

Performance and integrity of Australia's administrative review system

Submission to the Senate Legal and Constitutional
Affairs References Committee

5 November 2021

Contents

| | |
|---|---|
| Who we are..... | 4 |
| Introduction | 5 |
| The importance of the AAT as a mechanism of ensuring government accountability..... | 6 |
| The need for independence in appointment to the AAT..... | 6 |
| Reform proposals on appointments and independence | 7 |
| Conclusion..... | 9 |

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry being conducted by the Senate Legal and Constitutional Affairs References Committee ('the Committee') into the performance and integrity of Australia's administrative review system.
2. The ALA will confine this submission to comments relating to the selection process of members for the Administrative Appeals Tribunal ('AAT').
3. The ALA considers that the process of appointments to the AAT needs to be open, fair, transparent and merit-based, to promote equity and diversity. The ALA considers that a review of the appointment process is necessary to secure the tribunal's independence and the public perception of that independence.
4. The ALA submits that the AAT performs a vital role in delivering access to justice for people who are affected by government decision, by virtue of its relative accessibility and informality. However, the ALA is concerned that public credibility and confidence in the AAT is significantly undermined by concerns that appointments to the Tribunal reflect partisan political interests. The ALA agrees with Administrative Law expert Assistant Professor Narelle Bedford from Bond University:

The AAT facilitates access to justice by conducting merits review of government decisions thereby permitting ordinary people to have their voice heard when their matter is reviewed by an independent, expert body. The availability of independent review increases public confidence in government decision-making because it shows the government's commitment to transparency. These positive benefits are at risk if the public perceives the appointment process as undermining the independence of the AAT.²

² Narelle Bedford, 'AAT: Importance, Independence and Appointments' on AUSPUBLAW (10 April 2019) <<https://auspublaw.org/2019/04/aat-importance,-independence-and-appointments/>>.

The importance of the AAT as a mechanism of ensuring government accountability

5. The ALA considers that that the AAT is a vital mechanism for ensuring accountability for government decision-making. The AAT was and remains an integral part of various reforms designed by Parliament to improve Australian public administration.
6. As such there are situations where the AAT may be placed in a situation of conflict with the Federal Government. The challenges this presents to the independence of the AAT were described by Justice Logan, Acting President in *Singh (Migration)* [2017] AATA 850:

The very existence of the Tribunal and the independent, quasi-judicial model adopted for it means that, inevitably, there will be tension from time to time between Ministers and others whose decisions are under review and it... These are inherent features of any checks on the exercise of arbitrary power.³

The need for independence in appointment to the AAT

7. Given the vital role of the AAT as an accessible and relatively informal forum for dispute resolution and ensuring accountability for government decision-making it is essential to ensure the independence of appointments of all members of the AAT.
8. The Administrative Review Council ('the ARC') acknowledged the importance of independence (and public perceptions of independence) in Commonwealth tribunals, stating that –

It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence.⁴

9. The ARC further commented that 'applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and

³ *Singh (Migration)* [2017] AATA 850, per Logan, J, paragraph 17.

⁴ Administrative Review Council. 1995. *Better Decisions: Review of Commonwealth Merits Review Tribunals*. Report to the Minister for Justice. Report No. 39, paragraph 4.4.

make a different decision to that of the relevant government agency where they consider that appropriate.' To emphasise the point the ARC explicitly stated that it is crucial to ensure that there is no perception (let alone any reality) that tribunals are in any way subject to undue influence either in reaching decisions in particular cases or more generally.⁵

10. Currently all appointments to the AAT are formally made by the Governor-General pursuant to section 6(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act'), although in reality appointments are the responsibility of the Attorney-General. Under section 7(3) of the *AAT Act* the broad qualifications required for appointments for senior members and other members (non-judicial appointments) are:

- Enrolled as a legal practitioner for at least 5 years; or
- Special knowledge or skills relevant to the appointed duties.⁶

11. Given the broad phrasing of section 7(3), the ALA is concerned that there is significant potential for partisan appointments of members who have close association with or membership of a political party.

12. The ALA notes that there has been a history of partisan appointments to the AAT by both major political parties and is concerned that its public credibility may be at risk of criticism due to the repeated occurrences of partisan appointments. Accordingly, the ALA submits that there is need to ensure that the process of appointments to the AAT is open, fair transparent and merit-based, to promote equity and diversity, and to reduce the potential for appointments made on the basis of political patronage, political party association or membership.

Reform proposals on appointments and independence

13. In 1995 the ARC published a detailed review of Australia's federal merits review system.⁷ In the resulting report the ARC stated that the selection and appointment process for all

⁵ Ibid, paragraph 4.5.

⁶ Section 7(3), *Administrative Appeals Tribunal Act 1975*(Cth).

⁷ Administrative Review Council. 1995. *Better Decisions: Review of Commonwealth Merits Review Tribunals*. Report to the Minister for Justice. Report No. 39.

tribunal members should be rational, merit-based and transparent, with the following elements:

- All prospective members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives;
- Those selection criteria should be made publicly available, as should the various steps to be followed in the selection process itself, so that members of the public can see what skills are required of potential tribunal members and how candidates will be assessed;
- Assessment against the criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments; and
- Appointments should only be made from within a pool of people who have been through such a process and assessed as suitable to perform the required task.⁸

14. The report included the following specific recommendations regarding selection of tribunal members and terms of appointments:

Recommendation 33: All prospective review tribunal members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives.

Recommendation 34: Selection criteria for review tribunal member positions should be made publicly available, as should information about the nature of the selection process to be followed.

Recommendation 35: Assessment of applicants for review tribunal membership against selection criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments.

Recommendation 36: Appointments of members of review tribunals should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment.

⁸ Ibid, paragraph 4.35.

Recommendation 37: Assessment panels should consider the use of a range of techniques for testing the suitability of applicants for review tribunal membership.

Recommendation 38: The assessments made by assessment panels of the suitability of applicants for review tribunal membership against the selection criteria should be documented. Applicants should be given access to their own assessment on request.

Recommendation 41: Review tribunal members should be appointed for terms of between three and five years.

Recommendation 42: Review tribunal members should be eligible for reappointment.⁹

15. The ALA submits that the ARC recommendations provide a sensible framework for the selection and appointment process for members of the AAT and should be formally adopted by the Australian Government Attorney-General's Department.

Conclusion

16. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into this inquiry into the performance and integrity of Australia's administrative review system. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Graham Droppert SC

President

Australian Lawyers Alliance

⁹ Ibid, Chapter Four, Tribunal Membership.