



# Tribunal Independence in Appointments

## A BEST PRACTICE GUIDE



## Preface

The Council received a submission from a female tribunal member who was troubled by a stranger's remark. When she told the stranger that she was a member of multiple tribunals, he replied: 'you must be well-connected then'. The member expressed to the Council her disappointment that an 'otherwise well-informed person and someone who has "been around" government himself should have this view how one comes to be appointed to tribunals'. She reflected: 'As things stand, I was not in a position to assure him that the current practice is one of consistent open appointment processes across tribunals'.

The anecdote reminds us that public faith in our tribunals depends upon integrity in the appointments process. If a perception arises that members are appointed because of 'who they know', public trust in the integrity of tribunals will erode.

This Guide is intended to inform, educate and raise awareness about appointment and reappointment processes for tribunal members. Based on research and consultation with stakeholders, the Guide proposes principles and best practice in appointments to ensure tribunal independence. The Council hopes that the Guide will assist ministers and tribunal Heads in developing processes for the appointment of tribunal members, and that governments will consider the Guide when establishing new tribunals, or when reviewing or amending tribunal legislation. The principles may assist in evaluating actual practices and legislative provisions, and in measuring progress towards excellence in appointment processes.

The Guide has been prepared following a process of reviewing the governing legislation, practices and procedures of Australian and New Zealand tribunals detailed in the Council's Best Practice Guide to Tribunal Independence in Appointments Discussion Paper (May 2015). The Council was greatly assisted by the thoughtful submissions it received in response to the widely-circulated Discussion Paper. The submissions are listed in Appendix A, below.

I wish to thank all those who contributed their time and expertise to assist in the preparation of the Guide, including the authors of the submissions and the members of the Project Steering Committee comprising the Honourable Justices David Thomas, Iain Ross AO, John Chaney, John Byrne AO, RFD and Michelle May, Ms Linda Crebbin, Ms Anne Britton and Ms Kathleen McEvoy (the latter two members shared the role of Committee Secretary), and Professor Pamela O'Connor who acted as the researcher.

The Hon Justice Duncan Kerr *Chev LH*  
Chair, Council of Australasian Tribunals Inc

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## Executive Summary

Public confidence in the work of tribunals cannot be taken for granted. Members appointed to tribunals must satisfy community expectations that they will bring unbiased and independent judgement to bear on their decisions. Confidence in tribunal impartiality is vital when members have authority to decide matters between individuals and government agencies.

Processes for appointment and reappointment of tribunal members impact both on the reality of, and the community's perceptions of, member independence.

This Best Practice Guide is intended to inform, educate and raise awareness about appointment and reappointment processes for tribunal members. Based on research and consultation with stakeholders, the Best Practice Guide proposes principles and best practice in appointments to ensure tribunal independence. The Council hopes that the Guide will assist ministers and tribunal Heads in developing processes for the appointment of tribunal members, and that governments will consider the Guide when establishing new tribunals, or when reviewing or amending tribunal legislation.

### Part A: Introduction

Tribunals play an essential role in our justice system by providing a timely and accessible dispute resolution at low cost. To maintain public confidence in their adjudication of disputes, the independence of tribunals must be assured, including in the processes for appointing members.

### Part B: Merit-based appointments

Selection on the basis of merit is the surest way to appoint the best members and ensure a tribunal's independence. Merit means that the appointee possesses the knowledge, skills and personal attributes required to perform the duties of the position. Merit can be assessed against a competency framework, such as the Council's Tribunal Competency Framework; or by a set of assessment criteria derived from the member competencies framework.

### Part C. Recruitment and assessment

To ensure tribunal independence and excellence, appointment processes should be open, merit-based and transparent. This means that recruitment is open to a wide range of applicants, and selection is based on an assessment of applicants' merit against publicly available criteria. The Guide sets out a best practice model with five stages: recruitment, assessment, selection, nomination and appointment. This part of the Guide also considers the options for reports by a panel including a "full report", a ranked shortlist of suitable applicants; or a recommended appointments report.

### Part D. Selection and nomination

Once an assessment panel makes its report, the Minister selects one candidate for each position and seeks Cabinet approval. Subject to good character, merit should be the dominant consideration in selection. Gender balance and diversity in the membership should be considered by the Minister in selecting among applicants of equal merit. Political considerations should be excluded as discriminatory and irrelevant. The Guide notes that in most jurisdictions, documents such as a Cabinet handbook or guidelines specify matters to be considered.

### Part E. Tenure, remuneration and reappointment

Members of tribunals are normally appointed for a fixed term of years and are eligible for reappointment. Independence requires that the member's tenure and rate of remuneration are secure for the term. Reappointment may be by way of application in an open competitive process. It is also consistent with best practice to reappoint on the Head's recommendation where the member's performance demonstrates that the member meets the assessment criteria.

### Part F. Conclusion

The role of tribunals in adjudicating disputes demands that tribunals and their members are impartial and are seen to be so. Some tribunals adjudicate cases in which the Executive is a party or has a policy interest. Tribunals may be called upon to decide questions which are politically sensitive for Ministers or government agencies. Impartiality requires that they are free of improper influences and pressures to decide cases in a particular way. Appointment processes should be consistent with ensuring public confidence in that impartiality.

## A: Introduction

Tribunals play an essential role in our justice system by providing a timely and accessible dispute resolution at low cost. To maintain public confidence in their adjudication of disputes, the independence of tribunals must be assured, including in the processes for appointing members.

Tribunals are an important part of the justice system. They provide a cheap, quick and accessible means of resolving disputes including:

- » **Civil disputes** under private law, eg consumer, credit, employment, rental and building disputes.
- » **Administrative decisions** made by government which affect individuals and businesses, eg taxation, pensions, migration, planning, occupational licensing matters.
- » Certain matters affecting **human rights** of individuals, eg discrimination and guardianship.

Tribunals use varied methods to resolve disputes, including adjudication. Adjudication is a process in which the tribunal gives the parties a hearing, and reaches a decision based on the law, the facts and the merits of the case. It is a function that tribunals share with the courts.

Adjudication, whether undertaken by courts or by tribunals, must be performed impartially. An impartial adjudicator has no personal stake in the case and is free of any improper influence to decide in a particular way. To ensure that adjudicators are impartial, they must be independent of any source of improper influence or pressure. A tribunal's impartiality must be safeguarded by arrangements which ensure its independence. Impartiality is a state of mind, while independence refers to the objective conditions which enable tribunals to adjudicate impartially.

Like all justice institutions, tribunals can operate effectively only so long as the public has confidence in their independence. For this reason, the International Framework for Tribunal Excellence<sup>1</sup>, developed under the Council's leadership, identifies 'Independence' as one of the eight areas for measurement of tribunal excellence. The Framework defines independence as 'the degree of separation from the Executive<sup>2</sup>'. The Executive includes the Ministers and Cabinet, departments or ministries of state and other administrative agencies of government.

Tribunals are made up of a Head (who may be called a President, Principal Member or Senior Member), and other members. The Head allocates cases for resolution by a panel (comprising more than one member), or by

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<sup>1</sup> (April 2014), [www.coat.gov.au/publications.html](http://www.coat.gov.au/publications.html), 2.

<sup>2</sup> Ibid 8.

a member sitting alone, depending on the tribunal and the type of case. Each tribunal is established under its own legislation ('tribunal Act') which may specify qualifications for appointment. Some tribunal Acts reserve the position of Head and certain other positions for judges or magistrates holding a concurrent appointment to a court. Some positions may be reserved by the Act for legal practitioners. Other positions may require specialist qualifications relevant to the work of the tribunal. For example, a tribunal which hears planning appeals may have members who are qualified in planning.

The process for appointing Heads and members is of particular significance for the independence of tribunals. In Australia and New Zealand, appointments are made by the Executive. In most jurisdictions, the appointment is made by the Governor or Governor-General in Council or the Executive Council on the nomination of a Minister and with the approval of Cabinet<sup>3</sup>.

While the system of appointment by the Executive confers high authority on tribunal members, it also gives Ministers the power to determine the makeup of the tribunal's membership and to affect the interests of members in a direct, individual and concrete way. If the power is exercised improperly, the independence of tribunals may be impaired. The risk is greater for tribunals which review government decisions or adjudicate disputes in which a Minister or government body is a party or has a policy interest in the outcome. For example, a Minister may be responsible for recommending appointments to a tribunal which determines appeals from decisions of the Minister or the Minister's department.

The system of Executive appointments is not necessarily inconsistent with tribunal independence. The system serves the public well when Ministers take care to appoint applicants who are best qualified for the position by their skills, knowledge and personal attributes. Threats to independence can arise where irrelevant considerations or improper purposes are taken into account in appointment decisions, as in the following scenarios:

- » A Minister recommends a person for appointment in order to show favour to a relative, friend or associate (nepotism), or because the person is politically aligned to the Minister or the Minister's party (political patronage), or because the Minister or the Cabinet believes the person will be disposed to decide cases favourably to the Minister's policy interests or opinions.
- » The Minister fails to nominate an outstanding candidate, or the Cabinet fails to approve a nomination, because of a personal attribute which is protected under anti-discrimination or human rights legislation, such as the candidate's gender, religion, marital status or political beliefs.

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<sup>3</sup> Cabinet approval is not required for appointments to the ACT and two New Zealand tribunals.

- » The Minister fails to recommend a member for reappointment because of the member's record in making decisions which, although lawful and proper, are contrary to the views or interests of the Minister, the Minister's department, or members of the Minister's party.
- » The Minister fails to nominate a current member for reappointment, or Cabinet fails to approve the nomination, because the member was previously appointed by an Executive led by another political party.

The principles and best practice discussed in this Guide are designed to ensure that such scenarios do not occur, and that the system of Executive appointments consistently delivers the best outcomes for tribunals and for the public. The Guide proposes ways in which the risk to tribunal independence can be contained and managed, within the system of appointment of members by the Executive.

## B: Merit-based appointments

Selection on the basis of merit is the surest way to appoint the best members and ensure the tribunal's independence. Merit means that the appointee possesses the knowledge, skills and personal attributes required to perform the duties of the position.

It is widely agreed that tribunal members should be selected and appointed on the basis of merit. This means that an appointee is chosen because he or she possesses the skills, knowledge and other attributes which are required to perform the duties of the position. Merit is often assessed comparatively, against other applicants for the same position. In a competitive process, selection on merit means that the appointee demonstrates the desired qualities to a degree equal to or greater than other applicants.

Appointment on the basis of merit promotes public confidence in the tribunal. It enhances tribunal independence by making tribunal appointments less susceptible to improper considerations such as nepotism, political patronage and discrimination. It also enhances tribunal excellence by ensuring that members are well-qualified and equipped to perform their role.

### How is merit assessed?

Tribunal members require high level knowledge, skills and personal attributes to perform their functions effectively. The content of the qualities that members need may vary depending on the type of cases the tribunal hears, the dispute resolution methods it uses, and whether the members have specialist functions.

Most tribunals have developed a competency framework, which specifies the skills, knowledge and personal attributes which a member of the tribunal must possess. To guide tribunals, the Council has published its Tribunal Competency Framework<sup>4</sup>. The Framework distinguishes eight different 'headline competencies', each representing a core element of the role of a tribunal member. They comprise knowledge and technical skills, fair treatment, communication, conduct of hearings, dispute resolution, efficiency, professionalism and integrity, leadership and management. Each headline competency is reduced to a set of performance-based indicators which members are expected to demonstrate in performing their role.

As the list of competencies show, the package of skills, knowledge and attributes required of a tribunal member is multi-faceted, takes a long time to develop, and is found in a relatively small pool of individuals. The qualities are not ones that can readily be acquired after appointment, although they can be enhanced by tribunal practice and professional development programs delivered to members.

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<sup>4</sup> Council of Australasian Tribunals, Tribunal Competency Framework: Promoting Professional Excellence [www.coat.gov.au/publications/](http://www.coat.gov.au/publications/).

## Developing assessment criteria

A few tribunal Acts specify criteria for the appointment of members<sup>5</sup>, but most do not. A tribunal which has adopted a member competency framework is able to specify the skills, knowledge and other qualities that an applicant for a tribunal position should possess. The merit of applicants for tribunal positions can be assessed by reference to a set of assessment criteria derived from the member competencies framework. Multiple applicants can be ranked against the same criteria to assess their relative merit.

The Australian Institute of Judicial Administration Inc has recently published a statement of suggested criteria for judicial appointments, based on its research into the areas of skills and qualities which are widely deemed important for judicial roles<sup>6</sup>. The statement provides an example of the criteria that tribunals may find helpful in drafting their own statements.

In the Council's view, it is best practice for tribunals to develop a statement of assessment criteria, which may include variations for specialist positions. Qualifications or criteria specified in the tribunal Act, if any, should be included. The Head should draft the statement, in consultation with the Minister, before recruitment commences. The Head and the Minister should consider the needs of the tribunal at the time, such as whether the tribunal requires particular specialist knowledge or skills in the membership.

It is best practice to make the assessment criteria available to applicants, so that they can demonstrate their suitability for the position by addressing the criteria in their application. This enables the comparative evaluation of applicants against the criteria, and makes the assessment process more transparent.

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5 The Disputes Tribunals Act 1988 (NZ) ss 7(2), 8; Disputes Tribunal Rules 1989 (NZ) s s 35A(1)(b), (5), (7); ACT Civil and Administrative Tribunal Act 2008 (ACT) s 96(3), (4); ACT Civil and Administrative Tribunal Regulation 2009 r 6(1)(2), tables 6.1, 6.2

6 The statement is reproduced below at Appendix B.

## C. Recruitment and assessment

To ensure tribunal independence and excellence, appointment processes should be open, merit-based and transparent. This means that recruitment is open to a wide range of applicants, and selection is based on an assessment of applicants' merit against publicly available criteria.

In the best practice model outlined below, the appointment process has five stages: recruitment, assessment, selection, nomination and appointment.

- » *Recruitment* is the process of identifying potential candidates for appointment.
- » In the *assessment* stage, applicants are assessed for suitability for the position and those found to be unsuitable are excluded from further consideration.
- » The Minister then makes a selection among assessed applicants to determine who shall be nominated (or recommended) for appointment.
- » The *nomination* stage includes the checks, inquiries, consultations and other steps required to obtain Cabinet approval of the Minister's proposed nomination.
- » The process is formally completed when the Executive Council makes an order of *appointment*.

### Open recruitment

Most tribunals conduct open recruitment for tribunal positions, in which the tribunal advertises positions and invites applications. It is common for a group of positions to be advertised as an 'appointment round' several months before current members' terms expire. Additional steps may be taken to bring the positions to the attention of persons belonging to socially or culturally defined groups which are under-represented in the tribunal's membership. The advertisement may refer to a policy commitment to equal opportunity and diversity in appointments.

A few tribunal Acts specify additional steps that must be included in recruitment, such as a requirement to consult with, or seek nominations from, particular groups or a specified Minister or office<sup>7</sup>.

By conducting open recruitment, the Minister and the tribunal signal to the public that tribunal appointments are made from a wide and inclusive pool of applicants, through a competitive, merit-based and transparent process. The practice enhances public confidence in the independence and the excellence of the tribunal.

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<sup>7</sup> ACT Civil and Administrative Tribunal Regulation 2009 r 6; Disputes Tribunals Act 1988 (NZ) s 8(1)

Open recruitment is not the only method for making appointments. Where appointments are by nomination, the Minister selects a candidate who has been identified and assessed by the Minister as suitable. The Minister decides which persons or bodies will be consulted in identifying and evaluating potential candidates, and may consult the Head. The position is not advertised or brought to the attention of others who might wish to apply.

Appointment by nomination poses risks to tribunal independence. The closed mode of recruitment creates the perception that certain individuals or groups have privileged access to tribunal appointments. It may also present an enhanced risk of political patronage and bias, especially where the Minister relies on party sources to identify or assess potential appointees.

The Council considers that for a first term appointment of a Head or a member, best practice requires recruitment by an open process to establish a competitive field. The same method should be used for appointment of Heads and other positions which a tribunal Act reserves for judicial officers, even though the potential candidates are few in number and are known to the Executive.

Appointment by nomination should be undertaken only in restricted circumstances, and with the Head's approval. For example, it may be necessary where a casual vacancy needs to be filled before the next open appointment round is due. A member appointed by nomination should not be reappointed without undergoing assessment by a panel in an open process.

Another reason for appointing without open process is where a tribunal position requires highly specialised skills and open recruitment would be unlikely to attract qualified applicants.

Reappointment of a Head or a member to a second or subsequent term requires assessment of merit, but not necessarily by an open process. Reappointment is discussed at Part E below.

## **Assessment of merit by a panel**

When one or more tribunal positions are advertised, best practice requires that a panel is established to assess the applicants against the assessment criteria and report to the Minister.

A few tribunal Acts make express provision for the establishment and membership of the assessment panel<sup>8</sup>. Where the Act is silent, tribunals have different practices and views about how panels are constituted, and by whom. The Council invited submissions on these matters in its *Best Practice Guide to Tribunal Independence in Appointments Discussion Paper*<sup>9</sup>.

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8 Disputes Tribunals Act 1988 (NZ) ss 7(2), 8; Disputes Tribunal Rules 1989 (NZ) s s 35A(1)(b), (5), (7); South Australian Civil and Administrative Tribunal Act 2013 (SA) ('SACAT Act') s 19(2)

9 (May 2015) [www.coat.gov.au/publications/](http://www.coat.gov.au/publications/) ('Discussion Paper')

In the Council's view, the membership of the panel should be determined by agreement between the Head and the Minister, or by the Minister on the recommendation of the Head. The Head, or a nominee of the Head, should be a member of the panel and will normally be appointed as Chair. The Minister should nominate one member, or around one third of the members if the panel is large. The Minister's nominee may be a senior and experienced member of the Minister's department with a good understanding of the tribunal's functions. The inclusion of a departmental officer will enhance the Minister's confidence in the panel's process and assessments. The Head should nominate at least one additional member, who may be a member of another tribunal or a member of a professional, stakeholder or community body. The panel should have an appropriate gender balance.

When the applications are received, the Chair should convene the panel. After excluding from further consideration applicants who lack required qualifications, the panel should assess each applicant against the criteria. For this purpose, it may interview applicants, contact referees and make inquiries.

## The panel's report

As the panel applies the same assessment criteria to all applicants for a particular tribunal position, it is able to compare and rank them according to the level of their competencies. There are various ways in which the panel may report its findings to the Minister, and the Minister may give instructions as to the preferred form. The options include the following:

- » In a full report, the panel provides an assessment report on all applicants, indicating those found not to meet the criteria ('not suitable'), those found to satisfy the criteria ('suitable') and those who meet the criteria to a high degree ('highly suitable').
- » The panel provides a ranked shortlist of suitable applicants, which exceeds the number of positions to be filled.
- » The panel provides a recommended appointments report, in which the number of applicants recommended for appointment does not exceed the number of positions to be filled. In other words, the panel recommends one applicant for each position, unless it recommends no applicant for a position.

Of these options, the full report offers the Minister the greatest choice among the assessed applicants, but little guidance as to relative merit. The recommended appointments list gives the Minister no choice among applicants, but the Minister may decline to make an appointment or may ask the panel to reconsider its recommendation. The latter method is used for appointments to New Zealand's two largest tribunals<sup>10</sup>. In

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<sup>10</sup> Disputes Tribunal Act 1988 (NZ) ss 7(1), (2)(b), 8(3); Disputes Tribunal Rules 1989 (NZ) r 35B(1), (5), 37(1). The same process is, by convention, followed for appointments to Tenancy Tribunals.

Australia, ministers generally expect to be offered a choice among applicants assessed as suitable, highly suitable or recommended.

In the Council's view, where an assessment panel is used it is best practice for the panel to give the Minister a guided choice from a shortlist of candidates. The panel should give the Minister a clear indication of its preferred candidate or candidates, with reasons. The panel may indicate its preference by ranking the suitable applicants or the shortlisted applicants.

## D. Selection and nomination

Once the assessment panel makes its report, the Minister selects one candidate for each position and seeks Cabinet approval. Subject to good character, merit should be the dominant consideration in selection. Gender balance and diversity in the membership should be considered by the Minister in selecting among applicants of equal merit. Political considerations should be excluded as discriminatory and irrelevant.

Most tribunal statutes say little about what matters the Minister should consider in selecting an applicant for appointment. A few statutes specify considerations such as the need for the tribunal's membership to have gender balance, to reflect the social and cultural diversity of the community, and to include indigenous persons<sup>11</sup>. The Minister may also be directed to consider the need for the tribunal to have a range of knowledge, expertise and experience in the membership<sup>12</sup>.

In most jurisdictions, documents such as a Cabinet handbook or guidelines specify matters to be considered and procedures to be followed before the nomination of an applicant (now a candidate) can be approved by Cabinet. The content of the documents is not the same in all jurisdictions.

### Relevant considerations

#### *1. Merit: the panel's report*

A few tribunal statutes expressly require the Minister to consider the report and recommendations of the assessment panel. The South Australian Civil and Administrative Tribunal Act 2013 (SA) ('the SACAT Act') s 19(4) requires the Minister to have regard to the panel's report. New Zealand's Disputes Tribunal Act 1988 goes further. It provides that a person may not be appointed as a referee of the Disputes Tribunal unless the person has been recommended by the panel<sup>13</sup>.

In the absence of a provision like that, best practice requires that the Minister should give serious consideration to the panel's report and recommendations. If the Minister decides to nominate a person who has not been assessed by the panel, or who has been assessed by the panel as unsuitable or not recommended, the Minister's reasons for proceeding in that way should be put on the public record. This can be done through disclosure to Parliament or in the *Government Gazette* (in jurisdictions that have one). Public disclosure and explanation will help to dispel any perception of privileged access, patronage or nepotism in tribunal appointments.

11 Queensland Civil and Administrative Tribunal Act 2009 (Qld) ('QCAT Act') s 183(6)(a)-(c); SACAT Act s 19(4)(i), (ii).

12 QCAT Act s 183(6)(d)

13 Sections 7(1), (2), 8(3)(a).

## *2. Standard character checks*

Cabinet guidelines commonly require that police record checks and other standard inquiries are made about the candidate's character prior to submitting the nomination for approval by Cabinet. The checks usually include whether the candidate has been convicted or sanctioned for a breach of the law, or has charges or lawsuits pending. The candidate may be asked to disclose financial and other interests which may conflict with the duties of the tribunal position. Checks may also be made to verify the candidate's qualifications and work experience.

In the Council's view, it is consistent with best practice for the detailed inquiries into a candidate's character and qualifications to be made at the nomination stage of the appointments process. As the inquiries are costly and intrusive, it makes sense to confine them to candidates who are likely to be appointed.

## *3. Gender balance and diversity*

As noted above, a few tribunal statutes direct the Minister to consider the need for gender balance and the need for cultural and social diversity within the membership of the tribunal. In some jurisdictions, Cabinet guidelines require the Minister to consider how the candidate's appointment would affect the achievement of any goals set by the government for gender balance and diversity in tribunals.

The Council considers that public confidence in the independence and excellence of a tribunal will be enhanced if its membership broadly reflects the cultural and social diversity of society and has an appropriate gender balance. A balanced and representative membership is consistent with open and inclusive recruitment and merit-based appointment.

Consideration of gender and diversity is not inconsistent with the merit criterion, but may need to be evaluated at a different stage of the appointment process. In this Guide, 'merit' refers to the competencies of individual applicants which are assessed by a panel against criteria derived from the tribunal's competency framework. An assessment panel is not well placed to consider the effect of an individual's appointment on the gender balance and diversity of the tribunal's membership overall, because the panel does not know which combination of applicants the Minister will select for the positions to be filled. The effect that each proposed appointment will have on the tribunal's overall membership profile is best assessed by the Minister, in consultation with the Head, at the selection stage.

The Council proposes that the panel's report should give the Minister a guided choice among shortlisted applicants for each position. If there are multiple applicants of equal merit, the Minister may properly take into account the effect of an applicant's appointment on the gender balance and diversity of the tribunal's membership.

## *4. Consultation with the Head*

Some tribunal statutes require the Minister to consult with the Head about the selection of a candidate for appointment<sup>14</sup>. The Council considers that consultation with the Head at the selection stage is best practice. The Head is well placed to advise the Minister about the effect of proposed appointments on the tribunal's gender balance and diversity, and whether they will provide the range of skills, expertise and experience required within the membership.

## **Irrelevant considerations**

### *1. Political purposes and considerations*

Since the Minister's selection of a candidate and the Cabinet approval processes are conducted in secrecy, there is a risk that decisions will be influenced by political considerations, such as a candidate's association with a political party, or a candidate's actual or presumed political opinions, beliefs or activities. For example, a Minister may select a candidate for nomination in order to reward a political ally or to secure influence. Or a Minister may fail to select a candidate because the Minister objects to the candidate's actual or presumed political affiliations, opinions, beliefs or activities.

An appointment is not necessarily a patronage appointment just because the appointee shares the Minister's political opinions or is affiliated to the Minister's party or an allied political organisation. Patronage refers not to the appointee's attributes or history, but to the Minister's reasons for selecting the person.

The confidentiality of the selection and nomination stages makes it difficult to prove the influence of political considerations in appointments. In some cases, observers draw inferences from the Minister's public remarks, the timing or pattern of appointment decisions, a blatant disregard of normal procedure, the bypassing of the assessment panel or the disregard of its report, or the perverse nature of the Minister's assessment of a candidate's merit. Where the inferences are aired in the media or in parliament, they can impair public confidence in the impartiality of a member or the tribunal. They may also cause other members to fear for their reappointment prospects if they decide cases against the submissions of a government party.

### *2. Discrimination on the ground of a protected political attribute*

A Minister who takes a candidate's political attributes into account in appointment may act in breach of an anti-discrimination law. Most jurisdictions have laws prohibiting discrimination in the area of employment on the basis of a protected political attribute, variously described as 'opinion', 'belief', 'conviction', 'activity' or 'affiliation'<sup>15</sup>.

<sup>14</sup> See eg, QCAT Act s 183(2)

<sup>15</sup> The provisions are discussed more fully in the Discussion Paper, above n 9, 26-30.

The Council considers that the general provisions of anti-discrimination statutes should apply to tribunal appointments. In jurisdictions where the general anti-discrimination provision applies to tribunal appointments, there is no need to duplicate it in tribunal statutes. In a few jurisdictions, a provision may be needed to remove doubt about whether tribunal appointments are within the defined area of 'work' or 'employment' in the relevant anti-discrimination Act<sup>16</sup>.

Administrative law provides another constraint on political patronage and discrimination in appointments. If a statutory power is given for a purpose, it must be exercised for the purpose and not for an unauthorised purpose. Where the purpose of a power is not expressly stated, it can be implied, but implied purposes are often overlooked. In the Council's view, it is desirable for each tribunal statute to include an express statement of the purpose or object of the power to appoint, as in the following example:

Appointments are made in the public interest without regard to a political or other purpose outside the objects of the Act.

A statement like this does not change the law. It simply spells out an implication from the statute, in a way that brings it to the attention of Ministers. By specifying the purpose of the appointment power, the statement also makes it clear that political considerations are an irrelevant consideration that should not be taken into account.

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<sup>16</sup> This may arise in the case of Western Australian, New Zealand and ACT tribunals. See Discussion Paper, above n 9, 26-31.

## E. Tenure, remuneration and reappointment

Members of tribunals are normally appointed for a fixed term of years and are eligible for reappointment. Independence requires that the member's tenure and rate of remuneration are secure for the term. Reappointment may be by way of application in an open competitive process. It is also consistent with best practice to reappoint on the Head's recommendation where the member's performance demonstrates that the member meets the assessment criteria.

### Terms and tenure

Security of tenure is internationally regarded as an important safeguard of independence for the courts. While judges are appointed until a statutory retirement age, tribunal members are normally appointed for a fixed term of years and are eligible to be reappointed. The purpose of fixed term appointments is to ensure that the members' attributes remain suited to the tribunal's functions, which may change over time. Appointment for a fixed term is security of tenure, because the term is 'secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner'<sup>17</sup>.

In the Council's view, a first term for a full or part time member should be of a duration long enough to attract quality applicants and to enable appointees to develop their competencies to a high level in tribunal practice. To achieve these objects, the Council considers that a first term should, as a general rule, be 5 years.

### Reappointment process

Tribunal statutes usually specify a maximum term of appointment and provide that a member is eligible for reappointment. A common process for reappointment is that the member applies for a further term in an open appointment process, and is assessed by the panel against the assessment criteria in competition with other applicants. The stages from recruitment to appointment proceed as for a first term appointment.

There are disadvantages in requiring an incumbent who is performing well to apply for reappointment through an open application process. In a submission to the Council, the Public Service Commissioner of Western Australia provided, by way of analogy, the following commentary on the experience in appointing public sector CEOs under the Public Sector Management Act 1994 (WA) ('the PSM Act'):

A competitive reappointment process was introduced for Western Australian public sector CEOs in the mid-nineties. However that approach was subsequently discontinued. It has the potential to cause disaffection for CEOs who were performing well, and sometimes resulted in difficulties in attracting and retaining valued CEOs. It also had the perverse effect of discouraging external

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<sup>17</sup> Valente v The Queen [1985] 2 SCR 673, at 698 (Le Dain J, Sup Crt Can).

applicants who perceived that a position was ‘owned’ or ‘occupied’ by the incumbent. In most cases the incumbent was reappointed though the open process in any event. In addition, readvertising imposed added costs and unavoidable delays. The current system of direct reappointment of CEOs who are performing to an acceptable standard and with the concurrence of the responsible minister and/or board chair, has proved to be more acceptable and effective for the public sector<sup>18</sup>.

In addition to the problems detailed by the Commissioner, it can be difficult to ensure that an open appointment round is completed in time to give incumbent members reasonable notice of the outcome of their applications for reappointment.

For these and other reasons, Ministers are sometimes willing to reappoint a current member on the Head’s recommendation, without requiring the member to apply in an open competitive process. A few tribunal statutes expressly authorise reappointment without full process<sup>19</sup>. The Minister may be more willing to proceed in this way if the member’s last appointment was made following an open process.

The preferred method of reappointment is affected by the diverse experiences and needs of tribunals. For example, Tribunal A needs to attract and retain experienced members, and would like its members to be reappointed on their performance. Tribunal B, which has recently adjusted its competency framework following significant changes to its functions, prefers an open process to ensure that its members possess the competencies required by its latest framework.

In the Council’s view, a proper assessment of merit for a sitting member does not in all cases require an open, competitive process with the use of a panel. It is consistent with best practice for a member to be reappointed on the Head’s recommendation, and with the Head’s approval, where the member’s performance meets the assessment criteria. It is also consistent with best practice for members to be reappointed following an open application process establishing a competitive field.

Whichever method is used, a sitting member should be notified of the outcome of the application a reasonable before the expiry of the member’s term. Delays in reappointment can place members under pressure when they are called upon to adjudicate cases in which the Minister or the Minister’s department is a party or has a policy interest.

## **Security of remuneration**

Provisions to ensure the security of remuneration of judges and tribunal members during a term of appointment limit the scope for Executive influence, and are an important safeguard of independence. Some tribunal Acts provide that rates of remuneration for members, or specified classes of member, are determined, published

<sup>18</sup> Mr Mal C Wauchope, Public Service Commissioner, Public Service Commission (Western Australia), 20 June 2015, (copy on file).

<sup>19</sup> See eg, QCAT Act s 183(8); SACAT Act s 19(7).

and reviewed by an independent statutory tribunal. The determinations may also affect certain allowances, such as travel allowances. The rates payable to the members may be tied to rates set by an independent tribunal for another class of office holder. The prescribed rates usually apply to full time or fractional members but not sessional members.

Another way in which rates of remuneration are determined is by an administrative instrument issued by a Minister, or by a public sector authority, without independence from the Executive.

Some tribunal statutes provide that rates of remuneration are determined by the Governor or a Minister and are specified in the instrument of appointment. A few statutes expressly allow the Minister to vary the rate payable in respect of a member during the term. For example, the *Mental Health Act 2007* (NSW) provides<sup>20</sup>:

A member, other than the President or a Deputy President, is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

In the Council's view, best practice requires that rates of remuneration for Heads and other members of tribunals are determined and published by an independent tribunal, reviewed from time to time, are specified in instruments of appointment, and are not reduced during a term. The scope of the allowances (eg travel allowances) determined in conjunction with the rate of remuneration should be comparable to the provisions for judicial officers in the relevant jurisdiction.

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<sup>20</sup> Schedule 5 cl 5(2); see also the recently repealed Guardianship Act 1987 (NSW) sch 1 cl 2(1).

## F. Conclusion

The role of tribunals in adjudicating disputes demands that tribunals and their members are impartial and are seen to be so. Impartiality requires that they are free of improper influences and pressures to decide cases in a particular way. Some tribunals adjudicate cases in which the Executive is a party or has a policy interest. Tribunals may be called upon to decide questions which are politically sensitive for Ministers or government agencies.

The system in which tribunal members are appointed by the Executive has generally served the public well and produced a fine tribunal service. The system relies upon Ministers exercising their appointment powers in a public-spirited and ethical manner, free of self-regarding considerations of political advantage or patronage.

In this Guide, the Council has sought to identify best practice appointment processes which will maintain public trust that the system of Executive appointments ensures the independence and impartiality of tribunals.

The principles proposed in this Guide are widely shared. Many reviews of tribunal appointment processes have said that the processes should be fair, open, rational, merit-based and transparent. The Council has sought to apply the principles and to distil from them elements which are widely considered to represent best practice. It has done so on the basis of extensive research and consultations within the tribunal sector, and with the judiciary, government and other stakeholders.

## Appendix A: Submissions

The following submissions were received by the Council in response to the *Best Practice Guide to Tribunal Independence in Appointments Discussion Paper* (May 2015). The table shows the numbering allocated for purposes of identification.

1. Ms Bronwen Overton-Clarke, Commissioner for Public Administration, (Office of) ACT Chief Minister, Treasury and Economic Development
2. Professor Greg Reinhardt, Executive Director, Australian Institute of Judicial Administration
3. Anonymous
4. Ms Anne Britton, Convenor, COAT NSW Chapter
5. Ms Kath McEvoy, Convenor, COAT SA Chapter
6. Mr Greg Geason, Convenor, COAT Tas Chapter
7. Ms Patricia Harper, Convenor, COAT Vic Chapter
8. Mr Richard Glenn, Acting Commonwealth Ombudsman
9. Ameer Tadros, Director, Heath Professional Councils Authority
10. Anonymous
11. Mr Dean Jarvis
12. Mr Michael Tidball, CEO, Law Society of New South Wales
13. Mr Rocco Perotta, President, Law Society of South Australia
14. Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice New Zealand
15. Not received
16. Representatives of eight New Zealand Tribunals
17. Mr Mal C Wauchope, Public Service Commissioner, Public Service Commission (Western Australia)
18. Senior Members of QCAT on behalf of permanent members of QCAT

## Appendix B:

# AIJA Assessment Criteria for Judicial Officers

These suggested criteria have been developed by the Australian Institute of Judicial Administration Inc, and are reproduced by permission. They are expressed to apply to all judicial appointments, but the list is not exhaustive and not all proposed criteria will apply equally to all judicial appointments. The suggested criteria draw on information from a range of sources including research into the qualities and skills regarded as important by the Australian judiciary at all levels.

They are included in this Discussion Paper as an example of the types and the range of criteria that may be relevant in appointment of tribunal members.

1. Intellectual Capacity
  - » Legal expertise
  - » Litigation experience or familiarity with court processes, including alternative dispute resolution
  - » Ability to absorb and analyse information
  - » Appropriate knowledge of the law and its underlying principles, and the ability to acquire new knowledge.
2. Personal Qualities
  - » Integrity and independence of mind
  - » Sound judgement
  - » Decisiveness
  - » Objectivity
  - » Diligence
  - » Sound temperament
  - » Ability and willingness to learn and develop professionally and to adapt to change
3. An Ability to Understand and Deal Fairly
  - » Impartiality
  - » Awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs
  - » Commitment to justice, independence, public service and fair treatment
  - » Willingness to listen with patience and courtesy
  - » Commitment to respect for all court users

#### 4. Authority and Communication Skills

- » Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- » Ability to inspire respect and confidence
- » Ability to maintain authority when challenged
- » Ability to communicate orally and in writing in clear standard English

#### 5. Efficiency

- » Ability to work expeditiously
- » Ability to organise time effectively to discharge duties promptly
- » Manages workload effectively
- » Ability to work constructively with others

#### 6. Leadership and Management Skills

- » Ability to form strategic objectives and to provide leadership to implement them effectively
- » Ability to engage constructively and collegially with others in the court, including courts administration.
- » Ability to represent the court appropriately including to external bodies such as the legal profession
- » Ability to motivate, support and encourage the professional development of others in the court
- » Ability to manage change effectively
- » Ability to manage available resources

# Appendix C: Best Practice Guide to Tribunal Independence in Appointments Discussion Paper

## Project Steering Committee members

The Hon Justice Duncan Kerr, <i>Chev LH</i> (Chair)	Chair, Council of Australasian Tribunals Inc; President, Administrative Appeals Tribunal
The Hon. Justice David Thomas	President, Queensland Civil and Administrative Tribunal
The Hon. Justice Iain Ross AO	President, Fair Work Australia
The Hon. Justice John Chaney	Inaugural Vice President and subsequent President, State Administrative Tribunal of Western Australia
The Hon. Justice John Byrne AO, RFD	Supreme Court of Queensland
The Hon. Justice Michelle May	Family Court of Australia
Associate Professor Kathleen McEvoy	Law School, University of Adelaide, and Member, South Australian Civil and Administrative Tribunal
Ms Linda Crebbin	General President, ACT Civil and Administrative Appeals Tribunal
Ms Anne Britton (Secretary)	Secretary, Council of Australasian Tribunals Inc; Principal Member, NSW Civil and Administrative Appeals Tribunal
Professor Pamela O'Connor (researcher)	Law School, University of the Sunshine Coast

The Council of Australasian Tribunals Inc commissioned Professor Pamela O'Connor of University of the Sunshine Coast to prepare this paper and the Steering Committee has authorised its publication. Mr Campbell Duncan prepared the draft legislative provisions at Appendix C.

## Preface

The objects of the Council of Australasian Tribunals include promoting excellence in administrative justice and the development of best practice models and standards of behaviour.

The International Framework for Tribunal Excellence, developed under the Council's leadership, identifies 'Independence', meaning 'the degree of separation from the Executive', as one of the eight areas for measurement of tribunal excellence'.

Procedures and criteria for the appointment of members have been identified as crucial for tribunal independence.

In 2014 the Council established a Project Steering Committee to develop a Best Practice Guide to Tribunal Independence in Appointments. The Best Practice Guide will propose a set of key principles to support tribunal independence in the areas of member recruitment, appointment, reappointment and remuneration. The principles are intended for use as standards to evaluate actual provisions and practices, to guide the development of new tribunal legislation and amendments, and to educate and raise awareness about tribunal independence. The Guide will include sample legislative provisions illustrating how the principles might be implemented in tribunal legislation in future.

This Discussion Paper sets out in Appendix A the Steering Committee's provisional Statement of Principles, for consultation with a range of stakeholders. After the time for submissions concludes on 14 July 2015, the Steering Committee will consider the comments and responses, revise the Principles and prepare the Guide for publication in late 2015.

The Hon Justice Duncan Kerr *Chev LH*  
Chair, Council of Australasian Tribunals Inc

## Call for Submissions

The Council of Australasian Tribunals Inc. invites your comments on this Discussion Paper. Your submission will assist us to understand different views and experiences of the tribunal appointments and reappointments process and to develop our Best Practice Guide.

The Discussion Paper includes a list of questions for you to consider. They are set out individually in text boxes in Chapters 2 to 6 where relevant to the discussion, and are listed together in Appendix B. You may wish to answer some or all of them, or to offer other comments on the issues discussed. When making a submission, it would assist us if you identify the number of each question you are answering.

When you make a submission, you should indicate whether you wish it be public, anonymous or confidential.

1. Public submissions can be referred to in our Guide. Your name will be shown but your address and contact details will not be shown.
2. Anonymous submissions can be referred to in our Guide but your identity will not be shown.
3. Confidential submissions cannot be referred to in our Guide but can still assist us in developing our Guide.

## How do I make a submission?

Submissions can be made by:

- » **Online form:** <http://www.coat.gov.au/contact.html>
- » **Mail:** addressed to Ms Mayda Flanagan, Executive Assistant to the Hon. Justice Duncan Kerr, President, Administrative Appeals Tribunal, GPO Box 9955 HOBART TAS 7001
- » **Email:** [mayda.flanagan@aat.gov.au](mailto:mayda.flanagan@aat.gov.au)

**Submission deadline: 14 July 2015**

## Executive summary

The Council of Australasian Tribunals has identified independence as a key value and area of excellence in tribunals. Tribunals use varied methods to resolve disputes, including adjudication. Adjudication, whether undertaken by courts or by tribunals, must be performed impartially. A tribunal's impartiality must be safeguarded by institutional arrangements which ensure its independence.

Appointments and reappointments are areas of particular significance for independence. Tribunal members are generally appointed by the Governor or Governor-General in Council on the nomination of Ministers, which confers high authority upon the members. The system of appointment by the executive government gives Ministers the power to determine the makeup of tribunals' membership and to affect the interests of members in a direct and individual way. The way the power is exercised can present a risk to the independence of tribunals, especially ones which review government decisions or adjudicate disputes in which a government entity is a party or has a policy interest in the outcome. The risk is greater where incumbent members are seeking reappointment to a further term.

This Discussion Paper examines ways in which the risk to independence can be controlled and managed. It proposes that the power to appoint is a discretionary power that needs to be better regulated by the tribunal statutes which create it, in order to better promote and preserve independence.

Each tribunal is established under a different statute, which provides for the appointment of its members. In recent years there has been a great deal of legislative activity in relation to tribunals, particularly resulting from amalgamation. There is a trend in recent statutes to provide more procedural detail in appointment provisions. The Council has identified an opportunity to contribute to the future development of tribunal legislation by developing a Best Practice Guide in consultation with stakeholders.

Law reform bodies in Australia and New Zealand have called for open recruitment and a merit-based, transparent selection process in tribunal appointments. Many tribunals have established open recruitment for periodic appointment rounds, and merit-based assessment of applicants by panels against published, competency-based criteria. However, the later stages of the appointment process, involving the selection of candidates by the Minister and the approval of the candidates' nomination by Cabinet, are arcane and the criteria unclear. This Discussion Paper examines what can be done to make the appointment process as a whole more open, transparent and merit-based, including the selection and nomination stages.

There is a need to clarify the considerations relevant to nominating a candidate for appointment, and who should assess them. Assessment panels can assess attributes of individual candidates - qualifications, merit and good character, although probity checks conducted at the nomination stage may lead to a candidate being disqualified on character grounds. Panels are not well-placed to assess the effect of a candidate's appointment on the composition of the tribunal's membership, including its mix of expertise and experience, because they

do not know which combination of candidates the Minister will select for the appointment round.

A best practice model could allocate the assessment of qualifications and merit to the panel, and leave the Minister, on advice from the Head, to consider the effect of a proposed appointment on the tribunal's institutional capacity. The Minister would also consider any disqualifying prior conduct by the candidate or any potential conflict of interests disclosed by the usual inquiries, and any other relevant public interest considerations.

Tribunal legislation rarely prescribes the relevant criteria for Ministers to consider when deciding whether to nominate a candidate. Under administrative law, the relevant considerations for exercising a discretionary power are to be implied by consideration of the subject matter, scope and purpose of the Act. To identify the relevant considerations requires an exercise in statutory interpretation. Implied considerations and purposes are invisible to Ministers and can easily be overlooked. They need to be stated expressly in tribunal legislation, in a way which clearly excludes irrelevant political considerations and purposes.

In most jurisdictions it is unlawful for a Minister to decline to appoint a candidate on the basis of an actual or imputed political opinion or belief. Discrimination in the offering of employment on the basis of political opinion is prohibited in all but a narrowly specified class of political jobs. The Australian government has ratified ILO Convention 111 and the International Covenant on Civil and Political Rights, each of which upholds the principle of non-discrimination on the basis of political opinion.

In exercising a power to nominate, Ministers are legally bound not to take into account an irrelevant consideration. While nothing in tribunal Acts implies that political attributes can be considered, tribunal statutes could exclude them more explicitly. By spelling out the purpose of the power, the relevant considerations, the assessment panel process and the consultation requirements, the legislation would demonstrate that the power is to be exercised according to legal, not political, considerations.

In the future, various jurisdictions may establish an independent appointments commission with power to select tribunal appointees. In the meantime, the power of Ministers needs to be better defined, by specifying procedures and decision outcomes. It also needs to be better structured, by more fully specifying the object of the power and the relevant criteria.

# Chapter 1: Introduction

## The role of tribunals in our systems of justice and government

A well-functioning civil and administrative justice system provides many benefits. It contributes to social cohesion and public order through timely and peaceful resolution of disputes. It facilitates economic welfare by enforcing agreements, protecting returns from economic activities and reducing the costs of transactions<sup>21</sup>. It upholds democratic civil society by making government accountable for decisions that affect individuals. It protects individual welfare by enforcing responsibilities, upholding rights and redressing civil wrongs.

Tribunals play an essential role in our systems of civil and administrative justice. They review the merits of government decisions which affect individuals, resolve disputes between parties under private law as an alternative forum to the courts, and determine questions arising in occupational licensing schemes. Tribunals enhance access to justice by providing timely and informal adjudication services at low cost. The Productivity Commission reported in 2014 that Australia's 54 tribunals resolve cases at the rate of 395,000 per year<sup>22</sup>.

In cases which are not resolved through assisted dispute resolution, tribunals determine the issues and outcome by adjudication. Adjudication is a decision making process which involves giving the parties a hearing, making findings of fact based on evidence, and applying the law to the facts. Effective adjudication, whether by a tribunal or by a court, requires public confidence that the decision maker will be impartial. An impartial adjudicator has no personal stake in the matter to be decided, and is free of any improper influence to decide in a particular way.

Adjudication requires participation and trust. Courts and tribunals rely on public confidence in their integrity and impartiality. The public perception of their impartiality depends on their independence from the executive government. Independence supports both the reality and the perception of impartiality. While impartiality is a state of mind, independence refers to institutional arrangements which enable tribunals to adjudicate impartially.

In the case of courts, it is widely accepted that judges require institutional safeguards for their independence. Measures such as security of tenure, removal only for cause, and security against reduction of remuneration during office are required by the constitutions of many nations, to ensure that courts are free to interpret the constitution and to check excesses of power by the legislature and the executive government.

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21 See eg. Commonwealth of Australia, Productivity Commission, Access to Justice Arrangements Vol 1 (2014) 138-139.

22 Ibid 345.

While courts alone have the role of interpreting and enforcing the constitution, the function of adjudication is shared by courts and tribunals. The starting point for tribunal independence is not to equate tribunals to courts, but to ask what they require to perform adjudicative functions<sup>23</sup>.

A number of human rights instruments recognise the right of a person to have their rights and obligations determined by an independent and impartial tribunal<sup>24</sup>. Each jurisdiction allocates the subject areas for adjudication to courts and tribunals in a different pattern. Since the human right is held by a person, it does not vary according to whether the adjudication is provided by a court or by a tribunal. The UK's Leggatt Report reasoned that because tribunals are established to provide justice as alternatives to the courts, they must be seen to demonstrate similar independence and impartiality to the courts<sup>25</sup>. While the principle is widely accepted, it does not mean that the legislative and institutional arrangements to protect independence need to be the same for tribunals as for courts.

## Aspects of independence

In 2012, the Council of Australasian Tribunals and the Australian Institute of Judicial Administration commissioned Pamela O'Connor to research and write a report on tribunal independence. The report, *Tribunal Independence*, identified a list of elements that had been proposed as aspects of tribunal independence, and proposed a new conceptual framework to organise the elements under three aspects:

1. Administrative independence is measured by the tribunal's control of its staff, budget and expenditure, premises, facilities and other resources required to carry out its functions independently of the executive government.
2. Institutional independence refers to a set of arrangements which determine the composition of the tribunal's membership from time to time. They include provisions for appointments, tenure or term of appointment, security of remuneration during term, reappointment to a further term, and removal from office during a term.
3. Adjudicative independence is supported by legislation, standards and procedures to ensure that members' are free of external influence and able to impartially decide cases assigned to them. The safeguards include indemnities and immunities, codes of conduct, common law rules of natural justice, and provisions for oversight of tribunal decisions in the form of judicial review or appeal.

<sup>23</sup> Parker proposes said that the inquiry for judicial independence should begin with what is needed for impartiality: Stephen Parker, *Courts and the Public* (AIJA Inc, 1998) 65.

<sup>24</sup> The instruments include: European Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1); International Covenant on Civil and Political Rights, art 14(1); Universal Declaration of Human Rights, art 10; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 24(1); Human Rights Act 2004 (ACT) s 21(1); Canadian Charter of Rights and Freedoms s 11(d).

<sup>25</sup> UK, *Tribunals for Users: One System, One Service – Report of the Review of Tribunals* (2001) ('Leggatt Report') at [2.12].

The Report analysed provisions in current tribunal statutes in Australia and New Zealand and identified examples of provisions which, in the author's view, gave relatively stronger or weaker protection to institutional independence. It was suggested that the Council consider developing principles and standards for the institutional design of tribunals, which governments would be invited to consider when establishing new tribunals, or when reviewing or amending tribunal legislation.

Institutional independence was identified as the aspect of greatest concern for the following reasons<sup>26</sup>:

Institutional independence is concerned with the tribunal's structural and institutional relationship to the executive. The 'executive' includes the Ministers and Cabinet, departments or ministries of state and other administrative agencies of government. The executive is empowered to make key decisions relating to tribunal members, including appointment, reappointment, promotion, term of office, rates of remuneration and allowances, conditions of office, suspension and removal from office.

Decisions made by the executive about these matters directly affect the financial and career interests of members. The executive may be an interested party in the review of its administrative decisions by a tribunal, or may otherwise have policy interests in the outcomes of the tribunal's decisions.

Institutional independence is about arrangements to ensure that executive powers to appoint and remunerate members do not influence the outcome of tribunal decisions or impair the perception of impartiality.

The Council has decided to develop a Best Practice Guide to Tribunal Independence in Appointments. Its purpose is to educate and raise awareness about appointment and reappointment processes affect institutional independence. It will propose principles for tribunal appointments, and provide examples of draft legislative provisions to incorporate the principles into tribunal Acts. The principles will also serve as standards for evaluating practices and legislative provisions, and to assist in measuring progress towards excellence in tribunal appointment processes

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<sup>26</sup> Pamela O'Connor, Tribunal Independence (AIJA Inc, 2013) <http://www.coat.gov.au/publications.html>, 17.

## Chapter 2: Appointments process

### Who appoints tribunal members?

Tribunal statutes usually provide for the appointment of tribunal members to be made by the highest level of the executive government, the Executive Council, which comprises the Governor-General or Governor and appointed Ministers. Appointments are made on the nomination of a Minister. A few tribunal statutes give a Minister the power to appoint tribunal members directly, without an order of the Executive Council.

The power to nominate or appoint members of specialist tribunals is commonly given to the Minister who is responsible for the program area in which the tribunal adjudicates. For tribunals which exercise jurisdiction across portfolios, and especially for tribunals which have judicial members, the power to nominate Ministers is often given to the Attorney-General or Justice Minister who is also responsible for appointments to the judiciary.

Regardless of which Minister makes the nomination or appointment, he or she is usually required by statute or Cabinet procedures to consult with other Ministers and to submit the proposed nomination for the approval of the Cabinet<sup>27</sup>. A tribunal statute may or may not require the Minister to consult the tribunal head before recommending an appointment<sup>28</sup>.

The process for appointment of tribunal members by the Executive Council on the nomination of a Minister is consistent with the process for appointing judges and statutory office holders. Ministers are accountable to the Parliament, and ultimately to the voting public, for the appointments<sup>29</sup>. The Administrative Review Council and the New Zealand Law Commission have each said that Ministers should remain responsible for recommending appointments to tribunals, and that the risk to tribunal independence should be controlled by requiring open recruitment and a merit-based, transparent selection process before appointments are made<sup>30</sup>.

27 See eg, *Weathertight Homes Resolution Services Act 2006 (NZ)* s 103(2); *Immigration Act 2009 (NZ)* s 219(2); New South Wales Department of Premier and Cabinet, *Ministerial Handbook* (June 2011) 14-15.

28 For an example of an express statutory requirement to consult, see *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act') s 183(2).

29 Simon Evans and John Williams, 'Appointing Australian Judges: A New Model (2008) 30 *Sydney Law Review* 295, at 299-300.

30 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [2.13] ('ARC, *Better Decisions*') at [4.28], [4.35], [4.36]; [4.27]; New Zealand Law Commission, *Tribunals in New Zealand*, Issues Paper No 6 (2008) ('NZLC IP 6'), 285-86 at [5.8]-[5.15].

## Stages in the appointment process

The Minister determines the process and timetable for recruiting and selecting members, or delegates the decisions to the Tribunal Head. In New Zealand, the conduct of the appointment process may be delegated to the Minister's department.

A common process involves advertising for applications or expressions of interest, assessment of applicants by a panel against competency-based assessment criteria, and submission of a list of suitable candidates for the Minister's selection with a report on the panel's findings. In most jurisdictions the Minister is required by Cabinet directions to submit the proposed nomination to Cabinet for its approval.

It is useful to distinguish five stages in the appointment process: recruitment, assessment, selection, nomination and appointment. Recruitment involves identifying potential candidates for appointment. In the assessment stage, applicants are assessed for suitability for the position and those found to be unsuitable are excluded from further consideration. The Minister then makes a selection among the suitable candidates to determine who shall be nominated (or recommended) for appointment. The nomination stage includes the checks, inquiries, consultations, Cabinet discussions and other steps required to obtain Cabinet endorsement of the Minister's selection. Once Cabinet has approved the Minister's selection of a candidate, the making of an order for the appointment by the Executive Council completes the process.

## Three types of appointment process

The models for appointment processes used in common law jurisdictions for both judicial and tribunal appointments are broadly of three types, which may be called the nomination method, the independent commission method and the assessment panel method.

### *The nomination method*

Where the nomination method is used, the Minister selects a candidate who has been identified and assessed by the Minister as suitable. The Minister may or may not interview the candidate. The process is 'closed' in the sense that the vacancy is not advertised or brought to the attention of other potential candidates. The Minister decides which persons or bodies will be consulted in identifying and assessing a candidate. The Minister may or may not consult the Head of the tribunal before nominating a candidate for appointment.

The use of the nomination method in tribunal appointments has declined since the early 1990s, when it came under sustained criticism as an 'old boy network' that gives privileged access to certain people and perpetuates a narrow membership profile. The closed mode of recruitment leads to qualified persons from

under-represented groups being systematically overlooked<sup>31</sup>. It may also present an enhanced risk of political patronage and bias, particularly where the Minister relies on party sources to identify or assess potential appointees.

It was to control both social and political bias in selection that the assessment panel method was introduced. The Administrative Review Council recommended that a 'rational, merit based and transparent' selection and appointment process would enhance independence by making tribunals less susceptible to improper influence<sup>32</sup>. The NZ Law Commission agreed that merit-based selection following a fair and neutral process would enhance public confidence in the integrity of tribunal appointments and dispel suspicion of political patronage<sup>33</sup>.

Despite the concerns about bias, the nomination method is still used in various circumstances. It is sometimes used for appointment to a casual vacancy which needs to be filled before the next competitive recruitment round is due. Some smaller tribunals recruit members by the nomination method, particularly for sessional member positions, because they lack the resources to conduct an assessment panel process. The method is sometimes used to fill positions for which the best potential candidates may be unwilling to apply under a competitive selection process, such as the position of Head of Tribunal, some positions reserved for judicial officers, and certain specialist positions which attract few qualified applicants. There are also instances where Ministers have departed from the assessment panel method for no apparent reason and without consulting the Head.

## **Question 1: Is it appropriate to use the nomination method and if so, in what circumstances?**

### *An independent appointments commission*

The independent appointments commission method provides for appointment based on a selection or shortlisting of candidates by an independent statutory appointments commission.

The UK has a broad based, independent Judicial Appointments Commission (JAC) established by statute, which has the function of selecting both judicial officers and tribunal members at the request of the Lord Chancellor (a Minister<sup>34</sup>). Selection is made solely on the basis of good character and merit. The JAC determines

31 Simon Evans and John Williams, 'Appointing Australia's Judges: A New Model' (2008) 30 Sydney Law Review 295, 301.

32 ARC, Better Decisions, above n 10, [4.34], [4.35], [4.21].

33 NZLC, IP 6, above n 10, [5.8]-[5.11].

34 Constitutional Reform Act 2005 (UK) ss 85-87, sch 14 pt 3.

the selection process to be followed and carries it out. It puts forward one name only for each appointment to be made<sup>35</sup>, unless it finds that the selection process has failed to identify candidates of sufficient merit<sup>36</sup>. The Act allows the Lord Chancellor to reject the JAC's selection or ask it to reconsider on two occasions, but must accept the JAC's third selection<sup>37</sup>.

Proposals for an independent appointments commission for judicial appointments have been considered in some jurisdictions. In 2009 a Senate Committee considered one for appointments to the federal judiciary, but was not satisfied that the cost was justified<sup>38</sup>. In 2010 the Victorian Department of Justice released a discussion paper seeking submissions on the process for appointing Victorian judicial officers<sup>39</sup>. One of the options it examined was the establishment of an independent Judicial Appointments Commission to assess candidates and make recommendations to the Attorney General<sup>40</sup>. The paper did not suggest that the commission would make recommendations for tribunal appointments.

The establishment of an independent appointments commission would be a major reform of the justice system, and would require legislation. It is unlikely that one would be established for tribunal appointments before the model is adopted for judicial appointments. If at any time a jurisdiction is willing to establish an independent judicial appointments commission, consideration should be given to extending the model to tribunal appointments.

### *The assessment panel method*

Under the assessment panel method, the Minister makes a selection after receiving a report from a panel which has assessed the suitability and merit of all individuals who have applied under an open recruitment process. It is the dominant and widely preferred method for making tribunal appointments in Australia and New Zealand. Its key elements include advertising periodically for applications or expressions of interest from suitably qualified persons seeking appointment to specified member positions. For each round of applications a panel is established by the Minister, or by the Head in consultation with the Minister. The panel assesses the applicants against publicly available assessment criteria.

The assessment criteria are competency-based. They are framed as descriptions of skills, abilities and

<sup>35</sup> Constitutional Reform Act 2005 (UK) 88(4).

<sup>36</sup> Constitutional Reform Act 2005 (UK) ss 88(2), 92(4), 93.

<sup>37</sup> Constitutional Reform Act 2005 (UK) s 90-92.

<sup>38</sup> Parliament of Australia, Senate, Legal and Constitutional Affairs References Committee, Australia's Judicial System and the Role of Judges, (2009) [3.57] «<http://www.apf.gov.au>» ('Senate Committee Report on the Judicial System') at [3.89].

<sup>39</sup> Victoria, Department of Justice, Reviewing the Judicial Appointments Process in Victoria, Discussion Paper (2010).

<sup>40</sup> Ibid 19-24.

knowledge required by an appointee to successfully perform the duties of the tribunal position. There may be different sets of criteria for classes or types of member position. A candidate is suitable for appointment if he or she possesses the competencies at the levels specified in the assessment criteria. The criteria can also be used to rank candidates relative to each other by reference to merit. The most meritorious candidate is the one who possesses the specified attributes in the highest degree.

The drafting of the assessment criteria is normally undertaken by the Head prior to the recruitment stage, to ensure that they are available to prospective applicants. The task cannot be given to an assessment panel as they usually constituted after recruitment has commenced. A panel can provide feedback to assist the Head in revising the criteria for the next round.

### *Constitution of the panel*

Usually the membership of the panel is determined by agreement between the Head and the Minister. There is no general standard as to how panels should be constituted. The Minister may wish to include an officer from his or her department, to ensure that the Minister's concerns are considered or that government standards for assessment processes are observed. The Minister may also wish to broaden the range of experience represented on the panel by nominating a member of a community organisation or stakeholder body. The inclusion in the panel of one or more members nominated by the Minister enhances the likelihood that the Minister will adopt the panel's assessment of the candidates. Other members of the panel usually include the Head or a senior member of the tribunal as Chair, and one or more experienced members of the tribunal or another tribunal.

Some Heads propose that the Minister should nominate around one third of the members, and the rest should be appointed by the Head. The Minister's nomination would be made informally in discussions with the Head.

## **Question 2: By what process, and with what composition, should an assessment panel be formed?**

### *The panel's report to the Minister*

The assessment panel conducts an assessment of the suitability of each applicant against the assessment criteria, and may interview applicants, check references and make inquiries. The panel prepares a report, the form of which is determined by the Minister. The Minister may request the panel to identify an 'assessed pool' of suitable candidates who have met the minimum requirements for appointment, or a 'recommended shortlist' of candidates, with or without a ranked order of preference ('ranked shortlist'). A shortlist gives the Minister a more confined range of choices than an assessed pool.

The Minister expects to be offered a choice of candidates for each position. If the report identifies insufficient candidates to give the Minister a choice, the Minister may decide to re-advertise.

**Question 3: Should the panel's report on candidates identify an 'assessed pool', a 'recommended shortlist' or a 'ranked shortlist'?**

## **The selection and nomination stages**

Tribunal legislation is usually silent as to the selection and nomination stages of the appointments process<sup>41</sup>. The procedures and some criteria are regulated by administrative policies and procedures set out in documents such as a Cabinet handbook or guide issued by a central agency of government. Their content and coverage differ from one jurisdiction to another.

The procedures usually deal with tribunal appointments in an undifferentiated way under a wider class of 'statutory appointments'. The procedures set out matters to be considered and procedures to be followed before a nomination can be approved by Cabinet.

The procedures prescribe police record and other standard inquiries to be made about the candidate. They focus on whether the candidate has been convicted or sanctioned for a breach of the law, or has charges or lawsuits pending. The candidate is also asked to disclose financial and other interests which may conflict with the duties of the tribunal position.

The procedures normally require the Minister to report on the outcome of consultations with other Ministers and government departments about the nomination.

The Minister may be required by the procedures to comment on the process leading to the selection of the candidate, but is not confined to selecting a candidate from among those assessed by the panel. The procedures do not require the Minister to state whether the decision departs from the panel's advice. Exceptionally, the Commonwealth's Merit and Transparency framework for appointment of statutory officers requires that if the Minister selects a person who has not been recommended by the panel<sup>42</sup>, or decides not to appoint a candidate who has been recommended by the panel<sup>43</sup>, the Minister must write to the Prime Minister giving the reasons. It is presently unclear whether the Merit and Transparency framework continues in force with

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41 With the exception of the SACAT Act, s 19(4), discussed below.

42 Australian Public Service Commission, Merit and Transparency: Merit-based selection of APS heads and APS Statutory Officers (4th ed, Oct 2012) ('Merit and Transparency') 3, 7.

43 Merit and Transparency, *ibid* 7.

respect to Commonwealth tribunal appointments<sup>44</sup>.

The guidelines in most jurisdictions require the Minister to consider how a proposed appointment would affect the achievement of any goals set by the government for gender balance or ethnic or cultural diversity in statutory appointments<sup>45</sup>. However the guidelines do not direct or authorise the Minister to treat a candidate's gender, ethnicity or cultural identity as a consideration in a nomination decision.

In sum, under current tribunal legislation and Cabinet procedures, the panel's assessment of merit is a relevant consideration in the Minister's selection, but is not the sole consideration. The Minister can re-assess the merits of the candidates, consider candidates who have not been assessed by a panel, evaluate new information as to the candidate's prior conduct and interests, and consult with other Ministers. Any of these considerations may cause the Minister to depart from the panel's advice.

### *Legislative regulation of the selection stage*

One innovative tribunal statute has extended the scope of regulation into the selection stage by specifying matters that the Minister must consider. The South Australian Civil and Administrative Tribunal Act 2013 ('SACAT Act') s 19(4) provides that the Minister in recommending a person for appointment must have regard to the following five matters: any selection criteria recommended by the panel; any report by the panel following assessment of the candidates; the need for gender balance; the need for cultural and social diversity; and the range of knowledge, expertise and experience required within the membership. In addition, the Minister must consult with the President before making a recommendation<sup>46</sup>.

The provision provides a model for structuring the Minister's discretion by specifying a list of relevant criteria which the Minister is bound to consider. The list is not expressed to be exhaustive, and Ministers are not precluded from considering other matters that may be relevant in the circumstances of a particular candidate or position, such as information about the candidate's past conduct or interests. Additional criteria may also be implied from the statute. For example, if the Minister is required to consult with the Head, it can be implied that the Head's advice is a relevant consideration<sup>47</sup>.

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44 It was applied to Commonwealth tribunal appointments by a ministerial direction. Senator John Faulkner, 'New Arrangements for Merit and Transparency in Senior Public Service Appointments', Media Release 02/2008, 5 Feb 2008; and list of statutory offices: [http://www.senatorjohnfaulkner.com.au/Media/list\\_of\\_agencies\\_attachment\\_4Feb08.pdf](http://www.senatorjohnfaulkner.com.au/Media/list_of_agencies_attachment_4Feb08.pdf). No announcement regarding the application

45 Some jurisdictions are committed to achieving gender equality in the membership of government boards or bodies: eg, Queensland's Women on Boards Strategy - Stage 2: *ibid* 6.2.1.

46 SACAT Act s 19(5).

47 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-41.

Administrative law recognises two kinds of relevant considerations: mandatory and permissive<sup>48</sup>. A mandatory relevant consideration is one to which the Minister must have regard. Failure to consider it would be a legal error. A permissive relevant consideration is one which the Minister may have regard to, or may not have regard to, without committing a legal error either way<sup>49</sup>. The SACAT provision states that the Minister must have regard to all five of the matters listed in s 19(4). In the next chapter, there will be further discussion as to which matters should be permissive, and which should be mandatory, relevant consideration.

Administrative law also recognises a category of irrelevant considerations, meaning considerations that the Minister must not take into account. A Minister who has regard to an irrelevant consideration commits a legal error. Statutes rarely state irrelevant considerations, but they can be implied by the process of statutory interpretation. The question of whether a candidate's political opinion or belief is an irrelevant consideration will be further considered in Chapters 5 and 6.

**Question 4: Should tribunal legislation specify matters that the Minister must consider, and matters that the Minister may consider, in nominating a person to a tribunal?**

<sup>48</sup> Mark Aronson & Matthew Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook Co, 2013) [5.30].

<sup>49</sup> *Ibid.* *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J); *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375 (Deane J); *Ballantyne v Workcover Authority (NSW)* NSWCA 239, [113] (Beazley JA).

## Chapter 3: Criteria for appointment

In the previous chapter it was noted that the criteria which a Minister can consider when selecting a candidate are open-ended. Four criteria stand out as requiring systematic and careful consideration: qualifications, merit, character, and the needs of the tribunal to maximise its institutional capacity. The first three require individualised assessment of applicants, while the last requires a broader assessment of the effect of a proposed appointment on the tribunal's membership. It is necessary to consider which of these should be considered, by whom and at which stage. The following discussion assumes that the assessment panel method is used.

Later in the chapter, two other matters are considered: public interest considerations; and gender balance and cultural diversity in the membership of the tribunal.

### Qualifications

Professional qualifications may be specified by statute, such as a requirement that a candidate holds judicial office in a specified court, or is a legal practitioner of not less than 5 years' standing. Tribunals may have different qualification requirements for categories of member required to perform specialist functions, such as qualifications in law, medicine, social work, land valuation or planning. Required qualifications, including any required experience, should be specified in recruitment advertising. Possession of required qualifications can be assessed by a panel, or as a threshold test applied by the Head.

### Merit

A candidate has merit to the extent that he or she possesses attributes required for the effective performance of the tribunal role. The attributes will normally be a combination of knowledge, skills and behavioural attributes, such as "willingness to listen with patience and courtesy"<sup>50</sup>. (For examples of other personal attributes that may be required, see Appendix D). For each tribunal position, the Head or an assessment panel usually prepares a statement of the required qualifications, knowledge, skills, and personal attributes (competencies), from which assessment criteria for the position are derived. The Council has prepared a Competency Framework as a guide to assist tribunals in developing their own statements of competencies<sup>51</sup>.

The assessment of each applicant's merit can be undertaken by an assessment panel with a degree of objectivity, based on evidence, information and observation.

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<sup>50</sup> AIJA, Suggested Criteria for Judicial Appointments (2015); Appendix D.

<sup>51</sup> Council of Australasian Tribunals, Tribunal Competency Framework: Promoting Professional Excellence [www.coat.gov.au/publications/](http://www.coat.gov.au/publications/)

Since possession of the competencies is a question of degree, the panel may rank in order of merit the applicants (now ‘candidates’) it assesses as suitable to appoint. This does not necessarily mean that the panel recommends the appointment of one or more of the candidates.

No current tribunal Act provides for the panel to be the final arbiter of merit. Even the SACAT Act s 19(4) states only that the Minister must have regard to the assessment criteria and the panel’s report. The Minister is not bound by the panel’s assessment and ranking of the candidates, nor by the assessment criteria. The Minister is not even required to request an assessment by the panel before recommending a candidate<sup>52</sup>.

Currently, assessment of merit is a function of both the Minister and the panel, if a panel is used.

## Character

Tribunal statutes are usually silent as to the character of appointees. Merit could be said to include character, but it is better to regard character as a separate requirement<sup>53</sup>, to distinguish it from the relativism of merit.

Since character requires individualised assessment, it is capable of being undertaken by the panel, but under current arrangements the panel does not have access to all the relevant information. The panel is largely dependent on information provided by applicants and their referees.

Police record checks are made by the Minister’s department or a central agency of government at the nomination stage, to minimise the number of checks required. The selected candidate is also asked at that stage to make declarations as to interests, solvency and whether the candidate has been convicted or sanctioned for breach of any law. If adverse information is revealed, the Minister or Cabinet may have to decide whether to proceed with the proposed nomination.

Assuming that all the relevant information cannot reasonably be made available to the panel at assessment stage, character assessment is a shared responsibility of the panel and the Minister.

## Needs of the tribunal

The SACAT Act s 19(4) (c)(iii) requires the Minister to have regard to ‘the range of knowledge, expertise and experience required within the membership of the Tribunal’. Other tribunal Acts are silent as to the needs of the tribunal, but it may be implied as a relevant consideration from other indications in the Act, such as a provision requiring the Minister to consult the Head before making a nomination<sup>54</sup>.

The needs of the tribunal for a range of knowledge, expertise and experience within the membership may

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<sup>52</sup> SACAT Act s 19(2), (4)(b).

<sup>53</sup> This is the approach adopted in the Constitutional Reform Act 2002 (UK) ss 63, 64(1).

<sup>54</sup> For an example of an express statutory requirement to consult, see QCAT Act s 183(2).

best be seen as a shared responsibility of the Head, the panel and the Minister. The Head and the Minister should consider it at the recruitment stage, the Head should consider it when drafting the qualification requirements and the assessment criteria, the panel should consider it in assessing applicants, and the Minister should consider it in selection.

To ensure that the Minister has information about the needs of the tribunal, tribunal statutes should expressly provide that the Minister must consult the Head and consider the Head's advice in selection.

**Question 5: Should the effect of an appointment on the tribunal's social and cultural diversity or gender balance be considered, and if so, how and by whom?**

## Public interest considerations

When a statute gives a discretionary power to a Minister, it may be taken to indicate that an assessment may be required of public interest considerations. For example, if the Minister believes, in exceptional circumstances, that the appointment of a certain person would undermine public or stakeholder confidence in the tribunal, the Minister may have regard to the circumstances as a public interest consideration<sup>55</sup>.

### *Public interest considerations and government policy objects*

If Ministers adopt a view of the public interest which prioritises their policy objects, tribunal independence may be at risk. For example, a Minister is likely to believe that his or her policies and programs are in the public interest. The Minister may imply that it is therefore relevant to consider whether a particular candidate would be more likely, or less likely, to make decisions which advance the Minister's policy interests.

If a Minister adopts this view, a perception may arise that members will not be reappointed if they set aside government decisions or decide matters against the Minister's policy interests<sup>56</sup>. Members may feel pressured to conform to ministerial expectations in making decisions, if their decision outcomes are considered in reappointment<sup>57</sup>. In this way, impartiality can be undermined if Ministers place their own policy interests above the public interest in maintaining independent adjudication.

<sup>55</sup> See, eg, *R v Secretary of State for the Home Department; ex parte Venables* [1998] AC 407; Aronson & Dyer, above n 28, [5.50].

<sup>56</sup> ARC, *Better Decisions*, above n 10, [4.57].

<sup>57</sup> See generally, Rachel Bacon, 'Amalgamating Tribunals: A Recipe for Optimal Reform' (PhD thesis, Univ of Sydney, 2004), 226-27.

Public interest considerations are open-ended and cannot be exhaustively defined. Tribunal legislation can limit their scope by specifying the relevant criteria for appointments as fully as possible.

## Gender balance and diversity

The public expects the government to ensure that tribunals, like other public institutions, should demonstrate gender balance in their membership, and should also reflect the ethnic and cultural diversity of society<sup>58</sup>. A diverse membership is expected to enhance the tribunal's social and cultural sensitivity and to bring a broader range of perspectives to adjudication<sup>59</sup>. Progress towards diversity goals and gender balance contributes to social justice and cohesion, and enhances the acceptance by all communities of the exercise by tribunals of state power<sup>60</sup>.

There are various strategies for advancing diversity and gender balance in the membership of tribunals. Open recruitment and non-discriminatory assessment criteria help to widen the range of applicants for tribunal positions.

The question whether and how gender balance and diversity should be taken into account in assessment and selection is controversial. There is a debate as to whether diversity is an aspect of merit or a separate consideration, and whether it is suitable for assessment by a panel. A Senate Committee reported in 2009 that the 'overwhelming view put to the committee is that merit should be the fundamental criterion in judicial appointments, and the committee itself was strongly of the same view<sup>61</sup>'. However, the Senate Committee did not believe that encouraging diversity in appointments was inconsistent with selection on merit<sup>62</sup>.

While this may be correct in principle, in practice it has proved difficult to incorporate diversity into assessment criteria. Attempts by the Judicial Appointments Commission (UK) to do so have failed to achieve diversity goals<sup>63</sup>. There is a tension between merit, which concerns the levels of competencies possessed by individuals, and diversity, which relates to the tribunal's overall composition.

Achieving progress towards gender equity and diversity in statutory appointments is regarded by governments and the public as a matter of political responsibility. Governments commonly announce whole-

58 ARC, *Better Decisions*, above n 10, [4.22].

59 Jeffrey Jowell, 'The Growing International Consensus in Favour of Independent Judicial Appointment Commissions' in Jowell et al, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Judicial Appointments Commission UK, 2010), 1, 3; J Neuberger, *Report of the Advisory Panel on Judicial Diversity 2010* [www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf) 15.

60 Hon. Justice Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004).

61 Senate Committee Report on the Judicial System, above n 18 at [3.26], [3.58].

62 Ibid at [3.58].

63 O'Connor, above n 6, 56-59.

of-government targets for categories of appointment, such as board and tribunal appointments. In some jurisdictions, Cabinet procedures require Ministers to report on the effect of each recommended appointment on the government's achievement of its targets.

The Cabinet procedures are framed in terms of reporting and monitoring. They do not require or authorise Ministers to have regard to gender and diversity in making nomination decisions. To do so would likely contravene anti-discrimination law, except to the extent that the policy is a 'special measure' authorised temporarily for the purpose of achieving substantive equality<sup>64</sup>.

The SACAT Act s 19(4)(c) requires the Minister to have regard, when recommending a person for appointment, to '(i) the need for balanced gender representation in the membership of the Tribunal' and '(ii) the need for the membership of the Tribunal to reflect social and cultural diversity'. The provision should be interpreted as meaning that the Minister must have regard to those matters to the extent that it is lawful to do so. There is little scope to consider them in selecting among candidates without contravening other laws such as the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1985 (Cth).

**Question 6: Who should be responsible for assessing qualifications, merit, character, needs of the tribunal and any other relevant considerations?**

<sup>64</sup> See eg, Sex Discrimination Act (Cth) 1984, s 7D; Racial Discrimination Act 1975 (Cth) s 8.

## Chapter 4: Re-appointments, terms and remuneration

### Re-appointment process

Tribunal statutes usually specify a maximum term of appointment and provide that a member (including a Head) is eligible for reappointment. The statutes usually say little or nothing about the process. The default process is that the member applies for a further term when the tribunal advertises for applications, and is assessed by the panel against the assessment criteria in competition with external applicants and any other internal applicants. The stages from recruitment to appointment are conducted according to the same process as for a first term appointment.

Sometimes Ministers are willing to reappoint an incumbent to a second or subsequent term on the recommendation of the Head, without requiring them to apply in an externally competitive process, or without a panel assessment. A few tribunal statutes expressly authorise, but do not require, re-appointment without an application process<sup>65</sup>.

As appointment rounds occur at intervals of years, the identity of the appointing minister is liable to change from one round to the next. The tribunal head cannot assume that the process followed in the last round of reappointments will be followed in the next. Inquiries are made months before the expiry of the terms of current members, to ascertain what the process will be. It can take a long time to get a response.

In some cases the Minister fails to notify incumbent members of a decision not to nominate them for reappointment, or notifies them just before or even after their term has expired. The delay can cause hardship and stress for incumbents, distract them from their duties and create uncertainty in listing arrangements. This can place members under pressure at a time when they may be adjudicating matters in which the Minister or a portfolio department or agency is a party or has an interest. It represents an unacceptable risk to tribunal independence.

Due to the difficulties with ministerial choice of procedure, some Heads believe that it would give more certainty if first terms are for 5 years, and all reappointments are by open competitive process with a pre-determined timetable scheduled to be completed before members' terms expire. Incumbents are likely to compete well against external applicants, since they have demonstrated and developed relevant knowledge and skill in the previous term.

Even if all reappointments are by competitive process and a timetable is prepared, there is no certainty that the appointments for the new term will be completed in a timely way. Once the panel has delivered its report to the Minister, the Head has no control over the timing of the selection, nomination and appointment stages. Therefore some would prefer to retain the Minister's option of reappointment upon the Head's

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<sup>65</sup> See eg, QCAT Act s 183(8); SACAT Act s 19(7).

recommendation. While members who are recommended for reappointment would have to wait for notification from the Minister, incumbents whom the Head does not recommend for reappointment could at least receive timely notification by the Head.

## **Question 7: Should appointments to a second or subsequent term be made by the same process as first term appointments?**

### **Terms and tenure**

The question of reappointment is linked to the duration of the term. Judges are appointed until a statutory retirement age because they ‘are less independent if their terms are renewable because they have an incentive to please those who reappoint them’<sup>66</sup>. Security of tenure does not require appointment to a statutory retirement age<sup>67</sup>. It means:

a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner<sup>68</sup>.

Different views have been expressed about how to maintain a tribunal’s independence in relation to renewable terms. Governments and legislatures in Australia and New Zealand do not support tenured appointments for tribunal members<sup>69</sup>. Most tribunal statutes provide for fixed term renewable appointments. Maximum terms for most ordinary members are three to five years, and can be up to seven years for presidential members. Tribunal statutes usually fix a maximum term but no minimum. It is not uncommon for members to be appointed to terms as short as one year.

It is proposed that tribunal statutes should specify a minimum term of not less than five years in the case of a first term appointment. A five year term gives the member security of tenure for a significant period of time, enhancing their independence from those who appoint them.

66 Bernd Hayo and Stefan Voigt, ‘Mapping Constitutionally Safeguarded Judicial Independence- A Global Survey’ (December 13, 2010) 2, SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=O1724696](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=O1724696)>, 5.

67 *Claydon v Attorney-General* [2004] NZAR 15 [115] (New Zealand Court of Appeal).

68 *Valente v The Queen* [1985] 2 SCR 673, 698 (Supreme Court of Canada, Dain J). This definition has been adopted by Australian courts: *Forge v ASIC* (2006) 228 CLR 45, [13]; *Owen v Menzies* (2012) 293 ALR 571, 573; *Baker v Commonwealth* [2012] FCAFC 121, [37].

69 Hon. Justice Deirdre O’Connor, ‘Administrative Decision-Makers in Australia: The Search for Best Practice’ (Paper presented at the 2nd International Conference on Administrative Justice, Quebec, 17-20 June 2001), 9-10.

## **Question 8: What should be the minimum duration of a first term appointment?**

### **Security of remuneration**

Provisions to ensure the security of remuneration of judges and tribunal members during a term of appointment limit the scope for executive influence and are regarded by many commentators as important safeguards of independence<sup>70</sup>. A number of tribunal Acts provide that rates of remuneration for specified classes of members are determined, published and reviewed by an independent statutory tribunal. Usually these are full time or fractional appointments, not sessional appointments. Sessional remuneration is significantly affected by the number of sitting days allocated which cannot be guaranteed.

Some statutes provide that rates of remuneration are determined by the Governor or a Minister and are specified in the instrument of appointment. A few provisions allow the Minister to vary the rate payable in respect of a member during the term. For example, the Mental Health Act 2007 (NSW) provides<sup>71</sup>:

A member, other than the President or a Deputy President, is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

It is proposed that the Statement of Principles should include a Principle as follows:

Rates of remuneration for members are determined and published by an independent tribunal, are reviewed from time to time, are specified in instruments of appointment, and are not reduced during a term.

It is also proposed that the principle should be incorporated into tribunal legislation. An example of how this might be accomplished is set out in the draft legislative provisions in Appendix B at section 11.

## **Question 9: Should tribunal legislation provide that the rate of remuneration payable to a member is not reduced during a term?**

<sup>70</sup> Eg, NZLC, IP 6, above n 10, [5.2]; Gabriel Fleming, 'Tribunals in Australia: How to Achieve Independence' in R Creyke (ed) *Tribunals in the Common Law World* (Federation, 2008) 86, at 92-93; Phillip Bryden, 'How to Achieve Tribunal Independence: A Canadian Perspective' in Robin Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 62 at 74.

<sup>71</sup> Schedule 5 cl 5(2); see also the recently repealed Guardianship Act 1987 (NSW) sch 1 cl 2(1).

## Chapter 5: Political Considerations

As the Minister's selection of a candidate and the nomination stage are conducted in secrecy, it is possible for the Minister or the Cabinet to be influenced by political considerations such as a candidate's membership or association with a political party or a candidate's actual or presumed political opinions, beliefs or activities. For example, a Minister may select a candidate for nomination in order to reward a political ally or to secure influence (a patronage appointment). Or a minister may fail to select a candidate because the Minister objects to the candidate's political affiliations, political opinions, beliefs or activities (discriminatory non-appointment).

### Patronage appointments

An appointment is not necessarily a patronage appointment just because the appointee shares the Minister's political opinions or is affiliated to the Minister's party or an allied political organisation. Patronage refers not to the appointee's attributes or history, but to the Minister's purpose in selecting a candidate of undistinguished merit.

A Canadian commentator has described the kinds of circumstances which, in Canada, have led to allegations of political bias and patronage:

Reported abuses include appointments without consultation with the chair; unexplained failure to re-appoint capable adjudicators on the expiry of their original term; replacement of competent and experienced tribunal members with unqualified political friends; re-appointment of non-performing members with strong political connections; and disregard in the selection process for important, relevant qualifications<sup>72</sup>.

The confidentiality of the selection and nomination stages makes it difficult to prove the influence of political considerations in decisions. In some cases inferences are drawn from the Minister's public remarks, the timing or pattern of appointment decisions, a blatant disregard of normal procedure, or the perverse nature of the Minister's assessment of a candidate's merit. Where the inferences are aired in the media or in parliament, they can impair public confidence in the impartiality of a member or the tribunal. They may also cause other members to fear for their reappointment prospects if they decide cases against the submissions of a government party.

A Minister accused of a patronage appointment is likely to assert that the candidate is suitable or meritorious, even if the panel's advice is to the contrary. In theory, Ministers are accountable to Parliament for appointments, but partisan politics shields them from investigation and censure. Allegations of political bias and patronage

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72 Heather M McNaughton, 'Future Directions for Administrative Tribunals: Canadian Administrative Justice - Where Do We Go From Here?' in R Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 203, 214.

in tribunal appointments are either flatly denied, or are met with counter-allegations that the criticism of the appointment is politically motivated. Parliamentary committees which investigate the allegations can be expected to deliver reports divided on party lines, with similar divisions reflected in the media.

Public confidence in tribunals is put at risk when appointments decisions are publicly challenged, and when Ministers respond with cross-allegations of patronage appointments by their political opponents on other occasions.

## **Political discrimination in failing to appoint**

Ministers who believe they are entitled to take a candidate's political attributes into account in selection and nomination may have overlooked their obligations under anti-discrimination law. In a number of jurisdictions, it is unlawful to treat an applicant or incumbent member less favourably on the basis of a political attribute, in deciding who should be appointed or not appointed to a tribunal position.

### *Political discrimination in State and Territory laws*

The anti-discrimination statutes of all Australian States and Territories except New South Wales and South Australia prohibit discrimination in the offering of employment for an attribute variously expressed as political 'opinion', 'belief', 'conviction', 'activity' or 'affiliation'<sup>73</sup>. It has been suggested that political 'opinion', political 'belief' and political 'conviction' have 'the same meaning and effect'<sup>74</sup>. All the statutes are expressed to bind the Crown<sup>75</sup>.

Discrimination means direct or indirect discrimination on the basis of an attribute which the person has or (except in Western Australia) is presumed to have, at any time<sup>76</sup>. Direct discrimination means treating a person

73 Equal Opportunity Act 2010 (Vic) s 6(k) 'political belief or activity', defined in s 4(1) as 'holding or not holding a lawful political belief or view, or engaging in, not engaging in or refusing to engage in a lawful political activity', ss 7(1), 8(1); Equal Opportunity Act 1984 (WA), ss 11(1), 53 ('political conviction'), 54; Anti-Discrimination Act 1991 (Qld) s 4, and sch, ss 7(j) ('political belief or activity'), 8-11, 14, 15; Anti-Discrimination Act 1998 (Tas) ss 14-15, 16 ('political belief or affiliation', and 'political activity' defined in s 3 to include engaging in, not engaging in, or refusing to engage in, political activity), ss 22(1)(a), 53; Discrimination Act 1991 (ACT) s 2, s 7 ('political conviction'), 8, 10, 45; Anti-Discrimination Act (NT) s 19(n) (political opinion, affiliation or activity or association with a person believed to have the attribute), ss 20, 21, 28, 31, 35(1)(b)(i).

74 N Rees, S Rice and D Allen, *Australian Anti-Discrimination Law* (2nd ed, 2014, Federation) at [6.6.13.3], citing *Harrison v Comr for Social Housing in the ACT* [2012] ACAT 10 at [51].

75 See eg *Discrimination Act 1991 (ACT)* s 5; *Equal Opportunity Act 2010 (Vic)* s 6.

76 *Equal Opportunity Act 2010 (Vic)* s 7(1); *Anti-Discrimination Act 1991 (Qld)* ss 8, 10(1); *Anti-Discrimination Act 1998 (Tas)* s 14(1), (2); *Discrimination Act 1991 (ACT)* s 7(1)(i), (2); *Anti-Discrimination Act (NT)* s 20(1), (2). The *Equal Opportunity Act 1984 (WA)* s 53(1) (does not include a presumed or imputed political conviction, but includes a characteristic imputed to a person with the political conviction).

with a particular attribute less favourably than a person without the attribute<sup>77</sup>. While Tasmania simply prohibits discrimination in an ‘employment or occupation’<sup>78</sup>, five jurisdictions specify that an employer must not discriminate against a person in determining who should be offered employment, or in failing to offer employment, and must not discriminate against an employee by subjecting the employee to dismissal or other detriment<sup>79</sup>. The statutes permit an employer to discriminate on the basis of political belief or activity in the offering of employment of a political nature, such as the position of ministerial adviser<sup>80</sup>.

Although the statutes do not precisely define the protected attribute, it seems that the adjective ‘political’ has a wide scope. The Queensland Civil and Administrative Tribunal Appeals has held that a ‘political belief or activity’ under the Queensland Act does not require an ideological basis<sup>81</sup>. Victoria prohibits discrimination on the basis of the attribute of ‘political belief or activity’ in the area of employment<sup>82</sup>. ‘Political belief or activity’ is defined to mean holding or not holding a lawful political belief or view, or engaging in, not engaging in or refusing to engage in a lawful political activity<sup>83</sup>. A Victorian tribunal said that a ‘belief or activity’ may be political if it relates to some aspect of government, the relationship between government and the governed, or involves affiliation with a political party<sup>84</sup>.

### *The scope of the area of employment*

The statutes are not all clear that a statutory appointment to a tribunal falls within the protected area of ‘employment’. Three jurisdictions, Queensland, Victoria and the Northern Territory expressly include statutory appointments in the area of employment, while Tasmania defines ‘employment’ broadly to include ‘employment or occupation in any capacity’<sup>85</sup>. Western Australia and the ACT have non-exhaustive

77 Equal Opportunity Act 2010 (Vic) s 8(1); Anti-Discrimination Act 1991 (Qld) s 10; Anti-Discrimination Act 1998 (Tas) s 14(2); Equal Opportunity Act 1984 (WA) s 53(1); Discrimination Act 1991 (ACT) s 8(1); Anti-Discrimination Act (NT) s 20(1).

78 Anti-Discrimination Act 1998 (Tas) s 22(1)(a).

79 Equal Opportunity Act 2010 (Vic) s 18(d), s 26; Anti-Discrimination Act 1991 (Qld) ss 13(1), 14, 15; Equal Opportunity Act 1984 (WA) s 54(1), (2); Discrimination Act 1991 (ACT) s 10; Anti-Discrimination Act (NT) s 31(1), (2).

80 Eg, Equal Opportunity Act 2010 (Vic) s 26.

81 Cairns Regional Council v Carey [2012] QCATA 150 at [106]; cited in N Rees et al, above n 54, at [6.6.13.5]

82 Equal Opportunity Act 2010 (Vic) ss 6, 7, and pt 4.

83 Equal Opportunity Act 2010 (Vic) s 4.

84 Nevil Abolish Child Support v Telstra Corporation Ltd [1997] VADT 44, cited in N Rees et al, above n 54, at [6.6.13.6].

85 Anti-Discrimination Act 1991 (Qld) s 4 and sch, definition of ‘work’; Equal Opportunity Act 2010 (Vic) s 4(1) definition of ‘work’; and ‘employee’; Anti-Discrimination Act (NT) s 4 definition of ‘work’; Anti-Discrimination Act 1998 (Tas) s 3 has a limited but non-exhaustive definition of ‘employment’.

definitions of ‘employment’ which do not mention statutory appointments<sup>86</sup>.

In Tasmania, Western Australia and the ACT, there is a question as to whether tribunal appointments are within the area of ‘employment’. In *Commissioner of Police v Estate of Russell*, the New South Wales Court of Appeal held that the meaning of the word ‘employee’ as used in the Anti-Discrimination Act 1977 (NSW) s 53 should be given a purposive and beneficial interpretation<sup>87</sup>. Understood in its statutory context, it was not limited to its common law meaning of a person working under a contract of employment, and could encompass a work relationship in which there is ‘some element of regularity and permanence in the relationship, and also an element of direction and control of work’<sup>88</sup>. A leading text observes:

The decision is of major significance in anti-discrimination law throughout Australia because it is a clear statement by a court of considerable authority that when considering the range of relationships which are subject to the rights and obligations created by an anti-discrimination statute, the legislation should be interpreted expansively<sup>89</sup>.

Tribunal appointments for a specified term have a degree of regularity and permanence. Although tribunal members have adjudicative independence, they are subject to direction as to their allocated cases, procedures and the timing of sittings and delivery of decisions. It is arguable that this satisfied the ‘element of direction and control of work’ in this context.

While New South Wales does not recognise a relevant protected attribute, the reasoning in *Commissioner of Police v Estate of Russell* supports an argument that members appointed to ACT, Tasmanian and Western Australian tribunals are within the area of employment and have the benefit of a protected political attribute.

### *Political discrimination in New Zealand*

A similar issue of the scope of the area of employment arises under the New Zealand provisions. The Bill of Rights Act 1990 (NZ) s 19(1) affirms the right of everyone to be free from discrimination on the grounds specified in the Human Rights Act 1993 (NZ), and applies to acts done by the executive, legislative and judicial branches of government and by a person in the performance of a public function, power or duty conferred by law<sup>90</sup>. Those persons and bodies are subject to the provisions of the Human Rights Act which make it unlawful for an ‘employer’ to refuse or omit to employ an applicant by reason of ‘political opinion’ whether

<sup>86</sup> Equal Opportunity Act 1984 (WA) s 4(1); Discrimination Act 1991 (ACT) s 2 and sch.

<sup>87</sup> [2002] NSWCA 272.

<sup>88</sup> [2002] NSWCA 272 at [88] (Spigelman CJ, Stein JA and Davies A-JA agreeing).

<sup>89</sup> N Rees et al, above n 54 at [7.1.2.8].

<sup>90</sup> Bill of Rights Act 1990 (NZ) s 3.

held currently or in the past or assumed to be held<sup>91</sup>. There is an exception for appointment to employment of a political nature<sup>92</sup>. ‘Employment’ is not defined. ‘Employer’ is defined in a non-exhaustive way, without mention of statutory appointments<sup>93</sup>.

### *Political discrimination in Commonwealth appointments*

The Commonwealth has not legislated to prohibit discrimination on the ground of political belief or activity in offering employment<sup>94</sup>. The Fair Work Act 2009 (Cth) s 351 provides a civil remedy for ‘adverse action’ taken by the Commonwealth against certain employees or prospective employees on the ground of ‘political opinion’<sup>95</sup>. Section 351(2)(a) of the Act appears to provide that an action which is not unlawful under Commonwealth and State or Territory anti-discrimination laws applying in the place in which the action is taken will not be unlawful under the Fair Work Act<sup>96</sup>. The provisions have been taken to mean that only conduct prohibited under the other anti-discrimination laws will contravene s 351<sup>97</sup>.

While many of the State laws which prohibit discrimination on the ground of ‘political opinion’ purport to bind the Crown in right of the Commonwealth<sup>98</sup>, a leading text suggests that due to constitutional limitations, they do not apply to appointments by the Commonwealth<sup>99</sup>. However the Human Rights Commission has power to conduct a human rights inquiry on a complaint of workplace discrimination on the ground of ‘political or other opinion’ contrary to Art 26 of the International Covenant on Civil and Political Rights, where the alleged act of discrimination is by or on behalf of the Commonwealth<sup>100</sup>. ‘Discrimination’ is broadly defined consistently with ILO Convention 111<sup>101</sup>, covering any ‘distinction, exclusion or preference’ made

91 Human Rights Act 1993 (NZ) ss 21A, 21(1)(j), (2)(b), 27(1).

92 Human Rights Act 1993 (NZ) s 31.

93 Human Rights Act 1993 (NZ) s 2(1).

94 N Rees et al, above n 54, at [6.6.13.1], noting that the inclusion of ‘political opinion’ as a protected attribute in the area of work was included in the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth).

95 Fair Work Act 2009 (Cth) pt 3.

96 Fair Work Act 2009 (Cth) s 351.

97 *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27 at [161] (Mortimer J).

98 See eg Anti-Discrimination Act 1991 (Qld) s 3.

99 N Rees et al, above n 54, at [3.5.3]–[3.5.6], referring to the ‘implied constitutional limits on the powers of the States to legislate in a way that governs the activities of the Commonwealth’.

100 Australian Human Rights Commission Act 1986 (Cth) s 3 (definitions of ‘act’, ‘discrimination’, ‘human rights’ and ‘Covenant’), ss 11(1)(f), 31(b); N Rees et al, above n 54, at [6.6.13.1].

101 International Labour Organisation, Convention Concerning Discrimination in Respect of Employment and Occupation (No 111, 1958). The Convention has been ratified by Australia and is set out in the Australian Human Rights Commission Act 1986 (Cth) sch1.

on the basis of ... political opinion ... that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation<sup>102</sup>. The Commission's powers in a human rights inquiry are limited to investigation and conciliation or, if a breach is found and the matter is not able to be resolved, making a report to the Attorney-General<sup>103</sup>.

## Conclusions on anti-discrimination laws

In sum, most jurisdictions prohibit discrimination in the area of employment on the basis of a protected political attribute. All but two jurisdictions (South Australia and New South Wales) ban discrimination in employment for a political attribute (variously described as 'opinion', 'belief', 'conviction', 'activity' or 'affiliation'). Three of the jurisdictions, Victoria, Queensland and the Northern Territory expressly include statutory appointments in the area of employment. In another three of the jurisdictions, the ACT, Tasmania and Western Australia, tribunal appointments may be within the area of employment according to the broad view in *Commissioner of Police v Estate of Russell*. If so, candidates and members in those three jurisdictions also have the benefit of a protected political attribute. In relation to Commonwealth tribunals, Commonwealth law provides a complaint, inquiry and conciliation avenue for anyone subjected to discrimination by the Commonwealth on the basis of political opinion in 'employment or occupation'.

The statutes which prohibit discrimination in the area of employment on the basis of a protected political attribute allow exceptions for a narrow and specifically defined class of bona fide occupation categories. None of exceptions would apply to a statutory appointment to an adjudicative tribunal.

In most jurisdictions, a Minister acts unlawfully if he or she fails to nominate a candidate because of a protected political attribute. Accordingly, the political attribute is an irrelevant consideration which the Minister must not take into account in deciding whether to nominate a candidate.

It is not clear that all Ministers are aware of the law and its implications for their decision making. There may be a need to draw the law to the attention of Ministers and Cabinet, by incorporating a summary of the anti-discrimination provisions in the Cabinet procedures document for each jurisdiction. Tribunal statutes could also make it clear that political attributes are an irrelevant consideration.

Two jurisdictions, South Australia and New South Wales, lack a non-discrimination provision for a protected political attribute. As in other jurisdictions, tribunal legislation is silent as to whether a candidate's political attributes are relevant. It is arguable that political attributes are an irrelevant consideration in the Minister's selection because they do not relate to the objects of the power to appoint. To consider them would also

<sup>102</sup> Australian Human Rights Commission Act 1986 (Cth) s 3. The definition is consistent with the ILO Convention 111, *ibid*.

<sup>103</sup> Australian Human Rights Commission Act 1986 (Cth) ss 11(f), 31(b). See generally N Rees et al, above n 54, at [12.13.12] - [12.13.15].

be inconsistent with two international instruments ratified by Australia which recognise the right to equal treatment in work and employment without discrimination on the basis of political opinion<sup>104</sup>.

**Question 10: Are existing anti-discrimination laws sufficient to ensure that candidates are not discriminated against in tribunal appointment processes on the ground of political attributes?**

<sup>104</sup> ILO Convention No 111, above n 81; UN, International Covenant on Civil and Political Rights (as set out in Australian Human Rights Commission Act 1986 (Cth) sch 2.

## Chapter 6: Better Legislative Design for Independence

A key reason for concern about the exercise of Ministers' powers to nominate is that the purpose and relevant criteria are left unspecified in tribunal legislation. This does not mean that there are none, or that the Minister is at liberty to consider whatever he or she wishes. If left unstated, the purpose and criteria are implied by considering the subject matter, scope and purpose of the Act<sup>105</sup>. It is also possible in the same way to imply which criteria are irrelevant to the exercise of the power and must not be considered<sup>106</sup>.

Implied criteria and purpose may be invisible to Ministers and their advisers. Tribunal Acts need to be more explicit.

In his book *Discretionary Justice: A Preliminary Inquiry*, Kenneth Culp Davis argued that a discretionary power should be confined, structured and checked<sup>107</sup>.

*Confining* a discretion means that the statute specifies the range of decision outcomes open to the decision maker. A confined discretion is one where the choice is limited to the outcomes specifically mentioned in the statute.

*Structuring* a discretion means setting criteria and standards to be applied in exercising the power. A discretion can be

- » fully structured, meaning that the Act sets out in an exhaustive way the criteria that are to be applied;
- » partly structured, where the Act provides a non-exhaustive (or inclusive) list of criteria to be considered when exercising the discretion; or
- » unstructured, where the Act states no criteria.

*Checking* means a process by which a decision may be reviewed and changed by another decision maker, such as by internal review or external review on the merits by a tribunal.

<sup>105</sup> *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 504–505; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39–41; *Attorney General SA v City of Adelaide* (2013) 249 CLR 1 [38], [39].

<sup>106</sup> See, Aronson & Dyer, above n 28, [5.30]; *Ballantyne v Workcover Authority (NSW)* NSWCA 239, [113].

<sup>107</sup> (1969, 1980), cited in Margaret Allars, *Introduction to Australian Administrative Law* (Butterworth, 1990) at [1.19].

It would help to banish political considerations from Ministerial decision making if tribunal legislation states the purpose and the relevant criteria for the nominations power, and confines the Minister's choices through process requirements.

## Specified purpose

If a statutory power is given for a purpose, it must be exercised for the purpose and not for an unauthorised purpose. To exercise the power for an improper purpose is a breach of the requirements of administrative law. It would be helpful for tribunal statutes to include an express statement of the purpose or object of the power to appoint. The Council seeks the views of consultees as to the following two options.

### *Option 1*

"Appointments are made in the public interest to serve the objects of this Act. While prior participation in political or public life does not disqualify a candidate, appointments are not made to serve a political or other extraneous purpose".

### *Option 2*

"Appointments are made in the public interest without regard to a political or other purpose outside the objects of this Act."

Both options include a statement of the purpose of the power, and prohibit its use to serve a political purpose. Neither option would change the current law. They simply spell out implications from the statute in accordance with administrative law. By expressly stating the law in the tribunal Act, it is brought to the attention of Ministers. By specifying the purpose of the appointment power, the options also make it clear that political considerations are an irrelevant consideration.

The statement in Option 1 that 'prior participation in political or public life does not disqualify a candidate' spells out an implication of the principle that 'appointments are made in the public interest to serve the objects of the Act'. Option 2 shifts the statement from the legislative provision but retains it in the discussion of the principle in the Best Practice Guide.

**Question 11: Which is preferable Option, 1 or Option 2?**

## Specified procedures and criteria

A tribunal Act which sets out the procedures to be followed and the criteria which the Minister must consider gives a clear indication that the decision depends on legal, not political, criteria, and is subject to judicial review<sup>108</sup>. This provides a means of checking the exercise of the power.

Specifying processes can extend the list of relevant considerations. If the Act provides for an assessed panel model and requires the Minister to consult with the Head before making a nomination, it can be implied that the Minister must have regard to what results from the processes, namely, the assessment criteria, the panel's assessment of the candidates, and the views of the Head. Each of the matters is a relevant consideration which the Minister is bound to take into account. Under administrative law principles, a decision maker must give proper, genuine and realistic consideration to each relevant consideration<sup>109</sup>.

The Minister's discretionary power of nomination can be further structured by a provision such as SACAT Act s 19(4) which provides a list of matters to consider. As the stated criteria are not exhaustive, the Minister may take into account additional considerations, not including an irrelevant consideration<sup>110</sup>.

The selection of a candidate who has not been assessed by a panel may be justified in some circumstances<sup>111</sup>, but can open the door to patronage appointments. It is therefore suggested that a Minister who nominates a candidate who has not been assessed by a panel should be required by the Act to make a report to Parliament as to his or her reasons. The provision would confine the Minister's discretion by requiring the Minister to either select from the candidates assessed by the panel, or report reasons to Parliament. It would also ensure a degree of transparency for selection decisions made in the absence of a panel assessment.

**Question 12: Should a Minister be required to report if he or she nominates a person who has not been assessed as suitable by a panel, and if so, to whom should the Minister report?**

108 *Stewart v Ronalds* (2009) 76 NSWLR 99 at [42]. In this case it was held that the Premier's decision to advise the Governor nor to withdraw a Minister's commission depends on political rather than legal considerations and is therefore not subject to judicial review.

109 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 174-76; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

110 Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(2)(a) and 6(2)(a) incorporate the common law ground of review for irrelevant considerations.

111 See above, pp 9-10, where the nomination method is discussed.

## Appendix I: Statement of Principles

Number	Principle
1	Tribunal appointments are made in the public interest to serve the objects of this Act. [Option: add 'While prior participation in political or public life does not disqualify a candidate, appointments are not made to serve a political or other extraneous purpose'].
2	All tribunal appointments are made by the Governor (or Governor-General) in Council on the nomination of a Minister following an open and competitive application process. [Option: include the appointment of the Head of Tribunal]. 3 Tribunal vacancies are publicly advertised to encourage applications from a wide and diverse field of qualified applicants.
4	Details of the appointment process and assessment criteria are made available to applicants. 5 Applicants are assessed by a panel against merit-based assessment criteria expressed as levels of competencies and other personal attributes required to perform the functions of the advertised office.
6	The Head or the Minister appoints the panel, in consultation with the other. 7 The panel prepares a shortlist of candidates found to be the most meritorious by reference to the assessment criteria, and may indicate a preferred candidate, or preferred candidates, with reasons.
8	If the panel finds only one candidate to be suitable for appointment, the Minister may decide to nominate the candidate or to re-advertise the vacancy. 9 The Minister consults with the Head as to the needs of the tribunal.
10	The Minister may cause further inquiries to be made as to a candidate's character, in accordance with normal procedures for Executive Council appointments. 11 In selecting a candidate or candidates from the shortlist, the Minister may have regard to any government policies relating to gender balance or social and cultural diversity in the membership of tribunals.
11	If the Minister departs from the panel's shortlist to select a person who has not been recommended by the panel, the Minister reports his or her reasons to the Parliament. 10 A first term appointment of a head or member is for a minimum term of five years or more and members are eligible for reappointment to a further term or terms.
11	A sitting member seeking reappointment on expiry of a term applies in an open and competitive application process [option: add: 'unless the Minister determines that a member be reappointed on the recommendation of the Head where the member demonstrably meets the assessment criteria']. 12 If a current member is not to be reappointed, the member is notified in writing a reasonable time before the term expires.
13	Rates of remuneration for members are determined and published by an independent tribunal, are reviewed from time to time, are specified in instruments of appointment, and are not reduced during a term.

## Appendix II: Questions for consultees

1. Is it appropriate to use the nomination method, and if so, in what circumstances?
2. By what process, and with what composition, should an assessment panel be formed?
3. Should the panel's report on candidates identify an 'assessed pool', a 'recommended shortlist' or a 'ranked shortlist'?
4. Should tribunal legislation specify matters that the Minister must consider and matters that the Minister may consider in selecting a candidate for nomination to a tribunal?
5. Should the effect of an appointment on the tribunal's social and cultural diversity or gender balance be considered, and if so, how and by whom?
6. Who should be responsible for assessing qualifications, merit, character, the needs of the tribunal and any other relevant considerations?
7. Should appointments to a second or subsequent term be made by the same process as first term appointments?
8. What should be the minimum duration of a first term appointment?
9. Should tribunal legislation provide a guarantee that the rate of remuneration payable to a member is not reduced during a term?
10. Are existing anti-discrimination laws sufficient to ensure that candidates are not discriminated against in tribunal appointment processes on the ground of political attributes?

11. Which is preferable Option, 1 or Option 2?

### Option 1

"Appointments are made in the public interest to serve the objects of this Act. While prior participation in political or public life does not disqualify a candidate, appointments are not made to serve a political or other extraneous purpose".

### Option 2

"Appointments are made in the public interest without regard to a political or other purpose outside the objects of this Act."

12. Should a Minister be required to report if he or she nominates a candidate who has not been assessed as suitable by a panel, and if so, to whom should the Minister report?
13. Are there any other matters which should be included in the Statement of Principles?

## Appendix III: Sample Draft Legislative Provisions

The following draft legislative provisions are included to demonstrate how the principles in the Statement of Principles might be translated into legislative form. The draft also indicates how some of the options considered in this discussion paper might be incorporated into legislation.

### 1. Definitions

In this Act—

*assessment panel* means a panel appointed under section 6;

*integrity principle* has the meaning given to it in section 3;

*merit principle* has the meaning given to it in section 3.

## PART X – APPOINTMENT OF TRIBUNAL MEMBERS

### Division 1 – Appointment of [ordinary members]

### 2. Appointments to be made by Governor in Council [General]

- (1) The Governor in Council [Governor-General] may, on the nomination of the Minister,       appoint a person as a member of the Tribunal.
- (2) A nomination by the Minister must be made in accordance with section 9 or section 10       [option: add or section 13].

### 3. Principles to be applied

- (1) In exercising powers under this Part, the Minister and the assessment panel must have   regard to the integrity principle and the merit principle.
- (2) In this section—
  - (a) “integrity principle” means the principle that appointments are made in the public interest to serve the objects of this Act [Option: add ‘While prior participation in political or public life does not disqualify a candidate, appointments are not made to serve a political or other extraneous purpose’];
  - (b) “merit principle” means the principle that merit is a primary consideration in appointments to tribunals.

### Division 2 – Appointment of [ordinary members]

#### **4. Advertising of vacancies**

- (1) The Minister must ensure that vacancies in the office of member are advertised from time to time.
- (2) An advertisement may call for applications for appointment to current vacancies, or to future vacancies.
- (3) In deciding on the form and duration of advertising, the Minister must have regard to the need to encourage applications from a wide and diverse field of qualified applicants.

#### **5. Assessment criteria and appointment process**

- (1) The Minister must ensure that a vacancy in the office of Tribunal member is not advertised unless assessment criteria have been determined for the office.
- (2) Assessment criteria—
  - (a) must specify the qualifications, competencies and other attributes required to perform the duties of the office;
  - (b) may differ for different offices or categories of member; and
  - (c) must be determined by the [head of Tribunal] in consultation with the Minister.
- (3) The [head of Tribunal] must ensure that applicants are provided with—
  - (a) information about the appointment process; and
  - (b) the assessment criteria applying to the advertised vacancy.

#### **6. Assessment panel**

- (1) The [head of Tribunal] in consultation with the Minister may, from time to time, appoint persons to form an assessment panel.
- (2) The functions of an assessment panel are—
  - (a) to assess applicants for appointment as members of the Tribunal; and
  - (b) to provide advice to the Minister in relation to its assessment of applicants in accordance with section 7.

#### **7. Assessment of applicants by panel**

- (1) An assessment panel must assess applicants against the assessment criteria and prepare for the consideration of the Minister a short-list of candidates found to be the most meritorious.
- (2) The assessment panel may indicate a preferred candidate, or preferred candidates, with reasons.

- (3) If the assessment panel considers that there are insufficient candidates to prepare a short-list, it must advise the Minister accordingly.

## **8. Reconsideration or readvertising**

The Minister, on receiving a short-list of candidates or advice under section 7(3), may—

- (a) request the assessment panel to reconsider the short-list or advice; or
- (b) cause the vacancies to be readvertised under section 4(1).

## **9. Nomination by the Minister**

- (1) The Minister may nominate one or more candidates for appointment as members of the Tribunal.
- (2) Except as provided in section 10, a nominee must be a person whose name is on the short-list prepared under section 7(1).
- (3) The Minister must consult the [head] before making a nomination under subsection (1).
- (4) In deciding whether to nominate a candidate, the Minister:
  - (a) must consider:
    - (i) the assessment criteria;
    - (ii) any advice or report received from the panel under section 7;[and]
    - (iii) any advice received from the head under subsection (3).
  - (b) [option] may consider any lawful government policy relating to the achievement of gender balance or cultural and social diversity in the membership of tribunals.

## **10. Nomination of person not on the short-list**

- (1) Subject to subsection (2), the Minister may recommend for appointment a person who is not on the short-list.
- (2) If the Minister recommends for appointment a person who is not on a short-list, the Minister must cause a statement setting out his or her reasons for making the recommendation to be laid before each House of Parliament within 7 sitting days after making the recommendation.

## **11. Term of appointment**

- (1) The term of appointment of a member is the period specified in the instrument of appointment, being not less than five years in the case of a first term appointment.
- (2) A member is eligible for reappointment.

## **12. Remuneration**

- (1) Rates of remuneration and allowances for [full time or part time members] must be determined and published by [an independent tribunal]
- (2) The [independent tribunal] must review the rates of remuneration from time to time.
- (3) The rate of remuneration of a [full time or part time member] must not be reduced during the member's term of appointment.

### **Division 3 – Reappointment**

[Option for reappointment on Head's recommendation]

## **13. Nomination on recommendation of [head of Tribunal]**

- (1) The Minister may, on the recommendation of the [head of Tribunal], nominate a sitting member to be reappointed to an office for a further term.
- (2) The [head of Tribunal] may nominate a sitting member to be reappointed if, in his or her opinion, the sitting member demonstrably meets the assessment criteria for the office determined under section 5.

## **14. Notification to sitting member**

The Minister must notify a sitting member within [a reasonable time] before the expiry of the member's term of office if–

- (a) the Minister decides not to nominate, under section 12(1), the member for reappointment; or
- (b) the Minister decides that the sitting member's office is to be advertised in accordance with section 4.

## Appendix IV: AIJA Assessment Criteria

These suggested criteria have been developed by the Australian Institute of Judicial Administration Inc, and are reproduced by permission. They are expressed to apply to all judicial appointments, but the list is not exhaustive and not all proposed criteria will apply equally to all judicial appointments. The suggested criteria draw on information from a range of sources including research into the qualities and skills regarded as important by the Australian judiciary at all levels.

They are included in this Discussion Paper as an example of the types and the range of criteria that may be relevant in appointment of tribunal members.

### **1. Intellectual Capacity**

- » Legal expertise
- » Litigation experience or familiarity with court processes, including alternative dispute resolution
- » Ability to absorb and analyse information
- » Appropriate knowledge of the law and its underlying principles, and the ability to acquire new knowledge.

### **2. Personal Qualities**

- » Integrity and independence of mind
- » Sound judgement
- » Decisiveness
- » Objectivity
- » Diligence
- » Sound temperament
- » Ability and willingness to learn and develop professionally and to adapt to change

### **3. An Ability to Understand and Deal Fairly**

- » Impartiality
- » Awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs
- » Commitment to justice, independence, public service and fair treatment
- » Willingness to listen with patience and courtesy
- » Commitment to respect for all court users

#### **4. Authority and Communication Skills**

- » Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- » Ability to inspire respect and confidence
- » Ability to maintain authority when challenged
- » Ability to communicate orally and in writing in clear standard English

#### **5. Efficiency**

- » Ability to work expeditiously
- » Ability to organise time effectively to discharge duties promptly
- » Manages workload effectively
- » Ability to work constructively with others

#### **6. Leadership and Management Skills**

- » Ability to form strategic objectives and to provide leadership to implement them effectively
- » Ability to engage constructively and collegially with others in the court, including courts administration.
- » Ability to represent the court appropriately including to external bodies such as the legal profession
- » Ability to motivate, support and encourage the professional development of others in the court
- » Ability to manage change effectively
- » Ability to manage available resource







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