

25 February 2015



Senate Legal and Constitutional Affairs Committee
BY EMAIL: legcon.sen@aph.gov.au

Dear Committee Members,

Tribunals Amalgamation Bill 2014 (Cth)

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Tribunals Amalgamation Bill 2014 (**the Bill**). Overall, PIAC believes the Bill's primary function of amalgamating the specialist tribunals will not adversely impact on access to justice, and indeed may improve it.

In this brief submission, however, PIAC highlights a number of practical obstacles for disadvantaged people accessing justice, which this Bill raises. PIAC's submission is based on our experience providing legal assistance to disadvantaged people.

Public Interest Advocacy Centre

By way of background, established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Primarily through its legal casework, PIAC has extensive experience in administrative law and the principles and operation of judicial review. In particular, from the experience of providing representation for vulnerable clients, PIAC has developed in-depth knowledge of the legislative and practical barriers to social justice.

General principles

Overall, PIAC believes the Bill has the potential to improve access to justice. PIAC's experience of tribunal amalgamation at the State level is that the process of seeking merits review of administrative decisions has consequently

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become more straightforward for our vulnerable clients and others in the community.

The Bill's proposed amendment to s 2A of the *Administrative Appeals Act 1975* (Cth) (**AAT Act**) will set out two new objectives for the Act: the need to ensure public trust and confidence in decision-making of the AAT; and a need for the review mechanism to be proportionate to the importance and complexity of the matter. The pursuit of these should assist in the overall goal to make review in the new tribunal 'fair, just, economical, informal and quick'. The centrality of these objectives is underscored by the proposed new s 18A, which would provide that the President is responsible for efficiency and expediency, as well as pursuing the s 2A objectives. Similarly new s 33(1AB) in the AAT Act will require parties before the Tribunal to assist it to fulfil the s 2A objectives.

While PIAC appreciates the need for efficiency, it must not override the proper administration of justice where the two concepts come into conflict. 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 probing administrative decisions that can often have a hugely significant impact on individual lives, including on people's human rights.

Application fees

High application fees are undoubtedly a deterrent for those seeking merits review of an administrative decision. Applications to the newly established Tribunal will be required to be accompanied by a prescribed fee: new s 29(1) of the AAT Act. That fee will be prescribed by way of regulation under s 70 of the AAT Act.

Currently, application fees vary across the various tribunal bodies. Under the *Administrative Appeals Regulation 1976* (Cth) (**AAT Regulation**), the fee to make an application to the AAT is \$861. There is no fee to apply to the Refugee Review Tribunal, and in most cases applications to the Migration Review Tribunal require \$1604. There is provision for the fee to be waived or reduced to \$100 under the AAT Regulation, and refunded if the applicant is successful. A decision in the applicant's favour in the Migration Review Tribunal only qualifies for a partial refund of \$802.

It is unclear from the Bill and the Explanatory Memorandum whether different fees will continue to apply to the different divisions in the newly amalgamated Tribunal. If the Government is minded to retain a different fee structure, there should be parity across the divisions. The basis for reduced fees, for example, currently set out in the AAT Regulations should be equally applicable to applications under the Migration Act.

PIAC recommends the Committee propose that the Bill be amended to set boundaries for the prescription of fees by way of regulation. Where Regulation already prescribes low fees or a means by which fees can be reduced on the basis of individual circumstance, those fees should not be increased to meet higher levels currently imposed in other tribunals. Rather, any fees should not be arbitrarily imposed and must be commensurate with the applicant's ability to pay.

Specialist divisions: Freedom of Information

The newly amalgamated tribunal will create a number of specialist divisions, with further divisions to be created by regulation.

PIAC recommends that a specialist division for Freedom of Information (**FOI**) also be included in the primary act.

As previously submitted to the Committee, PIAC opposes the Australian Government's proposed abolition of the Office of the Australian Information Commissioner (**OAIC**) in the Freedom of Information (New Arrangements) Bill 2014. The changes proposed in that Bill will have far-reaching consequences, undermining the ability of the federal FOI regime to underpin transparent and accountable government, central to the proper functioning of Australia's democracy.

The loss of the OAIC will mean the loss of an independent body with a range of statutory powers and functions aiming to guide and advise government agencies on how best to comply with the FOI regime. PIAC believes that this will lead to poorer decision making by government agencies determining FOI requests. As a consequence, there is potential that there will be an increased number of applications for review of government decisions to refuse access to public information.

By transferring review of FOI decisions to the AAT, the Government claimed that it would align FOI legislation 'with other merit review processes across the Australian Government'.¹ However, PIAC believes 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. This would also reflect the level of expertise developed by the OAIC when determining whether there is a public interest in disclosure of information a government agency wishes to withhold from publication.

Member appointment

The Bill provides for ministerial consultation regarding the appointment of members to the specialist Divisions of the newly amalgamated tribunals. As outlined above, PIAC appreciates the need for specialist expertise and the benefit that specialist knowledge will bring to the operation of the discrete areas of the Tribunal's operation.

However, it is unclear why a consequence of retaining specialist expertise requires consultation with the relevant portfolio minister. An open and transparent selection process undertaken by the Attorney-General should be capable of ensuring appointments are made on merit. This would also ensure the AAT retains its independence and reinforce the objective of the Bill in bringing together, in the one body, the various discreet areas of administrative review.

Legal representation

While the AAT is intended to be a more informal path by which to resolve legal disputes, it is still vitally important for those who appear before the Tribunal do so with legal representation and/or having had the benefit of legal advice. The costs to the public purse of lack of legal representation are well established. Providing sound legal advice, and doing so at the earliest possible stage of a matter, has been shown to assist in preventing legal and social problems escalating. It can also save court time and promote efficiency, two clear objectives of the Bill.

As a matter of principle, legal representation promotes and assists individuals accessing justice. With cuts to legal aid and community legal service providers, it will be increasingly common for individuals to be unrepresented before the courts and the new Tribunal proposed in the Bill. As

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 16-11077, The Hon Scott Morrison MP.

a consequence, individuals will frequently find themselves trying to resolve a dispute where the government-funded defendant is legally represented. This will inevitably undermine the important principle of equality of arms that underpins access to justice in support of the rule of law.

Accordingly, PIAC supports the recommendation previously made by the Law Council to ensure access to legal representation for all applicants before the Tribunal as a matter of right, such as by the creation of a publicly-funded duty solicitor scheme.²

Should the Committee require any further information or have any questions in relation to this brief submission, please do not hesitate to contact us, our contact details are below.

Yours sincerely

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² Law Council of Australia *Tribunals Amalgamation: Department of Immigration and Border Protection* (17 July 2014).