

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 26 April 2024

Question date: 29 April 2024

Paul Scarr asked the following question:

1. Please refer to the issues raised by Emeritus Professor Terry Carney in his submission. How does the Department respond to the concerns raised by Professor Carney on page 9 of his submission; namely the first four dot points of Appendix B (there is no need to respond to the two dot points on page 10)?

The response to the question is as follows:

Litigation supporters

Clause 67 has been amended to provide a supported, rather than substituted, decision-making approach in relation to litigation supporters. Litigation supporters must, in accordance with paragraph 67(5)(a) support a party to participate in a proceeding and should only participate on behalf of the party as a matter of last resort.

Clause 84 – where an applicant has died or become bankrupt, etc

Clause 84 was developed in consultation with the AAT to address circumstances in which a matter is not able to proceed because the applicant in relation to review of a decision has died or become bankrupt (if they are an individual), or where (if the applicant is not an individual) the applicant is wound up, ceases to exist, or becomes subject to any form of liquidation or administration. The AAT Act does not currently include this power. As a result, there are matters that cannot be either progressed or dismissed.

Clause 84 provides a discretionary power to dismiss the application in these circumstances. Subclauses 84(2) and (3) are included to ensure that the Tribunal cannot do so if another person is able to continue with the application. If the application can clearly progress despite an event in subclause 84(1) having occurred (such as a social services applicant becoming bankrupt), there would be no need for an application under subclause 84(2) as the question of dismissal would not arise.

Dispute resolution in social services matters

Under the Bill, dispute resolution is broadly available across the Tribunal but the Bill recognises that it may not assist in the resolution of all matters. The use of dispute resolution in appropriate matters supports the objective of the Tribunal, as set out in clause 9, to provide a mechanism of review that is quick, informal and inexpensive, as well as the objective of the reform to emphasise early resolution where possible. Some types of dispute resolution may be of more assistance in particular reviews, and less use in others.

Clause 87 provides the Tribunal with discretion to refer a matter to a dispute resolution process. This means a dispute resolution process will be available in social security matters but only where the Tribunal considers that it is useful in the circumstances. This allows an approach tailored to the circumstances of particular cases. It also allows the Tribunal to conduct a case conference that does not involve the decision-maker -- for example, with the parents in a child support matter – if it will assist in the efficient identification and resolution of the issues.

The Tribunal will have the ability to order a decision-maker to participate in a particular proceeding where it would assist the Tribunal to make its decision. This would provide the Tribunal with the flexibility it needs to resolve matters efficiently and with regard to the needs of the matter – in particular, where a matter may be amenable to dispute resolution or involves circumstances of significant complexity. A rule-making power included in the Bill would ensure that the settings relating to the participation of decision-makers could be adjusted in response to operational experience and the needs of particular cohorts.

The President may refer a matter to the guidance and appeals panel if the President considers that it raises an issue of significance to administrative decision-making. This mechanism does not rely on either party choosing to appeal the Tribunal's decision. Under clause 87(3), the guidance and appeals panel may not refer a matter to dispute resolution other than conferencing, and amendments in Schedule 3 of Consequential and Transitional Bill 1 ensure that the decision-maker in a social services matter cannot vary or substitute a decision that is under review by the guidance and appeals panel without the consent of the parties and the Tribunal (see clause 31 of the ART Bill). These safeguards ensure that systemic issues are not able to be settled without the knowledge and consent of the Tribunal, providing greater capacity to identify settlements that could be perceived to be made for the purpose of avoiding broader scrutiny.

Publication of Tribunal decisions

Under clause 113 of the Bill, the Tribunal may publish any decision and the reasons for them. However, it must publish decisions involving a significant conclusion of law or which have significant implications for Commonwealth policy or administration. Clause 113 does not limit the number of decisions that the Tribunal publishes. It promotes the Tribunal's objective in clause 9 of improving the transparency and quality of government decision-making. The language used in clause 113 implements Recommendation 20.4 of the Robodebt Royal Commission Report that the new federal administrative review tribunal should publish decisions which involve significant conclusions of law or have implications for Commonwealth policy.

The AAT's current publication target of 5,000 matters is part of its Portfolio Budget Statement performance objective, rather than a legislated requirement. The Bill would not preclude the setting of targets for the ART, including through its Portfolio Budget Statement, in relation to the number of published decisions generally or in particular jurisdictions.