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# Back together - back to basics

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## *Tips and Traps for the non-lawyer on multi-disciplinary panels*

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# Multi-Member Panels – why bother?

- ▶ Non-legal Members with either an expert or community background is a key distinguishing feature of Tribunals from Courts
- ▶ When parties are not legally represented and the quality of expert evidence is often uneven, the collective expertise of the Tribunal assists it in understanding the available evidence and discharging its fact-finding role.
- ▶ In circumstances where the parties or other participants are in conflict and the subject matter is contentious, the use of a multi-disciplinary panel can contribute to a more effective and fairer hearing

# Multi-Member Panels – why bother?

- ▶ There is an argument that a community or lay Member brings legitimacy / the view of the community to decision-making
- ▶ Plato's ideal society\* – one rationale for community Members participation is motivated by the sociologically driven desire of the ordinary citizen to participate in decisions about things “done” to them – e.g. mental health advocate on the MHS
- ▶ A multi-member panel with varying skill bases may contribute to a greater chance that the ultimate outcome of the hearing is not a surprise to the parties – the parties involvement and understanding of the hearing is advanced.

\**“Why include a community member in the decision-making of tribunals and boards”, Dr Kylie McShane]*

# Some caselaw on the role and parameters of non-legal Members

## ***B v Mental Health Tribunal* [2020] TASSC 10**

[54] The Tribunal is not required to listen to submissions in silence. It must often be appropriate for tribunal members to test the merits of submissions made to them by engaging in robust discussion.

[55] One important distinction between a court and a specialist tribunal is that, whilst courts are required to consider issues afresh on a case by case basis, it can be appropriate for a specialist administrative decision-maker to come to a case with a predisposition towards a particular conclusion in particular circumstances. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (above), Hayne J said, at [187]:

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## ***B v Mental Health Tribunal* [2020] TASSC 10 (cont.)**

"In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision-makers, however, may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed ... the notion of an 'expert' tribunal assumes that this will be done. ... It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker."

# Some caselaw on the role and parameters of non-legal Members

## ***B v Mental Health Tribunal* [2020] TASSC 10 (cont.)**

[56] Section 167(2)(b) of the Act requires the Tribunal to include at least one person who is a psychiatrist. It is unrealistic to expect any psychiatrist, or any experienced member of the Tribunal, to come to each case without any predisposition as to the circumstances in which a person's mental illness, without treatment, is likely to seriously harm the person's health or safety or the safety of other persons – that is, as to the treatment criterion in s 40(b). In the circumstances, it was not unreasonable for members of the Tribunal to challenge, bluntly and robustly, the submission that the s 40(b) criterion was not satisfied

# Some caselaw on the role and parameters of non-legal Members

## ***Veterinary Surgeons Investigating Committee v Llyod [2000] NSWADT 98***

*Former NSW ADT decision – some useful comments on interplay between Members*

[31] Multi-member Tribunals typically have a representative character. Whatever the role conferred on them by statute, all members of this Tribunal are the holders of important public offices, and have taken an oath to discharge faithfully and impartially their duties as a member. While questions of law are reserved to the judicial member (s 78(2)), judicial and non-judicial members are co-equal as to findings in relation to the facts. No hierarchy applies to the relationship between members of the Tribunal in relation to making findings of fact. Obviously in matters involving technical expertise, any member who has been appointed by reason of that expertise (as applies in this case in respect of Dr McGilvray) will have special weight accorded to his views by the other members of the Tribunal. This is no more than would be expected in the deliberations of a Tribunal of this kind. But the other members remain free to differ from the expert member's conclusions.

# Some caselaw on the role and parameters of non-legal Members

## ***Ghosh v Health Care Complaints Commission* [2020] NSWCA 353**

- All Members must take responsibility, no matter their role.

142. It was unsatisfactory and regrettable that the Tribunal dealt with Complaint Six in this way. In truth, it did not deal with Complaint Six at all, although purporting to do so.

143. Complaint Six was the only complaint that alleged professional misconduct as opposed to unsatisfactory professional conduct. It was the most serious of the complaints made against Dr Ghosh. The Tribunal's erroneous treatment of it cannot be passed off as an unfortunate typographical error, and in fairness to Mr Britt, this submission was pressed but lightly. **It is moreover deeply regrettable and difficult to understand how all four members of the Tribunal failed to detect these various errors in relation to Complaint Six, and failed to consider the complaint as formulated and advanced by the Commission.**

144. Further, no attention can have been given as to how the publication of a judgment in this form exposed the Tribunal's process of reasoning in relation to Complaint Six.

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## ***Ghosh v Health Care Complaints Commission* [2020] NSWCA 353**

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145. Even a cursory consideration of the reasons in draft form would have made it apparent that whoever was their principal author had not addressed the correct and most serious complaint, that of professional misconduct, and, in any event, to the extent that he or she had purported to do so, had not exposed any reasoning process whatsoever. A similar observation can and should be made in relation to the absence of reasoning in relation to the matters dealt with at [173]-[185] below.
146. As Mr Jackson submitted, the statutory regime constituted by the National Law is disciplinary in nature and bears potentially very serious consequences for both the medical practitioner and the general public. Complaints in relation to the National Law are prosecuted by an independent prosecutorial body, the Commission, that particularises the complaints made against the practitioner with care.

# Some caselaw on the role and parameters of non-legal Members

- ***Ghosh v Health Care Complaints Commission* [2020] NSWCA 353**
- All Members must take responsibility, no matter their role.

147. Such complaints should be treated with great care. That, regrettably, did not occur in the present case. Our criticism of the Tribunal exists at a number of levels:

1. the correct complaint was not dealt with;
2. this should have been obvious to the principal author of the reasons;
3. the basic errors, whether they be characterised as “word processing errors” or otherwise, **should have been obvious to the other members of the Tribunal who should not join in reasons without carefully reading and considering them even if they have not had principal carriage of drafting them;**
4. albeit relating to the wrong complaint, the purported “reasoning” process was quite inadequate.

151. If it were necessary to do so, we would have upheld Dr Ghosh’s appeal against the Tribunal’s decision in respect of Complaint Six on this basis alone.

# COAT Guidance as to using Member expertise

- ▶ COAT Practice Manual For Tribunals (5<sup>th</sup> Ed.)
- ▶ [6.2.7] – Using Tribunal Knowledge

*Personal knowledge or expertise may be used in assessing the information presented to a tribunal or to assist in the questioning of witnesses. However, such knowledge or expertise should not form a basis for decision-making unless the facts are so commonly known that they are within the awareness of the general community or they are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy. Tribunals should only rely on matters canvassed during the hearing or, if tribunal members propose to use other materials, they should signify that intention in such a way that the materials are made available to parties before the tribunal and they are enabled at least to make submissions in relation to the materials. It is legitimate for tribunal members to rely upon other decisions, published policies, scholarly writings or specific information, provided that they were made available during the hearing or floated as a possibility in the course of the hearing. Tribunal members can cite a legal commentary or case authority in answer to a legal issue even though that source was not mentioned in the hearing. However, if the discovery of such a commentary or decision was not canvassed at all at the hearing, there are occasions when the hearing should be reconvened to enable a party or parties to make submissions in relation to its applicability to the decision to be made by the tribunal.*

# Case Study (1)

- ▶ The medical practitioner, appearing at the Medical Council hearing, is assisted/supported by a lawyer. The lawyer doesn't have the right to represent him and is there only in a support role. However, the lawyer is quite assertive and attempts to intervene and objects to the medical Members of the panel asking a range of medical questions.
- ▶ The medical issue before the panel is quite complex. The Medical Council has provided a brief of documents and the doctor has also provided documents. One of the medical Members on the panel knows a doctor who is an expert in the area in question. Without discussing it with any panel Members he decides to ring him on the morning of the hearing to get his advice about the medical issues. He announces this to the panel just before the hearing is to commence.
- ▶ The community (non-medical) member of the panel begins to ask a range of medical questions. Is this a problem?
- ▶ The medical practitioner who is the subject of the proceedings is extremely distressed and upset at the end of the hearing. This is understandable as his medical registration and hence his livelihood and reputation have been impacted by the panel's decision. You are concerned that he may be at risk, in particular that his mental health may be at risk. What can you do?

## Case Study (2)

- ▶ You are the community Member on a three Member panel hearing a guardianship matter. The matter involves a 56 year old man, Henry, who has early onset dementia. The applicant for guardianship is a hospital. Essentially there is a dispute between the hospital and the man's wife, Margot. He is an inpatient in the hospital following a fall. He has recovered medically but the hospital does not believe it is safe for him to be discharged home with Margot. Margot strongly disagrees.
- ▶ Margot asserts that her husband has decision-making ability and criticises the medical evidence on this point as being "light on". Your panel Member with medical expertise starts to ask questions of Margot as to what she thinks of Henry's decision-making ability. That Member then starts to ask questions of John, such as can he spell his name, and can he spell "world "backwards. The Member then gets out some paper and starts to draw a clock. You are sitting with a quite new legal presiding Member – what do you do, if anything?
- ▶ As the hearing progresses, Margot argues there is no need for an order in any event as she has managed to access the NDIS for her husband in the last few days and the NDIS will now be supplying all the support she could possibly need to assist Henry to remain living at home with her. You know that given the regional area that Margot and Henry live in that they will simply not be able to get the services that Henry needs, certainly not in the short-term. You know this given your role outside of the Tribunal as a disability support advocate. What do you do?