Our ref: RM:sg
Your ref:

4 March 2015

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Committee
The Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Ms Dunstone

**RESPONSE TO THE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE REGARDING THE *TRIBUNALS AMALGAMATION BILL* 2014**

**Introduction**

1. The Chief Executive of the Bar Associate of Queensland (**the Bar Association**) received a letter by email dated 13 February 2015 from the Legal and Constitutional Affairs Legislation Committee (**the Committee**), inviting a submission in response to the *Tribunals Amalgamation Bill* 2014 (Cth) (**the Bill**) "addressing issues that may be of relevance".

2. The letter notes that the Senate referred the Bill to the Committee for inquiry on 12 February 2015, for a report to be returned by 16 March 2015. Any submission by the Bar Association is to be lodged with the Committee by 4 March 2015.

**The Bill and the Explanatory Memorandum**

3. The Bill proposes amendments to a number of Commonwealth Acts, with the proposed effect being the merger of the Administrative Appeals Tribunal (**the AAT**), the Social Security Appeals Tribunal (**the SSAT**), the Migration Review Tribunal (**the MRT**) and Refugee Review Tribunal (**the RRT**), (together, **the Tribunals**) into the AAT. The Veterans Review Board and the Classification Review Board will not be amalgamated.

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4. The explanatory memorandum accompanying the Bill (**the EM**), states that the amalgamation would "primarily affect the Tribunals' internal administrative and corporate operations and is not intended to materially affect the rights of tribunal users"; the Bill is not intended to affect the substantive rights to merits review under the Tribunals.

5. The EM states that the amalgamation would:

   (a) further enhance the efficiency and effectiveness of the Commonwealth merits review jurisdiction and support high quality and consistent Government decision making;

   (b) generate savings through shared financial, human resources, information technology and governance arrangements;

   (c) provide for greater utilisation of members' specialist expertise across subject matters and facilitate the sharing of expertise between members and staff;

   (d) incorporate the successful features of the tribunals as currently constituted; and

   (e) incorporate merits review of freedom of information decisions into the work of the amalgamated tribunal.

6. In principle, the Bar Association supports the consolidation and streamlining of the Tribunals into the AAT assuming that the EM is accurate in stating that the rights of users of the Tribunals will not be materially affected, however insofar as the Bill affects the internal operations of the Tribunal, there appears to be a fundamental erosion affecting the independence of the Tribunal which is unacceptable and cannot be supported.

**Erosion of independence of members of the Tribunal**

7. The Bar Association has significant concerns about the Bill. It opposes amendments to the legislation that significantly affect the independence of members of the Tribunal and considers those are undesirable and ought not be proceeded with.

8. The first, and most concerning amendment, affects the security of tenure of members. Whilst the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) originally provided for members to be appointed to age 65 or 70, more recent amendments to s 8 of the AAT Act allow members to hold office for a period of up to 7 years as specified in the instrument of appointment. In practice, successive governments on both sides have generally made appointments not longer than five years[1]. Members are eligible for re-appointment. But, within the term of that appointment, members have Act of Settlement tenure, that is, they may only be removed by the Governor-General

[1] That practice is noted in para 173 of the *Explanatory Memorandum* to the *Tribunal Amalgamation Bill* 2014 (Cth).

for proved misbehaviour or incapacity upon an address by both Houses of Parliament.

9. Section 26 of the Bill proposes the repeal of s 13 of the AAT Act and its replacement by a new s 13 that would permit termination of the appointment of a member by the Governor-General for misbehaviour, for incapacity and for a variety of causes set out in s 13(2) of the proposed section. An address by both Houses is not required.

10. There can be no doubt that what is proposed amounts to a significant reduction in the security of tenure of members appointed, or re-appointed, under that provision. The change is sought to be justified in the EM on the basis that it is consistent with termination provisions that apply to current members of the MRT, RRT and SSAT and that it more closely reflects the standard model for termination of statutory officers. These matters do not justify the proposed change.

11. The AAT is the Commonwealth's premier independent merits review Tribunal. It reviews decisions of Ministers, departments and agencies at the behest of individuals affected by those decisions. The Tribunal's independence plays a critical role in the proper functioning of the Tribunal.

12. Independence has both subjective and objective elements. First, subjectively, members must regard themselves as independent. Additionally, and importantly, those who seek a review of decisions must regard the Tribunal as having the necessary independence from the government whose decisions are being reviewed. Independence is very much a matter of culture. That culture is buttressed by institutional protections including security of tenure that makes removal from office impossible except in defined and limited circumstances. When one of those protections is diminished, the culture of independence is diminished. Rather than reduce the present security of tenure the Bill ought increase the security of tenure of existing MRT, RRT and SSAT members on their appointment as members of the amalgamated AAT. Such a step would foster the necessary culture of independence.

13. Members of the AAT are not like ordinary statutory appointees. They require security of tenure in fact and in perception in order for them to do their unique job of reviewing the merits of administrative decisions made at the highest levels of government. While they are not members of a Chapter III court, the same logic applies to suggest AAT members require institutionalised protection of their independence, and of the culture of independence. The amendments before the parliament will diminish that institutionalised protection. Even if the expanded powers in the Bill were never exercised, their very existence will have implications for the culture of independence, the quality of the Tribunal's reviews, and the calibre of individuals who are prepared to accept appointments to this essential forum.

14. Lest it be thought that this is a minor matter there are other amendments proposed that diminish the institutional independence of the Tribunal by removing from the President of the Tribunal duties that ought be performed by the President, not the Minister as the Bill contemplates.

15. The Bill proposes alterations to the existing Divisions of the Tribunal and the addition of Divisions encompassing what was the work of the MRT, RRT and SSAT. Non-presidential members (senior members and members) are assigned to Divisions by the Minister following consultation with the President and, in some cases, with another Minister e.g. the Treasurer in the case of the Taxation and Commercial Division. So much is unremarkable and in accordance with the present Act. The Bill though proposes that in the amalgamated Tribunal there be Heads of Divisions as well as Deputy Heads. However it is proposed that the Minister, rather than the President, make those assignments after consultation with the President and, again in some cases, with another Minister.

16. Whilst the creation of Heads and Deputy Heads of Divisions is desirable it is undesirable that those appointments ought be made by the Minister. The task of appointing Heads and Deputy Heads ought be that of the President who has the statutory responsibility for managing the affairs of the Tribunal. It may be accepted that the Minister has a role to play in assigning members to Divisions but it diminishes the independence of the Tribunal to deprive the President of the role of determining who is best suited to perform the roles of Head, and Deputy Head, of the Divisions.

17. There is another example of the erosion of the independence of the Tribunal that arises in relation to the appointment of the Registrar. The Act presently provides for the Registrar to be appointed by the Governor-General on the nomination of the President and for the President to determine then terms and conditions of the appointment where the Act is silent. The Bill proposes that power be removed from the President.

18. There is much about the Bill that is desirable but in these features it weakens the Tribunal by undermining its independence – the most fundamental feature of a merits review tribunal. The amalgamation of the various Commonwealth tribunals presents as an opportunity to strengthen and underline the independence of those tribunals by bringing the security of tenure of members of the MRT, RRT and SSAT to that of present members of the AAT. To miss that opportunity and to reduce the security of tenure to the lowest common denominator is a retrograde step.

19. The Bar Association however contends that this is a matter which must be addressed before the Bill proceeds further.

Yours faithfully

**Robyn Martin**
Chief Executive