

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Administrative Appeals Tribunal

Question I:

Senator Hon Kim Carr asked the following question on 18 January 2021:

AAT Members empowered to issue warrants under s 3ZZAF of the Crimes Act, the Surveillance Devices Act and the Telecommunications (Interception and Access) Act

1. Please provide the names of all Deputy Presidents, Senior Members and Members nominated to issue warrants under these Acts / provisions.
2. In relation to the two Senior Members who are nominated to issue warrants under the Surveillance Devices Act and Telecommunications (Interception and Access) Act who are not enrolled as legal practitioners:
 - a. Do both of those senior members have law degrees?
 - b. What qualifications do those two senior members have?
 - c. How many warrants under the Surveillance Devices Act and Telecommunications (Interception and Access) Act did each of those two members issue in 2018/19, 2019/20, 2020/21 and 2021/2022 (to date)?
 - d. How many applications for warrants under the Surveillance Devices Act and Telecommunications (Interception and Access) Act did each of those two members refuse in 2018/19, 2019/20, 2020/21 and 2021/2022 (to date)?
 - e. Are those two members part time or full time?

The response to the Honourable Senator's question is as follows:

Question 1

Persons appointed as members of the Administrative Appeals Tribunal (AAT) who meet the specified eligibility requirements may be nominated or appointed under the following provisions to issue warrants and perform related functions under these Acts:

- section 3ZZAF of the *Crimes Act 1914* (Crimes Act)
- section 13 of the *Surveillance Devices Act 2004* (Surveillance Devices Act)
- section 6DA, 6DB and 6DC of, and items 15, 16 and 17 of Schedule 1 to, the *Telecommunications (Interception and Access) Act 1979* (Interception and Access Act).

Members undertake these functions in their personal capacity (as a *persona designata*) and not as part of their duties as a member of the AAT under the *Administrative Appeals Tribunal Act 1975*. Applications made under the Acts are dealt with exclusively by the AAT member, in confidence in accordance with the requirements of the relevant legislation. AAT staff provide limited administrative assistance to members, primarily scheduling appointments.

The power to nominate or appoint a person under the above-mentioned provisions rests with the Attorney-General. A request for complete and accurate information about persons who have been so authorised should be directed to the Attorney-General's Department.

To the extent the AAT holds information about members who have been authorised under the above-mentioned provisions, the AAT does not publicly disclose their names. The issuing of warrants for law enforcement purposes, particularly in relation to the investigation of serious offences, gives rise to potential risks to the safety of persons undertaking these functions. Public disclosure of their identity may also affect the willingness of eligible AAT members to continue to consent to perform the functions and prejudice the maintenance of lawful methods for the protection of public safety.

While some AAT members have brought their status as persons authorised to perform persona designata functions to the attention of the Committee in information provided by the AAT on their behalf, a number of members have expressed concern about their names being provided to the Committee and the potential ramifications of this information being published.

The AAT would be happy to facilitate a process for members to provide information directly to the Committee about their authorisation under the above-mentioned provisions if this course of action is preferred to obtaining the information from the Attorney-General's Department, including on a confidential basis if the Committee were to agree to this.

Question 2 (a), (b) and (e):

Section 13 of the Surveillance Devices Act and section 6DA of the Interception and Access Act provide that the Attorney-General may nominate a person who holds an appointment to the AAT as a:

- (a) Deputy President
- (b) senior member
- (c) member.

The Attorney-General must not nominate a person who holds an appointment as a part-time senior member or a member of the Tribunal unless the person:

- (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory; and
- (b) has been so enrolled for not less than 5 years.

Information held by the AAT indicates that there is one Senior Member who has been nominated under section 13 of the Surveillance Devices Act and section 6DA of the Interception and Access Act who was not enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory. As this member held an appointment as a full-time Senior Member, they had the qualification required to be nominated under those provisions.

Sections 6DB and 6DC of the Interception and Access Act provide that the Attorney-General may appoint a person who:

- (a) holds an appointment to the AAT as Deputy President, senior member or member
- (b) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory; and
- (c) has been so enrolled for not less than 5 years.

Information held by the AAT indicates there are no current members appointed under section 6DB or 6DC of the Interception and Access Act who were not enrolled as a legal practitioner of

a federal court or of the Supreme Court of a State or a Territory for at least 5 years in accordance with the relevant statutory requirements.

Questions 2 (c) and (d):

In its annual report the AAT provides high-level information about the number of occasions recorded in its case management system where applications have been considered by an AAT member for the exercise of persona designata functions. The AAT also produces internal reports that include information about the number of such occasions recorded against individual members.

For the Senior Member referred to above, the number of occasions recorded against each period requested is:

- for 2018/19 – 96 occasions
- for 2019/20 – nil occasions
- for 2020/21 – 29 occasions, and
- for 1 July 2021 to 18 January 2022 – 50 occasions.

For accurate information about the number of applications considered and their outcomes, these questions should be directed to the Department of Home Affairs. The Minister for Home Affairs administers and has reporting responsibilities under the Surveillance Devices Act and Interception and Access Act.