NSW Tribunals: getting the balance right

Submission to the Legislative Council Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW

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Preface

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on administrative tribunals and healthcare rights

In relation to healthcare rights, PIAC was central to the consultation process leading to the enactment of the *Health Care Complaints Act 1993* (NSW). PIAC also provided legal representation in the New South Wales Royal Commission into Deep Sleep Therapy (the Chelmsford Royal Commission) and was involved in related processes dealing with the specific issues at the Chelmsford Hospital, but also more broadly, about the handling of serious complaints about medical practice in NSW.

PIAC has continued to be involved with issues and campaigns about healthcare rights. In recent years, PIAC has successfully campaigned for an Australian charter of healthcare rights, the ending of executive discretion or governor's pleasure in the detention of forensic patients, an independent Health Care Complaints Commission retaining its role in investigation and prosecution of complaints under the National Scheme for the Registration of Health Professionals and for an independent commissioner to investigate and determine the outcome of complaints in aged care.

PIAC, as a legal centre, has considerable experience in appearing before administrative tribunals such as the NSW Administrative Decisions Tribunal (ADT) and the Commonwealth Administrative Appeals Tribunal (AAT). PIAC has also made a considerable contribution to the public debate about administrative law reform New South Wales and in Australia more

generally. In April 2011, PIAC made a submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia called *Statutory judicial review - keep it, expand it*.[1] In June 2009 PIAC made a submission in response to the NSW Government's public consultation draft, *Open Government Information legislative package* called *Improving government accountability through information access.*[2]

1 Alexis Goodstone, Edward Santow, Elizabeth Simpson, Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia, *Statutory judicial review - keep it, expand it,* http://www.piac.asn.au/publication/2011/07/statutory-judicial-review-keep-it-expand-it at 25 November 2011

2 Elizabeth Simpson, Submission in response to the NSW Government's public consultation draft Open Government Information legislative package*, Improving government accountability through information access, http://www.piac.asn.au/publication/2009/06/090605-piac-nswfoisub* at 25 November 2011

1. Introduction

PIAC welcomes the opportunity to respond to the issues raised in the Issues Paper, *Review of Tribunals in New South Wales* (the Issues Paper).

PIAC will confine its comments to two areas raised in the Issues Paper:

- the establishment of one tribunal (or division of a tribunal) to deal with health practitioner disciplinary matters; and
- the amalgamation of the Mental Health Review Tribunal (MHRT) and the Guardianship Tribunal (GT).

PIAC supports in principle the first proposition, while expressing some concerns about the structures proposed to implement this change set out in the Issues Paper.

PIAC has considerable misgivings about the second proposal and, while not opposing some of the administrative changes set out in the Issues Paper relevant to both tribunals, would not support the combination of the two tribunals into one Protective Division.

PIAC submits that there is a public interest in establishing efficiencies in relation to the administration and functioning of the various tribunals in NSW. PIAC, however, strongly believes that where Tribunals have been established for a clear public purpose (for example in the case of the health disciplinary tribunals, for the purpose of public protection from the conduct of unethical, impaired or incompetent health professionals) and have developed a level of expertise and experience in their jurisdiction, then it is not in the public interest to merge the functions of these tribunals with tribunals in other jurisdictions.

2. The proposal for a Health Practitioners Tribunal

2.1 Benefits of proposal

PIAC supports the principle of establishing one tribunal to deal with disciplinary proceedings about all registered health practitioners in NSW.

2.1.1 One Tribunal would allow the establishment of a core group of experienced persons to chair hearings before the tribunal.

Recently, some Medical Tribunal matters have been presided over by judicial members of the Industrial Relations Commission (IRC). PIAC considers this to be unfortunate, given that the protective nature of this jurisdiction is very different to consideration of matters before the IRC. Previously a panel of particular District Court Judges have presided in these matters, who, over time, have developed expertise in the jurisdiction.

An allegation of misconduct against a health professional that reaches the tribunal stage of the disciplinary process involves, by definition, an allegation of a serious departure from acceptable standards.[3] Complainants and respondent health practitioners both have a large stake in the outcome of the proceedings. The decision whether to allow a health practitioner to continue to practise after such a serious breach can have significant ramifications for the safety and quality of health care received by NSW health consumers.

[3] *Health Practitioner Regulation National Law (NSW),* s.139E

The matters before these tribunals require fine balancing between the procedural and professional rights of health practitioners and the requirement to protect the public against unethical, incompetent, dishonest or impaired health professionals. These decisions should be made by tribunal members who are well across the law and practice in this area, and have well developed familiarity and knowledge of the operation of the health system, both private and public.

If the outcome of the changes suggested by the NSW Government were the establishment of a core panel of tribunal members with this level of expertise, presiding over all disciplinary proceedings about health professionals in NSW, this would represent a significant positive reform.

2.1.2 Consistency in the decision making of tribunals dealing with health disciplinary proceedings

It is important for health professionals to be able to have some degree of certainty — both with regard to the acceptable boundaries of their conduct as health professionals, and certainty in the knowledge of probable outcomes if they, or their colleagues, do not meet professional standards or carry out unethical conduct.

Similar standards and outcomes should occur if these standards are breached, whether consumers are dealing with a doctor, a nurse or a physiotherapist. The same consequences transpire for the safety and quality of health care if any health professional cannot or will not meet acceptable standards of conduct, competency or ethical practice.

It cannot be said that there has been consistency in this regard across all health practitioner tribunals in NSW. Conduct, which generally leads to deregistration in some tribunals, rarely does so in others. However, some tribunals such as the Dentists Tribunal and the Pharmacy Tribunal have only been in operation for several years, so overall, consistency is hard to measure.

PIAC is confident that, with the establishment of one tribunal with an experienced expert panel available to conduct disciplinary proceedings, greater consistency would be achieved.

2.1.3 Allow more public access and scrutiny with regard to disciplinary decisions about health professionals.

Many tribunal hearings are effectively not accessible to the public because they are held behind closed doors with no public notice of the listing of matters or the location of hearings.

A single tribunal could and should be able to hold its proceedings in places accessible to the public, including the media; make the time and location of hearings known to the public through public notices; and publish its decisions, if not in hard copy, then at least on-line.

The issues of privacy, particularly relevant for witnesses and victims of unethical and inappropriate conduct, can be dealt with by giving the tribunal discretion to hold closed hearings in designated exceptional circumstances and the use of existing powers to make suppression and non-publication orders.

2.2 Caveats to support of proposed change

PIAC however is concerned that these outcomes may not necessarily be achieved, depending on the model for reform adopted by the Government. PIAC submits that the following should occur if one tribunal is created to deal with all serious health practitioners' matters.

2.2.1 The current system of Professional Standards Committees shall be retained to deal with less serious disciplinary matters

Less serious disciplinary matters for both medical practitioners and nurses in NSW are dealt with by Professional Standards Committees (PSCs) that are less formal than the tribunals and do not have powers of deregistration or suspension. If the PSCs were not part of the ongoing system of disciplinary proceedings for healthcare professionals in NSW, then the tribunal would find itself overwhelmed with less serious matters at the expense of the time and preparation required for the appropriate deliberation on serious alleged breaches of standards.

Although PIAC in the past has supported more open PSC hearings[4], PIAC nevertheless sees the benefit in having mechanisms where certain matters can be dealt with less formally and with outcomes that assist the health practitioner to change or moderate their conduct or practice, rather than restrict or remove them from the ability to practise.

Health professions in NSW which do not have PSCs have alternative mechanisms whereby the Professional Councils (previously the NSW Boards) deal with less serious matters. While PIAC prefers the PSC model, where the proceedings are presided over by independent legally qualified persons, PIAC sees no benefit in a consolidated Tribunal dealing with less serious matters where the practitioner's right to practise is not in jeopardy.

2.2.2 The current system where the tribunal consists of a presiding member, a member or members of the profession and a community representative should be maintained

There is considerable benefit in having a member of the particular profession as part of the tribunal. They do not involve themselves in legal or procedural questions. However, they in all other ways are members of the tribunal, providing valuable advice and guidance to other tribunal members on professional standards and practice.

The community member, who also does not deal with procedural or legal questions, plays a valuable role because of the importance of the protection of the public in disciplinary matters. They are there to balance the possible sectional interests of the professional member with the interests of consumers and the general public.

Tribunals also hear evidence from peer reviewers in disciplinary proceedings. Public interest issues are often canvassed in disciplinary matters. The presence of the additional members provides the presiding member additional sources of information and opinion, as well as assistance in critically examining all of the evidence before a tribunal.

PIAC notes that the multi-member tribunal model, with professional and community members in addition to the presiding member, is found in the *Health Professions Regulation Act 2005* (Vic).

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[4] Peter Dodd, *Putting healthcare rights to work: the Health Practitioner Regulation National Law, a step closer to best practice in healthcare complaints,* PIAC, July 2009 < http://www.piac.asn.au/publication/2009/07/090717-piac-national-reg-sub> Peter Dodd, *Maintaining consumer focus in health complaints: the key to national best practice. Response to the Consultation Paper on national health complaints handling,* PIAC, *November* 2008 <http://www.piac.asn.au/publication/2008/11/081121-piac-nat-complaints-sub>

2.2.3 That any Health professional's Disciplinary Tribunal not be subsumed into a general 'Employment Tribunal'

PIAC does not object to a structure where Tribunals are brought together for the purposes of efficiencies and economies of scale, where discrete divisions or panels deal with particular jurisdictions. PIAC is however, opposed to a 'one size fits all' general tribunal where tribunal members deal with a wide range of areas currently located in separate jurisdictions. PIAC is particularly concerned that healthcare professionals' disciplinary matters are dealt with in this manner.

PIAC does not support the same tribunal or the same panel of a larger tribunal dealing with disciplinary matters for both lawyers and health professionals. The arguments for one health tribunal set out above, particularly with regard to consistency of decisions, do not apply if a tribunal deals with more than one cluster of professionals. The standards and ethical principles that apply to health professionals are different to those which apply to solicitors and barristers. For example, because of the different power relationships involved between professional and client/patient, sexual contact between the two is treated in very different ways. For a health professional, such contact is considered a serious boundary violation. Unless there is coercion or lack of consent, such contact is not seen as a breach of ethics for a lawyer, although not seen as best practice. Another example of difference is that confidential communication between lawyer and client is protected by legal professional privilege. Health professionals do not have this protection.

Although it might be considered efficient to have one tribunal member travel to a regional centre and deal with a disciplinary matter about a nurse's conduct in the morning and deal with a tenancy matter in the afternoon, PIAC submits that the public interest in having experienced expert panels dealing with one jurisdiction outweighs the possible public benefits achieved by costs savings that would be achieved in this example. Economies of scale can still be achieved in areas like common registries, shared IT and shared accommodation. If lack of expertise and experience of tribunal members leads to more appeals and longer hearings, which PIAC submits are possible outcomes of a larger all-encompassing tribunal, then any such costs savings could be lost.

PIAC is particularly concerned with any proposal to merge the industrial relations jurisdiction and the protective jurisdiction that regulates and disciplines the health professions. Industrial relations deals with negotiation and compromise. It deals with disputes between parties and tries to conciliate and/or arbitrate to find a resolution.

In the broader healthcare complaints system, complaints are often resolved through informal and formal forms of conciliation. However, matters that are referred to disciplinary tribunals matters can never be resolved in this way, because the primary role of such proceedings is to protect the public. A complaint about a psychiatrist who abuses his or her power relationship with a vulnerable patient with a mental illness to gain sexual pleasure cannot and should not be resolved by negotiation and/or conciliation between the parties. The tribunal here has the responsibility to ensure that the doctor does not repeat this conduct, either by means of deregistration or imposing strict conditions on his or her practice. The jurisdiction has more affinity with the criminal law in that, using the above example, considerations of both general and specific deterrence would be very relevant in the final decision of the tribunal. PIAC submits that industrial relations and professional discipline might superficially appear similar, but legally the principles that apply are worlds apart. Therefore, PIAC submits it is inappropriate to have one tribunal dealing with both unless there are distinct panels of members dealing with the two different jurisdictions.

3. The Mental Health Review Tribunal and the Guardianship Tribunal

PIAC does not support the formation of a protective division without a clear distinction between the existing functions of the MHRT and the Guardianship Tribunal. PIAC does see a benefit in the realignment of the two tribunals' roles to reduce duplication of specific functions.

The role of the MHRT is to balance the rights of patients with a suspected mental illness with rights to treatment, the protection of the community and protection of the individual against self-harm. Under the *Metal Health Act 2007* and the *Mental Health (Forensic Provisions) Act 1990*, the MHRT applies legal tests that determine whether to continue to detain involuntary patients or forensic patients. The Guardianship Tribunal on the other hand is primarily concerned with determining questions of capacity, and if there is lack of capacity, substitute decision-making.

The MHRT is concerned with people with a mental illness. The Guardianship Tribunal is concerned with cognitive and sometimes physical impairments. The tests that each tribunal applies are of a different nature. The MHRT's role is to review the treatment decisions of medical practitioners (for the 'care, treatment and control' of patients according to section 3 of the *Mental Health Act 2007*). The Guardianship Tribunal's role is to seek the expert advice of health professionals, the views of the person concerned and their family and friends, and to then determine whether substitute decision-making is appropriate.

There is certainly an overlap of the two tribunal's roles. The MHRT is required to decide on issues of substitute decision making both in terms of financial orders and substituted consent to particular medical procedures. PIAC suggests that these functions could be transferred to the Guardianship Tribunal, while perhaps leaving the MHRT with limited powers to make interim financial management orders for involuntary patients under the *Mental Health Act 2007.*

The Mental Health Review Tribunal has a role in conducting inquiries under section 34 of the *Mental Health Act* 2007. Section 27(d) of the *Mental Health Act 2007* states that these inquiries should be conducted 'as soon as practicable' after a person is detained in a hospital on two doctors certificates. PIAC has strong concerns about the current interpretation of this section by the MHRT, and believes that since June 2010, the gap between admission and MHRT inquiry, which can be up to four weeks, is far too long.[5] Section 44 of the *Mental Health Act 2007* also provides an opportunity for patients to appeal to the MHRT if they want to be discharged.

Because a person's liberty is in question, and because people are, by definition, detained when the section 34 inquiries or section 44 appeals take place, these inquiries are either conducted at the Hospital where the person is detained, or by way of audiovisual links. There has been concern expressed about the appropriateness of audiovisual links in such circumstances[6], and the MHRT, since it took over the initial inquiries from visiting magistrates

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5 See PIAC website: *Mental Health Act changes: a cause for concern* at <http://www.piac.asn.au/project/mental-health-act-changes-cause-concern>; PIAC Issues Paper, *Delays in inquiries under the Mental Health Act: a cause for concern* 2010 <http://www.piac.asn.au/publication/2011/11/delays-inquiries-under-mental-health-act>

6 See letter from NSW Council of Civil Liberties to Hon C. Tebutt, NSW Minister for Health, 12 May 2010.http://www.nswccl.org.au/issues/mental_health.php#changestomha at 15 November 2011

in June 2010, has substantially increased the number of hospitals it visits for the purposes of initial inquiries and s44 appeals.

This situation creates a number of practical difficulties that make the functioning of the MHRT very different to other NSW Tribunals. PIAC fears that amalgamation with other tribunals may further increase the delay in patients having the benefit of an independent review of their detention. There would be inevitable pressure by a busy multi-function tribunal to increase the number of reviews and hearings by telephone and audiovisual links instead of in face-to-face proceedings.

Certain matters, most notably discharge of a forensic patient, under the *Mental Health (Forensic Provisions) Act* 1990, can only be dealt with by a judicial member of the MHRT (i.e. a judge or a former judge). The Parliament clearly intended that, if a forensic patient is to be released, then the relevant issues, including both human rights and public safety concerns, should be determined by someone with both standing in the community and judicial experience. PIAC is concerned, if this provision is not retained because of the consolidation of the two tribunals, inexperienced tribunal members may be more reluctant to release forensic patients back into the community.

The Guardianship Tribunal also is often required to convene and hear matters at short notice. PIAC is concerned that, if presiding tribunal members are not experienced in the guardianship jurisdiction, then decisions made in such circumstances may not be properly considered. The consequences of this for people with cognitive disabilities and their families are potentially catastrophic. The consequences for the tribunal may be an increased number of appeals and the increased costs associated with this outcome.

In conclusion, PIAC submits that the disadvantages in amalgamating the two tribunals outweigh the advantages. Again, PIAC would have fewer objections to a Protective Tribunal or a Protective Division of a larger administrative tribunal, where there is clear distinction between the existing functions of the MHRT and the Guardianship Tribunal and where there are two separate and distinct panels of members with considerable experience in the mental health and guardianship jurisdictions respectively.