Legal Representation

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Before I deal with the specific topic that I have been asked to comment on, I think it is important to briefly comment on the Law Council of Australia's position in relation to the ART legislation. In making these comments I should say that we have not yet been able to form any definitive view on the consequentials bill. The Law Council now supports, and always has strongly supported, the continued existence of a truly independent Commonwealth merits review tribunal. We agree that benefits and efficiencies may be gained by restructuring the AAT and other tribunals, and have already indicated our full support for a single tribunal structure.

It is our view that the legislation under discussion today includes changes to the current system that are inconsistent with the goals of the administrative review process. We are concerned that the restructure goes far beyond organisational changes and undermines the currently accepted principles of administrative review of which Australia is proud. The Law Council believes that there are five fundamental principles of administrative review: first, independence so as to achieve correct or preferable decisions; secondly, accountability and responsiveness; thirdly, promotion of better quality decision making; fourthly, fairness; and, finally, cost effectiveness.

The federal government justifies the amalgamation of the tribunals and structural reform of the merits review system on economic grounds. The explanatory memorandum to the Administrative Review Tribunal Bill notes that the reforms should deliver savings from 'economies of scale due to the elimination of the duplication of infrastructure and support services'. Moreover, the explanatory memorandum states that one of the goals of the restructuring is to 'rationalise resources and create efficiencies'. We consider that this is the driving factor behind the restructuring initiative and that the government has devalued the other four fundamental principles of administrative review.

Our main concerns in relation to the ART Bill are: first, reduced opportunity for merits review; secondly, compromised independence of the ART; thirdly, issues associated with the appointment and qualifications of members; fourthly, denial of a right to legal representation; and, lastly, the constitution of the panels themselves. A theme of the bill is a whittling away of the independence of the external merits review tribunal and its absorption into the bureaucracy. This is reflected in lack of tenure of members, the funding of divisions by departments, the concept of ministerial directions and the code of conduct and performance agreement requirements. Any reform which attacks the independence of the external merits tribunal must be regarded with caution.

A tribunal cannot hope to engage in impartial decision making which will have a normative effect on government decision making if it is not independent from and seen to be independent from the Executive. The Law Council has concerns about the perception of the ART's independence because the ART divisions are to be funded by portfolio agencies. The general division will be funded through the Attorney-General's Department. We acknowledge that this is a continuation of existing funding arrangements for the tribunals other than the AAT, but the Law Council does not consider this desirable. There is the potential for an agency to restrict or influence funding as a way of imposing pressure on the division either to manage with fewer resources or to comply with departmental policies. The funding of the

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ART by the very same department whose decision is under challenge could legitimately give rise to a reasonable apprehension of bias.

The proposal that portfolio ministers could issue directions that must be followed by the ART in reviewing decisions made under that particular minister's legislation raises similar concerns. Ministerial directions could be used to influence the substantive determination of cases by limiting the ability of members to take into account the individual circumstances of individual applicants. Under the proposed regime ministerial directions will prevail over directions issued by the President or executive members to the extent of any inconsistency. There is also no requirement for a responsible minister to consult with the President before issuing the directions. While proposed subsection 161(4) provides that all directions, including ministerial directions, must have regard to the objects of the Act as set out in section 3, the Law Council is not convinced that there is sufficient protection provided by this subsection. On any view, ministerial directions should be disallowable instruments.

The *Better Decisions* report noted that there is a general trend for government agencies to be held more accountable for performance against declared objectives and targets. In this context, the report recommended that review tribunals should develop appropriate appraisal schemes and that all tribunal members should participate in setting standards against which their performance is to be appraised. The Law Council agrees with the general observations and recommendations in the *Better Decisions* report about performance appraisal. The bill contains two linked concepts: performance agreements and the code of conduct. The coverage of a performance agreement is spelt out; the intended content of the code of conduct is not, although the code of conduct is a disallowable instrument. Members must comply with both the performance agreement and the code of conduct. Non-compliance may lead to a written direction from the President to improve members' performance and to comply with the code, which may also lead to the member being removed.

The removal powers relating to performance agreements and the code of conduct are ground-breaking and unprecedented. Currently, an AAT member who is not a judge can be removed by the Governor-General only if both Houses of Parliament in the same session pass a resolution to remove the member on the ground of proven misbehaviour or incapacity or the member becomes bankrupt. The Law Council is concerned that the combination of the imperative to enter into and comply with a performance agreement and the code of conduct, and the ever present risk of dismissal for non-compliance, impinge on the independence of tribunal members.

Having said that, let me turn now to the issue of legal representation. The Law Council believes the presumption in the ART Bill against legal representation is fundamentally misguided, as well as contrary to the recommendations of the *Better Decisions* report. As the experience of the SSAT indicates, it is not legal representation *per se* which produces an adversarial culture. If in a particular case a legal representative is not assisting the tribunal, the answer is for the tribunal to say so. The bill, as it stands, permits portfolio legislation to restrict or remove access to representation altogether. In other cases where the availability of representation is not excluded by legislation, whether or not it is granted will be at the discretion of the sitting member or members, subject to practice and procedure directions which may be issued by the portfolio Minister. We are not just talking about legal representation; it extends to any representation.

The case for maintenance of legal representation is obviously a difficult argument for the Law Council to mount. We will always be seen to be just promoting the role of lawyers to preserve their current role. But we assert that there is a strong public interest argument in seeking to maintain the right of representation. In many cases, representation is a means of redressing the power and resource imbalance implicit in an appeal by the individual citizen against the state.

An example is the review of a decision denying access to documents under the FOI Act. The relevant department may be represented by an experienced FOI officer who is well versed in the legislation and precedent. By contrast, it is unlikely that an applicant would have equivalent knowledge. In these circumstances there must be a right to representation. Legal representation of applicants before a tribunal not only assists the applicant in presenting a proper case but also assists the tribunal in obtaining all the relevant material in the case, including the benefit of appropriate cross-examination or the testing of information placed before the tribunal by the parties.

The Attorney, in a speech in September this year, quoted the ALRC *Managing Justice* report's finding that the median duration of cases finalised in the AAT was longer than for cases in the Federal Court or the Family Court. I venture to suggest that a key element in this may be the fact that many applicants before the AAT are unrepresented. Without the assistance of a lawyer to put concisely the issues at hand, it will often take a court or tribunal longer to hear an application. Rather than being a cost in the process of merits review, legal representation contributes to the speed and economy of the review process by assisting in the efficient presentation of the case, and to ensure all information is available to the tribunal for the tribunal's consideration.

Lawyers are skilled in the various processes leading up to a hearing for the early resolution of matters. Preliminary meetings, telephone conferences and other forms of mediation may often be more effectively handled by the applicant's legal representative. A personal appearance by the applicant in every matter is not appropriate for a number of reasons.

Often the applicant needs the help of lawyers with expertise in a particular area of administrative law. The applicant may be a company or another entity which employs a solicitor or legally qualified person to represent it in matters before the tribunal. The use of legal representatives by these applicants is the more economical course in the circumstances.

The Attorney, in the speech I referred to earlier, has said that one of the objects of the bill is to enable the tribunal to review decisions in a non-adversarial way, except where this would be inappropriate. The Law Council does not agree that the involvement of lawyers will automatically create an adversarial treatment of a matter before the tribunal. The Law Council asserts that there should be no presumption that representation is to be permitted only in exceptional or prescribed circumstances, nor that there be a power of veto in members. In particular, it would not like any presumption against representation to apply to review panel processes, nor to divisional processes in the taxation and commercial and general divisions. It feels strongly that applicants and agencies should have the option of being legally represented without this right being limited to particular circumstances. This right should be expressed in the governing statute of the ART.

In conclusion, the Law Council have already indicated support for the creation of one new tribunal, the ART, but we believe that the detail in the bill for restructuring the ART is misguided in part. The restructure goes far beyond any necessary organisational changes and it undermines the fundamental principles of administrative review. The ART will have a diminishing role in administrative law. It will be kept in check by the Executive through the use of general directions, policy directions, performance targets and other measures. These measures will reduce the independence of the ART and the members serving on the ART.