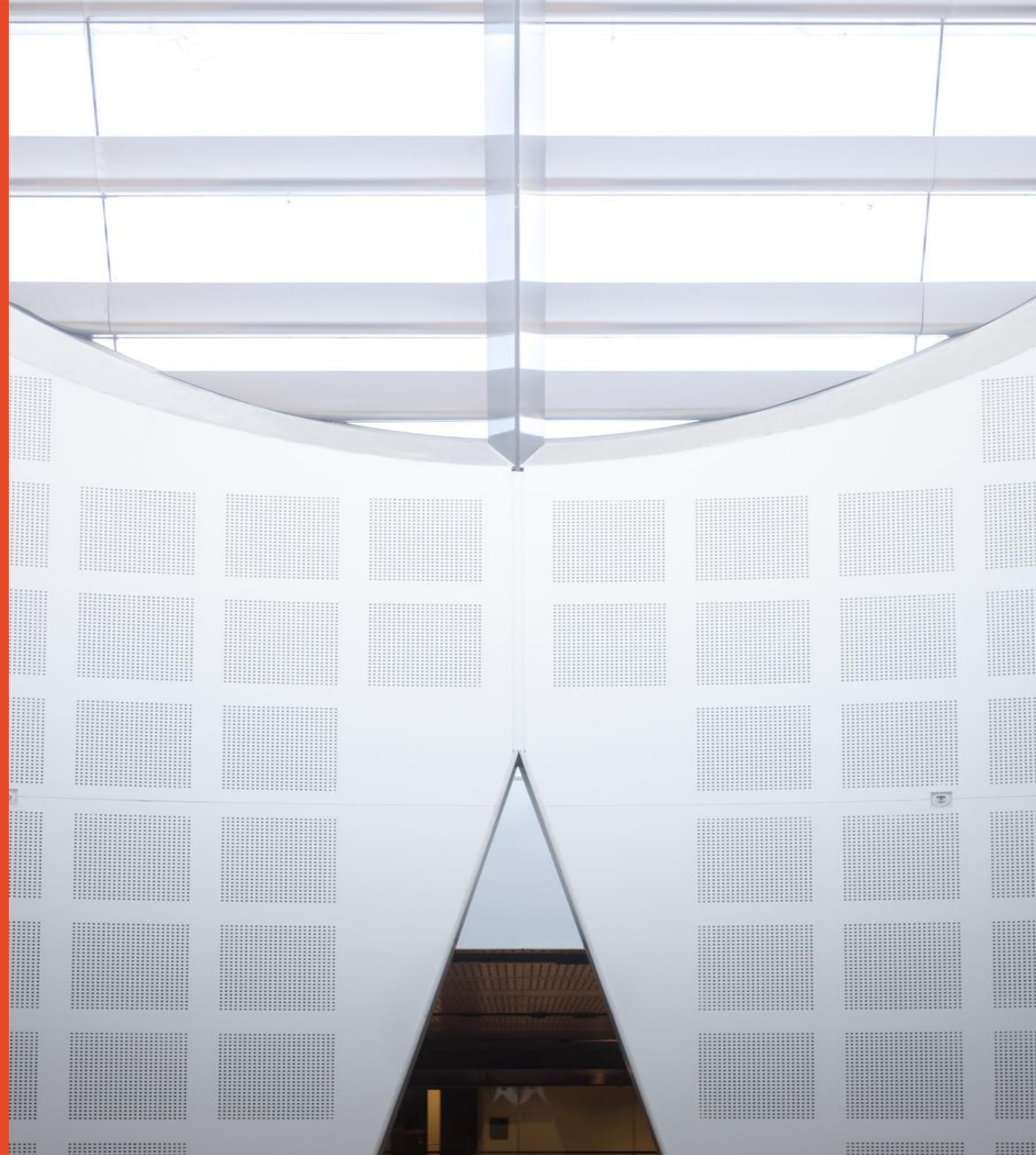


Integrity and Performance of Administrative Review in Social Security

Em. Prof Terry Carney AO
Sydney Law School



THE UNIVERSITY OF
SYDNEY



AAT: Its role in social security

Bureaucracies sometimes regard the AAT as an irksome trespasser on their territory – a cuckoo in the administrative nest. And so it is. And, in my respectful opinion, so it should be. It should also be a constructive participant in the improvement of administration and the refinement of policy.

- Gerard Brennan 1978 'The Parliament, the Executive and the Courts: Roles and immunities' Bond University Law School, 21 February 1998,
https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_bond2.htm

In social security this principally entails *professional quality* delivery of accessible and reliable justice for applicants in terms of obtaining a correct and preferable decision on their matter, free of any sense of partiality to un-enshrined values or world views of the government of the day

- Carney, T., 'Integrity and Oversight in Merits Review' (2022) February 22 *Social Security Rights Review* <https://www.ejaustralia.org.au/integrity-and-oversight-in-merits-review/>

Concerns regarding current fitness for purpose

- Lack of integrity and political favour in member appointments
- Because of lack of protocol/adherence
- Rising proportion over recent years, Grattan Institute

Katina Curtis, “Terrible for democracy”: Political appointments to appeals tribunal skyrocket under Coalition’, *Sydney Morning Herald* Monday, 16 May 2022,

<https://www.smh.com.au/politics/federal/terrible-for-democracy-political-appointees-on-aat-skyrocket-under-coalition-20220513-p5a14u.html>

- Correlation between member background and discretionary decision-making on refugees: UNSW Kaldor Centre Ghezelbash/Dorostkar study

Daniel Ghezelbash and Keyvan Dorostkar, ABC *Law Report* 4 August 2022 [New data reveals decisions about an asylum seeker's visa can vary depending on which judge they get - ABC News](#)

Mike Secombe, ‘Odds stacked against justice in politicised AAT’ *The Saturday Paper*, Saturday, 23 July 2022 <https://www.thesaturdaypaper.com.au/news/politics/2022/07/23/odds-stacked-against-justice-politicised-aat#:~:text=Odds%20stacked%20against%20justice%20in%20politicised%20AAT>

Member capacity or backgrounds?

- Both are in play (AAT trust is critical), but principally it is ensuring against appointment of members of poor quality
- Callinan Report misunderstood role of merits review in ‘stepping into shoes’ or original decision-maker in thinking that only lawyers can make quality decisions
- In current Child Support and Social Services Division the ‘tribunal-side manner’ (ability to relate) of members is a critical skill set

See my submission to the Senate Legal and Constitutional Affairs

Committee: <https://www.aph.gov.au/DocumentStore.ashx?id=f0cf9b47-44e6-4f83-84e4-01cde3de874c&subId=717719>;

or summary in - Carney, T., ‘Integrity and Oversight in Merits

Review’ (2022) February 22 *Social Security Rights Review* <https://www.ejaustralia.org.au/integrity-and-oversight-in-merits-review/>

What is to be/should be done?

Senate Legal and Constitutional Affairs regarding future appointments

7.45 The committee recommends that the Attorney-General develop and legislate a process for the appointment of members to the Administrative Appeals Tribunal that:

- incorporates clear selection criteria;
 - advertises the selection criteria broadly;
 - establishes and supports an independent panel to properly consider each applicant's suitability for the role and their qualifications, and recommend appointments against the selection criteria;
 - limits the discretionary powers of the Attorney-General to make appointments not in accordance with the recommendations of the independent panel;
 - imposes a uniform approach to the duration of appointments; and
 - promotes transparency and makes public the outcome of each application and selection round
- **A self-evidently essential minimum standard?**

AAT: To continue to be or not to be?

7.56 The committee recommends that the Attorney-General disassemble the current Administrative Appeals Tribunal (AAT) and re-establish a new, federal administrative review system, by no later than 1 July 2023. The structure of the new tribunal system should re-align the merits review process with the AAT's legislated objectives of being accessible, proportionate, fair, economic, informal and quick, while promoting public trust and confidence in the decision-making of the review body.

A live consideration?

Katina Curtis, 'Attorney-General considering abolishing AAT and starting from scratch' *Sydney Morning Herald*, Wednesday, 29 June 2022,
<https://www.smh.com.au/politics/federal/attorney-general-mulls-option-to-abolish-aat-and-start-from-scratch-20220629-p5axjn.html>

A delicate policy balance that depends on multiple considerations of sufficiently wide array of concerns across multiple aspects of AAT weighed against gains and risks to public trust in institutions of administrative justice?

Why it Matters: The view from the field

Dermott Williams (Community Lawyer, Integrated Services Project,
Social Security Rights Victoria Inc)

#SystemIntegrityforEconomicSecurity
#EJAconf2022

References

- Brennan, Gerard (1978) 'The Parliament, the Executive and the Courts: Roles and immunities' Bond University Law School, 21 February 1998, https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_bond2.htm
- Carney, Terry (2022), 'Integrity and Oversight in Merits Review' (2022) February 22 *Social Security Rights Review* <https://www.ejaustralia.org.au/integrity-and-oversight-in-merits-review/>
- Carney, Terry (2021) Submission to the Senate Legal and Constitutional Affairs Committee: <https://www.aph.gov.au/DocumentStore.ashx?id=f0cf9b47-44e6-4f83-84e4-01cde3de874c&subId=717719>
- Curtis, Katina (2022) "'Terrible for democracy": Political appointments to appeals tribunal skyrocket under Coalition', *Sydney Morning Herald* Monday, 16 May 2022, <https://www.smh.com.au/politics/federal/terrible-for-democracy-political-appointees-on-aat-skyrocket-under-coalition-20220513-p5a14u.html>
- Ghezelbash, Daniel & Keyvan Dorostkar (2022), ABC *Law Report* 4 August 2022 [New data reveals decisions about an asylum seeker's visa can vary depending on which judge they get - ABC News](#)
- Secombe, Mike (2022) 'Odds stacked against justice in politicised AAT' *The Saturday Paper*, Saturday, 23 July 2022 <https://www.thesaturdaypaper.com.au/news/politics/2022/07/23/odds-stacked-against-justice-politicised-aat#:~:text=Odds%20stacked%20against%20justice%20in%20politicised%20AAT>