LABOR AND DEMOCRAT SENATORS MINORITY REPORT

1.1 Labor and Democrat Senators see merit in the concept of merging the separate administrative review bodies into one body. However we believe that the model proposed by the Government as outlined in the provisions of the *Administrative Review Tribunal Bill 2000* and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* is not going to achieve this. We believe, as many of the witnesses to the inquiry believe, that the Bills are fundamentally flawed. The legislation dramatically departs from the *Administrative Review Council Report No.39 - Better Decisions: Review of Commonwealth Merit Review Tribunals*, on which it purports to be based.

1.2 Labor and Democrat Senators support the recommendation of the *Better Decisions* Report that the statutory objective of a merit review system should be to provide a mechanism of review which is 'fair, just, economical, informal and quick'.[1] However, the legislation values efficiency and economies at the expense of fairness and justice. We are concerned that this legislation with estimated budget savings of $13.5M over four years[2] will not deliver a more efficient and improved merits review system. We accept that the existing tribunal system is not perfect, that it can be improved, but these Bills will not achieve this.

1.3 These large Bills present Labor and Democrat Senators with a dilemma when considering restructuring the present system. Because of their complexity and inter-relatedness we have concluded that it is difficult to suggest amendments without undertaking a complete revision. As the Australian Council of Social Service said:

> . . if you pull one thread, it unravels.[3]

1.4 Importantly, Labor and Democrat Senators note concerns raised by community groups that the Bills would make it more difficult than at present for disadvantaged groups with fewer skills and resources to access and successfully find their way through the tribunal system. The Australian Council of Social Service warned:

> If this bill were implemented, we believe that it would provide a system of administrative review that would be less accessible, more complex than the current system, more intimidating for people who come before it and more time consuming, which would certainly be an unintended consequence, and that, if it were introduced, it would result in an unfair system that is weighted in favour of government and agencies and against applicants.[4]

1.5 The Government has implicitly and publicly acknowledged the flaws in its scheme by excluding the Veterans' Review Board from the new Review Tribunal. No explanation has been given for this extraordinary action and Government representatives seek to explain it away by saying that it is simply Government policy.

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1 Administrative Review Council, 1995, p.16. This objective has been incorporated in paragraph 3(c) of the Administrative Review Tribunal Bill.

2 Media Release, Attorney-General, 9 May 2000

3 *Transcript of evidence*, Australian Council of Social Service, p.138

4 *Transcript of evidence*, Australian Council of Social Service, p.139

1.6 Witnesses generally accepted that the Social Security Appeals Tribunal currently works well, and in itself is not in need of great change. On the other hand, the proposed Immigration and Refugee Division will be treated so much like a separate tribunal that one wonders why it is to be included in the ART at all. It seems to us Labor and Democrat Senators that the Government could achieve its objectives, without the disadvantages contained in the legislation, by simply co-locating the existing tribunals and giving members multiple appointments. Professor Dennis Pearce suggested such a solution at the seminar on the legislation; it was also suggested in two submissions.[5]

1.7 It was made abundantly clear, in submission after submission, that spokespersons for clients of the VRB/AAT and SSAT/AAT were generally satisfied with the existing system and did not want it replaced with the model proposed in this legislation.[6] Many others, while accepting the desirability of amalgamation, rejected the model and considered that the legislation should be withdrawn and redrafted.[7] Relatively few submissions suggested that the legislation was generally satisfactory, even with amendments. The approach taken by the Government towards suggestions made in earlier consultations has been so negative that one would despair of it being receptive at this time, even if the problems could be overcome without massive redrafting.

1.8 The main concerns identified to Labor and Democrat Senators during the Inquiry were the independence of the proposed tribunal, the quality of review by the proposed tribunal and the procedure aspects including the appeal process. In most cases the issues outlined below relate to more than one of these concerns.

Independence of the tribunal

1.9 The proposed model seeks to increase the role of the portfolio Minister responsible for the decisions the particular division of the Tribunal is reviewing. This is demonstrated by the portfolio Minister being able to influence the funding, staffing composition, practice and procedure directions, measurement of the tribunal members' performance, and the continued employment of tribunal members in relation to the corresponding division. This closer relationship between the executive and tribunal presents a major obstacle for a body that must have and be seen to have independence. Victoria Legal Aid warned that:

> We know that the tribunal is not a chapter III court; it is not independent in the same way as the judiciary, but we would certainly say that things like binding directions and things like asking the department for permission in effect to hand

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5 *Transcript*, Seminar: Administrative Law in Transition – The proposed Administrative Review Tribunal, 25 October 2000, p.66; *Submission 43*, ACT Bar Association, p.5; *Submission 24*, Community Legal and Advocacy Centre, p.5

6 For example, *Submission 3*, Illawarra Sub Branch, Vietnam Veterans Association of Australia (NSW Branch) Inc., p.3; *Submission 4*, Vietnam Veterans' Federation, p.3; *Submission 7*, Vietnam Veterans Federation South Australian Branch Inc. p.3; *Submission 8*, Sydney University Students' Representative Council, p.6; *Submission 14*, Returned & Services League of Australia (S.A. Branch) Inc., p.1; *Submission 25*, Flinders University Union, p.3; *Submission 34*, Bar Association of Queensland, p.11

7 For example, *Submission 23*, Law Society of Western Australia, p.5; *Submission 26*, Western Australian Council of Social Service Incorporated, p.1; *Submission 29*, Committee on Rights of Review, p.1; *Submission 35*, Curtin Student Guild, p.1

> down a decision positively on the papers cut against what an independent executive tribunal ought to be in a civilised Western democracy.[8]

1.10 The proposed model provides for each division to be funded by the portfolio agency responsible for the decisions it is reviewing. *The Better Decisions* Report recommended against this source of funding.[9] As the Administrative Review Council said in the hearing:

> . . . in *Better Decision*s, the Council recommended that the administrative and financial links of the new tribunal should reside with the department whose decisions seldom fall for review.[10]

1.11 Labor and Democrat Senators recognise that the funding arrangement proposed for the ART is similar to the current arrangement for the funding of the Social Security Appeals Tribunal and the Veterans' Review Board. However, we point out that the better model to follow would be that applicable to the Administrative Appeals Tribunal so that a single appropriation from the Attorney General's Department funded the ART.

1.12 Concerns were also raised about the method of the appointment of tribunal members. The Minister whose department's decisions will be reviewed by a particular division of the tribunal will be the Minister responsible for recommending the appointments of the executive member and tribunal members for that particular division to the Governor-General. The Law Council of Australia cautioned:

> Put yourself for a moment in the position of an applicant: you go to a tribunal and you think, rightly or wrongly – because the minister gets to appoint members – there is a close correlation between the department that you are unhappy with and the tribunal you end up before. If you have a perception that this is just another aspect of internal review by the department, if you lose – and you might well lose on the merits – you are going to have an added perception that you have not been dealt with fairly, which is not a good thing for our system of government…[11]

1.13 Labor and Democrat Senators realise that this is the current process for the appointment of members to the Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal and the Veterans' Review Board. However, we recognise that there were expectations that the new legislation would introduce an improved system of appointing tribunal members. There were expectations that the new system would not place a portfolio Minister in the invidious position of appointing persons who may be required to make decisions which are contrary to the interests of the relevant Minister. Effectively, this is the system used for appointments to the AAT. The potential for perceptions of unfairness to arise is increased by the lack of specific criteria for appointment to the tribunal. This is dealt with further at paragraphs 1.27 and 1.28 below.

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8 *Transcript of evidence*, Victoria Legal Aid, p.20

9 Administrative Review Council, 1995, p.130

10 *Transcript of evidence*, Administrative Review Council, pp.89-90

11 *Transcript of evidence*, Law Council of Australia, p.126

1.14 The proposed Administrative Review Tribunal will not be a court but those who are to constitute it will need attributes comparable to those required for judicial office. At the very least, senior tribunal members ought to have legal capabilities. Yet the legislation under consideration fails to specify these qualities as requirements for a person to have before he or she is appointed to the Tribunal. Accordingly it is flawed for this as for a number of other reasons.

Performance Pay

1.15 One area in which Labor and Democrat Senators would proceed with caution relates to performance agreements for tribunal members (other than the President). One of the criteria under these agreements could be productivity. The legislation would allow dismissal where criteria were not met, and there could be performance pay bonuses where criteria were met. The *Better Decisions* Report, the ALRC,[12] the SSAT,[13] the RRT,[14] the MRT,[15] and, for that matter, the Attorney-General's Department,[16] *all* recommended against this type of remuneration.[17] It is inevitable that tying remuneration to performance will encourage a style of decision making that operates with speed being the only consideration rather than ensuring the best decisions are made.

1.16 The issue of performance pay for Tribunal members only came to the notice of the Senate Legal and Constitutional Committee at the public hearing in Canberra on 4 December 2000. The representatives of the Refugee Review Tribunal, in vigorously opposing the concept of performance pay for Tribunal members, informed the Committee that the Commonwealth Remuneration Tribunal had made an indicative determination that substantially amended the salaries to be paid to members of the new Tribunal. The indicative determination was made on 23 June 2000 and has not been made public. A request by Senators to be provided with a copy of the indicative determination was refused by the Remuneration Tribunal.

1.17 The indicative determination provides for performance pay of up to $11,670 per annum to a Tribunal member, $14,250 per annum to a Senior Member and $20,250 per annum to an Acting Principal Member. Whilst increasing the remuneration to full time Members the indicative determination suggests that the per diem fees paid to part time Members be dramatically reduced from $500 to $370 per diem. A copy of the indicative determination was tabled at the December hearing and this is appended to this report.

1.18 The Committee asked for a copy of the communication from the Secretary of the Attorney General's Department that asked the Remuneration Tribunal to consider the issue of remuneration for offices created by the ART Bill. Mr Robert Cornall's letter was supplied on 19 January 2001. The matter of performance pay was certainly an issue in the letter with the Secretary suggesting that "performance pay for ART members is both unnecessary and

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12 *Transcript of evidence,* Australian Law Reform Commission, p.111

13 *Submission 20C,* Social Security Appeals Tribunal, pp.6-7

14 *Submission 68,* Refugee Review Tribunal, p.5

15 *Submission 71,* Migration Review Tribunal, p.3

16 *Submission 74,* Attorney-General's Department, pp.12-13

17 Administrative Review Council, 1995, p.85

inappropriate". The full text of Mr Cornall's suggestion to the Tribunal on performance pay is repeated below.

> I note that the Tribunal, in its November 1999 statement, providing advice on the outcome of its review of the remuneration paid to judicial and related offices, noted that it 'will consider the merits of extending [performance pay] arrangements to judges and related offices, in a major review of judicial remuneration it intends to undertake[n] in 2001'. Although there is no constitutional barrier to performance pay arrangements for ART members (contrast the situation for federal judges), I strongly recommend that the Tribunal not include any performance pay component in remuneration for ART members.
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> Performance pay is intended to reward and encourage good performance. In relation to most statutory offices, this would be related to implementation of government decisions and policy. In the ART, the performance that should be rewarded is timely, high-quality and independent decision-making. The ART will be a less court-like body than the AAT. There will be public concerns that the ART lacks the status of the AAT and will provide lower quality merits review. It is therefore vitally important that the independence of members be upheld, and that any perception that the decision-making of members could be affected by access to performance pay be avoided.
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> The ART Bill provides a mechanism to ensure good performance from members, while avoiding the appearance of linking a member's decision-making to remuneration – an appearance that would seriously affect the credibility of the ART as the principal federal merits review tribunal. Every member will be required to enter into a performance agreement (clause ^270) which must require the member to, amongst other things, participate in a performance appraisal scheme and be accountable for his or her productivity and performance. However, the performance agreement is expressly not to deal with the substance of particular decisions made by the member, or in which the member participates. A member who fails to comply with a performance agreement can be directed by the President to improve his/her performance (clause^ 280) or be removed from office (clause ^287)
>
> Thee provisions allow the President, with the executive members, to deal with poor individual performance. The funding model for the ART ensures the good performance of the ART as a whole. Portfolios will purchase review services from the ART based on agreements struck between the ART and those portfolios. This purchaser/provider model will be the only source of funding for the ART which will, therefore, not be able to tolerate poor performance from its members if it is to provide efficient review services at the agreed cost.
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> For these reasons – because of the mechanism by which good performance of the ART as a whole will be ensured, and because of the importance of the independence (and perceived independence) from government of ART members – I believe that performance pay for ART members is both unnecessary and inappropriate. I note that the New South Wales Statutory and Other Offices Remuneration Tribunal, in making a determination of the remuneration to be paid to, amongst others, members of various State review tribunals, commented that performance pay would be inappropriate for such office holders.

1.19 Labor and Democrat Senators are totally opposed to the concept of performance pay for Tribunal members and we find it quite extraordinary that it should be suggested at this time.

1.20 Another issue relating to performance agreements is the lack of transparency and accountability being proposed. The legislation does not guarantee that the measures of performance will be fair and effective. The *Better Decisions* Report recommended that all tribunal members should be involved in the process of designing appropriate standards to assess performance.[18] The legislation does not address the detail of the performance agreements and the issue of whether these agreements or standards will be publicly available for scrutiny by the Parliament and the general public is also neglected. Subject to privacy considerations, performance agreements or standards for tribunal members should be made public to ensure that members, and their performance, do not suffer from inappropriate expectations.

1.21 The other issue relating to performance agreements or standards is the appraisal element. The *Better Decisions* Report considered that the responsibility for the appraisal of members should lie with the tribunal head. *Better Decisions* suggested that it might be appropriate for appraisal to be delegated or for a broad-based group within the tribunal to assist in the task, so as to alleviate any concerns about personal factors affecting the objectivity of the process.[19]

1.22 The implications of the lack of tenure for members relate to both the perceived independence and quality of the tribunal. The legislation allows for a maximum term of seven years but does not specify a minimum term. The *Better Decisions* Report suggested that a shorter term than 3 years does not provide members with any sense of security.[20] Similar evidence was heard from witnesses.[21] It seems likely that shorter terms will make it more difficult to attract and keep competent tribunal members resulting in their quality diminishing. Even more distressing, perhaps, is the potential for shorter terms to affect the independence of the Tribunal as tribunal members faced with job insecurity are forced to make decisions mindful of the government of the day.

Quality of review of proposed tribunal

1.23 Labor and Democrat Senators are in favour of a more economical tribunal system. However, we can not support a model that does not place importance on maintaining the high standard of decision making that characterises the current system. The proposed model undermines the quality of the performance of tribunal members by artificially constraining the number of senior members, by not spelling out the minimum qualifications for appointment to the tribunal and by taking a simplistic approach to the maintenance of performance standards.

1.24 Labor and Democrat Senators are concerned with the potential effects on the quality of decision making of restricting the number of senior members to not more than 10 per cent of the total number of members and not more than 15 per cent of the members in any division. We believe that this prescriptive rule will not give the tribunal the flexibility to deal

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18 Administrative Review Council, 1995, p.87

19 Administrative Review Council, 1995, p.86. See also remarks of Mr Graham McDonald and Social Security Appeals Tribunal, *Transcript of evidence*, pp.66-67

20 Administrative Review Council, 1995, p.82

21 *Transcript of evidence*, Mr Peter Johnston, p.4, Social Security Appeals Tribunal, p.53 & *Estimates Transcript,* 22 November 2000, Refugee Review Tribunal, p.118

with complex laws that may require more expertise or thorough advice. For instance, the current proportion of senior staff in the Administrative Appeals Tribunal is 30 per cent. This figure has been derived from the Tribunal's experience of how it best operates. While restrictions on the number of senior tribunal members may contribute to budget savings it seems likely that they will be delivered at what the Victorian Bar refer to as 'cut price justice'.[22] They argued:

> …. one of the justifications for a restrictive rule like that might be to save money, because if there were more senior members presumably the tribunal would have to compete in the employment market for people with perhaps better qualifications and more experience. 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 fact and about law. So we would see that going to the quality of decision making…[23]

1.25 It will also impact on one of the important roles of senior members, the training and professional development of less experienced tribunal members. This process ensures the high quality of decision making by the tribunal is maintained. In artificially restricting the number of senior members this investment in the future becomes more difficult, and the Government's inherent lack of commitment to providing the highest level of administrative decision making becomes apparent.

1.26 As stated above, it appears from an indicative determination by the Commonwealth Remuneration Tribunal that, apart from the possibility of performance pay, the remuneration levels for ART members could be lower than current levels paid to some tribunal members. A rationale has not been offered for this decrease. The proposed model does not appear to sufficiently value the high degree of skill and expertise currently found in the tribunal system. It also raises the question of whether there is sufficient incentive for the most qualified and experienced people to leave existing careers to take up an appointment in the new tribunal. The Refugee Review Tribunal indicated that one of the main concerns of members:

> ….is the suggestion that they may be doing the same work in the same manner, but for less remuneration. There are structural concerns about the consequences of relocation. What are the consequences going to be in the corporate sector? That is to say, as regards staffing and support services. Are they going to be rationalised?[24]

1.27 Labor and Democrat Senators have a sense of unease about the absence of criteria setting out the minimum qualifications for the President and other members of the ART. Presently, the President of the Administrative Appeals Tribunal must be a Judge of the Federal Court of Australia. We note that doubts were expressed to the Committee on the constitutional validity of appointing a Federal Court Judge as President of the ART.[25] While the Administrative Review Council have expressed the view that a judicial qualification is

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22 *Transcript of evidence*, Victorian Bar, p.28

23 *Transcript of evidence*, Victorian Bar, p.28

24 *Transcript of evidence*, Refugee Review Tribunal, p.73

25 *Transcript of evidence*, Victorian Bar, p.23; Law Council of Australia, p.131

not necessary, they do support at least a legal qualification and legal experience.[26] The legislation does not offer this assurance. The Law Council of Australia cautioned:

> We find it more strange when the legislation vests in the president and the executive members important tasks which, realistically, will only properly be able to be discharged by persons with legal training; for example, the decision whether or not to grant leave – as Mr Robertson has already indicated – turns on whether or not the president or executive member is satisfied that a first-tier decision involves a manifest error of law or fact. It is not – in my view, at least – an encouraging prospect to have persons who are not legally trained having to grapple with those issues.[27]

1.28 There is no assurance that other tribunal members will be suitably skilled either. The legislation does not include an indication of a minimum set of core skills and abilities, a recommendation of the *Better Decisions* Report.[28] The legislation states that the Minister must be satisfied that the person should be appointed, having regard to the person's qualifications and experience. Currently, the *Administrative Appeals Tribunal Act 1975* sets out required skills and qualifications. These skills and qualifications are not just desirable but absolutely necessary when dealing with complex matters of law and fact. It is the view of Labor and Democrat Senators that in giving the Minister the freedom to appoint a member, without necessarily satisfying what should be essential criteria, the Bill creates the potential for the erosion of the standing and quality of our tribunal system. We consider that the Government should have set out in the legislation the minimum qualifications for appointment as President, executive member and member of the tribunal.

Procedure aspects including the appeal process

1.29 Labor and Democrat Senators note that the inquiry process helped identify a number of flaws in the procedure aspects of the proposed model. The most serious relate to second tier review, the size of tribunal panels, representation and excessive formality.

Second tier review

1.30 The proposed restricted access to second tier review is less than what is currently enjoyed by social security and family assistance recipients but more than what is available to some other applicants before the Administrative Appeals Tribunal[29]. Applicants before the Veterans' Review Board will enjoy automatic appeal rights. However the legislation does not give any second-tier review to applicants before the Immigration and Refugee Division.

1.31 The Victorian Bar referred to what it described as the inconsistency in the operation of the system of second tier review:

> There are very restrictive rules about second-tier review. There is a sharp division in treatment which can only reflect a political decision, and that political decision we assume must be driven by some special case that the government believes the ex-service organisations have been able to make out. We do not know what that special case is because we are not privy to those negotiations. It certainly gives

26 *Transcript of evidence*, Administrative Review Council, p.91

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

28 Administrative Review Council, 1995, p.171

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

> that appearance of special beneficial treatment. We do not attack the fact that there is a Rolls Royce system for veterans, but we are very concerned about the serious reduction in the review rights of other persons who are affected by administrative decisions. [30]

1.32 A person seeking second tier review will either need to raise a principle or issue of general significance (where the first tier decision was made by a single member) or obtain agreement from the original decision maker, the applicant and the tribunal member from whom leave is sought that the first tier review decision was materially affected by a manifest error. In practice, it seems there will only be one ground for second tier review as the nature of administrative decision making would rarely have both parties in agreement over a 'manifest error' in the first tier review decision. The Law Council said that the provision should be simplified.[31] In addition, they suggested that it should be made less stringent because, as the provision stands, it would be easier to appeal to the Federal Court than to get second tier review. [32]

1.33 The restriction on second tier review is forecast to provide savings of $2.6 million. While restricting second tier review will clearly generate a cost saving, it is Labor and Democrat Senators' view that the Government has not made its case that such a restriction will contribute to the fairness of the review process. Indeed it is possible that the absence of a second tier review mechanism for a limited number of cases may complicate and slow down all ART hearings where applicants believe that this is their only chance to obtain a favourable review.

Size of tribunal panels

1.34 The proposed model favours a single member panel over the multi-member panel system. This rejects the recommendation of the *Better Decisions* Report, which stated that all review panels should have a statutory preference for multi-member panels in appropriate cases[33] and it departs from the Guilfoyle recommendation that there be a statutory preference for multi-member panels. It is again likely that the preference for single member panels has been decided on the basis of budget savings rather than on the best quality decision making. For instance, it may not be possible to provide the higher quality of decision making that is demanded in more complex cases such as those involving social security law or different disciplines.[34] The ALRC said that it also deprives the ART Income Support Division of the benefits of participation of the SSAT 'executive members' who provide a useful bridge into the department for the purpose of getting its cooperation in investigations.[35]

1.35 Secondly, a multi-member panel reduces the risk of bias, and contributes to perceptions of overall independence. Regardless of whether savings are to be gained (and that is in dispute),[36] Labor and Democrat Senators suggest that the more desirable approach

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30 *Transcript of evidence*, Victorian Bar, p.27

31 *Transcript of evidence*, Law Council of Australia, p.125

32 *Transcript of evidence*, Law Council of Australia, p.132

33 Administrative Review Council, 1995, p.34

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

35 *Transcript of evidence*, Australian Law Reform Commission, p.113

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

would be to allow the size of the panel to be determined by the type and complexity of each case.

1.36 The Guilfoyle Report was presented to the Government about two years ago. Its contents have never been made public. The Hon. Dame Margaret Guilfoyle was asked to inquire into the following matters:

1) The number of levels of review within the Social Security portfolio;

2) The operation of internal review;

3) The impact of the appeals and review decision on the quality and efficiency of decision making by DSS staff;

4) The operation of the SSAT's review processes, including the number of members required to hear an appeal, the requirement to use paper records, basis of proof for evidence rendered and the issue of representation for appellants;

5) Whether the Department (or the Agency) should appear at the SSAT;

6) The SSAT's membership arrangements;

7) The SSAT's powers of review; and

8) Whether there should be a right of appeal to the Administrative Appeals Tribunal (AAT) or whether appeal to the AAT should be by leave.

1.37 The Attorney General did not refer to the Guilfoyle Report when he introduced the ART Bills to the Parliament and the importance of the Report only came to notice when the submission was received from the Department of Family and Community Services on 6 November 2000. The Committee, in the short time frame available to it, has not had the opportunity to fully consider the contents of, and the recommendations contained in, the Report. It is regrettable that the report was not made public as it could have made a useful contribution to debate on the merits of the ART Bills.

Representation

1.38 Many witnesses were concerned that representation will only be permitted if the tribunal agrees.[37] This proposal to limit representation conflicts with the *Better Decisions* recommendation that applicants for review should be entitled to be represented or assisted in any dealings with a review tribunal.[38] It also conflicts with recommendation 16 of the Guilfoyle Report.[39] It also drew more criticism than probably any other provision in the

37 See, for example, *Transcript of evidence*, National Welfare Rights Network, p.104; Australian Law Reform Commission, p.116; Australian Council of Social Service, p.141

38 Administrative Review Council, 1995, p.61

39 *Review of the Social Security Review and Appeals System: A report to the Minister for Social Security, August 1997, by Dame Margaret Guilfoyle*

legislation, not just from organisations whose members might be financially disadvantaged, but also from people who would seem to have no financial interest.[40]

1.39 It is worth quoting the ALRC's Report *Managing Justice*:

> 9.116 The Commission considers that legislation, policy and practice concerning federal review tribunal proceedings should focus, not on excluding, but on better defining and managing representatives. Legislative strictures on particular types of participation – for example, limiting examination and addresses to the tribunal – may serve to limit the tribunal's discretion to seek assistance from representatives where this is appropriate or necessary in the case. Any provisions for ART management of party and representative participation should be judiciously targeted to allow management, not inappropriate restriction, of representation or participation. Where there is scope for resolution of the case without a hearing, full participation by representatives should be encouraged, as should assistance by representatives in written case preparation.

1.40 Labor and Democrat Senators note the argument that the limitation on the involvement of lawyers in the tribunal process is an attempt to create an informal process. However, Dr Rory Hudson pointed out that the cure may be worse than the disease:

> I understand that it may be advantageous sometimes to have less legal representation and not allow proceedings to be overlegalistic, but I see a possibility in section 105 that an applicant may desire legal representation and yet the tribunal may deny him or her that representation. I think that is a more serious thing than the possibility of perhaps overjudicialising the process, having too much representation. I think the evil on that side is greater.[41]

1.41 The committee heard evidence suggesting that, in view of the complexity of social security law, representation may even minimise legal complexities.[42]

Excessive formality

1.42 One ironic twist to the legislation, given that one of the objects of the Administrative Review Tribunal Bill is to ensure that the tribunal provides an informal mechanism for reviewing decisions, is the frequent claim that the Bills will increase formality.[43] Instances given of this alleged additional formality included the need for leave for representation, the need for leave to obtain second-tier review,[44] and the need to apply for an interpreter[45] or an oral hearing.[46]

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40 See, for example, *Transcript of evidence*, National Welfare Rights Network, p.72; Australian Law Reform Commission, p.116; Australian Council of Social Service, p.141; and *Submission 25*, Flinders University Union, p.2; *Submission 26*, Western Australian Council of Social Service, p.7; *Submission 35*, Curtin Student Guild, p.2; *Submission 14*, Administrative Review Council, p.14

41 *Transcript of evidence*, Dr Rory Hudson, p.46

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

43 For example, *Transcript of evidence*, National Welfare Rights Network, p.100

44 *Transcript of evidence*, National Welfare Rights Network, p.100

45 *Transcript of evidence*, Australian Law Reform Commission, p.113

46 *Transcript of evidence*, Australian Council of Social Service, p.139

Transitional matters

1.43 Labor and Democrat Senators note that in the early development of the proposed legislation, widespread consultation with involved organisations appears to have been carried out. Similar consultations apparently did not occur during the latter stages of the Bills' development. Currently, the Administrative Review Tribunal Working Group consists only of officers from the relevant departments and current tribunals.[47] The interests of those organisations whose clients will be affected by the Administrative Review Tribunal have not been reflected in the membership of the working group.

1.44 Labor and Democrat Senators are appalled that two deputy presidents of the AAT and a number of senior members of tribunals will have their tenure dissolved by the proposed legislation. The dissolution of their tenure does not reflect the contribution these people have made to Australia's tribunal system. A flaw in the transitional arrangements seems to be the lack of acknowledgment and financial compensation for the loss of tenure.

1.45 The reduction in the total number of tribunal staff has been estimated at 15 per cent.[48] The Community and Public Sector Union (Victorian Branch) reported:

> I would have to say the disruption is in the form of fairly low morale when you have 60 to 80 jobs lost from what are fairly small organisations. It is a substantial change and a substantial threat faced by our members. Equally, the uncertainty of how the tribunals will operate is of concern in terms of whether or not they really are part of an organisation that is turning into something that they would not want to be part of.[49]

1.46 It should be acknowledged that in the interim period before the passage of the legislation short term appointments have been adopted for members of existing tribunals whose terms have come up for reappointment. This process has had to be repeated as the start up date of the new tribunal was put back. It would appear that the necessary transitional arrangements have not been formulated to address these important issues of uncertainty and job insecurity. This is a disgrace.

Other areas of concern

1.47 The Government Senators express their understanding at 3.123 that the excessive power conferred on inquiry officers is of concern. Labor and Democrat Senators do not accept that the problems can or will be resolved by the suggestion that "the amount of detail to be filled in by the practice and procedure directions issued by the Minister to be subject to prior consultation with the President" (3.124).

1.48 Labor and Democrat Senators are pleased that Government Senators have recognised that the provisions relating to the giving of decisions and reasons are of concern (para 3.119). We are disappointed that no remedies are advanced by the majority report to address the concerns.

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

48 *Transcript of evidence*, Attorney-General's Department, p.149

49 *Transcript of evidence*, Community and Public Sector Union, p.121

1.49 Government Senators identified the concerns (3.165) about the capacity of a person who has difficulty with the English language or finds it difficult, for some other reason, to follow proceedings, to understand that they may request the assistance of an interpreter. That the assistance must be requested in writing was also recognised. Labor and Democrat Senators think that it is a preposterous proposition that should be rejected.

1.50 Labor and Democrat Senators are also concerned that the so called reforms of the tribunal system will be paid for by staff of the current tribunals. The Government has informed the Committee some 15% of them will lose their employment when the new tribunal is established.[50] Neither they nor their unions have been involved or consulted during the development of the Bills.

CONCLUSION

1.51 Labor and Democrat Senators have considered the extensive submissions and transcripts of evidence in relation to the legislation. We thank the submitters, witnesses and Government officers who provided detailed advice on this very complex legislation. Their help and assistance has been valuable.

1.52 We acknowledge the tremendous effort that the Law Council of Australia went to in suggesting a large number of amendments to the Bills. We thank the Council for their assistance. We note the Government dismissal of the Council's proposals at 3.168.

1.53 Labor and Democrat Senators recognise this as further reinforcement of the view that the Bills are fundamentally flawed and beyond redemption.

1.54 We find that while these bills have been designed around the umbrella concept for a merit review system, the proposed detail and extent of change to the tribunal system is a very loose and inadequate adaptation of the generally sound recommendations contained in the *Better Decisions* Report. This view was also expressed by the National Welfare Rights Network:

> We saw many favourable things in *Better Decisions* that we hoped would be included in this bill. But when we received the bill it did not contain those things. In fact, what it contained was, sadly, a diminution of the rights of our clients.[51]

1.55 Labor and Democrat Senators are not convinced that the findings of the *Better Decisions* Report or the views of organisations representing consumers have been sufficiently considered in the drafting of these bills.

1.56 More thought needs to be given to ensuring that the benefits of amalgamation are not bought with the loss of desirable features in existing tribunals.

1.57 The detailed consideration of these bills provided by the Senate Committee process has confirmed that this legislation is fundamentally flawed.

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50 *Transcript of evidenc*e, Attorney-General's Department, p.149

51 *Transcript of evidence*, National Welfare Rights Network, p.103

RECOMMENDATION 1

Labor and Democrat Senators recommend that the Bills be withdrawn.

RECOMMENDATION 2

Labor and Democrat Senators also recommend that the Bills be re-drafted in a form that reflects the *Better Decisions* Report and that addresses the concerns identified during the Senate Committee inquiry and detailed in this report.

Senator Jim McKiernan, Deputy Chair

Senator Barney Cooney, Member

Senator Joseph Ludwig, Participating Member

Senator Brian Greig, Member

Senator Andrew Bartlett, Participating Member