

# **Cronyism in appointments to the AAT**

## **An empirical analysis**

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Discussion paper

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# Summary

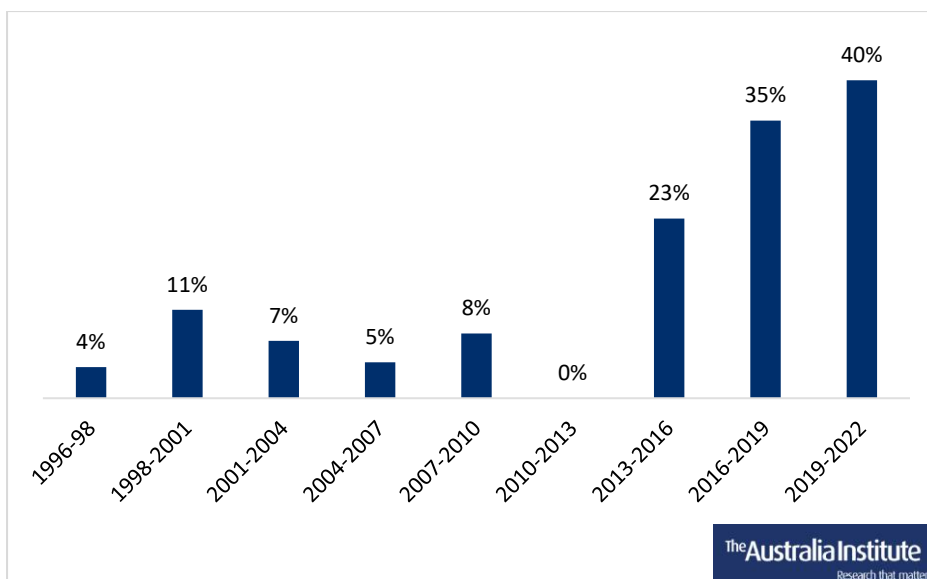
This study, the largest and most comprehensive domestic study of the practice of cronyism in relation to appointments to a government agency ever conducted, finds there has been a sharp rise in the proportion of political appointments to the Administrative Appeals Tribunal (AAT) during the Abbott/Turnbull/Morrison administration.

In the study, political appointments were defined as the appointment of people who, prior to appointment, had worked for a political party with representation at the federal level in either a paid or voluntary capacity. This included those who had worked as elected representatives, advisers or other staffers, party officials, candidates, pre-selection candidates or for party-affiliated organisations.

In the Howard and Rudd/Gillard/Rudd administrations, political appointees accounted for 6 and 5 per cent of all appointees respectively. By contrast, during the Abbott/Turnbull/Morrison administration, political appointees accounted for 32 per cent of all new appointments.

Within the Abbott/Turnbull/Morrison administration, political appointments were highest during the second Morrison ministry (see Figure 1). They climbed from 23 per cent of all appointments during the 2013–2016 Abbott/Turnbull Government to 35 per cent during the 2016–2019 Turnbull/Morrison Government to 40 per cent during the 2019–2022 Morrison Government. In the Abbott/Turnbull/Morrison era, a total of 236 appointments were made.

**Figure 1: Percentage of political appointments by government (1996 to 2022)**

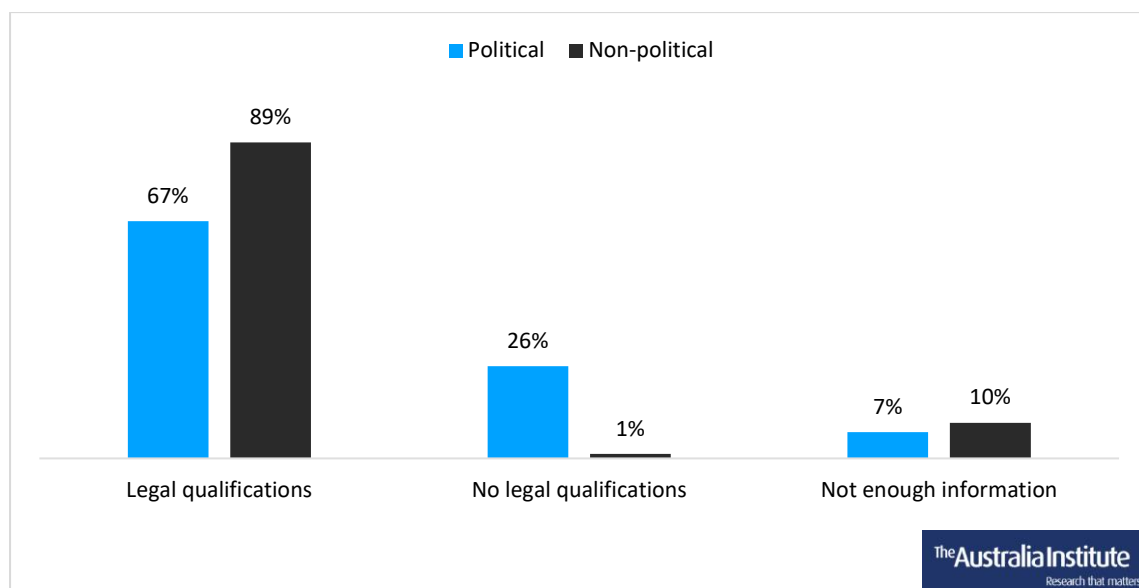


Source: Australia Institute original research.

## Senior members without legal qualifications

Beyond the growth in the number and proportion of political appointees, the loss of norms of good governance in relation to appointments to the AAT is indicated by the growing number of appointments of Senior Members who do not have legal qualifications. This is significant because Senior Members are supposed to provide leadership on legal matters. Over the entire study period (1996–2022), just over a quarter (26 per cent, 7 of 27) of all political appointees appointed as Senior Members did not have legal qualifications compared with only 1 per cent of non-political appointees appointed as Senior Members (1 of 80) (see Figure 2).

**Figure 2: Legal qualifications of political and non-political appointees appointed as Senior Members (1996 to 2022)**



Source: Australia Institute original research.

The escalation in the appointment of Senior Members without legal qualifications has happened recently. Between 1996 and 2015, only one person was identified as having been appointed to the level of Senior Member or above who did not have legal qualifications. They were not identified as being a political appointee.

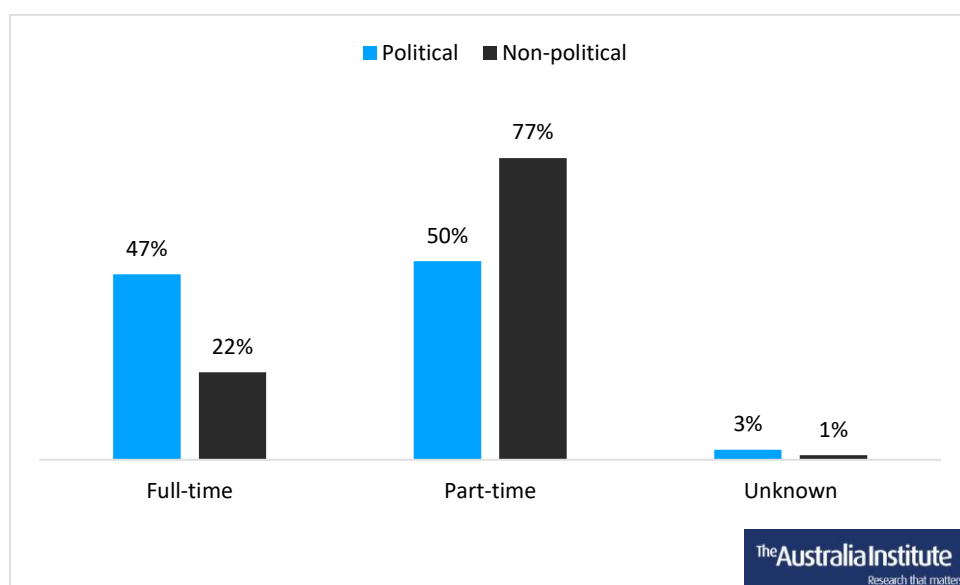
By contrast, over the approximately six-year period since 2016, seven people have been appointed to the AAT as Senior Members who do not appear to have legal qualifications. All were political appointees, six of whom had served the Coalition. Together they represented 32 per cent of all political appointees appointed as Senior Members by the Abbott/Turnbull/Morrison administration (7 of 22 political appointees, out of 61 total appointed as Senior Members during the administration).

## Patterns in political appointments

Political appointees were more likely to be appointed as Senior Members than non-political appointees. Between 1996 and 2022, 23 per cent of political appointees were appointed as Senior Members compared with 9 per cent of non-political appointees.

Political appointees were also more likely to be appointed on a full-time basis than non-political appointees, with 47 per cent of political appointees having been appointed on this basis compared with only 22 per cent of non-political appointees.

**Figure 3: Work hours of political and non-political appointees (1996 to 2022)**



Source: Australia Institute original research.

All administrations were far more likely to appoint political appointees who had served the appointing party or parties. Seventy-nine per cent of the Howard administration's political appointments went to those who had served the Coalition, 90 per cent of the Rudd/Gillard/Rudd administration's appointments to those who had served the Labor Party, and 89 per cent of the Abbott/Turnbull/Morrison administration's appointments to those who had served the Coalition.

There was considerable variability in the qualifications and experience of political appointees over the study period. While some political appointees had legal qualifications and significant legal experience, others had low education levels and no professional experience outside of their political employment.

Ten per cent of political appointees had identified education levels below the level of a bachelor's degree compared with 2 per cent of non-political appointees. All political appointees with identified education levels below the level of a bachelor's degree were appointed by the Coalition.

Political appointees were less likely to have legal qualifications than non-political appointees. Whereas 45 per cent of political appointees had legal qualifications, 59 per cent of non-political appointees had such qualifications.

Even when they had legal qualifications, political appointees were more likely to have less legal experience. Only 3 per cent of non-political appointees with legal qualifications had less than 6 years of legal experience at the time of first appointment, compared to 17 per cent of political appointees.

## Recommendations

In order to restore the independence, impartiality, integrity and capacity of the AAT, the report recommends significant reforms, summarised below.

1. An independent Commission of Inquiry into appointments to the AAT should be conducted. This inquiry should have the power to compel people to give evidence.
2. Special legislation should be introduced revoking, where legally possible, all membership positions on the AAT. All new appointments and re-appointments should be made in line with the criteria set out below.
3. All people who have worked for a federal party in the last four years should be ineligible for appointment to the AAT.
4. If AAT decisions continue to be made by one member only, all people appointed to the AAT should possess legal qualifications.
5. All people appointed to the AAT should be appointed for at least five years.
6. All people should be appointed through an open and transparent selection process.
7. All members of the AAT should be required to publish details of their qualifications and prior work experience.
8. Conflict of interest provisions should be amended.
9. All appointees should be required to resign their membership of a political party whilst serving on the AAT.
10. All recommended changes to appointment criteria and the process for appointment should be reflected in the AAT's enabling legislation.



# Introduction

The appointment of members to the Commonwealth Administrative Appeals Tribunal (AAT) has been the subject of significant and sustained public and parliamentary scrutiny in recent years. Concerns have been raised about the appointment of people with strong political connections to the appointing party and the extent to which this has adversely affected the independence of the institution. Particular issues have been raised about the apparent low levels of relevant qualifications and expertise of some appointees and whether some appointments have been made as gifts for political service.

In the last five years, two inquiries have been undertaken addressing the subject of appointments to the AAT. The first inquiry was commissioned by the Turnbull Government and undertaken by former High Court Justice Ian Callinan in 2018.<sup>1</sup> The second inquiry is currently being conducted by the Senate Legal and Constitutional Affairs References Committee. Submissions to this inquiry closed on 30 November 2021 and the Committee's final report is due to be tabled on 30 June 2022. No hearings have been conducted.

In the academic literature, the practice of appointing colleagues and friends to government positions is referred to as either cronyism or patronage. The research suggests that, in advanced democracies like Australia, the practice — referred to as cronyism in this paper — is typically done in order to achieve 'policy control', defined as the desire to control the policy and political outcomes associated with the work of the relevant government agency.<sup>2</sup> The research also suggests that, in these same countries, cronyism is sometimes additionally practiced in order to provide a reward to those who have provided political service, but that the occurrence of this type of cronyism is relatively rare.<sup>3</sup> Whilst it is given comparatively little attention, the practice of cronyism can also sometimes extend to the provision of appointments to a rival party in order to obtain a political benefit for the appointing government or party.

Debate continues within the literature about whether the policy control driver of cronyism is corrupt. Some academics argue that, when practiced under certain conditions, cronyism for policy control is not an abuse of power. These conditions typically include, amongst other things, an open and transparent appointments process, the publication of merit-based selection criteria, the conduct of interviews and other controls on the extent of ministerial

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<sup>1</sup> Callinan (2019) *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>

<sup>2</sup> Kopecky, Meyer Sahling, Panizza, Scherlis, Schuster & Spirova (2016) 'Party patronage in contemporary democracies: Results from an expert survey in 22 countries from five regions', *European Journal of Political Research*, vol. 55, no. 2, p. 428

<sup>3</sup> Kopecky et al. (2016) 'Party patronage in contemporary democracies: Results from an expert survey in 22 countries from five regions'

discretion. By contrast, there is widespread agreement that the use of cronyism to provide a reward and/or the appointment of people who are not qualified or experienced (in other words, who cannot be appointed on merit) are forms of corruption.<sup>4</sup>

In the largest and most comprehensive domestic and potentially international study of the practice of cronyism in relation to appointments to a government agency, this study seeks to quantify the extent of political appointments to the AAT and to analyse the qualifications and experience of members to the AAT at the time of appointment. The study is also distinguished by the fact that, whereas most previous research on cronyism in appointments to government agencies has been based on surveys and interviews, this study uses information on appointees that is available in the public domain, making it more objective.

The study analyses all new appointments to the AAT and its precursor tribunals over the period 1996 to 2022. That is, from the election of the Howard Government in March 1996 to the end of the second Morrison Government in April 2022. A total of 974 appointees were identified and analysed over the study period in accordance with the method.

In the study, political appointments were defined as the appointment of people who, prior to appointment, had worked for a political party with representation at the federal level in either a paid or voluntary capacity. This included those who had worked as elected representatives, advisers and other staffers, party officials, candidates, pre-selection candidates and for party-affiliated organisations. The definition did not extend to those who had been engaged by a party as a consultant, worked at senior levels of the bureaucracy, provided non-ongoing pro-bono advice or were found to be party members with no other publicly available record of political service. As a result, the findings on the number of political appointments are likely to be conservative.

This report analyses the practice of cronyism in relation to appointments to the AAT and its precursor tribunals over the study period. It does this by analysing the backgrounds of appointees including their political connections, qualifications and levels of legal experience. The research seeks to:

- a) identify the number and proportion of new appointees who meet the definition of political appointees;
- b) identify the proportion of appointees who have previously worked for the governing party (in other words, were appointed by the same party they worked for);
- c) identify the proportion of appointees who have worked for non-governing political parties (for example, were Labor representatives who were appointed by the Coalition or vice-versa);

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<sup>4</sup> Flinders & Matthews (2010) 'Think again: patronage, governance and the smarter state', *Policy & Politics*, vol. 38, no. 4, pp. 639-656

- d) quantify any differences in the appointment level and work hours of people identified as either political or non-political appointees;
- e) quantify any differences in the employment history, levels of qualification and years of legal experience of political and non-political appointees;
- f) quantify any differences in the appointment, qualifications and experience of political appointees by party and administration; and
- g) consider what impacts the appointment of political appointees may be having on the independence and capacity of the AAT.

The report is divided into six parts. Part 1 discusses the functions and structure of the AAT and the need for independence. Part 2 discusses the controls on government cronyism in relation to the AAT. Part 3 discusses the method. Part 4 outlines the results. Part 5 provides a discussion and Part 6 makes recommendations for reform.

# Part 1: The functions and structure of the AAT and the need for independence

The AAT conducts merit reviews of certain administrative decisions made by the federal government under statute.<sup>5</sup> Most appeals relate to child support, Commonwealth workers' compensation, family assistance, paid parental leave, social security and student assistance, migration and refugee visas and visa-related decisions, taxation and veterans' entitlements.<sup>6</sup>

Decisions are often (but not exclusively) made by one member only. In making decisions, tribunal members are required to remake the relevant government decision in accordance with the law, having regard to relevant facts and government policy. Tribunal members can choose to affirm, vary, set aside and replace or remit a decision to the decision-maker for reconsideration.<sup>7</sup> In certain situations, AAT decisions can be appealed to the Federal Court of Australia.<sup>8</sup>

Prior to 1 July 2015, the AAT's workload was spread between a smaller AAT and three subject specific tribunals: the Social Security Appeals Tribunal (SSAT), Migration Review Tribunal (MRT) (previously the Immigration Review Tribunal (IRT)) and the Refugee Review Tribunal (RRT).<sup>9</sup> These tribunals sometimes made decisions in different ways to the current AAT. Decisions of the former SSAT, for example, were, for much of its history, made by a panel of three and sometimes four members (with three being the minimum and four the maximum).<sup>10</sup> Panels comprised an executive member (who was a 'detached' public servant from relevant federal departments), a legal member, a welfare member and, on occasion, a medical member.<sup>11</sup>

The AAT forms part of the Attorney-General's portfolio and is headed by the President, who must be a judge of the Federal Court of Australia. Judicial and non-judicial Deputy

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<sup>5</sup> The AAT can only review decisions where the law states that those decisions can be reviewed by the AAT.

<sup>6</sup> Other reviews concern decisions related to Australian citizenship, bankruptcy, civil aviation, corporations and financial services regulation, customs, freedom of information, the National Disability Insurance Scheme, passports and security assessment by the Australian Security Intelligence Organisation. AAT (2021) *About the AAT*, <https://www.aat.gov.au/about-the-aat>

<sup>7</sup> Where there is more than one potentially correct decision, the tribunal must make the preferable one. AAT (2021) *About the AAT*

<sup>8</sup> *Administrative Appeals Tribunal Act 1975* (Cth), Part IVA.

<sup>9</sup> In 2015, the SSAT, MRT and RRT were formally incorporated into the AAT.

<sup>10</sup> *Social Security Act* (Cth), s 1328.

<sup>11</sup> SSAT (1996) *Social Security Appeals Tribunal Annual Report 1995–96*, [https://parlinfo.aph.gov.au/parlInfo/download/publications/taledpapers/2107/upload\\_pdf/HPP042016001696.pdf](https://parlinfo.aph.gov.au/parlInfo/download/publications/taledpapers/2107/upload_pdf/HPP042016001696.pdf)

Presidents sit below the President, followed by Senior Members and then ordinary Members. Deputy Presidents may be assigned as the Head or Deputy Head of one or more divisions, while Senior Members may be assigned as a Deputy Head only. There are currently nine divisions including the Migration and Refugee Division, Social Services and Child Support Division and the General and Other Divisions (which comprise the remaining seven divisions).

Appointments to the AAT are made by the Governor-General on the recommendation of the Attorney-General. Members may be appointed for up to seven years and can be reappointed.<sup>12</sup> Unlike the judiciary, there are no age-related disqualifications on members.

Like other statutory agencies, the AAT is supposed to be independent of government. As quasi-judicial body, this independence is integral to the proper functioning of the AAT.

The word independent does not appear in the AAT's enabling legislation but the word is used by the organisation to describes its role.

*We provide independent merits review of a wide range of administrative decisions made by the Australian Government [emphasis added].*<sup>13</sup>

The independence of a statutory authority can be operationalised in different ways. One important mechanism is through the appointment of members who are independent of government, have the necessary expertise to conduct their duties, and who understand the importance of acting in an independent and impartial manner in the conduct of their duties. The problem is that conversely, the appointment of members, and the terms under which they are appointed (including the length of their tenure), provide a means by which governments can seek to control the independence of a statutory authority.<sup>14</sup>

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<sup>12</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 8

<sup>13</sup> AAT (2021) *Welcome to the AAT*, <https://www.aat.gov.au/>

<sup>14</sup> Palmer (1985) 'State Theory and Statutory Authorities: Points of Convergence', *Sociology*, vol. 19, no. 4, p. 533.

## Part 2: Controls on government cronyism in relation to the AAT

To protect both the actual and perceived independence and capacity of the AAT, and thus control the practice of cronyism, rules are needed in relation to the appointment of political appointees and the qualifications and experience of members.

The main rules that directly regulate appointments to the AAT are found in Section 7 of the *Administrative Appeals Act 1975* (Cth). This section outlines various qualification requirements of people appointed to the tribunal as President, Deputy President, Senior Member and Member.

The President must be a judge of the Federal Court of Australia.<sup>15</sup> To be appointed a judge of the Federal Court, appointees must be either a judge of another court or have been enrolled as a legal practitioner for not less than five years and have ‘appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court’.<sup>16</sup>

The qualifications and experience required for all other appointees to the AAT are similar. Deputy Presidents, Senior Members and ordinary Members need to have been enrolled as a legal practitioner for five years or have ‘special knowledge or skills’ relevant to their appointment as a Deputy President, Senior Member or Member.<sup>17</sup> Previously, non-judicial Deputy Presidents were required to have been enrolled as a legal practitioner for five years, whilst Members were required only to have ‘knowledge or skills’ relevant to their appointment.<sup>18</sup>

These rules are weak, leaving governments with a broad discretion to appoint people that lack the requisite skills and experience to perform the roles and responsibilities of an AAT member, or to otherwise make political appointments. Most notably, the ability to appoint people on the basis of having ‘special knowledge or skills’ has facilitated the appointment of people with a broad variety of experience, including those with backgrounds in accountancy, aviation, disability, engineering, medicine, migration, pharmacology, military affairs, public administration, science, social welfare and taxation.<sup>19</sup> In its submission to the

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<sup>15</sup> *Administrative Appeals Act 1975* (Cth), s 7(1)

<sup>16</sup> *Federal Court of Australia Act 1975* (Cth), s 2(b)

<sup>17</sup> *Administrative Appeals Act 1975* (Cth), ss 7(2) & 7(3)

<sup>18</sup> AAT (2014) *AAT Annual Report 2013-14*, <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR1314-complete.pdf>

<sup>19</sup> AAT (2006) *Administrative Appeals Tribunal Annual Report 05-06*; AAT (2011), *Administrative Appeals Tribunal Annual Report 11-12*; AAT (2017), *Administrative Appeals Tribunal Annual Report 16-17*

Senate inquiry, the Commonwealth Attorney-General's Department also noted the following.

The mechanism for appointing members under section 7 is intended to ensure that the AAT is constituted by individuals who have a wide range of experiences which make them well placed to undertake merits review. These individuals do not necessarily need a legal background, but instead may be appointed for their professional and technical expertise, knowledge or skills. For example, this knowledge could be in relation to accountancy, medicine, taxation, defence or public administration.<sup>20</sup>

In his review of the AAT Act, however, Justice Callinan argued that 'all further appointments, reappointments or renewals of appointment ... should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit'.<sup>21</sup> This is due to the central role that the law plays in the functions of AAT members, both in relation to the conduct of hearings and the making of determinations.

AAT proceedings are quasi-judicial in nature. In making their decisions, members are exercising statutory powers and must do so in accordance with the law. This requires them to interpret the empowering legislation and to apply the facts to the law. Further, in conducting proceedings, while members are not bound by the rules of evidence, they must 'determine the weight that should be given to any evidence that is before it'.<sup>22</sup> They must also ensure that the proceedings are conducted in a procedurally fair manner. Due to the nature of their functions, AAT members need to have legal skills – they must be able to interpret and apply legislation, and have an understanding of administrative law.

While there is growing support for the exclusive appointment of those with legal qualifications, a broad range of experiences and expertise has sometimes been regarded as a virtue. However, the appointment of people with broader backgrounds arguably made more sense with different decision-making models. Members of the SSAT, for example, were 'selected for general skills, such as an understanding of, and commitment to, the principles of administrative review, a knowledge of the Social Security system, interpersonal skills, and particular expertise in one of the disciplines of law, welfare/community work or

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<sup>20</sup> Attorney-General's Department (n.d.) *Submission 5*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Ad\\_minreviewsystem/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Ad_minreviewsystem/Submissions)

<sup>21</sup> Callinan (2019) *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>. He qualified this by saying 'a possible exception is appointment to the Taxation and Commercial Division to which competent accountants might be appointed'.

<sup>22</sup> AAT (2015) *Guideline: Persons Giving Expert and Opinion Evidence*, <https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/persons-giving-expert-and-opinion-evidence-guideli>

medicine'.<sup>23</sup> But, as discussed above, decisions of the former SSAT were, for much of its history, made by a panel of three or four appointees from different backgrounds, but always including a legal member. By contrast, decisions of the AAT are often made by one member who may not have legal qualifications.

In addition to the qualification and experience requirements, section 11(a) of the AAT Act provides that full-time members cannot engage in additional paid employment without the approval of the President. Part-time members can engage in additional paid employment but they 'must not engage in any paid employment that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties'.<sup>24</sup> Interestingly, the 'section does not apply in relation to the holding by a member of an office or appointment in the Defence Force'.<sup>25</sup> There are also no requirements in the legislation for appointees to have to resign their membership of a political party.

To strengthen these weak legal rules, informal appointment processes have also been used as a way of guarding against the making of crony appointments to the AAT and the tribunals that were merged into them. To illustrate, in 1995/96, the SSAT's protocol regarding appointment was revised with the explicit goal of entrenching 'the making of appointments free of political involvement'.<sup>26</sup>

These protocols are approved by the relevant Minister (today, the Attorney-General), and have covered, at different times, the advertising of positions, the publication of merit-based selection criteria and/or the conduct of interviews by selection panels. They do not, however, fully constrain the practice of cronyism. Ministers routinely retain the power to appoint candidates who have neither replied to an advertisement nor have been recommended by a committee.

In recent years, this phenomenon has been explored at length in Senate Estimates hearings, with a significant proportion of new appointments apparently being awarded to people who did not apply for the position through an open and transparent recruitment process involving interviews.<sup>27</sup> Documents released under freedom of information laws have also demonstrated how appointment decisions made in the absence of such a process have sometimes been made in haste and without consideration of a candidate's curriculum vitae. In one instance, the Department, who was struggling to find the contact details for all candidates suggested by the Attorney-General, suggested that if all material required for a complete submission to the Prime Minister could not be collated in time, it could 'provide

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<sup>23</sup> SSAT (1996) *Social Security Appeals Tribunal Annual Report 1995–96*

<sup>24</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 11(b)

<sup>25</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 11(c)

<sup>26</sup> SSAT (1996) *Social Security Appeals Tribunal Annual Report 1995–96*

<sup>27</sup> Legal and Constitutional Affairs Legislation Committee (2017) *Estimates: Attorney-General's Department*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/420421b5-6149-431f-96e2-06a8423423cf/0007%22>



the [submission] with the letter to the Prime Minister attaching all of the [curriculum vitae and personal interest declarations] that we have at that point in time and note that the department will provide the outstanding documents to PM&C once we have received them'.<sup>28</sup> The documents also reveal that potential candidates were suggested by other ministerial offices.

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<sup>28</sup> Attorney-General's Department (2021) *Documents released under FOI21/056*

## Part 3: Method

As outlined above, the aim of this research is to:

- a) identify the number and proportion of new appointees who meet the definition of political appointees;
- b) identify the proportion of appointees who have previously worked for the governing party (in other words, were appointed by the same party they worked for);
- c) identify the proportion of appointees who have worked for non-governing political parties (for example, were Labor representatives who were appointed by the Coalition or vice-versa);
- d) quantify any differences in the appointment level and work hours of people identified as either political or non-political appointees;
- e) quantify any differences in the employment history, levels of qualification and years of legal experience of political and non-political appointees;
- f) quantify any differences in the appointment, qualifications and experience of political appointees by party and administration; and
- g) consider what impacts the appointment of political appointees may be having on the independence and capacity of the AAT.

To do this, a five-staged method was used.

First, with the exception of judicial appointees, the names, date, level and work hours at first appointment of all appointments over the study period was obtained using annual reports and media releases found on the Australian Parliament House database, ParInfo.<sup>29</sup> Judicial appointees were excluded from the analysis because their appointments are determined by their status as judges of the Federal Court. All other appointees were subsequently analysed in relation to their year of first appointment. This was done in order to avoid the double counting of appointees who had been re-appointed at various times over the study period and to enable the analysis, on a yearly basis, of 'new' appointees.

As the annual reports of the SSAT did not typically provide the day and month of the appointment, SSAT appointees were allocated a starting date of 1 January of the relevant financial year in which they were appointed. For example, new appointees appointed during the 2011/12 financial year, were recorded as having been appointed on 1 January 2012. Similarly, where annual reports of a tribunal indicated a person was appointed in a calendar year or month without providing a specific appointment date, a date of 1 July was recorded or the 15th of the relevant month of appointment.

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<sup>29</sup> The exception to this was that as the work hours of some appointees appointed in 2022 could not be obtained from an annual report or a government database, information was instead obtained from a media report.

Second, those appointees who had served on a relevant tribunal prior to the election of the Howard Government in March 1996, and had been re-appointed during the study period, were excluded from the dataset. This was also done using annual reports found on ParInfo. The reason for this is that the appointment of those who have already served is significantly different from the appointment of those who have never served and whose actions and competencies on a future tribunal cannot be judged as easily. In other words, they are not 'new' appointees in the same way that other appointees who have never served are new.

Third, information related to the appointees' political connections, employment histories, qualifications and legal experience was gathered using publicly available material.<sup>30</sup>

Consideration of the political connections of appointees was limited to those who had worked for a political party with representation at the federal level in either a paid or voluntary capacity. This included those who had worked as elected representatives, advisers and other staffers, party officials, candidates, pre-selection candidates or for party-aligned organisations. The definition did not extend to those who had been engaged by a party as a consultant, worked at senior levels of the bureaucracy, provided non-ongoing pro-bono advice or were found to be party members with no other publicly available record of political service.

The employment history of appointees was analysed by assessing the field in which an appointee had the greatest amount of work experience at the time of their first appointment. Eight categories were used to classify this information: law; medicine, social work & policy, defence, public service, politics and other.

The law category was defined to include work as a legal practitioner, legal bureaucrat, legal academic, public prosecutor or jurist. The medicine category was defined to include work as any type of medical practitioner including psychiatrists and medical administrators. The social work & policy category was defined to include all work related to both practical and policy-orientated social and community work including community development, disability support and counselling. The public service category was defined to include all other work in the public service not otherwise categorised. The defence category was defined to include all work in the military and defence bureaucracy. Military lawyers were included in the law category. The politics category was defined to include all work as an elected representative, adviser, party office holder, party worker etc. The other category included all other fields not otherwise categorised.

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<sup>30</sup> To date, published academic studies of government cronyism have relied on interviews and surveys. However, interviews and surveys are an unreliable research method in the corruption field given the incentive for respondents to provide false or misleading information. While a research method relying on information in the public domain also has its limitations (for example, some relevant information will not be available), it nevertheless offers the best prospect of creating and analysing a more comprehensive and robust dataset.

The qualifications of appointees were analysed by assessing whether appointees had a bachelor level degree or above, a diploma or qualifications below the level of a diploma.

The legal experience of appointees was assessed by looking at the amount of time a legally qualified appointee had spent working in the law as a legal practitioner, legal academic, legal bureaucrat, public prosecutor or jurist prior to their date of appointment. A legally qualified appointee was defined as a person with legal qualifications that, with an additional year of professional training or the completion of a year of articles in a law firm, would enable them to enrol as a legal practitioner.

To qualify for inclusion, the publicly available material had to be either authored or approved by the appointee or have been published in a credible publication where there is likely to have been some level of peer review. This meant that any material published on social media could not be used unless it was authored by the appointee or could be verified by another credible document. Examples of credible documents included government documents, company and organisational reports and websites, traditional and new media (but not individual blogs).

Finally, in order to ensure the robustness of the research, and to avoid the over-estimation of political appointees, several decision rules were followed in the collation and analysis of the data. These are outlined in Appendix 1.

## Part 4: Results

The results of the research are outlined below. They indicate that, over the period 1996 to 2022, the practice of cronyism in relation to appointments to the AAT was systemic. They also indicate that there were significant differences in the skills and experiences of political appointees compared with those who were not so identified, with the former sometimes having significantly lower levels of expertise relative to the tasks of the tribunal(s) than the later. They also indicate that while both the Coalition and Labor engaged in the practice of cronyism, the Coalition during the Abbott/Turnbull/Morrison administration appointed a far higher proportion of political appointees who had worked for the appointing party than did either Labor during the Rudd/Gillard/Rudd administration or the Coalition during the Howard administration.

### DATASET

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A total of 974 appointees were identified and analysed over the study period. Of these 974 appointees, 432 (44 per cent) had been appointed to the SSAT, 309 (32 per cent) to the AAT and 233 (24 per cent) to the IRT/MRT/RRT.

Appendix 2 shows that there was significant variation in the number of new appointments made per year. In one year, over 100 new appointments were made, whereas in another, no new appointments were made. There were also significant differences in the number of appointments made by the different administrations, with 553 appointments being made by the Howard administration (57 per cent), 185 by the Rudd/Gillard/Rudd administration (19 per cent) and 236 by the Abbott/Turnbull/Morrison administrations (24 per cent).

For some appointees, no data was available in the public domain to enable further analysis, whilst for others, data could be collected in some areas but not others. The number and percentage of valid entries for each data category is summarised in Table 1 below. Notably, valid entries were most difficult for appointments to the SSAT due to the absence of biographical information on appointees in annual reports.

**Table 1: Summary of analysis**

	<b>Appointees with data available</b>	<b>Percentage of appointees</b>
<b>Membership level</b>	974	100%
<b>Work hours</b>	961	99%
<b>Identified political associations*</b>	119	12%
<b>Employment history</b>	581	60%
<b>Educational qualifications</b>	816	84%
<b>Legal qualifications</b>	816	84%
<b>Years of legal experience</b>	330**	59%**

\* All appointees were assessed in relation to their political associations. The figure recorded above is the number of political appointees who were found to have sufficient information in the public domain to determine they were political appointees in accordance with the method.

\*\* Only includes those with legal qualifications.

Source: Australia Institute original research.

It is important to note that the absence of publicly available data on an appointee's political associations does not indicate definitively that they do not have them. Rather, it indicates that there is either no relevant information on this issue in the public domain or that what material is in the public domain is not sufficient to make an assessment in line with the method. As a result, the proportion of appointees who were found to have such associations is likely to be conservative.

## **Political associations**

As discussed above, in this study, an appointee's political associations were limited to an analysis of whether the person had worked for a party with representation at the federal level in either a paid or voluntary capacity (see Appendix 1 for more information). These appointees are referred to as political appointees. They include people who have provided political service to Labor and were appointed by the Coalition and vice versa.

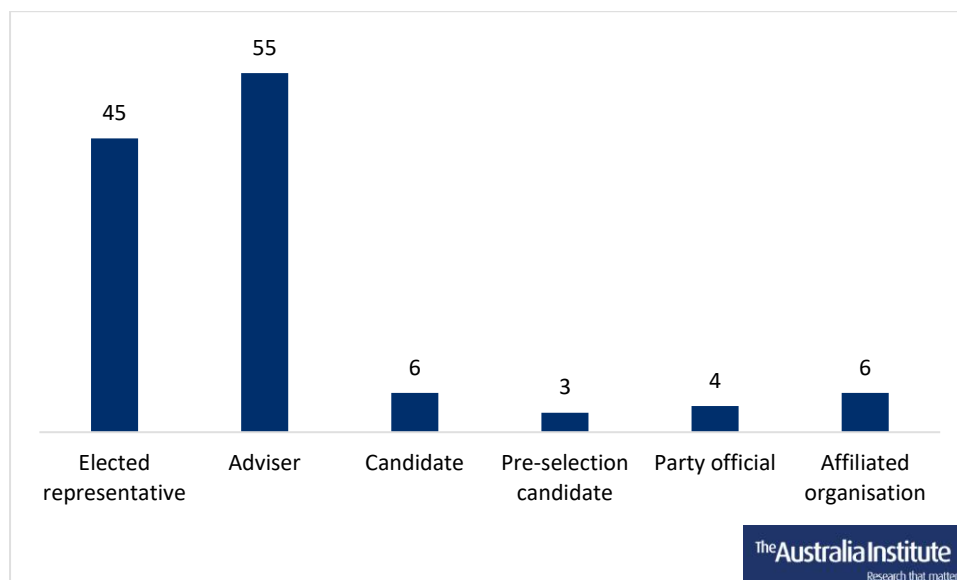
In accordance with this restriction, the analysis found that, over the period 1996 to 2022, 12 per cent of appointees to AAT and its precursor tribunals had worked for a party with representation at the federal level prior to their first appointment and could be classified as political appointees. This is a high percentage given the relatively small proportion of the population who have worked for a political party as an elected representative, adviser, candidate etc. While there are no official figures on this proportion, less than 1 per cent of the Australian population is believed to be a member of a mainstream political party,<sup>31</sup> with far fewer having worked for a party in accordance with the definition used in this study.

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<sup>31</sup> Sawyer, Abjorensen & Larkin (2009) *Australia: The state of democracy*, Federation Press

The analysis also found that most of this cohort (46 per cent) had worked as an adviser, with elected representatives (including those who had also worked as advisers) being the next biggest group (see Figure 4). All had provided political service to either the Coalition or Labor. No appointees were found to have provided political service to the Greens or any other federal party.

**Figure 4: Political roles of political appointees (1996 to 2022)**



Source: Australia Institute original research.

The data indicate that the Coalition made 109 political appointments over its roughly 21 years in office,<sup>32</sup> whereas Labor made 10 political appointments over its roughly six years in office. This meant that 92 per cent of all political appointees appointed to the tribunals over the study period were appointed by the Coalition.

Table 2 shows that the appointment of political appointees has grown substantially during the Abbott/Turnbull/Morrison administration. In the Howard and Rudd/Gillard/Rudd administrations, political appointees accounted for 6 and 5 per cent of all appointees respectively. By contrast, during the Abbott/Turnbull/Morrison administration, political appointees accounted for a significantly higher 32 per cent of all new appointments.

<sup>32</sup> One appointee appointed by the Coalition had worked as a ministerial adviser for an unknown party.

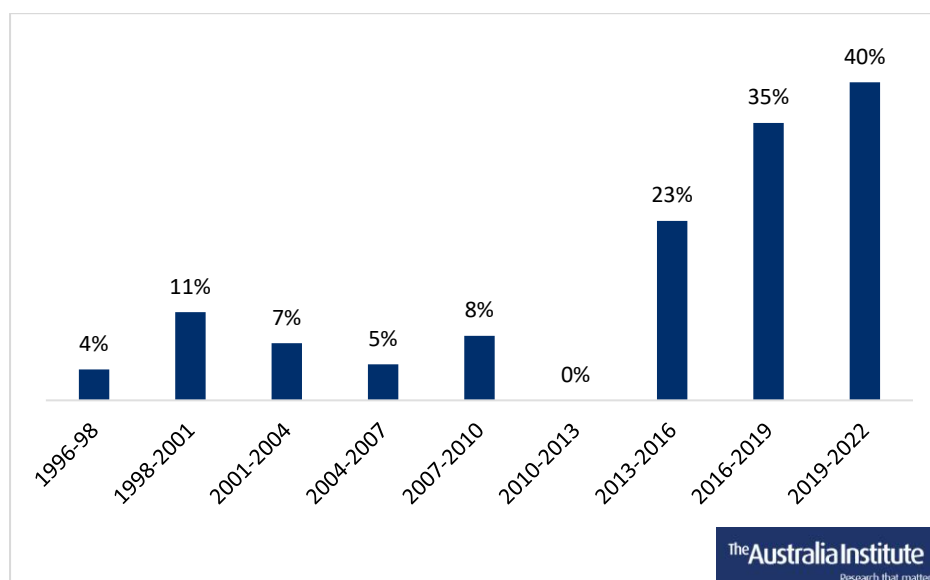
**Table 2: Political appointments by administration (1996 to 2022)**

Administration	Political appointees appointed	As percentage of all appointees
Howard administration	33	6%
Rudd/Gillard/Rudd administration	10	5%
Abbott/Turnbull/Morrison administration	76	32%

Source: Australia Institute original research.

Within the Abbott/Turnbull/Morrison administration, political appointments were highest during the Morrison Government (see Figure 5). They climbed from 23 per cent of all new appointments during the Abbott/Turnbull Government, to 35 per cent during the Turnbull/Morrison Government to 40 per cent during the second Morrison ministry.

**Figure 5: Percentage of political appointments by government (1996 to 2022)**



Source: Australia Institute original research.

As could be expected, most political appointments made by the Coalition and Labor were of people who had served their respective parties (see Table 3). Over the study period, 90 per cent of political appointees appointed by Labor had served the Labor Party. Similarly, 86 per cent of political appointees appointed by the Coalition had served the Coalition. However, the overall results for the Coalition mask an important difference. Whereas 79 per cent of all political appointments during the Howard administration went to those who had served the Coalition, a higher 89 per cent of all political appointments made by the Abbott/Turnbull/Morrison administration did the same. As a result, not only was the overall percentage of political appointments higher during the Abbott/Turnbull/Morrison administration, so to was the proportion of appointments to political appointees who had served the Coalition.



**Table 3: Analysis of political appointees by appointing administration (1996 to 2022)**

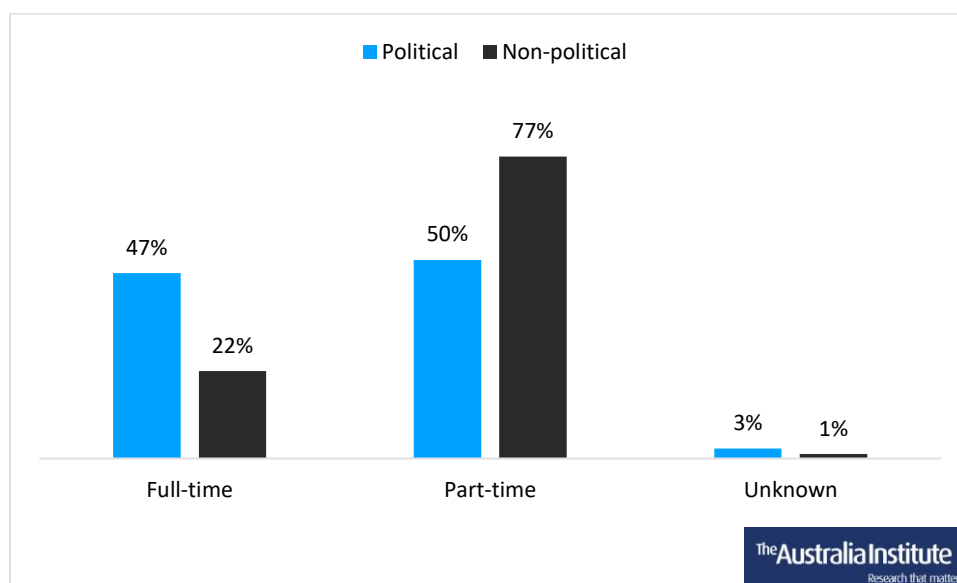
Administration	Political appointees appointed who had served the appointing party	As percentage of all political appointees
Howard (1996 to 2007)	26	79%
Rudd/Gillard/Rudd (2007 to 2013)	9	90%
Abbott/Turnbull/Morrison (2013 to 2022)	68	89%

Source: Australia Institute original research.

## Appointment level and work hours

Significant differences were found in the level at which political appointees and non-political appointees were appointed and whether they were appointed on a full or part-time basis. Over the study period, 23 per cent of political appointees were appointed as Senior Members and above at the time of first appointment, whereas only 9 per cent of non-political appointees were appointed to this level. Similarly, whereas 47 per cent of political appointees were appointed on a full-time basis at the time of first appointment, only 22 per cent of non-political appointees were appointed on this basis (see Figure 6).

**Figure 6: Work hours of political and non-political appointees (1996 to 2022)**



Source: Australia Institute original research.

Some interesting differences in the appointment of Senior Members during the different administrations were also found, growing by roughly 10 per cent for each administration. As Table 4 shows, during the Howard era, 9 per cent of political appointees were appointed as Senior Members or above at the time of first appointment. This grew to 20 per cent during

the Rudd/Gillard/Rudd administration and then to 29 per cent during the Abbott/Turnbull/Morrison administration.

**Table 4: Differences in the appointment of political appointees as Senior Members by administration (1996 to 2022)**

Administration	Political appointees appointed as Senior Members	Political appointees	Percentage of political appointees appointed as Senior Members
Howard (1996 to 2007)	3	33	9%
Rudd/Gillard/Rudd (2007 to 2013)	2	10	20%
Abbott/Turnbull/Morrison (2013 to 2022)	22	76	29%
<b>Total</b>	<b>27</b>	<b>119</b>	

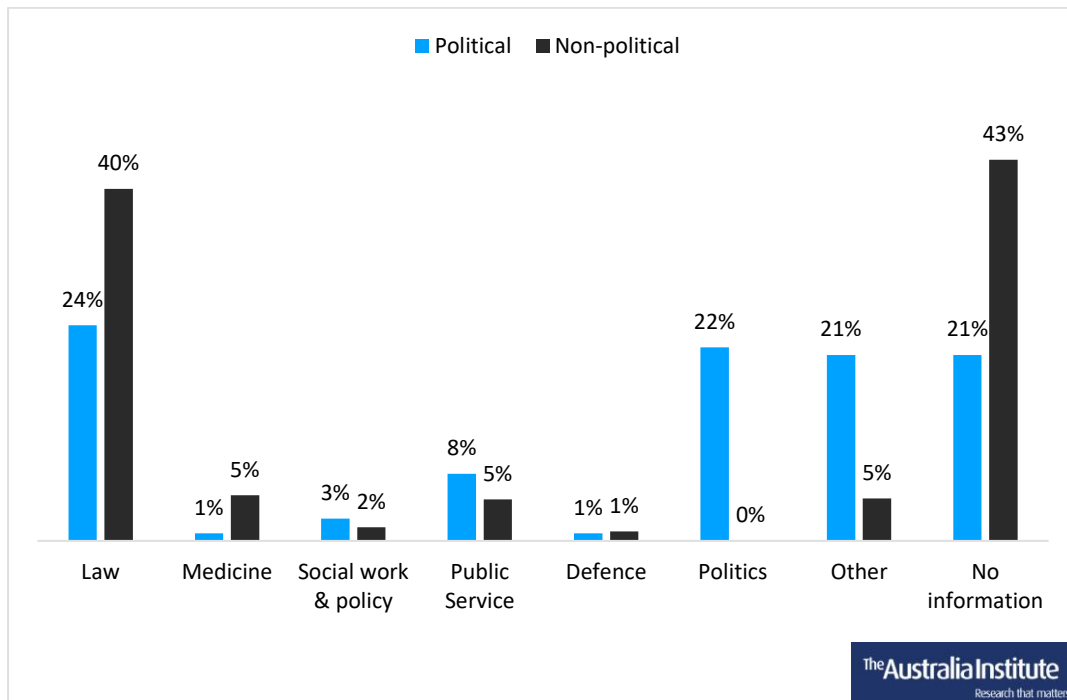
Source: Australia Institute original research.

The data also revealed that 36 per cent of political appointees were appointed as full-time members by the Howard administration compared to 30 per cent of political appointees being appointed as full-time members by the Rudd/Gillard/Rudd administration. During the Abbott/Turnbull/Morrison administration, over half (54 per cent) of political appointees were appointed as full-time members.

## Employment history

The analysis found that political appointees had very different employment histories compared with non-political appointees (see Figure 7). Whereas 40 per cent of non-political appointees had spent most of their working lives working in the law, only 24 per cent of political appointees had done so. As mentioned above, those working in the law included legal practitioners, legal academics, legal bureaucrats, public prosecutors and jurists.

**Figure 7: Work experience of political and non-political appointees (1996 to 2022)**



Source: Australia Institute original research.

There was also a significant difference in the proportion of political and non-political appointees who had spent most of their working lives in fields of work classified by the 'Other' category. The results indicate that 21 per cent of political appointees worked in fields covered by the 'Other' category compared with only 5 per cent of non-political appointees. The Other category includes all other fields of work not covered by the fields of law, medicine, social work and policy, public service and defence.

Tribunal annual reports state that '[p]ersons appointed as Members to the Tribunals have typically worked in a profession or have had extensive experience at senior levels in the private or public sectors'.<sup>33</sup> However, several appointees covered by the 'Other' category, and in particular those classified as political appointees, had spent majority of their working lives in occupations (or in some cases, a suite of occupations) that were either:

- a) not typically managerial occupations in which workers held bachelor level qualifications; or
- b) reasonably low on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) (in other words, below Managers and Professionals),

Within the eight-tiered ANSCO system, appointees were found to have worked in occupations covered by the four major groups immediately below the level of Professionals.

<sup>33</sup> MRT & RRT (2006) *Migration Review Tribunal and Refugee Review Tribunal Annual Report 2005-06*, [https://parlinfo.aph.gov.au/parlInfo/download/publications/taledpapers/32833/upload\\_pdf/HPP022016001430.pdf](https://parlinfo.aph.gov.au/parlInfo/download/publications/taledpapers/32833/upload_pdf/HPP022016001430.pdf)

These categories were, from highest to lowest, Technicians and trades workers, Community and personal service workers, Clerical and administrative workers and Sales workers.

Contrary to statements that political appointees and in particular elected representatives ‘actually make very good decision-makers in terms of looking at administrative decisions because they themselves have been responsible for administrative decision-making’,<sup>34</sup> the research found that the experience and expertise of political appointees in the field of public administration, including administrative decision making, varied significantly. Many appeared to have no experience in public administration outside of their political work.

Furthermore, some appeared to have little to no experience of public administration in the context of their political work. For example, while some advisers were engaged as ministerial advisers and may have developed some public administration experience related to particular policy areas, others appeared to be principally engaged in constituent management, event organisation and party/political policy and organisational work.

Likewise, whereas some elected representatives had experience of public administration and administrative decision-making through their role as a Minister or Parliamentary Secretary (38 per cent of all elected representatives appointed), others appeared to have limited public administration experience in the context of their political work. For this cohort, their experience in public administration appeared restricted mainly to committee work (where committee members are sometimes charged with assessing the implementation of government policy), prior work as a local Councillor or ministerial adviser (where applicable). In a Westminster system of government, only elected representatives who serve as Ministers and Parliamentary Secretaries have responsibility for administrative decision-making.

## Education levels

The analysis found that most political and non-political appointees (82 and 81 per cent respectively) held a tertiary degree of bachelor level or above at the time of appointment. Many also had a tertiary degree at the level of a master’s, with a minority also holding a PhD. In addition to law, degrees were held in arts, education, economics, science, social work and medicine amongst others.

The major difference in the education levels between political and non-political appointees was the proportion who had levels below the level of a bachelor’s degree and, in particular, a diploma. As Table 5 reveals, whereas only 2 per cent of non-political appointees appeared to have education levels below the level of a bachelor’s degree, 10 per cent of political

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<sup>34</sup> Porter (2019) *Transcript: 6PR Perth Mornings with Gareth Parker*, [https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/6522153/upload\\_binary/6522153.pdf](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/6522153/upload_binary/6522153.pdf)

appointees appeared to have this level of education. The difference was starkest for the lowest education level analysed. Whereas 7 per cent of political appointees appeared to have qualifications below the level of a diploma, only 1 per cent of non-political appointees appeared to have such a comparatively low level of education.

**Table 5: Education levels of political and non-political appointees (1996 to 2022)**

	Bachelor's degree	Diploma	Below diploma	No information	Total
<b>Political appointees</b>	82%	3%	7%	8%	100%
<b>Non-political appointees</b>	81%	1%	1%	17%	100%

Source: Australia Institute original research.

Further analysis also found that of this 7 per cent (8 political appointees), some did not appear to have completed Year 12. The eight individuals comprised six people who had served the Coalition and two who had served Labor. All were appointed by the Coalition. Consistent with the findings regarding work history, outside of their political work, those who had qualifications below the level of a diploma, were either typically engaged in managerial positions that were not typically populated by people who held a bachelor's degree, or who had worked in occupations below the level of professional in the ANZSCO system.

The analysis also found that there were marked differences in the education levels of political appointees appointed during the different administrations. Table 6 shows that 100 per cent of all political appointees appointed by Labor had a bachelor's level degree at the time of first appointment. By contrast, a lower 85 and 79 per cent respectively of all political appointees appointed by the Coalition during the Howard and later Abbott/Turnbull/Morrison administration appeared to have this level of education. Consistent with this, during the Howard administration 6 per cent of all political appointees appeared to have education levels below the level of a diploma. This level was 8 per cent during the Abbott/Turnbull/Morrison administration.

**Table 6: Education levels of political appointees by administration (1996 to 2022)**

Administration	Bachelor's degree	Diploma	Below diploma	No info	Total
<b>Howard (1996 to 2007)</b>	85%	3%	6%	6%	100%
<b>Rudd/Gillard/Rudd (2007 to 2013)</b>	100%	0%	0%	0%	100%
<b>Abbott/Turnbull/Morrison (2013 to 2022)</b>	79%	4%	8%	9%	100%

Source: Australia Institute original research.

## Legal qualifications

Significant differences were found in the proportion of political and non-political appointees who had legal qualifications that, with an additional year of professional training or a year of articles in a law firm, would enable them to gain admission as a legal practitioner. Whereas 45 per cent of all political appointees appeared to have legal qualifications, a significantly higher 59 per cent of non-political appointees appeared to have these qualifications at the time of appointment (see Table 7).

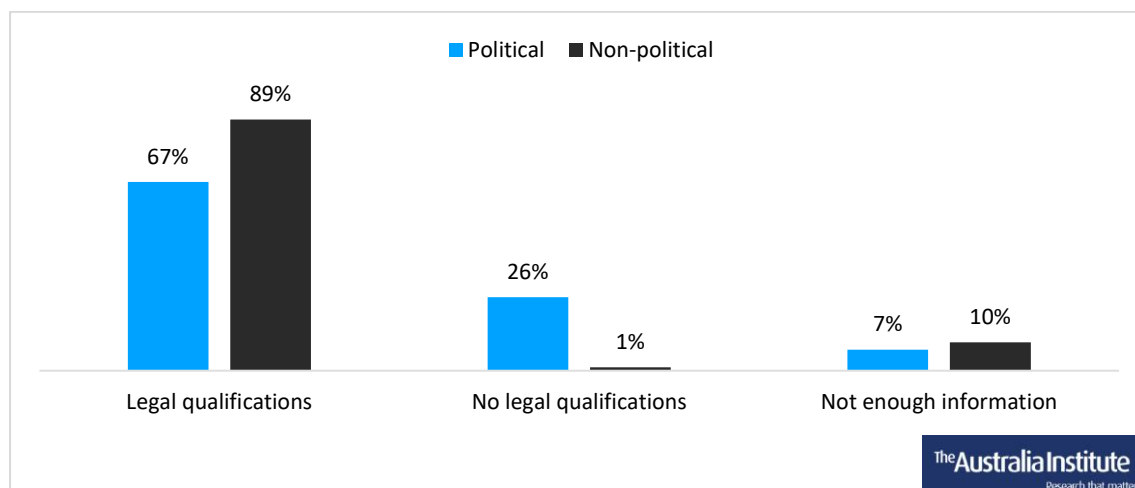
**Table 7: Legal qualifications of political and non-political appointees**

	Legal qualifications	No legal qualifications	No information
<b>Political appointees</b>	45%	47%	8%
<b>Non-political appointees</b>	59%	24%	17%

Source: Australia Institute original research.

Figure 8 shows there were particularly marked differences in the proportion of political and non-political appointees appointed as Senior Members without legal qualifications. Just over a quarter (26 per cent) of all political appointees appointed as Senior Members did not appear to have legal qualifications compared with only 1 per cent of non-political appointees appointed to this level. Legal qualifications are particularly important for Senior Members because they are ‘generally expected to hear and decide cases of greater complexity and challenge within one or more allocated caseloads’.<sup>35</sup> Furthermore, ‘[t]heir decisions should make a significant contribution to the Tribunal’s jurisprudence in that jurisdiction’.<sup>36</sup>

**Figure 8: Legal qualifications of political and non-political appointees appointed as Senior Members (1996 to 2022)**



Source: Australia Institute original research.

<sup>35</sup> Attorney-General’s Department (2021) *Documents released under FOI21/054*

<sup>36</sup> Attorney-General’s Department (2021) *Documents released under FOI21/054*

The results also reveal a significant change in the legal qualifications of Senior Members and above over time. Prior to the Abbott/Turnbull/Morrison administration, only one appointee was identified as having been appointed at the level of Senior Member or above at the time of first appointment who did not appear to have legal qualifications. They were not identified as a political appointee.

By contrast, over the approximately six-year period since 2016, seven people were identified as having been appointed to the AAT as Senior Members who did not appear to have legal qualifications. All seven (100 per cent) were political appointees and all were appointed by the Coalition. Together they represented 32 per cent of all political appointees appointed as Senior Members by the Abbott/Turnbull/Morrison administration (7 of 22 political appointees, out of 61 total appointed as Senior Members during the administration).

The results also indicate that the Coalition appeared more willing to appoint political appointees without legal qualifications than Labor (see Table 8). This appeared to include political appointees who had served the Labor Party. Of the nine political appointees who had undertaken political service for Labor and were appointed by the party over the roughly six-year period from 2007 to 2013, at least seven (78 per cent) had legal qualifications sufficient to qualify as a legal practitioner. By contrast, of the six political appointees who had served the Labor Party and were appointed by the Howard administration over the period 1996 to 2007, only two (33 per cent) appeared to have legal qualifications. Similarly, of the eight political appointees who had served the Labor Party and were appointed by the Coalition during the Abbott/Turnbull/Morrison administration, only three (38 per cent) appeared to have legal qualifications.

**Table 8: Legal qualifications of political appointees by administration (1996 to 2022)**

Administration	Legal qualifications	No legal qualifications	No information
Howard (1996 to 2007)	42%	52%	6%
Rudd/Gillard/Rudd (2007 to 2013)	80%	20%	0%
Abbott/Turnbull/Morrison (2013 to 2022)	42%	49%	9%

Source: Australia Institute original research.

## Legal experience

Consistent with the above, significant differences were found in the amount of legal experience of legally qualified political and non-political appointees at the time of first appointment.

Table 9 shows that while the proportion of political and non-political appointees with more than 16 years' experience at the time of first appointment appeared to be similar (33 compared with 36 per cent), a larger proportion of political appointees had lower levels of legal experience. Specifically, whereas 17 per cent of political appointees appeared to have less than 6 years of legal experience at the time of first appointment, a lesser 3 per cent of non-political appointees had this level of experience.

**Table 9: Legal experience of political and non-political appointees with legal qualifications (1996 to 2022)**

	No legal experience	Between 0.1 & 5.9 years	Between 6.0 & 15.9 years	More than 16 years	No information
<b>Political appointees</b>	2%	15%	24%	33%	26%
<b>Non-political appointees</b>	0%	3%	18%	36%	42%

Source: Australia Institute original research.

There were also significant differences within this cohort by appointing administration. In contrast to other findings, the Howard administration appeared to appoint a smaller proportion of political appointees with more than 16 years' experience than did the Abbott/Turnbull/Morrison administration who appointed a high 41 per cent of appointees with more than 16 years' experience (see Table 10). It was also notable that both the Rudd/Gillard/Rudd and the Abbott/Turnbull/Morrison administration appeared to appoint the same percentage (63 per cent respectively) of political appointees with more than six years' experience. However, whereas the Abbott/Turnbull/Morrison administration appeared to appoint 16 percent of political appointees with less than 6 years' experience, the Rudd/Gillard/Rudd administration appointed no appointees with this level of experience.

**Table 10: Legal experience of political appointees with legal qualifications by appointing administration (1996 to 2022)**

Administration	No legal experience	Between 0.1 & 5.9 years	Between 6.0 & 15.9 years	More than 16 years	No information
<b>Howard (1996 to 2007)</b>	0%	29%	29%	14%	29%
<b>Rudd/Gillard/Rudd (2007 to 2013)</b>	0%	0%	25%	38%	38%
<b>Abbott/Turnbull/Morrison (2013 to 2022)</b>	3%	13%	22%	41%	22%

Source: Australia Institute original research.



## Part 5: Discussion

The key findings from the research are as follows.

1. Based on available data on political associations, there has been a significant increase in political appointments to the AAT during the Abbott/Turnbull/Morrison administration, with 32 per cent of all new appointees being political appointees. This reached a peak during the second Morrison Government, with 40 per cent of all new appointments being political appointees. By contrast, in the Howard and Rudd/Gillard administrations, political appointees accounted for 6 and 5 per cent of all new appointments respectively.
2. Political appointees were more likely to be appointed as Senior Members than non-political appointees. Over the study period, 23 per cent of political appointees were appointed as Senior Members compared with 9 per cent of non-political appointees. Similarly, whereas 47 per cent of political appointees were appointed on a full-time basis at the time of first appointment, only 22 per cent of non-political appointees were appointed on this basis.
3. All administrations were far more likely to appoint political appointees who had served the appointing party or parties. Seventy-nine per cent of the Howard administration's political appointments went to those who had served the Coalition, 90 per cent of the Rudd/Gillard/Rudd administration's appointments to those who had served the Labor Party, and 89 per cent of the Abbott/Turnbull/Morrison administration's appointments to those who had served the Coalition.
4. There was considerable variability in the qualifications and experience of political appointees over the study period. While some political appointees had legal qualifications and significant legal experience, others had low education levels and no professional experience outside of their political employment. A high 10 per cent of political appointees had education levels below the level of a bachelor's degree compared with 2 per cent of non-political appointees. All political appointees with education levels below the level of a bachelor's degree were appointed by the Coalition.
5. Political appointees were less likely to have legal qualifications than non-political appointees. They were also more likely to have less legal experience.

The 'stacking' of the AAT with political appointees is having two adverse impacts:

- a) it is eroding the perceived and actual independence of the AAT; and
- b) it is weakening the capacity of the AAT to perform its functions.

These impacts are discussed in turn below.

## Independence and impartiality

In making appointments to the RRT in 1997, Liberal Attorney-General Phillip Ruddock stated, '[t]ribunal members need to be impartial and free from bias'.<sup>37</sup> The results as presented above, however, raise concerns about the functional independence of the AAT and the perceived capacity of some members to conduct reviews in an impartial manner. The reason for this is that the systemic appointment of members who have worked for the appointing party raises concerns that at least some members have been appointed as a method of procuring policy control.<sup>38</sup>

This outcome can be achieved both directly and indirectly. In relation to the former, appointed members could be expected to make decisions that are broadly in line with government policy and which protect the political interests of the government and its core constituencies. In relation to the latter, the systemic appointment of people who have worked for the governing party (including those who may not possess sufficient qualifications and experience) could be expected to influence the decisions of at least some other members on a conscious or subconscious level. Members who are not political appointees are likely to perceive that their on-going employment is not contingent upon how well they perform in making decisions but rather whether they make decisions that support government policy. Reflecting this, in their anonymous submission to the Senate inquiry, a former member noted the current level of anxiety amongst some members.

Pre-2014 Members who had their appointments coming to an end rightly feared their heads were on the chopping blocks, knowing that appointments are not made on merit.<sup>39</sup>

This person also writes that '[t]he new Members spoke of being given an application form from their accountant and/or of having someone in the Liberal Party sponsor them'.<sup>40</sup>

The data appears to suggest that the Abbott/Turnbull/Morrison administration, in particular, used the practice of cronyism to procure policy control. This is evidenced by the Abbott/Turnbull/Morrison administration's significant increase in the appointment of political appointees who had served the Coalition, and potentially by the appointment of

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<sup>37</sup> Ruddock (1997) *New members for Refugee Review Tribunal*,

[https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/LDF30/upload\\_binary/LDF30.pdf](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/LDF30/upload_binary/LDF30.pdf)

<sup>38</sup> No adverse inference should be drawn about any appointees or the behaviour of particular appointees on the AAT. The research did not look at the decisions and other relevant behaviour of any appointees on the AAT. Accordingly, no comments are made about whether they adhered to the appointing government's policy or political positions, and no inferences should be drawn about appointees' behaviours in this regard.

<sup>39</sup> Anonymous (2022) *Submission 34*,

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Adminreviewsystem/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Submissions)

<sup>40</sup> Anonymous (2022) *Submission 34*

particular political appointees who had decision-making or advisory responsibility for some reviewable policy areas.

The apparent increase in the use of appointments to achieve policy control appears to have been driven mostly by concerns related to the AAT's role in the review of decisions in the migration portfolio. Evidencing this level of government concern, in 2018, Home Affairs Minister Peter Dutton argued that '[w]e have a problem with the AAT and there's no sense pretending otherwise'.<sup>41</sup> In the context of a discussion about the AAT's decision to overturn the cancellation of some visas, the Minister also stated that the AAT 'does not reflect ... the views of the Australian people'.<sup>42</sup> He then added:

[w]e are looking at ways in which we can reform ... the migration aspect of the AAT and I want to make sure that if we cancel the visa of someone who has committed serious criminal offences ... that person ... has their visa cancelled and they're deported from our country'.<sup>43</sup>

The reform of the AAT would appear to have extended to the appointment of members who met particular criteria. As former Attorney-General Christian Porter stated:

My ... personal thoughts about this last range of AAT appointments is I was very keen to get people who would reflect community values in migration decisions, because we have had a very large number of ministerial migration decisions overturned by the AAT, about 39 per cent for last year, in excess of 4000. And I was looking for a range of people who I thought would reflect community values in very important decisions on migration matters, visa applications and particularly, where our Minister has taken visas off people who've been charged and convicted of criminal offences in Australia.<sup>44</sup>

Issues of actual and perceived bias were also noted in relation to the appointment of some non-political appointees. Over the study period, several non-political appointees (appointed on a full-time basis) had worked, immediately prior to their appointment, for one of the federal departments whose administrative decisions were reviewed by the tribunal they had been appointed to. They were the Department of Social Services and the Department of Immigration. Indeed, some appointees were actively involved in AAT appeals from within the relevant Department immediately prior to appointment.

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<sup>41</sup> Dutton (2018) *Interview with Ray Hadley, Radio 2GB-ABC*, <https://minister.homeaffairs.gov.au/peterdutton/Pages/Hadley-Ray,-2GB.aspx>

<sup>42</sup> Dutton (2018) *Interview with Ray Hadley, Radio 2GB-ABC*

<sup>43</sup> Dutton (2018) *Interview with Ray Hadley, Radio 2GB-ABC*

<sup>44</sup> Porter (2019) *Transcript: 6PR Perth Mornings with Gareth Parker*

## Capacity, performance and workplace culture

In addition to impacts upon independence and impartiality, the results raise concerns about the capacity of some members to undertake their statutory duties to the highest possible standard. They also raise concerns about the impact the appointment of members who may not possess sufficiently high skills is having on both the overall performance of the organisation and the morale of other members and staff.

Two anonymous submissions to the current Senate inquiry indicate these concerns are well-founded. One submission was written by a former member who had served for over twenty years.<sup>45</sup> The other was written by current and former staff of the organisation.<sup>46</sup>

The concerns raised in the submissions about the capacity of appointees include:

- a) the lack of basic office-based employment skills possessed by some members such as the ability to type, save a document in Microsoft Word or access resources on the Internet;
- b) the lack of legal skills of some members and the time wasted in having to repeatedly assist them;
- c) the poor attitude of some members towards their role and their lack of interest in ensuring that hearings are conducted in a procedurally fair manner and that lawfully sound decisions are made;
- d) the lack of a merit-based culture within the organisation and the impact this is having on the morale of staff;
- e) the increased likelihood that poorly drafted decisions will be remitted from the courts for re-consideration; and
- f) as a result of the above, the disservice being done to applicants to the AAT.<sup>47</sup>

While the appointment of some members who lack skills in the areas outlined above could be expected to be absorbed by the organisation to some degree, the appointment of so many members who fall within this category appears to have adversely affected the overall performance of the organisation. As a result of this, the former member writes that the AAT's performance as review body that is 'accessible, fair, just, economical and quick' has declined to 'unacceptably low levels' and that this is attributable to 'the appointment process for Members'.<sup>48</sup> Prior to 2014:

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<sup>45</sup> Anonymous (2022) *Submission 34*

<sup>46</sup> Anonymous (2022) *Submission 35*,

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Ad\\_minreviewsystem/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Ad_minreviewsystem/Submissions)

<sup>47</sup> Anonymous (2022) *Submission 34*; Anonymous (2022) *Submission 35*

<sup>48</sup> Anonymous (2022) *Submission 34*

[t]he process of selecting Members was standard. The positions were advertised, people applied, and suitable people interviewed, and references checked before commencing or recommencing appointment. This standard process stopped in around 2014. I witnessed highly experienced and efficient Members, whose performance appraisals documented them exceeding expectations in all areas, dumped and replaced by inexperienced inefficient post-2014 Members...<sup>49</sup>

The other anonymous submission made similar remarks, noting that '[t]ribunal staff with relevant skills, knowledge and experience are unable to advance in their careers and be meaningfully considered for appointment'.<sup>50</sup> They also attributed the decline in the organisation's performance to the process for appointments.

Since [2015]... any new appointments to the Tribunal have not been selected via an open, transparent merits based process whereby the most suitable applicants are identified and appointed. New appointments have occurred by invitation only and to the exclusion of anyone who is not acquainted with the relevant powerbrokers.<sup>51</sup>

The practice of cronyism would also appear to have created an unhealthy division between different social groups within the tribunal. According to the former member, 'Liberal Party appointees formed cliques which excluded staff and other Members'.<sup>52</sup> Some members also 'gloat[ed] about expecting reappointment irrespective of their performance'.<sup>53</sup>

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<sup>49</sup> Anonymous (2022) *Submission 34*

<sup>50</sup> Anonymous (2022) *Submission 35*

<sup>51</sup> Anonymous (2022) *Submission 35*

<sup>52</sup> Anonymous (2022) *Submission 34*

<sup>53</sup> Anonymous (2022) *Submission 35*

# Part 6: Recommendations

In order to restore the independence, impartiality, competency and hence integrity of the AAT, the following actions and reforms are recommended.

## Independent review

1. An independent Commission of Inquiry into appointments to the AAT, with a particular focus on the period 2014 to 2022, should be conducted. This inquiry should have the power to compel people to give evidence.

## Current membership

2. As soon as possible after Parliament is resumed, special legislation should be introduced into Parliament revoking, where legally possible, all membership positions on the AAT. This is the simplest, quickest and most effective way of restoring the independence, impartiality, capacity and integrity of the organisation. All new appointments and re-appointments should be made in line with the criteria set out below.

## Future membership

3. All people who have worked in either a paid or unpaid role for a party with representation at the federal level (for example, former elected representatives, advisers, candidates and party office holders (broadly described)) should be ineligible for appointment to the AAT until at least four years has elapsed from the date at which they last undertook that paid or unpaid role. All people appointed to the AAT should also be required to publicly declare any past political activity that fits within the above definition that was undertaken within the preceding eight years.
4. If AAT decisions continue to be made by one member only, all people appointed to the AAT should possess legal qualifications that allow them to practice as a legal practitioner (regardless of whether or not they have completed their final professional year required for entry as a legal practitioner). Deputy Presidents should have at least 16 years' experience as a legal practitioner, legal academic, legal bureaucrat, public prosecutor or jurist post enrolment on a full-time equivalent basis, Senior Members 12 years, and Members at least 8. The Minister may be given discretion to appoint a person with fewer years' legal experience but only in exceptional circumstances. Furthermore, the capacity to appoint a person who does not have the requisite level of experience should be curtailed such that a Deputy President must have no less than 14 years full-time equivalent experience as a legal

practitioner, legal academic, legal bureaucrat, public prosecutor or jurist, Senior Members no less than 10 years, and Members no less than 6. All reasons for exceptions should be tabled in Parliament.

5. All people appointed to the AAT should be appointed for a period of at least five years.
6. All people appointed to the AAT should be appointed through an open and transparent selection process. Ministers may request that certain people be asked to nominate for appointment, but Ministers should not be able to appoint people who have not been recommended for appointment by a selection panel. In constructing the selection panel, care should also be taken to ensure that it includes legal experts who are not employed by the Australian Government or the appointing party, and that Australian Government bureaucrats, or people otherwise engaged by the Australian Government as contractors, do not possess a majority on the panel.
7. All members of the AAT should be required to publish details of their qualifications and prior work experience covering the level of experience required for appointment as detailed above. Details should be published in annual reports and include the first date of admission as an Australian legal practitioner (where applicable).
8. Conflict of interest provisions should be amended to preclude the concurrent appointment of people who are working as lobbyists or who have worked for a government department whose decisions are reviewed by the AAT in the four years prior to appointment. People serving as current members of the defence force (not in the Defence Force Reserves) should be ineligible for appointment as should people currently employed or contracted by the Australian Government.
9. All appointees should be required to resign their membership of a political party whilst serving on the AAT. Members who wish to stand for pre-selection should similarly be required to resign their appointment to the AAT prior to re-joining the relevant party.
10. All recommended changes to appointment criteria and the process for appointment should be reflected in the AAT's enabling legislation.

# Appendix 1: Decisions rules for research process

Several decision rules were applied in the conduct of the research. These are discussed below.

## General

- a) In order to ensure material was being collected on the right person, information pertaining to an appointee's position on a relevant tribunal was data matched. In most cases, this was achieved by finding biographical information explicitly detailing an appointee's employment on the relevant tribunal. Sources included annual reports, government media releases, online biographies, organisational websites, personal websites and networking websites such as LinkedIn amongst others. Where no explicit confirmation of an appointee's employment on a tribunal could be found, other government derived data points were matched. For example, members of the SSAT were typically ascribed to three different types of membership (legal, medical and welfare) and to a particular jurisdiction. This data was then matched with other data sources (for example, admission details found on the websites of the Law Societies of Australian states and territories) in order to confirm the right appointee. Where no information could be found to provide a data match, or where uncertainty about an appointee remained due to their being other people with the same name, no data was recorded.

## Work hours

- b) In some cases, the work hours of Senior Members were not recorded in annual reports. These appointees were assumed to have been appointed on a full-time basis because members who had been appointed on a part-time basis were recorded in the same annual reports. In all other instances where no information was available, no data was recorded.

## Political associations

- c) As mentioned previously, analysis of the political associations of appointees was restricted to those who had worked in either a paid or voluntary capacity for a party with representation at the Commonwealth level and had thus provided significant levels of political service to that party. This included elected representatives, advisers and other staffers, candidates, pre-selection candidates, party officials and others who worked for party-affiliated organisations. It did not include those who had been engaged



by a party as a consultant, worked at senior levels of the bureaucracy, provided non-ongoing pro-bono advice or who were found to be party members with no other publicly available record of political service.

- d) To be recorded as being a political appointee, evidence of political activity had to be evident at the time of appointment. This meant that appointees whose political activity was only evident after the time of their appointment were not included.
- e) Where an appointee had been engaged in more than one political role, only one role was recorded in accordance with the following order of hierarchy: elected representatives (highest), advisers, candidates, pre-selection candidates, party officials, party-affiliated organisations (lowest). The application of this hierarchy meant, for example, that if an elected representative had also worked as an adviser, they would be categorised as an elected representative.
- f) Elected representatives were defined to mean any person elected to federal, state or local government as a representative of a party. Party officials were defined to mean any person holding either a paid or unpaid office-bearing position for a party at a local, state or federal level. This included those who had served as an office bearer for party clubs at university. Party affiliated organisations were defined to mean organisations explicitly affiliated with a particular party. They included official party think tanks, foundations and unions. The definition did not include organisations whose aims were in broad agreement with the preferences of a political party but where no formal affiliation was found to exist.
- g) Evidence of working as an adviser included the inclusion of the appointee's name as a media contact on a media release of an elected representative where there was no suggestion that they were either a departmental employee or worked for an external organisation.

## Employment history

- h) The work history of appointees was analysed by assessing the field in which an appointee had the greatest amount of work experience at the time of their first appointment during the study period. To make this assessment, two pieces of data were used. First, a career beginning date (or period), and second, reasonably detailed biographical material covering the breadth of a person's career until the point of appointment. Where this information could not be found, evidence of genuine seniority within a field (for example, having been appointed an SC or a QC in the legal profession) before or around the time of appointment was accepted if no other field of work was indicated. Likewise, if no exact career beginning date could be found, reasonably detailed biographical material covering a substantial time period was accepted if it appeared likely that this employment covered the majority of an appointee's working life. For all other instances in which there was not enough information available to make an assessment, no data was recorded. This meant that for some appointees, evidence of qualifications was recorded but not evidence of work history. The reason for this is that

the presence of a qualification does not necessarily mean that a person has either worked in that field, or for most of their working lives.

- i) Employment history was divided into eight categories: law; medicine, social work & policy, defence, public service, politics and other. As outlined above, the law category was defined to include work as a legal practitioner, legal bureaucrat, public prosecutor or legal academic. The medicine category was defined to include work as any type of medical practitioner including psychiatrists and medical administrators. The social work & policy category was defined to include all work related to both practical and policy-orientated social and community work including community development, disability support and counselling. The defence category was defined to include all work in the military and defence bureaucracy. Military lawyers were included in the law category. The public service category was defined to include all other work in the public service not otherwise categorised. The politics category was defined to include all work as elected representative, adviser, party office holder, party worker etc. The other category included all other fields not otherwise categorised.

## Qualifications

- j) The qualifications of appointees were analysed by assessing whether appointees had a bachelor level degree or above, a diploma or qualifications below the level of a diploma.
- k) Where no information could be found, the data was recorded as such. However, where government reports or databases listed the qualifications of all other appointees, and none were recorded for a particular appointee, that appointee was described as having qualifications below the level of a diploma.
- l) Unless evidence to the contrary could be found, appointees were assumed to have acquired any bachelor or diploma level degrees they held at the time of their appointment to the relevant tribunal.
- m) Legal members of the SSAT were assumed to have a law degree sufficient to qualify for admission as a legal practitioner at the time of their first appointment even if no publicly available biographical evidence of a law degree could be found. Likewise, medical members of the SSAT were assumed to have a medical degree (of some type) at the time of their appointment even if no publicly available biographical evidence of a medical degree could be found. However, welfare members were not assumed to have a tertiary degree as, unlike legal and medical members, instances were found where welfare members either did not have a degree or did not have a degree in social work, counselling etc. In these instances, no data was recorded. Additionally, legal and medical members of the SSAT who were analysed in accordance with this rule were assumed to have only legal or medical degrees respectively.
- n) In instances where it was difficult to ascertain the commensurate level of a post-graduate qualification, no data was recorded.
- o) Legal qualifications were defined as undergraduate or postgraduate legal qualifications that enabled students (with an additional year of professional study or the completion of a year of articles), to gain admission as an Australian legal practitioner. Post-graduate

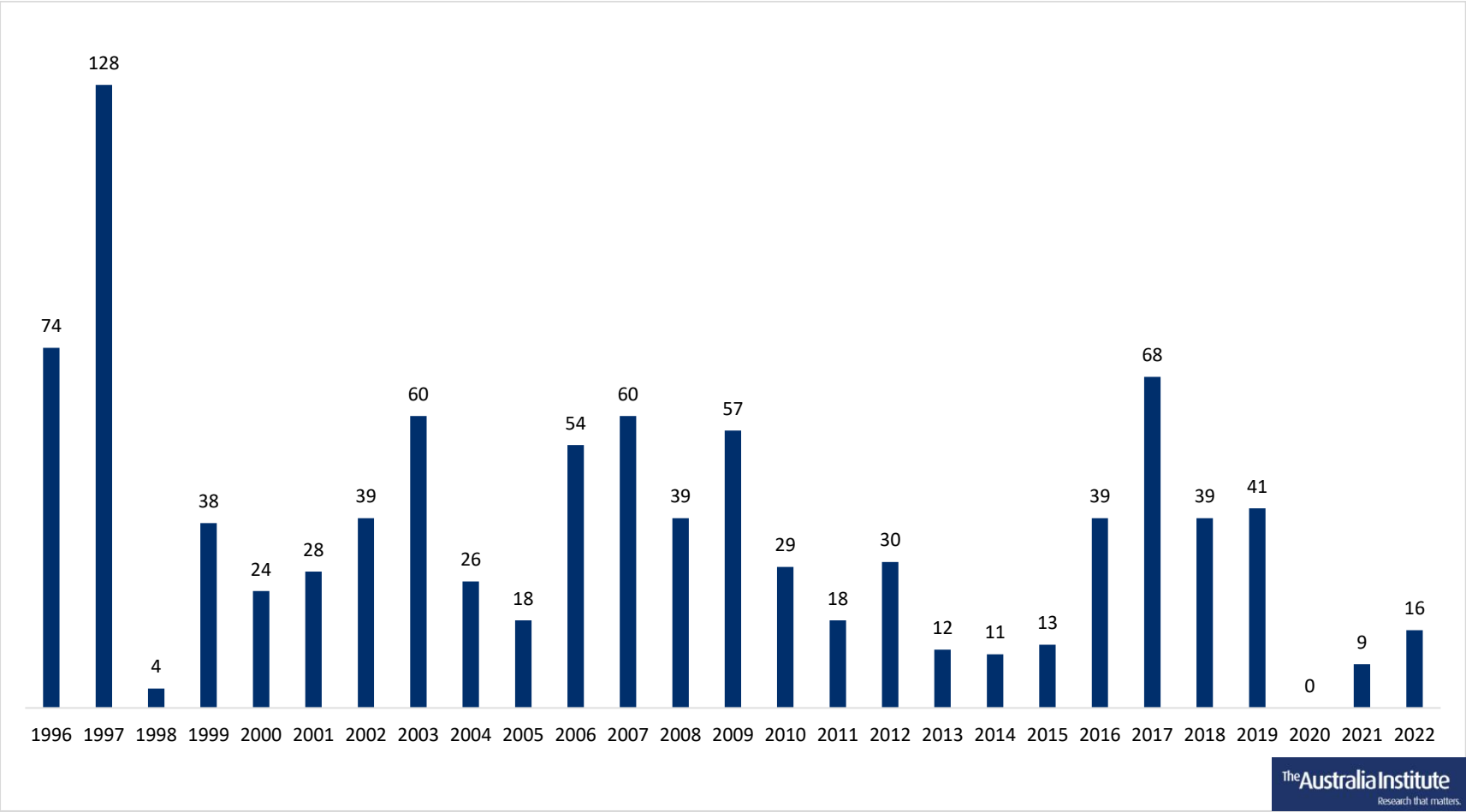
legal degrees including research degrees that did not meet this threshold were not included within this definition.

- p) If appointees were described as a legal practitioner in a government document or in a document authored by them, it was assumed that they had legal qualifications even where there was some ambiguity in the qualifications otherwise indicated.

## Legal experience

- q) The amount of time those with legal qualifications (sufficient to qualify as a legal practitioner with or without having completed a professional year of training or a year of articles) spent working in the law prior to appointment was calculated. Work in the legal profession was defined to mean work as a legal practitioner (barrister or solicitor), legal bureaucrat (working as a solicitor or legal policy officer within the bureaucracy or in the Crown solicitor's office), public prosecutor or legal academic. To make this assessment, two pieces of data were used. As with the method for quantifying an appointee's work history, these were a career beginning date in the law (which may be before formal admission), and second, reasonably detailed biographical material covering the breadth of a person's career in the legal profession until the point of appointment. Overseas legal work experience was counted towards this assessment.
- r) The number of years spent working in the law was subsequently classed as follows: nil, between 0.1 and 5.9 years, between 6 and 15.9 years and more than 16 years. Where there was uncertainty, appointees were always categorised into the higher group.
- s) In some cases, appointees with legal qualifications were not working full-time in the law and were working in fields that were only partially legally focused. For example, working as a political adviser doing a mixture of legal and political work. In these cases, the amount of time spent working in the relevant position was halved. Likewise, where an appointee left the legal profession for a period (either to take up different employment or for a period of leave), this period was deducted.

# Appendix 2: New appointments by year (1996 to 2022)



Source: Australia Institute original research.