Volume 4, Number 7, February 2001

SOCIAL SECURITY

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Opinion

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The Administrative Review Tribunal Bill 2000

The *Administrative Review Tribunal Bill 2000* was introduced into the House of Representatives on 28 June 2000 and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* was introduced on 12 October 2000. The Bills provide the legislative model for the establishment of the Administrative Review Tribunal (the ART), which amalgamates four existing tribunals, the Refugee Review Tribunal, the Migration Tribunal, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal. Both Bills were referred by the Senate to the Legal & Constitutional Affairs Legislation Committee for inquiry and report. That Committee released its report in February 2001, after consideration of written submissions and evidence given at public hearings.

In its introductory remarks the report states:

> While most witnesses agreed that the amalgamation of the tribunals will be a positive development, there were concerns expressed about the possibility of adverse effects on the quality of administrative review. The primary concern of witnesses is that the amalgamation proposal has been 'driven by cost factors' only and that the resultant model devalues other fundamental requirements for effective administrative review. In particular, it has been claimed that the anticipated efficiencies and cost savings will be gained at the expense of:
>
> - Lack of independence of the proposed ART from government agencies;
> - Loss of multimember/ multiskilled review panels;
> - Reduced quality of review;
> - Loss of two-tier external review;
> - Reduced procedural fairness; and
> - Restriction on consumer representation despite increased participation of government agencies.

Independence

Submissions made to the Committee argued that the lack of independence was threatened by:

- ***the proposed purchaser/provider funding model***

This was contrary to the proposal put in the Better Decisions report (produced by the Administrative Review Council in September 1995) that as a general rule, tribunal funding should not be provided for within the budget of an agency

The **Social Security Reporter** is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 9544 0974 ISSN 0817 3524

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Typesetting: Marilyn Gillespie **Printing:** Thajo Printing, 4 Yeovil Court, Mulgrave.

Subscriptions are available at $66 a year, $44 for Alternative Law Journal subscribers.

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Print Post approved PP381667/00178

whose decisions form all or a large proportion of the tribunal's workload. The stated object of the rule was to strengthen perceptions of independence amongst tribunal users.

The majority view of the Committee was that the proposed purchaser/provider funding model under the ART Bill was based on the assumption that responsibility for the funding of the body conducting review of administrative decisions, should lie with the department that made the original decision. This had two important ramifications:

> First, it clearly identifies the ART as being part of, or the responsibility of, the executive and may have a part to play in reducing the tension between the executive and the tribunals. It supports the proposition that the function of reviewing decisions on their merits is an administrative act, not a judicial or quasi-judicial one. Secondly, it places significant pressure on departments to 'get it right' the first time.

- ***the method of appointment of Tribunal members***

It was argued that the process of appointment of members, being subject to relevant ministerial approval, was a threat to the independence of the ART. The majority of the Committee considered that this was no different from the current method of appointment of members to existing tribunals, and that the method of appointment to the ART would not compromise independence any more than it had done in relation to existing tribunals. The responsible Minister was 'best placed to understand the skills required by, and expertise available to, his or her own Division.'

- ***terms of appointment for members in preference to tenure***

Concerns here related to the possibility that short-term tenure would be seen to compromise the independence of members, whose decision making might be perceived to be influenced by their need to seek reappointment. Further it was argued that short-term appointments would not attract quality applicants who would be reluctant to leave successful careers elsewhere. Member expertise should not be lost and members should not feel threatened by removal or non-appointment. Limited terms should not be allowed to undermine the perception of stability and permanence in the process of external merits review. Although the legislation allowed for a maximum appointment of seven years, no minimum term of appointment was specified.

The majority view of the Committee was that provision for terms of appointment of up to seven years would promote an appropriate mix of membership of the ART. Appointments of seven years were sufficient to ensure that corporate knowledge was preserved and that there was consistency and stability on a professional level. In addition, the capacity for some shorter appointments or changes of membership meant that new members could join at appropriate intervals, bringing fresh expertise to the Tribunal.

- ***the requirement for members to enter into performance agreements***

Concerns were expressed about the requirement that Tribunal members enter into performance agreements which would place pressure on members to meet productivity expectations and particular quotas, regardless of the type of case involved and the complexity of individual matters.

The Committee noted that although performance agreements would require members to be accountable for their productivity and performance there was no suggestion that it was intended to bind members to a quota system and this would be inappropriate. It was considered that the monitoring of performance standards was appropriate but that generic performance standards required of ART members should be published in the annual report of the ART. Individual member performance should remain subject, however, to the provisions of the *Freedom of Information Act 1982*. The Committee also suggested that the inclusion of any kind of performance bonus pay in the remuneration of ART members should be approached with caution.

- ***the power to remove members***

Under the proposed legislation Tribunal members could be removed for failing to enter into a performance agreement or for committing a serious or continuing breach of the agreement, or the code of conduct for members. It was argued that the involvement of Ministers in the removal of ART members was intervention of a kind that eroded the Tribunal's independence and credibility before the public. The concern was also raised that the removal powers, when viewed in the context of the requirement for members to enter into performance agreements and the code of conduct, could impinge on the independence of Tribunal members. It was possible that this provision could be used to remove members who made decisions with which Ministers were unhappy.

The majority view of the Committee was that it was appropriate for members to enter into performance agreements and that there should be a power of removal for any breach that was serious and continuing. The Committee, however, approved a recommendation made that the inclusion of generic performance standards in any code of conduct should be the subject of public scrutiny and should therefore be published in the annual report of the ART.

- ***the involvement of the Minister in determining process used by the Tribunal, by issuing practice and procedure directions***

It was argued that the power to issue practice directions should be available only to the President and executive members of the ART and that the precedence of a Minister's practice and procedure directions over that of the President was inconsistent with the concept of independence.

The majority of the Committee accepted that a certain amount of Ministerial involvement in formulating practice and procedure directions was consistent with the enhanced administrative character of the Tribunal. However, it was considered that the public perception of the independence and efficiency of the Tribunal would be enhanced if Ministers were required to consult with the President of the ART before issuing any directions.

The constitution of review panels

It was submitted that cost savings in relation to the use of single member panels, rather than multimember panels, were illusory for a number of reasons. In particular, the SSAT, notwithstanding its use of three member panels was cost-effective, being one of the cheapest Commonwealth tribunals. A trial of single member panels at the SSAT had shown that no significant cost savings resulted. By contrast evidence was submitted to the Committee that there were significant advantages to using multimember panels. These included:

- an inbuilt peer review process that resulted in issues being better defined, research being undertaken more thoroughly, fair and more objective fact-finding, with the process of writing reasons expedited because decisions were shared;
- effectiveness for unrepresented persons, given the skill mix which enabled all legal, administrative and social issues affecting a person to be considered;
- the perception of fairness and the removal of potential for external bias,

which was more likely to occur in single member panels;

- the confidence of decision makers, resulting in quicker decision making.

The majority of the Committee considered that the proposed legislation allowed flexibility in determining panel composition, with a presumption in favour of single member panels. It was open to the President of the ART to properly determine that a particular case or class of cases was appropriate for multimember panels.

Quality of review

Concern was expressed that there was no general requirement for members to have any legal training, that the President was not required to be a Federal Court Judge and that only 10% of the membership were to be senior members.

The majority of the Committee accepted that there was insufficient evidence to suggest that legal training was a necessary prerequisite for membership of a tribunal conducting administrative review. Further, there was nothing in the Bill that would exclude the appointment of members with legal training. It was not necessary for the ART to be headed by a judicial officer. Any such requirement could 'well be inconsistent with the structural framework of the proposed Tribunal which clearly identifies it as part of the executive'. The role of the President would be to lead the Tribunal professionally and to assist in the overall responsibility for the management of the Tribunal. Neither would a cap on the number of senior members detract from the quality of review and this was consistent with current arrangements across the existing tribunals.

Restriction of access to second-tier review

The proposed legislation provided for limited second tier review by leave of the Tribunal or by agreement of the parties, where there was a manifest error of law or fact. It was argued that the restriction of access to second-tier review would severely impact on already disadvantaged groups, particularly in the social security jurisdiction, and that there would be a potential increase in the level of adversarialism in the conduct of cases.

The report of the majority noted that some jurisdictions had never had access to second-tier review (e.g. immigration and refugee decisions) and that the legislation therefore offered the possibility of further access, where it had not existed previously. The decision to restrict access to second-tier review was said to be consistent with the *Better Decisions* report.

Procedural fairness

Concerns under this heading related to the Tribunal's power to decide procedural matters. In particular it was claimed that it was inappropriate for the Tribunal to have power to conduct reviews on the papers, to determine the scope of reviews, to impose conditions on certain matters relevant to the conduct of a review and to restrict an applicant's right to representation. The proposed system was argued to be weighted in favour of government agencies by virtue of the government's ability to block an applicant's access to second-tier review, the enhanced role of the decision maker in the review process, the requirement to remit matters to the original decision maker in certain situations and the employment of agency staff to conduct Tribunal functions. There was further concern regarding the power to appoint an inquiry officer to assist in the conduct of a review and the seemingly wide discretionary powers residing in that officer. The removal of the requirement for written reasons for decisions was argued to be inappropriate because there would be no check on the ART's decision making and accountability, potential applicants would not be able to discover the ART's jurisprudence and the Tribunal itself would be disadvantaged by not having access to precedents.

The majority of the Committee considered that the concerns in relation to the proposed procedures of the ART were unjustified, and that the Bills achieved the key objectives which were to reduce procedural complexity, and allow for flexibility.

Rights of representation

Under the Bill representation, legal or otherwise, would only be permitted where practice and procedure directions issued by the President, executive members or relevant Ministers allowed, or where the Tribunal agreed, and practice directions did not prohibit such representation. It was argued that the complex nature of the particular fields of legislation which would be considered by the ART, combined with the unique characteristics of the users of such legislation, necessitated a right to representation, in particular the right to legal representation.

The majority of the Committee was of the view that the proposed restrictions were consistent with the government's intention that representation, legal or otherwise, should only be available in cases where it was strictly necessary but that it should not otherwise be allowed. However, the Committee agreed that the Tribunal should use its discretion in favour of permitting representation for applicants where a decision maker or agency appeared. The Committee therefore recommended that the Bill set out guidelines for the exercise of the Tribunal's discretion to allow parties to be represented and that these guidelines should include the complexity of the matter, the presence of a question of law, the relative capacity of each party to conduct their case, the stage the review process had reached and the type of proceedings. There should be a presumption in favour of permitting representation for an applicant if the decision maker or agency concerned was appearing.

The minority view

Labour and the Democrats produced a minority report which acknowledged merit in the concept of merging the various separate administrative review bodies. However, it concluded that the model proposed under the Bills was fundamentally flawed. It stated that the proposed model undermined the quality of the performance of Tribunal members by artificially constraining the number of senior members, by not spelling out the minimum qualifications for appointment to the Tribunal and by taking a simplistic approach to the maintenance of performance standards. The minority view was that performance agreements, as proposed under the Bill, and in particular performance pay, were inappropriate. There was concern about the proposed model for single member panels when the recommendation of the Better Decisions report was that there should be a statutory preference for multimember panels.

The minority was also concerned about issues such as the restriction on second-tier review, restriction in relation to rights of representation, the possibility of excessive formality, the power conferred on inquiry officers, and the lack of procedural detail in the Bills, which it was not convinced could be appropriately dealt with by the practice and procedure directions to be issued by the Minister, even where this occurred subject to prior consultation with the President of the ART.

The defeat of the Bills in the Senate

On 26 February 2001 the Bills were debated in the Senate, and defeated when Labor and the Democrats voted against

their passage. It is interesting to note some of the comments made in opposition to the Bills during debate, regarding the public perception of the SSAT. It was stated:

> Indeed, the features of the SSAT in particular are held to be most sound by Australian legal welfare groups, its clients and the general community. I think that one of the pleasing aspects of the evidence that was given before the Senate committee inquiry into these bills was the mostly positive feedback from welfare groups and those working with individual members of the community who use the SSAT and the AAT about how well that process works. That does not mean that you do not necessarily always strive to make it better or that it is absolutely perfect in every way, but it does mean that, when you do finally have a system that seems to work fairly well for the majority of Australians, you want to be very careful before you go around changing it. Many of the positive aspects of the SSAT were threatened by the changes made in these bills.

> Some of the positive aspects of the features of the SSAT that are highlighted include: the absence of adversarial appearance by either the department or the agency; the absence of formality in both the lodgement and hearing processes; the ability of the consumer to be represented by a person of their choice including, but not limited to, legally qualified people: the provision of full papers to the tribunal; the timeliness on average of less than 10 weeks from appeal to conclusion; the readiness of access features for people from non-English speaking background and people with disabilities; the procedures conforming to procedural fairness principles that are accessible, clear, certain and relatively uncomplicated; and the ability to appeal as of right to the second tier of external review, the Administrative Appeals Tribunal...

> Common feedback from the existing tribunal system, particularly the SSAT, even from people who lose at the SSAT, is that they feel they have had a fair go. They have had an opportunity to have their situation considered fairly and impartially...

The tenor of the arguments made against the ART was that the model proposed was fundamentally flawed. It would appear unlikely, therefore, that any compromise will now be reached which will be acceptable to the opposition parties in the Senate, spelling the death knell for the ART in the form proposed under these Bills. However, given the expressed commitment of all parties to some form of merger of the various tribunals, it is likely that the proposal to establish a similar tribunal will re-emerge at some time in the future. In the meantime, however, those tribunals which were to be subsumed under the umbrella of the ART, will continue to function with a certain degree of uncertainty about their future and the danger that there will be a consequent lack of clear direction for those bodies.

[A.T.]

Administrative Appeals Tribunal Decisions

Disability support pension: in 'gaol'; conviction and rehabilitation

PARDO and SECRETARY TO THE DFaCS (No. 2000/1105)

Decided: 8 December 2000 by J. Handley.

Background

In September 1998 Pardo was ordered, under a Hospital Security Order, to be admitted and detained in the Rosanna Forensic Psychiatric Centre as a security patient for 12 months.

The order made by the magistrate was:

> Under s.93(1)(e) in lieu of a term of imprisonment I sentence the defendant by way of a hospital security order to be detained in an approved mental health service for 12 months.

Pardo's claim for disability support pension was rejected by Centrelink as he was considered to be in 'gaol' and therefore this pension could not be paid to him under s.1158 of the *Social Security Act 1991* (the Act).

The SSAT affirmed the decision.

The issue

The main issue for the Tribunal was whether s.1158 acted to preclude payments to Pardo.

This section states:

> An instalment of a social security pension is not payable to a person on a day on which such an instalment would normally be paid to the person if
>
> (a) on that day the person is
>
> (i) in gaol or
>
> (ii) undergoing psychiatric confinement because the person has been charged with an offence and
>
> (b) that day is not the first day and is not the last day in the period of imprisonment or confinement on which such an instalment would normally be paid to the person.

It was therefore necessary to decide whether Pardo was 'in gaol' or ' undergoing psychiatric confinement' because he had been charged with an offence.

Section 23(5) of the Act states:

> for the purposes of this Act a person is in gaol if the person
>
> (a) is imprisoned in connection with the person's conviction for an offence; or
>
> (b) is being lawfully detained in a place other than a prison in connection with a person's conviction for an offence; or
>
> (c) is undergoing a period of custody pending trial or sentencing for an offence.

Flowing from this definition it was necessary to decide whether Pardo had been 'convicted'.

The Tribunal also considered the term 'psychiatric confinement' which is defined in s.23(8) and (9) of the Act:

> subject to sub-section (9), 'psychiatric confinement' in relation to a person includes confinement in
>
> (a) a psychiatric section of a hospital; and
>
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.

Section 23(9) states:

> the consignment of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

The submissions

Pardo submitted that:

- he had not been convicted — he had been sentenced and a hospital security order had been imposed under s.93 of the *Sentencing Act 1991;*
- he was not in gaol, he was in a hospital and had not been 'imprisoned';
- he had been 'engaged in rehabilitation' within the meaning of s.23(9) and that a decision in the case of *Secretary, Department of Family & Community Services & Fairbrother (1999) AATA 580* was a narrow interpretation of the law.

The Department submitted:

- that although the magistrate's order did not technically record a finding of guilt