CHAPTER 3

ISSUES RELATING TO THE PROPOSED ADMINISTRATIVE REVIEW ARRANGEMENTS

Introduction

3.1 The majority of witnesses to the inquiry indicated their support for the proposal to amalgamate the Administrative Review Tribunal (AAT) with the various specialist tribunals, namely the Social Security Appeals Tribunal (SSAT), the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) under a single tribunal structure. The proposal constitutes the most significant and far-reaching reform to the Commonwealth merits review system since the inception of the AAT in 1976.

3.2 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.[1] 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 multi-member/multi skilled 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.[2]

3.3 This chapter deals with the concerns raised in respect of each of these areas.

Independence of the ART

3.4 A principal concern is that the Bill creates a tribunal that will have an ethos or culture that is essentially *of* the executive rather than *as an adjunct to* the executive.[3] It is widely acknowledged that adjudicative tribunals like the AAT are in a 'rather unusual

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1 *Submission 40*, Law Council of Australia, pp. 2-3: The Law Council argued that effective administrative review requires independence from the Executive, accountability and responsiveness, promotion of better quality decision making, fairness and cost effectiveness.

2 See for example *Submission 54,* National Welfare Rights Network, p. 5

3 *Transcript of evidence,* Mr Peter Johnston, p. 2

constitutional situation'. While they are essentially executive bodies participating in executive decision making, they have not yet been identified with the executive itself. By contrast, it is claimed that the proposed ART will be subject to the control of the executive.[4]

3.5 The Victorian Bar Association commented that many of the matters prescribed under the Bill 'push towards a mechanistic system in which the opportunity for independent reflective review is minimised'.[5] The principal matters claimed to threaten the independent and impartial review of administrative decisions, include:

- the proposed purchaser/provider funding model;
- the method of appointment of Tribunal members;
- the provision of terms of appointment in preference to tenure;
- the requirement for members to enter into performance agreements;
- the extent of the removal powers; and
- the involvement of the Minister in determining processes used by the Tribunal.[6]

The proposed purchaser/provider funding model

3.6 The objective in relation to the funding for the ART is that with time, it will be funded entirely through the running costs of those departments that 'purchase' review services from the Tribunal. Initially, the Department of Family and Community Services will fund the costs of review in the Income Support Division and the Department of Immigration and Multicultural Affairs will fund the costs of review in the Immigration and Refugee Division. The remaining costs of the ART will be met through the appropriation for the Attorney-General's Department. When sufficient information is available to enable calculations to be made of the cost of reviewing decisions in the different portfolios, the Tribunal will be funded entirely through the running costs of those departments having portfolio responsibility for the Divisions of the Tribunal.[7]

3.7 The Committee was told that the proposed funding model is contrary to the *Better Decisions* Report which recommends that, as a general rule, tribunal funding should not be provided for within the budget of an agency whose decisions form all or a large proportion of the tribunal's workload.[8] The stated object of the rule is to strengthen perceptions of independence amongst tribunal users.[9] It was claimed then, that the proposed funding of the

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4 *Transcript of evidence,* Mr Peter Johnston, p. 2

5 *Transcript of evidence,* The Victorian Bar Association, p. 28

6 See for example *Submission 59,* Legal Aid Commission of NSW, pp. 10-13, *Submission 40,* Law Council of Australia, Attachment A, pp. 11-14, *Submission 54,* National Welfare Rights Network, p. 12 and *Submission 25*, Flinders University Union, p. 2

7 *Explanatory Memorandum,* Administrative Review Tribunal Bill, p. 3

8 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals, Report No 39,* Recommendation 78.

9 *Submission 59*, Legal Aid Commission of NSW, p. 13; Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals, Report No 39,* paragraph 7.15

ART, where the department responsible for the primary decision will fund the review of that decision, will adversely affect the independence of the ART and threaten its integrity:[10]

> A purchaser of a service usually has the opportunity to exercise control or influence over the service they are providing. If Departments are seen as purchasers, what prevents them from exercising the powers of a purchaser over the ART? This funding nexus between the ART and the Departments under review has the potential to diminish the independence of the administrative review process.[11]

3.8 The Victorian Bar favoured retaining the current funding model for the AAT where funding is provided through the vote of the Attorney-General's Department. It claimed that, ideally, funding should be completely removed from government agencies to enhance perceptions of independence. The Bar recognised, however, that as funding is a parliamentary decision, a Department has to put forward the funding proposal in the relevant schedule to the Appropriation Bill. In its view then, funding through the Attorney-General's Department is the preferred option because it places a significant insulator between the departments whose decisions are reviewed by the tribunal and decisions about the level of funding for the AAT. It considered that the current funding of the Administrative Appeals Tribunal through the Attorney-General's Department was appropriate because, like the courts, it was involved in distributing justice. Alternatively, the Victorian Bar suggested that there should be a permanent appropriation built into the ART bill – that is, permanently appropriating the moneys required to fund its operations, so that there would be no 'bureaucratic hand on the lever'.[12]

3.9 The Attorney-General's Department, however, advised the Committee that the purchaser/provider funding model proposed for the ART is not new and is, in fact, the model currently used in relation to funding for the SSAT and the VRB. The Department's understanding is that the model has not caused any erosion of the independence of those Tribunals[13] and, in fact, there was no evidence presented during the inquiry that suggested otherwise.

3.10 Under the new administrative review structure, the VRB will be retained. This will ensure that there are two external tiers of review in relation to decisions by the Veterans' Affairs Department. The Veterans' Affairs Department stated that the level of funding for the VRB is determined by an agreed and transparent formula thus ensuring that the department does not and cannot influence the outcomes of reviews at the VRB. The Department expects that a similar approach will be adopted in relation to the funding of the Veterans' Review Division of the ART. The Veterans' Affairs Department, therefore, will eventually be responsible for funding both the VRB and the Veterans' Review Division of the ART - that is, when the calculations mentioned in paragraph 3.6 are available and funding has been transferred from the Attorney-General's Department to the relevant Departments with portfolio responsibility.

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10 *Submission 59*, Legal Aid Commission of NSW, p. 13; *Submission 25*, Flinders University Union, p. 2; *Submission 45*, Welfare Rights Centre (SA) Inc, p. 5

11 *Submission 45*, Welfare Rights Centre (SA) Inc., p. 5

12 *Transcript of evidence,* The Victorian Bar Association, p. 25

13 *Transcript of evidence,* Attorney-General's Department, p. 152

3.11 The purchaser/provider funding model is based on the assumption that the responsibility for the funding of the body conducting reviews of administrative decisions should lie with the department that made the original decision.[14] The Committee is of the view that, although it is not aimed at eroding the independence of the ART, the funding model will have 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.[15] 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. In the Committee's view, this funding model will sharpen departmental decision-making processes.

The method of appointment of Tribunal members

3.12 It was claimed that the appointment of members subject to relevant ministerial approval will erode the independence of the ART.[16] Under the Bill, members and executive members of the various Divisions of the ART are to be appointed by the Governor-General subject to their respective portfolio Ministers being satisfied that, having regard to their qualifications and experience, they should be appointed. This means that members will be appointed to the Income Support Division, for example, only with the approval of the Minister for Family and Community Services.[17]

3.13 A number of inquiry participants were concerned that if Ministers have a significant influence over the selection of appointees, they will also have influence over the actions of members who will be reviewing decisions made by their departments.[18] The Committee on Rights of Review submitted:

> Further, there is the problem of the involvement of the Ministers responsible for the legislation under review, especially with no legislative standards and protection, as this process is supposed to be independent. Given that many appointments are simply rubber stamped by the Governor-General there is nothing to prevent Ministers being 'satisfied' with a member more likely to find in favour of the Agency whose decision is under review. There is certainly no legislative protection within the ART Bill from such an abuse of power.[19]

3.14 Part of the concern about ministerial involvement in the appointment of members stems from the fact that the Bill does not include any specific criteria or qualifications for selection. As indicated in paragraph 3.12 above, the Bill merely states that the Minister must be satisfied that the person should be appointed after having regard to the person's qualifications and experience. This is a departure from the *Administrative Appeals Tribunal*

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14 *Transcript of evidence,* Department of Veterans' Affairs, p. 160

15 See for example *Transcript of evidence,* Australian Law Reform Commission, pp. 108-110 and 114

16 Administrative Review Tribunal Bill, clause 15

17 Administrative Review Tribunal Bill, clause 15

18 *Submission 40*, Law Council of Australia, p. 19; *Submission 25*, Flinders University Union, p. 3; *Submission 26*, Western Australia Council of Social Service Inc, p. 3; Submission 31, Law Institute of Victoria, pp. 3, 11

19 *Submission 29*, Committee on Rights of Review, p. 2

Act (Cth) 1975 where the required skills and qualifications for members are specified in section 7.[20] The Law Council of Australia asserted that the selection of members by the responsible Minister without public accountability or reference to any objective, published, criteria would raise questions about their independence[21] and WACOSS claimed it would reflect adversely on the credibility of the ART.[22]

3.15 The Law Council referred to the recommendations in the *Better Decisions* Report that a core set of skills and abilities should be developed to assist the selection of tribunal members and that all prospective members should be assessed against publicly available selection criteria developed by a broad based panel established by the responsible Minister.[23] In addition, the Committee was told that the lack of criteria against which to test an applicant members suitability for the position was inappropriate given the complexity of the legislation to be reviewed and the significance of the outcomes of such reviews on people's lives.[24]

3.16 The Committee was advised, however, that the proposed legislative arrangements for the selection and appointment of members to the ART are no different from the current arrangements. The Attorney-General's Department confirmed that in relation to appointments to the MRT, the RRT, the AAT and the VRB, the portfolio Minister makes recommendations to the Governor-General as will be the case for appointments to the ART.[25]

3.17 This was also confirmed by the Australian Taxation Office (ATO) which commented that the procedures that govern the appointment of members to the taxation division of the AAT will basically stay the same in relation to the Taxation Division of the ART. It said that the ATO advises the Treasurer with respect to the appointment of members to the tax division of the AAT, because the Treasurer is required to consent to an appointment even though the actual appointment is proposed by the Attorney-General.[26]

3.18 The Committee is confident that the method of selection and appointment to the ART will not compromise the independence of the Tribunal in the same way it has not compromised the independence of existing tribunals. In addition, the Committee sees little advantage in entrenching detailed selection criteria for positions in legislation.[27] The requirement that relevant Ministers must be satisfied that members have appropriate qualifications and experience is sufficient. As is stated in the *Explanatory Memorandum,* the responsible Minister is 'best placed to understand the skills required by, and the expertise available to, his or her own Division'.[28]

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20 *Submission 29*, Committee on Rights of Review, p. 2

21 *Submission 40*, Law Council of Australia, p. 18

22 *Submission 26*, Western Australia Council of Social Service Inc, p. 3

23 *Submission 40*, The Law Council of Australia, p. 18 referring to Administrative Review Council report no 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals,* Recommendations 31-37

24 *Submission 26*, Western Australia Council of Social Service Inc, p. 3

25 *Transcript of evidence,* Attorney-General's Department, pp. 152-153

26 *Transcript of evidence,* Australian Taxation Office, p. 165

27 For example, as specified in the *Administrative Appeals Tribunal Act 1975,* section 7

28 *Explanatory Memorandum,* Administrative Review Tribunal Bill, p. 8

The provision of terms of appointment rather than tenure

3.19 Several reservations were expressed about the provision of terms of appointment instead of tenure and the effect that this might have on the independence of the ART. Mr Allen, a senior member of the AAT, referred to the statement in 1982 of the then Attorney-General, the Hon. P Durack QC when introducing the amendment to the *Administrative Appeals Tribunal Act 1975* to give senior members of the AAT tenure. Senator Durack said that tenure would emphasise the independence of the members when performing their Tribunal functions.[29] The Victorian Bar Association commented that the limited time appointments could potentially affect the independence of the ART:

> Short-term appointments which are renewable are a recipe for people looking over their shoulders when they are making decisions.[30]

3.20 Mr Allen also compared the protection of tenure given to members of the judiciary with that proposed for members of the ART and argued that as every case will involve the government as a party, members of the ART will be in need of even greater protection from pressure.[31] In addition, Mr Allen contended that the decision to grant members terms rather than tenure might affect the quality of persons who offer themselves for appointment:

> No legal practitioner with a successful practice would abandon it for a period of years with no guarantee of re-employment. To take such an appointment destroys one's practice but with no guarantee that after the period of years has elapsed he or she will not be forced to commence practice again from scratch.[32]

3.21 Mr Johnston, a former deputy president of the AAT, supported 7 year terms of appointment but noted that the language in clause 18 indicates that members can be appointed for shorter terms (clause 18 states that appointments must not exceed 7 years).[33] The Law Council was similarly unperturbed about 7 year terms of appointment but was concerned that such limited terms should not be allowed to undermine the perception of stability and permanence in the process of external merits review. In particular, the Law Council argued that members' expertise (and the cost of their relevant training) should not be lost and members should not feel threatened by removal or non-appointment.[34] In addition, the Attorney-General's Department advised that Commonwealth statutory officers such as the Ombudsman and the Privacy Commissioner have fixed-term appointments, with no prescribed minimum terms, and that this has not been perceived as interfering with their independence.[35]

3.22 The Committee takes the view that the provision for terms of appointments of up to 7 years will promote an appropriate mix of membership at the ART. Appointments of 7

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29 *Submission 9*, Mr M D Allen, p. 5

30 *Transcript of evidence,* The Victorian Bar Association, p. 28

31 *Submission 9,* Mr M D Allen, p. 5

32 *Submission 9*, Mr M D Allen, p. 6

33 *Transcript of evidence,* Mr Peter Johnston, p. 6

34 *Submission 40*, Law Council of Australia, p. 20

35 *Submission 74,* Attorney-General's Department, Attachment: Comments on the Law Council of Australia's submission (number 40B: *Suggested drafting amendments)*, p. 2

years are long enough to ensure that corporate knowledge is preserved and that there is consistency and stability on a professional level. In addition, the capacity for either some shorter appointments or changes of membership after 7 years means that new members can join at appropriate intervals, thus bringing new expertise and a fresh approach to the Tribunal. Further, the Committee notes that appointments can be renewed after 7 years. The *Explanatory Memorandum* confirms that members may be reappointed for a further term.[36]

3.23 The Committee, however, acknowledges the concerns expressed in submissions and in evidence about the way in which members of existing tribunals have been appointed and those appointments extended in the lead-up to this legislation. The Committee hopes that these administrative problems are addressed sympathetically and quickly.

The requirement for members to enter into performance agreements

3.24 Clause 24 requires a tribunal member (other than the President) to enter into a performance agreement which will deal with the member's performance and require the member, amongst other things, to be accountable for his or her productivity. The breach of a performance agreement can be grounds for dismissal of a member under clause 28. While witnesses acknowledged that the Government's motivation behind the provision was to ensure the efficient operation of the Tribunal, several witnesses suggested that there is considerable room for misuse of these powers:

> The reference to productivity and performance opens the way for abuses of all kinds to take place with no possibility of redress. Emphasis on productivity is utterly unjustifiable and will only produce a Tribunal which churns out quick decisions to which proper thought has not been given; this can in turn be expected to increase the number of appeals – and, indeed, successful appeals – to the Federal Court, and the cost to the Government and the time involved, in both argument before the Federal Court and in dealing with remitted decisions, will be greatly increased.[37]

3.25 The National Welfare Rights Network referred to an article by Gabrielle Fleming[38] on the use of statistics and performance indicators in the migration tribunals (MRT and RRT). The Network argued that statistics can be used to restrict the quality of decision-making if performance indicators have strictly numerical processing requirements.[39]

3.26 The CPSU submitted that the introduction of a performance measurement system into the ART legislation marks a dramatic shift in the status of Tribunal members:

> Rather than being likened to judges, whose independence is guarded by statutory protections against removal from office and immunity from certain legal action, the

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36 *Explanatory Memorandum,* Administrative Review Tribunal Bill, p. 9. The *Explanatory Memorandum* refers to section 33(4A) of the *Acts Interpretation Act 1901* where it is stated that the use of the word 'appoint' includes 'reappoint'.

37 *Submission 12*, Dr Rory Hudson, pp. 1-2. See also *Transcript of evidence,* Mr Peter Johnston, pp. 3-4

38 Australian Journal of Administrative Law, November 1999, Volume 7, p. 33

39 *Transcript of evidence*, National Welfare Rights Network, p. 107

> conditions of members of the new statutory scheme are more like those of high level public servants.[40]

3.27 In addition, it was argued that fixing a quota of decisions, regardless of the complexities of the issues involved, could place members under significant pressure from the executive because, in the event that a quota is not met, the member could be dismissed under clause 28. It was claimed that as currently drafted, the clauses did not lend themselves to public confidence and trust in the full independence of the ART.[41] Dr Hudson told the Committee:

> I think that is a cause of very serious concern, because it supports the idea of efficiency at the cost of justice. There are many occasions when one simply needs to take time to do the proper research as to the facts and the law, and decisions just cannot be made according to order or necessarily within a certain time frame. That should be recognised. I think it is most inappropriate for those sorts of time limits to be in performance agreements.[42]

3.28 To avoid such a perception, it was suggested that performance agreements should be made publicly known and be subject to the control and scrutiny of the Parliament. This would enable applicants for review to have greater confidence in the independence of members.[43] Alternatively, it was suggested that the proper course would be for there to be a standard form performance agreement that is a disallowable instrument.[44]

3.29 The Committee notes that there is a trend towards improving and monitoring the performance of tribunal members in general and the Committee believes that this is a positive development in relation to administrative decision review mechanisms. The MRT and the RRT already utilise performance agreements. The MRT gave evidence that assessment under its performance agreement proceeds according to a range of management statistics and other indicators of quality of decisions.[45] The SSAT also has a performance appraisal mechanism in place. The SSAT stated that its performance reporting system is based on the legislative requirement that the SSAT proceed fairly, justly, economically and quickly. (The Act requires written reasons to be produced within 14 days). The system has regard to such matters as the member's research and conduct in hearings and with staff and other members.[46] In addition, the VRB is also currently negotiating a performance agreement and appraisal system.[47] The Department of Veterans' Affairs indicated to the Committee that it is

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40 *Submission 51*, Community and Public Sector Union, Victorian Branch, p. 3

41 *Submission 42*, Refugee & Immigration Legal Centre Inc and Refugee Advice and Casework Service (Australia), p. 4

42 *Transcript of evidence,* Dr Rory Hudson, p. 50

43 *Submission 42*, Refugee & Immigration Legal Centre Inc and Refugee Advice and Casework Service, p. 4

44 *Transcript of evidence,* The Victorian Bar Association, p. 26

45 *Transcript of evidence*, Migration Review Tribunal, p 72

46 *Transcript of evidence*, Social Security Appeals Tribunal, pp. 66-67

47 *Transcript of evidence,* Attorney-General's Department, p. 151

expected the performance agreement for VRB members will cover matters such as the timeliness and quality of decisions.[48]

3.30 The Law Council of Australia supports performance appraisal for tribunal members but noted that the ARC's *Better Decisions* Report did not contemplate that the performance appraisal scheme would have legislative status or be linked to the grounds for the removal of members from office (clause 28). The Law Council's concern about the proposed linkage between performance agreements and the grounds for the removal of members from office is dealt with below.[49] (See Paragraph 3.37 – 3.40)

3.31 The Committee understands that the principal fears in relation to the requirement that Tribunal members enter into performance agreements is that the agreements might give rise to some kind of expectation about the outcome of cases or require members to meet a fixed quota of cases regardless of the complexities involved. The Committee believes that these fears are unjustified. The Bill specifically provides that performance agreements are not to deal with the substance of decisions (subclause 24(3)) and the Committee accepts the advice of the Attorney-General's Department that this means agreements are 'not to relate to the outcome of any particular matter that comes before the Tribunal'.[50] In relation to the possibility of fixed quotas, the Committee believes that this is unlikely. Although the performance agreements will require members to be accountable for their productivity and performance (subclause 24(2)), there is no suggestion that it is intended to bind members to a quota system. In any event, the Committee strongly records its opposition to any such 'fixed quota' requirement.

3.32 Finally, the Committee notes that the requirement for non-presidential members to enter into performance agreements also emphasises the true constitutional position of such a Tribunal. Requiring members to be accountable for their productivity and performance reflects the status of tribunal members involved in performing administrative review as a function of the executive.

3.33 There was some discussion before the Committee on alternative ways of assessing performance, e.g., peer-monitoring[51] and a reference by the ALRC to informal 'shaming sessions' in meetings of judges in which outstanding judgments are discussed.[52] Another suggestion contained in an indicative determination by the Remuneration Tribunal is the possibility of the remuneration of ART members including a performance bonus component.[53] In relation to the possibility of performance bonus pay, the ALRC commented that it would be very brave to build bonus pay into the remuneration of members because of the difficulty of obtaining reliable indicia of quality in a legal system.[54] Given the ALRC's

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48 *Transcript of evidence,* Department of Veterans' Affairs, p. 152

49 *Submission 40C,* Law Council of Australia, p. 4

50 *Transcript of evidence,* Attorney-General's Department, p. 151

51 *Transcript of evidence*, Mr Graham McDonald, p. 67

52 *Transcript of evidence,* Australian Law Reform Commission, p 111

53 See exhibit 1 tabled by Mr John Godfrey, Deputy Principal Member, Refugee Review Tribunal at the public hearing held on 4 December 2000

54 *Transcript of evidence,* Australian Law Reform Commission, p 111

advice, the Committee believes that the suggestion of including any kind of performance bonus pay in the remuneration of ART members should be approached with caution.

3.34 In conclusion, the Committee expresses its support for performance standard monitoring of tribunal members. For the reasons given below[55] (relating to the linkage between performance standards and the removal of members from office), however, the Committee recommends that generic performance standards required of ART members should be published in the Annual Report of the ART. Access to the individual performance agreements that members are required to enter into under clause 24, however, should remain subject to the provisions of the *Freedom of Information Act 1982* (FOI Act). The Attorney-General's Department advised that access to an ART member's performance agreement could be sought under the FOI Act but that such access would be subject to any relevant exemptions. The Department indicated that exemptions that may be relevant include: subsection 41(1) (the unreasonable disclosure of personal information); and paragraph 40(1)(c) (substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency subject to a balancing public interest test in subsection 40(2)).[56]

The extent of the power to remove members

3.35 Subclause 28(3) of the Bill provides a large number of grounds for the removal of tribunal members by the Governor-General with the concurrence of the President and, if the member is an executive member, with the concurrence of the responsible Minister for the executive member's Division.[57] By comparison, an AAT member who is not a judge can only be removed by the Governor-General if both Houses of the Parliament in the same session pass a resolution to remove the member for proved misbehaviour or incapacity or if the member becomes bankrupt (this is the procedure specified in clause 27 for the removal of the President of the ART).[58]

3.36 It was claimed that the involvement of Ministers in the removal of executive members of the ART is ministerial intervention of a kind that will erode the Tribunal's independence and credibility before the public.[59] Further, a concern was 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, may impinge on the independence of Tribunal members.[60] It was conceivable, the Committee was told, that this provision could

55 See paragraph 3.37 – 3.40

56 *Submission 74,* Attorney-General's Department, p. 2. The Committee notes, however, that The Freedom of Information Amendment (Open Government) Bill 2000 seeks to amend the exemption in subsection 41(1) but even if that amendment were passed, the disclosure might still be exempt under the proposed section 41 – documents affecting personal privacy.

57 Those grounds of removal are set out above in Chapter 2, paragraph 2.12

58 *Administrative Appeals Tribunal Act 1975,* section 13

59 *Submission 52*, Welfare Rights and Advocacy Service, p. 9

60 *Submission 40*, Law Council of Australia, p. 22

be used to remove members who make decisions with which Ministers are unhappy .[61] Other concerns included that:

- there is no definition of 'misbehaviour' within the legislation and therefore it may be interpreted broadly or narrowly; [62] and
- the removal powers are a breach of the doctrine of separation of powers – a member of the executive should have no role in relation to the dismissal of an executive member of the Tribunal. The removal power in subclause 27(1) of the Bill, (that is, the removal of the President) is the standard model for the removal of judicial officers and should apply to all members. The Attorney General should have no control over the President or any tribunal member directly or indirectly whatsoever.[63]

3.37 The Law Council of Australia described the removal powers relating to performance agreements and the code of conduct as 'ground breaking and unprecedented'.[64] The Law Council was particularly concerned that members could be removed for failing to enter into a performance agreement or for committing a 'serious or continuing breach of the agreement' (subclause 28(3)(d)). The Law Council pointed out that while a member could also be removed for committing a serious or continuing breach of the code of conduct, the code of conduct is a disallowable instrument and so subject to the scrutiny of the Parliament whereas the performance agreements are not. In addition, as mentioned above, the Law Council advised that it was not contemplated in the ARC's *Better Decisions* Report that performance agreements should attain a legislative status or be linked to the removal of tribunal members.

3.38 The Law Council's position is that the code of conduct should contain the generic performance standards expected of members and, as the code is a disallowable instrument under the principal Bill, those performance standards would be scrutinised by the Parliament. Removal, then, would be triggered by a 'serious or continuing breach of the code' or a breach of a direction related to the code:

> In effect, the Law Council is recommending to the Committee that the provisions relating to performance agreements should be deleted from the Bill and that the generic performance standards for the Tribunal should be incorporated into the code of conduct. … This would not preclude the ART from implementing a performance appraisal scheme to provide feedback to members about individual members' performance.[65]

3.39 The Committee is of the view that the removal powers complement the move towards improving and monitoring the performance of tribunals. If members are to be required to enter into performance agreements, then it would be of superficial value if they were not to be required to abide by them. Further, the Bill emphasises that for removal of a member to occur, the breach of the performance agreement (or code of conduct) must be

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61 *Submission 26*, Western Australia Council of Social Service Inc, p. 4

62 *Submission 26*, Western Australia Council of Social Service Inc, p. 4

63 *Submission 10*, Mr Stephen Colbran, Faculty of Law, Queensland University, p. 1

64 *Submission 40*, Law Council of Australia, p. 22

65 *Submission 40C*, Law Council of Australia, p. 6

'serious and continuing'.[66] The doctrine of the separation of powers is not applicable, as the ALRC stated in evidence:

> … it is fair to say that the Australian tribunal system is very different from everywhere else and that is because of our Constitution. The tribunals are explicitly under the Constitution part of the executive.[67]

3.40 The Committee, however, considered the recommendation put by the Law Council in relation to the inclusion of generic performance standards in the code of conduct which would be subject to the scrutiny of the Parliament. The Committee agreed that there should be some form of public accountability in relation to the performance standards required of ART members, especially as non-compliance with the performance agreements constitutes a ground for removal. The inclusion of generic standards of performance in the code of conduct, however, could result in a perception that the only importance of performance standards is in their relationship to the grounds for removal or as the basis of disciplinary action (for example directions under clause 26). This perception would run counter to the trend of monitoring performance standards for the purpose of improving and enhancing the performance of tribunals. Most importantly, the Committee sought to balance the need for public accountability in relation to the performance standards required of ART members against the need to respect the privacy of individual ART members. The Committee has recommended that generic performance standards required of ART members should be published in the Annual Report of the ART but that access to the individual performance agreements of members should remain subject to the provisions of the FOI Act.[68]

Ministerial power to issue practice and procedure directions

3.41 The conduct of the ART members and the staff of the ART will be governed by administrative practice and procedure directions issued by either the President, the Minister or executive member responsible for each division. The Minister's directions will prevail over those of the President and executive members and the President's directions will prevail over those of the executive members.[69] In addition to clause 161 which is the substantive source for the power to issue directions, other clauses of the Bill contemplate the issuing of practice and procedure directions in relation to specific matters. Examples of such matters include: the form and manner of making applications to the Tribunal (subclause 141(1)); the time period for agencies to lodge documents with the Tribunal and documents that the decision makers need not furnish to the Tribunal (subclause 77(2)); whether the tribunal is to give copies of documents to participants (clause 81); the practice and procedure to be followed by the Tribunal in conducting a review (clause 107); and representation before the Tribunal (clause 105).

3.42 At the public seminar on the Bills, held on 25 October 2000, a representative of the Attorney-General's Department said that it was true that the President, a minister or an executive member of a Division could issue directions, but that the directions were limited. It

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66 *Submission 74,* Attorney-General's Department, Attachment: Comments on the Law Council of Australia's submission (number 40B: *Suggested drafting amendments)*, p. 3

67 *Transcript of evidence*, Australian Law Reform Commission, p. 116

68 Note above the exemptions discussed in paragraph 3.34

69 See Administrative Review Tribunal Bill, clause 161

was only where a provision of the principal Bill referred to something dealt with by the practice and procedure directions that the directions could deal with that subject matter. The principal Bill did not give the power to ministers, for example, to issue directions requiring the ART to apply a particular government policy.[70] Nonetheless, the Law Council contended that the range of matters that can be dealt with under those directions is sufficiently broad for the control of a Minister to be 'significant'. For example, one of the 'procedural' matters upon which a Minister could issue directions is the availability of representation. A direction could be made excluding representation.[71]

3.43 A major concern in relation to the practice and procedure directions is that much of the detail in relation to the ART will be determined under directions developed by portfolio Ministers, the President and executive members rather than being prescribed in the Bill. The Committee was told that it is contrary to democratic principles to confer extensive powers of this kind without providing appropriate accountability and control devices. To this end, it was suggested that the directions should be made disallowable instruments.[72] The Law Council considers that the power to issue directions should only be given to the President and the executive members. If, however, the ministerial directions are to be retained, the Law Council considers they should be disallowable instruments.[73]

3.44 It was claimed that the precedence of the Minister's practice and procedure directions over those of the President is inconsistent with the independence of the ART.[74] The Victorian Bar stated that the ministerial power is so inconsistent with the independence of the ART that it compromises any prospect of an independent and reputable review system.[75] Similarly, the CPSU stated:

> It is of concern that the directions issued by portfolio Ministers, rather than the President of the Tribunal, prevail in the event of any inconsistencies. This has serious implications for the operation of different Divisions and the perceived independence of the ART as a whole; it is arguably an intrusion of the political into what is supposed to be an independent review process. There is no requirement for Ministers to consult with the President or Executive Members before issuing directions to the Tribunal.[76]

3.45 Victoria Legal Aid told the Committee that under existing law, Ministers may not issue formal directions to the AAT about the conduct of reviews although weight is given to official ministerial/Government policy. This enables the AAT to accord appropriate weight to government policy, without the use of ministerial directions that interfere with the conduct of reviews. Under the ART Bill, however, Victoria Legal Aid said it was possible that

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70 Australian Institute of Administrative Law and Senate Legal and Constitutional Law Committee, Transcript of proceedings: *Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal,* 25 October 2000, p. 15

71 *Submission 40*, The Law Council of Australia, p.10

72 *Submission 60*, Australian Council of Social Service, pp. 11-12

73 *Submission 40*, Law Council of Australia, p. 36; See also *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 6

74 *Submission 60*, Australian Council of Social Service, pp. 11-12

75 *Submission 49*, The Victorian Bar Inc, p. 5

76 *Submission 51*, Community and Public Sector Union, Victorian Branch, pp. 15-16

members could be bound to make decisions in particular ways on particular classes of cases.[77] The Victorian Bar believes that a similar approach to that employed in the AAT should apply in the ART.[78]

3.46 The ARC submitted that although Ministers will have legitimate interests in the operations of a Division, the provision diminishes the President's overall responsibility for the Tribunal. Several witnesses asserted that the Minister should consult with the President as a matter of course about the development of directions, to avoid inconsistencies. In the ARC's view, genuine differences of view are better resolved by consultation and negotiation rather than by legislating that a Minister's direction prevails.[79] Flinders University Union pointed out that while the President and the executive members are required to consult each other, there is no similar requirement for the Minister to consult with anyone.[80] The Committee was told that the issuing of directions by both responsible Ministers and the Tribunal without consultation raises the possibility of fragmenting the administration of the ART. There is also a risk that multi or complex directions may be issued which would be at odds with the relatively simple nature of merits review procedures.[81]

3.47 A further suggestion was that the model of a 'rule Committee' as seen in the *Administrative Decisions Tribunal Act 1997* (NSW) should be adopted. Under that model, rules in relation to the ADT can be made specific to the operation of particular divisions of the ADT but only where the making of such rules has been recommended by a subcommittee. Subcommittees are composed of an equal number of tribunal members and community representatives (s 97(2)). The model includes a notice and comment regime to canvas public opinion. The Committee was told that use of this model would clearly enhance the quality of the ART's practice and procedure directions.[82]

3.48 The Committee was told, however, that the employment of practice and procedure directions as a major structural component of the ART has significant advantages. First, departments with extensive experience in administrative review, such as Centrelink, can and should be able to make a significant contribution to the establishment and operations of the proposed new tribunal. Centrelink submitted:

> Our advocacy and administrative law service is staffed by officers who have significant experience in the operations of merits review tribunals and administrative review generally. Those staff are thus in a good position to provide insights and input into what processes work effectively and those processes that do not operate as well as consumers of tribunal services might anticipate and expect. [83]

3.49 Centrelink customers will probably constitute the ART's largest user group. Given that Centrelink has substantial data about customer expectations in dealing with government,

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77 *Transcript of evidence,* Victoria Legal Aid, p. 11. See also Submission 42, Refugee and Immigration Legal Centre and Refugee Advice and Casework Service (Australia), p. 4

78 *Submission 49*, The Victorian Bar Association., pp. 6-7

79 *Submission 56*, Administrative Review Council, p. 10

80 *Submission 25*, Flinders University Union, p. 3

81 *Submission 49*, The Victorian Bar Association, p. 6

82 *Submission 60*, Australian Council of Social Service, p. 12

83 *Submission 62*, Centrelink, p. 6

that agency has already been involved in a pilot project with the AAT aimed at improving the delivery of administrative review services to social security customers.[84] Centrelink has a staff of 22,000 who handle over 300 million customer contacts per annum. It is estimated that some 36 million decisions are taken each year by those staff. In the year ended 30 June 2000 there were a total of 36,043 requests for internal review. There were 7,766 appeals to the SSAT. A total of 1,592 applications for review were lodged with the AAT of which 243 were lodged on behalf of the client department. The Committee considers that the practice and procedure directions and their formulation will afford departments and agencies like Centrelink an opportunity to put their experience and knowledge to good use.[85]

3.50 On the question of practice and procedure directions, the Committee was assisted by the ALRC. The ALRC acknowledged that there is speculation as to what form the directions will take and how they will operate and this has led to some anxiety given that directions are an important structural component of the ART. The ALRC said that it is consistent with the administrative character of the ART that the Minister should have a greater involvement in the functioning of the Tribunal than in that of the court system. Investigations of existing tribunals indicated that review systems work best when there is a 'comfortable fit between the portfolio departments and the tribunals' – that is, where departments have a stake in the good functioning of the tribunals – and practice and procedure directions provide a mechanism for that fit.[86]

3.51 Regarding the actual content of the practice and procedure directions for the ART, the ALRC said:

> . . . if I can use the analogy that we would draw from looking at the way in which case management happened in the Federal Court, the Family Court and the AAT, we found that the Federal Court worked extraordinarily well, and there was universal commendation of that court. Part of the reason it worked very well is that it had customised procedures. There was very strong and consistent criticism of the Family Court. Again, the reason it was criticised was largely because of the way it managed its case procedures and that they were scripted. There was an emphasis on consistency over customising, or tailoring, it to the particular case.
>
> The other aspect of these practice directions that I think is enormously important to get right is that you have to leave sufficient space in there for members to make a judgment about a particular case. With this tribunal, particularly, there is enormous variability not just in substantive matters that come before it but in the extraordinary array of applicants. You have to be able to distinguish between mischievous, unskilled and naïve applicants. You have got to distinguish between those who are well represented and well resourced and those who have very, very few skills and where you are going to have to do a lot of the work. Even with particular divisions, you get the difference – and we have made the point in our submission – between a university student appealing a benefit and a migrant non-English-speaking single parent appealing a benefit decision. They are going to be very different applicants. Insofar as practice and procedure directions seek to focus

84 *Submission 62*, Centrelink, p. 6

85 *Submission 62*, Centrelink, pp. 1-2

86 *Transcript of evidence,* Australian Law Reform Commission, pp. 109-110

> on consistency, rather than customising, then we would say, as with the Family Court, that they may not work well.[87]

3.52 The ALRC did, however, suggest it was important to consider how the processes of the ART could be crafted to avoid ministers using them for macro outcome purposes (which is often the focus at the ministerial level) while at the same time allowing for departments to assist the Tribunal.[88]

3.53 The Committee agrees with the ALRC that the question of the independence of the ART has to be looked at in the context of the nature of the Tribunal itself. To date, the role of tribunals and where they fit in the legal system has never been analysed although there has been significant tension between the executive and the tribunals and between the tribunals and the courts on that question. The reform of the merits review system has provided an opportunity to clarify the position of administrative processes in our legal system and whether and in what ways they should work differently. The ALRC favours emphasising the investigative character of tribunals because at least one-third of applicants before the AAT are unrepresented and many of those are unskilled. At least as many will be unrepresented before the ART so the tribunal will have to employ an investigatory approach in order to make a fair decision.[89]

3.54 The Committee accepts that a certain amount of ministerial involvement in formulating practice and procedure directions is consistent with the enhanced administrative character of the Tribunal. The Committee takes on board the ALRC's comments, however, that there is a line that separates those matters that are appropriate for ministerial directions from those that are not.[90] The Committee does not consider that ministerial involvement in directions will compromise the independence of the Tribunal and believes that users can properly have confidence in the review system. The concern that Ministers will use directions to improperly influence tribunal outcomes arises partly from the fact they have yet to be formulated. The Committee is confident that these fears will subside when the Tribunal becomes operational. Having said that, the Committee considers that the public's perception of the independence and efficiency of the tribunal would be greatly enhanced if Ministers had to consult with the President before issuing directions.

The constitution of review panels

3.55 The President will have significant powers over the constitution of Tribunals. Most importantly, the President will direct whether a single member or 2 or 3 members will constitute a Tribunal. Multi-member panels may only be used if the President considers it appropriate because the review raises a principle or issue of general significance or one or more of the members have particular and relevant expertise.[91] A second tier review may also

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87 *Transcript of evidence,* Australian Law Reform Commission, p. 109-110

88 *Transcript of evidence,* Australian Law Reform Commission, p. 110

89 *Transcript of evidence,* Australian Law Reform Commission, p. 110

90 *Transcript of evidence,* Australian Law Reform Commission, p. 114-115

91 Administrative Review Tribunal Bill, subclauses 69(1) and (2)

be conducted by a single member.[92] In addition, the President will have substantial powers to direct that a tribunal be reconstituted. Such a direction can be given if a member is unavailable,[93] if a participant requests reconstitution and the President accedes to that request,[94] and if the President considers that it would contribute to achieving 'fair, just, economical, informal and quick' review.[95]

Single-member panels

3.56 In relation to the constitution of tribunals, concern was raised that the above provisions amount to a presumption in favour of single-member panels and that, in practice, the operation of that presumption will affect the quality of review.

3.57 While recognising that the ART should have the flexibility to choose panel membership and that single member panels may often be appropriate, the Law Council of Australia viewed with concern any presumption that panels should be constituted by a single member. In the Law Council's opinion, such a presumption is contrary to the recommendations in the *Better Decisions Report.* In that report, the ARC considered how tribunals should be constituted for different cases and the arguments in favour of and against the use of multi-member panels. As a starting point the ARC noted:

> There is broad acknowledgment that the characteristics of particular cases dictate what sort of tribunal panel is appropriate for the hearing of those cases. A general preference for multi-member tribunal panels needs to be balanced against the resource implications. As a result of these competing factors, there is general support for tribunals to have the maximum flexibility and discretion in constituting panels.[96]

3.58 The ARC formally recommended that:

- review tribunals should have the discretion to determine panel composition for particular cases (recommendation 7);
- existing statutory prescriptions of panel composition should be removed and replaced with a statutory preference for multi-member panels in appropriate cases (recommendation 8); and
- review tribunals should develop guidelines on panel composition in consultation with user groups and these should be published (recommendation 9).[97]

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92 Administrative Review Tribunal Bill, subclause 69(4) states that in the case of a second tier review, the member or members who are to constitute the Tribunal must not be or include any person who was a first-tier review member.

93 Administrative Review Tribunal Bill, clause 70

94 Administrative Review Tribunal Bill, clause 72

95 Administrative Review Tribunal Bill, clause 71

96 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals,* Report No. 39, 1995, p. 31

97 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals,* Report No. 39, 1995, pp. 34-36

3.59 The proposition that review tribunals should have flexibility in determining the composition of panels for particular cases received considerable support from witnesses.[98] The Law Council itself recommended that, generally, the President of the ART should have the flexibility to determine the composition of panels but that certain classes of cases should be heard by multi-member panels. Those classes included cases in the Income Support Division, final merits review hearings and cases which raise issues of general principle or are of considerable commercial or taxation significance or precedent value.[99]

Arguments in relation to the composition of panels

3.60 Several witnesses were concerned about the extent to which single-member panels might be used under the new regime and pointed to the deficiencies of single-member panels compared to multi-member panels. The Committee was told, for example, that in the SSAT's experience, few cases are suitable for single member panels because most cases are more complex than appears on the papers.[100] In addition, the Committee was told that any perceived cost savings in relation to the use of single-member panels are illusory because:

- time taken per case will increase if written reasons are requested from single-member panels: whereas three-member panels can share the burden of preparing written reasons and reduce the amount of time spent, single-members cannot. There will be cost implications if single members have to prepare written reasons for many of their cases;[101]

- time taken per hearing will increase: generally, a three member hearing involving one applicant takes approximately one hour because three individuals are able to focus their minds on the issues at hand. Hearings with single-member panels will take longer as one individual will have to identify all of the facts and the issues, determine an appropriate outcome as well as deal with any contingencies that may arise;[102] and

- the first tier of the proposed ART will be a more formalised process and, given the potential for government agencies to appear and cross examine witnesses, may cause time per hearing to increase with consequent impact on costs.[103]

3.61 Insofar as cost is concerned, the Committee was told that the evidence of the SSAT shows that the use of single-member panels represents no savings[104]and that the SSAT, notwithstanding its use of three-member panels for most matters, 'is at the cheap, if not the cheapest, end of the scale'.[105]

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98 *Submission 13*, South Australian Council of Social Service Inc., p. 1

99 *Submission 40*, Law Council of Australia, p. 25

100 *Submission 40*, Law Council of Australia, p. 25

101 *Transcript of evidence,* Victoria Legal Aid, p. 16

102 *Transcript of evidence,* Victoria Legal Aid, p. 16

103 *Transcript of evidence,* Victoria Legal Aid, p. 16

104 *Submission 24*, Community Legal & Advocacy Centre, p. 2. A similar point was made in *Submission 26*, Western Australia Council of Social Service Inc, p. 5

105 *Transcript of evidence,* Victoria Legal Aid, p. 16

3.62 By contrast, the Committee was told that there are significant advantages to using multi-member panels. These included that multi-member panels:

- have an in-built peer review process that results in issues being better defined, legal research undertaken more thoroughly, fairer and more objective fact finding, and the process of writing reasons expedited because decisions are shared;[106]
- are more effective for unrepresented persons as the skill mix enables all legal, administrative and social issues affecting such a person to be considered; [107]
- promote the perception that a fair process has been followed by avoiding situations where applicants perceive the single member as unsympathetic and the process as therefore biased.[108] A person who feels that the one member panel is against him or her may not feel comfortable enough to disclose important information that may affect his or her case.[109]
- are less likely to be subject to external bias; [110]
- can more confidently make a decision, leading to quicker decisions; [111] and
- can combine members with an administrative law background and community members who can provide a higher level of understanding of the difficulties faced by many of the disadvantaged persons within our community.[112]

3.63 The Committee has examined clause 69 and the statement in the Explanatory Memorandum that many reviews, particularly in high volume decision making areas, will be conducted by single-member panels.[113] That statement reflects the expectation of how reviews will, in fact, be conducted given the requirements of the vast bulk of cases. The Committee disagrees with the Law Council's assertion that clause 69 is contrary to the *Better Decisions* Report. To the extent that there is flexibility in determining panel composition, the Committee considers that the operation of clause 69 does go some distance in reflecting the recommendations in the *Better Decisions* Report in relation to panel composition. In addition, there is nothing to prevent the President directing that particular classes of cases,[114] be heard by multi-member panels. Such a ruling would still be consistent with the 'presumption' for single-member panels.

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106 *Submission 40*, Law Council of Australia, p. 25

107 *Submission 24*, Community Legal & Advocacy Centre, p. 2

108 *Submission 24*, Community Legal & Advocacy Centre, p. 2

109 *Submission 25*, Flinders University Union, p. 2

110 *Submission 24*, Community Legal & Advocacy Centre, p. 2

111 *Submission 26*, Western Australia Council of Social Service Inc, p. 5

112 *Submission 26*, Western Australia Council of Social Service Inc, p. 5

113 *Explanatory Memorandum,* Administrative Review Tribunal Bill, p. 26

114 Such as those mentioned in paragraph 3.59

3.64 While the Committee appreciates the arguments presented in favour of multi-member panels over single-member panels, the Committee considers that there is sufficient flexibility built into clause 69 and the new administrative arrangements to enable the President to properly determine that a particular case or class of cases is appropriate for multi-member panels.[115]

Reconstitution of Tribunal on certain grounds: clauses 70-74

3.65 As noted above, the President will have significant powers in relation to the reconstitution of Tribunals in certain situations. The South Brisbane Immigration & Community Legal Service Inc. (SBICLS) expressed concern in relation to clause 71 of the ART Bill on the ground that a decision-maker could be substituted after all the hearings and taking of evidence and deny an applicant a chance to answer any reservations that may be in the mind of a new decision-maker. SBICLS also questioned the rationale of clause 72 that enables a tribunal to be reconstituted on the basis of a request made by the participants pointing out that it would be a strange state of affairs if the participants were able to dictate the composition of a tribunal.[116]

3.66 The Committee has examined clauses 71 and 72 and is satisfied that the powers to reconstitute the Tribunal are discretionary. The President may direct that the Tribunal be reconstituted if it is satisfied of certain things. Equally, the President may decide not to reconstitute the Tribunal. The heading of the clause indicates that reconstitution is to be used for the 'efficient conduct of review'. There is nothing to suggest that the discretion will be exercised in a manner that would compromise the quality of the review process and the Committee rejects any suggestion that it would be.

3.67 The Committee was told that clause 110 allows a party an automatic right to veto a Tribunal member's further participation in a case once the member has conducted a preliminary conference or other like process aimed at streamlining the issues in dispute. Professor Aronson referred to the 'docket system' of case management introduced by the Federal Court some time ago where the general idea is to ensure that the same judge handles a case from its pre-trial to trial stages. The ALRC's *Managing Justice* Report concludes that this is a successful system and should be emulated elsewhere. According to Professor Aronson, there should be no automatic veto on a member continuing simply because he or she has presided over a conference or other process.[117]

3.68 On the other hand, the Committee believes that this clause gives participants (and particularly applicants) the feeling that they have some control over the review process. Given that concerns have been raised about the extent of the Tribunal's power to control the process[118] and claims that the new arrangements favour government agencies,[119] this clause

115 In its June 2000 report 'A Sanctuary under Review – An Examination of Australia's Refugee and Humanitarian Determination Process', the Legal and Constitutional References Committee discussed the issue of single or multi-member panels of the Repatriation Review Tribunal at length and recommended that the size of the panel for particular cases be determined by a Senior, or the Principal, Member (see paragraphs 5.86 to 5.111 and recommendation 5.4). The Committee did not specifically consider the issue of a presumption in favour of single member panels

116 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 3

117 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 6

118 See below paragraphs 3.99 to 3.104

will redress some of that 'perceived' imbalance by allowing either participant to object to the continued involvement in the matter after the pre-hearing process of a Tribunal member in whom he or she has lost confidence. The Committee notes that sections 34 and 34A of the *Administrative Appeals Tribunal Act 1975* similarly restrict the further participation in a proceeding of an AAT member who has mediated, or presided at a conference, between the parties.

Concerns in relation to the quality of review before the ART

3.69 It was suggested to the Committee[120] that there will be a reduction in the overall standard and quality of review of administrative decisions under the proposed ART. The Law Council asserted that a 'likely imbalance' will result from restricting applicant representation on the one hand in view of the capacity of agencies to be well-resourced and have access to legal assistance and training on the other. In the Law Council's view, this imbalance might have an 'especially pernicious effect' when combined with the fact that members may lack legal training and an awareness of the need to afford procedural fairness to applicants.[121] At present, there is no general requirement in the Bill for members to have any legal training although, as the Law Council points out, Items 74, 139 and 543 of Schedule 3 to the cognate Bill require the ART, when dealing with particularly sensitive matters, such as the issue of warrants for listening devices, to be constituted by members who have been enrolled as legal practitioners for at least 5 years.[122]

Legal training of members

3.70 It was submitted that the inclusion of a requirement for members of the ART to have legal training would have a twofold impact. First, it would enhance the quality of review of the ART because such members can ensure that the business of the ART is conducted fairly and according to law. Secondly, there would be a flow-on advantage from having matters dealt with fairly in that there would be a reduction in the incidence of appeals to the Federal Court. In addition, however, the Law Council of Australia attributed much of the success of the AAT to the work of well-trained lawyers and (significantly) experts from other disciplines and claimed that the multi-disciplinary membership of the SSAT had also worked well:[123]

> While the ART will not be a court, it will nonetheless be a forum for the resolution of disputes between parties. The process of resolution requires particular skills and abilities which are not so dissimilar from those required of members of courts. The Law Council does not assert that all tribunal members should be lawyers, but it is not surprising that issues of administrative review often involve legal issues. Legal qualifications should also be recognised for executive and other members. This is

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119 See below paragraphs 3.105 to 3.117

120 *Transcript of evidence*, Dr Rory Hudson, p. 48; Vietnam Veteran's Federation, p. 87; Law Council of Australia, p. 128

121 *Submission 40*, Law Council of Australia, pp. 13-14

122 *Submission 40A*, Law Council of Australia, p. 29

123 *Submission 40*, Law Council of Australia, p. 19

> because the ART will undertake significant tasks involving statutory construction, interpretation and application of legal precedent, and complex fact finding.[124]

3.71 In the Committee's view, there was insufficient evidence to suggest that legal training is in fact a necessary pre-requisite to membership of a Tribunal conducting administrative review.[125] Further, there is nothing in the ART Bill that would exclude the appointment of members with legal training.

The President no longer required to be a Federal Court Judge

3.72 There is no requirement in the Bill for the President to be a Federal Court Judge. This attracted some criticism from submitters who are concerned that this represents a departure from the present AAT and the reasoning that supported the appointment of a judicial person to that office.[126] The Law Council asserted that the presidential appointees to the AAT had had a positive effect on the development of procedures of that tribunal and urged the Committee to consider the influence that the office of President is likely to have on this new Tribunal.[127] At the very least, the Council stated that legal qualifications and high level experience in decision making and dispute resolution should be essential.[128] The Law Council cited the Administrative Review Council's *Better Decisions* Report in support of its position that the President requires high level legal skills, equivalent to those expected of a judge:

> The Council considers that there remain strong reasons why a judge is likely to be eminently suitable for appointment as President of the AAT … However, the Council considers that a person other than a judge should not be excluded from consideration for that position. The President would need to have high level legal skills, equivalent to those expected of a judge, high level experience in decision-making and dispute resolution, an ability to determine authoritatively any decision from the diverse range of matters that would come before the tribunal and the capacity to manage an organisation effectively.[129]

3.73 The Committee notes that the *Better Decisions* Report did not recommend that the president be a judge although it recommended that the person have high-level legal

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124 *Submission 40*, Law Council of Australia, pp. 19-20. See also *Transcript of evidence,* Mr Peter Johnston, p. 3 and *Submission 31*, Law Institute of Victoria, p. 5

125 In its report, 'A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Process', dated June 2000, the Legal and Constitutional References Committee pointed out that 29 of the then 52 Refugee Review Tribunal members were lawyers (paragraph 5.127) and recommended that members of the RRT be drawn from a broad cross-section of the Australian community, including the legal profession, with experience in refugee and humanitarian issues (recommendation 5.8).

126 For example, *Submission 29*, Committee on Rights of Review, p. 2. Section 6 of the *Administrative Appeals Tribunal Act 1975* requires that the President be a Federal Court Judge.

127 *Submission 40*, Law Council of Australia, p. 21

128 *Submission 40*, Law Council of Australia, p. 21

129 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals, Report No 39*, paragraph 4.19

qualifications.[130] The Committee also notes that the Joint Statutory Committee on Native Title and the Torres Strait Islander Land Fund Committee, in dealing with the *Native Title Amendment Bill 1996*, accepted the Government's proposal that a person who had been enrolled as a legal practitioner for 5 years (who might be a Judge or former Judge of the Federal Court) could be appointed President of the National Native Title Tribunal.[131] Moreover, the Government has rejected the recommendation by the Parliamentary Joint Committee on the National Crime Authority that the Chair of the NCA be a judge.[132]

3.74 Mr Johnston, a former deputy president of the AAT, told the Committee that the question of whether the President should be a judge is evenly balanced. In some cases, making the head of a tribunal a judge can cause persons using it to mischaracterise it as a judicial body.[133]

3.75 The Committee notes, moreover, the evidence of the Victorian Bar in relation to constitutional issues that might arise by virtue of requiring the President of an administrative review tribunal to be a judge. The Bar told the Committee that while it was concerned that there is no attempt in the Bill to specify qualifications for the office of President, it did not believe that the President should be a judge. It referred to a recent line of judicial authority where issues had been raised about the validity of actions of the judiciary in performing executive functions:

> One was the case of Grollo and Palmer, which looked at the role of Federal Court judges issuing warrants under the Telecommunications (Interception) Act. The other case was that of Wilson and a former minister for Aboriginal Affairs, which arose out of the participation of a Federal court judge in an inquiry into the Aboriginal heritage value of Hindmarsh Island. In each of those cases, the High Court said that legislation which provided for Federal Court judges to perform certain functions which were closely tied with the executive government was invalid because those functions were incompatible with the independence of judicial office required of Federal Court judges.[134]

3.76 The Committee took note of the Victorian Bar's view that certain aspects of the structure of the proposed ART might be considered incompatible with judicial office. In particular, the Bar referred to the closer relationship that the ART will have with executive government, through, for example, ministerial directions and financial control. It stated that in view of the close relationship, there might be concerns raised if the President were required to be a judge:

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130 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals, Report No 39*, paragraph 8.32

131 Sixth Report of the Joint Parliamentary Committee on Native Title and the Torres Strait Islander Land Fund, *The Native Title Amendment Bill 1996*, dated November 1996, pp 53-54

132 Government Response to the *Third Evaluation Report* by the Parliamentary Joint Committee on the National Crime Authority.

133 *Transcript of evidence,* Mr Peter Johnston, p. 3

134 *Transcript of evidence*, The Victorian Bar Association, p. 23. See also, Law Council of Australia, p. 131

> We do not put it more highly than that. We do not say it would necessarily fail, but there would be some concern.[135]

3.77 The Bar acknowledged that, despite that line of judicial authority, the President of the AAT has always been a judge. In the case of *Drake v Minister for Immigration* (1979) 24 ALR 577, the court relied on the doctrine of *persona designata* to uphold the validity of a Federal Court Judge being the President of the AAT. That doctrine is based on the premise that if the office of President of the AAT is separate from the office of Federal Court judge, there is no difficulty with that judicial officer performing executive functions. The Committee was told that this reasoning typified the High Court's decisions in relation to the telecommunications interception warrant cases in the seventies and the eighties. The Victorian Bar also contended that even the cases of *Grollo v Palmer 1995 (69) ALJR 724* and *Wilson* v. *The Minister for Aboriginal and Torres Islander Affairs* (1996) 70 ALJR 743 would not invalidate the holding of the Presidential office of the AAT by a judge because the structure of the AAT is characterised by its independence from the executive.[136]

3.78 In the Committee's view, there is a strong suggestion that the structure of the ART, because it is intended to reflect the performance of an executive or administrative function by the Tribunal, may not require (or even permit) the President to hold a judicial office. The Committee was told:

> … the intention of the government is to move away from a court-like body to a more informal body that is able to be more inquisitorial rather than adversarial in its approach. On that basis, it seems less relevant to be necessarily looking to a judge to head the tribunal.[137]

3.79 The Attorney-General's Department indicated that the Government's intention is to set up a Tribunal which has an investigative and inquisitorial role rather than one that promotes a culture of adversarialism. To this end, members of the ART will be required to assist the parties before it by taking measures to ensure that participants understand the process and the procedures (clause 108). This is a very different role than would be expected of a presiding officer in an adversarial setting – the presiding officer would be less pro-active.[138] The Attorney-General's Department, did, however, advise the Committee that the Attorney-General had publicly stated that he would expect the person appointed as president to have legal qualifications.[139]

3.80 The Committee is of the view that the quality of review by the ART will not be reduced if the President is not a judge. The Committee also believes that any requirement that the President be a judge may well be inconsistent with the structural framework of the proposed Tribunal which clearly identifies it as part of the executive. Such a situation might fall foul of the recent judicial authority that casts doubt on the validity of administrative functions performed by judicial persons. The Committee accepts the advice of the Attorney-General's Department that the role of the President will be to lead the tribunal professionally

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135 *Transcript of evidence,* The Victorian Bar Association, p. 23

136 *Transcript of evidence,* The Victorian Bar Association, pp. 23-24

137 *Transcript of evidence,* Attorney-General's Department, p. 161

138 *Transcript of evidence,* Attorney-General's Department, p. 162

139 *Transcript of evidence,* Attorney-General's Department, p. 162

and, assisted by the Chief Executive Officer (CEO), to have overall responsibility for the management of the Tribunal.[140] The view of the Committee is that this is a role that can be performed by persons from a wide variety of backgrounds, not merely judicial.

10% of members to be senior members

3.81 The proposal in the ART Bill is that only 10% of members should be senior members (subclause 13(3)). The Committee was told that this is less than the current percentage in the AAT where senior members comprise approximately 30% of members. Members of the Victorian Bar Association told the Committee that the 10% rule will most likely affect the quality of decision making within the tribunals. In the Bar's view, any savings expected from retaining less qualified people for less money should be offset against other likely consequences of such a measure:

> But a sort of cut-price justice is really what this system is contemplating: saving money, having less experienced and less qualified people to undertake what, in many cases, is a very difficult task resolving disputes about facts and law. So we would see that going to the quality of decision making rather than so much towards the issue of independence.[141]

3.82 In relation to the proposal to cap the number of senior members, Mr Peter Johnston commented that there should be at least one senior member in every outlying capital, Territory and State, and that this would ensure a geographical spread of senior members.[142]

3.83 The Committee received further evidence on the question of percentages of senior members in tribunals and this placed the matter in context for the Committee. Although the percentage of senior members at the AAT is high, the issue should be considered in the context of all the tribunals being amalgamated. The Attorney-General's Department advised the Committee that currently across all tribunals, the percentage of senior members is less than 10 per cent. The Department also confirmed that any analysis of figures in relation to percentages of senior members has to be looked at closely because the concept of 'senior member' varies across the tribunals. The Attorney-General's Department said:

> I recall at our Senate estimates hearing that Ms Kay Ransome from the AAT explained the role of senior members in the AAT at the moment and distinguished that from the role of senior members in the MRT and RRT, for example. The role given by the Bill to senior members is more akin to the role that is given to senior members in the MRT and the RRT than to the role given to senior members in the AAT.[143]

3.84 The Committee considers that the cap on numbers of senior members will not detract from the quality of review of the ART and is consistent with current arrangements across the existing tribunals. In addition, the Bill clearly contemplates that there may be differences in the percentages of senior members appointed to the different Divisions of the ART. Proposed paragraph 13(3)(b) states that the total number of senior members appointed

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140 *Transcript of evidence,* Attorney-General's Department, p. 163

141 *Transcript of evidence,* The Victorian Bar Association, p. 24

142 *Transcript of evidence,* Mr Peter Johnston, p. 5

143 *Transcript of evidence,* Attorney-General's Department, p. 161

to a Division (as their primary Division) must not exceed 15% of the total number of members appointed to that Division. This being the case, the Bill allows for certain Divisions to have higher percentages of senior members than other Divisions.

Restriction of access to second tier review

3.85 The Bill provides for two tiers of review by the Tribunal[144] but the second tier of review is by leave only. Clause 63 states that the original decision-maker or a participant in the first-tier review may apply to the Tribunal for leave to make an application for review of the first-tier review decision.[145] Significantly, the Bill provides that in the absence of special circumstances for doing otherwise, the application for leave will be decided on the papers.[146] The grounds on which leave will be granted are:

- where the application raises a principle or issue of general significance, and the original decision was made by a single member (subclause 65(2)); or
- where the first-tier applicant, the original decision-maker and the President/executive member from whom leave is sought all agree that the first-tier review was materially affected by a manifest error of law or fact and there has been no appeal to the Federal Court on the question (clause 65(3)).

Possible effects of restricting second-tier review

3.86 It was claimed that the provisions of the Bill will operate to restrict access to the second-tier review stage because the requirement to obtain leave to appeal from first-tier review will rarely be met in practice. The Committee was told the attitude to first-tier review will change substantially if applicants who currently have two opportunities to seek merits review of decisions will now only have one if their application for leave is unsuccessful.[147] It was suggested that changes might include:

- greater Tribunal and legal aid resources will have to be applied in every matter as it will be impossible to predict which cases will require this level of assistance;[148]
- the level of adversarialism will increase because Departments will seek a greater degree of intervention[149] and appellants would be unwise to try and replicate the truly informal and inquisitorial style of the old SSAT;[150] and

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144 Although there has never been and will not be second tier review for decisions in the migration jurisdiction.

145 Administrative Review Tribunal Bill, clause 63. 'Participants' are defined to include the applicant and the decision maker. By virtue of clause 84, any other person whose interests are affected by the decision may apply to become a 'participant'.

146 Administrative Review Tribunal Bill, subclause 65(6)

147 *Submission 40*, Law Council of Australia, p. 27

148 *Submission 24*, Community Legal & Advocacy Centre, p. 2

149 *Submission 24*, Community Legal & Advocacy Centre, p. 2

- applicants will conduct the first-tier review as if it is the only and last opportunity to correct a decision[151] or, alternatively, tribunals may erroneously assume that applicants will have access to second-tier review and the standard of tribunals' decisions at the first tier may fall with the expectation that errors will be corrected at the later stage.[152]

3.87 Professor Aronson suggested that if the intent is to focus appellants' minds on the first tier stage, a fee for second tier review would achieve the same end whereas the effect of removing an automatic right of second-tier review might be an increase in appeals to the Federal Court. Professor Aronson submitted:

> If one can extrapolate from experience in the area of Migration appeals, the more one reduces the chances of a tribunal resolving a dispute's *merits,* the more adventurous will be Federal Court litigants in seeking to provide a solution. It is therefore unwise to impose severe restrictions on second-tier appeals, particularly in the terms proposed.[153]

3.88 In addition, it was claimed that the restriction on access to second-tier review would severely impact on certain groups. For example, the Committee was told it is unlikely that applicants challenging decisions about overpayments in the social security jurisdiction would meet either of the conditions for accessing second-tier review.[154] Similarly, it was contended that students challenging Centrelink decisions about the granting of independence and other academic issues will probably not fit into a category that entitles them to second tier review.[155]

Manifest error of law or fact agreed by applicant and decision maker

3.89 Several concerns have been raised in respect of subclause 65(3) which states that leave to apply for second-tier review is to be granted where the applicant and the original decision maker and the President or executive member hearing the application for leave agree that there has been a manifest error of law or fact that materially affected the first-tier review decision . Concerns include:

- the ground is unrealistic and likely to be unworkable – both parties are unlikely to agree; [156]
- the provision gives an agency a power of veto over review of decisions involving error of law or fact [157] which means that there is considerable power in opposing parties controlling the right of review;[158]

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150 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, pp. 4-5

151 *Submission 24*, Community Legal & Advocacy Centre, p. 2

152 *Submission 40*, Law Council of Australia, p. 27

153 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 4

154 *Submission 13*, South Australian Council of Social Service Inc., p. 1

155 *Submission 25*, Flinders University Union, p. 1

156 *Submission 40*, Law Council of Australia, p. 17

157 *Submission 40*, Law Council of Australia, p. 17

- the provision results in 'manifest injustice' because it contemplates manifestly wrong decisions being unappellable within the Tribunal[159] and sanctions illegal practices or incorrect or not preferable decision making;[160]
- the significance for the applicant is that if the manifest error is one of fact, there is no further avenue of review or appeal. If the error is one of law, an appeal lies directly from the first-tier ART decision to the Federal Court – the right to appeal does not require the agreement of the other party;[161] and
- there will be jurisdictional and definitional arguments about what is an issue of 'significance' (subclause 65(2)) and whether an error is 'manifest' (subclause 65(3))[162] as the legislation gives no guidance on the meanings of the words.

3.90 The Committee realises that the main concern in relation to subclause 65(3) is a fear that the government party will never agree that there is an error of law or fact and so block the applicant's access to second-tier review. In this respect, the Committee acknowledges the assurance by the Attorney-General's Department that a safeguard exists in the form of the model litigant policy. Government departments are bound by the model litigant policy which requires them to act honestly and fairly in such matters. If government departments do not abide by the model litigant policy, for example, by unreasonably refusing to acknowledge the existence of such an error, complaints can be made to either the Attorney-General directly or to the Department. The Attorney-General's Department indicated that that Department:

> … has a role in administering that policy and ensuring that it is respected. Our department therefore emphasises to other agencies that they are obliged to abide by that. If it came to the department's notice that they had not been, the department would, quite apart from anybody complaining, take that up with the relevant department.[163]

3.91 The Committee also believes that the claim that applicants' rights to access second-tier review will be restricted is somewhat misleading. Under the current arrangements, not all applicants who challenge decisions of government have access to second-tier review. It should be noted, for example, that there is not and never has been second-tier review for migration matters. That remains unchanged.[164] In addition, other classes of applicants have only ever had one tier of external review at the AAT (the AAT only offers one tier) so it is not a restriction as such for them. In fact, for those applicants, the Bill offers possible access to a second-tier to which they had no access previously. The Committee was told, however,

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158 *Submission 40*, Law Council of Australia, pp. 27-28. Paragraph 167(1)(c) of the Administrative Review Tribunal Bill seeks to ensure the right of appeal to the Federal Court in cases involving an error of law

159 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 3

160 *Submission 40*, Law Council of Australia, p. 17

161 *Submission 40*, Law Council of Australia, p. 17

162 *Submission 40*, Law Council of Australia, p. 28; *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 3

163 *Transcript of evidence,* Attorney-General's Department, p. 170. The Committee notes that 'there could be proceedings in the Worker's Compensation Division in which the respondent would not be a government department': *Submission 74,* Attorney-General's Department, p. 3

164 *Transcript of evidence,* Attorney-General's Department, p. 168

that the *Better Decisions* report recommended restrictions on access to second tier review[165] and that it is expected that there will be a reduction of applicants accessing second-tier review in relation to decisions in the social security jurisdiction (such as those in receipt of social security payments including family assistance).[166] At the seminar sponsored by the Committee jointly with the Australian Institute of Administrative Law on 25 October 2000, the Attorney-General, the Hon Daryl Williams, summarised the position thus:

> Currently, most Commonwealth administrative decision making is subject to only one tier of external review. There are two exceptions to this. The AAT provides a second tier of review of decisions made by the Social Security Appeals Tribunal and the Veterans' Review Board. However, within the AAT itself there is no second tier of review. The ART, like the AAT, will continue to provide second-tier review of decisions of the Veterans' Review Board. The government has decided that the current right of veterans to access second-tier of review should continue. It has also decided that, as at present, there will be no second-tier review of most migration matters. In all other cases the ART will have power to grant leave to apply for second-tier review of a first-tier ART decision on limited grounds.[167]

3.92 However, the Committee suspects that whatever the word 'manifest' means, it is tautological.[168] The fact of a three-way agreement that there has been a mistake suggests that the mistake is manifest. The Committee recommends that the word be deleted.

Review on the papers

3.93 Subclause 65(6) of the Bill provides that, unless the President or the executive member considers there are special circumstances for doing otherwise, the decision about whether to grant leave to apply for second-tier review must be made 'on the papers'. That means the review is conducted without the applicant or any other person being permitted or required to appear before the Tribunal.

3.94 There are three principal arguments against deciding the application on the 'papers':

1. It is claimed that the procedure ignores the significance that attaches to the second-tier review stage for those applicants for whom access to the Federal Court and High Court is not a realistic option. For such people, second tier review is, in reality, the final option for accessible, merit review. Where such significance attaches, applicants should be able to appear and be heard;[169]

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165 *Transcript of evidence,* Attorney-General's Department, p. 168

166 *Transcript of evidence,* Attorney-General's Department, p. 168

167 Australian Institute of Administrative Law and Senate Legal and Constitutional Law Committee, Transcript of proceedings: *Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal,* 25 October 2000, p. 5

168 The Committee notes the advice of the Attorney-General's Department that the word 'manifest' has been interpreted to mean 'evident or obvious, rather than merely arguable': *Submission 74,* Attorney-General's Department, p. 3

169 *Submission 26*, Western Australia Council of Social Service Inc, p. 5

2. The procedure deprives a non-agency participant of the right to appear and be heard on the application and consequently has natural justice implications;[170] and

3. To apply for leave to make an application for review of a first-tier decision, an applicant must provide a statement of the grounds on which the application is based. It is claimed that this procedure is inappropriate for those who have limited education or who are unfamiliar with legislation. Similarly, it is unfair to require written documentation from those with low levels of literacy or who cannot write English fluently.[171] The Committee was told the same applies for those who have few resources and little or no understanding of the system.[172]

3.95 The Committee notes, however, that the decision to decide the leave application 'on the papers' is discretionary. It is open to the President or the executive member to determine that there are special circumstances involved in a particular application that necessitates that parties should appear. In addition, the Committee notes that the Bill provides that the CEO must provide assistance to applicants in preparing their applications (subclause 141(2)).[173] The Committee is confident that this provision provides the proper balance to ensure, on the one hand, that the review procedures in the ART are 'informal, flexible and responsive'[174] while on the other hand, ensuring that applicants are not unfairly denied the opportunity to appear.

3.96 The Committee also believes that the Tribunal's procedures, including the manner of conducting a review, should be consistent with the Government's intention that the tribunal as a whole should develop a 'flexible, non-adversarial culture, with an emphasis on informality and accessibility'.[175]

3.97 In addition, the Committee notes that the power of the Tribunal to review an application for leave to apply for second-tier review 'on the papers' under subclause 65(6) should be distinguished from that of conducting the actual review 'on the papers' under subclause 96(3). In the latter case, the Tribunal is required to notify parties of its decision to conduct the review on the papers and take into account any submissions made in relation to it.

Increased uncertainty and reduced procedural fairness

3.98 It is widely acknowledged that the purpose of a system of merits review of administrative decisions is to provide citizens with the opportunity to challenge government

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170 *Submission 26*, Western Australia Council of Social Service Inc, p. 5

171 *Submission 26*, Western Australia Council of Social Service Inc, p. 5. See also *Submission 40*, Law Council of Australia, p. 28

172 *Transcript of evidence,* Victoria Legal Aid, p. 14

173 *Submission 74,* Attorney-General's Department, Attachment: Comments on the Law Council of Australia's submission (number 40B: *Suggested drafting amendments)*, p. 4

174 Australian Institute of Administrative Law and Senate Legal and Constitutional Law Committee, Transcript of proceedings: *Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal,* 25 October 2000, p. 5 per the Attorney-General, the Hon Daryl Williams QC

175 The Hon. Daryl Williams MP, Second Reading Speech, *Administrative Review Tribunal Bill 2000,* p. 18405

decisions that affect them. Inherent in any such challenge is an inbuilt power imbalance – that is, in most cases, if not all, the government is better resourced and equipped to defend their decisions than most applicants are to challenge them. One of the complaints to the Committee was that certain aspects of the proposed ART system augment rather than lessen that imbalance. The Committee was told that those procedural elements increase uncertainty and reduce procedural fairness for applicants, with the result of further weighting the system in favour of the government agencies. These concerns, said to stem from the following aspects of the Bill, are dealt with in this section:

- the Tribunal's power to control the review process;
- provisions that confer a *prima facie* advantage on government agencies;
- the excessive power conferred on inquiry officers; and
- the effect of the provisions relating to the giving of reasons and decisions.

Tribunal's powers to control the review process

3.99 The Committee was told that the Bill leaves too many important procedural matters to the discretion of the Tribunal therefore providing the applicant with no certainty about how the review will be conducted.[176] In particular, it was claimed that it was inappropriate for the Tribunal to have power to conduct a review 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.

3.100 Under subclause 96(3) of the Bill, the Tribunal is required to consider whether a matter should be dealt with on the strength of arguments presented in the papers ('on the papers'). Under subclause 96(4), the Tribunal is required to notify the participants of its decision and to seek their views and submissions relating to it although the Tribunal can still decide to conduct the review 'on the papers' without the agreement of any of the participants. The Law Council is concerned that this will operate as a presumption in favour of dealing with matters on the papers[177] thereby in effect removing a statutory right to a hearing.[178] Insofar as the review mechanism is used for resolving disputes, the Committee was told that:

- the opportunity to put one's case is an important psychological factor that affects the applicant's degree of satisfaction with the process and outcome of the case;
- matters that appear simple on the papers often involve complex questions of law and fact and take longer to be resolved than initially anticipated;
- the most disadvantaged applicants are least likely to be able to produce adequate written submissions; and

176 *Submission 54*, National Welfare Rights Centre Network, p. 11;

177 *Submission 40*, Law Council of Australia, pp. 31-32

178 *Submission 65*, South Brisbane Immigration & Community Legal Service Inc., p. 4

- making decisions on the papers without the consent of the parties erodes a fundamental principle of procedural fairness: the right to present one's own case.[179]

3.101 The Committee was told that the proposed process will disadvantage those applicants who are unaware of the issues involved in their case and who are ill-equipped to challenge written information on departmental files. On the other hand, it was claimed that a review process that relies only on written submissions will favour well-resourced government agencies. Another reason advanced for preserving the right to an oral hearing is that additional information often comes to light during an informal hearing critical to the proper determination of the case.[180] The Law Council recommended that, as a minimum, the Tribunal should be required to convene a pre hearing conference to allow the applicant an opportunity to make oral submissions before a decision is made to deal with the substance of a matter without a hearing.[181]

3.102 The South Brisbane Immigration & Community Legal Service (SBICLS) claimed that certain other clauses have the potential to confer an unfair advantage on government parties and, as such, are contrary to the spirit of administrative review. For example, clause 81 enables the Tribunal to determine whether participants will receive a copy of certain documents; clause 93 enables the Tribunal to determine the scope of the review of a decision by limiting questions of fact, the evidence and the issues that it will consider; subclause 96(2) enables the Tribunal to impose conditions on the giving of evidence, the making of statements, and the presentation of arguments; clause 97 empowers the Tribunal to authorise other persons to take evidence on behalf of the Tribunal; and clause 105 provides that participants may choose another person to represent them only if the Tribunal agrees and the practice and procedure directions do not prohibit it.[182] The procedural matters covered by these provisions are subject to the discretion of the Tribunal.

3.103 The Committee considers that the concerns in relation to the conduct of a review 'on the papers', the possible content of practice and procedure directions and the exercise of the Tribunal's discretion are premature and focus on the worst possible case scenario. Those concerns continually envisage that the government agency or, in fact, the Tribunal might seek to unfairly weight the conduct of a case against a non-government party. Although the Committee is aware that much of the detail about practice and procedure directions will not be known until they are formulated and publicly available, the Committee is confident that those directions will be formulated in good faith and with the objective of enhancing the Commonwealth merits review system.

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179 *Submission 40*, Law Council of Australia, pp. 31-32

180 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 4

181 *Submission 40*, Law Council of Australia, p. 32

182 *Submission 65,* South Brisbane Immigration & Community Legal Service Inc., pp. 3-4

183 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 3

184 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 3

185 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 4

186 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 4

187 S*ubmission 65*, South Brisbane Immigration & Community Legal service Inc., p. 4

3.104 Similarly, the Committee is confident that the Tribunal will exercise its discretion guided by the objects of the ART Bill which provide, among other things, that the reviews will be conducted independently of the persons or bodies who made them and provide review that is, amongst other things, fair. The Committee also notes that while some participants claimed that the Tribunal will have too much control over the review process, other participants complained that the ministerial power to issue directions with precedence over those of the President undermined the Tribunal's control. In the end, the Committee's view is that the ART Bill is designed to ensure that justice will prevail - the Tribunal members, departments and representatives are all experienced players in the field with vast amounts of knowledge about administrative review procedures and can be expected to act in good faith.

Disproportionate advantage to government agencies

3.105 As noted above, there is some concern that the proposed system is weighted in favour of government agencies. The principal mechanisms complained of are those that enable the government to block an applicant's access to second-tier review, the enhanced role of the decision-maker, the remission of matters to decision makers in certain situations, and the employment of agency staff to conduct Tribunal functions.

3.106 The Committee was told that the provisions relating to access to second-tier review[188] constitute an unfair advantage to government agencies in that:

- unrepresented non-government parties are unlikely to be able to identify principles or issues which are of general significance because they are generally not in a position to analyse the effect that a decision might have on others. By contrast, agencies are aware of the impact of decisions within their portfolio;[189] and
- government agencies will have the power to block an applicant's access to second-tier review where the appeal ground is manifest legal or factual error. The Committee was told this conflicts with the objective of an external appeal system which is to do away with appeals from 'Caesar to Caesar'.[190]

3.107 Insofar as these matters are likely to have a bearing on a particular case in practice, the Committee notes that much will turn on the conduct of government agencies involved in litigation, particularly where applicants are unrepresented. There was, however, conflicting evidence about the past record of agencies as litigants. Whereas one submitter said that in her experience as a longstanding practitioner, agencies do not always behave reasonably, fairly and impartially,[191] the Attorney-General's Department referred to the 'model litigant

188 Set out above in paragraph 3.85

189 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 1

190 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 3

191 *Submission 16*, Ms Lyn Hudson, p. 1. Ms Hudson, a legal practitioner with 20 years experience including AAT work, is of the view that the AAT legislation (the current legislation, not the Bills) is based on the false premise that agencies will behave reasonably, fairly, impartially and as a model litigant and referred the Committee to the ALRC Report *Managing Justice,* paragraphs 3.134-3.140. See also, *Transcript of evidence*, Mr Peter Johnston, p. 6, who said that as a departmental advocate, he incurred the wrath of his client on occasion for being too generous to an applicant

policy' which governs the conduct of government agencies in litigation.[192] As noted above,[193] the Committee concludes that this important safeguard should operate to ensure that government parties do not seek to unfairly block an applicant's access to second-tier review. The Committee would like to be assured that the policy will be observed and suggests that reference to it be made in a note to subclause 65(3). In addition, the Committee accepts the view of the Attorney-General that the creation of a second-tier review structure considering issues of general significance has the potential to increase the precedential value of ART decisions.[194]

3.108 Concern was raised about the elevated role given to agency decision-makers. It was claimed that clauses 77-81 provide decision-makers with some control over whether and what documents they will provide to the Tribunal and that, therefore, they will have more rights than non-agency participants.[195] Whereas subclause 77(1) provides that decision-makers must provide the Tribunal with all documents relevant to a review, this obligation is diluted by subclause 77(2) which provides that practice and procedure directions may exempt a decision-maker from providing all relevant documents. It was argued that this means that agencies are responsible for determining what papers are sent to the Tribunal and that it conflicts with the principles of procedural fairness.[196] It was also argued that an exemption should only apply to evidence that would prejudice Australia's security, defence or foreign relations or would involve a consideration of the deliberations of Cabinet.[197]

3.109 The Committee, however, has examined clauses 77-81 and formed the view that they achieve the proper balance required so that the Tribunal can have some flexibility in determining what is appropriate in a given case. Clause 77 contains a clear presumption that decision-makers will, in fact, provide all documentation relevant to a review to the Tribunal. There is also nothing to prevent the practice and procedure directions from being formulated in a manner consistent with that suggested by the SBICLS, so that decision-makers are only exempted from producing documents in extremely narrow categories of cases.

3.110 In addition, clause 85 will entitle the decision maker to choose not to participate in a Tribunal review. WACOSS claimed this might aggravate the existing power imbalance between the decision-making agencies and non-agency participants.[198] The Committee considers, however, that it would be rare, if at all, that an applicant would be unfairly disadvantaged by a decision-maker opting not to participate in a review. In addition, WACOSS's concern fails to take account of subclause 85(3) which provides that an Agency Head may require the decision-maker to be a participant notwithstanding the decision-maker's preference not to.

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192 *Transcript of evidence,* Attorney-General's Department, p. 170

193 See paragraph 3.90

194 Australian Institute of Administrative Law and Senate Legal and Constitutional Law Committee, Transcript of proceedings: *Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal,* 25 October 2000, p. 5 per the Attorney-General, the Hon Daryl Williams QC

195 *Submission 26*, Western Australia Council of Social Service Inc, p. 6

196 *Submission 25*, Flinders University Union, p. 2

197 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 3

198 *Submission 26*, Western Australia Council of Social Service Inc, p. 6

3.111 It was claimed that the requirement in clause 124 that cases be remitted back to the decision-maker where new information becomes available during a review also disadvantages applicants. The SBICLS submitted that:

> New material often becomes available on review for a variety of reasons including fear of the government agency and/or inability to discern relevant material from irrelevant material. In our view, it is better for the tribunal to deal with such material on review rather than the system being bogged down in remitted matters to the frustration of all concerned.[199]

3.112 Victoria Legal Aid stated that many of their clients are totally reliant on the receipt of social security benefits and payments and that the provision requiring that matters be referred back to the decision-maker is 'incredibly unfair'. The SSAT (and by analogy the ART) is in a position to make an appropriate decision on the new information. Victoria Legal Aid is concerned about added delays and complications in the remission procedure:

> The only rationale I can see behind forcing people to go back to the original; decision maker is that it is a normative effect, educative and so forth, but that seems a huge price to pay for the incredible inconvenience that can be placed on clients who are literally deprived of any source of income.[200]

3.113 The Committee agrees that the remission procedure might have a significant impact on the quality of decision-making at the departmental level and is of the view that the long term benefits to departmental decision-making processes sufficiently justify the procedure as a general practice. The remission procedure should, however, be subject to a provision that the tribunal may make a decision on the basis of the new material if, in all the circumstances, that is more appropriate than remitting the matter. The Committee therefore recommends that clause 124 provide that, if appropriate, the Tribunal can make a decision on the basis of new material instead of remitting the matter to the original decision maker.

3.114 It was argued that a further imbalance in favour of agencies is that clause 46 enables agency staff to be made available to the Tribunal. It was asserted that the 'employment' of agency staff by the Tribunal would contribute to the perception that the Tribunal does not enjoy the appropriate degree of independence from the agency whose decisions are under review.[201]

3.115 However, there has always been a close relationship between agencies and tribunals. For example, the SSAT indicated that it had 28 executive members whose background is that of experience in the public sector. One-third of them were part-time[202] (which suggests that they worked in the relevant department for the rest of the time). The natural tendency to look at such changes with suspicion was illustrated by the evidence of Mr Ian Jaffit of Victoria Legal Aid. He had been an executive member of the SSAT, on secondment from the Department. He said:

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199 *Submission 65*, South Brisbane Immigration & Community Legal Service Inc., p. 5

200 *Transcript of evidence,* Victoria Legal Aid, p. 14

201 *Submission 65*, South Brisbane Immigration & Community Legal Service Inc., p. 3. See also, *Transcript of evidence*, Vietnam Veterans' Federation, p. 61

202 *Transcript of evidence*, Social Security Appeals Tribunal, p. 54

> I think there was a perception initially amongst the members of the SSAT that we would be there as the departmental reps. Clearly, that is not what the legislation envisaged and I think that, almost universally, that was not the case.[203]

3.116 Mr Jaffit told the Committee that he had been with the SSAT for nearly ten years and that he thought it had worked well.[204] Moreover, clause 24, Part 3, Schedule 3 of the *Social Security (Administration) Act 1999*, (which replaced section 1341 of the Social Security Act 1991), provides that any staff required to assist the SSAT are to be persons appointed or employed under the Public Service Act 1922 and made available for the purpose by the Secretary.

3.117 The Committee recognises that the employment of agency staff in the affairs of the Tribunal is consistent with the perception that the Tribunal is an extension of the executive. It also promotes the concept that the performance of Tribunals is enhanced by departments having a stake in the good governance of the Tribunal and has the effect of negating any perception that the Tribunal is 'the enemy'.[205]

Excessive power conferred on inquiry officers

3.118 The Bill allows the Tribunal to authorise persons to take evidence on its behalf (clause 97) and to appoint inquiry officers to conduct conferences or other processes to resolve issues (clause 110) or to inquire into any issue raised in, or other matter connected with, the review (clauses 111-119). An inquiry officer may limit the scope of his or her inquiry, impose conditions on appearances and determine his or her own practice and procedure. Once an inquiry officer's report is given to the Tribunal, the Tribunal member may decide to adopt all or part of it but only after giving the parties the opportunity to make oral or written submissions in respect of the report.

3.119 The principal concern in relation to the appointment and role of inquiry officers is that there are seemingly very wide discretionary powers residing in the inquiry officer:

- there is no restriction on who can be appointed an inquiry officer; [206]
- tribunal members may rely heavily on the reports of inquiry officers, yet the officer may have no expertise or, alternatively, have a bias; [207]
- there is no control over how an inquiry officer is to conduct an inquiry and there is no requirement for the officer to accord procedural fairness;[208]
- the appointment of inquiry officers will detract from the independence and effectiveness of the tribunal; [209] and

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203 *Transcript of evidence,* Victoria Legal Aid, p. 21

204 *Transcript of evidence*, Victoria Legal Aid, p. 21

205 *Transcript of evidence,* Australian Law Reform Commission, pp. 110 and 114

206 *Submission 12*, Dr Rory Hudson, p. 2

207 *Submission 12*, Dr Rory Hudson, p. 2

208 *Submission 12*, Dr Rory Hudson, p. 2

209 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 5

- the use of inquiry officers would create unnecessary procedural complexities and delay the actual determination of matters under review.[210]

3.120 Dr Hudson suggested that the Bill should take a more prescriptive approach in relation to the inquiry officer's role and duties.[211]

3.121 The Law Council noted that there is little guidance in the Bill on the types of matters intended to be remitted to inquiry officers:

- given the power in the Bill to allow others to collect evidence on the Tribunal's behalf, the apparent width of the provisions allows scope for much of the fact finding to be conducted away from the Tribunal;
- alternatively, there are no bars to the appointment of departmental staff to these positions, with the consequent risk that inquiry officers may not be seen to be independent or impartial. Clause 111 clearly contemplates the appointment of the CEO or other staff of the tribunal as potential appointees.[212]

3.122 In addition, the Law Council was uneasy that the Tribunal may 'delegate' to inquiry officers and consultants power to conduct conferences and other undefined processes and to conduct inquiries and to limit and control their scope and to determine their nature.

3.123 The Committee understands the concern caused by the lack of precision in the scheme and by the freedom apparently to be given to an inquiry officer. However, it notes that the power to conduct an inquiry is quite separate from that of taking evidence and may therefore be fairly expected to be wider. Regarding the 'undefined processes', the Explanatory Memorandum[214] indicates that such processes might include counselling, mediation and conciliation and clause 110 makes it clear that they must be used for the purpose of resolving issues relevant to the review or for other purposes relating to it. It is appropriate for the details of the scheme to be left to practice and procedure directions in general and to the directions of the Tribunal in the particular case. An important safeguard is the provision for the Tribunal to provide copies of the inquiry officer's report to the review participants and to take account of any oral or written submissions they make on it. The Committee acknowledges that the power to appoint inquiry officers can be used to properly progress and expedite a review and is another mechanism that promotes the flexibility of the Tribunal. In addition, the ability to direct inquiry officers to undertake particular aspects of an inquiry enhances the Tribunal's capacity to tailor its procedures to suit the needs of individual cases.

3.124 Having said that, the Committee is somewhat puzzled by the relationship between clause 111 which enables the Tribunal to arrange for, or appoint, a person to conduct an inquiry into an issue and clause 112 which permits the inquiry officer to limit the issues that

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210 *Submission 65*, South Brisbane Immigration & Community Legal service Inc., p. 5

211 *Transcript of evidence,* Dr Rory Hudson, p. 51

212 *Submission 40*, Law Council of Australia, pp. 37-38

213 *Submission 40*, Law Council of Australia, p. 38

214 See Information Package, p. 205

he or she considers. The Committee considers that the amount of detail to be filled in by the practice and procedure directions indicates the need for directions issued by the Minister to be subject to prior consultation with the President.

Provisions relating to the giving of decisions and reasons

3.125 The Committee was told that the proposed provision relating to the giving of reasons for decisions will have unjust consequences for some applicants because subclause 136(3) imposes an unfair timeframe for participants to request written reasons for decisions. If applicants want written reasons, they must request them within 28 days after the decision has been furnished to the applicant. It is claimed that this limited timeframe is unjust because of the consequences of failure to meet it. Subclause 137(2) provides that if the Tribunal gives its reasons orally and does not publish those reasons or give them in writing, evidence of those reasons is not admissible in any court or other proceeding authorised to hear evidence. This means that if reasons are not requested within the 28 day period, the participant cannot later put those reasons before the Federal Court.[215] It is claimed that the net effect is to impose a severe restriction on the chances of Federal Court judicial review of a decision for which only oral reasons have been given, which amounts to back door exclusion of the courts.[216]

3.126 The Committee was also told that the timeframe means that some participants may have to make the decision to apply for second-tier review or to the Federal Court in the absence of those written reasons. This, it is claimed, could lead to a situation where people lodge all sorts of protective appeals to the Federal Court or to the Tribunal for leave to apply for second tier review which otherwise might not have been lodged.[217]

3.127 Victoria Legal Aid contended that the provision of written reasons for decisions should be compulsory because it assists participants to cope with the impact of decisions and it has a normative effect on the original decision-maker and the department. Victoria Legal Aid expressed concern that under the new proposals, the giving of oral reasons will become the norm and written reasons will only be provided on request.[218]

3.128 Under subclause 136(6), the Tribunal may, but is not required to, publish its decisions. It was claimed that the Tribunal's discretion about publication is inappropriate because:

- there will be no checks on the ART's decision making and no accountability;
- potential applicants will not be able to discover the ART's jurisprudence; and

215 *Submission 9*, Mr M D Allen, p. 11

216 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 5

217 *Transcript of evidence,* Victoria Legal Aid, p. 13

218 *Transcript of evidence,* Victoria Legal Aid, p. 13

- the Tribunal itself will be disadvantaged by not having access to precedents.[219]

3.129 It was confirmed that, presently, most tribunals are required to give written reasons for their decisions. This situation, however, has to be viewed in the context of current trends in reforming administrative review processes. The ALRC told the Committee that in relation to the usual requirement to provide reasons:

> There are varied views on whether or not that is good in all cases – whether in some cases the person does not really need them or you can give abbreviated reasons. I think all courts and tribunals are looking at ways of making that task of either a tribunal or a judge an easier one, because it can very easily become a terrible chore for them. So features that streamline that are probably not a bad thing in many ways.[220]

3.130 The Committee agrees that the requirement to provide reasons on request, and within a given timeframe, will promote the efficiency of the Tribunal. Given the volume of cases that pass through the administrative review processes, it would be unfair to require the Tribunal to provide reasons when, for example, they are not required. The Committee, however, does consider it important that information relating to the timeframe for requesting reasons should be widely disseminated, at least to every applicant who uses the ART procedures and by the Tribunal itself on the completion of each case.

Committee's comments in relation to procedural unfairness claim

3.131 The claims that the users of the ART will be subject to reduced procedural fairness, increased procedural complexity and uncertainty ignore and are contrary to the main objects of the ART Bill. Clause 3 sets out those objects clearly and unambiguously. Among them are: to ensure that the Tribunal provides an accessible mechanism for review that is fair, just, economical, informal and quick; to enable the Tribunal to review decisions in a non-adversarial way; and to enable the Tribunal to adopt flexible and streamlined procedures and a variety of processes for resolving issues. As the Attorney-General's Department asserted, one of the key objectives of the ART is to reduce procedural complexity.[221]

3.132 During the inquiry, it became apparent to the Committee that some concerns in relation to the proposed procedures of the ART are unjustified because the concerns relate to procedures that will, in fact, remain unchanged under the new Tribunal. Other concerns were based on a misunderstanding of the new procedures. These included:

- concern about the provision for matters to be transferred by the Federal Court to the Federal Magistrates Service either on its own initiative or on the application of a party to the appeal.[222] It was clarified for the Committee, that there is, in fact, no change to current procedures because AAT matters do go to the Federal Magistrates Service;[223]

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219 *Submission 12*, Dr Rory Hudson, p. 2

220 *Transcript of evidence,* Australian Law Reform Commission, p. 117-118

221 *Transcript of evidence,* Attorney-General's Department, p. 146

222 Submission 57, Ms Joan Dwyer, p 4

223 *Transcript of evidence,* Attorney-General's Department, p. 146

- criticism that the Bill does not include a clause to provide for the compensation of current tribunal members for loss of tenure. The Committee was advised that there is no such clause in the ART Bill because it is a separate matter for the Remuneration Tribunal;[224]

- concern that applications for review would have to be made in writing to the ART.[225] The Committee notes, however, that no such requirement is stipulated in clause 141 which states that applications must be in the form and manner prescribed by the practice and procedure directions.[226] Were a requirement to be prescribed that applications are required in writing, then subclause 141(2) would operate so that the CEO would be obliged to ensure that persons who request assistance to make applications to the ART are given reasonable assistance;

- claims that the ART Bill requires applicants for compensation matters to bear their own legal costs.[227] The Committee was told that, in fact, this represents no change to the current situation in relation to the AAT. Clause 156 provides the procedure for taxing costs should a participant be required to pay another participant's costs and this, again, is analogous to section 69A of the AAT Act. Also, the power to award costs which is in the *Safety, Rehabilitation and Compensation Act* will be unchanged;[228] and

- concern that pre-hearing processes will not operate in the ART.[229] The view expressed by the Attorney-General's Department is that there will be at least the same, if not more, pre-hearing processes employed in the ART.[230]

3.133 In conclusion, the Committee believes that the provisions in the Bill achieve a sense of structural balance – the prescription of certain, fundamental procedural matters are balanced against the power of the Minister, President and executive members to issue practice and procedure directions. This structure will enable the ART to adopt flexible and fair practices tailored to the needs of individual cases. The Committee believes that the measures will operate to improve the quality and consistency of administrative decision making processes in the environment of a new tribunal.

The absence of a right to representation and other assistance

3.134 Under the Bill, representation (legal or otherwise) will only be permitted where the practice and procedure directions issued by the President, executive members or Portfolio Ministers allow such representation or where the Tribunal agrees to an applicant being represented and the practice and procedure directions do not prohibit it. In addition, the

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224 *Transcript of evidence,* Attorney-General's Department, p. 147

225 *Transcript of evidence*, National Welfare Rights Network, p. 101

226 Administrative Review Tribunal Bill, subclause 141(1); *Transcript of evidence,* Attorney-General's Department, p. 1147

227 *Transcript of evidence,* Community and Public Sector Union, Victorian Branch, p. 119. See Administrative Review Tribunal Bill, clause 155

228 *Transcript of evidence,* Attorney-General's Department, p. 147

229 *Submission 51*, Community and Public Sector Union, Victorian Branch, p. 15 and *Transcript of evidence,* p. 122

230 *Transcript of evidence,* Attorney-General's Department, p. 147

practice and procedure directions may direct the Tribunal to take certain matters into account when deciding to grant a request for representation and may also regulate the way in which that representation is to take place.[231]

3.135 These provisions attracted substantial comment from organisations that deliver representation services to users of the current AAT and various specialist tribunals. The main concern was that, as the Bill now stands, representation could conceivably be prohibited either altogether or in relation to a particular category of cases. The Committee was told that restricting an applicant's right to representation constitutes a departure from the current practice in the AAT and is contrary to the recommendations in the *Better Decisions* report.[232]

3.136 One of the main arguments for maintaining the right to professional representation is that it redresses the power and resource imbalance implicit in an appeal by the individual against the state. The Law Council illustrated the point by referring to an FOI review where it is likely that an experienced FOI officer with sound knowledge of the legislation would represent the Department while the applicant would be unlikely to possess equivalent knowledge.[233] The Community Legal & Advocacy Centre made the same point:

> The agency is always a repeat player, well aware of the issues and procedures and ought to be capable of putting its case in writing. Consumers on the other hand are usually unaware of what may or may not be relevant or appropriate and often fail to present their full case. The absence of unrestricted consumer representatives inhibits the quality of decision making and leaves the Tribunal open to capture by virtue of regular departmental appearance.[234]

3.137 Mr M D Allen, a senior member of the AAT, asserted that the restriction on representation for applicants would be advantageous to the bureaucracy. Mr Allen referred to the ALRC's Discussion Paper No 62, *Review of the Federal Civil Justice System,* where it was noted that analysis of the ALRC's AAT case file survey results had shown that representation had a significant impact on whether applicants were 'successful':

> Unrepresented applicants in the AAT sample were more likely to be unsuccessful in having the decision under review set aside, varied or remitted. After excluding appeals, applicants were successful in 42% of all the sampled AAT cases. An unrepresented applicant 'won' (albeit sometimes only in the sense of getting the case remitted) 23% of the time compared to 51% of the time, if represented. If the applicant had a final hearing the figures were 17% for unrepresented applicants and 54% if represented.[235]

3.138 It was also suggested in a number of submissions[236] that the combined effect of clause 96, enabling the Tribunal to permit a participant (including the decision-maker) to

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231 Administrative Review Tribunal Bill, Clause 105

232 *Submission 40*, Law Council of Australia, p. 32

233 *Submission 40*, Law Council of Australia, p. 33

234 *Submission 24*, Community Legal & Advocacy Centre, p. 3

235 *Submission 9*, Mr M D Allen, p. 10 referring to paragraph 12.218 of the Discussion Paper

236 For example, *Submission 45*, Welfare Rights Centre (SA) Inc, Executive Summary, paragraph 15; *Submission 49*, The Victorian Bar Inc., p. 14; *Submission 54*, National Welfare Rights Network, p. 11; *Submission 58*, Victoria Legal Aid, p 12; *Submission 31*, Law Institute of Victoria, p. 10

appear, and clause 105, restricting the representation of participants, weights the system in favour of the decision-maker, who will have far more expertise than the person disputing the decision. The Committee was told, however, that requests by agencies to be allowed to appear would probably be made only in a relatively small percentage of cases.[237] In addition, the Committee was told that the ministerial power to issue practice and procedure directions that affect representation strengthens the impression that the Bill is designed to favour the interests of the Executive, rather than provide for impartial and independent review.[238] The discretionary power of the President, executive members and Ministers to issue practice and procedure directions about representation amounts to an unchecked power to control the ART.[239]

3.139 The Committee was told that the power and resource imbalance is particularly obvious in certain portfolio areas. Victoria Legal Aid commented that there is no restriction on representation in the SSAT where the conduct of the hearing is controlled by the Tribunal. It advised that most applicants before the SSAT do not have legal representation, usually because of 'resource difficulties in accessing free legal advice' and that this is unlikely to change even if the right to representation is preserved. However, Victoria Legal Aid claimed that the right to representation should be preserved for social security matters to avoid an 'unbalanced playing field'. Centrelink, for example, has an administrative law section which, in some states and in Canberra, has legally qualified people and a great deal of accumulated expertise whereas the clients of Centrelink are often severely disadvantaged.[240]

3.140 Victoria Legal Aid said that the complex nature of particular fields of legislation combined with the unique characteristics of the users of that legislation necessitated the right to representation being enshrined in the legislation rather than being at the discretion of a tribunal. In this sense, it referred to the complex nature of refugee law and jurisprudence and the obvious cultural and linguistic difficulties that most applicants for refugee status face.[241] Similarly, Victoria Legal Aid referred to the complexity of social security law and pointed out that the people affected by social security decisions often fall within 'the most disadvantaged and disenfranchised sections of the community'.[242] In its view, representation minimises some of the complexities involved.[243]

3.141 The Committee was also referred to information that suggested that restricting the right to representation was not a cost-effective measure. The Law Council submitted that anecdotal indications are that unrepresented applicants to Tribunals often present their cases inefficiently[244] and a senior member of the AAT asserted that many self-represented litigants

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237 *Transcript of evidence,* Victoria Legal Aid, p. 20. See also *Transcript of evidence*, discussion with Departments, pp. 153-155

238 *Submission 40*, Law Council of Australia, p. 35

239 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 2

240 *Transcript of evidence,* Victoria Legal Aid, p. 13

241 *Transcript of evidence,* Victoria Legal Aid, p. 13. A similar point was made in *Submission 3*, Law Institute of Victoria, p. 4

242 *Transcript of evidence,* Victoria Legal Aid, p. 12

243 See also *Submission 9*, Mr MD Allen, p. 10 and *Submission 26*, Western Australia Council of Social Service Inc, p. 8

244 *Submission 40*, Law Council of Australia, p. 35

take up unreasonable amounts of time by presenting ill thought out arguments and pointless questioning of witnesses.[245] The Committee was told this is supported by empirical research on the effects of legal representation in the AAT conducted by the ALRC which showed that, without lawyers, cases were more likely to be inappropriately long or short, but that with lawyers, there was a higher likelihood of settlement.[246]

3.142 The Committee was told that representation should be permitted as of right at:

- the first-tier review stage - because for many, the first-tier review would be their only chance of review;[247] and
- the second-tier review stage – because it will be difficult for non-government parties to identify and articulate their grounds for an application for leave to apply for second-tier leave under clause 65 – that is whether the case is one that raises a principle or issue of general significance or whether it is one that involves a manifest error of law or fact.[248]

3.143 During evidence, the Law Council told the Committee that in its view, the ART should have a discretion in relation to representation by non-lawyers but that by contrast, the right to representation by lawyers should be as of right:

> An advocate may be able to articulate the argument, but one ought to be able to make the presumption – and it is true in most cases, in my experience – that lawyers are trained to be able to present cases. The same cannot be said, as a general presumption, about other persons. That is not to deny, though, that in some cases there will be other persons who are suitable to act as advocates. That is why that should be governed by leave rather than an unqualified right.[249]

3.144 In its submission to the Attorney-General in response to the ALRC's *Managing Justice* Report,[250] the Law Council asserted that there are three grounds that justify its position that applicants before the ART should be entitled to legal representation as of right. They are that: the Executive should not abrogate a person's choice to be legally represented; legal representation for a non-government applicant serves to equalise the power imbalance between the applicant and departmental and agency officers; and legal representation assists in the early settlement of disputes and the efficient disposition of matters in tribunals. In addition, the Law Council pointed out that lawyers are subject to and guided by professional

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245 *Submission 9*, Mr M D Allen, p. 10

246 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 1 referring to the ALRC Report, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, 2000 paragraph 5.9.

247 *Submission 25*, Flinders University Union, p. 2

248 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 2

249 *Transcript of evidence,* Law Council of Australia, p. 130

250 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89, 2000

conduct rules (and a disciplinary regime) which mandate the primacy of a legal practitioner's duty to assist a court or tribunal.[251]

3.145 Some argument was specifically directed at preserving the right to legal representation as distinct from other kinds of representation. The chief arguments presented in favour of preserving a right to legal representation included that legal representation:

- assists the applicant in presenting a proper case;
- assists the Tribunal in obtaining the relevant material, including the cross examination and testing of information before the Tribunal;
- contributes to the speed and economy of the review process by assisting in the efficient presentation of the case;
- can lead to early resolution of cases as mediation initiatives, such as conferences, may be more effectively handled by a legal representative;
- is useful where the personal appearance of an applicant is not appropriate. An applicant company may find legal representation more economical; and
- may be necessary, depending on the complexity of the legislation in areas such as taxation and compensation.[252]

The Committee's view

3.146 The Government's stated intention is that representation, legal or non-legal, should be available only in cases where it is really necessary but that it should not otherwise be allowed.[253] Clause 105 is in keeping with the Government's stated intention. As the provision stands, the participation of representatives in the ART will continue to vary between review jurisdictions by virtue of the practice and procedure directions and, except where specific portfolio legislation requires otherwise, representation at proceedings will only be allowed in exceptional or prescribed circumstances. The significant point, in the Committee's view, is that limitations on representation, as opposed to limitations on appearances, affect the unincorporated applicant but not the agency or the incorporated applicant.

3.147 After considering the evidence, particularly that given by the departments, the Committee is confident that the objective of departments is not to take advantage of unrepresented litigants but rather to assist the adjudicative process in reaching a satisfactory and correct outcome.

3.148 The evidence indicates that in many cases, departments will not, generally, be present or request to be present at review hearings. The Department of Family and Community Services (DFACS), for example, indicated that they would only want to attend

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251 *Submission 40C*, Law Council of Australia, pp. 2-3

252 *Submission 40*, Law Council of Australia, pp. 33-34

253 Australian Institute of Administrative Law and Senate Legal and Constitutional Legislation Committee, *Transcript of proceedings: Seminar: Administrative Law in Transition – The Proposed Administrative Review Tribunal, 25 October 2000,* p. 5 per the Attorney-General, the Honourable Daryl Williams QC.

hearings of significance such as where the Tribunal is considering new measures. In addition, DFACS indicated that some of the advocates who appear on behalf of the Secretary are legally qualified and some are not. The Department determines whether legally qualified representatives should attend on the basis of the particular case at hand and in the interests of finding the right balance of representation. DFACS also indicated that it would not object to a client being legally represented.[254]

3.149 DIMA advised the Committee that 97 per cent of the immigration review caseload is dealt with by the MRT and the RRT before which the Department has no right of appearance. The Secretary, however, can make submissions to the Tribunals and that has been retained under the proposed arrangements for the ART (IRD Division). The Department indicated that given the costs involved, it was unlikely that it would change its level of participation – preferring to appear only in exceptional cases. DIMA anticipated, however, that it would seek to have a higher level of participation in criminal deportations and character matters where an applicant was likely to be represented. Under both current and proposed arrangements, an assistance provider may help an applicant to prepare written submissions for the tribunal and be present with, and provide advice to, the applicant in a hearing before the Tribunal. However, the assistance provider cannot put oral argument to the tribunal without its consent.[255]

3.150 DIMA's current attitude was that if it was appearing before the tribunal, it would not object to the applicant being represented before the Tribunal and the representative participating fully in its proceedings. However, it could be a different situation where the tribunal was investigating of its own volition and taking evidence without the participation of the Department. In such a case, representation of the applicant would be unnecessary.[256]

3.151 The Committee was told that the Veterans' Affairs Department had aimed to maintain the status quo in relation to the arrangements under the ART. Section 147 of the *Veterans' Entitlements Act 1986* provides that a party may either personally appear before the VRB or have non-legal representation at the party's own expense. In essence, the VRB will be the equivalent of first-tier review under the proposed ART, and no change is envisaged in relation to that right of appearance. The Veterans' Affairs Department advised that the Repatriation Commission has never been represented before the VRB and, again, it is envisaged that that practice will continue. In relation to matters before the AAT, both legal and non-legal advocates represent the Repatriation Commission. The same practice will continue in relation to matters before the ART. The Department said:

> I also understand that the minister has indicated that in relation to the practice and procedure directions for legal representation for the veterans' appeals division of the ART, the proposal is that there would be a right to legal representation. That is something that the ex-service organisations expect and, given also their current legal status for obtaining legal aid funding to conduct both AAT and Federal Court matters, we would imagine that there would be no change to the status quo.[257]

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254 *Transcript of evidence,* Department of Family and Community Services, p. 153

255 *Transcript of evidence,* Department of Immigration and Multicultural Affairs, p. 154

256 *Transcript of evidence,* Department of Immigration and Multicultural Affairs, p. 154

257 *Transcript of evidence,* Veterans' Affairs Department, pp. 154-155

3.152 The Committee was advised that the Department of Employment, Workplace Relations and Small Business, as opposed to particular employers, would not normally be a party to matters in the Workers' Compensation Division so the question of its appearance did not arise. The Department, however, is considering what might be appropriate practice and procedure directions in relation to the issue of representation. So far, the process has indicated that representation is valued by employee-applicants in workers' compensation matters and by the determining authorities and it was not something with which the Department had any difficulty.[258]

3.153 With respect to Australian Taxation Office matters, the Committee was advised that decisions that are reviewed range from small matters to excise decisions made by the Collector of Customs that involve substantial amounts of money. The Taxation Office stated that it is usual for the ATO and the Collector of Customs to use both legal and non-legal departmental advocates as well as in some cases, external barristers and solicitors. Similarly it is common for applicants to be represented by tax agents or by legal representatives. With respect to the Taxation Division of the ART, the ATO is considering practice and procedure directions that reflect its understanding that there is frequently some value in representation because it assists applicants and the decision-making process.

3.154 An amendment has been made to the Consequential and Transitional Bill that allows applicants to retain the choice they currently have of appealing either to the AAT or to the Federal Court in relation to taxation matters. The amendment will allow an applicant to the ART, with the consent of both parties, to remove his or her application and instead relodge it in the Federal Court. This will be particularly useful if it is a matter of legal significance – as well as assisting applicants, the provision will assist the ATO because a Federal Court decision has more precedential value.[259]

3.155 The Committee also notes that the fears held by some witnesses are less justified when considered in the light of the Model Code for Litigants. Government departments are bound by the model litigant policy and departments are legally required to abide by that policy. If government departments do not abide by the model litigant processes, complaints can be made to either the Attorney directly or to the Department as previously stated. The model litigant policy is promulgated to all departments through the Attorney-General's Department, which said:

> … our department has a role in administering that policy and ensuring that it is respected. Our department therefore emphasises to other agencies that they are obliged to abide by that. If it came to the department's notice that they had not been, the department would, quite apart from anybody complaining, take that up with the relevant department.[260]

3.156 The Attorney-General's Department provided a summary of the intended operation of the Bill with respect to the issue of representation:

> Paragraph 3(d) of the ART Bill provides that one of the objects of the Bill is to enable the Tribunal to review decisions in a non-adversarial manner. Decision-

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258 *Transcript of evidence,* Department of Employment, Workplace Relations and Small Business, p. 155

259 *Transcript of evidence,* Australian Taxation Office, pp. 155

260 *Transcript of evidence,* Attorney-General's Department, p. 170

> makers will not necessarily be participants in a review and, where a decision-maker is a participant, he or she will have a positive obligation to assist the ART in reaching its decision (clause 94). Clause 92 specifically requires the ART to act with as little informality and technicality as a proper consideration of the matter permits. The ART is not bound by the rules of evidence (clause 91). It is required to ensure that participants in a review understand the nature of any assertions made in the review and the legal implications of those assertions. These measures aim to create an environment that is informal, flexible and responsive. They will thus enable applicants in many cases to conduct proceedings before the ART without the need for specialised assistance. The intention of the ART legislation is to encourage and enable people to conduct their own review where this is appropriate.[261]

3.157 As with other provisions of the Bill, the Committee also believes that many of the concerns that have been expressed arise only because the Bill is not overly prescriptive in relation to the subject matter. Clause 105 confers a discretion on the Tribunal to decide when representation is appropriate. Just as the provision has been criticised as conceivably being used to exclude classes of cases from representation, equally it may be said that the provision operates to confer flexibility on the Tribunal so that it may respond as appropriate in particular circumstances.

3.158 The Committee is confident that the culture of the proposed ART will be one that responds positively to the needs of applicants in the pursuit of reaching correct and fair outcomes and decisions. It was suggested to the Committee that the issues arising from the provisions dealing with representation in the Bill may be resolved if the ART adopts a culture that places a priority on assisting applicants:

> From my recollection and experience, the style that the tribunal itself adopts is tremendously important in assisting applicants, looking for openings and possible solutions and also actively looking for evidence that might assist applicants. It is possible that a culture like that could emerge in the relevant divisions of the new ART. That is possible.[262]

3.159 In relation to the position of the Law Council, the Committee rejects the proposition that the ART should have a discretion in relation to representation by non-lawyers but that representation by lawyers should be as of right:

> The Council also wants lawyers to have an unrestricted right to appear before the ART, while at the same time arguing that that restrictions should be placed on the capacity of non-lawyers to appear and assist applicants. A Tribunal operating under these arrangements would certainly benefit the legal profession, but this is not the object of the Government's reforms. What the Commonwealth wants is what applicants want: a system that provides fair, impartial, accessible and timely decision-making, with legal representation available where it is needed.[263]

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261 *Submission 74,* Attorney-General's Department, Attachment: Comments on the Law Council of Australia's submission (number 40B: *Suggested drafting amendments)*, pp. 5-6

262 *Transcript of evidence,* The Victorian Bar Association, p. 30

263 Attorney-General, the Hon Daryl Williams AM QC MP, News Release, *Law Council Criticism of the Administrative Review Tribunal,* 13 December 2000

3.160 The Committee also believes that clause 105 reflects the intended administrative nature of the new Tribunal. The ALRC distinguished the Australian tribunal system from those in other countries. Under the Constitution, tribunals are explicitly part of the executive whereas tribunals in other countries are more an adjunct to the judicial system and they are accordingly characterised as 'informal courts':

> It is a feature of our Constitution that makes it clear that we have to craft for our tribunals something that is different from a court. We have never really wrestled with what it is that makes them different and one of the features of this bill is that it is a good opportunity to wrestle with that. It does not mean that you have to be so different from a court that you do not have any of the appearance and context because clearly you are doing very similar work to a court, but you need to craft it in such a way that it works differently. It is hard for us to say whether this clause exists anywhere else – you should not be, in a sense, surprised if it does not exist anywhere else because our tribunal system is different. [264]

3.161 The ALRC advised against being too prescriptive and excluding all kinds of representation because often, applicants are so nervous that, in the time available for a hearing, it is impossible to elicit from them the information needed to determine their case. It suggested that practice directions should be formulated to allow for the member to have the flexibility to depart from them.[265] Similarly, the ALRC suggested a form of words or a concept that should be incorporated in the practice and procedure directions under clause 105 – that is, that in any particular case, the tribunal have discretion to determine whether it would be of assistance to have a representative, legal or otherwise, present. The ALRC preferred inbuilt flexibility because while its empirical research found that representation assisted the resolution of cases, it was equally true that there may be cases where the tribunal may want to 'clamp down on representation' or on certain representatives.[266]

3.162 The Committee accepts that there should be a discretion in the Tribunal to allow representation of parties but notes that the Bill contains no criteria for guiding the Tribunal's decision. The Committee considers that guidelines are essential to assist the Tribunal in determining which cases are appropriate for representation. Professor Aronson from the Faculty of Law, University of NSW advised that appropriate criteria would be similar to those contained in section 71 of the *Administrative Decisions Tribunal Act 1997 (NSW)*. Those criteria include: the complexity of the matter and whether it involves a question of law; whether each party has the capacity to conduct their own case orally; the stage the review process has reached; and the type of proceedings.[267] Professor Aronson submitted that the same criteria should be employed for deciding whether parties appearing before an inquiry officer under clauses 111-119 should be permitted representation.[268]

3.163 The Committee generally agrees with the criteria suggested by Professor Aronson but considers that the Tribunal should use its discretion in favour of permitting representation

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264 *Transcript of evidence,* Australian Law Reform Commission, p. 116

265 *Transcript of evidence,* Australian Law Reform Commission, pp. 116-117

266 *Transcript of evidence,* Australian Law Reform Commission, p. 117

267 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 1

268 *Submission 1*, Professor Mark Aronson, Faculty of Law, University of NSW, p. 2

of an unincorporated applicant where the decision maker or agency concerned appears. The Committee therefore recommends that:

a) The Bill set out guidelines for the exercise of the tribunal's discretion to allow parties to be represented;

b) These guidelines include the complexity of the matter, the presence of a question of law, the relative capacity of each party to conduct his, her or its case orally, the stage the review process has reached and the type of proceedings; and

c) There be a presumption in favour of permitting representation for an unincorporated applicant if the decision-maker or agency concerned is appearing.

Other assistance

3.164 Clause 106 provides that an applicant before the Tribunal may apply in writing to the Tribunal for permission to have the assistance of an interpreter or someone to help them understand the proceedings. If the Tribunal considers that it is appropriate, and the person chosen is suitably qualified or skilled, the applicant can have that assistance. In certain circumstances, the Tribunal may itself initiate assistance of an interpreter or other person, chosen by itself, to help the applicant understand the proceedings.

3.165 Although this matter received much less attention than the issue of representation under clause 105, the Committee was concerned about the capacity of a person who has difficulty with the English language or finds it difficult, for some other reason, to follow the proceedings, to understand that they may request such assistance, but need to make the request in writing. The point was picked up by WACOSS who submitted that:

> Access to justice does not simply refer to access to an appeals mechanism, it refers to the capacity of applicants to adequately present their case. … those who have accessed the current structures include some of Australia's most disadvantaged people. Administrative law is extremely complex and any unfamiliar procedures, however informal, are going to be complicated for applicants to navigate. … It is clearly essential for those for whom English is their second language to have legislative access to interpreters and legal representation.[269]

3.166 It seems to the Committee that it will be absolutely necessary for the Tribunal to be sensitive to the possible needs of an applicant for assistance and be ready to take the initiative.

Conclusion

3.167 In examining the concerns raised in relation to the proposed ART, the Committee was assisted by the high quality of debate and strength of argument throughout the inquiry. Given that the proposal departs from the current system in several important respects, it was not surprising that some witnesses are concerned about how the new tribunal will operate and how users will be affected. The Committee has concluded, however, that many of the concerns fail to take account of the Government's strongly and explicitly stated intention that

269 *Submission 26*, Western Australia Council of Social Service Inc, p. 8

the new tribunal should be of an essentially administrative rather than quasi-judicial character.[270] Many other concerns stemmed from the fact that the tribunal will be subject to practice and procedure directions not yet formulated or were, in some cases, based on misunderstandings.

3.168 The Committee was grateful for the assistance rendered to it by particular organisations in its consideration of the principal and cognate Bills. The Committee refers in particular to the assistance provided by the Law Council of Australia. Although the Committee did not endorse the prioritised list of amendments[271] proposed by the Law Council, the Committee nevertheless found them useful and appreciated the efforts undertaken by the Law Council to provide that material within the tight time frame.

3.169 In conclusion, the Committee is confident that the legislative proposal for the ART will achieve the Government's aim of streamlining merits review in a way which is both cost-effective and which will enhance the quality of review.

Recommendation

That the Bill proceed, subject to the following changes:

1. That generic performance standards be published in the Annual Report of the ART but that access to the performance agreements of individual ART members be governed by the provisions of the *Freedom of Information Act 1982* (paragraphs 3.34 and 3.40);

2. Clause 161 provide that Ministers must consult with the President before issuing directions (paragraph 3.54);

3. The word 'manifest' be deleted from subclause 65(3) (paragraph 3.92);

4. A note be inserted after clause 65 notifying participants of the existence of the model litigant policy and its objective to ensure the fair conduct of government parties in matters being reviewed by the ART (paragraph 3.107);

5. Clause 124 provide that, if appropriate, the Tribunal can make a decision on the basis of new material instead of remitting the matter to the original decision maker (paragraph 3.113); and

6. Regarding representation, that:

   a) The Bill set out guidelines for the exercise of the tribunal's discretion to allow parties to be represented;

   b) These guidelines include the complexity of the matter, the presence of a question of law, the relative capacity of each party to conduct his, her or its

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270 See for example the Attorney General the Hon Daryl Williams AM QC MP, *Reform of the merits review tribunal system,* May 1998: http://www.law.gov.au/ministers/attorney-general/articles/art_merits.html 22/01/2001 p. 2

271 *Submission 40C,* Law Council of Australia, Attachment, pp. 8-10

case orally, the stage the review process has reached and the type of proceedings;

c) There will be a presumption in favour of permitting representation for an unincorporated applicant if the decision-maker or agency concerned is appearing (paragraph 3.163).

Senator Marise Payne, Chair
February **2001**