

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 page 4 of the submission made by Dr Denis Dragovic dated 7 March 2024. How does the Department respond to the points raised by Dr Dragovic with respect to the differences in years of experience required for different positions on the ART?
2. Please refer to page 9 of the submission made by Dr Denis Dragovic. How does the Department respond to the concerns raised by Dr Denis Dragovic that the provisions of the Bill may undermine the independence of members?
3. Please refer to page 10 of the submission of Dr Denis Dragovic. Why is there a different standard of conduct for judicial and non-judicial members? Further, did the Department consider providing the authority to the ARC to develop the code of conduct to apply to Tribunal members? Why did the Department not give the ARC this responsibility?

The response to the questions is as follows:

1. The ART is a different, and separate, organisation to the courts, and members in the ART perform a different function than members of the judiciary. For example, where all judges on a Court are equals (albeit with an informal seniority framework), members of the ART work within a more traditional organisational, hierarchical structure, including with more senior members potentially having managerial, supervisory and mentoring roles for other members. It is appropriate and reasonable that more senior members of the ART ought to have more experience.

The ART Bill outlines the minimum qualifications to be appointed as a member of the Tribunal. In consultation on the reform, stakeholders (including AAT members) strongly supported clearer differentiation between the roles and expectations for each of the member levels. In response to this, the qualifications required for each member level in the ART increase reflecting the increased seniority of the role, the responsibilities they will hold, and the complexity of the matters they will be hearing. Importantly, these minimum qualifications are not an exhaustive list of requirements or capabilities required to be suitable for appointment to the Tribunal. The merit-based assessment of the suitability of an applicant for appointment will include a wider range of considerations and selection criteria (which will be included in the regulations).

The role of President of the ART is complex and demanding, requiring the appointee to be an excellent leader, manager and decision-maker. Although the President of the Tribunal must be a judge of the Federal Court of Australia (FCA), given the specialised nature of the role, it is appropriate that the President is selected through a public, transparent merit-based selection

process (per clause 205). These processes may also attract applicants who are not currently judges of the FCA, who must be both suitable for appointment as a FCA Judge and for the additional role of President in order to be recommended. In practice, persons who are suitable for appointment as a FCA judge are highly likely to meet the eligibility requirements to be a non-judicial Deputy President in the ART.

2. Under the AAT Act, the grounds for terminating a member's appointment mirrored the grounds for removal of a federal judge. This is an exceptionally high threshold, with significant procedural barriers to its exercise. In consultation on the reform, there was strong support from stakeholders (including AAT members) to revisit these provisions and to realign the termination process with community expectations with regard to proper accountability of members in relation to their conduct and performance. A common theme in these discussions was to recognise that appropriate consequences for unacceptable conduct toward others is entirely compatible with independence in decision-making, as are reasonable expectations in relation to timeliness, quality and output of those decisions.

The ART Bill provides an exhaustive list of grounds which would enable the Governor-General to terminate an ART member's appointment. There are grounds for mandatory termination (outlined in subclause 221(3)) and grounds where termination remains at the Governor-General's discretion (those contained in subclause 221(1)). The grounds for discretionary termination of appointment include where:

- the member has engaged in conduct that constitutes a serious breach of the performance standard or the code of conduct
- the member is convicted of an indictable offence
- the member engages in serious misconduct, including unlawful discrimination under the AHRC Act, or serious or repeated bullying or harassment of a person.

A member may only be terminated where the grounds in subclauses 221(1) or 221(3) of the ART Bill are present. These grounds are appropriate for the removal of a statutory office-holder, and assist to maintain public confidence in the Tribunal.

Where a member wishes to challenge the termination of their appointment, or action taken in relation to an investigation for breach of the code of conduct, they may seek review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

3. *Complaints relating to Judicial Deputy Presidents*

The conduct and performance of judges are matters for the Courts, and there are existing complaints-handling mechanisms in those institutions that would apply to Judicial Deputy Presidents. The President could refer a complaint to the relevant Chief Justice if required. However, the ART Bill is not the appropriate place to deal with matters of judicial conduct, noting the separation and independence of the Courts.

Code of conduct

The ART Bill provides that the President's functions include 'the management of the performance and conduct of members' (paragraph 193(d)). Bullying, harassment and discrimination are unacceptable in any context, and modern workplace standards require that senior leaders are empowered to manage and take action in relation to performance and conduct issues. The President is the appropriate authority to develop a code of conduct, given their direct responsibility for Tribunal members performance and conduct, and responsibility for the administrative affairs of the Tribunal (see clause 224 of the Bill). Further, the President

of the Tribunal is the official with the most in-depth knowledge of expectations and standards required for Tribunal members, and is best-placed to consult within the Tribunal about what the code of conduct ought to cover.

The Administrative Review Council is not the appropriate entity to determine the code of conduct for Tribunal members, as it is not responsible for the day-to-day operations of the Tribunal. The ARC has a significant number of functions which are aimed at the integrity and the operation of the Commonwealth administrative law system. Notwithstanding the Tribunal's important role within that system, the President would have a more complete understanding of the needs and expectations for members' conduct than the ARC.