LAW INSTITUTE VICTORIA

Tribunals Amalgamation Bill 2014

SUBMISSION

Prepared by: Laura Helm and Kate Browne
Date: 27 February 2015

Contact:
Laura Helm, Lawyer, Administrative Law and Human Rights Section

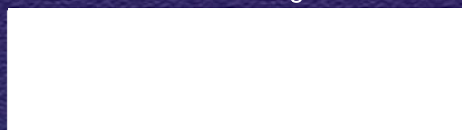

TABLE OF CONTENTS

Introduction 1
Membership of the Tribunal 2
1. Terms of Appointment 2
2. Qualifications of Deputy Presidents 2
3. Outside Employment 3
4. Termination of Members' appointment 4
5. Disclosure of Interests 5
6. Appointment of Division Heads 5
Conclusion 7

INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to contribute to the Senate Standing Committee on Legal and Constitutional Affairs, Legislation Committee Inquiry into the Tribunals Amalgamation Bill 2014 (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 17,000 members. Established in 1859, the LIV has a strong and proud history. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary. The LIV is a constituent body of the Law Council of Australia.

This submission is informed by contributions from the LIV's Administrative Law and Human Rights Section, which has previously been involved in law reform in this area and incudes legal practitioners with extensive experience appearing before and working with the various tribunals affected by this Bill.

While the LIV welcomes the efficiency savings and simplification of the tribunals system under the Bill, there are concerns that some of the provisions in the Bill may damage the independence, flexibility and efficiency of the new Tribunal.

As the Law Council of Australia noted in its previous submission to the Department of Immigration and Border Protection, it is imperative that the Government protects the independence of the new Tribunal.[1] The LIV welcomes the requirement in the Bill that the President of the new Tribunal be a Federal Court Judge. However, the LIV is concerned that this does not go far enough in protecting and promoting the independence of the new Tribunal. Whilst the President's role within the Tribunal is an important one, it is the members of the Tribunal who undertake the vast majority of the work of the Tribunal and their independence is equally important to the independence of the Tribunal as a whole.

[1] Law Council of Australia, Submission to Department of Immigration and Border Protection, *Tribunals Amalgamation*, 17 July 2014, 11. Available online: http://www.lawcouncil.asn.au/ILS/images/pdfs/2014_07_11_-_Tribunals_Amalgamation.pdf.

MEMBERSHIP OF THE TRIBUNAL

1. Terms of Appointment

Under the Bill, members may only be appointed for terms not exceeding five years (clause 19). This is a reduction from the current seven year term under s 8(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*). Under the *Migration Act 1958* (Cth) and *Social Security Act 1991* (Cth), the maximum terms of appointment for the Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) and the Social Security Appeals Tribunal (SSAT) are both five years.

As noted in the Explanatory Memorandum for the Bill, in practice, appointments at the AAT are currently made for no more than five years. The LIV notes that some recent appointments have been made for one, two or three year terms.

Shorter terms of appointment undermine the ability of the Tribunal to attract members with the appropriate skill sets, as professionals who are engaged in their careers are not prepared to forego them for a relatively short term appointment with no certainty of reappointment. Longer appointments allow members to securely build up their knowledge in specialised areas. Longer appointments also promote the independence of the Tribunal as a whole by protecting members from political interference.

The seven year period (if retained) would remain a maximum period and would allow flexibility for shorter-term appointments where appropriate. However, there should also be the ability to provide for longer term appointments to ensure the independence of the Tribunal and to allow an adequate knowledge base among its members.

Recommendation 1
The LIV recommends that the Bill not amend the current seven year term of appointment available under the *AAT Act*. This will ensure that all Divisions under the new Tribunal will have the ability to appoint members for up to seven years.

2. Qualifications of Deputy Presidents

Clause 18 of the Bill will replace s 7 of the *AAT Act* with a new section. Under these new provisions it will be possible to appoint a person as a Deputy President if that person has, in the opinion of the Governor-General, 'special knowledge or skills relevant to the duties of a Deputy President' (new s 7(2)(c)). Under the current *AAT Act*, a Deputy President of the AAT is required to be a 'legal practitioner enrolled in the High Court or the Supreme Court of a State or Territory for at least 5 years'. The Explanatory Memorandum notes that this change is included to reflect the fact that 'equivalent positions in the MRT-RRT and SSAT do not

have such a requirement and that there are special knowledge or skills other than legal qualifications that may make an individual suitable for the role'.[2]

Administrative decisions are made within the framework of the law. The framework of the law is a constant in every administrative decision regardless of whether the subject matter of the decision is environmentally or scientifically based or a matter of income maintenance, taxation, compensation or migration or refugee reviews. Specialised skills are vitally important in the Tribunal but they should not be seen as displacing the law in any particular case.

As a matter of practice, the resources available to the AAT have meant that it is the Deputy Presidents, and not the presidential members who are Judges, who preside on the more complex cases and so maintain the rule of law. Specialised knowledge may be vital in a particular case but it is more appropriately allowed for at the Senior Member level, rather than the Deputy President level.

The role of Deputy President is an important one, and it will be these members who will be appointed Division Heads under the new structure (discussed below). For these reasons, it is important that these members have a legal background to maintain the integrity of decision-making in the new Tribunal as amalgamated.

Recommendation 2
The LIV recommends that the Bill require a Deputy President to be a legal practitioner of at least five years standing.

3. Outside Employment

The LIV welcomes the extension of provisions regarding outside employment to part-time members as well as full-time members under clause 26 of the Bill, which repeals s 11 of the *AAT Act* and replaces it with a new section 11.

However, the LIV is concerned that the new s 11 changes the person with responsibility for approving outside employment from the Minister to the President. The Explanatory Memorandum provides the reason for this as the large number of members in the new Tribunal.[3] The LIV is concerned that this amendment may undermine the integrity of the Tribunal by requiring the President to make decisions that may place them and the members involved in a conflict of interest. It is more appropriate for this decision to be made by someone independent of the Tribunal (such as the Minister). The decision to allow a member to undertake outside employment is not an internal decision and giving this responsibility to the Minister will not affect the internal workings of the Tribunal itself. Instead, having an external, independent person making these decisions protects the reputation of the President and the Tribunal and ensures that conflicts of interest to do with outside employment do not occur.

[2] Explanatory Memorandum, Tribunals Amalgamation Bill 2014 (Cth) 24.
[3] Ibid 27.

If, as the Bill proposes, the President is required to make these decisions about outside employment, this may place the President in a difficult situation. If, for example, a barrister were to be appointed as a part-time member and wished to appear before the President in his or her position as a Judge of the Federal Court, the President would have to consider two matters. The first is whether that appearance conflicts, or may conflict, with the proper performance of the barrister's duties as a member. The second is the ethical question of whether the barrister should appear before the President in his or her capacity as Federal Court Judge when that barrister is subject to the President's directions in some instances as a member. It would be detrimental to the integrity and independence of the Tribunal to have a provision that placed the President in this situation.

Recommendation 3
The LIV recommends that the Bill be amended to require the Minister to approve outside employment of members (as it currently the case).

4. Termination of Members' appointment

Under the current *AAT Act*, a member can only be removed from office if the Governor-General has been presented by both Houses of Parliament with an address praying for the removal of the member on the grounds of 'proved misbehavior or incapacity' (s 13(1)).

Under clause 26 of the Bill, s 13 will be replaced by a new section that will allow the Governor-General to terminate a member's appointment without requiring a motion by each House of Parliament and will substantially extend the possible grounds for removal.

The LIV is concerned that the changes to this provision will result in a marked diminution in the protection provided to members of the Tribunal. It is the members of Tribunals who must ensure that the rule of law is upheld within the merits review systems. The Courts play an important role in this regard but they do not handle the volume of cases dealt with in the various tribunals.

The requirement that removal can only occur after receiving a motion from both Houses of Parliament is a vital check on the power of the Executive to remove members of the Tribunal and, therefore, ensures that the Tribunal can discharge its functions independently, without fear of political interference. The recent criticism of the President of the Human Rights Commission underlines the importance of Parliament, rather than the executive, making decisions on the removal of an independent statutory officer-holder,

The protection that this section has in the past provided to members of the AAT is essential in upholding the independence of the new Tribunal and should be retained.

Recommendation 4
The Bill should require the Governor-General to table motions of termination of members to both Houses of Parliament.

5. Disclosure of Interests

Under the new s 14 (which replaces the old s 14 under the *AAT Act*), a member must disclose a conflict of interest to both the parties in a proceeding and to the President and obtain their consent to take part in the proceedings. In the current *AAT Act*, a conflict of interest is only required to be disclosed to (and require the consent of) the parties to the proceeding.

The new requirement for the consent of both the parties and the President does not appear to be necessary in light of s 14(2) of the *AAT Act* (which is maintained in the new s 14(3) in the Bill) which provides the President with the power to direct a member not to take part in the a proceeding where there is a conflict of interest. It is also likely to lead to delays in proceedings as many conflicts are not identified until the hearing when the evidence is provided and are then dealt with during the course of the hearing.

This new section is particularly problematic in terms of its application to the President him or herself. Under the new s 14(1), if the President has a conflict, he or she will be required to disclose that conflict to the Minister and may not take part in the proceedings without the consent of both the parties and the Minister.

This new section undermines the independence of the new Tribunal by providing the Minister with an inappropriate opportunity to interfere in the management of the business of the Tribunal.

Recommendation 5
The Bill should maintain the current wording of s 14 of the *AAT Act*. Alternatively, new s 14 in the Bill should be amended to ensure that the President is not required to disclose a conflict of interest to the Minister and obtain their consent. The President should still be required to disclose a conflict of interest to the parties involved and obtain their consent.

6. Appointment of Division Heads

Under new section 19 (replacing the previous s 19) the Tribunal will continue to be divided into different Divisions. However, the Bill also creates the new positions of Division Head and Deputy Division Head (new ss 17K, 17L). The role of these positions is to assist the President to carry out his or her functions (new s 17K(6)).

These appointments are made by the Minister and are made for the duration of the selected member's term of appointment and may be varied but cannot be revoked (new ss 17K(5) and 17L(5)). The Minister is required to consult with the President before making these appointments (new ss 17K(2) and 17L(2)).

The Explanatory Memorandum states that these changes are intended to promote Tribunal independence by 'providing stability to assignments'.[4] However, these changes reduce the President's flexibility in managing the Tribunal by moving around members who may be better placed to manage particular Divisions. They also allow the Minister to inappropriately influence the internal management of the Tribunal, particularly when

[4] Ibid 37.

viewed in light of the changes to reduce terms of appointment and the changes to the dismissal power discussed previously.

Recommendation 6
The Bill should be amended to allow the President to appoint members to Heads and Deputy Heads of Divisions.

CONCLUSION

The recommendations listed above are crucial in maintaining the integrity and independence of the new Tribunal. The amalgamation of these Tribunals is an opportunity for the Parliaments to improve upon and ensure the independence and impartiality of the new Tribunal. This in term will ensure the public's confidence in these important institutions of review.