic of South Africa, 1996 (“the Constitution) and ‘Parliament is no longer supreme. Its legislation, and the legislation of all organs of State, is now subject to constitutional control’ in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) 32.

⁹ ‘The British system of administrative law, which is followed throughout the English-speaking world, has some salient characteristics...the outstanding characteristic of the Anglo-American system is that the ordinary courts, and not special administrative courts, decide cases involving the validity of governmental action’ Wade & Forsyth *Administrative Law* 10. In South Africa, S33(3) of the Constitution states that ‘national legislation must be enacted to give effect to these rights (of just administrative action) and must- a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal’.

¹⁰ Cane *Administrative Law* 4 ed (2004) 28, ‘In a general sense, ‘judicial review’ refers to judicial control of public decision-making in accordance with rules and principles of administrative law.’

¹¹ 1903 TS.

¹² 111 at 115. This definition is somewhat dated and there are several points raised in Boule, Harris & Hoexter *Constitutional and Administrative Law* (1989) 246-251 which require clarity. Hoexter also considers the problems with the definition in Hoexter *Administrative Law in South Africa* (2007) 111-112.

¹³ This case was decided under the interim Constitution, but was confirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU 3)* 2000 1 SA 1 (CC) 148.

¹⁴ 58. Although the act in question did not constitute ‘administrative action’, the court still had power to review under the principle of legality. For a further explanation of the principle of legality see s 2 2 2 *Ultra Vires* doctrine.

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,¹⁵ the court explains that although the historical origin of judicial review lies in common law, its continued existence and relevance is rooted in the Constitution.

Judicial review served the purpose of enabling Courts, whilst recognising the supremacy of Parliament, to place constraints upon the exercise of public power. It was a power asserted by the English courts as part of their common-law jurisdiction. Our Courts did the same and the development of administrative law in South Africa was much influenced by the developments in England.¹⁶

And

although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions.¹⁷

Besides retaining primacy in terms of common law, judicial review has also been captured in legislation in certain commonwealth countries. These include the codification of the grounds of review and a right to reasons as contained in the *Administrative Decisions (Judicial Review) Act 1977* in Australia and the *Promotion of Administrative Justice Act*¹⁸ in South Africa.

Due to the primacy that judicial review retains, this section aims to analyse its nature and functioning. A broad description of some of the most important elements of judicial review will be discussed, and the problems and limitations will be highlighted.

2 2 2 *Ultra Vires* Doctrine

The constitutions of Anglo-American legal systems, whether written¹⁹ or unwritten,²⁰ are founded on the rule of law. According to Wade & Forsyth, the rule of law can be said to have

¹⁵ 2000 2 SA 674 (CC).

¹⁶ 38.

¹⁷ 51.

¹⁸ 3 of 2000 (PAJA).

¹⁹ Such as the Constitution of the United States of America or the Constitution of South Africa s2 which states that 'this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

four meanings.²¹ The first is that everything must be done according to law and that the person affected by a law always has a right of recourse to the courts (the principle of legality). However, a standard higher than legality is required by the rule of law otherwise any law, even if it were arbitrary and unfair, would conform to the standard. The second meaning is therefore that government action should be conducted within a system of rules and regulations so that the rule of law is not replaced with the rule of arbitrary power. The third meaning relates to the first, and provides that disputes about the legality of acts of the administration are adjudicated by impartial and independent courts, or in other words, independent of the executive. The final meaning of the rule of law is that although government will necessarily have special powers in relation to citizens, its agents are neither exempt from the law nor does it benefit from gratuitous privileges under the law.

When courts review administrative action, they will generally frame their enquiry on one of the grounds of review.²² These grounds then enable the court to decide whether or not there was illegality or irregularity in taking the action and then hand down an appropriate remedy. However, these grounds are merely indications of the more general concept which underlies the rationale of judicial review, namely legality.²³ The basis behind the judiciary's power to control actions of the executive has historically been rooted in the doctrine of *ultra vires*. This means that the executive can only act legitimately where their conduct is lawful, which must be authorised by an empowering provision.

The *ultra vires* doctrine is closely tied to the concept of the separation of powers and to parliamentary sovereignty. It implies that parliament confers certain powers or '*vires*' on public authorities, who must act within the boundaries of those powers. The function of the court is to apply the laws made by parliament, and to ensure that public authorities act within

²⁰ Such as the British Constitution which 'though largely unwritten, is firmly based upon the separation of powers' in *Duport Steel v Sirs* (1990) 1 WLR 142 at 157.

²¹ Wade & Forsyth *Administrative Law* 21-22.

²² In South Africa these have been codified in S6 PAJA, but we share many of the common law grounds with the other commonwealth countries. Furthermore, the common law is still a relevant source in understanding and informing the grounds of judicial review. *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* para 38; *Pharmaceutical Manufacturers: In re Ex Parte President of the Republic of South Africa* para 45; O'Regan "Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law" (2004) 121 SALJ 430-431.

²³ Boule et al *Constitutional and Administrative Law* 256 state that 'The notion of legality, then, is the source of all the various grounds of review.'

their *vires*. Judicial review is therefore legitimated on the idea that the court is applying the intention of parliament, which is in accordance with the idea of parliamentary sovereignty.

There are, broadly speaking, two interpretations of the *ultra vires* doctrine; the narrow and the wide. In both South African and English law, the wide approach has historically dominated the case law.²⁴ The distinction is that the narrow theory only requires fulfillment of the principle of legality, while the wide theory requires compliance with the rule of law. Baxter²⁵ identifies three fundamental characteristics of the wide theory. Firstly, it is a justificatory doctrine for the existence of judicial review. Secondly, it is a comprehensive doctrine which encompasses any administrative action falling short of any principle of legality being *ultra vires*. Thirdly, it is a negative statement of the positive requirements of legality. The grounds of review are therefore negative statements of the positive duties required by the principle of legality.

Although *ultra vires* has historically been the underlying premise upon which judicial review is founded,²⁶ that idea is slowly being eroded.²⁷ Although there are some writers who cling to the orthodox view of *ultra vires*,²⁸ there is rich debate and much criticism related to its continuance as the defining justification for judicial review.²⁹ Craig argues that the concept of judicial intervention should not rely on its willingness to give effect to the will of parliament, but rather on whether there is ‘a reasoned justification which is acceptable in normative terms for the controls which are being imposed.’³⁰

²⁴ See the dictum of Milne AJ in *Estate Geekie v Union Government* 1948 SA 494 502 that ‘in considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself on whether the tribunal acted *ultra vires* or not.’

²⁵ Baxter *Administrative Law* (1984) 307-312 and 301-305.

²⁶ Wade & Forsyth *Administrative Law* 41 state that the doctrine of *ultra vires* is ‘the central principle of administrative law’.

²⁷ Oliver “Is the Ultra Vires Rule the Basis for Judicial Review?” in Forsyth (ed) *Judicial Review & the Constitution* (2000) 3-27; Craig *Administrative Law* 6 ed (2005) 12.

²⁸ Forsyth “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” in Forsyth (ed) *Judicial Review & the Constitution* (2000) 29-46 answers criticisms and vigorously defends the argument that the *ultra vires* principle ‘remains vital to the developed law of judicial review’.

²⁹ Craig “Ultra Vires and the Foundations of Judicial Review” in Forsyth *Judicial Review & the Constitution* (2000) 47-71 collates and discusses the criticisms and argues that the doctrine is ‘indeterminate, unrealistic, beset by internal tension, and that it cannot explain all the instances where the judiciary has applied public law principles.’

³⁰ Craig “Ultra Vires” in *Judicial Review* 71.

Most importantly in this context is that the *ultra vires* doctrine has ultimately been abolished in South Africa.³¹ Forsyth³² discusses the judgments of both Rabie ACJ and Hefer JA in the *UDF* case.³³ Rabie ACJ declares that the *ultra vires* approach was ‘unjustified. In my opinion it is artificial and false, and I think that vagueness must be seen as a self-standing ground...not as an example of *ultra vires*.’³⁴ Hefer JA stated that the concept of *ultra vires* was too closely related to ‘conceptualism’, and that South African law ‘has no need of this kind of conceptualism or of an all embracing ground rule for the exercise by the courts of their review jurisdiction.’³⁵

This being said, the underlying idea behind the doctrine remains true.³⁶ Courts are able to intervene in executive action when it is unlawful or illegitimate. In the new Constitutional era, however, this reliance is not on the common law idea of *ultra vires*, but rather a direct application on s33 of the Constitution, as well as reliance on other constitutional provisions.³⁷

Henderson describes the new constitutional *ultra vires* doctrine as follows:

By expressly empowering the courts to control administrative action the Constitution explains *why* the courts are entitled to control that action. The *ultra vires* doctrine lends a logical explanation of that empowerment by explaining *how* the courts control administrative action. A court is able to recognize a ground of judicial control where an administrative actor has not respected, protected, promoted or fulfilled a requirement of the constitutionality principle, whether reflected in the Administrative Justice Act or not. Such recognition occurs only where the administrative actor has operated *outside the law and the Constitution* and the administrative action is *ultra*

³¹ *Staatspresident en andere v United Democratic Front en ‘n Ander* 1988 4 SA 830 (A) hereinafter referred to as *UDF*. Boule et al *Constitutional and Administrative Law* 261-264 provide a detailed discussion of the following case and its impact on South African administrative law. Cf O’Regan (2004) *SALJ* 427; Mureinik “Pursuing Principle: The Appellate Division and Review under the State of Emergency” (1989) 5 *SAJHR* 71 for a criticism of the case.

³² Forsyth “Of Fig Leaves and Fairy Tales” in *Judicial Review* 35-38.

³³ The case dealt with a challenge to emergency regulations made in terms of the *Public Safety Act* 3 of 1953, which sought to prevent media coverage of ‘unrest’. The challenge was that the concept of ‘unrest’ was too vague and that the regulations should be struck down on that ground.

³⁴ *UDF* 855 H-F.

³⁵ *UDF* 868.

³⁶ ‘There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality.’ *Fedure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 59.

³⁷ S8(1) states that the Bill of Rights binds all organs of state; s7 requires the state to ‘respect, protect, promote and fulfil the rights contained in the Bill of Rights’ and s39(2) requires the courts to promote the spirit, purport and object of the Bill of Rights when interpreting legislation and when developing common or customary law. The courts therefore justify their intervention constitutionally.

vires. The doctrine is as comprehensive as the Constitution will allow, and although it is the Constitution itself which now provides the courts with political ‘license for judicial review’, the doctrine still provides a logical explanation of how the courts control administrative action.’³⁸

2 2 3 Difference between Appeal and Review

The difference between appeal and review should briefly be stated here, because (at least on a theoretical level) the importance of maintaining the distinction is one of the fundamental pillars in South African administrative law generally and in judicial review specifically.³⁹ While both are means of reconsidering a decision made by an administrator or lower tribunal, they reconsider the decision in different ways and therefore serve different purposes.⁴⁰ Appeal is concerned with the actual merits of the decision and whether the decision reached was the ‘correct’ one. Appeal judges can therefore declare whether the decision was right or wrong.⁴¹ Review, on the other hand, is not concerned with the merits. When the courts review decisions they assess the *manner* in which the decision was reached to determine whether or not it was lawful.⁴² In essence this means that the enquiry which the courts follow is one of legality, or whether the decision was reached in a procedurally fair, lawful manner. Considerations which are taken into account are process-related, rather than ‘whether the record reveals relevant considerations that are capable of justifying the outcome.’⁴³

The reasoning behind courts and judges in particular showing such judicial restraint and deference to the executive is that an enquiry into the merits and a decision that the initial conclusion reached was the ‘wrong’ one involves an unconstitutional usurpation of the constitutional function of the executive. Provided courts only consider the method and the process, they are not questioning the inherent discretionary or decision-making powers of the

³⁸ Henderson “The Curative Powers of the Constitution: Constitutionality and the New Ultra Vires Doctrine in the Justification and Explanation of the Judicial Review of Administrative Action” (1998) 115 *SALJ* 359 (emphasis and spelling as in original).

³⁹ Hoexter *Administrative Law* 105.

⁴⁰ Hoexter *Administrative Law* 104-105.

⁴¹ *Tikly v Johannes NO* 1963 2 SA 588 (T) 590G-H. This may also put them in a position to substitute their own decision as a ‘correct’ one.

⁴² *Rustenberg Platinum Mine Ltd (Rustenberg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 SA 576 (SCA) para 31 Cameron JA states that ‘the focus is on the process, and on the way in which the decision-maker came to the challenged conclusion.’

⁴³ *Rustenberg Platinum Mines v CCMA* para 30. Hoexter states that ‘that is the territory of appeal, when the question is whether the decision is correct.’ Hoexter *Administrative Law* 105.

executive, but are rather performing their own constitutionally-ordained function. Hoexter explains that ‘the distinction reflects the separation of powers, a fundamental pillar of our constitutional order.’⁴⁴ She considers that we have inherited a ‘watchdog theory’ from English law, which places the courts as checks against the executive. This watchdog theory is also part of the ‘red-light theory’ as used in the traffic-light metaphor.⁴⁵

That being said, this categorical distinction between appeal and review is not as apparent in practice as it may appear in theory. Hoexter illustrates that ‘in truth it may be impossible in some cases to separate the merits from the rest of the matter, since a court cannot effectively judge the legality of a decision without considering its merits as well.’⁴⁶ One of the most contentious points is a review for reasonableness, but this is not the only example. Hoexter lists several of the other grounds for review in *PAJA*⁴⁷ and explains how an investigation into whether they were complied with will inevitably involve an enquiry into the merits.⁴⁸

However, the importance of the distinction is still relevant when considering what function judicial review should play. Due to the fact that it is concerned with the process of decision-making, courts are able to limit their enquiry to the lawfulness of the decision and do not find themselves in an awkward position between judicial intervention and judicial restraint. This will allow the boundaries of judicial review to be respected and would not amount to an unconstitutional usurpation of functional competence on the part of the judiciary. At the same time, there may very often be a need for an enquiry into the merits, especially in the field of administrative law. For this reason, judicial review should generally not serve as the first forum for intervention. Rather, if a decision reached is a ‘wrong’ one and does not require an

⁴⁴ Hoexter *Administrative Law* 107.

⁴⁵ The metaphor is discussed below in s 2 2 5 regarding the Facilitation of Review. In *Carephone v Marcus NO and Others* 1999 3 SA 304 (LAC) 37 Froneman DJP discusses the difference between appeal and review and states that ‘it seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?’ He sees no reason for the abolition of the difference between appeal and review.

⁴⁶ Hoexter *Administrative Law* 106.

⁴⁷ Listed in S6 *PAJA*.

⁴⁸ Hoexter *Administrative Law* 107. These include whether sufficient weight was given to a relevant consideration, or whether an ulterior purpose or motive was pursued by the decision-maker, or whether the decision was dictated by an unauthorised person or body, or whether the decision-maker adhered rigidly to a policy or precedent.

enquiry into the process, but the correction of an incorrect decision, there should be a system of appeals to which applicants can turn.⁴⁹

2 2 4 Counter-Majoritarian Difficulty – Is Review Democratic?⁵⁰

One question which has been raised about the legitimacy of judicial review, and a factor which puts pressure on judges to show more judicial deference, is the counter-majoritarian difficulty. The counter-majoritarian difficulty exists because courts, in effect judges, are able to hand down binding judgments over-and-above the actions of the executive. Judges are not elected officials and therefore do not necessarily represent the will of the people. This is a broader constitutional concept, but applies specifically in the tension between judicial intervention and judicial restraint.⁵¹

Hoexter states that ‘judicial review is characterised by a continuous tension between two opposing ideals: the ideal of governmental freedom of action, and the ideal of judicial control.’⁵² The reason for the tension is ultimately a political decision; the courts attempt not to overstep their institutional role and to infringe on the sphere of the executive or the legislature. The reasoning is that

the actions of administrative bodies and officials, established by a democratically elected legislature to perform certain functions (involving questions of law, fact and policy) stand opposed to a judiciary with the (constitutional, common-law or derived legislative) function of controlling, reviewing or supervising such action.⁵³

Courts have tried to lessen the potentially undemocratic consequences of their decisions by retreating into a mechanistic role, focusing on strict classifications of functions in order to the

⁴⁹ See Ch 3 for a discussion of appeal tribunals; their advantages and functioning.

⁵⁰ See also s 2 2 6 Limits and Limitations of Judicial Review. However, a full discussion of the separation of powers implications of tribunals is beyond the scope of this thesis.

⁵¹ ‘The “difficulty” of reconciling the judicial control of legislation with the fact that such legislation has been enacted by a democratically elected legislature...is in other words replicated in the administrative law context.’ De Ville “Deference as Respect and Deference as Sacrifice: A Reading of *Bato Star Fishing v Minister of Environmental Affairs*” (2004) 20 *SAJHR* 586. ‘The democratic objection to judicial review, which has dogged constitutionalism since the early nineteenth century, originates in the ‘countermajoritarian difficulty’: the problem of justifying the exercise of judicial review by unelected and unaccountable judges in a political democracy.’ Lenta “Democracy, Rights Disagreements and Judicial Review” (2004) 20 *SAJHR* 20 1-31 5.

⁵² Hoexter *The New Constitutional and Administrative Law II: Administrative Law* (2002) 68.

⁵³ De Ville (2004) *SAJHR* 586.

limit their influence.⁵⁴ However, in a constitutional state where the judiciary has an accountable, influential role on the achievement of socio-economic rights, such formalism and conceptualism cannot be reconciled with their purpose.⁵⁵

There are two important counter-arguments to this difficulty. Firstly, it is only ministerial heads who are directly elected to office. Many, if not most of the administrators who make the bulk of the decisions are far removed from the people who they serve. Judges, on the other hand, are appointed by officials who were democratically elected. Judges also have a far higher standard of accountability than low-level public servants and administrators.

A second argument is that the democratic ‘cost’ of judicial review is surely outweighed by its ability to hold the administration accountable for its actions and in the limitation of maladministration. In fact,

most administrative lawyers surely see review itself as a desirable and essential component of modern democracy, and reject any crude majoritarian conception of democracy in which review would feature as the automatic enemy.⁵⁶

These arguments aside, the counter-majoritarian difficulty is still a real concern. The potential threat that judicial review poses of being undemocratic may be a powerful factor towards avoiding over-reliance on judicial review as a control mechanism.

2 2 5 Facilitation of Review: The Traffic-Light Metaphor

The purpose with which review is employed is an essentially important aspect of how it is used as a safeguard against the abuse of public power. The traffic-light metaphor, as employed by Harlow & Rawlings,⁵⁷ is especially useful in determining the role that judicial review plays. The metaphor is a way of describing approaches to the control of public and

⁵⁴ In *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A), the strict classification of functions approach was finally rejected by Milne J. He states at 13 that ‘a departure from formal classification as criterion not only would be in accordance with modern trends in administrative law, but also would provide a more rational function for the application of the rules of natural justice in this area.’

⁵⁵ There is a clear commitment in s1 of the South African Constitution to ‘accountability, responsiveness and openness’ and courts must be able to conduct reasonableness review over governmental action, according to O’Regan (2004) *SALJ* 336.

⁵⁶ Hoexter (2000) *SALJ* 493.

⁵⁷ Harlow & Rawlings *Law and Administration* 2 ed (1997). The 2nd rather than the 3rd edition has been used here as the concept is more fully discussed and explained than in the later edition. Taggart discusses reasons for the movement away from the traffic-light metaphor in Taggart “Reinvented Government, Traffic Lights and the Convergence of Public and Private law” (1999) *PL* 124-138.

administrative power by the courts, and the intention with which the courts exert jurisdiction. The metaphor uses the example of the three stages of a traffic-light, the red-light theory, the green-light theory and the integrated 'amber-light theory'.

The red-light theory indicates courts as watchdogs whose primary function is to curb the misuse⁵⁸ of public power. In this way courts provide a controlling and limiting function over the power of the executive. This may often lead to judicial activism⁵⁹ and may give weight to the objection that judicial review is not democratic.⁶⁰ The red-light theory has at its centre the rule of law. This means that courts are the primary weapon of the citizen against the state and the control of the executive. Woolf et al state that

in matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals, and other officials exercising public functions, and to afford protection of the rights of the citizen.⁶¹

Red-light theory further looks to a balanced constitution, the strict separation of powers and supports strong judicial control of the executive and legislature. Hoexter describes this theory as one in which 'law is elevated above politics, and judges are independent and impartial arbiters protecting citizens' rights and guarding against tyranny and arbitrariness in government.'⁶²

The green-light theory, on the other hand, views courts as facilitators to administrative justice. Rather than merely curbing executive power, they encourage good governance and facilitate better operations in the administrative sphere. In this way, green-light theory favours the 'administrative state' and identifies administrative law as a vehicle for positive social change.

⁵⁸ Misuse in this sense is more appropriate than 'abuse' because according to Wade & Forsyth *Administrative Law* 5 "'abuse", it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.'

⁵⁹ Hoexter refers to the dangers of this by saying 'it is futile to deny the dangers of unbridled activism...a particular judicial willingness to intervene in administrative matters, or alacrity in setting aside administrative action, correcting it, or granting some other remedy.' Hoexter (2000) *SALJ* 494.

⁶⁰ See s 2 2 4 Counter-Majoritarian Difficulty. The traffic-light metaphor is inextricably linked to the democratic debate and thus these two sections should be read in conjunction.

⁶¹ Woolf, Jowell & Le Seuer (eds) *De Smith's Judicial Review* 6 ed (2007) 5.

⁶² Hoexter *Constitutional and Administrative Law* 69.

The focus of green-light theory must then also be the reform and change of the legal system itself and naturally the theory focuses on the alternatives to courts, especially the construction of so-called administrative courts. Green-light theory also places far less emphasis on judges and courts as having the primary responsibility for giving effect to social justice. Rather, green-light theorists view the whole of administrative law and all of the parties within it as equally responsible agents in the process of transformation. Green-light theorists aim to minimise the role of courts and although ‘lawyers still regard themselves as champions of the popular cause; there can be little doubt that the great departments of state...are not only essential to the well-being of the great mass of the people, but also the most significant expressions of democracy in our time.’⁶³

While the red-light theory seems to prioritise judicial control over the executive, it is important to be aware of exactly what the word ‘control’ means. Harlow & Rawlings pay specific attention to this concept by unpacking its meaning.⁶⁴ Control is not merely a negative reinforcer, but can also be a positive impetus which provides structure and support. Once again, it appears that there is no settled answer to which of the theories provides a more democratic and just answer to administrative law questions.

Harlow & Rawlings make an interesting point regarding the role of courts in administrative law. They state that their approach to the role of courts is ‘pragmatic’, that they ‘do not demand consistency with some overarching theory of the administrative state’ and are ‘prepared to accept new ways of addressing problems, even though they may make a theoretical jumble of the legal culture.’⁶⁵ In this way, an either/or approach does not necessarily need to be followed. Rather, the valuable features of both theories should be combined in order to create the most efficient, most democratic solution to administrative law problems. Even Wade & Forsyth, who are typically regarded as advocating a ‘red light theory’ which aims at curbing governmental power, also state that

⁶³ Robson *Justice and Administrative Law* 3 ed (1951) 421. This statement reinforces the idea that government departments should be as accountable as judges as agents of social change.

⁶⁴ Harlow & Rawlings *Law and Administration* 39 ‘Control can be symbolic or real; it can mean to check, restrain or govern.’ Also see Griffith & Street *Principles of Administrative Law* (1973) 24 ‘Banks control a river; a driver controls his car. The influence of a parent over his child may be greater than the power of a prison guard over a convict.’

⁶⁵ Harlow & Rawlings *Law and Administration* 48, and in this passage they are quoting Shapiro ‘Pragmatic Administrative Law’ in Stewart (ed) *Issues in Legal Scholarship: the Reformation of American Administrative Law* (2005) 1.

it is a mistake to suppose that a developed system of administrative law is necessarily antagonistic to efficient government...Nor should it be supposed that the continuous intervention by the courts...means that the standard of administration is low...The contribution that the law can and should make is creative rather than destructive.⁶⁶

It has been argued that judicial review is an important and essential safeguard to misappropriation of public power. However, the important argument remains that courts cannot and should not be the only guardians of rights.⁶⁷ Only an integrated system of responsible agents of administrative law who all work collectively and with a transformative agenda will give effect to positive social change. Boule et al⁶⁸ consider this as a third alternative where neither green-light nor red-light theories ultimately prevail, but rather where administrative law is a consistent balance between both sides. They term this the ‘amber-light theory’.⁶⁹ This differs from green light theory in that political institutions are not viewed as adequate to control state power alone and that new administrative principles, procedures and law should be developed ‘to supplement the democratic and political controls over those who exercise state power.’⁷⁰ The idea is to create a balance between internal administrative controls and external, judicial or political controls. This approach to control of administrative action acknowledges both a limited role for judicial review and the courts as a control mechanism, and an improved level of coherent administrative principles and procedures.

2 2 6 Prominence of Review

Woolf et al⁷¹ show that judicial review, as well as traditionally being the most important safeguard of public power, is not in any way diminishing. They explain that there is a danger in relegating judicial review to a minor role, firstly because there is evidence to suggest that the judicial review case load grows every year⁷² and secondly because there is evidence to

⁶⁶ Wade & Forsyth *Administrative Law* 7.

⁶⁷ Harlow & Rawlings *Law and Administration* 48 state that ‘lawyers...suffer from a professional deformation; they are too easily inclined to assume a judicial answer to every problem.’

⁶⁸ Boule et al *Constitutional and Administrative Law* 80-83

⁶⁹ Boule et al *Constitutional and Administrative Law* 81.

⁷⁰ Boule et al *Constitutional and Administrative Law* 81. For a summary and critique of the usefulness of the traffic-light metaphor in South African administrative law see Klaaren “Redlight, Greenlight” (1999) 15 *SAJHR* 209-216 and for a English perspective see Taggart (1999) *PL* 124-138.

⁷¹ Woolf et al *De Smith’s Judicial Review* 3.

⁷² Woolf et al *De Smith’s Judicial Review* 3. Hoexter (2000) *SALJ* 492.

suggest that there is a heightened awareness among administrative officials of the potential impact of judicial review.⁷³ However, the practical impact and relevance of these judicial decisions are realised only when administrators translate and incorporate the judgments into their daily administration, which will only be achieved when judges show sensitivity to the complex and policy-laden decisions of the administrative officials. Failure to co-operate in this way may lead to 'greater formalism and increased bureaucratisation.'⁷⁴

They consider this point in light of the fact that while judicial review may be the ultimate and highest form of control, it cannot stand alone and must be seen in a broader context of all the checks and controls available in administrative law. Judicial review simply cannot perform all the control functions necessary in a complex, stratified administrative law system.

Judicial review provides just one of a number of legal controls of administrative action and its role is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies.⁷⁵

This means that judicial review must retain its authoritative role as the ultimate defense against administrative abuse and the protector of the rights and legitimate expectations of citizens. At the same time, there should be an integrated system of checks and controls at a lower, administrative level to provide efficient, effective and progressive realisation of administrative rights.⁷⁶

2 2 7 Criticism of Review: Limits and Limitations

Hoexter⁷⁷ summarises some of the major criticisms against judicial review. While many of these are especially prominent in South Africa, these criticisms relate to judicial review in general. The following section uses her synopsis as a starting point for the discussion.

Hoexter categorises the types of criticisms against judicial review. Firstly, review is described as being 'marginal or peripheral' in three different senses; the first of which is that it does not

⁷³ Woolf et al *De Smith's Judicial Review* 19. Hoexter (2000) *SALJ* 492.

⁷⁴ Woolf et al *De Smith's Judicial Review* 23.

⁷⁵ Woolf et al *De Smith's Judicial Review* 3.

⁷⁶ 'Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration could be brought to a standstill.' Woolf et al *De Smith's Judicial Review* 3. Cf Hoexter (2000) *SALJ* 494.

⁷⁷ Hoexter (2000) *SALJ* 489-490. Paraphrasing her summary I will outline the major problems.

consider matters which are not ‘justiciable’ or not of a nature that is able to be decided by a court of law.⁷⁸ Secondly, there is no conclusive evidence to show that the outcomes of adverse judicial review judgments cause administrators to change their decision-making methods in any way.⁷⁹ Thirdly, review does not necessarily grant applicants the kind of relief they are seeking. As will be demonstrated with reference to the Eastern Cape social assistance cases,⁸⁰ merely remitting the decision back to the administrator to re-make it is often insufficient. The applicants generally seek a favourable substantive decision, not merely the same adverse decision re-made in accordance with procedural requirements. This criticism links heavily with the intended institutional purpose of judicial review, which is not to question the merits of the decision, but rather its form and process.

The second criticism is that review is negative and retrospective. This means that rather than aiming progressively at ensuring better future administrative decision-making, review focuses on past maladministration and seeks to cure defects that have already occurred.⁸¹

The third criticism is that review is sporadic and random, and that decisions are corrected on an *ad hoc* basis.⁸²

Fourthly, review is criticised as being slow, expensive,⁸³ time-consuming and ‘deeply mysterious to the layperson.’⁸⁴

⁷⁸ Fuller “The Forms and Limits of Adjudication” (1978-1979) 92 *Harvard LR* 353 details how we consider disputes to be ‘justiciable’ and what precisely it means to have a dispute which can be adjudicated by a court of law.

⁷⁹ In fact, it may even have negative consequences in that administrators employ defensive practices which will limit their exposure to liability rather than focusing on making the decision-making process better. Hoexter (2000) *SALJ* fn 18; Harlow & Rawlings *Law and Administration*; Hutchinson “The Rise and Ruse of Administrative Law and Scholarship” (1985) *Modern LR* 293.

⁸⁰ S 232.

⁸¹ Woolf et al *De Smith’s Judicial Review* 1 and Cane *Administrative Law* 4 ed (2004) 378.

⁸² Woolf et al *De Smith’s Judicial Review* 1. Galligan “Judicial Review and the Textbook Writers” (1982) 2 *Oxford Journal of Legal Studies* 257.

⁸³ This point is also one of the essential bases for considering alternative administrative adjudication mechanisms, such as a system of administrative appeals tribunals.

⁸⁴ Hoexter illustrates that this is a particularly salient objection in South Africa where high levels of poverty and illiteracy abound. Cf Budlender “The Accessibility of Administrative Justice” in Bennett, Cockrell, Jooste, Keightley & Murray (eds) *Administrative Law Reform* (1993) 128; Plasket “Accessibility through Public Interest Litigation” in Corder & Maluwa (eds) *Administrative Justice in South Africa* (1997) 119.

The last criticism, one that has important consequences for the legitimacy of judicial review, is the accusation that it is undemocratic. Hoexter divides the 'undemocratic' accusation into two categories; firstly that the process of review does not enhance participation of the public or the 'problem of non-participation'⁸⁵ and secondly that judicial review involves usurpation by the judiciary of the function of the executive.⁸⁶ The first 'undemocratic' objection is that

judicial review operates as a pale and perverse substitute for genuine and vigorous popular involvement and control. Indeed, the need for judicial review is premised on the failure of the institutional structure of British democracy to ensure meaningful citizen participation in government.⁸⁷

The noteworthy point about the criticisms above is that, although they are true of judicial review, they are only problematic when review is required to fulfill a different function than the one it was created to. For example, despite the fact that it is true that review is backward-looking and a negative check, there should be other positive and progressive means of promoting good governance.⁸⁸ That way, judicial review would remain a curative power of the courts and would only be employed as a final means to correct glaring legal errors. If judicial review is required to perform the function of an internal appeal mechanism, it can naturally be criticised for not fulfilling this task.

Based on the more general concepts of judicial review as discussed above, the following section will consider the position of judicial review in South Africa, with a focus on the role that judicial review has been forced to play in the development of South African administrative law. The examination will also highlight the above criticisms of judicial review in South Africa in the case law. From that, arguments against the criticism will be evaluated, and potential alternatives will be considered.

⁸⁵ Hoexter (2000) *SALJ* 490.

⁸⁶ This is dealt with more comprehensively in s 2 3 3 above.

⁸⁷ Hutchinson (1985) *Modern LR* 323. In South African constitutional law, and especially administrative law, public participation is both a fundamental cornerstone of our constitutional order and an indispensable part of any administrative action.

⁸⁸ Woolf et al *De Smith's Judicial Review* 4 state that 'English administrative law is becoming increasingly interested in different forms of regulation and in prophylactic rather than exclusively curative techniques of control'.

2 3 Judicial Review in South Africa

2 3 1 Introduction

Judicial review in South Africa has enjoyed primacy as the courts' approach to the control of executive power.⁸⁹ To some extent, judicial review has almost become synonymous with administrative law,⁹⁰ despite the two being rather different. It is because of this that the first set of criticisms against judicial review, that it is 'marginal and peripheral', do not necessarily apply the same way in South Africa.⁹¹ Rather than being relegated to a marginal role, 'as a result of our oppressive history, it has been made to play a dominant and central role.'⁹² Hoexter points out that the Apartheid political and social structure made it necessary for judicial intervention to be the only bulwark against the misuse of power and that judicial review has been forced to 'fill the vacuum created by the absence (or lack of efficacy) of non-judicial safeguards.'⁹³ The case law reiterates the idea that courts face a daunting temptation not to intervene on behalf of an applicant who has been wronged by the system and who has no other remedy.⁹⁴

Hoexter⁹⁵ provides a detailed explanation of the shortcomings of judicial review in South African law, and particularly in the creation of an administrative justice act⁹⁶ as envisaged by S33 of the Constitution. She identifies two main problems with South African administrative law of the 20th century; firstly that it was in desperate need of completion, for an 'integrated system of administrative law in which judicial review is regarded as merely supplementary to the business of making good primary decisions';⁹⁷ and secondly that both courts and

⁸⁹ 'The field (of administrative law) had always been dominated by judicial review, other controls and safeguards in the administrative process having been relegated to unimportant positions or neglected altogether.' Hoexter (2000) *SALJ* 484.

⁹⁰ Hoexter explains that the reason for this is that in the pre-constitutional era, South African administrative law had little to offer in the way of remedies other than judicial review. Hoexter (2000) *SALJ* 485.

⁹¹ The sub-problems of a non-recognition of rights which are not justiciable; of administrators not necessarily changing their decision-making standards; and the potential unsuitability of judicial review in remedying administrative error still apply.

⁹² Hoexter (2000) *SALJ* 492.

⁹³ Hoexter (2000) *SALJ* fn 37.

⁹⁴ Galligan (1982) *Oxford Journal of Legal Studies* 269. See s 2 3 2.

⁹⁵ Hoexter (2000) *SALJ* 492.

⁹⁶ *PAJA*.

⁹⁷ Hoexter (2000) *SALJ* 484.

administrators required an appropriate theory of deference which would give guidance as to the role of judicial intervention into executive decision-making. This problematic position is still a reality. Despite the regulation of administrative action by *PAJA*; numerous definitive judgments from the highest courts;⁹⁸ and academic opinion;⁹⁹ judicial review continues to be forced to play an ‘anti-administration’¹⁰⁰ role; and a clear, consistent theory explaining the tension between judicial activism and judicial restraint has not been formulated.

This section will not deal with the vast set of problems with the pre-constitutional position of judicial review, but rather consider its failings after the enactment and coming into effect of *PAJA*. Recent case law will demonstrate how the general objections above are particularly salient in South Africa today.

2 3 2 Case Law

The cases discussed in this section will show the situation in the country as it is today, and how the administrative law system is failing so many of the most desperate and needy citizens of South Africa. Although this is not directly attributable to the shortcomings of judicial review and is more often than not attributable to the failings of local government and administrators, the unsatisfactory remedies that judicial review can offer will be demonstrated. Reason will also be provided for an alternative form of dispute resolution because review simply does not result in the necessary administrative outcomes.

In a leading case in the Eastern Cape High Court,¹⁰¹ Plasket J provides a succinct explanation of the situation surrounding social assistance in the province. He paints a bleak picture of the incompetence, unwillingness and sheer lack of responsibility of provincial government in the administration of social benefits. He begins with his greatest cause for concern which is the backlog of cases which appear on the motion court role. He states that

⁹⁸ Cameron JA in *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) para 21; O’Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC) para 46-48; *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC).

⁹⁹ Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in Taggart (ed) *The Province of Administrative Law* (1997) 303; De Ville (2004) *SAJHR* 586.

¹⁰⁰ Hoexter states that ‘when South African lawyers placed great reliance on judicial intervention in administrative matters to remedy the injustices of political and legal oppression...the fostered an attitude that was distinctly ‘pro-review’ and ‘anti-administration’. Their assumption – apparently justified by history – tended to be that the more review there was, the better things would be.’ Hoexter (2000) *SALJ* 484. This is in contrast with the idea of an integrated administrative law system.

¹⁰¹ *Vumazonke & Others v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 6 SA 229 (SE) hereinafter referred to as *Vumazonke*.

during a week of motion court duty from 8 to 12 November 2004, I dealt with 102 matters in which applicants claimed relief in essentially similar terms against the Member of the Executive Council for Social Development in the Eastern Cape Provincial Government...Unfortunately, it is a phenomenon that is now common: the judges of this division, as well as those in the other two divisions in the Eastern Cape, have grown accustomed to the depressing tales of misery and privation contained in an ever-increasing volume of cases that clog their motion court rolls in which applicants complain about administrative torpor in the processing of their applications for social assistance. To make matters worse, this situation is not new. Over the last four or five years, judges have commented, often in strident terms, about the unsatisfactory performance of the respondent's department in the administration of the social assistance system in the province.¹⁰²

Another problem is that because many of the residents of the province do not have access to legal aid and legal representation, 'the matters that do come to court are probably but the tip of the iceberg'.¹⁰³ This means that there is a very distressing reality that even though the motion courts are full of people coming to review their cases, in all probability many more are suffering in the same way but are unable to rectify it. With reference to several other cases, he explains the problems facing the judiciary.¹⁰⁴

A recent Supreme Court of Appeal case, *MEC for the Department of Welfare v Kate*¹⁰⁵ also deals with the Department of Welfare in the Eastern Cape and the administrative failings thereof. The two judgments will be analysed in order to show the potential problems with judicial review in South Africa. Although Plasket J and Nugent JA deal with these in a different order respectively,¹⁰⁶ the order of the discussion will reflect the criticisms highlighted by Hoexter above.

¹⁰² *Vumazonke 2*.

¹⁰³ *Ndevu v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* SECLD undated judgment case no. 597/02 2.

¹⁰⁴ *Somyani v Member of the Executive Council for Welfare, Eastern Cape and Another* SECLD undated judgment case no 1144/01; *Ndevu v Member of the Executive Council for Welfare, EC*; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape and Another* 2004 2 SA 611 (SCA); *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk); *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2001 2 SA 609 (E) and *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* 2006 4 SA 478 (SCA).

¹⁰⁵ 2006 4 SA 478 (SCA) hereinafter referred to as *Kate*.

¹⁰⁶ Plasket J delivered the judgment in *Vumazonke*, while Nugent JA delivered the judgment in *Kate*.

2 3 2 1 Marginal and Peripheral

As has been demonstrated above, judicial review plays a central role in the administration of justice in South Africa. The argument that can be made here is not that judicial review plays a marginal role, as it clearly occupies a central and dominant position, but rather that judicial review is a marginal remedy against maladministration because so few of these cases can ever reach court. While judicial review remains the primary possibility of redress, so few claimants have access to the levels of education or wealth needed to bring a case to court. Furthermore, judicial review is a peripheral and marginal remedy against maladministration because it cannot assist with systematic improvements to the administrative system, but can only cure a small percentage of badly-made decisions.

2 3 2 2 Negative and Retrospective

The problem that negative remedying poses to a system determined to better its decision-making is that decisions are often remedied months to years after they are made. For people who are reliant on social assistance not only for support but to actually live, this position is untenable. In the *Kate* case, it is apparent that Kate applied for a social grant just after the coming into of the *Social Assistance Act*¹⁰⁷ in 1996 and her case only reached the Supreme Court in 2006. Ten years to wait during difficult, prolonged litigation resulting in exorbitant costs, both for the applicant and the public purse, cannot be the solution to the massive crisis facing social administration in the Eastern Cape.

The long delays relate not only to slow court proceedings, but also to the time it takes the applicant to bring her case before the courts. The members of society that our Constitution is most committed to assisting and who must ‘animate our understanding of the Constitution’s provisions’¹⁰⁸ are usually the ones without the necessary resources or the legal knowledge to enforce such rights. This was acknowledged in *Kate* where it was stated that

rights that are now in issue are directed towards the very poorest in our society, who have little or nothing to sustain them, and who can be expected to have little or no knowledge of where their rights lie nor the resources readily to secure them.¹⁰⁹

¹⁰⁷ 59 of 1992.

¹⁰⁸ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another v Ngxuzza and others* 2001 4 SA 1184 (SCA) 12.

¹⁰⁹ *Kate* 31.

Furthermore, the retrospective relief courts can provide to the individuals who are fortunate enough to approach courts cannot systematically improve the quality of administrative service they received. In *Vumazonke* Plasket J states that

the courts are left with a problem that they cannot resolve: while they grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people...¹¹⁰

The curative remedies available to courts processing an application for judicial review are simply not suited to the large-scale systemic problems facing the administrative system. This problem can also be related to the fact that there is no empirical evidence to suggest that the administrators change their decisions after unfavourable judgments against them. In the Eastern Cape, the evidence is overwhelmingly to the contrary and the case law reinforces this idea that the administration is in fact not responding whatsoever to court intervention.¹¹¹

2 3 2 3 Sporadic and Random

This criticism relates to the criticism of a backward-looking remedy and can be found in the same paragraph. From the judgments it appears that administrators are willing, even in the best-case scenario, only to pay the costs and obey the orders that they are ordered to by court. Rather than envisaging new and innovative ways to improve and enhance good governance and better decision-making from the beginning, administrators opt to pay massive cost orders and to use the courts' adjudicatory function to decide who should be paid out.¹¹²

Plasket states that

notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of

¹¹⁰ *Vumazonke* 10.

¹¹¹ *Vumazonke* 10 fn 20 states that 'The point must be made that the respondent's department hardly ever opposes the applications brought against it and, when it opposed, hardly ever does so successfully.' This statement seems to suggest that neither original process nor justified opposition are being altered in accordance with court orders or court pronouncements.

¹¹² Rather than viewing the courts' intervention as an unconstitutional usurpation, the misuse of the role of the courts in administrative law should be a cause for concern.

maladministration and inefficiency that has been identified as the root cause of the problem.¹¹³

As stated above by Woolf et al¹¹⁴ the administrative process cannot merely be a ‘succession of justiciable controversies.’ Plasket J alludes to this when he describes that it is not only the relevant governmental authorities¹¹⁵ that are responsible for the dire situation, but also two other public bodies which are empowered by the Constitution to investigate, monitor and evaluate the organisation and implementation of the administration.

He refers firstly to the Human Rights Commission (HRC) which is a Chapter 9 institution created to strengthen constitutional democracy in the Republic.¹¹⁶ The duties of the HRC are outlined in s184¹¹⁷ and it is required to promote respect for human rights; promote the protection, development and attainment of human rights and monitor and assess the observance of human rights in the Republic. This is to be achieved by investigating and reporting on the observance of human rights; taking steps to secure appropriate redress where human rights have been violated; carrying out research; and educating administrators. Finally, the HRC must require relevant organs of state to provide information regarding the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.¹¹⁸ S15 of the Human Rights Commission Act¹¹⁹ empowers the HRC to conduct these investigations and sets guidelines for how they are to be carried out.¹²⁰

¹¹³ *Vumazonke* 10 (footnotes omitted).

¹¹⁴ Woolf et al *De Smith's Judicial Review* 1.

¹¹⁵ Such as the MEC for Social Welfare and Development, the Premier of the province, the Social Development Standing Committee of the provincial legislature and the Minister of Social Development in the national sphere of government all of whom are responsible according to their Constitutional obligations.

¹¹⁶ *Vumazonke* 15.

¹¹⁷ Constitution of South Africa, 1996.

¹¹⁸ S184(2) of the Constitution.

¹¹⁹ 54 of 1994.

¹²⁰ Danaline Fransman, Head of Legal Services of the HRC advised via e-mail (28-04-2011) that there was a thorough investigation conducted by the EC office regarding this judgment. A series of meetings with the then Premier of the Eastern Cape, the Minister of the Eastern Cape Social Development and senior officials of the Department of Social Development were convened. There were walkabouts to some selected offices of Social Development to verify information received from the Department and thereafter a letter was sent to the Judge informing him of their investigation.

Plasket ordered that a copy of the judgment should be served on the HRC in order that the Commissioner could make a reasoned decision whether

to institute an investigation into the conduct of the respondent's department, with a view to proposing concrete steps to ensure that it begins to comply with its constitutional and legal obligations and ceases to infringe fundamental rights on the present grand scale.¹²¹

The second institution to which he refers is the Public Service Commission (PSC). This is an independent body created to maintain 'effective and efficient public administration' and to promote 'a high standard of professional ethics in the public service'.¹²² The functions of the PSC are contained in s196(4) and include the promotion of the values and principles in s195 of the Constitution;¹²³ the investigation, monitoring and evaluation of the organisation and administration of the public service; the proposing of measures to ensure effective and efficient performance within the public service; the reporting of activities and performance of functions and the general investigation and evaluation of personnel and public administration practices. The PSC is empowered to conduct such enquiries and investigations in terms of the *Public Service Commission Act*.¹²⁴

The reason for his choosing to serve the judgments on the HRC and PSC is that they can then consider whether to institute an investigation into the relevant department. Rather than relying solely on a route which can only solve one case at a time, Plasket highlights the responsibility of the independent institutions to investigate and systematically improve the disorganisation and ineptitude of the department in the administration of social assistance.

In *Kate*, the problem is highlighted with regard to how applications for review are approached. Rather than being sensible reasoned applications which relate specifically to judicial review, they are desperate attempts to illicit any response from an unresponsive and impotent government department. Nugent JA explains that

¹²¹ *Vumazonke* 18.

¹²² S196(2) of the Constitution.

¹²³ Namely s195(1)(a), which requires that a 'high standard of professional ethics must be promoted and maintained'; s195(1)(b), which requires that '[e]fficient, economic and effective use of resources must be promoted'; s195(1)(e), which requires that the needs of people 'must be responded to'; s195(1)(f), which requires that public administration 'must be accountable'; and s195(1)(g), which requires that '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information'. *Vumazonke* 12.

¹²⁴ 46 of 1997 ss 9 & 10.

typically what seems to be occurring is that when a demand upon the administration is ignored an application to court spews from a word processor, with adaptations to meet the particular case...¹²⁵

and later that

another consequence of litigation on that scale...is that cases are often commenced without adequate thought being given to the formulation of the claim. Instead a burst of shrapnel is fired in the general direction of the government in the hope that somewhere something will strike home.¹²⁶

2 3 2 4 Expensive, slow, time-consuming and daunting

This four-part criticism relating to courts generally is perhaps one of the most important in our context. However, it is more thoroughly dealt with in the section relating to the Chapters 3, 6 and 7.

What should be noted here is that it is not only the costs to the applicant which should be considered, because even if they are successful there is often a costs order against the administration. This is even more alarming because it is the public purse which is being plundered. Instead of making correct decisions and administering allocated funds from the beginning, each case now has an additional and unfavourable cost order attached to it.

In *Ndevu v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and another*,¹²⁷ Erasmus J states

I have obtained from the Registrar a copy of a bill taxed in a similar matter. On that basis these matters tax out at about R4 000.00 per case. It would mean therefore that in today's cases alone about R100 000.00 will be paid in legal costs in respect of the fees and disbursements of the legal representatives of the applicants. Clearly, millions of rand in taxpayers' money have been wasted in unnecessary legal costs occasioned by indolence and/or incompetence on the part of public servants.¹²⁸

¹²⁵ *Kate 6*.

¹²⁶ *Kate 6*. Here he refers to the case of *Makalima v Member of the Executive Council: Welfare* SECLD 27-01-2005 case no 1601/03 hereinafter referred to as *Makalima*.

¹²⁷ This case was one of 27 related cases in which all of the applicants had applied for grants but had either received no responses or inadequate responses.

¹²⁸ *Ndevu v MEC for Welfare, EC 5 – 6*.

Plasket J comments on this statement by stating that R4 000.00 per case is an optimistic estimate and that ‘going rate’ of cost orders per case are more likely in the region of R5 000.00.¹²⁹ In the 2004 judgment of the same court,¹³⁰ Leach J introduces his judgment with a statement about ‘the worrying inability of the Department to properly perform its functions continues, seemingly unabated, with hundreds of these applications being heard in our courts every month, at huge financial costs to the fiscus.’¹³¹ Nugent JA¹³² also highlights the problematic element that public funds are being used to finance damages claims against the administration and that ‘it is indeed troubling...that the public purse, upon which there are many calls, should be depleted by claims for damages.’¹³³ He states that hopefully legislative accountability will resolve the matter, but the fact that it is not a justifiable situation is not a reason to withhold such damages. In the absence of legislation to combat such claims, there is authority to award them.

2 3 2 5 Unconstitutional

The theory behind judicial deference to the executive is demonstrated in the *Vumazonke* case. Plasket J uses the concept of institutional competence and demonstrates how this limits the scope of interference of the court. At the same time, he explains why the review of administrative failings of government is in fact a judicial function and that the protection of human rights that have been so grossly infringed is ‘within the heartland of the judicial function’. He states that

when rights are infringed or threatened, the impugned conduct becomes very much the business of the judiciary: s38, s165 and s172 of the Constitution make that abundantly clear, placing as they do a duty on the judiciary to remedy such infractions.¹³⁴

However, he is quick to point out that there is no unconstitutional infringement of the spheres of government and that courts only intervene when there has been a gross violation of rights.

¹²⁹ *Vumazonke* fn 9.

¹³⁰ *Makalima*.

¹³¹ *Makalima* 1.

¹³² *Kate*.

¹³³ *Kate* 32.

¹³⁴ *Vumazonke* 9.

Despite the fact that he attempts a justification for his actions, there is still evidence of a highly deferential attitude towards the executive.

Although the case law has been limited to problems occurring in the Eastern Cape, these difficulties extend to all of the provinces in South Africa and are symptomatic of unresponsive and unwilling government departments. Our focus, however, is rather on the fact that judicial review as a primary dispute resolution forum is unsuitable to adequately address the dilemma. The limitations of judicial review as to its operation, its ability to cure systematic defects, its coherent remedying, its potential unconstitutionality and its costliness have been identified and explained in case law, and must be weighed against its ability to provide administrative justice across the board.

In a country fraught with such monumental challenges against the effective administration of justice, judicial review cannot and should not be made to perform the myriad of roles which should be dispersed over an integrated and comprehensive system of administrative dispute resolution.

2.4 Conclusion

South African judicial review reflects many of the common-law characteristics inherited from its English parent-law. Judicial review occupies a central and primary role in the control of executive and legislative power and continues to be viewed as the most prominent avenue of administrative justice. That said, our system of administrative law requires compliance with a written and comprehensive Constitution. Administrative law in South Africa must also then comply with the standards and provisions of the Constitution, and should perform a function which advances openness, transparency and good governance.

What is clear from the above discussion is that judicial review in its current role is highly unsuitable for the advancement of administrative justice in South Africa. It suffers from various limitations and is inappropriate in many instances to cure large-scale maladministration. On the other hand, judicial review remains an essential element of what should become an integrated and complex system of administrative justice. The important argument that has been advanced in this chapter is not the abolition of judicial review nor a slander on its effectiveness and importance. Rather, the argument centralises around the point that judicial review cannot provide all forms of relief in a system of administrative law which spans every sphere of government and almost every aspect of the lives of our citizens.

Should judicial review no longer be the primary avenue for justice, it is necessary to consider alternative forums of the adjudication of administrative disputes. The following chapter will provide a detailed discussion of the nature of administrative appeal tribunals and their potential suitability for the adjudication of large-scale systematic administrative action.

CHAPTER 3: DEFINING FEATURES OF TRIBUNALS

3 1 Introduction

One of the key elements of this study is the fact that tribunals offer an alternative form to the traditional method of judicial review as control of the executive. As a result it is necessary to investigate theoretical elements of how tribunals operate and are composed. While not every element can be covered as there are many different forms and types of tribunals, an attempt has been made to highlight some of the most general and important features.

A brief historical explanation of the origin of tribunals will set out their position and the need for them in an administrative law system. The discussion that follows will consider the characteristics of tribunals and how these are to be understood. Thirdly, certain hallmarks of tribunals have been generally identified and these elements will be discussed. Supervision of tribunals remains an important safeguard as to the regulation and circumscription of their functioning. A discussion of the relevant features that any supervisory body should embody will be shown. Lastly, a short outline of the debate relating to the scope of tribunal jurisdiction, and some of the issues, will be demonstrated. These elements should then provide an over-arching blueprint for a tribunal structure.

3 2 Historical Origins of Tribunals

According to Schwartz and Wade, ‘the welfare state could not work without an elaborate judicial system of its own.’¹ The reason for this is that when governments are involved in the administration of tangible rights to its citizens, they do so with total control. In order to ensure that the administration is fair and just, state action should be controlled and sufficient mechanisms should be in place so that disputes which spring up can be adjudicated and dispensed with both quickly and effectively.

The historical story of tribunals is a long one,² and can be traced back as far as 1066. This thesis will focus only on their development in the 19th and 20th century,³ as only this is

¹ Schwartz & Wade *Legal Control of Government: Administrative Law in Britain and the United States* (1972) 143. However, ‘the proliferation of tribunals is a phenomenon of the present century. Many, but by no means all, tribunals form part of the apparatus of the welfare state’ in Report of the Committee of the JUSTICE – *All Souls Review of Administrative Law in the United Kingdom Administrative Justice: Some Necessary Reforms* (1988) 212.

² The full history can be found in Cane “Understanding Administrative Adjudication” in Pearson, Harlow & Taggart (eds) *Administrative Law in a Changing State* (2004) 275-283.

pertinent to tribunals as we know them. In the 19th and 20th century, the rise of the welfare state allowed for tribunal development in a similar manner to the tribunals of today. Developments in tribunals could also be attributed to the growth of the apparatus of the welfare state in the 20th century. Commonwealth countries have their origin in the administrative law of England, and so the following discussion deals with the most important developments of tribunals which occurred in England.⁴

During the period of the Industrial Revolution in the first half of the 19th century, statutory schemes of social relief were implemented by combining functions of the legislature, the executive and the judiciary into central, multi-functional agencies.⁵ This combination was thought to be the most efficient problem-solving mechanism, and indeed more appropriate than the ill-equipped courts to remedy major social and economic problems.⁶ However, these multi-functional agencies went into decline in the 20th century due to a growth in power of the executive and a preference for exclusive ministerial responsibility in policy-making. The agencies were replaced, in part due to a different conception of separation of powers, and the tribunals that remained were charged only with an adjudicative function. The issue which then arose was that although tribunals served essentially the same core function as courts, they were not courts and not therefore part of the superior judiciary as envisaged by Montesquieu.⁷ Had there been a proper understanding of the reasons behind the separation of powers, namely the restriction of concentrated power and a desire to avoid conflicts of interests caused by governmental departments overstepping their competencies, the creation of tribunals which were not courts would not have been problematic. However, as Cane states;

the problem of tribunals had emerged, a product of the institutional aspect of separation of powers and the idea that government is composed of three branches...The idea that the judicial function should be allocated to judicial

³ For this account, Cane “Understanding Administrative Adjudication” in *Administrative Law* 280-283 is the informing text and a shortened, paraphrased version of his explanation follows.

⁴ Boule, Harris & Hoexter *Constitutional and Administrative Law* (1989) 107. This is also due to Britain’s colonisation of the United States, Australia, part of India and many African countries.

⁵ Multi-functional agencies were vehicles of administration of regulatory schemes, such a poverty relief or health and safety benefits. An example of this is the non-departmental ‘board’ which had the duty of implementing a statutory scheme by exercising a mixture of legislative, judicial and executive functions. The combination of functions was thought to be the most efficient way to deal with large-scale socio-economic problems.

⁶ Stebbings *Legal Foundations in Nineteenth Century England* (2006) 37-72. The courts were considered ill-equipped because they were slow, costly and could not provide the highly specialised relief required in these matters.

⁷ Montesquieu *L’Esprit des Lois* (1748).

institutions, coupled with the narrow understanding of judicial institutions in terms of the superior central courts, generated the problem of tribunals.⁸

The concept of non-departmental agencies, such as had developed in England, followed a similar line of growth in Australia but, due to different conditions,⁹ Australian law reflected centralism and federalism rather than parliamentary sovereignty. While also not favouring multi-functional agencies, the Australian system aligned their adjudicatory bodies with the executive rather than the judiciary. Their particular model of separation of powers is such that it accommodates tribunals and entrenches them as necessary adjudicatory bodies within any welfare state.

South Africa falls decidedly under the model of judicial supervision of administrative action found in English Law. This means that the decisions of administrators are subject to control of the ordinary courts.¹⁰ This model, as well as our Apartheid past,¹¹ meant that judicial review was essentially the courts' only way of regulating administrative action, and merits review or errors of fact were remedied by the executive or the legislature. Although tribunals do exist in South Africa, they are fragmented and not coherent, centralised structures like the ones that can be found in Australia and England.¹² However, since the new constitutional dispensation, s33(3)¹³ and *PAJA*,¹⁴ the door has been opened for the creation of a central tribunal structure.¹⁵ A weakness that may be identified is that the legislation provides for 'judicial review' and not merits review, but at the very least it 'lays the foundations for what in time

⁸ Cane "Understanding Administrative Adjudication" in *Administrative Law* 281.

⁹ The political climate was very different as Australia was initially a British colony, had a far smaller population and had unaccommodating climatic conditions.

¹⁰ Boule et al *Administrative Law* 92.

¹¹ Ch 2 explains this history and existence of judicial review, as well as its weaknesses.

¹² Govender "Administrative Appeals Tribunals" in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 83 notes that South Africa had a 'disparate collection of appeal bodies with vastly differing modes of operation, and consequently different levels of effectiveness'. Hoexter *Administrative Law in South Africa* (2007) 68 confirms that 'little or nothing has changed. There is still no coherent system of administrative appeals in this country'. This topic is dealt with in more detail in Ch 6.

¹³ Constitution of the Republic of South Africa, 1996 allows for the review of administrative decisions by a court 'or, where appropriate, an independent and impartial tribunal'.

¹⁴ Promotion of Administrative Justice Act 3 of 2000 (*PAJA*) ss 6 – 10, and a tribunal is defined in s1 as 'any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this act'.

¹⁵ Hoexter *Administrative Law* 60-62 describes that the suggested tribunal structure would be similar to that of the Administrative Appeals Tribunal (AAT) found in Australia. The description of the AAT can be found in Ch 4, while Hoexter's suggestions will be discussed in Ch 6.

may become a system of special administrative courts or a type of ‘non-judicial’ review.’¹⁶ A centralised system of tribunals has been suggested in South Africa, and the possible advantages of such a system have been acknowledged.¹⁷ At this stage, however, the advantages of tribunals have only been suggested and accepted theoretically.¹⁸

Cane then articulates the 20th century ‘problem’ of tribunals

how to explain and justify the existence of institutions performing adjudicatory functions similar to those of courts which are not part of the judicial branch of government and are staffed by officials who are not guaranteed the tenure and salary protections enjoyed by judges?¹⁹

The remaining chapter will therefore outline the important elements and characteristics of tribunals in an attempt to illustrate and to justify their continued existence in administrative law systems.

3.3 Characteristics of Tribunals

Tribunals are informal investigative or quasi-judicial bodies which deal almost exclusively with administrative law, and usually on a highly specialised level. According to Farmer,²⁰ tribunals per definition should consist of the following characteristics. Firstly, they should have the ability to make final, legally enforceable decisions. Secondly, they should be independent from any departmental branch of government. Thirdly, the nature of the hearings conducted in tribunals should be both public and of a judicial nature, while not necessarily subject to the stringent formalities of a court of law. Fourthly, tribunal members should be in possession of specific expertise, in the field of operation of the tribunal as well as judicial expertise. Fifthly, there should be a duty on tribunals to give clear reasons for their decisions, and lastly that there should be a right of appeal to a higher court on disputes regarding points of law.

¹⁶ Hoexter *Administrative Law* 61.

¹⁷ South African Law Reform Commission Project 115 *Report on Administrative Justice* (1999). See Ch 6 s 2 2 1.

¹⁸ A more detailed discussion about the history of tribunals and position in South African administrative law will follow in Ch 6.

¹⁹ Cane “Understanding Administrative Adjudication” in *Administrative Law* 283.

²⁰ Farmer *Tribunals and Government* (1974) 184.

According to Govender,²¹

the usefulness of this definition lies not in its description of existing tribunals but rather as a list of prerequisites which would ensure the optimum effectiveness of tribunals in any administration.

If, as a point of departure, the above six characteristics are prerequisites for effective tribunals, then a careful study and unpacking of what each entails would create a general measure against which tribunals can be evaluated.

3 3 1 Finality and Enforceability

The first important consideration is the finality and legal enforceability of the decisions. The finality requirement does not require that there is no leave to appeal to a higher court, but that the decisions reached by tribunals are not mere suggestions, but rather judgments with enforceability. The requirement of finality distinguishes tribunals from bodies without this power, such as commissions of inquiry and mediation committees.²² Tribunals need to have sufficient power to enforce their decisions; for fear that they become nothing more than a committee empowered only to make suggestions to the parties.

Another reason why tribunals need to be empowered with final decision-making abilities lies in the nature of the disputes they are called to resolve. Specifically in the resolution of disputes regarding civil-political and socio-economic rights, the government acts under a duty as a responsible agent.²³ Govender quotes the Bland Committee of Australia's²⁴ unpacking of the responsibilities of government with regard to the individual,

there are powers to admit or accept and to refuse or reject claims; powers to grant less than the maximum of a prescribed benefit; powers to determine degrees of disablement; powers to select beneficiaries for benefits; powers to seize and forfeit goods; powers to exempt persons from statutory obligations; powers to remit and make rebates; powers to authorise what is otherwise explicitly prohibited by legislation; powers whose exercise can advance or prejudice a career, a livelihood or a

²¹ Govender "Administrative Appeals Tribunals" in *Comparing Administrative Justice* 77.

²² Schwartz & Wade explain the theoretical distinction in England that 'tribunals in principle lie outside the area of ministerial power. Inquiries are essentially part of it.' in Schwartz & Wade *Legal Control of Government* 148.

²³ One problematic issue with South African administrative law that has been raised in Boule et al *Administrative Law* 95 is that it treats administrative disputes from a private law perspective and thus all actors as equals. This issue is more fully explained in the problems with judicial review in Ch 2.

²⁴ Committee on Administrative Discretion Parliamentary *Interim Report* (1998) 5-6 as reproduced in Sharpe *The Administrative Appeals Tribunal and Policy Poles* (1986).

cherished ambition; and powers whose exercise may impinge deeply on property right, with sometimes no redress for the person affected.²⁵

Bearing in mind the far-reaching consequences that state action has on the life of the individual, the checks that judicial or quasi-judicial institutions have against the executive must have more official effect than a mere proposition. Tribunals need to be empowered to grant judgments with sufficient finality to bring administrative officials to check when there has been an abuse of power or a mismanagement of administrative action.

The second element of the first requirement is that tribunals should be empowered to make legally enforceable decisions. Enforceability is a big concern because the legal enforcement of a judgment is related to the function of the judiciary. Whether tribunals fall under the control of the executive or under the control of the judiciary, their decisions must result in enforceable consequences. As with any judgment, unless its outcome is fully and legally enforceable it is not effective, and in order to retain public confidence in the power and authority of the tribunal, their decisions must have enforceability.

3 3 2 Independence

The second characteristic is that of independence.²⁶ The independence of the judiciary in South Africa is enshrined in the Constitution,²⁷ and case law has unequivocally confirmed that independence.²⁸ If tribunals are to be seen as ‘quasi-courts’ as in the English model, then their independence is probably guaranteed underneath that blanket protection.²⁹ Cane states that ‘independence is thought essential to the effective operation of courts as an external check on government decision-making.’³⁰

²⁵ Govender “Administrative Appeals Tribunals” in *Comparing Administrative Justice* 76.

²⁶ This characteristic is also mentioned in, among others, Schwartz & Wade *Legal Control of Government* 145; Justice *All Souls Review* 213; Wade & Forsyth *Administrative Law* 9 ed (2004) 911-912; Cane *Administrative Law* 4 ed (2004) 389-391 and is generally accepted to be one of the most important elements of a tribunal. However, almost all of the writers acknowledge that this is a theoretical independence and that in practice it does not always occur.

²⁷ S165 Constitution of the Republic of South Africa, 1996 (“the Constitution”).

²⁸ *Van Rooyen v The State* 2002 5 SA 246 (CC); *De Lange v Smuts* 1998 3 SA 785 (CC).

²⁹ It should be noted that in the *Tribunals, Courts and Enforcement Act 2007* this independence is guaranteed. The Lord Chancellor is required to uphold the independence of the judiciary, and even when the bill was promoted in the House of Commons, the Minister stated that “The purpose of the (first) clause is manifest. It puts beyond doubt the fact that the tribunal judiciary are independent of the Executive.”

³⁰ Cane *Administrative Law* 390.

However, tribunals generally operate differently to courts and are not bound by the same rules of evidence or strict court procedures.³¹ Tribunals do not necessarily follow the adversarial procedure, nor are bound to adhere to the rules of court. By their very nature tribunals require constant communication with the government branch whose decisions they review, in order to promote more effective governance and to remedy errors committed by officials.³² Cane raises the argument that it is merely a matter of political choice that tribunals are separate from the government departments whose actions they review, and that there is no intrinsic reason why internal review is any less preferable to external merits review.³³ This said, he agrees that public perception may play an important role in the decision to keep tribunals and governmental departments separate. Schwartz & Wade also confirm the characteristic of independence as seminal to the operation of tribunals, and state that ‘tribunals are wholly independent of the government departments which dispense benefits and exercise controls.’³⁴

The resultant effect is that the operation of tribunals may fall under a grey category whereby, even in a strict system of separation of powers, the functions of the branches of government are not as defined. Depending under which branch of government tribunals function, adjudication may be a case of the executive acting in a judicial capacity, or alternatively the judiciary administering executive justice. In either instance, it is important that although there is communication, co-operation and collaboration between the tribunals and the government departments, there is still a measure of independence and decisions reached by tribunals are not influenced by governmental bias. Cane³⁵ illustrates the difference between courts’ and tribunals’ functions with this distinction between ‘adjudication as an instrument of governance and adjudication as an accountability mechanism’.³⁶

³¹ Tribunals should still be bound by the objectives of consistent treatment, fairness and the rules of natural justice.

³² They may even depend heavily on the departments whose actions they review for staff. This is problematic because even if the membership of the tribunals committee remains independent, clerks or other civil servants working in the tribunals system may give the impression that there is no independence. This was noted in Wade & Forsyth *Administrative Law* 911-912.

³³ Cane *Administrative Law* 390.

³⁴ Schwartz & Wade *Legal Control of Government* 145.

³⁵ Cane “Judicial Review in the Age of Tribunals” in Forsyth, Elliott, Jhaveri, Ramsden & Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 493.

³⁶ In this way courts are responsible for dispensing with a constitutional function of a governmental system, namely the resolution and adjudication of crimes and disputes, while tribunals are responsible for calling administrators to be accountable for their actions, and indeed remedying them should there be error.

3 3 3 Public Hearings

The point of departure is that tribunal hearings should be public and open. Although public hearings of a judicial nature appear to be a surefire way to promote accountability and transparency of proceedings and of tribunal lack of bias,³⁷ in some cases this may be totally undesirable. One of the reasons for the existence of tribunals is that certain disputes may concern an area which requires high expertise, such as tax disputes or disability benefits where the assessment of the disability requires medical expertise, and very often such areas of the dispute are of a highly personal and sensitive nature.³⁸ While court hearings on the same subject matter are of public record and open to the public, courts can still maintain control and impartiality as judicial proceedings are heavily policed by rules of witness appearance and testimony, evidence and conduct. In order to fulfill the requirements of effectiveness and efficiency, tribunals are not necessarily subject to the same restrictions. Members of tribunals may engage on fact-finding missions, call for submissions *mero moto* on issues of the dispute on which they require clarity, question persons who appear before them of their own accord, request written submissions on issues and not have regard to information which they consider irrelevant.³⁹ Making these kinds of proceedings open to public record may actually infringe on their effectiveness and indeed their accessibility as the public may be deterred from approaching a tribunal due to the notion that the proceedings would be tantamount to privacy infringement.⁴⁰ Rather, the 'public nature' of the hearings could be attained by requiring all members of tribunals to publish clear, coherent and comprehensive reasons for their findings. This would protect the dignity and personal integrity of the claimant,⁴¹ but would also maintain a system wherein members must be accountable and transparent in the course of

³⁷ Wade & Forsyth *Administrative Law* 786.

³⁸ Disability claims may require in-depth medical information, tax claims would divulge personal wealth and means information, water and housing claims may require information relating to personal hygiene and living conditions which may be highly confidential to the claimant.

³⁹ Wade & Forsyth *Administrative Law* 785.

⁴⁰ In England, several tribunals already sit in private, such as the Betting Levy Appeal Tribunal, Mental Health Review Tribunal, General and Special Commissioners of Income Tax. Other hearings can be held in private where the claimant so requests, where there are intimate personal circumstances involved or where there is an issue of public security. This privacy is lost in an appeal to the high court. Further explanations of the privacy of English tribunals can be found in Wade & Forsyth *Administrative Law* 786.

⁴¹ Art 6(1) of the of the European Convention on Human Rights, by which all European and UK tribunals must abide, does not insist on public hearings where "the interests of morals, public order or national security,..the interests of juveniles...the protection of the private lives of the parties or the interests of justice" require otherwise.

their deliberations. In principle, however, hearings should always be public and a case made out for instances when such a deviation from normal proceedings is required.⁴²

3 3 4 Expertise

Farmer's fourth characteristic is that tribunal members must be in possession of expertise. The purpose of tribunals is to provide quicker and more cost-effective resolution of administrative disputes, and thus the requirement that members must be in possession of detailed and intricate knowledge of the issues at stake is very important to that efficiency. While this may seem like a fairly obvious requirement, it is the level, rather than the existence, of expertise which is important. In some jurisdictions, India being an example, the structure of the tribunals is such that it engages members not due to expertise, but due to station in life. Datar states that 'tribunals are structured in such a way that only civil servants who are on the verge of retirement would be interested in applying for the vacancies.'⁴³ He illustrates this with reference to India's National Company Law Tribunal (NCLT). Any member of the Bar or Chartered Accountants with fifteen years of expertise is eligible to become a member of the tribunal, but the term of office is only five years, without the guarantee of any extension. It would be absurd for experienced advocates or accountants to leave practice at the height of their careers, serve on the tribunal for a five-year term, and then return to practice with a five-year loss of experience. The Indian experience is that most of the members recruited for tribunals are retired or near-retired civil servants. This is not desirable, as the tribunals become a gateway into retirement for the members. Rather, tribunals should attract highly experienced members and thus would need to offer competitive benefits and incentives to those it wishes to attract.

Just as expertise in the relevant field of operation is especially important, particularly with regard to revenue disputes, housing policies and all other technical and intricate policies, judicial expertise is as much of an imperative. Tribunals administer a judicial function and have legally enforceable decisions. If this is the case, then those decisions must be legally sound and uphold the underlying values with which all judicial decisions must comply. The informing values of the Constitution,⁴⁴ such as the principle of legality and the rule of law,

⁴² Justice *All Souls Review* 221.

⁴³ Datar "The Tribunalisation of Justice in India" in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 296.

⁴⁴ S1 of the Constitution.

equality, human dignity and fairness, as well as accountable and transparent governance must be upheld in the functioning of the tribunals. Judicial expertise is necessary to ensure the legal accuracy of the decisions.

3 3 5 Reasons

The fifth requirement that Farmer identifies, that of giving reasons, is hardly a new concept in South African administrative action.⁴⁵ Reason-giving is a basic feature of judicial decision-making in South Africa.⁴⁶ Based on this, the giving of reasons is an important justificatory measure in all administrative adjudication. More specifically, S5 of *PAJA*⁴⁷ requires that administrators give reasons for their decisions, and indeed grants a ground of judicial review if there is a failure to give ‘adequate’ reasons.⁴⁸ If that is the case, decisions made by tribunals should comply with the same, if not a higher, standard.⁴⁹ The requirement of providing reasons for decisions has several positive effects. Firstly, reasons promote transparency and accountability from the members of the tribunals. Secondly, reasons offer to both the administrative official and the claimant a satisfactory understanding of why the decision was given, which contributes to the perception of fairness and justice. Thirdly, reasons provide a blueprint to the administrators as to how to improve the original administration to avoid a similar claim. Good governance can then be promoted from primary administrative action rather than only at the later remedial stage.

⁴⁵ S33(2) of the Constitution provides a right to written reasons to those whose rights have been adversely affected by administrative action.

⁴⁶ The court makes this point expressly in *Mphahlele v First National Bank of SA Ltd* 1999 2 SA 667 (CC) 12 by saying that giving reasons in a judgement ‘explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.’ This point is re-iterated in *Strategic Liquor Services v Mvumbi NO and Others* 2010 2 SA 92 (CC) 17. In *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2010 14 SA (CC) 59 the court quotes Corbett “Writing a Judgment” (1998) 115 *SALJ* 118 in saying that ‘the true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it.’

⁴⁷ S5 gives effect to S33(2) of the Constitution and is in keeping with the goals of the preamble of *PAJA* which aim to “create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function”.

⁴⁸ A number of cases find their pivotal issue as to what constitutes ‘adequate’ reasons, notably *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC); *Commissioner for the South African Police Services and Others v Maimela and Another* 2003 5 SA (T) 481. In *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 CC the court discussed the considerations for reasons and their constitutional basis.

⁴⁹ ‘The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration.’ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 538.

3 3 6 Appeal

The last requirement is that there should be a right to appeal to a court on points of law.⁵⁰ Appeal is not the same as judicial review.⁵¹ While they both allow for reconsideration of administrative decisions, judicial review relates to errors of law, while appeal allows a challenge of the merits of a decision.⁵² In common law jurisdictions where tribunals are an accepted part of the administrative adjudication machinery, the courts continue to play an important supervisory role as a court of appeal.⁵³ The decisions of administrative bodies and tribunals should be subject to this right of appeal to the courts in order to ensure that the legal system remains essentially unitary.⁵⁴ These considerations are discussed more fully in s 3 3 5.

Although these characteristics of tribunals have been identified and generally accepted over a period of time, these arise out of the effective functioning of tribunals. The next section will deal with more theoretical underpinnings of tribunals in order to establish their nature.

3 4 Informing Principles of Tribunals

As was illustrated above,⁵⁵ tribunals are necessary elements in any welfare-state machinery. However, it is important to understand how they operate and what differentiates them from courts. The following discussion aims to consider what principles define and inform the structure and procedure of tribunals, and why despite these principles, courts continue to exist side-by-side with, or as a higher standard of, tribunals.

⁵⁰ On questions of fact, the general rule is that there is no appeal at all: Schwartz & Wade *Legal Control of Government* 158.

⁵¹ A full explanation of judicial review in South Africa can be found in Ch 2.

⁵² 'Unlike judicial review, such appeals are established specifically to challenge the merits of a particular decision. Judicial review, on the other hand, focuses on the way in which the decision was reached, and not on the justice or correctness of the decision itself. At least in the theory, review tests the legality and not the merits of the decision' Hoexter *Administrative Law* 63.

⁵³ In England there is a specific and automatic statutory right to appeal to courts against administrative decisions. This should be distinguished from judicial review which arises from the inherent jurisdiction of the courts at common law.

⁵⁴ Schwartz & Wade *Legal Control of Government* 157.

⁵⁵ Schwartz & Wade *Legal Control of Government* 143.

3 4 1 Franks Report

A report which fundamentally defined the principles of tribunals was the report of the Committee on Administrative Tribunals and Enquiries (Franks Committee)⁵⁶ in the United Kingdom. The committee firmly established the position of tribunals within the government of the United Kingdom, stating that ‘tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.’⁵⁷ Furthermore, the Franks Committee is most notable for laying out the three essential values of tribunals, namely ‘openness, impartiality and fairness’.⁵⁸ The report then defined these values as follows:

In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decision; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent of departments concerned with the subject-matter of their decisions.⁵⁹

As was illustrated above in the second characteristic according to Farmer, impartiality in decision-making is not always the same thing as independence. Harlow and Rawlings see ‘independence as *institutional* and related to the structural framework of the adjudicative machinery; impartiality, on the other hand, is *functional* and refers to the adjudicator’s approach to his task’.⁶⁰ This means that although tribunals may not have strict institutional independence from the departments with which they work, impartiality can still be achieved through the way in which decision-making is approached. This being said, there is still room

⁵⁶ Committee on Administrative Tribunals and Enquiries *Report of the Committee on Administrative Tribunals and Enquiries Cmnd 218* (1957). The Franks Committee was commissioned in order to evaluate the position regarding tribunals and enquiries in the UK. It became a watershed for tribunals and spurred much development for tribunals. Hereafter referred to as ‘Franks report’.

⁵⁷ Franks report 5. This position is entrenched into English administrative law, and should be contrasted with the Kerr Committee Report, which cemented the Australian position of tribunals within the executive. See Ch 4 s 3 1.

⁵⁸ Franks report 4. The Franks report’s recommendations allowed for gradual change to be implemented with regard to the nature of tribunals. The Committee identified the three core values of openness, fairness and impartiality. These became informing values of all tribunals and are still relevant in the re-structuring of tribunals today. These, along with the recommended changes with regard to the Council of Tribunals, allowed for a measure of judicialisation and tribunals began to be regarded as quasi-courts, or court substitutes. Tribunals also began to be regarded without deep suspicion and rather as an effective means of adjudication of administrative law.

⁵⁹ Franks report 42.

⁶⁰ Harlow & Rawlings *Law and Administration* 3 ed (2009) 489 fn 8.

for the argument that institutional independence may help ‘to maintain a distance between the decision-maker and both the subject-matter of the dispute and the personalities involved, and in that sense can be seen as instrumental to achieving impartiality and hence good outcomes.’⁶¹

3 4 2 Unique Features of Tribunals

Courts continue to have an important place in the administrative law system and should not be seen to be replaced by tribunals. Harlow & Rawlings explain that although tribunals may have the legal force and the competence of a quasi-court, the functional nature of tribunals is very different from courts and they are rather ‘prized for qualities that *differentiate* a tribunal from a court hearing’.⁶² Cane confirms this by saying that although the functions of both courts and tribunals are the adjudication of disputes, tribunals are far more important as agents who dispense administrative justice.⁶³ He explains that courts are considered less suitable than tribunals because of their formal procedures; costly and slow operations; their individualist approach to policy-based problems and their lack of expertise in complex welfare programmes. It follows then that the hallmarks of tribunals would be the contrast to these problems. While the hallmarks of tribunals are each individually important, it is the combination of them which give tribunals their distinctive advantage. If measured individually, each would possibly indicate an alternative route to tribunals and thus it is necessary for them to be packaged together.⁶⁴

3 4 2 1 Cost and Speed

One of the most pressing reasons for the creation of tribunals is cost.⁶⁵ Tribunals are cheaper for the government to run than courts for a number of reasons, but among them that tribunal members are paid less than judges and that the government is not usually under a duty to provide legal aid. From a claimant point of view, tribunals are more accessible because it is cheaper to apply to them, and usually a speedier process. The characteristics of speed and cost

⁶¹ Harlow & Rawlings *Law and Administration* 489.

⁶² Harlow & Rawlings *Law and Administration* 491.

⁶³ Cane “Understanding Administrative Adjudication” in *Administrative Law* 274.

⁶⁴ This means that if speed were the only consideration, then an internal review would seem more appropriate. If participation the only concern, then mediation is more fitting. Each element must be considered in conjunction with the others to provide a balanced tribunal.

⁶⁵ The cost element will be more fully explained in Ch 7.

are consequently interlinked, and contribute to each other. Harlow & Rawlings also identify these positive qualities, namely cheapness, speed and accessibility, and how they interact.⁶⁶ They say that these values are not merely positive in regard to the managerial aspect of a tribunal, but rather that the underlying values are in conformity with effective dispute resolution, and that tribunal processes are in a better position to give effect to proportional resolution of disputes than courts.⁶⁷ It should be borne in mind that there will be implementation costs involved when establishing a new tribunal system, but these costs should be weighed against the future benefit that tribunals can provide.⁶⁸

3 4 2 2 Participation

Participation in the tribunal process remains an important aspect of their effectiveness. The proceedings of tribunals may be either adversary or inquisitorial, depending on the nature of the right and the nature of dispute, but either way the claimant's role and participation in the decision is fundamental to a feeling of justice and fairness. Harlow & Rawlings quote Professor Bell in saying that the level of participation within tribunals helps to 'foster civic competence, personal responsibility and active involvement rather than over-dependency on professionals and a belief that people are not able to cope.'⁶⁹ Factors that contribute to the participatory nature of tribunals include the oral nature of the proceedings as well as the presence of lay members on the tribunal.⁷⁰

3 4 2 3 Informality

The formality, or lack thereof, of tribunals gives them an advantage over courts as primary administrative adjudicators. Not only does the license of the proceedings contribute to the speed and the efficiency of the adjudication, but the informality in itself may be a key attribute. Claimants, especially of welfare benefits, are usually poorly-educated and may be intimidated by formal court proceedings.⁷¹ The informality of tribunal proceedings makes approaching them more accessible to the neediest members of society. Furthermore,

⁶⁶ Harlow & Rawlings *Law and Administration* 491.

⁶⁷ Harlow & Rawlings *Law and Administration* 491.

⁶⁸ See Ch 7 s 5 1 2 fn 37 for an indication of the implementation and subsequent cost savings of the Victorian Council of Administrative Tribunals.

⁶⁹ Harlow & Rawlings *Law and Administration* 491 fn 20.

⁷⁰ Schwartz & Wade *Legal Control of Government* 147.

⁷¹ Cane *Administrative Law* 396

informality of proceedings is an essential element in any fact-finding mission and can contribute greatly to tribunals being able to provide the 'correct' decision. However, criticism remains that the informality of tribunals may result in the sacrifice of a certain amount of legal accuracy.⁷²

3 4 2 4 Specialisation

Specialised tribunals are in a more appropriate position than courts to give effect to individual administrative law claims within a broader policy-based framework. Despite the fact that, like courts, highly specialised tribunals such as tax tribunals or welfare grant tribunals must take into consideration the consequence their decisions have on the effective administration of the executive, an advantage of tribunals is that they are not bound by the rules of precedent and thus can decide each case on its facts. Specialised tribunals can then also contribute to the development of improved initial decision-making by identifying common problems or errors within a specific area of administrative law. In addition, while courts may have to adjudicate a wide range of both civil and criminal disputes, tribunals are specifically responsible for an individual aspect of social administration. This specialisation contributes then to accuracy and speedier adjudication.

While these traits of tribunals are largely undisputed, criticism has been raised regarding the effectiveness that tribunals provide. Cane goes on to explain that although the goals of cheapness, speed and efficiency are all desirable, they must be balanced with the other important goals such as procedural fairness and legal accuracy.⁷³ An administrative law system, in considering how to construct tribunals, should pay attention to all sides of the spectrum of concerns in order to give weight to all the considerations necessary in adjudicatory bodies.

3 5 Supervision of Tribunals

While tribunals may offer useful assistance to the enormous field of administrative adjudication, it is important that they do not merely spring up unassisted or in a haphazard way. In South Africa especially, one of the biggest challenges facing tribunals is their

⁷² Cane *Administrative Law* 396. He further points out that the nature of the dispute and the issues of legality involved will naturally push proceedings to either be more informal and flexible, or more formal and rigid.

⁷³ Cane *Administrative Law* 394.

fragmentation and disorganisation.⁷⁴ Schwartz and Wade identify one of the main problems with tribunals as being ‘proliferation’.⁷⁵ The reason for this is that tribunals have an inherent tendency to multiply.⁷⁶ Cane raises the question as to why judicial systems would prefer to create alternative institutions for adjudication rather than reform the court system itself.⁷⁷ The following section will discuss the need for supervision of tribunals, and further how courts are still necessary to lend important institutional and supervisory guidance to the development of a coherent tribunal system.

3 5 1 Central Supervisory Body

An essential element of tribunal justice, especially with regard to its effective functioning, is a centralised supervisory body. A study of other common law jurisdictions’ supervisory bodies and their development may supply a useful basis to illustrate which characteristics are most important.⁷⁸ Australian tribunals are monitored by a central supervisory body, the ARC.⁷⁹ The Franks Committee also identified the essential need for such a body to maintain and regulate the functioning of the tribunals in England, namely the Council of Tribunals or a similar permanent supervisory body which would provide ‘a focal point from which knowledgeable advice and guidance could be maintained.’⁸⁰ Any envisaged body will be most effective if it has a sufficient budget to function according to its mandate and performs three major roles; a consultative role, a supervisory role and an advisory role.

⁷⁴ This will be further discussed in Ch 6.

⁷⁵ Schwartz & Wade *Legal Control of Government* 149.

⁷⁶ Notably it is not their proliferation alone which is problematic, but their *unchecked* proliferation.

⁷⁷ Cane “Understanding Administrative Adjudication” in *Administrative Law* 284. He presents two possible explanations. The first is that ‘creation is seen as being politically and technically simpler and more efficient than re-creation’, and therefore more appealing to policy-makers. Cf Schwartz & Wade *Legal Control of Government* 150. The second explanation is a resistance from government to the expansion of a ‘judicial elite’ and to a ‘proliferation of tenured public offices’. See s 3 6 1 for a further discussion of this question.

⁷⁸ However a full discussion of the structure and functioning of the supervisory bodies of Australia and England will follow in Chs 4 and 5 respectively.

⁷⁹ Australian Review Council (ARC) which was created in terms of the *Administrative Appeals Tribunal Act* 1975.

⁸⁰ Franks report. This description can be seen as a blueprint for how a supervisory body should generally be understood. The Council of Tribunals has since been replaced with the Administrative Justice and Tribunals Council (AJTC)

Although there is not a set specific structure to which the supervisory body should conform, certain accepted traits have developed.⁸¹ Firstly, the body should be independent. Secondly the council should have the necessary resources⁸² to conduct individualised visits to tribunals and to compile reports about their functioning. These resources should extend both to personnel as well as to expertise. Unless tribunal growth and procedures can be closely monitored and the results carefully documented and analysed, it will be difficult to assess problems and areas for development and improvement. This assessment and reformulation will be especially necessary in the initial implementation stages of a new tribunal system. Thirdly, the supervisory body needs to be able to make recommendations generally to the administrative sector.⁸³ If their recommendations and advice are limited to tribunals, then the result may be the fragmentation of hierarchies and structures.⁸⁴ Fourthly, the supervisory body should have dual role of watchdog and of mentor. As well as reviewing the functioning and effectiveness of the tribunal, the body should facilitate better decision-making and provide support and training for tribunal members. This role of encouragement and guidance should include the formulating of ‘best practice’ rules, performance standards for tribunals and guidelines for more efficient administration, based on a collective experience.⁸⁵

If a council on tribunals is to be effective, it must have both an adequate research budget and sufficient regularity authority over the whole of the administrative justice sphere. The need for a supervisory body to constantly regulate and re-formulate the structure of the tribunals is necessary for good governance. Tribunals, if they are to offer the kind of flexible and efficient dispute resolution which is required of them, must be adaptable to the changing nature of the

⁸¹ The most successful supervisory body is the Australian ARC. It was the basis of the new English AJTC, and was also suggested as a model in South African administrative reform in clause 15(a) of the draft bill appended to the South African Law Reform Commission Project 115 *Report on Administrative Justice* (1999). See Ch 6 s 2 3 1 for a discussion on the role of an ARC in South Africa.

⁸² Despite having noble intentions, any council without the necessary budgetary resources will be nothing more than an empty shell and unable to perform its appointed role.

⁸³ Two examples of legal systems whose institutions take on this extensive oversight role are Australia’s ARC and England’s AJTC.

⁸⁴ This was a core concern in the development of the AJTC. Craig points out that it would be ‘beneficial to extend the ambit of the Council’s power to the whole area of administrative adjudication’ which should ‘embrace regulatory agencies, as well as more traditional court-substitute tribunals.’ in Craig *Administrative Law* 6 ed (2005) 268.

⁸⁵ These objects are all supported both by the Australian ARC and the Council of Australasian Tribunals (COAT). Furthermore these Councils provide and promote research seminars, conferences, the publishing of papers and the proliferation of adequate literature on the topic of tribunal supervision. Administrative Review Council *Report on the Council of Australasian Tribunals* (2002) 14.

society and the needs of citizens. The informality of tribunals is one of its most essential qualities and thus tribunals should be under constant scrutiny to ensure that there is no stagnation of procedures and that functionality is a more dominant requirement than constancy. Furthermore, the supervisory body should be empowered to perform a supervisory, consultative and advisory role with regard to the administrative justice system as a whole.

3 5 2 Administrative Appeals to a Higher Body

All tribunals and similar bodies should be subject to some form of control by a higher body or court. This higher appeal process contributes to a unitary and coherent structure of dispute resolution, as well as lending judicial certainty to the decision of tribunals. As described above,⁸⁶ appeal is not the same as judicial review. Although both consist of a judicial-type remedy, they differ in several major ways. The power of review is inherent in the jurisdiction of the courts, while the power of appeal must be expressly provided for by statute. Appeal focuses on the merits of a decision, while review is concerned with the way in which the decision was taken. Judicial review is considered to be an external remedy, while appeal is a form of control which is internal to the administrative action.⁸⁷ Lastly, in appeal proceedings, the original decision may be altered by the appeal tribunal or court. This allows the court to ‘stand in the shoes’ of the original decision-maker and replace his decision.⁸⁸ In review, the court must refer the decision back to the original decision-maker for reconsideration.⁸⁹ While these important differences between the two remedies exist, there is inevitable overlap between them. Decisions made by tribunals often give rise to a remedy both by way of a statutory right of appeal (if such a right exists), and an automatic right to judicial review.

3 5 3 Judicial Review by Courts

Tribunals cannot and should not be used to completely replace courts. Cane describes the reasons for this, explaining that not only is there a functional differentiation between courts

⁸⁶ S 3 6.

⁸⁷ Boule et al *Administrative Law* 253.

⁸⁸ Hoexter *Administrative Law* 63.

⁸⁹ There is the possibility that in exceptional cases the court itself may be able to take the decision, and this possibility is recognised in several common law countries. An example is S8(1)(c)(ii)(aa) of *PAJA* recognises that the court may make any order ‘in exceptional cases – substituting or varying the administrative action or correcting a defect resulting from the administrative action’.

and tribunals, but there are specific institutional reasons for the continued existence of both.⁹⁰ While tribunals have certain advantages to add to the system, they should be placed in their correct role.⁹¹ Courts should retain their superiority as courts of final instance. While judicial review as the primary form of control of administrative action has been criticised,⁹² much of the criticism relates to the role it has been forced to play in South African administrative law historically. When used correctly and as an instance of last resort,⁹³ judicial review continues to play a necessary, constitutionally-ordained role in administrative adjudication. This position and the challenges facing courts have been discussed in Chapter 2.

3 6 Scope of Tribunals

As is apparent from the above descriptions of tribunals, tribunals can offer many advantages to a system of adjudication of administrative disputes, at least at a theoretical level. What then becomes a point of contention is over which exact elements of the dispute tribunals are competent to adjudicate.⁹⁴ The question arises whether tribunals should only preside over questions of fact or ‘merits review’, and leave questions of errors of law which are concerned with legality and scrutinised by ‘judicial review’ up to competent courts, or whether tribunals should be able to fully preside over all elements of the dispute.⁹⁵ The contrast between the

⁹⁰ Cane “Understanding Administrative Adjudication” in *Administrative Law* 283-299. These institutional reasons are further discussed in s 3 6 2 ‘Judicial and Non-Judicial Review’.

⁹¹ Tribunals should be subject to control by the superior courts in order to ensure that they have observed the limits of their statutory power to make enforceable decisions. The dictum “That supervision goes to two points: one is the area of the inferior judgment and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise” can be found in the English case of *R v Nat Bell Liquor* (1922) 2 AC 128 156.

⁹² See Ch 2 for a full discussion of the problems related to judicial review.

⁹³ The availability of review should not, however, be accepted as a substitute for appeal proceedings, and ‘wherever...it can be shown that the absence of an appeal procedure is leading to the widespread use of judicial review as a substitute, there must be a strong presumption that some form of appeal should be provided.’ Turpin & Tomkins *British Government and the Constitution* 6 ed (2007) 720.

⁹⁴ ‘Tribunals have both a positive duty to decide the questions that the legislature intended them to decide and a negative duty to refrain from exceeding their jurisdiction.’ Wade & Bradley *Constitutional and Administrative Law* 11 ed (1993) 886.

⁹⁵ In Cane *A Research Agenda for the Age of Tribunals* <http://www.ajtc.gov.uk/adjust/articles/feature_peter_cane.pdf> (accessed 21-02-2010), he writes that ‘in Australian federal law, tribunals and courts are categorically different institutions, and merits review is a function categorically different from judicial review. In English law, by contrast, courts and administrative tribunals are understood as species of the same genus. It remains to be seen whether a generic concept of tribunal review will develop in English law; and if it does, in what respects will it resemble and differ from judicial review.’

Australian position and the position in England provides a backdrop for the position tribunals occupy within government; in the executive and the judiciary respectively.⁹⁶

3 6 1 Judicial and Non-Judicial Review

Cane⁹⁷ draws a distinction between ‘judicial review’, that is review by judges in courts, notably superior courts, and ‘non-judicial review’ which is review by other entities. He further distinguishes between internal non-judicial review and external non-judicial review, the former being the implementation of rules and the latter the adjudication of disputes arising out of the implementation of rules. His article then relates to the relationship between external non-judicial review and judicial review, more specifically that ‘the merits of decisions do not negatively define the limits of judicial review but positively characterise a mode of administrative adjudication distinct from judicial review.’⁹⁸ He uses the example of the AAT and points out that because it has more intrusive and investigative powers than a court, merits review is something of an ‘enhanced judicial review’⁹⁹ and

merits review by tribunals is considered to be categorically different from judicial review by courts, as least in procedural and remedial terms. Whereas the characteristic merits review remedy is to vary a decision or make a substitute decision, the characteristic judicial review remedy is to set the decision aside and remit it for reconsideration.¹⁰⁰

He then raises the question as to why judicial review has not then been rendered obsolete by merits review. He contends that judicial review still occupies a constitutionally ordained superiority with regard to judicial review jurisdiction. Although tribunals can decide on errors of law, the finality of this decision remains a judicial function that only courts can conclusively perform and ‘tribunals may be the biggest show in town but they are not the

⁹⁶ However, this discussion merely highlights some of the problematic elements and does not seek to offer any solution or suggestion. This thesis does not have the scope to discuss the wealth of literature on the subject. Interesting sources on the issue can be found in Cane “Understanding Administrative Adjudication” in *Administrative Law* 273-299 and Pearson “Fact-Finding in Administrative Tribunals” in Pearson, Harlow & Taggart (eds) *Administrative Law in a Changing State* (2008) 301-323.

⁹⁷ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 490.

⁹⁸ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 494.

⁹⁹ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 495. He later points out that if a claimant has a choice between merits review and judicial review, it would seem strange for anyone to prefer the latter, especially considering the more intrusive nature of the former.

¹⁰⁰ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 501.

brightest.’¹⁰¹ The jurisdictional argument is that tribunals are only as competent as far as they are empowered by statute, whereas the high courts are empowered with inherent jurisdiction. In this way, judicial review and merits review should not merely be seen as alternatives to each other as modes of primary review, but rather as each having important functional and institutional relevance within the system. Courts discourage judicial review if merits review is also available and has not already been pursued, and although ‘tribunals are commonly considered to be preferable to courts in certain respects (such as higher speed and lower cost); ... such supposed advantages have not raised their status relative to courts...’¹⁰²

Cane points out that

courts and tribunals are both understood to be external to the agencies whose decisions they have the power to review. Moreover, courts strongly discourage applicants who have a choice between review by a tribunal and review by a court from opting for the latter. Judicial review is a last resort.¹⁰³

Similar arguments and conclusions may be reached within a South African context as well. Judicial review in *PAJA* can already be suspended if all internal remedies have not been pursued prior to review proceedings.¹⁰⁴ If tribunals occupy a specific institutional role, then high courts may retain their jurisdictional superiority on the conclusive determination of questions of law. A warning from Chief Justice Warren comes at a time when the rise of tribunal power is increasing in Australia and he points out that

on the one hand, it may be that tribunals continue to grow. On the other hand, long standing judicial institutions are capable of change, and may respond. Whatever the outcome, maintaining the integrity and effectiveness of the superior courts and recognising their fundamental difference, in particular, their role in judicial independence, should remain the first priority.¹⁰⁵

¹⁰¹ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 504.

¹⁰² Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 505.

¹⁰³ Cane *A Research Agenda for the Age of Tribunals* 3.

¹⁰⁴ S7(2).

¹⁰⁵ Warren *The Growth in Tribunal Power* (2004) speech delivered to The Council of Australasian Tribunals Victoria, 07-06-2004 10.

3 6 2 Errors of Fact and Errors of Law

The distinction between tribunals and courts in England differs to that in Australia because tribunals in England fall into the same institutional branch of government as courts. There is not a constitutional or institutional argument that would prevent the tribunals from exercising a judicial function and thus not a conclusive argument against their making decisions on errors of law. While the Australian tribunals are members of the executive and thus perform functions that are categorically different to courts, the English tribunals are seen as ‘quasi-courts’ and perform a similar function to the courts. Tribunals offer an institutionally-alike service, but they provide practically preferable means to do so, such as being more efficient, more effective, cheaper, more accessible and more informal.¹⁰⁶ This institutional similarity then raises the question of whether tribunals are empowered only to decide on the merits of the case, or whether, like courts, they can decide on issues of law as well.

The argument that courts should not be empowered to decide on errors of fact, and practically are not empowered to substitute decisions of the executive with decisions of their own, has traditionally been based on the separation of powers. The courts act deferentially towards the executive when they will not decide on the error of fact of the administrator, and the argument is institutional as to why they will only decide on decisions of law. Using the English system as a basic example, lower tribunals,¹⁰⁷ however, are able to ‘stand in the shoes’ of the decision-maker. Unlike a court with judicial-review powers, a tribunal is not limited to questions of lawfulness. Appellate tribunals¹⁰⁸ can decide issues of fact, of law and of policy, and even substitute their decision for that of the decision-maker based on it being the ‘wrong’ decision.¹⁰⁹ Cane illustrates that the duty of tribunals is essentially to decide whether the decision-maker exercised correct discretion in the case.¹¹⁰ Practically, this means that lower tribunals decide fact, upper tribunals decide law, fact and policy (both through merits review) and it remains the duty of the courts to scrutinise pure law by means of judicial review. This places appellate tribunals into some sort of ‘twilight zone’¹¹¹ because while tribunals are part

¹⁰⁶ These characteristics are explained in more detail Cane *Administrative Law* 392-397.

¹⁰⁷ First-tier tribunals. The structure of the English system of tribunals will be fully explained in Ch 5.

¹⁰⁸ Upper tribunals.

¹⁰⁹ Wrong in the sense that it is not the decision that the tribunal members would have made, based on the evidence before them.

¹¹⁰ Cane *Administrative Law* 389.

¹¹¹ Cane *Administrative Law* 389.

of the judiciary, lower tribunals perform similar functions to the administration in order to reach their decisions. How this will operate in practice remains to be seen.

3.7 Conclusion

Through a study of what constitutes some of the most important issues around tribunals, it becomes clear that there are several important points. For our purposes, it is relevant that in South Africa space has been created within legislation for the creation of tribunals. Tribunals form such a large part of the administrative justice machinery of other commonwealth jurisdictions with whom we share many legal structures and understanding, and their continued existence is becoming ever more important. Tribunals, while not necessarily identical in structure or operation, share many general characteristics and are prized for the specific hallmarks which make them unique creatures of administrative law adjudication. Those characteristics subsequently show that while tribunals are valuable parts of administrative law adjudication, they also need to be controlled and supervised, and as a result a supervisory body is essential to their effective functioning. In order for the supervisory body to retain effective control of the tribunals, it should maintain a powerful role in the review and regulation of administrative justice as a whole. The control of tribunals by the courts should also form an important feature of the supervision of their development. Lastly, it is by no means certain nor generally established as to exactly how a tribunal should exercise its jurisdiction and just how wide its scope of adjudication should be. However, it is necessary that whatsoever that scope is determined to be, courts should retain their superior jurisdiction and exclusive function of judicial review in order that tribunals do not overtake their institutional role. After establishing these theoretical frameworks, a yardstick has been created which can be used to measure and analyse the functioning and operation of tribunals in the Australian and English administrative law systems.

CHAPTER 4: AUSTRALIAN TRIBUNALS AND THE ADMINISTRATIVE SYSTEM

4.1 Introduction

Tribunals have a long history of existence in Australia. The broader Australian administrative system boasts a unique and coherent model of administrative justice, with a unique system of tribunals. Since a watershed development in the 1970's,¹ reforms have been introduced systematically which have been instrumental in the development of the Australian administrative model. Tribunals, while individually responsible for a vast portion of administrative dispute resolution, work alongside various other governmental institutions and structures which occupy distinct roles in the administration of Australia. Consequently, Australian administrative law is administered by a comprehensive, integrated and accessible system.

This chapter aims to briefly outline the structure of Australia's model of administrative justice, with a specific focus on the role and functioning of tribunals. The scope of operation, the effectiveness of merits review and tribunal justice, and the supervision of tribunals will also be discussed. The purpose of the discussion in this chapter is to facilitate a comparison with the English system in the next chapter, and eventually within the broader context of the thesis to facilitate a comparison with the South African system.

4.2 Federal Government

What should be noted before discussing the administrative structure is that Australia has a federal system of government made up of a commonwealth government and separate governments in Australia's states and territories.² Government at the federal level employs a strict separation of powers between the legislature, the executive and the judiciary, which is imposed by the Constitution.³ For this reason, the references in this chapter to tribunals will be to *federal* tribunals, unless otherwise indicated. The individual states within Australia do

¹ This is discussed in s 4.3.1 below.

² *Commonwealth of Australia Constitution Act 1900* Part 1 established the Australian Federal Government.

³ The first three chapters of the Australian Constitution are headed respectively 'The Parliament', 'The Executive Government', and 'The Judicature'. Each chapter begins with a provision vesting the relevant 'power of the Commonwealth' in the appropriate branch of government. The individual states are not bound by the Constitution.

not necessarily share all the same legal provisions as at federal level, and so this discussion will be limited to describing the position of the federal tribunals.⁴

4 3 General Administrative Structure

4 3 1 Kerr Committee Report

Australia's current system of administrative dispute resolution mechanisms is the result of administrative reforms of the 1970's. The *Commonwealth Administrative Review Committee Report*⁵ of 1971 was an investigative committee report that introduced a drastic overhaul of the structure of the administrative justice system and suggested an ambitious range of apparatus designed to provide control of government action. The objective was to 'establish machinery which provided for a more comprehensive review of administrative decisions.'⁶ These reforms included development of judicial review jurisdiction and codification of the grounds of judicial review; a central tribunal empowered to provide merits review across the whole of government; a supervisory body to oversee the administrative law framework and operation; a system of disclosure of government documents; and a human rights protectorate.⁷

The implementation of the suggestions made by the Kerr Committee resulted in the structures that exist today. The following discussion will briefly outline the organisation of the various bodies empowered to control and facilitate government action.

4 3 2 Administrative Appeals Tribunal (AAT)

Due to the fact that the Kerr Committee was originally assembled to advise the Government about a proposal for a commonwealth superior court to review administrative decisions, their major focus was on the necessity of a 'court' to provide merits review. A large part of the report is focused on the role of such a court. A primary recommendation of the report was the

⁴ Murray "Legislative and Executive Governance in South Africa" in LeRoy & Saunders (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 462 explains that South Africa is also federal in form, and therefore it is useful to examine the federal tribunals as models for national tribunals.

⁵ Administrative Review Committee Report *Commonwealth Administrative Review Committee Report* (1971) ("Kerr Committee Report").

⁶ Kerr Committee Report 12.

⁷ Kerr Committee Report 12.

establishment of a general and central tribunal with wide jurisdiction to review government decisions of all kinds affecting individual rights (AAT).⁸

4 3 3 Federal Courts of Australia

The Federal Court of Australia was designated by the *Administrative Decisions (Judicial Review) Act*⁹ to be the principal national court for administrative law matters. However, this court has been fairly unsuccessful in the administration of these matters and the Federal Magistrate's Court has had a better record of case administration.¹⁰ The *Administrative Decisions (Judicial Review) Act* also codified the grounds of judicial review¹¹ and imposed a statutory obligation upon decision-makers to provide written reasons for their decisions.¹² Both of these reforms provided a legislative requirement of openness and the disclosure of reasons for decisions which did not exist in the common law and were important safeguards against the abuse of power.

4 3 4 Ombudsman

While Ombudsmen were among the first administrative law mechanisms established in Australia, the office of the Ombudsman was only officially established by statute in terms of the *Ombudsman Act*.¹³ These offices act on both a state and a federal level and work hand-in-hand with each other, providing a two-tier structure to which affected parties can apply. The role of the offices of the Ombudsman is to 'consider and investigate complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency.'¹⁴ They are not empowered to override the decisions of the agencies

⁸ A more comprehensive description of this tribunal and the reasons why a tribunal was more suitable than a court can be found in s 4 4 3 1 below.

⁹ 1977.

¹⁰ Creyke "Administrative Justice: Beyond the Courtroom Door" in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 262 outlines the caseload of the two courts. See Ch 7 s 5 1 3 and McMillan "Re-thinking the Separation of Powers" (2010) 38 *Federal LR* 12.

¹¹ Ss 5-7

¹² S 13. Prior to this common law did not always require administrators to provide reasons for all decisions.

¹³ 1976.

¹⁴ Ombudsman "About Us" (12-04-2011) *Commonwealth Ombudsman* <<http://www.ombudsman.gov.au/pages/about-us/our-office/what-we-do.php>> (accessed on 08-11-2010).

complained about, nor do they issue directions to the administrators. Rather, they resolve disputes through consultation and negotiation, and if necessary, by making formal recommendations to the most senior levels of government. They have been described as ‘one of the main instruments of administrative review at the federal level’.¹⁵ An added advantage of the Ombudsman over and above their primary dispute-resolution function is the production of whole-of-government reports, such as the ‘best practice’ standards for public service.¹⁶ Creyke states that these reports ‘demonstrate admirably the dual focus of administrative law – providing appropriate avenues for individual complaints, while encouraging systemic reform within public administration.’¹⁷

4 3 5 Freedom of Information and Privacy Legislation

The *Freedom of Information Act*¹⁸ provides the public with a right of access to the official documents of the commonwealth government and its agencies. One of the motivating factors behind the establishment of the Kerr Committee was concern from citizens regarding the secretive nature of Westminster-style government agencies and the closed-door policy regarding the decisions of administrators.¹⁹ The *Freedom of Information Act*²⁰ aimed to provide a right of access to government documents to the public in order to advance the goals of openness and the transparency of government decision-making. These reforms were later complemented with national privacy legislation, namely the *Privacy Act*²¹ which legislated the acquisition, storage, use and disclosure of personal information by government agencies.²²

¹⁵ Administrative Review Council *Annual Report* (1983) 24. Creyke “Administrative Justice” in *Comparing Administrative Justice* 261.

¹⁶ These reports can be accessed on Ombudsman “Publications and Media” (12-04-2011) *Commonwealth Ombudsman* <<http://www.ombudsman.gov.au/pages/publications-and-media/better-practice-guides/>> (accessed 02-03-2011).

¹⁷ Creyke “Administrative Justice” in *Comparing Administrative Justice* 279.

¹⁸ 1982.

¹⁹ Downes *Australian Tribunal Reforms* (2009) speech delivered at the Commonwealth Law Conference Hong Kong, 08-04-009.

²⁰ 1982.

²¹ 1988.

²² Creyke “Administrative Justice” in *Comparing Administrative Justice* 258.

4 3 6 Australian Human Rights Commission

The Australian Human Rights Commission, previously called the Human Rights and Equal Opportunity Commission (HREOC), acts on a national level and was established in 1986. The Australian Human Rights Commission²³ is an independent statutory organisation that works to protect and promote the human rights of all people in Australia. The Commission was established by the *Australian Human Rights Commission Act*,²⁴ formerly called the *Human Rights and Equal Opportunity Commission Act*, and has as its main objectives to inquire into, and attempt to conciliate, complaints of unlawful discrimination in terms of the *Age Discrimination Act*,²⁵ the *Disability Discrimination Act*,²⁶ the *Racial Discrimination Act*,²⁷ the *Sex Discrimination Act*²⁸ or any other enactment.²⁹

4 3 7 Administrative Review Council³⁰

The Administrative Review Council (ARC) is primarily an independent law reform and advisory committee and fulfills an important and coherent supervisory role over Australian administrative law.³¹ The ARC was established in 1976, on recommendation of the Kerr Committee Report and under the *Administrative Appeals Tribunal Act*.³² The major functions of the ARC are ‘to keep the commonwealth administrative law system under review, monitor

²³ This name was not shortened to an acronym because according to the information released on their website, ‘We will not use an acronym for the Australian Human Rights Commission. ‘AHRC’ is just as hard to remember as ‘HREOC’ so we will not use it.’ The only acceptable shortened form is ‘The Commission’. AHRC “About Us” (04-12-2010) *Australian Human Rights Commission* <http://www.hreoc.gov.au/about/faqs/FAQ_name_2008.html> (accessed 08-11-2010).

²⁴ 1986.

²⁵ 2004.

²⁶ 1992.

²⁷ 1975.

²⁸ 1984.

²⁹ *Australian Human Rights Commission Act* 1986 ss1(a) and 1(aa).

³⁰ A more specific and comprehensive description of the ARC and its relationship to tribunal supervision can be found in the s 4 5 below.

³¹ This basis for this concise description of the ARC can be found in Buck “Administrative Justice and Alternative Dispute Resolution: the Australian Experience” (2005) <http://www.dca.gov.uk/research/2005/8_2005_full.pdf> (accessed 12-08-2010) .

³² 1975 (AATA) Part V.

developments in administrative law and recommend to the Minister improvements that might be made to the system.³³ The ARC is further involved in several investigative reports which aim to identify problems and challenges, and to make recommendations to streamline and update the functions of tribunals. These include the *Better Decisions* report,³⁴ reports regarding computerisation of the administrative decision-making³⁵ and current investigations such as the one into the scope of judicial review.³⁶ The most important characteristic of the ARC is its effectiveness. In its roles of monitoring, facilitation, and recommendation, the ARC has been able to actually influence the structures and systems within the Australian administrative law system.³⁷ It has recently been described as ‘an effective body, providing useful and timely advice on administrative review matters.’³⁸

4 3 8 Judicial Review by Courts

Judicial review by the courts retains a primary role in the administrative law system. Creyke illustrates that ‘the principal Australian administrative law text [Aronson, Dyer & Groves *Judicial Review of Administrative Action* 4 ed (2009)] is unashamedly single-minded about review by the courts’³⁹ and that ‘the longevity and pre-eminence of the Aronson et al publication indicates that judicial review... (has) a pivotal role in administrative law.’⁴⁰

Comparable to the position in South Africa, the courts’ judicial review function was at one stage seen as central to administrative law, but Creyke illustrates how that centrality is diminishing and other elements of the system are in ascendancy. The courts’ power of judicial review is largely curtailed and confined only to jurisdictional error. More important is

³³ S51(1)(aa) AATA. The remainder of the statutory functions can be found in s51. They include making recommendations to the Minister, make inquiries as to the adequacy of law and procedures, facilitating the training of members and promoting knowledge of the commonwealth administrative law system.

³⁴ Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995).

³⁵ Administrative Review Council *Automated Assistance in Administrative Decision Making: Report to The Attorney-General* (2004).

³⁶ Administrative Review Council *Review of Commonwealth Merits Review Tribunals* (1994).

³⁷ Administrative Review Council *Annual Report* (2008/2009) 5-8 has most recently documented the achievements and effective functioning of the ARC. Prior to this, there are annual reports stretching back to the establishment of the council which also are testament to its efficacy.

³⁸ Senate Legal and Constitutional Legislation Committee *Report on the Role and Functions of the Administrative Review Council* (1997).

³⁹ Creyke “Administrative Justice” in *Comparing Administrative Justice* 264.

⁴⁰ Creyke “Administrative Justice” in *Comparing Administrative Justice* 264.

the realisation that the curtailment of judicial review is no strange phenomenon, but is both requisite for good governance and manifests itself frequently in different legislative ways. The ARC has identified nine legislative methods which exclude judicial review.⁴¹

Similar criticisms to those illustrated by Hoexter in Chapter 2 have arisen in the Australian context as well.⁴² The Australian model made use of alternative structures of dispute resolution to courts before the emerging criticisms to judicial review, and the evidence now shows that the prominence of judicial review may be declining,⁴³ while the alternative measures are becoming more widely and effectively employed. Morris J, President of the Victorian Civil and Administrative Tribunal (VCAT)⁴⁴ stated that the VCAT is ‘gradually replacing judicial review as the principal method of resolving issues between citizens and government’⁴⁵ because ‘judicial review is poorly positioned to provide an accountability mechanism over executive decision-making.’⁴⁶

The advantages of tribunals which were outlined in Chapter 3 show why they may be preferable forums for adjudication to courts. Warren points out that tribunals provide administrative law with ‘speed, efficacy, economy and expertise’⁴⁷ and that their proliferation is a result of ‘dissatisfaction with the courts in resolving particular types of disputes.’⁴⁸

Nevertheless, whether judicial review is as effective or as important as it has historically been, it remains the highest form of review. It is under the sole jurisdiction of the High Court and the grounds for review remain codified in the *Administrative Decisions (Judicial Review) Act*.

⁴¹ These are listed in Creyke “Administrative Justice” in *Comparing Administrative Justice* 267.

⁴² For a thorough discussion of the comparison between South African and Australian judicial review see Saunders “Constitutions, codes and administrative law: the Australian Experience” in Forsyth, Elliott, Jhaveri, Ramsden, & Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010).

⁴³ See Ch 7 s 5 1 3.

⁴⁴ The VCAT is a similar institution to the AAT.

⁴⁵ Morris “The Emergence of Administrative Tribunals in Victoria” (2004) *AIAL Forum* 21.

⁴⁶ Morris (2004) *AIAL Forum* 22.

⁴⁷ Warren “The Growth in Tribunal Power” 2004.

⁴⁸ Warren “The Growth in Tribunal Power” 2004.

4 4 Tribunals

4 4 1 History

Tribunals occupy a space in Australian administrative law which has been carved out specifically for them. They function as the primary adjudicators of administrative disputes,⁴⁹ despite having no constitutionally guaranteed status.⁵⁰ Tribunals give effect to the bulk of administrative justice in Australia by way of merits review of administrative decisions. The model of the tribunal system in Australia is one of the most coherent and over-arching. While there are highly specialised tribunals who deal specifically with certain disputes, the defining feature of the tribunal system is the Australian Appeals Tribunal which has extensive jurisdiction over administrative disputes.

4 4 1 1 Kerr Committee Report and Tribunals

Tribunals have been a part of the Australian system for many years, but this chapter will only describe their development from 1971. As described above at 3 1, the result of the findings of the Kerr Committee⁵¹ caused the tribunal structure to undergo a dramatic change and the wheels were set in motion to create the system that we see today.

Despite the fact that the Committee's principal requirement was 'to consider the jurisdiction to be given to the proposed Commonwealth Superior Court to review administrative decisions',⁵² they decided that they were not constrained by the use of the word 'court' and were therefore able to examine administrative law more comprehensively. They stated that administrative review 'requires to be considered in its entirety' because judicial review 'cannot provide for an adequate review of administrative decisions' on its own.⁵³ The Committee's remarkable initiative meant that instead of merely examining judicial review of administrative decisions undertaken by courts, they embarked on a study which has been

⁴⁹ Cane *Administrative Tribunals and Adjudication* (2009) 21 states that 'in aggregate, administrative tribunals deal with many more disputes between citizen and government than do courts...'.

⁵⁰ Mullan "Where do Tribunals Fit into the System of Administration and Adjudication? – A Canadian Perspective" in Creyke (ed) *Administrative Tribunals: Taking Stock* (1992) 18.

⁵¹ The full report of the Committee is a detailed and comprehensive document, the details of which are too wide-ranging for the scope of this study. This section contains only a brief summary of the recommendations relating to tribunals specifically.

⁵² Kerr Committee Report 1.

⁵³ Kerr Committee Report 4.

described as ‘the most extensive examination of merits review by tribunals which had ever been undertaken.’⁵⁴ The Committee’s recommendation was as follows:

Stated broadly, our view is that the work of the Court should be complementary to a system of administrative review on the merits. As we have already indicated, we are disposed to the view that, as part of any comprehensive system of administrative law in Australia, there should be a general Administrative Review Tribunal.⁵⁵

Rather than establishing a superior ‘court’ for the review of administrative decisions, the Kerr Committee came to the conclusion that judicial review was an inadequate remedy for administrative disputes. The Kerr Committee then examined three potential forums for expanding the framework for *merits* review; a court; specialised tribunals; or a general administrative review tribunal. Dismissing the first option, the Committee favoured the general administrative review tribunal over specialised tribunals. Two advantages of a general tribunal in particular were that many areas of decision-making would not justify the creation of a specialist tribunal;⁵⁶ and that the creation of a general tribunal was preferable to the proliferation of specialist tribunals.⁵⁷ The Committee did nonetheless acknowledge that the creation of specialist tribunals in some circumstances would be warranted where expertise was required that did not exist in a general tribunal.⁵⁸ The Kerr Committee further highlighted the need for more comprehensive research on Australian review before its proposed new system was established⁵⁹ and as a result two further inquiries were commissioned.

⁵⁴ Downes *The Tribunal Dilemma: Rigorous Informality* (2008) unpublished paper presented as the Second Professor Harry Whitmore Lecture at the *Annual General Meeting of the Council of Australasian Tribunals* Sydney, 17-09-2008

⁵⁵ Kerr Committee Report 291.

⁵⁶ Kerr Committee Report 233

⁵⁷ Kerr Committee Report 282.

⁵⁸ Kerr Committee Report 280.

⁵⁹ Kerr Committee Report ch 18.

4 4 1 2 Bland Committee⁶⁰ and Ellicott Report⁶¹

These two inquiries were concerned with other aspects of the administrative review system, but which were considered integral to the implementation of the suggestions made by the Kerr Committee. The Committee on Administrative Discretions (“Bland Committee”) issued two reports; an interim report examining the Kerr Committee proposal for an Ombudsman; and a final report examining the proposals for administrative review. The Committee of Review of Prerogative Writ Procedures (“Ellicott Report”) examined the Kerr Committee’s proposals for a reformed system of judicial review. Both committees produced reports in 1973. These two reports highlighted the need for comprehensive administrative law reform and not merely the reform of individualised areas.

4 4 2 Constitutionality

In order to fully understand the results of these commissions, there is an important constitutional consideration to be mentioned. The Australian Constitution obeys a strict doctrine of the separation of powers,⁶² and contains provisions to ensure its adherence.⁶³ For that reason, courts are prohibited from fulfilling functions other than judicial ones and no other sphere of government may fulfil the judicial function.⁶⁴ Tribunals in Australia are not considered to be ‘quasi-courts’ or court replacements, but rather a fully-fledged and functioning part of the executive.⁶⁵ Tribunals are not empowered to adjudicate any other

⁶⁰ Committee on Administrative Discretions *Interim Report of the Committee on Administrative Discretions Parliamentary Paper No 53 of 1973* (Bland) (1973).

⁶¹ Committee of Review of Prerogative Writ Procedure *Report of the Committee of Review of Prerogative Writ Procedure Parliamentary Paper No 56 of 1973* (Ellicott) (1973).

⁶² Creyke illustrates that ‘the Australian Constitution has shaped the jurisdiction of tribunals. Chapter III of the *Constitution* restricts the exercise of judicial power of the commonwealth to courts covered by Chapter III. A concomitant restriction is that such courts are not permitted to exercise non-judicial power.’ Creyke “Tribunals and the Australian System” in Huscroft & Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) 85. This was confirmed in *R v Kirby Ex parte Boilermakers’ Society of Australia* (1956) HCA 10; (1956) 94 CLR 254 at 273

⁶³ Spigelman “The Integrity Branch of Government” (2004) 78 *ALJ* 730.

⁶⁴ *Australian Constitution* Chapter III.

⁶⁵ Downes *Overview of Tribunals Scene Australia* (2006) speech presented at the International Tribunals Workshop Canberra, 05-04-2006 states that ‘in Australia, reviewing administrative decisions on the merits is not an exercise of judicial power, any more than the making of original administrative decisions is an exercise of judicial power. Both are exercises of executive or administrative power.’ However, this position has been questioned in the debate about the ‘fourth’ or ‘integrity’ branch of government. Creyke “Tribunals and the Australian System” in *Inside and Outside Canadian Administrative Law* 110 writes that ‘Tribunals are neither

disputes than administrative ones, and they do not have the power of judicial review. Rather, tribunals have the power of ‘merits review’ and they are able to reconsider the decisions originally made by administrators on the merits of the specific instance. In the same way, courts are not empowered to make enquiries into the merits, but are restricted to judicially review decisions of administrators under the doctrine of legality.⁶⁶

4 4 3 Tribunal Structure

The five major merits review tribunals providing external review of government decisions are the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board. The AAT has a wider jurisdiction than the other specialised tribunals and may also be approached to review decisions made by the other tribunals.

4 4 3 1 Administrative Appeals Tribunal⁶⁷

The AAT was explicitly set up to perform merits review by the AATA. Recommendations of both the Kerr Committee Report and the Bland Committee were implemented in order to create the structure of the AAT.⁶⁸ The main objective of the AATA was to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.

Although the AAT has widespread jurisdiction, it does not have an inherent general jurisdiction.⁶⁹ The AAT derives its authority statutorily and consequently,

part of the judicial arm, nor, since they are exempted from requirements which apply to officials such as compliance with policy, are they part of the executive. Tribunals, since they do not fit easily into the traditional three arms of government, but are, at the same time, a key accountability mechanism, deserve a place in the integrity or fourth branch of government'. This view is also endorsed by Spigelman (2004) *ALJ* 734 and McMillan 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 11.

⁶⁶ *Administrative Decisions (Judicial Review) Act 1977*.

⁶⁷ There are two other similar tribunals in Australia; in New South Wales the equivalent is the Administrative Decisions Tribunal (the ADT) and in Victoria it is known as the Victorian Civil and Administrative Tribunal (VCAT). All three are essentially similar and therefore only the characteristics of the AAT will be discussed.

⁶⁸ Pearce "The Australian Government Administrative Appeals Tribunal" (1976) 1 *NSWLJ* 193.

⁶⁹ Part VI S25(1) & (4) *AATA*.

the Tribunal can only review a decision if an Act, regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. Jurisdiction is generally conferred by the enactment under which the original decision was made.⁷⁰

Nevertheless, the AAT has jurisdiction to review decisions made under more than four hundred acts and legislative instruments. The Tribunal's jurisdiction includes areas such as commonwealth employees' compensation, social security, taxation, veterans' entitlements, bankruptcy, civil aviation, corporations' law, customs, freedom of information, immigration and citizenship, industry assistance and the Australian Security Intelligence Organisation. Cane explains that

in the areas of taxation and worker's compensation the AAT provides a first-tier of review, whereas in the areas of social security and veterans' benefits it undertakes second-tier review (of decisions of the Social Security Appeal Tribunal and the Veterans' Review Board respectively). There are two first-tier 'specialist tribunals' – the Refugee Review Tribunal and the Migration Review Tribunal, from which there is no 'appeal' to the AAT.⁷¹

4 4 3 1 1 Structure of the AAT

The AAT has four levels of members. The AAT consists of a president, presidential members including judges and deputy presidents, senior members and members.⁷² The president must be a judge of the Federal Court of Australia⁷³ and all deputy presidents must be qualified lawyers.⁷⁴ Senior members may be lawyers or have special knowledge or skills relevant to the duties of a senior member.⁷⁵ Members other than the president may also be judges, but this in no way means that the AAT is in any sense a court, nor does it in any way affect the tenure of the judge.⁷⁶ The judicial members of the AAT exercise administrative or executive power.⁷⁷

⁷⁰ AAT "Introduction to the AAT" <<http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>> (accessed 02-02-2011).

⁷¹ Cane "Judicial Review in the Age of Tribunals" in Forsyth, Elliott, Jhaveri, Ramsden, & Hill (eds) *Effective Judicial Review* 485.

⁷² S6 AATA.

⁷³ S7(1).

⁷⁴ S7(1AA).

⁷⁵ S7(1B).

⁷⁶ S7A.

The Tribunal can sit in panels of one, two or three members. Members have expertise in over ninety different areas of expertise such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation. This diverse range of expertise is part of what facilitates the AAT's wide scope and functionality.⁷⁸

The AAT is also divided into internal specialised divisions. They are the General Administrative Division; Medical Appeals Division; Security Appeals Division; Taxation Appeals Division; and the Valuation and Compensation Division. Each division has specific requirements which relate to its composition and functioning.

4 4 3 1 2 Procedures of the AAT

While the structure of the AAT is unique in itself, it also employs unique procedures relating to the administration of justice. An important goal of the AAT is aimed at assisting early settlement between the parties, where that is possible. Where it is not, the AAT aims to resolve the disputes set before it. Contributing factors to the overwhelming success and acceptance by government agencies of the AAT are its ability to be flexible in procedure according to the dispute at hand, as well as the way in which those procedures are carried out.⁷⁹

4 4 3 1 2 1 Formality of the AAT

Although the Tribunal is informal in its procedures, it performs its adjudicatory function in a court-like manner. There is an essential requirement of procedural fairness in tribunal proceedings. That being said, an important aspect of the Tribunal's procedure is its flexibility

⁷⁷ Downes *Why does Australia have a General Review Tribunal?* (2005) Address to the New Zealand Chapter of the Council of Australasian Tribunals, Wellington 07-10-2005 5.

⁷⁸ Information regarding the structure of the AAT can be found on their website AAT "Introduction to the AAT" <<http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>> (accessed 02-02-2011).

⁷⁹ 'Merit review, as two decades of legal development have shown, is as much about the way in which disputes with the state are settled, and about who is to settle them, as it is about the criterion that is applied in settling those disputes.' McMillan "Merit Review and the AAT: A Concept Develops" in AIAL (ed) *The AAT—Twenty Years Forward* (1998) 54.

and subsequently its ability to adapt its procedures to the dispute which is laid before it. Downes points out that

a small social security case with a self represented applicant is conducted informally around a table, while a multi-million dollar tax case with Queens Counsel bears more relation to a hearing in a superior court. Even when the Tribunal acts more like a court it is obliged by its empowering Act to provide ‘a mechanism of review that is fair, just, economical, informal and quick’. It must also conduct proceedings ‘with as little formality and technicality, and with as much expedition, as [possible]’.⁸⁰

4 4 3 1 2 2 Fact-finding in the AAT

Firstly, the AAT conducts merits review, as opposed to judicial review, like a court.⁸¹ Cane⁸² illustrates that the categorical difference in procedure between the AAT and a court is the process of fact-finding. Courts conduct review based on the situation which existed at the time of the dispute, and allow extrinsic or new evidence only as an exception. In contradistinction, the AAT conducts review on the facts that exist at the time of the hearing.⁸³ He points out both the positive and negative aspects of this; the former being that the tribunal can add value to the decision-making process because they are able, and indeed encouraged, to spend more time and energy investigating the facts than the original decision-maker and can usually come to a more ‘correct’ decision. The latter negative aspects are two-fold and flow from each other. Firstly, the additional powers of the tribunal may give rise to resentment from administrators who have their decisions reversed because while they must make decisions under pressurised situations and within the available resources, the AAT has the benefit of time and resources in their decision-making. The criticism that flows from this relates to fairness. Because only a small percentage of decisions are reviewed, the decision-making process is considered unfair to citizens who do not have their administrative decisions taken under review.⁸⁴ Cane points out that this is the

⁸⁰ Downes *Australian Tribunal Reforms* 7 (fns omitted).

⁸¹ See s 4 4 4.

⁸² Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 490.

⁸³ *Shi v Migration Agents Registration Authority* [2008] HCA 31.

⁸⁴ ‘Given that only a tiny proportion of administrative decisions are ever reviewed, how can we justify giving a very small proportion of affected citizens the benefit of a Lexus decision-making process when the vast majority

central dilemma of merits review: constructing a convincing rationale for merits review depends on identifying a distinctive contribution that the reviewer can make to the decision-making process and the primary decision-maker cannot...⁸⁵

But he subsequently says that

having identified significant value added by the reviewer, it may be difficult to justify the very limited incidence of review.⁸⁶

This dilemma is resolved to a certain extent if the roles of administrators and administrative review tribunals are properly considered. Cane describes that the review of decisions is a mode of adjudication while administrative decision-making is a mode of implementation. This means that the AAT's main function is to focus on the individual's circumstances and to resolve their individual disputes in a more specialised and adjudicatory forum than the original decision-maker. On the other hand, the administrator's basic responsibility is to 'promote the social purposes of general rules' than to resolve every individual's specific situation.⁸⁷

4 4 3 1 3 Success of the AAT

The AAT has been a well instituted and implemented administrative reform and has gone a long way to improving the delivery of administrative justice. During a conference reviewing the AAT after twenty years of functioning, Skehill⁸⁸ stated that

(my) assessment is that within Commonwealth administration our policy and legislative development processes and our decision-making processes are now far better than they were pre-AAT. The bureaucracy has, I think, responded well overall to external review. Training of decision-makers and awareness of concepts of natural justice are much heightened. Our systems of external review outside the AAT are now

have to be satisfied with the Lada version?' Cane "Judicial Review in the Age of Tribunals" in *Effective Judicial Review* 487.

⁸⁵ Cane "Judicial Review in the Age of Tribunals" in *Effective Judicial Review* 487.

⁸⁶ Cane "Judicial Review in the Age of Tribunals" in *Effective Judicial Review* 487.

⁸⁷ Cane "Judicial Review in the Age of Tribunals" in *Effective Judicial Review* 487.

⁸⁸ Skehill provides insight from the perspective of government as he served as an advisor to many administrative bodies.

far better than they were pre-AAT. A great deal of this is directly attributable to the AAT itself; other improvements are attributable to the sea-change of which the AAT has been a part.⁸⁹

What appears to be the greatest factor in favour of the effective functioning of the Tribunal is that it is a general tribunal. Creyke⁹⁰ illustrates some of the advantages of the general tribunal, stating that it offers a more coherent system to the citizen; offers a single, overarching structure through which all appeals can be lodged; provides greater clarity and simplicity to the applicants; enables a greater level of participation from the citizen; offers a non-threatening, easily approachable single source of information regarding the functioning and procedures of all administrative appeal forums; and provides standardised and consistent tribunal merits review procedures.⁹¹ Another advantage of the general tribunal is that it can be adapted to undertake merits review in any new field, provided legislation makes provision therefore. This reduces long delays in the legislative process because

if the Parliament is considering legislation on a new topic and the question arises whether a decision should be subject to merits review there is a readily available a tribunal to undertake the review. In other jurisdictions it will usually be necessary to create a new tribunal attended by cost, both initial and recurring, and delay, associated with increasing bureaucracy.⁹²

A secondary factor towards the success of the AAT is its ability to both ‘deliver justice in the individual case but also see beyond it to the departmental decision-makers and intermediate review tribunals’.⁹³ Dwyer⁹⁴ explains that the task of the AAT is both challenging and important, and must be seen to both provide justice in individual cases and to enhance and improve original decision-making.

⁸⁹ Skehill “The Impact of the AAT on Commonwealth Administration - A View from the Administration” in AIAL (ed) *The AAT—Twenty Years Forward* (1998) 59.

⁹⁰ In this discussion, she relies Leggatt *Tribunals for Users One System, One Service* (2001). This report was conducted in England and consequently will be discussed in detail in Ch 5 s 3 1 2.

⁹¹ Creyke ‘Tribunals and Access to Justice’ (2002) 2 *QUT Law and Justice Journal* 69-70.

⁹² Downes *Australian Tribunal Reforms* 6. This is important feature of the AAT and will be considered further in Ch 7 s 5 1. .

⁹³ Dwyer “The Impact of The AAT: A View from the Tribunal” in AIAL (ed) *The AAT—Twenty Years Forward* (1998) 97.

⁹⁴ Dwyer provides perspective from the view of the tribunal, as she served on the Administrative Appeals Tribunal, Social Security Appeals Tribunal and Equal Opportunity Board of Victoria.

The AAT has many unique and desirable characteristics which apply universally to a merits review tribunal, and can be held up as a distinct model for how a general merits review tribunal should operate.⁹⁵ The Leggatt Report stated in 2001 that

[they] found general agreement that the AAT had had a thoroughly beneficial effect on the development of administrative law, establishing a valuable tradition of individual treatment of cases, and of test cases. That had enabled the development of a distinctive process of merits review which all tribunals used in their separate jurisdictions.⁹⁶

4 4 3 2 Specific Tribunals

As mentioned above, the *AATA* allows for the creation of specific tribunals when necessary. The Migration Review Tribunal and Refugee Review Tribunal review decisions made under the *Migration Act*,⁹⁷ particularly decisions to refuse or cancel visas or refuse applications for refugee status. The Social Security Appeals Tribunal reviews decisions made by officers of Centrelink⁹⁸ under social security and similar laws. The Veterans' Review Board reviews certain decisions made by the Repatriation Commission under veterans' entitlements legislation.⁹⁹ The Social Security Appeals Tribunal has the power to review decisions made by the Child Support Agency.¹⁰⁰ Decisions of the Social Security Appeals Tribunal in child support matters will generally not be able to be reviewed by the AAT.

⁹⁵ Ch 7 s 5 1.

⁹⁶ Leggatt *Tribunals for Users* (2001) 6.

⁹⁷ 1958.

⁹⁸ 'Centrelink is an Australian Government statutory agency, delivering a range of Commonwealth services to the Australian community.' Centrelink "About Us" <http://www.centrelink.gov.au/internet/internet.nsf/about_us/index.htm> (accessed 10-02-2011).

⁹⁹ Such as the *Veterans' Entitlements Act* 1986 and the *Veterans' Entitlements Amendment (Income Support Measures) Bill* 2010.

¹⁰⁰ 'CSA is responsible for administering Australia's Child Support Scheme and supporting separated parents to transfer payments for the benefit of their children.' Child Support Agency "About Us" <<http://www.csa.gov.au/>> (accessed 10-02-2011).

4 4 4 Merits Review or Judicial Review?¹⁰¹

4 4 4 1 The Distinction

As discussed above at s 4 2, the distinction between merits review and judicial review is an indispensable pillar of Australian administrative law. The distinction between the concepts generally has been discussed more thoroughly in Chapter 2. The important point here is how merits review and judicial review relate to each other in Australian administrative law.

Merits review is the sole responsibility of the tribunals, acting in their capacity as members of the executive and ‘standing in the shoes’¹⁰² of the original decision-maker.¹⁰³ Review on the merits is concerned with whether a legally sound decision was the ‘correct and preferable’ one.¹⁰⁴ Judicial review remains the sole responsibility of the court, performing their judicial function. Judicial review is concerned with reviewing decisions against the standard of legality and for this reason judicial review does not prevent wrong decisions; it instead prevents them from being made unjustly.

Based on this distinction, tribunals are generally the logical first step in administrative adjudication. Tribunals are empowered to change the decision if it was not the correct one. Once all of the aspects of the case at hand have been examined and the tribunal comes to the conclusion that it would have made a different decision, then that decision will be substituted for the original administrator’s decision. For most administrative disputes, this direct approach will provide the most appealing and satisfactory results, both from an efficiency and a finality perspective. In addition, because the tribunals are able to both review the decision and then make a ‘correct’ one, Cane describes merits review as ‘enhanced judicial review’.¹⁰⁵

¹⁰¹ See Cane “Understanding Administrative Adjudication” in Pearson, Harlow & Taggart (eds) *Administrative Law in a Changing State* (2008) 273-299; Cane *Administrative Tribunals and Adjudication* (2009); Cane “Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals” in Rose-Ackerman & Lindeth (eds) *Comparative Administrative Law* (2010) 426 – 448 for a comprehensive explanation of the value of the distinction.

¹⁰² S43(6), S43(1) AATA; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 143 per Smithers J.

¹⁰³ Administrative Review Council *What Decisions should be Subject to Merits Review?* (1999) 1.

¹⁰⁴ Spigelman (2004) *ALJ* 730.

¹⁰⁵ Cane “Judicial Review in the Age of Tribunals” in *Effective Judicial Review* 489.

In many instances courts will not entertain judicial review if it can be shown that merits review would have been preferable and was not attempted.¹⁰⁶ Resort to the law should only be necessary when the administrative decision-making process has failed in some way and judicial review of administrative decisions should be regarded as an ‘option of last resort’.¹⁰⁷

Furthermore, judges have decided that the distinction must be strictly upheld and that merits review must be approached before resorting to the law.

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative error or injustice, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.¹⁰⁸

However, judicial review is still an important control mechanism and the executive must make decisions that are in accordance with the principle of legality. If the administrative dispute relates to the legality of the decision or any of the grounds of review, then the relevant court must be approached and judicial review by the courts must be permitted. The power of the court is restricted to declaring the invalidity of the decision and remitting the matter back to the original decision-maker for re-determination in accordance with the law. The courts’ power to review the legality of administrative decisions is found in the *Administrative Decisions (Judicial Review) Act* and the Australian Constitution.¹⁰⁹

Finally, tribunals are not courts. Tribunals must also act in accordance with the principle of legality and may also err in law when they make decisions. For this reason, the court may also be approached to perform judicial review of the decisions made by tribunals.

¹⁰⁶ Allars “Federal Courts and Federal Tribunals: Pluralism and Democratic Values” in Opeskin and Wheeler (eds) *The Australian Federal Judicial System* (2000) 214.

¹⁰⁷ Douglas & Jones’s *Administrative Law* 4 ed (2002) 1.

¹⁰⁸ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 35-36 per Brennan J.

¹⁰⁹ Chapter III.

4 4 4 2 Is Merits Review Working?

Although the full extent of this question cannot be fully discussed within the scope of this thesis, it remains an important point of consideration. An interesting research paper by Linda Pearson¹¹⁰ provides a basis for the issues in question, and I will briefly summarise her opinions here.¹¹¹ Firstly, Pearson points out that merits review cannot provide ‘administrative justice’ on its own, but must be allowed to work within a comprehensive framework of administrative redress.¹¹² She then explains that merits review has become entrenched in Australian administrative law to such an extent that more is expected of it than to merely remedy individual complaints. Rather,

there is an expectation that tribunal decisions and decision-making have a role to play in ensuring that there is fairness and consistency in the treatment of individuals by government; that there is an improvement in the quality and consistency of agency decision-making beyond the individual case; and that there is an improvement in administration generally through the adoption of the values inherent in administrative review.¹¹³

The second part of the research paper considers ‘the impact *of* what and the impact *on* what’.¹¹⁴ She states that the relationship between a tribunal and the agency whose decisions it reviews is far more complex than that between the agency and a court, and any evaluation of merits review must reflect that complexity.¹¹⁵ Tribunals engage in a process of making correct decisions and are far more intrusive in their activities than courts when engaging in judicial review,¹¹⁶ so an impact analysis of merits review must take this into consideration.

¹¹⁰ Pearson *The Impact of External Administrative Law Review: Tribunals* (2007) UNSW Law Research Paper No. 2007-53.

¹¹¹ Notably, Pearson calls for more empirical and complete research about the impact of merits review and the measuring of the current system, in order to be more conclusive about whether merits review and the tribunal system offer a more complete and coherent model of administrative justice.

¹¹² Pearson *The Impact of External Administrative Law Review* 3.

¹¹³ 5. Cf Fleming “Administrative Review and the ‘Normative’ Goal: Is Anybody Out There?” (2000) 28 *Federal LR* 63.

¹¹⁴ Pearson *The Impact of External Administrative Law Review* 5.

¹¹⁵ Pearson *The Impact of External Administrative Law Review* 5: ‘Any evaluation of impact, whether it be of judicial review or tribunal review, must acknowledge that external review is only one influence on administrative decision-making’.

¹¹⁶ *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 ‘Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented

The third part of the research paper considers the statistics¹¹⁷ and how merits review is being measured. What Pearson is keen to emphasise is that individual statistics and the possibility of having an unfair decision overturned can only be a part of the greater administrative aim, and she quotes Spigelman J's warning against the 'dangers of "pantometry", or the belief that everything can be counted: "...not everything that counts can be counted. Some matters can only be judged – that is to say, they can only be assessed in a qualitative way".'¹¹⁸ She refers to examples of qualitative factors such as the role of active participation of the citizen and fairness of decision-making.¹¹⁹

However, the positive effects of merits review can be measured by the extensive use of the AAT and the decrease in the judicial review caseload. Chapter 7 discussed this success in more detail.

4 5 Supervision of Tribunals

4 5 1 Administrative Review Council

4 5 1 1 Composition of the ARC

Like any structure, especially one with wide jurisdiction and far-reaching influence, the tribunal system requires supervision and management. For this purpose, the ARC was established under the *AATA* Sec V. Although the focus in this discussion will be on the ARC's supervision of tribunals specifically, its field of influence is not limited to that. The ARC is empowered and indeed statutorily required to supervise and manage the whole field of administrative justice and to make recommendations about the improvement of the administrative justice system in its entirety.

from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.'

¹¹⁷ Some statistics relating to the success of the AAT will be discussed in Ch 7 s 5 1 3.

¹¹⁸ Spigelman "Measuring Court Performance" (2006) 16 *Journal of Judicial Administration* 70.

¹¹⁹ Pearson *The Impact of External Administrative Law Review* 9.

The Council consists of three *ex officio* members, six appointed members and a president.¹²⁰ The *ex officio* officers are the commonwealth ombudsman holding office under the *Ombudsman Act*;¹²¹ the resident of the Australian Law Reform Commission established by the *Australian Law Reform Commission Act*;¹²² and the Australian Information Commissioner holding office under the *Australian Information Commissioner Act*.¹²³ The appointed members are able to serve on the ARC for a term of up to three years, and are eligible for reappointment. Appointed members need to be highly qualified and are judged by criteria which include *inter alia*; extensive practice at a high level in industry, commerce, public administration or industrial relations; the practice of a profession or service in government or an authority of a government; an extensive knowledge of administrative law or public administration; or direct experience and direct knowledge of the needs of people significantly affected by government decisions.¹²⁴

4 5 1 2 ARC Supervision of Tribunals

The general statutory functions of the ARC are contained in the *AATA*¹²⁵ and have been described above at 3 7. They have general advisory functions as to the whole of administrative law but they also have functions which relates specifically to the context of tribunals. The ARC is required to ascertain and keep under review the classes of administrative decisions that are not the subject of review by tribunals;¹²⁶ to make recommendations to the Attorney-General about the categories or types of decisions that should be subject to merits review;¹²⁷ and to make recommendations to the Minister with regard to the constitution of tribunals engaged in the review of administrative decisions.¹²⁸

¹²⁰ S49 *AATA*.

¹²¹ 1976. S49(1)(b) *AATA*.

¹²² 1996. S49(1)(c) *AATA*.

¹²³ 2010. S49(1)(ca) *AATA*.

¹²⁴ S50 *AATA*.

¹²⁵ S51 *AATA*.

¹²⁶ S51(1)(a) *AATA*.

¹²⁷ S51(1)(b) *AATA*.

¹²⁸ S51(1)(e) *AATA*.

The ARC's role in the efficient functioning of tribunal justice is not limited to its influence over tribunal processes and members. They also communicate to and advise government agencies in order to improve their original decision-making competence,¹²⁹ facilitate the training of administrators,¹³⁰ and advise the legislature when they develop legislative proposals that involve the creation of administrative powers of decision. The Council has released several publications with guidelines regarding good decision-making and merits review in order to make them more accessible and user-friendly to administrators.

4 5 1 3 Success of the ARC's Supervisory Role

A recent and comprehensive assessment of the success of the Council in exercising its powers and fulfilling its supervisory role can be found in the *Report on the Role and Function of the Administrative Review Council*.¹³¹ The conclusions of the Committee were that the ARC 'has been an effective body, providing useful and timely advice on administrative review matters'; that 'there is a continuing need for the Commonwealth Government to receive advice and recommendations on administrative review and decision-making, and to promote a comprehensive, affordable and cost-effective administrative law system' and that the ARC 'should remain as a separate and permanent body, provided that it is making a significant contribution towards an affordable and cost-effective system of administrative decision-making and review.'¹³² It is clear from the Committee's report, and indeed from the many and varied submissions made to it during its deliberations, that the ARC provides an invaluable and positive contribution to the maintenance of the administrative justice system as a whole, and its continued independent existence is a necessary safeguard in the protection of the integrity and coherent functioning of the system.

¹²⁹ S51(1)(ab) AATA.

¹³⁰ S51(1)(g) AATA.

¹³¹ Senate Legal and Constitutional Legislation Committee *Report on the Role and Functions of the Administrative Review Council* (1997).

¹³² Rather than the suggestion that the ARC should be abolished and its functions transferred to the Attorney-General's Department or merged with those of the Australian Law Reform Commission.

4 5 2 Other Forms of Tribunal Supervision¹³³

4 5 2 1 Legislative Supervision

Parliament and the legislature exercise control over tribunals by requesting that they present annual reports about their activities, and by requesting that tribunal executive officers appear in front of parliamentary committees which investigate issues surrounding the functioning and existence of tribunals. Furthermore, because they are creatures of statute, Parliament exercises control over tribunals from their very existence. This applies to a lesser extent to the AAT since jurisdiction can merely be extended by Parliament and a new tribunal does not necessarily have to be created, but the legislature can maintain a level of control through legislative provisions.

4 5 2 2 Supervision by the Ombudsman and the Auditor-General

Ombudsman and the Auditor-General exercise a control function over tribunals because tribunals are accountable to them by virtue of their status as independent statutory agencies. The office of the Ombudsman is empowered by the *Ombudsman Act*¹³⁴ to investigate acts which relate to 'a matter of administration' taken by a department or a 'prescribed authority',¹³⁵ either by virtue of a citizen making of a complaint or *mero moto*. Although courts are excluded from the provision, tribunals remain under their supervision.¹³⁶ The Ombudsman exercises control by ensuring that tribunal decisions are made fairly, rationally and efficiently. The Ombudsman also presents an avenue whereby interested parties can partake in government decision-making, and it allows tribunal decisions to be scrutinised.

4 5 2 3 Judicial Supervision

Australian courts have inherent judicial review jurisdiction and are able to monitor and regulate tribunal decisions. Courts require stricter standards over tribunal decisions than they

¹³³ The following discussion of the supervision of tribunals relies on the chapter Creyke "Tribunals and the Australian System" in *Inside and Outside Canadian Administrative Law* 92-107.

¹³⁴ 1976 s5.

¹³⁵ S5.

¹³⁶ S5(2).

do over inferior courts, and require a higher standard of reasoned decisions. This review power of the courts is one of the most important control mechanisms over the actions of tribunals, but should come with a warning to courts not to overzealously interfere in tribunal decisions. This results in an unconstitutional infringement by courts of the merit review function and infringes the well-developed doctrine of the separation of powers in Australia.¹³⁷ Creyke also describes the undesirable situation that arises when courts express negative opinions and ‘a lack of confidence in tribunal adjudication’.¹³⁸ This adversely affects opinions of the public regarding tribunal effectiveness and importance and consequently results in the relegation of the impact of their jurisprudence.

4.6 Conclusion

Through the above discussion, the importance and centrality of Australian tribunals within a comprehensive administrative review and dispute resolution system have been described. All the same, it is precisely that coherent and comprehensive range of administrative relief mechanisms that allows for an effective and properly-functioning system. Within tribunals themselves, there is overwhelming support for the consistency and homogeneity which can be achieved through a tribunal of general jurisdiction, like the AAT. Furthermore, the ARC provides the essential supervisory and regulatory role which is critical to the success of tribunals and their proficiency. The following chapter will describe the recently revamped tribunal system in England. The Australian model, with its successful implementation of the recommendations of the Kerr, Bland and Ellicot Committee reports, was an important blueprint for the establishment of the English Tribunal system.

¹³⁷ Creyke & McMillan *Control of Government* (2005) Ch 3.

¹³⁸ Creyke “Tribunals and the Australian System” in *Inside and Outside Canadian Administrative Law* 103.

CHAPTER 5: ENGLISH TRIBUNALS AND THE ADMINISTRATIVE SYSTEM

5.1 Introduction

From an historical perspective, England has been the guiding light in commonwealth administrative law and many of the concepts and legal principles were imported from there to other commonwealth countries.¹ However, England has not been the forerunner with regard to the modern system of tribunal justice. Due to an overwhelming need in the English law for a comprehensive system of tribunal justice,² the English system only recently undertook an overhaul of their administrative review mechanisms and a reform of the tribunal system. The new scheme came into effect on 3 November 2008 and the structure and composition of this reformed system will be the focus of this chapter. Nevertheless, the reasons leading up to the refining of the system will assist the reader in understanding the importance of the modern tribunal in English administrative law, and an historical overview of the necessity for the reforms will be provided accordingly. The supervisory Council on Tribunals was also reconstructed, and the new Administrative Justice and Tribunals Council's oversight role will be described, along with other forms of tribunal supervision.

Many of the concepts and reasons behind tribunal reforms in England can be compared to those in the Australian system, and the discussion in this chapter will follow a similar formal structure to that of the previous chapter. This chapter will also use the conceptual distinction between merits review and judicial review discussed in Chapter 4 as a basis for comparison of the differences and similarities of the functioning of tribunals.³ Furthermore, this chapter provides a basis of analysis and comparison with the South African system for the implementation and effective execution of systematic reform of a tribunal system.

¹ See Ch 3 s 2.

² This will be discussed in s 5.3.

³ For a comprehensive, authoritative and constitutional comparison of tribunal adjudication across Australia, the United States, the United Kingdom and France, see Cane *Administrative Tribunals and Adjudication* (2009).

5 2 General Administrative Structure

5 2 1 System of Government

The United Kingdom is a parliamentary democracy,⁴ wherein parliament is sovereign. This implies that the legislature has absolute sovereignty⁵ and it is supreme to all other government institutions, including any executive or judicial bodies.⁶ The UK has a Westminster system of government and endorses to a lesser degree the separation of powers.⁷ Unlike the Australian system, tribunals in England do not fall under the executive branch of government, but rather under the judicial branch.⁸ Tribunals fall strictly under the supervision of the courts and are considered to be a form of ‘quasi-court’. This eliminates the idea of the institutional distinction of merits review and judicial review as in the Australian model, but raises different issues regarding the doctrine of the separation of powers.⁹

5 2 2 Constitutional Reform

Three major changes in the constitutional structure of the UK are relevant for discussing the nature of the relationship of the judiciary, and by extension tribunals, and the executive. They

⁴ The government of England is also in the form of a Constitutional Monarchy, in which the monarch is head of state and the prime minister is the head of government. Executive power is exercised by Her Majesty's Government on behalf of the sovereign. However, this distinction does not affect the discussion of the tribunals in any material way and therefore will not be discussed in any detail.

⁵ This sovereignty is however subject to the European Convention on Human Rights (ECHR) entered into on 3 September 1953, which the UK ratified in 1951. See fn 10 below.

⁶ This contrasts directly with the South African system of government. Our Constitution is supreme and every government institution, including parliament, is subject to it. S2 Constitution of the Republic of South Africa, 1996 (“the Constitution”). England does not have a written Constitution like the South African or Australian systems.

⁷ Although the doctrine of separation of power plays a role in England’s constitutional doctrine, England is often described as having ‘a weak separation of powers’. This is due to the fact that the executive and legislative branches are intermingled to a certain extent. Up until very recently, even judicial power and executive power were assigned to the same person, namely the Lord Chancellor (see fn 13). Even now, all governmental power is exercised in the name of the Monarch, even if only notionally. Although the South African government and the Constitution also follow the doctrine of the separation of powers, in practice the executive and legislative functions often overlap. Cf Hoexter *Administrative Law* 71.

⁸ This constitutional classification was confirmed in Committee on Administrative Tribunals and Enquiries *Report of the Committee on Administrative Tribunals and Enquiries Cmnd 218* (1957) (Franks Report) 40.

⁹ The English seem to be less concerned with the issues surrounding the separation of powers than South African lawyers. There are issues that arise such as the counter-majoritarian difficulty and the encroachment of the judiciary into the realm of the executive, but the literature available on the subject does not seem overly concerned with these issues of legitimacy. As is evident from the discussion of the Leggatt report in s 53 1 2 below, the most important aspect of English tribunals are their independence and their impartiality.

are the *Human Rights Act (HRA)*,¹⁰ the *Constitutional Reform Act (CRA)*¹¹ and the creation of the new Ministry of Justice.¹² The most important of the three was the reform initiated within the broader constitutional framework by the *CRA*. The *CRA* came into effect in April 2006 and was enacted and intended to provide modernised statutory clarity to the relationship between the executive and the courts.¹³ The first part of the *CRA* is about the rule of law; the rest of the *CRA* is divided into three parts. The first and most important part reforms the office of Lord Chancellor, removing his functions of Speaker of the House of Lords and Head of the Judiciary of England and Wales. The second part of the act creates the new Supreme Court,¹⁴ and the third regulates the appointment of judges. The major effect of the act is that ‘the *CRA* confers on the court judiciary a new statutory guarantee of judicial independence.’¹⁵

5 2 3 Relationship between the Executive and the Judiciary

As a result of the doctrine of the separation of powers, and more recently the influence of the constitutional reforms, there is a strong degree of separation between the executive and the judiciary. The relationship between these branches of government requires a careful balance

¹⁰ 1998. The *HRA* gives citizens a practical right to use the *European Convention on Human Rights (ECHR)* in litigation in English courts. Although the *HRA* attempts to preserve the principal of parliamentary sovereignty, S3 places a duty on courts in relation to the way in which they carry out their function of interpreting legislation: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’.

¹¹ 2005.

¹² The Ministry of Justice came into being on 9 May 2007 and brought under one head the courts and tribunals, the prisons, and policy for civil, family and criminal law. ‘The new ministry replaced the Department for Constitutional Affairs and started life from a simple premise – that the justice system exists to serve the public.’ Tribunals Service *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007 – The Government’s Response CP 30/07 (19-03-2008)* (“Transforming Tribunals”).

¹³ The motivation behind these reforms may have been that the existing division of institutional functions ran contrary to the idea of separation of powers. The reform was prompted by concerns that the historical combination of legislative, judicial, and executive power might not conform to the requirements of the right to a fair hearing by an independent and impartial tribunal in terms of Article 6 (paragraph 1) of the *European Convention on Human Rights*.

¹⁴ The Supreme Court is now the court of last resort and highest appellate court in the United Kingdom. It assumed the judicial functions of the House of Lords, which were previously exercised by the Lords of Appeal in Ordinary. Lord Phillips, president of the Supreme Court, stated that ‘For the first time, we have a clear separation of powers between the legislature, the judiciary and the executive in the United Kingdom. This is important. It emphasises the independence of the judiciary, clearly separating those who make the law from those who administer it.’ Anonymous “New Supreme Court opens with Media Barred” *The Telegraph* (11-10-2009) <<http://www.telegraph.co.uk/news/uknews/law-and-order/6251272/New-Supreme-Court-opens-with-media-barred.html>> (accessed 23-02-2011).

¹⁵ Carnwarth *Tribunal Reform in the UK: a Quiet Revolution* speech delivered at *The Future of Administrative Justice Symposium* Toronto, 17-01-2008 <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/5/0/0/0&contentId=1694#Material> (accessed 10-06-2010). Note the distinction between court and tribunal judiciary, namely judges in courts not judges sitting on tribunals.

of the separation of powers and the important constitutional system of checks and balances.¹⁶ The judiciary is empowered to examine acts of the executive, and by extension its administrative agents, by virtue of its role as an important safeguard to the abuse of executive power.

In England there is a rich debate as to the source of the courts' power of judicial review.¹⁷ Historically, the proposition has been based on the principle of *ultra vires*, namely that judicial review is legitimated on the ground that the courts are applying the intention of the legislature.¹⁸ Parliament has found it necessary to confer powers (*vires*) onto the various agents of the executive, subject to certain restrictions, and they must act within these boundaries. Should they act outside the boundaries of the powers bestowed on them; courts are empowered to intervene to police the boundaries of Parliament.¹⁹

However, critics of the theory of *ultra vires* contend that when judges review administrative action, they do so to fulfill the 'duties of their constitutional position, acting in their own right independently of Parliament, adjusting the balance of forces in the constitution, and asserting their title to promote fairness and justice in government under the rule of law.'²⁰ By this, critics find the foundations of judicial review in the common law, rather than in the concept of *ultra vires*. Regardless of whether the *ultra vires* or the common law basis is correct,

¹⁶ Tension between these two branches is inevitable, but this tension is viewed as a positive driving force in the relationship between the two branches. Sir Igor Judge, President of the Queen's Bench Division, thought that 'a degree of tension is healthy'. The former Lord Chancellor, Lord Mackay, agreed with this, saying that 'a certain degree of tension between the judiciary and the executive is inevitable and healthy because from time to time the judiciary are called upon to adjudicate under the judicial review procedure and in other ways on actions of the executive.' Lord Bingham, the senior Law Lord, took a similar approach, stating that 'there is an inevitable, and in my view entirely proper, tension between the two.' All of these comments are extracts from the House of Lords Select Committee of the Constitution *Minutes of Evidence taken before the Constitution Committee on Wednesday 22 November 2006 House of Lords Select Committee on the Constitution 6th Report of Session 2006-07 "Relations between the Executive, the Judiciary and Parliament"* (2006).

¹⁷ See generally Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" in Forsyth (ed) *Judicial Review & the Constitution* (2000) 29-46 where Forsyth sets out and defends the doctrine of *ultra vires*; Craig "Ultra Vires and the Foundations of Judicial Review" in Forsyth (ed) *Judicial Review & the Constitution* (2000) 47-71 for an alternative argument in favour of the common law or 'conceptual' doctrine; and Oliver (ed) "Is the Ultra Vires Rule the Basis for Judicial Review?" in Forsyth *Judicial Review & the Constitution* (2000) 3-27; and for a summary of the various opinions and critiques of the two topics.

¹⁸ This is a highly simplified construction of the *ultra vires* doctrine, as an examination of the articles in the fn above will indicate. See Ch 2 s 2.

¹⁹ Wade & Forsyth *Administrative Law* 9 ed (2004) 30 state that 'it is assumed that Parliament, when conferring power, intends that power to be used fairly and with due consideration of rights and interested adversely affected. In effect, Parliament legislates against a background of judge-made rules of interpretation. The judges have constructed a kind of code of good administrative practice, taking Parliament's authority for granted.'

²⁰ Wade & Forsyth *Administrative Law* 33.

there is, nevertheless, an inescapable tension between, on one hand, the traditional doctrine of ultra vires and its foundations in legislative supremacy and, on the other hand, the contemporary recognition of a range of common law rights conceived as basic components of a liberal, democratic legal order.²¹

Tribunals, as members of the independent judiciary, present something of an anomaly to the rigid classification of the distinct branches and to the strict basis for judicial review. The reason behind this is by their very function tribunals engage in a very different activity when they review administrative action. As is evident from the discussion below,²² first-tier tribunals especially engage in merits review when approached to resolve disputes.

5 2 4 Relationship between the Courts and Tribunals

As stated above, the administration of tribunals falls under the Ministry of Justice, while the operation and decision-making of tribunals under the supervision of the normal courts.²³ The responsibilities of the Senior President of Tribunals²⁴ were closely fashioned according to those of the Lord Chief Justice under the *CRA*. There is a right of appeal²⁵ from tribunals generally to the Court of Appeal by virtue of its inherent common law jurisdiction. Furthermore, there is now also a statutory right of appeal from the Upper-Tier tribunals to the Court of Appeal on issues of law.²⁶ The supervisory relationship between the courts and the tribunals service will be discussed further below in s 5 3 3 2.

²¹ Wade & Forsyth *Administrative Law* 34. Cf Craig “Ultra Vires and the Foundations of Judicial Review” in *Judicial Review & the Constitution* 90: ‘we should recognise also that the ambit of review can only be legitimated in the same way as other common law powers, by asking whether there is a reasoned justification which is acceptable in normative terms for the controls which are being imposed.’

²² S 5 3 2 1 1.

²³ Although the tribunals are members of the judiciary, much of the administrative oversight falls to the Ministry of Justice. While this relationship is beneficial and contributes to co-operation between the two spheres, it is important that tribunals maintain their independence.

²⁴ S 5 3 2 1 4.

²⁵ However, in reality this is more like a right of review.

²⁶ S13 *TCEA*.

5 2 5 Parliamentary and Health Services Ombudsman

Akin to the situation in Australia, ombudsmen and other independent complaint handlers are generally recognised as an essential part of the administrative justice landscape. It has been noted that ombudsmen ‘constitute a genus rather than a species’.²⁷ According to the AJTC,

at one end of the spectrum there are the classic public sector ombudsmen now represented by the Parliamentary and Health Service Ombudsman, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales, the Northern Ireland Ombudsman and the Local Government Ombudsman (England). These are established under statute and are typically concerned with complaints of maladministration giving rise to injustice. Their decisions are not binding but their recommendations are almost always complied with. At the other end of the spectrum are non-statutory ombudsmen set up by particular sectors such as the removals industry to resolve disputes between firms and customers.²⁸

The Parliamentary and Health Services Ombudsmen is a statutory office created in terms of the *Parliamentary Commissioner Act 1967*. The role of the ombudsman²⁹ is to provide a service to the public by undertaking independent investigations into complaints of maladministration by government departments and other public bodies who have not acted properly or fairly or have provided a poor service.³⁰

5 3 Tribunals

5 3 1 History

5 3 1 1 Franks Report³¹

Although tribunals have been very important historically in the English administrative justice regime,³² the first intensive investigation into the modern tribunal was only commissioned in the 1950’s. The Franks Commission, named after its chair Sir Oliver Franks, was a commission of inquiry commissioned to investigate tribunals due to concerns regarding their haphazard and diverse system, diversity in their proceedings, and the lack of cohesion and

²⁷ AJTC *The Developing Administrative Justice Landscape: Executive Summary* <http://www.ajtc.gov.uk/adjust/articles/landscape_paper.pdf> (accessed 23-02-2011).

²⁸ AJTC *The Developing Administrative Justice Landscape* 4.

²⁹ For a more complete description of the role of the Ombudsman see Department of Constitutional Affairs *Transforming Public Services: Complaints, Redress and Tribunals* White Paper Cmnd 6243 (2004) (“the White Paper”) 16-19.

³⁰ Parliamentary and Health Services Ombudsman “About Us” (12-11-2010) <<http://www.ombudsman.org.uk/about-us/our-role>> (accessed 23-02-2011).

supervision over their functioning.³³ Among other things, the committee firmly established the position of tribunals within the government of the United Kingdom, stating that ‘tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.’³⁴ The most important statement about tribunals were the Franks principles of ‘openness, fairness and impartiality’, which became the watchwords for how tribunals ought to operate.

5.3.1.2 Leggatt Report³⁵

While the Franks Report defined important characteristics of tribunals and gave directions as to what their essential role should be, the Leggatt report provided the modern catalyst for the reforms in England. The Leggatt Report stated that tribunals were of such significance because

together they form the largest part of the civil justice system in England and Wales, hearing about a million cases each year. That number of cases alone makes their work of great importance to our society, since more of us bring a case before a tribunal than go to any other part of the justice system. Their collective impact is immense.³⁶

However, Leggatt noted that the tribunal system was dissatisfactory because ‘the present collection of tribunals [had] grown up in an almost entirely haphazard way.’³⁷ The Leggatt report’s main concern was that tribunals were created as and when they were required, resulting in a collective fragmented and unsystematic tribunals which made use of diverse procedures, degrees of formality, and approaches to dispute resolution. This meant that the tribunal system was reflecting the convenience of the departments whose decisions it reviewed, rather than the needs of the user.³⁸

³¹ Franks Report Ch 3 fn 56 above. Also see Ch 3 s 4 1.

³² See the discussion in Ch 3 s 2. Cf Cane “Understanding Administrative Adjudication” in Pearson, Harlow & Taggart (eds) *Administrative Law in a Changing State* (2004) 275-283 for the full history.

³³ This is also an important concern in the South African system of tribunals. See Ch 6; Ch 2 and Govender “Administrative Appeals Tribunals” in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 73.

³⁴ Franks Report 40.

³⁵ Leggatt *A Tribunals for Users: One System, One Service* (2001).

³⁶ Leggatt *Tribunals for Users* 1.

³⁷ Leggatt *Tribunals for Users* 3. Cf Ch 6 fn 23 as these challenges are similar to those in South Africa.

³⁸ Leggatt *Tribunals for Users* 3.

The following extract from the report describes the main problems:

In the 44 years since tribunals were last reviewed, their number has increased considerably and their work has become more complex. Together they constitute a substantial part of the system of justice in England and Wales. But too often their methods are old-fashioned and they are daunting to users. Their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them. The object of this review is to recommend a system that is independent, coherent, professional cost-effective and user-friendly. Together tribunals must form a system and provide a service fit for the user for whom they were intended.³⁹

The Leggatt report focused on the role of the tribunal user.⁴⁰ All the requirements of accessibility, independence, speed, efficiency and cost were considered important as from the view of the user.⁴¹ This viewpoint is significant because it has shaped the vision of the tribunal reforms. Leggatt stated that

it should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.⁴²

The Leggatt report evaluated many of the problems with the tribunal system and made far-reaching recommendations for its reform. Two central recommendations of the report were that firstly, tribunals should be brought together in a new, independent, single tribunal system⁴³ and secondly that the new tribunal structure should be two-tier, under the supervision of a senior judge. The report stated that it hoped that the new structure would

³⁹ Leggatt *Tribunals for Users* 1.

⁴⁰ Since the report, there has been other academic research into the user and the tribunal. See Adler & Gulland *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* (2003); Partington, Kirton-Darling & McClenaghan "Empirical Research on Tribunals: An Annotated Review of Research Published between 2002-07" *AJCT* (10-08-2007) <www.ajtc.gov.uk> (accessed 23-02-2011).

⁴¹ This means that without perceived independence, the tribunal loses its important feature of independence. Unless users found tribunals to be quicker, easier and more efficient than court procedures, they were failing in their task to provide a better avenue of administrative justice.

⁴² Leggatt *Tribunals for Users* 6.

⁴³ The advantages of a single system of tribunals were described by Creyke in Ch 4 s 4 3 1 3, and can be reiterated here. The streamlining of the system enhances the efficient distribution of resources, negates the need for duplication, and allows for a coherent and homogenous set of practices and procedures to be followed.

enhance the independence of the tribunal system, enhance its status relative to courts, and that tribunals would acquire

a collective standing to match that of the Court System and a collective power to fulfill the needs of users in the way that was originally intended.⁴⁴

5 3 1 3 White Paper: *Transforming Public Services: Complaints, Redress and Tribunals*

The general considerations of the Leggatt report were accepted in the governmental White Paper *Transforming Public Services: Complaints, Redress and Tribunals*. The White Paper did not only envision tribunal reform, but also made further recommendations as to the ‘quality and responsiveness of the system as a whole’,⁴⁵ including the establishment of a new tribunal council to replace the existing Council on Tribunals⁴⁶ and a new form of statutory Ombudsmen. The White Paper stated that their ‘vision for that system is therefore different from, but, [we] believe, compatible with [Leggatt’s].’⁴⁷

In the section focusing on Tribunals, the White Paper made use of a MORI survey⁴⁸ to provide concrete statistical data about the state of tribunals and their effectiveness at the time. The White Paper coherently lays out reasons for why it deemed it necessary to institute a new tribunal system.⁴⁹ It also details the envisaged phased implementation of the necessary reforms as per the Reform Bill.⁵⁰ The White Paper stated that

the case for change is strong. And it is a case for collective action to deliver better services to users.⁵¹

And

⁴⁴ Leggatt *Tribunals for Users* 8.

⁴⁵ The White Paper 1.12.

⁴⁶ See s 5 3 3 1.

⁴⁷ The White Paper 1.12.

⁴⁸ Ipsos Mori is the second largest independent survey research organisation in the UK.

⁴⁹ The White Paper Ch 5 20-24. The White Paper states in para 5.29 that ‘the total cost of the tribunal ‘system’ is in the region of £280m per year. This money is not being spent effectively. We believe that for the same resources a much better system can be created.’

⁵⁰ The White Paper Ch 6 *Resolving Disputes: A New Approach* 25-38.

⁵¹ The White Paper Ch 5.30.

the procedures and processes of the new tribunal system need to be viewed systematically to ensure that they are all genuinely focused on achieving justice for the user.⁵²

Accordingly, the implementation of the reforms was achieved in stages,⁵³ systematically updating and building on the current system. In his First Implementation Review, the Senior President of Tribunals stated that

[he] believes that the key to realising the benefits of the new arrangements, while maintaining the quality of decision-making and the confidence of users, is to proceed gradually, adapting and building on the strengths of the system as it is, rather than by dramatic change. The legal and administrative changes required to establish the new tribunal structure are necessarily complex. However, our aim should be to achieve these changes with as little disruption as possible to the experience of ordinary users.⁵⁴

5 3 2 Tribunal Reforms⁵⁵

5 3 2 1 Tribunals Service⁵⁶

The first of the tribunal reforms was the establishment of the Tribunals Service in 2006. The Tribunals Service was established as an executive agency of the Department for Constitutional Affairs (DCA).⁵⁷ The Tribunals Service combined tribunals that were at the time administered by the DCA. The major function of the Tribunals Service was to separate tribunals from their sponsoring departments and establish procedures for the streamlining of the new two-tiered tribunal structure. The Tribunals Service aimed to

⁵² The White Paper Ch 7.10.

⁵³ This took place in two phases. The first phase was termed “T1 day” and the second “T2”. T1 day was 3 November 2008 and involved the establishment of the Upper Tribunal (Administrative Appeals Chamber) and the First tier Tribunal (Social Entitlement Chamber 1; Health, Education and Social Care Chamber). T2 day occurred in April 2009 and consisted of establishing other Upper Tribunal chambers (Finance and Tax, and Lands) and other First-tier chambers (Tax and Duties; Lands; General Regulatory).

⁵⁴ Carnwath *Senior President of Tribunals First Implementation Review* (2008) <[http://www.tribunals.gov.uk/Tribunals/Documents/News/\[30june\]SPImplementationClean7b.pdf](http://www.tribunals.gov.uk/Tribunals/Documents/News/[30june]SPImplementationClean7b.pdf)> (accessed 12-07-2010) (*First Implementation Review*).

⁵⁵ The following section is a summary of the White Paper’s recommendations about the implementation of the new tribunals service.

⁵⁶ A more comprehensive discussion of the functioning and operation of the Tribunals Service can be found in *Transforming Tribunals* 16-20.

⁵⁷ The Department of Constitutional Affairs has now been amalgamated into the broader Ministry of Justice. Fn 12 above.

ensure that tribunals were visibly independent of original decision makers; make it easier for users to understand the process of seeking redress; bring improved quality and efficiencies of scale to the provision of administrative and management support and allow the implementation of a national organisation, with a regional structure.⁵⁸

In the Tribunals Service Annual Report⁵⁹ published after its first year of operation, the Tribunals Service had given common independent sponsorship to over twenty seven fragmented tribunals. Furthermore, they reached their key objectives⁶⁰ of initiating the structural⁶¹ and statutory reform⁶² necessary for the new tribunal system.⁶³

The Tribunals Service continues to provide a high level of service delivery in their maintaining and monitoring of the tribunals system. An especially laudable characteristic of the Tribunals Service is their commitment to transparency and to accountability, through the publishing of high quality, easily accessible, intelligible annual reports.⁶⁴

5 3 2 2 *Transforming Tribunals*

The next step in the process was the publishing by the Tribunals Service of the consultation paper *Transforming Tribunals: Consultation on implementation of Part 1 of TCEA 2007*. The paper laid out the proposals for the how the TCEA would approach the new structure of the two-tier system; the division of chambers, the assignment of judges and the role of non-legal members in order to obtain comment about the envisaged changes from everyone involved in the tribunal structure. This document served as the basis for a twelve month public consultation with all the key tribunal role-players.

⁵⁸ *Transforming Tribunals*17.

⁵⁹ Tribunals Service *Annual Report and Accounts 2006/2007* (2007) <<http://www.official-documents.gov.uk/document/hc0607/hc09/0905/0905.pdf>> (accessed 03-03-2011).

⁶⁰ These key objectives and how the Tribunals Service has performed are comprehensively described in the *Tribunals Service Annual Report and Accounts 2006/2007*.

⁶¹ These changes included developing a regional management structure and business model consisting of multi-jurisdictional Administrative Support Centres supporting a network of Hearing Centres; changing the procedural requirements to simplify appeals; and investigating the potential success of alternative dispute resolution in tribunal adjudication.

⁶² The creation of the TCEA.

⁶³ 'All of this has been achieved while reducing expenditure by £15m, which represents 5% of the Tribunals Service budget.' *Transforming Tribunals*17. Cf *Tribunals Service Annual Report and Accounts 2006/2007* 16-17 for the statistical breakdown of the costs.

⁶⁴ The most recent report is the *Tribunals Service Annual Report and Accounts 2009/2010* (2010) <<http://www.tribunals.gov.uk/Tribunals/Documents/Publications/TS-AR-09-10-WEB-final.pdf>> (accessed 25-02-2011).

After receiving one hundred and forty replying submissions, the Tribunals Service published its response on 19 May 2008.⁶⁵ The conclusions reached after the consultation paved the way for the implementation of the *TCEA*.

5 3 2 3 *Tribunals, Courts and Enforcement Act 2007 (TCEA)*

The first fundamental purpose of the Act is to establish a two tier tribunal structure, consisting of a First-tier Tribunal and an Upper Tribunal. Each tier would be sub-divided into distinct chambers of jurisdiction. The jurisdictions of the existing tribunals were subsumed by either one of the new tribunals.⁶⁶ Part of the new tribunal structure is the appointment of a Senior President of Tribunals. The second purpose is to abolish the Council on Tribunals and replace it with the newer, more inclusive Administrative Justice and Tribunals Council. The following section will explain the reformed structure as implemented by the Act, with reference to the various supporting apparatus enacted to give structure and support to it.

5 3 2 3 1 First-Tier Tribunals

The First-tier Tribunal is established in terms of S3(1) of the *TCEA*. The First-tier Tribunal is the tribunal of first instance in most cases. The First-tier Tribunal is currently divided into six chambers, namely the General Regulatory Chamber; Social Entitlement Chamber; Health, Education and Social Care Chamber; War Pensions and Armed Forces Compensation Chamber; Tax Chamber; and the Immigration and Asylum Chamber. The creation of chambers is an important structural initiative, because the chambers allow the Tribunal to remain as a single judicial unit, without losing the expertise and jurisdictional knowledge that is so necessary in the effective adjudication of administrative disputes. Each chamber is led by a chamber president,⁶⁷ who is also a judge of the Upper Tribunal.⁶⁸

The First-tier Tribunal is more diverse in its range of functions than the Upper Tribunal, as the intention was to expand and improve on the systems and approaches of the existing tribunals which were united by the Tribunals Service in 2006. Due to the fact that the First-tier Tribunal is the foremost and most widely-used forum for dispute resolution, the primary

⁶⁵ *Transforming Tribunals* contains a detailed description of the submissions and opinions received.

⁶⁶ The exceptions to this are the employment tribunals and Employment Appeal Tribunal which will continue as distinct pillars within the new system. Initially the Immigration and Asylum Tribunal was also to stand apart, but that has now been integrated into the Upper Tribunal. *Transforming Tribunals* 28.

⁶⁷ S7 *TCEA*. Cf Schedule 2 of the *TCEA*.

⁶⁸ S5 *TCEA*.

objective of its dispute resolution function must be to make the principles of expeditious, accessible and specialist administrative justice a reality through tribunal flexibility, procedural innovation, and the increased skills development of tribunal judges.

The adjudicators of the First-tier Tribunal consist of judges⁶⁹ and other members. Legally qualified members of the former tribunals became judges of the First-tier Tribunal when their jurisdiction was transferred, whereas the non-legal members, such as tribunal experts, became other members. New judges and members are appointed by the Judicial Appointments Commission.⁷⁰

The First-tier Tribunal may review decisions, and may correct accidental errors in the decision or in a record of the decision; amend reasons given for the decision; or set the decision aside.⁷¹ If the First-tier Tribunal sets aside a decision, it must either re-decide the matter concerned, or refer that matter to the Upper Tribunal,⁷² who must decide the matter.⁷³ The First-tier Tribunal is mostly concerned with review on the merits and is empowered to engage in fact-finding activities. Accordingly, there is the possibility of appeal to the Upper Tribunal on points of law.

5.3.2.3.2 Upper Tribunals

The Upper Tribunal is established in terms of S3(2) of the *TCEA*. The Upper Tribunal is primarily an appeal tribunal, but can sit as the tribunal of first instance in certain exceptional matters.⁷⁴ The Upper Tribunal is also divided in chambers, namely the Administrative

⁶⁹ The independence and impartiality, as well as the stature, of tribunal judges are emphasised by naming them ‘judges’ as opposed to ‘tribunal members’ like in the AAT of Australia.

⁷⁰ The provisions surrounding the appointment of judges are contained in Schedule 2 of the *TCEA*.

⁷¹ S9(4) *TCEA*.

⁷² S9(5) *TCEA*.

⁷³ S9(6) *TCEA*. S9(8) states that any tribunal who acts under Ss9(5) & (6) may also make any findings of fact it considers appropriate.

⁷⁴ ‘The Upper Tribunal will also have a limited first instance jurisdiction. This will be for complex cases or those dealing with issues which have general application and where the Upper Tribunal may set precedent for the First-Tier Tribunal.’ *Transforming Tribunals* 28. These exceptions include complex tax, finance and land disputes.

Appeals Chamber (AAC);⁷⁵ the Tax and Chancery Chamber; the Lands Chamber; and the Immigration and Asylum Chamber.

While the First-tier Tribunal specialises in dispute resolution on the large-scale and serves as the primary means for administrative adjudication, the Upper Tribunal is designed to deal with appeals, set precedent in administrative law and provide a forum other than the High Court for judicial review. The Upper Tribunal

will lead on developing the law underlying administrative justice. It will deal with appeals from the First-tier Tribunal and from some tribunals outside the unified system. It will also have power to deal with judicial review work delegated from the High Court. The Upper Tribunal will be the highest tribunal to which an appeal can be made within the new tribunals structure.⁷⁶

The main function of the Upper Tribunal is to consolidate the cluttered collection of appeal routes from various different administrative tribunals into a singular, coherent avenue of appeal. Linked to this unifying function is the Upper Tribunal's second function which is to be an authoritative and respected appeals body at the head of the system.

The creation of the Upper Tribunal provides the opportunity not only to rationalize the procedures, but also to establish a strong and dedicated appellate body at the head of the new system. Its authority will derive from its specialist skills, and its status as a superior court of record, with judicial review powers, presided over by the Senior President. It is expected that the Upper Tribunal will come to play a central, innovative and defining role in the new system, enjoying a position in the judicial hierarchy at least equivalent to that of the Administrative Court in England and Wales.⁷⁷

Like the First-tier Tribunal, the Upper Tribunal may also review decisions and may also correct accidental errors in the decision or in a record of the decision; amend reasons given for the decision; or set the decision aside.⁷⁸ If the Upper Tribunal sets a decision aside, then it

⁷⁵ The AAC is the largest chamber in the Upper Tribunal, both in caseload and in number of judges assigned to it. A full breakdown of the number of cases resolved by each chamber can be found in Tribunals Service *The Quarterly Statistics for the Tribunals Service, 2nd quarter 2010-11* (2011) <<http://www.justice.gov.uk/publications/docs/tribunals-stats-q2-2010-11.pdf>> (accessed 04-03-2011).

⁷⁶ *Transforming Tribunals* 28.

⁷⁷ *Transforming Tribunals* 36.

⁷⁸ S10(4) TCEA.

must re-decide the matter concerned.⁷⁹ In this instance, Upper Tribunals also engages in ‘merits review’.⁸⁰

Appeals from the First-tier Tribunals are only allowed with permission from either the First-tier or Upper Tribunal⁸¹ and only on a point of law.⁸² The Upper Tribunal also has the power of judicial review and is empowered to grant the following remedies, namely a mandatory order; a prohibiting order; a quashing order; a declaration; or an injunction.⁸³ In both its appeal and judicial review function, the Upper Tribunal acts more like a court and limits its enquiry into the legality of the decision. This is because these remedies are as enforceable and have the same effect as relief granted by the High Court on an application for judicial review.⁸⁴ In deciding whether to grant relief of an order, the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief.⁸⁵ For this reason, the Upper Tribunal is described as a Superior Court of Record.⁸⁶

Cane points out that this combined function of the Upper Tribunal places it in a puzzling position in England. He states that by formally restricting the power of the Upper Tribunal to appeals on aspects of law, but at the same time granting it equal power as the First-tier Tribunal, the section

contains an amalgam of ideas. The provisions that the Upper Tribunal may make any decision that the First-tier Tribunal could have made casts it procedurally in the role of a merits reviewer.⁸⁷

⁷⁹ S10(5) *TCEA*. S10(6) states that when the Upper Tribunal acts in terms of s10(5) it may also make any findings of fact that it considers appropriate.

⁸⁰ Cane *Administrative Tribunals and Adjudication* 193.

⁸¹ S11(4) *TCEA*.

⁸² S11(1) *TCEA*.

⁸³ S15(1) *TCEA*.

⁸⁴ Ss15(3)(a) & (b) *TCEA*.

⁸⁵ S15(4) *TCEA*.

⁸⁶ This means that a decision of the Upper Tribunal is binding on tribunals and public authorities below it, and that it has powers both to enforce its own procedures and the procedures of the First-tier Tribunal.

⁸⁷ Cane *Administrative Tribunals and Adjudication* 193.

Cane then discusses two examples of English tribunals⁸⁸ in order to explain some of the issues involved when a tribunal falling essentially within the judicial branch engages in a form of merits review. While a full account of his discussion is beyond the scope of this chapter, his analysis concludes that the mode of review employed in English tribunals

shows that UK law embodies a significantly less clear, uniform and developed understanding of the role of tribunals than that found in Australian law. It remains to be seen what effect the creation and operation of the First-tier and Upper Tribunals will have on the juridical concept of administrative adjudication.⁸⁹

The future position of merits review will be discussed in s 5 4 below.

5 3 2 3 3 Other Tribunals

The Employment Tribunals Service (ETS) became a distinct component of the new Tribunals Service, under a protocol made in 2001 between the Lord Chancellor and the (then) Secretary of State for Trade and Industry. The ETS consists of the Employment Tribunals (ET) and the Employment Appeals Tribunal (EAT), which have similar status to First-Tier Tribunals and Upper Tribunals respectively. Both the ET and EAT remain under the supervision of the Senior President of Tribunals, and also form part of the Tribunals Service. They are distinct because they deal with party-to-party cases rather than purely administrative disputes.⁹⁰

5 3 2 3 4 Senior President of Tribunals (SPT)⁹¹

One of the most important developments of the reform was to ensure that there were high levels of co-operation from key role players within different departments. It was essential to

⁸⁸ The Social Security and the Immigration tribunals. Cane *Administrative Tribunals and Adjudication* 194-200.

⁸⁹ Cane *Administrative Tribunals and Adjudication* 200.

⁹⁰ Carnwath notes that this is not problematic. 'For my part, I see no difficulty in embracing party/party tribunals. A rigid division between administrative and non-administrative decision-making does not seem to me a realistic way of defining the proper role of tribunals. Tribunals are well-adapted to providing an accessible and flexible means of applying the law which most directly affects people in their ordinary lives – their homes, their jobs, their health, their welfare. Whether they are provided by state or private agencies is not usually fundamental to the nature of the dispute or the best means for resolving it.' Carnwath *Some Jottings on Administrative Justice* speech delivered at *The Future of Administrative Justice Symposium* Toronto 17-01-2008 <http://www.law.utoronto.ca/documents/conferences/adminjustice08_CarnwathKeynote.pdf> (accessed 10-06-2010)

⁹¹ The Senior President's supervisory role will be discussed in more detail in s 5 3 3 2.

consider both the nature of the office as well as to identify the most suitable candidate to fulfill the very important supervisory position.

Prior to the creation of a statutory office for the SPT in the *TCEA*, Carnwath was appointed as Senior President Designate (SPD), to provide strategic leadership to the tribunal judiciary pending the creation of the statutory office. This appointment coincided with the publishing of the White Paper. The primary role of the SPD was to actively engage in and provide supervision over discussions about the creation of the *TCEA* and the establishment of the Tribunals Service.⁹² A secondary role was to establish a Tribunal Judges' Executive Board, and to chair meetings of the Tribunals Presidents' Group.⁹³

At a later stage of the tribunal reform, the *TCEA* created an independent⁹⁴ statutory position for the SPT in Section 2. Carnwath LJ was appointed as the first SPT on 12 November 2007. The government was of the opinion that

strong judicial leadership will be required across both the First-tier and the Upper Tribunal, to ensure that the needs of the various jurisdictions are met; there is cohesion and continuity across both tiers, and the unified tribunal system has a strong identity within the justice system as a whole.⁹⁵

The Act states that the STP

must, in carrying out the functions of that office, have regard to the need for tribunals to be accessible; the need for proceedings before tribunals to be fair, and to be handled quickly and efficiently; the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters; and the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.⁹⁶

The SPT's major functions,⁹⁷ modeled on those of the Lord Chief Justice, are the following: representing the views of tribunal judiciary to Parliament;⁹⁸ training, guidance and welfare of

⁹² The contribution of these steps to the development of a Senior President are invaluable. Even at the foundational stage of the publishing of the White Paper, key players in the tribunals' reforms were identified and required to play an active, deliberative role in the establishment of a new tribunal system.

⁹³ See s 5 3 2 2 5.

⁹⁴ Although the SPT is essentially a judicial office, the president remains independent of both the executive and the Chief Justices in charge of the courts.

⁹⁵ *Transforming Tribunals* 28.

⁹⁶ S2 *TCEA*.

⁹⁷ The STP may delegate any of these functions by virtue of S8 *TCEA*.

judges and other members of the First-tier and Upper Tribunals;⁹⁹ organising chambers¹⁰⁰ and assigning judges and members to chambers;¹⁰¹ reporting to the Lord Chancellor about tribunal cases of specific importance;¹⁰² taking oaths of allegiance and judicial oaths from tribunal judges and other members;¹⁰³ issuing practice directions to the First-Tier and Upper Tribunals;¹⁰⁴ and chairing the Tribunal Procedure Committee.¹⁰⁵ The STP is also an *ex officio* judge of the Upper Tribunal.¹⁰⁶

5 3 2 3 5 Tribunal Presidents' Group (TPG), Tribunal Judges' Executive Board (TJEB) and the Tribunal Services Executive Team (TSET)

In his Annual Report,¹⁰⁷ the STP identified the need for his office to be supported by strong agencies¹⁰⁸ underpinned by a sense of co-operation between the role players in government.¹⁰⁹ The STP describes a number of different agencies and committees which encourage the ongoing functioning of tribunals.¹¹⁰ Three important committees which will be described below are the TPG, TJEB and the TSET.

⁹⁸ Schedule 1 item 13 & 14 *TCEA*.

⁹⁹ As well as the judges and members of the ET and EAT. Schedule 2 item 8 *TCEA*.

¹⁰⁰ S7(1) *TCEA*, a function which the STP holds concurrently with the Lord Chancellor.

¹⁰¹ S7(6) *TCEA*.

¹⁰² Ss43(1)(a) & (b) *TCEA*.

¹⁰³ Schedule 2 item 9(2)(a) *TCEA*.

¹⁰⁴ S23(1) *TCEA*.

¹⁰⁵ Schedule 5 item 20 *TCEA*.

¹⁰⁶ S5(1)(a) *TCEA*.

¹⁰⁷ Carnwath *The Senior President of Tribunals' Annual Report: Tribunals Transformed* (2010) <http://www.judiciary.gov.uk/NR/rdonlyres/EF000745-B38E-4A81-8356-E3317E1251F5/0/senior_president_tribunals_annualreport_feb_2010.pdf> (accessed 12-07-2010) (*Tribunals Transformed*).

¹⁰⁸ 'A major concern in relation to the establishment of the new service was to ensure that there was adequate administrative support for the Senior President and other judicial leaders.' Carnwath *Tribunals Transformed* 82.

¹⁰⁹ 'The tribunal reform project has been unusual, perhaps unique, among major legal reform programmes, in the extent of active involvement of judges at every stage. It has also benefited from consistently friendly but respectful working relationships between judges, ministers, and administrators, with generally all-party support, and with other vital stakeholders.' Carnwath *Tribunals Transformed* 76.

¹¹⁰ These are explained in detail in Carnwath *Tribunals Transformed*, but are beyond the scope of this thesis. They are important mainly to note that the Tribunals Service and Tribunal Judiciary do not stand alone or isolated, but have been established within a comprehensive framework of co-operative and communicative

The TPG was originally established by Lord Justice Brooke, acting under authority of the Lord Chief Justice, in the period leading up to the publishing of the White Paper. The TPG was established to coordinate and consolidate the judicial contributions to the tribunal reforms. Carnwath states that the TPG

brought together the jurisdictional leaders of all the tribunals expected to be affected by the changes, working with the civil servants responsible for drafting the paper and advising Ministers. Under [Brooke's] active direction, the TPG played an important part in the formulation of the policies of the White Paper, and in building a sense of common purpose between the various tribunals.¹¹¹

The TPG is chaired by the STP and now consists of all tribunal presidents and judges, the chairman of the AJTC, representatives of the Forum of Tribunal Organisations and on occasion, senior Tribunal Services officers.¹¹² It continues to provide a supporting role for the leadership of tribunals by providing an informal forum for the sharing of information, the discussion and consultation on the progress of the reforms, and any other pertinent issues relative to the broader tribunal judiciary.

However, Carnwath notes that after the implementation of the *TCEA*, the 'function of TPG as a planning and decision making forum was diminished.'¹¹³ He established the TJEB to be a smaller, more focused forum in which issues surrounding tribunals could be discussed and to be a 'smaller policy group which could meet more regularly and engage directly with the administrators on policy and operational issues.'¹¹⁴ The TJEB is the central decision-making body of the tribunal judiciary. Although leadership and responsibility rests with the senior members and the STP, much of the actual work is done by the TJEB sub-groups. These are divided into training, appointments, communications, medical issues, and appraisal and welfare.

The TSET is the equivalent of the TJEB in the Tribunals Service. Under the joint chairmanship of the STP and the Chief Executive, the two bodies engage in regular meetings

government agencies. In other words, several agencies and departments work together to provide an integrated and comprehensive administrative law system.

¹¹¹ Carnwath *Tribunals Transformed* 35.

¹¹² These attend by invitation and only when required.

¹¹³ Carnwath *Tribunals Transformed* 86.

¹¹⁴ Carnwath *Tribunals Transformed* 86.

to discuss common issues. According to the Annual Report and Accounts of the Tribunals Service¹¹⁵

the Tribunals Service (TS) and the tribunals' judiciary have maintained a close working relationship, whilst respecting each other's distinctive constitutional position.¹¹⁶

This close relationship has helped to strengthen and consolidate the new two-tier system. The co-operation between the supervisory executive body, the TS, and the tribunals judiciary has resulted in a greater level of service delivery to the users of tribunals. This has ensured that the dual goals of administrative dispute resolution, namely administrative justice to the aggrieved and enhanced original decision-making, are being realised to a greater extent.

5 3 3 Supervision of Tribunals

5 3 3 1 Administrative Justice and Tribunals Council (AJTC)

The predecessor of the AJTC, the Council on Tribunals,¹¹⁷ has since been abolished.¹¹⁸ It was criticised during its forty years of existence for limitations on its effective functioning. Some of these limitations can be identified as its 'scanty resources' and 'weak political position.'¹¹⁹ Furthermore, the old council was declared by Professor Street to be 'playing no effective part in ensuring that the personnel are discharging their duties competently...Its supervision of tribunals is so slight as to be ineffective.'¹²⁰ Shwartz & Wade¹²¹ identified similar problems with the Council, namely that its membership was not suited to the nature of work it was required to perform, and secondly that it was ineffective. The former problem arose from a lack of sufficient budgetary resources, and the latter from the circumscription of the work of

¹¹⁵ Tribunals Service *Annual Report and Accounts 2008/2009* (2009) <<http://www.official-documents.gov.uk/document/hc0809/hc05/0599/0599.pdf>> (accessed 04-03-2011).

¹¹⁶ Tribunals Service *Annual Report and Accounts 2008/2009* 42.

¹¹⁷ The Council on Tribunals was established in 1958 on the recommendations of the Franks report. See s 5 3 1 1 above.

¹¹⁸ S45(1)(a) *TCEA*.

¹¹⁹ Wade & Forsyth *Administrative Law* 782.

¹²⁰ Street *Justice in the Welfare State* 2 ed (1975) 63.

¹²¹ Shwartz & Wade *Legal Control of Government: Administrative Law in Britain and the United States* (1972).

the Council. These problems with the old Council were important points to improve in the development of the new supervisory body.

During the overhaul of the English tribunal system, the structure of the tribunal supervisory body also required reconsideration. The drafters of the *TCEA*, on a careful study and emulation of the Australian ARC,¹²² established in the Council on Tribunal's place a new Administrative Justice and Tribunals Council (AJTC).¹²³ The functions of this council are as follows:

It has the power to keep under review and report on the constitution and working of tribunals in general and in particular. And it may scrutinise legislation relating to the Lord Chancellor...; unlike the old council, it must formulate a programme of work.¹²⁴

In addition to these functions, it also has the task of

keeping the administrative justice system under review, and considering ways in which that system may be made 'accessible, fair and efficient'. It may advise the Lord Chancellor and the Senior President on the development of administrative justice and refer proposals for changes in the system to him.¹²⁵

Carnwarth LJ explains that the wider role in the administrative justice context 'will be concerned with ensuring that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution routes satisfactorily reflect the needs of users.'¹²⁶ The wider scope illustrated here is significant in that the AJTC has the right not only to advise with regard to tribunal administrative justice, but rather to review the whole of the administrative justice system.¹²⁷ This comprehensive supervisory role will contribute to greater consistency and collaboration within the various agencies of the integrated administrative law system.

¹²² See Ch 4 s 5 1.

¹²³ S44 *TCEA*.

¹²⁴ Wade & Forsyth *Administrative Law* 781. Schedule 7 Item 14 *TCEA*.

¹²⁵ Wade & Forsyth *Administrative Law* 781.

¹²⁶ Carnwarth *Tribunals Judiciary* (2007) speech delivered at *CCAT 4th International Conference on Administrative Justice Without Borders - Developments in the United Kingdom* Toronto, 08-05-2007 8.

¹²⁷ These functions are found in Schedule 7 Item 13 *TCEA*.

However, critics have illustrated that while the new ARJC may have valiant aims and noble purpose, it still suffers from some of the same limitations as the old Council on Tribunals and its only 'realistic strategy is to act as a co-coordinator of networks, fostering co-operation.'¹²⁸

As it stands, the AJTC has been an effective body in the process of the tribunal reforms in that it is given a wider role in its supervisory capacity.¹²⁹ It is not restricted to be merely a council on tribunals, but has remit to extend its supervisory influence to the whole of administrative law. Carnwath states that

the AJTC's role is not just about the final stage of dispute resolution, but covers the whole process from initial decision until final resolution at whatever level.¹³⁰

5 3 3 2 Senior President of Tribunals (STP)

The role and office of the STP has been discussed briefly in s 5 3 2 3 4 above. As well as holding office as the independent judicial head of the tribunal judiciary, the STP has the responsibility of supervision and guidance over that judiciary. He has the responsibility of issuing practice directions about the operation of both tier tribunals.¹³¹

During the period between the White Paper and the *TCEA*, a Memorandum of Understanding was agreed upon to regulate the relationship of the STP, the Lord Chancellor and the chief justices. Defined in this Memorandum was the role of the STP to provide strategic leadership

¹²⁸ Harlow & Rawlings *Law and Administration* 509. One reason for this is that the budget is still insufficient. Harlow & Rawlings describe that it can 'offer advice and assistance on policy issues; comment from time to time on Tribunal Service priorities, standards and performances measures; and monitor so far as it is able the progress and performance of tribunals against common standards and performance measures.' However, this will be achieved only if the council 'seek(s) to build up influence' and 'raise(s) awareness of the different approaches within the UK legal systems.' The new AJTC must work towards creating an environment that allows it to perform the actual role that should be performed by the supervisory body.

¹²⁹ However, the AJTC is one of the bodies that is to be included among the Ministry of Justice sponsored Arms Length Bodies to be abolished through the *Public Bodies Reform Bill*, due to be introduced in British Parliament in September 2011. The bill has not yet been assented to, nor is it clear in any way how this will affect the functions of the AJTC. The AJTC Chairman notes that 'whilst recognising the absolute prerogative of Ministers and Parliament to take such a decision, the outcome is disappointing and it is unfortunate that we were not included in the discussions leading to this decision. However we look forward to contributing to the debate about how our functions are to be discharged in the future. The AJTC and the former Council on Tribunals have been valued for playing a leading role in the development of tribunals and administrative justice for over 50 years. Even if the life of the AJTC itself is to be cut short, we firmly believe that our functions of monitoring, influencing and improving the administrative justice system as a whole, particularly from the perspective of the users, will continue to be vital. This is especially so at a time when simultaneously we see a wish to reinforce the power of the citizen against the state, massive pressures upon public services and a mushrooming in the volumes of complaints and appeals.' *AJTC Annual report 2009/2010* (2010).

¹³⁰ Carnwath *First Implementation Review* 56.

¹³¹ S23 *TCEA*.

for the tribunals judiciary; work in partnership with the tribunal presidents and the chief executive of the TS to develop and improve the tribunal system; and to oversee the training and guidance of the tribunal judiciary.¹³² The implementation of the *TCEA* captured in statute the supervisory role of the STP. Carnwath notes that the successful role of supervision played by the STP relies on the office's wide scope and that

unlike the functions of the Lord Chief Justice under the CRA, which are confined to England and Wales, the Senior President's responsibilities may extend to all or part of the United Kingdom, depending on the statutory extent of the each jurisdiction.¹³³

Another important way that the STP can exercise control over tribunals is by virtue of his appointment as an Upper Tribunal Judge and member of the Court of Appeal. Through the hierarchal management structure in place in the two-tier system, the STP can assist with the formulating of judicial precedent and the streamlining of appeal procedures. Carnwath notes that

as the senior tribunal judge and as a serving member of the Court of Appeal, [he] regards it as important that [he] should sit regularly in both capacities... The establishment of the new Upper Tribunal, as the normal route of appeal for most cases within the tribunal system, provides an unprecedented opportunity to build on the existing case law of the different jurisdictions and to develop a more coherent approach to the many common themes of tribunal justice.¹³⁴

The STP also retains a supervisory and leadership role over the ET and EAT.

5 3 3 3 Other forms of Supervision

5 3 3 3 1 Tribunals Service (TS)

The supervisory role of the TS has been described in detail in section 3 2 1 above. The TS continues to maintain and review tribunal procedures, accounts, case loads and the provision of administrative justice through its annual reports. These have been discussed and alluded to throughout the discussion of the tribunal reforms.

An important point to raise here is that although the tribunals are a distinct part of the judiciary, they are supervised and monitored by an executive body. This allows for an

¹³² This is a summarised version of the comments in Carnwath *Tribunals Transformed* 12.

¹³³ Carnwath *First Implementation Review* 8.

¹³⁴ Carnwath *First Implementation Review* 10.

interchange of ideas between the two and encourages co-operation and co-development across the two spheres of government.¹³⁵

5 3 3 3 2 Court of Appeal

Although the reformed tribunal system is designed to take over the bulk of administrative dispute resolution, the Court of Appeal retains its status as a higher judicial body of appeal. The Court of Appeal is the second highest court in the English legal system, subject only to the Supreme Court of the United Kingdom. A decision of the Upper Tribunal may be appealed to the Court of Appeal,¹³⁶ with permission of the Upper Tribunal or the Court of Appeal,¹³⁷ but the grounds of appeal are limited to a point of law.¹³⁸ When considering matters on appeal, the Court of Appeal has the same powers as the Upper Tribunal would have had.¹³⁹ The judiciary can therefore extend an overarching form of control over the legality of decisions made by lower tribunals, but at the same time can also exercise any power that the Upper Tribunal may when engaging in a process of merits review. That said,

the general principle is that an appeal hearing should not be an opportunity to re-litigate the factual issues that were decided in the First-tier Tribunal. Its purpose is to determine legal points and to ensure consistency of approach.¹⁴⁰

It is also envisaged that the role of the Court of Appeal will be limited to a supervisory one, and that the Upper Tribunal's Administrative Appeals Chamber will provide the major avenue for administrative appeals. This will have the two-fold advantage of firstly, diminishing the workload of the Court of Appeal and secondly, consolidating and streamlining appeal procedures. It is hoped that administrative appeals to the Court of Appeal will be limited to those of particular judicial importance because

it is the Lord Chancellor's intention to use his powers under s13(6) of the 2007 Act to prescribe that appeals from the Upper Tribunal to the Court of Appeal will only be

¹³⁵ Of course, this exchange of ideas is not without its challenges and there should be an important degree of independence between the two.

¹³⁶ S13 *TCEA* provided it is not excluded in terms of s8.

¹³⁷ Ss13(3) & (4) *TCEA*.

¹³⁸ S13(1) *TCEA*.

¹³⁹ S14 *TCEA*.

¹⁴⁰ *Transforming Tribunals* 28.

permitted in cases of general importance or for other compelling reason (as for second appeals from the courts).¹⁴¹

5 3 4 Tribunals Transformed:¹⁴² The Success of the 2008 Reforms and Future Developments

Unlike the Australian position where tribunals have firmly established themselves in the administrative system, it is still relatively early to assess the success of the reforms and it remains to be seen how the tribunals system will function in the English context. However, there is already substantial evidence to suggest that the reforms are a positive step in the direction of a comprehensive system of administrative justice.

Possibly the most important aspect of the tribunal reforms is that tribunal decisions are no longer viewed as second-rate or weak judicial decisions. Their importance in the administration of justice has achieved a higher status. According to Hale,

tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system.¹⁴³

Carnwath adds support to this point. In a recent speech, he stated that

the key message of the new Act is that tribunals are no longer the Cinderellas of the justice system. Tribunal justice is real justice, and a distinctive and vital part of the judicial system; and tribunal “judges” ... are full members of the independent judiciary. Section 1 of the Tribunals Act underlines the point, by extending to them the statutory guarantee of judicial independence, conferred on the court judiciary by the Constitutional Reform Act 2005.¹⁴⁴

It will remain to be seen how effective the tribunal system is in the future. Cane’s prediction is that the tribunals will continue to grow in strength, alongside the courts, and that it will attain

effective recognition as a branch of government, the prime function of which is adjudication (the adjudicatory branch as opposed to the judicial branch), consisting of two separate adjudicatory hierarchies (of courts and tribunals), differentiated primarily

¹⁴¹ *Transforming Tribunals* 28.

¹⁴² Carnwath *Tribunals Transformed*.

¹⁴³ *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 6.

¹⁴⁴ Carnwath *Tribunal Reform in the UK* (2008).

in terms of their respective areas of jurisdiction, running in parallel but converging at the appellate level and sharing the two highest appellate bodies...In this dispensation it will be possible to describe tribunals as a type of court and courts as a type of tribunal; or, more accurately, courts and tribunals as species of adjudicative institution.¹⁴⁵

5.4 Merits Review in Tribunals: The Value of the Distinction¹⁴⁶

This section requires consideration of the theoretical concepts discussed in both Chapters 4 and the present chapter. The distinction between merits review and judicial review is an important constitutional concept in Australian law, as could be seen in the discussion in the previous chapter.¹⁴⁷ The distinction does not seem to have the same degree of importance, nor does it raise the same level of theoretical debate, in England.¹⁴⁸ Cane states three possible reasons for this; it is firstly due to the fact that there is no constitutional bar from tribunals from exercising a judicial function, such as judicial review, as there is in Australia, because tribunals are a form of quasi-court. Secondly, the English system does not necessarily employ a strict constitutional separation of powers and the lines are somewhat blurred between the branches of government. Thirdly, there is little or no research on what the actual procedure of tribunals is outside of Australia and the real constitutional importance of tribunals has received little attention.¹⁴⁹

What becomes clear through the discussion of the two models of tribunal justice is that although the two different jurisdictions have distinctive systems of tribunals, each fulfilling

¹⁴⁵ Cane “Understanding Administrative Adjudication” in *Administrative Law in a Changing State* 287.

¹⁴⁶ For a more comprehensive understanding of the value of the distinction, see Cane “Judicial Review and Merits Review” in Rose-Ackerman & Lindeth *Comparative Administrative Law*, cf Cane “Understanding Administrative Adjudication” in *Administrative Law in a Changing State*, cf Cane *Administrative Tribunals and Adjudication*.

¹⁴⁷ Further, see the discussion relating to the function of tribunals in Cane *Administrative Tribunals and Adjudication* 176-182.

¹⁴⁸ Cane states that ‘Australian experience supports the prediction that in England, judicial review and non-judicial review are likely to converge substantively even if they come to be understood as distinctively different modes of administrative adjudication...Given the differences of constitutional background between England and Australia...it is perhaps unlikely that any contrast in this respect between the two modes of review will be as great in England as it is in Australia.’ Cane *Administrative Tribunals and Adjudication* 270.

¹⁴⁹ ‘In contemporary public law scholarship, tribunals are often treated as being of great practical significance in terms of public administration and government accountability but of little theoretical interest in constitutional terms.’ Cane “Understanding Administrative Adjudication” in *Administrative Law in a Changing State* 299. In Cane *Administrative Tribunals and Adjudication* 139 ‘the focus of attention shifts to what administrative tribunals do. This is a topic on which (outside of Australia, anyway) there is surprisingly little literature.’

supposedly categorically dissimilar roles, what ultimately defines tribunals must be their actual function.¹⁵⁰ To date, the literature surrounding tribunals is far more concerned with their practical operations and effective functioning than with their constitutional nature of their functions.¹⁵¹

For our purposes, the distinction between judicial review and merits review should be relevant as far as it is useful. This means that whether tribunals are seen to fall under the independent arm of the judiciary, or as a branch of the executive, their characteristic features must be that they are able to fully reconsider the facts of individual cases, usually in light of all the relevant material that was available to the reviewer; that they have the power to make a decision in substitution for the decision under review; that they provide a speedier, less expensive, more accessible administrative dispute forum than traditional courts; and that because of these functional qualities that differentiate them from courts they deliver a heightened level of administrative justice.

5 5 Conclusion

The Australian system of tribunals, within a comprehensive system of administrative justice, formed the blueprint for dramatic reform of tribunals in England. The method of reform in England, most especially in the process of engagement and discussion, may provide a useful outline for the reform of South African tribunals.

Despite distinct constitutional and institutional differences between the functioning of tribunals in Australia and England, there are many similarities with regard to the type of administrative relief that they can and should provide. These similarities extend to comprehensive structural administrative reform; the role of supporting governmental agencies; the necessity of co-operative government strategies for the realisation of efficient administrative dispute resolution and the improvement of original decision-making; the importance of an adequately and sufficiently resourced, overarching, centralised supervisory body empowered to exercise its overseeing capacity over the whole of the administrative

¹⁵⁰ Cane does however stress the need for more theoretical analysis of tribunals. He quotes Thomas 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) *Legal Studies* 463 where he states that 'the task of evaluating tribunal adjudication systems...requires a different methodology from that of traditional court-centred administrative law scholarship. Rather than analysing the development of legal principles...attention needs to be focused on the mass adjudication processes.' Cane *Administrative Tribunals and Adjudication* 274 fn 42.

¹⁵¹ Cane *Administrative Tribunals and Adjudication* 274.

sphere; the continued supervisory jurisdiction of an appeal court on issues of law; and the progressive movement towards speedy, efficient, effective and satisfactory administrative relief for citizens.

The following chapter aims to describe and assess the current state of tribunals in South Africa. According to Govender, South African tribunals suffer from the same limitations as those identified in the Leggatt report, namely that they have grown up in a haphazard way and now exist as a disparate, disorganised and unsystematic collection of tribunals. The following chapter will provide an analysis of South African tribunals and evaluate the need for reform.

CHAPTER 6: TRIBUNALS AND ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: DEVELOPMENTS AND THE CURRENT POSITION

6 1 Introduction

The concept of tribunals as alternative fora for administrative adjudication is not a new one in South Africa, nor has the idea only developed in recent years. During the deliberations prior to the establishment of the Final Constitution¹ and the enactment of the *Promotion of Administrative Justice Act*,² the creation of an organised and coherent system of administrative tribunals was a fundamental issue of reform and one that received much scholarly attention. The establishment of a supervisory administrative body to oversee the creation of such a system was also strongly advised. However, since *PAJA* there has been little or no attention paid to the establishment of an administrative review council, the implementation of a comprehensive tribunal system or the vital role such a system can play in an effective and functioning administrative justice system. Tribunals have continued to grow, but the tribunal landscape of South Africa continues to be made up of haphazard, unstructured and unsystematic appeal procedures which hinder rather than assist the advancement of access to administrative justice.

This chapter aims to explain the development of tribunals after the end of Apartheid³ and to explore suggestions regarding the inclusion of tribunals in the new administrative justice regime. Reasons for the disparity between the original recommendations of the South African Law Reform Commission regarding the inclusion of a comprehensive administrative tribunal system into constitutionally ordained national legislation and their eventual disappearance from *PAJA* will be provided. Following the history of the call for tribunal reform, the current system of tribunals will be described. Four general examples of the various constructions of tribunals are outlined in order to show how varied and far-reaching the differences between tribunals are in South Africa. To even describe a ‘tribunal’ in South Africa is difficult due to the vastly inconsistent structural and institutional differences between the various tribunal bodies. However, an evaluation of the current successes and failures of tribunals in South

¹ Constitution of the Republic of South Africa, 1996 (“the Constitution”).

² 3 of 2000 (*PAJA*).

³ The history of tribunals prior to the end of Apartheid is beyond the scope of this study. For a list of the tribunal landscape prior to 1992, see South African Law Reform Commission *Project 24 Investigation into the Courts’ Powers of Review of Administrative Acts* (1992) (Project 24).

Africa will be provided, as well as some brief lessons from the tribunal systems of Australia and England. Taking academic support for a coherent system of tribunals, the current fractured tribunal system in South Africa, and the lessons from Australia and England into account, some important considerations of tribunal reform and tribunal supervision will be suggested.

6 2 Development of Tribunals in South Africa

6 2 1 History of Tribunals: The Call for Tribunal Reform

The need for a comprehensive system of tribunals is not a recent development. After the end of apartheid and during the deliberations for a constitutional right to administrative justice, an organised system of tribunals attracted widespread academic support and was considered an important addition to an administrative justice system. Unfortunately, these suggestions were not implemented. What remains is a system of tribunals which is fragmented and which does not provide any comprehensive measure of administrative justice. The following section will describe the major historical developments in South Africa leading to a reformed tribunal system. The discussion will provide a possible explanation as to the reasons why *PAJA* did not contain so many of the suggestions regarding tribunals recommended by both academics and the South African Law Reform Commission.⁴ Furthermore, the importance of an Administrative Review Council will be considered in order to illustrate why its enactment is so crucial to the development of a comprehensive tribunal structure in South Africa.

6 2 1 1 South African Law Reform Commission Report 1992⁵

The first major South African study⁶ undertaken into the state of appeal and review was completed in 1992. The extensive two hundred and sixty one page document provides a detailed and comprehensive overview of the administrative justice landscape at the time. The report is divided into two sections; the first evaluates the South African system of administrative appeals, providing a comparative study of the administrative appeals of several

⁴ The recommendations relating to the establishment of the Administrative Review Council will be discussed in s 6 5 2.

⁵ Project 24 (fn 3 above).

⁶ This is not the first academic work on tribunals, but it is the first major practical project. Professor Baxter already refers to the need for a proper system of tribunals in Baxter *Administrative Law* (1984) 268, and Professor Rabie supports tribunals in Rabie “Administratiefregtelike Appèlle” (1979) *De Jure* 155. However, their contributions are acknowledged and discussed in the SALRC Project and will be discussed accordingly under the same heading.

other jurisdictions and evaluates their suitability in South Africa. The second evaluates the current state of judicial review. The main aim of the project was to

determine whether the present situation regarding appeals is satisfactory. Moreover, concerning the review of administrative acts, the aim will be to establish whether the grounds of review present effective means of controlling the legality of such acts in a modern state.⁷

In the section regarding Appeals,⁸ the SALRC lists all the various types of administrative appeals and categorises each form of appeal into one of the different types.⁹ Following the categorisation process, criticism of the South African system of appeals is discussed. The major criticism is that ‘appellate bodies have been created on an ad hoc basis.’¹⁰ Furthermore,

numerous suggestions have been made for the creation of either a fully-fledged system of administrative courts or at least a general administrative appeal tribunal. Professor Baxter bases his suggestions in this regard on the establishment of the Administrative Appeals tribunal (AAT) in Australia... Professor Rabie has also advocated the creation of a permanent tribunal for considering administrative appeals... Professor Raath comments on the Commission’s Working Paper 15 and comes to the conclusion that the establishment of lower and higher administrative courts for South Africa should be given serious consideration. The President’s Council has on two occasions recommended the possible establishment of a branch of the Supreme Court or an independent tribunal to function as a general court of appeal for administrative decisions.¹¹

Based on these recommendations from academics, the SALRC embarks on a study of the administrative justice systems of Australia, the United Kingdom,¹² France, the Netherlands, West Germany, Zimbabwe and New Zealand. In each, the relative value of the different appeal procedures is evaluated. The SALRC evaluates the possible success of the various suggestions in South African administrative law reform. There is support for the creation of

⁷ Project 24 3.

⁸ Project 24 S3 22.

⁹ The categorisation is a combination of the classifications used in Rabie (1979) *De Jure* 128 and Baxter *Administrative Law* 264 respectively. The categorisations used below in s 6 4 are based on Baxter’s classification and will be discussed in that section.

¹⁰ Baxter *Administrative Law* 268 and Rabie *De Jure* (1979) 154 – 155. Project 24 50 fn 16. This criticism remains valid.

¹¹ Project 24 50 (footnotes omitted).

¹² England’s system has been dramatically reformed since and these reforms are discussed in Ch 5.

‘an advisory body’ to supervise the creation and functioning of a tribunal system.¹³ The report also documents the comments received on the Commission’s recommendations in Working Paper 34,¹⁴ most of which are in support of the establishment of a tribunal system.¹⁵ Despite the academic support of such tribunal reform, the SALRC is not in favour. Their objections to a general tribunal exercising appeal jurisdiction are mostly related to the fact that South Africa, in 1992, was undergoing major procedural upheaval with regard to the division of provinces, the location of courts and the levels of jurisdiction.¹⁶ It was considered that the creation of a general tribunal at that delicate stage of democratic transition would be too complicated. In other words, these objections may not hold as much weight at this stage in our democratic development.

It is at this point that there appears to be a gap in the logic of the Commission.¹⁷ Despite having performed a major comprehensive research project spanning multiple jurisdictions and illustrating the effectiveness and importance of administrative appeal tribunals, the Commission comes to the abrupt, and seemingly unfounded, conclusion that the current system of appeals should remain as is and that the focus of administrative justice should be on streamlining and developing judicial review. They state that

in the light of the views expressed above the Commission recommends that the present system of appeals should be retained, that no provision should be made for a general right of appeal to the Supreme Court against administrative decisions, and that reform should rather be effected with regard to judicial review, that is the extension of the grounds of review.¹⁸

¹³ Project 24 97.

¹⁴ South African Law Reform Commission Project 24 *Investigation into the Courts’ Powers of Review of Administrative Acts: Working Paper 34* (1991).

¹⁵ Report 24 102. Mynhardt states that the introduction of a tribunal system is unsatisfactory because it will only lead to a further hierarchy of tribunals being established. Burns agrees that the appeal system should be maintained and that attention should be directed towards judicial review. However, Viljoen supports the creation of a general tribunal. Corder also supports the creation of a structured form of tribunals. Baxter further supports the tribunal reforms. The SALRC’s major objections relate to the time at which these suggestions were issued and so may no longer be a stumbling block to the successful tribunal reform.

¹⁶ It will be argued that these criticisms do not hold weight anymore now that the dust of constitutional reform has settled.

¹⁷ Hoexter *Administrative Law in South Africa* (2007) 68 notes that ‘this recommendation seems to miss the point that administrative appeals are essentially an alternative to judicial review: ideally, a more specialised, accessible, cheaper and democratically less threatening alternative. It is difficult to see how improving judicial review would solve the problems of incoherence identified by the Law Commission.’

¹⁸ Project 24 106.

However, as indicated above, the SALRC's biggest objections seem to relate to the time that the suggestions were made and the fact that tribunal reform was not an appropriate consideration during a period of uncertainty and constitutional upheaval.

6 2 1 2 Conferences on Administrative Justice: The Breakwater Declarations

6 2 1 2 1 Breakwater I: *Administrative Law Reform*¹⁹

Fortunately, the investigation did not end there. Although the SALRC recommended that the ad hoc and unsystematic system of appeals was to be retained, academics continued to discuss the need for tribunal reform and a systemisation of administrative appeals.

In 1993, a conference on administrative justice was held in the Breakwater Lodge in Cape Town.²⁰ The conference attracted the attendance of a number of local and foreign academics and was largely concerned with debating and considering the next step in the nature of administrative justice in South Africa. A major feature was deliberation around whether, and how, a right to administrative justice should be included in the final Constitution. Although s33 is now a constitutionally entrenched right in the Bill of Rights, it was a highly contentious right and one that was hotly contested by academics.²¹ The role of administrative tribunals, despite being dismissed by the SALRC's 1992 report, also formed a substantial part of the discussions. The most important academic contribution will be discussed below.

6 2 1 2 1 1 Govender: Administrative Appeals Tribunals

The most direct contribution regarding tribunals was that of Govender. His article provided the next analysis of the system of tribunals in South Africa after the SALRC's 1992 report.²² Govender states that 'effective administrative appeal tribunals breed confidence in the

¹⁹ (Breakwater 1). The workshop was named 'Administrative Law for a future South Africa'. Abbreviated versions of the papers have been published in Corder & McLennan (eds) *Controlling Public Power* (1995), while the full texts can be found in Bennett, Cockrell, Jooste, Keightley & Murray (eds) *Administrative Law Reform* (1993).

²⁰ The declarations which were drawn up and assented to at this and the subsequent conference received their name from this.

²¹ 'In early 1996 the Constitutional Assembly was not convinced that a right to administrative justice should be perpetuated in the final Constitution, seriously weighing the alternative of a mere reference in the Bill of Rights to a still-to-be-adopted legislation on the subject' Corder & Maluwa "Background and Some Issues" in Corder & Maluwa (eds) *Administrative Justice in South Africa* (1996) 9. Cf Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 165-170.

²² Report 24.

administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed.²³

He describes the important role of administrative appeals tribunals in the checking and controlling of administrative power, while emphasising their role as positive and facilitative aspects of good administrative decision-making. Govender illustrates the advantages of tribunals as follows:

By focusing on the same subject matter on a regular basis, tribunals acquire both the required awareness of the policy considerations of the administration and a familiarity with technical provisions. This expertise fosters a belief within the administration that correct and accurate decisions are being taken. As tribunals develop greater flexibility in respect of procedure, strict adherence to the adversarial mode becomes less necessary. Tribunals are then able to elicit all the relevant information from the applicant and, as a consequence, the applicant can more confidently appear on his or her own. Moreover, tribunals are more accessible to the public as they are generally cheaper and speedier than regular judicial bodies.²⁴

Another important advantage which is specific to the South African context relates to the role of tribunals in a system on the verge of institutional political changes. In a society which strives to effect dramatic democratic change, tribunals may be able to provide an integral facilitative role. Govender states that

a structured and co-ordinated system of tribunals will have certain obvious attractions for a future democratically elected government. New policies will have to be applied by an administration comprising individuals, some of whom would be either reluctant to apply them or positively hostile towards them. An effective tribunal system may assist in ensuring that policies determined by a democratic government are applied and enforced.²⁵

Govender uses examples of the different appeal procedures in South Africa at the time to illustrate the inconsistencies and vast differences between them.²⁶

²³ Govender “Administrative Appeals Tribunals’ in Bennett, Cockrell, Jooste, Keightley & Murray (eds) *Administrative Law Reform* (1993) 77.

²⁴ Govender “Administrative Appeals Tribunals’ in *Administrative Law Reform* 77.

²⁵ Govender “Administrative Appeals Tribunals’ in *Administrative Law Reform* 78.

²⁶ A similar approach will be followed in s 6 4. However, many of these tribunals no longer operate in the same way, or no longer exist, and those that are still relevant will be discussed in s 4 below.

A very important element of Govender's article is the counter-argument he provides for the SALRC's dismissal of the reform of appeal procedures.²⁷ Govender contends that although the SALRC has decided against the creation of a general tribunal or a reformed tribunal structure,

these recommendations do not deal with the central issue, namely, the reform of the tribunal system in order to introduce 'openness, fairness and impartiality' in its operation and thus to ensure justice to the individual while policy is applied competently. The recommendations of the Law Commission fail to recognize the many advantages that an effective system of administrative tribunals have over judicial review. An extension of the grounds of judicial review will contribute to a more accountable administration, but will only tangentially contribute to the establishment of the effective system of administrative tribunals.²⁸

Lastly, Govender expresses support for a supervisory administrative body. In his article he likens it to the previous Council on Tribunals of the United Kingdom, but describes it in terms which are of general application. He states that

a supervisory body, vested with the powers recommended, will also be necessary in order to achieve the desired uniformity in respect of the checks and balances on the powers of the tribunals and in respect of the internal procedures adopted by tribunals during their hearings.²⁹

6 2 1 2 1 2 Breakwater Declaration

The conference also generated the 'Breakwater Declaration',³⁰ an historical document directing the focus of administrative justice in the pre-constitutional era. The Breakwater Declaration viewed tribunals as part of a system of positive change, and provided support for them in the following way. Firstly, a point of departure of the Breakwater Declaration was that

²⁷ S 6 3 1 1 above.

²⁸ Govender "Administrative Appeals Tribunals' in *Administrative Law Reform* 85.

²⁹ Govender "Administrative Appeals Tribunals' in *Administrative Law Reform* 84.

³⁰ Bennett et al *Administrative Law Reform* 18-20 ('Breakwater Declaration').

South African administrative law currently has a retrospective focus: it concentrates on judicial remedies for maladministration. It needs to develop a prospective focus; it needs to create procedures and structures which will foster good decision-making.³¹

A point of agreement among the delegates was that the

legal regulation of public power should include judicial review of administrative action as well as a range of procedures and institutions to ensure good governance, including:

(viii) the provision of accessible, appropriate and adequate remedies for maladministration, including review of administrative action and, where desirable, alternative dispute resolution procedures (having special regard to the dangers of informal procedures for those with poor bargaining power).³²

Lastly, the delegates felt that one of the areas which required more research and investigation was '(i) the need for and design of administrative appeals, internal or external.'³³ It is clear from this document that the delegates were in agreement that judicial review could not alone perform the task of a comprehensive administrative law system. The idea of supporting structures continued to hold force in the deliberations.

6 2 1 2 2 Breakwater II: *Administrative Justice in South Africa*³⁴

In 1996, between the enactment of the Final Constitution³⁵ and the coming into effect of ss33(1) and (2), the second Breakwater Conference was held. With the right to administrative justice now entrenched in the Constitution,³⁶ debate focused more on the implications thereof,³⁷ the national legislation that Parliament was required to draft and the impact of the

³¹ Breakwater Declaration 18.

³² Breakwater Declaration 19.

³³ Breakwater Declaration 19.

³⁴ The workshop was initially entitled 'Controlling Public Power in South Africa', but the proceedings have been compiled and published in Corder & Maluwa (eds) *Administrative Justice in Southern Africa* (1997).

³⁵ The Constitution.

³⁶ The right was initially contained in s24 of the Interim Constitution (Act 200 of 1993), but was also included in the Constitution in s33 with a series of complex provisions (item 23 in Schedule 6) relating to the suspended enforcement of the right, subject to Parliament enacting legislation. See Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 28 for a description of the legislative history and reasoning behind the staged approach.

³⁷ 'The purpose of the workshop was 'to explore ideas about the regulation of public power in an informal educative atmosphere'. The papers were grouped around four themes: defining the scope of public power, the

right on administrative justice. Breakwater II was more heavily focused on the practical implications of how public power should both legitimately and fairly be exercised and controlled. Once again, administrative tribunals and their suitability to the South African context were raised as significant points of discussion.

Breakwater II spawned another historical document, namely the ‘Second Breakwater Declaration’.³⁸ The Declaration sets out the basic principles of the role, function and extent of public power and how it should be exercised and controlled. In ‘The Way Forward’, this Declaration contains commitment to the establishment of tribunals by saying that

the constitutional basis of administrative justice must be supported by the enactment of a Statute to give substance to the rights given constitutional protection. An investigation into the desirability and feasibility of establishing an Administrative Appeal Tribunal and a binding Code of Principles of Good Administration should be carried out.³⁹

6 2 2 Development of National Legislation to give effect to the Right to Just Administrative Action⁴⁰

6 2 2 1 South African Law Reform Commission *Report on Administrative Justice* August 1999⁴¹ and Draft *Administrative Justice* Bill⁴²

S33(1) of the Constitution states that ‘everyone has the right to administrative action that is lawful, reasonable and procedurally fair’. S33(3) of the Constitution places an obligation on Parliament stating that ‘national legislation must be enacted to give effect to these rights’. Prior to the enactment of such legislation, the rights contained in s 33(1) and (2) were suspended,⁴³ and s 24 of the Interim Constitution continued to apply. Parliament was

means of regulating power through the law, realising the regulation of public power in South Africa, and a comparison with non-African systems.’ Corder & Maluwa “Background and Some Issues” in *Administrative Justice in SA* 10.

³⁸ Corder & Maluwa *Administrative Justice in SA* 13-16.

³⁹ Corder & Maluwa *Administrative Justice in SA* 15.

⁴⁰ It must be stated at the outset of this section that it will not contain an evaluation of *PAJA* in its entirety. The discussion will be limited only to those provisions relating specifically to tribunals and tribunal supervision. The scope and consequences of *PAJA* as a whole are too broad and far-reaching to be discussed in detail in this thesis. For a thorough analysis of the history, functioning and interpretation of *PAJA*, see Currie & Klaaren *The Promotion of Administrative Justice Benchbook* (2001).

⁴¹ South African Law Reform Commission *Project 115 Report on Administrative Justice* (1999).

⁴² South African Law Reform Commission Draft Bill 1999 (The Draft Bill).

⁴³ In terms of item 23 of Schedule 6 of the Constitution.

therefore required to enact legislation before 3 February 2000 effectively, that is within a period of three years from the commencement of the 1996 Constitution.⁴⁴

The SALRC was given the task in November 1998⁴⁵ of producing a draft bill which would fulfil the constitutional mandate. The first discussion paper containing the first draft bill was published in February 1999.⁴⁶ After a series of workshops, deliberations and comments, as well as the advice of international experts,⁴⁷ the SALRC prepared a report for the Minister of Justice who was responsible for the drafting of the statute relating to administrative justice in August 1999. The report contained the recommendations of the SALRC regarding the national legislation that parliament was required to draft to give effect to the constitutional right to administrative justice, as well as a draft Administrative Justice Bill.

For our purposes, the most important recommendation of the SALRC relates to the creation of an Administrative Review Council (ARC). The reason for this is that the ARC would have been responsible for the essential enquiry into the possible creation of an appeals tribunal or any other form of tribunal review, and thus the actual topic of tribunal reform was not a topic of debate. It was always envisaged that those debates and discussions would take place under the guidance of the ARC.⁴⁸

Chapter 6 focuses on the contemplated Administrative Review Council. As is indicated in the appropriate footnote, this has been in contention. There has been an understandable aversion (particularly on the part of the Department of Justice) to the creation of what is seen to be yet a further governmental structure. The Commission has considered this and related objections, and substantial amendments to the original proposed body have been effected through successive drafts. The latest indication by the Department is that the contemplated ARC would cost in the order of R980 000,00 per annum to run (this out of the current Justice budget in the order of R300 million). Three points to be made in this regard are the following: that if the ARC is what it takes to obey the constitutional imperative, this limited funding has to be found; secondly, enhanced administrative justice contemplates greater state efficiency and thereby savings; and thirdly, that it is not evident that the function to be performed

⁴⁴ For a more complete history of the development of the right to just administrative action and the enactment of national legislation, see Currie & Klaaren *The AJA Benchbook* 4-13.

⁴⁵ The Committee that was established consisted of a project leader, Jeremy Gauntlett, Rainer Pfaff, representing German Technical Co-operation (GTZ), Hugh Corder and Andrew Breitenbach, appointed as researcher in respect of the project.

⁴⁶ South African Law Reform Commission *Discussion Paper 81: Administrative Law* (1999).

⁴⁷ A description of these proceedings can be found in SALRC *Report on Administrative Justice* 9-10.

⁴⁸ S 63(3)(1) below explains the important and essential role of the ARC in tribunal reform in South Africa.

(given in particular the need for autonomy and public regard) is best served by seeking to warehouse the ARC's allocated tasks within some other institution or government department.⁴⁹

The SALRC Draft Bill contained detailed and comprehensive clauses relating to the structure, appointment, expenditure and functioning of the proposed ARC. Amongst others, the purpose of the ARC would be to inquire into the law and practice relating to (i) internal complaints procedures, (ii) internal administrative appeals, (iii) the review by courts of administrative action; and to inquire into the appropriateness of establishing (i) independent and impartial tribunals, in addition to the courts, to review administrative action; and (ii) specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action; and make its first recommendations to the Minister of Justice within two years after the date of the commencement of the Act.⁵⁰

6 2 2 2 Portfolio Committee on Justice and Constitutional Development:⁵¹ Things Fall Apart

When comparing the Draft Bill of the SALRC to *PAJA*, there are considerable differences. Many of the differences can be attributed to hesitation and reservation expressed by the Department of Justice,⁵² but it can also be attributed to the deliberations held by the Portfolio Committee. Prior to the first meeting of the Portfolio Committee, there appeared to be three versions of the Draft Administrative Justice Bill. The first is the version produced by the SALRC. The second draft Bill was drafted by Professor Sarkin and resulted from the fact that cabinet was unhappy that new structures were created and that the bill was too detailed. The then Minister of Justice and Constitutional Development, Dr P Maduna, asked the Deputy

⁴⁹ SALRC *Report on Administrative Justice* 13-14. The 'appropriate footnote' is fn 35 in the Draft Bill which states that 'The Department of Justice has indicated that there will probably be insufficient funds to establish the Council (it now estimates the cost to be about R980 000 per annum), and has questioned the need for a separate organization with its own budget and staff. It has been suggested that consideration be given to the establishment of a unit within the SALRC (or Human Rights Commission) to perform the functions of the Council, and that donor funding be sought for the expenditure associated with establishing the unit and its initially heavy workload...Although the SALRC will investigate the feasibility of the Department's proposal (which would require an amendment to the SALRC's founding Act), it considers the Council/unit as one of the keys to harmonizing the constitutional requirements of administrative justice and efficient administration and, hence, to the success of the Bill. If this capacity is not created, the Bill cannot work.' SALRC *Report on Administrative Justice* 36. The debate relating to cost will be more thoroughly considered in Ch 7.

⁵⁰ Draft Bill S15.

⁵¹Portfolio Committee on Justice & Constitutional Development and Select Committee on Security & Constitutional Affairs *Administrative Justice Bill* [B56-99] (The Portfolio Committee).

⁵² See fn 49 for the objections of the Department of Justice. Also see Ch 7 where the objections to the ARC and tribunals are discussed.

Dean of the UCT Law Faculty to assist his department in reworking the SALC version to deal with those problems.⁵³ The third version was apparently drafted by an official within the Ministry of Justice.⁵⁴ It is this third version which was submitted to the Portfolio Commission for deliberation. This unfortunate turn of events excluded several very important clauses, and left some practically irrelevant.⁵⁵ These include specifically the amended requirements of the establishment of the ARC.⁵⁶ The regulations clause reads:

11(1) The Minister may make regulations relating to (g) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on— (i) the appropriateness of publishing uniform rules and standards which must be complied with in the exercise of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state; (ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the review by courts of administrative action; (iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and, of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action; (iv) the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards; (v) initiating, conducting and co-ordinating programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action; (vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice; (vii) any steps which may lead to the achievement of the objects of this Act; and (viii) any other matter in respect of which the Minister requests advice.⁵⁷

⁵³ Submission of Sarkin, Deputy Dean of UCT to the Portfolio Committee 15-11-1999 (AJU 29).

⁵⁴ It is unclear which official was responsible for the drafting of the Draft Bill, but it did originate from the offices of the Minister of Justice. Submission of the Legal Resources Centre and Clive Plasket, Former Director of the Grahamstown Office of the Legal Resources Centre to the Portfolio Committee 15-11-1999 (AJU 4).

⁵⁵ 'I do believe that the draft by the department is highly problematic, does not understand the issues around administrative justice and does not give meaning to the constitutional right.' Submission of Sarkin 15 November 1999 and 'It is noted with considerable regret and concern that, from the first version to the third version of the Bill, the machinery for meaningful on-going administrative law reform has been systematically dismantled.' Submission of LRC 15-11-1999.

⁵⁶ The effect of this is described in s 6 3 3 1. While the draft bill officially established the ARC, *PAJA* requires only that 'the Minister *may* make regulations relating to the establishment, duties and powers of an advisory council to monitor the application of this Act'. (my emphasis) S10(2)(a) *PAJA*.

⁵⁷ S11(g) of the Administrative Justice Bill B-99 15-12-1999 (my emphasis).

When the deliberations of the Portfolio Committee began on 25 November 1999, it was expressed that ‘the regulations set up an advisory council which will hopefully lead to a tribunal system or a review process that is more accessible than the High Courts.’⁵⁸ At this stage the establishment of an ARC had already been excluded from the draft bill presented to the Portfolio Committee and merely included in the regulations. Several of the submissions received by the Portfolio Committee indicated strong support for the establishment of the ARC and for the reform of administrative tribunals. These include the submissions of the South African Human Rights Commission,⁵⁹ South African Law Commission,⁶⁰ the Legislative Drafting Project of GZT,⁶¹ Legal Resources Centre⁶² and several others.⁶³ Furthermore, the deliberations between the 20th and the 26th November included much debate about the inclusion of the ARC into the Bill.⁶⁴

⁵⁸ Parliamentary Monitoring Group “Deliberations of the Portfolio Committee on Justice & Constitutional Development and Select Committee on Security & Constitutional Affairs” *National Assembly Committees* (25-11-1999) <http://www.pmg.org.za> (accessed 12-06-2011).

⁵⁹ ‘The Minister should be compelled to set up the advisory council and should not be afforded a discretion in this regard. This will go some way to addressing section 33(3)(c) of the Constitution.’ Submission of SAHRC to the Portfolio Committee 15-11-1999 (AJU 38).

⁶⁰ A possible constitutional difficulty with the approach adopted in the Bill is that the Minister has a discretion to make regulations dealing with the matters listed in clause 11, but is not bound to do so. It may be argued, therefore, that the Bill itself does not “provide for” review by an independent and impartial tribunal where appropriate as required by clause 33(3)(a) of the Constitution or “promote” an efficient administration as required by clause 33(3)(c) thereof. The question which then arises is whether the Bill is “national legislation” of the sort envisaged by section 33(3) and, if it is not, what the constitutional implications are. Item 23(3) of Schedule 6 to the Constitution provides that section 33(3) will lapse if the legislation envisaged by it is not enacted within three years of the date when the Constitution took effect.’ Submission of SALRC to the Portfolio Committee 15-11-1999 (AJU 2).

⁶¹ ‘It is obviously possible to give the Minister the responsibility to ensure further development of administrative justice and refrain from setting up an ‘Administrative Review Council’ as discussed by the SALC in their consultation phase. Nevertheless, I have my doubts whether it passes constitutional muster if it is completely up to the Minister’s discretion to embark on such further steps - or not... without a clear mandate to the Minister to establish such a system of internal and external administrative remedies, the objective of the constitution is not met: To ensure that in particular ordinary people have effective tools to have administrative action reconsidered in a way which is a economic, quick and as informal as possible. Judicial review on its own, although of greatest importance as measure of last resort, is not sufficient. It is expensive, cumbersome and time consuming.’ Submission of GTZ to the Portfolio Committee 15-11-1999 (AJU 36).

⁶² ‘It is suggested that the Bill include provisions relating to an Administrative Review Council or similar institution. If necessary, the sections creating and empowering it can be brought into operation at a later stage when funding is available or when agreement has been reached with either the South African Law Commission or the Human Rights Commission for it to fall under the auspices of one or other of these institutions.’ Submission of LRC 15-11-1999.

⁶³ These include Black Sash; SARS and the Western Cape Provincial Government.

⁶⁴ This said, when the Western Cape Provincial Government suggested that ‘a tribunal to review administrative action should be legislated for within the Act and not within the regulations’, the chairperson pointed out that only an advisory council to advise on the appropriateness of a tribunal was set up in the regulations. If a tribunal was deemed appropriate it would then have to be legislated for separately.

It is at this point where the debate of the Portfolio Committee surrounding the possible establishment of the ARC comes to a halt. On the 7th December, a fresh draft of the Bill was presented to the Committee with several new options provided for the areas of contention. There is debate regarding various other regulations, but there is no change to the word 'may' in clause 11(1)(g) and there is no further discussion thereon. The Portfolio Committee seems to simply accept that the establishment of the ARC is at the discretion of the minister, and does not consider amending the regulations any further in this regard. On the 21st January 2000, the Portfolio Committee voted on the Bill; 11 Members voted in favour of the Bill, and 2 abstained.

In its report to the National Assembly on the 24th January 2000, the Portfolio Committee state in its Resolution to the Administrative Justice Bill that

during its deliberations on the Bill, the Committee's attention was drawn to the fact that certain existing laws contain provisions providing for a procedure for the review of, or appeal against, an administrative action, other than a review by, or appeal to, a court of law. Due to the fact that no audit of such laws has been done and due to a lack of time, the Committee was not in a position to conduct an investigation in order to determine the impact of the Bill on such laws and the procedures created therein. The Committee expressed the opinion that the advisory council contemplated in Clause 11(1)(g) of the Bill would be the most appropriate body to conduct such an investigation. It therefore recommends that the Minister for Justice and Constitutional Development be requested to direct the advisory council, if established, to conduct such an investigation and to advise the said minister on its findings. However, the Committee recommends that, in the meanwhile, the Minister for Justice and Constitutional Development be requested to direct his or her Department to conduct the said investigation.⁶⁵

However, no ARC was ever established, and no report of this nature was ever considered.⁶⁶ Several of the other regulations were complied with,⁶⁷ such as the drafting of Fair Administrative Procedures⁶⁸ and a Code of Good Administrative Conduct.⁶⁹ There are Draft

⁶⁵ Justice And Constitutional Affairs Portfolio Committee; Security And Constitutional Affairs Select Committee *Resolution To Administrative Justice Bill [B56-99] (24-01-2000)* <<http://www.pmg.org.za>> (accessed 27-06-2011).

⁶⁶ The Portfolio Committee gave a deadline of six months for the Minister to report on the establishment of the ARC, but in their next meeting on *PAJA*, no such discussion was contemplated. Portfolio Committee <http://www.pmg.org.za/minutes/20011106-regulations-promotion-administrative-justice-act-briefing> 7 November 2011 accessed 12-08-2011.

⁶⁷ The regulations were presented to Parliament on 7 November 2001.

⁶⁸ GG 23674 31-07-2002.

Regulations on the ARC that were drafted, but further than that nothing was achieved. They exist as nothing more than guidelines on the Department of Justice's webpage.⁷⁰

The practical effect of the difference between the original Draft Bill of the SALRC and *PAJA* are that important elements that should have been an integral part in the shaping of our new administrative justice regime have been relegated to helpful suggestions, and left at the discretion of the minister. Hoexter states that the fact that they were not included when Parliament was required to include them means that these measures may never now be part of the South African landscape.⁷¹

6 2 2 3 Criticism of *PAJA* from the perspective of Tribunals

The result of seven years of intense work was *PAJA* which was enacted to give practical effect to the right contained in s33 to administrative justice. Although the enactment of administrative legislation should have been viewed as a positive and progressive step forward for South African democracy, *PAJA* was not received with equal enthusiasm, least of all by those academics and researchers who had been actively and intimately involved with each step of its creation.⁷² Two relevant criticisms with regard to tribunals will be discussed in this section.⁷³

The first criticism is that *PAJA* focuses solely on the right to have unfair administrative action judicially reviewed.⁷⁴ The constitutional imperative in S33 calls for more than the mere control function provided by judicial review. It calls for fair and efficient administrative justice. If *PAJA* provides only for the right to have administrative action judicially reviewed

⁶⁹ Department of Justice "Code of Good Administrative Conduct" *Department of Justice* <http://www.justice.gov.za/paja/docs/unit/PAJA_Code_draft_v2_2006.pdf> (accessed 12-08-2011).

⁷⁰ Department of Justice "Subordinate Legislation" *Department of Justice* <<http://www.justice.gov.za/legislation/regulations/r2001%2000%2099.htm>> (accessed 12-08-2011).

⁷¹ Hoexter "The Future of Judicial Review in South African Administrative law" (2000) 117 *SALJ* 499. However, it will be demonstrated below in s 6 that there is still room within s33 of the Constitution and the regulations of *PAJA* to develop and reform the administrative justice system.

⁷² Hoexter *Administrative Law* 68.

⁷³ See s 6 3 3 1 for the position relating to the ARC. See further criticism in the submissions to the Portfolio Committee in fns 59-62.

⁷⁴ Although it allows for this to be by a 'court or a tribunal', no provision is made for non-judicial review or appeal.

and does not provide for effective alternative forms of redress,⁷⁵ then it is not fulfilling the function that the Constitution compels it to perform. Hoexter states that

in its failure adequately to address the integration of our system, the Act represents an opportunity lost. It seems unlikely that the government will ever again have the necessary incentive to impose further tedious administrative procedures on itself, or the political will to do so.⁷⁶

A second criticism is that *PAJA* has allowed the minister too much discretionary power to make the necessary regulations, and that without being forced to do so, he may never call for the establishment of an administrative review council.⁷⁷ Hoexter states that

the proposed duties of the ARC to make recommendations for reform within certain deadlines have been reduced to a discretionary power to establish a council which may (or may not) make such recommendations.⁷⁸

An important point to bear in mind is the considerable pressure under which the bill was drafted.⁷⁹ The right in s33 called for national legislation to be enacted within three years. In the end, the president assented to *PAJA* one day before the deadline of 3 February 2000. The research committee was only established in January 1999 and thus were working under extremely pressurised circumstances and without a well-resourced, adequately-staffed research team.⁸⁰ Although this is a daily reality in the South African legislative environment,

⁷⁵ Corder states in relation to the research committee's draft bill that 'what we have attempted to do in the time at our disposal is to create a basic platform which satisfies the Constitutional mandate, while at the same time pointing many fingers or arrows in the direction of a future reform agenda in the area of Administrative justice.' Corder *SAHRC Workshop on Open and Accountable Democracy: Generating recommendations on the Open Democracy Bill of 1998* (1999) as tabled in Parliament and the Administrative Justice Bill, 21-06-1999.

⁷⁶ Hoexter (2000) *SALJ* 499.

⁷⁷ Hoexter (2000) *SALJ* 497. Regulations in regard to an ARC were drafted in 2002, but they remain nothing more than a document on the Department of Justice's website. No actual implementation or serious discussion about the feasibility of establishing the ARC has ever taken place within Parliament.

⁷⁸ Hoexter (2000) *SALJ* 497.

⁷⁹ 'The appointment of a project committee only in November 1998 has left very little time for this to be accomplished. The situation is made more difficult by the extensive current legislative burdens borne by Parliament, and the interruption of the legislative programme for 1999 by the national elections. The result, it must be stressed at the outset, is that this project has necessarily had to be conducted on an expedited basis.' *SALRC Report on Administrative Justice* 4.

⁸⁰ Corder *SAHRC Workshop on Open and Accountable Democracy* 1999.

it is necessary to bear it in mind when reviewing how accurately *PAJA* fulfils the constitutional requirement.⁸¹

However, that cannot be the end of the matter. The practical upshot is that there can no longer be any excuse for half measures in the fulfilment of a right in the Bill of Rights. Parliament is no longer under a time pressure to enact legislation. Rather, they are in the perfect position to review the effectiveness of the legislation and to re-evaluate how *PAJA* gives effect to s33 twelve years down the line. As Chapter 2 illustrates, judicial review needs to be well-supplemented by other administrative control and facilitations structures in order to begin to fulfil the constitutional imperative.

6 2 3 Administrative Review Supervisory Body

6 2 3 1 Administrative Review Council (ARC)⁸²

The role of a central supervisory body in the delivery of a comprehensive administrative justice regime is well-established in commonwealth jurisdictions. Chapter 3 provides an historical explanation of the development of the concept of a supervisory body, as well as illustrating its pivotal role in the development and progressive effectiveness of organised tribunal structures. Chapters 4 and 5 outlined the quintessential functions and positions of the Australian Administrative Review Council (Australian ARC) and the English Administrative Justice and Tribunals Council (AJTC) respectively. There is considerable academic support for a similar central supervisory body in South Africa, and the importance of the establishment of this body has been unequivocally agreed upon. However, *PAJA* has had the effect of changing the responsibility of the minister to establish such a council from imperative to optional. This section will describe the academic support of a supervisory council on administrative justice and evaluate some of the reasons why it was not enacted as a statutory necessity in *PAJA*. The discussion will also briefly summarise why the establishment of an ARC would be the first step in tribunal reform.

⁸¹ In the morning session of the Portfolio Committee of 10 January 2000 the Chair acknowledged that ‘there is not going to be a 100% perfect Bill - there is too much work to be done in the time remaining’ and on 11 January 2000 that the Committee had only one day left to get through the working document and that the committee would sit until it was finished. Neither of these comments inspires much confidence in the complete nature of *PAJA*.

⁸² This body will be referred to as the Administrative Review Council (ARC) as per the wording in the Draft Bill.

6 2 3 2 Support for the Establishment of the ARC

The academic support for the creation of the ARC is overwhelming. Especially during the deliberations relating to the creation of *PAJA*, the establishment of an ARC was recommended by almost all parties. Govender states that ‘a supervisory body, vested with the powers recommended, will also be necessary to achieve the desired uniformity in respect of the checks and balances on the powers of tribunals and in respect of the internal procedures adopted by tribunal during their hearings.’⁸³ Corder states that ‘provision should be made for the establishment and function of a small but influential research and review secretariat...whose chief purpose would be constant oversight of the administrative process and recommendations for its improvement.’⁸⁴ Furthermore, almost all of the submissions to the Portfolio Committee included strong reliance on the possibility that the ARC would be established and then charged with the task of investigating alternatives to judicial review.

However, *PAJA* has relegated this establishment to a discretionary power of the minister.⁸⁵ As Hoexter explains,

these proposals were watered down considerably in the *PAJA*, which merely allows (and does not require) the Minister to make regulations establishing an ARC to advise her on such matter. The creation of an AAT-type body (and indeed any other programmatic reform relating to administrative appeals) thus depends on a chain of events: the making of regulations to establish an ARC, its giving appropriate advice and that advice being heeded and acted upon by the Minister. The reform process, if it ever occurs, will certainly be a lengthy and complicated one.⁸⁶

As was illustrated above, the major reason behind watering down this important clause was the department’s objections relating to the costs of establishing such a council.⁸⁷ Furthermore, the Department of Justice expressed aversion to the creation, and proliferation, of yet another governmental department.⁸⁸ Although these may be valid concerns on the part of the

⁸³ Govender ‘Administrative Appeals Tribunals’ in *Administrative Law Reform* 84.

⁸⁴ Corder (1997) *SAJHR* 40.

⁸⁵ S10(2)(a) *PAJA* states that ‘The Minister may make regulations relating to the establishment, duties and powers of an advisory council.’

⁸⁶ Hoexter *Administrative Law* 69 (footnotes omitted).

⁸⁷ This cost objection will be discussed further in Ch 7 in the cost debate relating to tribunals as a whole.

⁸⁸ Hoexter *Administrative Law* 99 ‘...several important innovations proposed by the Law Reform Commission in its draft bill of 1999 were rejected or heavily watered down by the legislature...either for lack of funding or for fear of the burden some of these proposals would have imposed on a unprepared government.’

Department of Justice,⁸⁹ the SALRC is clear on the point that the important role of the ARC cannot merely be amalgamated into another government institution, nor is it a sufficient objection to state lack of funding as a way to avoid the constitutional imperative.⁹⁰ The Commission goes so far as to say that it ‘considers the Council/unit as one of the keys to harmonizing the constitutional requirements of administrative justice and efficient administration and, hence, to the success of the Bill. If this capacity is not created, the Bill cannot work.’⁹¹

The above description of the historical development of tribunals and the failure to develop a comprehensive tribunal system shows that despite strong academic support and clear indications that a move in this direction was the right one; the process of widespread tribunal reform was stopped in its tracks by the enactment of *PAJA*. However, tribunals continue to form part of our administrative justice landscape. In order for their sustainable growth and development, a more consolidated and comprehensive system of control is required. Furthermore, the establishment of the ARC is the first step in a program of tribunal reform.

6.3 Tribunals Today: The Current Tribunal Landscape

This section will analyse the current state of tribunals in South Africa, and provide some comparison to the tribunals of Australia and England. This will provide a measure of clarity as to why exactly reform is required in the South African tribunal system. From this analysis, a brief discussion of the future of tribunals and possible considerations for reform will be presented.

When Baxter originally explained the need for a general administrative appeals tribunal in 1984, he commented that the current fragmented collection of tribunals failed to represent a ‘coherent system’.⁹² When the SALRC compiled a list of all the existing appeal avenues in 1992, they reiterated his criticism that administrative appeals were created on an ad hoc basis.⁹³ When Govender described all the administrative appeal tribunals in 1993, he lamented

⁸⁹ In England, the AJTC is being incorporated into another department as part of a cost-saving exercise. See Ch 5 fn 129.

⁹⁰ See fn 49 above.

⁹¹ SALRC *Report on Administrative Justice* 36.

⁹² Baxter *Administrative Law* 268.

⁹³ Project 24 50.

that they were ‘haphazard and incoherent’.⁹⁴ Hoexter confirmed this position in 2007.⁹⁵ The tribunal landscape today is no different.

This section aims to classify some of the major types of administrative tribunals in South Africa. Not all of these bodies are necessarily called ‘tribunals’, and several other names are also used such as ‘advisory board’, ‘appeal board’ and even ‘court’. However, they reflect the characteristics and features of tribunals which were outlined in Chapter 3 and so will be considered administrative tribunals for the purpose of this discussion. The rationale behind the classification exercise will be to illustrate that although tribunals are being used to distribute administrative justice, there is a definite lack of a coherent structure or comprehensive system through which these tribunals are administered and against which their successes can be evaluated. Furthermore, there is no one ‘type’ of tribunal nor a common standard against which they are created. Rather, various different types of bodies and structures have been established and created for specific purposes and continue to operate in vastly disparate ways. However, certain tribunals share similar characteristics and in order to evaluate their relative successes and failures, it is helpful to group similar tribunals together.

When analysing administrative tribunal appeals in South Africa, four major types of administrative tribunals⁹⁶ are the most prominent.⁹⁷ These can be divided into ‘dispute-resolution’ tribunals, ‘administrative appeal’ tribunals, ‘supervisory’ tribunals and the ‘combined comprehensive’ tribunal.⁹⁸ Under each type an example of a major tribunal will be discussed in order to illustrate the nature, function and setup of the type of tribunal. Other tribunals which are similar in form will be listed in each category.⁹⁹ Furthermore, a tribunal

⁹⁴ Govender ‘Administrative Appeals Tribunals’ in *Administrative Law Reform* 83.

⁹⁵ Hoexter *Administrative Law* 68. ‘Little or nothing has changed. There is still no coherent system of appeals in this country.’

⁹⁶ Two of the tribunals that are discussed do not necessarily always adjudicate administrative disputes, but relate rather to issues of employment and competition. However, in both Australia and England, the inclusion of other branches of law within the overarching tribunal structure have proved both necessary and worthwhile. See Chs 4 and 5 for the tribunal structures respectively. See also the success of these tribunals in s 4.1.4 below.

⁹⁷ This classification is based on that of Baxter’s in Baxter *Administrative Law* 268. However, the types of appeal tribunals have been grouped differently to his original classifications. Further reference is also made to Hoexter *Administrative Law* 64-66 and Govender ‘Administrative Appeals Tribunals’ in *Administrative Law Reform* 78-83.

⁹⁸ These terms have been designed to reflect the type of tribunal and are not official terms.

⁹⁹ However, this is not a complete list of every tribunal in South Africa. The extensive and individualist approach that was followed in Project 24 is beyond the scope of this thesis, and is a mammoth task reserved for the ARC which will hopefully be established.

example comparable to the Australian and English tribunal chambers will be used under each type. This will allow for a brief assessment of the tribunal against some of the desirable characteristics of tribunals as discussed in Chapter 3, as well as a comparative analysis with the English and Australian models. This process should provide an indication of the problem of the far-reaching differences in tribunal setup, procedure, hierarchy and success.

6 3 1 Four Major ‘Types’ of Tribunals

6 3 1 1 ‘Dispute-Resolution’ Tribunal

The first tribunal type which will be considered is that of dispute resolution. These tribunals are usually established when the primary aim of the tribunal is to assist two parties to reach a solution, and as a result are not very adversarial in nature. This type of tribunal will require its member(s) to conduct investigations and to take personal circumstances into account whenever making decisions relating to the type of hearing, the nature of the dispute and the recommendations. An example is the Pension Funds Adjudicator (PFA)¹⁰⁰ which is a body established by the *Pension Funds Act*.¹⁰¹ The *Pension Funds Act* was amended to create a special process by which complaints against pension funds could be investigated and decided, with the object of disposing of complaints in a procedurally fair, economical and expeditious manner.¹⁰² The adjudicator is appointed by the Minister of Finance after consultation with the Financial Services Board and must be a person with at least 10 years of legal experience and training.¹⁰³

An interesting feature of this kind of tribunal is its investigative powers. The PFA’s approach to resolving pension disputes is to ensure that proceedings before the adjudicator are informal, accessible, swift and inexpensive. The investigative process is as a result more inquisitorial in nature. However, the adjudicator must determine a complaint in an impartial manner and there is no question of acting ‘on behalf’ of a complainant. Once an investigation into a complaint

¹⁰⁰ There is also the Special Pensions Board and the Special Pensions Appeal Board, which regulates the pensions of those who were involved in the liberation struggle and who on that account lost the opportunity to provide for a pension before 2 February 1990. These will not be dealt with in this example.

¹⁰¹ 24 of 1956 Ch VA.

¹⁰² The legislation relied substantially on provisions establishing the office of the Pension Ombudsman in England. In many respects the two offices resemble each other, function similarly and perform the same tasks. Murphy “Alternative Dispute Resolution in the South African Pension Funds Industry: an Ombudsman or a Tribunal” (2002) 23 *Indus LJ* 55.

¹⁰³ The exact requirements are specified in S30(c).

has been completed, the adjudicator must furnish written reasons for his determination to all parties concerned and a copy of the decision must also be lodged with the registrar or Clerk of the Court.¹⁰⁴ Alternatively, S30E(1)(b) allows the PFA to establish a Conciliation Service Unit (CSU), which will first conciliate a dispute before referring it to adjudication.¹⁰⁵ The CSU allows the PFA to select cases which can be resolved simply to be referred to conciliation, which contributes to the efficiency and speed of the resolution of disputes. Conciliation also fosters participation of the parties involved and allows for communication between parties.¹⁰⁶

Section 30A states that a complainant should first lodge an internal complaint with the pension fund or their employer participating in the fund, and then if still unsatisfied should approach the PFA, and although it is uncertain whether exhausting the internal remedy is a requirement, it would seem a logical first step in the resolution of any dispute. The decisions of the PFA are binding and have the same status as a civil judgment, and any party who is not satisfied with the PFA's decision may, within six weeks from the date of that decision, apply to the High Court for relief.¹⁰⁷

One problem with this kind of tribunal is that the power of the adjudicator to condone non-compliance with the restrictive time period has been removed, and he therefore has no competence to adjudicate the dispute if the complaint is lodged outside the three-year period.¹⁰⁸ This places poor people in the rural areas in a disadvantaged position, because the majority of these people are not aware of their pension law rights.¹⁰⁹ Another problem is that

¹⁰⁴ S30(m).

¹⁰⁵ The CSU is a new unit in the office but in the two years of its existence it has recorded a settlement rate of over 70%. This figure was given by the Head of Conciliation at the Pension Funds Adjudicator strategic planning workshop, 2010. See also the OPFA *Annual Report* (2009/2010) which states that in the 2010 year, 3 996 cases were conciliated. Office of the Pension Funds Adjudicator "Reports" OPFA <<http://www.pfa.org.za/sitesmart/uploads/files/701E136E-3373-4547-9E74-18261FC53B47.pdf>> (accessed 11-08-2011).

¹⁰⁶ Unfortunately, communication between parties has not always proved successful in this tribunal.

¹⁰⁷ S30P.

¹⁰⁸ S30I of the *Pension Funds Amendment Act* imposes certain time limits with regard to lodgement of complaints before the Adjudicator and states that the Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

¹⁰⁹ Nevondwe & Tetey "The Role of the Pension Funds Adjudicator and Special Pensions Tribunals" (2010) *I & T* 31 2.8.

the PFA suffers from a large backlog of appeals.¹¹⁰ The reason for this backlog can be attributed to poor communication between pension funds and applicants, as well as fairly simple cases being referred to the PFA that should have been resolved easily through simple pension fund complaint management or conciliation.¹¹¹ Lastly, the PFA is modelled on the office of the English ombudsman and conducts most of its investigations on documentary submissions. There has been call for reform of the PFA and to establish an

adjudicative tribunal of first instance, supported by an internal separate mediation service, with litigants enjoying a limited right of appeal only on points of law to a specialist Pensions Appeal Tribunal. It allows first for a process of conciliation, fact finding, advisory opinions and preliminary determinations, followed by selective adjudication of significant cases, with a limited right of appeal.¹¹²

At this stage, however, the PFA remains an office akin to that of an ombudsman. While this is not in itself problematic, the role of the PFA in adjudicating disputes should be considered.

6 3 1 2 'Administrative Appeal' Tribunal

This type of appeal tribunal is perhaps the most general and widely used type. In this case, special appeal tribunals are established to hear administrative appeals. Hoexter states that these types of bodies should 'exhibit a degree of independence and begin to resemble a proper system of administrative courts'.¹¹³ A body of this nature is not merely a court substitute, but a tribunal purposely designed to handle administrative appeals in a specific field. Baxter states that they try to 'represent a compromise between the conflicting demands of public policy and private rights.'¹¹⁴ In South Africa, these bodies are established across a wide range of administrative areas, but are vastly dissimilar in their structure, procedures, areas of jurisdiction and success.

A recent example of this kind of a tribunal is the proposed appeal tribunal of the South African Social Security Agency (SASSA). This is one of the largest and most socially important areas of administrative law, but has also historically been one of the most unsuccessful in rendering a measure of administrative justice which could be considered fair

¹¹⁰ OPFA *Annual Report* (2009/2010) 10 describes the level and amount of the backlog.

¹¹¹ OPFA *Annual Report* (2009/2010).

¹¹² Murphy (2002) *Indus LJ* 15. See also Nevondwe & Tettey (2010) *I & T* 31.

¹¹³ Hoexter *Administrative Law* 65.

¹¹⁴ Baxter *Administrative Law* 267.

and efficient. During a recent parliamentary presentation of the South African Social Security Agency's Strategic Plan 2011/12 to 2013/14,¹¹⁵ questions were raised regarding the massive backlog of claims and appeals, the vastly ineffectual distribution of justice and the proposed infrastructure and development to address the problem. However, there was little to no discussion regarding the value of appeal tribunals to provide redress to maladministration.

In the Department of Social Development (DSD) and SASSA Budget and Strategic Plans¹¹⁶ parliamentary presentation of 17 June 2009, the DSD gave some consideration to the need for 'governance and institutional development and establishing regional and international solidarity and engagement', or in other words to improving the tribunal effectiveness and efficiency, setting up a comprehensive appeals framework, and reviewing and proposing reforms on the social security legislation around appeals.¹¹⁷ However, it was stated that 'the establishment of the Social Security Inspectorate and Appeals Tribunal would cost a lot of money.'¹¹⁸ It was lamented that 'there was not a lack of will in the Department, but a severe lack of resources constrained the DSD's ability to deliver on its mandate.'¹¹⁹

These objections aside, the *Social Assistance Amendment Act*¹²⁰ came into operation on 16 September 2010 and provides for a mechanism for reconsideration by SASSA of its decisions and a subsequent appeal to the Independent Tribunal (IT). Draft Regulations prescribing the process to be followed in both reconsiderations and appeals were published for comment in December 2010.¹²¹

The regulations state that when reconsidering a decision, SASSA is allowed, but not restricted to, uphold, dismiss or vary the original decision. It must provide reasons for such a decision. When an application is made to SASSA to reconsider its decision, no new information may be provided that it did not have the opportunity to take into account on the first consideration.

¹¹⁵ South African Social Security Agency presentation on Strategic Plan 2011/12 to 2013/14 on 2 August 2011.

¹¹⁶ Department of Social Development (DSD) and SASSA Budget and Strategic Plans parliamentary presentation 17-06-2009.

¹¹⁷ Zane Dangor, Chief Operations Officer, DSD.

¹¹⁸ Coceko Pakade, Chief Financial Officer, DSD.

¹¹⁹ Vusi Madonsela, Director General, DSD.

¹²⁰ 5 of 2010.

¹²¹ GN R1258 in GG 33908 29-10-2010.

One worrying clause is Regulation 3(5) which states that ‘if the Agency fails to reconsider its decision within the stipulated period of receipt of such an application, the Agency is regarded to have dismissed the application.’ In light of the enormous backlog and massive delays experienced by applicants, a regulation to this effect may simply exonerate SASSA of its responsibility to effectively reconsider applications.

The Regulations also empower the minister to establish an Independent Tribunal to hear appeals against decisions made by SASSA.¹²² The IT is comprised of a legal practitioner who must act as the chairperson; a medical practitioner as an assessor; and a member of civil society.¹²³ The IT is empowered, but not restricted to, uphold, dismiss or vary the decision on appeal and may request any information from any agency which is relevant to the appeal. The IT is also empowered to condone an application for appeal lodged after 90 days, provided there is good cause shown.¹²⁴ The appeal is conducted on documentary evidence and in the absence of the applicant. This last consideration appears to be contradictory to two of the important requirements of tribunals; namely that of publicity and of participation. However, as long as clear, coherent and comprehensive reasons for the findings of the IT are published, these requirements may be met.

To date, these tribunals have not yet been established and their success can therefore not be evaluated. Furthermore, their establishment is at the discretion of the minister. SASSA has been allocated R25 million to start the process of appointing officials to begin the process of internal reconsiderations. They have established reconsideration teams in all nine provinces and there are currently approximately 18 teams across the country dealing with reconsiderations of applications.¹²⁵ The DSD is also in the process of creating awareness around the appeals process by developing a one-page pamphlet in several official languages informing people how to appeal and the terms they had to follow for the reconsideration

¹²² S4 of Draft Regulations.

¹²³ Regulations are also in place to control when the medical practitioner and member of civil society may form part of the IT. Reg 5(2) states that ‘a medical practitioner may only form part of the IT in respect of an appeal on disability, care dependency, war veteran’s or grant-in-aid grant’; and Reg 5(3) states that ‘a member of civil society may only form part of the IT in respect of an appeal against the decision of the Agency relating to a social relief of distress grant’. These regulations are in place to ensure the expertise and relevance of the members of the IT.

¹²⁴ Reg 15(2) states the factors to take into consideration are the reason for the delay; whether it is in the interest of justice that condonation be granted; and if there are reasonable prospects of success.

¹²⁵ DSD and SASSA Budget and Strategic Plans parliamentary presentation of 17 June 2009.

process.¹²⁶ The extent or success of these ITs will depend on their eventual establishment by the minister.

This tribunal specifically incorporates a right of internal appeal to a higher ranking official within the departmental agency (SASSA) prior to a right of appeal to the IT. Despite the desirability of having the agency reconsider its decision before referring to the tribunal, this internal avenue of appeal is not always available. Whether a right of appeal to a higher court is available to the applicant is unclear from the regulations, and therefore the only further avenue would be judicial review in the high court.

Further examples¹²⁷ of general administrative appeal tribunals include the Publications Appeal Board, licensing appeal boards and town planning appeal boards.¹²⁸ The Film and Publications Appeal Board and the Film and Publications Review Board are established by s3 of the *Films and Publications Act*¹²⁹ to be independent appeal bodies. Chapter 5 of the Act prescribes the procedure for the lodging of a complaint or application to the Board,¹³⁰ as well as the procedure to be followed should the applicant need to lodge an appeal with the Review Board. Furthermore, s21 allows for an appeal to the High Court.

Apart from social security, these bodies regulate disputes which are most similar to the jurisdiction of the general regulatory chamber of the English First-tier Tribunals discussed in

¹²⁶ This will be done after September 2011 as the focus is currently on reducing the backlog on appeals.

¹²⁷ Other examples include a board of appeal in terms of s20 of the *Stock Exchanges Control Act* 1 of 1985 against decisions taken by the Committee of the Stock Exchange; a board of appeal considers appeals in terms of s19 of the *Financial Markets Control Act* 55 of 1989; an appeal committee considers appeals in terms of s24 of the *Medicines and Related Substances Controls Act* 101 of 1965; an appeal committee considers appeals in terms of s15 of the *National Welfare Act* 100 of 1978; an appeal committee considers appeals in terms of s25 of the *Social Service Professions Act* 110 of 1978; a review board considers appeals in terms of s9(1) of the *National Building Regulations and Building Standards Act* 103 of 1977.

¹²⁸ The Kwa-Zulu Natal Town Planning Appeals Board was established in terms of s73 bis of the Natal Town Planning Ordinance 27 of 1949 and is responsible for adjudicating certain town planning decisions emanating from the Town Planning Ordinance that are appealed against. The board comprises between 3 and 15 people.

¹²⁹ 65 of 1996.

¹³⁰ S19 states that 'any person who applies for a classification of a film...or who appeals to the Review Board against a decision with regard to such an application, shall have the right (a) to appear in person before the executive committee, classification committee or Review Board, or to be represented or assisted by a legal practitioner or by any other person of his or her choice, to adduce oral or written evidence and, subject to a reasonable time-limit imposed by the chairperson concerned, to address that committee or board, in the language of his or her choice; and (b) to have his or her case and arguments duly considered and to be informed, in writing, of the decision of the Review Board or committee, of the reasons for and grounds upon which such decision is based.'

Chapter 5,¹³¹ or to the disputes regulated by the Australian AAT in Ch 4.¹³² However, it is especially among these kinds of tribunals in South Africa that disparity in proceedings, right of appeal, the right to reasons and the level of informality is found. Some, such as the proposed SASSA appeal tribunal, allow for an internal appeal and a subsequent appeal to the IT. Others, such as the Film and Publications Appeal Board, allow for an appeal to the Review Board and a subsequent appeal to the High Court. Most of the tribunals have a requirement to provide and publish reasons for their decisions, which is an encouraging trend and may lead to an improvement of initial decision-making. However, there is no common way to approach the tribunals, nor a general hierarchy of appeals. Each body has their own procedure and their own method of adjudication. This was one of the key problems with tribunals identified in England by both the Franks Report¹³³ and the Leggatt Report,¹³⁴ and reflects the problem that tribunals seem to exist for the convenience of the departments they review, not for the intended applicants who apply to them. A statement of the Leggatt Report applies to these types of bodies in that,

their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them. The object of this review is to recommend a system that is independent, coherent, professional cost-effective and user-friendly. Together tribunals must form a system and provide a service fit for the user for whom they were intended.¹³⁵

It is this category of appeals that a tribunal with overarching jurisdiction such as the AAT or with a general regulatory chamber, such as the First-tier Tribunal, would be of the most use. This would allow for shared resources, especially of staff, computer systems and property; a similar hierarchy of appeal; a common procedure and format for appeals; and as a result a simplified procedure for the potential applicant.

However, it is suggested that social security appeals be provided for by a specialised chamber of appeal tribunal, and not in the general regulatory chamber. In Australia, social security is

¹³¹ S 5 3 2 3 1.

¹³² S 4 4 3 1.

¹³³ Committee on Administrative Tribunals and Enquiries *Report of the Committee on Administrative Tribunals and Enquiries Cmnd 218* (1957). See Ch 5 s 3 1 1.

¹³⁴ Leggatt *Tribunals for Users: One System, One Service* (2001). See Ch 5 s 3 1 2.

¹³⁵ Leggatt *Tribunals for Users* (2001) 1. See Ch 5 s 3 1 2.

regulated by the Social Security Appeals Tribunal (SSAT),¹³⁶ which receives around 10,000 appeals each year. It provides a mechanism of merits review that is fair, just, economical, informal and quick.¹³⁷ Above that, there is also a right of appeal on the merits to the AAT, a right of appeal to the Federal Court on questions of law and, with permission, to the High Court of Australia.

6 3 1 3 ‘Supervisory’ Tribunal

Where a largely policy-based administrative system operates over a broad spectrum, there often exists a right of appeal to a national control body who exerts control over the entire system. While there may be several local administrative boards, a right of appeal exists to a national board that can regulate and control both the individualised appeals and the policy considerations of the sector as a whole.¹³⁸ The significant and ever-increasing area of migration is regulated in this way in South Africa. The most important two tribunals in the area are the Immigration Advisory Board (IAB) and the Refugee Appeal Board (RAB).

In 2004 the Immigration Courts were abolished¹³⁹ by the *Immigration Amendment Act* and the IAB was established. The IAB is tasked with advising the minister¹⁴⁰ in respect of the contents of Regulations made in terms of the *Immigration Act*; the formulation of policy pertaining to immigration matters; the implementation of immigration policy by the Department of Home Affairs (DHA); reviewing decisions of the DHA in terms of S 8 of the Act (which deals with adjudication and review procedures) when requested to do so by the minister; and any other matters relating to the Act on which the minister may request advice. The IAB consists of five experts in the fields of immigration law and policy and four

¹³⁶ *Social Security (Administration) Act* 1999 (Cth) and the *A New Tax System (Family Assistance) (Administration) Act* 1999 (Cth) set out the powers, functions and procedures of SSAT.

¹³⁷ Buck “Administrative Justice and Alternative Dispute Resolution: the Australian Experience” (2005) <http://www.dca.gov.uk/research/2005/8_2005_full.pdf> (accessed 12-08-2010) 24.

¹³⁸ One example is the Financial Services Appeal Board (FSAB) which is an independent tribunal comprising of members who are neither employees of the Financial Services Board nor are active participants in the financial services industry. The purpose of the FSAB is to hear appeals on complaints received in the financial services sector. The sector is a very large and complicated one and requires that the FSAB make decisions which are in line with policy and regulation in the industry. Other examples include the South African Heritage Resources Agency Council; the Heraldry Council; the South African Council for the Landscape Architectural Commission and the Engineering Council of South Africa.

¹³⁹ S37 of the *Immigration Amendment Act* 19 of 2004.

¹⁴⁰ S5.

representatives appointed by the minister on the basis of their expertise in administration, regulatory matters or immigration law, control, adjudication or enforcement.

However, there is no longer an immigration appeal tribunal. In fact, the right to appeal against a decision of the Director-General lies directly to the minister.¹⁴¹ The IAB is only a supervisory body and its main task is advising the minister. It is difficult to see how internal appeals to the minister can measure up to the requirements of independence and impartiality. Furthermore, this is a very current development and is as recent as 2004. The abolition of the immigration tribunal may indicate a worrying trend for South African administrative law and may point to the fact that appeals are becoming more formalistic and that administrative appeals are being retained within the ministerial structure.

The RAB is an independent body established in terms of section 12(1) of the *Refugees Act*¹⁴² following an agreement between South Africa and the United Nations High Commissioner for Refugees (UNHCR). The purpose of the RAB is to consider all the appeals made against the decisions of the Standing Committee for Refugee Affairs. The RAB consists of a chairman and five members and its major functions are to hear and determine questions of law; hear and determine appeals; advise the minister or Standing Committee regarding any matter which they refer to the RAB; and to either uphold, dismiss or vary a decision of the Status Determination Officer. The DHA has published rules for the functioning of the RAB, which prescribe its jurisdiction and adjudicatory powers.¹⁴³ However, a bill has been tabled in Parliament¹⁴⁴ which will abolish the RAB and the Standing Committee and establish in its place the Refugee Appeals Authority (RAA).¹⁴⁵ The RAA will be an independent body consisting of a chairperson, and any number of members the minister chooses,¹⁴⁶ and its role will be to determine appeals lodged and advise the Minister regarding any asylum matter.¹⁴⁷ However, the bill is not yet legislation and many of the amendments are still under discussion in parliament.

¹⁴¹ S8.

¹⁴² 130 of 1998.

¹⁴³ The Refugee Appeal Board Rules GN R 1330 in *GG* 25470 26-11-2003.

¹⁴⁴ *Refugees Amendment Bill* [B30-2010].

¹⁴⁵ S8A.

¹⁴⁶ S8B.

¹⁴⁷ S8C.

Unfortunately, the refugee adjudication system is under resourced, in terms of both budgets and staff, and beset with problems, including inexperienced adjudicators, poor information on countries of origin and the validity of claims, and a tendency to make decisions based not on individual circumstances, but simply on the basis of the origin country. In 2008, the backlog of claimants was still extremely high, with the DHA reporting over 89,000 applications from 2006 and 2007 still outstanding.¹⁴⁸

In an area of administrative law which is highly policy-related and which generally experiences a huge caseload of applications, a two-tiered and systematic approach seems to provide the most administrative redress.¹⁴⁹ The mere supervisory function performed by the IAB with an appeal to the minister does not seem a satisfactory remedy for maladministration in the extensive field of immigration. In England, immigration and asylum are specialised chambers both within the First-tier Tribunal and within the Upper Tribunal.¹⁵⁰ The First-tier Tribunal allows for merits review, or appeal based on the facts. The Upper Tribunal deals with issues of law or appeals from the First-tier Tribunal. In Australia, immigration and asylum are regulated by the Migration Review Tribunal and the Refugee Review Tribunal,¹⁵¹ both of which provide independent and final merits review of decisions made in relation to migration.

¹⁴⁸ Crush "South Africa: Policy in the Face of Xenophobia" *Migration Information Source* <<http://www.migrationinformation.org/USfocus/display.cfm?ID=689>> (accessed 11-08-2011).

¹⁴⁹ An explanation of this can be found in the English Senior President of Tribunals Annual Report in the discussion about the integration of the asylum tribunals into the overarching tribunal structure. 'The working group concluded that there would be advantages in replacing the system of reconsideration of single tier decisions with a two-tier appellate process, whereby initial judicial decisions in immigration and asylum cases could be appealed (with permission) to the Upper Tribunal. As well as having the benefit of placing ultimate responsibility for permission applications with a specialist Tribunal, (which would nevertheless be able to call on High Court input, where appropriate), the creation of a two tier system was seen to have the advantage of enabling initially legally erroneous decisions to be remade in the Upper Tribunal, thereby leading to a reduction in the immigration and asylum workload of the Court of Appeal, which had also increased to levels that were causing concern.' Carnwath *The Senior President of Tribunals' Annual Report: Tribunals Transformed* (2010) <http://www.judiciary.gov.uk/NR/rdonlyres/EF000745-B38E-4A81-8356E3317E1251F5/0/senior_president_tribunals_annualreport_feb_2010.pdf> (accessed 12-07-2010) 23 (*Tribunals Transformed*).

¹⁵⁰ This was not always the case, but in early 2010 the *Transfer of Functions of the Asylum and Immigration Tribunal Order* 2010 came into effect, abolishing the Asylum and Immigration Tribunal and transferring its functions to the First-tier Tribunal. The Upper Tribunal assumes jurisdiction in respect of appeals against decisions of the First-tier Tribunal in immigration and asylum cases. What was a single tier jurisdiction became a two tier one, in common with other tribunal jurisdictions in England. *Tribunals Transformed* 23.

¹⁵¹ The Tribunals are established and governed by the *Migration Act* 1958 and in the 1994 Migration Regulations. See also Ch 4 s 4 3 2.

6 3 1 4 ‘Combined Comprehensive’ Tribunal

The above categories of tribunals have not been the most successful ones in South African administrative law. There are thriving tribunals, however, and the fourth type of appeal tribunal is also possibly the one that provides the highest levels of effective administrative redress.¹⁵² The tribunals grouped under this type of appeal reflect similar qualities in that they allow for a comprehensive approach to the specific area of law concerned; a stratified and coherent avenue for appeals against maladministration; and a commitment to the promotion of better initial administrative decision-making. The three examples below illustrate a working combination of the above three constructions of tribunals; and display aspects of dispute-resolution, supervisory and administrative appeal tribunals. This may provide a useful example for the establishment and implementation of a comprehensive system of tribunals.

6 3 1 4 1 Competition

Prior to the promulgation of the Competition Act of 1998,¹⁵³ competition matters in the economy were regulated by the old Competition Board.¹⁵⁴ However, a new framework of Competition Regulation was established by the democratic government of South Africa.¹⁵⁵ Three independent bodies were created to replace the old board, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Commission is the investigation and enforcement agency.¹⁵⁶ The Tribunal is an adjudicative body which operates as both as a court-like body as well as being an appeal tribunal. The Appeal Court considers appeals and reviews against decisions of the Tribunal.

¹⁵² This ‘level of administrative redress’ will be evaluated against the characteristics of tribunals in Ch 3 s 4 2.

¹⁵³ 89 of 1998.

¹⁵⁴ The Competition Board was not independent of the Minister of Trade and Industry and only had advisory powers in relation to competition matters.

¹⁵⁵ ‘The need for a new competition policy in South Africa must be seen in the context of a historical legacy of excessive economic concentration and ownership, collusive practices by enterprises and the abuse of economic power by firms in dominant positions. It was also recognized, however, that the South African economy and society was in a state of transition, in terms of a broader restructuring of the economy, the effects of globalization and trade liberalization and the need to redress past inequality and non-participation in the national economy. A fundamental principle of competition policy and law in South Africa thus is the need to balance economic efficiency with socio-economic equity and development.’ Competition Commission “About Us” <<http://www.compcom.co.za/about-us>> (accessed 27-06-2011).

¹⁵⁶ The Commission’s functions include investigating anti-competitive conduct in contravention of the Chapter 2 of the *Competition Act*; assessing the impact of mergers and acquisitions on competition and taking appropriate action; monitoring competition levels and market transparency in the economy; identifying impediments to competition and playing an advocacy role in addressing these impediments.

The Competition Tribunal is arguably one of the most successful independent appeal bodies in South Africa.¹⁵⁷ It is established in terms of s26 of the Competition Act. Its function is to adjudicate competition matters and it has jurisdiction throughout South Africa. In terms of s27, the Competition Tribunal may adjudicate on any prohibited conduct;¹⁵⁸ hear appeals from, or review any decision of, the Competition Commission; and make any ruling or order necessary or incidental to the performance of its functions in terms of the act. In this way the Competition Tribunal has a dual function of being a tribunal of first instance as well as being an appeal tribunal. The Tribunal is required to hold hearings in each matter and its proceedings are open to the public. Once the Tribunal has arrived at a decision, it is required to publish reasons on the official Competition website.¹⁵⁹

In terms of s27, the Competition Appeal Court may review any decision of the Competition Tribunal; or consider an appeal arising from the Competition Tribunal in respect of any of its final decisions; or any of its interim or interlocutory decisions that may be taken on appeal. The Appeal Court may give any judgement or make any order, including an order to confirm, amend or set aside a decision or order of the Competition Tribunal; or remit a matter to the Competition Tribunal for a further hearing on any appropriate terms. The Appeal Court has the same status as a High Court.¹⁶⁰

Competition law is regulated and controlled through a three-tier structure. The Commission is responsible for the investigation and regulation of competition matters, especially those related to the abuse of competition regulations. The Tribunal is then responsible to adjudicate and to hear appeals in respect of such abuses. For purposes of control and in order to retain judicial force, the Appeal Court can hear both appeals and review decisions for legality. This structure reflects that of a First-tier and Upper Tribunal,¹⁶¹ while also allowing for national regulation and the balance between individual rights and the importance of policy considerations. This structure provides a coherent and comprehensive avenue of redress, while at the same time striving to improve and enhance the levels of an efficient, competitive

¹⁵⁷ In the 2009/10 year, tribunal decisions were issued in respect of 71 of the 85 cases heard; 52 large merger cases heard were decided of 63.46% were heard within 10 days of receipt. Furthermore all decisions regarding large merger cases were released within 10 days of their hearings. Competition Tribunal *Annual Report* 2009-10.

¹⁵⁸ In terms of Ch 2 of the *Competition Act*.

¹⁵⁹ <http://www.comptrib.co.za>.

¹⁶⁰ S36 *Competition Act*.

¹⁶¹ Ch 5 s 3 2 3 1.

economic environment which balances the interests of workers, owners and consumers and is focused on development.¹⁶²

6 3 1 4 2 Employment

The Commission for Conciliation, Mediation and Arbitration (CCMA) is another highly successful independent statutory body which provides an avenue of redress in the labour environment.¹⁶³ Previously, labour disputes were regulated by Conciliation Boards and the Industrial Court. Under the new constitutional dispensation,¹⁶⁴ these structures proved unsatisfactory¹⁶⁵ and consequently the CCMA was established in terms of s112 of the *Labour Relations Act*.¹⁶⁶

The functions of the CCMA are to attempt to resolve, through conciliation, any dispute referred to it; or if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute; assist in the establishment of workplace forums; and compile and publish information and statistics about its activities.¹⁶⁷ The CCMA is also empowered to make and publish regulations and provide training and education in labour-related matters.¹⁶⁸ These publications include information sheets and codes and procedures which are easily accessible and understandable and available on the CCMA's website.¹⁶⁹

Although the CCMA handles the bulk of employment disputes, there is a right to appeal to the Labour Courts, and a further right of appeal to the Labour Appeal Court.

¹⁶² Preamble, *Competition Act*.

¹⁶³ The CCMA was awarded a Public Sector Excellence Award for the Best Reputation in the Legal Sector in 2009.

¹⁶⁴ S23 of the Constitution contains the right to labour relations.

¹⁶⁵ 'Conciliation Boards and the Industrial Court lacked credibility with the State's social partners, organised business and organised labour and resulted in a very low settlement rate of disputes. The explanatory memorandum released with the draft bill of the LRA highlighted that the previous dispute resolution processes resulted in only 20% of disputes being settled. The failure of the statutory structure to resolve those disputes effectively resulted in an excessively high workload for the Industrial Court and the unnecessarily high incidence of strikes and lockouts.' Commission for Conciliation, Mediation and Arbitration "About Us" <<http://www.ccma.org.za/>> (accessed 27-06-2011).

¹⁶⁶ 66 of 1995 (*LRA*).

¹⁶⁷ S115(1) *LRA*.

¹⁶⁸ S115(2) *LRA*.

¹⁶⁹ <http://www.ccma.org.za>.

The success of the CCMA can be attributed largely to its relative informality and the greater variety of approaches and solutions which may be adopted in the settlement of disputes. The CCMA embodies many of the characteristics of a successful tribunal identified in Chapter 3,¹⁷⁰ namely accessibility,¹⁷¹ speed,¹⁷² efficiency,¹⁷³ informality¹⁷⁴ and specialisation. Furthermore, the CCMA is committed to the education and training of both staff members and those involved in the labour sector. This training and producing of rules, guidelines and standards is an important part of improving initial decisions and increasing the quality of decisions which are produced. Although the adjudication of a labour dispute does not necessarily imply that the subject matter is administrative action, the act of administrative adjudication may be.¹⁷⁵ The CCMA provides a valuable model for an effectively-functioning tribunal which has been able to dramatically increase the quality, effectiveness and efficiency of decisions and ultimately provide complainants with a higher level of redress. The CCMA also demonstrates an example of a highly functional tribunal despite high budgetary constraints¹⁷⁶ and in the face of vast socio-political difficulty.¹⁷⁷

¹⁷⁰ Ss 3 & 4.

¹⁷¹ ‘The new system has proved to be very cheap and accessible to workers on the point of entry.’ Brand “CCMA: Achievements and Challenges – Lessons from the First Three Years” (2000) 21 *Indus LJ* 78.

¹⁷² ‘The CCMA’s case load has grown by 18 percent in the last five years to an average of 150 000 cases a year, making the CCMA the largest dispute resolution body in the world. In the last five years, turnaround time of conciliation has improved by 19 days to 26 days and arbitration turnaround has improved by 10 days to 69 days.’ CCMA “Reappointment of CCMA Director Gives Stability and Continuity to the World’s Biggest Dispute Resolution Body” CCMA <<http://www.ccma.org.za>> (accessed 27-06-2011).

¹⁷³ ‘The commission receives an average of 500 new referrals every working day and processes at least 10 000 cases every month. Since it came into existence, it has handled more than 1 million cases.’ Kahn “CCMA Celebrates 10th Anniversary” CCMA <<http://www.skillsportal.co.za/page/features/389805-CCMA-celebrates-10th-anniversary>> (accessed 27-06-2011). Furthermore, in the 2009/10 Annual Report, the CCMA recorded that their caseload increased by 9%, 14% more cases were actually settled and 99% of awards were submitted on time. CCMA *Annual Report* (2009/2010) 17. More detailed statistics are available in the *Annual Report* 47-48.

¹⁷⁴ ‘The absence of a requirement for formal pleadings and complicated referral procedures has, it seems, proved to be a very successful feature of facilitating access to the CCMA. It has ensured that illiteracy and a lack of skill and resources are not an entry barrier to the system.’ Brand (2000) *Indus LJ* 79.

¹⁷⁵ This means that decisions of the CCMA Commissioners are subject to judicial review in terms of *PAJA*.

¹⁷⁶ ‘There has been a major deficit between the financial needs of the CCMA and the actual funding given to it by the State.’ Brand (2000) *Indus LJ* 82.

¹⁷⁷ The CCMA is not without its failings. However, ‘the CCMA has done all that it could reasonably have been expected to do to provide a service within its severe capacity constraints. It has made its service as accessible, simple, expeditious and competent as its resources permitted.’ Brand (2000) *Indus LJ* 96.

6 3 1 4 3 Tax

The adjudication of tax law disputes is another area of administrative law where an administrative tribunal system functions effectively. Despite having jurisdiction over a wide range of administrative action, the South African Revenue Service (SARS) provides a high level of administrative justice through the structures it provides to taxpayers who are adversely affected by tax administrative decisions.

If a taxpayer is unhappy with a decision of the Commissioner of Revenue, they can issue an objection to the Commissioner.¹⁷⁸ On receipt of an objection, the Commissioner must alter the assessment; disallow the objection;¹⁷⁹ reduce the assessment;¹⁸⁰ or withdraw the assessment;¹⁸¹ and must notify the taxpayer of his or her decision in writing. A taxpayer can alternatively appeal¹⁸² to the Commissioner and the dispute will be referred to Alternative Dispute Resolution (ADR).¹⁸³ SARS publishes clear and simple guidelines as to how to approach the Commissioner in the event of dispute, and step by step instructions for taxpayers to follow in the event of ADR.

A taxpayer is also able to appeal to the Tax Board¹⁸⁴ or to a Tax Court.¹⁸⁵ Appeals for decisions on amounts under R100 000 must be made to the Tax Board, and over R100 000 to the Tax Court.¹⁸⁶ A decision of the Tax Board can also be taken on appeal to the Tax Court.¹⁸⁷ Decisions of the Tax Court can then be taken on appeal to the Provincial Division of the High Court or to the Supreme Court of Appeal.¹⁸⁸ The Tax Board consists of Chairman, who is an

¹⁷⁸ S81 *Income Tax Act* 58 of 1962 (*ITA*). See also Rule 4 and 5 of the Rules Promulgated under Section 107A of the *Income Tax Act* 58 of 1962 R 467 1 April 2003 (The Income Tax Rules).

¹⁷⁹ S81(4) *ITA*.

¹⁸⁰ S79A *ITA*.

¹⁸¹ S79B *ITA*.

¹⁸² Income Tax Rule 6.

¹⁸³ Income Tax Rule 7 and the regulations contained in Schedule A and Schedule B. SARS also provides guidelines for taxpayers to show how to approach ADR and what the procedure what entail.

¹⁸⁴ S83A *ITA*.

¹⁸⁵ S83(1) *ITA*.

¹⁸⁶ S83A(1)(a) *ITA*.

¹⁸⁷ S83A(13) *ITA*. Income Tax Rules 9 – 29 govern the proceedings of both the Tax Board and the Tax Court.

¹⁸⁸ S86A(2) *ITA*.

advocate or attorney and, if the Chairperson, the Commissioner or the taxpayer considers it necessary, an accountant or a representative of the commercial community.¹⁸⁹ The Tax Court is a division of the High Court, and is empowered to confirm, alter or refer the assessment back to the Commissioner for re-evaluation.¹⁹⁰ Hearings of the Tax Court are not public.¹⁹¹

Due to this stratified system of objection, ADR and appeal, very few tax cases are decided in terms of judicial review, even though determinations or decisions of the Commissioner are mostly administrative action and therefore subject to review in terms of *PAJA*. In SARS' 2010 Annual Report,¹⁹² the statistics indicate that there were 125 Tax Court cases, 5 High Court cases and only 3 Supreme Court of Appeal cases. These statistics show that objections to the Commissioner, ADR and appeals to the tax board are able to effectively adjudicate and resolve the administrative tax issues, and there are therefore fewer cases adjudicated on the basis of judicial review.

Although each of the above three tribunals have been set up in very different ways and with different purposes, they share some similar trends of establishment and functioning and much of their success can be attributed to this. The following section will briefly evaluate why these tribunals function, and why other tribunals are not as effective.

6 3 2 Evaluation of the South African System: Some Lessons from Australia and England

The above description of some of the current appeal tribunal bodies indicates that the term 'tribunal' is a vague and far-reaching one in South African law. It encompasses a range of distinct and disparate bodies which are established for different reasons, serve diverse purposes and are constructed in fairly dissimilar ways. To even begin to evaluate their relative successes is a complicated process because some of the characteristics against which we could measure them¹⁹³ do not even apply.

¹⁸⁹ S83A(3) *ITA*.

¹⁹⁰ S83(13) *ITA*.

¹⁹¹ S83(11) *ITA*. However, as indicated in Ch 3 s 3, as long as the Tax Court provides clear and well-reasoned reasons for their decision, the requirement of a public hearing is still met.

¹⁹² SARS "Annual Report" SARS (2009/2010) <<http://www.sars.gov.za/home.asp?pid=286>> (accessed 12-08-2011).

¹⁹³ See Ch 3 s 3 for these characteristics. An example of this is the supervisory tribunal. The supervisory tribunal does not generally display high levels of independence, but it is established in order to regulate the industry and advise the minister on policy while adjudicating disputes. Independence is not a characteristic one would

Some tribunals are delivering a high measure of administrative justice, while others are failing in their mandate to provide this. Although it is difficult to pinpoint exactly why some tribunals succeed and others do not, there are characteristics in the successful tribunals which have contributed to their ability to deliver.¹⁹⁴ Firstly, sufficient funding and staffing are quintessential starting points for the effective functioning of any tribunal. Secondly, tribunal members must be in possession of expertise; both judicial expertise and expertise in the field they are adjudicating. Tribunal members must be well-trained in the adjudication of administrative disputes in order to provide high quality decision-making. Thirdly, tribunals must be accountable for their decisions and must publish clear and coherent reasons for their decisions. Fourthly, a wide range of dispute-resolution structures, as well as a comprehensive tiered appeal structure contributes to efficient and speedy resolution of complaints. Fifthly, it is important that tribunal users know what the system of appeal and the procedure for adjudication are in order to properly present their case. Lastly, tribunals should also consider the implications of their decision-making and take into account the policy decisions that governmental departments are required to make. This would require a level of communication with the department whose decisions they are intended to evaluate in order to assist with the improvement of the original decisions of administrative decision-makers.

What remains clear from the description of the South African tribunal landscape above is that it is still made up of a fragmented and unsystematic collection of tribunals. As long as disparity in tribunal procedures exists, it will be hard for these tribunals to provide the level of comprehensive and supportive administrative dispute resolution that tribunals can provide. However, the outline of the tribunal structures regulating the legal fields of competition, labour and tax do provide helpful insights into what is required to streamline and consolidate tribunal processes and structures.

Furthermore, there are three common features from the Australian and English systems which may be helpful in the reform of tribunals in South Africa.¹⁹⁵ The first is the creation of a

necessarily associate with this kind of tribunal. Another example is the dispute resolution tribunal where judicial expertise is not necessarily the key characteristic, especially if the dispute is referred for conciliation.

¹⁹⁴ This is not an exhaustive list of all the characteristics which result in a successful tribunal, but merely a brief list of the some important characteristics which can be found in the tribunal systems of competition, employment and tax.

¹⁹⁵ Again, this is not a comprehensive list and there are many important lessons to be learned from these two jurisdictions. However, these three trends will be helpful in identifying a direction for tribunal reform in South Africa.

general appeal tribunal, or the establishment of a tribunal which is empowered to adjudicate over a vast range of general regulatory matters. Both England and Australia have had success¹⁹⁶ with this type of structure to streamline appeal processes and allow for easier and faster resolution of disputes. Parliament can still regulate the jurisdiction of the tribunal by giving it only statutory authority and not inherent jurisdiction.¹⁹⁷ Furthermore, this type of tribunal can save costs in that computer systems, property and resources are shared; and a new tribunal does not have to be proliferated for each specific area of administrative law.¹⁹⁸

The second important lesson is the stratification of appeals, which allows for dispute resolution of relatively simple claims on the first tier, and more complex and specialised appeals on the second tier. This is especially important in areas of administration which deal with high levels of similar complaints, not all of which need to be taken on review to a high court, but can be dealt with in a more informal way.

A third lesson is that there is no need to completely abolish current tribunals, especially not those that are highly functional and provide a solid blueprint for the development of other tribunals. The development of the tribunal reforms in England¹⁹⁹ are especially useful here in that the introduction of the new system was brought in systematically and by the gradual extension of jurisdiction of tribunals which were providing the highest forms of administrative justice. It is especially in this area of reform where a competent supervisory body will have the most impact.

6 4 Future for Tribunals: Legislative Tribunal Reform and the ARC

Hoexter notes that although South African administrative law has undergone fundamental and far-reaching changes, there are still many areas of administrative law where the system is formalistic, rigid and is not delivering on the constitutional mandate. Especially in the field of non-judicial review or the development of administrative appeals,

¹⁹⁶ See the success of the AAT in Ch 4 s 4 3 1 3.

¹⁹⁷ See Ch 4 fn 92.

¹⁹⁸ Ch 4 fn 92.

¹⁹⁹ Ch 5 s 3 2.

it is regrettable that no progress seems to have been made with the reform of the existing system of administrative appeals. Reform is urgently needed in this area if the system is ever to function as a worthy adjunct and alternative to judicial review.²⁰⁰

In both the English and Australian systems respectively the AJTC and Australian ARC played a vital role in the initial implementation of tribunal reform, as well as its continued existence and effective functioning. In England, the AJTC was the driving force behind the research surrounding and reform of tribunals. They achieved this by constant communication with various tribunals, the Senior President of Tribunals and by engaging with the academic community on areas of research which were of pertinent value. The AJTC was also instrumental in assisting with the phased implementation of the new two-tiered tribunal structure.²⁰¹ The Australian ARC has proved its important and necessary role and is still regarded as a highly relevant role player in the distribution of administrative justice.²⁰²

Chapters 3, 4 and 5 have illustrated the need, importance and characteristics of a successful, functioning and relevant central supervisory body. In the South African context, the issues that may prove the most problematic will relate to budgetary constraints,²⁰³ the need for qualified and well-trained employees, and the necessary scope to oversee the development and reform of the whole of the administrative justice system. South Africa is not unique in these challenges, and the development and criticism of the supervisory bodies of Australia and England, with specific emphasis on the criticism of the old English supervisory council,²⁰⁴ can provide useful blueprints for how to overcome such challenges. The English Council of Tribunals was criticised throughout its existence for failing in its task to provide a coherent oversight role, firstly due to budgetary limitations and secondly because the work of the Council was heavily ring-fenced. However, the subsequent restructuring of the Council and the development of the AJTC is useful in demonstrating how to structure and design an effective supervisory body.

²⁰⁰ Hoexter *Administrative Law* 99.

²⁰¹ See Ch 5 s 3 1 3 for a more detailed description of the work of the AJTC.

²⁰² Ch 4 s 5 1 3 where the success of the Australian ARC is outlined.

²⁰³ The importance of budgetary constraints will be discussed in Ch 7.

²⁰⁴ See Ch 5 s 3 3.

Hoexter notes that

in spite of all that has been achieved, then, it is clear that work remains to be done. However, the prospects of further programmatic reform of administrative law and the administrative system are slim. As noted by Pfaff, the Department of Justice does not have the capacity to take on the various tasks listed in s 10(2) of PAJA.²⁰⁵ In the absence of an ARC or some other sort of administrative-law champion within government, South Africa is reliant on the will of the Minister of Justice to push for reform and on the government's preparedness to provide funding for such reform.²⁰⁶

The above statement indicates the important role to be played by the ARC in tribunal reform, and stresses that without this first essential step being taken, the reform of the system will be virtually unmanageable and is unlikely to succeed. Chapter 7 will more clearly outline the challenges facing tribunal reform in South Africa and will provide some possible arguments to the objections that have been raised.

6 5 Conclusion

Although the preceding chapter paints a fairly bleak picture of the current position of administrative tribunal justice, it does so in order to show the need for an organised and structured system of tribunals. Despite the relative failure of Parliament and *PAJA* to deliver on the constitutional imperative to provide a fair and efficient administration, all is not lost. The gateway remains open for further administrative reform and the historical developments described above outline that South African administrative law is long overdue for reform.

As is indicated above, tribunals do currently exist and do currently assist in the administration of justice. However, they need to be brought into more coherent structures in a systematic and phased process of implementation. S33(1) of the Constitution provides for a right to fair and efficient administrative action, while s33(3) provides for the establishment of independent tribunals. There is strong academic support for the establishment of an ARC, whose task would be the investigation of tribunal reform, and even more support for the necessity of such tribunal reform. *PAJA* empowers the minister to issue regulations establishing an ARC. Parliament is in a position to enact legislation to govern the ARC without too much of a drafting procedure, as the SALRC's 1999 Draft Bill already provides a detailed framework

²⁰⁵ Pfaff "Implementation Strategies for the Promotion of Administrative Justice Act: State-of-Affairs Report and Recommendations for Further Developments" in Corder & Van der Vijver (eds) *Realising Administrative Justice* (2002) 114.

²⁰⁶ Hoexter *Administrative Law* 102.

for its functioning, expenditure and constitution. Furthermore, Draft Regulations governing the ARC have already been drawn up and are comparable to the Draft Bill. The ARC, provided it is properly staffed and adequately resourced,²⁰⁷ would be empowered to conduct the necessary investigation into the suitability of establishing a general administrative tribunal, or any other such tribunal reforms it deems necessary.

Once the ARC is established, the valuable lessons from the jurisdictions where tribunals function effectively, such as Australia and England, could be implemented in a systematic phased way which promotes tribunals as valuable contributors to the administering of administrative justice. Without the establishment of an ARC, sustained tribunal reform does not appear to be a viable option in South African administrative law.

An important challenge that remains a stumbling block for the establishment of an ARC and the subsequent tribunal reform is the question of budgetary limitations. Along with the various objections to the establishment of a tribunal reform, this challenge will be considered and evaluated in the following chapter.

²⁰⁷ S 3 3 1 refers to some of the requirements for an effectively functioning ARC. See Ch 3 s 5 1 for more requirements in this regard.

CHAPTER 7: THE ESTABLISHMENT OF THE ADMINISTRATIVE REVIEW COUNCIL AND COMPREHENSIVE TRIBUNAL REFORM IN SOUTH AFRICA: THE COMMONWEALTH COMPARISON

7.1 Introduction

Chapter 2 explains the failure of judicial review to provide comprehensive administrative justice in South Africa, and shows the basis for considering alternative forms of administrative redress. The remaining chapters illustrate the value of tribunals in administering justice; describe two working models of tribunals in two commonwealth jurisdictions; and explain the necessary reasons for tribunal reform, as well as their potential importance, in South Africa. Tribunals have been shown to be able to assist dramatically with the ‘two goals of administrative review: to redress individual complaints; and to improve the quality generally of primary decision-making, to the advantage of the many who seek benefits or entitlements from government.’¹

However, objections have been voiced against the potential reform of the tribunal system in South Africa, namely; desire on the part of government to avoid the unnecessary proliferation of government departments; and the budgetary implications of reform. In a country limited by scarce resources and many important institutions and social causes to which those resources can be allocated, any new system or institution will only be viable if it considers budgetary limitations and the availability of funds. If a new system is to be of any value to South Africa, it must reduce costs and improve the access of the population to the new resource. That said, the debate surrounding ‘costs’ cannot simply refer to the actual monetary cost of establishing such a new system. The ‘cost’ of tribunal reform must be considered against the ‘cost’ of poor administrative redress and the ‘cost’ to society of a system of administrative justice which fails to be fair and efficient.

This chapter will outline the objections raised to tribunal reform in South Africa. Through a comparison with the tribunal systems of Australia and England, the general trends instrumental in tribunal reform will be highlighted. This chapter then considers whether administrative tribunal reform could potentially result in a more cost-effective system in South Africa, and whether it may be a feasible alternative to judicial review.

¹ Creyke “Tribunals and Access to Justice” (2002) 2 *QUT Law and Justice Journal* 64.

7.2 'Unknown Cost' of Poor Decision-Making

The English Administrative Justice and Tribunals Council (AJTC) recently released a report entitled 'Right First Time'.² The report is focused on the importance and need for the monitoring and review of decision-making to be more proactive and to actually aim to correcting initial decisions, rather than remedying them at a later stage. As was illustrated in Chapter 2,³ one of the biggest problems with South African administrative law is its retrogressive and backward-looking effect. Rather than aiming to prevent maladministration, South African administrative law has been disproportionately focused on redress and the remedy of judicial review.

The AJTC highlights one of the problems of such an approach, stating that 'the precise financial cost of poor decision-making and poor service delivery is unknown.'⁴ This unknown cost relates to the fact that the precise cost of maladministration and bad decision-making cannot be accurately measured.

The high volume of complaints and appeals has implications not just for the individuals concerned, but also for the taxpayer more generally, with the failure of public bodies to deliver services or get decisions right first time having significant consequences for the public purse. Financial costs will be incurred at different stages and by different organisations. These include the cost of service delivery or making of original decisions, the cost of review or reconsideration, the cost of appeal to the original decision-maker or complaint to the original service deliverer in addition to the cost of running the Tribunals Service and the offices of ombudsmen. In addition, there are of course the financial costs incurred by the appellant or complainant, and their family and/or advisers, in pursuing their case.⁵

In Chapter 2,⁶ the financial criticisms to judicial review were explained. In four separate cases emanating from the Eastern Cape High Court,⁷ four different judges⁸ were particularly

² Administrative Justice and Tribunals Council *Right First Time* June 2011.

³ See Ch 2 for a discussion on the prominence and problems of judicial review.

⁴ AJTC *Right First Time* June 17.

⁵ AJTC *Right First Time* June 17.

⁶ Ch 2 s 3 2 4.

⁷ *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 6 SA 229 (SE); *Ndevu v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* SECLD undated judgment case no. 597/02; *Makalima v Member of the Executive Council: Welfare* SECLD 27-01-2005 case no 1601/03; *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* 2006 4 SA 478 (SCA).

concerned with the huge financial burden that erroneous decision-making was placing on the public purse. Furthermore, all of the judges were concerned about the fact that decisions under review were seldom opposed by the administrator or his department. This meant that not only was the scarce funding for areas such as social assistance being squandered by poor administrative decisions, but that even heavier burdens were placed on the government to pay out cost orders for review applications.

In addition to this, judicial review is seldom able to cure the initial problem and merely treats the symptoms. Chapter 2 illustrates that as the primary avenue of administrative redress, judicial review is simply incapable of providing systematic improvement of decision-making or long-term improvements in the sphere of public administration. The comprehensive and overarching tribunal structures in Australia and England that have been discussed go some way to showing how tribunals can begin to address the cost of bad decision-making, and how they can systematically begin to improve initial decisions and assist with the progressive realisation of rights through administrative law.

7.3 Major Objections to Tribunal Reform in South Africa

The comprehensive reform of administrative appeals tribunals has not happened in South Africa. The first two objections to tribunal reform in South Africa stem mainly from the Department of Justice (DoJ). However, it must be noted at this point that actual *tribunal* reform was not objected against.⁹ As was illustrated in Chapter 6, the establishment of an Administrative Review Council (ARC) was always considered to be the first step in any reform of non-judicial review. The newly-established council would then have been responsible for the investigation and possible implementation of any tribunal reform. The fact that this council was never created means that government was never required to consider tribunal reforms, and had no chance to object to them. The DoJ's objections therefore relate to the establishment of the ARC, rather than directly to the reform of the tribunal system.¹⁰

⁸ Plasket J; Erasmus J; Leach J; and Nugent JA respectively, the latter in the judgment in appeal against *Kate v MEC for the Department of Welfare*, EC 2005 (1) SA 141 (SE).

⁹ See the Chairperson's response to the submission of the Western Cape Provincial Government in regard to tribunal reforms in Ch 6 fn 64.

¹⁰ The actual written submissions from the DoJ to the SALRC during *SALRC Project 115 Report on Administrative Justice* (1999) are not able to be located as the SALRC have moved offices and the original documents have not been found. However, P van Wyk, the Principal State Law Adviser of the SALRC confirmed telephonically and via e-mail (27-06-2011) that the information contained in the SALRC's reports

7 3 1 Practical Implications

A major objection to the establishment of the ARC relates to the practical implications thereof, and the DoJ expressed concerns about how exactly such a council would be instituted. One of their suggestions was that instead of creating an entirely new body responsible for the investigation and supervision of administrative law, the function merely be extended to the SALRC.¹¹ Another alternative was that the function be subsumed under the Public Service Commission or another Chapter 9 institution.¹²

The DoJ was clearly expressing concerns about the proliferation of yet another governmental department.¹³ If the recent developments in England regarding the abolishment of the AJTC are considered, this may be a valid concern.¹⁴ However, what will be demonstrated below is that despite its potential termination, the role that the AJTC played in the development and restructuring of the tribunal system was a critical one, and that without the overarching supervision and communication structures of the AJTC, the tribunal transition would not have been as smooth as it was. One can of course thus argue that the potential abolition of the AJCT indicates that the cost of creating a new body, such as the ARC, to guide tribunal reform may only be a temporary cost, although in light of the Australian experience this is not the best option. Furthermore, the Australian ARC has proved to be an important and long-lasting institution and it will be illustrated below that the retention of the ARC as an

would be an accurate summary of the objections received from the DoJ. The points raised in this section are based on the information contained therein.

¹¹ The SALRC state that ‘it has been suggested that consideration be given to the establishment of a unit within the SALC (or Human Rights Commission) to perform the functions of the Council, and that donor funding be sought for the expenditure associated with establishing the unit and its initially heavy workload.’ South African Law Reform Commission Project 115 *Report on Administrative Justice* August 1999 36. These suggestions were also made during parliamentary deliberation on the *Promotion of Administrative Justice Act* 3 of 2000 by various parties as an attempt to compromise. One such suggestion was made by the Legal Resources Centre stating that ‘it is suggested that the Bill include provisions relating to an Administrative Review Council or similar institution. If necessary, the sections creating and empowering it can be brought into operation at a later stage when funding is available or when agreement has been reached with either the South African Law Commission or the Human Rights Commission for it to fall under the auspices of one or other of these institutions.’ Submission of The Legal Resources Centre and Clive Plasket, Former Director to the Justice and Constitutional Affairs Portfolio Committee in December 1999 [B56-99].

¹² These institutions are established in Ch 9 of the Constitution and seek to redress maladministration in a non-judicial way.

¹³ ‘There has been an understandable aversion (particularly on the part of the Department of Justice) to the creation of what is seen to be yet a further governmental structure.’ South African Law Reform Commission *Report on Administrative Justice* August 1999 s6.11.

¹⁴ See Ch 5 fn 129 where the *Public Bodies Reform Bill* is explained.

independent and impartial body is critically important to the successful monitoring and supervision of administrative law, albeit in the Australian context.

7 3 2 Budgetary Implications

Undoubtedly the most important objection and consideration of any tribunal reform is the question of budgetary implications. The actual cost of a new system will always be at the forefront of any debate relating to its suitability in the South African context.

As was explained above, the DoJ has not directly expressed reservations relating to a reformed tribunal system. Their objections related to the establishment of the first step in reform, namely the ARC. The DoJ submitted in 1999 that the ARC would be too expensive to establish and that ‘the contemplated ARC would cost in the order of R980 000 per annum to run (this out of the current Justice budget in the order of R300 million).’¹⁵

In response to this objection, the SALRC stated that

three points to be made in this regard are the following: that if the ARC is what it takes to obey the constitutional imperative, this limited funding has to be found; secondly, enhanced administrative justice contemplates greater state efficiency and thereby savings; and thirdly, that it is not evident that the function to be performed (given in particular the need for autonomy and public regard) is best served by seeking to warehouse the ARC’s allocated tasks within some other institution or government department.¹⁶

The ARC was never established, and Chapter 6 describes the reasons why not. However, Chapter 6 also outlined reasons why it should be established,¹⁷ and an indication that its establishment is neither an unreasonable nor a cumbersome burden on Parliament or the Minister of Justice.

The discussion below will indicate that the establishment of an ARC is an important step in the development of tribunal reforms, and is therefore a cost that must be borne by the DoJ.

¹⁵ SALRC *Report on Administrative Justice* 13. However, that figure has not been revised since 1999, and it is not known what the cost of establishing an ARC would be today.

¹⁶ SALRC *Report on Administrative Justice* 13.

¹⁷ ‘The SALC...considers the Council/unit as one of the keys to harmonizing the constitutional requirements of administrative justice and efficient administration and, hence, to the success of the Bill. If this capacity is not created, the Bill cannot work.’ SALRC *Report on Administrative Justice* 36. See Ch 6 fn 49.

7 4 South African Financial Reality

In the DoJ's report to parliament in June 2011, it stated that the estimated expenditure of the DoJ for the next year is about R12 billion, which will be increased to nearly R16 billion by the year 2016.¹⁸ Of this, nearly R750 million is allocated for State Legal Services. It must be acknowledged that the DoJ faces many challenging tasks, some of which include the upgrading of services and establishment of courts in previously disadvantaged areas.¹⁹ Another important task of the DoJ is to try and reduce the massive court backlogs and improve efficiency.²⁰ In addition, there is the worrying indication that 'there has been a significant increase in litigation against the state that requires interventions such as the development of a policy to manage state litigation and increased resources to the Office of the State Attorney.'²¹

The report states that litigation against the state 'is increasing as a result of citizens being more aware of their rights; opportunism; a fragmented approach to the management of state litigation and the absence of a framework making use of alternative dispute resolution mechanisms.'²² The report explains that the DoJ has a strategic plan to reduce the costs of state litigation by developing a framework for the efficient management for state litigation; increasing the resources allocated to the office to improve its capacity; preparing and implementing a standardised fee structure for paying private counsel; and developing an alternative dispute resolution mechanism process.²³ However, the reform of the administrative tribunal system is not mentioned as one potential mechanism to reduce the state's litigation costs.

¹⁸Department of Justice Committee Report *Announcements, Tablings and Committee Reports* Third Session, Fourth Parliament (6-06-2011) 1892. National Treasury *Estimates of National Expenditure – Abridged Version* (23-02-2011) 507. *Appropriation Act* 11 of 2011 Schedule 2 20.

¹⁹ 'The Department has a major challenge in addressing the historical imbalances of the court infrastructure: prior to 1994, most court services were not situated in townships or in rural areas. When the Department decided to increase its services to previously excluded areas; facilities were unsuitable, requiring major refurbishment.' DoJ Committee Report *Announcements, Tablings and Committee Reports* (6-06-2011) 1897.

²⁰ DoJ Committee Report *Announcements, Tablings and Committee Reports* (6-06-2011) 1904.

²¹ DoJ Committee Report *Announcements, Tablings and Committee Reports* (6-06-2011) 1897.

²² DoJ Committee Report *Announcements, Tablings and Committee Reports* (6-06-2011) 1904.

²³ DoJ Committee Report *Announcements, Tablings and Committee Reports* (6-06-2011) 1904.

As Chapter 2 describes, the burden on the public purse of judicial review against state departments is exorbitant.²⁴ Despite judgements clearly indicating the worrying trend, not much has been done to alleviate the burden. As Erasmus J states,²⁵

I have obtained from the Registrar a copy of a bill taxed in a similar matter. On that basis these matters tax out at about R4 000.00 per case. It would mean therefore that in today's cases alone about R100 000.00 will be paid in legal costs in respect of the fees and disbursements of the legal representatives of the applicants. Clearly, millions of rand in taxpayers' money have been wasted in unnecessary legal costs occasioned by indolence and/or incompetence on the part of public servants.

Clearly, wasted litigation costs should be a cause of great concern to government and are an expense South Africa simply cannot afford to bear. In addition to this, the pressure on courts is extremely high and administrative cases contribute to that backlog. All of the factors listed above should cause the DoJ to start considering alternative options to reduce the pressure on courts and to consider alternative means of resolving disputes with state departments.

7.5 General Trends in Australia and England

The objections above present two important concerns of the South African government, as well as a pressing need for the investigation of an alternative to judicial review for administrative redress. A brief comparative analysis of the systems of Australia and England may provide some counter-arguments to the objections, and indicate the value of a reformed tribunal system over a fragmented and ad hoc one. Both the English and Australian system can offer useful advice as to what the important elements of reform are. As was illustrated in Chapters 4 and 5, the most important attributes extend to comprehensive structural administrative reform; the role of supporting governmental agencies; the necessity of co-operative government strategies for the realisation of efficient administrative dispute resolution and the improvement of original decision-making; the importance of an adequately and sufficiently resourced, overarching, centralised supervisory body empowered to exercise its overseeing capacity over the whole of the administrative sphere; the continued supervisory jurisdiction of an appeal court on issues of law; and the progressive movement towards speedy, efficient, effective and satisfactory administrative relief for citizens.

²⁴ Ch 2 s 2.7.

²⁵ *Ndevu v MEC for Welfare*, EC 5-6.

7 5 1 Australia

7 5 1 1 Value of the Australian ARC

The Australian ARC has been a successful supervisory administrative body, and through its dual purposes of research and integration, ‘has had a large impact in shaping Australian administrative law.’²⁶ The ARC provided the basis for the establishment of the English AJTC, and was the basis for the reason that the AJTC was given a wider spectrum of influence in the development of the English tribunal reforms.

A recent report²⁷ on the effectiveness and importance of the Australian ARC considered whether it was necessary to continue to support a separate institution or whether it would be more sensible and cost-effective to transfer these functions under the auspices of the office of the Attorney-General. Based on the submissions received,²⁸ the Senate Committee came to the conclusion that ‘there is a continuing need for the Commonwealth Government to receive advice and recommendations on administrative review and decision-making, and to promote a comprehensive, affordable and cost-effective administrative law system.’²⁹

The first reason was independence.³⁰ The second reason was the ARC’s public image,³¹ and its ability to provide a ‘whole-of-government approach’ which was unaffected by ‘turf protection difficulties which would make it particularly difficult for a unit within a

²⁶ McMillan *Administrative Justice – Adapting to Change* 9th Ben Beinart Memorial Lecture delivered at the University of Cape Town, 2-08-2011 4.

²⁷ Senate Legal and Constitutional Legislation Committee *Report on the Role and Functions of the Administrative Review Council* (1997).

²⁸ A list of the submissions can be found in the Senate Committee Report Appendix 1.

²⁹ Senate Committee Report s2.20. ‘The Administrative Review Council should remain as a separate and permanent body, provided that it is making a significant contribution towards an affordable and cost-effective system of administrative decision-making and review.’ Senate Committee Report s2.35 Recommendation 1.

³⁰ ‘The Committee considers that administrative review and administrative law generally are important aspects of personal rights, which justify a separate and permanent administrative law advisory body. Any dilution of the independence or powers of the ARC would be undesirable and the worst outcome for the effectiveness of the ARC would be if it was absorbed by, or became under the control of, the Attorney-General’s Department. The quality of ARC’s report on rule-making by commonwealth agencies would not have been as good if it had, for instance, been passed through the sieve of a Department of State. Submission of the Senate Standing Committee on Regulations and Ordinances.

³¹ Submission of the Welfare Rights Centre, New South Wales.

government department to take a similar approach.³² The third reason relates to cost, and the fact that there would be no significant decrease in cost should the ARC's functions be subsumed under the Australian Law Reform Commission (ALRC) or the Auditor-General.³³

7 5 1 2 Cost of Tribunal Reform and Some Suggestions: Queensland

In a recent article,³⁴ Creyke addresses the recommendation of the Queensland Electoral and Administrative Review Commission (EARC) for the establishment of a general merits review body, the Queensland Independent Commission for Administrative Review (QICAR).³⁵ The EARC report noted the potential costs for establishment of a new system, but also noted that there would be cost reductions once the new system was underway.³⁶

By using both the Australian AAT and the development of state tribunals, Creyke outlines some of the most important issues for consideration in any tribunal reform. She discusses whether the system is in need of reform, what desirable elements should be included in a tribunal system, and what essential requirements are needed for a new tribunal structure to work. Her recommendations are premised on the development of the Australian tribunal system and are therefore a reflection of the valuable elements of the Australian system.

Her first suggestion is that there should be a single, generalist jurisdiction tribunal, such as the AAT. Through a comparison with the Victorian Civil and Administrative Tribunal (VCAT), Creyke shows that the generalist tribunal offers the two-fold advantage that it reduces costs

³² Submission of the Administrative Review Council, evidence of Prof Neave 39-40.

³³ 'It is unlikely that there would be any significant economies to be gained in seeking to provide common secretariat services for the Council from some other source, for example, amalgamation with ALRC. Rather, it is likely that an amalgamation would generate additional cost in the immediate short term and would risk the dissipation or dilution of expertise in the longer term. Submission of the Auditor-General's Department 6-7.

³⁴ Creyke (2002) *QUT Law and Justice Journal*.

³⁵ QICAR would have reduced over 130 existing review bodies reduced to 26, created appeal rights for over 1000 decisions not then subject to review, and established the Queensland Administrative Review Council as an independent body to promote and co-ordinate the whole Queensland administrative review system.

³⁶ The report notes that the 'start-up cost of the development would be about \$8.3 million with recurrent operating costs being about \$10.2 million. That was compared with the existing costs of about \$8.75 million a year. However, the proposed tribunal system would review nearly double the number of decisions as compared with the 2,000 under the existing scheme, so there were considerable cost savings for decisions which would be transferred, even excluding the cost of court review, estimated at a further \$1 million.' Queensland Electoral and Administrative Review Commission *Report on Review of Appeals from Administrative Decisions* (1993) 64-66, 68.

and increases efficiency;³⁷ and that it offers an informal and flexible service.³⁸ In an earlier article,³⁹ Kirby also explains that the advantages of a general tribunal. It provides a more effective remedy to individuals who are affected by administrative action; leads to heightened awareness amongst officials of compliance with the law and the content thereof; provides greater consistency in public administration; includes the enhancement of the accountability of officials and provides for a more open administration; has led to improved internal arrangements within departments who have introduced improved systems for training staff and improved mechanisms for decision-making; and lastly the AAT provides ‘not only an assurance to the individual of justice in the particular case but a safeguard against arbitrary decision-making and a stimulus to improved administrative standards.’⁴⁰

There are arguments against the generalist tribunal, specifically to its independence and its expertise.⁴¹ However, McMillan counters these arguments by stating that the courts maintain a supervisory oversight role over tribunals through the avenue of appeal.⁴² Furthermore, if the appeal statistics are considered, tribunals appear to be handling the challenge competently.⁴³

³⁷ ‘In its first year of operations, the VCAT dealt with 75,076 cases within its budget of \$18.3 million. In its second year of operations, with a slight increase (9 per cent) to the budget (\$20 million), VCAT resolved 89,368 cases, an increased caseload of 19 per cent. Matters finalised for 2000-2001 exceeded 92,000 with no increase in the cost. It is clear that VCAT is demonstrating the greater efficiencies from having a unified, not just a colocated, system.’ Creyke (2002) *QUT Law and Justice Journal* 72. See also Victorian Civil and Administrative Tribunal *Annual Report* (2000-2001) 13.

³⁸ ‘As to formalism and inflexibility, that too is discounted by the Victorian experience. Despite having members of the new tribunal who were formerly magistrates and therefore more familiar with formal court processes, the presence in the VCAT headquarters in Melbourne of several styles of hearing rooms, and a concerted focus by the presidential members on changing the culture of tribunal members, has helped develop a flexible attitude amongst most tribunal members.’ Creyke (2002) *QUT Law and Justice Journal* 73.

³⁹ Kirby “Effective Review of Administrative Acts: The Hallmark of a Free and Fair Society” (1989) 5 *SAJHR* 331-333.

⁴⁰ Kirby (1989) *SAJHR* 333.

⁴¹ ‘It has, nonetheless, been fashionable in legal circles to disparage tribunals and compare them unfavourably to courts. There are two main themes in the criticism. One is that tribunal members do not enjoy the same independence as judicial officers...the second criticism is that tribunal members are not for the most part as legally experienced or competent as judicial officers.’ McMillan “Re-thinking the Separation of Powers” (2010) 38 *Federal LR* 12.

⁴² McMillan (2010) *Federal LR* 12.

⁴³ ‘The appeal statistics do not present a damning picture. Of 122 appeals from AAT decisions to the Federal Court in 2008–09, 30 per cent were allowed or remitted, 55 per cent were disallowed, and 15 per cent were discontinued. By contrast, of the 62 appeals from federal and state superior court decisions to the High Court in

Creyke's second suggestion is that there are certain pre-requisites that need to be met for a sustained favourable systematic reform. These are sufficient funding; adequate levels of expertise both by members and by those in oversight roles; a measure of tribunal independence; and a mechanism to monitor compliance with tribunal decisions or to monitor the systemic effect of compliance with tribunal decisions.⁴⁴ The first three requirements are familiar in the sphere of tribunals and are reminiscent of characteristics identified by the Franks Report⁴⁵ and the Legatt Report.⁴⁶ The fourth suggestion is that 'what is needed is an office or body charged with ensuring that decisions are implemented in the individual case, that, when courts or tribunals have found anomalies, injustice or inconsistency in legislation or policy, the legislation or the policy is changed, and that front-line decision-makers take account of court and tribunal findings.'⁴⁷ This level of monitoring would lead to greater consistency in decision-making and assist with improving initial decisions.

Lastly, Creyke suggests that the reform of Queensland's tribunals can occur by learning from the developments in Australia and in England, and by applying the comparative information available to the EARC. In this way, the valuable lessons learned from the successful operation of tribunals can be collated and be applied in the context-specific jurisdiction facing reform. In the South African context, this would mean developing a tribunal reform in line with our own constitutional development and instituting reforms which are suitable to our own institutional structures.

7 5 1 3 Success of the Australian Tribunals

Another important feature of Australian tribunals is the impact they have had on reducing the administrative caseload on the courts. The decline in judicial review in Australia and the rise

2008–09, 68 per cent were allowed, 29 per cent were dismissed, and three per cent were discontinued.' McMillan (2010) *Federal LR* 12-13.

⁴⁴ Creyke (2002) *QUT Law and Justice Journal* 73.

⁴⁵ Committee on Administrative Tribunals and Enquiries *Report of the Committee on Administrative Tribunals and Enquiries Cmnd 218* (1957).

⁴⁶ Leggatt *Tribunals for Users: One System, One Service* (2001).

⁴⁷ Creyke (2002) *QUT Law and Justice Journal* 81.

of reliance on tribunals as primary dispute-resolution structures is evidence of their successful approach to correcting administrative injustice.⁴⁸

The AAT's success can also be measured by its output. Since its establishment nearly 30 years ago, the major federal tribunals alone have handled nearly 500 000 cases.⁴⁹ In contrast, the figures for administrative law review decisions in the Australian Federal Court have either been stagnant or in decline.⁵⁰ Creyke states that 'these features have indicated a high degree of satisfaction within Australia for tribunal review as an adjudicative option and have led to a deserved international reputation.'⁵¹ In a recent report,⁵² Creyke and McMillan indicate that tribunals are also the most satisfactory form of redress from the perspective of government departments and 'tribunals met administrative law objectives by focusing decision-makers' attention on their task, and by enhancing accountability and compliance with the law.'⁵³ Importantly,

in terms of public impact, the AAT has had a dramatic influence. Especially in the area of disputed social welfare benefit entitlement, the AAT has provided a review mechanism where previously there was a void...For those members of the Australian community at the most disadvantaged end of the socio-economic spectrum, the

⁴⁸ 'In other ways too the role of courts has been diminishing by contrast with that of tribunals and Ombudsman. Australia has three federal courts – the Federal Magistrates Court, which reported only 28 non-migration administrative law matters last year; the Federal Court, which no longer has a separate statistical listing for judicial review, other than for migration cases; and the High Court, which last year handled only five non-migration cases concerning the exercise of government power. It is possible that those figures will fall even further – again, immigration aside – because of a government policy, strongly worded and vigorously pursued, to prefer alternative dispute resolution to litigation.' McMillan *Administrative Justice – Adapting to Change* 9th Ben Beinart Memorial Lecture 2-08-2011 3.

⁴⁹ Creyke "Administrative Justice in Australia" in Adler (ed) *Administrative Justice in Context* (2010) 281 fn 25 based on the Annual Reports of the AAT, the Migration and Refugee tribunals, the Social Security Appeals Tribunal and the Veterans' Review Board. McMillan states that the 'caseload is substantial: in 2008–09 the Administrative Appeals Tribunal (AAT) finalised 7 231 applications, while four other specialist tribunals — the Social Security Appeals Tribunal, Migration Review Tribunal, Refugee Review Tribunal and Veterans' Review Board — finalised 28 883 applications.' McMillan (2010) *Federal LR* 11.

⁵⁰ Creyke "Administrative Justice in Australia" in *Administrative Justice in Context* 281 fn 24 based on the figures supplied by the High Court, Federal Court and Magistrates court between 2004-2009.

⁵¹ Creyke "Administrative Justice in Australia" in *Administrative Justice in Context* 282.

⁵² Creyke & McMillan "Executive Perceptions of Administrative Law – An Empirical Study" (2002) 9 *AJAL* 163.

⁵³ Creyke & McMillan (2002) 9 *AJAL* 172-173; 187-187.

provision of an effective system of external merits review has proved to be a major advance in the securing of individual rights.⁵⁴

If the current social assistance position in South Africa is considered, this kind of a tribunal may provide the level of administrative justice necessary to begin to process the administrative backlog. Furthermore, the successful implementation of a coherent and comprehensive system of tribunals can lead to increased reliance on alternatives to court for the resolution of disputes. McMillan states that ‘tribunals, as those statistics indicate, have become the frontline of administrative justice for the public. The large number of people who turn each year to tribunals for review of government decisions is itself a measure of their importance.’⁵⁵

7 5 2 England

7 5 2 1 Administrative Justice and Tribunals Council (AJTC) and Co-operative Government

The role of the AJTC in rolling out the tribunal reforms in England was a critical one.⁵⁶ Despite the fact that the tribunal system is administered and run by the Tribunals Service, an executive agency of the Ministry of Justice, the AJTC provides a unique and independent element of continued tribunal reform.⁵⁷ Carnwath states that ‘the AJTC’s role is not just about the final stage of dispute resolution, but covers the whole process from initial decision until final resolution at whatever level.’⁵⁸ The AJTC describes their approach under three core areas; carrying out projects to identify improvements; working with others to effect change; and exploiting opportunities for their voice to be heard on behalf of users.⁵⁹ Their purpose is

⁵⁴ Mendelsohn & Maher “The Australian Experience in Merits Review Tribunals” in Mendelsohn & Maher (eds) *Courts, Tribunals and New Approaches to Justice* (1994) 94.

⁵⁵ McMillan (2010) *Federal LR* 12.

⁵⁶ A description of the role played by the AJTC can be found in the Administrative Justice and Tribunals Council *Annual Report* (2007/2008).

⁵⁷ ‘The AJTC was also established to take a unique perspective of how the various components of the administrative justice system – i.e. decision makers, tribunals, ombudsmen, complaint handlers and the courts – fit together.’ Thomas, Chairman of AJTC in Administrative Justice and Tribunals Council *Annual Report* (2009/2010).

⁵⁸ Carnwath *The Senior President of Tribunals’ Annual Report: Tribunals Transformed* (2010) <http://www.judiciary.gov.uk/NR/rdonlyres/EF000745-B38E-4A81-8356-E3317E1251F5/0/senior_president_tribunals_annualreport_feb_2010.pdf> (accessed 12-07-2010) 56 (*Tribunals Transformed*).

⁵⁹ AJTC *Annual Report* (2009/2010) 2-3.

to consider how ‘the components of the administrative justice system relate to each other so as to ensure that the system is accessible, fair and efficient....by playing a pivotal role in the development of coherent principles and good practice; promoting understanding, learning and continuous improvement and ensuring that the needs of users are central.’⁶⁰

In addition, the success of the AJTC can be attributed to the high levels of communication and co-operation between them and all the spheres of government. Chapter 5 describes the role of the Senior President of Tribunals (STP) and his role in the implementation of the new tribunals.⁶¹ Chapter 5 also describes the role of the Tribunal Presidents’ Group (TPG), Tribunal Judges’ Executive Board (TJEB) and the Tribunal Services Executive Team (TSET).⁶² One of the major strengths of the phased implementation of the tribunals in England was the identification of key role-players and the emphasis on clear, coherent co-operation in the rolling out of the new structures. It is apparent from the successful implementation of the new tribunals that collaborative efforts of all key players, under the supervision of a separate, independent supervisory body like the AJTC, is essential for the transition and phased implementation of tribunal reform.

The tribunal reform project has been unusual, perhaps unique, among major legal reform programmes, in the extent of active involvement of judges at every stage. It has also benefited from consistently friendly but respectful working relationships between judges, ministers, and administrators, with generally all-party support, and with other vital stakeholders.⁶³

As was noted in Chapter 5,⁶⁴ the AJTC is one of the bodies which stand to be abolished through the *Public Bodies Reform Bill*.⁶⁵ The effect of this bill on the AJTC is as yet unknown, but does not diminish from the significant implementation and strategic role played by the AJTC throughout the initial phases of tribunal reform. Furthermore, there is

⁶⁰ See Thomson “Current Developments in the UK: System Building – From Tribunals to Administrative Justice” in Adler (ed) *Administrative Justice in Context* (2010) 500.

⁶¹ Ch 5 s 3 3 2.

⁶² Ch 5 s 3 2 3 5.

⁶³ Carnwath *First Implementation Review* 35.

⁶⁴ Ch 5 fn 129.

⁶⁵ ‘The Conservative-Liberal Democrat Government has indicated that their reforms of public bodies have two objectives: to reduce costs and increase accountability.’ *Public Bodies Bill* 188 of 2010 Research Paper 11/50 13-06-2011 9.

disagreement that this exercise will necessarily cut costs, especially in relation to the arms length bodies like the AJTC.⁶⁶

7 5 2 2 Tribunals: Cost and Accessibility

The main drive behind the Leggatt report was the restructuring and systemisation of the disparate collection of tribunals which existed in England. The focus was on the needs of the users of tribunals, and the idea behind streamlining and collating tribunals was as much about cost reduction as it was about creating an affordable, accessible and user-friendly system.⁶⁷ Additionally, the purpose of the systemisation of tribunals was to improve the initial decisions of administrators and so to progressively move towards a more efficient administration. Thomson states that ‘the theme that underpins the reform of tribunal and administrative justice is system-building...the system is to be subject to oversight and the twin concerns are to put things right and get things right first time.’⁶⁸

In order to achieve this accessible and affordable system, First-tier Tribunals were created whose focus is on dispute resolution. Informality and flexibility of tribunal procedures was considered a key aspect of speedy resolution, as well as the incorporation of non-judicial mechanisms of review, such as the role of alternative dispute resolution.⁶⁹ To preserve a level of judicial certainty and to promote the role of judicial independence, the Upper Tribunals were given overarching supervision and appeal jurisdiction on questions of law. The Upper

⁶⁶ ‘Previous attempts at reform of arm’s length government in the UK have tended to focus on reducing the numbers of ALBs. Ongoing focus on cost is clearly inevitable in the current fiscal climate and some functions performed by ALBs may be considered no longer to be affordable. But, based on historical experience, an excessive focus on the number of bodies will be unlikely to yield long-term improvements to arm’s length government, and it neglects the fact that ALB spending is concentrated in just a handful of larger bodies. Restructurings can be an effective way of achieving economies of scale but, given the costs and disruption involved, care should be taken to ensure that any such moves are justified by a clear business case...’ Gash Institute for Government *Read Before Burning: Arm’s Length Government for a New Administration* (2010) 52. Arms length bodies are bodies whose day-to-day decision making is independent from government, although ministers are ultimately responsible to Parliament for their independence, effectiveness and efficiency.

⁶⁷ For a detailed explanation of the processes involved in the restructuring of tribunals, see Thomson “Current Developments in the UK” in *Administrative Justice in Context* 485.

⁶⁸ Thomson “Current Developments in the UK” in *Administrative Justice in Context* 499.

⁶⁹ See Le Seuer “Courts, Tribunals, Ombudsmen, ADR: Administrative Justice, Constitutionalism and Informality” in Jowell & Olivier (eds) *The Changing Constitution* 6 ed (2007) 317 for a more complete explanation of the relationship between informality, ADR and tribunals.

Tribunal was also created to alleviate the massive burden on the upper courts.⁷⁰ An important lesson of English tribunal reform is the two-tiered structure of appeals, which allows for both rapid and simplified dispute resolution and more complex, formalistic dispute resolution within the same overarching structure. This approach has been shown to work in South Africa too, especially in the tiered dispute resolution found in the tax and competition tribunal structures.⁷¹

The success of the English reforms can also be attributed to their phased implementation. The disparate collection of tribunals were gradually upgraded and systemised through coherent and well-planned strategic movements, rather than displacing them entirely and beginning with a new system from scratch. Carnwarth points out that

the key to realising the benefits of the new arrangements, while maintaining the quality of decision-making and the confidence of users, is to proceed gradually, adapting and building on the strengths of the system as it is, rather than by dramatic change. The legal and administrative changes required to establish the new tribunal structure are necessarily complex. However, our aim should be to achieve these changes with as little disruption as possible to the experience of ordinary users.⁷²

This is an important consideration to bear in mind, especially in light of the three highly-functional tribunals in South Africa. There is scope to widen the jurisdictions of these tribunals, to gradually phase in a more coherent and general tribunal and to draw from their current success stories in order to progress to a more efficient system of tribunals.

7 6 Conclusion: Advantages and (outweighed) Disadvantages of Tribunals

The South African government currently spends, indeed wastes, a significant amount of taxpayer money on administrative law litigation.⁷³ Due to the limitations of judicial review as outlined above, even after the high costs of litigation and the long duration of court proceedings, the results achieved may still be unsatisfactory. Furthermore, judicial review is

⁷⁰ ‘Over time the Upper Tribunal should come to play a central, innovative and defining role in the new system, enjoying a position in the judicial hierarchy at least equivalent to that of the Administrative Court in England and Wales.’ *Tribunals Transformed* 20.

⁷¹ See Ch 6 s 3 1 4.

⁷² *Tribunals Transformed* 56.

⁷³ See Ch 2 s 3 2 4.

unsuited to giving effect to systemic administrative change and the improvement of initial decision-making.

Two other commonwealth countries, also concerned with the negative and retrogressive limitations of judicial review, have begun to move away from the traditional court model for the resolution of administrative disputes. Both Australia and England have indicated a preference for the important role of tribunals in the administration of disputes. Tribunals have been shown to offer the advantage of being speedier, cheaper, more efficient, more participatory and more accessible than traditional courts. These advantages contribute to tribunals being a more available resource for lay people or people without sophisticated legal knowledge, and provide wider access than courts.

What is clear from the discussion of the English and Australian models is that there are a few important trends which need to be applied universally to ensure a sustained tribunal reform and a system which will provide a higher level of administrative redress than the overburdened and institutionally inept courts currently do. These have been described in detail above, but relate specifically to co-operation among government departments and tribunals; open and accountable systemic change; the need for supervision and evaluation of the whole of administrative law by an independent and competent body; and ultimately a focus on the needs of users of the services of the state.

At the same time, there are arguments against the establishment of administrative tribunal reform. These arguments relate to the costs of reform; the ways to establish tribunals; and the level of independence shown by the tribunals. These arguments are especially relevant in the South African context, where the government faces huge social problems and a scarcity of resources. However, from the above analysis of the valuable characteristics of tribunals and the role that they serve in the day to day administration of justice, it is difficult to see how any objections to tribunals can outweigh their potential importance in the administrative justice system.

The need for sustained systematic reform in South Africa is one that cannot be ignored. Tribunals offer a valuable alternative to judicial review for the resolution of administrative disputes, and the value of a comprehensive and coherent structure for the establishment and administration of tribunals is apparent from the above discussion. Furthermore, the tribunal systems of Australia and England have demonstrated how the effective creation and continued use of comprehensive tribunal structures contributes firstly to cost reduction and secondly to

ease the administrative burden on courts who are not suited to cure large-scale administrative error.

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