



Amended Ontario Agencies and Appointments Directive, November 1, 2019

The Ontario government has passed a new Agencies and Appointments Directive, effective November 1, 2019. It replaces the June 2017 version. Find the full Directive here <https://www.ontario.ca/page/agencies-and-appointments-directive>

The Directive sets out the rules and accountability framework for provincial agencies, short-term advisory bodies and special advisors, as well as the remuneration guidance for government appointments.

This SOAR document sets out the amendments to Part 3 – Appointments and Appointee Remuneration and includes SOAR commentary. New additions have been underlined. Removed portions are in italics.

Part 3 – Appointments and Appointee Remuneration

3.1 NEW: Where possible, ministers shall ensure that terms of appointments do not all end in the same year.

SOAR Commentary:

This amendment addresses an issue raised in [SOAR's study of the impact of the "10-year rule"](#) on administrative tribunals, where we raised the concern that large numbers of appointments expired in 2017, 10 years after the rule was introduced in a 2007 Directive.

Many OIC appointments throughout 2019 at different tribunals have an end date of December 31, 2019. SOAR is not aware of any consistent approach to re-appointment of these individuals.

3.2 NEW: All government appointments regardless of position or appointing mechanism are required to follow the PAS process and prior to an appointment must have:

- Completed Public Appointments Secretariat profile;
- Completed Personal Disclosure and Conflict of Interest Form for Public Appointment Candidates;
- Criminal record check.

SOAR Commentary:

Previously, these steps were completed following appointment. Note that the government has created a new, longer disclosure form.

3.2.2 Term of Appointment – adjudicative tribunals and regulatory agencies

In the case of a person appointed as the executive chair or chair of an adjudicative tribunal or regulatory agency:

- There will be an initial appointment for a period of up to two years. The two year period may be waived at the discretion of the responsible minister;
- Where the initial two-year appointment is not waived, an executive chair or chair is eligible for re-appointment for a term of up to three years; and
- After completion of a term or terms totalling five years, an executive chair or chair is eligible for re-appointment for a further term of up to five years.

In the case of a person appointed as an associate chair, vice-chair or member of an adjudicative tribunal or regulatory agency and, subject to the recommendation of the executive chair or chair in exceptional circumstances:

- There will be an initial appointment for a period of up to two years;
- On the recommendation of the executive chair or chair, the appointee is eligible for re-appointment for a term of up to three years; and
- After completion of terms totalling five years, and on the recommendation of the executive chair or chair, the appointee is eligible for re-appointment for a further term of up to five years.

SOAR Commentary:

Numerous recent appointments to provincial adjudicative agencies have been for periods shorter than the 2, 3 or 5-year terms that were outlined in the previous Directive. The changes to the Directive indicate that, rather than these shorter terms being an exception to the rule, the rules have now changed to enshrine shorter and less predictable terms.

SOAR is concerned that the lack of a predictable and transparent reappointment process may significantly undermine adjudicator independence. A major advantage of the previous system of fixed term re-appointment, subject only to the recommendation of the tribunal Chair, was that it created an environment where adjudicators and the public could reasonably assume that all decisions about re-appointments were merit-based. In contrast, a system in which re-appointments may be for less than the standard period and with no explanation for varying terms, creates at least the potential perception that factors other than merit have been considered. This is particularly problematic for those tribunals at which the government appears as a party.

There may be reasons why an appointment or re-appointment should be less than the standard 2, 3, and 5-year terms, for example, if a tribunal may be shut down or have its jurisdiction significant changed. However, in those situations, a clear and transparent explanation would be available to explain the reason for the non-standard term. In all other cases, fixed, predictable terms will bolster the public confidence in the independence of the administrative justice system.

3.2.2 Re-appointment beyond ten years

The ultimate decision to re-appoint rests with the appointing authority. Re-appointment to a further additional term beyond the maximum of ten years in total, may only be made in exceptional circumstances in the public interest. In making a recommendation beyond ten years, the chair clearly describes the recruitment approach taken to find new candidates.

There is no obligation on the government to re-appoint individuals for subsequent terms at the conclusion of any appointment.

SOAR Commentary:

The new requirement to describe the recruitment approach fails to recognize that exceptional circumstances often involve a need for experienced members within a tribunal's roster of adjudicators. This addition will require the Chair to seek out and substantiate a search for a qualified candidate with 10 years relevant experience in adjudication.

REMOVED:

Appointees will be notified of the expiry date of their appointment at least four months prior to the expiry of their term of appointment.

SOAR Commentary:

With the removal of any notice of non-reappointment, all appointments going forward are, effectively, term contracts. OICs should not anticipate any "presumption" of re-appointment, even where performance is excellent. It is expected therefore that adjudicators will begin looking for work outside their tribunal while still adjudicating in their field of expertise.

3.5.1 Disclosure of remuneration

Appointee remuneration rates and ranges must be a matter of public record. In addition, appointee remuneration Orders in Council made after July 1, 2016 must be publicly available and posted in an accessible and bilingual format on a government website.

In the case of provincial agencies that prepare annual reports, the reports shall include total remuneration (not including expenses) provided to each individual appointee.

SOAR Commentary:

The requirement to post remuneration paid to each part-time member of a tribunal will now cover adjudicators receiving less than \$100,000 who are not subject to the statutory Sunshine List. This provision is arguably a disclosure of personal information that violates an individual's right to privacy (except where their remuneration is subject to the statutory Sunshine List), and has the potential to create dissension by inviting comparisons between members of a tribunal in the absence of context.