

# CHAPTER 2

## Key issues

2.1 This chapter discusses the key issues raised in submissions in relation to the provisions of the Bill. It mainly focusses on the proposed amendments to the AAT Act, but also touches on proposed amendments to the migration and social services legislation.

### Introduction

2.2 The majority of submissions favoured the general idea of amalgamating the AAT, the MRT–RRT and the SSAT into an amalgamated AAT.<sup>1</sup> However, submissions raised some specific issues with the Bill which will be examined below. These issues are grouped into general issues, social security-specific issues and migration-specific issues.

### General issues

2.3 The key issues that submitters raised were related to the governance, membership and structure of the amalgamated AAT, and penalties for committing offences under the amended AAT Act.

### Governance

2.4 The Refugee Council of Australia (RCOA) acknowledged that the President of the amalgamated AAT would be a Federal Court Judge and that this has 'the potential to create a stronger culture of robust decision-making and of independence'. The RCOA also expressed hope that the independence of the merits review process would be further enhanced by removing the Migration and Refugee Division of the amalgamated AAT from the purview of the Minister of Immigration and Border Protection and placing it within the portfolio of the Attorney-General.<sup>2</sup> However, some submitters, including the RCOA, argued that the proposed amendment requiring the Attorney-General to consult with the relevant Minister, before assigning a member to a division associated with that Minister's portfolio, may compromise the independence of the amalgamated AAT. These submissions recommended that

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1 Migration Review Tribunal–Refugee Review Tribunal, *Submission 1*, p. 1; National Welfare Rights Network, *Submission 2*, p. 1; Refugee Council of Australia, *Submission 3*, p. 1; Public Interest Advocacy Centre, *Submission 4*, pp 1–2; Legal Aid NSW, *Submission 5*, pp 1–2; Law Institute of Victoria, *Submission 7*, p. 1; Bar Association of Queensland, *Submission 9*, p. 2.

2 Refugee Council of Australia, *Submission 3*, p. 1. See also Andrew and Renata Kaldor Centre for International Law, UNSW, *Legislative Brief: Tribunals Amalgamation Bill 2014*, 23 January 2015, p. 2 at [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative\\_brief\\_tribunals\\_bill\\_final\\_23.01.2015\\_1.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_tribunals_bill_final_23.01.2015_1.pdf) (accessed 4 March 2015).

appointments to the amalgamated AAT should be made entirely on merit, with specific consideration given to the expertise of the individual.<sup>3</sup>

2.5 The EM explains that the requirement for the Attorney-General to consult with the relevant Minister before appointing a member to the National Disability Insurance Scheme Division or the Taxation and Commercial Division reflects the current legislative framework. The EM also notes that:

The consultation requirements for assignment to the Migration and Refugee Division and the Social Services and Child Support Division are appropriate given the need for members exercising powers in those Divisions to have specific subject-matter expertise.<sup>4</sup>

2.6 Law Institute Victoria (LIV) highlighted that under the Bill, the Attorney-General would also appoint division heads and deputy division heads, not the President, arguing that this could allow the Attorney-General to 'inappropriately influence the management of the Tribunal'.<sup>5</sup> In contrast, the EM points out that an assignment to the position of division head or deputy division head could not be revoked or varied without the assignee's consent and argued that these restrictions 'are intended to promote Tribunal independence by providing stability to assignments'.<sup>6</sup>

2.7 The Bar Association of Queensland made the point that the independence of the amalgamated AAT might also be eroded by the proposed amendment which provides that the Registrar would be appointed by the Governor-General, who would no longer be required to take the President's nomination for the appointment to the office of Registrar.<sup>7</sup>

2.8 The EM argues that the:

...nomination requirement does not apply to any other statutory officers of the Tribunal...The standard processes for appointment of statutory officers by the Governor-General would apply to this position.<sup>8</sup>

### *Membership*

2.9 Both the Bar Association of Queensland and LIV noted concerns over the proposed amendment that would allow the Governor-General to terminate the appointment of a member of the amalgamated AAT without an address in both Houses of Parliament. Both submissions implied that this provision would result in a

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3 Refugee Council of Australia, *Submission 3*, p. 2; Public Interest Advocacy Centre, *Submission 4*, p. 3; Bar Association of Queensland, *Submission 9*, p. 2. See also Andrew and Renata Kaldor Centre for International Law, UNSW, *Legislative Brief: Tribunals Amalgamation Bill 2014*, 23 January 2015, p. 3.

4 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 4 and 31–32.

5 Law Institute of Victoria, *Submission 7*, pp 5–6. See also Bar Association of Queensland, *Submission 9*, p. 4.

6 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 33–34.

7 Bar Association of Queensland, *Submission 9*, p. 4.

8 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 41–42.

significant reduction in the security of tenure of members, which could undermine the independence of the amalgamated AAT.<sup>9</sup>

2.10 In rebuttal, the EM explains that:

This provision is consistent with the termination provisions that apply to the MRT-RRT...and SSAT...which more closely reflect the standard model for termination of statutory officers...New section 13 balances the need to ensure members have sufficient tenure in their offices to be able to act independently of Government, and need to ensure that officers who behave inappropriately, have irreconcilable conflicts of interest or who are unable to perform their duties can have their appointments terminated.<sup>10</sup>

2.11 LIV made the point that the reduction in the maximum term of appointment for AAT members from seven years to five years, effectively bringing the employment conditions in line with members of the MRT-RRT and the SSAT, would further reduce the level of job security. LIV stated:

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.<sup>11</sup>

2.12 The EM states that, in compliance with section 2.7 of the Australian Public Service Commission's Merit and Transparency Guidelines,<sup>12</sup> all appointments to the AAT are currently for a maximum period of five years, even if the legislation currently allows maximum periods of seven years. Further, the EM explained that this amendment would align the maximum period of appointment with existing practice in the MRT-RRT and the SSAT.<sup>13</sup>

### *Structure*

2.13 The Public Interest Advocacy Centre (PIAC) recommended that the government reconsider the decision to only specify six divisions of the amalgamated AAT in the Bill. The PIAC proposed the inclusion of a specialist Freedom of

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9 Law Institute of Victoria, *Submission 7*, p. 4; Bar Association of Queensland, *Submission 9*, p. 3. See also, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 32.

10 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 28.

11 Law Institute of Victoria, *Submission 7*, pp 2 and 5–6. See also Bar Association of Queensland, *Submission 9*, p. 2.

12 Australian Public Service Commission, *Merit and Transparency: Merit-based selection of APS agency heads and APS statutory office holders, Fourth Edition*, October 2012 at [http://www.apsc.gov.au/\\_data/assets/pdf\\_file/0004/8554/Merit-and-transparency.pdf](http://www.apsc.gov.au/_data/assets/pdf_file/0004/8554/Merit-and-transparency.pdf) (accessed 5 March 2015)

13 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 24.

Information Division and argued that, given the proposed abolition of the office of the Australian Information Commissioner, there would be a role for specialist expertise when considering freedom of information review applications.<sup>14</sup>

2.14 The committee notes that the Bill would allow for regulations to prescribe new divisions of the amalgamated AAT should the need arise.

2.15 The University of New South Wales' Kaldor Centre for International Law, noted that the Bill would allow for all divisions of the amalgamated AAT to be constituted by up to three members. Although this would involve a change from the single member reviews of the MRT-RRT, it was put that:

The power to constitute multi-member tribunals is a welcome provision. Multi-member panels may be particularly beneficial in the case of 'country guidance decisions', which are likely to be introduced in 2015. Confidence in the quality of such decisions will also be promoted by the supervision of the President of the AAT.<sup>15</sup>

### *Penalties*

2.16 RCOA argued that there is no justification for doubling the penalties for committing offences under the AAT Act from 6 months imprisonment to 12 months imprisonment and from fines of 30 penalty points up to fines of 60 penalty points. RCOA stated that the proposed levels 'would be out of step with similar provisions for Commonwealth and State courts, tribunals and Royal Commissions'.<sup>16</sup> However, the EM states that the revised penalties are intended to bring the penalty for offences:

...into line with the penalties for other offences in the AAT Act, and would be consistent with those applying for similar offences in other Acts conferring jurisdiction on the AAT (such as the Migration Act) and the legislation establishing other courts and tribunals.<sup>17</sup>

### *Social security issues*

2.17 The National Welfare Rights Network (NWRN) stated that:

The amalgamation proposed by the bill is effectively an annexation of the Social Security Appeals Tribunal in its current form...NWRN therefore supports this Bill. In particular we support moves to make our tribunals more efficient by co-location and shared administrative arrangements.<sup>18</sup>

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14 Public Interest Advocacy Centre, *Submission 4*, p. 3.

15 Andrew and Renata Kaldor Centre for International Law, UNSW, *Legislative Brief: Tribunals Amalgamation Bill 2014*, 23 January 2015, p. 2.

16 Refugee Council of Australia, *Submission 3*, pp 2–3. See also Andrew and Renata Kaldor Centre for International Law, UNSW, *Legislative Brief: Tribunals Amalgamation Bill 2014*, 23 January 2015, pp 3–4.

17 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 79–82.

18 National Welfare Rights Network, *Submission 2*, p. 1.

2.18 In contrast, other submitters claimed that the Bill does include some substantive amendments which could have adverse effects. These are discussed in the following sections.

#### *Reviews on the papers*

2.19 Legal Aid NSW supported many elements of the Bill but did not support the proposed amendment that would allow the amalgamated AAT to conduct a second-tier review on the papers without first obtaining the consent of the parties. Legal Aid NSW argued that:

This amendment will potentially adversely affect many who utilise the review process...a large proportion [of whom] are vulnerable people with limited finances, limited English language skills, and serious physical or mental health issues. If the provision is applied then it effectively denies such a person the right to a proper hearing...[and] sacrifices the statutory objectives of the Tribunal conducting a review which is *fair and just* to the objectives of being *economical and quick*.<sup>19</sup>

2.20 The EM notes that this represents a minor amendment that would have the effect of assisting the amalgamated AAT 'to ensure second review is conducted efficiently, but is clearly limited to those cases where it would be appropriate.'<sup>20</sup> The EM also states:

This change would permit the Tribunal to conduct second review in an expeditious and efficient manner, while preserving the requirement that a hearing must be held if the Tribunal considers that the issues cannot be adequately dealt with in the absence of the parties.<sup>21</sup>

#### *Right to be represented*

2.21 As noted in chapter 1, under the Bill, the right of a party to be represented at a hearing in the Social Services and Child Support Division of the amalgamated AAT would be contingent upon the amalgamated AAT giving its permission for the party to be represented. Victoria Legal Aid did not support this qualified right of representation, arguing that:

...legal representation promotes fairness, accessibility and public confidence in the decisions of the Tribunal and, at a broader level, government. Given the inherently complex nature of social security law, access to legal representation for the preparation and conduct of hearings before the Tribunal is a proportionate response to addressing the structural inequality associated with the social security review processes.<sup>22</sup>

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19 Legal Aid NSW, *Submission 5*, p. 2. See also National Welfare Rights Network, *Submission 2*, p. 2; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 34.

20 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 15.

21 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 54.

22 Victoria Legal Aid, *Submission 6*, p. 1.

2.22 Victoria Legal Aid also criticised the fact that the proposed amendment fails to clarify how the discretion to permit legal representation would be regulated.<sup>23</sup> The EM explains that:

The Tribunal's power to determine whether parties (other than agency parties) in the Social Services and Child Support Division should be represented would promote the inquisitorial and informal nature of proceedings as well as the efficient conduct of reviews. It also reflects the sensitive and personal nature of the matters dealt with in social services and child support reviews.<sup>24</sup>

2.23 The committee notes that it follows that the Social Services and Child Support Division of the amalgamated AAT must be allowed to determine on a case-by-case basis whether or not a party should be permitted representation, even if this may cause some minor inconvenience to potential stakeholders.

#### *Removal of Family Court jurisdiction*

2.24 The Family Court criticised the Bill for proposing to remove the existing jurisdiction of the Family Court to hear appeals from the Federal Circuit Court, following a judicial review of decisions made under the CSRC Act by the SSAT. The Family Court also submitted that there is also a lack of appropriate saving and transitional provisions in the Bill to preserve appeals that have been heard but not determined.<sup>25</sup>

2.25 The Family Court argued that transferring the jurisdiction of the Family Court to the Federal Court would result in:

...greater fragmentation in child support appellate jurisdiction, and a squandering of the considerable expertise already developed in the Appeal Division of the Family Court...<sup>26</sup>

2.26 The AGD quoted the EM, which explains that the decision to remove from the jurisdiction of the Family Court those appeals from a first review of a child support matter was because the:

...proliferation of jurisdictions is unnecessary and potentially confusing for applicants, many of whom are unrepresented. In practice the vast majority of matters are heard by the Federal Circuit Court, which has established a specialist child support panel to manage this caseload. The number of matters handled per annum by the Federal Circuit Court is relatively small (42 appeals from the SSAT were filed during 2013-14)...The amalgamation provides an opportunity to streamline judicial review pathways for child support matters on AAT first review...This would simplify the options for

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23 Victoria Legal Aid, *Submission 6*, p. 3.

24 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 50.

25 Family Court of Australia, *Submission 8*, pp 1–2.

26 Family Court of Australia, *Submission 8*, pp 3–4.

the parties and create greater consistency on appeals across the amalgamated Tribunal...<sup>27</sup>

2.27 The AGD stated that:

The Government considers that any referrals on questions of law in relation to child support matters can be handled appropriately by the Federal Court. The power to refer questions of law to a court is rarely used, either by the AAT or the SSAT. Therefore, having different courts consider referrals of questions of law in relation to different subject matters is unnecessarily complex.

Further, the amalgamated Tribunal (including its Social Services and Child Support Division) will have access to members at the AAT Deputy President level, including those members who are also judicial officers. These members will have an advanced knowledge of legal issues arising in administrative review and would be well placed to determine matters that might previously have been considered for referral to a court.<sup>28</sup>

2.28 The EM also notes that, in order to promote modernisation and simplification of legislation, where provisions in the existing legislation are already dealt with by the general provisions of the *Acts Interpretation Act 1901* (Cth) they have been removed by the Bill.<sup>29</sup> The *Acts Interpretation Act 1901* (Cth) provides that:

If an Act, or an instrument under an Act, repeals or amends an Act...then the repeal or amendment does not...affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.<sup>30</sup>

2.29 The AGD highlighted that there is no need for further saving and transitional provisions in the Bill to preserve appeals that have been heard but not determined, as:

...paragraph 7(2)(e) of the *Acts Interpretation Act 1901* will ensure that the status of any pending appeal or reserved judgment of the Family Court is preserved.<sup>31</sup>

### ***Migration issues***

2.30 The MRT–RRT acknowledged that the Bill would repeal provisions that allow for the referral of decisions to the AAT and that deal with some pre-1993 visa applications. However, the MRT–RRT submitted that:

...repeal of these provisions should not impact on applicants to the tribunal. They deal with matters that are redundant, either because of the passage of time or the effect of the amalgamation itself.<sup>32</sup>

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27 Attorney-General's Department, Submission 10, pp 1–2; Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 165.

28 Attorney-General's Department, Submission 10, p. 2.

29 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 15.

30 *Acts Interpretation Act 1901* (Cth) para. 7(2)(e).

31 Attorney General's Department, *Submission 10*, p. 2.

## Committee comment

2.31 The committee notes that the Bill has been carefully planned and drafted, drawing on the recommendations of a number of public reports and a broad-ranging stake holder consultation process.

2.32 The committee takes the view that the passage of the Bill will enhance the efficiency and effectiveness of the Commonwealth review process, augment the independence of the amalgamated AAT, provide members with better career and knowledge-sharing opportunities, and improve stakeholder access and usability. The committee believes that the Bill will result in better services and a more consistent experience for the end user while minimising unnecessary duplication and inefficiency in the administration of the review process.

2.33 However, the committee considers that there are two areas in which the Bill could be improved, namely: the maximum statutory appointment period for tribunal members; and the ability of the amalgamated AAT to conduct second tier reviews without the consent of the parties.

### *Maximum appointment periods*

2.34 The committee acknowledges that under the *Australian Public Service Commission's Merit and Transparency Guidelines* (guidelines), appointments should be for a period of five years. However the guidelines also clearly state that statutory appointments may be for a different period where, among other things, 'the relevant legislation stipulates a different period',<sup>33</sup> as the AAT Act currently does. The committee takes the view that there are good grounds for treating the AAT differently from other statutory bodies. A longer period for AAT appointments would tend to reinforce the independence of the amalgamated AAT, support the development of expertise on the amalgamated AAT, and assist in the recruitment of members. The maximum term set out in legislation establishing the SSAT and the MRT-RRT is five years. If the Australian government wishes to continue this practice with regard to the specialist divisions that succeed those tribunals, the government retains the discretion to make those appointments shorter than the seven-year maximum term specified in the legislation. The committee believes that amalgamation of the tribunals should see standards of independence raised across the board, where possible.

## Recommendation 1

**2.35 The committee recommends that item 19 of Schedule 1 of the Bill be omitted so that the current seven-year term for Administrative Appeals Tribunal members is retained.**

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32 Migration Review Tribunal–Refugee Review Tribunal, *Submission 1*, p. 2. See also Andrew and Renata Kaldor Centre for International Law, UNSW, Legislative Brief: Tribunals Amalgamation Bill 2014, 23 January 2015, p. 3.

33 Australian Public Service Commission, *Merit and Transparency: Merit-based selection of APS agency heads and APS statutory office holders, Fourth Edition*, October 2012, p. 3, available at [http://www.apsc.gov.au/\\_data/assets/pdf\\_file/0004/8554/Merit-and-transparency.pdf](http://www.apsc.gov.au/_data/assets/pdf_file/0004/8554/Merit-and-transparency.pdf) (accessed 13 March 2015).



### *Second tier reviews*

2.36 The committee agrees with Legal Aid NSW's criticism of the proposed amendment that would allow the amalgamated AAT to conduct a second-tier review of a social-security matter on the papers without first obtaining the consent of the parties. Legal Aid NSW claimed that the amendment would effectively deny a party a right to a proper hearing.<sup>34</sup> The committee accepts that this change could assist the amalgamated AAT to deal with second reviews in an efficient manner. However, the proposed objective of the amalgamated AAT would oblige the Tribunal to provide a mechanism for review which is not just 'economical, informal and quick', but also 'fair' and 'just' and which 'promotes public trust and confidence' in the amalgamated AAT.<sup>35</sup> Each of these latter objectives would be furthered by allowing applicants to have a hearing on a second review where they so desire.

### **Recommendation 2**

**2.37 The committee recommends that items 64 and 65 of Schedule 1 of the Bill be omitted so that second-tier reviews may only be determined on the papers with the consent of the parties.**

### **Recommendation 3**

**2.38 The committee recommends that, subject to the preceding recommendations, the Bill be passed.**

Senator the Hon Ian Macdonald  
Chair

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34 Legal Aid NSW, *Submission 5*, p. 2. See also National Welfare Rights Network, *Submission 2*, p. 2; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 34.

35 Tribunals Amalgamation Bill (Cth), Sch. 1 item 1.

