Submission

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Introduction

1. On 20 October 2021, the Senate referred an inquiry into the performance and integrity of Australia's administrative review system to the Legal and Constitutional Affairs References Committee for inquiry and report by 31 March 2022.

2. The deadline for submissions is 24 November 2021.

3. The Terms of Reference (the **TOR**) are espoused in the following terms:

    a. the Administrative Appeals Tribunal (the **Tribunal**), including the selection process for members;

    b. the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;

    c. whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and

    d. any related matter.

4. The inquiry is titled: '*The performance and integrity of Australia's administrative review system*'.

About the Submitter

5. The submitter's background can be described as follows:

> Dr. Jason Donnelly is one of Australia's leading administrative law and migration law barristers. Dr. Donnelly has both advised and appeared (at all levels) in many legal cases before Australian courts and tribunals and various important Commonwealth parliamentary inquiries.
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> Dr. Donnelly has represented homeless people, international entertainment stars, non-citizens who have serious criminal records, police officers, politicians, and a wide range of other members of the Australian community.
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> Dr. Donnelly holds three university degrees, including a Ph.D. in law from a leading Australian university. Dr. Donnelly graduated with the prestigious

university medal in law. Dr. Donnelly was appointed a university lecturer-in-law at the age of 23 and became a barrister at 25.

Dr. Donnelly holds a senior university lecturer appointment in the School of Law at Western Sydney University, is the Course Convenor and Founding Author of the Graduate Diploma in Australian Migration Law, and is the Co-Author/Editor of the *Federal Administrative Law* publication with Thomson Reuters.

Dr. Donnelly previously worked as the Tipstaff to the Hon Justice Peter McClellan AM QC (Chief Judge at Common Law, Supreme Court of New South Wales) and as a Legal Researcher to the Hon. Michael Kirby AC CMG (Former Justice of the High Court of Australia).

Dr. Donnelly has also published widely; and various courts and Commonwealth Committees in Australia have cited his academic legal work.[1]

6. The submitter's Ph.D. was strongly focused on Australian public law. The submitter has significant practical experience appearing in many cases before the Tribunal, the Federal Court of Australia (the **Federal Court**), and the High Court of Australia (the **High Court**).[2]

7. It is against that backdrop that the submitter provides submissions in the context of the TOR.

Qualifications for Appointment

8. Division 2 of Part II of the Administrative Appeals Tribunals Act 1975 (Cth) (the **AAT Act**) provides the statutory framework for appointing members to the Tribunal. The submitter does not propose to summarise all of the relevant provisions in this submission but will address statutory provisions in the context of the proposed reforms respectfully advanced.

9. A person may be appointed as a Deputy President, Senior Member, or Member of the Tribunal if, in the opinion of the Governor-General, the person has special knowledge or skills relevant to the duties applicable to the statutory

[1] See https://www.jdbarrister.com.au/
[2] See https://www.jdbarrister.com.au/biography/

appointment. This is reflected in section 7 of the AAT Act (the **special knowledge or skills qualification**).

10. Respectfully, the special knowledge or skills qualification should be removed from the AAT Act. There are various reasons in support of this contention.

11. First, it would appear to be uncontroversial that the work of the Tribunal is complex and progressively becoming more difficult. Statutory members of the Tribunal are required to consider intricate statutory provisions in Commonwealth legislation, extensive and rapidly evolving Commonwealth policy, and otherwise have regard to developing common law principles.

12. At a broad level of generality, the Tribunal's work involves the strong interplay between applying relevant legal principles to the factual matrix in a particular case. The fundamental nature of such work is the domain of the legal profession. It is what lawyers are trained to do. No doubt, it is for that reason that legal practitioners enrolled (for at least five years) are eligible for a statutory appointment to the AAT.

13. Respectfully, legal practitioners and judges are best suited to undertake the complex and progressively difficult nature of work undertaken by the Tribunal. In the submitter's view, a person who is not a legal practitioner is more likely to struggle to undertake the important work of the Tribunal than a duly enrolled legal practitioner or judge.

14. Secondly, the appointment of a person to the Tribunal on account of the special knowledge or skills qualification does not find an analogous application in the provision of legal services. For example, in New South Wales, a person cannot provide legal services unless they are an Australian legal practitioner holding an Australian practising certificate. In that regard, see section 43 of the Legal Profession Uniform Law (NSW).

15. Critically, section 15 of the Legal Profession Uniform Law (NSW) makes plain that the objective of the appropriate academic qualifications and practical legal training is to protect the administration of justice and the clients of law practices.

In that context, the special knowledge or skills qualification criterion has the potential to undermine the administration of justice (because persons may be appointed to the Tribunal even though they do not have appropriate qualifications and practical legal training).

16. As outlined earlier in these submissions, the inherent nature of the work undertaken by the Tribunal includes the application of the law to a particular case (much like the work Australian legal practitioners undertake daily in the discharge of their important professional obligations).

17. Respectfully, the fact that the special knowledge or skills qualification is not an exemption in the provision of legal services under the Legal Profession Uniform Law is no accident. An important objective of being required to be a legal practitioner before providing legal services is to ensure the person is competent and maintains high ethical and professional standards. See section 3 of the Legal Profession Uniform Law.

18. A person appointed based on the special knowledge or skills qualification cannot, with respect, be assumed (like a legal practitioner) to be competent and have high ethical and professional standards required in the promotion of the administration of justice.

19. Thirdly, the appointment of persons to the Tribunal based on the special knowledge or skills qualification has the real potential to undermine various of the important statutory objectives reflected in section 2A of the AAT Act. That section provides that in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

    (a) is accessible; and

    (b) is fair, just, economical, informal and quick; and

    (c) is proportionate to the importance and complexity of the matter; and

    (d) promotes public trust and confidence in the decision-making of the Tribunal.

20. A person appointed to the Tribunal on account of the special knowledge or skills qualification may occur because of actual political connections or some other political affiliation to the government of the day. In those circumstances, the appointment of such a person may tend to undermine the promotion of public trust and confidence in the decision-making of the Tribunal.

21. Members of the public may very well form the view that a person has received a statutory appointment not necessarily because they are the best person for the job but rather because of some political connection. Whether that hypothesis is true, with respect, is beside the point. Critically, what ultimately matters is the perception of the Australian community.

22. Fourthly, the special knowledge or skills qualification is expressed at a broad level of abstraction or generality. The impugned criterion is somewhat vague. In that context, the special knowledge or skills qualification can be abused by those vested with the important legal power to appoint such persons to the Tribunal.

23. Fifthly, the Tribunal's 2020-2021 Annual Report (page 17) indicates that:

> Members come from a diverse range of backgrounds with expertise in areas such as accountancy, disability, law, medicine, migration, military affairs, public administration, science, social welfare and taxation.[3]

24. Respectfully, for reasons already advanced, members should be appointed to the Tribunal for being suitably qualified given their legal background in the practice of the law.

25. To the extent that the Tribunal needs assistance in a given case involving matters of accounting, disability, medicine, military affairs, taxation, and so on, it is open for expert evidence to be adduced to assist concerning the impugned issue (much like the process that occurs in legal proceedings before a Court).

26. Sixthly, an important aspect of the work undertaken by the Tribunal includes the resolution of applications involving Australian migration law. In that respect,

[3] https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf

the Migration and Refugee Division of the Tribunal undertake important work in resolving migration applications involving non-citizens.

27. Interestingly, section 281(1) of the Migration Act 1958 (Cth) makes it a criminal offence (punishable by ten years imprisonment) for a person who is not a registered migration agent or Australian legal practitioner from providing immigration assistance and charging fees for such services.

28. Immigration assistance is defined in section 276 of the Migration Act 1958 (Cth). Generally, it includes where a person uses or purports to use, knowledge of, or experience in migration procedure to assist non-citizens in various prescribed circumstances.

29. There is no special knowledge or skills qualification exemption to the general prohibition against providing immigration assistance and charging fees if the person is not a registered migration agent or Australian legal practitioner. Undoubtedly, the narrow scope of persons who can provide immigration assistance for a fee is in place to protect the public and ensure only those who are competently qualified can provide immigration assistance.

30. The preceding demonstrates a rather odd anomaly. On the one hand, a person who is not a registered migration agent or an Australian legal practitioner commits a serious criminal offence by providing immigration assistance for a fee. Still, that same person does not commit a criminal offence if they are appointed to the Tribunal to undertake work of the same essence of immigration assistance (i.e. using, or purporting to use, knowledge of migration procedure to resolve issues concerning non-citizens).

31. Regrettably, the fundamental objectives behind section 281 of the Migration Act 1958 (Cth) do not sit comfortably with the apparent special knowledge or skills criterion reflected in section 7 of the AAT Act. In other words, the strict regulatory objectives related to protecting the public and proper administration of justice appear to have been forgotten in permitting non-lawyers to undertake work that is essentially within the domain of the legal profession and migration agent industry.

Selection Process of Members

32. Section 6 of the AAT Act makes plain that members shall be appointed by the Governor-General.

33. Section 8(7) of the AAT Act provides that a member of the AAT holds office on such terms and conditions as are determined by the Minister in writing.

34. In the submitter's view, an independent statutory authority should have the absolute legal power to recommend the statutory appointment of members to the Tribunal via the Governor-General. Critically, the statutory authority should be entirely independent of government to ensure transparency and legitimacy in the appointment of statutory members to the Tribunal.

35. Some basic features of the independent statutory authority should include the following:

- A committee of five members, including a practising senior counsel or queen's counsel, a practising solicitor, an academic, a lay individual, and the President of the Tribunal (or a person so delegated by the President).

- Independent of the President, the balance of the committee members should be changed every 12 months.

- Persons are ineligible for appointment to the committee in circumstances where they are either a member of an Australian political party or otherwise have been a member of a political party in the seven years before their proposed appointment.

- The committee should annually review the selection criteria for statutory appointment to the Tribunal, ensuring that it remains consistent with the statutory objectives of the AAT Act.

- A statutory member holding office in the Tribunal should be on such terms and conditions as determined by the independent statutory authority.

36. In a free democratic country bound by the rule of law, it is extraordinarily disturbing to read reports that various statutory appointments to the Tribunal may have been made on account of political connections or political associations and not based on merit.

37. There is a treasure trove of media articles that have reported on purported appointments to the Tribunal on account of political connections or political associations:

- In Christian Porter's world, party mates override process or merit
- Anatomy of a scandal: how the government stacks the AAT with its political cronies
- Political stacking leaves appeals tribunal in chaos
- AAT: Importance, Independence and Appointments
- Federal Government slammed for stacking Administrative Appeals Tribunal with 'Liberal mates'
- AAT appointments must be transparent and merit-based
- Government Looks After Their Own With AAT Reappointments

38. The most practical and fair way to avoid the perception of bias in the appointment of statutory members to the Tribunal is to introduce the independent statutory authority as a matter of urgency. The work of the Tribunal respectfully demands that the administration of justice is discharged by those persons that are suitably qualified, fit and proper, and otherwise based purely on merit. The rule of law in Australia demands no less.

39. It is timely this inquiry is reminded of the wise words of the Hon. Justice Michael Kirby AC CMG (as he then was):

> Human nature being what it is, it is unlikely that persons whose decisions are regularly reversed on review, will look kindly on the re-appointment of the

> decision-maker if they have a choice. It is unlikely that a decision-maker, with personal and family obligations and a career at stake, will be wholly unaffected, as the date of potential re-appointment approaches, by such factors. Even if robust individuals of complete integrity are involved, the appearances are distinctly unfavourable. They tend to reinforce the misgivings of the cynical. Obtaining appropriate performance standards, whilst at the same time securing and protecting true independence of mind on the part of decision-makers, will remain a major concern for the AAT, and other independent merits tribunals, particularly if short term appointments become the norm.[4]

40. An independent statutory authority can go a long way to addressing the logical concerns expressed by Justice Kirby, as outlined above.

41. Part III (Subdivision B) of the AAT Act provides relevant rules concerning the assignment of members to particular Divisions of the Tribunal. For example, section 17D of the AAT Act provides that before assigning a member to the Migration and Refugee Division, the minister must consult the Minister administering the Migration Act 1958 (Cth) about the proposed assignment.

42. Respectfully, sections 17C to 17H of the AAT Act should be amended so that the independent statutory authority has the exclusive power to assign statutory members to relevant Divisions of the Tribunal. Cabinet Ministers and the government of the day should not be responsible for assigning members to relevant Divisions of the Tribunal.

The Tribunal's Performance

43. As reflected towards the commencement of these submissions, a term of reference of the inquiry is examining the importance of transparency and parliamentary accountability in the context of Australia's administrative review system. The terms of reference appear to be deliberately broad, encapsulating a final term of reference in the following form: '*any related matter*'.

44. Having already outlined several important recommendations for reform concerning the Tribunal, it is appropriate to briefly assess the performance of the Tribunal between 2020-2021. There are some concerns that the

[4] https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm#FOOTBODY_67.

performance of the Tribunal is not effectively promoting the Tribunal's objectives in section 2A of the AAT Act.

45. By way of example, the Tribunal document titled '2020-21 At a glance'[5] tells us that:

- the Tribunal failed to meet the prescribed target in the context of the number of finalisations between 2020-21
- only 54% of applications were finalised within 12 months of lodgment, suggesting a large number of applications were not being resolved in a timely fashion.

46. Given the apparent difficulties with the Tribunal finalising applications promptly, it appears there is a necessity for the appointment of additional statutory members to address the backlog of pending applications and ensure greater efficiency in the finalisation of matters. This appears consistent with what was reported in the Tribunal's 2020-21 Annual Report (see page 9):

> Recognising that we are not sufficiently resourced to substantially reduce our significant on hand caseload, we will continue to engage with Government about additional member appointments, commensurate increases to staffing levels to support members and appropriate funding.[6]

47. The '2020-21 At a glance' document indicates that only 2.3% of decisions were set aside on appeal.[7] At first blush, such a statistic tends to indicate that decisions of the Tribunal are fair, just and promote public trust and confidence in the decision-making of the Tribunal.

48. Despite the preceding, the 2.3% statistic concerning judicial review outcomes needs to be considered properly. Undoubtedly, a not insubstantial number of applicants who appear before the Tribunal are not legally represented. In those circumstances, such applicants are already at a considerable disadvantage in persuading the Tribunal that the correct or preferable decision is to set aside

[5] https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/2020-21-At-a-glance.pdf
[6] https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf
[7] https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/2020-21-At-a-glance.pdf

the decision under review.

49. Moreover, a not insubstantial number of aggrieved applicants appeal decisions of the Tribunal in judicial review applications before the Court. Once again, a not insubstantial number of such aggrieved applicants do not have the benefit of legal representation to persuade a Court that the Tribunal committed a jurisdictional error in making the impugned decision.

50. Given the preceding, there is a realistic possibility that the 2.3% statistic is likely to be higher if one were to consider that various Tribunal decisions may not have been competently appealed.

51. Moreover, aggrieved persons may also choose not to appeal a Tribunal decision affected by jurisdictional error for other reasons (i.e. setting aside the Tribunal's decision would be futile, the aggrieved person has had enough of prolonged immigration detention, the aggrieved person cannot afford application fees for judicial review proceedings and costs associated with obtaining a copy of the transcript).

Conclusion

52. Without an independent statutory authority being vested with sweeping legal powers to recommend the appointment of statutory members to the Tribunal, the appointment and selection process of Tribunal members is likely to face continued justified criticism about a lack of transparency and fairness.

53. Previous condemnation of relevant statutory appointments to the Tribunal appears to have gone nowhere in the context of parliamentary accountability.

54. If the government is serious about the rule of law and promoting public trust and confidence in the decision-making of the Tribunal, all proposed statutory appointments to the Tribunal should be made by an independent statutory authority that has an overarching commitment to the administration of justice.