



Australian Government
Attorney-General's Department
Deputy Secretary
Civil Justice and
Corporate Group

16/10049

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Macdonald

Correction and clarification of evidence

I write to correct the evidence provided to the Senate Standing Committee on Legal and Constitutional Affairs hearing of 18 October 2016.

Since giving evidence that evening, an examination of Departmental records in relation to appointments to the Administrative Appeals Tribunal (AAT) has revealed the need to correct and clarify some evidence given by myself and another officer where that evidence was incorrect or inadvertently has the capacity to mislead.

Appointments to the Administrative Appeals Tribunal are made in accordance with the Protocol for Appointments to the AAT, which was settled by the Attorney-General, in consultation with the President of the AAT, the Hon Justice Duncan Kerr *Chev LH*, on 6 November 2015.

The following corrections are identified by reference to the relevant Hansard extract from the Proof Committee Hansard released on 19 October 2016.

Hansard reference 1 (page 93)

*Mr Anderson: Senator, I will take that one. The advice that the President provides to the Attorney makes recommendations about reappointments. It makes recommendations about whether members should be cross-appointed to divisions. It makes recommendations about whether some members should be promoted. **But it also makes recommendations about the creation of new positions, so the-***

Senator Wong: But you're not able to tell me, because you cannot find the letter and you have no information, whether that letter did in fact recommend new positions? Or can you do that now?

*Mr Anderson: I can tell you that **that letter did actually recommend that there be some new positions created.***

The President's letter dated 11 December 2015 did not in fact recommend the creation of new positions. Rather, in the introductory paragraph, the President recommended appointments required "in order to meet **anticipated vacancies** (including those as members' terms expire) in the required membership of the AAT".

The President refers to two categories of anticipated vacancies. The first group of vacancies comprises members with terms expiring before 30 June 2016 that the President recommends for reappointment. The second group of vacancies comprises positions that require filling either because the President does not recommend appointing the incumbent or there is an additional gap that the President has identified in the Tribunal's establishment since amalgamation. One table attached to the President's letter is headed "Additional gaps identified as requiring filling".

Hansard reference 2 (page 94)

Senator Wong: You are entitled to do that so I'll wait until the Attorney comes to consider that. You agree with me, don't you, that the decision to create 56 new positions is a decision of the Government.

Mr Anderson: That's correct.

Senator Wong: And I'm asking for the timing of the decision. When was the decision made to create 37 new positions?

Mr Anderson: I'm sorry Senator. As Dr Smrdel indicated before, we do not have the precise timing.

Senator Wong: It is some point between December 2015 and May 2016. Is that correct?

Mr Anderson: Correct.

No new positions were in fact created in the membership of the AAT, and no decision was made to create new positions. The decision made by the Government was to fill a number of vacant positions.

Hansard reference 3 (page 95)

Senator Wong: Thank you very much; I appreciate that. In relation to the round of appointments that we are discussing - the ones that resulted after the President wrote in December 2015 and culminated in the appointments of May 2016 - can you tell me: was a selection committee established as per paragraph 4 of the protocol?

Dr Smrdel: No selection committee was established.

Senator Wong: Can you tell me why?

Dr Smrdel: The protocol in paragraph 2 also provides the Attorney with the ability, after the President has written to him, for the Attorney to indicate that he will choose a suitable person who is appropriately qualified himself.

In considering what appointments to recommend to Cabinet, the Attorney-General did in fact decide that 16 positions require public advertising, and advised the Department of this. This requires the establishment of a selection committee, under the Protocol.

The Protocol sets out three consecutive steps for appointment decisions. Firstly, the President provides the Attorney-General with his assessment of the appointment needs of the AAT. Secondly, upon consideration of the President's advice, the Attorney-General may decide to accept the President's recommendations about reappointments or choose a suitable person who is appropriately qualified to fill a vacancy. Thirdly, if there are any vacancies that are not filled following step 2, then the Attorney-General will seek expressions of interest by public advertisement for those vacancies. The requirement to establish a selection committee arises if there are vacancies that have not been filled following steps 1 and 2.

The first three steps identified in the Protocol were followed for the appointments announced in May:

- a number of positions were filled on the President's recommendation for reappointment
- a number of positions were filled with appropriately qualified persons, and
- the Attorney-General identified 16 of the vacancies as requiring filling through public advertising, and advised the Department of this.

The vacancies the Attorney-General identified for public advertising have yet to be advertised. At the time they are advertised, a selection committee will be established, in accordance with the Protocol.

Hansard reference 4 (page 96)

Senator Wong: No, that was not the discussion I had with the Deputy Secretary. He will not give me the letter precisely because he says it reveals cabinet considerations, because then I can compare the letter with the numbers in what was announced. I thought we had agreed that the letter went to (a), (b) and (c) - that is, which positions, advice and recommendations. I suppose (a) could cover new positions; is that right?

Mr Anderson: The letter does make a recommendation about new positions.

I refer to the correction of my evidence in relation to Hansard reference 1. The letter from the President does not in fact make a recommendation about new positions in the membership of the AAT.

[The Hansard records this evidence as being given by Dr Smrdel, but in fact it was given by myself.]

Hansard reference 5 (page 96)

Senator Wong: You are saying to me: in relation to all positions, the Attorney came to the view that none of them require a public advertisement.

Dr Smrdel: In relation to that selection process, that is correct. Either the president's recommendations are agreed to or the Attorney may suggest a suitable other person for appointment.

I refer to the clarification of evidence in relation to Hansard reference 3. The Attorney-General in fact identified 16 vacancies to be publicly advertised, and advised the Department of this decision.

Hansard reference 6 (page 96)

Senator Wong: I will get to that. You can ask questions about that if you want. Of the 76 appointments that were announced in May 2016, did any of them go through a selection committee process?

Dr Smrdel: No, Senator.

A number of the 76 appointments were in fact made pursuant to one or more selection processes which commenced prior to the Protocol taking effect. Candidates identified in these processes were ultimately considered within the Protocol process that led to the announcement of 76 appointments in May.

Specifically 12 appointees were identified through a Social Security Appeals Tribunal (SSAT) selection committee process conducted prior to the 1 July 2015 amalgamation. One of these appointees also underwent a Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) selection process prior to amalgamation.

In addition, members from the MRT-RRT and SSAT who were re-appointed to the AAT in May 2016 may in fact have been initially appointed to the MRT-RRT and SSAT as a result of a selection committee process. That data is not available to the department because it relates to selection committee processes conducted by other departments prior to amalgamation.

Hansard reference 7 (page 96)

Senator Wong: Not one of the 76 appointments the day before the election was announced went through the process set out in this protocol, which includes a selection committee and advertising.

Mr Anderson: That is correct. But, of course, a number of those were actually matters that were recommended by the president.

I refer to the clarification of evidence in relation to Hansard reference 3. The Attorney-General in fact identified 16 vacancies to be publicly advertised and advised the Department of this decision.

In addition, all of the 76 appointments in fact went through the process set out in the Protocol. The Protocol only requires public advertising and establishment of a selection committee if there are vacancies that will not be filled through reappointment or by the Attorney-General identifying suitably qualified persons.

[The Hansard records this evidence as being given by Dr Smrdel, but in fact it was given by myself.]

Hansard reference 8 (page 99)

Senator Wong: And the department's advice is that no selection committee was established in relation to any of the 76 positions. So, my next question - not about advertising - is whether or not, in relation to any appointment to the AAT by this Attorney-General, has there been a selection committee process established.

Mr Anderson: There has only been that one batch of appointments, in May.

Senator Wong: So the answer is no.

*Mr Anderson: **That is correct.***

In fact, the Government made appointments to the AAT on three occasions in 2016.

A total of 114 appointments were announced in 2016 as follows:

- 9 appointments were announced on 25 February
- 29 appointments were announced on 24 March, and
- 76 appointments were announced on 5 May.

33 of those 114 appointments were in fact recommended by selection committee processes conducted by the AAT, or by other portfolios prior to the 1 July 2015 amalgamation.

Hansard reference 9 (page 100)

Senator Wong: Okay. Was the Department aware before the appointment that Ms Brandon-Baker was Mr Morrison's former Chief of Staff?

Mr Anderson: I do not believe that we were aware.

Prior to the appointment of Ms Brandon-Baker, the Department had in fact received documentation from Ms Brandon-Baker which disclosed that she had been the Chief of Staff for the Hon Scott Morrison MP.

Yours sincerely

Iain Anderson
20 October 2016