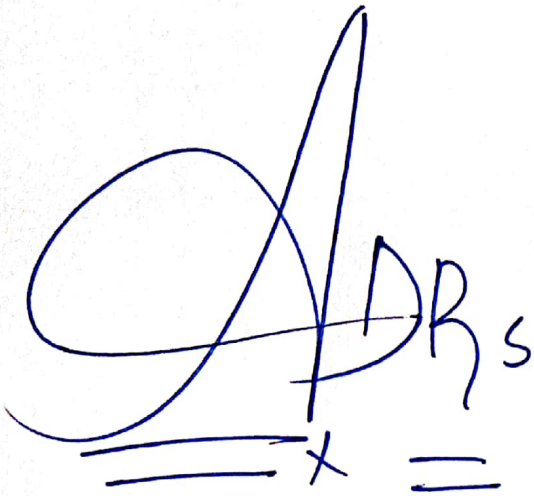
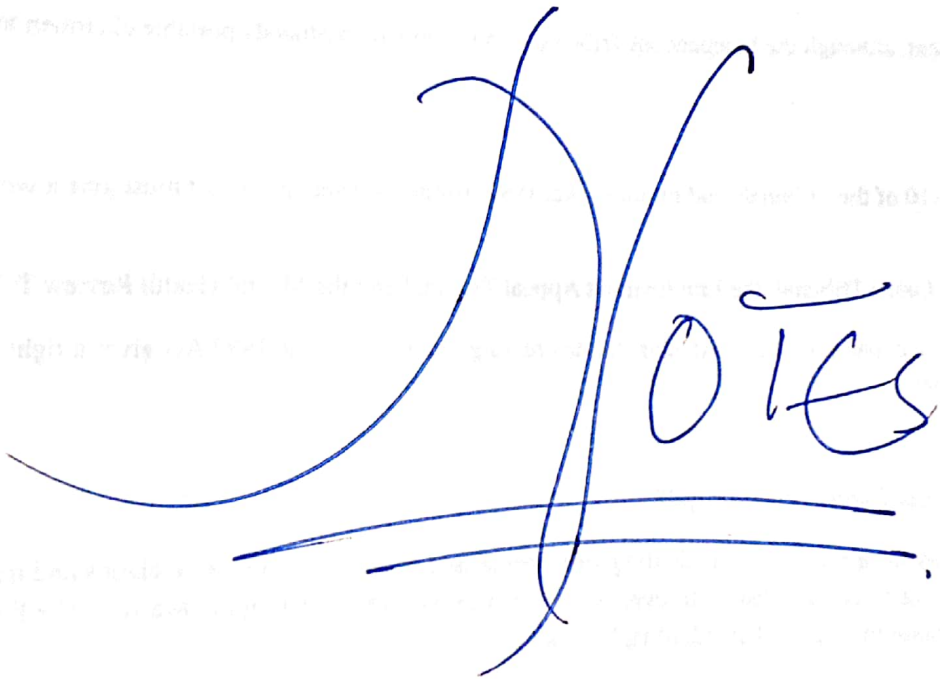


By Umair Ahmed Shaikh.



The Alternative dispute resolution

Alternative dispute resolution (ADR) (also known as External Dispute Resolution in Australia) includes dispute resolution processes and techniques that fall outside of the government judicial process.

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR.

Alternative Dispute Resolution provides an alternative to going to court to settle disagreements. Methods include arbitration, where disagreeing parties agree to be bound by the decision of an independent third party, and mediation, where a third party attempts to arrange a settlement between the two sides. ADR law in Australia involves federal and state enactments reflected in a range of schemes that are specific to particular industries, organizations and enterprises.

ALTERNATIVEDISPUTERESOLUTIONPRACTITIONERS' GUIDE – March 1998 (Technical Publication Series, Center for Democracy and Governance Bureau for Global Programs, Field Support, and Research) 1-4 \

National regime

At a national level the International Arbitration Act 1974 (here) reflects the UNCITRAL Model Law on International Commercial Arbitration (here) about procedures for international arbitration, covering all international commercial arbitration conducted in Australia unless otherwise agreed

The Act also adopts the Convention on the Recognition & Enforcement of Foreign Arbitral Awards – aka 'New York Convention' – (here) and 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention). It sets out the institutions and procedures that are available for the conduct of international arbitration. It does not deal with other alternative dispute resolution processes for resolving private international commercial disputes.

Methods of Alternative Dispute Resolution are:

Negotiation

Negotiation has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between themFootnote 1. Negotiations may be used to resolve an already-existing problem or to lay the groundwork for a future relationship between two or more parties.

Negotiation has also been characterized as the "preeminent mode of dispute resolution"Footnote 2, which is hardly surprising given its presence in virtually all aspects of everyday life, whether at the individual, institutional, national or global levels. Each negotiation is unique, differing from one another in terms of subject matter, the number of participants and the process used.
Given the presence of negotiation in daily life, it is not surprising to find that negotiation can also be applied within the context of other dispute resolution processes, such as mediation and litigation settlement conferences.

Conciliation

Conciliation is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, encouraging parties to explore potential solutions and assisting parties in finding a mutually acceptable outcome.
Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.
Conciliation differs from mediation in that in conciliation, often the parties are in need of restoring or repairing a relationship, either personal or business.

Arbitration

Arbitration is an out of court procedure designed to resolve disputes with one or more neutral third parties involves. Arbitration utilizes rules of evidence and less formal procedures than what a trial court would utilize, leading to a resolution that is usually much quicker and more cost effective than taking a dispute resolution to court. There are numerous different types of arbitration including binding arbitration, non binding arbitration and hi-lo arbitration. With access to information and resources about arbitration and arbitration law, you can get the most out of an arbitration process, often allowing the resolution to rule in your favor.

Arbitration is a legal mechanism used to resolve disputes through the aid of a neutral third-party who is given the authority to make a legally binding decision. The weight of this decision is what distinguishes arbitration from mediation. The parties are not obligated to follow a mediator's decision. In arbitration, both parties must agree to be bound by the arbitrator's decision before entering into the process. The arbitration process consists of written submissions from each party and an evidentiary hearing to establish the facts of the case. Arbitration can be either voluntary or mandatory and can be either binding or non-binding.

Advantages of Arbitration:

Speedier resolution; however, there can be exceptions due to multiple parties, arbitrators, lawyers and litigation strategy.

Less costly; however, there can be exceptions due to multiple parties, lawyers, arbitrators and litigation strategy.

Exclusionary rules of evidence don't apply; everything can come into evidence so long as relevant and non-cumulative.

Not a public hearing; there is no public record of the proceedings. Confidentiality is required of the arbitrator and by agreement the whole dispute and the resolution of it can be subject to confidentiality imposed on the parties, their experts and attorneys by so providing in the arbitration agreement.

From defense point of view, there is less exposure to punitive damages and run away juries;

The ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise.

Limited discovery because it is controlled by what the parties have agreed upon and it is all controlled by the arbitrator.

Often, the arbitration process is less adversarial than litigation which helps to maintain business relationships between the parties.

The arbitration is more informal than litigation.

The finality of the arbitration award and the fact that normally there is no right of appeal to the courts to change the award.

Disadvantages of Arbitration:

There is no right of appeal even if the arbitrator makes a mistake of fact or law. However, there are some limitations on that rule, the exact limitations are difficult to define, except in general terms, and are fact driven.

There is no right of discovery unless the arbitration agreement so provides or the parties stipulate to allow discovery or the arbitrator permits discovery.

The arbitration process may not be fast and it may not be inexpensive, particularly when there is a panel of arbitrators.

Unknown bias and competency of the arbitrator unless the arbitration agreement set up the qualifications or the organization that administers the arbitration, has pre-qualified the arbitrator.

There is no jury and from the claimant's point of view that may be a serious drawback.

An arbitrator may make an award based upon broad principles of "justice" and "equity" and not necessarily on rules of law or evidence.

An arbitration award cannot be the basis of a claim for malicious prosecution.

The possibility of compromise or splitting of baby awards.

Business Contracts often Require Arbitration:

Typically, many business throughout virtually all industries use arbitration as a means of rectifying outstanding business disputes, however, for individuals embroiled in a dispute, the need for an arbitrator may not prove necessary, efficient, or cost effective. Personal disputes, between two individuals, often times are best served through the judicial system and the civil courts, given the costs associated with brining in an arbitrator to a given situation. Though for larger, more complex cases requiring esoteric knowledge regarding the dispute at hand, arbitration produces serious benefits; personal disputes involving a limited scope of impact will not require the expertise, impartiality, or knowledge of an arbitrator. Typically, these cases are better served through mediation, or if truly necessary, a jury trial in the civil courts.

Arbitration is Most Often Binding:

Arbitration also leaves no room for an appeals process in the overwhelming majority of instances. This is a risk parties and individuals should seriously assess prior to engaging in arbitration, as well as when considering the methods for resolving their disputes. Most individuals would like the option for an appeal in the event a ruling is not in their favor, which is more than probable in the course of a civil court trial, however, with arbitration, the options for appeals are virtually nil, not to mention the costs associated with an appeals process may not even be worth the amount being disputed between two parties.

Also, in the arbitration process, there is a limited period of discovery, which can lead to surprise evidence or testimony occurring during an arbitration process, which a party may or may not be able to effectively refute at the time of their arbitration hearing. Likewise, there is no jury to decide the outcome of a dispute, but rather, the decision rests solely in the hands of the arbitrators, whom usually consist of one individual or a panel of three persons, that may or may not be able to remain entirely impartial during all proceedings regarding all matters.

Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.

Mediation

Mediation, a form of alternative dispute resolution (ADR) aims to determine the conditions of any settlements reached — rather than accepting something imposed by a third party. Mediation is a nonbinding dispute resolution technique in which the disputing parties voluntarily attempt to reach a mutually agreeable resolution of their dispute with the assistance of an impartial third person, who is called the "mediator."

Even though related to negotiation, mediation may be more effective than direct negotiations between the parties. Mediation had commonly been used to resolve disputes in the labor-management and family law fields. Disputants, both public and private, have successfully used mediation to resolve a wide variety of disputes. Both businesses and the courts have discovered that mediation can resolve many disputes faster and less expensively than the more traditional alternatives of litigation and arbitration.

Mediators use appropriate techniques and/or skills to open and/or improve dialogue between disputants, aiming to help the parties reach an agreement on the disputed matter. Mediation is the only way assisted by one third, which promotes freedom of choice of protagonists in a conflict

Types of cases

An American Arbitration Association publication lists, under the heading "What types of cases are suitable for mediation," further examples of successful mediations of disputes involving banks. For example, a claim of fraud, negligence and mismanagement of a bank by its president was

settled for $3.4 million following 21 hours of mediation. A multi-party construction dispute in which the bank had threatened foreclosure was settled for $2.8 million after 36 hours of mediation.

Among the best known of all mediated settlements involving banks was the settlement of a series of consumer class actions against Wells Fargo and other California banks. After 13 years of litigating allegations of unconscionable fees for bounced checks, the multi-million dollar dispute was submitted to mediation and was settled in a short time.

Advantages of Mediation:

One of the hallmarks of mediation, and one of its important advantages, is mediation's generally private, confidential nature. Mediation's confidentiality may be one of the main reasons for its success in creating settlements. Parties are often unwilling to disclose confidential information about their view of the case to the opposing party during direct negotiation.

Bottom Line

The parties also may be reluctant to disclose their true "bottom-line" settlement position, or to disclose special concerns to the opposing party. A mediator can avoid this communication roadblock to settlement. The mediator may be told these things in confidence, and he or she can use them in directing the negotiations without disclosing them to the opposing party. This might facilitate a settlement that would not have been possible in direct negotiations.

Low Risk

The voluntary, confidential, and inexpensive characteristic of mediation makes it almost risk-free. Attempting mediation is low-risk; if mediation fails to bring about a resolution to the dispute, the parties can still submit the dispute to any other dispute resolution process, including arbitration or litigation. However, many parties deem this risk acceptable when compared to the cost and time savings of mediation, as well as its confidentiality.

Flexible

Other hallmarks of mediation are its informality and flexibility. There are almost no formal rules of procedure, and the process itself is flexible. This informality allows the disputants and the mediator to control and design the process. Mediation's informality often results in cost savings to the disputants.

Mediation is generally far less adversarial than litigation or arbitration, and is therefore far less likely to damage business relations. Mediation's informality generally allows for greater client participation in the settlement than is allowed in almost any other dispute resolution process.

QUICK AND INEXPENSIVE

When parties want to get on with their business and their lives, mediation may be desirable as a means of producing rapid results. The majority of mediations are completed in one or two sessions.

CONFIDENTIAL

Mediation is a confidential process. The mediators will not disclose any information revealed during the mediation. The sessions are not tape-recorded or transcribed. At the conclusion of the mediation, mediators destroy any notes they took during the mediation session.

Disadvantages of Mediation:

The voluntary, nonbinding nature of mediation can be a disadvantage when one or more parties are recalcitrant or cannot be trusted to honor a voluntary settlement agreement. When coercive methods are likely necessary to force a party to honor a settlement agreement or reward, an adjudicatory dispute resolution process, such as binding arbitration or litigation, may be more appropriate than mediation.

Enforceable

Disputants and their counsel sometimes seek to avoid mediation because it is not final or binding. They are worried that any mediated agreement will not be enforceable in the same ways as court judgments or arbitration awards are. However, mediated agreements may have an advantage over court judgments and arbitration awards because mediated agreements are the product-at least theoretically- of the mutual agreement and understanding of the parties. Thus, disputants can structure a mediated agreement to meet the needs of both sides. Moreover, mediated settlement agreements can, and generally should, be executed and signed at the end of the mediation session. This produces an enforceable settlement agreement.

Time

Mediation is an extremely quick process or it can be an extremely quick process if the parties involved make it quick. Why? There is no judge, no court date and no lawyers involved. Because the parties involved with mediation make their own decision on the outcome, this makes the process quite quick.

Having a Lawyer

Mediation does not require a lawyer to be present during one or more of the sessions. Instead, if the parties involved wish to have their lawyer present it must be approved by the other party in the case. Many people, when negotiating a settlement, want their lawyer present at all times. Litigation requires the presence of a lawyer or attorney. With mediation, only a mediator is required.

The Agreement Is Legally Binding

Even though there are normally no lawyers present at mediation, the agreement between the parties involved is legally binding in most judicial systems. The agreement is documented with the written word. Because there are no lawyers present, some people might be hesitant to sign the agreement without having their lawyer review it.

Anything can be Mediated

With mediation, anything can be mediated. That means the smallest of disagreements, such as, a dispute over a water bill can be mediated. There is no limitation on the amount of money involved in mediation or the topic that is being mediated. As long as the topic does not require statutory, judicial or regulatory case law to resolve, then it can be mediated.

The Mediator Is an Outside Party

With mediation, the mediator that is hired is an outside party. He or she has no previous knowledge of the case and has never previously met the parties involved. This can be somewhat of a hindrance in the process. A lawyer usually has some knowledge of the case and more than likely knows the party or parties involved because that lawyer has been working with that party for a couple of years.

There Is No Judge

Most people that want to settle an argument or disagreement use litigation because they want the end result to come from a judge. In mediation, the mediator does not render a verdict in favor of one side or the other. In litigation, the judge reviews each side of the case and then makes an informed decision. Granted, one side is not happy because they lost and the other side is satisfied because they won. In mediation, it is a win-win situation but not everyone leaves happy.

Either Party Can Withdraw

Another disadvantage of mediation is that either party can withdraw from the proceedings at any time. In litigation, the only party that can withdraw is the plaintiff, if they drop the suit. This means that even the party that is 'at fault,' can withdraw if they are not happy with where the mediation process is headed.

Tribunals

Tribunals have been defined as "Bodies outside the hierarchy of the courts with administrative or judicial functions" (Curzon, *Dictionary of Law*, 1994, p387). Administrative tribunals resolve disputes between, for example, the citizen and an officer of a government agency or between individuals in an area of law in which the government has legislated the conduct of their relations.

REASONS FOR EXISTENCE

Administrative tribunals have been established by statute, in the main, to

resolve:

* disputes between a private citizen and a central government department, such as claims to social security benefits;

* disputes which require the application of specialised knowledge or expertise, such as the assessment of compensation following the compulsory purchase of land; and

* other disputes which by their nature or quantity are considered unsuitable for the ordinary courts, such as fixing a fair rent for premises or immigration appeals.

The main reasons for the creation of administrative tribunals may be

identified as:

* the relief of congestion in the ordinary courts of law (the courts could not cope with the case-load that is now borne by social security tribunals, employment tribunals and the like);

* the provision of a speedier and cheaper procedure than that afforded by the ordinary courts (tribunals avoid the formality of the ordinary courts); and

* the desire to have specific issues dealt with by persons with an intimate knowledge and experience of the problems involved (which a court with a wide general jurisdiction might not acquire).

Note: a distinction must be drawn between administrative tribunals and domestic tribunals. Domestic tribunals are bodies appointed within an organisation to decide disputes, eg, the Disciplinary Committee of the General Medical Council, which controls the professional activities of doctors.

CLASSIFICATION OF TRIBUNALS

Administrative tribunals are sets of tribunals which adjudicate on specialist civil disputes outside of the court system. Darbyshire has reported (2008) that there are over 130 such bodies in the UK covering a vast array of areas. Until recently each tribunal was separate and in 1996 the list of administrative tribunals included: agricultural land tribunals, child support appeal tribunals, the Civil Aviation Authority and the Director General of Fair Trading in their licensing functions, criminal injuries adjudicators, the Data Protection Registrar, education appeal committees, immigration adjudicators and the Immigration Appeal tribunal, industrial tribunals (renamed employment tribunals), the two Lands Tribunals, mental health review tribunals, the Comptroller-General of Patents, war pensions appeal tribunals, rent assessment committees, social security appeal tribunals and the Social Security Commissioners, disability and medical appeal tribunals, the general and special commissioners of income tax, traffic commissioners, valuation and community charge tribunals, and VAT tribunals. However, these tribunals have now been incorporated into the unified Tribunals System which includes all administrative tribunals with the exceptions of Patent Office tribunals and the Investigatory Powers Tribunal.

GENERAL CONSIDERATIONS

(a) Some tribunals may be composed of a lawyer alone, but commonly there will be a lawyer 'chair' (called a 'tribunal judge') and two lay people who may be drawn from the relevant industry. The Judicial Appointments Commission is now in control of the selection process.

(b) Appointments are usually made for a fixed period of years.

(c) Many tribunals, like the Lands Tribunal and the commissioners of income tax, exercise strictly judicial functions. Some, like the Civil Aviation Authority, base their decisions on wider aspects of policy, exercising regulatory functions in a judicial form.

(d) In 1997, legal aid was available before the Lands Tribunal, the Commons Commissioners and the Employment Appeal Tribunal; legal assistance by way of representation was available before mental health review tribunals and for certain proceedings before the Parole Board. Legal advice and assistance without representation can be obtained in connection with all tribunal proceedings (Part III, Legal Aid Act 1988).

(e) In general, tribunals are not bound by the rules of evidence observed in courts and could not reach decisions simply and speedily if they were. Some tribunals follow procedures that are essentially inquisitorial rather than adversary, but minimum standards of evidence and proof must be observed by tribunals if justice is to be done.

(f) The legal profession has no monopoly of the right to represent those appearing before tribunals. This fact alone makes tribunals more accessible to the public than the courts, since an individual's case may often be presented effectively by a trade union official, an accountant, a surveyor, a doctor, a social worker or a friend.

The Administrative Justice and Tribunals Council

This body supervises tribunals and replaces the Council on Tribunals. Its aim is to aid in making tribunals fair and accessible by keeping them under review. The Council reports directly to the Ministry of Justice. Currently (2011), a consultation process is underway which may result in the abolition of the Council.

Legatt Review of Tribunals

In 2000 the Legatt Review was set up to look into the operation of administrative tribunals. The Review found that each tribunal had its own processes and standards and were not accessible to users. It also raised concerns about the level of independence of tribunals and the long delays which users faced in having their dispute resolved by the tribunals.

The Legatt Review recommended that a new independent tribunal service be set up so that the relevant sponsoring government departments could no longer be seen as influencing the individual tribunals and that a composite two-tier tribunal structure should be adopted.

Tribunals, Courts and Enforcement Act 2007

Ultimately, the Legatt Review Recommendations were adopted by the government in the form of the Tribunals, Courts & Enforcement Act 2007 (TCEA 2007).

The TCEA 2007 created a new structure for tribunals. There are now two tribunals in the unified tribunals system with generic rules of procedure, a system of appeals and one Senior Precedent. The two tribunals are the First-tier Tribunal and the Upper Tribunal. All the previously existing tribunals (with the exception of Patent Office tribunals and the Investigatory Powers Tribunal) are now contained within the unified tribunals. It should be noted that the Employment Tribunal and the Employment Appeal Tribunal are not within the unified structure, however these are not in essence administrative tribunals but deal mainly with private issues.

The First-tier Tribunal is a fact-finding tribunal which hears appeals directly from decision makers. Thus, if an individual is unsatisfied by a decision made eg by a Secretary of State he may appeal to the First-tier Tribunal. The First-tier Tribunal is divided into Chambers, with each Chamber having its own President and its own area of law eg social security. This separation into legal-area Chambers allows the system to continue to provide specialist judges with relevant experience to the area in question in each individual case. The Upper Tribunal is mainly an appellate tribunal to hear appeals from the First-Tier tribunal. However, it also has primary jurisdiction to hear certain matters including finance and tax matters.

Tribunal Procedure

Section 22 TCEA 2007 requires that Tribunal Procedure Rules are made by the Tribunal Procedure Committee and states that the objectives of the rules are that: justice is done; the tribunal system is accessible and fair; proceedings are handled quickly and efficiently; the rules are both simple and simply expressed; and that the rules where appropriate confer on members of the relevant Tribunal responsibility for ensuring that the proceedings are handled quickly and efficiently.

There are variations in procedure depending on the area of law involved. However, each set of procedures must follow the basic objectives listed above. Schedule 5 TCEA 2007 provides the rules relating to the tribunal procedures. Part 1 sets out that the procedural rules may contain certain provisions relating eg to time limits, whether hearings should be in public or private, representation, evidence, witnesses and notice.

The Tribunal Procedure Committee is in charge of creating the individual sets of procedural rules. So far several sets of procedural rules have been devised including those relating to social entitlement, health and education. Generally, the procedural rules do not require leave for the commencement of proceedings, but normally the applicant should send an application within 28 days of the decision in dispute. The respondent must then state the grounds, if any, on which the application will be opposed. A hearing will then normally take place, with the general rule being that these are in public except in relation to mental health issues and some educational issues. Each party may have a representative, who may be legally qualified or not, and the tribunal has wide powers to control the way in which evidence is given and the amount of evidence which may be presented. Once a decision has been reached the Tribunal must provide written reasons for it and notification of any rights of review or appeal.

Appeal

The First-tier Tribunal is capable of reviewing its own decisions on application by a dissatisfied party. Decisions reached by the First-tier Tribunal may be appealed to the Upper Tribunal. Beyond this, the next point of appeal is the Court of Appeal, rather than the High Court as was previously the case.

ADVANTAGES AND DISADVANTAGES

The advantage of a tribunal is that it is:

(a) quick with no long waits for the case to be heard and it is dealt with speedily;

(b) cheap, as no fees are charged;

(c) staffed by experts who specialise in particular areas;

(d) characterised by an informal atmosphere and procedure;

(e) allowed not to follow its own precedents, although tribunals do have to follow court precedents.

The disadvantages of tribunals are that:

(a) some are becoming more formal;

(b) they are not always independent of the Government, although the Independent Tribunal Service now recommends possible chairmen to the Lord Chancellor;

(c) some tribunals act in private;

(d) they do not always give reasons, although under s10 of the Tribunals and Inquiries Act 1992, tribunals listed in the Act must give a written or oral statement of reasons, if asked to;

(e) legal aid is not generally available, except for the Lands Tribunal, the Employment Appeal Tribunal and the Mental Health Review Tribunal;

(f) there is no general right of appeal to the courts: it all depends on the particular statute creating the tribunal. The 1992 Act gives a right of appeal on a point of law to the High Court from specified tribunals.

EVALUATION OF TRIBUNALS

According to T. Blakemore and B. Greene, *Law for Legal Executives*, 1996, p95:

They do a useful job in taking some types of work away from the courts and dealing with specialised matters, less valuable claims and matters involving the exercise of a discretion. It has been estimated that they deal with over one million cases a year (Partington, Martin, 'The Future of Tribunals', *Legal Action*, May 1993, p9). Problems remain over lack of standard rights, like the right of appeal, and procedures. In many instances they make important decisions affecting people's livelihoods and quality of life. The Council on Tribunals has begun to investigate the use of precedent, the establishment of a standard complaints procedure. Training for tribunal members is provided in association with the Tribunals Committee of the Judicial Studies Board. The Council on Tribunals has proposed setting up a Tribunals Association as a representative body for all tribunals. Its influence is hampered through lack of funds and having part time members. Some tribunals, for example the Lands Tribunal, have a backlog as large as the ordinary courts. Following the Genn Report ('Effectiveness of Representation at Tribunals') the Council on Tribunals believes that legal aid should be available at tribunal hearings. Although the Woolf Report pays little attention to tribunals, some see them as offering an alternative to the courts in certain cases and a way of solving the problems of access to the civil justice system identified by the Woolf Report, as tribunals are cheap, informal and quicker than the ordinary courts (Zuckerman and Cranston (eds), *Reform of Civil Procedure*; Roy Sainsbury and Hazel Genn, *Access to Justice: Lessons from Tribunals*, Clarendon Press, 1995). (adapted from T. Blakemore and B. Greene, *Law for Legal Executives*, 1996, p101.)