

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: One of the witnesses we had earlier today raised concerns about the constitutional validity of appointing a chapter III judge as a president, given the very significant administrative functions that the president will have, including quite significant new administrative functions under this bill. Is that something that you've sought advice on?

Ms Samios: I think I'd make a general comment: we sought copious advice on the legislation.

Senator SHOEBRIDGE: I'm asking you about a specific point, because if it's found to be constitutionally invalid, given the central role the president plays, that's going to create a hell of a lot of uncertainty going forward. Have you sought any advice about whether or not the appointment of the president in those dual functions—as a chapter III judge and as a president with all the administrative functions proposed under this ART—is constitutionally valid?

Ms Samios: I might have to take that on notice, to establish what I can appropriately share and to check with the minister in relation to that.

The response to the question is as follows:

Throughout the course of policy development and drafting, the department obtained extensive legal advice on a range of matters within the Bills, including the functions of the President, in the context that the President would also be a Federal Court Judge.

Subclause 205(3) of the ART Bill provides that a person appointed to the position of President must be a Judge of the Federal Court of Australia. This provision is equivalent to existing section 7 of the AAT Act. The Explanatory Memorandum notes at paragraph 1319 that a judicial President reinforces the independence of the Tribunal from government in that it entrenches its impartiality, notwithstanding its existence within the executive branch.

In addition to obtaining relevant legal advice, the department consulted extensively with the Expert Advisory Group, chaired by the Hon Patrick Keane AC KC and including eminent constitutional law experts, throughout development and drafting of the Bill, and consulted numerous experts during the public consultation process. No concerns were raised with the department in relation to the constitutional validity of the President's functions as set out in the Bill.