



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: DisputeResolution JEMV1039532

22 July 2015

Ms Mayda Flanagan
Executive Assistance
Administrative Appeals Tribunal
GPO Box 9955
HOBART
TAS 7001

By email: mayda.flanagan@aat.gov.au

Dear Ms Flanagan,

Best Practice Guide to Tribunal Independence and Appointments – Discussion Paper

I am writing to you on behalf of the Dispute Resolution Committee (“Committee”) of the Law Society of New South Wales. The Committee is comprised of practising solicitors and nationally accredited mediators, and represents the Law Society on Alternative Dispute Resolution (“ADR”) issues as they relate to the legal profession.

The Committee appreciates the opportunity to provide comments in response to the Discussion Paper, *Best Practice Guide to Tribunal Independence and Appointments*.

Tribunals are an important and integral part of the justice system. They provide the public with access to low cost, timely and specialist dispute resolution for particular types of disputes. They also provide efficient access to justice, reducing demand on court services. Given the extensive capacity of tribunals to resolve cases in the civil and administrative justice system, the independence of the tribunals needs to be safeguarded by an appointments system that will engender public confidence in the integrity and impartiality of the system.

The Committee recognises that the recommendation of appointments to tribunals is a Ministerial responsibility. However, a transparent, established, open recruitment and merit-based selection process would contribute to public confidence and trust in the independence of tribunals. This would also be consistent with judicial appointment recommendations.

The Statement of Principles set out in Appendix A to the Discussion Paper enables the promotion and benchmarking of good process to be standardised. The Committee supports the promotion of the Principles and also the sample draft legislative provisions. If adopted, these will increase consistency in process across tribunals.

In relation to the specific Questions set out in Appendix B of the Discussion Paper, the following responses are made:

1. In keeping with a transparent merit-based approach, the assessment panel method is the preferred method for selecting tribunal members.

2. The composition of an assessment panel needs to take account of the tribunal's workload, the positions sought to be filled and the various interests that require inclusion in the tribunal. The Committee notes that the formation of an assessment panel that has the capacity to make competency-based decisions and has the experience and expertise to rank candidates may include the Head or a senior member of the tribunal as chair, one or two experienced members of the tribunal or another tribunal, a member of a stakeholder body and a representative from the Minister's department. The size of the panel should be fit for purpose rather than one size for all.

3. The Committee considers that a 'ranked shortlist' of appointable candidates, measured against the selection criteria, would provide the Minister with the best information following the assessment process. Also, an "assessed pool" of candidates who meet the selection criteria should be retained until the next call for applications to enable any casual vacancies which occur to be filled in an administratively efficient manner.

4. Tribunal legislation should clearly state which matters a Minister "must" and "may" consider when nominating a person to a tribunal.

5. The inclusion of the tribunal chair, or senior member, and another member from the tribunal on the assessment panel who has knowledge of the tribunal's social and cultural diversity and gender balance composition should be used to inform the assessment panel's recommendations to the Minister.

6. The assessment panel (properly comprised) should be responsible for assessing the qualifications, merit, character and the needs of the tribunal. The Committee suggests that "other relevant considerations" could be a matter for the responsible Minister when making a selection from the "ranked list".

7. The Committee considers that a Head of Tribunal's assessment of a tribunal member's performance should be sufficient to enable a member to be appointed to a second term. The Committee considers that if a tribunal member wishes to serve a third term they must compete in an open recruitment process. A two term appointment would strike a balance between administrative efficiency and the retention of institutional knowledge and experience.

8. The Committee agrees that first terms of appointment should be for a period of five years and should only be terminated for good reason. These reasons should be clearly set out in the governing statute and include: inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct. This increases the independence of the tribunal members from those who have appointed them. A five year minimum first term appointment may also assist in attracting high quality candidates.

The Committee notes that appointments for shorter periods (ie less than five years) can be time consuming and costly to administer. The involvement of tribunal members in these processes can also impact upon the efficiency of the tribunal process. Shorter appointment periods can also attract recruitment problems, especially in those tribunals with lighter workloads.

9. In addition to certainty of term of appointment, the Committee supports certainty in remuneration to protect tribunal independence. The Committee supports the proposed clause 12.

10. To ensure the independence of tribunals the Committee supports mechanisms designed to ensure, to the extent possible, a politically neutral appointment process.

11. If tribunal statutes are to contain a provision addressing political considerations, Option 2 is preferred.

12. A tribunal candidate nominated by the Minister as a possible tribunal member should be required to go through the panel selection processes. It is important to the independence and impartiality of tribunals that the appointment process is seen to be politically neutral. If all candidates are required to go through an assessment process the Committee sees no benefit in requiring the Minister to disclose his/her nominations to that process.

The Committee thanks you for the opportunity to comment. If you have any questions please feel free to contact Michelle Vaughan, policy lawyer for the Committee on michelle.vaughan@lawsociety.com.au or (02) 9926 0214.

Yours sincerely,



Michael Tidball
Chief Executive Officer