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The Mental Health Review Tribunal of NSW: Diversity in law and practice

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This chapter briefly explains the operation of the Mental Health Review Tribunal of New South Wales. It examines the Mental Health Act\(^1\) provisions that recognise ethnic and linguistic diversity and explores what these provisions mean in practical terms and how the Mental Health Review Tribunal seeks to accommodate cultural diversity in practice. It also discusses how persons from diverse cultural backgrounds can best present their case, sometimes with the assistance of competent interpreters, mental health workers, and their legal and non-legal advocates.

The Mental Health Act (the Act) has been very progressive in influencing changes with respect to the care and treatment of persons who are mentally ill or mentally disordered. The Act has led to far greater transparency and accountability in the care and treatment of people with mental illness. Among other things, it has allowed for the establishment of the Mental Health Review Tribunal of NSW (the Tribunal).

The Act seeks to facilitate the best possible care and treatment of persons who are mentally ill or mentally disordered in the least restrictive environment. Its objectives are to ensure that the civil rights, dignity and respect of persons with mental illnesses are protected. At the same time the Act gives very wide powers to doctors, magistrates and the Tribunal to detain against their will persons who have mental illnesses. The Mental Health Review Tribunal also, through its ability to scrutinise decisions regarding involuntary detention, has a ‘watching’ brief that ensures consumers are not inappropriately detained against their will in hospitals.

What the Tribunal Does

The Tribunal is a quasi-judicial body that conducts hearings, like many European courts, in an inquisitorial manner. It is extremely well placed to prevent people

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\(^1\) The Mental Health Act 1900 (NSW) as amended to Act 1997 No 49 is referred to throughout this chapter as ‘the Act’.
being hospitalised unnecessarily. It deals with 'mentally ill persons' and in section 9 of the Act there is a legislative definition of a 'mentally ill person'. Section 9 provides that the person must be suffering from a mental illness and there must be reasonable grounds for believing that care, treatment, and control of the person is necessary for the person's own protection from serious harm or for the protection of others from serious harm. The person's continuing condition and any likely deterioration are to be taken into account. Even if these requirements of section 9 are satisfied the person cannot be detained in hospital against their will if other care of a less restrictive kind is appropriate and reasonably available.

The Tribunal at hearings may review decisions of Magistrates, Medical Superintendents and others, to retain persons who are 'mentally ill persons' in hospital against their will. Where a person is considered to be a 'mentally ill person' under the Act and there is no other less restrictive care available, the Tribunal may make an order under which the person is involuntarily detained in hospital for a period of time.

The Tribunal plays a role in implementation of the legislative scheme for community treatment orders (CTOs) and community counselling orders (CCOs), making such determinations either on its own initiative in the course of hearing a matter, or on the application of the medical superintendent. (See the Act sections 118ff. for CCOs and section 131ff. for CTOs).

The Tribunal also systematically reviews continued treatment patients every six months (see the Act section 62) and informal patients every twelve months (see the Act section 63). It has power, upon consideration of various matters, to order electroconvulsive therapy (ECT) for involuntary patients (see the Act section 185ff.). It may make determinations about whether involuntary patients can have surgery or special medical treatment (the Act sections 203, 204, 205, 206 and 207). It may also order that the financial affairs of a person be managed by the Protective Commissioner (see Protective Estates Action section 16 (2), 17,18 and 19).

How the Tribunal Works

It is important to note that the Act and the Tribunal operate within a society that is made up of many cultures and languages. Australia is a large multicultural society, every language of the world is spoken and every religion is practised by some group or individual (Department of Immigration and Ethnic Affairs, 1995).

Approximately 5.5 million immigrants from 240 parts of the world have settled in Australia since the end of World War II. One in four comes from a non-English speaking background (NESB). Our laws and the legal considerations, upon which determinations are made, by the Courts and also by the Mental Health Review Tribunal, should reflect the multicultural nature of our society.

When matters are referred to the Tribunal for decision, the Tribunal is made up of three members: a lawyer, a psychiatrist and another person with suitable experi-
ence or qualifications (see the Act section 253 (1)). The Tribunal, wherever appropriate and possible, attempts to have a racial and gender mix on its threemember panels (the Act section 253 (2)). Its membership is made up of persons from diverse cultural and linguistic backgrounds. Significantly the Act incorporated the requirement that the Tribunal include persons from ethnic backgrounds (the Act section 253 (2)).

There are now only two full-time Tribunal members (the President and the Deputy President) and 110 part-time members. Fifty-six part-time members are women, and nineteen part-time members are from non-English speaking backgrounds; three are members of Aboriginal communities.

Tribunal hearings are conducted with little formality and technicality and in as timely a manner as proper consideration of the matters before it permit (the Act section 267 (1)). The Tribunal makes its determinations on whether it is satisfied ‘on the balance of probabilities’². Tribunal hearings are generally public, although apart from health professionals, family members and friends and sometimes medical or nursing students, few of the public ever attend. If the representative of a consumer objects, the Tribunal has the power to exclude persons from hearings (the Act section 272). On occasion it may request a person to leave because of objections of the consumer.

It is most important for the NESB communities and for NESB consumers to understand that the Tribunal is not bound by the rules of evidence and that it is an inquisitorial body (the Act section 267(2)). This, combined with the informality with which the Tribunal must conduct hearings, has major implications for NESB persons. To some extent these factors help overcome the disempowerment NESB people feel because of the cultural and linguistic differences.

Many believe that NESB persons feel a greater disempowerment than persons of Anglo-Celtic origin do, particularly before our Courts. This is largely because of the formality, the adversarial nature of the court proceedings, and also because of the rigidity with which rules, such as rules of evidence, are adhered to³. The informality of the proceedings before the Tribunal and the lack of evidentiary rules means that virtually any relevant information may be put to the Tribunal in connection with the matter being heard by the Tribunal.

The consumers, community and relatives and representatives of consumers have the opportunity to be outspoken and contribute to outcomes, in the absence of the type of formality that exists in a Court. NESB persons should be encouraged to

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2 This is a civil standard of proof. It requires the Tribunal to be satisfied that the point or fact that is being established is more probable than not. See, for example, section 268(2) of the Act.

3 Courts in this country are adversarial. This means the judge is akin to an umpire and can only make a determination on matters that are put to the judge. The judge, generally, has no power to call for evidence or reports etc.
present as much relevant evidence and information as possible to achieve a result that not only protects the civil rights, dignity and self-respect of the consumer but has given due regard to cultural factors (the Act section 268 (2)) and is consistent with their best interests and safety and welfare.

**The Basic Nature of Courts**

To further clarify, in Australia the system of justice is a common law system, which is an adversarial system. Judges are passive in relation to the information and evidence that is presented. They are described as akin to an umpire; the lawyers and parties on each side are likened to combatants going into battle. Judges usually can only make a decision on facts, matters and arguments that are put forward in evidence, and are admitted under strict evidentiary rules. Generally judges have no power to call for evidence, reports or further information if they feel dissatisfied with what has been presented. They must simply weigh up what each side has presented and decide on these matters alone.

**Magistrates’ Hearings and the NESB Consumer**

Many NESB consumers have experience of the adversarial system simply by virtue of their involuntary admission to a psychiatric hospital. They are often admitted to hospital on an involuntary basis after appearing before Magistrates of the Local Court (the Act sections 38–53). Although the Act provides in many sections that the Magistrate should ‘inquire’ into various matters to decide whether the person is a ‘mentally ill person’ under the Act and whether they should be admitted to hospital on an involuntary basis, it is generally accepted that the Magistrates conduct these hearings in the same adversarial manner that they conduct all hearings.

Many NESB people (consumers, carers, friends, interpreters and advocates) have a great deal of difficulty understanding this system because it is so different from European models of justice. Proceedings before Magistrates appear to NESB people to be authoritarian, very formal, difficult to understand and, according to NESB consumers themselves, often quite frightening.

It is not difficult to strongly support the view that the Courts and Magistrates have no place in the determination of involuntary hospitalisation of people with mental illness. One can understand why consumers, before a Magistrate in a hearing, would believe that they are about to be punished with involuntarily hospitalisation rather than treated.

Cumines and Hayes (1998) state that:

... the hearing is conducted by a lawyer, namely a magistrate, with a person who is unable or unwilling to consent to treatment being represented by another lawyer, with the treatment team, which is trying to make out the case for treatment, effectively being cast in the prosecutor’s role (p. 11).

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This obviously is a most undesirable situation. It is argued that NESB consumers suffer greater disadvantage under this system. Cumes and Hayes suggest that it would be more appropriate for the Mental Health Review Tribunal to conduct these hearings instead of the Magistrates. It would clearly be fairer and more equitable for NESB and other consumers if the Tribunal was given the Magistrates’ functions in this regard.

The Basic Nature of the Mental Health Review Tribunal

The Tribunal is inquisitorial. This means that the Tribunal members hearing the case can inquire about matters relating to the case and can play an active role in calling for reports and persons to clarify matters or present evidence. The mechanisms are broader and more flexible and greatly assist in determining, in a collaborative manner, what is in the consumer’s best interests.

The Tribunal and the NESB Consumer

The inquisitorial system favours vulnerable groups like NESB persons. This is because it gives the ‘trier of fact’, in this case the Tribunal, the opportunity to collect information, call witnesses and obtain reports in an effort to arrive at a just outcome within the terms of the Act. At the same time it permits greater protection of the rights, dignity and self-respect of the consumer. In addition, the Act requires the Tribunal to give due regard to cultural factors and to evidence concerning the person’s cultural background and its relevance to the question of mental illness (the Act section 368).

Anecdotal evidence gathered from NESB persons indicates that they believe that their cultural differences contributes to their lack of power, not only within the court system but within the health system generally4.

The Use of Interpreters

Insofar as NESB consumers are concerned the Act gives positive directions regarding the use of interpreters5 and the ‘taking into account [of] the various religious, cultural and language needs’ of persons.

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4 These insights derive from Victor Borg, Barrister and Solicitor of Melbourne, who (in October 1998) interviewed various religious and other representatives of ethnic communities: for example, Maltese, Turkish, Greek, Vietnamese, Arabic-speaking and Yugoslav communities (they did not wish to be named).

5 See, in particular, sections 6 (b), 30(4), 163, 268(2), 275, 292 of the Act.
Experience shows that the Tribunal, when sitting and hearing matters, is pro-active in ensuring NESB consumers who appear before the Tribunal have interpreters. It is not uncommon for hearings to be adjourned by the Tribunal where interpreters have not been arranged.

To a person having any matter before the Tribunal the Act gives the right, where that person is unable to communicate adequately in English but is able to communicate adequately in another language, to be assisted by a competent interpreter. In the course of the hearings it sometimes becomes obvious to Tribunal members that the interpreter is not performing the role appropriately. Vigilance needs to be maintained regarding the competency of interpreters. In light of the shrinking resources and increasing needs, it appears that sometimes less than competent persons are utilised. Where they are available NAATI-accredited interpreters are the most competent and suitable.

Sometimes lawyers (briefed by the Mental Health Advocacy Service to represent NESB consumers) raise the issue that, although their client has an interpreter at the Tribunal hearing, when the doctor was interviewing the consumer to write a report for the Tribunal hearing an interpreter was not used. The lawyer will sometimes, rightly, challenge the validity of the doctor’s report on this basis.

**Legal Representation of NESB Consumers**

In 1997–98 interpreters were required for 222 hearings concerning NESB consumers. In 152 other hearings, where NESB consumers were legally represented, only 46 of these hearings had an interpreter present\(^6\). Many of the matters where NESB consumers were unrepresented related to Community Orders, involuntary ECT, and involuntary detention in hospital under Temporary Orders and Continued Treatment Orders; other matters concerned Appeals and still others voluntary patients.

This is of great concern because, if a person has such poor command of the English language as to need an interpreter, it is highly likely that they will not understand the process or their rights under the Act. It also means that they are tremendously disempowered and are extremely vulnerable. These consumers should be offered legal representation by the Mental Health Advocacy Service.

All consumers having any matter before the Tribunal may be represented by a lawyer or, with the approval of the Tribunal, by another person of their choice.

The provision of legal representation is driven by lack of resources in Legal Aid and in the Mental Health Advocacy Services.

\(^6\) These figures were extracted from the Tribunal statistics. The assistance of Mr Alan Langely, the Tribunal’s Registrar, in providing access to this information is acknowledged.
When legal representation is provided it greatly assists the consumer, particularly the NESB consumer. Legal representation is almost essential when the NESB person has poor English language skills, although legal aid providers may not agree. Advocates for NESB communities need to investigate this matter and to lobby for the rights of legal representation for these most vulnerable members of the community. All those with serious mental illness who are detained involuntarily in psychiatric hospitals and who have poor English language skills must not only have interpreters but also legal representation.

The ‘Statement of Rights’

Patients presenting to the Tribunal will sometimes show the Tribunal a ‘Statement of Rights’. This is a document prescribed by regulations that a Medical Superintendent, under section 30 of the Act, is required to give patients. It sets out what happens in hospital, and patients’ rights of appeal and details of when they can be treated against their will, what orders the Magistrate can make and matters of this kind. Additionally it sets out where the consumer can get help and lists a number of agencies, including Legal Aid, Mental Health Advocacy, the Transcultural Mental Health Centre, the Translation and Interpreter Service (TIS) and so on. The Act requires that if the person is unable to communicate in English the Medical Superintendent is to arrange for an oral explanation in the consumer’s language (the Act section 30(4)).

The concern is that, while an Anglo-Celtic consumer has this information in English in a document they can keep throughout their admission and refer to at will, the NESB client has had only an oral explanation of what is in the document and this was probably received when they were most distressed and anxious. Generally they have no document in their own language that they can refer to at a later time. This seriously disadvantages NESB consumers and adds to their disempowerment and their lack of understanding of their rights and of the system.

The Importance of Cultural Considerations

Of necessity, hospitals are largely institutionalised, particularly some psychiatric hospitals. There are accepted hierarchies, patterns of behaviour and strict boundaries in relation to what is acceptable and unacceptable conduct. Such institutions acknowledge, support and entrench the positions, behaviour, and hierarchies that are recognised and understood. In some areas there have been advances in relation to cultural considerations, particularly through the work of the Transcultural Mental Health Centre. Largely though, in many areas, many service providers — including various professionals connected with mentally ill persons in hospital — are still struggling with their perceptions of persons from non-English speaking
backgrounds. To a large extent the system still has great difficulty recognising or understanding other cultures and persons who are culturally and linguistically different.

Without appropriate consideration of culture the Tribunal would have the potential, aided by the various professionals, to inappropriately disrupt the lives of mentally ill persons, their children's lives and their basic cultural values and sense of worth. The perception of some NESB persons is that there is a paternalistic and elitist attitude in some, often powerful, professional persons who assume that they somehow know what is in the consumers' best interests devoid of any cultural considerations.

The Act seeks to redress these attitudes. The Tribunal, if it is determining whether a person is a mentally ill person under the Act, must give due regard:

*To any cultural factors relating to the person which may be relevant to the determination, and to any evidence given to the Tribunal by an expert witness concerning the person's cultural background and its relevance to any question of mental illness (section 268(2) (a) (b)).*

Culture provides tremendous insight into attitudes, beliefs and behaviour. The manifestation of behaviour and attitudes are strongly influenced by the cultural context. Cultural insights and information may assist the Tribunal in determining whether or not a person is 'a mentally ill person' under the Act.

If the cultural insight is not presented it is quite possible that the belief of the consumer could be considered delusional when, in actual fact, it may be perfectly appropriate and proper within the cultural context. Additionally, some behaviour might be considered as symptomatic of mental illness when the cultural perspective reveals that, within the specific cultural context, it was both normal and appropriate.

Culture also serves to inform us as to when behaviour is symptomatic of mental illness. It also assists in providing identifiers that may indicate when the consumer is at risk of being a serious danger to themselves or others. Knowledge of the cultural context and meaning aids awareness and understanding of emotions and behaviour and may greatly assist in the treatment of NESB consumers, not to mention determinations made by the Tribunal.

It is important for consumers, families, friends, professionals and advocates to put as much relevant cultural information to the Tribunal as possible, to ensure that the best possible decision is reached in relation to the NESB consumer.

The Mental Health Review Tribunal is willing and able to view the people before it within the reality of their culture and language. The knowledge of cultural and linguistic diversity is essential if injustices to consumers are to be avoided.
References

