maker, far from being a partaker in the appellate process is in fact a *party* before the review body. He or she can be called upon to produce material and expand on the reasons.

We would often like to call on the judge at first instance to explain more fully the reasons for the decision, but we have not done that so far. The criteria adopted by the initial decision-maker are brought forward and considered at the administrative level by a body whose members will never have to apply those criteria in day to day practice. While the independence of the appeal tribunal is important it seems to me that a great deal of understanding and knowledge of the administrative process will be necessary if the tribunal members are to be in a position to make decisions which are practical, sensible and which are going to be influential in the practice of the administration. I do not know the extent to which decisions of the Tribunal have had in the past, or could have in the future, an impact on administrative practice, but, from comments which I have heard, I suspect that there is a long way to go in that field.

I know too from the papers, that the original decision-maker has so far had a role in assisting the Tribunal and putting before the Tribunal material, and perhaps additional reasons, which would help the Tribunal in its role in reaching the right or I think it is called the preferable decision. I am interested to know how far in the example which I quoted earlier, the Tribunal itself could lay down rulings which would lead to alteration in the guidelines or handbook which apparently guides the operation of the officers of the Department of Social Security. In case the rulings of the Tribunal are not accepted at the level of day to day practice, I conclude with the thought that who will then decide such issues and what steps can be taken to ensure that considered decisions will in fact go through into the administration itself?

## Mr S. SKEHILL*

It is a great pleasure for me to appear today after the Tribunal rather than before it. I first appeared before the Tribunal in August 1977 and then managed to my lasting surprise to convince the Tribunal that a pot-bellied stove was in fact a space heater. Since then I have appeared before the Tribunal on numerous occasions. I now have a functional responsibility for something well in excess of five hundred Administrative Appeal Tribunal cases each year. In the course of the last four years I have formed a few opinions about the Tribunal, which I guess is only to be expected, but in looking to address you today and comment on these papers, I asked a number of people what they thought might be appropriate things for me to say. I spoke to people in the Public Service and outside it; in the

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* LL.B. (A.N.U.); First Assistant Director-General, Commonwealth Department of Social Security. The views expressed are the personal views of the author and do not necessarily reflect those of the Department in which he serves.

Department and outside the Department. I was urged to express my total dissatisfaction with the Tribunal, and equally I was urged to wax lyrical at its marvellous nature. My own staff said "say what you like but, whatever you do, do not aggravate them—we have got to appear before them next week".

There is a degree of total opposition to the Tribunal within the Public Service. Some of that is very natural and springs from the fact that, in a great many areas, public servants have been extremely free from any review for a great many years. I think that opposition of anywhere near that degree is totally futile. The new rights that have been conferred by the package of legislation which incorporates the Administrative Appeals Tribunal are rights which are not going to go away and closing one's eyes to them is not going to help. The thing to do is to face up to them, learn to live with them and take what you can from them—and that is what I want to talk about.

Equally I think it is wrong to wax too lyrical about the Tribunal, because I think there is danger in that it is possible to place too much emphasis on the Tribunal, which is of course only a part of the decision-making process. There can be considerable debate about the resource allocation between primary decision-making and review mechanisms. But wherever the resource allocation properly lies, it is necessary I think to look at what the Tribunal should be doing, and can be made to do, in those areas in which it properly does review cases. I accept immediately that the obvious role for the Tribunal in reviewing any case is to consider the merits of that case, the facts of that case, and the law applicable to that case. In my experience the Administrative Appeals Tribunal does, or is moving to do, an admirable job in that regard.

The Tribunal has adapted its procedure to the nature of the case before it, the subject matter of the inquiry, the nature of the representations before it and the importance of the issues. On many occasions you could walk through the door of the Tribunal room and it would be hard to tell the difference between it and a court. On other occasions it is greatly different. Probably the most striking example of that is the telephone conference—a process which it pioneered. This is being used increasingly in social security cases and increasingly to great advantage both to the appellant who is able to sit in the comfort of his or her own lounge-room and to our advantage in that we do not have to travel to remote areas. We do not incur the time and the expense of that. We help our resource allocation in that way.

I think there is scope for a great deal more development in the handling of cases, particularly in the social security jurisdiction and I am sure the Tribunal will be moving to that. There is, for example, a need for the speeding up of processes in cases involving medical assessments where expert evidence needs to be called. The case needs therefore, to be scheduled sometime in advance. But the very essence of the decision in dispute requires that the whole thing be resolved as quickly as possible. The Tribunal is I understand working towards that. The Tribunal, particularly in most social security cases, finds that the level of representation of the appellant is not high—the appellant is usually either totally unrepresented

or represented by a non-qualified friend. The Tribunal goes to extraordinary lengths to make sure that such a person has a full opportunity to present his case—something which he might not be able to do satisfactorily if left to his own resources. The Tribunal has begun to travel a little to remote areas where the case cannot be resolved over the telephone. Developments like this, with a degree of flexibility of that nature, are excellent.

It is not, as Mr Todd said, possible to generalise about how the Tribunal operates, and it is constantly changing. I look forward to seeing it change in the future. But what I also look forward to is that, with time, the Tribunal will not only build up the body of precedent on a case by case decision basis but will, increasingly, feel itself able to express something in the way of guidelines that go beyond what has necessarily to be said for that case. Such an approach would assist the decision-maker to extract guidance and apply those decisions to primary decision-making. They will not of course be binding on the decision-maker; they may not be accepted by the decision-maker until such time as he is forced to accept them after later argument, in a case that specifically raises the issues. The Tribunal has shown some indication of doing this. I think particularly of one case in which the Tribunal sought to list the type of factors to which regard might be had in determining whether special circumstances existed for the purpose of back-dating a claim for a benefit. I do not think it was strictly necessary to provide such a list in order to resolve that case, but it is there and it is helpful to us. There are other cases that I think either now, or with the resolution of one Federal Court appeal that is on foot, will provide confirmation of the practice that we have been following in the area of *de facto* relationships and the factors to which regard must be had when considering those relationships.

There needs to be an appeal mechanism obviously for those cases where we might give disproportionate weight to one only of the factors, where we may be wrong on the evidence, where there may be other facts of which we are not aware. But the most important thing now, once we have those criteria settled, is that we can ensure that our primary decision-making pays proper regard to those criteria and that we avoid evidentiary problems in that we have regard, at the primary stage, to the material that is necessary in order to sustain a decision when and if it gets to the Tribunal.

I am not going to be alone and not quote Mr Justice Brennan, who I think was saying something very similar. The passage was cited by Mr Hall from, the 1978 Annual Report of the Administrative Review Council where Mr Justice Brennan said, "Administrative review has its proper limits; it is not a substitute for sound primary administration".

To my mind that is the essence of what those of us involved in public administration should be doing. We need a proper appeal mechanism but everything we do in and for that mechanism must be directed to ensure that the primary decision is of such calibre that it renders the need for an appeal mechanism almost unnecessary. The papers that Mr Hall and Mr Todd have made available are of their usual calibre, and that is of an extremely high standard. They usefully explain the thinking of the Tribunal and the method by which it has operated to date, and the ways in which it might operate in the future. I think their data will be important.