

ACT LAW SOCIETY GOVERNANCE REVIEW 2024

COMMENTS BY CHRIS DONOHUE, SOLICITOR

September 2024

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1. Introduction

This is to express my considerable concern about the current review of governance (“the Review”) that is currently taking place in the ACT Law Society, and this concern is exemplified by the survey that has recently been sent out to Society members (“members”).

I write this as a member of the Society, and not as a Council member or any other such role. I maintain completely my obligations of Council confidentiality as appropriate.

All members will have received an invitation on or about 22 July 2024 to participate in a survey titled Governance Review Member Consultation (“the Survey”). The Survey participation was closed on 2 August 2024. That is, a 2 weeks window.

The intention of the Review, revealed by the Survey questions and backing information, appears to be quite clearly to move in the direction of a bureaucracy.

***Bureaucracy:** A system of government in which most of the important decisions are taken by state officials rather than by elected representatives. OED*

I do not believe that this is for the good of the Society moving into the future. Good governance would have a cooperation between the appointed CEO of the Society (supported by the staff and control of expenditure) and the elected President of the Society (supported by the elected Council). This is the way it is currently set out in our Constitution and supporting documents, (apart from some recent documents which have degraded the positions of President and of Council).

What is needed out of this Review is a strengthening of the roles of the elected President and Council (both by better resourcing and access to information and training), not by weakening them.

In this document you will find my commentary on the Survey and the explanatory document accompanying the Survey. The Survey itself is now no longer visible on the Society website.

In addition to the above, my concerns are:

- The consultation process with Society members has been severely constrained and has not seriously attempted to ascertain members views before setting a path. There is a lack of transparency, and it would be more respectful of members to provide them more of the basic information about options that has resulted in the Survey.
- Our Committee system, which has legal subject matters as their terms of reference, is not considered in the Survey. A proper connection between the Council and these Committees is essential to ensure an overview of the position

the Society takes on legal questions, some of them very contentious, on which the Society expresses a view on behalf of members. Our Constitution says that matters of policy are only to be determined by Council.

As usual, it is the detail that matters, so my comments in the attachments follow the text of the Survey and the Information Pack. I also make some limited comments on the “Interim Roles and Responsibilities” document, which until now has been confidential to the Council.

The Survey as part of the Review, appears to be intended to be used to justify imminent amendments to the Constitution, which could be used to significantly reduce the input of the elected President and Council on Society decision making.

I am asking for your support to maintain the Society as a membership organisation and, and to not allow it to degenerate into a bureaucracy.

Please make time to read this document and send me an email with any queries or comments that you have. If you wish, please phone me.

Also, please feel free to share with other Society members.

Chris Donohue
Solicitor

lawyer@donohueco.com.au

10 September 2024

2. Governance Review Member Consultation (“the Survey”)

The Survey – sent to Society Members on 22 July 2024 and closed 2 August 2024

Preliminary comments

Some of the survey questions are ambiguous, confusing, and raise other questions. This impedes members in their efforts to sensibly answer the Survey. Lack of clarity about the questions themselves, and different assumptions about the underlying meanings and effects will prevent consistency of thought and significantly compromise the Survey results.

The overall approach appears to be to reduce the Council role as a representative of members, whereas it should be in the other direction – strategies to enable more participation of members. A reduction in the power of the elected President and Council leaves a partial vacuum, and that vacuum is by default taken up by the appointed CEO.

The threshold question as to governance is whether the Society is to remain a membership organisation with significant membership input to its directions and functions, or whether it is to become a bureaucracy which governs in what it considers to be the best interests of the organisation, but without obtaining genuine input from members.

***Bureaucracy:** A system of government in which most of the important decisions are taken by state officials rather than by elected representatives. OED*

The limited consultation prior to this Survey has not allowed members the opportunity to raise these or any other such matters of their concern.

Instead, a small selected group has been consulted, and from this the Survey has channelled questions into a particular direction.

Has this group been required to maintain confidentiality of the views they each expressed, and of the views expressed by other group members? If so, the transparency of the member consultation process is compromised.

Who were the members of this group, and how were they selected?

Have this group produced a report? If so, where is it?

The Society has also engaged consultants Cameron Ralph Khoury to provide advice on this Review.

Where is this advice?

Or is it to be kept from the membership?

The threshold questions of the purpose and role of the Society have not been considered by the membership at large.

COMMENTS ON THE SURVEY

(Titled “Member Consultation)

(It is noted that the Survey questions have vanished off the Society’s website. Why?)

Survey question about Governance review

Extract of information provided with survey

The aim of the review is to ensure that the societies governance is modern, efficient, responsive, transparent and fit for purpose.

Survey Question 1

As a peak body association representing lawyers, how important is it to you that the Society’s Constitution and related governance framework align with contemporary best practice governance?

My comments/ questions

This question asks whether we support “best practice governance” without saying what that actually is.

By asking that as a first question, it leads the responding member to answer subsequent questions in the affirmative, even though the member is not informed as to the direction these questions are ultimately taking.

The “aim” of transparency referred to above in the extract has therefore failed at its first test.

Is it now to be assumed the current governance is not fit for purpose?

Why not? This should be stated.

Why do we need to fix something if it is not broken?

Questions about Council composition, tenure and turnover

Extract of information provided with survey

Currently, the Council could be replaced each year, impacting on the level of corporate knowledge retained as well as the regulatory experience of the Council to make good administrative decisions from year to year. Best practice governance principles include keeping the board at a manageable size for effective discussion, setting maximum term limits, and providing for a rotation of members to ensure a good mix of corporate knowledge retention, and continuity as well as refreshment.

Survey Questions 2, 3, 4, 5 and 6

These include extending the term beyond one year for council members, having a maximum term limit for councillors, council members appointments occurring on a rotating basis, restricting the number of Councillors from a single firm, and reducing the overall number of Council members from 16 down to a possible 8 members.

My comments/ questions

What size is “manageable”? Is it suggested that it is not manageable now? Manageable by who?

How can a rotation of Council members ensure “retention” and “refreshment” any more than our current election process which allows any member to nominate, and our members voting takes care of it.

Why would there be a reduction in Council members needed when the membership of the Society has massively increased over recent years. Is an increase more appropriate?

Reducing the size means reducing the opportunity for breadth of opinions, diversity, corporate knowledge, and opportunity for “refreshment”.

A smaller group is usually more malleable than a larger group.

Questions about eligibility to serve on the Council

Extract of information provided with survey

Questions of whether someone is fit and proper to serve and make regulatory decisions, “independent” skilled members, immediate past Presidents and former Presidents.

Survey Question 7

Should Council members meet basic eligibility criteria having regard to the skills and experience required to serve as both directors and regulatory decision-makers and having regards to any skills experience gaps identified by Council based on those retiring?

My comments/ questions

This is an extremely difficult question to answer. What would a basic eligibility requirement look like? Aren’t we already all lawyers?

There is no suggested method in the preamble as to how the Society could ensure the Councillors have basic eligibility criteria – nor anything about a criteria.

“Basic eligibility” requirements may see many members become unqualified to be Council members – on the basis of a bureaucratic assessment.

This is a direct assault on the elected and representative nature of the Council.

Survey Question 10

On conclusion of their term, should a President continue to serve on Council?

My comments/ questions

This is a strange question to ask. Generally, members would not really know one way or the other whether a former President should be on the Council, so it is unnecessarily difficult for members to answer with any usefulness.

The extract seems to be directed to the role of Immediate Past President, which is currently a mandated position. However, the question relates further to any former President serving on Council.

There is an information hierarchy in the Law Society. The group that has access to the least amount of information is the Society members. The hierarchy of access to information is:

- CEO
- President
- Executive members
- Council members
- Committee members
- Society Members

It follows from this that the President on completing the President's term has a significant amount of experience and corporate knowledge. To exclude that person from continuing on Council would be a detrimental step. So, why is there this attempt to do so?

It is my experience that former Presidents are very willing to provide advice from time to time, but their advice and experience would be more likely to be carried through effectively if they were on Council.

Survey Question 11

Should there be an option for a small number of independent members (up to 3) to be appointed to Council as skilled members to support governance responsibilities where skills gaps are identified?

My comments/ questions

What is an "*independent member*"? "Independent" of what?

How are they to be appointed? On whose recommendation? For what purpose?

What are the “skills gaps” identified so far? If there are none, why implant such a provision?

Surely it is a better proposition to include “governance” and “budgeting” into the inductions sessions for new Councillors?

It is already the case that outside expertise is engaged for legal and other purposes. The question seems to imply that, if a person is not a member of the Council, then the skills are not available to the Council.

This question raises so many more questions that the question itself is almost impossible to answer sensibly.

It also raises the serious possibility that 3 paid appointees (ie, not elected) would take up positions on a Council that is reduced to 8 (see above). Therefore only 5 elected members of Council. To whom would the appointees be answerable to if not the members? How can this be seen as an improvement in governance?

Survey Question 12

If independent members were appointed to the Council, should they be involved in regulatory functions?

My comments/ questions

The answer is so obviously “no” that it is hard to see why it was asked. What is the agenda here?

See my comments in relation to question 11. Once again, what are the regulatory functions referred to that could possibly require “independent” members? The term “regulatory” is often/usually used to mean conduct (misconduct) matters.

How can Society members possibly make any informed answer to this question?

Questions about Council and officeholder appointments

Extract of information provided with survey

There is no useful information provided

Survey Question 13

Should a simplified voting process (rather than the current preferential process) be implemented where members simply indicate all the candidates they support to fill the total number of positions available on Council?

My comments/ questions

This question confusingly conflates the vote counting process with the question of whether executive members should be separately voted on.

There was the opportunity to set out more clearly the issues about the vote counting but this opportunity has been ignored.

See chapter 5 of this paper which sets out clearly the current deficiency and the change in By Laws needed to correct it.

Survey Question 15

Should the President honorarium be reviewed?

My comments/ questions

This already occurs, and the suggestion that it be reviewed is a suggestion that it be reduced.

To maintain the task of carrying out the President's role properly, there needs to be proper compensation.

For what possible reason would the President's honorarium be reduced?

There is insufficient information provided to members to enable them to make any relevant or sensible answer to this question.

Survey Question 16

Should consideration be given to an honorarium for all office holders and/or Council members?

My comments/ questions

There is no information given to members as to the level of engagement by Council members to enable Society members to make any informed decision on this question.

However, when this question is aligned with the questions about "independent" members, one can ascertain that the intention is to appoint some paid Council members to the exclusion of elected members.

It is objectionable that such open ended questions are asked.

Survey questions about Governance vs Regulatory functions***Survey Question 17***

Should the governance and regulatory functions currently performed by the Council be separated internally?

My comments/ questions

The Survey information has not adequately described what is meant by the respective functions. Members are left guessing or making assumptions. Either way the results of the Survey question will be defective.

Surely governance includes the management and control of regulatory functions. How can governance be possibly separated from one of the core roles of the Society?

Survey Question 18

Do you have any other comments or feedback about the current governance framework for the Society?

My comments/ questions

One page only.

What comments have been made?

What are the survey results?

The major defect in the whole Review exercise so far, exemplified by the Survey, is that there is an attempt to show some “consultation” with the membership. The fact is that the consultation is so nebulous, inadequate and confusing that any purported reliance on it would have to be considered delusional.

There are a hand picked group who are so far incognito, not permitted/ not willing to have their names or opinions known publicly, their comments have been distilled and included or not included in the summaries and the Survey questions.

The Survey results have not been made available members. Comments made in relation to the Survey have not been made available to members. The whole Survey exercise is being carried out in an inadequate and non-transparent manner.

It is indicative of a particular outcome being favoured, but not being open and transparent with what outcome is desired, or for what reason.

3. Member Consultation Information Pack

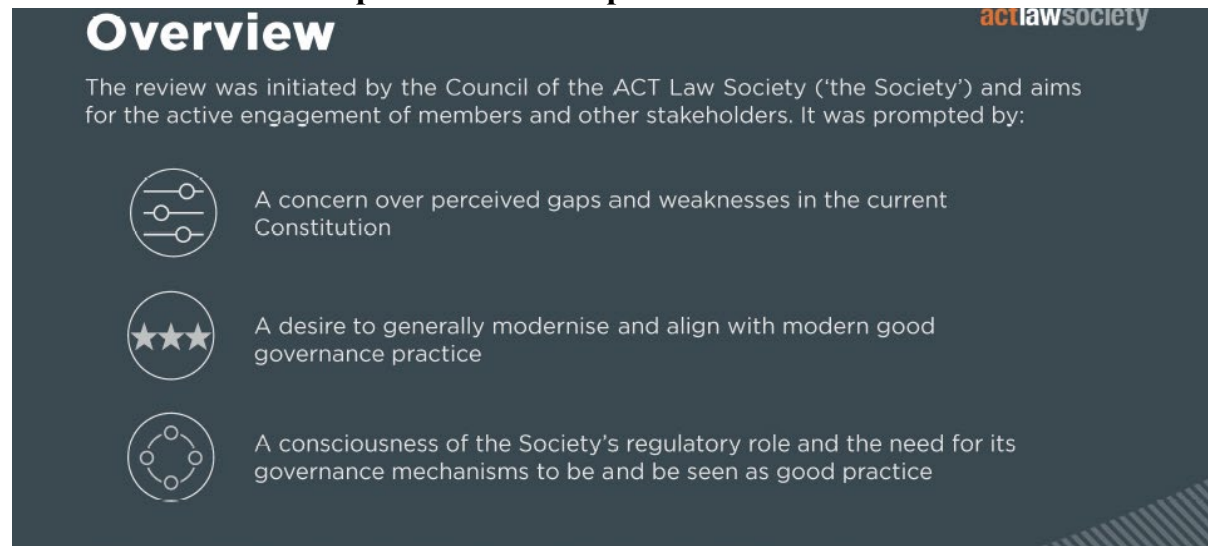
GOVERNANCE REVIEW 2024

MEMBER CONSULTATION INFORMATION PACK

(To assist, I have where possible set out below extracts of the “Consultation Pack” and followed with comments and questions on each extract. I note the pack can be viewed on the Society website.)

The overview (page 1)

Extract of information provided in the “pack”



My comments/ questions

This overview needs elucidation

Who are the “other stakeholders”, and why do they have a stake in the Society’s governance?

Who had concerns over “*perceived gaps and weaknesses*” in the current Constitution?

What were the “concerns” that have been expressed about “*perceived gaps and weaknesses*” in the Constitution?

What is meant by “*modernise*” and “*good governance practice*”? These general words will have different meanings to different people, and the effect of “modernising” may be highly undesirable to a member organisation.

How is it envisaged that “modernising” will change Society governance and decision making?

Why are members not given this information?

Objectives (Page 2)

Extract of information provided in the “pack”

In drafting an updated constitution, all stakeholders should consider the following objectives:

1. Focus on meeting **future challenges for governance** of the Society
2. While remaining appropriate to the Society's unique role, **align with modern governance** expectations
3. Aim to consistently **attract and develop the skills and experience** needed for the governing body of the Society
4. Adapt to **meeting the professional needs** of a changing legal sector
5. Encourage **diverse participation in the governance** of the Society

My comments/ questions

What are the “*future challenges*” that are referred to?

What are the governance expectations that are considered to be “*modern*” and how do they differ from past expectations?

These would seem to be interlinked with the question of whether the Society is to remain a membership organisation or become a bureaucracy.

What is the diversity that is now being sought and which is not already apparent in the Council (now and in recent years)?

There are considerable differences in the Society's:

- (a) Licensing of and control of professional conduct of members;
- (b) Own financial management;
- (c) Involvement in law reform and review; and
- (d) Involvement in access to justice.

Governance Overview (Page 3)

Extract of information provided in the “pack” – Not reproduced

This is an extract from a publication by the Australian Institute of Company Directors, and uses the terms “director” instead of “councillor”, and “board” instead of “Council”.

My comments/ questions

Inclusion of this page shows the intention and direction of the Review.

As an example, a few years ago the Law Council of Australia (LCA) had to resolve an internal management issue. “Directors” were instructed that they had to vote while only considering the interests of the LCA. “Members Representatives” (representing the interests of the Law Societies in the States and Territories) were not to vote at all. So, therefore, did the LCA represent the interests of its constituent bodies?

Do we members of the ACT Law Society want to go down a similar path where our elected Councillors must manage/govern the Society without regard for the interests of our members?

Governance Review Stages (Page 5)

Extract of information provided in the “pack”

1. Prepare Plan and identify issues (Completed)
2. Listen Initial stakeholder advice (Completed)
3. Consult Broad consultation with members
4. Develop Develop options for consideration
5. Recommend Draft and present new constitution

My comments/ questions

This page clarifies that this survey is now intended to be at stage 3, and the next that members can expect are specific amendments to the Constitution.
If I am right in this, then the “consultation” has been a complete failure.

Current governance structure (Page 6)

Extract of information provided in the “pack”

President:

**President is the primary ambassador for the Society.*

**The role includes external representation and spokesperson functions, and ceremonial duties.*

**The Constitution and Council Delegations Schedule do not provide the President with any additional delegations other than leading the Council and Chair of the Executive Committee.*

**Elected for one year with up to three consecutive terms permitted (typically two terms)*

My comments/ questions

It is factually incorrect to say the President is limited as above.

Our Constitutions says

13(b) Notwithstanding anything contained in this Constitution, either the President or the Council may establish such committees as he, she or it deems desirable from time to

time and may delegate any of its power to such committees which may consist of one or Members.

That section gives the Council or the President the authority to establish committees. Flowing from that role, it is implied that the President can establish a committee including setting out its terms of reference and its membership. Further flowing from that, the role is maintaining contact with committees to ensure their viability, and that they are carrying out their function.

Accordingly, the President needs to be supported to maintain connection with committees and the issues they deal with. The President should be specifically recognised as being a member of all the Society's committees.

As the President's role is spokesperson for the Society, it follows that the President must be conversant and up to date with the issues that are relevant to the Society, and that includes all the issues that are being considered by the Society's committees. That is, the President's connection with the Committees is immutable, unless the Society wants its spokesperson to appear to be out of touch with matters relevant to the Society. This perception can appear at formal speech giving, but is more likely to be revealed during conversations at casual/semi social events outside of the formal speech giving.

How does the President speak for the Society (ie, its membership of around 3,000) if there are not adequate methods in place to warrant that authority, and if the President is not adequately resourced to ascertain members views. Council is elected by members, and should exercise (with the President) that function.

The role of the President and CEO need to be considered as an equal partnership with no power imbalance. The CEO already has a relatively massive advantage via complete control of all the staff, and all the finances. The President has none of this.

There should be systems in place that enables the President to carry out that role properly and completely including:

- An office space which is reasonably private,
- Acknowledged membership of all Society Committees
- Full access to SharePoint
- A personal assistant only answerable to the President

Interim roles and responsibilities of the Law Society Council (Page 7)

See – on the ACT Law Society website

<file:///C:/Users/User/Downloads/Roles%20and%20Responsibilities%20of%20the%20ACT%20Law%20Society%20Council.pdf>

As this document is now available to members, I am now able to comment on it.

See the next chapter 4 of this paper for some limited comment.
The whole “policy” needs to be thoroughly reviewed

Functions of the Council (Page 8)

(inappropriately referred to as a “board”).

Extract of information provided in the “pack”

Governance:

Set strategic direction (how to best meet purpose)

Oversee effective/efficient operation

Ensure ethical and legally compliant

Ensure sustainable organisation (including engaging members, succession)

Ensure legitimacy, accountability (to purpose and members)

Regulatory

Licensing of legal practitioners in the ACT and enforcement against non-licensed practice

Determine complaints against professional conduct of solicitors, including disciplinary proceedings

Receive and investigate complaints

Receiving notifications under the Act and other regulatory responsibilities

My comments/ questions

Absent from this summary is any reference to the Society’s role in law reform. This is a serious omission.

These committees form opinions on, and provide advice on, and sometimes make public comment on - law reform, the carrying out of legal responsibility of various authorities and entities, and will sometimes need to do this in a highly politically charged background.

Constitution says

14(f) The Council may from time to time delegate to the Executive Committee such of its function as it determines provided that matters of policy or matters affecting the rights of a Member shall be dealt with only by the Council.

The connection between the Council and the committees has been an issue for a long time, and in the last few years has become significantly worse. There appears to be no strategy envisaged to correct this issue.

It is simply not good governance for these small groups to be effectively bringing about positions of the Society (on contentious matters particularly) without there being the opportunity for wider reference to membership. That reference has to be via the elected members of the Council – not just to the unelected members of staff and CEO.

How does the governance review attempt to resolve this difficult question? It seems to be ignored, and should be addressed properly and transparently.

4. Interim Roles & Responsibilities Policy

INTERIM ROLES AND RESPONSIBILITIES POLICY 2023

See:

<file:///C:/Users/User/Downloads/Roles%20and%20Responsibilities%20of%20the%20ACT%20Law%20Society%20Council.pdf>

President's speeches, media and articles

Extract

Appendix "President Representation" (no para numbers)

"At times the President may have some input into representations, such as speeches, but to ensure continuity of messaging, communications are prepared by the Society and such input must be provided in consultation with the appropriate Society staff."

My comments/ questions

This provision excessively subjugates the President to the "staff" of the Society. It undermines and degrades the position of President. Are the opinions of "staff" to override the elected President and dictate what she/he may say? Council should have faith and trust in the President.

Defects

- | | |
|-------------------|--|
| "At times" | – President should always have input |
| "may have" | – see above |
| "representations" | – what does this mean? |
| "communications" | – this could include conversations, emails, letters, etc |
| "by the Society" | – Society staff? |

Should read

"When speeches or written articles are to be prepared for the President's use, the initial draft can be prepared by the President or Society staff. Consultation about a draft will then be done via the CEO.

The President and the CEO will seek to reach agreement, failing which the Executive Committee will make any necessary final decision.

With speeches and in person media appearances, after such process, the final wording delivered will be entirely at the President's discretion."

Related documents

Unnumbered paragraph following para 8.3

Extract

“Related documents:

Constitution of the Law Society of the ACT

Delegations Schedule

Conflict of Interest Policy

Code of Conduct (Interim)

Media Policy

Privacy Policy”

My comments/ questions

The list is not complete.

Relationship to this policy document not specified

Should read

This policy is to be read subject to the provisions of the following related documents, and in the event of any inconsistency, the provisions of the related documents will prevail over the provisions of this policy:

Code of Conduct (Interim)

Committee Charter

Conflict of Interest Policy (Interim)

Constitution of the Law Society of the ACT

Delegations Schedule

Legal Profession Act and Regulations

Legal Profession (Solicitors) Conduct Rules 2015

Media Policy

Privacy Policy

5. Correction of Vote Counting System

All of these comments are from me

EXISTING VOTE COUNTING AT COUNCIL ELECTIONS

Each year we have **an election for council members**. There are 10 positions and usually about 12 or 13 nominees (noting that some nominees will have ceased to be so if they are elected to an executive position).

We receive one ballot “paper” with all those 12 or 13 candidates listed, and the invitation to number them in order of preference.

It may still come as a surprise, but the effect of existing By-law 12 is that upon our first preference candidate receiving sufficient votes to be elected, then the remainder of our ballot paper becomes irrelevant. That is, we each only have one vote and when it effectively lands on one candidate, we have no say in the remaining candidates.

See the following example: (hypothetical, but possible)

Positions 10
Candidates 13
Voters 750 (an approximation of the reality – despite having around 3000 members)

Candidate	Total First Preference Votes Received	Total second Preference Votes Received
A	200	50
B	200	0
C	150	0
D	150	0
E	11	0
F	11	0
G	7	0
H	6	0
I	5	0
J	4	0
K	3	0
L	2	0
M	1	700
Totals	750	750

Under the above scenario, M, who received 700 second preference votes does **not** get elected. In fact, M, having got the fewest number of first preference votes, is the first excluded, and that 1 vote is transferred to whoever was listed second on that particular

ballot “paper”. **None** of the second preference votes that were cast for M are counted for anything.

E, F, G, H, I, and J are elected despite their low first preference votes and despite getting 0 second preferences.

Obviously, the example is an exaggeration, but does serve to illustrate the point. The same issue arises with the two vice president positions, but to a lesser degree.

This can be corrected by amending our By-laws to ensure 10 votes are available to voting members, as per the Amendment now proposed.

MY PROPOSED AMENDMENTS TO BY LAWS

Vote counting

11.

- (a) For the election of a candidate to a single position (such as President, Treasurer and the Secretary), if, on the count of votes a candidate has received a number of first preference votes greater than half the total number of formal ballot papers counted, then that candidate shall be declared elected to that position.
- (b) If no candidate has received an absolute majority of first preference votes, the candidate who has received the fewest first preference votes for that office shall be excluded and each of his or her first preference votes shall be counted to the next unexcluded candidate in the order of preference indicated by the voter and shall for the purposes of the succeeding clauses of this Bylaw be regarded as first preference votes. In the event that two or more candidates received the lowest number of first votes, the candidate to be excluded shall be determined by lot.
- (c) The process of eliminating the candidate who has received the fewest first preference votes shall be repeated until one candidate has received a number of first preference votes greater than half the total number of formal ballot papers counted.
- (d) Should the ballot result in there being an equal number of votes in favour of two or more candidates for an office after distribution of preferences if required by these By-laws, then lots shall be drawn between these candidates in such a manner as the Returning Officers shall determine.
- (e) If a ballot paper contains no sufficient order of preference to determine the candidate next in order of preference then such ballot paper shall in respect of the future conduct of the election for that office be treated as informal

12. For the election of a candidate to a position where there are multiple vacancies (such as vice president or a member of Council):

- (a) Each voter shall be entitled to make 2 votes (in the case of the vote for vice president) and 10 votes (in the case of the vote for member of Council) of equal value respectively.
- (b) The candidates who have received the highest number of votes for the 2 positions for vice president and 10 positions for member of Council shall be deemed elected to those respective positions.
- (c) In the event that a vote is counted to a candidate who has for any reason ceased to be a candidate for the office in respect of which the count is being conducted, then each such vote shall be discarded.
- (d) In the event that two or more candidates have received equally the lowest number of votes, then lots shall be drawn between these candidates in such a manner as the Returning Officers shall determine.