Submission No 54

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Name: Mr Nick O'Neill

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Submission
to
Legislative Council Standing Committee on Law and Justice
on
Inquiry into Opportunities to Consolidate Tribunals in NSW
by
Nick O'Neill LLB (Melb), LLM (Lond)
Chairperson, NSW Nursing and Midwifery Tribunal
Deputy Chairperson, NSW Pharmacy Tribunal
Formerly President, NSW Guardianship Tribunal

Honourable members of the Committee,

Thank you for the invitation to make a submission to this inquiry.

Why tribunals exist
As Australian society became more complex in the 20th century, a number of tribunals were established. Their purpose was to provide for decision-making of a judicial nature in a range of different settings in which it was appropriate for some of the decision-makers not to be lawyers. This was, and continues to be, a need in our complex society. It was not a role that the courts could carry out effectively. They have complex procedures. They have become places where substantial civil disputes and criminal offences are tried. Except in jury trials judges, who must be experienced lawyers, make all the decisions. They have become very expensive to use and their architecture and the way they are run makes them daunting places to be. Nevertheless, they are an important part of the governmental structure of our society and the Supreme Court and Court of Appeal have key roles in dealing with appeals form tribunals.

The tribunals that were established came into existence at different times and for different reasons. They developed evidence gathering and decision-making processes which, while procedurally fair, were suited to the subject-matter of and the circumstances in which their decision-making was called upon.

For example, most of the tribunals of the health professions came into existence in the late 20th but some in the early 21st century. They developed as the final stage of the processes created initially within the health professions to deal with members who had health, competence or conduct problems. The Nurses Tribunal, now the Nursing and Midwifery Tribunal (the NMT), came into existence in 1992.

The Guardianship Tribunal (the GT) began operations in August 1989. As more people with whole of life intellectual disabilities survived into adulthood and even

old age, as others survived motor vehicle accidents and other trauma but with serious brain injuries, with the growing number of older people living with dementia and with many people with serious psychiatric conditions, the need for an accessible and cheap mechanism for substitute decision-makers to be appointed to make personal and financial decisions for them became more and more apparent. To carry out insightfully as well as efficiently and effectively the work of deciding whether or not there was a need to appoint a guardian or financial manager for a person with decision-making disabilities, the three member, multi-disciplinary GT was brought into existence. It continues to meet a growing demand year on year.

The Mental Health Review Tribunal (the MHRT), which began operations in September 1990, plays a central role in dealing with mentally ill and mentally disordered persons and in deciding which of them remain in mental health facilities and for how long. It also has an oversight role in relation to people with people with mental health conditions living in the community under community treatment orders. It has other function as well.

To carry out it functions appropriately to ensure that people who need treatment for their mental health conditions in a mental health facility are there for an appropriate time but that others who no longer need treatment or who can be treated in the community are released there, the MHRT needs to be constituted by panels of people with appropriate skills and experience to carry out that role. While some of the functions of the MHRT are carried out by the President a Deputy President or a person qualified to be a Deputy President, many functions are carried out by panels comprising a lawyer, a psychiatrist and a suitably qualified and experienced person. All members of the MHRT have extensive experience in mental health. The MHRT conducts its hearings in hospitals and community health services in the large cities or in large towns with mental health facilities. Otherwise it conducts its hearing by video link or telephone.

As can be seen from what has just been set out, the different subject-matter and the different circumstances in which they are called upon to act have resulted in three differently constituted tribunals conducting their processes in three different ways. It would not be appropriate to put these three tribunals together in one super tribunal as they all operate cheaply, with all appropriate speed and both efficiently and effectively to achieve the purposes for which they were created.

Nursing and Midwifery Tribunal

The Nursing and Midwifery Tribunal (NMT), which I chair, is now established under the *Health Practitioner Regulation National Law (NSW)* (the *Law*) as are the tribunals of the other health professions regulated by the *Law*. All those tribunals, but particularly the NMT have developed as the health professions have

become more sophisticated in their responses to the need to establish and enforce both the standards for the skill and knowledge required to enter and continue in the profession and the ethical standards required to be met in the proper practise of the profession. As already noted, the NMT was established in March 1992 as the Nurses Tribunal. It has been in existence for nearly 20 years.

The health professions have developed mechanisms for dealing with members whose technical knowledge and skills are insufficient. These involve performance reviews and Performance Review Panels. They try to, and often succeed in, rescuing members who have drug and alcohol, mental health or other health problems affecting their capacity to practise their profession. Impaired Registrants Panels play a role in this process. The medical, nursing and midwifery professions have Professional Standards Committees (PSCs) to deal with matters that, if proven, would not lead to suspension or deregistration. The Council of each profession plays an active role in dealing with reports from the its Performance Review Panels and Impaired Registrants Panel, imposing conditions on a registrant's capacity to practise, monitoring conditions and deciding , in consultation with the Health Care Complaints Commission (HCCC), which competence, impairment, conduct and other matters are to be investigated by the HCCC with a view to them grounding a Complaint to be heard and determined by a PSC or a tribunal.

When a Complaint comes before the tribunal of a health profession because the HCCC and the relevant Council have agreed that it should be sent there, the subject-matter of the allegations in the Complaint is usually such that the practitioner complained against, is at risk of losing their career in that profession.

Currently, the 10 health professions regulated by the *Law*, to which the Aboriginal and Torres Strait Islander Health Practice, Chinese Medicine, Medical Radiation Practice and Occupational Therapy professions will be added from 1 July next year, are all provided with the administrative support they need by the Health Professional Councils Authority (the HPCA). Currently all the health professions, except the medical profession, share the same accommodation in the city. The newly regulated professions will join them there next year. The hearing rooms used by the tribunals are used also by PSCs and by the various Panels and the committees of the councils. The records management, scheduling and other processes and documentation of the tribunals is all done, in an effective as well as efficient manner, by the computer system used by the HPCA. The tribunals, of which the NMT is the busiest, are well supported by the HPCA as a small element of the service it provides to all the health professions' councils in NSW. All of this, except for the cost of the HCCC, is paid for out of the registration fees paid by the members of these professions and not out of government revenue.

Prior to the coming into force of the *Law* on 1 July 2010, these services were provided to all those professions, except the medical, dental and pharmacy professions, by the Health Professions Registration Boards unit (the HPRB) within the NSW Department of Health. The HPCA uses the same premises as the HPRB. Most of the infrastructure for regulating the health professions under the national system through the NSW version of the national *Law* currently administered by the HPCA was in existence prior to the commencement of the national system. That infrastructure was mandated by the separate *Acts* that controlled the registration and regulation of each of the health professions; for example the *Nurses and Midwives Act 1991(NSW).*

In other words, while the formal arrangements for the management of the registration and regulation of the health professions underwent a significant change with the introduction of the national scheme in 2010, the administrative arrangements for doing so have been in place for 20 years steadily evolving over that time.

A hearing panel of the NMT is made up of four members. The other health professions tribunals have the same structure for hearings. A panel is made up of:

- The Chairperson or a Deputy Chairperson of the Tribunal nominated by the Chairperson. The Chairpersons and Deputy Chairpersons are statutory appointees, appointed by the Governor on the recommendation of Cabinet. Cabinet usually accepts the recommendations to it of the Minister responsible for the tribunal appointment provisions of the *Law*, currently the Attorney-General. To be appointed as a Chairperson or a Deputy Chairperson of any of the health professions tribunals, except the Medical Tribunal, the person must be an Australian lawyer of at least 7 years' standing. Most, if not all, current appointees have been appointed to more than one tribunal.
- Two currently registered and qualified nurses or midwifes appointed by the Nursing and Midwifery Council of NSW (the Council) for the purpose of hearing and determining the particular matter before the Tribunal.
- A "lay" person meaning a person not registered as a nurse or midwife but appointed by the Council from among a panel of lay persons nominated by the Minister.

It should be noted that the only on-going members of a tribunal established by the *Law* are the Chairperson and any Chairpersons appointed by the Governor to that tribunal. The three other members of a panel appointed by the Council for the purposes of hearing and determining to hear a particular matter are appointed for that matter only. The Council can appoint any currently registered and qualified nurse or midwife to hear a matter. This allows the Council to appoint nurses or

midwifes with the appropriate skills and experience in areas of nursing or midwifery practise relevant to the matter they are appointed to hear and determine.

In my six years as Chairperson of the NMT, I have been happy with the appointments made by the previous Nurses and Midwives Board of NSW and now the Council. The nurses and midwives appointed have been well qualified and experienced to deal with the subject-matter of the inquiry, application or appeal they were appointed to hear and determine. Also there has been a good balance achieved between nurses and midwives sitting often enough to develop the necessary hearing and decision-making skills and the need to achieve a throughput of nurses and midwives with the right skills and experience to serve on the NMT who are also currently practising those skills and taking part in all the other aspects of the practise of nursing or midwifery.

It is essential for maintain the quality of decision-making by the NMT that the Council continue to have this role in appointing at least the two professional members of the hearing panel. They have greater access to the members of the profession than a tribunal would. Also it is essential for the successful administration of the protective aspects of the regulatory process that the profession has a central role not only in regulating the conduct of members of the profession but also in determining who is entitled to be a member of the profession and who is entitled to return to it after deregistration.

Another reason that is even more important to the maintenance of the quality of decision-making by the NMT is the retention of two nurse or midwife members. Two nurse/ midwife members are more effective than one. My experience sitting on the NSW health professions tribunals is that the views of the two health professionals are regularly adjusted in discussion between them so as to become more subtle but more clearly agreed upon. The same applies to their views about how the proven facts are perceived from the professional perspective when considering conduct matters. This ensures that the other members have confidence that the views expressed are correct. It is also essential for the acceptance of a health profession’s tribunal’s decisions by that profession’s members that the profession has equal representation on the tribunal with others.

Since I have been Chairperson of the NMT, I have been involved in the training of the Deputy Chairs and the more regularly sitting professional and lay members of the Tribunal. Also in April this year the Chairs and Deputy Chairs of the health professions tribunals, except the Medical Tribunal, held a conference on the new *Law* which I led. This will be repeated next year when we will share our experience of administering the *Law* and the insights we have gained during that process.

The national registration and regulation for health professionals has many benefits, but because of the complexity of the scheme, there has been a need to work out the relationships between the various organisations involved to ensure that the purpose of the scheme is achieved as efficiently as possible in the areas of concern to the NMT and the other health professions tribunals. When it comes to regulation matters, the Council, the HCCC, AHPRA and the Nursing and Midwifery Board of Australia can all have an interest.

The number of matters commenced each calendar year by the NMT since 2006 is as follows:

2006 – 27
2007 – 36
2008 – 36
2009 – 43
2010 – 28
2011 – 35 (as at 24 November 2011)

Not all matters commenced are proceeded with. While most of the work of the NMT is to conduct inquiries into complaints brought by the HCCC against nurses and midwives, the Tribunal also deals with applications to return to nursing after deregistration, appeals against decisions of the Nursing and Midwifery Board of Australia refusing re-registration to a nurse or midwife, appeals against decisions of PSCs or the Nursing and Midwifery Council of NSW.

The NMT is required by the *Law* to determine the matters coming to it expeditiously. This means that the Tribunal must proceed to hear and determine the matter as quickly as possible consistent with the requirements of procedural fairness (natural justice). This means that through the exchange of documents, including witness statements, both parties know the case of the other side, that sufficient time is provided for the examination of witnesses and for both sides to make submissions as to the evidence and the outcome of the case. It also means that the members of the NMT must take the time needed to deliberate and determine the case. It should be recalled that when the matter before the NMT is a Complaint prosecuted before it by the HCCC, the nurse or midwife the Complaint is made against, is usually at risk of losing their career through deregistration.

The inquiries into complaints usually take more hearing time than the other applications and appeals. This year they have averaged 2.8 hearing days each. However they, like the applications and appeals, require that the members have time to read the usually substantial numbers of documents lodged by the parties and time to deliberate and decide the outcome of the case. Finally there is the drafting of the reasons for decision required in each case, usually undertaken by

the presiding member during and after the deliberation and decision-making stage. The final draft of the reasons for decision is signed by all members of the panel of the NMT hearing the case.

All four members are paid for the time taken to read the documentary evidence filed by both parties to the matter. This is usually done together so that the issues arising can be discussed and the members can go into the hearing with a good appreciation of both sides of the case. Also this time can be used by the presiding member, as appropriate, to advise the other members on such matters as the hearing procedures, the legislation and case law relevant to the particular matter and on the quality of the evidence.

All four members are also paid for the hearing days and for the time taken in discussing the evidence and determining the outcome of the case. The presiding member is paid a nominal amount for drafting the reasons for decision. The other members are not paid for their efforts in reading and commenting on the draft and reading and signing the final version of the reasons for decision. Quite properly, under the *Law*, the NMT (and all the other health professions tribunals) are required to provide written reasons for decision for every case. These reasons for decision are made public as required by the *Law*. This is done currently through the free access internet website www.austlii.edu.au.

Members of a panel of the NMT are paid only for the time it takes to carry out the functions set out above. No members are paid a stipend, nor are they guaranteed a certain number of working days are year. The Chairperson is not paid for any administrative work undertaken. Where relevant, travel and accommodation expenses are paid for members travelling substantial distances to attend hearings. However, none of statutory appointees to or members of the NMT nominated by the Council accrue any holiday, sick leave, long service or other leave entitlements or other benefits.

The NMT deals with the matters before it as quickly as possible consistent with its obligations to be procedurally fair and provide a set of written reasons for decision after appropriate consideration of the evidence and the issues to be decided.

For the reasons set out above, it is respectfully suggested that it would be unlikely that disconnecting the NMT from its present support system and taking it into a super tribunal would result in it operating cheaper, quicker or more effectively. The much more likely outcome would be that the NMT would become more expensive to run on a recurrent basis. Moving it physically and uncoupling it from the HPRB would not only cost money but would create the need to establish a new set of administrative arrangements between the Council and the NMT.

Guardianship Tribunal

The Guardianship Tribunal (GT) began operations in 1989. Its workload has grown quickly year on year and is now very substantial. In 2009-2010, the GT finalised 9006 matters. In the process it conducted 5850 hearings. The GT has established and continues to enhance its processes and procedures to meet the demands of its ever increasing workload. Those investigation processes and hearing procedures have been developed to meet the special needs of the GT's jurisdictions.

The GT's primary jurisdiction is to hear and determine applications for the appointment a guardian or financial manager or both for adults with decision-making disabilities who need someone else with formal authority to make decisions on their behalf. The GT reviews all its guardianship orders at regular intervals and financial management orders on request. In addition it has jurisdiction to consent to medical and dental treatment and to review the making and operation of appointments of enduring guardians and enduring powers of attorney.

Expertise in relation to people with decision-making disabilities is required in the three member panels of the GT that carry out most of the GT's jurisdiction. Consequently, the *Guardianship Act 1987 (NSW)* provides that the professional members of the GT must have experience in assessing or treating people with disabilities while community members must have experience with people with disabilities. While the legal (presiding) members do not require this experience for appointment, most now have it when appointed. If not they soon come to appreciate that they have a lot to learn from their professional and community member colleagues.

The GT has only two full-time members, the President and Deputy President. Currently the GT has 82 part-time members. The part-time members sit regularly but also pursue their professional careers or carry out other functions which enhance their role as members of the GT. The knowledge, expertise and insight of both the professional and community members of the GT has been essential to its success over the 22 years it has been in existence.

The Tribunal has a sophisticated system for preparing cases for hearing. This system was developed to ensure that those who have an interest in the matter are advised of the hearing and are given their opportunity to let the GT know their views about the matter. The system also operates to ensure that the relevant evidence about the person's disability and the other matters to be decided is available to the panel of the GT hearing the matter.

The GT carries out community education about its role, has a very accessible website and has developed a comprehensive set of publications about its work and how to make applications to it. In addition the Office of the Public Guardian carries out a statutory role to advise the public about the Guardianship Tribunal the Public Guardian and the NSW Trustee and Guardian, their roles and how to contact them.

It should be noted that a major reason why the GT was set up under legislation enacted in 1987 was that the Supreme Court, which previously had exclusive jurisdiction in guardianship and financial management matters, had procedures that were too formal, too expensive and very daunting for the great majority of people who do not have experience of the courts.

As already noted, the GT's primary jurisdiction is to hear and determine guardianship and financial management applications relating to people with decision-making disabilities. At the hearing the three member panel of the GT takes control by introducing itself to the person the subject of the hearing and thus to all the others attending. The GT finds out who is present and then gets down to the issues to be resolved. From the beginning the focus is on the person who the hearing is about, and if they have a decision-making disability whether they need a guardian or a financial manager. Appropriate steps are taken to obtain the views of the person the hearing is about and all those who have something relevant to say to the panel of the GT hearing are given the opportunity to do so.

At the end of the evidence and after any submissions, the panel of the GT adjourns to make its decision. If the GT is satisfied that the person has a decision-making disability and is in need of a guardian, it will see who is willing, able and appropriate to be appointed guardian and then appoint that person and give them the functions of a guardian the GT considers they need to act in the best interests they have been appointed guardian for. The same process is followed when the application is for a financial manager to be appointed or where both a guardian and financial manager are needed.

The GT members then adjourn briefly to make its findings and decide what orders, if any to make. They then return to tell those present what they have decided and what orders will be made. Written reasons for decision follow, as required in every case, soon after (how long?) After a further brief adjournment, the panel of the GT moves on to the next case.

The contrast between the processes followed by the NMT and the GT are marked. For matters before the NMT, the parties prepare their cases in advance and exchange the material they intend to rely on. In all cases the HCCC is represented by a barrister and solicitor and the nurse or midwife is usually similarly

represented. The lawyers present their cases in the established order, witnesses are called then cross-examined. At the end of the evidence, the parties make submissions. When the lawyers are finished the NMT adjourns to make its decision. The members of the NMT will sometimes ask questions of the witnesses. The presiding member will rule on objections to questions and may put matters to the barristers for their consideration or rule on procedural legal points that arise. The active involvement of the NMT members in the proceedings prior to the deliberation stage is limited particularly when contrasted with the active involvement of the GT members during the hearing as discussed below.

In most matters before the GT lawyers are not required and do not seek to be involved. When it is appropriate to have lawyers, the GT gives them leave to appear, but except in those few, fraught cases where court like formality is required in order for the matter to progress, the GT members still direct the proceedings as each case requires, moving through the issues to be covered gathering the evidence relevant to the facts of the case and the matters to be decided. Where necessary the GT members direct those present to the issues so that their evidence is relevant. The proceedings are kept as informal as possible to assist people to take part. Procedural fairness is attended to in that context and the evidence directed to the key issues does the person the hearing is about have a decision-making disability, do they need a guardian or financial manager, do they have views on who that person should be? Who should be appointed and, if a guardian, what should their functions be?

As can be seen, these processes are very different. The NMT processes are formal and require a hearing room layout with separation between the NMT members and the lawyers who themselves need to be at separate tables. Witnesses need to be sworn or affirmed and to give their evidence from a witness table. Time, usually more than two days is required for one case while the GT may conduct four or more cases in a day. Except in exceptional cases, the outcome of a case will not be communicated either immediately as in the case of the GT or before the NMT's reasons for decision are also provided.

In GT proceedings the tribunal members sit on one side of the table and the parties and witnesses on the other. No separate witness table is required and the proceedings are conducted in much less formal surroundings than at the NMT.

Mental Health Review Tribunal

As can be seen from the brief description of the MHRT given above, it operates in a way that is substantially different from the way either the NMT or GT operates. The MHRT has developed hearing processes as well as administrative structures appropriate for it to exercise its different jurisdictions. In 2009-2011 it conducted 9101 hearings.

Should NSW have a 'Super Tribunal'?
It is clear from the Committee Chair's press release that the Committee understands that it is part of its remit to advise the Government on whether or not to create a super tribunal.

The Issues Paper puts forward four options for consideration. Option 1 proposes that the Industrial Relations Commission (the IRC) become an Employment and Professional Services Commission into which it is assumed that the remaining IRC functions would be transferred along with the Anti-Discrimination Division of the Administrative Decisions Tribunal (the ADT), the ADT's professional discipline functions in relation to lawyers and its jurisdiction in relation to those who carry out other occupations such as taxi driving and acting as commercial and private inquiry agents. All the health professional tribunals would be transferred into that Commission.

This proposal fails to recognise that the IRC's jurisdiction in relation to employment is different in nature and purpose from the nature and purpose of the professional discipline functions and other similar functions in relation to other occupations currently exercised by the ADT. The role of the health professional tribunals is different again.

As members of the Standing Committee, you have the unenviable task of advising a Government faced with the question of what to do with the underutilised members of the IRC. However, you would be aware that any substantial change made to the structure of tribunals in NSW would be likely to continue to be in place long after the all the current members of the IRC have reached retirement age. It is respectfully submitted that this problem, which I accept has achieved only partial resolution so far, is not a proper basis for making changes to the structure of other tribunals in NSW.

Options 2A and 2B are variations of Option 1 and suffer from the same defects as it does referred to above. Option 2B includes the "health profession disciplinary tribunals". It is not clear whether Option 2A does. A tribunal dealing with employment issues has a completely different role and operates in a completely different milieu from the health professional tribunals. A tribunal dealing with employment issues deals with the question of whether or not a person is entitled to employment and under what conditions in a business run by others. That business may be a large or small private enterprise body, a government department or agency or a non-government agency. It may also cover person to person arrangements involving paid work. A range of business related issues and employment law issues are relevant considerations for such a tribunal when it is dealing with what is essentially a specialised form of dispute between parties.

It is constantly stated, and correctly so, by the NSW Court of Appeal and the health professional tribunals themselves, their role is not punitive but protective of the public. They are not disciplinary in that sense. They are called upon to decide whether or not because of reasons of misconduct, lack of professional competence, impairment and a number of other considerations a health practitioner is a suitable person to remain a member of his or her profession and, if so, under what conditions. In conducting their proceedings, health professional tribunals consider different evidence and apply different criteria to employment tribunals when dealing with matters before them.

Their jurisdiction is specifically limited by sections 3 and 4 of the *Law*. Those sections provide that an entity, which includes a tribunal, that has functions under the *Law* is to exercise those functions having regard to the objectives and guiding principles of the national registration and accreditation scheme for health practitioners. Guiding principle (c) states that, "restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality". In other words the jurisdiction is not to be exercised to discipline members of a health profession but to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered, as required by objective (a) of the *Law*. This is a conceptually different approach to the notion of discipline.

Option 3 the 'super tribunal' proposal

Option 3 in the Issues Paper proposes a civil and administrative tribunal for NSW of enormous proportions in terms of the breadth and the diversity of the jurisdictions it would contain.

As already noted the workload of the GT is large and increasing. In 2009-2010, it finalised 9006 matters and in the process conducted 5850 hearings. In 2009-2011 the MHRT conducted 9101 hearings. The Consumer Trader Tenancy Tribunal (CTTT) which has a huge workload dealing with a wide range of different kinds of disputes usually between two parties acts very quickly, and in most cases without lawyers, to bring about the termination of disputes either by agreement or by the making tribunal finding and orders, finalised 62,000 matters in 2009-2010 while VCAT finalised 86,000 matters in 2010-2011. That makes the CTTT's caseload approximately 72% of VCAT's caseload, before any of the other large volume tribunals in NSW is considered.

A proposal to create a super tribunal should have to be justified in terms of the benefits to the community it will bring and the costs it really will save that the community would want saved

It is respectfully submitted that the costs and the benefits of undertaking the complex process of substantially consolidating the existing tribunals in NSW need to be established before the decision to proceed with such a proposal is made. The research to provide that information has not been done. The Issues Paper published with the Committee's terms of reference does not provide a basis for the adoption of any of the options that it proposes for consideration.

It is submitted that the 2009 report *One VCAT* by Justice Bell the then President of VCAT must give the Standing Committee pause about recommending that the NSW tribunals be consolidated into a body that will be larger than VCAT.

Just to take a few issues raised by Justice Bell:

1. *Creeping legalism.*
   This has happened in VCAT and is happening in the Western Australia State Administrative Tribunal (WASAT) and the Queensland Civil and Administrative Tribunals (QCAT). It is unsurprising, however it is antithetical to the purpose of creating tribunals not bound to observe the rules of evidence but able to inform itself of any matter in the way they think fit as well was being required to operate expeditiously and expected to operate cheaply. It is unsurprising because all the super tribunals are led by Supreme Court judges supported by District Court judges. Theses judges are appointed for a period, usually not more than five years, after which they return to the court to which they were appointed. They have all had successful careers in the practice of law in usually appearing regularly in the superior courts. They bring the habits of a successful career with them and don't want to become deskilled before they return to their courts. They are confident and very able people in leadership positions. Naturally they will tend to operate in a way that reflects their previous and very successful experience. The desire for apparent, which is not necessarily real, efficiency leads them to adopt processes and procedures they are familiar with in the conduct of proceedings and to disregard the opportunities that tribunals have to create or retain are range of processes and procedures more suited dealing with the different jurisdictions that they have. This is the tendency to a "one size fits all" approach to the conduct of proceedings.

2. *Excessive costs*
   The concern that Justice Bell reported from Victoria has been experienced in the Administrative Appeals Tribunal of the Commonwealth (the AAT) where senior counsel now regularly appear and argue for outcomes that

result in the hearing processes of the AAT becoming more and more complex and so more expensive. In some tribunals in NSW lawyers regularly appear. These include the health professions tribunals. However, in the NMT nurses and midwives the subjects of Complaints are not always represented. Also former nurses and midwives seeking to return to their professions are often not represented. It is the obligation of the NMT to ensure that it conducts its hearings so that unrepresented parties are accorded procedural fairness. However, lawyers are not often required in GT matters but are given leave to represent parties when appropriate. In some of the jurisdictions of the CTTT legal representation is rare and beyond the capacity of many parties to purchase.

3. *Delays in listed for a hearing and getting a decision*
   Because of the availability of the either the Chairperson or a Deputy Chairperson to take management of a case, matters are listed for hearing at the NMT and the exchange of document times are set soon after they are lodged with the Tribunal. The orders and reasons for decision follow as soon as practicable after the decision-making and decision-writing processes are completed. There are no delays at the hearing and decision-giving stages of matters before the NMT. When the Chairperson and Deputy Chairpersons are not actually involved in the hearing processes, they are not being paid or accruing any other entitlements so they are not costing the registered members of the nursing and midwifery professions anything.

4. *Access country communities*
   From the time it commenced its hearings in 1989, the GT has had a strong commitment to conducting hearings in regional towns in NSW in order to allow as many as possible of those involved in the matter to attend in person. This is an important element of the GT's work – to be available to all members of the NSW community. While it uses new communications technologies where appropriate, face to face hearings are important for the GT in making the right decision in the circumstances of a particular case. In tribunals in which there are only two parties the use of the new communications technologies may be sufficient for a proper disposal of the case. Cost-cutting pressures in relation issues of this kind, which are inevitable in a super tribunal, can have a serious impact on the effectiveness of some of the tribunal's jurisdictions.

5. *Accommodation*
   Justice Bell raised the issue of the deficiencies of VCAT's building. Currently the NMT and the other health professions tribunal are appropriately and satisfactorily accommodated in premises provided by the

HPCA. The GT has premises in Sydney which are extremely well adapted to the way it operates and are easily accessed by those using cars or public transport. The GT uses carefully chosen premises in it is away from its Balmain base.

As already noted, the existing super tribunals VCAT, WASAT and QCAT are all headed by a Supreme Court judge who are supported by one or more District Court judges as Deputy or Vice Presidents. Supreme Court judges are entitled to at least two personal staff to support them and District Court judges to at least one such staff person. They are entitled to chambers of a high standard of fit out and of a size large enough to accommodate them and their staff appropriately. The salaries of the judges are substantial and the costs of their accommodation considerable. They also have very generous leave entitlements.

The health professional tribunals come into existence only for the purpose of hearings. There are no salary costs outside hearings and only limited need for accommodation and staff support. As already noted no other entitlements accrue to them except the superannuation entitlement of 9% of fees paid.

The President and Deputy President of the GT are paid considerably less than District Court judges and have no entitlements to staff or to chambers. Their leave and superannuation entitlements are considerably less than those provided to judges.

Summary

Because tribunals were set up to achieve decision-making in different contexts and with different decision-makers, and in particular to differentiate their decision-making processes from courts, it is counter-intuitive to seek to amalgamate them into one body and for that body to be led by judges.

A super tribunal cannot work as a body capable of maintaining within it constituent parts which operate with different processes of evidence gathering, fact-finding and decision-making and different people with different skill-sets and different professional qualifications and experience to carry out those roles. This is because the pressures within such a tribunal are for standardisation of processes on the grounds of expenditure efficiency, not efficiency in achieving the goals for which the original tribunal was set up. This pressure for expenditure efficiency leads to the steady reduction of multi-member, multi-disciplinary panels of the super tribunals, as has happened in WASAT and QCAT, replacing them with single member panels comprising trained lawyers with sufficient standing to be qualified for appointment as judges (seven years).

How do the lawyer, single member panels of the super tribunal work? They rely on the evidence of expert witnesses who can be called and examined on the contents of their written reports. Where there is no input at the decision-making stage from tribunal members with expertise in relation to the matters under consideration, there is a risk that tribunal will misunderstand the meaning of the evidence and will not appreciate what the real issues are. Expert evidence comes at a cost to the parties involved in the matter and the extra hearing time comes at a cost to whoever pays for the tribunal, the members of the health profession involved through their registration fees or the government through a budgetary allocation to the tribunal.

To avoid the risk of error in understanding the subject-matter of cases before the tribunals of the health professions and to maintain the confidence of those professions in their tribunal, it is essential for each tribunal to keep the professional membership at half of the tribunal and to have the profession appointing those members.

A similar concept applies to the GT. It has been conducting hearings and making orders for 22 years now. All initial hearings and many other hearings are conducted by the multi-member, multi-disciplinary panels of the GT. Because of the knowledge and experience of disability matters held by at least two of the three members of each panel, the hearing preparation processes it uses and the way it goes about conducting its hearings, making its decisions and producing its written reasons for decision, the GT has the confidence of those who appear before it.

For the reasons set out above, it is respectfully submitted that in relation to the NMT, GT and the MHRT, neither the creation of a super tribunal nor the amalgamation of some tribunals would provide any opportunities to make tribunals quicker, cheaper or more effective. A super tribunal is likely to add costs and to cause matters to take longer to be heard and determined. It is much more likely than not to render at least some of its constituent parts to be less effective in achieving the purposes for which they were created.

Nick O’Neill
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