



# ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE  
ATTORNEY-GENERAL

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## STUDENT ASSISTANCE REVIEW TRIBUNALS

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## INTRODUCTION

1. The functions of the Administrative Review Council are set out in section 51 of the *Administrative Appeals Tribunal Act 1975*. The Council is specifically empowered to make recommendations to the Attorney-General on tribunals which review administrative actions. Recommendations may cover their appropriate jurisdiction, constitution and procedures, and may also concern the question of incorporation of existing tribunals into the Administrative Appeals Tribunal (AAT). The Council has adopted a project on Commonwealth administrative tribunals, the object of which is to identify existing Commonwealth tribunals and to consider the appropriateness of a draft code of procedure which has been referred by the Attorney-General to the Council, as well as to consider the matters covered by section 51.

2. In pursuing this project the Council is first concentrating on the review tribunals. A number of tribunals are presently being considered. This report states the Council's conclusions and lists recommendations arising from its study of Student Assistance Review Tribunals (SARTs). The knowledge gained by the Council in this study will also assist its consideration of the wider project.

3. Members of the Council and its Secretariat have visited SARTs in the Australian Capital Territory, New South Wales, Victoria, South Australia, Queensland and Tasmania. Most visits coincided with full hearing days (5 cases). Extensive consultations occurred between the Secretariat, members of the Council, and the Chairmen and members of the Tribunals. The Department of Education was consulted and preliminary conferences and post hearing discussions of the Tribunals were also observed.

4. The Council attempted to ascertain the nature and volume of complaints that may have been made concerning the operations of SARTs. Information was sought from a number of tertiary institutions in all States (including Australian Union of Students, Universities, Colleges of Advanced Education and Institutes of Technology), student advisers, the Commonwealth Ombudsman and the Department of Education. The result of the consultations indicated to Council that there was a wide acceptance and satisfaction with the way in which SARTs were operating.

5. One general criticism to emerge was that the Student Assistance Regulations are complex and their frequent amendment makes it difficult to be up-to-date on these laws. The Council notes that the major cause of amendments to the Regulations is the great number of courses presently offered by relevant institutions in Australia and the diversity of their course rules. Approved courses are continually altered, discontinued and new courses added. The Regulations have therefore required frequent amendment to provide, for example, for new eligibility criteria. Unless courses can to some extent be regularised within and between institutions, it appears that the Regulations will require frequent amendment, consequently adding to their complexity.

## **PRIMARY DECISION MAKING AND THE CURRENT REVIEW PROCESS**

6. *The Student Assistance Act 1973* (the Act) provides the legislative basis for assistance to students who are Australian citizens or permanent residents. Assistance under the Act may be by way of Tertiary Education Assistance or Postgraduate Awards.

7. Applications for assistance are determined by 'authorised persons'. If an applicant is dissatisfied with a decision of an authorised person relating to an application for assistance (including any decision with respect to any suspension or revocation of assistance) he may, not later than 30 days after the date of the decision or the date upon which the decision first comes to his notice (whichever is the later) or within such further time as the authorised persons allows, request the authorised person to reconsider the decision. The authorised person is required to inform the person of the result of the reconsideration and give reasons for that decision.

8. Upon receipt of notification of the reconsideration decision (or if no notification is given within 90 days of making the request for reconsideration) the applicant may, by notice in writing to the authorised person who made the decision, within 30 days of notification (or the expiration of the 90 days) request him to refer the decision to a Student Assistance Review Tribunal for review.

9. The Act establishes Tribunals (SARTs) which operate in each state. SARTs have power to affirm a decision of an authorised person, vary it or set it aside and make a decision in substitution. There is a SART in each state and the Australian Capital Territory. Each tribunal consists of a chairman and two members. Tribunal members are drawn from a 'pool'. At present there are seven chairmen (one for each state) and seventy-one ordinary members. The procedures of tribunals are within their own discretion; they are required to conduct proceedings with as little formality and technicality as a proper consideration of the cases permit. They are not bound by the rules of evidence. Tribunals decide all applications following a hearing, at which a party may, if the tribunal thinks fit, be represented by another person not being a legal practitioner. Hearings are normally public, although the tribunal has a discretion to hold a private hearing and direct who may be present. Tribunals

have power to summon a person to give evidence and produce documents, and take evidence on oath or affirmation.

10. The general conduct of Tribunal hearings is informal. The majority of applicants appear in person. The hearing is in the form of a round table discussion. Each member of the tribunal takes part in the discussions with the applicant and the departmental representative (who often is the 'authorised person'). Tribunals hear and determine about five cases in a day. Decisions are given orally and a written decision is forwarded to the applicant and the department within a few days.

11. The Council observed that SARTs are working well. Very few complaints of substance have been received concerning their operations. The requirements for a fair hearing in student assistance matters are already generally well met, although the Council considers that there is need for change in some areas, (see below paragraph 18 et seq). SARTs are independent, and seen to be, from the decision-making authority. The Council considers that the present constitution of the Tribunals is appropriate. There is no inordinate delay in the great majority of cases.

12. The attitude of the Tribunals towards applicants is benevolent; members often try to help applicants find grounds upon which eligibility may be based even though those grounds may differ from the basis on which their appeals were made. The tribunals often explain in detail to unsuccessful applicants the reasons why they were not eligible for assistance. This particular function, giving students the satisfaction of seeing their cases independently and sympathetically considered, is more in the area of public relations than adjudication.

13. SARTs are inexpensive tribunals for the number of decisions they produce. The table below indicates the location and extent of SART hearings in 1979.

#### **Student Assistance Review Tribunals Hearings 1979**

<b>Place of Hearing</b>	<b>No. of Half-day Sittings</b>	<b>No. of Sitting Days</b>	<b>Decisions Reviewed</b>
Canberra	4	4	24
Armidale	2	-	5
Newcastle	2	-	4
Sydney	-	18	84
Melbourne	2	20	97
Brisbane	1	8	41
Townsville	-	-	-
Adelaide	4	3	18
Perth	1	4	22
Hobart	2	-	5
<b>TOTAL</b>	<b>18</b>	<b>57</b>	<b>300</b>

The number of cases heard by all SARTs in previous years was as follows:

1978	412
1977	409
1976	388
1975	382

### **INCORPORATION OF SARTS INTO THE AAT**

14. The main question the Council considered was whether to recommend that the jurisdiction currently vested in the SARTs should be transferred to the Administrative Appeals Tribunal. The Council has decided not to make any recommendation to this effect at this time. Although all members of the Council concur in this decision there are some differences in their reasons.

15. As noted earlier in paragraphs 1 and 2, the study of the SARTs is part of a wider project which involves examination of all Commonwealth review tribunals. This wider project will necessitate consideration of the institutional structure for review of administrative decisions on their merits. In particular it will raise the question of whether it is feasible and desirable that the AAT become a general administrative tribunal broadly along the lines envisaged by the Kerr Committee. If this pattern is followed, the AAT would have a very wide jurisdiction embracing all areas of Commonwealth decision making which are to be subject to review on the merits other than those where for special reasons separate tribunals are more appropriate. Other structures are possible and will need to be considered. One alternative model, for example, would involve creation of a small number of tribunals each with its own particular area of jurisdiction into which all existing review tribunals would, except for special cases, be consolidated. If this model were adopted, it would be necessary to consider whether there should be links between the other tribunals and the AAT, e.g. by provision for rights of appeal or for reference of cases to the AAT in specified circumstances.

16. In the opinion of most members of the Council it would be premature to recommend the transfer of the jurisdiction of the SARTs to the AAT before a clear view has emerged as to the institutional structure which is desirable. Other members take the view that the SARTs are working efficiently and economically in a field which presents some special features and that while this continues to be the case, it is undesirable to disrupt the existing arrangements (except for the modifications recommended later in this report).

17. The possibility remains open that in the light of further progress in its study of review tribunals generally, the Council will conclude that the jurisdiction of the SARTs should be transferred to the AAT or to another

tribunal. If so, the Council will submit an appropriate recommendation at that time.

## **SARTS LINK WITH AAT**

18. While of the view that incorporation of the SARTs into the AAT is not at present required, the Council concluded that there should be avenues of reference and appeal in certain circumstances. The AAT should have a supervisory role leading to an improved authority of tribunal decisions in primary decision making and encouraging more consistency in decision making at all levels. These effects would follow from the likely involvement of Presidential members of the AAT in deciding important cases.

19. *Recommendation 1.* Legislative provision should be made for the following arrangements:

- (i) Before a decision is given by a SART, the Chairman of a SART may refer the matter for hearing by the AAT where he certifies that the matter involves an important principle of wide application.
- (ii) After a decision is given by a SART, a party may apply to the AAT for a review of the decision on the ground that the matter involves an important principle of wide application. If the President of the AAT is satisfied that this ground is made out, he may grant the application.

## **PROCEDURES OF SARTS**

20. The Council makes the following recommendations to improve the current procedures of Students Assistance Review Tribunals.

## **Legal Representation**

21. As referred to above in paragraph 9, section 28 of the Act provides that: 'A party to proceedings before the Tribunal may, if the Tribunal thinks fit, be represented by another person not being a legal practitioner'. In the light of the experience of Student Assistance Review Tribunals and bearing in mind that all present Chairmen are legally qualified, the Council considers that legal representation will rarely be necessary and should not become the expected practice. However, the Council is of the view that representation by a legal practitioner should not be prohibited. There may be cases, for example, where an applicant wishes to be represented by a relative who is a legal practitioner. Legal representation may occasionally be of assistance to SARTs in cases involving statutory interpretation.

22. *Recommendation 2.* Section 28 of the *Student Assistance Act 1973* should be amended by deleting the words 'not being a legal practitioner'.

## **Access to Information**

23. Access to all relevant material is necessary to ensure that rights of appeal are effective. An applicant should be in a position of having full reasons referring to all relevant material before he decides whether to appeal. Once he has appealed he should receive all such material in advance of a hearing to allow him to prepare properly. Additionally although it appears that the relevance of current Ministerial directions and Tribunal principles is diminishing as the Regulations continue to be amended, it is considered that the existence of such material and its availability should be made known to the applicant.

24. *Recommendation 3.* Authorised persons should be required by legislation to send to applicants as soon as practicable but no later than 14 days before the date of hearing:

- (i) copies of all material forwarded to the Chairman of a Tribunal under section 24 including a copy of any Notes prepared by the SARTs' Executive Officer(s) for the Tribunal, and
- (ii) advice that copies of relevant extracts from the Policy Guidelines Manual, Ministerial directions, 'Tribunal Principles', internal instructions and any other relevant general material are available on request by applicants.

25. The Council understands that the Tribunals would like the Act to be amended to provide that all parties to the proceedings of a Tribunal shall have access to all documents presented to a Tribunal, unless the Tribunal directs otherwise for the purposes of safeguarding confidentiality. The Council understands that documents which might be protected in this way would be such things as medical or student assessment records. The Council is unsure whether there is likely to be a real occasion for exercising power to receive documents in confidence but it does not oppose the suggestion.

### **Withdrawal of References**

26. The Council considers that the lack of a power for applicants to withdraw references to SARTs may impede the expeditious function of the review process. SARTs should not have to 'sit' to dispose of matters which applicants desire to withdraw.

27. *Recommendation 4.* An applicant should be expressly empowered to withdraw a reference to a SART.

### **Ministerial Directions**

28. The Council considered the role of the Ministerial directions which have been issued to authorised persons pursuant to sub-section 6(2) of the Act. The directions lay down interpretive guidelines for authorised persons on matters such as entitlement to assistance. A question was raised whether these directions were within the power of sub-section 6(2) conferred by the Act, which, on a narrow view, may be confined to issuing directions relating only to administrative matters not affecting decisions whether to grant assistance. The Council makes no recommendation on this, nor upon whether it would be preferable for all the legal parameters upon which these decisions are made to be in the Act or Regulations. However, the Council suggests that if directions of this nature are intended to bind authorised persons on substantive matters, those directions should be publicly available.

29. In relation to a review of an authorised person's decision the Council understands that the Department of Education, relying on an opinion from the Attorney-General's Department, takes the view that the Ministerial directions do not bind SARTs. The result of this is that authorised persons may deny assistance pursuant to a Ministerial direction, although there may be a number of SART decisions to the contrary, and although their decisions may well be set aside if the students affected were to appeal. The Council considers that this is an undesirable situation and suggests that if Ministerial directions bind authorised persons, they should also bind any tribunal which reviews the decisions of authorised persons.

30. *Recommendation 5.* The Act should be amended to clarify the position of Ministerial directions.

## **Extensions of Time**

31. Section 22 provides, *inter alia*, that an applicant may request an authorised person to reconsider a decision, and requires requests to be made not later than thirty days after the date of the decision or the date on which the decision first comes to his notice (whichever is the later date), or within such further period as the authorised person allows. The Act, Regulations, Ministerial Directions and Departmental Policy Guidelines Manual do not mention any parameters by which the power to allow further time is presently exercised. The Council understands that in fact extensions of time are seldom refused. However, the Council considers it desirable for there to be a right of review of such a decision.

32. *Recommendation 6.* SARTs should be given power to review a refusal of an authorised person to allow further time for the lodging of a request for reconsideration by an authorised person.

33. Section 23 provides that a person may within 30 days of receipt of notice of a reconsideration by an authorised person request the authorised person to refer the decision to a SART for review. There is no power in either the Tribunal or the authorised person to extend this period of 30 days.

34. *Recommendation 7.* Authorised persons and Sarts should be empowered to extend the time for an applicant to request a reference for review.

## **Review in Default of Reconsideration**

35. Under sub-section 22(3) upon receipt of a request for reconsideration, the authorised person is required to reconsider the decision and either confirm or

vary it. Section 23 provides that a person who, having requested a reconsideration, does not receive notice of the reconsidered decision within 90 days, may request a reference at the expiration of that 90 days. The Council considers that authorised persons should clearly be required to conduct the reconsideration within a specified time, and that the 90 day time period is unnecessarily long. It suggests that a 60 day period would be more appropriate.

36. *Recommendation 8.* Section 22 of the Act should be amended to require an authorised person to reconsider the decision as soon as practicable but in any case within 60 days after receiving the request. Section 23 of the Act should be amended by substituting the words '60 days' for the words '90 days' wherever appearing.

### **Time Requirements for Review**

37. Section 24 provides, inter alia, that upon receipt by an authorised person of a request under section 23 for the review by a Tribunal of a decision of the authorised person, the authorised person shall forward the request to the Chairman of the Tribunal. There is no time limit by which the authorised person is to forward the request for review. The Council understands that the Department in practice forwards requests to the Tribunal within a short period of time. That being the case the Council sees no obstacle to recommending that a time limit of fourteen days be inserted.

38. *Recommendation 9.* Section 24 of the Act should be amended to require the authorised person to forward to the Chairman of the Tribunal the request together with all the records and other papers relevant to the decision and its reconsideration as soon as practicable but in any case within 14 days.

39. The Council recommends that this report be published.

23 January 1981