

Submission: Administrative review body reform

All responses are based on the Australia Institute's 2022 report 'Cronyism in appointments to the AAT' by Debra Wilkinson and Elizabeth Morison

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MEMBERS

Should all members be required to be legally qualified to be eligible for appointment?

The functions of an administrative review body require legal skills. Members exercise statutory powers in accordance with the law, requiring them to interpret empowering legislation and apply facts to the law. When making decisions, they also must “determine the weight that should be given to any evidence”, and ensure procedurally fair proceedings.

A 2022 analysis by the Australia Institute found that political appointees had very different employment histories compared with non-political appointees. 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.

The new administrative review body should have provisions in exceptional circumstances for ordinary Members to be appointed on the basis of relevant “special knowledge or skills” (including but not limited to disability, medicine, migration, public administration, taxation and military affairs), to provide for diversity of perspectives. However, every decision made by a new administrative review body should be made

collaboratively with a member with legal qualifications. This means for decisions made by one member, that this member should have legal qualifications. Decisions made by a panel of experts should include at least one member with legal qualifications.

The establishment of the new administrative review body is an opportunity to strengthen the rules around the requirements for legal expertise to be eligible for appointment. People appointed to the AAT as legally qualified members 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 requirements that the President of the administrative review body must be a judge of the Federal Court of Australia, and to have "appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court" should remain.

Recommendation: 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.

What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?

Historically, the rules about appointments based on relevant “special knowledge or skills” have been weak and misused by the previous Government to facilitate cronyism in appointments. Australia Institute research found that the public administration experience of political appointees to the AAT, including those who had been elected representatives, varied significantly. Many appeared to have no experience in public administration outside their political work and some had little or no such experience even in the course of their political work.

The AAT’s effectiveness suffered as a result of some appointees lacking office-based and legal skills, the poor attitude of some members and their lack of interest in conducting proceedings to ensure lawfully sound decision-making, the lack of a merit-based culture and the impact of this on staff, and poorly drafted decisions being remitted from the courts for re-consideration.

To avoid these weaknesses, and to protect the independence and capacity of the new administrative review body, tight rules are needed in relation to the appointment, qualifications and experience of members. Legal qualifications are the most important qualifications for members of a new administrative review body. Legally qualified candidates with relevant additional subject-matter expertise, which may include but is not limited to accountancy, aviation, disability, engineering, medicine, migration, pharmacology, military affairs, public administration, science, social welfare and taxation, should be sought out to round-out the skills and experience of the new administrative review body.

As discussed above, even if those without legal qualifications are appointed to the new administrative review body, decisions should include at least one member with legal qualifications.

APPOINTMENTS AND REAPPOINTMENTS

Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?

Any changes to appointments for the AAT or a similar body should be reflected in the legislation.

Recommendation: All recommended changes to appointment criteria and the process for appointment should be reflected in the AAT's (or similar body's) enabling legislation.

Recommendation: 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.

Recommendation: 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.

Recommendation: All people appointed to the AAT, or similar review body, should be appointed for a period of at least five years.

Recommendation: All people appointed to the AAT, or similar review body, 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.

Recommendation: All members of the AAT, or similar review body, 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).

Recommendation: 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, or similar review body, 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.

Recommendation: All appointees should be required to resign their membership of a political party whilst serving on the AAT, or similar review body. Members who wish to stand for pre-selection should similarly be required to resign their appointment to the AAT, or similar review body, prior to re-joining the relevant party.

Should the legislation require the Minister to consult the President before appointing or reappointing members?

See response to above question.

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party, and that Australian Government bureaucrats, or people otherwise engaged by the Australian Government as contractors, do not possess a majority on the panel.

What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?

In the past, informal appointment processes have been used as a way of guarding against the making of crony appointments to the AAT and the tribunals that were merged into them. For example, 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'. Other protocols in the past 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.

However these informal protocols have not fully constrained the practice of cronyism. In the AAT, Ministers appointed candidates who did not apply or interview, and were not recommended by a committee. In some cases, these appointments were made without consideration of a candidate's curriculum vitae.

Formal protocols to prevent political appointments are an essential component of any transparent and merit-based appointment process for the new administrative review body.

In addition, the Australia Institute recommends that potential appointees should be shortlisted by an independent panel to assess their merit and that all members should be required to publish their qualifications and work experience.

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What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?

The Australia Institute recommends five years as the minimum length of an appointment to the administrative review body.

Short tenures, particularly when the length of tenure is at the discretion of the relevant Minister, give the government undue influence on members, who may feel pressure to make decisions that will encourage the government to reappoint them. Longer appointments make members more independent.

Recommendation: All people appointed to the AAT should be appointed for a period of at least five years.

How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?

The independence of a new administrative review is of paramount importance, considering the lack of independence of the preceding AAT. Political appointments in the AAT – including elected representatives, those employed by the Government in public administration, or recommended by ministerial offices – raised concerns that at least some members were appointed as a method of procuring policy control.

The most obvious form of policy control would have been from political appointments making decisions that protected the political interests of the government and its core constituencies. More indirectly, political appointees may have influenced the decisions of other members, or given the impression that their on-going employment was not contingent upon how well they perform in making decisions but rather whether they make decisions that support government policy.

To avoid this conflict of interest, and to protect the integrity of a new administrative review body, appointments should always be made based on the recommendations of an independent panel, who would consider the qualifications of every candidate.

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'. All of these provisions to avoid conflicts should remain for the new administrative review body. The new body should also require an equivalent measure to 11(a) to be extended to apply to those who hold an office or appointment in the Defence Force. Appointments to the administrative review body should also be required to resign their membership of a political party.

Recommendation: 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.

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N.B. No adverse inference should be drawn about any appointees or the behaviour of particular appointees on the AAT. The Australia Institute's 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.

What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter. What consequences for the member should follow from such a conflict?

See response to the question above, noting in particular that there should be a cooling-off period before those who have worked for a party can be appointed to the AAT and that members who wish to join or re-join a party should be required to resign their appointment to the AAT first.

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