Victoria's Residential Tenancies Tribunal

Renovate or demolish?

Andrea Treble

Lynda White

Can the Residential Tenancies Tribunal conduct fair and unbiased hearings?

Andrea Treble and Lynda White are solicitors with the Tenants Union of Victoria.

The Residential Tenancies Tribunal (RTT) was established under the *Residential Tenancies Act* 1980 (Vic.) to hear and determine disputes arising in relation to residential tenancy agreements in Victoria. The aim was to provide an accessible, inexpensive and speedy dispute resolution process, and these goals have largely been achieved. Application fees to the RTT are $10 for either party, legal representation is restricted, and an award of costs is rare. The financial disincentives which potential litigants usually face are not generally an issue in this jurisdiction, and do not hamper the parties' ability to initiate or defend actions.

A hearing at the RTT can usually be listed within four to six weeks, with provision for urgent matters to be given priority listing. While the majority of hearings take place at the tribunal's city location, sittings are regularly held at regional and country locations, so that landlords and tenants in outlying areas are not discriminated against in their access to the tribunal.

However, there have been continuing concerns about a number of matters relating to the RTT, in particular its ability to conduct hearings which are perceived by participants as fair, just and unbiased.

Furthermore, the RTT is overwhelmingly used by landlords, predominantly for the purpose of obtaining vacant possession. Over 90% of applications are made by landlords, yet they make no contribution to the costs associated with running the tribunal, other than the $10 fee which all applicants must pay. Most of the money required to operate the tribunal comes from the Residential Tenancies Fund, which is the interest tenants forgo on their bonds.

Independence of the RTT

The Law Institute of Victoria has suggested that the RTT in its current form should be abolished, to be replaced by a specialist division within the structure of the Magistrates Court.[1] Such a proposal must be greeted with grave concern. Michael Schilling in his recently released *Review of Fair Trading and Business Affairs* noted that:

> care must be taken to ensure that the accessibility of tribunals is not affected by an environment which has previously, by necessity, relied on formality and an adversarial approach.[2]

Indeed, it has been found that where RTT hearings in country areas have been held in Magistrates Court buildings, the surroundings have acted as a major impediment for participants in the conduct of their case.[3] Both parties find the informality of the surroundings and the proceedings allow them to feel at ease to properly present their case.

Further concerns about such a proposal include:

- the impact on pre-hearing procedural requirements;
- the costs associated with conduct of the matter in the Magistrates Court;
- the potential necessity for legal representation should a more formal adversarial approach be adopted; and
- the impact on waiting times.

It is clear that the RTT was designed to overcome just these problems, and that the introduction of measures such as increased costs or the necessity for legal representation will effectively deny the average tenant access to legal redress.

In April 1986, the Attorney-General's Advisory Committee produced a *Report on the Future Role of Magistrates Courts*, which weighed the arguments for transferring the jurisdiction of the RTT to the Magistrates Court. Specifically, the committee looked at the potential for conflict between executive and judicial functions given the location of the tribunal within a government department, and viewed this criticism as unjustified.[4] The committee also concluded that there was no duplication of functions between the Magistrates Court and the tribunal and that the method of dispute resolution in the court system was so markedly different from that of the tribunal as to make the court inappropriate as a dispute resolution forum in the area of residential tenancies. It noted that:

> The [Magistrates] Court could not provide the same range of dispute resolution services, nor could its personnel respond immediately to the requirements of such jurisdictions.[5]

Despite the introduction of pre-trial conference and arbitration procedures in the Magistrates Court, the same reservations are valid today. Specialist counter staff at the RTT play a key role in advising users about making an application, ensuring that all necessary paperwork is completed and attached to the application and, importantly, ensuring that the application is within the correct jurisdiction and has been made under the correct legislation.[6] Court registrars with their responsibility for proceedings on a wide range of matters would not have the time or the specialist knowledge to assist users in this manner. This may result in increased waiting periods and also increase the administrative costs involved in processing applications.

Procedure regulating the RTT

The *Residential Tenancies Act* 1980 sets out the procedural requirements regulating the tribunal. It is required to abide by the rules of natural justice, but is otherwise not bound by the rules of evidence or procedure. It 'may inform itself in relation to any matter in such manner as it thinks fit' (s.32(4)) and 'may regulate its own procedure' (s.30(1)(b)). It is not bound by precedent.

Clearly the intention of providing such flexibility is to allow the tribunal to tailor the conduct of hearings to suit the capabilities of the parties appearing before it, and to ensure that referees are able to adopt a more inquisitorial role where the circumstances might require it. The RTT, if it believes it is reasonable to do so, is also able to take such steps as it thinks fit to achieve a settlement of the issues without proceeding to hear and determine the application.

Experience suggests that the quality of justice can sometimes be compromised by the informality of the tribunal process. Certainly, many tenants come away with a negative view of the tribunal, believing they have not obtained a fair hearing. Many claim they have been denied their procedural rights (for example, that the tribunal has refused to provide written reasons for decision on request, or has refused to consider relevant evidence). It is often reported that the tribunal member has made biased or inappropriate comments. These concerns are not only expressed by tenants. Legally qualified and lay advocates have reported similar difficulties. The lack of precedent combined with the lack of procedural control has resulted in inconsistent decision making. It is often difficult to advise tenants as to the merits of their case given the unpredictable outcomes at the tribunal.

A position paper produced by the Law Institute on the Statutory Regulation of Tribunals in 1989 identified a number of problems relating to tribunals in general.

> Adequate notices of claims are not given, matters are raised in a claim not covered in the notice, little opportunity is given to provide answering material to a claim before a hearing, expressions of obvious favour or prejudgment are made, many tribunal members tend to take over . . . full reasons for decisions are not always given and written reasons are not always available or, if given, often differ from previous oral reasons or are incomplete.

The paper goes on to say:

> Too often we have found that the quite laudable objective of reducing usual formalities has been allowed to be taken too far, with the result that administration of the tribunal is too open to abuses which those formalities sought to guard against.[7]

Both the Law Institute and State Government policy advocate the introduction of procedural regulation of tribunals generally and the need for such regulation in regard to the RTT cannot be denied. However, it is imperative that the content of such regulation retains sufficient flexibility to ensure that users are not alienated by the process, and that the accessibility of the tribunal is not diminished by cost factors, including the need to retain a legal representative.

Some possible reforms

A guide to the operations of the tribunal

The RTT should produce a publicly available guide which describes in full its practices, procedures and the rights of all parties affected by its decisions. Such a guide should include as many details as possible to assist in the preparation of a case, and include information about use of witnesses, availability of interpreters, rights to representation, rights to written reasons for decision, adjournments, consequences of non-attendance, where assistance may be obtained, etc.

In addition, important decisions should be publicised. A regular newsletter, such as that produced by the RTT in New South Wales, distributed to relevant government departments, community and industry groups, would assist those groups to properly advise potential users. It would also promote consistency of decision making.

The RTT should be required to provide annual reports detailing its activities. Previously it has provided only a very brief contribution to the annual report of the (then) Ministry of Consumer Affairs.

Notice of claim

In many situations the Notice of Hearing will be the first notice a party receives of an applicant's claim. It is imperative that adequate notice of claim be provided to a respondent to enable proper preparation for a hearing. The notice should contain an adequate explanation of each of the claims without overly formalising the process. Where adequate notice of claim has not been provided, or where a claimant wishes to introduce additional claims on the day of the hearing, the RTT should make directions accordingly and adjourn the matter to a further date. The Tenants Union is aware of cases where undue pressure has been placed on the tenant to have a new matter dealt with by consent, presumably in the interests of having the dispute resolved once and for all. Such a practice is entirely inappropriate in a forum where parties are unrepresented. They will not feel confident to resist such pressure, nor will they be prepared to meet any new claims.

An adequate period of notice of hearing should be prescribed to ensure that respondents have sufficient time to prepare their cases and to seek advice if necessary. Flexibility in the case of urgent hearings would be required and an indica-

tion of the matters to be regarded as urgent and listed accordingly would be advantageous as there appears to be some inconsistency in the listing of matters on an urgent basis.

Adjournments

The procedure for obtaining an adjournment prior to hearing needs to be clarified, as do the circumstances in which an adjournment should be granted as of right, for example, where insufficient notice of the hearing has been given, or where a party has requested an interpreter to be present at the hearing, and one is not available.

The conduct of the hearing

In the United Kingdom it is the role of the Council on Tribunals to 'set practical guidelines as to how tribunals should operate and in what environment'.[8] The Council recognises that individuals appearing before a tribunal may suffer from very real anxieties, and therefore the way in which a hearing is opened is crucial. The Council recommends that the introduction of the hearing must include: the identification of the member hearing the matter, an explanation that the tribunal must apply the existing law, and, most importantly, an outline of the order of the hearing, while indicating that there will be flexibility to ensure that all relevant evidence is presented and tested. Further, the tribunal should be required to identify all parties and witnesses and make them aware that there are alternatives to taking an oath on the Bible, for example that the Koran is available, or that affirmation is acceptable.

A definite order of events promotes clarity and enables the parties to feel that the hearing is being conducted in an orderly and understandable fashion. There will be circumstances where this will present a problem for an unrepresented party and therefore some flexibility must be maintained.

The parties must be entitled to give their evidence, call witnesses, question any witnesses and address the tribunal both on the evidence and generally on the subject matter. The tribunal should not be bound by the rules of evidence and should be able to take into account evidence which would be inadmissible before a court of law, but it should not refuse to admit and consider any evidence which is admissible at law. The impression that one party has an advantage or that the case is sewn up from the start must be avoided at all costs.[9]

It is important that tribunal members allow the parties to present all their evidence:

> In fact a legalistic approach is to be avoided throughout. Interrupting the parties tends to be counterproductive: often their apparent irrelevancies turn out to be important, and the gaps they leave can be filled in when they have finished . . . [Tribunal members should] be firm and yet courteous and patient.[10]

A common complaint from tenants is that the tribunal member was obstructive and did not allow them to put their case adequately.[11] Such matters may be beyond the reach of specific procedural rules, but the introduction of adequate training for members, especially in the skills necessary to promote an informal and equitable environment in the hearing room, would go a long way towards addressing these problems.[12] In addition, a written detailed procedural guide should be provided to all members.

The requirement to promote settlement

Section 25 of the *Residential Tenancies Act* empowers the RTT to take such steps as it thinks fit to achieve a settlement of the issues. This section of the Act should be removed, and procedural guidelines introduced to prevent abuse. It may be appropriate to stand a matter down to allow negotiation between parties, but there have been many reports from tenants who have accepted a settlement proposal because they believed they were subjected to undue pressure by a tribunal member. Tenants often state that they were made to feel that they had no real choice, that the tribunal had already reached a decision and that they would not be able to put their case in full if the matter proceeded. This should clearly not be the role of the tribunal, especially when other services are available to assist with negotiation or provide conciliation.

Witnesses

It should be a requirement that witnesses wait outside the hearing room until called to give evidence. Allowing witnesses to remain in the hearing room before giving evidence creates a perception of bias.

Representation

The issue of representation is problematic in the area of residential tenancies. The *Residential Tenancies Act* allows legal representation where:

- the parties agree;
- the other party to the proceedings is a body corporate or a qualified legal practitioner;
- the proceedings relate to an order for possession; or
- the tribunal is satisfied that a party ought to be represented (s.44(2)).

A lay advocate may represent a party where the Tribunal deems it appropriate (s.44(3)).

Landlords are usually represented by estate agents who will ordinarily have some degree of familiarity with the tribunal. They will be allowed to act as a representative if they have had the day-to-day management of the tenancy. In these circumstances it may seem appropriate to remove the restrictions on legal representation. However, it is also clear that the cost of legal representation is beyond the resources of most tenants and that the removal of restrictions may therefore create an unfair advantage for landlords, who, in the main, have greater monetary resources at their disposal. An appropriate compromise would be to retain the current restrictions on legal representatives, while removing the restrictions on representations by lay advocates, given the prevalence of estate agents already acting in matters at the tribunal. This would ensure that tenancy advice workers appearing on behalf of tenants are not excluded. Currently they must show special circumstances before they are allowed to appear.

The decision

Currently the obligations of the RTT in relation to written reasons are governed by the *Administrative Law Act* 1978 (Vic.). Written reasons do not have to be provided unless they were requested before or at the time of the giving of the decision. At no point in the process are parties advised of the right to request written reasons, and, where parties have requested them, they have reportedly been dissuaded or refused.

Where a decision is not reserved, the tribunal should be obliged to provide reasons for its decision at the conclusion of the hearing. In addition, it should be required to provide written reasons for decision in all cases. The tribunal has consistently argued that this would result in an administrative overload. However, they would not be expected to provide a long and precise account of their reasoning. A short and concise

statement in clear language indicating to the parties why a particular order has been made is all that is required.[13] Such procedures would promote confidence in the tribunal process, and encourage better and more reasoned decision making.

Right to have a matter re-heard

A party may only apply to have a matter re-heard where he or she was not present or represented at the original hearing and had a good reason for failing to appear (s.41). A party can also apply to have a determination rectified if it contains a clerical error (s.39A).

It would be appropriate to extend the right to apply for a review to situations where: the decision has been made as a result of an error on the part of tribunal staff; new evidence has become available since the conclusion of the hearing, the existence of which could not have been reasonably known at the date of the hearing; or where the interests of justice may otherwise require.

Rights of appeal

Currently, parties wishing to appeal a decision of the RTT are limited to seeking an Order to Review in the Supreme Court under the *Administrative Law Act* 1978 on the grounds of lack of jurisdiction or denial of natural justice. The right of parties to appeal a question of law remains in doubt. The Supreme Court has rejected the argument that prerogative relief can be obtained under Order 56 of the Supreme Court Rules.[14] The current situation should be rectified immediately to allow for a right of appeal on a question of law under the *Administrative Law Act*.

It is true to say that many injustices go unremedied because of the prohibitive costs involved in Supreme Court proceedings. However, the question of whether the Supreme Court is appropriate as the sole avenue of appeal is more perplexing. There is an obvious need to limit rights of appeal, in order to maintain the benefits of a speedy and low cost jurisdiction. In addition, it is unlikely that tenants will have adequate resources to institute appeals.

If the right of appeal is broadened to allow, say, general appeals to the Magistrates Court (as suggested by the Law Institute)[15] this may well add to the fears already faced by tenants in pursuing their rights. Fears of rent increases, evictions, and tenant 'blacklisting', as well as trepidation about the tribunal process itself are very real concerns. To introduce the possibility of becoming embroiled in an expensive appeal process would inhibit tenants from instituting action through the tribunal.

It would be far better to implement the suggested procedural improvements and training programs, thereby improving the quality of hearings, consistency in decision making and also restoring public confidence in the RTT.

The suggestion made by the Law Institute that proceedings be tape-recorded, so that the record could be used for a review if necessary, also merits some consideration. This may be a cost-effective method for protecting tribunal users' rights.

Should a more accessible appeal mechanism be considered necessary, a possible alternative would be to allow an appeal to a three member panel of the RTT, comprised of the chairperson and two senior members. Application fees should be affordable but high enough to dissuade parties from lodging appeals arbitrarily. Cost penalties could apply where applications are vexatious or frivolous.

Conclusion

An overhaul of the RTT is clearly in order, and procedural regulation would seem to be an appropriate answer. Much can be learnt from the experience of the United Kingdom and the operations of the Council on Tribunals which has during the past 30 years translated the ideals of the Franks Report into practice, and has recently released a report containing 'Model Rules of Procedure for Tribunals'.

It is to be hoped that the regulations when introduced do not take away any of the benefits of a tribunal system, in particular its accessibility. It must be stressed that any discussion of reform of the Residential Tenancies Tribunal must take into account and redress the current inequitable arrangements for funding its operations.

References

1. Law Institute of Victoria, Position Paper, *Statutory Regulation of Tribunals*, December 1992, p.5.
2. Schilling, Michael, *Review of Fair Trading and Business Affairs*, Department of Justice, Victoria, February 1993, pp.90-1.
3. The Residential Tenancies Review Steering Committee found that the tribunal tended to be overly formal in its physical setting and 'this effect is compounded whenever hearings occur in Magistrates Courts and that tenants in particular are intimidated and therefore disadvantaged by this formality'. See Ministry of Consumer Affairs, *Review of Residential Tenancies Functions and Services*, 1989, p.99.
4. The RTT was recently removed from the umbrella of the Office of Fair Trading, to the Attorney-General's Department in response to such concerns.
5. Para. 4.14, p.23. The Committee was referring to both the RTT and the Small Claims Tribunal.
6. The RTT currently has jurisdiction to deal with applications under the *Residential Tenancies Act* 1980 (Vic.), the *Rooming Houses Act* 1990 (Vic.) and the *Caravan Parks and Movable Dwellings Act* 1988 (Vic.).
7. Law Institute of Victoria, Administrative Law Section, Position Paper, *Statutory Regulation of Tribunals*, 1989, p.1.
8. Sayers, Michael and Webb, Adrian, 'Franks Revisited: A Model of the Ideal Tribunal', (1990) *Civil Justice Quarterly* 36 at 44.
9. These rules are recommended by the Council on Tribunals in *Model Rules for Procedure for Tribunals*, Report, London, HMSO, 1991, Cm 1434.
10. Sayers, M. and Webb, A., above, p.44.
11. See Tenants Union of Victoria survey 1987 (Wilson) which found: 'some 16 referees were observed at 44 hearings. To the credit of referees, in 49% of cases they were observed to be "helpful" or "very helpful" to both parties. However, in 6% of hearings their attitude was observed to be "obstructive" or indeed "very obstructive". In the remaining 45%, referees were seen as neither helpful nor obstructive.'
12. See also Ministry of Consumer Affairs 1989, above, Recommendation 62.
13. At present it is common to see written determinations, which state only that the 'Application (was) dismissed'. See also Ministry of Consumer Affairs 1989, above Recommendations 50, 51 and 52.
14. *Director of Housing v Turner* (unreported, Vic. Supreme Court Practice Court, decision 1992).
15. Law Institute of Victoria, 1992, ref. 1, above, p.13.