



Law Council
OF AUSTRALIA

Accountability, transparency and diversity – the importance of an independent tribunal appointment process

Speech delivered by Arthur Moses SC, President, Law Council of Australia at the 2019 Council of Australasian Tribunals National Conference.

7 June 2019

Distinguished guests, ladies and gentlemen.

I acknowledge the Traditional Custodians of the land on which we meet, the Wurundjeri People of the Kulin nation, and pay my respects to their Elders, past, present and emerging. I also acknowledge and extend those respects to Aboriginal and Torres Strait Islander Peoples attending today from around Australia.

Thank you to the Council of Australasian Tribunals for inviting the Law Council of Australia to be part of this Conference. It is a pleasure to address you today, and I look forward to this afternoon's presentation by the Law Council's Deputy Director of Policy, Leonie Campbell, on the Justice Project. The Justice Project was a landmark piece of research led by former Chief Justice of Australia the Honourable Robert French AC and undertaken by the Law Council between 2017 and 2018.

The Justice Project provides a compelling evidence base for the need to address access to justice issues for significantly disadvantaged people in Australia. I commend Leonie's session on improving access to justice for people with communication needs to you.

The theme of this conference is 'Communicating Justice: Tribunals in the Community'. There are delegates here today from many different walks of life, including practitioners, professionals, judges and tribunal members. What we have in common with each other – and with the community we serve – is a shared commitment to natural justice and to the Rule of Law.

The first President of the Administrative Appeals Tribunal (AAT) and Former Chief Justice of Australia, the Honourable Sir Gerard Brennan, AC KBE, once said that "However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law".¹

It seems inconceivable that a concept so important as the Rule of Law can be so little understood, and its meaning so little agreed upon. Yet all too often we see the term used, with little thought as to what it actually means.

There is widespread agreement that the Rule of Law means that the law applies with equal measure to us all, regardless of fear or favour. That all are as entitled to its protection and to procedural fairness, as to the force of its rebuke. Institutional independence is therefore a natural requirement: not only independence of the Parliament, but also the Executive, the Judiciary and Tribunals, as well as the legal profession and the media.

¹ The Hon Sir Gerard Brennan AC KBE, *Judicial Independence* (Speech, Australian Judicial Conference, 2 November 1996) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_ajc.htm>.

In Australia, this facet of the Rule of Law is enshrined in our Constitution through the separation of powers and zealously guarded. There is, however, another facet of the Rule of Law that is equally as important, though perhaps not done nearly so well.

That is, the principle that maintaining the appearance of institutional independence is just as important as maintaining actual independence.

This corollary of the Rule of Law is more nuanced and less entrenched in our institutions than it should be, to the discredit of our Executive and legislature, and to the real disadvantage of our Judiciary, including tribunal members and decision-makers.

Why does the appearance of independence matter?

Appearances matter, Sir Brennan argued, because public confidence is what he called the “power base” of the judiciary. Unlike other branches of government, Sir Brennan said the Judiciary:²

has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom we serve have confidence in the exercise of the power of judgment.

That logic applies with equal force to our tribunals. Whilst not all tribunals exercise judicial power, all are of course bound by the Rule of Law, procedural fairness and natural justice. Australians are more likely to experience a proceeding before a tribunal than a court.³

It is critical therefore that our society can have confidence in our civil and administrative tribunals. Confidence that our tribunals maintain the highest standards of integrity and independence. That they adhere to the Rule of Law, are accountable for their decisions, and serve the administration of justice and the people first and foremost.

The importance of public perception is underscored by the objects of the *Administrative Appeals Tribunal Act 1975* (Cth), as amended in 2015. This provision now reads:

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

...

*(d) promotes public trust and confidence in the decision-making of the Tribunal.*⁴

Importantly, this responsibility is not borne by tribunal members alone. It is a key duty of our civil and administrative tribunals, together with the Executive, legislature, organisations such as the Law Council and each of us here today who are a part of these systems, to ensure that the community can continue to hold this confidence and trust in these important institutions.

Maintaining the independence – and the appearance of independence – of tribunals is as much an obligation on the Executive, the legislature, the legal profession and all of us in this room, as for our judges and tribunal members. Not only is this an obligation, it is also a key protection for tribunal members. Other sectors of the community who interact with tribunals must be mindful of how our words and our actions can only too easily erode that appearance of independence and undermine community confidence.

² Ibid.

³ The Hon Justice Garry Downes, ‘Tribunals in Australia: their roles and responsibilities’ (2004) 84 *Reform* <<https://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/tribunals.pdf>>.

⁴ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(d).

There are three primary challenges to maintaining both the reality and the appearance of our tribunals' independence, which I would like to speak with you about this morning:

- First, the character and purpose of tribunals;
- Second, Executive and parliamentary comment on tribunals' decision-making; and
- Third, the absence of a transparent merit-based, diverse appointments process.

These challenges, in turn, demonstrate the compelling case for both an open, clear and apolitical appointments process and a Federal Judicial Commission including oversight over tribunals: initiatives that the Law Council has consistently advocated for, and will continue to press during the 46th Parliament.

Turning to the first challenge to tribunals' independence, failure to properly characterise and understand the purpose of tribunals can undermine their perceived independence from government.

Tribunals and merits review bodies are cornerstones of Australia's administrative law system and continue to grow in scale and importance. Justice Janine Pritchard observed that their effective presence 'promotes the observance of the Rule of Law'.⁵ All levels of government play a significant role in regulating public life. The administrative law system is integral to effective administrative decision making and promoting accountability.

In contrast with state tribunals, it is trite law that Commonwealth tribunals cannot exercise judicial power but rather only exercise executive or administrative power. There is therefore a natural nexus between tribunals and a culture of executive decision-making in government. The Law Council strongly endorses the view of the former Administrative Review Council that an effective review tribunal should improve the quality of future agency decision-making to benefit all Australians.

The Administrative Review Council has identified a 'normative effect' of tribunal decisions, where the involvement of merits review leads to departmental decision making that is consistent and equitable as between individuals in similar situations and compliant with the Rule of Law.⁶

In short, the work of administrative tribunals – the work of those in this very room – plays a critical role in promoting better decisions at the primary level and helps to foster good governance.

However, there is a nuanced and important distinction to be made.

Speaking in relation to the AAT, Sir Brennan explained that while the tribunal:⁷

does not exercise the judicial power of the Commonwealth within the meaning of that term in Chapter III of the Constitution, it is designed to do justice in individual cases, according to law and independently of the executive power. Those are the features which mark the AAT as an element in the judicial system.

⁵ The Hon. Justice Pritchard, 'The Rise and Rise of Merits Review Implications for Judicial Review and for Administrative Law' (2015) AIAL Forum 79, online at <www.aial.org.au/aial-forum-articles/the-rise-and-rise-of-merits-review-implications-for-judicial-review-and-for-administrative-law>.

⁶ Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' Report No. 39 (1995), at 1, online at <www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf>.

⁷ Sir Gerard Brennan AC KBE, 'AAT 30th Anniversary 1976-2006' (Speech, Administrative Appeals Tribunal's 30th Anniversary Dinner, Canberra, 2 August 2006).

Maintaining both the actual and perceived independence of tribunals, especially from the Executive, is therefore critical to safeguard public trust and confidence in these institutions and processes, given this nuanced identity.

Speaking on the 30th Anniversary of the AAT in 2006, Sir Gerard Brennan went on to note that:

An essential characteristic of the AAT is that it is independent of the Executive branch of government. It must be independent in its thinking, independent in its procedure, independent in its interpretation of the law. Not only does independence give authority to the AAT and its decisions; independence is essential to the AAT's very survival. If it were not, and were not seen to be, independent of sponsoring departments, its existence would be a costly charade.⁸

The very nature and nuanced identity of Australian tribunals increases the importance of being alert to another challenge – that is, the risk of undue Executive or parliamentary influence undermining, or being seen to undermine, tribunals' independence.

The risk of the Executive branch weakening public confidence in the independence of our tribunals, and eroding the actual independence of tribunals, manifests in two ways: first, through attempts – whether directly or indirectly – to influence decision making and outcomes; and second, through the presence of perceived bias or partiality in the appointments process.

Executive and parliamentary comment on decision-making

A particular threat to tribunals' independence is public commentary by the Executive or Legislature that seeks to influence tribunal decision making, whether by commenting on matters prior to a decision being made, or subsequently criticising decisions of tribunal members once these are delivered.

Tribunals are not, and should not be, immune from legitimate criticism. Scrutiny of merits review decisions is crucial to the integrity of the judicial and tribunal system, and these institutions are not to be seen as above critique and public dialogue.

However, the Law Council has become increasingly concerned with public comments from members of Parliament who have used the media to criticise AAT decisions and the merits review function of the tribunal. Regardless of the reality, such criticisms exposure both governments and tribunals to the suggestions that political bias in the appointment process has carried through to decisions made along partisan lines.

One prominent example are the controversial criticisms made in 2017 by Minister for Immigration and Border Protection, Peter Dutton, of the AAT.

The Minister remarked that:⁹

When you look at some of the judgements that are made, the sentences that are handed down, it's always interesting to go back to have a look at the appointment of the particular Labor government of the day... Anyway, it's a frustration we live with.

Such statements are unacceptable. Members of the Executive are of course entitled to disagree with decisions of administrative tribunals.

However, it must be recognised and appreciated that these bodies provide an important check upon the unlawful exercise of power. Any suggestion by any member of government that

⁸ Ibid.

⁹ Quoted in Law Council of Australia, 'Minister's comments attacking independence of tribunal were unfortunate, should not be repeated' (Media Statement, 17 May 2017) <<https://www.lawcouncil.asn.au/media/media-releases/minister-s-comments-attacking-independence-of-tribunal-were-unfortunate--should-not-be-repeated>>.

Australian tribunals are not acting with independence – or any unwarranted attempts to influence the exercise or curtail the role of merits review – can be dangerous and damaging to our justice system.

Minister Dutton subsequently stated that:¹⁰

The AAT does not reflect, in many of these cases, the view of the Australian people. In my judgement, it's unacceptable to be appointing people who clearly don't have the confidence of the government, and clearly don't have the confidence of the Australian people.

Unjustified criticism of the merits review function of the AAT, particularly any suggestion that the tribunal is not acting with independence, has the potential to undermine the public perception of the legitimate role of merits review, and weakens the Rule of Law.

In the face of these challenges, it is appreciated that maintaining independence and upholding public confidence is not always easy. As then Acting President of the AAT Hon Justice Logan said in his 2017 decision in *Singh (Migration)*:¹¹

*any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction. For those members who do not enjoy the same security of tenure as judges, that may call at times for singular moral courage and depth of character.*¹²

This difficulty for tribunal members is exactly why the Law Council has strongly responded to attacks from members of the Executive or Parliament against the AAT when decisions are made that do not accord with their views.

We will continue to speak out when we believe the Rule of Law is being threatened, and the reputations and integrity of our judicial officers and tribunal members impugned.

Courts and tribunals provide important checks and balances on the exercise of executive power and their members must be supported, not criticised for performing this vital function.

Absence of a transparent merit-based, diverse appointments process

The third challenge to the appearance of tribunals' independence is the absence in Australia of a transparent, merit-based, diverse appointments process. This exacerbates the potency of Executive criticisms, such as those of Minister Dutton, because there is no clear, apolitical process to point to or fall back on.

The quality of tribunals' decision making depends on the integrity of decision-making. This necessarily comes from the quality of persons appointed to discharge the onerous role of serving as a Tribunal member.

Currently, there is no proper method of consultation that the Commonwealth Attorney-General embarks upon in relation to judicial or tribunal appointments. It may be that she or he only consults with the heads of jurisdiction. This cannot be sufficient. As the heads of jurisdiction would themselves agree, they cannot be everywhere at once and they are not – and physically cannot – be aware of the complete array of talent available for candidacy.

¹⁰ Minister for Home Affairs, *Transcript of Interview with Ray Hadley, Radio 2GB-4BC* (24 May 2018) <<https://minister.homeaffairs.gov.au/peterdutton/Pages/Hadley-Ray.-2GB.aspx>>.

¹¹ [2017] AATA 850 (16 June 2017).

¹² *Ibid.*

Our community is extremely diverse and we must look to all corners to ensure the best people are put forward and considered for appointment.

I have sat on panels with the Attorneys-General of South Australia and Western Australia and listened to them describe the process they embark on when appointing judges. These Attorneys demonstrated to me that they understand and are well alive to the importance of safeguarding our justice system by facilitating diverse, merit-based appointment tested through widespread consultation. Others would do well to learn from their colleagues' example.

It is critical to consult widely to assist in the decision, including with professional associations and community, and to have a structured selection process to vet candidates and identify potential conflicts or outstanding issues.

Such a process is an important safeguard against unconscious bias which continues to permeate our justice system and government. We know that unfortunately unconscious bias continues to exist in the legal profession and our courts, and we must do all we can to safeguard the quality of justice delivered from this. This responsibility must be felt acutely by those entrusted to positions of senior leadership in both the courts and in the office of First Law Officer.

There is a dire need for a transparent appointment process – not only to enhance the quality of appointments but also to enhance the quality of decision-making, and provide further confidence in the administration of justice.

Further, the absence of a clear, transparent and merits-based appointment process can expose the judiciary to claims of political bias. Regrettably, the furore over the AAT appointments on the eve of this year's election and the appearance of political stacking has underlined how fundamentally damaging the appearance of bias can be to tribunal members.

There was controversy earlier this year when the government announced the appointment, and reappointment, of a significant cohort of AAT members in the lead up to the election.

Let me be very clear – concerns raised by the community, including by the Law Council, were not and should not be understood as criticisms of the quality of the individual appointees, but rather the unsatisfactory and opaque nature of the appointment process itself.

Nonetheless, reports and suggestions of bias were extremely damaging the perception of the tribunals' independence.

A transparent, structured process provides protection equally for the Attorney-General and the tribunal members themselves, as well as those members of the community who appear before them.

The stories are legend that once an Attorney-General has been appointed – on both sides of politics – her or his friends come knocking on their door seeking appointment. It is not limited to the Attorney-General – the Chair of the Senate Legal and Constitutional Affairs Committee, Senator the Hon Ian Macdonald, admitted during the recent hearings on the bills to merge the Family and Federal Circuit Courts that:¹³

There's no shortage of lawyers lining up at my door and, I suspect, other people's doors wanting to be appointed to the judiciary, whether it be the Federal Circuit Court, the Family Court, the High Court or whatever... Not with any success, I might say...

¹³ Senate Legal and Constitutional Affairs Legislation Committee, *Transcript of hearing in the Inquiry into the Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*, Sydney, 12 December 2018, 38.

A transparent process of judicial and tribunal appointment reinforces the integrity and independence of both the Executive and the Judiciary and secures better decision making.

Frankly, the government did those members a significant disservice in appointing them in such a manner that eroded their appearance of independence, through no fault of the tribunal members themselves. This is patently unfair.

Regardless of whether the 34 recent appointments to the AAT (which were made without community consultation) or the 52 reappointments of existing members (many of which were made well before the expiration of current terms) were meritorious and based on sound decision-making, the timing and circumstances around those appointments gave rise to a reasonable apprehension among members of the public that appointments are affected by political considerations. And as we have seen, the appearance of partiality can be just as damaging as actual partiality.

At least 14 former state and federal MPs and staffers were amongst the 86 appointments.

The independence and integrity of our tribunals depends on an apolitical, open and merit-based appointment system.

There is a real risk that continuing to keep the AAT appointment process behind closed doors will compromise the reputation of the tribunal and will only serve to provide ammunition to those who may not be impressed with later decisions of the tribunal to allege political bias.

The Law Council has been unashamedly strident in raising concerns over these appointments which were not transparent, to a body that is overworked and under-resourced, and in grave need of subject matter experts capable of doing the work. The AAT, by way of example, deals with a significant number of cases that directly impact on the lives of Australians. It is critical those appointed have the necessary skills to discharge its functions according to law and community expectations, and the confidence of the community to do so.

Otherwise, this places significant pressure on the tribunals and litigants. It also places significant pressure on the President of a Tribunal, who is put in the unenviable position of having to investigate complaints of misconduct and deal with misconduct issues concerning members of the Tribunal if and when these arises – and I will come back to this point shortly.

In response to our concerns regarding these pre-election appointments and re-appointments, the Attorney-General pointed out that the decisions were made in line with the Australian Government's *Protocol for Appointments to the AAT 2015*, which outlines a process for managing the appointment needs of the AAT. Under this process, the President of the AAT provides the Attorney with an assessment of the appointments needs of the tribunal, together with recommendations about reappointments.

However, under this Protocol, the Attorney-General will then:

indicate which positions will not require public advertisement for expressions of interest because:

- a. a particular member will be reappointed without the requirement for advertising; or
- b. the Attorney-General has chosen a suitable person who is appropriately qualified.

This Protocol imposes significant discretion and exposes both the Attorney-General and the members they appoint to the full ambit of allegations I have already mentioned.

While it is true the appointments may have complied with set protocols and procedures that have been developed in consultation with the relevant heads of jurisdiction, this does not mean that

there is no room for improvement. The Law Council believes more can and must be done to improve transparency and accountability in the recruitment process.

These criticisms are by no means novel. In 1995, a report of the Administrative Review Council titled '*Better Decisions: Review of Commonwealth Merits Review Tribunals*' commented on appointments to the then Immigration Review Tribunal and called for 'more open and merit-based selection and appointment processes for all tribunals', noting that '[s]uch processes would minimise the scope for speculation about the basis upon which members have been selected'.

The Law Council has long supported increased transparency in the judicial appointments process and has argued for a judicial appointment protocol that includes transparent eligibility criteria, and a clear process for selection which includes a requirement that the Attorney-General must personally consult a minimum number of identified office holders prior to the appointment. Although some of these requirements are met by the appointment processes for some tribunals, there are many examples of tribunals' appointments, including at the AAT, which fall short of such a process.

A failure to ensure transparency in the appointments process communicates the wrong message to the community. The current appointments process is shrouded in mystery, which is simply not acceptable in this day and age, and fundamentally diminishes public confidence in the judiciary and justice system, as well as those entrusted to appoint judges.

Our courts and tribunals are built on the principles of open justice, accountability and transparency. An appointments process that takes place behind closed doors and involves discussion with a select few is the very antithesis of the core values of our system. This lends itself to speculation and the perception of arbitrary or idiosyncratic decision-making which is unhelpful at best and at worst unfairly casts a shadow over the reputations of those appointed, as well as those who appoint them.

We must do better than this to safeguard the integrity of our judicial system and maintain confidence in the separation of powers.

The Law Council has welcomed a commitment by the Commonwealth Attorney-General to consult with the Law Council on future appointments, but this is not enough. Appointments should be made transparently and in consultation with the community, including the legal profession, to safeguard their quality and improve their diversity.

In this regard, Professor Elizabeth Handsley of Flinders Law School and Professor Andrew Lynch at the University of New South Wales suggest that:

Public institutions, including the judiciary, cannot operate effectively unless there is broad acceptance of their legitimacy, and that includes (or is another way of saying) confidence in them. Avoiding any perception that political, social or familial networks are a key means to appointment, and that all those who are properly qualified for appointment are given the same consideration, is obviously vital to this end.¹⁴

It is inconceivable that in this era there would be those who argue against transparency, community consultation or disclosure when selecting the most senior members of our courts and tribunals, who are not only tasked with making important decisions that directly impact on the lives of Australians but making case law that impacts on our community, business and government.

¹⁴ Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37(2) *Sydney Law Review* 187
<<http://classic.austlii.edu.au/au/journals/SydLawRw/2015/10.html>>.

The swiftest way to dispel fears and accusations of bias is to shine a light on the process and demonstrate there is nothing to hide. The best way to ensure appointments are made on merit is to consult widely and openly with all sectors of the community.

By contrast to Australia's experience, in England and Wales an independent Judicial Appointments Commission was established in 2006 and is responsible for selecting candidates for judicial office in courts and tribunals.

This independent body does not obviate ministerial appointments, however, the Appointments Commission reviews the processes and policies for making and reviewing appointments and for handling grievances and appeals and provides an independent filter for the appointments process which makes it harder for political appointments to occur.

Under the UK model, the Judicial Appointments Commission makes recommendations for appointments to the Appropriate Authority (either the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals), which can accept or reject a recommendation of the Commission, or ask the Commission to reconsider it. If the appropriate authority rejects a recommendation or asks for reconsideration, they must provide written reasons to the commission.

The selection process typically starts when the Commission receives a vacancy request from Her Majesty's Courts and Tribunals Service or the Ministry of Justice. The vacancy request includes the number of vacancies, a job description and the eligibility requirements set by statute for the post. It may also contain additional selection criteria set by the business area. The Commission then advertises for the vacancy, and undertakes what is effectively a recruitment process involving numerous interviews and vetting stages.

It has been said that the UK Judicial Appointments Commission effectively operates as an appointing body as, in practice, successive Lord Chancellors have seldom used the power to reject the Commission's recommendation or the power to request that the Commission reconsider its recommendation, rejecting or requesting reconsideration only five times out of around 3,500 recommendations made by the Commission between 2006 and 2013.¹⁵

Opinions on the UK experience seem to be mixed. It has been criticised as overly bureaucratic and delays in the appointment process have been the source of some frustration. It nonetheless represents a model worth reflecting on as we consider a balance between a system that is flexible and responsive yet maintains appropriate levels of due process, checks and balances.

Back home, the Law Council understands that agreement was reached between the former President of the AAT and the then Attorney-General that there would be a protocol governing appointments to the Tribunal. That protocol, it is understood, was that notice of upcoming need for appointments and recommendations for appointment is provided by the President to the Attorney-General some six months prior to positions becoming vacant. Only in the event of a shortfall in recommended appointments can the Attorney-General fill the positions with suitable candidates, and if there still remains a shortfall, there is to be open advertising.

This protocol does not fully realise the principles accepted in the Administrative Review Council's *Better Decisions* report. In that report, the Council observed:¹⁶

4.25 There is overwhelming support for a rational and transparent selection and appointment process, and for the proposition that more broadly-based consultation in that process is likely to assist in ensuring merit-based appointments. Some suggested that otherwise the conclusion would remain open that appointments were being made for reasons other than merit.

¹⁵ Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 178.

¹⁶ Administrative Review Council, above n 6, [4.25]-[4.28].

...

4.28 *The existence of concerns about independence, whether or not correctly based in fact, can itself damage the credibility of individual tribunals and the tribunal system, whereby undermining the function that tribunals were established to perform.*

In our view, a transparent selection process will promote accountability and diversity in appointments, while alleviating pressures often placed on Attorneys-general to appoint individuals to the judiciary – not because they are necessarily the best-placed individuals to perform the role, but because of lobbying done on the individual's behalf.

This issue arose in the lead up to the May federal election, where the Opposition announced its support for changes that would see judicial positions in the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia, as well as appointments to the AAT publicly advertised, with an independent panel to provide a shortlist to the Attorney-General of potential appointees.

Under this model, appointments would remain the decision of the Attorney-General and Cabinet, however, any made outside this process would have to be reported and explained to Parliament.

The Law Council welcomed this position and sees this as a long-overdue step in addressing the deficiencies with the current judicial appointment processes in Australia. We will continue to advocate to the government to consider the merits of such a system.

One of the driving forces for the introduction of the Judicial Appointments Commission in the UK was the lack of diversity in the judiciary and the self-replicating nature of the process.

The 'equal merit' provision under subsection 63(4) of the *Constitutional Reform Act 2005* (UK) enables the Commission to select a candidate for the purpose of increasing judicial diversity where two or more candidates are considered to be of equal merit. This is used at the final decision making stage of the selection process and only:

- when two or more candidates are judged by the Commission to be of equal merit when assessed against the advertised requirements for a specific post;
- and where there is clear under-representation on the basis of race or gender (determined by reference to national census data and judicial diversity data from the Judicial Office).

Diversity

Diversity is another important way in which appointment process can affect trust and confidence in an institution. A tribunal that properly reflects the community it serves better enhances public confidence in the administration of justice, including respect for the Rule of Law.

Promoting diversity goes hand in glove with promoting merit-based appointments because it ensures decision-makers are presented with the widest range of suitable and talented candidates for consideration.

The Lord Chief Justice of England and Wales gave a speech on this issue in February, which was incredibly timely. Lord Burnett rejected the idea that increasing judicial diversity is change for change's sake. Instead, he made the important point that:¹⁷

Promoting diversity and appointing on the basis of merit are mutually reinforcing because the wider the pool the greater the availability of talent, the greater the competition for places and the greater the quality of appointments.

Public confidence in officers, he said, is likely to be higher if judicial officers “come from all sections of society and are not skewed towards, or against, any particular group”.¹⁸

The President of the UK Supreme Court, Lady Hale, put it more simply.

Her Honour said that the most important reason for ensuring a diverse judiciary is so that the public can “look at the judges and say ‘They are our judges’”, instead of seeing them as “beings from another planet”.¹⁹ That same principle is just as applicable to members of tribunals.

The public must be able to have confidence that appointments are based on merit – and those who have the qualities required for appointment are fairly considered.

In its ‘Better Decision’ report, the Administrative Review Council noted the role of diversity in tribunal appointments.²⁰

In addition to ensuring that members are appropriately qualified in the sense set out above, there is another important objective of selection processes: to ensure that the membership of tribunals reflects as closely as possible - consistent with merit-based appointments – the diversity of the Australian community, in terms of gender, ethnic origin, culture and background.

Australia is certainly not immune to criticism regarding diversity within its judiciary. I was interested to read an article from April this year which pointed out that of the 52 judges in the NSW Supreme Court, only eleven are women with three new female appointments made last year.²¹ The same article drew attention to the gender gap in federal politics, as well as observing that there are currently more men named ‘John’ running ASX 200 companies than there are women in these roles. We as a society need to improve gender and ethnic diversity in senior positions across sectors, and the judiciary is no exception.

This said, by our count the AAT appears to be bucking the trend at least in terms of gender diversity, with the split between its members very close to 50 per cent.

The Law Council strongly supports the implementation of a process for judicial and tribunal appointments that is transparent, involves consultation with the community, including the legal profession, and seeks to ensure diversity of background, experience and expertise.

Such an approach will safeguard the quality and diversity of appointments and in turn safeguard the confidence of the public in these institutions.

¹⁷ The Right Hon the Lord Burnett of Maldon, *A Changing Judiciary in a Modern Age* (Speech, Treasurer’s Lecture 2019, 18 February 2019) 1 <<https://www.judiciary.uk/wp-content/uploads/2019/02/mt-treasurers-lecture-final-for-publishing.pdf>>.

¹⁸ *Ibid*, 5.

¹⁹ Owen Bowcott, ‘White and male UK judiciary ‘from another planet’, says Lady Hale’, *The Guardian* (online), 1 January 2019 <<https://www.theguardian.com/law/2019/jan/01/lady-hale-supreme-court-president-judges-diversity>>.

²⁰ Administrative Review Council, above n 6, [4.22].

²¹ Jan Fran, Emily Jane Smith, ‘Based on Merit? 17 per cent of NSW Supreme Court judges went to one exclusive Sydney private school’, *SBS* (online) <SBS News ‘Based on Merit?’ <https://www.sbs.com.au/news/the-feed/based-on-merit-17-per-cent-of-nsw-supreme-court-judges-went-to-one-exclusive-sydney-private-school>>.

These challenges to the independence – and appearance of independence – of tribunals could be met, in no small part, by the introduction of a transparent appointments process.

Yet, the Law Council also considers there is a dire need to improve complaint handling, education and training within the judiciary and our tribunals – which also has the potential to significantly enhance the integrity and independence of our courts and tribunals. For this reason, while the Law Council has welcomed the commitment by both the Government and Opposition at the May election to move forward with a Commonwealth Integrity Commission, we continue to call for a stand-alone Federal Judicial Commission.

The Law Council has argued for the Australian Government to follow the lead of New South Wales and establish a fair and transparent mechanism for dealing with judges – and possibly tribunal members – against whom allegations of misconduct or misbehaviour are raised.

In an age of transparency and accountability, it is critical that there is an independent mechanism to deal with complaints of conduct or competence against the federal judiciary, and to provide a fair opportunity for the judicial officer to be heard. It would be advantageous, for the reasons already outlined, for such a mechanism to extend too to tribunal members.

A Federal Judicial Commission would enhance the openness, transparency and independence of the judicial system. This is important for a number of reasons, including maintaining public confidence in the judiciary as well as to provide a judicial officer with the right to explain her or his conduct which may be the subject of complaint and procedural fairness, instead of allegations simply being raised in the media with the risk of permanently tarnishing reputations.

I note that the NSW Judicial Commission has the jurisdiction to receive and investigate complaints about the President of NCAT, but not about tribunal members. There is an important discussion to be had around the benefits of extending oversight to all tribunal members, to best equip tribunals and their Presidents to uphold their objects and standards, and fairly deal with any allegation as and when these arise.

Under the system as it currently stands, the heads of Tribunals are put in the unenviable position of having to investigate complaints of misconduct if and when they arise, and deal with misconduct issues concerning members of their Tribunal. The Heads should not have to be put in that position.

That is why there should be a Judicial Commission that deals with Tribunal members both at a State and at a Federal level. The other difficulty is that the heads of the Tribunal should be given express powers to deal with performance issues concerning members of the Tribunal. It is not fair to task the Head of a Tribunal with responsibility for maintaining the utmost standards of tribunal members, when their hands are tied behind their back in respect of any ability to properly handle performance issues in the few cases where they arise. Such cases may be few. But they have the potential to unfairly cast a shadow over the work and good reputations of other hard-working tribunal members. And fundamentally erode public trust and confidence in some of our most important justice infrastructure.

In these respects, the Law Council looks forward to continuing this discussion with government and with the tribunals as we continue our advocacy in this area.

In conclusion, as the 46th Parliament gets underway, it is hoped that much of the political point scoring we have witnessed this year at the expense of the courts and tribunals will subside, in favour of a measured consideration of how to improve the administration of justice.

There is a real opportunity – and more than that, a genuine appetite – to revisit the way in which we appoint judicial offices and tribunal members with fresh perspectives and clarity of purpose. This is as much to protect the integrity and independence of the officers and members themselves, as the community they serve.

Few would argue it is essential to the protection of the Rule of Law that there be a strong and independent merits review framework, separate to, rather than subject to, the executive arm of government.

We must also recognise the adverse impact that unjustified criticism of tribunals, or any suggestion of impartiality, have. Both in terms of undermining the public's perception of legitimacy of merits review, and weakening the Rule of Law by undermining the appearance of independence. Regrettably, these criticisms are given a platform due to a lack of transparency in the appointment process.

Australian tribunals are expected to exhibit impartiality and fairness. Public confidence in the integrity of any tribunal may be undermined if it is seen to be vulnerable to indirect governmental influence. In this respect, the Law Council will not allow unjustified attacks on Tribunal members to go unanswered.

The Law Council will continue to endorse and advocate for an appointment framework which sufficiently protects both the actual and perceived independence of tribunal members.

I look forward to working with each of you, and with the Executive and Parliament, to safeguard the independence and integrity of Australia's tribunals.

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