

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 26 April 2024

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David Shoebridge asked the following question:

Senator SHOEBRIDGE: But we've heard from a number of experts who were consulted and had their opinions ignored in other aspects, not least a very eminent professor on the social security changes that were put through. Can you advise us who you've consulted with and whether or not you've actually followed their advice?

Ms Virtue: We have our expert advisory group, which is chaired by the Hon. Patrick Keane AC, KC and includes Alan Robinson, a former Federal Court judge; and Robyn Creyke and Cheryl Saunders, who are both emeritus professors, I think.

Senator SHOEBRIDGE: Is that who you're saying you consulted with?

Ms Virtue: We worked very closely with the expert advisory group in all aspects of this legislation, including this one.

Senator SHOEBRIDGE: Are you saying that that expert advisory group unanimously gave this the tick?

Ms Samios: My recollection is that they were comfortable with the drafting.

Senator SHOEBRIDGE: Rather than your recollection that they were comfortable with the drafting, can you provide an answer to my question, which is unambiguous.

Ms Samios: I will double-check our notes to make sure that I am not missing something, but my recollection is that they were very comfortable with this drafting.

The response to the question is as follows:

Clause 110 of the ART Bill requires members to have regard to guidance decisions in cases with similar facts and issues. However, a failure to have regard to a guidance decision does not affect the validity of the Tribunal's decision. This is intended to have a normative effect and promote consistency in the Tribunal's decision-making while recognising that the Tribunal is not a court and cannot create binding precedent. Similar models exist in the Upper Tribunal in the United Kingdom and currently in Migration and Refugee Division of the AAT under the Migration Act which allows the President to direct that decisions of the AAT are guidance decisions.

Importantly, guidance decisions are also intended to influence the behavior of primary decision-making agencies. A pattern of inconsistent tribunal decisions on the same issue makes it more difficult to determine if changes to practice are required at the primary decision-making stage. This means that opportunities to correct for future errors at the primary decision-making stage are lost. Outcomes for individual applicants who seek review in the AAT are unpredictable and those who do not seek review continue to be affected by poor practices. A clear and authoritative ART guidance decision on a systemic issue would provide a much stronger impetus for primary decision-makers to either follow the decision or challenge the guidance decision through judicial review.

It is expected that members will comply with their obligations under the ART Bill and have regard to guidance decisions in the same way that they consider a number of other factors in making decisions, such as policy, ministerial directions or other Tribunal or court decisions. Consideration of these factors does not fetter a member's independence noting that a member still needs to reach their own conclusions on both the law and the facts before them in the individual matter. Having regard to a relevant guidance decision means members will explain in their reasons why a guidance decision has or has not been followed, including circumstances where the facts or law may have been distinguished. This would strengthen the clarity, quality and consistency of Tribunal decision-making. It would better position parties to understand why apparently similar matters have been decided differently.

The department consulted extensively on all aspects of the ART Bill, including in relation to this provision, with the Expert Advisory Group. In particular, the Expert Advisory Group supported the creation of the guidance and appeals panel, noting it was important for the Tribunal to be able to issue guidance decisions to support the Tribunal to make consistent (but still independent) decisions, particularly where there was a need to resolve issues of significance authoritatively. The Expert Advisory Group was consulted in relation to the drafting of clauses 109 and 110 and was supportive of the drafting.

The drafting also reflects comments from numerous stakeholders and experts in the public consultation process about the need for a mechanism to identify, escalate and resolve systemic issues within the Tribunal.