



Australian Government

Australian Government response to the
Senate Legal and Constitutional Affairs Committee report:
Courts and Tribunals Legislation Amendment (2021 Measures
No. 1) Bill 2021

SEPTEMBER 2021

Australian Government response to the Senate Legal and Constitutional Affairs Legislation Committee Report

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

The Government thanks the Committee for its consideration of the provisions of the Courts and Tribunals Legislation Amendment Bill (2021 Measure No. 1) Bill 2021.

The Government provides the following responses to the Committee's recommendations.

Recommendation 1:

The Committee recommends that the Senate pass the Bill.

Response:

The Government agrees with the recommendation and notes that the Bill was passed by the Senate with amendments moved by the Opposition (as noted below) on 2 September 2021.

Minority Report – Labor Senators

Recommendation 1:

Labor senators recommend that the bill be amended to remove:

- the proposed amendments to sections 7(2)(c) and (3)(b) of the *Administrative Appeals Tribunal Act 1975* (replacing the reference to 'Governor-General' with 'Minister')
- proposed new section 60(1B) of the *Administrative Appeals Tribunal Act 1975* (protections and immunities for Immigration Assessment Authority (IAA) Reviewers), and
- proposed new section 28(5) of the *Federal Court of Australia Act 1976* (allowing the Federal Court to provide short-form reasons).

Recommendation 2:

Following the implementation of Recommendation 1, Labor Senators recommend that the Senate pass the Bill.

Response:

The Government notes that the Bill was passed, including three Opposition amendments to reflect Recommendation 1, in the Senate on 2 September 2021.

Dissenting Report – Australian Greens

Recommendation 1:

The Australian Greens recommend that the government reject the proposed amendments to subsections 7(2)(c) and 7(3)(b) of the *Administrative Appeals Tribunal Act 1975* from the bill to remove the role of the Governor-General in the Administrative Appeals Tribunal (AAT) appointment processes. Instead the government should abolish the IAA and establish a fairer process for persons seeking asylum.

Response:

The Government notes that the Senate passed the Bill on 2 September 2021 with the amendments proposed in the Minority Report by the Labor Senators, including the removal of proposed amendments to subsection 7(2)(c) and 7(3)(b) of the *Administrative Appeals Tribunal Act 1975* from the Bill.

The Immigration Assessment Authority (IAA) provides automatic review of fast track reviewable decisions. Fast track reviewable decisions are those decisions made by the Minister for Immigration, or delegate, to refuse to grant a protection visa to a fast track applicant. The IAA must conduct a review that is efficient, quick, free of bias and consistent with the procedural requirements set out in Division 3 of Part 7AA of the *Migration Act 1958*.

The review process employed by the IAA is rigorous and includes:

- review ‘on the papers’ – careful consideration is given to the material that was before the Department of Home Affairs (DHA) when it made its decision as well as a written submission from the applicant as to why they disagree with the DHA’s decision or identifying any claim or matter that was presented to the DHA that it overlooked
- review of new information – where circumstances justify, the IAA may request or accept any new information that was not before the DHA for its consideration, and
- interviews – where circumstances justify, an applicant may be invited to attend an interview to give specified new information or to comment on new information that may be adverse to their case.

The IAA’s efficiency in reviewing fast track matters is clear. The median time for a matter to be finalised in the IAA in 2020-2021 was between 4-6 weeks as opposed to 99 weeks in the Migration and Refugee Division of the Administrative Appeals Tribunal for the same period. This recognises that fast track applicants are facing challenging personal and financial circumstances that warrant fast and fair decisions. Further, the IAA remits approximately 10% of decisions to the DHA for reconsideration and its decisions remain subject to judicial review. The option to seek judicial review remains open to applicants after the IAA process.

The Government therefore does not agree with the position that the IAA should be abolished and a fairer process be established for persons seeking asylum.

Recommendation 2:

The Australian Greens recommend that the Senate reject proposed amendments to section 60 of the *Administrative Appeals Tribunal Act 1975* from the bill to grant High Court judge privileges and immunities to IAA reviewers.

Response:

The Government notes that the Senate passed the Bill on 2 September 2021 with the amendments proposed in the Minority Report by the Labor Senators, including the removal of proposed amendments to section 60 of the *Administrative Appeals Tribunal Act 1975*.

Recommendation 3:

The Australian Greens recommend that the Senate reject proposed amendment to section 28(5) of the *Federal Court of Australia Act 1976*, which would allow the Federal Court to provide short form judgments. Instead, the Government should properly resource the AAT, and appoint more relevantly qualified and experienced AAT members to address the current backlogs.

Response:

The Government notes that the Senate passed the Bill on 2 September 2021 with the amendments proposed in the Minority Report by the Labor Senators, including the removal of proposed amendments to section 28(5) of the *Federal Court of Australia Act 1976*.

The Government recognises the significant backlogs which exist in the AAT, primarily in the Migration and Refugee Division (MRD). As at 31 May 2021, the AAT had approximately 66,000 existing matters on hand, of which approximately 57,000 were within the MRD.

The Government acknowledges the work of the AAT in addressing the backlogs in the MRD, finalising over 20,000 matters per year over the last three years. The Government has provided \$18.9M in additional funding to the AAT from 2021-22 through 2024-25 to finalise an additional 2,000 matters per year in the MRD.

The Government acknowledges that additional funding and members will only go so far and recognises that applications without merit are contributing to the backlog, especially in the MRD. The Government is committed to ensuring that the migration review system in Australia is not subject to abuse and that meritorious applicants have appropriate access to justice.

The Government therefore does not agree with the position that the AAT is not properly resourced and notes efforts to appoint more relevantly qualified and experienced AAT members to address the current backlogs.

Recommendation 4:

The Australian Greens recommend that the government create an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.

Response:

The Government is committed to ensuring the AAT has the resources it needs to provide high quality merits review with minimum delay.

In accordance with the *Protocol for Appointments to the Administrative Appeals Tribunal 2019*, an Expression of Interest process is run each year for appointments to the AAT. The President of the AAT considers the suitability of applicants who have provided expressions to the register and provides recommendations to the Attorney-General as to what positions need to be filled, suitable candidates and advice about members whose appointment is expiring and whether they should be reappointed.

The Attorney-General will then recommend potential appointments to Cabinet. When recommending appointments, the Attorney-General certifies (where required) that the appointees are qualified under sections 7(2)(b) and 7(3)(b) of the *Administrative Appeals Tribunal Act 1975* by virtue of having specialist skills and relevant knowledge. Following Cabinet consideration, the proposed appointments are considered by the Executive Council and ultimately made by the Governor-General.

The existing process is rigorous with a number of checks to ensure its integrity and that the most suitable candidates are appointed to the AAT.

The Government does not agree with the position that an independent body should be established to make AAT appointments.