Representing tenants

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Tribunals have the capacity to provide quick and inexpensive final judgements but at what expense to justice?

Ever since Cicero, progressive civilisations have not only struggled with the notion of justice itself, but also with the practical forms that the provision of justice could take. With the diversifying society's awareness developing, there has been a recognition of the natural right which 'justice' entails, and the need to extend this right to those previously denied, who unfortunately represent a significant proportion of Australia's population. The introduction of tribunals or small claims courts into the Australian judicial system, is one such attempt, which has enormous potential for extending general access to justice.

One such Tribunal is the New South Wales Residential Tenancies Tribunal (RTT), established by the NSW *Residential Tenancies Act 1987,* and dealing specifically with disputes between landlords and tenants. Of all the tribunals established, the RTT appears to have potentially the greatest influence over society, as its decisions can deny a person/family one of the basic rights of human existence — shelter. The nature of the restricted representation allowed before the tribunals has combined with a lack of procedure and consistency to create severe disadvantage in the pursuit of justice in many cases.

The NSW Residential Tenancies Tribunal

In 1986 through legislation introduced by the NSW Labor Party, the NSW RTT was created to deal with unfair rent increases. Additional functions were given to it by the *Residential Tenancies Act 1987.* On the election of a Liberal Government in 1988, the Act was altered to its present form, the changes resulting in a much less tenant-oriented tribunal despite reference to the South Australian and Victorian examples.[1] The RTT has jurisdiction over tenant/landlord disputes covered by the Act, notably termination of tenancies, bonds disputes up to $20,000, and repairs and compensation up to $5000. As with the majority of tribunals, the RTT objective is to determine applications quickly, inexpensively, in a manner which is straightforward, fair, unbiased, and in accordance with the law and with justice, and, where possible, to determine applications by conciliation rather than adjudication.[2] Small claims tribunals have only limited appeals to a higher court, usually only on points of law or denial of natural justice. Tribunals are also not bound by precedent in order to achieve flexibility and cater for the varied possibilities each case seems to represent. This can, however, result in inconsistency in decision making and in interpretation of the legislation.

As the Chief Justice of the High Court, Sir Anthony Mason, recently admitted, the cost of the law is now beyond the reach of most Australians.[3] Tribunals, in general, were designed to remedy this, and offered a method which in theory was quite appealing in the effort to extend justice. One area of ongoing controversy with tribunals has been that of representation. Can justice be achieved when one party is unable to adequately inform the Tribunal of relevant information. The informality of the Tribunal, which creates a more relaxed atmosphere, often prevents justice being done because of the lack of tenant repre-

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sentation. The reality is that the RTT has followed the path of the legal system it sought to avoid by allowing specialist advocates to appear for landlords. Representation is not allowed for the tenant but given as a right to the Department of Housing, and landlords whose property is managed by estate agents.

In NSW, even where a tenant faces eviction, he or she will more often than not have to present their case against the landlord's representative, a quasi-legal real estate agent.[4] In public housing matters before the Tribunal the Department of Housing employs specially trained advocates, who, like real estate agents, have extensive 'experience' in appearing before the Tribunal. Agents receive attention from the 'Compliance Section' of the Tenancy Commissioner's Office which, through monthly meetings, educational seminars and information sessions, accompanied by routine visits to estate agents, provide the landlord's representative with a 'program [whereby] any misunderstandings or gaps in the knowledge of the law can be overcome'.[5] While these regulatory and educational activities are commendable, and agents gain a greater knowledge and experience of the practices and procedures of the Tribunal, there is no such system for tenants to gain such knowledge or experience. This imbalance effectively results in the RTT negating its primary objective of extending justice to ordinary Australians.

Use of the RTT

Present access strategies are uncoordinated, poorly designed, and in some cases contain the wrong information.[6] This is due to inadequate use of the Tribunal's funds on a general community education strategy. Tenants, in general, are unaware of the RTT, or are ignorant about procedures, resulting in a hesitancy to become involved which is amplified by a fear and mistrust of authority.[7] In the first year of the RTT's performance, over 600 applications were lodged. Only ten were from tenants, which strongly suggests tenants were unaware of the tribunal or their rights.[8] Statistics such as these have been consistent throughout the existence of the RTT. Evidence of this is present in the statistics used in the Tenancy Commissioners 1994 Annual Report and from a survey released by the Tenants Legal Working Party in 1990 (in brackets below). Both demonstrate the lopsided use of the Tribunal by landlords, the unequal state of representation, and the seriousness of matters dealt with. Landlords received a far higher degree of representation at hearings, being represented in 68.6% (76.5%) of hearings, against the tenants receiving 1% (7.5%) representation in hearings at the RTT. Most applications to the Tribunal are lodged by landlords 85.7% (67.5%), and most landlord applications are eviction related 57.8% (58.7%). These figures are reinforced again through statistics released in the Mant report (p.19) which displayed an extremely high usage of the Tribunal by landlords, and a 61% termination of tenancy rate out of the total number of applications. There appears to be inadequate funding for the distribution and promotion of educational materials and access strategies, while at the same time the budget is underspent, and cut as a result.[9] This is occurring while some community workers do not know of the existence of the RTT, and while the RTT acknowledges this fundamental problem, stating that if it had the 'expertise', public education would be given a greater priority.

In the year July 1990–June 1991, 8375 applications were lodged for termination and possession orders: 8567 such orders were actually finalised that year. This is a positive difference of 192![10] These statistics, combined with the consistent 'success' rate of over 90% for first hearings since the establishment of the Tribunal, highlight the lack of balance in the structure of the Tribunal process, which, although acceptable to the landlords, appears to be extremely disadvantageous to tenants.

The current nature of representation

Impressively s.94 of the *RTT Act* begins by clearly outlining the extent of representation allowed, which hinges on the requirement that the parties are to remain 'equal', that one party is not to be disadvantaged presenting their case by the other party receiving representation. However, this 'equality' is quickly demolished in s.94(3c) of the Act which allows the landlords to be represented by experienced quasi-legal personnel in the form of professional real estate agents and Department of Housing Advocates, while denying the tenant any general right to representation.

Some proposed changes

The current restrictions of legal representation should be maintained, as the introduction of the legal profession would result in an obvious increase in legal technicalities and also in the search for justice being located in wealth. The answer to the dire need of tenant representation, which is applicable to landlords also, presents itself in the form of unconditional semi-professional lay advocacy; if not unconditional representation, then at least for the graver matters such as eviction, which is already allowed for in the Victorian *RTT Act*. This would address the negatives of legal representation, while also providing people with adequate skills and knowledge of the Act and Tribunal proceedings to act on behalf of the tenants, in a similar capacity to estate agents.[11] The introduction of such lay advocacy would result in tenants presenting their cases effectively, and could also result in proceedings before the Tribunal being dealt with faster, as the parties are better informed, enabling the RTT to function better and reduce costly delays. The establishment of lay advocacy with an accompanying structure, could be provided for through allocations from the Rental Bond Board's (RBB) $100 million dollar surplus — effectively using money provided by the tenants to benefit the tenant, which as Mant points out was always the intention of the RBB.[12] The RBB did contribute $2.2 million in 1994 to the establishment of a 'Tenants Advice and Advocacy Program' (TAAP). However, while TAAP is a step in the right direction, as it provides a community-based information and support service about the Tribunal, it fails to address the problems of representation effectively.

One source of lay advocates could be final year law students. Students are not only aware of the personal impact of the legal system, but also 'no less able than an inexperienced solicitor, and have the benefit both of an enthusiasm for a task which may be uninspiring for a regular litigator, and of a considered and supervised preparation'.[13] Student participation would serve the dual purpose of providing a significant and unique contribution to a student's legal education, through demonstrating the nature of a specialised area of jurisdiction, while also providing a necessary service for a tenant.

Need for education

Education is not only a vital act of informing and educating the relevant parties of their rights, but also crucial in installing confidence and trust in the system of redress. The importance of an extensive education program in the search for justice is self explanatory, as Clark adeptly notes:

> A necessary precondition to the achievement of access to justice is an awareness by the disputant that the Small Claims Court

exists. Having the best system in the world will be of little avail if people do not know about it'.[14]

The Tenancy Commissioner is under a clear obligation under s.118(c) of the *RTA* to distribute information about the Act and service provided for landlords and tenant. While the current attempts by the Tenancy Commissioner to inform and educate tenants about the Tribunal and *their* rights are commendable, they still fail to effectively inform tenants of their rights under the Act. Funding of a concentrated advertising program designed to reach the tenant could be achieved through the Tribunal taking full advantage of its allocated budget. Evidence of the success and effectiveness of such a program can be seen in similar efforts used in other tribunals — one of which concentrated on a particular Melbourne suburb and resulted in 'a disproportionately high number of claims being lodged'.[15]

For tribunal members to fulfil their obligations of providing assistance to parties appearing before them, they need training to enable them to recognise and comprehend economic, social and cultural barriers. This must be accompanied by training in how to interact appropriately with parties appearing before them, in a manner which is not intimidating. To help achieve consistency and an appearance of unbiased decision making, responsibility for members should be shifted from the Department of Housing, to an external body such as the Judicial Commission as suggested by Mant (pp.50-52). Thus their training and supervision would be effectively covered under ss.9 and 10 of the *Judicial Officers Act 1986* (NSW), which outlines the powers of the Commission in relation to the organisation, supervision, education and monitoring of bodies under its jurisdiction. Such a process would result in the maintenance of higher standards within the Tribunal, as it would promote consistency in the procedures of the Tribunal and in the interpretation of the Act.

Conclusion

At present it appears that justice and equality have been compromised for the sake of efficiency and convenience. While landlords are content with the present situation of representation, the tenant's plight needs attention. So much is at stake for the tenant. What has to change is the atmosphere of the RTT and the way in which the tenant's case is presented. The suggested changes, most importantly the establishment of unconditional representation, advertisement, and the education, training and responsibility to an external body of members, could well make the RTT the instrument it was intended to be.

Example of the 90+% success rate in first hearing at the NSW Residential Tenancies Tribunal

The decision was handed down with consent from the tenant that she had breached her tenancy agreement through the non-payment of rent of her low income Department of Housing accommodation. The tenant agreed to pay the sum of $221.70, within three days, which if not complied with would result in the landlord being given the right to termination. The tenant voluntarily consented to this order, despite the impossible task of paying an amount of money which she knew she would not have. What was not disclosed during the hearing, despite a letter detailing the tenant's plight written by a social worker for the tenant (the presentation of which by the tenant to a tribunal officer was debated), was her particular situation. This was a result of both the intimidating atmosphere of the Tribunal and the lack of guidance for the tenant, but also of the failure of the Tribunal to fulfil its obligations under ss.87(2) and 109(1) of the Act, which demand that parties are to be given a reasonable opportunity to present relevant evidence, and that the Tribunal use to use its best endeavours to gain an acceptable settlement. The tenant was clearly intimidated by the procedures and surroundings of the Tribunal, and effectively was not able to present and explain her circumstances.

The reality of the situation was that the tenant was on a sole parent pension of approximately $460 a fortnight, and had two children, one a baby under 12 months and the other three years old. Due to other financial demands, such as payment for methadone treatment, for outstanding warrants, and for childcare, the tenant was left with approximately $230 a fortnight to support her family. Thus, for her to agree to the order, she would clearly be left with an insufficient amount of money to cater for the needs of her family, even if the payment date in three days time fell just after the fortnightly payment of the sole parent pension. With the impossibility of fulfilling the order the tenant was agreeing to eviction.

This result would have been just another 'successful' first hearing statistic in the dealings of the Tribunal, had it not been for the persistent social worker, who had written the first letter explaining the situation. However, on hearing from the tenant of the Tribunal's order, the social worker was able to take steps which resulted in the tenant agreeing to pay the outstanding amount over the next month and a half, after each pension pay day, until two weeks in advance of the due rent. She also agreed that if this agreement was broken the Department of Housing could take action against her. This was an acceptable agreement to both sides which wasted the time of both the Tribunal and the social worker, and which could have been overcome through the introduction of semi-professional lay advocates for tenants.

References

1. Creek, S., *Report of the Residential Tenancies Tribunal* Sydney, 1988, Postscript.
2. Mant, J., *Certain Customer Service Bodies Under the Responsibility of the Minister for Housing*, Sydney, 1993. See also the *Part-Time Members of the RTT Appointment Criteria* p.3.
3. Montgomery, B., 'Chief Justice Loosens the Shackles of Silence on Judges', *Australian*, 1.10.93, p.1.
4. As opposed to the Victorian *Residential Tenancies Act 1980,* which allows tenants unconditional representation in all eviction cases.
5. Report of the Tenancy Commissioner for the Year Ending 30 June 1991, p.5.
6. *Migrant Access to Tenants' Services*, a Report by the Tenants' Union of NSW, August 1993, p.5.
7. Clark, E.E., 'Public Ignorance and the Small Claims Court', (1993) 18(5) *Alternative Law Journal* 226-7.
8. Fitzgerald, J., *Contribution to the Residential Tenancies Report*, 11 December 1990, Legal Aid Commission of NSW, and Tenants Legal Working Group, p.2.
9. *Migrant Access to Tenants' Services*, Tenants' Union Report, p.26.
10. Report of the Tenancy Commissioner for the Year ending 30 June 1991, p.9. The pervious year's Report also encouraged the continuation of the 90% 'success' rate of dealing with matters in their first hearing.
11. An idea also expressed by Treble, Andrea and White, Lynda, 'Victoria's Residential Tenancies Tribunal: Renovate or Demolish?' (1993) 18(4) *Alternative Law Journal* 165; and Creek, above, p.xi.
12. Mant, above, pp.54 and 62. Also in *Migrant Access to Tenant's Service*, Tenant's Union Report, p.8.
13. Rice, S., 'Notice of Appearance', (1991) 2(3) *Polemic.*
14. Clark, above, p.226.
15. Yin and Cranston, 'Small Claims Tribunal in Australia' *Small Claims Courts: A Comparative Study*, Oxford, 1990, p.66.