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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Courts and Tribunals Legislation Amendment (2021 Measures No.1) Bill 2021

The Law Institute of Victoria (**'LIV'**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill (**'the Bill'**). We wish to provide our feedback in relation to Parts 8,10 and 15 of the Bill.

Part 8 – Appointments, Authorisations and Assignments

Clause 45 of the Bill seeks to amend the appointment process of the Deputy President, Senior Member or other Member of the Administrative Appeals Tribunal ('**AAT**'). Currently, the *AAT Act 1975* (Cth) provides that the Governor-General is to form an opinion as to whether a person has special knowledge or skills relevant to the duties of a Deputy President, a Senior Member or other member for the purposes of appointment to the AAT.[1] However, we note that the Bill seeks to confer this power on the Minister rather than the Governor-General. The LIV raises concerns that this amendment will remove the current safeguard and rigour that is currently maintained through the Governor General's current authority to make these decisions. Our members believe that this will further undermine the independence of the appointment process and unnecessarily increase ministerial power. We wish to clarify whether the reason for this amendment is due to the Governor-General generally supporting the appointments put to it by the Minister and therefore the government deems this step as unnecessary. We are concerned that by removing this step, it will further remove transparency in the process of appointing members to the AAT. The Statutory Review of the Tribunals Amalgamation Act 2015 submits that Members should be selected through a transparent process given the concerns

[1] *Administrative Appeals Act 1975* (Cth) s 6.

regarding the politicised nature of appointments at the AAT.[2] There needs to be a perception of separation of powers in order to maintain public confidence in the integrity and independence of the Tribunal review system and Part 8 of the Bill does not provide for this.

Part 10 – Protection and Immunity of Reviewers of Immigration Assessment Authority

The LIV does not support the introduction of clause 64(1)(c) which seeks to provide the same protection and immunity for Immigration Assessment Authority ('**IAA**') Reviewers as a Justice of the High Court of Australia.[3] This would give IAA Reviewers judicial immunity which provides that "a judge of a superior court is immune from civil liability for acts done in the exercise of judicial function".[4] Judicial immunity serves to protect the interests of society rather than protecting judges individually and ensures that justice is administered independently, free from bias.[5] Whilst it is clear that courts and tribunals are afforded such an immunity, LIV members report that this is an unnecessary protection for the IAA.

The Bill and Explanatory Memorandum[6] do not make clear or provide an adequate justification as to why this is a necessary measure for the IAA. The LIV understands that the Bill confers protection and immunity to IAA Reviewers in order to bring them in line with those protections and immunities conferred on Administrative Appeals Tribunal ('**AAT**') members when performing their duties. However, LIV members view the role of the IAA Reviewers and AAT Members as inherently different.

There are many clear differences between AAT Members and IAA Reviewers which explain the different status conferred on each and, upon closer scrutiny, suggest that parity of immunity is not justified. AAT Members are required to be legally qualified and/or have relevant special skills and

[2] The Hon Ian Callinan AC QC, Statutory Review of the Tribunals Amalgamation Act 2015 (Report, 23 July 2021) 170.
[3] Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021.
[4] Rajski v Powell (1987) 11 NSWLR 522, 528.
[5] Ibid.
[6] Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021; Explanatory Memorandum, Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 27.

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knowledge;[7] take an oath office;[8] enjoy independence of remuneration;[9] have terms fixed in advance;[10] and are statutorily required to disclose conflicts of interest.[11] These key features are also characteristics underpinning the appointment and office a Justice of the High Court and, importantly, do not apply to IAA Reviewers, as is made clear by the limited information around the structure of the IAA in the *Migration Act 1958* (Cth) and its role in administering justice.[12]

Furthermore, the LIV notes that the role of the IAA is to undertake limited merits review of fast track reviewable decisions. This is conducted 'on the papers'. [13] Its objective is to provide a mechanism of limited review that is efficient, quick and free from bias.[14] Contrary to the AAT, IAA Reviewers are not required to afford procedural fairness to applicants.[15] This also differs to the expectations of a Justice of the High Court.

The LIV raises concerns that the Bill seeks to stop people from bringing claims of misfeasance or acting in bad faith if IAA Reviewers are accorded the same immunity and protection. As IAA Reviewers are engaged by the *Public Service Act 1999* (Cth), they would be liable for the tort of misfeasance or acting in bad faith. Additionally, the Commonwealth may be vicariously liable for their actions. It appears that the Bill therefore seeks to remove personal liability in the performance of their duties. The LIV is concerned that this will reduce scrutiny and oversight over the IAA without adequate justification or consideration of the appropriateness of the proposed immunity. The IAA engages with clients who are vulnerable and seeking protection and it is important that proper oversight of public servants is maintained.

For these reasons, the LIV does not believe it would be appropriate to afford IAA Reviewers the same protection and immunity as a Justice of the High Court.

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[7] *Administrative Appeals Act 1975* (Cth) s 7(3).
[8] Ibid s 10B.
[9] Ibid s 9.
[10] Ibid s 8
[11] Ibid s 14.
[12] *Migration Act 1958* (Cth) Part 7AA, Division 8.
[13] Ibid s 473BA.
[14] Ibid s 473FA.
[15] Ibid s 473DA.

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Part 15 - Other amendments - *Federal Court of Australia Act 1976*

LIV members have raised concerns regarding clause 101 which seeks to amend the *Federal Court of Australia Act 1975* (Cth) to allow the court to give reasons for its decision in short-form if the court is dismissing an appeal and is of the opinion that it does not raise any questions of general principle. Whilst the LIV understands that this would benefit the court's efficiencies in managing the cases within the appellate jurisdiction, we are concerned that this will be disadvantageous for self-represented applicants who will not be provided a decision with full reasons.

For appellants within administrative law, the court must assess what constitutes a question of general principle. Our members report that there is a decision-making process that is required to form this opinion and effectively short-form decisions would deny an appellant an opportunity of such reasons. Furthermore, we submit that the use of short-form decisions in the administrative law practice area may undermine public confidence and the notion that justice needs to be seen to be done.

The LIV appreciates that there is a significant burden on the courts currently and we support the court in finding efficiencies to manage the court's caseload. However, we suggest that the government identifies other ways to increase resources of the Courts such as by appointing more judges.

Should you wish to discuss the matters raised in this letter, please contact

or

Yours sincerely,

Tania Wolff
President
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