ADDITIONAL COMMENTS BY SENATOR COONEY

BILLS ASSAIL CIVIL CULTURE AND THE RULE OF LAW

If the Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal (Transitional and Consequential Provisions) Bill 2000 are passed they will degrade the civil culture the Community now enjoys: they will prejudice the rule of law in Australia: they will attenuate the quality of administrative decision making by Government.

When the Commonwealth makes a wrong decision which impacts adversely on a person, or an institution, an injustice is done. A good society does not accept such iniquity. It moves to do something about it.

Australia has established a sound system to see to it that people and institutions are treated fairly by the Commonwealth. A number of statutes make a marked contribution to this system. These include the Administrative Appeals Tribunal Act 1975, the Commonwealth Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977, the Freedom of Information Act 1982 and the Human Rights and Equal Opportunity Act 1986. These were passed in the Seventies and Eighties.

During the Nineties and into the present decade the Government has sought to diminish the quality control of its decision making which was in place at the beginning of that period. The Migration Reform Act 1992 is an example of the Executive Arm initiating legislation to prune judicial scrutiny of its management. The Bills, the subject of this enquiry, are examples of it introducing measures to diminish administrative review of its determinations.

BILLS DEBASE REVIEW OF DECISIONS AND EXACERBATE THEIR HARM

A decision reached by Government should be fair and reasonable. This means it must be determined in accordance with the law and with the facts pertinent to the matter in respect of which it is made. An error in either or both of these will produce a wrong. This is something Government should strive to avoid.

Access to a review of Government decisions, whether undertaken by courts or by tribunals, is crucial to ensuring they have been made in accordance with the law and the facts relevant to the matters with which they deal. But if these bodies themselves allow a wrong to persist by failing to correct an error which has tainted a decision, or by falling into a fresh one of their own, then the vice they are meant to remedy is exacerbated.

If courts and tribunals are not possessed of the requisite powers they cannot cure errors made by the Administration. If the people comprising them are subject to undue pressure from Government then there is considerable risk that they will fail to do their duty.If they are incompetent, or in some other way unsuitable for the office they hold, then there is a high chance they will fall short of doing justice.

The Government is presently seeking to reduce the power of the Federal Court to remedy administrative decisions made in discord with the law. The Migration Legislation Amendment (Judicial Review) Bill 1998 illustrates that statement.

The Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal (Transitional and Consequential Provisions) Bill 2000 if passed, will impose upon those who are to sit on the Administrative Review Tribunal such constraints as will adversely affect their ability to review Government decisions, and will engender in people coming before it the apprehension that justice might well be denied them. If passed, these Bills will make the positions of those who are to sit on the Administrative Review Tribunal so tenuous that the people who accept appointment to it are likely to lack the learning, the experience, the insight, the skill and the temperament, to carry out a right and proper review of Government decisions.

If these Bills are passed they will degrade a system which in most cases presently offers excellent review of administrative determinations to the point where it would risk becoming a vehicle for laundering Government decisions, giving them a status in quality they may not deserve. Describing a tribunal as competent, independent and fair, does not make it so. It can only be brought to this state by putting in place measures to achieve that end.

These Bills in fact cull those measures which now exist to enable the Tribunals presently extant to operate with integrity and proficiency. They introduce measures which will subject those who are to sit on the proposed Administrative Review Tribunal to undue pressure from Government, to the knowledge that their hold on office is limited, to the consciousness that at the end of their job they will receive no adequate pension, and to the public perception, probably true in fact, that their abilities are not of the quality needed for the task they must perform.

ECONOMICS PLACED AHEAD OF JUSTICE

The Government contends that measures contained in these Bills will bring efficiency, accountability, productivity and practicability to the proposed Administrative Appeals Tribunal. This claim is essentially based on an economic perspective of the outcomes needed from the Tribunal. It gives too little weight to considerations such as fairness, due process, the requirement for justice to be done and to be seen to be done, and the need for a right and proper resolution of the matters in contention.

The Government seeks to justify these Bills by emphasising economic factors and by giving matters of law, fairness and justice too little weight.It argues the virtue of economics to justify the vice of injustice.

LACK OF TENURE AND ABSENCE OF A PENSION

English tradition lies behind Australian law. The Act of Settlement passed in 1701 gives judges tenure. At that time the Parliament of Britain realised from its recent history that unless the people who were to constitute courts did so on a basis which gave them security a necessary condition for independence would be missing. Two of the conditions essential to giving judges security are tenure and a proper pension. These Bills ignore that reality.

The proposed Tribunal is not a court but its decision making process is subject to the sort of pressures which the Act of Settlement seeks to allay.

UNDUE ADVANTAGE GIVEN TO GOVERNMENT AS DISPUTANT

The Administrative Review Tribunal is to determine issues persisting between the Government and those in dispute with it over its decisions. Yet these Bills give the Executive undue leverage over the Tribunal. The Departments whose determinations will be in contention are to have crucial influence over who will become a member of the Tribunal and for what term and, whether he or she will be reappointed. The Minister of the Department, in respect of whose decisions the Tribunal is to exercise its functions, can give it practice directions. The members of the Tribunal must enter performance agreements. They must abide by a code of conduct. All these are put forward by the Government as instilling virtue in the Tribunal. In reality they will instill in it fear. The fear it will have will be of Executive power; the very Executive whose decisions it must review.

ATTORNEY GENERAL SHOULD MANAGE APPOINTMENTS

The Attorney General has traditionally been the one to see to it that members of courts are properly appointed according to apt conditions and subject to appropriate accountability. Over the years a culture and a convention have developed which do much to ensure that he or she will appoint suitable people to the Bench and will protect their independence as it should be protected while they hold office. The Attorney General's Department supports him or her in doing this.This culture and this convention does not pertain when other Ministers and other Departments take part in appointing members to the Administrative Review Tribunal and in determining their conditions of employment.

NEED FOR ABUNDANT LEGAL KNOWLEDGE AND EXPERIENCE

Judges need to have intensive legal training and extensive experience in the practice of the law to carry out their job as it should be carried out. This is not because judicial office is a matter of status but because its function is to see justice done by properly applying the appropriate law to the true facts. This can be a most difficult task and one that needs deep knowledge of the law and its practice.

Many people have great wisdom and experience in life. They always act ethically and pursue the goal of being fair to all. But where they lack the necessary legal ability they fall short in what is an essential element for determining what is just according to the law.

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. Accordingly they ought be replete with 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.

ETHICS AND INTEGRITY

The Community expects that people who sit on courts and tribunals will be embued with ethics and will act with the highest integrity. Government declares that it too has this expectation.

The Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal (Transitional and Consequential Provision) Bill 2000 set up a system which will sorely test the ethics and integrity of those who are to constitute the Administrative Review Tribunal.

Short term appointments, performance agreements, the powerful influence to be held by Departments over who will be appointed to the Tribunal and for how long and under what conditions are some of the factors which will prejudice the ability of members to review decisions as they should.

Ethics and integrity need to be nurtured. Yet these Bills risk attenuating them by subjecting members of the Tribunal to undue pressures. The legislation fails to take this danger into account apparently on the assumption that ethics and integrity will be brought to the Tribunal by its members and they will withstand in all respects the leverage the Government has over them. Yet the Bills should provide for conditions which encourage the ethics and integrity of the Tribunal members to grow and to flourish not, as is presents the case, for conditions which are calculated to threaten them.

BILLS SHOULD BE REJECTED

The Government is now pursuing the passage of the Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal (Transitional and Consequential Provisions) Bill 2000 through the Parliament. If passed the Bills will infect the civil life of the Community; they will weaken the rule of law in Australia; they will adulterate decision making by Government. Parliament should deny it that pursuit by rejecting both Bills.

Senator Barney Cooney