

The Senate

Legal and Constitutional Affairs
Legislation Committee

Tribunals Amalgamation Bill 2014

March 2015

© Commonwealth of Australia 2015

ISBN 978-1-76010-179-4

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LP, QLD) (Chair)

Senator Jacinta Collins (ALP, VIC) (Deputy Chair)

Senator Catryna Bilyk (ALP, TAS)

Senator Barry O'Sullivan (NATS, QLD)

Senator Linda Reynolds (LP, WA)

Senator Penny Wright (AG, SA)

Secretariat

Ms Sophie Dunstone, Committee Secretary

Mr Hari Gupta, Senior Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Table of contents

Members of the committee	iii
Recommendations	vii

CHAPTER 1

Introduction and Background.....	1
Referral of the inquiry	1
Conduct of the current inquiry	1
Acknowledgement.....	1
Purpose of the bill.....	1
The current law pertaining to the existing tribunals.....	2
Structure and key aspects of the Bill	6

CHAPTER 2

Key issues.....	11
Introduction	11
Committee comment	18
Additional Comments by Labor Senators	21
Additional Comments by the Australian Greens.....	23
Appendix 1 - Public submissions	27

Recommendations

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.

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.

CHAPTER 1

Introduction and Background

Referral of the inquiry

1.1 The Tribunals Amalgamation Bill 2014 (Bill) was introduced into the Senate by the Assistant Minister for Social Services, Senator the Hon Mitch Fifield (Minister), at the request of the Attorney-General, Senator the Hon George Brandis QC, on 3 December 2014.¹

1.2 Pursuant to a recommendation of the Selection of Bills Committee, on 12 February 2015, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 16 March 2015.²

Conduct of the current inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 25 February 2015. Details of the inquiry were placed on the committee's website at http://www.aph.gov.au/senate_legalcon.

1.4 The committee received 10 submissions in response to this inquiry. The submissions are published on the committee's website and are listed at Appendix 1 to this report. The committee did not hold a public hearing for this inquiry.

Acknowledgement

1.5 The committee thanks the organisations and individuals who made submissions to the inquiry.

Purpose of the bill

1.6 In his second reading speech, the Minister stated that:

The Tribunals Amalgamation Bill will amalgamate key Commonwealth merits review tribunals—the Administrative Appeals Tribunal (AAT), the Migration Review Tribunal–Refugee Review Tribunal (MRT–RRT), and the Social Security Appeals Tribunal (SSAT).

Merging these tribunals into a single tribunal, which will be called the AAT, will support effective, efficient, and independent merits review into the future...The decision to amalgamate the tribunals represents a return to the more coherent merits review framework that was envisaged when the AAT was established.³

1 *Journals of the Senate*, No. 73—3 December 2014, p. 1967.

2 *Journals of the Senate*, No. 78—12 February 2015, pp 2156–2157.

3 *Senate Hansard*, 3 December 2014, p. 10 070.

1.7 The Minister went on to note that, by drawing on and then preserving the best aspects of each of the existing tribunals, the Bill would simplify the Commonwealth merits review system. The Minister stated:

The amalgamated tribunal will be a single point of contact for persons seeking review of administrative decisions. Tribunal users will benefit from an accessible 'one stop shop' for external merits review, better services and a more consistent user experience...The amalgamation will also create opportunities to simplify and streamline tribunal procedures to better serve users.⁴

1.8 The Explanatory Memorandum (EM) to the Bill argued that the Bill would be directed at the establishment, organisation and procedures of the new tribunal and it would not materially affect the substantive rights of end-users.⁵ The Minister highlighted that:

The savings from the amalgamation...[would total] \$7.2 million over the forward estimates...Better services and better value for the taxpayer will result from the economies of scale that come from a larger amalgamated tribunal...The size of the tribunal will provide members and staff with opportunities for a broader range of work and enhanced career pathways...Members and staff will have new opportunities to...learn from each other and draw on the best aspects of each of the current tribunals for the benefit of all.⁶

The current law pertaining to the existing tribunals

1.9 The Bill proposes to amend the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) to affect the governance, structure, membership and procedure of the Administrative Appeals Tribunal (AAT). The Bill would also abolish the Migration Review Tribunal–Refugee Review Tribunal (MRT–RRT) and the Social Security Appeals Tribunal (SSAT). The Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) are both constituted under the *Migration Act 1958* (Cth) (Migration Act) and the SSAT is constituted under the *Social Security (Administration) Act 1999* (Cth) (SSA Act). Each of these tribunals will be examined in turn.

The AAT

1.10 The AAT falls within the portfolio of the Attorney-General and provides independent merits review of administrative decisions made by Australian government ministers, departments, agencies and some other tribunals.⁷ The objective

4 *Senate Hansard*, 3 December 2014, p. 10 071.

5 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014, p. 2.

6 *Senate Hansard*, 3 December 2014, p. 10 071.

7 Administrative Appeals Tribunal, 'Overview of the Tribunal', *What we do*, <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> (accessed 2 March 2015).

of the tribunal is to provide 'a mechanism of review that is fair, just, economical, informal and quick'.⁸

1.11 The AAT does not have a general power of review; rather, it can only review a decision if an Act or other legislative instrument specifically provides that the decision is subject to its review jurisdiction.⁹ However, the AAT is empowered to review decisions made under more than 400 Commonwealth Acts and legislative instruments. The AAT noted that:

The largest part of the Tribunal's workload arises from applications about decisions in the areas of family assistance and social security, taxation, veterans' affairs and workers' compensation. The Tribunal also reviews decisions in areas such as bankruptcy, child support, citizenship and immigration, civil aviation, corporations and financial services regulation, customs, freedom of information, industry assistance, mutual recognition of occupations, passports and security assessments by the Australian Security Intelligence Organisation (ASIO).¹⁰

Constitution

1.12 In order to facilitate its workload, the AAT is broken up into various divisions, including the General Administrative Division, the Medical Appeals Division, the National Disability Insurance Scheme Division, the Security Appeals Division, Taxation Appeals Division, the Valuation and Compensation Division and the Veterans' Appeals Division.¹¹

1.13 The AAT is made up of the President, other presidential members (who may be judges or Deputy Presidents), the Registrar, Senior Members and Members. The President must be a judge of the Federal Court. The Deputy Presidents must have been enrolled as a legal practitioner for at least five years, while a senior member need not have legal expertise but be able to show special knowledge or skills relevant to his or her duties.¹² Tribunal members may currently hold office for a maximum of seven years, but a serving officer may seek re-appointment.¹³ Finally, the AAT Act provides that the Governor-General may only remove a member from office after a request for

8 *Administrative Appeals Tribunal Act 1975* (Cth), s. 2A.

9 Administrative Appeals Tribunal Jurisdiction List: Decisions Subject To Review (Jurisdiction as at 30 June 2014), p. 1 at <http://www.aat.gov.au/docs/JurisdictionList30June2014.pdf> (accessed 2 March 2015).

10 Administrative Appeals Tribunal, 'Functions and powers', *What we do*, <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> (accessed 2 March 2015).

11 *Administrative Appeals Tribunal Act 1975* (Cth), s. 19. See also Administrative Appeals Tribunal, 'Functions and powers', *What we do*, <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> (accessed 2 March 2015).

12 *Administrative Appeals Tribunal Act 1975* (Cth), s. 7. See also Administrative Appeals Tribunal, 'Membership of the Tribunal', *Who we are*, <http://www.aat.gov.au/AboutTheAAT/WhoWeAre.htm> (accessed 2 March 2015).

13 *Administrative Appeals Tribunal Act 1975* (Cth), s. 8.

the removal from both Houses of the Parliament on grounds of proved misbehaviour or incapacity.¹⁴

Procedure

1.14 Interested parties have a right to be heard by the AAT, and they may appear in person or may be represented by some other person.¹⁵ However, the tribunal may decide to determine a matter on the papers if the tribunal is satisfied that the issues could be adequately determined in the absence of the parties and all parties consent to the decision.¹⁶

The MRT–RRT

1.15 The MRT–RRT falls within the portfolio of the Minister for Immigration and Border Protection. The tribunals conduct merit reviews of visa and visa-related decisions made by the Department of Immigration and Border Protection. The tribunals make decisions within the legislative framework of the Migration Act, in the same way as the primary decision maker would have done, and may exercise all the powers and discretions conferred on the primary decision-maker by the Migration Act. The RRT reviews decisions relating to protection visas, while the MRT reviews decisions relating to other types of visa. The MRT and the RRT are expected to conduct reviews that are 'independent, fair, just, economical, informal and quick'.¹⁷

Constitution

1.16 The MRT and RRT are comprised of a Principal Member, Deputy Principal Members, a Registrar, senior members, and members.¹⁸ Members may be appointed by the Governor-General for a period of no more than five years, but a member is eligible for re-appointment.¹⁹ The Governor-General may remove a member from office on the ground of proved misbehaviour, physical or mental incapacity, bankruptcy and related grounds, being absent without leave, engaging in outside employment without permission, failing to disclose interests or having specified interests.²⁰

Procedure

1.17 An affected party who has a right to review under the Migration Act, may apply for review to the MRT-RRT in the prescribed form and within the prescribed

14 *Administrative Appeals Tribunal Act 1975* (Cth), ss. 13(1).

15 *Administrative Appeals Tribunal Act 1975* (Cth), s. 30 and s. 32.

16 *Administrative Appeals Tribunal Act 1975* (Cth), s. 34J.

17 MRT–RRT, 'Our role and services', *About us*, <http://www.mrt-rrt.gov.au/About-Us/Our-role-and-services.aspx> (accessed 2 March 2015).

18 MRT–RRT, 'Our people', *About us*, <http://www.mrt-rrt.gov.au/About-Us/Our-people.aspx> (accessed 2 March 2015).

19 *Migration Act 1958* (Cth), s. 396, s. 398, s. 459 and s. 461.

20 *Migration Act 1958* (Cth), s. 403 and s. 468.

period.²¹ Both the MRT and the RRT must invite the applicant to appear at a review hearing.²² Should the applicant fail to appear, the relevant tribunal may determine the review without taking any further action to allow or enable the applicant to appear before it.²³ In the MRT, generally, oral testimony is to be given in public;²⁴ whereas, hearings for the RRT must be conducted in private.²⁵ Examination or cross-examination is not permitted in either tribunal.²⁶ In the MRT, the applicant may have another person present at the hearing, to assist him or her, but that assistant may not present arguments to the tribunal.²⁷ In the RRT, a person appearing before the tribunal may not be represented before the tribunal by any other person.²⁸ Finally, the Principal Member of the MRT or the RRT may, if the Principal Member considers that the case involves an important principle, or issue, of general application, refer the matter to the President of the AAT.²⁹

The SSAT

1.18 The SSAT falls within the portfolio of the Minister for Social Services. The role of the SSAT is to provide independent merits review of administrative decisions using a mechanism of review that is 'fair, just, economical, informal and quick'.³⁰ The SSAT can only review a decision if an Act or regulation or other legislative instrument specifically provides that a decision is subject to review by the SSAT. As noted by SSAT:

The SSAT reviews decisions made under twelve Commonwealth Acts including the *Social Security Act 1991*, *Social Security (Administration) Act 1999*, *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, *Paid Parental Leave Act 2010*, *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*.³¹

21 *Migration Act 1958* (Cth), s. 347 and s. 412.

22 *Migration Act 1958* (Cth), s. 360 and s. 425.

23 *Migration Act 1958* (Cth), s. 362B and s. 426A.

24 *Migration Act 1958* (Cth), s. 365.

25 *Migration Act 1958* (Cth), s. 429.

26 *Migration Act 1958* (Cth), s. 366D and para. 427(6)(b).

27 *Migration Act 1958* (Cth), s. 366A.

28 *Migration Act 1958* (Cth), para. 427(6)(a).

29 *Migration Act 1958* (Cth), s. 361 and s. 443.

30 *Social Security (Administration) Act 1999* (Cth), s. 141.

31 SSAT, *About the SSAT*, <http://www.ssat.gov.au/about-the-ssat> (accessed 2 March 2015).

Constitution

1.19 The Tribunal consists of a Principal Member, Deputy Principal Members, the Registrar, senior members and members.³² Members may be appointed by the Governor-General for a period of no more than five years, but a member is eligible for re-appointment.³³ The Governor-General may remove a member from office on the ground of proved misbehaviour, physical or mental incapacity, bankruptcy and related grounds, being absent without leave, engaging in outside employment without permission or failing to disclose interests.³⁴

Procedure

1.20 The SSA Act provides that a person whose interests are affected by a decision of the Secretary, if that decision is a reviewable decision, may apply to the SSAT for a review of that decision.³⁵ A party may make oral and/or written submissions to the SSAT, or, with the permission of the Principal Member, may have another person make submissions to the SSAT on his or her behalf.³⁶ The Principal Member may direct that a hearing be determined on the papers if satisfied that the issues could be adequately determined on the basis of written submissions and all parties consent to the decision.³⁷ The SSAT hears matters in private and the Principle Member may give directions as to who may be present at any particular hearing.³⁸

1.21 The SSA Act provides a second tier of review, allowing an interested party to apply to the AAT for review of a decision of the SSAT to affirm, vary or set aside an earlier decision of the Secretary of the Department of Human Services.³⁹

Structure and key aspects of the Bill

1.22 The Bill is comprised of nine schedules. Schedule 1 proposes to amend provisions of the AAT Act, Schedule 2 proposes to amend Migration Act and other Acts in relation to migration, Schedules 3 to 7 propose to amend the relevant social security legislation, Schedule 8 proposes to make other consequential amendments and Schedule 9 proposes to provide for transitional and savings provisions.

Key provisions of the Bill

1.23 The EM provides that the Bill was developed in close consultation with key stakeholders to produce an amalgamated tribunal (amalgamated AAT) that adopts the

32 SSAT, 'Who we are', *About the SSAT*, <http://www.ssat.gov.au/about-the-ssat/who-we-are> (accessed 2 March 2015).

33 *Social Security (Administration) Act 1999* (Cth), Sch. 3 cl. 3 and cl. 4.

34 *Social Security (Administration) Act 1999* (Cth), Sch. 3, cl. 17.

35 *Social Security (Administration) Act 1999* (Cth), s. 141.

36 *Social Security (Administration) Act 1999* (Cth), s. 161.

37 *Social Security (Administration) Act 1999* (Cth), s. 162.

38 *Social Security (Administration) Act 1999* (Cth), s. 168.

39 *Social Security (Administration) Act 1999* (Cth), s. 179.

key features and procedures of each of the existing tribunals. According to the EM, the Bill would aim to promote a governance structure to maximise knowledge and skill sharing across the new specialist divisions of the amalgamated AAT and provide better informed decisions without the need for duplication of processes, so as to make the amalgamated AAT simpler and more accessible to stakeholders than the existing tribunals.⁴⁰

New objective

1.24 The Bill proposes to update the objective of the amalgamated AAT, requiring the amalgamated AAT to provide a mechanism of merits review that is: accessible; fair, just, economical, informal and quick; proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the decision-making of the amalgamated AAT.⁴¹

Governance, membership and structure

1.25 The Bill proposes that the amalgamated AAT would consist of a President, Deputy Presidents, two levels of senior members and three levels of members together with a Registrar and other officers.⁴² The President would have to be a Judge of the Federal Court, a Deputy President would have to be a Judge of the Federal Court or Family Court, or enrolled as a legal practitioner in an Australian jurisdiction for at least five years or have the special knowledge or skills required to act in the office. Other members of the amalgamated AAT would have to have been enrolled as a legal practitioner in an Australian jurisdiction for at least five years or have the special knowledge or skills required to act as a senior member or member respectively.⁴³ All members would be eligible for appointment for a maximum period of five years but could be re-appointed.⁴⁴ The Bill would also create the positions of division heads and deputy division heads. The division head would have the function of assisting the President, by directing the business of the amalgamated AAT in the division to which he or she is assigned, while the deputy division heads would assist the relevant division head in performing his or her role. Only Deputy Presidents could be assigned as division heads, while Deputy Presidents or senior members could be assigned as deputy division heads.⁴⁵

1.26 The Bill would prohibit a full-time member from engaging in paid employment outside his or her role without the approval of the President. Further, a part-time member could not engage in paid employment outside his or her role if, in the opinion of the President, that employment conflicts or may conflict with the proper performance of his or her duties. Under the provisions of the Bill, a member's

40 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 3 and 12.

41 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 1.

42 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 items 9 and 17.

43 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 18.

44 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 19.

45 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 27.

appointment could be terminated by the Governor-General on grounds of misbehaviour, physical or mental incapacity, bankruptcy and related grounds, being absent without leave, engaging in outside employment without relevant approvals, failing to disclose interests or holding specified interests.⁴⁶

1.27 In order to facilitate the proposed tribunal's workload, the Bill would establish six divisions of the amalgamated AAT and allow for other divisions to be prescribed. The specified divisions would be the General Division, the Migration and Refugee Division, the National Disability Insurance Scheme Division, the Security Division, the Social Services and Child Support Division, and the Taxation and Commercial Division. The Attorney-General would have to assign division heads, deputy division heads and other non-presidential members to one or more divisions of the amalgamated AAT, after consulting with the President. Before assigning any member to the Migration and Refugee Division, the National Disability Insurance Scheme Division, the Social Services and Child Support Division, or the Taxation and Commercial Division, the Attorney-General would also have to consult with the relevant Minister administering the portfolio. Moreover, a member who is or has been an employee of ASIO or an affiliate or acted as the Director-General of Security could not be assigned to the Security Division. Finally, the Bill proposes to allow proceedings in all divisions to be constituted by up to three members, but only one of those members could be a Judge.⁴⁷

Procedures

1.28 The EM notes that:

...the Bill does not seek to make significant changes to procedures that currently apply in the AAT, MRT-RRT and the SSAT. Instead, recognising that distinctions in procedure across the tribunals are appropriate to their particular cohorts of applicants and caseloads, the Bill seeks to preserve successful processes and features of the existing tribunals.⁴⁸

1.29 However, the Bill proposes to make a number of minor amendments to the existing legislative framework. For example, the Bill would create a new rule that would exonerate the tribunal from a failure to comply with the written directions of the President, as such a failure would not invalidate the reasoning or determination of the tribunal.⁴⁹

1.30 Another example of a proposed amendment in the Bill is that the Bill would allow for any party to be represented by another person before the amalgamated AAT, unless the matter is to be heard in the Social Services and Child Support Division. If the matter were heard in the Social Services and Child Support Division, a party could only be represented by another person with the permission of the tribunal. The Bill

46 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 26.

47 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 27.

48 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), pp 3 and 15.

49 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 27.

would also allow any person who is compelled to appear, with the permission of the tribunal, to be represented by another person.⁵⁰

1.31 The Bill also proposes to add a provision that would allow the amalgamated AAT to conduct a second tier review of a social services matter on the papers without the consent of the parties if the tribunal deems that the matter can be adequately determined in the absence of the parties.⁵¹

Penalties

1.32 The Bill would make the penalty for committing any offence under the amended Act imprisonment for 12 months or a fine of 60 penalty units, or both. Offences could include failing to comply with an order or summons of the amalgamated AAT, refusing to be sworn or to answer questions, breaching a non-disclosure order, obstructing or hindering the work of the amalgamated AAT or engaging in conduct that would constitute a contempt, if the amalgamated AAT were a court of record.⁵²

Migration-specific amendments

1.33 The EM notes that the migration-specific amendments in Schedule 2 of the Bill would abolish the MRT and the RRT and transfer the jurisdiction of these tribunals to the amalgamated AAT. The EM also states that the existing codes of procedure in Parts 5 and 7 of the Migration Act would be preserved by the Bill.⁵³ However, the Bill proposes to remove provisions that allow for the referral of decisions involving an important principle, or issue, of general application to the President of the AAT.⁵⁴ The Bill also proposes to repeal a provision related to visa applications made prior to 30 June 1993, where the member of the RRT makes a decision in the capacity of a delegate of the Minister.⁵⁵

Amendments to social security legislation

1.34 Schedule 3 to Schedule 7 of the Bill would make amendments to the relevant legislation on social security, child support, family assistance, paid parental leave and student assistance. More specifically:

- Schedule 3 proposes to amend the *Social Security Act 1991* (Cth) and the SSA Act;
- Schedule 4 proposes to amend the *Child Support (Registration and Collection) Act 1988* (Cth) (CSRC Act) and the *Child Support (Assessment) Act 1989* (Cth);

50 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 54.

51 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 item 65.

52 Tribunals Amalgamation Bill 2014 (Cth), Sch. 1 items 135–144, Sch. 2 items 60 and 101.

53 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 4.

54 Tribunals Amalgamation Bill 2014 (Cth), Sch. 2 items 68 and 113.

55 Tribunals Amalgamation Bill 2014 (Cth), Sch. 2 item 85.

- Schedule 5 proposes to amend the *A New Tax System (Family Assistance) Act 1999* (Cth) and the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth);
- Schedule 6 proposes to amend the *Paid Parental Leave Act 2010* (Cth); and
- Schedule 7 proposes to amend the *Student Assistance Act 1973* (Cth).

1.35 As noted in the EM, the effect of these amendments would be to abolish the SSAT and transfer the SSAT's jurisdiction to the amalgamated AAT, ensuring that the key procedural rules affecting these matters would be preserved.⁵⁶ However, the proposed repeal of Division 3 of Part VIII of the CSRC Act would also have the effect of removing the jurisdiction of the Family Court to hear appeals from the Federal Circuit Court on a first review of a child support matter. The jurisdiction to hear these appeals would be moved to the Federal Court of Australia.⁵⁷

56 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 5.

57 Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 (Cth), p. 165; Family Court of Australia, *Submission 8*, pp 2–3; Attorney-General's Department, *Submission 10*, p. 1.

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.¹ 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.² 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

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 (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.³

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.⁴

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'.⁵ 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'.⁶

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.⁷

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.⁸

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

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.⁹

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.¹⁰

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.¹¹

2.12 The EM states that, in compliance with section 2.7 of the Australian Public Service Commission's Merit and Transparency Guidelines,¹² 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.¹³

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

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 (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.¹⁴

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.¹⁵

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'.¹⁶ 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.¹⁷

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.¹⁸

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*.¹⁹

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.'²⁰ 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.²¹

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.²²

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.²³ 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.²⁴

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.²⁵

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...²⁶

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

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...²⁷

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.²⁸

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.²⁹ 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.³⁰

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.³¹

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.³²

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',³³ 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.

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 (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.³⁴ 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.³⁵ 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

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.

Additional Comments by Labor Senators

1.1 Labour senators broadly support the introduction of the Tribunals Amalgamation Bill 2014 (Bill). However, Labor senators wish to highlight a number of flaws in the Bill that should be addressed before the Bill is passed.

1.2 Labor senators agree with the Bar Association of Queensland, which argued that the independence of the amalgamated AAT might be eroded by removing the need for the Governor-General to accept the nomination of the President before appointing the Registrar.¹ Labor senators accept that the nomination requirement in the current AAT Act is not a standard feature of statutory appointments. However, the Registrar is tasked by s 24B of the current AAT Act with assisting the President in the management of the Tribunal.² This relationship, and by extension the position of the President and the independence of the Tribunal, is protected by the nomination requirement in the Act. In the opinion of Labor senators, no compelling reason has been provided for why the proposed Bill should depart from this established practice.

Recommendation 1

1.3 Schedule 1 item 30 of the Bill be omitted so that the current requirement that the Registrar be appointed on the nomination of the President is maintained.

1.4 As noted in chapter 2 of the majority report, the Family Court criticised the Bill for proposing to remove its jurisdiction to hear appeals from the Federal Circuit Court, following judicial review of decisions made under the *Child Support (Registration and Collection) Act 1988* (Cth) by the SSAT.³ Labor senators understand the desirability of simplicity and streamlining but are not persuaded that a case for change to current arrangements has been made. The Family Court rightly notes that it has substantial expertise in these matters.⁴ It is not clear, for what the AGD concedes is a relatively small number of matters, that any convenience achieved by the change in jurisdiction would outweigh the disruption of accepted existing practice.

Recommendation 2

1.5 Schedule 4 item 66 of the Bill be omitted to preserve the existing jurisdiction of the Family Court to hear appeals from the Federal Circuit Court following an appeal from a 'child support first review', and to hear referrals on questions of law.

1.6 Labor senators support the concerns raised by the Bar Association of Queensland and the Law Institute of Victoria that the Bill would allow the Governor-General to terminate the appointment of a member of the amalgamated AAT without

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

2 *Administrative Appeals Tribunal Act 1975* (Cth), s. 24B.

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

4 Family Court of Australia, *Submission 8*, p. 4.

the need for an address in both houses of Parliament.⁵ As noted in the majority report, the EM states that this change is intended to reflect standard practice with other statutory officers and current provisions applying to the MRT-RRT and the SSAT.⁶ However, Labor senators agree with submitters that this would have a detrimental impact on the independence of the amalgamated AAT,⁷ which has a role that is very distinct from many other statutory bodies. In the opinion of Labor senators, no case has been made to the Committee which would justify departing from current arrangements in the AAT. While amalgamation should take account of the current practice of the various tribunals, where possible, amalgamation should see the independence of the specialist tribunals elevated to the level currently enjoyed by the AAT.

Recommendation 3

1.7 Schedule 1 item 26 be amended to preserve the existing requirement that an Administrative Appeals Tribunal member be removed only on address from both Houses of Parliament.

1.8 Labor senators note that, if passed, the Freedom of Information (New Arrangements) Bill 2014 (FOI Bill) would confer responsibility for determining disputes about Freedom of Information applications in the first instance on the AAT. At present, a specialist body, the Office of the Australian Information Commissioner, fulfils that role. To alleviate concerns about the loss of specialist expertise in handling Freedom of Information disputes which may result should the FOI Bill come into force, Labor senators agree with the Public Interest Advocacy Centre⁸ that the amalgamated AAT should include a dedicated Freedom of Information Division.

Recommendation 4

1.9 Schedule 1 item 27 of the Bill be amended to formalise a division of the amalgamated Administrated Appeals Tribunal dedicated to hearing applications arising under the *Freedom of Information Act 1982 (Cth)*.

Senator Jacinta Collins
Australian Labor Party

Senator Catryna Bilyk
Australian Labor Party

5 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.

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

7 See Law Institute of Victoria, *Submission 7*, p. 4; Bar Association of Queensland, *Submission 9*, p. 3.

8 See Public Interest Advocacy Centre, *Submission 4*, p. 3.

Additional Comments by the Australian Greens

1.1 As noted in the Committee's Majority Report, the Tribunals Amalgamation Bill 2014 (the Bill) seeks to merge the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT) and Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) into a single amalgamated Tribunal, established under the AAT Act and to be called the AAT.

1.2 The policy objective of the amalgamation is to further enhance the efficiency and effectiveness of the Commonwealth merits review jurisdiction, as well as generating savings through shared financial, human resources, information technology and governance arrangements.

1.3 While the Explanatory Memorandum to the Bill states that the amalgamation would primarily affect the tribunals' internal administrative and corporate operations, this Bill makes substantial changes to the existing Commonwealth tribunal system that will have a significant impact on how everyday people experience 'justice' in this system. For example, these reforms will impact upon anyone who seeks review of a decision relating to their Centrelink benefits, or their student or work visa, or their freedom of information request.

1.4 The Australian Greens support efforts to improve the effectiveness and efficiency of the Commonwealth Tribunal system, provided that such changes are pursued in way that also enhances the accessibility, fairness and flexibility of the current system and recognises that different problems require different approaches to review.

1.5 As a result, there is a need to test whether this Bill in fact preserves the rights and interests of Tribunal users, and does not jeopardise fair decision making or specialist expertise.

1.6 Many of the submissions to this inquiry supported the structural reforms contemplated by this Bill. However, many submission-makers also drew attention to features of the Bill that would give rise to substantive concerns and that would require vigilant monitoring and review to be confident that the amalgamation process facilitated by the Bill does not sacrifice 'the statutory objectives of the Tribunal conducting a review which is *fair and just* to the objectives of being *economical and quick*.'¹

1.7 Similar sentiments were echoed by the Public Interest Advocacy Centre (PIAC) which observed:

The newly amalgamated Administrative Appeals Tribunal will be responsible for thousands of matters. The need effectively to manage that caseload must not impact on the equally important function of effectively

1 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.

probing administrative decisions that can often have a hugely significant impact on individual lives, including on people's human rights.²

1.8 The substantive concerns with the Bill raised by Tribunal users, experts and legal practitioners include:

- Concerns that the Bill may lead to an increase in Tribunal fees, which would in turn act as a deterrent for those seeking merits review of an administrative decision.³
- Concerns that the changes proposed in the Bill would allow the amalgamated AAT to conduct a second-tier review on the papers without first obtaining the consent of the parties. As Legal Aid NSW points out, this could potentially adversely affect a large proportion of tribunal users, particularly those with limited finances, limited English language skills, and serious physical or mental health issues.⁴
- Concerns that the requirement for the Attorney-General to consult with the Immigration Minister prior to assigning a person to the Migration and Refugee Division as a member, head or deputy head of the division could undermine the independence of the division and politicise the review process. For example, the Refugee Council of Australia (RCOA) noted that the Administrative Review Council's Better Decisions Report (1995) recommended that the 'selection and appointment process for all tribunal members should be rational, merit-based and transparent' and emphasised the need for appointments to be based on merit and expertise alone.⁵
- Concerns that many vulnerable users of the proposed Migration and Refugee Division of the amalgamated AAT would be left to navigate the complexity of refugee and migration law without access to independent assistance or legal advice. RCOA recommended that the Australian Government reinstate access to the Immigration Advice and Application Assistance Scheme at both the primary and review stages of the refugee status determination process and remove eligibility restrictions based on an asylum seeker's mode of arrival in Australia.⁶
- Concerns that the limitations on the right of a party to be represented at a hearing in the proposed Social Services and Child Support Division of the amalgamated AAT could undermine the efficiency and fairness of the review process. As Victoria Legal Aid explained in their submission, '[g]iven the

2 Public Interest Advocacy Centre, *Submission 4*, p. 2.

3 Public Interest Advocacy Centre, *Submission 4*, p. 2.

4 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.

5 Refugee Council of Australia, *Submission 3*, p. 2.

6 Refugee Council of Australia, *Submission 3*, p. 3.

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'.⁷

- Concerns relating to the proposed removal of 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. In its submission, 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...'.⁸
- Concerns relating to the doubling of 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. For example, RCOA submitted that the proposed levels 'would be out of step with similar provisions for Commonwealth and State courts, tribunals and Royal Commissions'.⁹
- Concerns that this Bill, when considered in light of the government's proposed abolition of the Office of the Australian Information Commissioner (OAIC) in the Freedom of Information (New Arrangements) Bill 2014, will lead to an increased number of applications for review of government decisions to refuse access to public information. For example, PIAC has submitted that there is 'a role for specialist expertise when considering FOI review applications and that this should be reflected in the specialist divisions of the newly amalgamated tribunal'.¹⁰

1.9 The Australian Greens also strongly endorse the observations of the National Welfare Rights Network that:

...access to a fair and effective tribunal for our vulnerable clients requires more than legislative rights of appeal. It is critical that tribunals are adequately resourced, that members are equipped with the necessary skills and expertise, that welfare rights service are well resourced and that there are appropriate case management procedures in place. Efficiency driven changes within the SSAT over recent years have, in our opinion, undermined the accessibility, efficacy and fairness of the SSAT.¹¹

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

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

9 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.

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

11 National Welfare Rights Network, *Submission 2*, p. 2.

1.10 It would be deeply regrettable if the same 'efficiency driven changes' comprising the rationale behind this Bill also result in undermining the accessibility, efficacy and fairness of the broader Tribunal system.

1.11 The Australian Greens are disappointed that the majority of the Committee did not use the opportunity presented by this Inquiry to fully explore the full range of issues raised by experts and practitioners making submissions to this Inquiry.

1.12 Without further information, it is difficult to be confident that the all of these potential concerns will be avoided once the amalgamated system is up and running.

1.13 In light of this, the Australian Greens recommend that the amalgamated Tribunal system be subject to comprehensive review within 24 months of coming into operation. This would provide an important opportunity for Tribunal users, Tribunal members, practitioners and other interested parties to reflect on whether the Bill has been successful in meeting its objectives of enhancing the efficiency and effectiveness of the Commonwealth merits review jurisdiction, whilst at the same time preserving fair decision-making, procedural fairness rights and specialist expertise.

Recommendation 1

1.14 The amalgamated Commonwealth Tribunal system established by this Bill be subject to comprehensive, independent review within 24 months of its operation.

**Senator Penny Wright
Australian Greens**

Appendix 1

Public submissions

- 1 Migration Review Tribunal - Refugee Review Tribunal
- 2 National Welfare Rights Network
- 3 Refugee Council of Australia
- 4 Public Interest Advocacy Centre
- 5 Legal Aid NSW
- 6 Victoria Legal Aid
- 7 Law Institute of Victoria
- 8 Family Court of Australia
- 9 Bar Association of Queensland
- 10 Attorney-General's Department

