

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

REFERENCE ON ADMINISTRATIVE REVIEW TRIBUNAL BILL 2023 AND RELATED BILLS

QUESTIONS ON NOTICE

EMERITUS PROFESSOR TERRY CARNEY AO, FAAL

Arising from my evidence in the public hearing on Friday 26 April I was asked to elaborate on three matters by way of questions on notice: the adequacy of the newly added Part 5A; the extent of Member independence once a guidance decision is issued; and the public accounting of actions in response to ART raising of systemic issues.¹

THE NEW PART 5A AMENDMENTS

[1]. I applaud both the decision of government to introduce amendments that retain rather than remove two tiers of as of right review of social security matters and to do so by way of a separate Part rather than by amending clause 124 of the *Administrative Review Tribunal Bill 2023* (see paragraph [14] of my original Submission).

[2]. As requested, I have reviewed the amended provisions including Part 5A of the amended *Administrative Review Tribunal Bill 2024* and am satisfied that they retain very close fidelity to the two tier processes enshrined in the *Administrative Appeals Tribunal Act*.

[3]. Variations such as the 'Henry VIII' regulation-making power of cl 131E(3)(b) is a sensible inclusion, given that Part 5A is essentially designed more as a self-contained regime in contrast to the AAT's greater 'combination' of AAT Act and other legislation, and the justification made out in the Explanatory Memorandum is on balance persuasive (2024 EM para [48]).

[4]. The articulation between two tier as of right review and the ability for a matter to be referred to the Guidance and Appeals Panel at the discretion of the President (cl 131W)

¹ I note for the record that the issues discussed at the hearing regarding the former litigation guardian provision have in my opinion now also been remedied by amendments to what is now to be called a 'litigation supporter' (cl 67 *Administrative Review Tribunal Bill 2024*).

in my opinion strikes the appropriate relationship between these two distinct avenues and functions.

MEMBER INDEPENDENCE IN LIGHT OF GUIDANCE PANEL DECISIONS.

[5]. The object of the Guidance and Appeals Panel (GAP) is to achieve greater consistency of decision-making within the new ART without unduly intruding on Member independence. This is not an easy balance to strike. That balance relies not only on the drafting of substantive provisions of the Act but also, and indeed mainly, on the ‘culture’ cultivated by the senior leadership of the Tribunal.

[6]. So far as the Bill is concerned, clause 110 requires that Members other than a Judge must ‘have regard’ to such rulings,² while making explicit that failure to do so does not invalidate the decision made by a Member (cl 110(3)). Relatedly, the Bill makes provision for a code of conduct (Part 8, Div 2, Sub-div C ‘Performance and conduct of members’) and among other things, enables the issuance of binding ‘directions’ to a Member, but states that this cannot extend to a specific decision (cl 200(3)(b)). In shifting the balance in the desired direction it is difficult to fault (or further improve on) the current language of those provisions.

[7]. I do continue to have a concern that the culture of the tribunal may become less accommodating of healthy and legitimate divergence of opinion regarding what is the ‘correct and preferable’ decision in more contentious matters (text to and footnote 7 of para [12] 2(a) of my original Submission), but the remedy for that mainly lies in the qualities of the ART leadership. The qualifications and processes for appointment of senior ART members and the new ART governance processes and bodies (e.g. the Tribunal Advisory Committee in cl 236) should alleviate much of that risk.

[8]. The other part of my concern on this issue in my Submission, *‘that imbalances between “lawyered up government” and unrepresented applicants will suppress opportunities for adequate testing of alternative lines of argument on important issues’* and the discussion in footnote 9 to the income apportionment cases such as *Re Lyall*, was a concern tied to the then ‘single tier’ review proposal in the 2023 Bill. I do not anticipate it will now carry the same weight given restoration of two tiers of as of right review in the 2024 Bill.

ACCOUNTABILITY FOR ACTING ON SYSTEMIC ISSUES

[9]. The machinery of the Bill with regard to ART identification of systemic issues and their referral out for consideration is a major strength, maximising its normative and preventative role (amplified in para [12] 1(a), (c)) of my Submission).

² Constitutional difficulties regarding ‘Chapter 3’ judicial power and the separation of powers, no doubt explain the departure from the otherwise preferred principle that any such provision should apply equally to all members of the ART.

[10]. Transparency with respect to ART *referral out* to others (such as the relevant Departmental Secretary or the Administrative Review Council 'ARC') is currently provided by the provision for its reporting in the ART Annual Report (cl 242(2)(i)), and in the case of one of those *recipients* of such referrals, by the ARC in its Annual Report (cl 264(2),(3)), as touched on my Submission (para [12] 1(c)).

[11]. Additional equivalent protections against the risk of referrals being 'shelved' rather than properly considered for possible resolution, irrespective of the avenue of such referral, would be advantageous, but I am unable to suggest the precise way of achieving that.

Terry Carney

Wednesday, May 1, 2024